COMMERCIAL LAW HARMONIZATION: THE ROLE OF THE UNITED STATES

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INTRODUCTION

The modern field of transnational commercial law harmonization began for the United States in the mid-1960s; the international basis of that began earlier in the mid-1940s, interestingly before the conclusion of the Second World War.[1] Before that, a limited number of areas of private international law (PIL) had active participation of US interests, such as maritime law.[2] PIL developments parallel to commercial law have been significant in the areas of applicable law, jurisdiction, commercial arbitration, family law, and other fields – all important areas of transnational law, but beyond the scope of this symposium.[3] Each of these areas of law, while affecting the overall field of international private law, has had dynamics particular to it.

I. INTERNATIONAL COMMERCIAL LAW HARMONIZATION: MODERN (POST 1940'S) U.S. TIMELINE

The stage for a new era of "harmonization" of international private law was set in the years just before and following 1945, primarily in the public international law arena. As noted above, the modern era of PIL harmonization and active participation by the US legal community and government largely began after the mid-1960s. With some exceptions, the US legal profession, as well as governmental engagement, arguably had largely remained in a neo-isolationist mode as to PIL prior to that time. Work on transnational commercial law, to a large extent, began for the US in the early 1970s,[4] by which time commercial law in the US had for the first tine

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1. *See* Henry D. Gabriel, *The Advantages of Soft Law in International Commercial Law: The Role of UNIDROIT, UNCITRAL, and the Hague Conference*, 34 BROOK. J. INT'L L. 655, 656–57 n. 4–5 (2009) (noting the Member States and reestablishment of UNIDROIT in 1940 and the establishment of UNCITRAL in 1966); *see also* Kurt H. Nadelmann*, The United States Joins the Hague Conference on Private International Law: A History With Comments,* 30 LAW AND CONTEMP. PROBS. 291, 305 (1965) (noting that the United States did not join the Hague Conference on Private International Law until an enabling act was passed by Congress in 1963).

2. *Convention on the International Maritime Organization*, INT'L MARITIME ORG., https://www.imo.org/en/About/Conventions/Pages/Convention-on-the-International-Maritime-Organization.aspx (the US hosted an international maritime conference in Washington, DC, in 1889, to discuss "a proposal to set up a permanent international body to cater for the needs of shipping." While that plan was rejected, the US joined the International Maritime Organization in 1950, two years after its founding).

3. Daniel J. Rothstein, *A Proposal to Clarify U.S. Law on Judicial Assistance in Taking Evidence for International Arbitration*, 19 AM. REV. INT'L ARB. 61, 82 (2008); Hague Evidence Convention, Art. 12(b).

4. The comments that follow will emphasize the developments at certain multilateral broad-based intergovernmental bodies. Developments at regional intergovernmental bodies play a significant role as well but are beyond then scope of comments at the BLS symposium. Readers

became largely uniform state law via wide state adoption of the new Uniform Commercial Code (UCC).[5]

The 1940s – 1950s:

- The 1944 Bretton Woods conference, prior to the end of World War II, established the World Bank Group and International Monetary Fund (IMF), headquartered in the US.[6]
- The 1944 Chicago Convention on Civil Aviation established the International Civil Aviation Organization (ICAO), headquartered in Montreal.[7]
- In 1945, the United Nations (UN) was established[8] and entered into "specialized agency" relationships with a number of international bodies, many of which had pre-World War II antecedents, such as the International Organization for Standardization (ISO), International Maritime Organization (IMO), and the International Telecommunications Union (ITU), each of which has had important effects on commercial law in areas relevant to their work.[9]

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may wish to access the work of those bodies to supplement these comments here on private international law - such as the OAS (Organization of American States), a body which as the Pan American Union was in the 1890s one of the earliest regional bodies of this sort relevant to our times; OHADA (Organization for harmonization of Business Law in Africa); COMESA (Common Market for Eastern and Southern Africa); ASEAN (Association of SouthEast Asian Nations), etc. Also beyond the scope of these comments at the BLS Symposium are non-governmental bodies important for private international law, such as the ICC (International Chamber of Commerce), CMI (Comite Maritime Internationale), INSOL (International insolvency association), and others.

5. Uniform Law Commission, *Uniform Commercial Code Summary*, UNIF. L. COMM'N, https://www.uniformlaws.org/acts/UCC#:~:text=Pennsylvania%20became%20the%20first%20state,over%20the%20next%20twenty%20years.

6. In sum, the World Bank and the IMF were established during the Bretton Woods conference at the end of the Second World War. Led by U.S. Treasury Secretary Henry Morganthau, his chief economic advisor Harry Dexter White, and British economist John Maynard Keynes, the trio sought "to establish a postwar economic order based on notions of consensual decision-making and cooperation in the realm of trade and economic relations. It was felt by leaders of the Allied countries, particularly the U.S. and Britain, that a multilateral framework was needed to overcome the destabilizing effects of the previous global economic depression and trade battles." *See* Bretton Woods Project, *What are the Bretton Woods Institutions?* (Jan. 1, 2019), https://www.brettonwoodsproject.org/2019/01/art-320747/#:~:text=The%20Bretton%20Woods%20Institutions%20are,to%20promote%20international%20economic%20cooperation.

7. *About ICAO*, ICAO, https://www.icao.int/about-icao/Pages/default.aspx (last visited Feb. 11, 2023).

8. *History of the United Nations*, UNITED NATIONS, https://www.un.org/en/about-us/history-of-the-un (last visited Mar. 14, 2023).

9. *About Us*, ISO, https://www.iso.org/about-us.html_(last visited Feb. 11, 2023); *About International Telecommunication Union (ITU)*, ITU, https://www.itu.int/en/about/Pages/default.aspx (last visited Feb. 11, 2023); INT'L MARITIME ORG., *supra* note 2.

- The General Agreement on Tariffs and Trade (GATT) was signed in 1947 and went into force on January 1, 1948.[10] It was reconstituted in 1995 as the World Trade Organization (WTO), headquartered in Geneva.[11]
- In 1948, the Organization for Economic Co-operation and Development (OECD) was established and headquartered in Paris.[12] It was reorganized in 1960, and its scope was increased to include economic private law activity.[13]
- During the 1950s, the Hague Conference on Private International Law, established 1893, was reorganized as a permanent intergovernmental body, adding English to French as official languages.[14]
- Also, during the 1950s, the International Institute for the Unification of Private Law (UNIDROIT), established in 1926 under the League of Nations, resumed activity after being reorganized as a governmental body in 1940.[15]

The Mid-1960s:

- The US Government, for the first time, became a member government of the Hague Conference and UNIDROIT.[16] As a result of private sector initiatives from the American Bar Association, the Washington, D.C. based International Law Institute, and others, US government approved delegations began to participate.
- Also, during the mid-1960s: The so-called "East bloc", composed of countries closely associated with the Soviet Union proposed the establishment of a UN Commission on International Trade Law (UNCITRAL), which was set up within the General Assembly system in 1966, conceived in part by its proposers as a counterweight to economics and trade focused organizations set up by the WWII Allied countries.[17] It was intended to be hedged in by the Western group, anticipating a possible drift toward south vs. north policies similar to some in the UN Conference on Trade and Development

10. General Agreement on Tariffs and Trade, opened for signature Oct. 30, 1947, T.I.A.S. 1700, 55 U.N.T.S. 187, art. I-III, available at, https://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm.

11. *Id.*

12. *Who we are*, OECD, https://www.oecd.org/about/ (last visited Feb. 11, 2023).

13. *Id.*

14. *ABOUT HCCH*, HCCH, https://www.hcch.net/en/about/history (last visited Feb. 11, 2023).

15. Gabriel, *supra* note 1, at 656.

16. Nadelmann, *supra* note 1, at 291.

17. E. Allan Farnsworth, *UNCITRAL-Why? What? How? When?*, 20 AM. J. COMP. L. 314, 315 (1972).

(UNCTAD) and UN Industrial Development Organization (UNIDO).[18]

But "A Funny Thing Happened on the way to the Forum" (apologies to Zero Mostel and Stephen Sondheim) – UNCITRAL, notwithstanding its title, did not then and does not now engage trade law, although commercial law topics may tangentially do so, but became instead focused on technical, commercial law, with an emphasis not on political geography but on practical effects of commercial law.[19]

It thus avoided political confrontations within the UN. That led to a de facto emphasis on established common law and civil law legal systems, with minimal attention in earlier years to the proposed "New International Economic Order" (NIEO) agenda, which focused on South vs. North (and to some extent East vs. West) priorities.[20] The NIEO agendas largely withered away in the mid-70s and 80s.[21]

The 1970s – 1980s:

- UNCITRAL's Convention on Contracts for the International Sales of Goods (CISG) and UNIDROIT's Principles of International Commercial Contracts (latest revised edition 2018) set the pace on commercial law.[22]

The 1990s and Onwards:

- During the 1990s, UNCITRAL took on rules for the emerging field of electronic commerce with rules on the dematerialization of "money" via electronic data passed rapidly across borders in international credit transfers, to be followed by basic rules for the

18. *Id.* at 317.

19. *See Texts and Status*, UNITED NATIONS COMM'N ON INT'L TRADE L., https://uncitral.un.org/en/texts (last visited Apr. 1, 2023).

20. *See generally* Branislav Gosovic & John Gerard Ruggie, *On the Creation of a New International Economic Order: Issue Linkage and the Seventh Special Session of the UN General Assembly*, 30 UNIV. OF WIS. PRESS 309 (1976).

21. *Id.*

22. United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, S. TREATY DOC. No. 98–9, 1489 U.N.T.S. 3. (1983); INT'L INST. FOR THE UNIFICATION OF PRIVATE L., *UNIDROIT Principles of International Commercial Contracts*, art. 1.6(2). The Hague Conference's conventions – such as international service of process, taking of evidence abroad, legalization of documents and other treaty work of the Hague are not covered here, as not falling within commercial law, but which were significant in the 1960s and beyond and were instrumental in building support for the multilateral process of harmonizing private law.

new field of electronic transactions, and other e-commerce initiatives.[23]

- Then the middle 1990s (timing is often a factor in whether projects are likely to gain needed traction) led to harmonization work on two closely related fields – secured financing of moveable assets and business insolvency law. By traditional wisdom, the harmonization of both has been labeled totally impractical because of the wide divergencies between countries' laws, including chasms between common law and civil law countries (e.g., UCC Article 8 and Article 9 revisions and the 1978 amended US Bankruptcy Codes),[24] with many in the more numerous civil law country bloc generally rejected as unacceptably radical. Advanced work was in fact concluded thereafter in both fields as the economic effects of each became more widely recognized.
- Part of this was due to differences in legal cultures.[25] Civil law country blocs generally change commercial laws much more slowly than common law countries are willing to do; civil law tradition favors rationalized legal principles deductively arrived at to justify changes, rather than common law acceptance of prevailing market and legal practices. Deductive legal changes were not satisfied by either the UCC or US bankruptcy code changes referred to (for example the options for reorganization and refinancing instead of liquidation in bankruptcy or the perfection and priority rules for non-possessory interests and mobile assets under the UCC).
- A number of international bodies, including the World Bank Group, the Regional Development Banks such as the Asian Development Bank and others, supported both the UCC initiatives and those of the US Bankruptcy Code, as eventually have a growing number of civil law countries. Significant advances have continued to result from both legal project areas.
- The Hague Conference also took up changes in the field of investment securities initiated by UCC Article 8[26] to deal with applicable law and the effect of high-volume transactions moving rapidly across borders in the new age of computers, where means to quickly identify applicable law at times was necessary. Solutions

23. *UNCITRAL Model Law on Electronic Commerce (1996) with additional article 5 bis as adopted in 1998*, UNITED NATIONS, https://uncitral.un.org/en/texts/ecommerce/modellaw/electronic_commerce.

24. U.C.C. § 8 (AM. L. INST. & UNIF. L. COMM'N 1994); U.C.C. § 9 (AM. L. INST. & UNIF. L. COMM'N 1998); Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, 11 U.S.C. §§ 101–1501.

25. *See generally,* BORIS KOZOLCHYK, COMPARATIVE COMMERCIAL CONTRACTS: LAW, CULTURE AND ECONOMIC DEVELOPMENT (2014) (surveying the legal cultures of various countries and systems and the widespread differences that result).

26. U.C.C. § 8 (AM. L. INST. & UNIF. L. COMM'N 1994).

were based on workable standards that could be applied rapidly, rather than satisfying structured and rationalized bases related to previous standards, the later more known for the battle between various complex theories of applicable law.

- UNCITRAL, during this time, took up aspects of cross-border business insolvency law, closely related to secured finance law, leading first to a 1997 Model Law[27] on procedural aspects of cross-border cases – which became the new Chapter 15 of the US Bankruptcy Code,[28] followed by a number of significant legal texts including recognition and promotion of possible options of refinance and reorganization of businesses rather than liquidation, including debtor-in-possession, priority for workout financing, etc. (all of which were considered at first unacceptable as without precedence in many legal systems, and at worst the creation of a "debtor's heaven").

II. INTERNATIONAL COMMERCIAL LAW HARMONIZATION: TAKEAWAYS

From the foregoing selected mini-history of some developments in the late 1990s and 2000s (and apologies to those interested in the various other developments in that period that cannot be covered here, several takeaways emerge:

(A) The Need for Periodic Reassessment

First, there is a need to periodically re-assess needed areas of change and consider new approaches beyond previous efforts, valuing legal and economic benefits and achievability, rather than slow incremental changes within the bounds of existing traditional structures.

(B) The Need to Unpack the Term "Harmonization"

The concept of harmonization must be unpacked to get the right focus on the types of proposed commercial law reforms, which can change the dynamics both of negotiation and implementation. A given project, of course, can have all three of the following elements, but it is essential to know which provisions fit within which categories in order to work toward an effective result. These three (one can further subdivide these) can be said to be the main categories:

- Harmonization of established (best) practices of differing well-developed commercial law systems.

27. *UNCITRAL Model Law on Cross-Border Insolvency (1997)*, UNITED NATIONS, https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency.

28. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, 11 U.S.C. § 1501.

- Economic Results-Based law reforms (regardless of which legal systems at the time have tested those, or whether they have been adopted by many states involved).
- Laws speculating on economic and legal developments – and adopted ahead of significant practice experience or adoptions in various national law.

A. "HARMONIZATION OF BEST PRACTICES"

The harmonization of best practices can be seen as a narrower term – a balancing between existing well-developed commercial law systems.

Prime examples of this are the 1980 "CISG" (the UN/Vienna Convention on Contracts for the International Sales of Goods),[29] a successful balance between contemporary common law and civil law generally, such as between UCC Article 2[30] and similar common law countries on the one hand, and civil law countries in various regions of the world. Other legal systems, such as the Soviet socialist law area, some Arabic law systems at the time, and others while having their own approach to commercial law, were less adapted to the free market compatible legal system work done by the international PIL bodies here focused on.

The UNIDROIT Principles of International Commercial Contracts, first released in 1994, and revised since that date, is a parallel example of a balanced set of best practices that can be cited and applied by parties as contract rules to the extent permitted in various countries, avoiding many unresolved issues about dueling sets of applicable laws.[31]

Although outside the scope of these comments, reference here should be made to a number of examples over several decades of model laws or other legal texts on international commercial arbitration, which mostly blend best practices of different legal systems with well-developed arbitration law traditions.

B. ECONOMIC RESULTS-BASED LAW REFORMS

This category covers projects drawing on experiences in law reform by some states (often not a majority), leading to new texts, whether treaties, model laws, guidelines etc., being concluded *aimed at particular economic effects and legal mechanisms to accomplish that*. It did *not depend* on *broad harmonizing of existing legal systems* but sought to promote new laws the economics of which have been tested in one or more jurisdictions.

29. United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, S. TREATY DOC. No. 98–9, 1489 U.N.T.S. 3. (1983).

30. U.C.C. § 2 (AM. L. INST. & UNIF. L. COMM'N 2002).

31. INT'L INST. FOR THE UNIFICATION OF PRIVATE L., *Principles of International Commercial Contracts*, art. 6.2.2 (1994).

An example would be the various international legal texts developed after the mid-1990s on modern (UCC Article 9 style) secured finance, including treaties, model laws, and practice guides developed at UNCITRAL, UNIDROIT, ICAO, the World Bank, IMF, OAS, and others. These treaties covered secured finance of moveable property generally, plus specific markets for aircraft, railroad equipment, space satellites, construction etc.

Coordination between international PIL bodies such as UNCITRAL, UNIDROIT, and others was often effected during negotiation to resolve potential conflicts between the texts, work done by these and other bodies. An example was the concurrent negotiation of the ground-breaking UNCITRAL Convention on Assignment of Receivables, done side-by-side with the UNIDROIT/ICAO Convention on secured finance of mobile equipment (the Cape Town Convention).[32] In the Americas, to accommodate Spanish law-type civil law statutes, the OAS adopted a comparable secured finance law model along the lines of the French-law based Quebec civil law system, which achieved similar results as did UCC Article 9.[33]

Another illustration of a results-driven harmonization has been investment securities. By the 1980s, the age of computers created high volume trading and ease of high-speed transferring of securities between countries and other factors, creating mountainous problems determining applicable law to various securities within an account was critical to be done quickly. The 2002 Hague Securities Convention drew on changes that were strictly result-based and tested at that time only in a few countries (the US system was a key example) but which worked quickly by virtue of the provisions of that treaty.[34]

A useful example of *applying different modes of "harmonization' to the same subject* was the Convention (multilateral treaty) that came after the Hague on investment securities, done under UNIDROIT auspices, and known as the Geneva Convention on certain rights that would generally accompany transfers of securities between countries.[35] That Convention, like the Vienna Convention on contracts for the sales of goods discussed above, followed the model of a blending of best practices between legal systems from countries with significant securities trading markets.

32. Cape Town Convention on International Interests in Mobile Equipment, Nov. 16, 2001, 2307 U.N.T.S. 285.

33. U.C.C. § 9 (AM. L. INST. & UNIF. L. COMM'N 1998).

34. *Hague Conference on Private International Law: Draft Convention on the Law Applicable to Certain Rights in Respect of Securities Held With an Intermediary*, SEC, https://www.sec.gov/divisions/marketreg/hagueconf702.htm.

35. *UNIDROIT Convention on Substantive Rules for Intermediated Securities*, UNITED NATIONS COMM'N ON INT'L TRADE L., https://www.unidroit.org/instruments/capital-markets/geneva-convention/.

C. LAWS ANTICIPATING ECONOMIC AND LEGAL DEVELOPMENTS BUT AHEAD OF SUBSTANTIAL ACTUAL MARKET AND LEGAL EXPERIENCE

Laws intended to promote E-commerce laws have been a recent prime example. Rapid technology developments, plus widely differing legal approaches to those developments, led to efforts by various bodies unsuccessfully to formulate basic rules to facilitate electronic transactions. Some earlier projects had focused, for example, on proposed new global registries, some on public key infrastructure (PKI), some on electronic data interchange (EDI) and other models, all of which rested on technology applications, and were abandoned at various organizations as impractical or too costly for general markets or when technologies or legal usages changed.

Eventually, this effort landed at UNCITRAL, where after starting out with a technology-related project (EDI), it completely switched its approach midstream in the negotiation to a technology-neutral enabling law approach, because of changes in practices and potential costs of applying technology-based rules. The first UNCITRAL Model Law on e-commerce transactions law then emerged in 1996, which was an important resource in the concurrent development by the Uniform Law Commission (ULC) in the US of the Uniform Electronic Transactions Act (UETA).[36] The UETA has essentially become uniform state law in the US, and the subsequent Federal "E-signature" Act[37] deferred many of its provisions to state law for states which adopted UETA.[38]

III. COMMERCIAL LAW PROCESS AND PREDICTABILITY

Commercial law predictability especially for cross-border transactional commerce includes the need to price risks in both contract and financing arrangements *ex ante.* That often as a practical matter rests on "industry best practices" and credit industry risk analyses, and much less on the slow movement of cases in dispute. The latter often frequently involve disputes as to applicable laws, and uncertainties as to the effect of one country's case results upon other countries, further diluting the effects of formal dispute resolution on predictability.

36. UNIF. ELEC. TRANSACTIONS ACT (UNIF. L. COMM'N 1999).

37. Electronic Signatures in Global and National Commerce Act, 15 U.S.C. § 96.

38. The recent 2022 adoption by the Uniform Law Commission of Article 12 of the UCC was designed to accommodate technology-related market and transactional changes ahead of substantial legal system experience. The new Article 12, sometimes known as the "2022 Amendments" bundles provisions affecting a number of Articles of the UCC in order to accommodate transactional changes involving e.g., crypto-currencies, blockchain, and other electronic developments., and to promote commonality amongst state laws. Whether it effectively anticipates the transactional effects of the technology developments or is widely adopted by the states (as was the UETA), remains to be seen.

Private international law treaties involving commercial law typically differ from public international law treaties in various ways, and generally achieve greater predictability as to transacting parties' rights and liabilities.

A. MORE DETAILED PROVISIONS

Private law treaties and model laws typically are drafted in greater detail, often sufficient to be applied as drafted, unless in a country that requires them to be further enacted as domestic legislation, a process that may lead to restating the provisions and attendant additional risks of differing results. That said greater detail of commercial law provisions generally increases the degree of commercial predictability.

In the US, unlike some countries, treaty practice generally allows "self-executing" treaties, whose terms can be applied as stated. The CISG, Assignment of Receivables Convention, and the Cape Town Convention were all ratified and applied as law as stated.[39]

As to the greater specificity and, usually, therefore, greater predictability for transacting parties of commercial law treaties, an example of a public international law treaty is useful by way of comparison. The seminal and widely adopted public law treaty on basic rights in outer space, the 1967 UN Treaty on (peaceful uses of) Outer Space,[40] and several subsequent treaties explicating some of it contain a number of key terms and provisions which are undefined and their effects opaque. While considered still today as the fundamental treaty on which most space law is based, the minimalist language – common to public international law treaties – has led to widely differing interpretations and practices amongst member states, achieving much less legal predictability. That said, without that approach, agreement on that widely adopted treaty likely could not have been reached.

If applied to a commercial law litmus test, the provisions that are quite uncertain in meaning or given widely differing interpretations are often assigned minimal value for credit finance risk assessment, or contract or liability risk assessment, and thus achieve less predictability. Dealing with foreign jurisdictions adds further layers of predictability risk. A comparison of the 1967 UN treaty above to the UNIDROIT Protocol on space satellite finance to the Cape Town Convention graphically illustrates the difference in detail.

39. The Cape Town convention and aircraft finance protocol did require technical legislation to merge some provisions into various FAA statutes, but the operative commercial law provisions were considered self-executing. In recent years the then majority party in the Senate Foreign Relations Committee required the treaty report to indicate whether it was self-executing. A related issue is whether it is effective as against State law as well as federal, a matter beyond the scope of this paper.

40. Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, Jan. 27, 1967, 18 U.S.T. 2410, 610 U.N.T.S. 205.

B. PIL TREATIES GENERALLY ARE ALSO TREATED AS CREATING PRIVATE RIGHTS OF ACTION FOR COMMERCIAL PARTIES

The treaty-related rights in private law treaties have traditionally been exercisable directly by parties to a transaction in whatever administrative or judicial *fora* may be available *without leave of governments*. By way of comparison, in most cases disputes under public law treaties typically depend on being presented by governments and resolved between states, some with access to treaty established dispute resolution not under the control of the private parties involved.[41]

C. THE ROLE OF NON-GOVERNMENTAL ORGANIZATIONS (NGOS)

Intergovernmental bodies that permit substantial participation by NGOs include those that specialize in private international law, and often do not include public law-focused bodies. In bodies dealing with private commercial law that permit this, it is common to limit that to NGOs with appropriate technical experience in the particular commercial sector at issue, and usually not general civil society NGOs. In international bodies which commonly do PIL work, this also usually means NGOs are allowed to present and promote views on policies and make proposals but are not counted when assessing whether a substantial majority has been reached or vote when on rare occasion voting is used.

This type of proceeding can often better keep commercial law texts targeted on effective results, and take closely into account industry and transactional practices, thus increasing commercial predictability. Many public international law bodies, on the other hand, tend to substantially restrict the functions of NGOs.

NGO participation was very important in the progress achieved in recent years on secured finance and insolvency law. While this working method is often assumed to be ordinary at private law bodies such as UNCITRAL and the Hague Conference,[42] experience has shown that it cannot be taken for granted in individual working groups and sometimes needs to be approved for each separate project.

41. Middle grounds exist, which include elements of both public and private law, such as in some "Investor/State treaties" where dispute provisions may provide for arbitration processes that involve governments as well as private counter-parties, and which can be initiated by either. Those developments as well as the capacity to bring sovereign governments into arbitration are beyond the scope of this paper.

42. *Hague Conference on Private International Law: Draft Convention on the Law Applicable to Certain Rights in Respect of Securities Held With an Intermediary*, SEC, https://www.sec.gov/divisions/marketreg/hagueconf702.htm.

D. PRIVATE LAW TREATIES GENERALLY PERMIT VARIATIONS IN SPECIFIC NAMED PROVISIONS VIA FORMAL NOTICE IN ADVANCE (DECLARATIONS)

These are significant for private law (PIL) treaties for commercial and financing predictability, and therefore it is important to maintain this practice. Also importantly these are not "reservations" as that term is used under the Vienna Convention on the Law of Treaties (VCLT),[43] which deals basically with public international law treaties, and whose provisions vary in some ways from accepted PIL treaty practice.

Under the VCLT treaty, "reservations" (i.e., notifications by a state that it will not recognize particular provisions) are applied generally to the treaty by the reserving state, but the reservation can be rejected by another ratifying state.[44]

In a private law treaty, a "Declaration" *applies only in the declaring state and when that states' law is applied*, and is *not subject to being rejected by other states party* to the treaty. These differences are significant in commercial law since they allow adjustments deemed necessary by ratifying states but require formal advance notice and are only applicable when the law of that state is applied. While it does introduce variations between countries, this allows transaction parties, financing entities, and others greater predictability to assess legal and financing rights in advance.

E. UTILIZING INTERNATIONAL TEXTS OTHER THAN BY TREATY RATIFICATION

Negotiating histories can be utilized by commercial parties as up-to-date templates to assess risks arising in various countries' practices as well as risks arising from inconsistent laws of a ratifying state, often in commercial or other codes that remain on the books without clarification as to the interaction with the treaty or model law.

Model laws can be effective, and treaty texts may also serve effectively as models without ratification. Modern examples in US practice are (1) the UNCITRAL Model Law on cross-border insolvency case procedures, which in the US was adopted as the new Chapter 15 of the Bankruptcy Code;[45] and (2) the 1996 UNCITRAL Model Law on basic rules for e-commerce

43. Vienna Convention on the Law of Treaties art. 32, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331. It should be noted that while the US recognizes and follows most provisions of the VCLT, it has not formally adopted the treaty for reasons unrelated to this topic.

44. *Id*.

45. *UNCITRAL Model Law on Cross-Border Insolvency (1997)* UNITED NATIONS, https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency; Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, 11 U.S.C. § 1501.

transactions, which became a primary sourcebook for the ULC's UETA.[46] (While outside the scope of this paper, the field of commercial arbitration at UNCITRAL has produced significant examples of the effectiveness model laws can achieve).

Lesser known, but an example of a model law effective without having been adopted was the earlier UNCITRAL Model Law on cross-border electronic credit transfers, developed concurrently in the early 1990s with UCC Article 4A.[47] The Model Law became a convenient litmus test for countries to generally observe, with certain exceptions, if they contemplated adopting their own legislation on that early e-commerce banking law topic, but still wanted their banking systems to work seamlessly with the Brussels-based Society for Worldwide Interbank Financial Telecommunication (SWIFT) interbank electronic payment order system.[48]

F. PICKING THE RIGHT INTERNATIONAL ORGANIZATION (IO)

Experience of an IO with commercial law topics and experience with private law-type texts are both important. If the IO is a governmental membership body, the willingness to allow broad participation of NGOs (although voting is usually limited to govt reps) discussed above is often a significant factor.

The willingness to apply a workable version of the *"substantial majority"* rule as being sufficient to determine "consensus" is also significant. Otherwise, if rules are similar to more political bodies in the UN system, for example, often formal objection of any state can prevent consensus adoption, and since actual voting is usually avoided so as not to have a 51% type decision, the objected to paragraph or provision is often dropped. Negotiating complex or detailed commercial law provisions under those circumstances could then be quite problematic.

One example of applying a strict consensus rule is illustrative – seeking to adopt model rules on electronic commerce transactions at the OAS, US proposed rules had the support or non-objection of all delegations – except one, whose objection was not based on any issue with the substantive rules but was nevertheless *per se* enough to block adoption.[49]

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46. *UNCITRAL Model Law on Electronic Commerce (1996) with additional article 5 bis as adopted in 1998*, UNITED NATIONS, https://uncitral.un.org/en/texts/ecommerce/modellaw/electronic_commerce; UNIF. ELEC. TRANSACTIONS ACT (UNIF. L. COMM'N 1999).

47. U.C.C. § 4A (AM. L. INST. & UNIF. L. COMM'N 2012).

48. *About Us*, SOC'Y FOR WORLDWIDE INTERBANK FIN. TELECOMM., https://www.swift.com/about-us.

49. This is *not* to say that the substantial majority rule is appropriate in all bodies or subjects. In some areas of law other than commercial law, or because of the nature of the body involved, maintaining a blocking ability may be important. This author for example has gone down the hallway from an UNCITRAL meeting to participate at meetings of another U.N. Commission where for arguably good reason strict consensus rules were followed. Much time therefor was spent assessing which sentences might or might not be objected to by various delegations, and accepting

IV. THE FUTURE?

A. POTHOLES AHEAD? WHAT POTHOLES?

Economic conditions, political patterns, and other developments can curtail progress through commercial law harmonization. Commonly discussed today current breakdowns in supply chain functions, greater risks in relying on off-shore production as well as prior years of lowering trade barriers (a type of collective harmonization) have resulted in resistance to some import-export trade arrangements and to trade agreements. Growing regional or country geopolitical conflicts also in turn make cooperation in international bodies more complicated and harmonization of commercial law thus more difficult.

Outside the US, secured finance reforms, for example, adopting UCC Article 8 or Article 9[50] type laws, can be done by adopting one or more treaties or applying model laws, including those referenced above. The Article 9 type laws on secured finance in particular can significantly expand the range of commercial finance in an adopting country, especially in developing countries, even for small enterprises and often including the "informal sectors" in many countries. But current experience indicates, notwithstanding the economic benefits that can be achieved, these changes have not always been welcomed by existing interests in other countries.

A different situation in the US was the recent and ultimately unsuccessful opposition to reauthorizing or refunding the Export-Import Bank (EXIM), given the purpose of that agency to support US exports as well as certain imports.[51] Much of what EXIM did reduced exposure to various overseas risks not encountered within the US, arguably leveling some aspects of the economic field. EXIM's work also drew on commercial law harmonization projects such as supporting the adoption of UCC Article 9[52] type laws which had been actively done through a number of international bodies.

Promoting the attendant commercial law changes overseas were not cited as issues in the EXIM conflict. While dodging the bullet, the lessons are there, and political support in some circles for internationalizing efficient commercial laws may not always be counted on. Multilateral or bilateral treaty work on trade and cross-border services, sometimes seen as promoting more receptive zones for cross-border commercial law reform, may fall to anti-trade movements even though as noted earlier commercial law is not related to what goods can enter what markets (the domain of trade agreements).

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what was left. In that setting one would not likely get far negotiating complex commercial law provisions.

50. U.C.C. § 9 (AM. L. INST. & UNIF. L. COMM'N 1998).

51. Ezra Klein, *The fight over the Export-Import Bank, explained,* VOX, https://www.vox.com/2015/6/30/18093622/export-import-bank (last visited Mar. 14, 2023).

52. *Id*.

B. COMMERCIAL LAW MODERNIZATION AS PART OF TRADE AGREEMENT NEGOTIATIONS?

This question that arises from time to time – Whether to seek inclusion of detailed commercial law provisions as a sidebar chapter in trade agreements.

Efforts to do that are an uphill climb, and while occasionally proposed, are not often done. Trade agreements are primarily about the movements of goods and services across borders, plus tariffs and related factors. Agreements to add sidebar chapters, commonly including environmental issues, labor rights, etc., while politically visible often remain secondary. In addition, adding a chapter on commercial law rules has a fair likelihood of resulting in generalized rules or goals, rather than provisions countries are obligated to implement or provisions detailed enough to be applied.

But – arguably – it then gets the subject out there publicly and provides an orientation for rules, if implemented at a later point by one or more negotiating states – thus potentially advancing that purpose.

The most visible example recently is the Trans-Pacific Partnership Agreement (TPP),[53] now in force for a number of countries, but not the US which although an important mover in its negotiation, withdrew for political reasons unrelated to the e-commerce rules chapter. The negotiators considered a sidebar chapter on e-commerce transaction rules separate from the trade provisions – proposed along with others by the US, and one of the few trade agreements to consider more specific provisions of that nature. But with US withdrawal the final version became more like soft law proposals akin to future goals, rather than wording parties could rely on.

So, should we look for and promote opportunities to include transactional commercial law provisions in appropriate US trade agreements? The same question relates to whether to propose projects of that nature at WTO or other international trade negotiation agencies, which operate differently than bodies like UNCITRAL, UNIDROIT or the HAGUE – or avoid it?

C. SUGGESTIONS FOR THE ACADEMY

The potential for economic and civil society progress through efforts to harmonize commercial laws with other countries can be quite significant, if they focus on laws that are economically and legally productive. Some of those expand the scope of persons who can access finance or other commercial opportunities and can include informal sectors which are quite large in some countries. Other sectors which are more limited in their scope have considerable potential to increase local economies. The World Bank

53. James McBride, Andrew Chatzky, & Anshu Siripurapu, *What's Next for the Trans-Pacific Partnership (TPP)*?, COUNCIL ON FOREIGN RELATIONS (Sep. 20, 2021), https://www.cfr.org /backgrounder/what-trans-pacific-partnership-tpp.

Group and others have seen these potential benefits from upgrading commercial laws for some time.

The role played by law schools in this has been demonstrably important, as the Symposium at Brooklyn Law School (BLS) made clear (and Professor Neil Cohen has been an outstanding example of the effect the Academy's experts can have on the international process).

It is hoped that those efforts and the role of the BLS faculty – and its alumni – will be expanded in the coming years. And consideration given to bringing more law students into contact with the arena of international private law, with its direct connection to various disciplines of practical law. This may enable more students to be adaptable to a world in which experience so far of the 21st century indicates it is likely to be increasingly interdependent, even if not cooperatively so.