

The Creation of International Commercial Law: Sovereignty Felled?

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I. INTRODUCTION

The creation of international commercial law presents an interesting paradox for proponents of sovereignty in international law. Indeed, it could be argued that the creation of international commercial law is the vanishing point of sovereignty in that nation states are becoming increasingly less important in the creation of international commercial law with the growth of regional organizations, non-state actors, and international arbitration. This is spurred on by the march of globalization and the consequent need for international commercial law. The term "harmonization" will be used as a surrogate to discuss the creation of international commercial law, as it is the primary means by which international commercial law is created. This article seeks to chart this trend and show that nation states are being marginalized and will become significantly less relevant as more and more international legal instruments are created. In Part II, I paint the landscape against which the process is evolving; in Part III, I will demonstrate the growing role of regional endeavors at harmonization; and in Part IV, I will attempt to draw broad themes that establish that nation states will increasingly have a secondary role in the creation of international commercial law.

II. THE LANDSCAPE

The end of the cold war and the corresponding explosion of commerce between nations have provided an impetus to internationalism in the law that has never previously been seen in human history. There is more curiosity about the different solutions offered by the various national laws to the common problems of international commerce than ever before.¹ A simple testament to this curiosity and spirit of

1. ROY GOODE, *COMMERCIAL LAW IN THE NEXT MILLENNIUM* 88 (London 1998) (noting that there is "an increasing movement away from" domestic international trade law to what has become known as "transnational commercial law"). According to Professor Goode, this is that body of law that "results from the harmonization or convergence of national laws, whether by international conventions, conscious or

internationalism is the proliferation in efforts to harmonize the law that are currently in progress in areas as diverse as civil procedure,² receivables financing,³ space asset financing,⁴ and insolvency law.⁵ More and more areas of the law are falling under the harmonizing lens. Only a decade ago, it would have been imaginable that it would ever be possible to have international conventions in areas under the remit of property law or civil procedure.⁶ This was the product of a belief that these areas of the law embody aspects of national socio-political history and culture, and that national sensibilities may be so strong as to render any attempt at harmonization unsuccessful.⁷ That belief has given way today. Aspects of property law are being attacked with great vigor and

unconscious judicial parallelism, uniform rules . . .” Professor Goode first defined the term in his article *Usage and its Reception in Transnational Commercial Law*, 46 INT'L & COMP. L.Q. 1, 2 (1997):

‘Transnational commercial law’ [which] is conceived as law which is not particular to or the product of any one legal system but represents a convergence of rules drawn from several legal systems or even, in the view of its more expansive exponents, a collection of rules which are entirely anational and have their force by virtue of international usage and its observance by the merchant community. In other words, it is the rules, not merely the actions or events, that cross national boundaries.

See also Roy Goode, *Insularity or Leadership? The Role of the United Kingdom in the Harmonization of Commercial Law*, 50 INT'L & COMP. L.Q. 751 (2001).

2. The American Law Institute and UNIDROIT are working on drafting procedural rules that a country may adopt for the adjudication of disputes stemming from international commercial transactions. See The American Law Institute, *Principles and Rules of Transnational Civil Procedure*, Discussion Draft No. 4 (Apr. 18, 2003).

3. See The U.N. Commission on International Trade Law (UNCITRAL), *Convention on the Assignment of Receivables in International Trade*, U.N. Doc. A/CN.9/WG.11/WP.87 (2001), available at <http://www.uncitral.org/stable/res5681-e.pdf>.

4. UNIDROIT is currently in the advanced stages of transmitting a draft Space Protocol to the Cape Town Convention of 2001. See The International Institute for the Unification of Private Law (UNIDROIT), *The Convention on International Interests in Mobile Equipment*, available at <http://www.oosa.unvienna.org/Reports/UnidroitSpaceprot0102.pdf> (last visited Jan. 31, 2004).

5. See U.N. Commission on International Trade Law (UNCITRAL), *UNCITRAL Model Law on Cross Border Insolvency with Guide to Enactment*, UNCITRAL, 48th Sess., Supp. No. 17, U.N. Doc. A/48/17 (1997).

6. See Ronald Cuming, *The Internationalization of Secured Financing Law: the Spreading Influence of the Concepts of UCC, Art 9 and its Progeny*, in MAKING COMMERCIAL LAW: ESSAYS IN HONOR OF ROY GOODE 499 (Ross Cranston ed., 1997) (commenting that “[s]ecured financing law has traditionally been viewed as an area which is ill suited to internationalization.”).

7. Cf. American Law Institute, *supra* note 2; *Principles of Transnational Civil Procedure*. See also Harold Burman, *Ten Years of the United Nations Sales Convention: Building on the CISG: International Commercial Law Developments and Trends for the 2000's*, 17 J.L. & COM. 355, 357 (1998) (arguing about insolvency law as well).

international instruments are rapidly being honed. The Cape Town Convention of 2001 is one instance.⁸ Yet another is the recently concluded Hague Convention on conflict rules in respect of securities held by intermediaries.⁹

This level of activity is but a reflection of a greater need for international commercial law. For decades despite lofty ambitions there was nothing but paralysis. One instance of this can be seen in the case of the grand idea of crafting principles of international contract law. The Secretariat of UNIDROIT¹⁰ presented such an idea for the drafting of general principles of international contract law in its Report to UNCITRAL¹¹ on the “Progressive Codification of the Law of International Trade” as far back as 1971.¹² The Secretariat’s ambition was as magnificent as it was unattainable:

[I]nternational trade needs its own ordinary law with its own particular role and full range of functions. . . . The very fact that the legal relationships of international trade are international in character puts them outside the jurisdiction of municipal law and makes them governable by a law removed from any national contingencies, that is, an ordinary law of international trade, which alone can provide the legal framework which international trade needs in order to develop Consequently, international trade now, as much as ever, needs . . . a material law that can govern international relations It would be unthinkable . . . to allow international trade to continue to be governed by a host of national laws, since that places it in an impossible position, or to leave all legal problems arising in international trade to be solved simply by practice . . . so the first task will be to prepare a draft for the general section containing the basic principles which will form the foundations and the framework of the unification.¹³

This was to remain a pipe dream until the emergence of the UNIDROIT Principles on International Commercial Contracts, and the now raging

8. International Institute for the Unification of Private Law (UNIDROIT), *supra* note 4 (signed by 26 nations as of June 2003).

9. *Hague Convention on the Law Applicable to Certain Rights in respect of Securities held with an Intermediary*, 2002, available at <http://www.hcch.net/el/conventions/menu36e.html> (last visited Jan. 31, 2004).

10. The International Institute for the Unification of Private Law (UNIDROIT) is an inter-governmental agency with headquarters in Rome, Italy.

11. UNITED NATIONS, UNCITRAL THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW 3 (1986).

12. UNCITRAL, *Progressive Codification of the Law of International Trade: Note by the Secretariat of the International Institute of the Unification of Private Law (UNIDROIT)*, 1968-70 Y.B. of the United Nations Commission on International Trade Law 285, U.N. Doc. A/CN.9/SER.A/1970.

13. *Id.* at 286 (stating that the first task was to prepare a draft for the general section containing the basic principles that would form the foundations and the framework of the unification effort). The Report called for a combined effort from all institutions such as UNIDROIT, UNCITRAL, and UNCTAD, and emphasized the impelling need for developing principles and rules of international contract law which could serve as a reference point for the construction of contracts and international conventions without recourse to domestic laws.

debate on the European Civil Code.

Similarly, when UNCITRAL asked Professor Ulrich Drobnig of the Max Planck-Institute to prepare a study on the legal principles governing security interests in the various legal systems of the world¹⁴ with a view to determining whether it would be possible to harmonize the law in that area, there was very little room for optimism.

After analyzing the law of nineteen nations, the study found that the differences in the treatment of secured credit were great.¹⁵ Thereafter, the report tried to make assessments to “help to consider the necessity or desirability of framing rules in this field on an international level, especially for the international movement of goods subject to security interests.”¹⁶ Despite the vast differences in national laws, Drobnig was not optimistic about the possibility of creating a convention:

It would seem that international legislation in the form of a convention providing uniform rules of substantive and conflicts law is not appropriate in this case. As against international sales or international transportation or the international circulation of negotiable instruments, transnational incidence of security interests is as yet relatively moderate. It would probably be difficult to obtain sufficient government support for an international conference dealing with the relatively technical topic of security interests; and even if the text of an international instrument could be agreed upon, national parliaments would probably be slow and perhaps even reluctant to ratify such a text.¹⁷

14. See UNCITRAL, *Report of the Secretary-General: Study on Security Interests*, [1977] 8 Y.B. UNCITRAL 171, 173, U.N. Doc. A/CN.9/SER.A.

15. *Id.*

16. *Id.* As part of these assessments, Professor Drobnig chronicled prior attempts to achieve some degree of international uniformity with respect to security interests. These attempts included: (1) a uniform conditional sales act enacted by three Scandinavian countries (Norway, Sweden, and Denmark) during 1915–1917; (2) the UNIDROIT draft provisions of 1939 and 1951 concerning the impact of reservation of title in the sale of certain goods; (3) provisions in the draft European Economic Community Bankruptcy Convention of 1970 regarding the effect in bankruptcy of reservation of title in the sale of goods; and (4) model reservation of title clauses contained in several “General Conditions” elaborated by the United Nations Economic Commission for Europe. See *id.* at 210–11.

17. *Report of the Secretary-General: Study on Security Interests*, para. 4.2.1, at 218 U.N. Doc. A/CN.9/131 (1997), reprinted in [1997] 8 Y.B. INT’L TRADE L. 171, 218, U.N. Doc. A/CN.9/SER.A/1977. This was despite the fact that there were proposals for the harmonization of secured credit law that had been submitted to the Council of Europe, made by UNIDROIT in 1968, and by the *Service de recherches juridiques comparatives* of the Centre National Recherche Scientifique of Paris in 1972. These proposals put forth a range of possible unification efforts, including that of creating a uniform security interest for international cases. Professor Drobnig noted the existence of a proposal to the European Community for the establishment of a central register for security interests. Professor Drobnig also took a negative view towards developing

Drobnig's words would prove prophetic at least with respect to Model Laws: "Perhaps moral persuasion or intellectual insight into the virtues of the model rules will move some States to adopt them. Others may need persuasion by more effective means such as insistence on the part of international financing institutions."¹⁸ The imperatives of modern international commerce have in fact pushed these very areas of the law, once thought to be beyond the pale of harmonization, to the very forefront.

A. *The Nature of Harmonization*

This section deals with the nature and characteristics of the harmonization of international commercial law. It is clear that there is a distinct difference between harmonization endeavors that have followed the end of the cold war and those that occurred during or before its advent. This paper is not overly concerned with harmonization endeavors during and prior to the Cold War, except in so far as they hold lessons for current efforts.¹⁹ The reasons for dispensing with a detailed study of harmonization endeavors during and prior to the Cold War are twofold: 1. Much of the debate that characterized scholarship at the time was organized along ideological lines which have no relevance today; and 2. The extent of globalization that characterizes the modern world makes many of the concerns of the cold war era redundant.

Perhaps the most important aspect of modern life is the idea that we live in a "global village." Although Professor Berger argues that "globalization" is an abstract term that has become a cliché rather than an idea with substantive content, he concedes that it has resulted in the "denationalization of the legal process."²⁰ He argues that because of the geopolitical and economic aspects of globalization at the beginning of the twenty-first century, associated with the decreasing significance of territoriality and the springing up of a "global civil society," a decentralized approach to law-making has become acceptable and even opens the door for the acceptance of the *lex mercatoria* as an

recommendations for nations to adopt rules that would promote uniformity. "Mere recommendations, even if emanating from an international organization of the highest repute, will not command sufficient moral or other support for adoption by any sizable number of States." *Id.* at para. 4.2.3.

18. *Id.* at para. 4.2.2.

19. One instrument which may hold such lessons is the Convention for the International Sale of Goods, 1980, a prize horse of the UNCITRAL stable that has been ratified by sixty-two countries as of June 2003.

20. Klaus Peter Berger, *The New Law Merchant and the Global Market: A 21st Century View of Transnational Commercial Law*, INT. A.L.R. 3(4), 91, 98 (2000).

autonomous legal order in international commerce.²¹ DiMatteo writes that “at the end of the twentieth century, globalization and the volume of international transactions have led to the idea of a new *lex mercatoria*,”²² in no small measure because the continued development of international trade requires the internationalization of commercial law. Even if we do not accept the idea of a *lex mercatoria*, new or otherwise, it is impossible to deny that there is a great impetus to create international commercial law instruments. This is primarily because insularity is no longer possible as contacts with legal systems that are foreign are more common today than ever before.²³ Further, international commercial law making is no longer the sole preserve of nation states. Coevally, because of the similarity of transactions encountered across the legal system, problems encountered by lawyers in different countries are likely to have many similarities. One example is financing of aircraft. Regardless of the airline involved, its lawyers will have to answer questions about registration requirements, the recording of security interests in the aircraft and its engines and the form that the transaction should take, among other things.²⁴ Similarly, creditors, regardless of the country they are from, are concerned primarily with the question as to how their interests can be protected in the event the debtor defaults in making payment.²⁵ This commonality of questions may provide the impetus for

21. *Id.* at 100.

22. Larry A. DiMatteo, *Reviewing the Historical and Practical Significance of the Principles of European Contract Law*, 43 HARV. INT'L L.J. 569, 570 (2002).

23. Westbrook writes that “more and more cases in United States bankruptcy courts have an important foreign element—a resident alien debtor with assets in the old country, or perhaps a foreign lender or a bondholder unfamiliar with [the American law on bankruptcy].” Jay Westbrook, *Creating International Insolvency Law*, 70 AM. BANKR. L.J. 563 (1996).

24. Thatcher Stone, *In Flight Between Geneva and Rome: Abandoning Choice of Law Systems for Substantive Legal Principles in International Aircraft Finance*, 20 U. PA. J. INT'L ECON. L. 487, 490 (1999).

25. Claps and McDonnell cite an Asian Development Bank Study which shows the following:

private creditors in all countries—common law and civil law, industrial and transitional, north and south—worry primarily about [repayment] . . . when the debtor offers collateral for a loan, private creditors offer larger loans, at lower interest rates, payable over longer periods of time. Compared to a debtor who cannot offer good collateral, one with such collateral can anticipate receiving six to eight times more credit, taking two to ten times longer for repayment, and paying interest rates 30 percent to 50 percent lower.

See Guillermo A. Moglia Claps & Julian B. McDonnell, *Secured Credit and Insolvency Law in Argentina and the U.S.: Gaining Insight From a Comparative Perspective*, 30 GA. J. INT'L & COMP. L. 393, n.19 (2002).

the pursuit of common solutions.

The move towards a global village brings with it several problems both for lawyers and legal systems. The former have to familiarize themselves with a vast array of legal systems to determine the legal position for issues raised by any given international transaction, while the latter have to evolve solutions for problems of an international nature. This is particularly difficult if the legal system in question has not encountered situations involving certain concepts before. One instance of this is the treatment of secured credit. Legal systems have widely varying attitudes towards secured credit. Even amongst those nations that have detailed secured credit laws, there are significant differences in the approach of civil law countries from that of the United States and even amongst each other.²⁶ Even in the European Union a recent study found that some security instruments for movable assets are unknown in some Member States and that in such cases the security interest fails if the secured goods are transferred across borders.²⁷ The study gave the example of the problems posed by the transfer of movable goods from Germany to Austria, and noted that the difficulties negatively affect the possibility of entering into cross-border leasing contracts.²⁸

The legal systems in developing countries do not have an adequate legal regime in place, and frequently do not accord enough importance to secured transactions law.²⁹ This may be explained in part by the fact that unfamiliarity with modern financing techniques has resulted in a lack of appreciation of the benefits of good secured credit laws. While this continues, parties from these countries are unable to derive the full benefits of globalization, hamstrung as they are by the underdevelopment of their legal systems. This asymmetry in participation is a serious problem, and one that can easily be corrected by harmonization. The sheer extent and potential volume of international trade justifies the investment in harmonization for these countries.

1. Harmonization Defined

While it is possible to get an intuitive idea as to nature of harmonization in the commercial law area, it may be useful to consider

26. Neil Cohen, *Internationalizing the Law of Secured Credit: Perspectives from the U.S. Experience*, 20 U. PA. J. INT'L ECON. L. 423, 431 (1999).

27. Commission of the European Communities, *Communication from the Commission to the Council: A More Coherent European Contract Law: An Action Plan*, COM(03)89, p.13, 12th February, 2003, available at http://europa.eu.int/comm/consumers/policy/developments/contract_law/com_2003_68_en.pdf (last visited Jan. 31, 2004).

28. *Id.*

29. Cohen, *supra* note 26, at 432.

some definitions. Ziegel writes that “Harmonization in this field of law is a word with considerable elasticity. In its most complete sense it means absolute uniformity of legislation among the adopting jurisdictions.”³⁰ According to Leebron, “Harmonization can be loosely defined as making the regulatory requirements or government policies of different jurisdictions identical or at least more similar.”³¹ Harmonization has also been described as an attempt to reduce the differences among national laws.³² Glenn writes that the harmonization process is an evolutionary process that results in ever “greater levels of uniformity and correspondingly greater levels of supranational governance.”³³ According to Zamora,

Harmonization does not entail the adoption of a single, model set of rules, but instead implies a wide range of ways in which differences in legal concepts in different jurisdictions are accommodated. This accommodation can take place in many ways: by a process of law reform in one or more countries, reflecting influences beyond the jurisdiction’s borders; by the mediation of private law concepts adopted by parties caught between two legal systems; or by a myriad of other contact points between legal regimes, from academic writings, the conceits of law professors, to visits by government officials to neighboring countries.³⁴

In his opinion, “harmonization should not be confused with unification of laws, or with the “imposition of one legal model on all jurisdictions.”³⁵

30. Jacob Ziegel, *Harmonization of Private Laws in Federal Systems of Government: Canada, the USA, and Australia*, in *MAKING COMMERCIAL LAW: ESSAYS IN HONOUR OF ROY GOODE* 133 (Ross Cranston ed., 1997).

31. David Leebron, *Claims for Harmonization: A Theoretical Framework*, 27 *CAN. BUS. L.J.* 63, 667 (1996). He also argues “the term ‘harmonization’ is something of a misnomer insofar as it might be regarded as deriving from the musical notion of harmony, for it is difference, not sameness, that makes for musical harmony.” *Id.* at 67.

32. American Law Institute, *supra* note 2.

33. H. Patrick Glenn, *Harmony of Laws in the Americas*, 34 *U. MIAMI INTER-AM. L. REV.* 223, 246 (2003).

34. Stephen Zamora, *NAFTA And The Harmonization Of Domestic Legal Systems: The Side Effects Of Free Trade*, 12 *ARIZ. J. INT’L & COMP. L.* 401, 403 (1995). According to Zamora,

the harmonization of law in an inter-jurisdictional and international transaction context is value neutral and cannot be justified in and of itself Harmonization of any legal domain particularly from legislative reform requires specific justification as to the desirability of harmonization and model upon which it is based. The justification cannot be found in any attribute of harmonization. [Due to the] increasing contacts between citizens of different countries, the trend towards harmonization and accommodation of legal differences is likely to continue.

Id. at 404–05.

35. *Id.*

For Professor Boodman, “in a legal context harmonization is merely synonymous with the process of problem solving and is as infinite in its configurations as are potential problems in law.”³⁶ According to Professor Goode, harmonization has two quite distinct purposes:

[t]he first is to create a special regime for international transactions while retaining national laws for purely domestic transactions. . . [t]he second is to facilitate a common market or political or economic grouping by harmonizing the national laws governing domestic transactions, so that state boundaries” do not affect commerce within the grouping.³⁷

Thus he draws a distinction between endeavors like the Vienna Convention and the EEC Directive on Consumer Credit, based on their motivations.

While each of these definitions is debatable, it will suffice for the purposes of this paper to formulate a working definition of harmonization in the field of commercial law: any attempt, by whatever instrument (international convention, model laws, restatements, model contracts, standard form contracts, codes of practice, or usages) to minimize or eliminate discord between national commercial laws as they apply to international commercial transactions. That is the operating definition for this paper and must be borne in mind as the analysis progresses.

2. Historical Context

Harmonization is not a new invention. Perhaps the clearest examples of formal harmonization in modern legal history have been the European national codifications of the 19th and 20th centuries.³⁸ These attempts may be better categorized as unification.³⁹ Thereafter, the growth of nationalism and the corresponding nationalization of law in Europe accentuated European diversity. National laws emerged in many languages and different forms. Germanic codes were different from the codes of the other countries.⁴⁰ The civil and common laws grew side-

36. Martin Boodman, *The Myth of Harmonization of Laws*, 39 AM. J. COMP. L. 699, 707 (1991).

37. Roy Goode, *Reflections of the Harmonisation of Commercial Law*, in COMMERCIAL AND CONSUMER LAW: NATIONAL AND INTERNATIONAL DIMENSIONS 3 (Ross Cranston & Roy Goode eds., 1993).

38. Glenn, *supra* note 33, at 223. Daniel Berkowitz, *The Transplant Effect*, 51 AM. J. COMP. L. 163, 174 (2003). The French pioneered the “first comprehensive national civil, commercial and criminal codes between 1804 and 1811. The [Napoleonic] codes consolidated legislation operating before the French revolution and codified existing business practice in [a systematic manner].” *Id.* at 173. Glenn points out that “[t]he other major codification of the nineteenth century is the German civil code . . . which had been preceded by commercial, criminal, civil and criminal procedure codes. . . .” *Id.*

39. *Id.* at 225.

40. Berkowitz, *supra* note 38, at 173.

by-side and diverged to such an extent that the differences were seen as barriers that were as tangible as physical national boundaries. While this may have been a mere European problem, and hence of little importance to the rest of the world, the impact of colonialism meant that the world's legal systems were divided along civil law and common law lines. Colonialism brought about a peculiar kind of harmonization with the colony acquiring laws based on those enacted in the mother country. "In the nineteenth century, French law was diffused through all continents" because of France's colonies.⁴¹ Likewise, English law dominated North America, Asia, Australia, and parts of Africa. It is true to say that most countries derived their current formal legal order from Europe during the nineteenth century and the early twentieth century. Despite the death of colonialism and the independence of the former colonies, most countries continue to retain the core characteristics of the legal system they had received from the colonizers. One notable exception is that of the U.S. where the law has broken free of English law.⁴²

Harmonization under colonialism is not to be confused with modern notions of harmonization which are based on respect for all legal systems. Colonial harmonization disregarded indigenous legal systems and imposed the colonizers' law against the consent of the local populace.⁴³ This kind of harmonization in many cases crept into the colonies slowly: at first the transplanted European law applied only to the European population, while local people continued to be governed by local laws and customs. Criminal, tax, and administrative law was applied to the locals but in family, inheritance, and also commercial matters amongst themselves, local law prevailed. This was the practice in many English colonies, including India, and the jurisdiction of common law courts was only extended over time.⁴⁴ This brief historical context only serves to distinguish modern harmonization from its colonial counterpart, and to free it of any political taint. In the modern

41. Rodolfo Sacco, *One Hundred Years of Comparative Law*, 75 TUL. L. REV. 1159, 1161 (2001).

42. Berkowitz, *supra* note 38, at 174.

43. Legal systems that were well developed included Hindu law, Islamic law and Chinese law.

44. It was only after the British government took over control from the East India Company in 1858 that the general jurisdiction of the common law established. Courts were created with the Privy Council as the highest court of resort. English common law was also codified which greatly accelerated the application of the common law to India and later to other parts of the empire.

era, there is vigorous participation in the creation of international commercial law from all countries, and in many cases, such participation offers the opportunity to get rid of colonial laws.

B. Arguments for the Creation of International Commercial Law

Although it may seem that harmonization has innate intuitive virtues, it is important to understand the arguments advanced by its proponents. There is no consensus that indicates overwhelming appeal, and each argument must be individually examined and evaluated. This paper contents itself with a brief outline of the main arguments.

1. Divergent National Laws Cause Problems

Some scholars have argued that the mere existence of different national laws is a reason to engage in the harmonization process.⁴⁵ According to Ansel, “the disparity of national laws is contrary to the requirements of [the] modern economy and inimical to the development of international relations; a uniform law is superior to a system of conflicts of law, which allows the existence of those specific differences on which it is based.”⁴⁶ He equates the diversity in national laws to diversity of local customs within a single country, and argues that it is undesirable because it “compromises the soundness, the general value, and the supremacy of the law.”⁴⁷ In his view, this diversity provokes stress, the elimination of which must be the aim. It is hard to agree with this extreme view.

Professor Stephan points out that divergences in national laws may cause “legal risk.”⁴⁸ In his view, such legal risk can encourage opportunism by commercial parties who may, for instance, race to litigate in a forum that will suit their interests in case something goes wrong with the transaction.⁴⁹ One of the pitfalls of the existence of “legal risk” is that at the dividing line between risky and non-risky transactions, many parties may desist from commercial activity.⁵⁰ Accordingly, there may be merit in reducing “legal risk” to foster commerce.⁵¹

45. Marc Ansel, *From the Unification of Law to its Harmonization*, 51 TUL. L. REV. 108 (1976).

46. *Id.*

47. *Id.* at 110.

48. Paul Stephan, *The Futility of Unification and Harmonization in International Commercial Law*, 39 VA. J. INT'L L. 743, 746 (1999).

49. *Id.*

50. *Id.*

51. *Id.*

Mere diversity in national laws is no reason to create international commercial law. National laws are founded on different policy assumptions and there is no reason to eliminate differences that stem therefrom unless they impede international commerce. Where differences in national commercial laws are an impediment, harmonization can help create an “interface” that helps parties across the divide transact business.⁵² In situations where differences in national laws are not material to the conduct of international commerce, there is little reason to create uniform law. It is important to emphasize this—in the absence of strong reason uniform laws stand very little chance of adoption and will result in wasted resources. Uniformity has very little innate value in this area. Uniformity has appeal only insofar as it eliminates or minimizes hurdles caused by disparity.

That divergent national laws can be an impediment to international commerce was well demonstrated in the European context by the European Commission’s consultation exercise, undertaken in 2001.⁵³ The joint response prepared by the Commission on European Contract Law (CECL), and the Study Group on European Civil Code (hereinafter referred to as the “Joint Response”), as expert a body on the state of European law as is likely to be found anywhere, painted a picture of the difficulties posed even in a small economic region by disparities in the law. The Joint Response was clear about the fact that there was diversity: “Contract laws across the EU show significant diversity on many fundamental points. Businesses cannot safely trade under the private law of another Member State in the supposition that it will be similarly to their own. The impossibility within reasonable conditions for participants in the internal market to acquire essential knowledge about foreign law always entails the danger of substantial loss of claims or unsuspected liabilities.”⁵⁴

They opined that differences between the contract laws of the Member States can have negative repercussions for participants in the internal market in at least four ways. First, they thought that differences effectively prevent certain kinds of commercial activity in the European

52. See Leebron, *supra* note 31, at 75.

53. Dr. Ole Lando & Dr. Christian v. Bar, *Communication on European Contract Law: Joint Response of the Commission on European Contract Law and the Study Group on a European Civil Code*, at v, available at http://www.sgecc.net/media/download/stellungnahme_kommission_5_final1.pdf (Oct. 25, 2001).

54. *Id.* at 9.

market. Second, the Joint Response pointed out that the differences impose additional costs because of the need to find out about foreign law. These costs are either borne by businesses or, where possible are passed on to consumers. If the costs are very great, a business may decide that it would not be worth entering into international deals and may choose to forego otherwise profitable economic activity. This can also adversely affect competition in the common market. Third, the differences may mean that legal relationships are entered into without a proper understanding of the legal consequences. They point out that businesses do not always take into account the many peculiarities of foreign contract law, and are taken by surprise when rules of private international law come into play.⁵⁵ Fourth, the fear of adverse legal consequences in a foreign country may motivate businesses to not risk international trade. This may apply with great force to deter small or medium-sized enterprises (SMEs) which cannot bear the legal costs.

The Joint Response points out that in view of the many profound differences between the contract laws in the Member States such a concern can often be justified. Even if the fear is unfounded, it can still deter businesses from engaging in trade.⁵⁶ Further, in their experience,

[I]t is difficult and often impractical for parties entering into agreements or already bound by contracts to obtain cost-effective information about foreign law relevant to rights and liabilities under transactions they are contemplating or have entered into. The problems are particularly acute in the area of the law of obligations and property law because even in many of the legal systems where this area of the law has been codified the legislation is relatively old and its meaning cannot be established without grasping the significance of much judicial interpretation of its provisions. In relative terms the law is less apparent and more difficult to ascertain with assurance of its correctness.⁵⁷

They concluded that there were “substantial increases in costs for market participants” that spring from “the diversity both of mandatory contract law rules . . . and of dispositive contract law rules.”⁵⁸ The parties also stood to incur additional costs if a legal dispute arose requiring them to resort to the courts. In the opinion of the authors, litigation in cases that invoke foreign law is particularly expensive as foreign legal opinion has to be obtained, witnesses may have to be

55. “This difficulty in finding essential information about foreign law on a cost-effective basis creates the very real danger that participants in the European market will trade on the basis of false assumptions as to their legal position or be dissuaded from commercial activity because of the legal uncertainties involved.” *Id.*

56. “The fact that substantially the same legal wine may be found in different shaped bottles as business activity moves from jurisdiction to jurisdiction is not enough to create the right environment for business in a continental market; apparent differences can be as damaging to confidence as real ones.” *Id.* at 6.

57. *Id.* at 9.

58. *Id.* at 10.

prepared, etc. Although the authors did not undertake any empirical study to assess the magnitude of any of these costs, they felt that it was a safe assumption, supported by anecdotal evidence, that significant costs are incurred in these situations. Furthermore, they also believed that private international law does not ameliorate that problem.

The Joint Response also addressed the diversity of legal regimes that arises when some Member States sign an international convention when others do not. As is obvious, this results in harmonization for the signatory countries, but as regards the non-signatories, within the European Union it results in fresh legal diversity. The answer is simple—the non-signatories can accede to the convention, or the European Union as a whole can enter into the convention. The authors wanted a coordinated approach of the international policy of Member States in signing, ratifying and implementing international agreements unifying private law, and thought that Member States should sign such conventions en bloc. One example of this is article 3 of Council Decision of February 19, 2002, authorizing Member States, in the interest of the Community to sign or ratify the International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001. This is an approach that has great merit and would also be welcomed whole-heartedly by the harmonizing agencies as it would improve the process of ratification and harvest more signatories.

In contrast to their counterparts in America, the authors were convinced that “divergent contract law makes it impossible to engage effectively” in Europe and that businesses which do so “are often burdened by costs which are either superfluous or unforeseeable.” Further, “risks of liability are extraordinarily difficult to gauge; often they are simply absorbed and may make business unprofitable or loss-making.”⁵⁹ From the Joint Response one gets the impression that very little trade happens because of these problems. However, this is not so, as proven by the sheer magnitude of trade in the European Union. The correct interpretation is perhaps that trade is conducted despite these great differences between the laws, and by incurring the costs that such differences impose. The elimination of these costs will probably reduce legal costs and improve profit margins. It is unclear from the European Commission’s consultation exercise if the respondents were objecting to the differences in mandatory rules of contract law, or contract law as a

59. *Id.* at 14.

whole. If they were only objecting to differences in mandatory rules, and problems created thereby, it would be sensible to tailor harmonization more narrowly.

2. *National Laws May be Inadequate for International Transactions*

There are situations in which national laws do not meet the demands of international commerce. This is not so much because of differences in solutions afforded by the different national laws that may come into play in relation to any given transaction as it is due to the innate limitations of national laws as they apply to international transactions.⁶⁰ As Rene David colorfully put it, “the use of domestic tools to solve questions that are essentially international ‘is to square the circle.’”⁶¹

One glaring instance of this is the area of security interests in mobile equipment. Because of its very nature, mobile equipment will not be confined to any one jurisdiction, and it would be difficult, if not impossible to keep track of the various security interests these items may be subject to in the absence of an international register that records these interests. No single national law can create such an international register. In the absence of such an international register, parties will be forced to conduct searches in various national registries (where they exist) to determine issues of priority, and even then may not be adequately protected. This is a clear example of the need for an international solution.

3. *Modernization and Facilitation of International Trade*

This has been a function of harmonization that has long been neglected. UNCITRAL was founded in 1966 with a mandate to further the harmonization of the law of international trade, motivated by:

60. To quote the colorful words of Professor Goode, “The time has long passed when domestic legislation shaped for internal trade can provide sensible solutions to the problems of internal commerce . . . there may be substantial advantages in uniform law within a restricted field. The parties are able to sing from the same hymn sheet, to become familiar with the text, to read it in their own language, and to reduce their dependency on local experts in every jurisdiction in which they transact business.” Goode, *Insularity or Leadership? The Role of the United Kingdom in the Harmonization of Commercial Law*, *supra* note 1, at 752.

61. Rene David, *The International Unification of Private Law*, in 2 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW 7 (1969) (cited in Friedrich Juenger, *Conflict of Laws, Comparative Law and Civil Law: The Lex Mercatoria and Private International Law*, 60 LA. L. REV. 1133, 1139 (2000)). Juenger also quotes Uruguayan private international law scholar Quint Alfons, who believed that the domestic law of a state is designed to serve the needs of its society and cannot be applied in international transactions.

[T]he belief that the progressive harmonization and unification of international trade law, in reducing or removing legal obstacles to the flow of international trade, especially those affecting the developing countries, would contribute significantly to universal economic cooperation among all States on a basis of equality, equity and common interest and to the elimination of discrimination in international trade and, thereby, to the well-being of all peoples.⁶²

Despite this mandate, modernization had not assumed the importance it should have due to the paralysis of the Cold War years. However, in the current global environment, this is a very powerful motivation for harmonization. This is especially true for countries that are moving from planned or mixed economies to a free market economy. Such a movement inevitably requires legal reform to facilitate free enterprise. While these nations may see the need to reform their laws, that may be easier said than done due to the absence of expertise of law as it works in a free market. One way out of this conundrum might be to copy the laws of a country or countries that have a free market.

This is indeed a common practice. Legislators very frequently and unwittingly bring about harmonization through the process of copying. Drafters in various countries examine legislation in other countries and seek to implement similar legislation at home by copying from foreign legislations.⁶³ Glenn points out that Mexico “created a law for non-possessory security interests in moveable property that is substantially based on the laws of the U.S., [and Canada].”⁶⁴ The Chilean legislature has similarly borrowed from Quebec.⁶⁵

In the process of copying, legislators even seek to improve the foreign law by making changes.⁶⁶ The advantage may be that the legislator has a whole array of domestic laws to choose from and can choose the best law. Glenn calls this “legislative transnationalism.”⁶⁷ Although at first blush this looks like a process of unintended harmonization, in fact it is not so. The copying legislature is free to make whatever changes it deems fit, and harmony is lost as another version of the law springs up adding to the diversity. Even if the copy is identical, this kind of

62. See UNCITRAL, *Report of the UNCITRAL on the Work of its Thirty-fifth Session*, 35th Sess., Supp. No. 17, U.N. Doc. A/57/17 (2003).

63. Glenn, *supra* note 33, at 242.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* According to Glenn, the process of “legislative transnationalization” can be aided by the creation of Model Laws. In his view, this would at least provide a unity at the starting point as states would only diverge for good reason.

harmonization can at best be fragmented.

Copying is not an adequate solution for many reasons. First, the law of the original country or countries may itself be crying out for reform. Second, the copying of another country's law results in an absence of participation in the legislative drafting process. In copying another country's law, there will also be the unnecessary copying of the political, financial, and interest group compromises that resulted in the adoption of that law. This baggage is not only unnecessary, but is also undesirable. Harmonization may provide the answer. It provides these nations with ready to adopt legal instruments that reflect the requirements of international commerce, while allowing them to participate in the formulation of the instrument. The problem of many nations not possessing the expertise required to craft legal instruments on their own⁶⁸ is also alleviated to some extent. The harmonization process allows them to draw upon a wealth of international expertise and build a body of scholarship for their own countries.

One recent example of modernization being a motivation for harmonization is the case of aircraft financing. With the enormous growth in civil aviation, demand for aircraft has skyrocketed. This is especially true of developing countries which did not have an extensive aviation industry even a decade ago. A concomitant development has been the privatization of many national carriers, with the result that these new private operators have to fend for themselves in obtaining financing. The law has been left behind and in the absence of a law that protects creditors' interests, the extension of credit to finance aircraft acquisitions is difficult.⁶⁹ The law has a direct impact on the availability of financing. The 2001 UNIDROIT Convention on International Interests in Mobile Equipment and its Aircraft Protocol were adopted with a view to achieve this direct impact and countries with deficient legal regimes have a good reason to adopt it.⁷⁰ The sheer proliferation in attempts to harmonize and hence modernize the law on secured credit is

68. Farnsworth notes that "[s]maller and poorer countries, however, are often unable" to field experts even for meetings. While this may be because these countries do not consider a particular harmonization endeavor to be of sufficient political significance to justify the costs involved in sending experts to meetings, it is nevertheless a pointer to the disparity in distribution of expertise amongst nations. See Allan Farnsworth, *Unification and Harmonization of Private Law*, 27 CAN. BUS. L.J. 48, 59 (1996).

69. Terena Penteado Rodrigues, *International Regulation of Interests in Aircraft: The Brazilian Reality and the Unidroit Proposal*, 65 J. AIR L. & COM. 279, 281 (2000). One indicia of the growth in the aircraft sector can be seen by the fact that over the next twenty years Airbus Industrie and Boeing Company estimate a combined delivery of 30,650 aircraft. See David Clancy & Gregory Voss, *Facilitating Asset-Based Financing and Leasing of Aircraft Equipment Through The Proposed Unidroit Convention: Manufacturers' Perspective*, 23 AIR & SPACE L. 287, 287-88 (1998).

70. Clancy & Voss, *supra* note 69, at 288.

an eye-opener to its importance: while the European Bank for Reconstruction and Development (EBRD) has spearheaded such attempts in Eastern Europe,⁷¹ in Asia it is under the umbrella of the Asian Development Bank (ADB).⁷² The Organization of American States (OAS) has crafted a Model Inter-America Law on Secured Transactions for Latin America.⁷³ This is vigorous activity by any standards.⁷⁴ It is a sure sign of the persuasiveness of harmonization as a tool for modernization, given the reality that the law of credit is directly related to the freeing up of markets and the expansion of trade.

An illustration of harmonization's modernization function can be seen in the Mexican experience with regard to secured transactions law. Before the enactment of the New Secured Transactions Law, Mexico's outdated law did not serve the purpose for which it was designed.⁷⁵ There were a number of security mechanisms which caused confusion.

71. In 1993 the European Bank for Reconstruction and Development published a Model Law on Secured Transactions, designed to be a guide those states of Central and Eastern Europe that were interested in modernizing their securities and financial laws. It was also meant to spur harmonization of the law among these states. In the words of its drafters, the "principle which has guided the drafting of the Model Law has been to produce a text which is compatible with the civil law concepts which underlie many central and eastern European legal systems, and at the same time, to draw on common law systems which have developed many useful solutions to accommodate modern financing techniques." European Bank for Reconstruction and Development, *An Introduction to the European Bank's Model Law on Secured Transactions*, at <http://www.ebrd.com/country/sector/law/st/modellaw/modellaw0.htm> (last visited Feb. 5, 2004).

72. Claps & McDonnell, *supra* note 25, at 398.

73. *Id.*

74. This could be explained by Professor Goode's view that "Without an adequate legal regime for personal property security rights, it is almost impossible for a national economy to develop. Indeed, the World Bank considers the role of security so central in promoting economic growth that before making a loan to a developing country it will normally seek to establish to what extent a sound legal system for the creation and protection of security interests is or will be in place." Roy Goode, *Security in Cross-Border Transactions*, 33 TEX. INT'L L.J. 47, 47 (1998). He notes the impetus as stemming from the growth of the private sector in countries that had a predominant public sector, with the result that sovereign risk has been converted to enterprise risk, the growth in asset-based financing of high value equipment, the evolution of multinational syndicates to finance loans that are too large to be handled by the banks of any one country; the fact that collateral extended by multinational companies may not be in just one country, the growth of securitization, and the globalization of securities markets. *Id.*

75. See Hale E. Sheppard, *Overcoming Apathetic Internationalism To Generate Hemispheric Benefits: Analysis of and Arguments of Recent Secured Transactions Laws In Mexico*, 10 J. TRANSNAT'L L. & POL'Y 133, 141 (2001); See also Boris Kozolchik, *What To Do About Mexico's Antiquated Secured Financing Law*, 12 ARIZ. J. INT'L & COMP. L. 523, 526-28 (1995).

There was no concept of a uniform security interest and the existence of this menu of instruments was a severe obstacle to the extension of credit. Even if credit was extended, litigation was rampant. Observers claimed that the reluctance of foreign entities to lend in Mexico was a foregone conclusion in light of such pervasive legal confusion.⁷⁶ According to Sheppard, “the overwhelming majority of small and mid-size businesses failed to obtain credit at a reasonable cost because they did not possess land, the only collateral acceptable to skeptical lenders.”⁷⁷ Mexican businesses were required to provide cash or property located in the U.S. as collateral before they were extended loans. If collateral was not available, “then the ability of a Mexican company to obtain credit [was] severely limited because of concerns by U.S. banks as to their ability to obtain enforceable security interests in Mexico.”⁷⁸ U.S. lenders were reluctant to extend credit to Mexican entities.⁷⁹ Professor Sheppard cites experts who state that “[t]here are numerous lenders in the United States and elsewhere who would like to come into Mexico to do business if the Mexican laws were more supportive to the lenders.”⁸⁰ He also quotes other experts who claim that the legal deficiencies in terms of secured lending actually contradicted the spirit of NAFTA. Although the trade agreement allowed U.S. and Canadian institutions to take part in lending transactions in Mexico, “they are constantly rejecting otherwise viable requests for loans from Mexican companies because of the inability to create security interests in assets located in Mexico.”⁸¹

The New Secured Transactions law based on Article 9, is a kind of harmonization achieved by borrowing, and has served to modernize Mexico’s secured transaction laws. The experience with regard to secured transactions law is as good a case for the need for harmonization brought about by market forces as there is ever likely to be. There is virtually a consensus in opinion that a modern secured credit law is a *sine qua non* for the availability and the lowering of the cost of credit.⁸²

76. See Todd C. Nelson, *Receivables Financing to Mexican Borrowers: Perfection of Article 9 Security Interests in Cross-Border Accounts*, 29 U. MIAMI INTER-AM. L. REV. 525, 546 (1998).

77. Sheppard, *supra* note 75, at 145-46.

78. *Id.* at 146.

79. *Id.* at 176.

80. *Id.* at 175.

81. *Id.*

82. UNCITRAL, *Draft Legislative Guide on Secured Transactions*, U.N. Doc. A/CN.9/WG.VI/WP.9, available at <http://www.uncitral.org/en-index.htm>. UNCITRAL noted that deficiencies in the law in this area could have major negative effects on a country’s economic and financial system, and observed that:

an effective and predictable legal framework had both short- and long-term macroeconomic benefits. In the short term, namely, when countries faced crises in their financial sector, an effective and predictable legal framework

As credit is the life-blood of commerce, the flow-through benefits for international trade from harmonization are obvious. There is also a redistributive function to harmonization here—no less a body than UNCITRAL believes that modern secured credit laws could alleviate inequalities in access to lower-cost credit between parties in developed countries and those in developing countries, with resulting improvement in the share of developing countries in the fruits of international commerce.⁸³ Accordingly, modernization will not only be of legal systems, but also of other aspects of life, impacted as it is by the ability to afford high value equipment due to the extension of credit.

Harmonization also serves the modernization function from a general systemic standpoint. Historically, legal systems in developing countries have been criticized for numerous reasons. Their legal institutions are congested, poor, corrupt, and in general incapable of adequately performing the functions for which they exist. The legal systems are characterized by uncertainty derived from the ambiguity of the laws which is compounded by uncertain interpretation by the courts. Many of these problems are endemic to legal systems throughout the developing world. They are all characterized by insufficient resources to support courts and judges, inefficient and corrupt dispute resolution procedures, convoluted procedural laws, and outdated substantive laws. There may also be systemic inefficiencies that have crept in as a result of these factors, exacerbated by a lack of critical study and impetus to change. Almost without exception these legal systems are thought to need a thorough overhaul to bring them in line with modern requirements. There can be no better solution than harmonization, in any of its myriad forms, to achieve this modernization at a systemic level. It would be impossible for any system to acquire the knowledge and resources to

was necessary, in particular in terms of enforcement of financial claims, to assist the banks and other financial institutions in controlling the deterioration of their claims through quick enforcement mechanisms and to facilitate corporate restructuring by providing a vehicle that would create incentives for interim financing. In the longer term, a flexible and effective legal framework for security rights could serve as a useful tool to increase economic growth. Indeed, without access to affordable credit, economic growth, competitiveness and international trade could not be fostered, with enterprises being prevented from expanding to meet their full potential.

Id.

83. *Id.* (cautioning that such laws needed to strike an appropriate balance in the treatment of privileged, secured and unsecured creditors so as to become acceptable to States).

take corrective action alone. Harmonization places the world's resources at the developing world's disposal in terms of its intellectual capital, and also carries with it legitimacy afforded to it by the reputations of the world's foremost experts.

4. *Reducing Costs*

Requirements imposed by various national legal systems can be extremely costly to business. These can range from the bare cost of legal advice to costs imposed by the law's inadequacy for international commerce. One illustration of the latter is again easily discernible in the instance of the law regarding the extension of credit. The unpredictability and uncertainty caused by differing treatment by national laws will necessarily affect credit cost. As uncertainty increases, risk increases, and this risk is passed on to the debtor in the form of higher credit cost. In international transactions, this uncertainty stems from the very outset in the form of the uncertainty as to the applicable law to govern the transaction. Even once the applicable law is determined, parties have to educate themselves about their rights and obligations under that law. There is then the substantive problem that the applicable law may not be creditor-friendly. For example, the creditor may not be able to repossess the assets in the event that the debtor defaults in making payment. In these circumstances, the existence of a single instrument that governs all aspects of the transaction can play a major role in reducing risk and thereby reducing costs, thus leading to a better use of resources.⁸⁴ Because the harmonized law subjects a transnational commercial transaction to a single set of rules, it increases the likelihood that there will be a production of efficient law, but there are some risks involved.⁸⁵

5. *Providing a Neutral Choice of Law*

Parties in international commercial transactions may be loath to disavow reliance on their own laws, particularly when they happen to be

84. See Anthony Saunders et al., *The Economic Implications of International Secured Transactions Law Reform: A Case Study*, 20 U. PA. J. INT'L ECON. L. 309, 310 (1999) (proclaiming the advantages of the International Institute for the Unification of Private Law, commonly known as UNIDROIT, and its Convention on International Interests in Mobile Equipment as modified by the Aircraft Equipment Protocol).

85. Steven Walt, *Novelty And The Risks Of Uniform Sales Law*, 39 VA. J. INT'L L. 671, 672 (1999) (explaining that uniform law is a "mixed blessing" for three reasons: (1) uniform law can increase the impact of inefficient rules; (2) despite uniformity there is the risk of differences in implementation; and (3) novelty in uniform law risks uncertainty in what the legal rule itself requires).

government entities. This is quite logical given that they know their own legal systems best and are most comfortable using their own laws. There is also the fact that government entities may view subjection of the contract to another national law as an affront to their sovereignty and prestige. This can result in a stalemate if both parties take the same position. This sort of situation is not uncommon and in many such cases the contract is subjected to vague notions such as “the general principles of law.” Professor Berger gives the example of two arbitral cases of this sort, where the contracts stated that they were subject to “Anglosaxon principles of law” and the “principles of natural justice.”⁸⁶ In such circumstances, the harmonized law can provide a way out of the impasse by allowing the parties to rely on a neutral law to govern the transaction without requiring a compromise from either party. In the example cases, the arbitrators applied the UNIDROIT Principles, trade usages, and the parties’ national laws, as a synthesized law that governed the contract.⁸⁷ In the Eurotunnel arbitration, the arbitrators and parties again applied the UNIDROIT Principles when the choice of law clause stated that:

[t]he construction, validity and performance of the contract shall in all respects be governed by and interpreted in accordance with the principles common to both English and French law, and in the absence of such common principles by such general principles of international trade law as have been applied by national and international tribunals. Subject in all cases, with respect to the works to be respectively performed in the French and in the English part of the site, to the respective French or English public policy (*ordre public*) provisions.⁸⁸

Although neutrality of choice as a reason is not as persuasive as it used to be for creation of international conventions, it is significant that the 1980 Vienna Convention on the International Sale of Goods, met with much success, with this as a major reason for adoption. Concerns of neutrality can only find more favor as international arbitration grows.

C. Arguments Against Creating International Commercial Law

Not everyone is convinced that harmonization is desirable.⁸⁹ In recent

86. Klaus Peter Berger, *International Arbitral Practice and the UNIDROIT Principles of International Commercial Contracts*, 46 AM. J. COMP. L. 129, 143 (1998).

87. *Id.*

88. *Id.* at 144 n.69.

89. “Many harmonization claims must be met with skepticism for it is unclear whether harmonization is the best solution to the underlying problem, and even if it is, it may impose unacceptable costs.” Leebron, *supra* note 31, at 64.

years, there has been criticism both of the need for and the methods employed by harmonizing agencies.⁹⁰ It has been argued that many of the products of harmonization endeavors were unnecessary, and in fact are detrimental to international commerce.⁹¹ Although Stephan concedes that the reduction of “legal risk” may foster commerce, he argues that such a reduction is not without a cost.⁹² He gives the example of a rule which voids all late deliveries and has the virtue of certainty, but which may be less preferable to an ambiguous rule that recognizes extenuating circumstances.⁹³ This is a rather simplistic view of the harmonization process. Harmonization does not aim to provide a mechanical lowering of risk. In pursuit of the best solution, it will take on board principles that might optimize risk, rather than seek its elimination.

Stephan understandably takes a very dim view of the benefits of harmonization:

International unification instruments display a strong tendency either to compromise legal certainty or to advance the agendas of interest groups. In either case they offer no obvious gains as compared to rules produced through the national legislative process. In particular, we have no reason to expect these instruments to achieve substantial improvements in the law, if we may disregard what the interest groups get out of their adoption. . . . And what reduction of legal risk the instruments achieve comes mostly, if not entirely, through conceding the field to specific interest groups, whether carriers, bankers, or other cohesive minorities.⁹⁴

This conclusion will be examined in the light of some of the general criticisms considered below.

1. Diversity is a Virtue

This school of thought holds that national laws are as much a product as anything else and that because of the needs of international commerce, nations have an incentive to compete to craft the best law. According to these scholars, harmonization acts as an impediment to innovation.⁹⁵ Daniels contends that it is not sufficient to assert that there are costs imposed by the diversity in national laws, but that it is

90. See J.S. Hobhouse, *International Conventions and Commercial Law: the Pursuit of Uniformity*, 106 L. Q. R. 530 (1990).

91. Stephan, *supra* note 48, at 744.

92. *Id.* at 747.

93. *Id.* (stating that the taste for risk, like the taste for spicy food, varies from person to person).

94. *Id.* at 788.

95. See Ronald J. Daniels, *Should Provinces Compete? The Case for a Competitive Corporate Law Market*, 36 MCGILL L.J. 130, 130 (1991). Although Daniels's criticisms are in the context of provinces in a federal structure, they apply in the international context as well. For a discussion of these criticisms, see Ziegel, *supra* note 30, at 136.

necessary to show that these costs exceed the benefits.⁹⁶

This position follows from the belief that parties must have great autonomy to choose whichever law they think is best to govern their transaction. The consequent fallout is that countries will compete to produce laws that may be more attractive. The fallacy in this line of thinking is manifest—it would result in a kind of perverse competition where some of the very fears advanced by the skeptics, viz., dominance by powerful interest groups, magnified transaction risks, etc., are all heightened. Stephan and others advance the analogy of U.S. corporate laws, where different states have competed to attract companies to incorporate within their boundaries by dangling the carrot of better legal treatment.⁹⁷ This, they argue, has resulted in a race to the top with Delaware boasting the best climate for incorporation. This analogy wears thin when transplanted to the international context. First, corporate law is quite different from commercial law. The former, at least for the purposes of this argument, only concerns a voluntary choice to incorporate, and the obligations that flow from that are transparent. Commercial law brings problems that are not voluntarily subscribed to, and drags in third parties who may not know what the rules are. The other obvious difficulty is that it is impossible to compare states within the United States with poor countries! Most U.S. states have greater resources than the majority of the nations of the world, and the kind of race to the top resulting from a move to create the “best law” is chimerical in the international context. Moreover, while it is true that some of the difficulties posed by different national laws in the international commercial context may be overcome by parties choosing the law that is to govern their transaction, this is not always the solution, even assuming that parties had the free choice to exclude mandatory rules. This is particularly the case when third parties’ rights are involved. At its barest minimum, harmonization reduces transaction costs.⁹⁸ It reduces uncertainty and improves efficiency, which is more than can be said for the “competitive law-making” scenario.

There is also a systemic attack launched by Pistor which argues that instead of improving domestic legal systems harmonization undermines the development of effective legal systems in developing countries.⁹⁹

96. Daniels, *supra* note 95, at 140.

97. Stephan, *supra* note 48, at 790.

98. Leebron, *supra* note 31, at 76.

99. Katharina Pistor, *The Standardization of Law and Its Effect on Developing*

Pistor's thesis is based on the idea that legal rules are interdependent and although transplanting external rules may be the best practice, it "sterilizes the process of lawmaking from political and socioeconomic development" and distances the lawmaking process from "the process of continuous adaptation and innovation."¹⁰⁰ Central to her argument is the idea that law is a living, contextual instrument. Accordingly, the creation of law outside the domestic context deprives it of the organic quality of home-grown law. Pistor also points out that distillation of the theoretically best legal rules from various legal systems results in the creation of legal rules which have not been tested in the laboratory of a real world system.¹⁰¹

Another argument is that such rules may also be resisted in practice by courts and other institutions. Pistor gives the example of the Vienna Convention on the International Sale of Goods to contend that in the few cases where courts have applied the Convention, both parties were apparently unaware that this Convention governed their transaction and that very frequently parties who realize that they might be subjected to it opt out by including a provision in the contract that explicitly denies the application of the CISG.¹⁰² While it is true that law is a living instrument, Pistor's arguments lose much of their potency when one considers that most countries have laws that are part of the common law or civil law systems due to their imposition by colonial rule. Accordingly, the law has grown somewhat in tune in the former colonies, and the kind of harmonization that Pistor is talking about does not have the deleterious impact that she argues it does. Instead of stultifying organic growth, harmonization can actually facilitate growth due to the education function it provides to lawmakers, and because of the room for equal participation.

2. *Lack of Representative Capacity*

One of the criticisms advanced against harmonization concerns the very nature of the bodies that play a role in this area. By their very nature, these agencies are bodies of experts, and cannot satisfy conventional democratic standards imposed on national legislatures. They are not held accountable in the same way as are national bodies. Even more worrisome is the fact that it is not clear if they are

Economies, 50 AM. J. COMP. L. 97, 98 (2002).

100. *Id.*

101. *Id.* at 102.

102. *Id.* at 110–11. According to Pistor the reason for opting out is that the parties consider the "uncertainties involved in interpretation of the new terms and concepts" in the convention "to be too high." *Id.* at 111.

accountable at all, and if so to whom. This is an inherent weakness in the process.

Some check on the process and its legitimacy is provided by the simple fact that harmonized laws have to pass muster before national legislatures before they come into force. Once a legislature takes for consideration a harmonized instrument, it is no different from a piece of domestic legislation. Thus there is a kind of filtered accountability.

Criticism exists that interest groups and lobbies may tilt the law in favor of themselves and those who are less powerful do not have much say in the drafting process, with the result that, at least with international conventions, legislatures are saddled with a binary take-it-or-leave-it choice. Stephan asserts that the nature of the bodies that play a role in harmonization lead them to be unduly influenced by interest groups.¹⁰³ Critics of the Uniform Commercial Code (U.C.C.) have argued that Article 9 is creditor-centered because major lending organizations dominated the U.C.C. drafting process.¹⁰⁴ Scholarly literature questions "the role of big banks, securities firms and major corporations in the U.C.C. drafting process."¹⁰⁵ Although there is some merit in this criticism, this is not unique to international lawmaking. Interest groups play a major role in the making of domestic laws as well, and one can only rely on the integrity of the legislators to ensure that laws reflect a balance of interests. It must be conceded that it has historically been difficult for smaller interest groups to be able to afford the resources required to participate effectively in international lawmaking. However, with advances in modern technology, particularly the Internet and telephone and video conferencing, the barriers have fallen significantly. One has only to look at the recent experience in the drafting of international conventions in the public law area to see the impact of non-governmental actors.¹⁰⁶

103. Stephan, *supra* note 48, at 744.

104. Claps & McDonnell, *supra* note 25, at 415. While noting that the UCC system accords primacy to the creditor's interest, they draw a contrast to the "legal order" precautions which have the priority position in Argentine law, explained by the Argentinean imperative to prevent fraud, mistake or overreaching. This, according to them, could be because Argentina's current documentation requirements for registered pledges are heavily influenced by the perception that earlier legislation allowing registered pledges for agricultural machinery, crops and livestock was abused by creditors. This could be true of many other nations, in particular those which had a feudal and colonial history.

105. *Id.*

106. This is particularly visible in the drafting of environmental conventions, and in

Thus this criticism must be met with skepticism, and in any event cannot be persuasive in ceasing harmonization efforts. At best, it can serve as criticism for improvement. Moreover, as Burman notes, in UNCITRAL, non-state actors have a role to play in the commercial law area. He does, however, observe that this is an area of tension as non-state actors believe that they should be as much involved with the formulation of law as sovereign states.¹⁰⁷

3. *Inferiority of International Commercial Law*

This is a more substantive concern, attacking the qualitative nature of the product of harmonization. The argument is that the national law is qualitatively superior.¹⁰⁸ Critics argue that by its very nature international draftsmanship requires compromises that severely enervate the resultant law.¹⁰⁹ National sensibilities have to be balanced in order to obtain acceptability. The quest for uniformity uncovers the reality that where uniformity is not achieved, a “diplomatic uniformity” is hammered out, very often in clever guises.¹¹⁰ One widely adopted tactic is that of a rule immediately emasculated by an equally broad exception.¹¹¹ This was particularly true before the last decade when the divides between common law and civil law and between capitalism and socialism was especially pronounced. Such ideological concerns have given way to pragmatism and lawmakers are not particularly concerned with seeking a balance anymore as they are with arriving at the best solutions. There is

the WTO process wherein NGOs have been included in the debate.

107. Burman, *supra* note 7, at 362.

108. To quote Professor Goode, once again, “there are those who consider that the English law in all its majesty is greatly superior to anything that could be devised at international level.” Goode, *Insularity or Leadership? The Role of the United Kingdom in the Harmonization of Commercial Law*, *supra* note 1, at 756.

109. Hobhouse, *supra* note 109, at 533.

110. *See id.* at 534 (arguing that uniformity achieved through diplomatic means, in practice, does not represent a freely chosen system of codes and ultimately interferes with parties’ contracts).

111. *See id.* *See also* CISG, art. 16(1) (“Until a contract is concluded an offer may be revoked if the revocation reaches the offeree before he has dispatched an acceptance.”); *id.* art. 16(2) (“However, an offer cannot be revoked: (a) if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable; or (b) if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer.”); *id.* art. 43(1) (“The buyer loses the right to rely on the provisions of article 41 or article 42 if he does not give notice to the seller specifying the nature of the right or claim of the third party within a reasonable time after he has become aware or ought to have become aware of the right or claim.”); *id.* art. 43(2) (“The seller is not entitled to rely on the provisions of the preceding paragraph if he knew of the right or claim of the third party and the nature of it.”). These articles exemplify various instances where rules become enervated as a result of the broad exceptions made.

no reason for international instruments to be inferior in quality to their nationally drafted counterparts. In fact, the recently adopted conventions on International Interests in Mobile Equipment, and The Hague Convention on Security Interests held by Intermediaries illustrate the tremendously high quality of drafting—something that was achieved only due to the availability of international expertise. These examples are not likely to be isolated instances as ideological divides crumble and the pursuit turns to the best solutions for given problems of international commerce.

4. The Problem of Amendment

Unlike parties under easily-amended domestic laws signatories are locked into an achieved harmonized instrument until a new instrument comes into force. Given that international lawmaking is a time-consuming process, this problem becomes pronounced. The further problem is that unless all of the countries adopt the new instrument, there will be even more discord than previously existed. This is definitely a problem that harmonizing agencies have to be keeping in mind. They must ensure that harmonization does not result in petrification.

There are two aspects to this problem: the first is the inordinate time taken to create international legal instruments. This is unavoidable to an extent, given that experts from far flung corners of the globe have to collaborate in drafting. However, the time frame for the drafting of international conventions is rapidly shrinking due to the evolution of modern communication techniques which dispense with travel requirements. The Hague Convention is a classic case in point – it took two years from start to finish, and it is hardly imaginable that domestic legislation could have been completed in a shorter timeframe. The second problem, and the root of the matter, is the extremely long time it takes for countries to ratify the harmonized law. While the instrument sits in cold-storage before it secures the requisite number of ratifications to come into force, true harmonization is not achieved. It requires a critical mass of the world's major commercial players to adopt the instrument. This can sometimes take decades, and harmonizing agencies are loath to render such hard wrought harmony nugatory by amending the original text. The solution may lie in adopting innovative techniques that dispense with the cumbersome requirements of adopting a new instrument. In any event, it follows that if the area for harmonization is well chosen, there will be sufficient impetus from industry to adopt the

instrument, and hence some of the time problems may be overcome.

5. *Entrenched National Preferences*

Many of the arguments against harmonization are motivated by thinly disguised parochialism. Lawyers and legal systems are reluctant to give up reliance upon their own familiar laws, and this reluctance is sometimes due to a view that their own laws are superior. There may also be the fear that their national laws would lose their pre-eminent position, and this would translate into a reduction in business. As Forte points out with regard to the United Kingdom's reluctance to ratify the Vienna Convention on Contracts for the International Sale of Goods, 1980, "If the Convention were ratified by the UK and . . . came to be widely applied to international sales, with or without a connection with this country, the role of English law in the settlement of international trading matters would obviously be diminished. A consequential effect might well be a reduction in the number of international arbitrations coming to this country."¹¹² This is definitely a legitimate concern and there is no need to denigrate the need for self-preservation. Legal services are as much a product as anything else and London as the pre-eminent commercial center is a huge market. English law is extensively relied on by parties in commercial transactions and this provides business for English lawyers.¹¹³ It is possible that the proliferation of international law may erode the dominant position that it enjoys.¹¹⁴

6. *Loss of Harmony Due to Interpretation by National Courts*

Another oft-repeated criticism is that it is not worth the effort to harmonize commercial law as any harmony that may have been crafted by the instrument is fleeting due to the possibility of divergent interpretations adopted by different national courts. Surprisingly enough, this concern has not manifested itself very powerfully. National courts have been more than willing to adopt an internationally oriented view

112. Angelo Forte, *The United Nations Convention on Contracts for the International Sale of Goods: Reason and Unreason in the United Kingdom*, 26 U. BALT. L. REV. 51, 58.

113. *See id.* Forte argues that "There is most definitely a self-perception that English law is a world brand-name and that those entrusted with its adjudication should be careful not to do anything which might jeopardize that position." *Id.* at 58.

114. *Id.* at 64-65. Forte points out that the 1989 Department of Trade and Industry Consultative Document asking for views on the desirability of accession by the United Kingdom to the Vienna Convention on the International Sale of Goods itself argued that accession would allow courts and arbitrators in the United Kingdom to have a market share in the resolution of disputes under the UN Convention and to participate in the evolution of its jurisprudence. *Id.*

towards the construction of international conventions and have accorded them great deference. Courts have even been willing to consider reference to *travaux préparatoires* in interpreting conventions.¹¹⁵

As Lord Diplock stated in *Fothergill v. Monarch Airlines Ltd.*:

The language of that convention [the Warsaw convention on the international air carriage of 1929, as amended by the Hague protocol 1955, and as scheduled, in its amended form, to the UK Carriage by Air Act 1961] that has been adopted at the international conference to express the common intention of the majority of the states represented there is meant to be understood in the same sense by the courts of all those states which ratify or accede to the Convention. Their national styles of legislative draughtsmanship will vary considerably as between one another. So will the approach of their judiciaries to the interpretation of written laws and to the extent to which recourse may be had to *travaux préparatoires*, doctrine and jurisprudence as extraneous aids to the interpretation of the legislative text. The language of an international convention has not been chosen by an English parliamentary draftsman. . . . It is addressed to a much wider and more varied judicial audience than is an act of parliament that deals with purely domestic law. It should be interpreted, as Lord Wilberforce put it in *James Buchanan & Co. Ltd. v. Babco Forwarding and Shipping (UK) Ltd.*, [1978] A.C.141, 152, 'unconstrained by technical rules of English law, or by English legal precedent, but on broad principles of general acceptance.'¹¹⁶

This view has found support in the United States as well. In construing the Warsaw convention, the U.S. Supreme Court in *El Al Israel Airlines v. Tsui Yuan Tseng*,¹¹⁷ relied on British decisions and held that to allow recourse to national law would undermine the uniform law that the Convention was designed to foster. It sent a clear signal that it would adopt an international approach to construing the convention, and explicitly stated that it would not like to upset the balance achieved between competing interests in the Convention.

III. THE GROWTH OF REGIONALISM

A. *Regional Endeavours Examined*

The growth of regionalism is another nail in the coffin of state sovereignty in the creation of international commercial law. It transfers sovereignty from nation states to regional bureaucracies and results in

115. See *Fothergill v. Monarch Airlines Ltd.*, 1981 A.C. 251; *Abnett v. British Airways PLC. Sidhu and Others*, 1997 1 All E.R. 192; see also *Gatoil Int'l Inc. v. Arkwright-Boston Mfrs. Mut. Marine Ins. Co.*, 1985 S.C. 1 (HL).

116. *Fothergill v. Monarch Airlines Ltd.*, 1981 A.C. 251, 281-82.

117. *El Al Israel Airlines v. Tsui Yuan Tseng*, 525 U.S. 155 (1998).

regional international commercial law. There are a multitude of regional harmonization efforts and it is well nigh impossible to examine every one of them. This paper contents itself with examining a few select efforts at regional harmonization that lend themselves to drawing broad themes for international harmonization. As can be seen from the following analysis, nation states are once again being pushed to the margins as regional bureaucracies craft international legal instruments.

B. The European Union

The architects of the European Union thought that the establishment of a successful economic community would require harmonization of national laws; accordingly, Article 100 of the Treaty of Rome calls for the harmonization of national laws as a means to help achieve a common market.¹¹⁸ This has served as the mandate for harmonization of civil and commercial law.¹¹⁹ European harmonization has proceeded on a sectoral basis with many instruments in certain areas and minimal efforts in others,¹²⁰ with the result that most areas of commercial law are still subject to divergent national laws. According to some experts the current piecemeal approach of harmonization has resulted in fragmentation and systemic incoherence. There does not appear to be a grand scheme for harmonization in the European Union, perhaps for good reason, and in many ways harmonization is preceding on an *ad hoc* basis. This may itself have resulted in divergence in E.U. private law.¹²¹ Ole Lando has argued that “optional Europeanization” has to give way to “mandatory Europeanization.”¹²²

118. “The Council shall, acting unanimously on a proposal from the Commission . . . issue directives for the approximation of such provisions laid down by law, regulation or administrative action in Member States as directly affecting the establishment or functioning of the common market.” TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY, March 25, 1957, art. 100, 1 C.M.L.R. 573, 633 [hereinafter TREATY OF ROME].

119. Ulrich Drobnig, *Creating International Legislation for the Twenty-First Century: Unified Private Law for the European Internal Market*, 106 DICK. L. REV. 101, 103 (2001).

120. *Id.* at 103–04. Drobnig writes that the vast majority of private law instruments are focused on relatively small topics that have attracted the attention of the European legislature. He points out that except in the fields of corporations, consumer contracts and intellectual property, European private law is a patchwork of individual measures aimed at specific economic or social needs.

121. DiMatteo, *supra* note 121, at 579.

122. Ole Lando, *Optional or Mandatory Europeanization*, 8 EUR. REV. PRIVATE L. 59 (2000).

1. *The European Civil Code*

The European Parliament passed a resolution in 1989 in which it requested that preparatory work be carried out for a European Civil Code, or at least a European Code of Contract Law.¹²³ That plea was renewed by the European Parliament in a 1994 resolution.¹²⁴ The ambitious quest to construct a European contract code has attracted much academic discussion, with academics ranged fiercely on either side.¹²⁵ This debate has also extended to the kind of instrument best suited to achieve such a code. For some experts, the vehicle of legislative harmonization is inappropriate for this task.¹²⁶ Some of their arguments are based on cultural factors, particularly a legal system as embodying a culture. Private law, they argue, represents the accumulation of centuries of legal tradition as part of broader cultural and social tradition. According to them, merely looking through the trade lens and treating divergent national laws as mere distortions to trade is to ignore this cultural aspect. Accordingly, imposing legislative harmonization will insult the richness of this cultural diversity.

Professor Jurgen Basedow has argued that an E.U. codification of the law of contracts is needed to harmonize the divergences in national contract laws.¹²⁷ According to him, codification of European private law would serve to create a single legal framework and foster the internal market, facilitate information about European law, provide a common point of reference for legal education, and create a professional identification for European lawyers. He argues that if the need for harmonization is deemed to be great enough, then the requirements of the principle of subsidiarity can also be satisfied.¹²⁸ With regard to the

123. European Parliament Resolution on action to bring into line the private law of the Member States, 1989 O.J. (C 158) 400.

124. European Parliament Resolution on the harmonization of certain sectors of the private law of the Member States, 1994 O.J. (C 205) 518.

125. Stephen Weatherill, *Can There be Common Interpretation of European Private Law?* 31 GA. J. INT'L & COMP. L. 139, 156 (2002).

126. *Id.*

127. Jurgen Basedow, *Codification of Private Law in the European Union: The Making of a Hybrid*, 9 EUR. REV. PRIVATE L. 35, 43 (2001).

128. The subsidiarity principle of Article 3 of the E.C. Treaty states that "in areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States." See George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 COLUM. L. REV. 331 (1994) (discussing the subsidiarity principal).

form that such harmonization should take, Basedow advocates the enactment of a “Community Contracts Regulation” that would be gradually phased in over a twenty- to thirty-year period.¹²⁹

One expert has argued that the attempt to create one legal order for Europe should not be an exercise concerned only with European needs but should be approached from a global perspective.¹³⁰ Prof. Mattei contends that in building the new European legal order, the stake is global and, therefore harmonization should be approached bearing in mind the law in the United States and non-Western legal cultures.¹³¹ His argument makes perfect sense as most other scholars seem to be obsessed with European law to the exclusion of all else. Europe does not exist in a vacuum and the fact that the civil law is not as dominant as it used to be must be borne in mind when new solutions are created. Further, it is a fact that U.S. law is currently viewed as the model by the rest of the world, for better or worse, and a due examination of legal solutions that have been created there may be profitable. Mattei is clearly ranged on the side of the harmonizers and he is convinced that the status quo, viz., no civil code, brings with it several costs.¹³² He labels these “information costs”, and believes that despite a transaction being intra-Community, transaction costs must be set aside by businesses in order to obtain specialist advice on foreign law from local lawyers.

Another expert opines that “diverse private law hampers the internal market” whether that can be proven by empirical evidence or not.¹³³ In response to the argument that private international law can solve the problem, he believes that this is not an adequate solution, and points out that in the long term the European Union cannot function effectively with more than 20 different regimes of private law which are expressed in different languages and deploying systematically different approaches.¹³⁴ This view is shared by Professor Lando.¹³⁵ Prof. Von Bar’s vision is even grander: He argues that the EU must not confine itself to a sectoral approach, but must try to formulate a broad “single currency” of law.¹³⁶

129. Basedow, *supra* note 127, at 35.

130. Ugo Mattei, *The Issue of European Civil Codification and Legal Scholarship: Biases, Strategies and Developments*, 21 HASTINGS INT’L & COMP. L. REV. 883, 889 (1998).

131. *Id.*

132. *Id.*

133. Christian v. Bar, *From Principles to Codification: Prospects for European Private Law*, 8 COLUM. J. EUR. L. 379, 385 (2002).

134. *Id.*

135. Ole Lando, *Principles of European Contract Law and UNIDROIT Principles: Moving from Harmonisation to Unification?* 8 UNIF. L. REV. 123, 124 (2003).

136. *Id.* Bar notes that the situation is entirely different from that of the U.S., as there are multiple legal systems that work in different languages in Europe, and unlike in the U.S., it is not possible to build on a shared legal tradition. He cautions that Europe

The other side of the debate points to the experience of the United States, where contract law exists in fifty different state forms, to say that there is no need for a codification.¹³⁷ They point out that there is considerable trade already happening between European countries, and this obviously means that legal costs are not that important. While it is true that trade is continuing to grow despite the differences between national laws, this cannot be taken to mean that the problems are insignificant. Nor is the comparison with the U.S. particularly helpful given the vast differences between the legal systems of the U.S. and Europe. Barring Louisiana, all U.S. states have laws from the same family, unlike the situation in Europe. There is also a common language, and judicial decisions are cited across state borders in courts.

2. *The Principles of European Contract Law*

“In 1980, a group of lawyers formed the Commission on European Contract Law (CECL) to draft general principles of contract law for the countries of what was then the European Community.”¹³⁸ The CECL is popularly known as the Lando Commission after its founding father, the Danish Professor Ole Lando. The group is a non-governmental body of lawyers from the fifteen European Union countries. They are not selected or appointed by any government, nor have they sought or received instructions from government or community institutions. A majority of the members are academics, not practicing lawyers. Although the European Commission supported the work of the CECL in the early stages, this was short-lived.¹³⁹ This is strange considering that the

should prevent a repetition the 19th century-type “national compartmentalization, solitary codification and splendid isolationism.” While conceding that cultural issues are relevant, he appears to be a firm internationalist, and romantically argues that it should be the culture of a truly European private law that must motivate harmonization.

137. See the text in *A position paper on behalf of the Law Reform Committee of the General Bar Council of England and Wales*, stating that “We would suggest that those concerns are often more imaginary than real. In the United States, the different states have different systems of private contract law. This has not hindered cross-border trade within the US. The reason why the difference in national contract laws are not a real impediment to inter-state trade (whether in the US or the EU) is because the parties to a cross-border transaction can currently stipulate for a choice of law clause to govern their relationship, and effect will generally be given to that choice of law clause.”

138. Ole Lando, *The Common Core of European Private Law and the Principles of European Contract Law*, 21 HASTINGS INT'L & COMP. L. REV. 809 (1998).

139. *Id.* at 811. The Commission was convinced that the existing unified and harmonized laws of the European Union dealing with contracts were fragmented and uncoordinated, and did not contribute much uniformity. They were also concerned by

Commission has spoken out in favor of harmonization.

The CECL's work was animated by the belief that the growth of trade and communication within the European Union makes unification of the law of obligations, and notably the law of contract, imperative.¹⁴⁰ After exhaustive comparative work, Part I of European Principles was published in 1995. It deals with issues of performance, non-performance, and remedies. A revised Part I, along with Part II, was published in 1998. Part III was published in 2003. Together, Parts I and II cover issues of contract law including formation, validity, interpretation, performance, remedies, and authority of agents. Part III covers issues including the effects of illegality, assignment, assumption, statutes of limitations, conditions, procedural issues involving plurality of parties, and capitalization of interest. These Principles of European Contract Law have already been translated into Dutch, French, German and Italian.

The PECL is much wider in scope than the CISG or UNIDROIT Principles and can therefore form a complete regime for contract law, especially for arbitration.¹⁴¹ This comprehensiveness is necessary if transacting parties are to take recourse to it. In the words of the CECL itself, the PECL has a number of purposes: the "facilitation of cross-border trade; strengthening of the single European market; creation of an infrastructure for Community laws governing contracts; guidelines for national courts and legislatures; and construction of a bridge between the civil law and the common law."¹⁴² It also lists five purposes for which the European Principles are designed: "a foundation for European legislation; express adoption by the parties; a modern formulation of a

the fact that there were severe problems caused by the lack of uniformity in interpretation, and believed that uniform interpretation can be guaranteed only by a common legal environment. It was felt that the absence of uniform rules hinders interpretation and further disharmony is created. One result of this lack of uniform legal environment is that in case of doubt, the interpreters have no recourse but to fall back on their own law. Obviously, even though such interpretations may sit well with a particular national law, in the overall scheme of things, uniformity is compromised. One of the most revolutionary features of the PECL is that the authors have not been content to merely find common solutions. They have gone beyond that objective to invent the best solution to a given problem where necessary.

140. Mattei thinks that the problem with both the UNIDROIT Principles and the PECL is that they offer restatements without having thoroughly looked at the basic question that must be approached by every restatement, *i.e.*, whether there is something common to be restated and what it is.

141. Michael J. Bonell, *The UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law: Similar Rules for the Same Purposes?* 26 UNIFORM L. REV. 229, 238-41 (1996). UNIDROIT Principles apply to all forms of contract, including sale of goods and services contracts, but it is also limited to commercial transactions. In contrast, European Principles not only apply to all forms of contracts, but also apply to both commercial and consumer contracts.

142. DiMatteo, *supra* note 22, at 576.

lex mercatoria; a model for judicial and legislative development of contract law; and a basis for harmonization.”¹⁴³

The European Principles will perhaps find their best use in international commercial arbitration, at least in the European context. They can facilitate interpretation where there are gaps. DiMatteo gives the example of such a use in an arbitration proceeding where “the arbitration panel cited Article 5:101(3) of the Principles of European Contract Law to interpret an ambiguous contract term to imply a duty of cooperation between parties in a contract of association.”¹⁴⁴

There is vigorous activity ongoing in Europe. A group of scholars called the Study Group on a European Civil Code, has released draft articles on tort law, *negotiorum gestio*, personal securities, sales, services, transfer of movable property, unjust enrichment, long-term contracts, and proprietary securities. There is another group of academics, who are working on the “common core project.” The Common Core Project is sponsored by the University of Trento, Italy and according to two of the principals in that project, Ugo Mattei and Mauro Bussani, their task is that of cartography—charting the legal landscape of Europe.¹⁴⁵ Unlike the CECL, their confessed purpose is not normative. Recognizing that it would be profitable to involve non-Europeans in this endeavor as well, the organizers of the Trento project invited American scholars to join the group, and some of them act as general reporters. As further evidence of the amazing productivity of European scholars is the work of the Center for Transnational Law (“CENTRAL”) at Munster University, which published its list of Principles, Rules and Standards of the Lex Mercatoria in 1996.¹⁴⁶

C. *The American Experience Contrasted*

The American experience is very different from that of the EU. Despite the conclusion of NAFTA, there is no bureaucracy to actively pursue harmonization. There appears to be less emphasis on formal harmonization, and certainly no feeling of urgent necessity.

143. *Id.*

144. *Id.* at 577; Anderson Consulting Bus. Unit Member Firms v. Arthur Andersen Bus. Unit Member Firms, 10 AM. REV. INT'L ARB. 451 (Int'l Comm. Arb. 1999).

145. Mauro Bussani & Ugo Mattei, *The Common Core Approach to European Private Law*, 3 COLUM. J. EUR. L. 339, 341 (1998).

146. Berger, *supra* note 20, at 91, 97.

Harmonization appears to more of an informal process, and seems to be encouraged more by U.S. dominance than any systemic endeavor to harmonize. To those used to the vigorous activity occurring in Europe, this seeming lack of activity is astonishing.

Professor Glenn opines that the law of the NAFTA countries is “characterized by two broad phenomena: (1) an informal process of harmonization, as national institutions adjust to the increase in cross-border trade brought about by NAFTA, and (2) ongoing unilateralism. . .”¹⁴⁷ Therefore, massive harmonization endeavors have not been demanded of comparable institutions in America.¹⁴⁸ Professor Glenn surveys the landscape and concludes that most of the change in the conflict of laws has evolved spontaneously in nations.¹⁴⁹ These changes have not been imposed by any international organization. Not surprisingly, the examples of such an evolution that he provides involve modifications to the laws of Canada and Mexico which have been essentially the transplant of U.S. legal principles. This seems to be hegemonic, but is perhaps inevitable given the regional dynamics. The great increase in trade resulting from a free trade agreement particularly between the United States and Mexico has pushed the Mexican legal system to converge with that in the United States.¹⁵⁰ Given that both Mexico and Canada want to increase trading opportunities with their more powerful neighbor, the United States can take a more indifferent approach to harmonization. Legal experts in the United States have been more than willing to export their own laws to Canada and Mexico, and indeed the rest of the world, often with a take-it-or-leave-it attitude resting on their economic might.¹⁵¹ NAFTA experience also reveals greater judicial cooperation across national borders in contrast with Europe. Professor Glenn states that transnational meetings of judges are multiplying, under the sponsorship of Judicial Councils. One result of such judicial interaction may be the growing tendency of Judges to “engage increasingly in ‘judicial parallelism,’ accompanied by a greater resort to

147. H. Patrick Glenn, *The Morris Lecture: Conflicting Laws in a Common Market? The NAFTA Experiment*, 76 CHI.-KENT L. REV. 1789, 1792 (2001).

148. Professor Glenn goes as far as to say that “the American experience stands for the proposition, however, that a successful free trade association does not, in principle, require any formal measures of private law harmonization whatsoever.” Glenn, *supra* note 33, at 232.

149. Glenn, *supra* note 147 at 1799.

150. Glenn, *supra* note 33, at 231.

151. This is apparent by the fact that there is no evidence that U.S. law has gone to any lengths to undertake a harmonization that adopts principles from Canadian or Mexican law. Accordingly, it would be safe to say that harmonization within the NAFTA context is “Americanization.” Although legislatures in Mexico and Canada could have resisted this, financial sense impels them to do otherwise.

transnational citation of judicial authority.”¹⁵² This is a soft kind of harmonization that results over a period of time. Harmonization has also been achieved at the regional level by the Interamerican Conference on Private International Law (CIDIP), an organ of the Organization of American States. It has crafted conventions on bills of exchange and checks, commercial arbitration, letters rogatory, foreign evidence, the legal regime governing powers of attorney, and model laws on secured transactions, and negotiable instruments.¹⁵³

D. Competition or Collaboration?

It is difficult to establish the true impact of regional harmonization endeavors on international harmonization. While some scholars have given instances where individual instruments or provisions within instruments cause conflicts, they do not shed much light on the broader issue. One way of approaching this issue may be to examine the debate on the codification of European contract law. If it is thought that the codification, or indeed even the evolution of principles would be beneficial, this may tend to support the view that in areas where there are vast divergences and difficulties at arriving at harmonization, regional harmonization may be intensely beneficial. This is due to the simple expedient of crystallizing the differences into a few broad regional groupings, and thereafter harmonization starts off on an inter-regional footing. The contrary view may be that regional harmonization leads to wasted resources when the real problem is a global one. There are many areas where harmonization is unnecessary in certain regions but may be necessary in others. There is no need for the whole world to undergo the

152. Glenn, *supra* note 33, at, 243-44. He gives the example of a judicial practice of transnational judicial collaboration which has developed in the NAFTA region in international bankruptcy cases, as a result of which joint judicial protocols and even joint, teleconferenced judicial hearings are undertaken. Glenn calls for the encouragement of such practices in a broader range of cases wherever parallel proceedings are present or likely, noting that the “judicial contribution to informal harmonization is possible if the UNIDROIT Principles and Rules of Transnational Procedure are voluntarily adopted in cases of transnational litigation, or used as a suppletive source of ‘generally recognized standards of civil justice.’” See also A.M. Garro, *On Some Practical Implications of the Diversity of Legal Cultures for Lawyering in the Americas*, 64 REV. JUR. U.P.R. 461, 476 (1995) (stating his belief that “an independent, powerful, and effective administration of justice is crucial to foster serious expectations of free trade and sustained economic development in the Americas”).

153. Carlos Vazquez, *Regionalism Versus Globalism: a View from the Americas*, 27 UNIFORM L. REV. 62 (2003).

process, or for the affected region to wait for international action in such cases. A classic case is that of the contract code. Regions other than Europe have no interest in such a codification, and the absence of the European Union as a forum to ventilate this need may well have resulted in the rest of the world being dragged into this debate.

Even in areas where there is an overlap of effort, there is scope for cooperation and collaboration. This can result in similar solutions being evolved as a matter of simple exchange of ideas, and facilitates international harmonization. In fact, due to such close interaction, regions may be able to adopt a harmonizing instrument well before conditions have arisen for such an instrument to be adopted on a global scale. The resources required for the organization of a regional instrument pale in comparison to those needed for an international convention, and this is a tool that has to be better adopted to attain incremental harmonization. There is also the increasing participation of regional bodies in the work of international harmonizing agencies like UNIDROIT, and this may get even stronger if regional bodies accede to conventions en bloc. In sum, there is greater evidence pointing to the fact that regional harmonization can facilitate international harmonization, than that it is in any way inimical to such a process. As long as that remains the case, regional harmonization must be encouraged.

IV. THEMES

The foregoing analysis is evidence that nation states are not as important as they were prior to the end of the Cold War for the creation of international commercial law. The analysis can be concluded by looking at the evidence presented by two further aspects of the harmonization process: first, the shattering of the idea that international conventions are not the be-all and end-all of international commercial law, and second, evidence that the growth of "soft law" is hastening the demise of state sovereignty given its tremendous popularity.

A. International Conventions are not as Effective as Supposed

Traditionally it was thought that international conventions were the best method of formulating international commercial law. This is principally because international conventions are binding in nature, and once ratified, have the great advantage that they usher in uniformity at the starting gate. Accordingly, where possible this is the favored instrument adopted by harmonizing agencies when they desire the creation of binding law.

The binding nature of a convention as a vehicle for harmonization

may itself be an Achilles heel. Countries which did not participate enthusiastically in the drafting of a convention, or which do not believe in the need for the convention will not want to be bound and will take the easy option of not ratifying it. Further, due to the fact that conventions take a very long time to create and require protracted negotiations and compromise, they can remain petrified for a long time as the sponsoring agencies do not want to lose whatever harmonization has been achieved by embarking on amendment.¹⁵⁴ A brief survey of some conventions and their acceptance rates illustrates the problems with this vehicle of international commercial law.

The Convention relating to a Uniform Law on the International Sale of Goods (ULIS), 1964 has only been ratified by eight countries.¹⁵⁵ The Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods (ULFIS), 1964, has also been ratified by the same eight countries.¹⁵⁶ The International Convention on Travel Contracts, 1970, has received a mere three ratifications¹⁵⁷ and three accessions.¹⁵⁸ The Convention providing a Uniform Law on the Form of an International Will, 1973, has been ratified by three countries¹⁵⁹ and acceded to by nine others.¹⁶⁰ The Convention on Agency in the

154. As the response submitted by the Society of Public Law Teachers In Great Britain and Northern Ireland (STPL) states: "commentators on legal harmonization have observed that rigid harmonization measures, such as international treaties, are often inappropriate. Preparation of such instruments tends to be a long process, involving, as it does, a search for common principles and the reconciliation of established principles from different legal systems and traditions. Moreover, treaties and similar instruments have been criticized as tending to be over rigid, lacking the flexibility to accommodate changing commercial practices and respond to new problems. The United Nations' Vienna Convention on Contracts for the Sale of Goods offers a prime example, having taken over ten years to prepare." They also state that the CISG is "uncertain."

155. See <http://www.unidroit.org/english/implement/i-64ulf.htm> for a list of countries that have ratified ULIS (United Kingdom, San Marino, Belgium, Israel, Netherlands, Italy, Federal Republic of Germany, Luxembourg, and one accession, Gambia). The Convention has since been denounced by Italy, the Federal Republic of Germany, the Netherlands, Belgium, Luxembourg and Israel. *Id.*

156. *Id.*

157. See <http://www.unidroit.org/english/implement/i-70.htm> for a list of countries that have ratified the International Convention on Travel Contracts (Belgium, Togo, and Italy, and then denounced by Belgium effective in 1994).

158. *Id.* (listing the accessions of Benin, Cameroon, and Argentina).

159. See <http://www.unidroit.org/english/implement/i-73.htm> for a list of countries that have ratified the Convention providing a Uniform Law on the Form of an International Will (Ecuador, Belgium, France).

160. *Id.* (listing the accessions of Niger, Portugal, Canada, Libya, Yugoslavia, Cyprus, Italy, Slovenia, Bosnia).

International Sale of Goods, 1983, has been ratified by two countries¹⁶¹ and acceded to by three others.¹⁶² The convention has not yet entered into force as it requires ten countries to accept it. The UNIDROIT Convention on International Financial Leasing, 1988, has been ratified by four countries¹⁶³ and acceded to by five others.¹⁶⁴ The UNIDROIT Convention on International Factoring, 1988 has also been ratified by four countries¹⁶⁵ and acceded to by two others.¹⁶⁶ The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, 1995, has been better received. It has been ratified by eleven countries¹⁶⁷ and acceded to by ten others.¹⁶⁸ The Convention on International Interests in Mobile Equipment has been ratified by one country till date.¹⁶⁹

The Hague Conference has had a slightly better record in the uptake of its conventions. The Convention on the Law Applicable to Contracts for the International Sale of Goods, 1986, which has been ratified by Argentina and acceded to by Moldova has not yet entered into force.¹⁷⁰ After Argentina's ratification in 1991, nothing happened till 1997 when Moldova acceded to it. The Convention on the Law Applicable to Trusts and their Recognition, 1985, has been ratified so far by Australia, Canada, Hong Kong, Italy, Malta, the Netherlands, and the United States.¹⁷¹ The Convention on the Law Applicable to Agency, 1978, has been ratified by a mere four countries.¹⁷² The Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, 1971, has been ratified by just four countries:

161. See <http://www.unidroit.org/english/implement/i-83.htm> for a list of countries that have ratified the Convention on agency in the International Sale of Goods (Italy and France).

162. *Id.* (listing the accessions of South Africa, Mexico, and the Netherlands).

163. See <http://www.unidroit.org/english/implement/i-88-l.htm> for a list of countries that have ratified the UNIDROT Convention on International Financial Leasing (France, Italy, Nigeria, Panama).

164. *Id.* (listing the accessions of Hungary, Latvia, Russia, Belarus, Uzbekistan).

165. See <http://www.unidroit.org/english/implement/i-88-f.htm> for a list of countries that have ratified the UNIDROT Convention on International Factoring (France, Italy, Nigeria, Germany).

166. *Id.* (listing the accessions of Hungary and Latvia).

167. See <http://www.unidroit.org/english/implement/i-95.htm> for a list of countries that have ratified the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (Lithuania, Paraguay, Romania, Peru, Hungary, Bolivia, Finland, Italy, Croatia, Cambodia, Portugal).

168. *Id.* (listing the accessions of China, Ecuador, Brazil, El Salvador, Argentina, Norway, Spain, Azerbaijan, Slovakia, and Guatemala).

169. See <http://www.unidroit.org/english/implement/i-2001-convention.htm> for a list of countries that have ratified the Convention on International Interest in Mobile Equipment (Panama, Ethiopia, Nigeria).

170. See <http://www.hcch.net/e/status/stat31e.html>.

171. See <http://www.hcch.net/e/status/stat30e.html>.

172. See <http://www.hcch.net/e/status/stat27e.html> (Argentina, France, Netherlands, and Portugal, with the last of the ratifications coming as far back as 1992).

Cyprus, Netherlands, Portugal, and Kuwait.¹⁷³ While this is the status of the Hague family of conventions on commercial matters, other conventions sponsored by the Hague Conference have met a much better fate. For instance, the Convention on the Civil Aspects of International Child Abduction has been ratified by 74 countries.¹⁷⁴ Similarly, the Convention on the Protection of Children and Cooperation in Respect of Inter Country Adoption, 1993, has been ratified by 41 countries and acceded to by 14 others.¹⁷⁵

UNCITRAL has the best record on adoption with regard to its international conventions. The New York Convention on the Recognition of Foreign Arbitral Awards, 1958, is perhaps the most successful convention ever with 134 ratifications.¹⁷⁶ A slightly lesser place in the UNCITRAL pantheon is taken by the Vienna Convention on Contracts for the International Sale of Goods, 1980, which has been ratified by 62 countries.¹⁷⁷ The New York Convention on the Limitation Period in the International Sale of Goods, 1974, as amended by the Protocol of 1980, has been ratified by 18 countries.¹⁷⁸ The United Nations Convention on the Carriage of Goods by Sea, 1978 (known as the Hamburg Rules), has been ratified by 29 countries, with the latest ratification being that of Syria in 2002.¹⁷⁹ However, none of the major maritime nations have ratified this Convention, so in reality it is of little significance.

It is clear that the mere adoption of a Convention does not achieve

173. See <http://www.hcch.net/e/status/stat16e.html> (Kuwait acceded to the convention in December, 2002).

174. See <http://www.hcch.net/e/status/abdshte.html> (Ratified by Argentina, Australia, Austria, Belgium, Bosnia, Canada, Hong Kong, Macau, Croatia, Czech Republic, Denmark, Finland, Macedonia, France, Germany, Greece, Ireland, Israel, Italy, Luxembourg, Netherlands, Norway, Portugal, Serbia, Spain, Sweden, Switzerland, Turkey, United Kingdom, United States, and Venezuela).

175. Hague Conference on Private International Law, *Concise Status Report Convention #33*, <http://www.hcch.net/e/status/adoshte.html> (last modified Dec. 3, 2003) (Ratified by Mexico, Romania, Sri Lanka, Cyprus, Poland, Ecuador, Peru, Costa Rica, Burkina Faso, Philippines, Canada, Venezuela, Finland, Sweden, Denmark, Norway, Netherlands, France, Colombia, Australia, El Salvador, Israel, Brazil, Austria, Chile, Panama, Italy, Czech Republic, Albania, Slovakia, Germany, Slovenia, Bolivia, Bulgaria, Latvia, Luxembourg, Switzerland, United Kingdom, India, and Belarus).

176. For a full list of ratifying countries, see United Nations Commission on International Trade Law, *Status of Conventions and Model Laws*, <http://www.uncitral.org/English/status/status-e.htm> (last modified Dec. 31, 2003).

177. *Id.*

178. *Id.*

179. *Id.*

harmonization. As the preceding paragraphs show, despite the many years expended in creating these conventions, sovereign states have shown scant enthusiasm in many instances, prompting one to ask what ails the convention as a harmonization vehicle? One readily apparent fact is that in some non-commercial law areas, conventions have been readily ratified. This may be contrasted with the fact that the New York Convention has achieved great success. The conclusion from these two statements may be that the subject matter of the convention is the most important factor. In areas perceived by states to be important and desirous of harmonization, a crowded legislative calendar has not deterred ratification. On the contrary, legislators have chosen to disregard arcane and highly specialized areas. These issues have been merely raised in this chapter and will be analyzed at greater length in the chapter on Issues Post Harmonization.

B. The Growth of "Soft Law"

This is a vehicle for harmonization that has assumed tremendous importance following the successful reception of the UNIDROIT Principles of International Commercial Contracts. Without a doubt, the tremendous flexibility offered by restatements has contributed to their recent allure. Parties can adopt them on a voluntary basis, and they serve many important functions. For example, the UNIDROIT Principles of International Commercial Contracts (hereinafter referred to as the "UNIDROIT Principles") are viewed as "neutral" contract law principles in that they reflect a balance of interests and have not been formulated by any government.¹⁸⁰ In cases where parties are unable to agree on the law that is to govern their contract, the UNIDROIT Principles provide a neutral law that both parties can adopt without losing face. In order to fully grasp the quality of restatements as vehicles of harmonization, it is essential to get an idea of how they are created. Restatements follow extensive comparative law research, examining the laws of different countries to show differences and similarities. After these have been identified, the restatement is not a distillation of the lowest common denominator. It is often an innovative solution that may not be from any one legal system.¹⁸¹

180. See Response submitted on behalf of the Society of Public Teachers of Law in Great Britain and Northern Ireland (SPTL) to the European Commission's Communication on Contract Law. The response further states that the UNIDROIT Principles could form the basis of a legal "restatement" of contract principles to which contracting parties could subscribe on a voluntary basis on a European level. According to them, an English court would give effect to a contractual agreement to apply the UNIDROIT Principles in place of the general rules of English law.

181. The Joint Response notes the need for comparative law research and

Restatements also escape that great problem that shadows international conventions—ratification. As the UNIDROIT Principles state:

[e]fforts towards the international unification of law have hitherto essentially taken the form of binding instruments, such as supranational legislation or international conventions, or of model laws. Since these instruments often risk remaining little more than a dead letter and tend to be rather fragmentary in character, calls are increasingly being made for recourse to non-legislative means of unification or harmonization of law.¹⁸²

No doubt this has contributed, at least in the European context, to the new enthusiasm for the use of restatements as vehicles for harmonization. The Joint Response of the Commission on European Contract Law and Study Group on European Civil Code to the Communication on European Contract Law, states the authors' belief that this is their preferred vehicle for European integration.¹⁸³ According to the Joint Response, it is only after undertaking a comparative study of the legal systems of Europe and after the crafting of a restatement that the need for harmonization can be shown.¹⁸⁴ This in their view is due to the fact that the process will not only reveal divergences across national legal systems, but will also reveal commonalities. This is a very important point, and one that has not been adequately appreciated. In areas such as property law where the differences are so great across national boundaries and where the sheer enormity of the law militates against the adoption of a binding text, starting off with a restatement can be very beneficial in that it narrows down the differences and winnows out the commonalities. It makes the task of subsequent codification in a binding form very much easier, and more importantly, can contribute to harmonization on an incremental basis with countries having the liberty of using the restatement for law reform purposes.

One of the great virtues of a restatement is its flexibility. It is capable of modification unlike an international convention, and countries can pick and choose rules from within a restatement depending on their

categorically asserts that it would not suffice to start off with one national law and make changes to it. *Id.* In their own words, they "aim not to adopt the lowest common denominator, but rather to suggest the best solution to the most important issues."

182. UNIDROIT, PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS vii (1994).

183. The Joint Response notes the need for comparative law research and categorically asserts that it would not suffice to start off with one national law and make changes to it. *Id.* In their own words, they "aim not to adopt the lowest common denominator, but rather to suggest the best solution to the most important issues."

184. *Id.*

comfort level.¹⁸⁵ In many instances, restatements can be the building blocks of national legislation, or at least can be a starting point for the national legislator.¹⁸⁶ As noted by the Joint Response of the Commission on European Contract Law and the Study Group on a European Civil Code, national legislators in the European Union are using the Principles of European Contract Law in reforming national legislation. They cite the role that the PECL has played in the reform of the German law of obligations, their use by the Scottish Law Commission in reports on contract law reform, and use by the Spanish law reform commission.¹⁸⁷ The Joint Response canvasses an innovative vehicle that is a:

set of principles which may be molded more freely than legislation, while still commanding the authority of a primary and binding legal source. This could be achieved by a process of continual restatement where the evolving jurisprudence of the courts in the development of the restatement is integrated, along with academic treatment,¹⁸⁸ in the text of the code and accompanying explanatory commentary.

This is an excellent idea as it exploits to the full the very essence of the idea of a restatement. Rather than remaining a monument to harmonization, it allows the restatement to move in sync with developments across jurisdictions, and also overcomes the problem posed by the fact that judges and arbitrators in all parts of the world cannot have access to decisions from everywhere else. The restatements can continually synthesize decisions on various issues from every jurisdiction, a luxury which no judge has. They could form the source that judges and arbitrators go to when deciding international commercial cases.

The flexibility also extends to contracting parties who can choose to include it in their contracts, or can ignore it altogether. In the view of the authors of the Joint Response, party autonomy can be facilitated even

185. See ICC Response: "Although ICC would like to express concerns as to whether non-binding principles are sufficient, it would like to also emphasize that such principles are an effective first step towards harmonization. Important attempts already exist, such as the UNIDROIT Principles of International Commercial Transactions, which are increasingly referred to in international contracts and in arbitration. Another example is the Principles of European Contract Law, which ICC considers could serve as an excellent starting point for the harmonization of European contract law."

186. See COMBAR Response: "In our view, the work of the Commission on European Contract Law, and the Study Group on a European Civil Code is valuable, and should be supported. A "Restatement" of contract law, which is what we would expect to be the end result, though not in itself binding, may be expected to "harden" into law, for example, by influencing the judicial process. At the least, where a provision of national contract law diverges from those as stated in principles, courts may be encouraged to consider whether such divergence is in fact justified by reference to conditions obtaining in the country concerned."

187. Joint Response, at para. 37.

188. *Id.* at para. 46.

more if the Rome Convention were to allow the application of restatements. They contend that:

[o]ffering an additional legal system to choose as the governing law for a contract would go a long way beyond merely offering terms that can be incorporated into an agreement. It would represent a very substantial and effective enhancement of the parties' autonomy because the law at their disposal would be one which is pan-European and non-partisan in nature and which will therefore have immediate appeal as an escape from the battle of choosing one or other of the parties' national laws.¹⁸⁹

However, all is not smooth sailing. Given that they have no binding force, restatements have the capacity of being reduced to mere ciphers. As the Opinion of the Economic and Social Committee on the "Communication from the Commission to the Council and the European Parliament on European contract law" concedes, "in Europe recognition of these private 'codes' by national judges when interpreting contract clauses, clarifying the intention of the parties or settling disputes is a problem, while elsewhere, non-State law can be taken into account, as is the case, for example, under the Mexico Convention."¹⁹⁰

Professor Goode does not believe that the "soft" nature of restatements has been a problem and opines that the PECL and the UNIDROIT Principles have been successful "precisely because they are not binding, have not been influenced by governments and do not pose any threat to national legal systems. Like the UNCITRAL Model Law on Arbitration they are designed to be a unifying influence and a resource, but it is left to legislatures, courts and arbitral tribunals to decide to what extent they assist in the solution of problems."¹⁹¹

1. The UNIDROIT Principles

The UNIDROIT Principles have been the subject of great scholarly

189. *Id.* at para. 36. The Joint Response further argues that "It would provide a neutral body of law which as a composite would be equidistant from the parties' own legal systems and yet have roots in both of them and with its dispositive and mandatory rules fundamentally reflect the same economic, liberal and social values underpinning all the national legal systems in the EU."

190. Opinion of the Economic and Social Committee on the "Communication from the Commission to the Council and the European Parliament on European Contract Law," 2002 OJ (C 241), 1.

191. Professor Goode's Response to the European Commission's Communication on a European Civil Code. Professor Goode notes that the UNIDROIT Principles have been "widely applied by arbitral tribunals, and even by some courts, and have influenced national legislation in a number of countries." *Id.*

and arbitral attention.¹⁹² Much of the scholarly writing has been done by the authors of the UNIDROIT Principles themselves, giving the idea that salesmanship, often neglected as a requisite for successful harmonization, was given importance here.¹⁹³ The Principles were drafted by a working group specifically formed for the purpose, and its members, who were from the different legal and socio-economic systems, were leading experts.¹⁹⁴ They included academics, judges and civil servants. Typical of UNIDROIT, the members of the working group were appointed in their own capacity and not as representatives of their governments.¹⁹⁵

In their comparative work, emphasis was not only placed on considering as many national legal orders as possible but on finding a synthesis between the different legal systems, especially between the civil and the common law. Inevitably, instruments such as the American Uniform Commercial Code, the Restatement (Second) of the Law of Contracts, the draft of the new Dutch Civil Code, and the new Civil Code of Québec, which were more current embodiments of the law, came in for more detailed consideration. The drafters also resorted to the 1980 Vienna Sales Convention as it reflected international consensus, at least on the law of sales.

Since their release the UNIDROIT Principles have enjoyed great acclaim, and have even served as a guide for the reform of the laws of some countries. They influenced the drafting of the Russian Civil Code, the Estonian Law of Obligations and the Civil Code of the Republic of Lithuania.¹⁹⁶ The development of the new Chinese contract law was also significantly influenced by the CISG.¹⁹⁷

According to Professor Rosett, the greatest achievement of the UNIDROIT Principles is that it persuasively demonstrates that basic principles of contract law can be agreed upon by all major legal systems

192. The Unilex database contains hundreds of articles and books which discuss the UNIDROIT Principles and it would take a few pages to even provide a snapshot view here. UNILEX and UNIDROIT Principles International Commercial Contracts, at <http://www.unilex.info> [hereinafter UNILEX on UNIDROIT].

193. The UNILEX database contains 60 articles by Bonell alone. *Id.*

194. The members of the working group (part II) included Bonell (Italy), Baptista (Brazil), Crepeau (Canada), Date Bah (Ghana), Di Majo (Italy), El Kholi (Egypt), Farnsworth (United States), Finn (Australia), Fontaine (Belgium), Furmston (U.K.), Hartkamp (Netherlands), Huang (China), Jauffret-Spinozi (France), Komarov (Russia), Lando (Denmark), Schlectreim (Germany), and Uchida (Japan).

195. Gesa Baron, *Do the UNIDROIT Principles of International Commercial Contracts form a new lex mercatoria?*, 15 J. CONT. L. 13, 20 (2001).

196. MICHAEL JOACHIM BONELL, AN INTERNATIONAL RESTATEMENT OF CONTRACT LAW: THE UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 236 *et seq.* (2d ed. 1997).

197. M. Williams, *An Introduction to General Principles and Formation of Contracts in the New Chinese Contract Law*, 17 J. OF CONTRACT LAW 13, 20 (2001).

in a form that is not “too vague and general to be useful in the resolution of specific disputes.”¹⁹⁸ He notes that “[t]his fact alone is immensely valuable to those who seek a structure to commercial contract law that can provide predictable and harmonious outcomes everywhere.”¹⁹⁹

2. *Efficacy of the UNIDROIT Principles*

It is one thing to say that the Principles have received wide scholarly recognition, and quite another to opine that they have achieved acceptance in practice. The litmus test for any restatement is the respect accorded to it by courts and legislatures. At least in the arbitral arena, the UNIDROIT Principles have made a start. As the Principles state, they can have application either as the *lex contractus* or as a supplement to a national law or an international convention. The UNIDROIT Principles have also been used as the reflection of the state of modern contract law in many arbitral awards. This is so in many cases despite the existence of a national law governing the contract. For instance, in ICC case 9593, where the dispute was between two Ivory Coast companies and the parties had agreed upon the law of the Ivory Coast, the arbitral tribunal referred to the UNIDROIT Principles in deciding that one of the parties had breached its obligation to cooperate in the performance of contract and said: “Further to a comparative study, UNIDROIT came to the conclusion that the obligation to cooperate in good faith in the performance of a contract amounted to a general principle applicable to international trade.”²⁰⁰

In another award, the tribunal said,

The reasons why this Tribunal considers the UNIDROIT Principles to be the central component of the general rules and principles regulating international contractual obligations and enjoying wide international consensus, which constitute the proper law of the contracts, are manifold: (1) the UNIDROIT Principles are a restatement of international legal principles applicable to international commercial contracts made by a distinguished group of international experts coming from all prevailing legal systems of the world, without the intervention of States or governments, both circumstances redounding to the high quality and neutrality of the product and its ability to reflect the present state of consensus on international legal rules and principles governing international contractual obligations in the world, primarily on the

198. Arthur Rosett, *The UNIDROIT Principles of International Commercial Contracts: A New Approach to International Commercial Contracts*, 46 AM. J. COMP. L. 347, 347 (1998).

199. *Id.* at 347–48.

200. ICC 9593, 10:2 ICC ICArb. Bull. 39 (1999) available at <http://www.unilex.info>.

basis of their fairness and appropriateness for international commercial transactions falling within their purview; (2) at the same time, the UNIDROIT Principles are largely inspired by an international uniform law text already enjoying wide international recognition and generally considered as reflecting international trade usages and practice in the field of the international sale of goods, which has already been ratified by almost 40 countries, namely CISG; (3) the UNIDROIT Principles are specially adapted to the contracts being the subject of this arbitration, since they cover both the international sale of goods and supply of services; (4) the UNIDROIT Principles have been specifically conceived to apply to international contracts in instances in which as it is the case in these proceedings, it has been found that the parties have agreed that their transactions shall be governed by general legal rules and principles; (5) rather than vague principles or general guidelines, the UNIDROIT Principles are mostly constituted by clearly enunciated and specific rules coherently organized in a systematic way²⁰¹

Further,

on the basis of at least two grounds, this Tribunal would not have been . . . prevented from referring to the UNIDROIT Principles as a part of the law applicable to the contracts in absence of an express or implicit choice of law situation: (1) . . . the contracts are governed as a result of a preliminary finding, by general rules and principles regarding international contractual obligations enjoying wide international consensus, i.e., they are not governed by any discrete domestic or national law . . . (2) the application of the UNIDROIT Principles does not depend on their self-given criteria of application, but on the powers vested in this Tribunal under article 13(3) of the ICC Arbitration Rules, which . . . authorize it to directly determine the applicable law it deems more appropriate to govern the merits, i.e., in this case, the general legal rules and principles regarding international contractual obligations enjoying wide international consensus, including without limitation, the UNIDROIT Principles as an adequate restatement and expression of modern general legal rules and principles.²⁰²

Prof. Bonell, the chief architect of the UNIDROIT Principles, writes that their use for the proper interpretation of the otherwise applicable domestic law was not anticipated by the drafters!²⁰³ According to him,

the statement in the Preamble²⁰⁴ according to which [the UNIDROIT

201. ICC 7110, 10:2 ICC IC Arb. Bull. 39 (1999) available at <http://www.unilex.info>.

202. *Id.*

203. Michael Joachim Bonell, *The UNIDROIT Principles as a Means of Interpreting and Supplementing International Uniform Law*, in UNIDROIT Principles of International Commercial Contracts—Reflections on their Use in International Arbitration, Special Supplement, ICC International Court of Arbitration Bulletin, ICC 2002, at 29.

204. Preamble (Purpose of the Principles):

These Principles set forth general rules for international commercial contracts. They shall be applied when the parties have agreed that their contract be governed by them.

They may be applied when the parties have agreed that their contract be governed by general principles of law, the *lex mercatoria* or the like.

They may provide a solution to an issue raised when it proves impossible to establish the relevant rule of the applicable law.

They may be used to interpret or supplement international uniform law

Principles] may provide a solution to an issue raised when it proves impossible to establish the relevant rule of the applicable law was intended to cover only those cases where it is extremely difficult, if not impossible, to determine the content of the applicable law because of the special character of the legal resources and/or the cost of access to them.²⁰⁵

Interestingly, Bonell points out that article 14 of the Model Contract for the International Commercial Sale of Perishable Goods adopted by the International Trade Center UNCTAD/WTO in 1999 allows for the use of the UNIDROIT Principles: "In so far as any matters are not covered by the foregoing provisions, this contract is governed by the following, in descending order of precedence: the United Nations Convention on Contracts for the International Sale of Goods, the UNIDROIT Principles"²⁰⁶

A survey of cases which have referred to the UNIDROIT Principles reveals that parties have subjected their dispute to the Principles after the dispute commenced even though the contract itself did not refer to it. In one such case, an *ad hoc* arbitration in Paris dated 21/4/1997, the dispute was between a Russian trade organization and a United States company concerning a loan agreement. Although the agreement did not contain a choice of law clause, after the dispute arose the parties agreed that the arbitral tribunal should apply Russian law, if necessary, supplemented by the UNIDROIT Principles.²⁰⁷ In another case before the Camera Arbitrale Nazionale ed Internazionale di Milano, 1/12/1996, a dispute between Italian and American parties, the parties agreed to the application of the UNIDROIT Principles even though the contract did not make any reference to it.²⁰⁸ In an arbitration before the Court of the Lausanne Chamber of Commerce, 21/2/2002, the contract did not contain a clear choice of law and the parties argued for the application of

instruments.

They may serve as a model for national and international legislators. UNIDROIT PRINC. pmbi., reprinted in Bonell, *supra* note 196, at 271.

205. Bonell, *supra* note 203. He contrasts this situation with the role of the UNIDROIT Principles to assist in interpreting and supplementing international conventions, which was contemplated by the drafters. Such a view is also espoused by Professor Rosett. See Rosett, *supra* note 198, at 354.

206. Bonell, *supra* note 203, at 32.

207. Loan Agreement Case (Russ. v. U.S.)(Ad hoc Arb., Paris 1997), available at UNILEX on UNIDROIT, *supra* note 192. In giving its verdict, the arbitral tribunal referred to Arts. 3.12 and 4.3(c) of the UNIDROIT Principles. *Id.*

208. Case A-1795/51, Commercial Agency Contract Case (Italy v. U.S.)(Camera Arbitrale Nazionale ed Internazionale di Milano 1996), available at UNILEX on UNIDROIT, *supra* note 192.

Swiss law, on the basis that it was a “neutral law.” Since the contract contained a reference to “general principles of law applicable to international commercial contracts,” they accepted the application of the UNIDROIT Principles.²⁰⁹ In another case before the same court, a partial award, the facts were as follows:

a Turkish company and a company incorporated in Anguilla, West Indies, with an office in the Philippines, [which had] entered into an agreement concerning highly sophisticated equipment. The contract contained two provisions on the choice of law, which appeared to contradict each other,” one applying English law and the other Swiss law. . . [t]he arbitral tribunal [suggested that] the parties choose the . . . provisions of the UNIDROIT Principles.²¹⁰

Application of the UNIDROIT Principles where the contract led to the application of the “general principles of law” is growing. There are twelve such cases on the UNILEX database. In *Andersen Consulting Business Unit Member Firms v. Arthur Andersen Business Unit Member Firms and Andersen Worldwide Societe Cooperative*, the Tribunal held that the UNIDROIT Principles are a reliable source of international commercial law in international arbitration for they “contain in essence a restatement of those ‘*principes directeurs*’ that have enjoyed universal acceptance and, moreover, are at the heart of those most fundamental notions which have consistently been applied in arbitral practice.”²¹¹ In a recent Russian arbitration where there were conflicting choice of law clauses, the Tribunal held that it would apply the general principles of law, and that the “UNIDROIT Principles were an expression of the general principles of the *lex mercatoria*.”²¹²

From the foregoing it is clear that the UNIDROIT Principles are here

209. Manufacturing & Marketing Contract Case (Belg. v. Spain)(Arb. Ct. Lausanne CCI 2002), available at UNILEX on UNIDROIT, *supra* note 192. The arbitral tribunal was helped in its decision by the fact the application of the UNIDROIT Principles did not offend mandatory rules in Switzerland, Belgium or Spain. Further, as the products in question in the case should have been marketed in many countries, the tribunal found it reasonable to apply the UNIDROIT Principles rather than a specific domestic law.

210. Equipment Contract Case (Turk. v. Anguilla)(Arb. Ct. Lausanne CCI 2002), available at UNILEX on UNIDROIT, *supra* note 192. The award is dated 5/17/2002. *Id.* In the final award, the arbitral tribunal referred to Arts. 7.4.2 and 7.4.7 of the Principles, in order to justify a reduction of the compensable harm as part of the harm was due to the conduct of the aggrieved party. *Id.* It also used Arts. 7.4.9 (2) and 7.4.10 to grant interest on the amount due. *Id.*

211. Anderson Consulting Bus. Unit Member Firms v. Arthur Andersen Bus. Unit Member Firms, 10 AM. REV. INT’L ARB. 451 (Int’l Comm. Arb. 1999).

212. Case 11/2002, Commercial Services Contract Case (Russ. v. F.R.G.)(Int’l Arb. Ct. CCI, Russ. 2002), available at UNILEX on UNIDROIT, *supra* note 192. Professor Rosett is a believer in the following argument: The Principles are said to be a Restatement of International commercial law and what is being restated is the *lex mercatoria*. The UNIDROIT Principles thus provide substance to international practice as a source of law; they give content to the claimed existence of a *Lex Mercatoria*.” See Rosett, *supra* note 198, at 354.

to stay. They have come to be seen as embodying principles of such quality that they may be safely used to settle disputes without either party complaining about the law being adverse to him/her. This alone is a huge contribution in international commerce. Further, the CENTRAL research project on transnational commercial law showed that parties were familiar with the UNIDROIT Principles and used them in many instances to overcome language barriers.²¹³ It confirmed many of the findings of UNIDROIT which had conducted a study of about 1000 users of the UNIDROIT Principles to obtain information about the practical application of the Principles. Although, the response rates are very low, and may be skewed by the fact that many of the uses have been in the context of arbitration, it is definitely indicative of the fact that the sheer quality of the Principles are causing commercial players to resort to them.

3. Principles of European Contract Law

The Principles of European Contract Law set forth general rules for contract law in contrast to the UNIDROIT Principles, which restrict their application to commercial contracts. Thus the UNIDROIT Principles exclude consumer contracts. The PECL, on the contrary, expressly include consumer contracts in their ambit. This is definitely important in the European context with the ever growing body of consumer law, and the PECL can serve as the context for these developments. The PECL were definitely influenced by the UNIDROIT Principles as there was a process of exchange between the drafters.²¹⁴ Although the PECL have not received the same kind of attention as the UNIDROIT Principles, they have also been referred to by arbitral panels in recent cases. In arbitral award no. 8128,²¹⁵ at the ICC Court of International Arbitration,

213. Klaus Peter Berger, *The Central Enquiry On The Use Of Transnational Law In International Contract Law And Arbitration: Background, Procedure And Selected Results*, INT. A.L.R. 2000, 3(5), 145-56, 153-54 (2000).

214. Martijn W. Hesselink, *The PECL: Some Choices Made By The Lando Commission*, GLOBAL JURIST FRONTIERS, Vol 1: No. 1, Article 4, at 8 (2001), at <http://www.bepress.com/gj/frontiers/vol1/iss1/art4> (noting that Professors Joachim Bonell, Ulrich Drobnig, Arthur Hartkamp, Ole Lando and Denis Tallon were members of both Commissions).

215. 1995. Available at <http://www.unilex.info/dynasite.cfm?dssid=2377&dsmid=13621&x=1>. In facts showed that a Swiss buyer entered into a contract with an Austrian seller for the supply of chemical fertilizer in order to fulfill a contract with a third party. The seller has a contract with an Ukrainian supplier to obtain part of the fertilizer. The buyer sent the Ukrainian supplier sacks that it had manufactured under the seller's

Basle, in awarding interest under Art. 78 of the CISG, the Arbitral Tribunal applied the average bank short term lending rate to prime borrowers, which is the solution adopted by Art. 7.4.9 of the UNIDROIT Principles²¹⁶ and by Art. 4.507 of the PECL. The Tribunal decided that these fell under the rubric of the general principles on which the CISG is based.

In arbitral award no. 9474 before the ICC International Court of Arbitration at Paris, where the parties agreed to the Tribunal's proposal at the beginning of the proceedings to apply "the general standards and rules of international contracts," it decided to apply along with the CISG "other recent documents that express the general standards and rules of commercial law" such as the UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law.²¹⁷ In another recent arbitration, where the parties had entered into a series of agreements aimed at developing the defendant into an efficient cement producer, despite the choice of law clause in the agreements expressly providing that Lithuanian law applied, the Claimant invoked the UNIDROIT Principles and the Principles of European Contract Law as a source of trade usages referred to in Article 17 of the ICC Rules of Arbitration. In the partial award on the issue of the applicable law, the Tribunal acknowledged that both the UNIDROIT Principles and the PECL represented the latest codification of international commercial trade usages, but thought that they were only persuasive and not

instructions to be used for delivery. These sacks did not conform with the technical rules of the Ukrainian chemical industry, and the supplier could not make use of them leading to the goods not being delivered within the time fixed in the contract. The buyer wanted to avoid the contract in respect of goods not delivered and asked the seller when it expected to deliver. The seller's reply was not satisfactory and the buyer had to make a substitute purchase at a higher price to be able to perform the contract with the third party. The buyer commenced arbitral proceedings demanding damages, including the cost of the sacks it had supplied as well as the loss deriving from the substitute purchase.

216. Article 7.4.9 (Interest for failure to pay money):

- (1) If a party does not pay a sum of money when it falls due the aggrieved party is entitled to interest upon that sum from the time when payment is due to the time of payment whether or not the non-payment is excused.
- (2) The rate of interest shall be the average bank short-term lending rate to prime borrowers prevailing for the currency of payment at the place for payment, or where no such rate exists at that place, then the same rate in the State of the currency of payment. In the absence of such a rate at either place the rate of interest shall be the appropriate rate fixed by the law of the State of the currency of payment.
- (3) The aggrieved party is entitled to additional damages if the non-payment caused it a greater harm.

UNIDROIT, *supra* note 182.

217. Case 9474, Bank Notes Contract Case (ICC ICArb., Paris 1999), *available at* UNILEX on UNIDROIT, *supra* note 192. This case was decided in 1999.

mandatory as they were not incorporated in the agreement between the parties.²¹⁸

The PECL have been referred to in decisions as far away as Australia. In *GEC Marconi Systems Ltd. v BHP Information Technology Ltd.*,²¹⁹ the court ruled that “the duty of good faith and fair dealing was to be considered an implied term of all contracts,” relying on such expressions in the UNIDROIT Principles and the PECL, despite the absence of such a rule in Australian law, and the “fact that the contract contained a “entire agreement” clause was not sufficient to preclude such an implication.”²²⁰ This joint reference to the UNIDROIT Principles and the PECL is probably the forerunner of things to come as more tribunals use these instruments at the interstices of positive law. They have the great virtue of clear expression and embody a synthesis of international legal rules in a way that promotes dispute resolution.

V. CONCLUSION

There is little doubt that international commercial parties have little patience with such ideas as state sovereignty. They demand laws to facilitate their transactions, and if states are loath to do so in a timely fashion, have not been hesitant to create international commercial law using “soft law” instruments that in actuality have even more potency than “hard law.” This is no doubt because international commercial disputes seldom require adjudication by the courts, and arbitral tribunals are less concerned with notions of sovereignty when they are fashioning relief that makes commercial sense. There is nothing that nation states need to worry about: they are not particularly competent to address the complexities of international commerce, and given their crowded dockets, should welcome this trend by supporting the use of soft law wherever possible. This paper has clearly shown the very limited role played by nation states in the creation of modern international commercial law: all the initiatives examined in the above pages involve international agencies, regional agencies, inter-governmental agencies, groups of scholars, and international arbitrators. Representatives of

218. Case 10022, Cement Contract Case (ICC ICArb. 2000), *available at* UNILEX on UNIDROIT, *supra* note 192.

219. Case NG733 of 1997, *GEC Marconi Sys. Pty Ltd. v. BHP Info. Tech Pty Ltd.* (Fed. Ct. Austl. 2003), *available at* UNILEX on UNIDROIT, *supra* note 192.

220. *Id.* (referring to article 1.7 of the UNIDROIT Principles and article 1:201 of the PECL).

governments have been pushed to the background. This is only a herald of things to come. Nation states do not appear to understand the demands of modern international commerce, and if they can't take the heat, they should get out of the kitchen.