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THE ADVANTAGES OF SOFT LAW IN INTERNATIONAL COMMERCIAL LAW: THE ROLE OF UNIDROIT, UNCITRAL, AND THE HAGUE CONFERENCE

*Henry Deeb Gabriel**

INTRODUCTION

In this Article, I suggest that the recent rise of nonbinding general principles (“soft law”) in international commercial law, such as the International Institute for the Unification of Private Law (“UNIDROIT”) Principles of International Commercial Law¹ and the United Nations Commission on International Trade Law (“UNCITRAL”) Draft Legislative Guide on Secured Transactions,² serves two important functions not met in treaties, conventions, or other positive law.

Following a brief introduction to soft law principles, I discuss in Part II how nonbinding general principles can achieve the goal of uniform or, at least, harmonized law³ by providing general principles that can more eas-

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1. UNIDROIT, PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS (2004).

2. UNCITRAL, LEGISLATIVE GUIDE ON SECURED TRANSACTIONS (2008).

3. UNCITRAL notes the following distinction between harmonization and unification:

“Harmonization” and “unification” of the law of international trade refers to the process through which the law facilitating international commerce is created and adopted. International commerce may be hindered by factors such as the lack of a predictable governing law or out-of-date laws unsuited to commercial practice. [UNCITRAL] identifies such problems and then carefully crafts solutions which are acceptable to States having different legal systems and levels of economic and social development.

“Harmonization” may conceptually be thought of as the process through which domestic laws may be modified to enhance predictability in cross-border commercial transactions. “Unification” may be seen as the adoption by States of a common legal standard governing particular aspects of international business transactions. A model law or a legislative guide is an example of a text which is drafted to harmonize domestic law, while a convention is an international instrument which is adopted by States for the unification of the law at an international level. Texts resulting from the work of UNCITRAL include conventions, model laws, legal guides, legislative guides, rules, and practice notes. In practice, the two concepts are closely related.

UNCITRAL, FAQ—Origin, Mandate and Composition of UNCITRAL, http://www.uncitral.org/uncitral/en/about/origin_faq.html [hereinafter FAQ—UNCITRAL] (last visited Mar. 27, 2009). This distinction is important because many, including myself, see true interna-

ily accommodate various legal traditions. In addition, because of their nonbinding effect, they can accommodate local law. This flexibility provides an easier basis for adoption in a given court or arbitration because there is less conflict between the international and the domestic law compared to a binding convention.

Second, as I discuss in Part III, because there is no need to have principles adopted by a given jurisdiction, the principles are more easily and readily available for use. Since these principles are not binding, their likely effect is more to set norms instead of hard and fast rules, but this still achieves the salutary goal of creating broad international standards.

The larger question posed is whether organizations such as UNIDROIT,⁴ UNCITRAL,⁵ and the Hague Conference on Private International Law

tional unification as a goal that may not be possible, given the different legal traditions in the world. Harmonization, on the other hand, is a much more reachable goal.

For a discussion of how Restatements in the United States have not brought about uniformity within the domestic law, see, for example, Kristen David Adams, *Blaming the Mirror: The Restatements and the Common Law*, 40 IND. L. REV. 205 (2007); Kristen David Adams, *The Folly of Uniformity? Lessons from the Restatement Movement*, 33 HOFSTRA L. REV. 423 (2004).

4. UNIDROIT is an independent intergovernmental organization seated in Rome. The purpose of UNIDROIT is to study the needs and methods for modernizing and harmonizing private law, particularly commercial law, at the international level. UNIDROIT was created in 1926 as an auxiliary organ of the League of Nations. Following the demise of the League of Nations, UNIDROIT was reestablished in 1940 on the basis of a multilateral agreement. UNIDROIT: An Overview, <http://www.unidroit.org/english/presentation/main.htm> (last visited Mar. 27, 2009). This agreement is known as the UNIDROIT Statute, and the membership of UNIDROIT is restricted to States that have acceded to the statute. There are presently sixty-one Member States: Argentina, Australia, Austria, Belgium, Bolivia, Brazil, Bulgaria, Canada, Chile, China, Colombia, Croatia, Cuba, Cyprus, Czech Republic, Denmark, Egypt, Estonia, Finland, France, Germany, Greece, the Holy See, Hungary, India, Indonesia, Iran, Iraq, Ireland, Israel, Italy, Japan, Latvia, Lithuania, Luxembourg, Malta, Mexico, Netherlands, Nicaragua, Nigeria, Norway, Pakistan, Paraguay, Poland, Portugal, Republic of Korea, Romania, Russian Federation, San Marino, Serbia and Montenegro, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, Tunisia, Turkey, the United Kingdom, the United States of America, Uruguay, and Venezuela. "The Institute is financed by annual contributions from its Member States," with an additional annual contribution from the Italian Government. *Id.*; UNIDROIT: Membership, <http://www.unidroit.org/english/members/main.htm> (last visited Mar. 27, 2009).

As with other international organizations whose broad mandate is legal reform, UNIDROIT has tended to develop certain specializations in its work. UNIDROIT's basic statutory objective is to prepare modern and, where appropriate, harmonized, uniform rules of private law, and to a great extent, it has eschewed work in public law. In addition, its uniform rules are generally concerned with substantive rules and not with the conflict of law principles that would supplement them or work independently of them. Over the years, UNIDROIT has drafted both hard law (conventions) and soft law (model laws and suggested principles).

(“Hague Conference”)⁶ should be spending their limited resources that come from their respective Member States to produce instruments other

5. A subsidiary body of the U.N. General Assembly, UNCITRAL was established in 1966, under G.A. Res. 2205 (XXI), U.N. Doc. A/6396 (Dec. 17, 1966) and has a general mandate to harmonize and unify the law of international trade. *Id.* art I.

From its founding, “UNCITRAL has since prepared a wide range of conventions, model laws and other instruments dealing with the substantive law that governs trade transactions or other aspects of business law which have an impact on international trade.” FAQ—UNCITRAL, *supra* note 1. A convention is a treaty that provides a set of international obligations that sovereign nations choose to undertake in their relations with one another. A model law is created as a suggested piece of domestic legislation.

UNCITRAL is made up of sixty-one Member States from five regional groups. *See* General Assembly, *Report of the United Nations Commission on International Trade Law on Its Thirty-Seventh Session*, ¶ 4, Supp. No. 17, U.N. Doc. A/59/17 (June 14–15, 2004).

The current members of the Commission, elected on 16 October 2000 and 17 November 2003, are the following States, whose term of office expires on the last day prior to the beginning of the annual session of the Commission in the year indicated: Algeria (2010), Argentina (2007), Australia (2010), Austria (2010), Belarus (2010), Belgium (2007), Benin (2007), Brazil (2007), Cameroon (2007), Canada (2007), Chile (2007), China (2007), Colombia (2010), Croatia (2007), Czech Republic (2010), Ecuador (2010), Fiji (2010), France (2007), Gabon (2010), Germany (2007), Guatemala (2010), India (2010), Iran (Islamic Republic of) (2010), Israel (2010), Italy (2010), Japan (2007), Jordan (2007), Kenya (2010), Lebanon (2010), Lithuania (2007), Madagascar (2010), Mexico (2007), Mongolia (2010), Morocco (2007), Nigeria (2010), Pakistan (2010), Paraguay (2010), Poland (2010), Qatar (2007), Republic of Korea (2007), Russian Federation (2007), Rwanda (2007), Serbia and Montenegro (2010), Sierra Leone (2007), Singapore (2007), South Africa (2007), Spain (2010), Sri Lanka (2007), Sweden (2007), Switzerland (2010), Thailand (2010), the former Yugoslav Republic of Macedonia (2007), Tunisia (2007), Turkey (2007), Uganda (2010), United Kingdom of Great Britain and Northern Ireland (2007), United States of America (2010), Uruguay (2007), Venezuela (2010) and Zimbabwe (2010).

Id. “Members of the Commission are elected for terms of six years. The terms of half the members expire every three years.” FAQ—UNCITRAL, *supra* note 1. The UNCITRAL Secretariat presently consists of only nineteen people. There are eleven professional and eight administrative support staff.

6. There are presently sixty-nine Member States of the Hague Conference on Private International Law: Albania, Argentina, Australia, Austria, Belarus, Belgium, Bosnia and Herzegovina, Brazil, Bulgaria, Canada, Chile, China, Croatia, Cyprus, Czech Republic, Denmark, Ecuador, Egypt, Estonia, European Community, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, India, Israel, Italy, Japan, Jordan, Latvia, Lithuania, Luxembourg, Malaysia, Malta, Mexico, Monaco, Montenegro, Morocco, the Netherlands, New Zealand, Norway, Panama, Paraguay, Peru, Poland, Portugal, Republic of Korea, Romania, Russian Federation, Serbia, Slovak Republic, Slovenia, South Africa, Spain, Sri Lanka, Suriname, Sweden, Switzerland, the former Yugoslav Republic of Ma-

than positive law. As I discuss in Part IV, I believe there are some specific uses of soft law that justify the allocation of resources to create soft law instruments.

Although my analysis should apply to any governmental or nongovernmental organization that produces soft law instruments, my particular concern is whether, given the limited resources available to the three international organizations most active in producing private international laws, UNCITRAL, UNIDROIT, and the Hague Conference, these organizations should be in the business of creating soft law.

I. "SOFT LAW"

Nonbinding legal principles are often referred to as "soft law." Defined by one commentator, "'soft law' is understood as referring in general to instruments of normative nature with no legally binding force and which are applied only through voluntary acceptance."⁷ Soft law is generally established legal rules that are not positive and therefore not judicially binding. The various soft law instruments in international commercial law include model laws,⁸ a codification of custom and usage promulgated by an international nongovernmental organization,⁹ the promulgation

cedonia, Turkey, Ukraine, the United Kingdom, the United States of America, Uruguay, Venezuela. HCCH Members, http://www.hcch.net/index_en.php?act=states.listing (last visited Mar. 27, 2009).

7. Michael Joachim Bonell, *Soft Law and Party Autonomy: The Case of the UNIDROIT Principles*, 51 LOY. L. REV. 229, 229 (2005).

8. See, e.g., UNCITRAL, MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION (1985). The principle purpose of this instrument is to assist countries in reforming and modernizing their laws on arbitration. *Id.* art I(1). In this respect, the Model Law has been quite successful, and it has been enacted into law by a large number of jurisdictions, including Armenia, Australia, Austria, Azerbaijan, Bangladesh, Belarus, Bulgaria, Canada, Chile, Croatia, Cyprus, Egypt, Germany, Greece, Guatemala, Hong Kong Special Administrative Region of China, Hungary, India, Iran, Ireland, Jordan, Kenya, Lithuania, Macau Special Administrative Region of China, Madagascar, Malta, Mexico, New Zealand, Nigeria, Oman, Peru, Republic of Korea, Russian Federation, Singapore, Sri Lanka, Scotland, Tunisia, Ukraine, Zambia, and Zimbabwe, and within the United States of America by the states of California, Connecticut, Illinois, Louisiana, Oregon, and Texas. UNCITRAL, Status—1985 UNCITRAL Model Law on International Commercial Arbitration, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html (last visited Mar. 27, 2009).

9. For example, the International Chamber of Commerce ("ICC") has promulgated the UNIFORM CUSTOMS AND PRACTICE FOR DOCUMENTARY CREDITS (1993) (ICC Publ'n No. 500), which sets out the rules and principles that govern letters of credit. The ICC, founded in 1919 in Paris, is a federation of business organizations and business people. It is a nongovernmental body, and it is neither supervised nor subsidized by governments. What Is the ICC?, <http://www.iccwbo.org/id93/index.html> (last visited, Mar. 27, 2009).

of international trade terms,¹⁰ model forms,¹¹ contracts,¹² restatements by leading scholars and experts,¹³ or international conventions.¹⁴ Although soft law principles do not begin as positive law, they can of course become positive law either by courts, arbitral tribunals, or legislatures adopting them, or by transactional parties adopting them in their agreements. Often they are drafted with the intent of becoming positive law in the future.¹⁵

Of the three major international governmental organizations delegated the task of producing international commercial law instruments,¹⁶ two of the organizations, UNIDROIT and UNCITRAL, have been quite active. These would include, for example, the UNIDROIT Principles on International Contracts and the UNCITRAL Arbitration Rules.¹⁷ Both of these have been used extensively by tribunals as guidance. Recent examples of new soft law products include the UNIDROIT Principles and Rules of Transnational Civil Procedure and the new UNCITRAL Legislative Guide to Secured Transactions.¹⁸ Unlike UNIDROIT and UNCITRAL,

10. See, e.g., the 2000 ICC, International Commercial Terms (“INCOTERMS”). “The ICC introduced the first version of [INCOTERMS] in 1936.” Since then, they have acquired tremendous popularity and are the standard trade definitions universally used in international sales contracts. International Chamber of Commerce, Understanding Incoterms, <http://www.iccwbo.org/incoterms/id3042/index.html> (last visited Mar. 27, 2009).

11. See INT’L CHAMBER OF COMMERCE, MODEL CLAUSES FOR USE IN CONTRACTS INVOLVING TRANSBORDER DATA FLOWS (1998).

12. The Grain and Free Trade Association has more than eighty contracts covering cost, insurance, and freight, “free on board,” and delivered terms. GAFTA Contract, <http://gafta.com/index.php?page=contracts> (last visited Mar. 27, 2009).

13. See, e.g., UNIDROIT, PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS (2004); UNIDROIT, PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS (1994).

14. For a discussion of the appropriate use of each of these types of soft law instruments, see Roy Goode, *Reflections on the Harmonisation of Commercial Law*, 1991-I UNIF. L. REV. 54 o.s. (1991).

15. For example, this is the case with the COMM’N ON EUROPEAN CONTRACT LAW, EUROPEAN PRINCIPLES OF CONTRACT LAW (1998).

16. There are, of course, many organizations that create private international law. For example, within the United Nations itself, these include the U.N. Conference on Trade and Development and the U.N. Economic Commissions for Africa, Asia and the Pacific, Europe, and Latin America and the Caribbean, as well as specialized agencies of the United Nations such as the International Bank for Reconstruction and Development, the World Intellectual Property Organization, the International Maritime Organisation, and the International Civil Aviation Organization.

17. G.A. Res. 31/98 (Dec. 15, 1967).

18. UNIDROIT Principles and Rules of Transnational Civil Procedure, available at <http://www.unidroit.org/english/principles/civilprocedure/ali-unidroitprinciples-e.pdf>; U.N. Com’n on Int’l Trade Law [UNCITRAL], *Security Interests: Recommendations of the*

the third organization, the Hague Conference, has not historically produced soft law texts.

Because of their long involvement in specialized trade issues, other private organizations, such as the ICC, have a long history of drafting very successful soft law documents. In the case of the ICC, this would include the highly influential INCOTERMS, governing shipping terms, and the Uniform Customs and Practice for Documentary Credits, governing letters of credit.¹⁹

II. THE DIFFICULTY OF HARMONIZATION IS NOT PRESENT IN CREATING SOFT LAW

Harmonization of positive law has some inherent difficulties that do not arise in the creation of soft law. The list of challenges offered in this Section is not meant to be exhaustive; however, it does set forth the major concerns and difficulties that drafters of positive law will confront in their efforts to harmonize the law among different legal systems in international commercial law.

In an ideal world, the drafters of both international and domestic laws would take the best features of several bodies of law and meld them into a comprehensive legislative scheme. The world is not ideal, however, and attempts to harmonize, though successful in many cases, often run into obstacles such as differences in commercial practices as well as differences in legal theory and legal policies.²⁰ As I see it, there are four major challenges to harmonization that may be mitigated by soft law.

UNCITRAL Draft Legislative Guide on Secured Transactions, U.N. Doc. A/CN.9/631 (Mar. 16, 2007).

19. INT'L CHAMBER OF COMMERCE, UNIFORM CUSTOMS AND PRACTICE FOR DOCUMENTARY CREDITS (1993) (ICC Publ'n No. 500)

20. Thus, after twelve years of work revising the American Uniform Commercial Code, the fruits of attempting to harmonize the Uniform Commercial Code with the Convention on the International Sale of Goods ("CISG") were reduced to the following prefatory comment:

When the parties enter into an agreement for the international sale of goods, because the United States is a party to the [CISG], the convention may be the applicable law. Since many of the provisions of the CISG appear quite similar to provisions in Article 2, the committee drafting the amendments considered making references in the Official Comments to provisions in the CISG. However, upon reflection, it was decided that this would not be done because the inclusion of such references might suggest a greater similarity between the Article 2 and the CISG than in fact exists.

U.C.C. REVISED ART. 2, 2003 prefatory note (amended 2003 & 2005).

A. The Mandate

Generally, drafters of any statute or convention will be given a specific mandate for change. Although the mandate may include harmonization with other law, the mandate will inevitably also include modernizing existing law to suit contemporary business practices as well as correcting or clarifying ambiguities and mistakes that have arisen in the current law. Harmonization will be a minor part of the mandate; the major pressure is to keep existing law, to the extent possible, consistent with the mandate for change, and the subsidiary goal of harmonization is often greatly minimized in the drafting process.

This is likely to be exacerbated when an existing statute or code is being revised, as contrasted with the creation of a new convention or treaty. When the drafters confront the actual and perceived problems of an existing convention, the focus tends to be inward looking, and the focus is on the pre-existing convention. This draws attention away from the goal of harmonization. To the extent that the revision is designed to update the law for purposes of changing business practices or social goals, the goal of harmonization may well lose out to the goal of modernizing the law.

It is also often the case that those tasked with the revisions bring to the process expertise in the laws being revised, but have no particular expertise in the other laws with which the revisions are to be harmonized. In this case, attempts for harmonization quickly get lost in the process.

This is not the case in the drafting of a soft law instrument because prior law does not confine the final product. Thus, for example, given the freedom to create a new soft law legal instrument, drafters of the UNIDROIT Principles of International Commercial Law sought to draft the best law possible based on actual commercial practices, without the restraint of an existing international or domestic law guiding their work.

B. Harmonization Is Difficult to Achieve Among Different Legal Traditions

The harmonization of international legal rules needs to take into account the globalization of trade and economies. To the extent that this crosses different legal traditions, harmonization efforts are more difficult because of the differences both among the various legal traditions as well as among languages.²¹

21. For a general discussion of the incompatibility issues in attempting to reconcile domestic and international law, see Henry D. Gabriel, *The Inapplicability of the United Nations Convention on the International Sale of Goods as a Model for the Revision of Article Two of the Uniform Commercial Code*, 72 TUL. L. REV. 1995 (1998).

Although there have been many successful efforts to harmonize international commercial law, this success has largely been due to the fact that its principles have only to be compatible with international commercial practice, not with domestic laws based on civil law or common law traditions.²²

Yet, when the process of crafting international legal rules begins, there is great pressure by the drafters to conform the international rules to their respective domestic laws. In this process, something has to be compromised, particularly when the drafters are coming from wholly different legal traditions. Either the international rules will not conform to the domestic rules, or the domestic rules will have to be redrafted to conform to emerging international law. The latter is rarely desired or achieved. Even if the goal of harmonization with other international or domestic legal systems is articulated, there is less incentive to make fundamental changes in one's domestic law to achieve this goal.²³ Moreover, to the extent that the law being revised is, or is based upon, the law of contract or property, the basic concepts and terms are not compatible. In addition, basic legal principles tend to work as a unified whole; thus, to selectively borrow a contract or property principle from another legal system runs the risk of destroying the balance and interplay with other rules.

This problem is greatly diminished with soft law principles in international commercial law because no domestic legal rules need to be accommodated.²⁴ There are also numerous examples of soft law instruments that straddle the civil law and common law traditions.²⁵

C. Harmonizing Existing Laws Is Difficult If the Scope of the Laws Differs

It is easier to harmonize laws when the laws being compared have the same scope. To the extent that a given statute or code provides unified coverage of a given area of the law or is part of a broader unified code, there is likely to be an internally consistent structure in the law that will make harmonization with other law difficult if the other law does not

22. An obvious exception is the CISG. The CISG successfully straddles both the common law and the civil law, and avoids grappling with the major distinctions between the two. See HENRY DEEB GABRIEL, *CONTRACTS FOR THE SALE OF GOODS: A COMPARISON OF U.S. AND INTERNATIONAL LAW* 14 (2d ed. 2009).

23. See Gabriel, *supra* note 21, at 2003.

24. I am assuming that the law of the enforcing jurisdiction or applicable arbitration tribunal will provide for the application of the soft law principles under choice of law rules. This would appear to be the case in the United States, for example. See U.C.C. § 1-301, cmt. 2 (2008).

25. See Gabriel, *supra* note 21, at 2004.

have the same scope.²⁶ Soft law instruments do not have this limitation because they are not attempts to replicate an existing law or legal structure.

D. The Advantages of Soft Law Instruments as a Means to Harmonization of the Law

As discussed above, soft law instruments are not subject to the same pressure to be harmonized with existing law, as is the case with treaties, conventions, and other sources of positive law. Moreover, in the case of soft law instruments, it is not necessary to attempt to harmonize the entire area of law, and therefore it is easy to pick the provisions out of another law that fit a specific need in the law being drafted for selective harmonization. Selective borrowing also lends itself to borrowing from various sources. This process of picking and choosing affords systematic reflection on what should be the best result, not simply a possible result, for the issue being considered.

Because treaties and conventions must be fashioned in a way that encourages adoption by various States, in order to create a high comfort level with the appropriateness of the instrument, there is a strong tendency toward the creation of instruments that will reflect the legal traditions of the potential adopting States. This inevitably results in an attempt to reconcile the differing legal traditions. It creates problems in terms of both the time necessary to finish the instrument as well as the actual substance of the resulting convention.

Preparation of international commercial law conventions and treaties tends to be a long process, and the long length of time is partially attributable to incessantly searching for common principles and reconciling established principles from different legal systems and traditions. This need was in large part the reason why the CISG took over ten years to prepare.²⁷

Moreover, and more importantly, the need to accommodate specific legal traditions locks the drafters into a straightjacket of limited possibilities that often prevents the examination of the best solution. This is often politically driven. For example, the late Professor Allan Farnsworth, who served as an American delegate for the CISG and as a member of the working group for the UNIDROIT Principles of International Commer-

26. *Id.* at 2006.

27. G.A. Res. 35/51, U.N. Doc. A/RES/35/51 (Dec. 4, 1980). *See also* UNCITRAL, 1980—United Nations Convention on Contracts for the International Sale of Goods (CISG), available at http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980_CISG.html.

cial Contracts, characterized the work leading to these two instruments as follows: "While the atmosphere in UNCITRAL was political (because delegates represented governments, which were grouped in regional blocs), that in UNIDROIT was apolitical (because participants appeared in their private capacity)."²⁸ For this reason, the UNIDROIT Principles are viewed as "neutral" contract law principles in that they reflect a balance of interests and have not been formulated by any government.

III. THE LACK OF A NEED FOR RATIFICATION AS AN ADVANTAGE OF SOFT LAW

Once completed, a soft law instrument is ready for adoption by the parties as part of their agreement or ready for use as an interpretive document by courts and arbitrators. Soft law instruments, unlike treaties and conventions, are not subject to the lengthy process of ratification that can delay enforcement for years.²⁹ For example, one of the most successful international conventions in recent times, the U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"), was completed in 1958, but not ratified by the United States until 1970.³⁰ Moreover, although the New York Convention has been very successful, this has not been the case with many recent international commercial law conventions.³¹ In a federal system, such as the United States, Canada, or Mexico, ratification often entails complicated political maneuvering between the federal government and the state or provincial governments.³²

28. E. Allan Farnsworth, *The American Provenance of the UNIDROIT Principles*, 72 TUL. L. REV. 1985, 1989 (1998) (citations omitted).

29. This can be the case with domestic law as well. For example, four years following a thirteen-year revision of the sales provisions of the American Uniform Commercial Code, no state has yet adopted the new law.

30. UNCITRAL, Status, 1958—Convention on the Recognition and Enforcement of Foreign Arbitral Awards, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (last visited Mar. 27, 2009)

31. See Sandeep Gopalan, *New Trends in the Making of International Commercial Law*, 23 J.L. & COM. 117, 153–55 (2004). Gopalan provides a detailed breakdown of the relative success of various conventions based on their ratification. Generally, many conventions passed since the 1964 Convention Related to a Uniformed Law on the International Sale of Goods have been ratified by only a handful of States. *Id.* The few exceptions to this pattern include "[t]he 1958 New York Convention on the Recognition of Foreign Arbitral Awards[,] . . . perhaps the most successful convention ever with 134 ratifications[,] . . . [and t]he 1980 Vienna Convention on Contracts for the International Sale of Goods[,] . . . ratified by sixty-two countries." *Id.* at 155.

32. Obviously a similar problem exists between the European Union and its Member States.

In the case of a treaty or convention, there is a strong desire by adopting jurisdictions to produce a treaty or convention consistent with the domestic law of the jurisdiction.³³ There is not a concomitant pressure to harmonize soft law instruments with domestic law because there is no need to ratify the soft law instrument, and therefore no need to justify it in relation to existing laws.³⁴

It has been suggested that soft law instruments, such as the UNIDROIT Principles of International Commercial Contracts, have been successful

precisely because they are not binding, have not been influenced by governments and do not pose any threat to national legal systems. Like the UNCITRAL Model Law on Arbitration they are designed to be a unifying influence and a resource, but it is left to legislatures, courts and arbitral tribunals to decide to what extent they assist in the solution of problems.³⁵

IV. THE USES OF SOFT LAW INSTRUMENTS

Soft law may have advantages over positive law instruments in terms of both harmonization as well as the lack of a need for ratification. But unless the soft law instruments themselves produce benefits beyond those derived from positive law, there would still be the question of whether they justify expenditure of limited resources. I believe that there are in fact important practical uses of soft law that justify the efforts and resources necessary to produce them, and I outline these uses below.

A. The Basis for Further Work

Some soft laws, such as model laws, are specifically intended to be the basis for adoption by individual jurisdictions,³⁶ and many have been most

33. See, e.g., Henry Gabriel, *The Revision of the Uniform Commercial Code—How Successful Has It Been?*, 52 HASTINGS L.J. 653, 654 (2001) (comparing the structure and content of the UCC to the Uniformed Electronic Transactions Act to argue that it is preferable to introduce state, rather than federal, legislation to promote universal commercial legal principles in the fifty U.S. states).

34. This is not to say that various domestic or other international laws will not have a strong influence on soft law principles. For example, the UNIDROIT Principles of International Commercial Law were influenced by the laws of Algeria, Canada, Germany, the Netherlands, and the United States, among other sources. See Sandeep Gopalan, *The Creation of International Commercial Law: Sovereignty Felled?*, 5 SAN DIEGO L. REV. 267, 319–20 (2004).

35. Gopalan, *supra* note 31, at 159 & n.188 (citing Roy Goode, *Communication on European Contract Law*, available at http://ec.europa.eu/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/comments/5.6.pdf).

36. For example, the UNCITRAL Model Law on Electronic Commerce, or legislation based on it, has been adopted in Australia, Bermuda, Colombia, France, Hong Kong Spe-

successful in setting international and domestic standards for legislation.³⁷ Nonetheless, model laws intended to be adopted as drafted or with minor revisions are often subject to the same political pressures of harmonization and the same need to conform to specific legal traditions as a treaty or a convention. Because the drafters of model law have the same concerns of ratification and coordination as drafters of domestic law, many model laws determined to be well drafted, such as the Model Law on Electronic Commerce, have been used for domestic legislation.³⁸ Moreover, model laws can be used as a template for related legislation. Thus, for example, the Model Law of Electronic Commerce was a source for the American Uniform Electronic Transactions Act, the Canadian Uniform Electronic Commerce Act, and the Australian Electronic Transactions Act.³⁹

cial Administrative Region of China, Ireland, the Philippines, Republic of Korea, Singapore, Slovenia, the States of Jersey (Crown Dependency of the United Kingdom of Great Britain and Northern Ireland) and, within the United States of America, the State of Illinois.

The countries that have implemented legislation influenced by the UNCITRAL Model Law on Electronic Commerce and the Principles include Canada and the United States. The Uniform Electronic Commerce Act was adopted in 1999 by the Uniform Law Conference of Canada, and enacted as federal Canadian legislation and Saskatchewan, Manitoba, Ontario, Nova Scotia, and Yukon. The U.S. legislation, the Uniform Electronic Transactions Act, was adopted in 1999 by the National Conference of Commissioners on Uniform State Law, and has been enacted in the following states: Alabama, Arizona, Arkansas, California, Delaware, the District of Columbia, Florida, Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, and Wyoming. UNCITRAL, Status, 1996—UNCITRAL Model Law on Electronic Commerce, http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/1996Model_status.html [hereinafter Status—Model Law on Electronic Commerce] (last visited Mar. 27, 2009).

37. Of course, sometimes actual conventions can be useful for setting international commercial standards for further conventions. This was clearly the case with the 1964 UNIDROIT Convention Relating to a Uniform Law on the International Sale of Goods, which was the basis for UNCITRAL's CISG.

38. Status—Model Law on Electronic Commerce, *supra* note 36.

39. For a discussion on the history and development of the UNCITRAL Model Law of Electronic Commerce as well as its influence on and differences from the American Uniform Electronic Transactions Act, see Henry Gabriel, *The New United States Uniform Electronic Transactions Act: Substantive Provisions, Drafting History, and Comparison to the UNCITRAL Model Law on Electronic Commerce*, 54 UNIF. L. REV. 652 (2000). For a discussion on the influence of the Model Law of Electronic Commerce on Canadian and Australian legislation, see Henry Gabriel, *Fear of the Unknown: The Need to Provide Special Protections in International Electronic Commerce*, 50 LOY. L. REV. 307 (2004).

On the other hand, statements of principles such as the UNIDROIT Principles of International Commercial Contracts, the UNIDROIT/American Law Institute Principles of Transnational Civil Procedure, and the many American Law Institute Restatements of the Law have all been drafted without the express purpose of adoption and therefore are not drafted with the attendant structural limitations. As a result, they have frequently achieved a neutrality and balance that would not otherwise be possible. Once completed, model laws have often taken on a great influence and significance in the further development of positive law. This can occur simply because they are a convenient and ready source of law and therefore eliminate the difficulty of drafting new language.⁴⁰

There can also be a more conscious adoption because it is thought that they represent the correct result. This would appear to be the case with the recent promulgation by the Organization for the Harmonization of Business Law in Africa of a new Uniform Law on Contracts, which is based on the UNIDROIT Principles of International Commercial Contracts.⁴¹

Of course, some of the most successful soft law instruments, such as the Uniform Customs and Practices for Documentary Credits and INCOTERMS, were specifically drafted for use by a large number of contracting parties because they reflect common, well-established business practices; for this reason they are the *de facto* legal standards for the transactions they govern. Thus, although not designed as models for further legislation, they have in fact become such. For example, this is the case with the letter of credit provisions of the American Uniform Commercial Code, which draws heavily from the Uniform Customs and Practice for Documentary Credits.⁴²

Private organizations, particularly trade organizations, have a strong financial incentive to produce soft law instruments that benefit their constituencies. It has been questioned whether governmental organizations, especially international organizations, should be spending limited re-

40. Describing the influence of the American Uniform Commercial Code and the Restatement (Second) of Contracts on the drafting of the UNIDROIT Principles of International Contracts, the late Professor E. Allan Farnsworth noted that unlike any other common lawyer, "I came with texts in statutory form: the Uniform Commercial Code and the Restatement (Second) of Contracts. No decision of a common law tribunal—not even the House of Lords—was as persuasive as a bit of blackletter text." Farnsworth, *supra* note 28, at 1990 (italics omitted).

41. Preparation by UNIDROIT of a Draft OHADA Uniform Act on Contract Law, <http://www.unidroit.org/english/legalcooperation/ohada.htm> (last visited Apr. 24, 2009).

42. Katherine Barski, Comment, *Letters of Credit: A Comparison of Article 5 of the Uniform Commercial Code and the Uniform Customs and Practice for Documentary Credits*, 41 *LOY. L. REV.* 735, 738 (1996).

sources on developing tools other than legislation intended for enactment. This critique, however, often does not take into consideration that by providing a template for possible legislation, model laws and restatements save the respective government the cost of having to produce a similar piece of legislation from scratch.

B. Guidance to Tribunals

Soft law instruments, such as principles and restatements, have been widely used by courts and arbitrations as a basis for forging new legal rules as well as interpreting existing ones. In the common law world, particularly the United States, courts have long relied upon as a source of law the various Restatements of the Law produced by the American Law Institute.⁴³ Moreover, arbitration tribunals, which are generally not bound by domestic choice of law restrictions, often adopt legal rules, such as the UNIDROIT Principles of International Commercial Law, because of the presumed neutrality of these rules.⁴⁴

Moreover, soft law is often a basis for gap fillers when the otherwise applicable international or domestic law does not address a specific question. For example, as the UNIDROIT Principles of International Commercial Law have a broader scope than the CISG, the Principles have been used to resolve questions not addressed by the CISG.⁴⁵

Whether this guidance is always useful may be questioned because, with the convenience of having existing rules in place, according to some, tribunals have a tendency to follow soft law principles blindly without any analysis of why the rules are appropriate or better suited for the issue than competing rules.⁴⁶ However, to the extent that the principles were drafted carefully and thoughtfully, this concern should be minimal. The courts, in effect, are likely to stumble upon the best rule.

43. See generally Kristen David Adams, *The American Law Institute: Justice Cardozo's Ministry of Justice?*, 32 S. ILL. U. L.J. 173 (2007) (noting Justice Cardozo's support for the Restatements published by the American Law Institute).

44. MICHAEL JOACHIM BONELL, *AN INTERNATIONAL RESTATEMENT OF CONTRACT LAW* 208–09 (3d ed. 2005).

45. See, e.g., *Yoshimoto v. Canterbury Golf Int'l Ltd.*, [2004] 2000 N.Z.C.A. 350 (C.A.); *SCEA GAEC Des Beauches Bernard Bruno v. Société Teso Ten Elsen GmbH & CO KG*, Cour d'appel [CA] Gernoble, Oct. 23, 1996, available at <http://www.unilex.info/case.cfm?pid=2&id=638&do=case>.

46. See, e.g., Gregory E. Maggs, *Ipse Dixit: The Restatement (Second) of Contracts and the Modern Development of Contract Law*, 66 GEO. WASH. L. REV. 508, 512 (1998); Symeon C. Symeonides, *The Judicial Acceptance of the Second Conflicts Restatement: A Mixed Blessing*, 56 MD. L. REV. 1248, 1269 (1997).

C. Party Autonomy and Neutrality

Within the limits provided by choice of law rules and party autonomy, parties may choose to adopt specific rules embodied in nonbinding instruments. Some instruments, such as the Uniform Customs and Practice for Documentary Credits or the INCOTERMS,⁴⁷ are so commonly used and accepted that they often govern by default absent a contrary party agreement. Most soft law instruments, however, become a part of the parties' agreement by express or implicit adoption.

The parties may choose to do so because they believe the rules reflect their business relationship better than domestic or other international law or they seek a neutral principle that does not give one party an advantage. Between parties of unequal bargaining power, the stronger party may insist on the choice of its own domestic law. However, there are times when a party, although having sufficient bargaining power to impose its own domestic law, in practice prefers not to because of its own law's lack of predictability or for another reason, and instead opts for other governing law such as the UNIDROIT Principles of International Commercial Contracts.⁴⁸

V. CAUTIONARY CONCERNS OF SOFT LAW INSTRUMENTS

There are two specific drawbacks to soft law instruments. First is the inability to meet the need for certainty of enforcement, and second is the concern that they have not been tested in the political process.

A. The Need for Certainty of Enforceability

In some areas of international commercial law, certainty of the law and the enforcement of the specific rules is a necessity. Because international

47. INT'L CHAMBER OF COMMERCE, INCOTERMS (2000) (ICC Publ'n No. 560).

48. For instance, as pointed out by the President of the International Court of Arbitration of the Russian Federation, Alexander S. Komarov:

[One] reason which may militate in favour of the wide use of the [UNIDROIT] Principles [in Russia] is the fact that Russian lawyers and business people do not seem to be as reluctant as their foreign counterparts to contemplate references to the Principles in place of the application of their domestic law on the ground that the former would not confer on them the advantages which parties to foreign trade contracts usually expect from the application of their own domestic law, namely the well-known and detailed regulation of business transactions to which they are accustomed.

Alexander S. Komarov, *The UNIDROIT Principles of International Commercial Contracts: A Russian View*, 1 UNIF. L. REV. 247, 250 (1996).

conventions are binding, once they are ratified they have the advantage of instant uniformity and enforceability.

Thus, for example, the recent Cape Town Convention on International Interests in Mobile Equipment⁴⁹ and the accompanying Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment⁵⁰ give an enforceable basis for the secured financing of aircraft in the international market; it would be unreasonable to expect the international financing of multimillion dollar aircraft without the level of certainty and protection afforded parties by a clear, black letter, enforceable convention.⁵¹

An agreement to use a particular set of rules is not self-enforcing, but needs some domestic law to provide a basis for its enforcement.⁵² This, in many circumstances, leads to uncertainty because the parties may not know in advance whether the governing terms of the agreement will be enforced according to their express wishes. However, this problem should not be overstated. A large proportion of international legal disputes are resolved in arbitration, and generally the party's choice of law will control in arbitration irrespective of the underlying substantive domestic law. Moreover, absent some direct conflict with domestic policy, most domestic laws provide for a strong rule of party autonomy.

49. Convention on International Interests in Mobile Equipment (Cape Town, 2001), available at <http://www.unidroit.org/english/conventions/mobile-equipment/main.htm>.

50. Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment (Cape Town, 2001), available at <http://www.unidroit.org/english/conventions/mobile-equipment/main.htm#NR2>.

51. For a discussion of the history of the Convention and the need for certainty in this area of international finance, see Sandeep Gopalan, *Harmonization of Commercial Law: Lessons from the Cape Town Convention on International Interests in Mobile Equipment*, 9 LAW & BUS. REV. AM. 255 (2003).

52. Domestic courts are obligated to apply their own national law, including the relevant conflict of law rules. Under the traditional and prevailing view, the choice of law applicable to international agreements is limited to the particular domestic law. This is the position of the European Union under the 1980 Convention on the Law Applicable to Contractual Obligations, Jun. 19, 1980, 19 I.L.M. 1492 (1993), which unifies the conflict of law rules for contracts within its Member States. Thus, even if parties expressly refer to soft law principles or rules as the law that governs their agreement, domestic courts are likely to conclude that soft law principles are incorporated into the contract. The law of the contract will therefore have to be determined separately on the basis of the conflict of law rules of the forum, and the incorporated terms will bind the parties only to the extent that they do not affect the domestic rules of law from which the parties may not derogate.

B. Untested in the Political Process of Adoption

With the drafting of conventions and treaties, political forces strongly influence the process at two stages. First, this occurs during the drafting process. Second, this occurs during the ratification process.

During the drafting, representative governments have a strong sense of what is in their best interests, and these interests will be strongly debated and lobbied for during the drafting process. Moreover, it is common in organizations, such as UNCITRAL, to have wide representation by industry and business organizations that will also press their concerns.

This process of vetting, compromise, and ultimate acceptance usually yields instruments acceptable to the various constituencies and, therefore, they are likely to result in a wide acceptance. This may not be the case with soft law instruments, which may have evolved through a more insular process. Moreover, conventions and treaties tend to reflect practical, specific problems that call for fact-specific rules, as opposed to abstract principles, and thus may be easier to apply and lend more certainty and less divergence in interpretation.

However, because of the various compromises for acceptable results, a convention may not reflect best practices but merely acceptable practices. In addition, they may lend themselves to a less flexible cherry-picking of rules. Moreover, irrespective of the proposed convention's quality, unless it is adopted, it has no force. That of course presupposes that the various constituencies do not bring the project to a standstill because of an inability of the various stakeholders to agree upon a final text at all.

CONCLUSION

This brings us back to our original question. Given the limited financial and human resources available to UNCITRAL, UNIDROIT, and the Hague Conference, should these organizations be in the business of producing soft law? This Article argues that they should. Given the increased globalization of the world economy, the development of international commercial law has had an exponential growth. For the reasons discussed in this Article, soft law has been an important part of this development.

The former Secretary General of UNIDROIT, Professor Herbert Kronke, recently addressed the question of whether it should be within the domain of government-financed international organizations to produce soft law instruments rather than concentrating solely on the produc-

tion of specific conventions that confront specific problems.⁵³ He concludes, I think properly, that the answer should not be an all-or-nothing proposition. Instead, there is a proper role for both soft law and binding conventions in the development of international commercial law. There are advantages to both.

53. See Herbert Kronke, *Methodical Freedom and Organizational Constraints in the Development of Transnational Commercial Law*, 51 *LOY. L. REV.* 287, 293–94 (2005). Kronke observes that

[m]uch has recently been written about the “new” transnational commercial law, consisting of fact-specific *rules*, having taken over from the “old” law, consisting all too often of highly abstract *standards*, which are constantly in need of interpretation and are, therefore, threatened by erosion. Assuming that is correct, would it then not be a disservice to the constituencies of transnational commercial law to continue producing international instruments such as the UNIDROIT Contract Principles? As a result, should we not then concentrate all resources on narrow problem areas resolving those specific problems by practice-driven drafting of instruments such as the Cape Town Convention or the [U.N.] Receivables Financing Convention?

The answer is “no” if the question were to suggest a radical “either-or” choice. For example, it is true that governments would be well-advised not to again discuss the concept of good faith in the context of developing rules for a *specific* transaction as they did in Vienna where they finally settled on papering over disagreements in article 7 CISG. We can make this assertion only now that we have discovered an alternative vehicle for the promotion of that concept: article 1.7 UNIDROIT Contract Principles. While it is equally true that a maxim of interpretation in good faith would sit awkwardly in the Cape Town Convention today, it would not today be used as an overarching and abstract principle on interpretation of any sophisticated domestic law concerning the taking of collateral either. Rather, it would be broken down into specific, mostly judge-made rules regarding the protection of the security provider or the lessee in specific circumstances.

In other words, standards have not become irrelevant. They have found their proper, yet different, place within the widened spectrum of types of international instrument. In an ongoing intellectual exchange with academic debate and business, the intergovernmental organizations were able to identify their proper role and designate their proper place thanks to the freedom granted by governments.

Id.