

## DO WE STILL NEED A CONVENTION IN THE FIELD OF HARMONISATION OF THE INTERNATIONAL COMMERCIAL LAW?

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*The paper critically discusses the opinion of certain scholars that the use of multilateral treaties (conventions) in the field of harmonisation of international commercial law has been in a state of steady decline. They believe that traditional treaty law has been gradually replaced in recent years by softer methods of making international law, such as the use of restatements and model laws. Some scholars even claim that treaty law is dead or dying. The work assesses whether this view has reasonable grounds, providing an overview of the most prominent hard law and soft law harmonising instruments and outlining issues relating to the success of conventions, their advantages, drawbacks and tensions arising in this area. The paper suggests that conventions remain necessary where the third party or public interest are at stake, however, further improvements are needed to make conventions more successful instruments in international commercial law.*

*Keywords: conventions; harmonisation of international commercial law; soft law; hard law; multilateral treaties; model laws; formulating agencies.*

### 1. Introduction

In the initial stages of the harmonisation of international commercial law, treaties or conventions representing hard law methods of harmonisation were the primary instruments. However, along with diversification in business and commercial transactions, many soft law instruments like model laws, restatements and codified customs and usages have been developed by formulating agencies for the benefit of businesses. Although until recently there have been a number of success stories and failures in both the areas of hard law and soft law, certain scholars and critics argue that the use of conventions in the area of harmonisation of international commercial law has been in a state of steady decline, with traditional treaty law

gradually being replaced in recent years by softer methods of making international law. In order to assess whether the above view has reasonable and sufficient grounds, this essay will review general issues of harmonisation and how it can be achieved through particular instruments. The tendency to adopt and use conventions and soft law instruments will be addressed by focusing on particular examples of the most prominent instruments recognized worldwide. The paper will study the views of academics and scholars on the development of treaty law, the success of conventions, along with tensions arising from harmonisation. An overview of improvements needed to perfect conventions will finalise the work, supporting the idea that treaty law is unlikely to be solely replaced by softer methods of law-making, but rather should be improved in accordance with recent business trends and evolving international commercial law.

## **2. Harmonisation of International Commercial Law: Aims, Instruments, Formulating Agencies**

### **2.1. Notion of Harmonisation**

The term 'harmonisation' is often used interchangeably with unification, though they have slightly different meanings. While 'unification contemplates the replacement of multiple and different rules with a single uniform rule, harmonisation contemplates the move to greater similarity, but not necessarily to unity or identity.'<sup>1</sup> At the international level, the necessity to unify rules primarily relates to international transactions between persons having their place of business in different states.<sup>2</sup> The unification of commercial law is considered a factor in reducing the costs of doing business as it enhances the predictability and legal certainty for the parties of a cross-border transaction.<sup>3</sup>

A number of prominent scholars, including C. Schmitthoff, R. Goode, L. Mistelis, M. Bonell dedicate their researches and works to the harmonisation, a key factor in international commercial law.

### **2.2. General Characteristics, Approaches, Methods**

Goode asserts that the 'particular characteristic of twentieth century harmonisation lies in its motivation, which is to *reduce the impact of national boundaries*.'<sup>4</sup> Goode

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<sup>1</sup> A. Claire Cutler, *Public Meets Private: The International Unification and Harmonisation of Private International Trade Law*, 13(1) *Global Society* 25, 35 (1999). doi:10.1080/13600829908443177

<sup>2</sup> Roy Goode, *Rule, Practice and Pragmatism in Transnational Commercial Law*, 54(3) *Int'l & Comp. L.Q.* 539, 554 (2005) [hereinafter Goode, *Rule*]. doi:10.1093/iclq/lei017

<sup>3</sup> Cutler, *supra* n. 1, at 37.

<sup>4</sup> Roy Goode, *Reflections on the Harmonisation of Commercial Law*, os-19(1) *Unif. L. Rev.* 54 (1991) [hereinafter Goode, *Reflections*]. doi:10.1093/ulr/os-19.1.54

also identified two separate and unique approaches: firstly, harmonisation of conflict-of-law rules, and secondly, representing the next, more ambitious step, the harmonisation of substantive law, aimed to harmonise the substantive law of contract in various jurisdictions, which are party to the same project.<sup>5</sup>

There are several methods by which harmonisation may be effected: multilateral conventions, a set of bilateral treaties, a model law, a codification of custom and usage and international trade terms promulgated by an international non-governmental organization, model contracts, or restatements by scholars and experts.<sup>6</sup>

Mistelis makes a collateral distinction of harmonisation purposes between hard law and soft law as follows: '*Hard law* consists of international conventions, national statutory law and regional or international customary law.'<sup>7</sup> Hardness of law may be explained by the fact that when parties choose a substantive law they must take the law as it is, without any modification, with the only possibility to change it set out within their contractual provisions.<sup>8</sup>

'*Soft law* consists of provisions embodied in model laws (but not incorporated in the national law), principles to be found in legal guides and in scholarly restatements of international commercial law,<sup>9</sup> and contractual stipulations agreed by parties. These rules are not legally binding unless the parties to a commercial transaction decide otherwise.<sup>10</sup>

Therefore, harmonisation may be achieved through the hard law sources (multilateral agreements) or soft law sources, including model laws, contracts and contract guides, or general statements of principles.<sup>11</sup>

### **2.3. Successful Harmonising Instruments**

Goode names several instruments that, in his view, may be considered 'continued and documented success stories'<sup>12</sup> in harmonising international commercial law. Among these instruments are: the *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (1958), the *UN Convention on Contracts for the International Sale of Goods* (CISG or the Vienna Convention) (1980), the UNCITRAL

<sup>5</sup> Roy Goode et al., *Transnational Commercial Law: Text, Cases and Materials* 505–06 (Oxford University Press 2007) [hereinafter Goode, *Transnational Commercial Law*].

<sup>6</sup> Goode, *Reflections*, *supra* n. 4, at 57.

<sup>7</sup> Loukas Mistelis, *Is Harmonisation a Necessary Evil? The Future of Harmonisation and New Sorces of International Trade Law*, in *Foundations and Perspectives of International Trade Law* 1-036 (Ian Fletcher et al., eds.) (Sweet & Maxwell 2001).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 1-037.

<sup>10</sup> *Id.*

<sup>11</sup> Cutler, *supra* n. 1, at 36.

<sup>12</sup> Goode, *Transnational Commercial Law*, *supra* n. 5, at 729.

*Model Law on International Commercial Arbitration* (1985), the *Cape Town Convention on International Interests in Mobile Equipment* (the *Cape Town Convention*) (2001), the *Hague Convention on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary* (2002), the *UNIDROIT Principles of International Commercial Contracts* (UPICC) (last revision 2010), the *INCOTERMS* (last revision 2010) and *Uniform Customs and Practice for Documentary Credits* (UCP) (last revision 2007).<sup>13</sup>

#### **2.4. Formulating Agencies**

The most prominent law-producing bodies in the area of international commercial law are the United Nations Commission on the International Trade Law [hereinafter UNCITRAL], the International Institute for the Unification of Private Law [hereinafter UNIDROIT], and the Hague Conference on Private International Law [hereinafter Hague Conference]. While the Hague Conference focuses on the forms of conflict-of-law conventions, UNIDROIT and UNCITRAL deal with a variety of instruments such as multilateral conventions, model laws, and international restatements of contract law.

Also, a number of non-governmental international organisations, being non-law-producing bodies, deal with unifying and harmonising commercial law using soft law methods. Among them are the International Chamber of Commerce (ICC) and the International Bar Association (IBA).

### **3. The Traditional Multilateral Treaties in the Field of Harmonisation of International Commercial Law: Examples of Successful and Unsuccessful Instruments**

The treaty notion is defined in the *Vienna Convention on the Law of Treaties 1969* (Art. 2(1)(a)) as follows:

An international agreement between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.

Therefore, all forms of agreements within this definition, including international conventions, fall under the category of treaties. For the purposes of our analysis we will refer to the multilateral private commercial law conventions available for all states. The treaties become binding for the parties to these agreements after ratification or accession. The Hague Conference, UNIDROIT and UNCITRAL are responsible for promulgating the bulk of international conventions in the field of commercial law.

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<sup>13</sup> Goode, *Transnational Commercial Law*, *supra* n. 5, at 729.

Initially, bilateral and multilateral treaties or conventions were the primary harmonising instruments for resolving issues and facilitating trade between states in key areas of commercial trade. The following approaches were used: either ratifying States implemented conventions by adapting their domestic laws accordingly, or they used uniform laws created by conventions.<sup>14</sup> However, along with the diversification of business and commercial transactions many soft law instruments have been promulgated by formulating agencies for the needs of businesses.

### **3.1. What Does Determine the Success of the Conventions?**

This is a question often raised by scholars and practitioners. An answer would help to identify the relative strength of a particular instrument so that formulating agencies could implement the best practice, and avoid possible tensions in future drafting of conventions and / or other harmonising instruments. Their success, according to Goode, is measured by the fact that harmonising instruments 'are not embroiled in constant or periodical divergences regarding their interpretation and application.'<sup>15</sup>

Kronke, in turn, emphasises that 'a large number of ratifications, a rapidly growing body of case law from many countries which succeeds in maintaining uniformity, no calls for revision enable us . . . to dub "advantageous" those Conventions that succeeded . . .'<sup>16</sup>

At the same time he notes that the number of ratifications of the convention and its important technical qualities might not be relevant if traders do not apply the convention to their transactions. Finally, he concludes by saying that a uniform law convention succeeds 'if it reduces costs and enhances benefits in a given area of transnational commercial transactions.'<sup>17</sup>

### **3.2. Success Stories Regarding the Conventions**

#### *3.2.1. The Vienna Convention (CISG)*

Three major formulation agencies have spent the last two decades formulating and promulgating a number of international conventions in diverse sectors of commercial law. Among them 'the *Vienna Convention* probably represents the high water mark for comprehensive global unification. Since then, however, initiatives are increasingly fragmented, sectorally focused, and soft in application.'<sup>18</sup> The Vienna

<sup>14</sup> Goode, *Transnational Commercial Law*, *supra* n. 5, at 194.

<sup>15</sup> *Id.* at 729.

<sup>16</sup> Herbert Kronke, *International Uniform Commercial Law Conventions: Advantages, Disadvantage, Criteria for Choice*, 5(1) *Unif. L. Rev.* 13, 15 (2000). doi:10.1093/ulr/5.1.13

<sup>17</sup> *Id.*

<sup>18</sup> Cutler, *supra* n. 1, at 43.

Convention [hereinafter CISG], operating in the area of commercial sales, came into force in 1988. As of today, 80 countries, including major trading nations like the USA, but excluding the UK, have adopted the CISG.<sup>19</sup> The most challenging factor in the CISG is that it has been successful in bringing together common law and civil law principles in one document.<sup>20</sup> It also has been tested in thousands of cases and arbitral hearings in many of the world's jurisdictions and it has been a subject of exhaustive academic commentary.<sup>21</sup>

### 3.2.2. *The Cape Town Convention*

While the CISG was criticised for excluding from its regulation questions relating to property rights issues, the *Cape Town Convention*, promulgated by UNIDROIT with an extensive involvement and support of intergovernmental aviation organization ICAO, addressed 'the problem of taking and retaining rights *in rem* in assets such as aircraft objects'<sup>22</sup> and contains rules governing priority and the effects of insolvency. The Convention provides substantive rules that would displace any consistent domestic law.<sup>23</sup> This instrument is characterized as 'the most ambitious problem-solving convention to date without doubt.'<sup>24</sup> The Convention was adopted in 2001, entered into force in 2006 and as of 2014 has been ratified by 60 States, including the USA and the European Community. The Convention is unique in that it combines public law and private law provisions.<sup>25</sup> In addition, its structure is unusual as it contains supplemental protocols setting forth industry specific rules. The Convention does not enter into force until the contracting State ratifies the protocol. This novel technique is aimed at eliminating deadlocks in the negotiations and allows for a speedy conclusion to negotiations.<sup>26</sup> The Convention solved the problem of the 'lack of a legal system to support the purchase, sale and financing of an aircraft.'<sup>27</sup>

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<sup>19</sup> *Status: United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980)*, <[https://www.uncitral.org/uncitral/en/uncitral\\_texts/sale\\_goods/1980CISG\\_status.html](https://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html)> (accessed Jan. 29, 2015).

<sup>20</sup> Goode, *Transnational Commercial Law*, *supra* n. 5, at 309.

<sup>21</sup> *Id.*; see also *CLOUT Abstracts*, at <[http://www.uncitral.org/uncitral/en/case\\_law/abstracts.html](http://www.uncitral.org/uncitral/en/case_law/abstracts.html)> (accessed May 5, 2014).

<sup>22</sup> Goode, *Rule*, *supra* n. 2, at 557.

<sup>23</sup> Amelia H. Boss, *The Future of Uniform Commercial Code Process in an Increasingly International World*, 68 Ohio St. L.J. 349, 393 (2007), available at <[http://papers.ssrn.com/abstract\\_id=978025](http://papers.ssrn.com/abstract_id=978025)> (accessed Jan. 29, 2015).

<sup>24</sup> Goode, *Rule*, *supra* n. 2, at 557.

<sup>25</sup> Goode, *Transnational Commercial Law*, *supra* n. 5, at 113.

<sup>26</sup> Boss, *supra* n. 23, at 386.

<sup>27</sup> *Id.* at 388.

### 3.3. Less Successful Stories

On a less optimistic note, it is worth saying that in many cases formulating agencies invested time, money and effort into projects that have never gotten off the ground.<sup>28</sup> For example, the *Convention on Independent Guarantees and Standby Letters of Credit*, produced by UNCITRAL in 1995 has been ratified by only eight States, none of which represents any major trade State. As the Convention, to some extent, follows *Uniform Rules for Demand Guarantee (URDG)*, which is the ICC's soft law instrument, it is obvious that the parties will prefer to incorporate the URDG in the majority of cases.<sup>29</sup>

Similarly, the *Convention on Agency in the International Sale of Goods*, adopted by UNIDROIT in 1983, was considered as 'the ill-fated project on agency in the international sale of goods' due to its over-ambitious aims.<sup>30</sup> It has been ratified by only five of the ten required States to bring it into force.

## 4. Recent Developments of Softer Methods of Making International Law in the Field of Harmonisation of International Commercial Law

'The growing trend in the use of soft law sources and voluntary or non-binding arrangements, like UNIDROIT's recent *Principles of International Commercial Contracts* signals the increasing salience of the private ordering of commercial relations that grants maximum scope to merchant autonomy and flexibility.<sup>31</sup> In the areas of commercial law, where the binding instruments were not essential, alternative ways of unification have become increasingly popular. They include, *inter alia*, model laws which States consider when drafting domestic legislation or general principles and 'which the judges, arbitrators and contracting parties they address are free to decide whether to use or not.'<sup>32</sup>

### 4.1. Restatements (PICC and PECL)

Two sets of Principles aimed at harmonising contract law were published in the 1990<sup>5</sup>. The first set of *Principles of International Commercial Contracts* [hereinafter PICC] was published by UNIDROIT in 1994 (and revised in 2004 and 2010) and was specifically tailored for international commercial transactions worldwide. The other

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<sup>28</sup> Michael J. Bonell, *An International Restatement of Contract Law 14* (3<sup>rd</sup> ed., Transnational Publishers 2005) [hereinafter Bonell, *International Restatement*].

<sup>29</sup> Goode, *Transnational Commercial Law*, *supra* n. 5, at 356.

<sup>30</sup> *Id.* at 230.

<sup>31</sup> Cutler, *supra* n. 1, at 43.

<sup>32</sup> A Guide to UNCITRAL: Basic Facts about the United Nations Commission on International Trade Law (United Nations 2013), available at <<http://www.uncitral.org/pdf/english/texts/general/12-57491-Guide-to-UNCITRAL-e.pdf>> (accessed Jan. 29, 2015).

set, the *Principles of European Contract Law* (PECL), was published and prepared in 1995 (with certain parts published in 2000 and 2005) for the member States of the European Union. It shares the same purposes as the PICC.<sup>33</sup>

The PICC represent the legislative codification of restatement of a law of international commercial contract, but do not have the force of law. They offer a set of rules produced by scholars, which cover all important areas of general contract law and appear to be 'a resource for those courts and arbitral tribunals who find them helpful – there have been numerous arbitral awards invoking them.'<sup>34</sup> 'Despite the fact that these Principles are nonbonding, they have gained worldwide recognition in academic circles and practice . . .'<sup>35</sup> They have been used as a model for law reform projects by many countries and are increasingly chosen by parties to govern their contracts (even if there is no express reference to them in the contract, as an expression of general principles of law, the *lex mercatoria*).<sup>36</sup> The PICC defer to internationally mandatory rules and also contain mandatory rules of their own.<sup>37</sup>

Professor J. Bonell, who headed up the work of international scholars on the PICC, says: 'It was both the merits and shortcomings of CISG which prompted UNIDROIT to embark upon a project as ambitious as the Principles.'<sup>38</sup> Though both CISG and the PICC in general address the same issues, the non-binding nature of the PICC allows them to address questions that are not covered by the CISG, such as authority of agents, fraud, third party rights, and others; making the PICC a more comprehensive instrument when compared to the CISG.<sup>39</sup>

Nevertheless, the PICC do not compete with the CISG and other harmonising instruments. The PICC are often applied as a gap-filler, to interpret and supplement uniform law instruments and specifically the CISG. These two instruments 'may actually fulfil very important functions side by side.'<sup>40</sup>

Bonell argues that ' . . . the impact of the Principles may prove to be even greater than that of an international convention . . .'<sup>41</sup> At the same time he points out that '[l]ike any other soft law instrument in the field of contract law, they are binding within

<sup>33</sup> Ole Lando, *Principles of European Contract Law and UNIDROIT Principles: Moving from Harmonisation to Unification?*, 8(1–2) *Unif. Law Rev.* 123 (2003). doi:10.1093/ulr/8.1-2.123

<sup>34</sup> Goode, *Rule*, *supra* n. 2, at 553.

<sup>35</sup> Michael J. Bonell, *Do We Need a Global Commercial Code?*, 106 *Dick. L. Rev.* 87, 99 (2001), available at <<http://www.cisg.law.pace.edu/cisg/biblio/bonell1.html>> (accessed Jan. 29, 2015).

<sup>36</sup> *Id.*

<sup>37</sup> Goode, *Rule*, *supra* n. 2, at 553.

<sup>38</sup> Bonell, *International Restatement*, *supra* n. 28, at 305.

<sup>39</sup> *Id.* at 311, 313.

<sup>40</sup> *Id.* at 314.

<sup>41</sup> *Id.* at 25.



the limits of party autonomy.<sup>42</sup> This fact causes discussions about the transformation of the PICC into a binding instrument.

#### **4.2. Model Laws**

'Treaties may result in unified law, but cross border harmonisation can occur in the absence of treaties when countries adopt as a part of their domestic law the same or similar legal principles. International model laws, for example, may serve as models for use in drafting domestic legislation.'<sup>43</sup> Model laws propose an option for regulating a certain type of transaction or a certain area of law. The model law, however, is a facultative harmonising instrument, which is not legally operative. As model laws do not require any ratification, states are free to accept them (wholly or in part), amend them, or even reject them. The description below illustrates two positive examples of recent development and promulgation of model laws in the areas of arbitration and insolvency.

##### *4.2.1. Model Law on International Commercial Arbitration*

The most successful instrument in international commercial law is the 1985 UNCITRAL *Model Law on International Commercial Arbitration*, amended in 2006, and adopted by a large number of jurisdictions. Though its scope is limited to international and commercial arbitration, this model law was used as a blueprint for modernizing laws governing both national and domestic legislation as well as commercial and non-commercial arbitration.<sup>44</sup> UNCITRAL published the *Digest of Case Law on the Model Law on International Commercial Arbitration*, a tool specifically designed to present selected information on the interpretation and application of the Model Law based on the large number of cases collected in the database CLOUT (Case Law UNCITRAL Texts), and also to further promote the adoption of this law.<sup>45</sup>

##### *4.2.2. Model Law on Cross-Border Insolvency*

Another positive example in the area of international commercial law is the *Model Law on Cross-Border Insolvency* adopted by UNCITRAL in 1997 with the purpose of presenting a set of internationally harmonised model legislative provisions on cross-border insolvency. The Law was prepared in collaboration with the International

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<sup>42</sup> Michael J. Bonell, *Symposium paper: the UNIDROIT Principles of International Commercial Contracts: Achievements in Practice and Prospectus for the Future*, 17 Australian International Law Journal 177, 181 (2010), available at <<http://www.austlii.edu.au/au/journals/AUIntLawJl/2010/8.html>> (accessed Jan. 29, 2015).

<sup>43</sup> Boss, *supra* n. 23, at 385.

<sup>44</sup> Goode, *Transnational Commercial Law*, *supra* n. 5, at 36.

<sup>45</sup> UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration (United Nations 2012), available at <<http://www.uncitral.org/pdf/english/clout/MAL-digest-2012-e.pdf>> (accessed Jan. 29, 2015).

Association of Insolvency Practitioners as a reaction to the growing number of insolvency cases. The Law 'has steadily grown in influence'<sup>46</sup> and has been adopted by 20 countries, including major trade states like the USA and the UK.<sup>47</sup> It focuses on encouraging cooperation and coordination between jurisdictions, rather than attempting the unification of substantive insolvency laws and respects the differences among national procedural laws.<sup>48</sup> In spite of the worldwide adoption, there has been some criticism with respect to certain aspects of the law, including, *inter alia*, enhanced uncertainty about creditor rights in a bankruptcy proceeding.<sup>49</sup>

In certain cases, model laws provide a basis for further conventions in a particular area. Thus, 'the UNCITRAL Convention on the use of Electronic communications in international contracts (E-Commerce Convention) is based in large part on two model laws previously drafted by UNCITRAL, namely, the *Model Law on Electronic Signatures* (2001) and the *Model Law on Electronic Commerce* (1996).'<sup>50</sup>

## 5. Scholars: Is the Treaty Dead?

'Why is that the treaty collections are littered with conventions that have never come into force for want of the required number of ratifications, or have been eschewed by major trading states or targeted developing and law reform countries?'<sup>51</sup> This question posed by Goode has been reviewed and analysed by many prominent academics.

Mistelis outlines the following major drawbacks of harmonisation of commercial law by international conventions:

- (i) 'a lengthy and costly process' of negotiation and drafting of the convention;<sup>52</sup>
- (ii) 'a degree of unification may be excessively restricted and the differences may be irreconcilable,'<sup>53</sup>
- (iii) 'issues of sovereignty may arise in the context of international trade regulation,'<sup>54</sup>

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<sup>46</sup> Goode, *Transnational Commercial Law*, *supra* n. 5, at 554.

<sup>47</sup> *Id.*

<sup>48</sup> UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation (United Nations 2014), available at <<http://www.uncitral.org/pdf/english/texts/insolven/1997-Model-Law-Insol-2013-Guide-Enactment-e.pdf>> (accessed Jan. 29, 2015).

<sup>49</sup> Paul B. Stephan, *The Futility of Unification and Harmonisation in International Commercial Law* 1, 32 (University of Virginia School of Law, Legal Studies Working Paper No. 99-10, June 1999), <<http://ssrn.com/abstract=169209>> (accessed Jan. 29, 2014).

<sup>50</sup> Boss, *supra* n. 23, at 399.

<sup>51</sup> Goode, *Transnational Commercial Law*, *supra* n. 5, at 729.

<sup>52</sup> Mistelis, *supra* n. 7, at 1-049.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

(iv) possible delays in ratification of the conventions that may last for many years before the convention comes into force;<sup>55</sup>

(v) 'the statutory law is subject to interpretation by the courts . . . and there is no guarantee that harmonised law will be interpreted in a harmonised manner.'<sup>56</sup>

In Mistelis' opinion, alternative means of soft harmonisation of commercial law could avoid the pitfalls of international conventions described above through their flexibility and 'effective convergence of different legal systems.'<sup>57</sup>

Further, Kronke outlines the principal disadvantages of the conventions in that they 'are normally rather specific and fragmentary in character.'<sup>58</sup> This 'so-called isolated-position syndrome'<sup>59</sup> may potentially create a case where, for instance, a convention on agency may be implanted in a body of law whose domestic rules on contracts, restitution and property are hard to reconcile with the Convention's solutions.<sup>60</sup>

In addition, Kronke argues that the worldwide impact of most conventions on domestic law reform seems to be less significant than the impact which various model laws or other soft law instruments, such as the PICC, have enjoyed. Lastly, the 'adoption of Convention considerably reduces room for competition among legal systems and regulatory arrangements because in some areas competition has been and will continue to be vital . . .'<sup>61</sup>

Kronke highlights certain shortcomings of conventions in terms of their elaboration process. For instance, the right choice of subject of the convention is a sensitive area where most mistakes have been made. 'Some projects were either too broadly or too narrowly tailored,'<sup>62</sup> while others tackled problems not recognized by commercial circles at all. Also, very slow progress in negotiations between governmental delegations and the fact that they very often aim to merely find a compromise between different legal systems, cause a serious impediment to the convention to succeed.<sup>63</sup>

Despite the number of disadvantages, discussed above, conventions still play a significant role as harmonising instruments. This brings us to the next point of the essay that will focus on the critical assessment of scholars as to whether instruments such as conventions are still needed in international commercial law and if so, how they could be improved upon to ensure their success.

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<sup>55</sup> Mistelis, *supra* n. 7, at 1-049.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> Kronke, *supra* n. 16, at 18.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 19.

<sup>62</sup> *Id.* at 17.

<sup>63</sup> *Id.*

## 6. Do We Need a Convention? Proposals for Improvement

### 6.1. What Do the Statistics Say?

The statistics, showing facts of preparation and promulgation of harmonising instruments in international commercial law and the frequency of their invocation in court decisions and arbitral awards worldwide, could reflect tendencies in terms of their use in international commercial law. Therefore it is necessary to look at the data available on the official UNCITRAL and UNIDROIT websites.

From 1991 until now, UNCITRAL has prepared five conventions. The last document was adopted in 2008. During the period from 1992, it has prepared six model laws the last of which was adopted in 2011. Three of the conventions endorsed in 1978, 1991, 2008 relate to sea transportation. UNCITRAL introduced three documents dedicated to electronic trade: two model laws in 1996 and 2011 respectively, and the convention of 2005.<sup>64</sup>

CLOUT currently includes cases referring to the *CISG*, the *Model Law on International Commercial Arbitration*, the *UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, the *UN Convention on the Carriage of Goods by Sea*, the *Model Law on Electronic Commerce* and the *Model Law on Cross-Border Insolvency*.<sup>65</sup>

UNIDROIT's statistics show that this institution has effectively worked on the preparation of PICC, endorsing it in 1994, with subsequent updated versions in 2004 and 2010. The *Cape Town Convention* and its Protocols were promulgated in 2001, and a new Protocol on matters specific to agricultural, mining and construction equipment is still being under formulation. A *Model Law on Financial Leasing* was endorsed very recently in 2008.

As we can see from the above, a good balance is demonstrated in the production by these agencies of both hard law (conventions) and soft law instruments (model laws and restatements) and also the use of these instruments in recent years. With the latest convention adopted by UNCITRAL in 2008, the continuing work of UNIDROIT on a new Protocol to the *Cape Town Convention*, a massive invocation of the *CISG*, and the *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards* in case law, it is hard to say that there is no progress in the arena of treaty law nor that it is in its final death throes.

### 6.2. Advantages of Conventions

One of the considerable advantages of conventions, indicated by Kronke, is the certainty of law as opposed to the flexibility and adaptability allowed by other sources of soft law, such as the PICC. 'It is submitted that the less satisfactory the state of the

<sup>64</sup> *About UNCITRAL*, <[https://www.uncitral.org/uncitral/en/about\\_us.html](https://www.uncitral.org/uncitral/en/about_us.html)> (accessed Jan. 29, 2014).

<sup>65</sup> *Case Law on UNCITRAL Texts (CLOUT)*, <[http://www.uncitral.org/uncitral/en/case\\_law.html](http://www.uncitral.org/uncitral/en/case_law.html)> (accessed Jan. 29, 2015).

art in private international law (conflict of laws) with regard to any area of substantive law, the greater the need for uniform law Conventions.<sup>66</sup> Therefore, the convention should not be abandoned, but improved based on past useful experience. 'We shall continue to need the Convention, especially in the more demanding areas beyond the law of contracts.'<sup>67</sup>

'It would be a misconception to envisage a future of harmonisation and unification of commercial law solely driven by the market operators and loosely framed by soft law instruments.'<sup>68</sup> A strong argument for this is that soft law instruments would not be suitable for resolving property issues such as, for instance, a delicate issue like the acquisition of title from a non-owner.<sup>69</sup>

### **6.3. Improvements to Be Made**

The convention may be very successful if certain changes relating to the general approach and structure could be implemented. In particular, conventions should be innovative and create the techniques needed by participants involved in international trade.<sup>70</sup> Very positive examples of such innovations are the CISG, and the two secured financing Conventions (UNIDROIT and UNCITRAL).

Another suggestion is that formulating agencies and states consider a commercial approach rather than seeking compromise as implemented in the *Cape Town Convention* (in terms of determining credit issues, in particular). Other improvements, such as audit and monitoring committees, and 'quite novel fast-track accession'<sup>71</sup> are also under consideration.

One of the major tensions that arise in the preparation of international conventions, as outlined by Goode, is the necessity to maintain the 'balance between pressure from commercial interests and respect for the rights of others.'<sup>72</sup> This relates to situations where the business community, which is best equipped to identify commercial and financial problems, must be a major player in a harmonising project and therefore, may not ensure that other interests are respected. One of the best examples where these tensions have been overcome is the *Cape Town Convention*, demonstrating the use of various techniques to respect the interests of others: 'a compromise approach to a proposed rule; the provision of variants, leaving it to each Contracting State to decide which it prefers, the insertion of provisions

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<sup>66</sup> Kronke, *supra* n. 16, at 19.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 20.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> Goode, *Rule*, *supra* n. 2, at 560.

allowing a State to opt out of rules . . . ' etc.<sup>73</sup> In summarizing the features, which should be improved or developed in terms of the use of international conventions as harmonising instruments, Goode makes the following conclusion: these conventions should be 'clearly drafted and sharply problem-oriented'<sup>74</sup> with active involvement of business experts in the work from the beginning necessary, but with a fair balance of competing interests and 'fundamental values'<sup>75</sup> of the convention being well preserved.

## 7. Conclusion

The initial role of treaties in the harmonisation of international commercial law can only be considered to be in a state of steady decline because of the very diversification of business. The growing number of complex commercial transactions and new areas of commercial law that may require regulation by more flexible and fast approaching mechanisms, stand in the face of convention. Certainly, these soft law instruments have their advantages – flexibility, easiness to accept and implement, and as shown above, there are certain examples of soft law instruments, i.e. *Principles and Model Law on International Commercial Arbitration*, which are deemed successful and widely used. Their very success has created grounds for scholars to opine that 'treaties risk remaining a dead letter, or nearly so.'<sup>76</sup> This essay has attempted to review this question by analysing various issues relating to the success of conventions and in particular, the measure of success; their advantages, drawbacks and the tensions arising in this area, together with recent work of UNCITRAL and UNIDROIT on formulating and promulgating conventions. This led to an assessment of features needing to be improved to make conventions more successful instruments. Based on the analysis, it can be said that the principal advantages of conventions are in providing certainty of law and remain crucial where third parties or public interests are at stake, as in property law issues. Soft law instruments would not be suitable for resolving these issues and therefore, conventions remain necessary, especially given the recent tendency of formulating agencies to move into 'areas previously taboo, such as property rights, priorities and even to a limited degree insolvency law.'<sup>77</sup> The *Cape Town Convention*, ratified by a large number of States, remains a unique instrument combining public law and private law provisions, containing a combination of novel techniques that make it 'the most ambitious problem-solving

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<sup>73</sup> Goode, *Rule*, *supra* n. 2, at 560.

<sup>74</sup> *Id.* at 562.

<sup>75</sup> *Id.*

<sup>76</sup> Bonell, *International Restatement*, *supra* n. 28, at 14.

<sup>77</sup> Goode, *Rule*, *supra* n. 2, at 557.

convention.' The fact that UNIDROIT continues its work on a new Protocol to the *Cape Town Convention* and the Convention's almost worldwide recognition belies the suggestion that treaty law is dying. In addition, the CISG and other conventions have been vastly invoked in case law, which provides further support to the view that conventions are still commonly used in the international commercial law. Their continuing success will depend on formulating agencies being innovative and problem-oriented regarding commercial approaches, with business experts involved to ensure a fair balance of competitive interests and the principal values of the convention being well preserved.

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