

# THE USE OF SOFT LAW IN THE CREATION OF LEGAL NORMS IN INTERNATIONAL COMMERCIAL LAW: HOW SUCCESSFUL HAS IT BEEN?

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## I. INTRODUCTION

In this Article, I examine several interrelated points. After defining soft law in Part II, I briefly set out some of the assumed advantages soft law instruments may have over legislation and regulations in Part III. In Part IV, I examine why some soft law instruments in international commercial law have been successful in creating international legal norms. In this Part, I specifically examine the UNIDROIT Principles of International Commercial Contracts to show how one might gauge success by looking beyond the express purpose of the instrument. I also compare the UNIDROIT Principles of Commercial Contracts with the American Law Institute's Restatements of Law to show different ways in which soft law instruments might be successful. In Part V, I examine the role international commercial trade usage may play in soft law. Finally, in Part VI, I suggest that the benefits of soft law in international commercial law might only be fully realized over a long timeframe.

## II. WHAT IS SOFT LAW?

Defined by one commentator, "soft law" is a set of legal "instruments of a normative nature with no legally binding force, and which are applied only through voluntary acceptance . . . ."<sup>1</sup> In other words, soft law is legal rules that are not positive law and therefore not judicially binding. In the last three decades, there has been substantial scholarly interest in soft law as a means of developing international legal norms<sup>2</sup> in addition to the production

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

2. There are strong critics of the use of soft law to replace or supplement positive law. See, e.g., Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AM. J. INT'L L. 413 (1983). Some other scholars question whether soft law can even be considered law. See, e.g., Jean D'Aspremont & Tanja Aalberts, *Which Future for the Scholarly Concept of Soft International Law? Editors' Introductory Remarks*, 25 LEIDEN J. INT'L L. 309 (2012). On the other hand, many scholars have seen the benefits of the use of soft law in the development

of a number of significant international commercial soft law instruments. I believe the current rise in new soft law in international commercial law is a welcome trend, but whether I am correct that it is welcome, the trend is occurring.

The influence of soft law on international commercial law has a long history based on a large body of historical international trade customs and usages dating back hundreds of years. This is what is now often referred to as the *lex mercatoria*. Many of the modern sources of soft law, though, are from instruments promulgated by prominent multinational organizations such as the United Nations Commission on International Trade Law (“UNCITRAL”) and the International Institute for the Unification of Private Law (“UNIDROIT”) and private bodies such as the International Chamber of Commerce (“ICC”).

Among the three major multilateral organizations assigned the task of providing uniform or harmonized private international law—UNCITRAL,<sup>3</sup> UNIDROIT,<sup>4</sup> and the Hague Conference on Private International Law<sup>5</sup>—two of these organizations, UNCITRAL and UNIDROIT, have long traditions of promulgating soft law instruments that significantly advanced inter-

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of new legal norms. See, e.g., R.R. Baxter, *International Law in “Her Infinite Variety,”* 29 INT’L & COMP. L.Q. 549 (1980).

3. The United Nations Commission on International Trade Law was established in 1966 and is a subsidiary body of the General Assembly of the United Nations. 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.

4. The International Institute for the Unification of Private Law 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 re-established 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 sixty-three member states.

5. The membership in The Hague Conference presently comprises seventy-two member states and one regional economic integration organization. The First Session of The Hague Conference on Private International 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 the 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 operation of the Conference is ensured by the Netherlands Standing Government Committee on Private International Law. Formally it is this Committee which sets the dates and the agenda for the Plenary Sessions. However, in practice the Member States have a direct influence on the Conference through the special commissions of governmental experts that meet between sessions and make recommendations to the agenda of the Plenary Sessions.

national commercial law. The Hague Conference's recent work on the Principles on Choice of Law in International Contracts brings it within the fold of the other two organizations for the promulgation of soft law instruments in international commercial law. Private organizations such as the ICC also have a long history of drafting very successful soft law documents. In the case of the ICC, for example, this includes the highly influential Incoterms (shipping terms)<sup>6</sup> and the Uniform Customs and Practice for Documentary Credits (letters of credit).<sup>7</sup>

It is clear that a new body of soft law has emerged. The question addressed in this Article is whether these new soft law instruments have had a successful impact on international commercial law.

### III. ADVANTAGES OF SOFT LAW OVER HARD LAW

In previous works, I examined the use of soft law as a means to develop binding international legal norms in different contexts.<sup>8</sup> In this Part, I examine the possible reasons for the success—or lack of success—of soft law in international commercial law. Because the major multinational institutions with mandates to produce international commercial law instruments have begun to use less of their resources to produce treaties and conventions and have instead shifted a significant part of their work toward model laws and soft law instruments, this is a question of importance to these institutions.

Along with the goal of producing useful and modern laws, one reason for this shift in emphasis may well be the relative lack of success of modern international commercial law conventions and treaties. It is common to speak of the great success of international commercial law treaties, but with the exceptions of the New York Convention on Arbitral Awards,<sup>9</sup> the Unit-

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6. INT'L CHAMBER OF COMMERCE, INCOTERMS 2010: ICC RULES FOR THE USE OF DOMESTIC AND INTERNATIONAL TRADE TERMS, ICC PUB. NO. 715 (2010).

7. INT'L CHAMBER OF COMMERCE, ICC UNIFORM CUSTOMS AND PRACTICE FOR DOCUMENTARY CREDITS, ICC PUB. NO. 600 (2006).

8. See generally, Henry D. Gabriel, *Ethics in the UNIDROIT Principles of International Commercial Contracts*, 22 UNIFORM L. REV. 132 (2017); Henry Deeb Gabriel, *Mandatory Rules as Limitations on the Freedom of Contract in the UNIDROIT Principles of International Commercial Contracts*, 7 PROTECTION PROJECT J. HUM. RIGHTS & CIV. SOC'Y 45 (2015); Henry Deeb Gabriel, *Fuhentekina Sofutorō Gensoku no Tenkai* [*The Development of Universal Principles: The Use of Soft Law in International Commercial Law.*] 65 HOKKAIDO L. REV. (Hokudai Hogaku Ronshu) 182 (2014); Henry Deeb Gabriel, *Toward Universal Principles: The Use of Non-Binding Principles in International Commercial Law*, 17 INT'L TRADE & BUS. L. REV. 241 (2013); Henry Deeb Gabriel, *The Use of the UNIDROIT Principles as Neutral Law in Arbitration*, 23 J. ARB. STUD. 39 (2013); Henry Deeb Gabriel, *UNIDROIT Principles as a Source of Global Sales Law*, 58 VILL. L. REV. 661 (2013).

9. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 38. One-hundred fifty-nine countries are parties to this convention [hereinafter New York Convention].

ed Nations Convention on Contract for the International Sale of Goods,<sup>10</sup> and possibly the Cape Town Convention,<sup>11</sup> it is difficult to name any other international commercial law treaties that have had a significant influence on international commercial law.<sup>12</sup>

This lack of success may, to a large extent, be due to the fact that international commercial law treaties tend to follow pre-existing instead of newly developed commercial practices, and, as such, they do not reflect the new legal norms that would justify new laws. This should not be unexpected because business practices develop and adapt to commercial needs much quicker than a convention or treaty can in its ponderously slow process of development.

One of the perceived advantages of soft law is its nimbleness in both the speed at which it can be drafted and adopted in relation to a similar treaty or convention. For those who desire a modern commercial law that reflects current business practices, drafting a convention poses several significant obstacles to this goal. I will note the main obstacles.

A primary goal of private international law conventions is generally either to harmonize the private international law with other legal rules—domestic or international—or to update the law with current international practices, or to do both. Harmonization is usually the more difficult task. In an ideal world, the drafters of international commercial law treaties would take the best features of several bodies of law and meld them into a comprehensive legislative scheme. The world is not ideal, however, and attempts to harmonize, though successful in many cases, often run into obstacles such as differences in commercial practices as well as differences in legal theory and legal policies. Drafters of positive law have challenges that do not exist in the drafting of soft law.

Thus, when the member states of an international organization give the drafters of a convention a mandate that may include harmonization with other law, the mandate inevitably also includes the direction to modernize the law with modern business practices as well as to correct or clarify ambiguities and mistakes in the existing law. This general and broad mandate is difficult enough to achieve when attempting to update or codify domestic laws,<sup>13</sup> but when the goal is to harmonize law as an international standard,

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10. U.N. Convention on Contracts for the International Sale of Goods, 1489 U.N.T.S. 3. Eighty-nine countries are parties to this convention.

11. Convention on International Interests in Mobile Equipment, Nov. 16, 2001, 2307 U.N.T.S. 285. Seventy-nine countries have ratified this convention.

12. Conversely, legislation based on or influenced by the Model Law on Electronic Commerce has been adopted in sixty-five States in a total of 141 jurisdictions. Status: *UNCITRAL Model Law on Electronic Commerce*, U.N. COMM'N ON INT'L TRADE L., [http://www.uncitral.org/uncitral/en/uncitral\\_texts/electronic\\_commerce/1996Model\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/1996Model_status.html) (last visited Mar. 22, 2019).

13. Thus, 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

these efforts are more difficult because of the differences among various legal traditions, both in the language as well as the concepts.

Preparation of international commercial law conventions and treaties tends to be a long process, and part of the long length of time is attributable both to the incessant search for common principles as well as the reconciliation of established principles among different legal systems and traditions. This tendency tends to be less accentuated with the drafting of soft law as the drafters do not need to sell the product back home. Because treaties and conventions must be fashioned in a way to encourage adoption by various states, there is a strong tendency toward instruments that will reflect the diverse legal traditions of the potential adopting states in order to create a certain level of comfort with the appropriateness of the instrument. This inevitably results in an attempt to reconcile differing legal traditions, which can cause significant delays in the treaty-creation process.<sup>14</sup>

The United Nations Convention on Contracts for the International Sale of Goods (“CISG”) is an excellent example of the problems raised by the attempt to modernize and harmonize the law. The CISG took over thirty years to complete, and, nevertheless, it is very limited in scope.<sup>15</sup> For example, it does not deal with the more difficult questions of finance and payment. It is also written at such a level of generality that it only covers the surface-level basics of sales contracts.<sup>16</sup> Although the CISG is one of the more successful international commercial law instruments, having been rati-

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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.” U.C.C. art. 2 prefatory note (AM. LAW INST. & UNIF. LAW COMM’N, Proposed Official Draft 2003).

14. In addition, basic legal principles tend to work as a unified whole. Thus, to borrow selectively a contract or property principle from another legal system runs the risk of destroying the balance and interplay with other rules. The harmonization of legal rules presupposes that the rules being harmonized do not have major substantive or structural differences. It is easy to pick selective provisions out of another law that fit a specific need in the law being revised, and often this selective picking is easier (but not necessarily better) than drafting a new provision. However, this is not harmonization. For unless the entire body of legal rules works harmoniously with the other body of rules, there will not be the benefit of certainty across legal systems that harmonization gives to parties. Selective borrowing also lends itself to borrowing from various sources. This process of picking and choosing does not lend itself to systematic reflection on how one body of law works with another. The resulting pastiche may be, in and of itself, an excellent statute or code, but the goal of harmonization is not met.

15. Henry Deeb Gabriel, *The CISG: Raising the Fear of Nothing*, 9 *Vindobona J.* 219, 219 (2005).

16. The CISG is an excellent example of how compromises can be made and how generalities can cover a multitude of sins, but I am not sure it is an example of what the law might aspire to be.

fied by eighty-nine countries,<sup>17</sup> it took years before it became widely ratified. Promulgated by UNCITRAL in 1980, the United States became a party only in 1988,<sup>18</sup> and Japan in 2008.<sup>19</sup> Denmark just ratified Part II in 2012.<sup>20</sup> These difficulties mirror those in many revision efforts at the domestic and regional level. 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 effects of a new statute.<sup>21</sup> Similar attempts at regional harmonization in the European Union have been equally unsuccessful.<sup>22</sup>

Drafting conventions simultaneously in several languages may also create difficulties. For example, the United Nations Convention on the Use of Electronic Communications in International Contracts<sup>23</sup> is limited in scope to “contract” because the working group could not agree on a term, such as the English word “transaction,” that would be understood in the same way in the six official languages of the United Nations.

Much of the perceived advantage of a soft law instrument such as the UNIDROIT Principles of International Commercial Contracts is the fact that the Principles have only to be compatible with international commercial practice, and not with the domestic laws that are based on the different civil Law and common law traditions as well as the domestic differences among jurisdictions within the wider civil law and common law families.<sup>24</sup> The late Professor Allan Farnsworth, for example, described what distinguished the work leading to the CISG, a hard law convention in which he was an American delegate, and that which brought about the UNIDROIT Principles of International Commercial Contracts, in which he was a member of the orig-

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17. *Status: United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980)*, U.N. COMM’N ON INT’L TRADE L., [http://www.uncitral.org/uncitral/en/uncitral\\_texts/sale\\_goods/1980CISG\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html) (last visited Mar. 22, 2019).

18. *Id.*

19. *Id.*

20. *Id.*

21. *See, e.g.*, Henry D. Gabriel, *Uniform Commercial Code Article Two Revisions: The View of the Trenches*, 23 BARRY L. REV. 129 (2018).

22. 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. The more recent Common European Sales Law has been abandoned in favor of new project on the barriers to online sales. *See generally Digital Single Market: Bringing Down Barriers to Unlock Online Opportunities*, EUR. COMM’N, [http://ec.europa.eu/priorities/digital-single-market\\_en](http://ec.europa.eu/priorities/digital-single-market_en) (last visited Mar. 6, 2019).

23. U.N. Convention on the Use of Electronic Communications in International Contracting, Nov. 23, 2005, 2898 U.N.T.S. 3.

24. Moreover, to the extent that the law being revised is based upon or is the law of contract or property, the basic concepts and terms may not even be compatible.

inal 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).”<sup>25</sup>

For an example of how soft law might avoid the political aspects of the drafting of a hard law instrument, one need only look to the most contentious aspects of the revisions of the American Uniform Commercial Code—particularly those provisions dealing with computer software contracts. These same rules were hardly noticed when they were incorporated into a non-binding instrument.<sup>26</sup> The political interests that care about binding legal instruments show much less resistance to soft law.

Unlike binding conventions or treaties, soft law has the flexibility of selective harmonization. Soft law instruments are not usually subject to the same pressure to be harmonized with existing law as are treaties, conventions, and other forms of hard law. With soft law instruments, it is not necessary to harmonize the entire law, and, therefore, it is easy to pick provisions selectively out of other law that fit a specific need in the law being drafted for a selective harmonization. Moreover, selective borrowing also lends itself to borrowing from various sources. This process of picking and choosing can lend itself to systematic reflection on the best result, not simply a possible result.

Thus, we might achieve another often-articulated advantage of soft law: crafting instruments that reflect the best practices and ideas as opposed to ones subjected to political compromises in order to be enacted in various jurisdictions. This reason has been used to describe the UNIDROIT Principles of International Contracts as “neutral” contract law principles in that they reflect a balance of interests and traditions and they were not formulated by any specific governmental interest or legal tradition in mind.<sup>27</sup>

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

precisely because they are not binding, have not been influenced by governments and do not pose any threat to national legal systems. Like the UNCITRAL Model Law on Arbitration they are designed to be a unifying influence and a resource, but it is left to legisla-

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

26. See AMERICAN LAW INST., PRINCIPLES OF THE LAW OF SOFTWARE CONTRACTS (2010).

27. See HENRY DEEB GABRIEL, CONTRACTS FOR THE SALE OF GOODS 13, (2d ed. 2009).

tures, courts and arbitral tribunals to decide to what extent they assist in the solution of problems.<sup>28</sup>

Furthermore, in addition to the lengthy process of preparing a convention, there is also the usually significant amount of additional time it takes for ratification. Soft law instruments, unlike treaties and conventions, are not subject to the lengthy process of ratification that can delay enforcement for years.<sup>29</sup>

#### IV. SOFT LAW'S SUCCESS IN INTERNATIONAL COMMERCIAL LAW

Have these advantages of soft law actually resulted in any measurable success? Regardless of how well drafted a soft law instrument is, if it does not ultimately have some positive effect on the law, it becomes no more than an interesting academic exercise. Soft law instruments are not ends in themselves but are usually the basis for further development in the law. As such, soft law instruments tend to be drafted with the express purpose of providing guidance for the best practices. They often are drafted as forward-looking by relying on current and potential industry usages and customs.

It is fair to exempt "model laws" from our discussion of the success of soft law. Model laws are generally intended for adoption by individual jurisdictions, and many<sup>30</sup> have been most successful in setting international and domestic standards for legislation.<sup>31</sup> Because model laws are intended to be adopted as drafted or with minor revisions, they are usually subject to the same pressures of harmonization and the same need to conform to specific legal traditions as a treaty or a convention. Moreover, like a treaty or convention, model laws need to go through the lengthy political and legislative process that a convention or treaty must go through for enactment. Questions of harmonization necessarily come to the forefront for the same reasons presented above.

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28. Sandeep Gopalan, *New Trends in the Making of International Commercial Law*, 23 J.L. & COM. 117, 159 (2004).

29. For example, one of the most successful international conventions in recent times, the New York Convention, *supra* note 9, was completed in 1958 but not ratified by the United States until 1970. This can be the case with domestic law as well. For example, the revision of the sales provisions of the American Uniform Commercial Code took thirteen years. After another eight years, the revisions were withdrawn with no state adopting them.

30. 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 China, Ireland, Philippines, Republic of Korea, Singapore, Slovenia, the States of Jersey (Crown Dependency of the United Kingdom of Great Britain and Northern Ireland) and the United States of America.

31. Of course, sometimes actual conventions can 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 (1964) which was the basis for UNCITRAL'S Convention on the International Sale of Goods. GABRIEL, *supra* note 27, at 4.



On the other hand, true soft law instruments such as the UNIDROIT Principles of International Commercial Contracts,<sup>32</sup> the UNIDROIT/American Law Institute Principles of Transnational Civil Procedure,<sup>33</sup> 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 those structural limitations. Thus, the texts of these instruments have achieved a neutrality and balance that would not otherwise be possible. But have these soft law instruments had any significant impact on the law? Ideally, they would serve as an influence for further development of the positive law. This could occur simply because they are a convenient and ready source of law and therefore eliminate the difficulty of drafting new law.<sup>34</sup> There could also be a more conscious adoption because the drafters believe it represents the correct result as the rules tend to reflect the most current legal thinking and best practices. Moreover, soft law can be used as a gap filler when the otherwise applicable international or domestic law does not address a specific question.<sup>35</sup>

In the United States, possibly the most common sources of soft law are the Restatements of Law produced by the American Law Institute (“ALI”). With over 150,000 citations to the Restatements of Law, these soft law instruments have had a tremendous impact on the positive law. Thus, it is clear that soft law can have a significant influence on the law.

#### A. *The Example of the UNIDROIT Principles of International Commercial Contracts*

Has there been concomitant success with soft law instruments in international commercial law? To address this question, I focus on the UNIDROIT Principles of International Commercial Contracts. The Principles are intended as a restatement of the general principles of contract law that do or should govern international commercial contracts. The Principles were—and are—intended as a real soft law instrument. They were not draft-

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32. UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS (4th ed. 2016).

33. ALI/UNIDROIT PRINCIPLES OF TRANSNATIONAL CIVIL PROCEDURE (2004).

34. Describing the influence of the American Uniform Commercial Code and the Restatement (Second) of Contracts on the drafting of the UNIDROIT Principles of International Contracts, the late Professor Allan Farnsworth noted: “unlike any other common lawyer, I came with texts in statutory form: the Uniform Commercial Code and the Restatement (Second) of Contracts. No decision of a common law tribunal – not even the House of Lords – was as persuasive as a bit of black letter text.” Farnsworth, *supra* note 25, at 1990.

35. For example, because the UNIDROIT Principles of International Commercial Contracts have a broader scope than the United Nations Convention on Contracts for the International Sale of Goods, the Principles have been used to resolve questions not addressed by the CISG. *See, e.g., Yoshimoto v. Canterbury Golf Int'l Ltd* [2001] 1 NZLR 523 (CA) at [89]; Cour d’appel [CA] [regional court of appeal] Grenoble, civ., Oct. 23, 1996, 94/3859.

ed as a basis for future legislation. In other words, they are not designed as a model law.<sup>36</sup>

The Principles were first promulgated in 2004 and revised in 2010 and 2016. The most recent compilation in the UNILEX database shows that only 259 reported court cases and 193 reported arbitral awards have cited the Principles.<sup>37</sup> This limited lens may, however, discount an important part of the significance of the Principles. There may be more law review articles and books written about the Principles than there are cases decided under them. If we merely measure impact by reported cases and arbitral decisions, the Principles appear to have a fairly insignificant impact, but there are reasons why there may be so few cases.

First, as is common with several soft law instruments, the Principles are not well known, and this lack of familiarity diminishes their effectiveness.<sup>38</sup> In international commercial law, this unfamiliarity is not limited to soft law. For example, American lawyers and courts are still discovering the existence of the CISG, even though it has been the law in the United States for twenty-nine years.<sup>39</sup> A second factor limiting use of the Principles is the lack of understanding of the Principles themselves. Because the Principles are not obligatory, there is a natural reluctance among potential users to master the text and comments, particularly since they require a certain comfort level with both the civil and common law traditions. Unlike binding conventions and treaties, one can usually safely avoid learning the rules of a soft law instrument.

A third limiting factor is the uncertainty of how the principles will be understood by a court or arbitral tribunal. Although a substantial commentary has developed regarding the Principles, and although they contain their own explanatory comments, there is uncertainty in how the rules will be interpreted. Unlike some conventions, such as the CISG, there is a limited number of cases interpreting the Principles. Given that the Principles may introduce concepts or understandings from other legal traditions, this concern may be significant. Unfortunately, the aspect of uncertainty in soft law instruments such as the Principles becomes a self-fulfilling circular argument: they are not understood because they are not understood.

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36. This is not to say that they could not be used as a template for domestic legislation. They are well drafted and should be easily converted into domestic contract legislation. Since their focus, however, is on international agreements, some adjustment would need to be made to reflect the expectations of domestic parties.

37. The most recent compilation is from 2016, and this only includes reported cases.

38. UNIDROIT has published Model Arbitration Clauses to encourage the use of the Principles. Although these are useful if parties intend to use the Principles as their governing law, the Model Clauses do not solve the problem of the lack of awareness of the Principles nor any of the other problems I discuss on the reasons why the Principles might not be used.

39. See John F. Coyle, *The Role of the CISG in U.S. Contract Practice: An Empirical Study*, 38 U. PA. J. INT'L L. 195 (2016).

A fourth limiting factor for the use of the Principles is the question of whether the Principles are law at all.<sup>40</sup> As with much of soft law in general, there is an inability to meet the need for certainty of enforcement because of the uncertainty of knowing in advance whether the Principles will be treated as enforceable law. In many transactions, certainty as to the applicable law and enforcement of that law is necessary. This concern of enforceability is not present with ratified conventions and treaties. Because international conventions are binding, once they are ratified, they have the advantage of instant enforceability. For example, the Cape Town Convention on International Interests in Mobile Equipment<sup>41</sup> and the accompanying Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment<sup>42</sup> give an enforceable basis for secured financing and leasing of aircraft in the international market, and it would be unreasonable to expect international financing of multi-million dollar aircraft without the level of certainty and protection afforded parties by a clear, enforceable convention.<sup>43</sup>

An agreement to use a set of soft law rules is not self-enforcing but rather needs some domestic law to provide a basis for its enforcement.<sup>44</sup> This may lead to uncertainty because the parties may not know in advance whether the governing terms of the agreement will be enforced according to their express wishes. However, this problem should not be overstated. A

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40. I am assuming that there has been a determination that the specific soft law instrument embodies rules that the parties would wish to use. Political forces strongly influence the drafting of conventions and treaties at both the drafting as well as the ratification stage. During the drafting, representative governments 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. This process of vetting, compromise, and ultimate acceptance often reflects instruments that are acceptable to the various constituencies and therefore are likely to result in wide acceptance. This may not be the case with a soft law instrument that may have evolved through a more insular process. Furthermore, a convention or treaty may reflect practical specific problems that call for fact specific rules, as opposed to abstract principles, and therefore may be easier to apply and lend more certainty and less divergence in interpretation.

41. Convention on International Interests in Mobile Equipment, Nov. 16, 2001, 2307 U.N.T.S. 285, T.I.A.S. No. 06-301.2.

42. Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment, Nov. 16, 2001, <https://www.unidroit.org/instruments/security-interests/aircraft-protocol> (last visited Mar. 22, 2019).

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

44. Domestic courts are obligated to apply their own national law, including the relevant conflict of laws rules. Under the traditional and prevailing view, the choice of the law applicable to international agreements is limited to a particular domestic law. This is the position in the European Union under the 1980 Rome Convention on the Law Applicable to Contractual Obligations, 1980 O.J. (L 266) 1 (“Rome Convention”), which unifies the conflict of law rules for contracts within the Member States of the European Union.

large proportion of international legal disputes are resolved in arbitration, and, generally, the parties' 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 party autonomy, allowing the parties to choose rules such as the UNIDROIT Principles either as a choice of law term in the agreement or as contract terms by incorporation.

A further concern with the use of soft law is the effect on third-party rights. Most soft law instruments create "closed systems." By choosing the specific soft law to govern the transaction, parties override the otherwise applicable law that would govern the transaction and thereby limit the application of the soft law to themselves. Because third parties will not, by definition, be part of the contractual relationship that allows for the choice of the soft law, the third parties would not be bound by any contractual choice that would otherwise affect the rights these third parties would have absent the choice of the soft law. This is a limiting feature of soft law that suggests its use is primarily restricted to contract and property rights between contracting parties. This would normally be the case with the use of the Principles.

Recall, however, the broader question of the Principles' influence. As has been discussed, it is difficult to show widespread usage of the Principles by parties in commercial agreements. Because the Principles were drafted to be used as either the choice of law or included as terms in commercial agreements, this lack of usage in agreements suggests that the Principles may not have been effective for the purpose for which they were drafted. However, that might be the wrong metric to measure the influence of the Principles. For, although the Principles were specifically not drafted as a source of domestic legislation, it is precisely this use where they have been successful as a template for domestic legislation.<sup>45</sup> This has been particularly true in the codification of contract law in the formerly-socialist countries.<sup>46</sup> Thus, although the Principles were not drafted as a model law, they have been widely used as such. In this respect, the influence of the Principles has been quite substantial in creating legal norms around the world.

#### 1. Comparing the UNIDROIT Principles of International Commercial Contracts with the American Law Institute Restatements of Law

Unlike the UNIDROIT Principles of International Commercial Contracts, the Restatements of Law produced by the American Law Institute<sup>47</sup>

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45. For a discussion of the influence of the Principles on domestic legislation, see STEFAN VOGENAUER, COMMENTARY OF THE UNIDROIT PRINCIPLES OF INTERNATIONAL CONTRACTS 100-06 (2d ed. 2015).

46. *Id.*

47. For a history of the American Law Institute and Restatements, see John P. Frank, *Symposium on the American Law Institute: Process, Partisanship, and the Restatements of Law, 1923-1998*, 26 HOFSTRA L. REV. 615 (1998).

were specifically drafted to influence and be adopted by domestic courts. Thus, the observations on how to gauge the success of the UNIDROIT Principles may not be appropriate for soft law instruments such as the Restatements. This Section examines how the UNIDROIT Principles differ from the Restatements and how one may evaluate their respective successes.

The American Law Institute Restatements are not generally concerned with international commercial law, but these soft law products have been quite successful as sources of hard law by courts.<sup>48</sup> If we compare them to the four points outlined in the discussion of the UNIDROIT Principles of International Contracts,<sup>49</sup> we can easily understand why they might be more successful as a source of case law.

First, the existence of the Restatements is well known by their potential users who usually are lawyers and judges.<sup>50</sup> Second, the Restatements, by their very nature as statements of American law, are generally understood by the lawyers and judges who use them. Third, the Restatements are well used, so there is little fear of misinterpretation by courts. A fourth point—whether the Restatements are law—deserves more extensive comparison with the Principles and features two essential points.

Although the Restatements are not law until adopted by a court, most Restatement principles are derived from existing American case law and thus are effectively law before adoption by a court. This is not the case with the Principles nor necessarily with many soft law instruments in international commercial law. As the Principles are an amalgam of various legal traditions, one cannot rely on them to be a statement of existing law.

Once the Restatements are adopted by a court, the Restatements in fact become the law, and one can generally rely on them as positive law. In the case of the adoption of the Principles, it is likely to be by an arbitral tribunal, and, therefore, their adoption does not create the same sense of certainty that it is the law. Thus, we might conclude from the success of the American Law Institute Restatements as a source of case law and the UNIDROIT Principles as a source of domestic legislation that there is nothing about soft law, such as restatements and principles, that inhibits its influence. It just might be influential in different ways.

## V. SOFT LAW AS TRADE USAGE

Some of the most successful international commercial soft law instruments, such as the Uniform Customs and Practices for Documentary Credits

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48. In this discussion, I am considering the Restatements as a group. Each one's success as a source of the law has varied greatly.

49. *Supra* pp. 13-14.

50. Since the Restatements are an easy and ready source of basic American legal principles, most lawyers and judges are force fed them in law school.

(“UCP 600”)<sup>51</sup> and the Incoterms<sup>52</sup>—soft law instruments that provide some structure for existing trade customs and usages—were specifically drafted for use by a large number of contracting parties because they reflect common, well-established business practices. For this reason, they are already the de facto existing legal standards for the transactions they govern. This is the case without any legislative adoption.

How might we distinguish the UCP 600 and the Incoterms from the UNIDROIT Principles? First, the UCP 600 and the Incoterms were drafted by the users for the users. Thus, the connection between these soft law sources and their intended users is more intimate than in the UNIDROIT Principles that were drafted by academics and practitioners. Second, the Principles, by their nature, are somewhat removed from the myriad possible applications in which they could be used—“International Commercial Contracts” covers a lot of ground. In other words, there is more familiarity with the *existence* of the UCP 600 and Incoterms by those who are likely to use them.

Another distinction between the Principles and the soft law codified trade usages is familiarity with the commercial practice that underlies the use of these trade usages—in other words, familiarity with the *effect* of these instruments on a commercial transaction. To illustrate this point of familiarity of result, I am willing to wager that a higher percentage of commercial parties who will possibly be subject to the Cape Town Convention are more familiar with its rules than an equal percentage of parties that are possibly subject to the CISG, although the CISG undoubtedly governs a significantly greater number of transactions.

This familiarity with the existence and employment of these soft law trade usages might be attributable to a combination of two factors. First, these instruments are narrow in scope. They are only intended to apply to very specific types of transactions in which the parties are likely to know that some rules do or must exist to govern the particular matter. Quite simply, if a lawyer is involved in a transaction for the shipping of goods, the lawyer most likely understands the existence of and need for shipping terms. The question is not whether they exist, but what they are and where they can be found.

Second, although instruments such as the UCP 600 and the Incoterms do evolve over time, the actual texts are strongly reflective of actual business usage and expectations at the time the text is promulgated. In other words, these soft law instruments follow trade practices; they do not lead them. This avoids the uncertainty parties feel when they adopt an instrument with unknown concepts and dimensions. The fear of the unknown does not hinder their usage.

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51. INT’L CHAMBER OF COMMERCE, *supra* note 7. These rules deal primarily with letters of credit.

52. INT’L CHAMBER OF COMMERCE, *supra* note 6.

## VI. SOFT LAW: THE LONG VIEW

Because soft law, by definition, is not binding positive law, one might ask why its effectiveness in international commercial law is worth examining. My interest in this question arises from my work with UNCITRAL and UNIDROIT, two organizations that have been active in the production of soft law for international commercial transactions. A question that often arises at the policy level at UNCITRAL and UNIDROIT is what role the creation of soft law should play in the work programs of these organizations given the limited resources available. The former Secretary General of UNIDROIT, Professor Herbert Kronke, questioned whether government-financed international organizations should produce soft law instruments rather than concentrate solely on producing specific conventions confronting specific problems. He concluded the answer should not be an all-or-nothing proposition. Instead, there is a proper role for both soft law and binding conventions in the development of international commercial law.<sup>53</sup> Though I agree with him, I think that we must take the long view to appreciate the benefits of soft law.

As to the utility of spending resources on soft law, another example might be examined. Working jointly with the United Nations Food and Agricultural Organization (“FAO”) and the International Fund for Agricultural Development, UNIDROIT recently completed a Legal Guide to Contract

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53. See, e.g., Herbert Kronke, *Brendan Brown Lecture Series: UNIDROIT Symposium: Methodical Freedom and Organizational Constraints in the Development of Transnational Commercial Law*, 51 LOY. L. REV. 287, 293–94 (2005) (“Much has recently been written about the ‘new’ transnational commercial law, consisting of fact-specific *rules*. This has replaced the ‘old’ law, consisting all too often of highly abstract *standards*, which are constantly in need of interpretation and are, therefore, threatened by erosion. Assuming that is correct, would it then not be a disservice to the constituencies of transnational commercial law to continue producing international instruments such as the UNIDROIT Contract Principles? As a result, should we not then concentrate all resources on narrow problem areas and resolve those specific problems by the practice-driven drafting of instruments such as the Cape Town Convention or the U.N. Receivables Financing Convention? The answer is ‘no’ if the question were to suggest a radical ‘either-or’ choice. For example, it is true that governments would be well-advised not to again discuss the concept of good faith in the context of developing rules for a *specific* transaction as they did in Vienna where they finally settled on papering over disagreements in article 7 CISG. We can make this assertion only now that we have discovered an alternative vehicle for the promotion of that concept: article 1.7 UNIDROIT Contract Principles. While it is equally true that a maxim of interpretation in good faith would sit awkwardly in the Cape Town Convention today, it would not be used as an overarching and abstract principle on interpretation of any sophisticated domestic law concerning the taking of collateral either. Rather, it would be broken down into specific, mostly judge-made rules regarding the protection of the security provider or the lessee in specific circumstances. In other words, standards have not become irrelevant. They have found their proper, yet different, place within the widened spectrum of types of international instruments. In an ongoing intellectual exchange with academic debate and business, the intergovernmental organizations were able to identify their proper role and designate their proper place thanks to the freedom granted by governments.”) (emphasis in original).

Farming.<sup>54</sup> Clearly within the realm of soft law, the Guide is ambitious in its purpose. It is designed both to give general legal guidance that provides models for domestic legislation (that is, to act as a model law) and to serve as an aid for NGOs and others that are providing contractual guidance to parties (that is, as a source of contract terms in an agreement). Moreover, the rules and principles enunciated are intended to have universal recognition in a transnational context. This effectively means the rules and principles must be—and are—rather general. Thus, although the Guide provides broad policy advice, it does not provide the type of detailed contract terms parties would need in a specific transaction.

What influence will the Legal Guide have on the development of the law? One can only speculate. One must, however, appreciate the context in which such a guide exists for one to understand that it will probably be difficult to determine exact influences. Today, many countries have highly developed legal regimes for contract farming. Many of these legal regimes could be used as models for future legislation. As for specific terms in a contract farming arrangement, model contracts and terms are numerous and well-developed. The FAO has a veritable library of these contracts that are readily available and usable. Therefore, whether it has a long-term influence either on future legislation or on the use of the guide to direct specific contract terms, it probably will be difficult to determine the specific influence of the all of the possible sources, including the Legal Guide to Contract Farming. Yet, over time, a guide based on best practices may have an influence, albeit indirect and immeasurable, that will have a positive influence on the development of the law. Our inability to measure precisely the influence of soft law such as the Legal Guide to Contract Farming should not necessarily indicate a lack of influence. This inability to measure the effect of soft law should not be a justification to dismiss its potential long-term influence.

Examining the UNCITRAL Legislative Guide to Secured Transactions<sup>55</sup> allows us to examine further this question of the influence of soft law on legal development in international commercial law. The Legislative Guide's development coincided with significant domestic and international legal developments worldwide in personal property security rights.<sup>56</sup> Thus, contemporaneously with the Legislative Guide were such major projects in security rights as the Cape Town Convention and its protocols. As with the

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54. LEGAL GUIDE ON CONTRACT FARMING (2015).

55. U.N. COMM'N ON INT'L TRADE LAW, UNICTRAL LEGISLATIVE GUIDE ON SECURED TRANSACTIONS, U.N. Sales No. E.09.V.12 (2008).

56. For an overview of this harmonization process and the various international legal instruments, see, for example, Henry D. Gabriel, *The International Harmonization of Security Rights Law: Its Successes and Challenges*, in A COMMITMENT TO EXCELLENCE: ESSAYS IN HONOUR OF EMERITUS PROFESSOR GABRIËL A. MOENS (Augusto Zimmermann ed., 2018).



Legislative Guide, the Cape Town Convention provides modernized security rights laws<sup>57</sup> to conform to modern commercial practices.<sup>58</sup>

The Legislative Guide and the Cape Town Convention were just two projects that coincided with other contemporaneous, significant developments in security rights law. For example, the European Bank for Reconstruction and Development published its Model for Secured Transactions in 1994.<sup>59</sup> The Organization of American States promulgated its Model Inter-American Law on Secured Transactions in 2002.<sup>60</sup> The Organization for the Harmonization of Business Law in Africa (“OHADA”)<sup>61</sup> adopted its Uniform Law on Security Interests in 1997 and revised it in 2010 and 2012, and the World Bank published its Principles for Effective Insolvency and Creditor Rights Systems in 2015.<sup>62</sup> Similar to these conventions and instruments, the Legislative Guide conformed to the general emerging international standards for security rights<sup>63</sup> that were—and still are—emerging. Thus, it will probably be general uniform global law for security rights.

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57. For example, in the United States, major revisions in the domestic law were made in 2000, with substantial amendments in 2010. Australia and New Zealand both recently substantially revised their respective laws of security rights in personal property.

58. For a thorough explanation of modern commercial practices in the law of security rights, as well as an overview of legal developments in this area worldwide, see SECURED TRANSACTIONS LAW REFORM PROJECT, <https://www.securedtransactionslawreformproject.org/> (last visited Mar. 22, 2019).

59. EUROPEAN BANK FOR RECONSTRUCTION & DEV., MODEL LAW ON SECURED TRANSACTIONS (1994).

60. Org. of American States, *Model Inter-American Law on Secured Transactions*, OAS Doc. OEA/Ser.K/XXI.6/CIDIP-VI/RES. 5/02 (Feb. 27, 2002). The purpose of the Organization of American States’ Model was to modernize secured transactions law by having OAS member states approve the law. The law was drafted to “foster economic growth in Central and South America, creating a ‘regional credit market for the Western Hemisphere.’” See Hannah L. Buxbaum, *Unification of the Law Governing Secured Transactions: Progress and Prospects for Reform*, 8 UNIFORM L. REV. 321, 333 (2003) (quoting John M. Wilson, *Secured Financing in Latin America: Current Law and the Model Inter-American Law on Secured Transactions*, 33 UCC L.J. 43, 107 (2000)).

61. The Organization for the Harmonization of Business Law in Africa is an international organization created by treaty and signed by fourteen African states. These states realize that, while their land is abundant with natural resources, no one will finance these expeditions without a stable legal and commercial framework that would provide for and protect private investment and property, nor without an independent judicial system to settle impartial disputes. This is an attempt to both modernize and harmonize the business law arena in Africa. See, e.g., Alex Bebe Epale, *The Revised OHADA Uniform Act on Security Law*, HOGAN LOVELLS (Dec. 2012), <https://www.hoganlovells.com/publications/the-revised-ohada-uniform-act-on-security-law>.

62. *Principles for Effective Insolvency and Creditor/Debtor Regimes* (Nov. 19, 2015), WORLD BANK, <http://www.worldbank.org/en/topic/financialsector/brief/the-world-bank-principles-for-effective-insolvency-and-creditor-rights>.

63. For a full discussion of these general principles, see *The Case for Reform*, SECURED TRANSACTIONS LAW REFORM PROJECT, <https://www.securedtransactionslawreformproject.org/the-case-for-reform/> (last visited Mar. 6, 2019).

Early in its work, UNCITRAL decided to create a legislative guide instead of a convention.<sup>64</sup> This was both a political as well as a practical decision. As to the political dimensions, UNIDROIT already made significant progress on the Cape Town Convention on International Interests in Mobile Equipment, and it was not considered prudent to duplicate a convention in the same area simultaneously addressed by a sister organization. There was also the practical concern of the feasibility of a general convention on security rights in personal property. For example, a soft law instrument such as a legislative guide is not subject to the same pressure to be harmonized with existing domestic laws as are treaties and conventions and other forms of hard law.<sup>65</sup>

The drafters of the Legislative Guide also understood that an international convention would conflict with many domestic laws, thereby making its application in transactions overly complex. For this reason, the wide adoption of a convention was thought unlikely.<sup>66</sup> Likewise, the drafters stated at that time that a model law on secured transactions would be infeasible;<sup>67</sup> it was specifically drafted as a set of principles and not a model law suitable for legislative adoption.

The major stumbling block to a model law was the question of whether the common law and civil law rules of property could both be accommodated. The Legislative Guide does not bridge that gap. This problem has vexed several international commercial soft law instruments and, as previously discussed, is a reason for these soft law instruments' lack of success. The Legislative Guide does, however, set out the basic principles for a modern and efficient system of personal property security rights. In this respect, it is an excellent source for understanding the basic principles of modern secured transactions, though not a model for domestic legislation in and of itself.

Because the Legislative Guide did not conclude UNCITRAL's work in security rights, we can see some actual influence the Legislative Guide has had on future developments in the law. For example, in 2012, a decade after the work on the Legislative Guide to secured transactions began and five years after it finished, UNCITRAL began to work on a Model Law of Secured Transactions. During this short interval, attitudes about the desirability of a Model Law reversed from the previous position. The original concerns were reiterated,<sup>68</sup> but:

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64. See U.N. Comm'n on Int'l Trade Law, Rep. of the United Nations Commission on International Trade Law on Its Thirty-Fourth Session, ¶¶ 351, 357–59, U.N. Doc. A/56/17 (July 27, 2001).

65. See Henry Deeb Gabriel, *Toward Universal Principles: The Use of Non-Binding Principles in International Commercial Law*, 17 INT'L TRADE & BUS. L. REV. 241 (2013).

66. See U.N. Comm'n on Int'l Trade Law, *supra* note 64, ¶¶ 351, 358–59.

67. See Neil B. Cohen, *Should UNCITRAL Prepare a Model Law on Secured Transactions?*, 15 UNIFORM L. REV. 325 (2010).

68. U.N. Comm'n on Int'l Trade Law, Rep. of Working Group VI (Security Interests) on the Work of Its Twenty-First Session, ¶ 74, U.N. Doc A/CN.9/743 (May 23, 2012) (“[T]he

[I]t was widely felt that a model law based on the general recommendations of the Secured Transactions Guide would provide urgently needed guidance to States in enacting or revising their secured transactions laws. In addition, it was generally viewed that a model law was sufficiently flexible and could be adapted to the various legal traditions . . . .<sup>69</sup>

The Model Law on Secured Transactions, which is based on the principles enunciated in the Legislative Guide, has great potential significance as many model laws have influenced domestic legislation. The success of the Model Law on Electronic Commerce<sup>70</sup> and the UNCITRAL Model Law on International Commercial Arbitration<sup>71</sup> are two excellent examples.

The UNCITRAL Model Law on Secured Transactions was completed in 2016. It not only retains the general principles of a modern security rights law articulated in the UNCITRAL Legislative Guide, but it also expands upon the Legislative Guide by providing actual model text for a secured transactions law. But what effect will the Model Law have on the development of transnational law? Both the UNCITRAL Model Law on Secured Transactions as well as the UNCITRAL Legislative Guide to Secured Transactions follow the core principle of modern personal property security rights law, which is the unitary approach of a “security interest” for all security rights in personal property.<sup>72</sup> This law reflects the most recent thinking in secured transactions. It is roughly consistent with the domestic laws of the United States, Canada, Australia, and New Zealand as well as the major international convention for security rights, the Cape Town Convention.

The UNCITRAL Legislative Guide and Model Law on Secured Transactions gives further support and credibility to what has become the standard model of secured transactions. Whether future legislation is influenced by these instruments in part or only in passing, if at all, they stand as a model for the current best thinking in this area of the law. Likewise, to the extent

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concern was expressed that a model law might be too prescriptive limiting the flexibility of States to address the relevant issues in an appropriate way that would fit their needs and suit their legal traditions.”).

69. *Id.* ¶ 75.

70. Legislation based on or influenced by the Model Law has been adopted in seventy-one States in a total of 150 jurisdictions. *Status: UNCITRAL Model Law on Electronic Commerce*, *supra* note 12.

71. Legislation based on the Model Law has been adopted in eighty States in a total of 111 jurisdictions. *Status: UNCITRAL Model Law on International Commercial Arbitration (1985), with Amendments as Adopted in 2006*, U.N. COMM’N ON INT’L TRADE L., [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/1985Model\\_arbitration\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html) (last visited Mar. 22, 2019).

72. See *UNCITRAL Legislative Guide on Secured Transactions (2007)*, U.N. COMM’N ON INT’L TRADE L., [http://www.uncitral.org/uncitral/en/uncitral\\_texts/security/Guide\\_securedtrans.html](http://www.uncitral.org/uncitral/en/uncitral_texts/security/Guide_securedtrans.html) (last visited Mar. 22, 2019); *UNCITRAL Legislative Guide on Secured Transactions (2016)*, U.N. COMM’N ON INT’L TRADE L., [http://www.uncitral.org/uncitral/en/uncitral\\_texts/security/2016Model\\_secured.html](http://www.uncitral.org/uncitral/en/uncitral_texts/security/2016Model_secured.html) (last visited Mar. 22, 2019).

that the UNIDROIT Legal Guide to Contract Farming—a document designed to emphasize best practices and policies in contract farming—may have some influence, however large or small, in future legislation and contracting, it will have achieved its purpose of positively influencing the law.

Thus, to the extent that an international commercial soft law instrument reflects the best practices and policies, over time, these instruments may have a positive influence on the norms and rules of future law and transactions. It may be a slow and indirect process, but the result will be improvement of the law.

## VII. CONCLUSION

The question of the success of international commercial soft law prompts a discussion of general observations. First, the use of soft law that relies both on the civil law and common law traditions may be inhibited by concerns about the meaning, as well as the application, of the soft law. Familiarity with the background law on which the soft law is based encourages and increases the use of soft law. Fear of the new and unknown diminishes the use of soft law. Second, soft law that addresses a specific aspect of trade and is driven by the relevant industry is likely to be widely used as it is already widely accepted and understood.

The more difficult question is the influence of soft law instruments that are not well recognized but nevertheless forward-looking. Such laws do not merely articulate existing law—they attempt to inculcate new legal rules that provide fair and balanced policies. These instruments may take time to be accepted and adopted, but as I have pointed out, they may prove quite influential in legal development over time. This influence may be hard to gauge, and it may often be indirect, but it is there just the same.