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NEIL COHEN'S CONTRIBUTION TO UNIFORM SECURED FINANCE LAW

Spyridon V. Bazinas[*]

ABSTRACT

This Article discusses Neil Cohen's contribution to uniform secured finance law and, in particular, to the UNCITRAL Model Law on Secured Transactions. It does so by focusing on the misgivings Neil Cohen had expressed before, and his reflections on those misgivings after, the preparation of the Model Law. The discussion presents Neil Cohen as is generally known, as a distinguished scholar, but also as he is known to his friends and colleagues, as a person with rare qualities.

INTRODUCTION

It was a bright winter morning in Vienna, I think, in 1999. At the time, the United Nations Commission on International Trade Law (UNCITRAL) and the Working Group on International Contract Practices was about to conclude their work on the draft Convention on the Assignment of Receivables in International Trade. The previous evening, the drafting group had considered rules on the rights of third parties (law applicable to perfection and priority of assignments of receivables, public policy, mandatory rules, and special rules on proceeds and subordination) and had agreed to include them all in one article. As this format made the rules difficult to read and to understand the different issues that they were addressing, as Secretary of the Working Group, I went to the delegates who had participated in that meeting of the drafting group,[1] and asked them whether, instead, they would agree to have one article per issue (ultimately, we had four articles, Articles 22 to 26).

For the English language, I went to Neil Cohen, as he was the representative of the English language at that meeting. Neil checked with the other members of the U.S. delegation,[2] and, at the next "consultation break,"[3]

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1. The drafting group was composed of delegates of States as representatives of one of the six official languages of the United Nations (UN), UN editors of each of the six official languages and me as the Secretary of the relevant UNCITRAL Working Group. Its task was to implement the decisions of the Working Group and align the various language versions with each other (and not necessarily all other language versions with the English language version).

2. Harold Burman, Harry Sigman, Edwin Smith, and Peter Winship.

3. Coffee breaks were and still are called "consultation breaks" as consultation means informal work, while coffee means an interval to work and was associated with a waste of valuable UN conference time, which led to a poor conference rating for the relevant Working Group and ultimately to it being given the worst available meeting dates!

approached me at the podium and said: "Okay. You can go ahead and do it. But I had to do some heavy weightlifting (convincing some of the other members of his delegation). You owe me one!" In the more than twenty-five years that I had the pleasure of working with Neil in the vineyard of trade law unification, I ended up owing him much more. This Article is far from paying my debt to Neil. But it is a way to recognize his invaluable contribution to the unification and harmonization of secured finance law, and to thank him for it.

The main topic of my work with Neil was secured finance law, and the jewel of the crown of our work was the UNCITRAL Model Law on Secured Transactions (2016, the Model Law).[4] This Article discusses Neil's contribution to the Model Law, starting with the misgivings he had expressed about the feasibility and desirability of preparing a model law after the preparation of the UNCITRAL Legislative Guide on Secured Transactions (2007, the Secured Transactions Guide) and the Supplement on Security Rights in Intellectual Property (2010, the IP Supplement), and it concludes with his reflections on those misgivings after the preparation of the Model Law.

Initially, Neil was skeptical, and after considering the arguments in favor and against the preparation of a model law, he concluded that "the arguments against proceeding to [the] preparation of a model law at this time are somewhat stronger."[5] However, that did not prevent Neil from later changing his mind, making a fine contribution to the Model Law, and in the end, recognizing that events had dispelled most of his concerns.[6]

Part I of this Article discusses Neil's concerns with regard to preparing a model law. Part II discusses Neil's contribution to the Model Law. Part III discusses Neil's reflections on misgivings. This Article will then offer some conclusions about Neil's outstanding contribution to uniform secured finance law.

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4. Adopted by the United Nations Commission on International Trade Law (UNCITRAL) in 2016. *See*, UNCITRAL Model Law on Secured Transactions (2016), *available at* https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-08779_e_ebook.pdf. For a comparison of the Model Law with UCC Article 9, see Spyridon V. Bazinas and Edwin E. Smith, The UNCITRAL Model Law on Secured Transactions and UCC Article 9 compared, UCC Law Journal, Vol. 50 No. 2, 79–141. See also of the same authors: UNCITRAL Model Law and UCC Article 9 Conflict-of-Laws Rules Compared, UCC Law Journal E Vol. 49 No. 3 387-428 and Security Interests in Insolvency Proceedings: The UNCITRAL and the U.S. Regimes Compared, UCC Law Journal E Vol. 50 No. 3, 181-215.

5. Neil B. Cohen, *Should UNCITRAL Prepare a Model Law on Secured Transactions?*, 15 UNIF. L. REV. 325, 334 (2010) [hereinafter *Cohen's concerns*].

6. Neil B. Cohen, *Reflections on Misgivings about a Model Law*, *in* INTERNATIONAL AND COMPARATIVE SECURED TRANSACTIONS LAW, ESSAYS IN HONOUR OF RODERICK A. MACDONALD 41–53 (Spyridon V. Bazinas & N. Orkun Akseli eds., 2017) [hereinafter *Cohen's reflections on misgivings*].

I. CONCERNS WITH REGARD TO PREPARING A MODEL LAW

In 2010, when UNCITRAL was about to conclude its work on the IP Supplement, the UNCITRAL secretariat held the Third International Colloquium on Secured Transactions.[7] One of the topics discussed at that Colloquium was whether a model law should be prepared on the basis of the recommendations of the Secured Transactions Guide.[8] Most of the participants were in favor of preparing a model law. The arguments that carried the day were that, for most States, a model law would be easier to implement and would provide more certainty, while allowing States some flexibility in fitting it into their legal systems, but without reopening the

7. U.N. Comm'n on Int'l Trade L., *Third International Colloquium on Secured Transactions*, (Mar. 1-3, 2010), *available at* https://uncitral.un.org/en/colloquia/security/papers_2010.

8. Other topics included: the implementation of UNCITRAL Texts on Secured Transactions Law, a Supplement to the Guide covering certain types of securities not covered by the Unidroit Convention on Substantive Rules for Intermediated Securities, Regulations on Registration of Security Rights, Contractual Guide on Intellectual Property Licensing and a Contractual Guide on Secured Financing. *See* U.N. Comm'n on Int'l Trade L., *Possible future work on security interests*, U.N. Doc. A/CN.9/702 (Apr. 23, 2010); U.N. Comm'n on Int'l Trade L., *Possible future work on security interests*, U.N. Doc. A/CN.9/702/Add.1 (Apr. 28, 2010). In 2010, UNCITRAL decided to prepare a text on the registration of security rights in movable assets as a matter of priority, and to retain other topics, such as security rights in non-intermediated securities, a model law based on the recommendations of the Guide and a text dealing with the rights and obligations of the parties on its future programme for further consideration. *See* Rep. of the U.N. Comm'n on Int'l Trade L., ¶ 268, U.N. Doc. A/65/17 (2010). Ultimately, the Model Law excluded only security rights in intermediated securities (Art. 1(3)(c)), and thus applies to security rights in non-intermediated securities. In 2013, UNCITRAL decided to prepare a model law based on the recommendations of the Secured Transactions Guide. *See* Rep. of the U.N. Comm'n on Int'l Trade L., ¶ 194, U.N. Doc A/68/17 (2013). In 2016, UNCITRAL decided to prepare a guide to enactment of the Model Law. *See* Rep. of the U.N. Comm'n on Int'l Trade L., ¶ 122, U.N. Doc. A/71/17 (2016). In 2017, UNCITRAL decided to prepare a practice guide on the Model Law. *See* Rep. of the U.N. Comm'n on Int'l Trade L., ¶ 227, U.N. Doc. A/72/17 (2017). The other topics, together with the topics identified at the Fourth International Colloquium on Secured Transactions, held in Vienna in 2017 (contractual, transactional and regulatory issues related to secured transactions, finance to micro-businesses, warehouse receipts, intellectual property licensing, alternative dispute resolution in secured transactions and real estate financing were retained on UNCITRAL's future work agenda for further consideration, with the exception of real estate financing. *See* U.N. Comm'n on Int'l Trade L., *Possible future legislative work on security interests and related topics*, U.N. Doc. A/CN.9/913 (Apr. 20, 2017)); Rep. of the U.N. Comm'n on Int'l Trade L., ¶ 220, 229, U.N. Doc. A/72/17 (2017)). Contractual, transactional and regulatory issues related to secured transactions, as well as microfinance, are briefly addressed in the Practice Guide. U.N. COMM'N ON INT'L TRADE L., UNCITRAL PRACTICE GUIDE TO THE MODEL LAW ON SECURED TRANSACTIONS, U.N. Sales No. E.20.V.6 (2020). The draft Guide on access to credit for MSMEs, currently being prepared by UNCITRAL, addresses in more detail microfinance. *See Working Group I: Micro, Small and Medium-sized Enterprises*, U.N. COMM'N ON INT'L TRADE L., https://uncitral.un.org/en/working_groups/1/msmes (last visited Feb. 11, 2023). The draft Model Law on Warehouse Receipts, which is currently being prepared by UNIDROIT and will be soon submitted to UNCITRAL, addresses warehouse receipts. *Model Law on Warehouse Receipts*, INT'L INST. FOR THE UNIFICATION OF PRIV. L., https://www.unidroit.org/work-in-progress/model-law-on-warehouse-receipts/ (last visited Feb. 11, 2023).

debate on key policy decisions.[9] Out of the five panelists,[10] two were against the preparation of a model law, but their exact positions and reasons were somewhat different. The first of those panelists was Roderick (Rod) Macdonald.[11] The other was Neil Cohen.[12]

In his familiar balanced approach, Neil considered the arguments in favor and against preparing a model law. Thus, he recognized that a model law would: (a) provide more guidance to States and a higher degree of harmonization of law; (b) be easier for States to implement; and (c) result in higher quality domestic law than a national law implementing legislative recommendations.[13]

At the same time, Neil expressed the view that the preparation of a model law would: (a) have only so marginal gains that could not justify the time, cost, and effort that its preparation would require; (b) inadvertently result in relitigating and possibly changing key policy decisions, which could have far-flung effects and cast doubt on the kind of law that would be recommended by UNCITRAL; (c) reduce the level of flexibility that legislative recommendations provided States both in terms of policy and formulation; and (d) ultimately fail to result in higher degrees of harmonization of law.[14]

Based on the above-mentioned considerations, Neil concluded, not with an outright, but with a qualified negative response (in his view, the arguments against proceeding to prepare a model law at this time were somewhat stronger).[15] Thus, he expressed the view that it would be more productive if the UNCITRAL secretariat devoted its resources to providing technical assistance to States in implementing the recommendations of the Secured Transactions Guide. In conclusion, displaying his usual open mind and flexibility, Neil left open the preparation of a model law in the future, if it later became clear that a model law would make it easier for States to implement the recommendations of the Secured Transactions Guide. He also

9. U.N. Doc. A/CN.9/702/Add.1, *supra* note 8, ¶ 3–11.

10. Neil Cohen, Alejandro Garro, Rod Macdonald, Jean-Francois Riffard, and Jan-Hendrick Roever.

11. Roderick A. Macdonald, *A Model Law on Secured Transactions. A Representation of Structure? An Object of Idealized Imitation? A Type, Template or Design?*, 15 UNIF. L. REV. 419–46 (Apr. 2010) [hereinafter *Macdonald*]. Rod left us unexpectedly 4 years later. His friendship and dedication was such that a few weeks before his passing, he responded with interest to questions of mine about matters relating to the then draft Model Law. In 2017, as we were concluding our work on the Guide to Enactment of the Model Law, we celebrated his life and honored him *post mortem* for his contribution with a book (International and Comparative Secured Transactions Law, Essays in honour of Roderick A. Macdonald, edited by Spyridon V. Bazinas and N. Orkun Akseli, Hart Publishing, Oxford and Portland, Oregon, 2017).

12. *Cohen's concerns*, *supra* note 5, ¶ 325–35.

13. *Id.* at 329–31.

14. *Id.* at 331–34.

15. *Id.* at 334.

added that such a model law that would address the precise difficulties proven to be faced by States would be a better law.[16]

To better appreciate Neil's position, it is interesting to compare it with the position that our other distinguished colleague and friend, Rod Macdonald, took at that time. Unlike Neil, who, on balance, was against the preparation of a model law *at that time*, Rod expressed dogmatic opposition to the preparation of a model law on secured transactions *at any time*.

Rod mentioned three somewhat different reasons. Firstly, it was not desirable to prepare a model law because "there has never been a 'one size fits all' multijurisdictional model law that has really succeeded."[17] Secondly, it was not feasible to prepare a model law since: (a) a model law did not involve an international normative regime such as the UNIDROIT Convention on International Interests in Mobile Equipment; (b) a model law would not create a regime that would deal with a relatively new field not subject to widespread or detailed regulation, and where the goal would be to relieve national legislatures of the burden of statutory development (as in the case of basic principles relating to electronic commerce); and (c) a model law would not be aimed at providing a short, specific patch on a relatively closely defined existing framework of national legislation (as in the case of a short model law on letter of credit financing).[18] Lastly, the time was not right, as there was no "coincidence of supply and demand,"[19] and as there was an oversupply of model laws (EBRD, OAS, and OHADA) with insufficient demand.[20]

After examining the key policy objectives of States enacting legislation on secured transactions, Rod concluded that it would be preferable to have multiple regional model laws drafted from the lowest-common denominator perspective, rather than a single, one-size-fits-all model law drafted from an ideal-type perspective. Rod ultimately suggested that UNCITRAL could devote any available resources to the promotion of the Secured Transactions Guide by selecting a few recommendations and producing two or three different drafting proposals for achieving their policy objectives (e.g., scope, rights in proceeds, third-party effectiveness and registration, priority, non-judicial enforcement, and acquisition financing).[21]

16. *Id.* at 335.

17. *Macdonald*, *supra* note 11, at 421–22. Yet, the regional model laws of the EBRD, the OAS and OHADA have already had some success. About the OAS Model Law, in particular, see Ley Modelo Interamericana sobre Garantias Mobiliarias: su implementacion, ed. David Moran Bovio, Marcial Pons, Madrid, 2020.

18. *Id.* at 422–23.

19. *Id.* at 423.

20. *Id.* at 423–24.

21. *Id.* at 444–46.

Three years later, in 2013, after completing its work on the UNCITRAL Guide on the Implementation of a Security Rights Registry,[22] UNCITRAL decided to prepare "a simple, short and concise model law on secured transactions based on the recommendations of the Secured Transactions Guide and consistent with all texts prepared by UNCITRAL on secured transactions."[23]

The main arguments that convinced UNCITRAL were that: (a) a model law would complement the work of the Commission in the area of security interests and provide urgently needed guidance to States as to how to implement the recommendations of the Secured Transactions Guide; and (b) in view of the importance of modern secured transactions law for the availability and the cost of credit, and the importance of credit for economic development, such guidance was extremely important and urgent to all States at a time of economic crisis but in particular to States with developing economies and economies in transition.[24]

The end result shows that the Model Law is not simple, short, or concise. The reason is not that the drafters did not try to achieve these goals, but that it was not realistic to expect that these goals could be achieved. A comprehensive secured transactions law, which would address one of the main problems of secured transactions law around the world, that is, the fragmentation of secured transactions law that results in gaps and inconsistencies and ultimately in uncertainty with deleterious effects for the availability and the cost of credit, cannot be simple, short, or concise.

However, the Model Law is based on the recommendations of the Secured Transactions Guide and is consistent with all texts prepared by UNCITRAL on secured transactions. Thus, the fear that the policy debate would be reopened and have different results did not materialize.

The fact that the Model Law was prepared and adopted by States in UNCITRAL is an initial indication that its preparation was both desirable and feasible. In addition, the fact that the Model Law has already been enacted by a number of States, is being considered for enactment by more States, and has influenced a number of other uniform law texts is an initial indication that its timing was right.[25] Of course, for the rest, as the saying goes, the jury is still out (this will be further discussed in Part III).

II. CONTRIBUTION TO THE MODEL LAW

Despite the concerns that he had expressed, once UNCITRAL decided to prepare a model law, Neil not only accepted that decision but also remained involved and played an active role in the preparation of the Model Law.

22. U.N. COMM'N ON INT'L TRADE L., UNCITRAL GUIDE ON THE IMPLEMENTATION OF A SECURITY RIGHTS REGISTRY, U.N. Sales No. E.14.V.6 (2014).
23. Rep. of the U.N. Comm'n on Int'l Trade L., ¶ 194, U.N. Doc A/68/17 (2013).
24. *Id.* at ¶ 193.
25. *See infra* note 29.

His previous work on Article 9 of the Uniform Commercial Code, his mathematical background, but mainly his personality, made Neil an ideal delegate. He clearly knew the issues and the acceptable ways in which they could be addressed and had the intellectual honesty to always discuss the pros and cons of each policy approach. During the discussion of each issue, he had the rare ability to identify the relevant issues, divide them into sub-issues, and place the agreement or disagreement in the right practical context.

Most importantly, Neil had the ability or humility[26] of the very few to listen carefully and respectfully to the statements of others, being prepared to address their concerns or be convinced by their arguments and to modify his position to help reach a consensus, without, however, compromising on the quality of the final text. This is the key to the success of any process that is based on consensus. Consensus in UNCITRAL meant and still means that discussion is initially based on the view of the majority. The Working Group then proceeds to address one by one the concerns of the minority so that, in the end, the results would be acceptable to all (but no delegation has a right to veto a decision). This means that the result is the highest, not the lowest, common denominator, and this is the main condition for the acceptability and success of an international uniform law text.

There is another characteristic of Neil's gifted personality—his positive and optimistic attitude. Being positive, constructive, or optimistic may not be a sufficient condition for addressing difficult issues, but it is necessary. I will always be grateful to Neil for approaching me at the podium to wish me good luck at the beginning of each meeting and, at difficult times, to say something helpful and constructive, or simply to encourage me to "keep . . . smiling!"[27]

26. Humility has come to be often viewed as an inferiority complex. Yet, in the Old and New Testament, it is the . . . key to Paradise! *See Proverbs* 15:33; *2 Chronicles* 7:14; *Psalm* 131:1; *Romans* 12:3, 1; *Peter* 5:6-7; *Matthew* 23:8-12; *see also, An Amazing Story – The Importance Of Humility According To St. Anthony And The Shoe-Maker,* PANTANASSA MONASTERY (Jan. 24, 2015), https://pantanassamonastery.org/an-amazing-story-the-importance-of-humility-according-to-st-anthony-and-the-shoe-maker/. In an international legislative standard-setting organization like UNCITRAL, in which decisions are being made by consensus, the inquisitive humility of humble Socrates, who used to ask questions, rather than lecture others, is not only rare but also extremely useful.

27. Most of the time I would follow Neil's advice. At the Second International Colloquium on Secured Transactions: Security Interests in Intellectual Property Rights, held in Vienna in 2007, after several weeks of preparation, I had agreed on a program with all panelists. However, on the day before some of the intellectual property law experts asked that we make radical changes to the program, to which I could not agree. The next day during the colloquium, I sensed a negative attitude from them in the conference room. So, I had to take the floor and repeat the lines of Big Julie from the movie *Guys and Dolls*. "Well, I used to be bad when I was a kid, but ever since then I've gone straight, as has been proved by my record: Thirty-three arrests and no convictions! In other words, feel free to do as you like!" I recall that Jeremy Phillips of Queen Mary University Law School was encouraged by these words and started his speech by throwing a kind of a bomb: "You cannot give an IP right to a bank as collateral. It is like giving a Stradivarius violine to a gorilla. The gorilla can only destroy it!" At another meeting in London with intellectual property practitioners, I kept answering their questions with respect to our work on intellectual property financing as calmly and positively as I could. This led one of them to say that he found it disconcerting that they kept

Neil's fingerprints are all over the Model Law. However, he played a key role in technical issues, such as debtor protection, priority, enforcement, conflict of laws, and transition issues. He knew very well that the key to success for the Model Law was not only "to get it right," but to get it right as a group, explaining things again and again, addressing each other's concerns, and, most importantly, helping us reach consensus on a practical but also fair result that would address in a balanced way the interests of all stakeholders. A uniform law is not a contract, which one side may trick the other into signing and leave satisfied that they have won. It is a law that has to be approved by national legislatures, and for that to happen, the law has to be balanced and generally acceptable. Moreover, if a State is forced to adopt an unbalanced or unsuitable law under some kind of pressure, judges and practitioners will still find a way to not apply it or to apply it in a way suitable for that State. So, reaching a good result with consensus is a *conditio sine qua non* for the success of a uniform law text.[28]

III. REFLECTIONS ON MISGIVINGS

After the conclusion of the Model Law, Neil looked back at the concerns he and Rod had expressed, and with the experience of his participation in the process, considered the question of whether their concerns were justified.

With regard to Rod's concern about the desirability of a model law, which Neil considered similar to his "concern that a single style of codification could lead to disharmony and decreased likelihood of success," Neil noted that only time would show whether that concern was justified.[29] He also remarked that the neutral drafting style of the Model Law might be an advantage for some States and a disadvantage for other States.[30]

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criticizing our work and I kept responding so calmly! Remembering Neil's advice, I responded: "I am in the certainty business. So, publicly, I have to radiate certainty. I bite my nails privately!" These kind of answers built a confidence between our secured finance group and the intellectual property bar, which helped us complete the most difficult of all texts: the Intellectual Property Supplement. On another occasion, I was not as successful. We were with Neil, Steve Weise, Michel Deschamps, and other colleagues and friends for a meeting with IP experts at the World Intellectual Property Organization in Geneva. IP experts kept raising issues and, when we managed to address one issue, they moved to the next, without recognizing that we had addressed all previous issues. So, at some point, I could not handle this bad faith any longer and I had to leave the room. When I returned, Neil mentioned to me that some progress had been made in my absence. So, from that time on, at difficult times in the discussion, I would offer to leave the room. Unfortunately, for me, most of the time my offer was not accepted!

28. And even that may not be enough, because of market or other conditions. Despite the fact that Colombia has taken action to "modernize its legal infrastructure and establish a movable collateral registry. . . . Access to affordable finance remains a critical challenge for many of Colombia's businesses today." *Profit, purpose and collateral The market opportunity for movable property lending in Colombia*, USAID 20 (Dec. 2018), https://banyanglobal.com/wp-content/uploads/2019/08/Profit-Purpose-and-Collatera.pdf.

29. *Cohen's Reflections on Misgivings*, *supra* note 6, at 51.

30. *Id.* at 51–52.

I think that Rod's concern was more fundamental and essentially went not only to the formulation but also to the policy of a model law, and not only to the desirability but also to the feasibility of preparing a model law. While I agree that only time will ultimately tell whether the Model Law will be successful, the fact that States reached an agreement on it in UNCITRAL is a strong indication of its desirability and feasibility. I also think that the neutral drafting style of the Model Law can only be an advantage because each State can adopt the Model Law in a way that is suitable to its drafting style, as long as it does not depart from the key policies of the Model Law. A model law does not need to, and cannot, be adopted verbatim. It is sufficient if its key policy approaches are implemented in domestic legislation.

With regard to Rod's concern about the timing of the preparation of the Model Law, Neil remarked that whether it was justified would depend on how many States would now implement the Model Law. I agree. I would only add that we already have a clear indication that the timing was right as nine States have already adopted the Model Law,[31] a number of other States are considering the Model Law for adoption,[32] and a number of uniform law texts have been influenced by the Model Law.[33]

As to Rod's concern about the risk of reopening debate on controversial policy issues, which Neil considered similar to his concern about relitigating and changing key policy decisions, Neil points out that that did not occur in a material way. He also added that where the Model Law adopted a slightly different approach (as in the case of the adoption of the unitary approach to acquisition finance in the Model Law, which was only one of the two options available in the Secured Transactions Guide), it was a welcome improvement.[34] I agree that it was an improvement. At the same time, I would add that, if a State would prefer to follow a non-unitary approach to acquisition finance, it could do so on the basis of the recommendations of the

31. Australia, Colombia, Fiji, Kenya, New Zealand, Nigeria, Papua New Guinea, Philippines, Zimbabwe. *See Status: UNCITRAL Model Law on Secured Transactions (2016)*, U.N. COMM'N ON INT'L TRADE L., https://uncitral.un.org/en/texts/securityinterests/modellaw/secured_transactions/status (last visited Feb. 11, 2023).

32. Bahrain, Georgia, Saint Lucia, Trinidad, and Tobago, and Ukraine.

33. UNCITRAL Draft Guide on access to credit for micro, small and medium-sized enterprises (MSMEs) (*see Draft Guide on access to credit for micro, small and medium-sized enterprises (MSMEs)* (U.N. Comm. on Int'l Trade Law, Working Paper No.130)); UNIDROIT Draft Model Law on Factoring (*see Model Law on Factoring*, INT'L INST. FOR THE UNIFICATION OF PRIV. L., https://www.unidroit.org/work-in-progress/factoring-model-law/ (last visited Feb. 11, 2023)); UNIDROIT Draft Model Law on Warehouse Receipts (*see Model Law on Warehouse Receipts*, INT'L INST. FOR THE UNIFICATION OF PRIV. L., https://www.unidroit.org/work-in-progress/model-law-on-warehouse-receipts/ (last visited Feb. 11, 2023)); UNIDROIT Draft Principles on Digital Assets and Private Law (*see Digital Assets and Private Law*, INT'L INST. FOR THE UNIFICATION OF PRIV. L., https://www.unidroit.org/work-in-progress/digital-assets-and-private-law/ (last visited Feb. 11, 2023)); UNIDROIT Best Practices on Effective Enforcement (*see Enforcement: Best Practices*, INT'L INST. FOR THE UNIFICATION OF PRIV. L., https://www.unidroit.org/work-in-progress/enforcement-best-practices/ (last visited Feb. 11, 2023)).

34. *Cohen's reflections on misgivings*, *supra* note 6, at 49–51.

Secured Transactions Guide. More importantly, the enactment of those recommendations of the Secured Transactions Guide would result in domestic law being formulated in a different way than that of the Model Law but would not differ from the approach taken in the Model Law as a matter of policy.

Neil concluded on a positive note, stating that "this happy result validates reasons for going forward described above, and might be seen as outweighing the misgivings expressed by Rod and me."[35]And after recognizing that one or the other provision could benefit from some further finetuning, he stated that the benefits of the Model Law outweigh any downside of one or the other provision and finally accepted that "our biggest concerns . . . did not take hold, and I am glad that events dispelled those concerns . . . As the saying goes, time will tell. In the meantime, I am rooting for the product's success and will be quite happy if the remaining concerns do not come to fruition."[36]

Neil's remaining concerns about the clarity and precision of some of the provisions of the Model Law are, in my view, proof that the Model Law got it right, as, if it reflected 100% of the views of any of its drafters, the Model Law would be lacking in balance and that could reduce its chances for success. In international uniform law, the choice between two workable formulations or approaches has to be based on which one can be agreed upon by consensus and thus can be actually implemented by States, even if imperfect. The perfect approach is out of this world and belongs to the realm of legal heavens.

CONCLUSION

At the beginning, Neil considered the arguments in favor and against the preparation of a model law based on the recommendations of the Secured Transactions Guide and ultimately expressed the view that the arguments against were stronger. These arguments included that: (a) the preparation of the Model Law was a substantial undertaking, and could provide only marginal gains when compared to those of the recommendations of the Secured Transactions Guide; (b) reopen the debate on key policy decisions; (c) require difficult choices that could lead to disharmony without adding significant value; (d) be ultimately unattainable in view of the differences in domestic style of legislation and codification; and (f) fail to lead to broader enactment of the recommendations of the Secured Transactions Guide.

However, once UNCITRAL decided to prepare the Model Law, Neil did his best to assist UNCITRAL in addressing all those and other concerns, and he became one of the main draftsmen and supporters of the Model Law. He also went much further. With his characteristic intellectual honesty, he reflected on the concerns that he had expressed and confirmed that they did

35. *Id.* at 52.
36. *Id.* at 53.

not take hold. At the same time, although he recognized that, like any human creation, the Model Law was imperfect and only time could tell whether it would be widely adopted, he made it clear that he was rooting for the success of the Model Law.

As for me, I am delighted that my good friend and distinguished colleague, Neil Cohen, saw the light on the road to . . . Vienna. I wish him well, and I am looking forward to continuing working with him for many more years to promote the worldwide unification and harmonization of secured finance law, in a practical and fair way. After all, "international trade *on the basis of equality and mutual benefit* (emphasis added) is an important element in the promotion of friendly relations among States," and "the adoption of uniform rules . . . would promote . . . the availability of capital and credit at more affordable rates and thus facilitate the development of international trade."[37] Besides international trade is the other side of peace and stability, and international trade law not just a stone of the house of international trade, but a cornerstone.

37. U.N. Convention on the Assignment of Receivables in International Trade, Preamble.