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The UNIDROIT Principles of International Contracts as a Basis for Teaching Law Reform and Other Legal Skills in the Course on Transnational Law

I would first like to put this in context. Among the audience of teachers of transnational commercial law at a conference on the teaching of transnational commercial law, we do not usually question why we teach this subject. We assume its teaching is self-justifiable in contemporary legal education given the globalization of the economy, the law, and legal practice.

What I would like to suggest in this paper is that transnational commercial law is an essential aspect of a legal education although this may not be widely appreciated among all in the legal academy. This may be especially the case in the United States where recent moves toward less teaching of doctrine and more emphasis toward 'experiential learning' and preparation for the professional bar exams has created an environment that values the training in immediately useful skills for a domestic practice above the more long term focus on the education of professionals who can work in the global legal market.

Thus it may be incumbent upon those of us that teach transnational commercial law[1] to be able to justify its inclusion as an essential part of the curriculum. In this regard, I suggest that the teaching of the UNIDROIT Principles of International Commercial Contracts as part of the transnational commercial law course serves several purposes that justify it and the broader course as an essential part of the law school curriculum.

The UNIDROIT Principles not only are a basis for teaching the doctrinal elements of international commercial contracts, but they are also ideal for teaching the skills of legal harmonization, law reform, and the need for and how to make policy choices among competing possible rules. It is this whole set of skills that makes the Principles worth teaching as part of the curriculum.

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[1] What I say here should be equally relevant to this course's first cousins, comparative law and international commercial law.

When we envisage the content of a course on transnational law, we might start by noting that everyone seems to agree that we should cover the CISG.[2] This seems intuitive. It is widely adopted,[3] its usage in actual transactions has grown exponentially over the last 35 years, and it is pretty much transnational law personified.

I should also note that it is relatively easy to teach. It does not cover much. It does not deal with the more difficult and complex questions of finance and payment. It is written at such a level of generality that it is easy to cover the surface basics to at least give the students a general notion of scope and the problems for which they should be looking.

I suspect that the primary reason that we give for why we teach the CISG is that it is the law for a significant number of transactions and therefore the students need this knowledge to function as transactional lawyers in general.

At the same time, we all use the CISG as a study in comparative law.[4] It is a great tool for this, and the barriers of entry are low; all of our students will have knowledge of some relevant domestic law of contract and sale to use as comparison. For those that do not otherwise a comparative common law/civil law background, it is an excellent tool for introducing some basic comparisons between the traditions.[5]

But how good is the CISG as a tool for developing the skills for law reform and legal development? What I have found is that it is not very good for this. It is easy to use the CISG to show how compromises can be made and how generalities can cover a multitude of sins, but I am not sure it is a good tool to show what the law might aspire to be.

Let me suggest that the UNIDROIT Principles of International Commercial Contracts may be better suited as a model for the discussion of and preparing students for law reform. I am, of course, suggesting this within the context of a course on transnational commercial law. Certainly the Principles may be an important part of a comparative law program as well as an adjunct to the basic contract and commercial law courses.

Thus, although the Principles do not achieve the goal of introducing students to 'the law' in the same way that the CISG or the Cape Town Convention[6] would, as they are binding conventions and therefore positive law, the Principles may do a better job at introducing students to law development and reform outside the constraints of the compromises and political pressures that have directed many conventions and treaties.

In this respect, the Principles might be used both as an academic model on how one might make the policy choices in the creation of law, and also as an actual model for what those rules might look like if one were to draft a contract law regime. Thus, properly introduced and

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[2] United Nations Convention on Contacts for the International Sale of Goods, http://www.uncitral.org/pdf/english/texts/sales/cisg/V1056997-CISG-e-book.pdf.

[3] There are currently 83 parties to the CISG.

[4] If given time, and if we are ambitious, the CISG can also be used as a background text for statutory interpretation. We rarely have time in our courses to pursue this.

[5] Of course, the possibly more important comparative distinctions between Civil Law and Common Law property law rules are not covered.

[6] http://www.unidroit.org/instruments/security-interests/cape-town-convention.

discussed, the Principles may serve as model for the process of drafting laws as well as the substance of the drafted law.

As an example of this point, I have in mind the American Restatements of the Law, which have been produced on a variety of legal subjects by the American Law Institute since the 1920's. The Restatements have always been aspirational: they not only state what the law is at a particular time, but also have always provided aspirational rules that arise either because the existing rule was thought to be deficient or because there were conflicting rules[7] from which the better rule could be chosen.

Because the Restatements were and are drafted by the American Law Institute, a non-governmental organization that need not satisfy any political or industry pressures, they have generally been viewed as objectively neutral instruments that can be relied upon to set out the best rule based on the best policy. For this reason, they are often used by default by American courts.

Thus so with the UNIDROIT Principles. Of course, what I have said should apply to any soft law instruments that were created in the same disinterested and neutral way.[8]

This brings us to the point of discussing the Principles as a basis for teaching legal harmonization. The Principles are an excellent model for what they are being and likely to be used for in the future: regional harmonization. This occurs both directly[9] and indirectly through the influence of arbitration[10] in which their usage creates a slow accretion of acceptance among regional partners.

Are the Principles the best model for harmonization? It must be noted that the UNIDROIT Principles have had relatively little usage and impact since they were first promulgated in 1994. It might be argued that if the Principles were meeting an important need they would already be widely used. Since this is not the case, why should we consider it as a model for harmonization now?

Since this question has been posed by others, I think this question needs to be put in context. The reason for the small acceptance and usage of the Principles at this time seems to be based on two factors. First, they are not widely known by their potential users The second reason is that they are not real 'law' and therefore one might question why should they be used.[11]

To answer these concerns, I would posit that the real question is whether the Principles are an appropriate model for harmonization in and of themselves, based on the content of the Principles, and not their current usage. For if they become the new regional or international

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[7] The Restatements are grounded in American law, but with over 50 separate jurisdictions, there is plenty of latitude of divergence of rules.

[8] Conversely this would not apply to soft law instruments that are created by and for industry trade groups that favor the trade groups.

[9] The Organization for the Harmonization of African Business Law, a regional organization in West Africa, has embraced this model.

[10] This, of course, is the primary use of the Principles today.

[11] One must appreciate that the Principles can be used. Lawyers appreciate the difference between a choice of law provision and the incorporation of the Principles as terms to an agreement, and it is quite easy to choose the Principles as governing the contractual relationship if parties wish.

standards, either by custom and usage within commercial transactions or by direct adoption by a jurisdiction, both of these concerns disappears.

There are advantages that the UNIDROIT Principles have as a soft law instrument over a competing binding convention that make it in and of itself worth teaching and a model for regional harmonization.

It has been suggests that 'soft law' instruments, such as the UNIDROIT Principles of International Commercial Contracts, have been successful 'precisely because they are not binding, have not been influenced by governments and do not pose any threat to national legal systems. Like the UNCITRAL Model Law on International Commercial Arbitration,[12] 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.'[13]

This aspect of the principles is what can be classified as the procedural advantage. This includes both the working methods used by UNIDROIT to create the Principles and the structural advantages soft law has over binding conventions and treaties.

At the technical level, the working methods of UNIDROIT may be better suited for this type of project. The UNIDROIT Principles were drafted by a select group of contract specialists from around the world who knew their own law and were fluent in comparative law and therefore were able to balance competing legal traditions. The members of the UNIDROIT working group were not tasked with supporting and defending their respective domestic laws. This type of work is much harder to accomplish at an organization such as UNCITRAL.

This would appear to be an advantage over competing positive law. Because treaties and conventions must be fashioned in a way to encourage adoption by various states and to create a high comfort level with the appropriateness of the instrument, there is a strong tendency toward the creation of instruments that will reflect the legal traditions and existing rules of the potential adopting states. At best, what emerges is the rule of one or another existing jurisdiction in the competition without any serious attempt to distance the draft from the existing rules and try to craft a possible new one that better reflects such values as business reality and fairness.[14]

This political tension, to a large extent explains the fairly limited coverage of the CISG. Thus, for example questions of validity, title and property rights[15] are specifically excluded from the CISG as are consumer contracts[16] and product liability actions.[17]

Competing with the existing legal models is the strong influence of concerned industry observers. Of course the benefit and justification of having industry input in the drafting of a convention or other legislation is that it allows the commercial users to give input on actual business practices and the needs of the affected industry. But there is a downside to this that has

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[12] http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html.

[13] R. Goode, 'Communication on European Contract Law' in S. Gopalan, 'New Trends in the Making of International Commercial Law' [2004] Journal of Law and Commerce 117-168.

[14] This need was a large part of the reason why the United Nations' Convention on Contracts for the Sale of Goods took years to prepare even though it began with the template of The Hague Sales Convention.

[15] CISG art. 4(a).

[16] Id. art. 2(a).

[17] Id. art. 5.

long been documented,[18] and that is the 'capture' of the drafting committee and the legislature by the more powerful elements of the industry to drive their preferred rules or block the enactment later.

Non-binding general principles such as the UNIDROIT Principles of International Commercial Contracts can achieve the goal of balance and fairness because there is less necessity to accommodate the various legal traditions or domestic laws much less accommodate powerful lobbying interests. This is, I suggest, is reflected in the final product.

Of course the Principles, or some version of them, could be adopted as a package. However, we are just as likely to find the Principles used in individual transactions either in conjunction with arbitration or as incorporated terms in an agreement where the dispute might end up in court. In this latter case, the Principles have a flexibility that does not exist in positive law because the parties (or arbitrators) can cherry pick the rules to suit the individual case. [19]

In this circumstance the adoption of the Principles as a regional or universal standard would be a slow but definite accretion over time.[20] Since these principles are not binding, their likely effect is more to set norms instead of hard and fast rules, but this still achieves the goal of creating broad international standards.[21] In fact, in many areas, well known soft law instruments have become the international standards, and there has never been any suggestion that theses

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[18] R. Scott, 'Is Article 2 the Best We Can Do?' (2001) 52 Hastings Law Review 677.

[19] Soft law is often as a basis for gap fillers when the otherwise applicable international or domestic law does not address the specific question. For example, because the UNIDROIT Principles of International Commercial Law have a broader scope than the United Nations Convention on Contracts for the International Sale of Goods, the Principles have been used to resolve questions not address by the CISG. See e.g., *Hideo Yoshimoto v Canterbury Golf International Limited,* Court of Appeal of New Zealand, (2000) NZCA 350; *SCEA GAEC Des Beauches Bernard Bruno v Société Teso Ten Elsen GmbH & COKG,* Cour d'appel de Grenoble (1996).
Whether this guidance is always be useful may be questioned because, with the convenience of having existing rules in place, there is some reported tendency of tribunals to follow soft law principles blindly without any analysis of why the rules are appropriate or whether the rules are better suited for the issue than competing rules. See e. g, G. Maggs, 'Ipse Dixit: The Restatement (Second) of Contracts and the Modern Development of Contract Law', [1998] George Washington L. Rev. 508-555; S. Symeonides, 'The Judicial Acceptance of the Second Conflicts Restatement: A Mixed Blessing' [1997] Maryland L. Rev. 1248-1283.
There is the question of whether the instrument is intended to reflect current commercial practice or whether the instrument is intended to reflect the aspirations of the drafters as to what the law should be. Sometimes an instrument can be both. This is certainly the case with the American Restatements of the Law, which are drafted by the American Law Institute. See e.g., E. A. Farnsworth, 'Ingredients in the Redaction of the Restatement (Second) of Contracts' [1981] Columbia L. Rev. 1-12. However, to the extent that the principles were drafted carefully and thoughtfully, this concern should be minimal. The courts, in effect, are likely to stumble upon the best rule.

[20] This has been the case with some other soft law instruments. In addition to the UNIDROIT Principles on International Contracts, some of the other more successful soft law instruments are the UNCITRAL Arbitration Rules and the more recent UNIDROIT Principles and Rules of Transnational Civil Procedure and the UNCITRAL legislative guide to secured transactions, all of which have and are providing international standards, and thereby deserve treatment in our classes.

[21] Because of these broad advantages for soft law instruments, of the three major international governmental organizations that are delegated the task to produce international commercial law instruments, the United Nations Commission on International Trade Law (UNCITRAL), the International Institute for the Unification of Private Law (UNIDROIT), and the Hague Conference on Private International Law, two of the organizations, UNIDROIT, UNCITRAL, have been quite active in producing soft law instruments.

instruments suffer any usage or recognition disabilities. Thus, for example, the UCP 600[22] and the INCOTERMS,[23] are so commonly used and accepted today that they often govern by default absent a contrary party agreement.

In a sense, the Principles were drafted in a vacuum. This is not to say that the drafters did not bring to the process their own perspectives and knowledge of and bias toward their own respective background and legal systems. But the drafters did not have the political pressures that forced compromises which moved the focus away from what should be the best rule.

In the case of a new treaty or convention, there is the strong desire by the negotiating jurisdictions to have the treaty or convention consistent with the domestic law of the jurisdiction.[24] Yet, the ability to harmonize a new treaty or convention with existing domestic or international law is subject to a variety of difficulties.[25]

With the revision of an existing convention or treaty, the focus tends to be inward-looking and focussed on the existing convention or treaty itself. In addition, the revisers of an existing

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UNCITRAL is a subsidiary body of the General Assembly of the United Nations. UNCITRAL was established in 1966. The Commission has a general mandate to harmonize and unify the law of international trade. Since its founding, UNCITRAL has prepared a wide range of conventions, model laws and other instruments that deal with the substantive law that governs trade transactions or other aspects of business law which have an impact on international trade. UNCITRAL is made up of sixty member states from five regional groups. Members of the Commission are elected for terms of six years. The terms of half the members expire every three years. Membership will increase to sixty member states over the next few years to provide greater representation.
UNIDROIT is an Independent intergovernmental organization with its seat in Rome. The purpose of UNIDROIT is to study the needs and the methods for modernizing and harmonizing private law, particularly commercial law, at the international level. UNIDROIT was created in 1926 as an auxiliary organ of the League of Nations. Following the demise of the League of Nations, UNIDROIT was reestablished in 1940 on the basis of a multilateral agreement. This agreement is known as the UNIDROIT Statute, and the membership of UNIDROIT is restricted to States that have acceded to the statute. There are presently sixty-three member states.
The Hague Conference on Private International Law consists of sixty-four member states. The First Session of the Hague Conference on Private International Law was convened in 1893 by the Netherlands Government on the initiative of T.M.C. Asser, who won the Nobel Peace Prize in 1911. Subsequent sessions were held in 1894, 1900, 1904, 1925, and 1928. The Seventh Session was held in 1951, and this session culminated with the preparation of a Statute which made the Conference a permanent intergovernmental organization. The Statute entered into force on 15 July 1955. Since 1956, regular Plenary Sessions have been held every four years. Under the Statute, the operation of the Conference is ensured by the Netherlands Standing Government Committee on Private International Law.

22 Uniform Customs and Practice for Documentary Credits 600, ICC Publication no. 645.

23 International Chamber of Commerce, INCOTERMS 2000, ICC Publication no. 560.

24 This, of course, may include international laws that are part of the domestic law of a given jurisdiction.

25 Thus, for example after twelve years of work revising the American Uniform Commercial Code, the fruits of attempting to harmonize the Uniform Commercial Code with the United Nations Convention for the international Sale of Goods were reduced to the following prefatory comment:

> When the parties enter into an agreement for the international sale of goods, because the United States is a party to the Convention, the applicable law may be the United Nations Convention on Contracts for the International Sale of Goods (CISG). Since many of the provisions of the CISG appear quite similar to provisions in Article 2, early in the process of drafting the amendments the drafting committee considered making references in the Official Comments to similar provisions in the CISG. However, upon reflection, the drafting committee concluded that these references should not be included because their inclusion might suggest a greater similarity between the Article 2 and the CISG than in fact exists.

convention or treaty will bring to the process their familiarity with the existing convention or treaty, and likely they are less familiarity with other laws that might be appropriate to consider for purposes of drafting the ideal instrument that is most compatible with modern business practices. Moreover, to the extent that there is a push to harmonize across the different legal traditions of the various states involved in the drafting of the convention or treaty, compromises, both in the language as well as the legal concepts, may have to be made which do not necessarily reflect the best view but simply a view that all parties can agree upon as not inconsistent with their internal law.[26]

This is not the case with the UNIDROIT Principles. With the Principles, it was not necessary to attempt to harmonize the Principles with the law of any specific jurisdiction or any international convention. Instead, without the eternal pressure to conform to a specific law, the drafters were able to pick provisions selectively among many sources to meet a specific need. This process of picking and choosing provided for systematic reflection on what should be the best result, and not simply a possible result.

This point was made by the late Professor Allan Farnsworth in describing what distinguished the work leading to the CISG, for which he was an American delegate and, which brought about the UNIDROIT Principles of International Commercial Contracts, for which he was a member of the working group:

> While the atmosphere in UNCITRAL was political (because delegates represented governments, which were grouped in regional blocs), that in UNIDROIT was apolitical (because participants appeared in their private capacity).[27]

For this reason, the UNIDROIT Principles can be viewed as 'neutral' contract law principles in that they do not reflect the specific interests of any group or government.

Soft law instruments such as the Principles generally fall into one of two categories; those that are intended as the basis for legislation, and those that are not. For those soft law instruments, such as model laws that are specifically intended to be the basis for adoption by individual jurisdictions, many[28] have been most successful in setting international and domestic standards for legislation.[29] However, those model laws that are intended to be adopted as drafted

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[26] Much of the success of the CISG, for example, is based on the fact that the CISG is not based on any particular set of underlying established domestic legal principles, and instead, was drafted to be independent of, rather than to work in conjunction with, any particular domestic law. To the extent that one can attach a specific legal tradition to the CISG, it is a blend of both the common law and civilian traditions.

[27] E. A. Farnsworth, 'The American Provenance of the UNIDROIT Principles' (1998) 72 Tulane Law Review 1985-1994, 1989.

[28] For example, Legislation based on the UNCITRAL Model Law on Electronic Commerce has been adopted in Australia, Bermuda, Canada, Colombia, France, Hong Kong Special Administrative Region of China, Ireland, Philippines, Republic of Korea, Singapore, Slovenia, part of the United Kingdom, and the United States of America.

[29] Of course sometimes actual conventions can be useful for setting international commercial standards for further conventions. This was clearly the case with the UNIDROIT Convention relating to a Uniform Law on the International Sale of Goods (1964) which was the basis for UNCITRAL'S Convention on the International Sale of Goods.

or with minor revisions, as with a treaty or convention, are often subject to the same political pressures of harmonization and the same need to conform to specific legal traditions or domestic laws because the drafters of the model law have the same concerns of ratification and coordination.[30]

Conversely, statements of principles such as the UNIDROIT Principles of International Commercial Contracts, the UNIDROIT/American Law Institute Principles of Transnational Civil Procedure, and the many American Law Institute Restatements of the Law have all been drafted without the express purpose of adoption, and therefore are not drafted with the external demands of harmonization limitations. Thus, they have often achieved a neutrality and balance that might not otherwise be possible.

This may suggest that the procedure for drafting the Principles may be better suited for creating a more balanced and neutral product, but the question still remains whether the Principles are substantively better than competing legal regimes that could be used to teach harmonisation and legal policy. In a sense, this is an unfair question as there is not any real competition in the broad global market.

As I have shown earlier, the CISG does what the CISG does, and it does it fairly well, but its scope is limited.[31] There have been various attempts to harmonize European contract and sales law, but to the extent that these are viable projects, they are very Eurocentric and therefore do not travel well. [32]

The Principles, on the other hand, have the advantage of being contemporary as well as having been drafted with a universal and not a regional perspective. This lack of a regional perspective is what has made the Principles actually attractive to attempts at regional harmonization, for it has become clear that even when creating regional rules, international commercial law is based on universal standards.

Thus, we see from the work of OHADA to create a regional contract law for West Africa that there was perception that the local law was a barrier and therefore they chose to use of the Principles as the basis for that regional law. In the current project on Asian Law Principles, they

[30] Thus, many model laws, such as the Model Law on Electronic Commerce, have been used for domestic legislation because they were determined to be well drafted. Moreover, model laws can be used as a template for related legislation. Thus for example, the Model Law of Electronic Commerce was a source for the American Uniform Electronic Transactions Act, the Canadian Uniform Electronic Commerce Act, and the Australian Electronic Transactions Act.

[31] See e.g., H. Gabriel, 'The CISG: Raising the Fear of Nothing' (2005) 9 Vindabona Journal 219. This is the major justification for the recent proposal by the Swiss Government for a UNCITRAL project on global contract law. See UNCITRAL, Possible Future Work in the Area of International Contract Law: Proposal by Switzerland on Possible Future Work by UNCITRAL in the Area of International Contract Law, at 4-5, U.N. Doc. A/CN.9/758 (May 8, 2012).

[32] I am mindful of broad generalizations such as this, and I appreciate some qualification may be in order. For example, the recent work on Principles of Asian Law has used the PECL as the model. Even in this project, though, the drafters have relied heavily on the Principles and the CISG as well as PECL, and the final product is likely to deviate from these instruments to the extent that the drafters can synthesize 'Asian Law'. See Shyiyuan Han, 'Principles of Asian Contract Law: En Endeavor of Regional Harmonization of Contract Law in East Asia' 58 (2013) Villanova Law Review 589.

have tried mightily to find 'Asian Law' but it seems to be just commercial law that is also based to a large extent on the Principles.

For the Principles themselves, the gestation period for the Principles expanded over thirty years. During that time, not only did the various working groups have the luxury of time and reflection, but there have been innumerable sources of scholarly and professional analysis of the Principles as well as a growing body of judicial opinions and arbitral awards that have analyzed the Principles.[33] The Principles have been road tested and have been shown as clear, balanced, and reflective of contemporary international business practices.

Which brings us back from where we started: the Principles as part of the law school curriculum. They have begun to be taught in law schools around the world. This has, at least in the United States however, been mostly an exercise in comparative law; an examination of how one might approach basic contract principles in a way different from the domestic law. This is a useful teaching device as it allows a close examination of the policy choices that underlie contractual relations.

The Principles are also taught in some law school courses as examples of what might be desirable rules.[34] In the course on transnational law, where harmonization of the law is a key component of the course, I suggest that the Principles may be one of the best examples we have to use as the basis for exposing students to legal harmonization.

Thus, to conclude, the UNIDROIT Principles not only are a basis for teaching the doctrinal elements of international commercial contracts, but they are also ideal for teaching the skills of legal harmonization, law reform and the need for and how to make policy choices among competing possible rules. It is this whole set of skills that makes the Principles worth teaching as part of the curriculum. In summation, it is this same set of skills that should be developed in a course on transnational law.

[33] These are collected on the UNILAW database maintained by UNIDROIT: http://www.unidroit.info/program.cfm?menu=subject&file=convention&lang=en.

[34] This, for example is the case in the Roy Good and Herbert Kronke's text *Transnational Commercial Law* (Oxford University Press 2007, Oxford).