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COMMERCIAL LAW HARMONIZATION: THE PAST AS PROLOGUE—A "FESTSCHRIFT" IN HONOR OF NEIL B. COHEN

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In Germany, the "Festschrift" is a time-honored institution. When a distinguished professor turns 70, his friends and colleagues present them with a volume, prepared in advance, of scholarly essays that relate to the professor's contribution to the literature. The honoree is not consulted or embarrassed by in person discussion. For a person as modest, even shy, as Neil Cohen, one suspects that this version might have been preferred to what actually happened at the "fest" in his honor on May 20-21 at Brooklyn Law School. For two days, at the "fest," Neil's friends and colleagues discussed a question that he has posed to each of us, at various times, paraphrased below:

> Commercial law harmonization efforts are creatures of their time. The Uniform Commercial Code, Restatements, and international model laws and conventions respond to then current practice and technology. Once promulgated, however, the commercial world inevitably changes, both because of and in spite of these instruments. Over the past half century of harmonization, "What have we learned, and what should we do next?"

This volume is the resulting "schrift." The irony, of course, is that, if anybody should know the answer to that question, it would be Neil. It is an illustration of his method – and his humility – that, even if he does know, he's not telling. He will let the discussion play out.

Neil has served as reporter, rapporteur, or representative in virtually every commercial law harmonization effort of the last 30 years. He was designated by the American Law Institute (ALI) as the R. Ammi Cutter Reporter for his work on the Restatement (Third) of Guaranty and Suretyship. He served as the Research Director to the Permanent Editorial Board of the Uniform Commercial Code, and on the drafting committees of and/or a participant in the efforts to revise virtually the entire Uniform Commercial Code, from the 1990s to the present. Internationally, he has served as a member of the United States delegation to Working Group VI (Secured Credit) of the United Nations Commission on International Trade Law (UNCITRAL), that prepared a Legislative Guide and Model Law on Personal Property Security Interests. He has worked on various projects at the International Institute for the Unification of Private Law (UNIDROIT), including the Model Law on Factoring, Best Practices on Enforcement, Principles on International Commercial Contracts, and the UNCITRAL-HCCH-UNIDROIT Tripartite Legal Guide on International Sales. The list is seemingly endless, and, as this volume will show, his contribution immeasurable.

But—and this is Neil's first superpower—if any of his colleagues, in any of these initiatives, were to be asked, "What is the outcome that Neil sought?" their response would be a blank puzzled stare. Or, if they managed to say anything, it would be, "Clearly, you don't know Neil." Neil's devotion has always been to the process—to producing a successful and useful instrument—and never to a particular point of view. He asks questions; he does not offer answers. Volumes have been written about how any attempt to give meaning to the concept of collective intent of legislatures, is nonsense, fiction, and, to quote Kenneth Arrow, "impossible."[1] Obviously, none of these academic writers have seen Neil at work.

The drafting processes of the "private" legislatures where Neil applies his trade are different from public legislatures. For better, and (some might say) sometimes for worse, they are committees of experts who draft by consensus – committed to the goal of clarifying an area of law, working towards a common vision. It is here that Neil excels. He keeps asking questions, until the common vision is formed and understood by the people in the room.

This, of course, is only half the battle, and this is Neil's second superpower. Once the common vision is understood and agreed upon, it must be articulated – reduced to writing. Legislative drafting is hard. It is even harder when a group of self-proclaimed experts is drafting as a committee of the whole. Neil is the consummate technician, but more than that, he is an extraordinary listener. He hears the room in all its nuance, and he is able to capture that nuance with statutory language that both embodies the agreement and leaves wiggle room where the agreement may not be so precise. This is a rare skill.

So, it makes sense that Neil's question for the assembled "schrifters," was not, "How do we get where I want to go?" but instead, "Based on where we've been together, where do we all want to go next?"

This question forms the basis for this volume of papers, spread over two issues of the *Brooklyn Journal of Corporate, Financial and Commercial Law*. The articles in this issue follow the arc of the symposium.

The first conceptual grouping of pieces (not exactly in the order of presentation) reflects generally on the history and nature of commercial law harmonization efforts. Ted Janger considers the change of jurisprudential stance from the Restatements and the Model Laws of the 1950s and 60s, through the 1990s and early 'aughts, to the present day. In his view, the instruments have morphed from deeply realist to increasingly formalist and now, somewhat reluctantly, back again toward realism. Carl Bjerre considers the channeling role of commercial law generally, as guiding the

1. KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (2nd ed. 1951).

flow of commercial transactions and avoiding collisions. Stephen Sepinuck's contribution joins these realist reflections with a reflection on the art of constructing multi-factor tests to channel and regulate the conduct of commercial transactors.

The second conceptual grouping of papers (again, not precisely in the order in which they were presented) zeroes in on the modern law of secured credit, from birth, through international proliferation, and explores the challenges posed by new forms of digital assets. Henry Gabriel describes the development, in the United States, of the "unitary security interest," and explores its evolution into a template for international harmonization through the UNCITRAL Model Law of Secured Transactions and the Cape Town Convention. Louise Gullifer describes the history of the UNCITRAL Model Law on Secured Credit and considers its proliferation both as an enacted statute, and as a model for harmonization. Finally, Bill Henning, considers the future, and the challenges to the existing harmonized world of secured credit posed by the explosion of digital assets. In particular, he tells the story of Wyoming, which has enacted a suite of laws to govern crypto-currencies in the hope of becoming the crypto-venue of choice. He then details the ALI-ULC response, through the recently promulgated amendments to the Uniform Commercial Code. In particular, he tells the story of how representatives of the Uniform Commercial Code process, convinced state legislators to await the availability of the uniform, harmonized products rather than following Wyoming's lead.

Finally, as a fitting capstone to this first volume of essays, Roberta Karmel steps back and considers harmonization from a different perspective: securities regulation. She explains why commercial law harmonization has been successful, both in the United States and internationally, while similar efforts to harmonize the law of securities regulation have failed.

Throughout these essays, Professor Cohen looms large. While Neil's belief has always been in the process, his goal has been to help each harmonization succeed. Each contribution shows how the process could not succeed without the tireless efforts and talents of people like Neil, and significantly, of Neil himself.