Volume 58 | Issue 4 Article 11

9-1-2013

Unidroit Principles as a Source for Global Sales Law

Henry Deeb Gabriel

2013]

UNIDROIT PRINCIPLES AS A SOURCE FOR GLOBAL SALES LAW

Henry Deeb Gabriel*

THE germination period for the United Nations Convention on Contracts for the International Sale of Goods (CISG) was forty-five years, and once it was completed it was slow to be adopted. It is now showing its age, and the question has been posed as to whether it is time to revise or expand its scope. Given its history, though, whether a revision or expansion of the CISG is a viable project that justifies the resources is subject to serious question.

Among the problems this project might encounter is a lack of resources, a clear articulation of the need for the project, the inability to define its scope, and the likelihood of widespread ratification within a reasonable time. Recent attempts to revise domestic and regional laws are instructive about the possible problems this project may have.

It may be that the barriers for a future convention on global contract law is not a realistic project, and the more recent path of soft law instruments, such as the UNIDROIT Principles of International Commercial Contracts (Principles), is a more viable method of providing global uniformity in contracts. Alternatively, another path is to replicate the creation of the CISG by relying on an initial product from UNIDROIT that provides for UNIDROIT's distinct working methods, and then have that work as the basis for a convention on global contract law, through the United Nations Commission on International Trade Law (UNCITRAL). This would entail a close working relationship between UNIDROIT and UNCITRAL.

I. A New Project?

At the last Plenary Meeting of UNCITRAL in the summer of 2012, the government of Switzerland proposed that UNCITRAL undertake a project to develop an instrument, presumably a binding convention,[1] to harmonize principles of contract law (hereinafter the proposal).[2] The scope of the project proposed is very ambitious.[3]

* Professor of Law, Elon University; member of the drafting committee and chair of the editorial committee of the 2010 UNIDROIT Principles of International Commercial Contracts.

1. The proposal cites as one of the faults of the UNIDROIT Principles of International Commercial Contracts, and therefore as a justification of the new project, the fact that the Principles are not binding law. *See* UNCITRAL, *Possible Future Work in the Area of International Contract Law: Proposal by Switzerland on Possible Future Work by UNCITRAL in the Area of International Contract Law*, at 4–5, U.N. Doc. A/CN.9/758 (May 8, 2012) [hereinafter *Proposal*].

2. *See id.* at 3.

3. The proposal sets out the following as possible topics:

The proposal was met with some strong opposition, and there was no strong support for it.[4] Regardless, it was concluded that the Secretariat should organize colloquia and undertake further study of the project.[5] This conference is part of the Secretariat's mandate. In this paper I examine whether this project is a feasible one, and if so, whether UNIDROIT and its work can play a significant role in the forging of a global contract law.

Initially it must be recognized that the proposal asserts, but does not demonstrate a need for, an international convention on contract law. Before discussing the possible need for the project, as an initial inquiry, I would like to address what may be some drawbacks to UNCITRAL undertaking this project.

> [G]eneral provisions, among others: freedom of contract, freedom of form; formation of contract, among others: offer, acceptance, modification, discharge by assent, standard terms, battle of forms, electronic contracting; agency, among others: authority, disclosed/undisclosed agency, liability of the agent; validity, among others: mistake, fraud, duress, gross disparity, unfair terms, illegality; construction of contract, among others: interpretation, supplementation, practices and usages; conditions; third party rights; performance of contract, among others: time, place, currency, costs; remedies for breach of contract, among others: right to withhold performance, specific performance, avoidance, damages, exemptions; consequences of unwinding; set-off; assignment and delegation, among others: assignment of rights, delegation of performance of duty, transfer of contracts; limitation; joint and several obligors and obligees.

Id. at 7 n.4.

4. A summary of the debate is contained in the Report of the United Nations Commission on International Trade Law. *See* Rep. of United Nations Comm'n on Int'l Trade, June 25–July 6, 2012, ¶¶ 127–32, U.N. Doc. A/67/17, 45th Sess. [hereinafter UNCITRAL Report]. In the United States, the National Conference of Commissioners on Uniform State Laws has also come out against the proposal. There are several areas for suggested coverage in the proposal that would be of particular concern for American law. These include the general difficulty with reconciling American law and the common law with other legal traditions—for example, defects of consent, the nature of software contracts, consumer contracts, unfair contracts, and, pre-contractual information duties.

5. The official report states the following:

> After discussion, it was determined that there was a prevailing view in support of requesting the Secretariat to organize symposiums and other meetings, including at the regional level and within available resources, maintaining close cooperation with U[NIDROIT], with a view to compiling further information to assist the Commission in the assessment of the desirability and feasibility of future work in the field of general contract law at a future session. Many delegates, however, urged that priority should be given to other work of the Commission, in particular in the area of microfinance. A number of delegates expressed clear opposition and strong reservations with regard to further work in the field of general contract law. In addition, several delegates, noting the significant opposition to the proposal by Switzerland, objected to the characterization of the debate on that topic as reflecting a prevailing majority view in favour of additional work.

Id. ¶ 132.

A. *Limited Resources*

UNCITRAL is facing significant budget pressures, as are many of its member states. Given this, the proposal, which would take many years to complete and which would use significant resources of UNCITRAL, would appear to need a strong justification for moving forward. Because the member states will have the final decision whether to go forward with the proposal, those states that have raised the issue of resources for this project[6] can be expected to continue with this objection.

It should also be noted that after several decades of work, UNIDROIT has recently completed Part III of the UNIDROIT Principles at a substantial allocation of the financial resources available to UNIDROIT. Several countries that are members of both UNIDROIT and UNCITRAL have suggested that this project would be redundant and repetitive of work already completed, and therefore would be a waste of limited resources available for UNCITRAL's other work.[7]

B. *Flawed Justifications*

The proposal suggests two major reasons for the need of a new instrument. Neither is supported by any empirical evidence. First, it is suggested that "[i]t goes without saying that different domestic laws form an obstacle for international trade . . . ."[8] At best, this is anecdotal and unproven. The fact that parties still routinely opt out of the CISG would belie this assertion. Second, it is suggested that "[t]oday's international sales practice shows that contracts—by the choice of the parties—tend to be governed by a closed circle of domestic laws . . . ."[9] Assuming this is true, it alone does not justify a global contract law, as there is no evidence that parties who choose a specific domestic law to govern their transactions are unhappy with their choices.

Evidence suggests just the opposite. It is not the specific law governing the transaction that parties are normally concerned about. Usually, the concern by parties is knowing with certainty in advance which law will govern the transaction in order to be able to contract around the default provisions.

Implicit, but not stated in the proposal, is the assumption that one party may be disadvantaged by current choice of law provisions that favor an existing law. Yet there is no evidence that a specific commonly used law of contract actually disfavors any parties. Nor is there any evidence that the parties that are now choosing a specific law under a choice of law

6. *See id.* ¶ 130.
7. *See id.* ¶ 131.
8. *Proposal*, *supra* note 1, at 2.
9. *Id.* at 3.

clause will somehow be dissuaded from making the same choice in the future.[10]

C. *Need*

The proposal suggests the need for both a revision of the present provisions of the CISG as well as an expansion of the scope of the sales convention.[11] The probability of either occurring is not likely.

1. *Revising the CISG*

Before undertaking a revision of the CISG, two considerations must be examined: whether there are substantial existing flaws in the CISG that need to be remedied, and the likelihood that the project would be successful. As to the first question, there is no evidence that serious flaws in the existing CISG have been articulated.[12] It is neutral and does not favor any particular party. Its wide use suggests it has not found any major detractors among potential users. In fact, the CISG has been "a worldwide success."[13] At present, with seventy-eight contracting states, it has been one of the most successful private international law treaties ever entered into force.[14]

Moreover, to the extent that parties are dissatisfied with any of the provisions of the CISG, these provisions can be easily and effectively modified to meet the parties' requirements.[15] The CISG, as with all modern sales codes, is primarily a set of default rules that can easily be modified or disclaimed.[16] This inherent flexibility allows the maximum in party autonomy and therefore militates against the need for revision.

The larger problem that arises is not the substance of the CISG, but the process by which it would be revised. Although the CISG is one of the more successful international commercial instruments, having been ratified by seventy-eight countries, it took years before it became widely ratified. Promulgated by UNCITRAL in 1980, the United States became a party only in 1989, Japan in 2008. The Scandinavian countries have just ratified Part II this year. Given this slow and uneven adoption, there has justifiably been great reluctance to reopen the CISG.

---

10. If the parties have bothered to put in a choice of law clause, the parties presumably know to contract around those provisions of the law they have chosen that do not reflect the agreement they wish to have.

11. *See Proposal*, *supra* note 1, at 6–8.

12. *See, e.g.*, Henry Deeb Gabriel, *The CISG: Raising the Fear of Nothing*, 9 VINDOBONA J. INT'L COM. L. & ARB. 219, 219 (2005).

13. INGEBORG SCHWENZER, PASCAL HACHEM & CHRISTOPHER KEE, GLOBAL SALES AND CONTRACT LAW ¶ 3.20 (2012).

14. For a discussion on how the CISG has been a source for other law, see *supra* note 13, ¶¶ 3.20–.24.

15. *See* Convention on Contracts for the International Sale of Goods art. 6, Apr. 11, 1980, 1489 U.N.T.S. 3 [hereinafter CISG], *available at* http://www.uncitral.org/pdf/english/texts/sales/cisg/V1056997-CISG-e-book.pdf.

16. *See id.*

It is worthwhile to remember that originally the 2005 UNCITRAL Electronic Commerce Convention was intended to amend the CISG, but quickly morphed into a free-standing instrument because of the fear of reopening the CISG. These reservations still justifiably exist. The particular concern is the possibility of two competing instruments—an original and a revised CISG.

2. *Expanding Scope Beyond the CISG*

To draft a global contracts law convention more expansive than the CISG, as suggested in the proposal,[17] will require coverage of subject areas specifically chosen not to be covered by the CISG, and many of these areas were not covered because of the difficulty of universal consensus. Thus, for example, the proposal suggests rules to govern the validity of contracts.[18] This is one area that the drafters of the CISG not only did not provide for, but specifically added an article to exclude it from the scope of the convention.[19]

It is not persuasive that because some of these topics are covered in the UNIDROIT Principles, that they are easily accommodated in a binding

17. *See Proposal*, *supra* note 1, at 3.

18. For example, issues of substantive validity were generally excluded from the scope of the CISG pursuant to Article 4, based primarily on a Secretariat report finding that: (1) these issues rarely arise, and that there was no indication that differences in the laws in respect to contract validity lead to significant problems in international trade; and (2) "rules on duress, or similar rules on usury, unconscionable contracts, good faith in performance and the like serve as a vehicle by which the political, social, and economic philosophy of the society is made effective in respect of contracts," and:

> [I]t is by the extensive or the restrictive interpretation of such rules that many legal systems have effected the balance between a philosophy of sanctity of contract with the security of transactions which that affords and a philosophy of protecting the weaker party to a transaction at the cost of rendering contracts less secure.

U.N. Secretary-General, *Formation and Validity of Contracts for the International Sale of Goods: Rep. of the Secretary-General*, ¶¶ 25–26, U.N. Doc. A/CN.9/128, Annex II (Feb. 3, 1977), *reprinted in* [1977] 8 Y.B. Comm'n on Int'l Trade L. 93, U.N. Doc. A/CN.9/SER.A/1977. States subsequently decided to exclude specific rules on validity with regard to mistake because of their inconsistent treatment under various legal systems. *See Rep. of the Working Group*, Sept. 19–Sept. 30, 1977, ¶¶ 48–69, U.N. Doc. A/CN.9/142, 9th Sess., *reprinted in* [1978] 9 Y.B. Comm'n on Int'l Trade L. 61, 65–66, U.N. Doc. A/CN.9/SER.A/1978 (discussing decision to exclude specific rules on validity, particularly with regard to mistake). Similarly, efforts to address issues related to agency were not successful. *See, e.g.*, *Rep. of the Working Group*, Jan. 27–Feb. 7, 1975, ¶ 47, U.N. Doc. A/CN.9/100, 6th Sess., *reprinted in* [1975] 6 Y.B. Comm'n on Int'l Trade L. 49, 53, U.N. Doc. A/CN.9/SER.A/1975 ("There was opposition to a special article on agency relationships in a convention on sales and no consensus was reached on the adoption of this proposal. At the same time it was agreed to delete any reference to agency relationship in other articles of the Convention . . . ."). UNIDROIT subsequently developed a Convention on Agency in the International Sale of Goods, but only a few countries have ratified it and it has never entered into force. *See* United Nations Convention on Agency in the International Sale of Goods, Feb. 17, 1983, 22 I.L.M. 249.

19. *See* CISG, *supra* note 15, art. 4.

convention. As is discussed below, both the working methods of UNIDROIT, as well as the differences between the soft law nature of the UNIDROIT Principles and the binding nature of the CISG as a convention, do not allow for an easy adaptation in convention form of all of the areas covered in the UNIDROIT Principles.

It is worth noting that the proposal also suggests some areas of coverage that are beyond what would normally be found in general contract law.[20] For example, shipping terms are suggested as a topic.[21] This seems an odd addition. Shipping terms are not part of the general law of contract, and there is no international consensus on standard shipping terms. The INCOTERMS[22] come close, and there appears to be no problem that needs to be addressed in this area.

II. HAS UNIDROIT ALREADY DONE THE WORK?

If the proposal becomes a working project, as the proposal is, to a significant extent, a proposal to cover areas already covered in the UNIDROIT Principles, the result of the project would be to create a binding convention out of what is presently a soft law instrument.[23] Thus, any significant justification for the proposal must be based on the need to supplement or supplant the UNIDROIT Principles with a similar binding convention.

It must also be noted that the UNIDROIT Principles have had relatively little usage and impact since first promulgated in 1994. Unless there is some compelling distinction between the Principles and a binding convention that suggests a greater likelihood of party usage of the convention, the need for the convention would appear already to be shown as minimal.

That the convention would be binding where the UNIDROIT Principles are not does not suggest a need for the project. Moreover, even with a binding convention, there is the question of whether parties would routinely opt out of its application, or whether countries would even see the need to ratify the convention in the first place. Both of the concerns go to the larger question of whether the members of UNCITRAL are willing to commit to the long process of drafting a global sales law convention without more evidence of a compelling need.

The proposal suggests that a convention is necessary to supplant the UNIDROIT Principles because courts are reluctant to give effect to soft law instruments.[24] However, lawyers appreciate the difference between a

20. *See Proposal*, *supra* note 1, at 7 n.4.

21. *See id.* For an exhaustive list of Switzerland's proposed areas of coverage, see *supra* note 3.

22. Int'l Chamber of Commerce, *Incoterms 2000*, ICC Pub. no. 560 (2000).

23. *See Proposal*, *supra* note 1, at 4–5 (explicitly stating that goal of project is to create binding convention out of soft law instrument).

24. *See id.* at 5.

choice of law provision and the incorporation of the Principles as terms to an agreement, and it is quite easy to choose the Principles as governing the contractual relationship if parties wish.

There is an assumption in the proposal that if UNIDROIT could agree on these areas of contract, a convention could be negotiated along the same lines. As will be discussed below, this ignores core differences between the UNIDROIT Principles and a binding UNCITRAL convention. The fact that the UNIDROIT Principles are non-binding and therefore do not have the same importance and urgency, a binding convention creates some distinct advantages.

However, before addressing the questions of whether the convention would serve important functions not met by the UNIDROIT Principles and whether the drafting of a convention on global contract law in and of itself is a feasible project, I want to first examine the advantages that the UNIDROIT Principles have as a soft law instrument.

A. *General Advantages*

In many circumstances, particularly in the area of private international law, soft law instruments,[25] such as the Principles, have advantages over conventions and treaties. For example, non-binding general principles can achieve the goal of uniform, or at least harmonized law,[26] be-

25. Non-binding legal principles are often referred to as "soft law." "'[S]oft law' is understood as referring in general to instruments of a normative nature with no legally binding force, and which are applied only through voluntary acceptance . . . ." Michael Joachim Bonell, *Soft Law and Party Autonomy: The Case of the UNIDROIT Principles*, 51 LOY. L. REV. 229, 229 (2005). These are generally established legal rules that are not positive law and are therefore not judicially binding. *See id.* The various soft law instruments in international commercial law include model laws, a codification of custom and usage promulgated by an international non-governmental organization, the promulgation of international trade terms, model forms, contracts, restatements by leading scholars and experts, or international conventions. *See id.* Although soft law principles do not begin as positive law, they can of course become positive law both by adoption by courts or tribunals or by adoption in the agreements of transactional parties. *See id.*

26. 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. The United Nations Commission on International Trade Law 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

cause there is less necessity to accommodate various legal traditions or domestic laws. Also, they may be adopted in part as well as a whole, thereby providing flexibility for an easier basis for adoption in a given court or arbitration because there is less conflict between the international and the domestic law as there would be in the case of a binding convention.[27] In addition, 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, while still achieving the goal of creating broad international standards.[28]

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.

FAQ—Origin, Mandate and Composition of UNCITRAL, UNCITRAL, http://www.uncitral.org/uncitral/en/about/origin_faq.html (last visited Apr. 11, 2013). I think this distinction is important because many, including myself, see true international 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.

27. In addition to the UNIDROIT Principles, some of the other more successful soft law instruments are the UNCITRAL Arbitration Rules, the more recent UNIDROIT Principles and Rules of Transnational Civil Procedure, and the UNCITRAL legislative guide to secured transactions. Private organizations, such as the International Chamber of Commerce, have a long history of drafting very successful soft law documents. In the case of the ICC, this would include the highly influential INCOTERMS (shipping terms) and the Uniform Customs and Practice for Documentary Credits (letters of credit).

28. Of the three major international governmental organizations that are delegated the task to produce international commercial law instruments—UNCITRAL, UNIDROIT, and the Hague Conference on Private International Law—two of the organizations, UNIDROIT and UNCITRAL, have been quite active in producing soft law instruments because of these broad advantages for soft law instruments.

UNCITRAL is a subsidiary body of the General Assembly of the United Nations, established in 1966. The Commission has a general mandate to harmonize and unify the law of international trade. Since its founding, UNCITRAL has prepared a wide range of conventions, model laws, and other instruments that deal with the substantive law that governs trade transactions or other aspects of business law which have an impact on international trade. UNCITRAL is made up of sixty member states from five regional groups. Members of the Commission are elected for terms of six years. The terms of half the members expire every three years. Membership will increase to sixty member states over the next few years to provide greater representation.

UNIDROIT is an independent intergovernmental organization with its seat in Rome. The purpose of UNIDROIT is to study the needs and the 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. 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 fifty-nine member states.

The Hague Conference on Private International Law consists of sixty-four member states. The First Session of the Hague Conference on Private Interna-

Although suggested in the proposal that parties are disadvantaged by non-binding rules such as the Principles,[29] the proposal presents no evidence of this. In fact, in many areas, well-known soft law instruments have become the international standards, and there has never been any suggestion that these instruments suffer any usage or recognition disabilities. Thus, for example, the UCP 600[30] and the INCOTERMS,[31] are so commonly used and accepted today that they often govern by default, absent a contrary party agreement.

B. *Harmonization of the Positive Law Is Fraught with Difficulties*

A UNCITRAL convention on global sales law would not be drafted in a vacuum, but would be drafted with the backdrop of the CISG as well as the various domestic laws of the member states. In the case of a new treaty or convention, there is the strong desire by the adopting jurisdictions to have the treaty or convention be consistent with the domestic law of the jurisdiction.[32] Yet, the ability to harmonize a new treaty or convention with existing domestic or international law is subject to a variety of difficulties.[33] This is particularly the case if there is an existing convention or treaty such as the CISG being revised instead of being drafted anew. Con-

---

tional Law was convened in 1893 by the Netherlands on the initiative of T.M.C. Asser, who won the Nobel Peace Prize in 1911. Subsequent sessions were held in 1894, 1900, 1904, 1925, and 1928. The Seventh Session was held in 1951, and this session culminated with the preparation of a statute, which made the Conference a permanent intergovernmental organization. The statute entered into force on July 15, 1955. Since 1956, regular Plenary Sessions have been held every four years. Under the statute, the Netherlands Standing Government Committee on Private International Law ensures the operation of the Conference.

29. *See Proposal*, *supra* note 1, at 5.

30. Int'l Chamber of Commerce, *Uniform Customs and Practice for Documentary Credits 600*, ICC Pub. no. 600 (July 1, 2007).

31. *Incoterms 2000*, *supra* note 22.

32. This, of course, may include international laws that are part of the domestic law of a given jurisdiction.

33. Thus, for example, after twelve years of work revising the American Uniform Commercial Code, the fruits of attempting to harmonize the Uniform Commercial Code with the 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 Convention, the applicable law may be the United Nations Convention on Contracts for the International Sale of Goods (CISG). Since many of the provisions of the CISG appear quite similar to provisions in Article 2, early in the process of drafting the amendments the drafting committee considered making references in the Official Comments to similar provisions in the CISG. However, upon reflection, the drafting committee concluded that these references should not be included because their inclusion might suggest a greater similarity between the Article 2 and the CISG than in fact exists.

Henry Deeb Gabriel, *Universalism and Tradition: The Use of Non-Binding Principles in International Commercial Law*, *in* LIBER MEMORIALIS: UNIVERSALISM, TRADITION, AND THE INDIVIDUAL 474 n.15 (Petar Šarčević ed., 2006).

versely, soft law instruments such as the UNIDROIT Principles were not subject to the same pressure to be harmonized with existing law.

As for a private international law convention such as the proposal for a global sales law, inevitably the actual and perceived problems of the existing statute, which will be primarily the CISG, would have to be addressed. With the revision of an existing convention or treaty, the focus tends to be inward-looking and focused on the existing convention or treaty itself. In addition, the revisers of an existing convention or treaty will bring to the process their familiarity with the existing convention or treaty. As such, it is likely that they are less familiar with other laws that might be appropriate to consider for purposes of drafting the ideal instrument that is most compatible with modern business practices. Moreover, to the extent that there is a push to harmonize across the different legal traditions of the various states involved in the drafting of the convention or treaty, compromises, both in the language as well as the legal concepts, may have to be made which do not necessarily reflect the best view, but simply a view that all parties can agree upon as consistent with their internal law.[34]

This is not the case with soft law instruments, and the UNIDROIT Principles are an example of this. With the Principles, it was not necessary to attempt to harmonize the entirety of any specific jurisdiction or any international convention, such as the CISG. Instead, without the internal pressure to conform to a specific law, the drafters were able to pick provisions selectively among many sources to meet a specific need. This process of picking and choosing provided for systematic reflection on what should be the best result, and not simply a possible result.

C. *No Need to Accommodate Specific Legal Traditions or National Laws*

As will certainly be the case in the proposed global contract law convention, there would be a strong tendency toward the creation of an instrument that would reflect the legal traditions of the potential adopting states because treaties and conventions must be fashioned in a way to encourage adoption by various states, in order to create a high comfort level with the appropriateness of the instrument. This would inevitably result in an attempt to reconcile differing legal traditions, and would create problems both in terms of 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 part of the long length of time is attributable to the incessant search for common principles and the reconciliation

34. Much of the success of the CISG, for example, is based on the fact that the CISG is not based on any particular set of underlying established domestic legal principles, and instead, was drafted to be independent of, rather than to work in conjunction with, any particular domestic law. To the extent that one can attach a specific legal tradition to the CISG, it is a blend of both the common law and civilian traditions.

of established principles from different legal systems and traditions. This need was a large part of the reason why the CISG took years to prepare even though it began with the template of the Hague Sales Convention.

Moreover, the CISG is fairly limited in its coverage, and to a large extent this is due to the inability to reconcile the major legal traditions. For example, questions of validity, title, and property rights[35] are specifically excluded from the CISG, as are consumer contracts[36] and product liability actions.[37] Yet, these are some of the proposed coverage areas in the global contract law proposal.[38]

Possibly more important, the need to accommodate specific legal traditions locks the drafters into a straightjacket of limited possibilities that often prevents the examination for the best solution. This is often politically driven. The late Professor Allan Farnsworth, for example, describes what distinguished the work leading to the CISG, in which he was an American delegate, and the work leading to the UNIDROIT Principles, in which he was a member of the working group: "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)."[39]

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. It is not clear that the CISG has this level of neutrality or whether a new expanded draft could be neutral either.

D. *No Need for Ratification*

Soft law, unlike treaties and conventions, are not subject to the lengthy process of ratification that can hold up enforcement for years.[40] For example, one of the most successful international conventions in recent times, the United Nations 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. Moreover, although the New York Convention has been very successful, this has not been the case with many recent international commercial law conven-

35. *See* CISG, *supra* note 15, arts. 4(a)–(b).

36. *See id.* art. 2(a).

37. *See id.* art. 5.

38. *See Proposal*, *supra* note 1, at 7 n.4.

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

40. This can be the case with domestic law as well. For example, after a thirteen year drafting process of the revisions of Article Two of the Uniform Commercial Code, the revisions were withdrawn from consideration a decade later after there had been no adoptions by any states. *See* Henry Deeb Gabriel, *The 2003 Amendments of Article Two of the Uniform Commercial Code: Eight Years or a Lifetime After Completion*, 52 S. TEX. L. REV. 487, 493 (2011).

tions.[41] In addition, in a federal system, such as the United States, Canada, or Mexico, ratification often entails complicated political maneuvering between the federal and the state or provincial governments.[42]

It has been suggested that soft law instruments, such as the Principles, have been successful precisely because:

> [T]hey 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.[43]

E. *Flexible Guidance for 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 the various Restatements of the Law produced by the American Law Institute as a source of law. Moreover, arbitration tribunals, which are generally not bound by domestic choice of law restrictions, often adopt legal rules, such as the UNIDROIT Principles, because of the neutrality of the rules. This flexible use, which allows dynamic growth of the law, is not possible through a fixed, adopted text such as a convention.

Moreover, soft law is often used as a basis for gap fillers when the otherwise applicable international or domestic law does not address the specific question. For example, because the UNIDROIT Principles have a broader scope than the CISG, the Principles have been used to resolve questions not addressed by the CISG.[44]

---

41. The 1964 Convention relating to a Uniform Law on the International Sale of Goods, which was the basis for the CISG, has only been ratified by eight countries. *See* Convention on International Sale of Goods and Formation of Contracts for International Sale of Goods, July 1, 1964, 3 I.L.M. 854.

42. Obviously, a similar problem exists between the European Union and its member states.

43. Roy Goode, Communication on European Contract Law (n.d.), *available at* http://ec.europa.eu/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/comments/5.6.pdf.

44. *See, e.g.*, Hideo Yoshimoto v. Canterbury Golf Int'l Ltd. (2001) 1 NZLR 523 (CA) 547 (N.Z.), *available at* http://cisgw3.law.pace.edu/cases/001127n6.html; Cour d'appel [CA] [regional court of appeal] Grenoble, Oct. 23, 1996 (Fr.), *available at* http://cisgw3.law.pace.edu/cases/961023f1.html. Whether this guidance is always useful may be questioned because, with the convenience of having existing rules in place, there is some reported tendency of tribunals to follow soft law principles blindly without any analysis of why the rules are appropriate or whether the rules are better suited for the issue than competing rules. *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, 508–14 (1998); Symeon C.

III. WHAT COULD BE ACHIEVED WITH THE UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS MIGHT NOT BE SUBJECT TO REPLICATION AT UNCITRAL

Putting aside the question of whether the Principles themselves have largely achieved what might be gained from a global contract law convention, there is also the question of whether UNCITRAL would be able to replicate the work and product of UNIDROIT. A comparison between the working methods of UNIDROIT and UNCITRAL may suggest difficulties that UNCITRAL would have with this project that were not present in UNIDROIT's drafting of the Principles.

The working methods of UNIDROIT may be better suited for this type of project. The UNIDROIT Principles were drafted by a select group of contract specialists from around the world who knew their own country's law, were fluent in comparative law, and therefore were able to balance competing legal traditions. The members of the UNIDROIT working group did not have the task of supporting and defending their respective domestic laws. This type of work is much harder to accomplish at UNCITRAL because members of the UNCITRAL working groups represent their respective governments. Thus, both the working methods of UNIDROIT, a small group of highly specialized experts in the field, as well as the lack of the need to accommodate any particular nation's domestic laws, allowed for a more neutral process and result than might be expected out of a UNCITRAL drafting process. Moreover, the scope of the Principles covers a variety of subjects that a UNCITRAL convention is not likely to be able to resolve because the mandatory nature of a convention will have individual countries disagreeing over some issues that were not contentious in UNIDROIT.

It is also important to keep in mind that the drafting of the UNIDROIT Principles had some difficulties that the uninitiated may not appreciate. An example is illegal contracts. The UNIDROIT Working Group spent five years on this subject and was unable to come up with any rule to govern illegal contracts.[45] It should be borne in mind that this was

---

Symeonides, *The Judicial Acceptance of the Second Conflicts Restatement: A Mixed Blessing*, 56 MD. L. REV. 1248, 1272–73 (1997). There is the question of whether the instrument is intended to reflect current commercial practice or whether the instrument is intended to reflect the drafters' aspirations as to what the law should be. Sometimes an instrument can be both. This is certainly the case with the American Restatements of the Law, which are drafted by the American Law Institute. *See, e.g.*, E. Allan Farnsworth, *Ingredients in the Redaction of the Restatement (Second) of Contracts*, 81 COLUM. L. REV. 1, 1 (1981). 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.

45. The result is an article that repeats the pre-existing rule that the Principles are "concerned only with a contract infringing mandatory rules." INT'L INST. FOR THE UNIFICATION OF PRIVATE LAW, UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS (2010), *available at* http://www.unidroit.org/english/principles/contracts/main.htm.

from a working group that did not have any need to replicate the concepts of illegality from their respective jurisdictions.[46] One can only imagine the difficulty this would pose if a convention attempted to accommodate the laws of over sixty jurisdictions.

IV. COULD THE UNIDROIT PRINCIPLES SERVE AS THE SOURCE OF A NEW CONVENTION?

If UNCITRAL moves forward with a project on global contract law, the UNIDROIT Principles may serve as a model and a starting point for the project. Although a global contract law project would not necessarily retain the scope in the Swiss proposal, it is important to remember that the possible scope set out in the Swiss proposal, for the most part, replicates the scope of the UNIDROIT Principles.[47]

Furthermore, the UNCITRAL plenary, when considering the possibility of the proposal, expressly provided for coordination between UNCITRAL and UNIDROIT on the project.[48] Thus, UNCITRAL already recognizes the work of UNIDROIT and its importance for a possible project.

Moreover, the history of the CISG shows the long-term historical relationship between the work of UNIDROIT and UNCITRAL in the area of international sales law. In fact, the text of the CISG is derived to a large extent from the Hague Convention relating to a Uniform Law on the International Sale of Goods,[49] a convention drafted and promulgated by UNIDROIT.[50]

But unlike the earlier transformation of one international convention—the Hague Convention on International Sale of Goods—to a revised convention—the CISG—what is proposed is the general adaptation of a non-binding set of principles into a binding convention. Thus, it is worth exploring whether there are distinct advantages to a binding convention that justifies this project as a supplement to the UNIDROIT Principles.

Soft law instruments, such as the Principles, generally fall into one of two categories: those that are intended as the basis for legislation, and those that are not. For those soft law instruments, such as model laws, that are specifically intended to be the basis for adoption by individual jurisdic-

46. This balancing of different legal traditions and domestic laws is not simply a distinction between common law and civil law. For example, the new provisions in the Principles on conditions are not only inconsistent with the common law, but also the law of Germany.

47. *See Proposal*, *supra* note 1, at 7.

48. *See* UNCITRAL Report, *supra* note 4, ¶ 131.

49. *Id.* ¶¶ 128–30.

50. For a discussion of the history of the CISG from its beginnings at UNIDROIT in 1929, see MICHAEL JOACHIM BONELL, AN INTERNATIONAL RESTATEMENT OF CONTRACT LAW 301–05 (3d ed. 2005).

tions, many[51] have been most successful in setting international and domestic standards for legislation.[52]

Moreover, as with a treaty or convention, those model laws that are 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 of domestic laws because the drafters of the model law have the same concerns of ratification and coordination.[53]

Conversely, statements of principles such as the UNIDROIT Principles, the UNIDROIT and 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 were not drafted with the external demands of harmonization. For this reason they have often achieved a neutrality and balance that would not otherwise be possible with the demands for harmonization. This was the case with the UNIDROIT Principles, and it is not clear that this same level of drafting independence could be achieved in the political context of the drafting of a binding convention.

However, even with this limitation, the Principles could be highly influential in the drafting of a convention. Various soft law instruments, once completed, have often been influential in the further development of the positive law.[54] This can occur simply because they are a convenient and ready source of law and therefore eliminate the difficulty of drafting

---

51. For example, legislation based on the UNCITRAL Model Law on Electronic Commerce has been adopted in Australia, Bermuda, Canada, Colombia, France, Hong Kong Special Administrative Region of the People's Republic of China, Ireland, Philippines, Republic of Korea, Singapore, Slovenia, part of the United Kingdom, and the United States of America.

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

53. Thus, many model laws, such as the Model Law on Electronic Commerce, have been used for domestic legislation because they were determined to be well-drafted. 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.

The history and development of the UNCITRAL Model Law of Electronic Commerce differed from and influenced the American Uniform Electronic Transactions Act. *See* Henry Deeb Gabriel, *The New United States Uniform Electronic Transactions Act: Substantive Provisions, Drafting History and Comparison to the UNCITRAL Model Law on Electronic Commerce*, 5 UNIF. L. REV. 651, 651–64 (2000). The Model Law of Electronic Commerce also influenced the Canadian and Australian legislation. *See* Henry D. Gabriel, *The Fear of the Unknown: The Need to Provide Special Procedural Protections in International Electronic Commerce*, 50 LOY. L. REV. 307, 322–31 (2004).

54. That the Principles might be used as the basis for legislation has long been acknowledged. *See, e.g.*, BONELL, *supra* note 50, at 243–48.

new law,[55] but there also can be a more conscious adoption because it is thought that soft law instruments represent the correct result.[56]

A. *Benefits of a Binding Convention*

As to the specific advantages of a convention over the non-binding Principles, there are two significant drawbacks to soft law instruments. The first drawback is the inability to meet the need for certainty of enforcement, and the second is the concern that the soft law instruments have not been tested in the political process.

In some areas of international commercial law, certainty of the law and the enforcement of the specific rules is a necessity. Because international conventions are binding, once they are ratified they have the advantage of instant uniformity and enforceability. Thus, for example, the Cape Town Convention on International Interests in Mobile Equipment Convention[57] and the accompanying Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment[58] give an enforceable basis for secured financing of an aircraft in the international market. It would now be unreasonable to expect international financing of a multi-billion dollar aircraft without the level of certainty and protection afforded parties by the clear enforceable rules and remedies provided for by the convention.

Conversely, an agreement to use a particular set of rules, such as the UNIDROIT Principles, is not self-enforcing, but rather requires some domestic law for its enforcement. This, in many circumstances could lead to uncertainty because the parties may not know in advance whether the gov-

55. Describing the influence of the American Uniform Commercial Code and the Restatement Second of Contracts on the drafting of the UNIDROIT Principles, the late Professor Allan Farnsworth noted, "[U]nlike 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 39, at 1990 (footnote omitted).

56. Of course some of the most successful soft law instruments, such as the Uniform Customs and Practices for Documentary Credits and the INCOTERMS, were specifically drafted for use by a large number of contracting parties because they reflect common well-established business practices, and for this reason they are in fact 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, the letter of credit provisions of the American Uniform Commercial Code draw heavily from the Uniform Customs and Practice for Documentary Credits. *See* Katherine A. Barski, *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, 736 (1996).

57. International Institute for the Unification of Private Law, Convention on International Interests in Mobile Equipment, Nov. 16, 2001, 2307 U.N.T.S. 285.

58. Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment, Nov. 16, 2001, 2307 U.N.T.S. 285.

erning terms of the agreement will be enforced according to their express wishes.[59]

It may well be that a convention has some attractiveness over the Principles because it would be vetted in the political process and therefore it may reflect concerns that might not have surfaced or been articulated in the more isolated drafting process of the Principles. With the drafting of a convention, political forces will strongly influence the process at two stages—during the drafting, and during the ratification process. During the drafting, representative governments will have a strong sense of what is in their best interests, and these interests will be strongly argued, debated, and lobbied 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 reflects instruments that are acceptable to the various constituencies and therefore are likely to result in a wide acceptance.

It is too early to tell whether the Principles will have a wide level of acceptance and use, but the Principles did evolve through a more insular process than can be expected in a UNCITRAL working group. It may also be the case that a UNCITRAL convention, which would likely reflect practical, specific problems that call for fact-specific rules, as opposed to abstract principles, could lend more certainty and less divergence in interpretation.

However, because of the various compromises for acceptable results, a convention may not reflect the best practices but merely reflect acceptable practices. Moreover, irrespective of the quality of a convention, such an agreement has no force unless it is adopted. That of course, presupposes that the various constituencies do not bring the project to a standstill and death before the completion of the project because of an inability of the various stakeholders to agree upon a final text at all.

B. *UNIDROIT Principles as a Template for a Convention on Global Contract Law*

If the proposal for a new global contract law convention proceeds at UNCITRAL, the UNIDROIT Principles may serve as an ideal template both for those areas covered by the CISG[60] as well as those areas outside the CISG's scope. The Principles have the advantage of being contemporary as well as having been drafted with a universal, and not a regional,

59. 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.

60. Presumably both the CISG and the UNIDROIT Principles would be possible sources for a new convention that covered the areas already covered by the CISG.

perspective. The gestation period for the Principles expanded over thirty years. During that time, not only did the various working groups[61] have the luxury of time and reflection, but there have also been innumerable sources of scholarly and professional commentary as well as a growing body of judicial opinions and arbitral awards that have analyzed the Principles.[62] The Principles have been tested and have been shown as clear, balanced, and reflective of contemporary international business practices.

Thus, if the project is viable, a realistic way forward is to replicate the creation of the CISG by relying on an initial product from UNIDROIT that provides for UNIDROIT's distinct working methods, and then use that work as the basis for a UNCITRAL convention on global contract law.[63] This would entail a close working relationship between UNIDROIT and UNCITRAL.

To the extent that a new convention would include and supersede the scope of the CISG, there is precedent for this, for as noted above, the CISG is based on a pre-existing UNIDROIT text, the 1964 Hague Convention on the International Sale of Goods. The growth of the law is cumulative, and as with the CISG, the law is often best served by expanding on its existing foundations and not by attempting to develop law as if it were from a blank slate.[64]

---

61. The Principles were drafted in three versions: 1994, 2004, and 2010, with each new version adding to the work's prior version. Although with some overlapping membership, each version had its own working group.

62. These judicial opinions and arbitral awards are collected on the UNILAW database maintained by UNIDROIT. *See Instruments Adopted by UNIDROIT*, INT'L INST. FOR THE UNIFICATION OF PRIVATE L., http://www.unidroit.info/program.cfm?menu=subject&file=convention&lang=en (last visited Apr.11, 2013).

63. This, of course, was the method for the drafting of the CISG.

64. It may be that UNCITRAL has already accepted the UNIDROIT Principles as the proper source of law in those areas where the scope of the CISG does not extend. For the 2010 Commission decision, see UNCITRAL Report, *supra* note 4, ¶ 140. For the 2007 Commission decision, see Rep. of United Nations Comm'n on Int'l Trade Law, June 25–July 12, 2007, ¶ 213, UN Doc. A/62/17 (Part I). The 2007 UNCITRAL Report states:

> [The UNIDROIT Principles] shall be applied when the parties have agreed that their contract be governed by them,
>
> They may be applied when parties have agreed that their contract be governed by general principles of law, the *lex mercatoria* or the like, . . . [and] when the parties have not chosen any law to govern their contract,
>
> They may be used to interpret or supplement international uniform law instruments, . . . [and] to interpret or supplement domestic law,
>
> They may serve as a model for national and international legislators.

Id. In this respect, it would appear to be redundant for UNCITRAL to embark on drafting law that already exists as far as UNCITRAL is concerned.

V. FEASIBILITY AND DESIRABILITY OF A CONVENTION ON GLOBAL SALES LAW

Where does this leave us? The proposal asserts, but gives no evidence, that a global contract law is needed.[65] This alone is likely to be the most important consideration among the member states of UNCITRAL in the deliberations about whether to move forward.

It has been argued by some that the project merely replicates the work accomplished by the UNIDROIT Principles, and therefore would be an unnecessary waste of resources. To this, there may be the response that the benefits of a binding convention justify the new project. This has yet to be shown, but may well be the case.

What might be the major hurdles if the project moves forward? First, it is worth noting that the CISG took over thirty years to complete and it is very limited in scope. A new global contract law convention would inevitably have within its scope the coverage of the CISG. Second, there has been no serious discussion that the CISG itself needs to be revised. A revision of the CISG would entail a major disruption of existing international commercial law and would create the problem of inconsistent duplicate conventions when no substantial problems with the current CISG have been articulated. As noted above, this specific fear was the basis for the United Nations Convention on the Use of Electronic Communications in International Contracts[66] serving as a free-standing convention instead of an addendum to the CISG.

The broader scope of the proposed convention on global contract law would additionally expand into areas specifically avoided by the CISG. Although many of these areas of contract law are covered in the UNIDROIT Principles, as has been discussed above, these subjects are not necessarily subject to easy agreement in a binding convention. In fact, it is not clear that the working methods of UNCITRAL lend themselves to the level of detail needed for a convention along the lines set out in the proposal.

Before beginning any endeavor such as the one proposed, it may well be worth considering the difficulty in contract law revision that has occurred domestically and regionally. For example, in the United States, the revision of the sales provisions of the Uniform Commercial Code failed after thirteen years of work because various vested interests feared the effect of a new statute.[67] Conversely, the most contentious aspects of the

65. This is certainly the position proffered by the United States Department of State, as well as the National Conference of Commissioners on Uniform State Laws. *See* Keith Loken, *A New Global Initiative on Contract Law in UNCITRAL: Right Project, Right Forum?*, 58 VILL. L. REV. 509, 509 (2013).

66. United Nations Convention on the Use of Electronic Communications in International Contracts, Nov. 23, 2005, *available at* http://www.uncitral.org/pdf/english/texts/electcom/06-57452_Ebook.pdf.

67. These revisions should have been successful. *See* Henry Deeb Gabriel, *The Revision of the Uniform Commercial Code—How Successful Has It Been?*, 52 HASTINGS

revisions, those dealing with computer software contracts, were hardly noticed when they were incorporated into a non-binding instrument.[68]

There have been difficulties at the regional level as well. For example, we need only look at the recent work in Europe to come up with a European contract law. Starting work in 1982, the Commission on European Contract Law began work on the Principles of European Contract Law. After twenty years of work, this project was completed in 2002. It has not been adopted as positive law. In 2009, another attempt at European contract law was created with the Draft Common Frame of Reference. At this time, the Draft Common Frame of Reference is considered too unwieldy and has been placed on the academic top shelf to collect dust. There is now the more recent Common European Sales Law that is presently being vetted. It has yet to gain any traction. All of these projects were in the context of a somewhat similar civil law framework. How this could be achieved across other legal traditions is not clear.

VI. CONCLUSION

UNCITRAL is now looking at the serious question of whether a revision or expansion of the CISG is a viable project that justifies the resources. Among the problems this project might encounter is a lack of resources, a clear articulation of the need for the project, the inability to define its scope, and the likelihood of widespread ratification within a reasonable time. Recent attempts to revise domestic and regional laws are instructive about the possible problems this project may have.

It may be that the barriers for a future convention on global contract law is not a realistic project, and the more recent path of soft law instruments, such as the UNIDROIT Principles, is a more viable method of providing global uniformity in contract. Alternatively, another path is to replicate the creation of the CISG by relying on an initial product from UNIDROIT that provides for UNIDROIT's distinct working methods, and then have that work as the basis for a UNCITRAL convention on global contract law. This would entail a close working relationship between UNIDROIT and UNCITRAL.

L.J. 653, 655–57 (2001). Unfortunately, the revisions were not successful. *See* Gabriel, *supra* note 40, at 489–91.

68. *See* AM. LAW INST., PRINCIPLES OF THE LAW OF SOFTWARE CONTRACTS (Tentative Draft No. 1, 2008).