

THE FUTURE OF HARMONIZATION: SOFT LAW INSTRUMENTS AND THE PRINCIPLED
ADVANCE OF INTERNATIONAL LAWMAKING

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ABSTRACT:

With vast amounts of financial and intellectual capital already being spent on international harmonization, inefficiencies infecting the lawmaking process render it ineffective and threaten the goodwill of the whole enterprise. This paper represents a synthesis of some of the most meaningful criticism about the perceived failures of the classic vehicle for harmonization—international conventions. In it, we have highlighted these failures, looked for their underlying causes, and searched for compelling soft law alternatives. This paper seeks to show that, above all, conventions suffer from over ambition. By intervening in the legal marketplace, underestimating national distrust and legal conflict, and insisting on uniformity, conventions create a rigid enterprise that simply tries to do too much. Soft law, on the other hand, embraces the organic emergence of law from practice, in which best solutions rise to the top. In doing so, soft law creates rules as they “should” be, while conventions create rules as they “must” be—the fragmentary result of compromised consensus. It would be a misconception to envisage a future of harmonization and unification of commercial law solely driven by the market operators and loosely framed by soft law instruments. However, it would be a similar misconception to envisage a future in which conventions operated on a business-as-usual basis. Thus, in the areas most fraught with failure, this paper seeks to propose ways in which soft law offers compelling solutions.

CONTENTS

I. INTRODUCTION: THE FUTURE OF HARMONIZATION	3
II. THE GOAL OF HARMONIZATION	4
III. SOFT LAW DEFINED	4
IV. INTERNATIONAL CONVENTIONS REDUCE COMPETITION	6
(A) THE PHILOSOPHICAL BENEFITS OF A LEGAL MARKETPLACE	
(B) THE UCP AS EMBODIMENT OF THE PHILOSOPHY	
(C) OBJECTIONS TO THE PHILOSOPHY AND THE SOFT LAW RESPONSE	
V. INTERNATIONAL CONVENTIONS RESULT IN FRAGMENTARY LAW	9
(A) NATIONAL DISTRUST AND LEGAL CONFLICT IDENTIFIED	
(B) THE RESULT OF NATIONAL DISTRUST AND LEGAL CONFLICT IN THE CISG	
(C) DO INTERNATIONAL CONVENTIONS JUST NEED TIME TO WORK?	
(D) THE PICC ALTERNATIVE	
VI. INTERNATIONAL CONVENTIONS INSIST ON UNIFORMITY OVER SIMILARITY	14
(A) THE LIMITED SCOPE OF CONVENTIONS UNDERMINES UNIFORMITY	
(B) THE INSUFFICIENT NUMBER OF RATIFICATIONS UNDERMINES UNIFORMITY	
(C) THE HOMEWARD TREND	
(D) SOLUTION TO THE ACCESS PROBLEM?	
(E) THE SHIFT TO ARBITRATION UNDERMINES UNIFORMITY	
(F) RESPONSES TO THE UNIFORMITY PROBLEM	
VII. INTERNATIONAL CONVENTIONS FAVOR RIGIDITY OVER FLEXIBILITY	19
(A) THE PHILOSOPHICAL BENEFITS OF PARTY CHOICE	
(B) OBJECTIONS TO THE PHILOSOPHY AND THE SOFT LAW RESPONSE	
VIII. CONCLUSION	21

I. INTRODUCTION: THE FUTURE OF HARMONIZATION

The received wisdom, at least among some notable scholars, is that the classic vehicle for harmonization has failed of its essential purpose, i.e., international conventions have become frequently muddled, multi-cultural compromises of little practical importance.¹ In this paper, we do not quarrel with the received wisdom. Rather, we seek to synthesize a portion of the existing scholarship and identify some of the underlying reasons for this failure. In doing so, we shall conclude that non-binding, soft law instruments are, on the whole, better suited to the goal of harmonization than international conventions.

We shall begin by identifying this goal. Surprisingly, debates in legal futurology often neglect to identify an agreed-upon goal at the outset, an omission that usually transforms an otherwise thoughtful exegesis into an unhelpful shouting match, where scholars simply talk past one another.² Likewise, we shall clearly define what we mean when we say “soft law.” That is, if we insist on comparing the successes *vel non* of international conventions to those of soft law, we should clearly define the margins of our comparison.

In the proceeding sections, we shall examine four core ways in which conventions fail to achieve the goal of harmonization.³ If, at times, our examination adopts a negative approach—how conventions fail—as opposed to a positive one—how soft law succeeds—it is because the term “soft law” encompasses a vast array of international instruments. Making general statements about such a broad area of law would be

¹ See e.g., Paul Stephan, *The Futility of Unification and Harmonization in International Law*, 39 VA. J. INT'L L. 743 (1999). See also Loukas Mistelis, *Is Harmonisation a Necessary Evil? The Future of Harmonisation and New Sources of International Trade Law*, retitled as *Is Harmonisation a Necessary Evil? Use and Abuse of Comparative Law and the Future of Harmonisation*, in FOUNDATIONS AND PERSPECTIVES OF INTERNATIONAL TRADE LAW 1 (I.F. Fletcher, L. Mistelis and M. Cremona eds.) (2001); Herbert Kronke, *Methodological Freedom and Organizational Constraints in the Development of Transnational Commercial Law*, 51 LOY. L. REV. 287 (2005) [hereinafter *Methodological Freedom*]; Herbert Kronke, *International Uniform Commercial Law Conventions: advantages, disadvantages, criteria for choice*, 5 UNIF. L. REV. 13 (2000) [hereinafter *International Uniform Commercial Law Conventions*].

² See Mistelis, *supra* note 1, at 1 (using “legal futurology” to investigate sources of international trade law).

³ These four reasons represent an attempt only to highlight some predominant themes; they are by no means exhaustive.

unhelpful. Our definition of conventions, on the other hand, is far more discrete and more susceptible to meaningful criticism.⁴ Therefore, the goal of this section is to expound upon these four key problems and, where appropriate, highlight soft law instruments that offer compelling alternatives.

Credible arguments exist in favor of conventions and we shall seek to identify them along the way. Indeed, the former Secretary General of UNIDROIT, Herbert Kronke, warns it would be a “misconception to envisage a future of harmonization and unification of commercial law solely driven by the market operators and loosely framed by soft law instruments.”⁵ It is self-evident, however, as we peruse treaty collections that are “littered with conventions that have never come into force,”⁶ that the classic vehicle for harmonization has failed in many respects. Despite genuine concerns, soft law does not advocate pure self-regulation, but rather a principled advance in international lawmaking.

II. THE GOAL OF HARMONIZATION

As we mentioned above, all exercises in legal futurology confront a common semantic problem.⁷ Namely here, if we insist on taking the position that soft law instruments are better suited to the goal of harmonization, we must define what that goal actually is. In surveying the literature, many goals can be identified, which include, but are not limited to, the following: (1) reducing encumbrances of international transactions, (2) avoiding the perceived inefficiencies and entrenched nationalism of conflict of laws rules, (3) fostering trust between nations, (4) avoiding economic, political and even

⁴ In particular, we will use the United Nations Convention on Contracts for the International Sale of Goods (1980) (“CISG”) as an exemplar.

⁵ *International Uniform Commercial Law Conventions*, *supra* note 1, at 20.

⁶ *Id.* at 16 (citing Roy Goode, *International Restatements of Contract and English Contract Law*, 3 UNIF. L. REV. 231, 232 (1997) [hereinafter *International Restatements*]).

⁷ The idea of the semantic problem as it pertains to questions of legal philosophy is best illustrated by Ronald Dworkin:

We can argue sensibly with one another if, but only if, we all accept and follow the same criteria for deciding when our claims are sound You and I can sensibly discuss how many books I have on my shelf, for example, only if we both agree, at least roughly, about what a book is. We can disagree over borderline cases: I may call something a slim book that you would call a pamphlet. But we cannot disagree over what I call pivotal cases. If you do not count my copy of *Moby-Dick* as a book because in your view novels are not books, any disagreement is bound to be senseless.

RONALD DWORIN, *LAW'S EMPIRE* 45 (1986).

military conflict, (5) solving perceived problems in the law, and (6) enhancing the role of legal advisors to international business people.⁸ Indeed, as many goals exist as there are writers on the subject. With respect to international commercial law, however, the goal is best described as the reduction of legal risk associated with international commerce,⁹ not only because it says the most in the least amount of words, but also because the other putative goals can be subsumed there under. The statement reminds us what we're talking about, which assuredly is *not* international criminal law or family law (areas of law that are forced to confront thorny issues like repair, morality, and fidelity). The harmonization of international commercial law is about money, or more specifically, the legal transference of money between merchants and businesses. No higher goal exists for such an enterprise than efficiency and the reduction of costs.¹⁰

III. WHAT WE MEAN WHEN WE SAY "SOFT LAW"

Next, if we insist on taking the position that soft law is better suited to achieve this goal, we should clearly define what we mean when we say "soft law." As a starting point, soft law is a comparative term and thus is probably only meaningful when used in contrast to the term "hard law." A brief digression into the definition of hard law is therefore warranted.

International conventions are widely seen as the embodiment of the "hard law" approach, consisting of "bilateral and multilateral treaties or conventions which either require[] that a ratifying state implement[] them by adapting its domestic law

⁸ Stephan, *supra* note 1, at 745. See also ROY GOODE, HERBERT KRONKE, EWAN MCKENDRICK AND JEFFREY WOOL TRANSNATIONAL COMMERCIAL LAW: TEXT, CASES AND MATERIALS 191-192 (2007) [hereinafter *Commercial Law*].

⁹ Stephan, *supra* note 1, at 745. Stephan identifies this goal as one of three primary goals of harmonization, stating that a "benevolent lawmaker's first objective should be predictability and stability in international commercial relations." *Id.* at 4. Only insofar as he included the other two goals do our positions differ.

¹⁰ Roy Goode provides a more thoughtful sketch of why reducing legal risk is the goal of harmonization:

Commercial law is not devised in the abstract but is a response to the practices and legitimate needs of merchants. It is mercantile practice that fashions commercial law; and mercantile practice evolves as a response to impediments to trade, whether legal or practical, that has to be surmounted and to the driving force of competition as each enterprise strives to attract increased business by developing new goods and services. *Commercial Law*, *supra* note 8, at 6-7.

accordingly, or which create[] for themselves uniform laws applicable *tel quel* in all contracting states.”¹¹ For our purposes, international conventions, or “hard law,” are characterized by their intention to become legally binding. States and parties who sign up to an international convention create default rules for themselves and, subject to some reservations, are obliged to abide by the convention’s terms.

Soft law, on the other hand, is everything else. Because the term “soft law” is so broad, it encompasses instruments that do not necessarily have much in common. Model laws, for example, look and sound like Law with a capital “L,” in all respects except being binding *per se*, whereas contractually incorporated, non-binding rules promulgated by the International Chamber of Commerce often look like a list of acronyms and hieroglyphics decipherable only by seasoned banking practitioners. Moreover, soft law itself can be binding, insofar as parties consent to develop a relationship that excludes the application of hard law consequences.¹² So, if soft law can be characterized at all, it is best described as any source of nonbinding international law, which depends for its survival upon incorporation into domestic law or party contract, and which can be continually improved upon by practical refinement.

IV. INTERNATIONAL CONVENTIONS REDUCE COMPETITION

Having identified the goal of harmonization and having properly defined the margins of our comparison between soft law and conventions, we now turn to the first core reason in which soft law is better suited to the goal of harmonization—international conventions reduce the room for competition among legal systems by favoring compromised consensus over self-determined advocacy among legal systems.¹³

A. *The Philosophical Benefits of a Legal Marketplace*

Our first objection to international conventions is a philosophical one, which rests on a presumption that advocacy is at the heart of the law. Be it the disputation of evidence in a courtroom or the vigorous negotiation of favorable terms in a contract, advocacy is the law’s means of directing information to its highest possible good. In this

¹¹ *Id.* at 194.

¹² H. Hilgenberg, *A Fresh Look at Soft Law*, 10 EUR. J. INT’L. L. 499, 513 (1999).

¹³ *International Uniform Commercial Law Conventions*, *supra* note 1, at 19.

sense, the law acts like a marketplace, in which the best ideas survive and the weakest perish. Conventions intervene in this marketplace and, as a result, reduce competition among legal systems.

As a riposte to those alarmed by the “free market” approach, one need only refer back to the goal of harmonization itself, which we made pains to define at the outset—reducing legal risk associated with international commerce. Why shouldn’t harmonization efforts in this field, which are focused solely on facilitating business, adopt the same marketplace mentality that drives the engine of business itself? In the competitive world of international commerce, businesses quietly advocate their favored position everyday by drawing upon experience to adopt organic rules that actually work.

The famous American jurist, Oliver Wendell Holmes, said that “the life of the law has not been logic; it has been experience.”¹⁴ In this manner, the harmonization of international instruments should result from an encounter of business and legal cultures, in which alternative ways of approaching the same legal problem advocate their best case, rather than from a “purely technical debate on some piece of legislation” in the midst of a diplomatic conference.¹⁵ Soft law offers this elevation of experience over technical debate because it places a higher premium on the real world encounter of business practice.

B. The UCP as Embodiment of the Philosophy

The elevation of experience over technical debate is nowhere more convincingly illustrated than in the work of the International Chamber of Commerce (“ICC”).¹⁶ Of the instruments produced by the ICC, perhaps none is more successful than the Uniform Customs and Practice for Documentary Credits (“UCP”).¹⁷ The documentary credit arose as a business practice and is based on actual risk in trade. It is widely considered the

¹⁴ *Commercial Law*, *supra* note 8, at 736 (citing THE COMMON LAW 1 (1881)).

¹⁵ *Id.*

¹⁶ *Commercial Law*, *supra* note 8, at 37. The ICC is the international, non-governmental organization representing world business, which has produced numerous uniform rules that are given effect by incorporation into contracts. It “differs significantly in its structural form from” public bodies such as UNCITRAL, UNIDROIT, and the Hague Conference on Private International Law in that it “chooses its experts more on industry interest than academic prestige.” *See* Stephan, *supra* note 1, at 752-53.

¹⁷ All references in this paper are to the UCP 600.

classic form of international export payment because it represents a purely autonomous undertaking, which relieves importers and exporters of substantial risk.¹⁸

When the ICC harmonized international letter of credit practice in the UCP, it simply gave form to the banking practice that had “advocated” most persuasively for itself in the legal marketplace.¹⁹ Now, it is “frequently cited as the foremost example of how international business self-regulation can be more efficient than treaties, government regulation, or case law. Indeed, legal commentators have called the UCP the most successful act of commercial harmonization in the history of world trade, with the UCP [500] currently observed by banks in approximately 180 countries.”²⁰

C. Objections to the Philosophy and the Soft Law Response

Defenders of international conventions take issue with this approach, specifically because it ignores the practices of emerging markets—an indignity that lengthy debate at diplomatic conference is apparently less likely to inflict. To some extent, this represents a major shortfall of soft law, not in reality, but in the perception that it is law made by the powerful, which entrenches existing financial power structures. Laws promulgated by UNCITRAL, for example, come into force only after taking account of the needs of developing nations.²¹

This objection is unconvincing for two reasons. Foremost, it mislays the forum where debate between legal systems should occur. Presumably, had the practice of an

¹⁸ *Commercial Law*, *supra* note 8, at 357 (citing Guillermo Jimenez, *The International Chamber of Commerce: Supplier of Standards and Instruments for International Trade*, I UNIF. L. REV. 284, 284, 286, 292 (1996)).

¹⁹ This is not to say that the ICC harmonization process was without debate. Rather, by the time the ICC chose the UCP as a harmonization project, the need for debate had been largely ameliorated by the near-universal acceptance of documentary credit practice.

²⁰ *Commercial Law*, *supra* note 8, at 357 (citing Jimenez, I Unif. L. Rev, 284 (1996)). Roy Goode speaks of a “[n]ear-universal adoption . . . that has had the effect of producing . . . a multi-lateral network of contractual engagements all based on a set of uniform rules by which parties make their own law, which is largely independent of legal systems.” *Commercial Law*, *supra* note 8, at 358.

²¹ UNCITRAL currently has sixty member states, which, along with observers from other UN member states and nongovernmental organizations, are invited to participate fully in the discussions held in working groups. *Commercial Law*, *supra* note 8, at 207. The two other lawmaking bodies most closely associated with international conventions are UNIDROIT and Hague Conference. UNIDROIT consists of 58 member nations. The Hague Conference has 45 members, most of whom also belong to UNIDROIT. See Stephan, *supra* note 1, at 753.

emerging market represented a best solution to a particular problem, the business and legal community would have examined its benefits in the real world and happily absorbed them. In failing to convince the powers-that-be of a deserved place at the table, the emerging market practice arguably failed its essential business purpose.

If this is too unsettling, consider a second reason: international conventions invariably support existing power imbalances too. In terms of political economy, the sheer cost and time it takes to adequately assert a position in the working groups and diplomatic conferences of an international convention is a greater hurdle to an emerging market practice than competitive recognition in the real world. In this way, conventions actually double the cost of being heard. Finally, if an emerging market practice fails to convince the lawmakers of its position at the diplomatic conference, which is likely, given the cost of funding a protracted delegation, it will be placed in a position of formal disharmony with international commercial law. To say nothing of the “problem of latecomers,” who find a body of existing law to which they have made no contribution whatsoever, the position of developing nation who had the opportunity to be heard and yet was subsequently ignored is one of double indignity.²²

What the foregoing points represent, therefore, is simple. By reducing the room for competition among legal systems, international conventions hijack the otherwise organic process of soft law, which, in the oft-cited case of the UCP, also produces superior results.

V. INTERNATIONAL CONVENTIONS RESULT IN FRAGMENTARY LAW

The second core reason that soft law is better suited to the goal of harmonization is that international conventions achieve a compromised consensus that is essentially fragmentary and of little practical importance. This compromised consensus results from two areas of discord: national distrust and fundamental legal conflict.

A. National Distrust and Legal Conflict Identified

²² *International Uniform Commercial Law Conventions*, *supra* note 1, at 19 (outlining the latecomer problem as a disadvantage of conventions).

Herbert Kronke describes the experience of Professor Allan Farnsworth, the prominent American scholar, during the process leading to the adoption of the United Nations Convention on Contracts for the International Sale of Goods or “(CISG”).²³ Kronke describes the atmosphere in Vienna:

[a]s a member of the United States delegation in Vienna, he took the floor as the “United States” and he, as well as other delegates, literally saw the stars and stripes fly while he spoke. The same certainly applied to others. When the French delegate raised his placard, on the face of it, everybody listened to some argument regarding the buyer’s duties in the performance of the contract. In the background, however, there were vibes of the *Marseillaise*. In other words, where governments negotiate, political and economic interests always lurk beneath the surface and chords of cultural identity are struck.²⁴

Conventions can often be poisoned by national distrust either because the members don’t take account of or simply ignore the fact that “the present world order is still founded on the traditional concept of the national state.”²⁵ Even if the delegations rise above petty nationalism, they face the greater obstacle presented by their vastly different conceptions law. The result is a race to the bottom in international harmonization and even the CISG, which is widely touted as an exemplar of a “successful” international convention, was not immune.²⁶

B. The Result of National Distrust and Legal Conflict in the CISG

The CISG is probably UNCITRAL’s proudest achievement. At the CISG’s inception, UNCITRAL formed a working group in 1968 and produced its first draft in 1976. After twelve years, “[t]he work culminated in a diplomatic conference . . . and

²³ United Nations Convention on Contracts for the International Sale of Goods (1980).

²⁴ *Methodological Freedom*, *supra* note 1, at 289-90 (citing E. Allan Farnsworth, *The American Provenance of the UNIDROIT Principles*, 72 TUL. L. REV. 1985 (1998)).

²⁵ Mistelis, *supra* note 1, at heading 2.3 (citing Clive M. Schmitthoff, *The Unification of the Law of International Trade*, JBL, 105-119, at 105 (1968)).

²⁶ The CISG “established the benchmark for the unification of commercial law in the post war era.” Harold S. Burman, *Building on the CISG: International Law Developments and Trends for the 2000s*, 17 J. L. & COM. 355, 355-364 (1998). The most significant legal document operative in the field of international sales is the [CISG].” *Commercial Law*, *supra* note 8, at 256.

was adopted on 11 April 1980.”²⁷ The necessary ratifications for its entry of force were finally secured in 1986 and it finally came into force on 1 January 1988.²⁸

To say nothing of whether the CISG is truly a success, it nevertheless took twenty years to come into force. One can only speculate as to the immeasurable cost of such an undertaking. Irrespective of time and costs, one would expect a convention as expansive as this to be the final word on international contracts for the sale of goods, but this is not the case. To start, the CISG essentially neglects to define what a contract of sale actually is. Then, Articles 2 and 3 exclude consumer sales from its scope and attempts what can only be described as a vague distinction between a contract for the sale of goods and a contract for services.²⁹ Among others, these “exceptions,” for lack of a more precise term, can be described as pinch points, in which national distrust or fundamental legal conflict eviscerated the strength of the convention piece by piece.³⁰

As a result, the United Kingdom, one of the few world centers of international commerce, still can’t seem “to find Parliamentary time for ratification.”³¹ This tepid response can be construed in one of two ways: first, as a thinly veiled condemnation of the convention, since, in light of the fact that “no article-by-article examination is involved” in the ratification, the demands on Parliament “would not appear to be great,”³² and second, as evidence of the U.K.’s preference for its own collection of laws on contracts for sale of goods, with which its legal community are more at ease.³³

The predilection for nationalism informs the United States’ position as well.

²⁷ *Commercial Law*, *supra* note 8, at 258.

²⁸ *Id.*

²⁹ *Id.* at 259. The general rule is that a contract for the sale of goods is one in which the monetary value of goods must exceed that for services. Article 3(2) uses the imprecise term “preponderant” to describe the criteria for applying the test. *Id.*

³⁰ “Shortage of time and the need for compromise meant that the CISG suffers from vagueness of expression and omissions.” MICHAEL BRIDGE, *THE INTERNATIONAL SALE OF GOODS LAW AND PRACTICE* 2.39 (1999).

³¹ *Commercial Law*, *supra* note 8, at 258.

³² *Id.*

³³ A final point on the U.K.’s response: the CISG suffered from a near complete lack of involvement by the business community, which is probably why insufficient attention was paid to commodity sales. Although arguments exist that the CISG is “better” with respect to manufactured goods, UK law is commodity-centric. As such, the U.K.’s reluctance to sign up comes as no surprise.

The U.S. excluded Article (1)(1)(b)³⁴ by making an Article 95 reservation.³⁵ According to Christophe Bernasconi, the U.S. did so because “it desired to preserve as much as possible the applicability of its UCC, apparently preferring its own law to that embodied in the CISG. This conviction . . . is legitimate; however, . . . such a position considerably reduces the frequency of the conventions applicability to international sales transactions.”³⁶ Two points are important here. First, the Uniform Commercial Code is itself a soft law document, albeit a domestic one, and enjoys a near universal adoption in all 50 states.³⁷ Its wide adoption, a result of continuous practical refinement, is a testament to the success of the soft law form generally. Second, and more to the point here, the United States’ “attitude [towards the CISG] illustrates the inherent tension between sovereignty and multilateral treaties embodying substantive rules.”³⁸

C. Do International Conventions Just Need Time to Work?

Proponents of the CISG will of course point out that, as the number of States ratifying the convention increases, the practical significance of Article 1(1)(b) can be expected to diminish.³⁹ This is tantamount to the broader assertion that international conventions simply need time to work, i.e., in the infancy of any project, one should expect some growing pains. With the number of national ratifications, at last count, up to seventy-three, many proponents accept as axiomatic that the CISG is highly successful because it governs almost two-thirds of the world’s international trade by now.

This formulation of “success,” however, is misleading. The considerable amount of contractual issues that the CISG expressly does *not* cover—the rights of third parties,

³⁴ Article (1)(1)(b) extends the CISG’s sphere of application so that it applies when the rules of private international law lead to the application of the law of a Contracting state, irrespective of whether both states involved have ratified it. *Commercial Law*, *supra* note 8, at 263.

³⁵ Article 95 “entitles a State, at the time of ratification, acceptance, approval or accession, to declare that it will not be bound by Article 1(1)(b).” *Id.*

³⁶ *Commercial Law*, *supra* note 8, at 265 (citing Christophe Bernasconi, *The Personal and Territorial Scope of the Vienna Conventions on Contracts for the International Sale of Goods (Article 1)*, 46 NETH. INT’L. L. REV. 137, 160-65 (1999)).

³⁷ The UCC is not itself law and depends, like all soft law documents, upon adoption by the states. It is distinguishable from a statute, which is a binding act of the legislature, and which is also akin to binding international law promulgated by conventions.

³⁸ *Commercial Law*, *supra* note 8, at 265 (citing Bernasconi, *supra* note 36, at 160-165).

³⁹ *Commercial Law*, *supra* note 8, at 262.

agency, competency of parties, and validity—render it a fragmentary document at best. Herbert Kronke alludes to this phenomenon in his description of the “isolated-position syndrome.”⁴⁰ As a result, the convention becomes another expansive text stacked clumsily atop the pile of other texts that lawyers have to consider when resolving international commercial disputes. As testament to this, according to the UNILEX website, the CISG has only been cited sixty-two times in American case law since 1989—that is twenty years of jurisprudence, with an average of only three references per year, in the most litigious country in the world. Unilex also indicated that in that same amount of time, United kingdom case law referenced the CISG twice.⁴¹ Put simply, the classic vehicle for harmonization insufficiently motivates governments and practitioners to ratchet up enthusiasm in the convention process and thus achieves an essentially fragmentary result.⁴²

D. *The PICC Alternative*

Soft law documents, such as the UNIDROIT Principles of International Contracts (“PICC”), avoid the need to enthrone governments by specifically leaving them out of the discussion. Comprised almost exclusively of scholars, the PICC specifically focus on elegant solutions rather than forced consensus.⁴³ Herbert Kronke again describes the experience Professor Allan Farnsworth during negotiations, this time during the work process leading up to the PICC. “As a member of the Contract Principles Working Group, he never put forward a United States position, but one of three or four technically conceivable solutions to the problem.”⁴⁴ It was an exploration of “best solutions” that demonstrated that the “formulation of international rules of general law that are of a

⁴⁰ *International Uniform Commercial Law Conventions*, *supra* note 1, at 18. He states that conventions “are normally rather specific and fragmentary in character” because they “often find themselves implanted in a body of [domestic] law” that is hard to reconcile with solutions provided by the convention.

⁴¹ See www.unilex.info. These statistics omit references in arbitration decisions, in which there are presumably far more, but which are generally not reported.

⁴² Some soft law documents, such as the UCP, also leave gaps in the scope of application for contractual issues like breach and fraud. These omissions are likely an acknowledgement that such issues normally fall within the province of domestic policy.

⁴³ The Principles of International Contract Law are soft law, which was “produced by a group of international scholars . . . and published under the imprimatur of the Governing Council of UNIDROIT” *Commercial Law*, *supra* note 8, at 508.

⁴⁴ *Methodological Freedom*, *supra* note 1, at 290.

higher level of abstraction is best left to scholars, which leaves governments and regional organizations” essentially out of the discussion altogether.⁴⁵

As a result, the PICC arrive at the best solution to a given contractual problem, unhindered by the need for consensus, and thus represent a race to the top in international lawmaking. Roy Goode echoes this sentiment, stating:

[t]he impact of the two sets [the PICC and the Principles of European Contract Law] of principles may prove to be greater than that of an international convention, for a convention has no force at the time it is concluded and represents at most a provisional indication of support by participating States which may or may not crystallize, whereas the Principles represent the unconditional commitment and consensus of scholars of international repute from all over the world⁴⁶

Until nations come to the table with a willingness to abandon nationalist propensities, the forced consensus of international conventions renders them too atomistic to be sustainable in the long term. Despite its poster child “success,” the CISG still represents a compromise convention. Perhaps as countries warm to the notion of internationally applicable substantive law, conventions will seem less like statecraft and therefore less inherently threatening to state sovereignty. In the meantime, soft law instruments, such as the PICC, avoid compromised consensus by creating a system that focuses on best solutions.

VI. INTERNATIONAL CONVENTIONS INSIST ON UNIFORMITY OVER SIMILARITY

A third reason why soft law is better suited to the goal of harmonization is that conventions customarily insist upon achieving uniformity, rather than highlighting similarity between legal systems.⁴⁷ Clive Schmittoff states “[i]t is a remarkable fact . . . that the law of international trade [already] shows a striking similarity in all national legal

⁴⁵ *Id.*

⁴⁶ *Commercial Law*, *supra* note 8, at 509-510 (citing *International Restatements*, *supra* note 6, at 234).

⁴⁷ The problem of maintaining uniformity in the law is not unique to conventions; the accumulated tomes of legal philosophy, from Jeremy Bentham to H.L.A. Hart, identify the problem as central to law itself. However, it highlights a unique difference between conventions and soft law.

systems.”⁴⁸ Thus, because uniformity is so difficult to achieve as an end unto itself, focusing on similarity can actually lead to convergence, which in most cases is largely “synonymous to uniformity.”⁴⁹

With soft law, for example, divergence is accepted from the start. That is, soft law simply builds upon the similarities between legal systems instead of insisting upon homogeneity. With conventions, however, maintaining uniformity presents itself as an unwieldy problem, in which, *inter alia*, language barriers, limited access to case law, and nationalism act upon domestic judicial interpretation and essentially de-harmonize the law. As such, international conventions struggle to maintain uniformity as a result of four principal destabilizing factors.

A. The Limited Scope of Conventions Undermines Uniformity

Foremost, conventions often have limited scopes within a given area of law (*e.g.*, as is the case with the CISG, it only covers certain issues relating to contracts for the sale of goods—as opposed to contracts for services).⁵⁰ This necessarily gives rise to disparate interpretations in hard cases at the margins. For example, in one jurisdiction, a contract that equally combines both the sale of goods *and* the rendering of services may be characterized by a domestic judge as “preponderantly” being a contract for goods—and thus governed by the CISG. That very same contract decided by a different judge in another jurisdiction could be characterized as “preponderantly” being a contract for services—and thus excluded from the CISG’s coverage. As a result of the convention’s limited scope, uniformity of decision—in an identical case, mind you—hinges on a domestic judge’s application of Article 3(2)’s imprecise term “preponderant.”⁵¹

B. The Insufficient Number of Ratifications Undermine Uniformity

The second destabilizing factor is more obvious, in that not every state in the

⁴⁸ Missetlis, *supra* note 1, at heading 2.1 (citing Clive Schmittoff, *The Law of International Trade, Its Growth, Formulation and Operation*, in CLIVE SCHMITTOFF (ED.) *THE SOURCES OF THE LAW OF INTERNATIONAL TRADE WITH SPECIAL REFERENCE TO EAST-WEST TRADE*, 3-38, at 3 (1964)).

⁴⁹ Missetlis, *supra* note 1, at 9.

⁵⁰ *Id.* at 21.

⁵¹ *Commercial Law*, *supra* note 8, at 259.

world will ultimately ratify the harmonizing measure.⁵² Because we discussed the reasons why certain states decline ratification in section V above, we shall not embark upon further investigation here. Suffice it to say, uniformity is best maintained when all states and commercial actors are playing by the same rule set. In the case of the CISG, this is impossible if key trading states like the United Kingdom stay out of the game.

C. *The Homeward Trend*

Third, conventions confront a more expansive destabilizing factor in the form of the homeward trend. When used broadly, “homeward trend” refers to a phenomenon in which judges interpret an international convention in light of their own domestic law instead of the convention’s international character. This necessarily results in a honeycomb effect, in which small pockets of divergent interpretations punctuate the sphere of international case law.⁵³ When used specifically, “homeward trend” almost always refers to the problem of maintaining uniformity in the CISG. It is the tendency of courts to ignore Article 7(1) and interpret the CISG in light of their respective legal tradition.⁵⁴ The CISG attempted to resolve the problem of uniformity in Article 7, which states:

(1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith international trade.

(2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based, or in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.⁵⁵

⁵² Mistelis, *supra* note 1, at 21.

⁵³ It is important to recognize the distinction between this example and the example used regarding different judges’ interpretation of “preponderant” when deciding whether a contract is for the sale of goods or for services. In that example, both judges applied CISG-compliant interpretations of an imprecise term in Article 3(2) and simply arrived at divergent conclusions. The homeward trend, on the other hand, is a phenomenon in which judges resort to domestic interpretations as opposed to CISG-compliant ones.

⁵⁴ Karen Halverson Cross, *Parol Evidence Under the CISG: The “Homeward Trend” Reconsidered*, 68 OHIO St. L.J. 133 (2007).

⁵⁵ *Commercial Law*, *supra* note 8, at 273 (reprinting UN Convention on Contracts for the

The result of the foregoing “solution” has been a mixed bag. Although parts of the CISG have enjoyed very few problems with maintaining uniformity, others indicate a serious homeward trend—namely, the meaning of good faith in Article 7(1) and the need for gap-fillers in Article 7(2).

A full and thoughtful exegesis of the problem of good faith and gap-fillers is beyond the scope of this paper; it is an examination unto itself.⁵⁶ Suffice it to say, however, one absurdity in the area of gap-filling warrants a brief digression. The CISG was promulgated in 1980, while the UNIDROIT Principles of International Commercial Contracts (PICC) were formed in 1994, primarily as a reference guide. In a plot twist that turns traditional statutory interpretation on its head, the PICC are now increasingly being used by courts and arbitrators to interpret the CISG, *i.e.*, to “read retroactively into the minds of the drafters of the CISG,” to resolve issues of interpretation not clarified therein.⁵⁷ Without question, it offends every tenet of hornbook law to resort to a document produced fourteen years *after* a “statute,” as a means of divining legislative intent. But such are the lengths courts seem willing to go in the ongoing struggle to maintain uniformity in the CISG.

Gap filling may be a less obvious manifestation of the homeward trend but, on closer inspection, the correlation is clear. If resort must be had to external sources of law to interpret a convention’s vagaries or omissions, the admonishment of Article 7 to have regard to the convention’s international character becomes nothing more than a banal platitude in reality. Put more bluntly, if courts are willing to indulge the absurdity in statutory interpretation outlined above, how much less absurd is it to resort to well-fashioned, domestic understandings of how to resolve interpretative disputes?

It appears self-evident, then, that the homeward trend is a direct result of the

International Sale of Goods (1980)).

⁵⁶ *Commercial Law*, *supra* note 8, at 278. The ways in which the term “good faith” has been interpreted by domestic courts are legion and present probably the CISG’s greatest hurdle in maintaining uniformity

⁵⁷ See Luke Nottage, *Educating Transnational Lawyers for the 21st Century: Towards the Vis Arbitration Moot in 2000*, 66 HOSEI KENKYU 390, 391 (1999).

“international community’s still underdeveloped ability to respond to changing circumstances.”⁵⁸ This underdeveloped ability manifests itself in many ways. First, because of their international ambitions, conventions are helpless to require that judges in one jurisdiction have any formal regard for decision-making in another. There is simply no mechanism for compulsion, in that the idea of “precedent,” as it were, carries different meanings in every state. This is made worse by the fact that most domestic judges lack the linguistic wherewithal to actually read what domestic judges in foreign jurisdictions have ruled. Despite perceived globalization, most judges speak only their native tongue, with varying degrees of mastery of English. In combating the homeward trend, this problem manifests as a lack of access to decisions.

D. Solution to the Access Problem?

In response to this lack of access, the international community have created large databases, such as the Pace University website, devoted entirely to the CISG, and the UNILEX website, which compiles articles, materials, statistics, and cases interpreting various conventions. Their purpose is to shine a constant global light on the decisions impacting the uniformity of conventions. These websites appear to be a remarkable resource. However, their usefulness is only as powerful as judges’ and practitioners’ willingness to resort to them. Moreover, these websites are undermined by a less obvious factor. Even if domestic judges or practitioners habitually were to make use of these online clearinghouses, and then were to find these cases available in a language they could meaningfully comprehend, they would still confront the distinct possibility that such cases were themselves products of a homeward trend in the jurisdictions where they were decided.⁵⁹

E. The Shift to Arbitration Also Undermines Uniformity

The “website” solution is further complicated by the shift towards international arbitration as the preferred method of resolving commercial disputes. Increasingly, businesses and merchants include arbitration clauses in their contracts to specifically

⁵⁸ *International Uniform Commercial Law Conventions*, *supra* note 1, at 18.

⁵⁹ *See generally*, Disa Sim, *The Scope and Application of Good Faith in the Vienna Convention* (2001), available at <http://www.cisg.law.pace.edu/cisg/biblio/sim1.html>.

exclude the consequences of hard law. More often than not, arbitral awards go unpublished and therefore exist beyond the reach of these databases. They cannot act as a reference, let alone precedent. In many ways, therefore, soft law is more suited to become part of the *lex arbitri* (if one can ever actually exist) for the sole reason that it does not depend on uniformity for its continued viability. There is much speculation—although a paucity of hard data—that arbitrators actually prefer the application of soft law. To be fair, there is no way to know if this in fact the case.

F. Responses to the Uniformity Problem

In light of the foregoing catalog, it would appear that the problem of uniformity is simply too great for conventions to endure. Their defenders, however, may insist that the idea of total uniformity is nothing more than a straw man, which is easily dismantled by a soft law advocate with an axe to grind. That is, total uniformity is a quixotic ideal that conventions would be foolish to aspire to, and, as it were, any system of law, international or domestic, must be able to tolerate some degree of divergence. There is much to be said for this response. Earlier in this section, we acknowledged that the problem of uniformity has been the subject of debates for centuries before the advent of harmonization efforts. It affects all areas of law and all jurisdictions, even closed judicial systems, which have robust scholarship and near total fidelity to the concept of *stare decisis*.

Against this strong riposte, we must return to our original question, i.e., which approach to international lawmaking is best suited to reducing legal risk associated with international commerce? It is true that preeminence in the field of harmonization is not a zero sum game and that ample room exists for both approaches. But in answering the evaluative question, it must be said that lack of uniformity, especially in a system that requires it (at least more than soft law does), creates high levels of uncertainty—and uncertainty equals risk in the business world. In contrast, by highlighting the similarities between legal systems, soft law mitigates risk. It adopts a “wait-and-see” approach, which mirrors the approach taken in business—“if-it-ain’t-broke-don’t-fix-it.” In our discussion of the UCP in section IV above, for example, we saw how the UCP was not delivered prematurely to banking practitioners with an insistence on uniform application

but was instead allowed to incubate in practice. In the UCP's case, history proved that this incubation led to successful convergence. On the whole, therefore, while total uniformity is unrealistic, conventions have proven themselves less well suited to deal with this thorny problem.

VII. INTERNATIONAL CONVENTIONS FAVOR RIGIDITY OVER FLEXIBILITY

A. *The Philosophical Benefits of Party Choice*

As we reach the end, we shall briefly discuss a final reason that soft law is better suited to the goal of harmonization—conventions favor rigid legal systems over the flexibility of party choice. Reminiscent of our section IV discussion, this objection is a philosophical one, and to a large degree, has been addressed in our previous sections. But it bears mentioning here that the ability of international merchants to choose the law governing a contract is perhaps the single most effective way to achieve reduction of risk associated with international commerce.

It seems contradictory that legal certainty can be found in a flexible regime. Here, however, flexibility means two things. First, it is the ability of the law to change, adapt, and be refined by common sense as times change and business models advance. For the law to remain relevant, this malleability is crucial. Soft law is obviously better suited to take up this mantle, if only because of the relative ease with which it can be amended and ratified.

Second, flexibility is the ability of parties to choose the law governing their dispute. Paul Stephan writes,

[w]e commonly assume that in commerce people often prefer off-the-rack legal regimes, but these regimes work only if they do not cramp the relationships they govern with excessively detailed requirements. In commercial law we continually must make tradeoffs between flexibility and certainty, and business people within reasonable limits seem to want the former."⁶⁰

⁶⁰ Stephan, *supra* note 1, at 746 (citing Charles J. Goetz & Robert E. Scott, *The Limits of Expanded Choice: An Analysis of the Interactions Between Express and Implied Contract Terms*, 73 CAL. L. REV. 261 (1985)).

To find evidence that parties increasingly choose flexibility over certainty, one need look no further than the recent exodus towards arbitration as the preferred method for dispute resolution. Arbitration gives more effect to parties' choice by allowing parties to choose the arbitrator, the forum, and the (substantive) law.⁶¹ As a result, businesses are increasingly excluding the consequences of hard law from their relationships in this manner.⁶² However, if parties choose to be bound by principles arising from a soft law document, such as the PICC, and if the arbitrator in turn applies them, then soft law is immediately transformed into binding law as to those parties, circumventing protracted delegation and costly debate. Thus, this ability to choose not only mitigates risk but also lowers cost.

B. Objections to the Philosophy and the Soft Law Response

Of all the objections to party choice, the most convincing is the one that purports to safeguard the rights of third parties. To be sure, very few contracts affect only those parties who have signed on the dotted line; third parties often find themselves embroiled in a dispute over which they had no control at the outset. Conventions thus purport to provide holistic regimes that avoid subjecting third parties to laws that they had no part in choosing. This objection, while compelling, overstates third party risk.

While "parties are free to regulate their transactions as they see fit, this freedom is restrained once the transaction has effects outside the parties' contractual sphere, their micro-cosmos. In the 'outside world' freedom of contract may be restrained by public policy considerations and/or relevant mandatory rules."⁶³ These mandatory rules are, quite simply, the rules of private international law that already exist in every significant trading country in the world. In the absence of express agreement, third party rights would be governed by these—not by the parties' contract—because, by definition, third

⁶¹ *Commercial Law*, *supra* note 8, at 663-65 (stating "the task of the arbitrators is to apply the law chosen by the parties; they are not entitled to impose a law or rules of law on the parties contrary to their wishes.") *Id.* at 664.

⁶² Although there is a paucity of data on which law (hard or soft) arbitrators apply to these disputes, it is widely speculated that parties choose soft law principles because they are malleable and unattached to these off-the-rack regimes.

⁶³ Mistelis, *supra* note 1, at heading 1.022.

parties lack the requisite privity to be governed by extra-contractual party choice. This objection to party choice is tantamount to the broader concern that business self-regulation is oxymoronic. However, the ability to choose law is not the ability to avoid it altogether. Public policy considerations and private international law provide sufficient safeguards for third parties and thus ameliorate the problem. In the end, soft law documents offer flexibility to merchants who seek to be governed by their terms precisely because they do not represent off-the-rack legal regimes.

VIII. CONCLUSION

With vast amounts of financial and intellectual capital already being spent on harmonization, it is axiomatic that inefficiencies infecting the lawmaking process can render it not only ineffective but invidious as well. Failure at the lawmaking level threatens the goodwill of the whole enterprise. Thus, what the foregoing represents is a synthesis of some of the most meaningful criticism about the perceived failures of the classic vehicle for harmonization. We have highlighted these failures, looked for their underlying causes, and searched for compelling soft law alternatives.

If a guiding principle can be gleaned, it is that conventions, above all, suffer from over ambition. By intervening in the legal marketplace, underestimating national distrust and legal conflict, and insisting on uniformity, conventions create a rigid enterprise that simply tries to do too much. Soft law, on the other hand, embraces the organic emergence of law from practice, in which best solutions rise to the top. To be sure, soft law is not immune to over ambition. Failures, such as the work on the Model Law on Secured Transactions carried out in 1990s by UNIDROIT, bear this out. On the whole, though, soft law is best suited to reduce legal risk because it performs a purely normative function. By focusing on practice and on best solutions, soft law creates rules as they “should” be, while conventions create rules as they “must” be—the fragmentary result of compromised consensus.

This is not say that conventions have no place. It would be a “misconception to envisage a future of harmonization and unification of commercial law solely driven by

the market operators and loosely framed by soft law instruments.”⁶⁴ However, it would be a similar misconception to envisage a future in which conventions operated on a business-as-usual basis. Thus, in the areas most fraught with failure, we have tried to show ways in which soft law offers compelling solutions. It is only by these investigations that we can glimpse the future of harmonization of international commercial law, which remains in a jungle, finding its way by trial and error, and building the road behind it as it proceeds.⁶⁵

⁶⁴ *International Uniform Commercial Law Conventions*, *supra* note 1, at 18.20.

⁶⁵ A similar quotation—“We are in a jungle and find our way by trial and error, building our road behind us as we proceed.”—has been attributed to Max Born, Quantum Physicist, Nobel Prize Winner, 1882-1970.