
Article

Soft Law as Governing Law

Steven L. Schwarcz[†]

INTRODUCTION

Commercial, financial, and other international business transactions increasingly are conducted¹ under “soft law” rules.² Some argue “we are witnessing the twilight of the traditional regulatory system and its gradual replacement by an amorphous and constantly evolving set of informal ‘soft law’ governance

[†] Stanley A. Star Professor of Law & Business, Duke University School of Law; Senior Fellow, the Centre for International Governance Innovation (CIGI). The author thanks José Enrique Alvarez, Henry Gabriel, Ralf Michaels, Alex Mills, Joost Pauwelyn, John A.E. Pottow, Geneviève Saumier, Michael Simkovic, Symeon Symeonides, and participants in a faculty workshop at Elon University School of Law for excellent comments and Ryan Arredondo and Kris Liu for valuable research assistance. Although the author is independently leading a CIGI inquiry into using soft law as governing law, the views expressed in this Article are entirely his own. *See infra* note 13 and accompanying text. Copyright © 2020 by Steven L. Schwarcz.

1. *Cf. infra* note 12 and accompanying text (explaining different ways in which a transaction could be conducted under soft-law rules).

2. *See generally* GEORGES AFFAKI & SIR ROY GOODE, GUIDE TO ICC UNIFORM RULES FOR DEMAND GUARANTEES URDG 758, at vi (2011) (observing that the “percentage of guarantees subject to URDG 758 [soft law in the form of the ICC’s Uniform Rules for Demand Guarantees] is increasing by the day and at a very satisfactory rate”); ABRAHAM L. NEWMAN & ELLIOTT POSNER, VOLUNTARY DISRUPTIONS: INTERNATIONAL SOFT LAW, FINANCE, AND POWER (2018) (examining the global economy’s increasing reliance on soft law). The UN’s Universal Declaration of Human Rights, promulgated by a non-binding General Assembly resolution in 1948, is a highly influential example of soft law, having influenced several later human rights treaties. *See* G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

mechanisms.”³ The University of Michigan Law School recently held an international conference to explore this phenomenon.⁴

Although not well-defined,⁵ soft law generally refers to non-state rules that may be aspirational or reflect best practices but are not yet legally enforceable.⁶ For this reason, soft law sometimes is called non-state law.⁷ It contrasts with standard, or “hard,” law, which is legally enforceable.⁸ The shift to soft law responds, at least in part, to the growing difficulty of adopting international treaties.⁹

3. Ryan Hagemann et al., *Soft Law for Hard Problems: The Governance of Emerging Technologies in an Uncertain Future*, 17 COLO. TECH. L.J. 37, 37 (2018).

4. Univ. of Mich. Law Sch., Conference, Soft Law in International Insolvency and Commercial Law (Sept. 21–22, 2018) [hereinafter Michigan Law Conference]. The author participated in this conference as a Distinguished Fellow.

5. The author observed profound disagreement at the Michigan Law Conference about what “soft law” precisely means. *Id.*

6. This reflects the author’s perception of the consensus of the conference participants. See Dinah Shelton, *Soft Law*, in HANDBOOK OF INTERNATIONAL LAW 68, 69 (David Armstrong ed., Routledge 2009), (observing that many varieties of soft law are “non-binding normative instruments [that] emerge from the work of international organizations, which in most instances lack the power to adopt binding measures”); *supra* note 5. Common examples of soft law “include normative resolutions of international organizations, concluding texts of summit meetings or international conferences, recommendations of treaty bodies overseeing compliance with treaty obligations, bilateral or multilateral memoranda of understanding, executive political agreements, and guidelines or codes of conduct adopted in a variety of contexts.” Shelton, *supra*, at 4.

7. *E.g.*, Ralf Michaels, *Non-State Law in the Hague Principles on Choice of Law in International Commercial Contracts*, in VARIETIES OF EUROPEAN ECONOMIC LAW AND REGULATION: LIBER AMICORUM FOR HANS MICKLITZ 43, 43–69 (Kai Purnhagen & Peter Rott eds., 2014) (discussing soft law and non-state law interchangeably).

8. The terminology can be even more confusing because the term “[r]ules of law,” as opposed to ‘law,’ has traditionally been understood to include non-state law.” *Id.* at 44. To minimize confusion, this Article will not use that term.

9. See *infra* Part I. Other reasons for the shift to soft law are more subtle. See Joost Pauwelyn et al., *When Structures Become Shackles: Stagnation and Dynamics in International Lawmaking*, 25 EUR. J. INT’L L. 733, 743 (2014) (arguing that other reasons for the shift to soft law include “the emergence of an increasingly diverse and complex network/knowledge society [that] is transforming the actors, processes, and outputs at work or required to deliver international cooperation”); *cf.* E-mail from Alex Mills, Professor of Pub. & Private Int’l Law, Univ. Coll. of London Faculty of Laws, to author (Jan. 8, 2019) (on file with author) (observing that soft law sometimes is developed through an industry-led bottom-up process in which industry prefers to avoid state control, as would occur under a treaty framework).

Whatever its cause, the shift is creating uncertainty because soft law's unenforceability undermines predictability.¹⁰ To increase predictability, this Article argues for an innovative use of soft law: as a set of rules to choose as all or part of the governing "law" of business contracts.¹¹ If respected, this use of soft law would be transformational: making the soft law enforceable against the parties and providing a flexible and practical alternative to treaty-making.

The analysis focuses, first, on whether parties should have the contractual right to choose soft law to govern their business transactions. Thereafter, the analysis focuses on an alternative: incorporating soft law merely by reference into contracts.¹² To

10. See, e.g., Robin Creyke, *'Soft Law' and Administrative Law: A New Challenge*, 61 *AIAL F.* 15, 18 (2010) (arguing that including unenforceable soft-law rules together with enforceable mandatory requirements in "one document with little distinction made between compliance obligations" can "lead to confusion and higher costs, and ultimately to litigation to resolve these uncertainties"); see also José E. Alvarez, *Reviewing the Use of "Soft Law" in Investment Arbitration*, 7.2 *EUR. INT'L ARB. REV.* 149, 149 (2018) ("Everything about 'soft law' is controversial.").

11. See HAGUE CONFERENCE ON PRIVATE INT'L LAW, PRINCIPLES ON CHOICE OF LAW IN INTERNATIONAL COMMERCIAL CONTRACTS cmt. ¶ 1.18 (2015) [hereinafter HAGUE PRINCIPLES], <https://www.hcch.net/en/instruments/conventions/full-text/?cid=135> [<https://perma.cc/4PL3-VA8P>] (observing that allowing parties to use soft law as governing law would be "novel"); Lauro Gama, Jr. & Geneviève Saumier, *Non-State Law in the (Proposed) Hague Principles on Choice of Law in International Contracts*, in *EL DERECHO INTERNACIONAL PRIVADO EN LOS PROCESOS DE INTEGRACIÓN REGIONAL* 41, 50 (Diego P. Fernández Arroyo & Juan José Obando Peralta eds., 2011) (observing that allowing the designation of non-state law outside of arbitration contracts "would be innovative for virtually all legal systems"). Professor Michaels calls this a "revolution in choice of law for contracts" and a "novelty" for state courts. Michaels, *supra* note 7, at 43.

12. Business transactions could be conducted under soft-law rules in at least two other ways: in the "shadow" of soft-law rules, or with the soft law forming the basis of enactment of hard law, which governs the transaction. Cf. NEWMAN & POSNER, *supra* note 2, at 35–37 (offering the Basel Committee's capital-adequacy standards, the macroprudential regulatory recommendations of the Financial Stability Board (FSB), and the master agreements of the International Swaps and Derivatives Association (ISDA) as examples of soft law governing financial and business transactions; whereas these examples more precisely are of soft-law rules that have been enacted into hard law, in the case of Basel and the FSB, and of privately negotiated model forms of contracts, in the case of ISDA). Conducting transactions in the shadow of those rules represents influence, not law per se. Conducting transactions under hard law based on soft law represents a time-honored and uncontroversial function of soft law that includes all uniform lawmaking in the United States, including, for example, the work of the private-sector American Law Institute and National Conference of

provide real-world grounding, the Article links its analysis to a parallel inquiry by the Centre for International Governance Innovation (CIGI), an “independent, non-partisan think tank with an objective” perspective.¹³ CIGI hopes to facilitate the restructuring of unsustainable sovereign debt by persuading parties to choose its sovereign-debt-restructuring model law (the Model Law)¹⁴ to include as part of their sovereign-debt contracts’ governing law.¹⁵ The Model Law is a set of soft-law rules, not yet enacted into law by any governmental body.¹⁶ As an alternative, CIGI is considering persuading those parties to merely incorporate the Model Law by reference into their contracts.¹⁷

Historically, the contractual right to choose soft law as governing law has been narrowly restricted to arbitration.¹⁸ The

Commissioners on Uniform State Laws (NCCUSL, or Uniform Laws Commission) in preparing a model text of the Uniform Commercial Code for enactment by states. *See, e.g.*, Alan Schwartz & Robert E. Scott, *The Political Economy of Private Legislatures*, 143 U. PA. L. REV. 595 (1995).

13. *See About CIGI*, CTR. FOR INT’L GOVERNANCE INNOVATION, <https://www.cigionline.org/about> [<https://perma.cc/R3EX-PC7H>].

14. *See STEVEN L. SCHWARCZ*, CTR. FOR INT’L GOVERNANCE INNOVATION POL’Y BRIEF NO. 64, A MODEL-LAW APPROACH TO RESTRUCTURING UNSUSTAINABLE SOVEREIGN DEBT, app. at 5–7 (2017), https://www.cigionline.org/sites/default/files/documents/PB%20no.64%20Updated_1.pdf [<https://perma.cc/M4U3-2EVU>] (providing the codified text of the Model Law).

15. The author thanks Professor Hans Tjio of National University of Singapore Faculty of Law for originally suggesting this possible approach. Assume, for example, that the parties choose the Model Law as part of their sovereign debt contract’s governing law, and that their contract is otherwise intended to be governed by New York law. The governing law clause might then state that the contract “is governed by New York law and the Model Law; in the event of a conflict, the Model Law will govern.” *See infra* note 30 and accompanying text (explaining why the right to choose soft law as governing law should include the right to choose that soft law as all or part of the governing law). Parties could include such a governing law clause in new contracts and, by amendment, also in existing contracts.

16. CIGI’s ideal goal is to persuade governments to enact the Model Law as their national law. *See infra* notes 53–54 and accompanying text. If and when such enactment occurs, the Model Law would be an international model law from the perspective of governments so enacting it, and soft law from the perspective of other governments. *See infra* Part I.

17. The author, a Senior Fellow of CIGI, is leading these soft-law-as-governing-law and incorporation-by-reference inquiries. *See supra* note †.

18. Arbitration is the out-of-court resolution of disputes by one or more impartial third parties, whose decision the disputing parties agree to accept. SYMEON SYMEONIDES, CHOICE OF LAW 408 (2016) (“Although nonstate norms long have been used in arbitration, they have not received legislative or judicial sanction for use in litigation.”); *see also id.* at 487–88 (noting that parties may

non-arbitration precedents are few.¹⁹ The Uniform Commercial Code (UCC) provides a possible U.S. precedent,²⁰ allowing parties to vary its provisions by “stating that their relationship will be governed by recognized bodies of rules or principles applicable to commercial transactions.”²¹ That recognition requirement restricts the choice to soft law promulgated “by intergovernmental authorities such as UNCITRAL or Unidroit” or to trade codes such as the Uniform Customs and Practice for Documentary Credits (UCP), a codification of customs and practice governing

choose to have arbitrators apply non-state substantive and/or procedural law “drafted by private nongovernmental bodies without any popular participation or approbation, and [expressing] the views and predilections of those who draft them”); Geneviève Saumier, *Designating the UNIDROIT Principles in International Dispute Resolution*, 17 UNIF. L. REV. 533, 538 (2012) (“The exception [i.e., choosing soft law as the choice of law] is reserved to the arbitral setting, where it is now generally accepted that non-State law can govern the parties’ contract and provide the substantive rules for the resolution of disputes between the parties.”).

19. See Gama, Jr. & Saumier, *supra* note 11, at 50 (recognizing the novelty of designating non-state law in contexts other than arbitration contracts).

20. The reservation that this is merely a “possible” U.S. precedent reflects ambiguity whether the above-quoted text contemplates a choice of soft law or merely an incorporation of soft law by reference. *Infra* note 21 and accompanying text. The argument for the latter is that UCC § 1-301 addresses choice of law—or at least, choice of hard law—and thus UCC § 1-302 must address something else. *Cf.* E-mail from Geneviève Saumier, Peter M. Laing Q.C. Professor of Law, McGill Univ. Faculty of Law, to author (Dec. 19, 2018) (on file with author). For several reasons, this Article takes the position that the above-quoted text contemplates a choice of soft law. First, that text envisions the parties agreeing “that their relationship will be governed by recognized bodies of rules or principles,” which is unequivocal choice-of-law language. *See, e.g.*, HAGUE PRINCIPLES, *supra* note 11, cmt. ¶ 4.3 (observing that a statement that a contract is “governed by” a particular law “meet[s] the requirements of an express choice” of law). Second, there is no inherent contradiction between UCC § 1-301 addressing choice of hard law and UCC § 1-302 separately addressing choice of soft law. Third, the UCC’s only example of parties implementing the above-quoted language provides that the relevant body of soft law thereby becomes the “law of the transaction.” *See* U.C.C. § 5-101 cmt. (AM. LAW INST. & UNIF. LAW COMM’N 2017). Finally, New York law provides that “a letter of credit that incorporates the UCP is not governed in any respect by” state law. *See id.* § 5-116 cmt. 3 (referencing New York law related to this topic). That would make sense only if the letter of credit incorporates the UCP as governing law, not merely by reference; otherwise, the letter of credit would be a contract with no governing law (*contrat sans loi*). *See infra* Part III.B.

21. U.C.C. § 1-302 cmt. 2 (“Variation by Agreement.”).

international letters of credit.²² This precedent gives parties very limited freedom to choose soft law as governing law.²³

The only other non-arbitration precedent²⁴ appears, incongruously, to be a provision of Paraguay law that allows parties to international contracts to select “generally accepted” soft law as governing law.²⁵ That provision, however, follows the Hague Principles on Choice of Law in International Commercial Contracts (Hague Principles),²⁶ a set of soft-law principles promulgated by the Hague Conference on Private International Law, an intergovernmental organization.²⁷ Although the Hague Principles do not purport to be legally binding,²⁸ they favor the right of parties to choose “rules” of soft law “that are generally accepted on an international, supranational or regional level as a neutral and balanced set of rules.”²⁹

22. *Id.*; see also *infra* note 125 and accompanying text (discussing the UCP). The UCP is one of the world’s most generally accepted bodies of commercial soft law. See, e.g., Larry A. DiMatteo, *Using Soft Law in International Commercial Contract Arbitration*, in CHINA AND INTERNATIONAL COMMERCIAL DISPUTE RESOLUTION 58, 84 (Qiao Liu et al. eds., 2016).

23. Saumier, *supra* note 18, at 536.

24. The Rome I Regulation, setting EU conflict-of-laws rules, originally proposed allowing contracting parties to choose certain limited, internationally recognized, soft-law rules as governing law. *Commission Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Contractual Obligations (Rome I)*, at 14–15, COM (2005) 650 final (Dec. 12, 2005). However, that proposal was not ultimately adopted. See Regulation (EC) No. 593/2008, of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I), 2008 O.J. (L 177) 6, 10–11 (allowing incorporation by reference under Article 3 and Recital (13)).

25. Sobre el Derecho Aplicable a los Contratos Internacionales [Regarding the Applicable Law to International Contracts Law] Ley No. 5393, art. 5 (2015) (Para.), https://assets.hcch.net/upload/contractslaw_py.pdf.

26. See HAGUE PRINCIPLES, *supra* note 11.

27. *About HCCH*, HCCH, <https://www.hcch.net/en/about> [<https://perma.cc/2XSL-XREU>]. For an excellent introduction to the Hague Principles, see Symeon C. Symeonides, *The Hague Principles on Choice of Law for International Contracts: Some Preliminary Comments*, 61 AM. J. COMP. L. 873 (2013). The Hague Principles are accompanied by a commentary written by a working group led by Professor Daniel Girsberger. *Id.* at 874–75.

28. Symeonides, *supra* note 27, at 874. The Hague Principles “can be seen both as an illustration of how a comprehensive choice of law regime for giving effect to party autonomy may be constructed and as a guide to ‘best practices’ in establishing and refining such a regime.” HAGUE PRINCIPLES, *supra* note 11, cmt. ¶ 1.5.

29. HAGUE PRINCIPLES, *supra* note 11, art. 3 at 18.

Accordingly, the few non-arbitration precedents for choosing soft law as governing law are limited to soft law that either is promulgated by a leading intergovernmental authority, generally accepted (or at least generally accepted as neutral and balanced), or a trade code. The limits to each of these precedents implicitly require that the soft law chosen as governing law have some degree of legitimacy.

This Article examines and goes beyond these limited precedents to analyze whether parties should be able to choose soft law as governing law³⁰ or, at least, incorporate such soft law by reference. The analysis focuses on business contracting, which not only is a core concern of private international law³¹ but also addresses rights and obligations among private citizens of different countries.³² Part I discusses the rise of soft law and explains why soft law is becoming an alternative to adopting international treaties. Part II then analyzes whether soft-law choice of law should be enforceable. Thereafter, Part III compares incorporating soft law by reference into contracts and analyzes whether that should be enforceable. Part IV applies the Article's proposed choice-of-law and incorporation-by-reference frameworks to CIGI's Model Law, as an example of soft law. Finally, Appendix A examines other possible applications of these frameworks to soft law.

Throughout, the Article strives to present its analysis based on first principles, cutting through much of the opaque choice-of-law jargon that has amassed over time. That should not only

30. All references in this Article to choosing soft law as governing law shall encompass choosing soft law as all or part of the governing law. *Cf. supra* text accompanying note 11 (stating that this Article argues for using soft law as a set of rules to choose as "all or part of the governing 'law' of business contracts"). If parties have the right to choose soft law as governing law, that right logically should extend, as the parties specify, to all or just part of the contract—paralleling the right of parties to choose hard law as governing law for all or part of their contract. *See* HAGUE PRINCIPLES, *supra* note 11, art. 2 at 18 (providing that "parties may choose – (a) the law applicable to the whole contract or to only part of it; and (b) different laws for different parts of the contract").

31. *Cf. Mathias Reimann, Savigny's Triumph? Choice of Law in Contracts Cases at the Close of the Twentieth Century*, 39 VA. J. INT'L L. 571, 594–95 (1999) (observing that the modern framework of private international law, which was developed by Friedrich Carl von Savigny, was largely centered around conflict-of-laws rules for international contracts).

32. 2 JOSEPH H. BEALE, TREATISE ON THE CONFLICT OF LAWS 1096 (1935).

make the Article more accessible but also help to reveal insights and connections long obscured by the jargon.³³

I. THE RISE OF SOFT LAW

The rise of soft law responds, at least in part, to the increasing difficulty of adopting international treaties.³⁴ A treaty or convention—the terms are synonymous—is a legal agreement or compact among nations.³⁵ The politics of a treaty, and the expectation that it needs a widespread consensus, can discourage its adoption.³⁶

For example, the International Monetary Fund (IMF) proposed a Sovereign Debt Restructuring Mechanism (SDRM) treaty for restructuring troubled sovereign debt.³⁷ Although the United States Treasury Secretary initially supported the SDRM,³⁸ he later shifted position due to lobbying by Wall Street³⁹ and certain emerging market countries,⁴⁰ thereby assuring the SDRM's demise. More recently, a majority of the members of the United Nations voted to begin work on a “multilateral

33. See, e.g., *infra* Part II.B (revealing the relationship between party autonomy and freedom of contracting).

34. See Joost Pauwelyn, *Rule-Based Trade 2.0? The Rise of Informal Rules and International Standards and How They May Outcompete WTO Treaties*, 17 J. INT'L ECON. L. 739, 740–44 (2014) (discussing correlation between the rise in soft law and stagnation in the formation of traditional treaty rules).

35. See *Treaty*, BLACK'S LAW DICTIONARY (11th ed. 2019).

36. Cf. BRAD SETSER, INITIATIVE FOR POLICY DIALOGUE TASK FORCE ON SOVEREIGN DEBT, THE POLITICAL ECONOMY OF THE SDRM 3 (2008), http://www.cfr.org/content/publications/attachments/Setser_IPD_Debt_SDRM.pdf [<https://perma.cc/48YN-PEGU>] (discussing the “profound difficulties [of] building international consensus behind any sweeping change in global financial regulation”).

37. IMF, PROPOSED FEATURES OF A SOVEREIGN DEBT RESTRUCTURING MECHANISM (2003), <https://www.imf.org/external/np/pdr/sdrm/2003/021203.pdf>. The SDRM was the brainchild of IMF Deputy Managing Director Anne Krueger, inspired by the works of Jeffrey Sachs, the author of this Article, and others. See Kenneth Rogoff & Jeromin Zettelmeyer, *Bankruptcy Procedures for Sovereigns: A History of Ideas, 1976–2001*, 49 IMF STAFF PAPERS 470, 470–71, 490 (2002), <http://www.imf.org/External/Pubs/FT/staffp/2002/03/pdf/rogoff.pdf> [<https://perma.cc/R5X6-FXJW>].

38. SETSER, *supra* note 36, at 1–2.

39. See Sean Hagan, *Designing a Legal Framework to Restructure Sovereign Debt*, 36 GEO. J. INT'L L. 299, 391–93 (2005) (arguing that the opposition to SDRM by major financial industry associations was a critical factor behind the U.S. reversal in position).

40. SETSER, *supra* note 36, at 16–17.

legal framework” for sovereign debt restructuring.⁴¹ Claiming, ironically, that the IMF is a more appropriate venue for this effort,⁴² the United States,⁴³ and apparently also the European Union,⁴⁴ have opposed this approach. Absent U.S. and E.U. support, there is skepticism whether this U.N. effort is feasible—at least in the near future.⁴⁵

The formality of a treaty can also discourage its adoption. Because of the lengthy negotiation process and their binding nature, treaties are not well suited to address an imminent or controversial global crisis.⁴⁶

A model-law approach is sometimes attempted when treaty-making fails. In this context, a model law is proposed legislation, having cross-border application, for governments to consider enacting as domestic law in their jurisdictions.⁴⁷ To facilitate cross-border legal comparability, each government enacting a model

41. Press Release, Second Comm., Proposal for Sovereign Debt Restructuring Framework Among 6 Draft Texts Approved by Second Committee, U.N. Press Release GA/EF/3417 (Dec. 5, 2014), <http://www.un.org/press/en/2014/gaef3417.doc.htm> [<https://perma.cc/BB5N-5HXY>].

42. See *supra* notes 37–40 and accompanying text (discussing prior U.S. opposition to the IMF’s proposed sovereign-debt-restructuring treaty).

43. Press Release, *supra* note 41 (“Also speaking before the vote, the representative of the United States was obliged to vote ‘no’ on the draft resolution as there was ongoing work on the technically complex issue in such bodies as the International Monetary Fund (IMF), which were more appropriate venues.”).

44. Italy, speaking on behalf of the European Union, stated that the IMF is the “primary forum to discuss sovereign debt restructuring.” *Id.*

45. See, e.g., Steven L. Schwarcz, *Sovereign Debt Restructuring: A Model-Law Approach*, 6 J. GLOBALIZATION & DEV. 343, 353 (2016).

46. Dinah Shelton, *Soft Law*, in ROUTLEDGE HANDBOOK OF INTERNATIONAL LAW 68, 75 (David Armstrong ed., 2009); cf. Geneviève Saumier, *The Hague Principles and the Choice of Non-State “Rules of Law” to Govern an International Commercial Contract*, 40 BROOK. J. INT’L L. 1, 7 (2014) (referencing “the sometimes stifling methods of treaty-drafting”); Jeffrey S. Peake, *The Decline of Treaties? Obama, Trump, and the Politics of International Agreements* 7 (Apr. 6, 2018) (unpublished manuscript), <https://ssrn.com/abstract=3153840> [<https://perma.cc/9MFX-449R>] (explaining that “[t]he modern treaty process is both procedurally and politically cumbersome, especially given the super-majority requirement for Senate approval”).

47. *Frequently Asked Questions – UNCITRAL Texts*, UNITED NATIONS COMM’N ON INT’L TRADE LAW, <https://uncitral.un.org/en/about/faq/texts#model> [<https://perma.cc/YMN3-HPE5>] (“A model law is created as a suggested pattern for law-makers in national governments to consider adopting as part of their domestic legislation.”).

law should, ideally, enact the same legislative text; for that reason, model laws are sometimes called uniform laws.⁴⁸ Whereas treaties are binding upon contracting states and may only be modified or denounced by a treaty amendment, model laws may be amended or denounced unilaterally by a nation without violating international law.⁴⁹ By promoting open communication, the less formal process of developing and enacting a model law can sometimes be more productive than a treaty approach.⁵⁰

A model-law approach, however, has its own difficulties. Model laws “are often subject to the same political pressures of harmonization and the same need to conform to specific legal traditions as a treaty or a convention.”⁵¹ Governments are also reluctant to pioneer law reform.⁵² For example, CIGI, joined by other influential organizations,⁵³ has been attempting to persuade governments to enact the Model Law *as a model law*.⁵⁴ So far, those efforts have been unsuccessful.

48. The UNCITRAL Model Law on International Commercial Arbitration exemplifies in an international context, and the Uniform Commercial Code (UCC) in the United States exemplifies in a subnational context, model laws that have been uniformly enacted.

49. Giorgio Gaja et al., *Instruments for Legal Integration in the European Community*, in 1 INTEGRATION THROUGH LAW: EUROPE AND THE AMERICAN FEDERAL EXPERIENCE, BOOK 2, at 113, 153–54 (Mauro Cappelletti et al. eds., 1985) (discussing the preference of European countries for conventions as opposed to model laws).

50. See *id.* at 154; Jay Lawrence Westbrook, *Creating International Insolvency Law*, 70 AM. BANKR. L.J. 563, 570–71 (1996) (noting that a treaty is harder to implement than a model law).

51. Henry Deeb Gabriel, *The Advantages of Soft Law in International Commercial Law: The Role of UNIDROIT, UNCITRAL, and the Hague Conference*, 34 BROOK. J. INT’L L. 655, 666 (2009).

52. See, e.g., Florencio Lopez-de-Silanes, G-24 Discussion Paper Series, *The Politics of Legal Reform*, at 27, U.N. Doc. UNCTAD/GDS/MDPB/G24/17 (2002), <https://g24.org/wp-content/uploads/2014/03/17.pdf> [<https://perma.cc/RH8P-SG3V>] (observing that “the politics of legal reform are difficult” even when the legal reform is desired).

53. These other organizations include the Jubilee USA Network, a prominent faith-based NGO. See *Financial Crisis 10 Years On. Has the Response to 2008 Laid the Foundations for the Next?*, BRETTON WOODS PROJECT, <https://www.brettonwoodsproject.org/2018/04/financial-crisis-10-years-response-2008-laid-foundations-next/> [<https://perma.cc/CY4U-3T36>].

54. See, e.g., MAZIAR PEIHANI & KIM JENSEN, CTR. FOR INT’L GOVERNANCE INNOVATION, *THE MODEL LAW APPROACH: HOW ONTARIO COULD LEAD THE WORLD IN PROVIDING CERTAINTY AND FAIRNESS IN SOVEREIGN DEBT RESTRUCTURING 1* (2017), <https://www.cigionline.org/sites/default/files/documents/2017%20SDR%20Round%20Table%20Report%20WEB.pdf> [<https://perma.cc/>

Not needing governmental validation or consent, soft law can provide rules of conduct when treaty-making and model laws fail.⁵⁵ The adoption of soft law also can help incrementally to develop norms, which governments may later try to codify into hard law.⁵⁶ Until that codification, however, soft-law rules are unenforceable and thus second-best to hard law. Nonetheless, the ability of parties contractually to choose soft law as governing law, as this Article proposes, would make that soft law directly enforceable against those parties.

II. SHOULD SOFT-LAW CHOICE OF LAW BE ENFORCEABLE?

This analysis starts by examining the fundamental underpinnings of choice of law, which focus on party autonomy.⁵⁷ It then scrutinizes party autonomy to choose soft law under the lens of freedom of contracting.⁵⁸ Finally, it asks whether governmental interest in ensuring legitimate enforcement might limit autonomy to choose soft law.⁵⁹

KV5A-SD5Z] (discussing CIGI's efforts to educate policy leaders and government officials about the advantages of the model-law structure); SCHWARCZ, *supra* note 14, at 2–5 (educating policymakers and other interested parties on the impact of the Model Law and arguing for its enactment). Recall that the Model Law would be regarded as an international model law from the perspective of governments enacting it but soft law from the perspective of other governments. See *supra* note 16 and accompanying text.

55. See Shelton, *supra* note 46, at 75–76.

56. Cf. Susan Block-Lieb & Terence C. Halliday, *Incrementalisms in Global Lawmaking*, 32 BROOK. J. INT'L L. 851, 852 (2007) (discussing the benefits of incrementalism for global insolvency law reform); Gabriel, *supra* note 51, at 656 (observing that because soft law is not binding, its “likely effect is more to set norms instead of hard and fast rules, but this still achieves the salutary goal of creating broad international standards”); Oona A. Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, 72 U. CHI. L. REV. 469, 531 (2005) (“[S]tates can be gradually led toward stronger legal rules . . . by starting with relatively weak international rules backed by little or no sanctions that all states feel comfortable joining, but then gradually pushing states to accept successively stronger and more challenging requirements.”); John A.E. Pottow, *Procedural Incrementalism: A Model for International Bankruptcy*, 45 VA. J. INT'L L. 935, 939 (2005) (observing that UNCITRAL's Model Law on Cross-Border Insolvency “created an opportunity to bridge the theoretical gap between universalists and territorialists . . . thus allow[ing] hesitant states to ‘acclimate’ to a regime of universalism”).

57. See *infra* Part II.A.

58. See *infra* Part II.B.

59. See *infra* Part II.C.

A. PARTY AUTONOMY

Any analysis of whether soft-law choice of law should be enforceable should start with the fundamental underpinnings of choice of law. Choice of law traces back to the Roman Empire, where Roman citizens, in deciding what law applied to their agreements, had the *right* to choose between Roman law and a provincial or barbarous law.⁶⁰ This principle of autonomy of the will became known as the doctrine of party autonomy.⁶¹

Party autonomy became the prevailing doctrine in Europe for private international law.⁶² The doctrine later became part of English law after the great eighteenth century jurist Lord Mansfield cited it with approval.⁶³ Mansfield argued that courts should respect the right of parties to choose a state's internal law as the law governing their contract, rather than applying the law of the state where the contract is to be performed (*lex loci contractus*) or the law of the forum state (*lex fori*).⁶⁴ Courts in the United States subsequently followed Lord Mansfield, making party autonomy the dominant common law rule.⁶⁵

Attempts by drafters of the First Restatement of Conflict of Laws to reject party autonomy were seen as "inconsistent with the predominant practice of courts" and deemed untenable,⁶⁶ and thus were generally disregarded by courts.⁶⁷ The current Restatement, in contrast, embraces party autonomy,⁶⁸ which is "sometimes viewed as an unqualified good."⁶⁹ Conceptually, party autonomy is consistent with parties contracting for their rights and obligations under private international law.⁷⁰ Party

60. BEALE, *supra* note 32, at 1096.

61. *Id.*

62. *Id.*

63. *Id.* at 1097 (observing that Lord Mansfield's citation of that doctrine, in *Robinson v. Bland*, was merely dicta).

64. *Id.*

65. *Id.* at 1095, 1097.

66. ALEX MILLS, PARTY AUTONOMY IN PRIVATE INTERNATIONAL LAW 7 (2018).

67. See William J. Woodward, Jr., *Contractual Choice of Law: Legislative Choice in an Era of Party Autonomy*, 54 SMU L. REV. 697, 712 (2001) (noting that "[d]espite the First Restatement's failure to recognize contractual choice of law, courts enforced choice of law clauses").

68. *Id.*; see also *infra* note 94 and accompanying text.

69. Michaels, *supra* note 7, at 46.

70. See *id.* (discussing party autonomy as "a professorial desire, emerging from a long academic tradition particularly in Europe, to 'privatize' private law, by removing its source from the state and making it independent").

autonomy is also pragmatic. It allows parties to choose the law governing their contract, thereby increasing predictability and certainty. It also reduces the burden on courts to choose the governing law when resolving multi-state disputes.⁷¹ Accordingly, both common law countries and civil law countries now respect party autonomy—insofar as it upholds the right of contracting parties to choose a state’s internal law as the governing law.⁷²

Logically, the principles of party autonomy—that the parties should be able to specify their respective rights and obligations⁷³—should also justify the right of contracting parties to choose soft law to govern those rights and obligations.⁷⁴ Certain pragmatic considerations that justify party autonomy—increasing predictability and certainty, and reducing the burden on courts—likewise should justify choosing soft law.⁷⁵ Honoring “freely negotiated choice-of-law clauses in order to secure the conditions necessary for the functioning of international commerce . . . benefits [states] even if at times their law is not applied.”⁷⁶ The Restatement of Conflict of Laws supports these considerations:

Prime objectives of contract law are to protect the justified expectations of the parties and to make it possible for them to foretell with accuracy what will be their rights and liabilities under the contract. These objectives may best be attained in multistate transactions by letting the parties choose the law to govern the validity of the contract and the rights created thereby. In this way, certainty and predictability of result are most likely to be secured.⁷⁷

71. Willis L.M. Reese, *Power of Parties to Choose Law Governing Their Contract*, 54 AM. SOC’Y INT’L L. PROC. 49, 51 (1960).

72. *Id.*; cf. MILLS, *supra* note 66, at 3 (observing that party autonomy’s longstanding history alone has made the doctrine justifiable and nearly uncontested).

73. Cf. BEALE, *supra* note 32, at 1096 (arguing that, “in the case of all voluntary obligations, parties, since they have the right to choose whether or not they will be bound, have also the right to choose the law under which they shall be bound”); *supra* notes 69–70 and accompanying text (explaining why party autonomy is conceptually consistent with private international law).

74. See Symeonides, *supra* note 27, at 895 (suggesting that party autonomy should justify the right of contracting parties to choose soft law as their governing law).

75. See Reese, *supra* note 71 and accompanying text.

76. Matthias Lehmann, *Liberating the Individual from Battles Between States: Justifying Party Autonomy in Conflict of Laws*, 41 VAND. J. TRANSNAT’L L. 381, 394 (2008).

77. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187.2 cmt. e (AM. LAW INST. 1977).

The only practical concern with allowing parties to choose soft law is whether that “law” can be “found” with clarity.⁷⁸ In contrast to soft law, state law usually is “published and may serve as precedent.”⁷⁹ As a policy matter, giving parties the right to choose soft law as governing law would be counterproductive if that leads to effort or unpredictability that overburdens the courts.⁸⁰ The arbitration precedents address this concern, however, recognizing that soft law, especially if codified, often can be found with clarity.⁸¹ Even when drawing from uncodified bodies of soft law, arbitrators have been able to use “reason and logic” to interpret the rules from the business context and common values shared by the business community.⁸² Soft law that is clear and accessible therefore ought to satisfy this concern.⁸³

From the perspective of party autonomy, therefore, the same considerations that justify choosing a state’s internal law should

78. Cf. Gama, Jr. & Saumier, *supra* note 11, at 51–52 (arguing that allowing for the choice of non-state law would “promote[] the stability of the parties’ expectations under their contract, even though non-State law is arguably more difficult to ascertain and may provide less valuable information than the *lex fori* in terms of future legal treatment”).

79. Michaels, *supra* note 7, at 47 (observing the need for doctrinal accuracy).

80. See Reese, *supra* note 71, at 51 (discussing the policy goal of reducing the burden on courts). It could be burdensome, for example, if parties choose soft law written in a language different than that of the contract.

81. Gabrielle Kauffman-Kohler, *Soft Law in International Arbitration: Codification and Normativity*, 1 J. INT’L DISP. SETTLEMENT 283, 295–98 (2010); see Abul F.M. Maniruzzaman, *The Lex Mercatoria and International Contracts: A Challenge for International Commercial Arbitration?*, 14 AM. U. INT’L L. REV. 657, 711 (1999) (observing that arbitrators have little difficulty in applying soft-law rules or principles when they are definitive).

82. Maniruzzaman, *supra* note 81, at 713–14.

83. In some cases, soft law may even provide rules of conduct that provide more clarity than hard law. In the context of international investment arbitration, for example, Professor Alvarez observes that “investment tribunals regularly cite to soft law” because the “rudimentary nature of international investment law . . . drives all [] stakeholders to anything that might fill the interpretative gaps.” Alvarez, *supra* note 10, at 17; cf. Anna Gelper, *The Importance of Being Standard*, in ESCB LEGAL CONFERENCE 2016, at 23 (2017), https://www.ecb.europa.eu/pub/pdf/other/escblegalconference2016_201702.en.pdf [<https://perma.cc/9XN8-TYT4>] (arguing for adopting a more centralized, modular approach to contracting incorporating by reference soft law that sets forth widely-used non-financial terms). Nonetheless, Alvarez worries that reliance on soft law can “run[] contrary to the need states and investors have for textually clear rules laid out in advance.” Alvarez, *supra* note 10, at 60.

justify choosing soft law that is clear and accessible. Conceptually, however, party autonomy is related to, if not a subset of, freedom of contracting.⁸⁴ To ensure a complete analysis, this Article next examines how freedom of contracting might influence the right to choose soft law as governing law.

B. FREEDOM OF CONTRACTING

Scholars traditionally have distinguished freedom of contracting and party autonomy.⁸⁵ The distinction, however, is subtle; freedom of contracting is limited by mandatory rules of local law,⁸⁶ whereas party autonomy is limited by private international law, which respects overriding mandatory rules of local law.⁸⁷ The latter has been defined, with some circularity, as rules that “are deemed so important that they should be applied to a (cross-border) case by a court, even if the issue is, in principle, governed by another law according to the choice of law rules of the forum.”⁸⁸

For example, freedom of contracting would not allow parties to contract around mandatory local law that protects parties who are infants.⁸⁹ In contrast, party autonomy would allow parties to choose a governing law that does not protect infants, subject to a court limiting that choice under private international law by

84. See *infra* notes 85–87 and accompanying text (explaining why the distinction between party autonomy and freedom of contracting is subtle); *infra* notes 94–95 and accompanying text (discussing the close relationship between party autonomy and freedom of contracting).

85. MILLS, *supra* note 66, at 21–23; see E-mail from Ralf Michaels, Arthur Larson Professor of Law, Duke Law Sch., to author (Oct. 19, 2018) (on file with author) (stating that he does “not think freedom to choose the applicable law is a part of freedom of contract” and that “[w]e distinguish normally in conflict of laws”). Recall that party autonomy refers to the right of parties to choose the governing law in private international law. See *supra* notes 60–61 and accompanying text.

86. In this Article, “local law” means the applicable national law absent a choice of law. See *Local Law*, MERRIAM-WEBSTER DICTIONARY (11th ed. 2020) (defining “local law” as including “the laws and legal principles and rules of a state other than those concerned with conflict[] of law[s]”).

87. MILLS, *supra* note 66, at 21; cf. UGLJESA GRUSIC ET AL., CHESHIRE, NORTH & FAWCETT: PRIVATE INTERNATIONAL LAW 743–51 (Paul Torremans & James J. Fawcett eds., 15th ed. 2017) (discussing overriding mandatory rules of local law, and observing that such rules create an “exception to the normal choice of law rules”).

88. LOUWRENS R. KESTRA, THE IMPACT OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS ON PRIVATE INTERNATIONAL LAW 24 (2014).

89. MILLS, *supra* note 66, at 348.

finding that the mandatory local law protecting infants is an overriding mandatory local law.⁹⁰ What constitutes overriding mandatory local law under private international law might also depend on agreements among the relevant nations, some of which include not only mandatory local law of the forum but also mandatory local law having a connection to the contract.⁹¹ Subject to this subtle distinction,⁹² party autonomy functionally should follow freedom of contracting.⁹³

The Restatement of Conflict of Laws similarly views party autonomy as consistent with, if not part of, freedom of contracting. It comments that “letting the parties choose the law to govern the validity of the contract and the rights created thereby [is] . . . consistent with the fact that . . . persons are free within broad limits to determine the nature of their contractual obligations.”⁹⁴ Likewise, Professor Reese, the Restatement’s Chief Reporter, concludes that “[d]oubt as to the parties’ ability to choose the governing law arises only with respect to questions that lie beyond their contractual power.”⁹⁵

90. *Id.* at 478–79.

91. KUESTRA, *supra* note 88, at 24. Agreements among nations might provide, for example, that private international law should respect local law rules on consumer protection, see Laura Maria van Bochove, *Overriding Mandatory Rules as a Vehicle for Weaker Party Protection in European Private International Law*, 7 ERASMUS L. REV. 147, 149 n.18 (2014), or “safeguard[] public interests.” See, e.g., Naciye Yilmaz, *Overriding Mandatory Rules in Private International Law*, ERDEM & ERDEM L. (July 2015), <http://www.erdem-erdem.av.tr/publications/law-post/overriding-mandatory-rules-in-private-international-law/> [<https://perma.cc/VJQ3-DY99>] (quoting Regulation No. 593/2008, *supra* note 24, art. 9(1)).

92. The distinction thus effectively turns on the difference, if any, between applicable mandatory rules of local law and overriding mandatory rules of local law. Professor Mills comments that this distinction could be much more significant for a legal system that has “a relatively low level of freedom of contract, invalidating many potential contractual terms.” Email from Alex Mills, *supra* note 9. A choice of foreign law might then enable the contracting parties to validly include those terms. *Id.*

93. *Cf.* MARIA HOOK, *THE CHOICE OF LAW CONTRACT* 12, 26 (2016) (calling for a perspective that views choice of law and contract law as a fused “choice of law contract,” and arguing that agreement to choice of law is itself a contract and that party autonomy in contracting is determinative in the choice-of-law process); Lehmann, *supra* note 76, at 390 (arguing that freedom of contracting might be an expansive, universal principle of law into which contractual choice of law should fall).

94. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2) cmt. e (AM. LAW INST. 1971).

95. Reese, *supra* note 71, at 51.

Freedom of contracting is generally subject to three limitations: paternalism, externalities, and public policy.⁹⁶ Paternalism should not apply in this Article's context of business contracting, assuming (as normally would be the case) that the parties are sophisticated.⁹⁷ It certainly should not apply to choosing the Model Law as the governing law of sovereign debt contracts; such contracts normally involve a sovereign debtor state and sophisticated investors who are represented by counsel.⁹⁸

However, the limitations imposed by externalities and public policy could apply to business contracting. First, consider externalities. Not all externalities defeat contract enforcement. To the contrary, many contracts create externalities, yet they are enforced.⁹⁹ When examining externalities, the critical questions are which externalities should defeat contract enforcement and under what circumstances.¹⁰⁰ Unfortunately, "[d]etermining which of these [externality] impacts, if negative, are to count in constraining the ability of parties to contract with each other poses major conceptual problems."¹⁰¹

96. See Steven L. Schwarcz, *Rethinking Freedom of Contract: A Bankruptcy Paradigm*, 77 TEX. L. REV. 515, 535–39 (1999).

97. Cf. HAGUE PRINCIPLES, *supra* note 11, art. 1(1) at 17 (providing that the Hague Principles apply to contracts "where each party is acting in the exercise of its trade or profession" but "do not apply to consumer or employment contracts"); Symeon C. Symeonides, *Contracts Subject to Non-State Norms*, 54 AM. J. COMP. L. 209, 224 (2006) (observing that "it is highly preferable to not allow choice of non-state norms in consumer . . . and other contracts in which one party is likely to be in a weak bargaining position").

98. Stephen J. Choi & G. Mitu Gulati, *Innovation in Boilerplate Contracts: An Empirical Examination of Sovereign Bonds*, 53 EMORY L.J. 929, 930 (2004) ("Sovereign bond contracts are a special breed of contract. The parties involved are among the most sophisticated in the world financial markets . . ."); cf. Woodward, Jr., *supra* note 67, at 713 ("Comparable latitude is given to the parties' ability to choose the law that will govern the transaction in the sophisticated areas of investment securities and letters of credit. Similarly, four commercial states have mandated that their courts uphold contractual choice of 'unrelated' law in large contracts."). *But cf.* William J. Woodward, Jr., *Finding the Contract in Contracts for Law, Forum and Arbitration*, 2 HASTINGS BUS. L.J. 1, 42 (2006) (arguing that the doctrine of unconscionability, which derives from paternalism in contract law, could be applied to unfair choice-of-law clauses).

99. Schwarcz, *supra* note 96, at 551–52.

100. *Id.* at 552.

101. MICHAEL J. TREBILCOCK, *THE LIMITS OF FREEDOM OF CONTRACT* 20 (1993).

Because this Article focuses on business contracting, it need not attempt to solve those major conceptual problems. If all contracting parties agree to a soft-law choice of law, there are, by definition, no externalities to those parties. Although that agreement might impose externalities on other parties, this Article later shows that business contracts are unlikely to cause significant third-party externalities.¹⁰² Insignificant externalities certainly should not limit freedom of contracting.

Public policy also could limit freedom of contract and hence party autonomy.¹⁰³ Although most legal rules are regarded as “default” rules that parties should be able to contract around, some rules are so essential to the legal scheme that they are regarded as mandatory. Local law prohibits parties from contracting around mandatory rules.¹⁰⁴ As later discussed, however, parties to business contracts are unlikely to want to disobey such mandatory rules.¹⁰⁵

In most cases, therefore, the principles of party autonomy and freedom of contracting should respect the right of sophisticated parties to choose soft law as the governing law of their business contracts. The discussion next explains, however, why that right might be limited by the need for legitimacy.

C. LEGITIMACY

Recall that the limited non-arbitration precedents for choosing soft law as governing law apply to soft law in only three cases: if the soft law either is promulgated by a leading intergovernmental authority, generally accepted (as neutral and balanced), or a trade code.¹⁰⁶ These precedents implicitly recognize

102. See *infra* Part IV.

103. See *supra* note 96 and accompanying text.

104. Schwarcz, *supra* note 96, at 529 n.69; cf. *supra* notes 86–91 and accompanying text (comparing mandatory rules of local law and overriding mandatory rules of local law).

105. See *infra* notes 179–81 and accompanying text (discussing the reputational and other costs of disobeying mandatory rules). Some authors distinguish mandatory rules and public policy. See, e.g., Symeonides, *supra* note 97, at 224; Michal Wojewoda, *Mandatory Rules in Private International Law*, 7 MAAS-TRICHT J. EUR. & COMP. L. 183, 193 (2000) (observing that when overriding mandatory local law does not apply, a court may still override choice of law when it affronts the *ordre public* of the forum). That distinction, however, is not meaningful for this Article. Cf. HAGUE PRINCIPLES, *supra* note 11, cmt. ¶ 11.11 (describing overriding mandatory rules and public policy as sharing “the same doctrinal basis and, in effect, [being] two sides of the same coin”).

106. See *supra* notes 21–29 and accompanying text.

that states will only enforce what they deem to be legitimate.¹⁰⁷ If parties want a state to enforce their choice of soft law as governing law, they effectively must persuade state authorities to trust “the legitimacy” of enforcing that choice.¹⁰⁸

In the Western world, legitimacy is largely founded on trust in institutional arrangements.¹⁰⁹ Each of the aforesaid precedents—promulgation by a leading intergovernmental authority, general acceptance, or being a trade code—derives its legitimacy from institutional trust. The Article next examines these precedents and considers other possible ways of achieving legitimacy.

1. Promulgation by a Leading Intergovernmental Authority.

Certain intergovernmental organizations, such as the International Institute for the Unification of Private Law (UNIDROIT)¹¹⁰ and the United Nations Commission on International Trade Law (UNCITRAL),¹¹¹ are highly respected worldwide. Their endorsement of a body of soft law would almost automatically impart it with a high degree of reputational legitimacy.¹¹²

107. Cf. Paul Schiff Berman, *The Globalization of Jurisdiction*, 151 U. PA. L. REV. 311, 502 (2002) (recognizing that enforcement of a judgment rendered by a non-state community “is limited by the willingness of others to accept the judgment as normatively legitimate”). The possibility that enforcement could avoid certain mandatory rules of local law could enhance the need for legitimacy. See *supra* notes 90–91 and accompanying text.

108. Berman, *supra* note 107, at 325, 511, 532.

109. Fritz W. Scharpf, *Problem-Solving Effectiveness and Democratic Accountability in the EU* 1–2 (Max Planck Inst. for the Study of Soc’y, Cologne, Working Paper No. 03/1, 2003); cf. Hans Gribnau, *Soft Law and Taxation: EU and International Aspects*, 2 LEGISPRUDENCE 67, 116 (2008) (arguing that the legitimacy of E.U. tax soft-law instruments can be enhanced through increased transparency, achieved by public participation, and the consultation of stakeholders); Jonathan Weinberg, *ICANN and the Problem of Legitimacy*, 50 DUKE L.J. 187, 213, 257–58 (2000) (discussing how the Internet Corporation for Assigned Names and Numbers (ICANN), the public-private organization overseeing parts of the internet, has attempted to enhance its legitimacy by gaining the consensus of the international Internet community).

110. UNIDROIT was originally founded in 1926 as an auxiliary body of the League of Nations. *History and Overview*, UNIDROIT, <https://www.unidroit.org/about-unidroit/overview> [<https://perma.cc/8UPD-4WFE>].

111. UNCITRAL was created to modernize and harmonize rules on international business. *Origin, Mandate and Composition of UNCITRAL*, UNCITRAL, https://uncitral.un.org/en/about/faq/mandate_composition [<https://perma.cc/8X4E-YRZ3>].

112. Cf. SYMEONIDES, *supra* note 18, at 407 (arguing for the legitimacy of soft-law “norms . . . drafted by intergovernmental bodies such as UNIDROIT and UNCITRAL”).

Even if less institutional, certain intergovernmental bodies may merit respect by virtue of their creation, composition, or work product. Professor Symeonides argues, for example, that soft law drafted by an impartial intergovernmental body—such as the Lando Commission, formed by the European Parliament in 1982 to develop a European code for contract law—could have legitimacy.¹¹³

Some, however, might judge legitimacy not by the reputation of the organization promulgating the soft law but by the fairness of the soft law itself. Professor Alvarez, for example, argues that “soft law produced by more public and global institutions like the UN or the ILO does not necessarily enhance [its] democratic legitimacy”¹¹⁴ because “[g]lobal processes within UN system institutions . . . replicate the standards favored by Western governments to enhance their own interests.”¹¹⁵

2. General Acceptance.

Something that is generally accepted is, almost by definition, seen as legitimate. The UCP, for example, is easily the world’s most generally accepted body of commercial soft law.¹¹⁶ Most nations respect the ability of parties to choose the UCP as the law governing their international letters of credit,¹¹⁷ not-

113. *Id.* at 406–07.

114. Alvarez, *supra* note 10, at 62.

115. *Id.* (citing an example in which soft law high-quality labor standards work “almost everywhere against developing countries”).

116. *See supra* note 22 and accompanying text.

117. *See, e.g.,* Alaska Textile Co. v. Chase Manhattan Bank, N.A., 982 F.2d 813, 816 & n.1 (2d Cir. 1992) (noting that over 140 countries had adopted the UCP and that the UCP governs most international letters of credit); Paolo S. Grassi, *Letter of Credit Transactions: The Banks’ Position in Determining Documentary Compliance. A Comparative Evaluation Under U.S., Swiss and German Law*, 7 PACE INT’L L. REV. 81, 104–05, 104 n.62 (1995) (discussing the UCP and its express and implied application to letters of credit); Charmian Wang Corne, *Rethinking the Law of Letters of Credit* 38–85 (2003) (unpublished doctoral thesis) (on file with the University of Sydney), <https://ses.library.usyd.edu.au/bitstream/handle/2123/660/adt-NU20051027.16310703chapter2.pdf?sequence=6&isAllowed=y> [<https://perma.cc/2G7L-3V7L>] (summarizing the development of the UCP and its general acceptance within the international letter-of-credit community).

withstanding that it is merely a set of rules published by the International Chamber of Commerce (ICC),¹¹⁸ a private-sector organization.¹¹⁹ Relatively few bodies of soft law, however, appear to be generally accepted. Also, except for cases where it is obvious,¹²⁰ general acceptance is a somewhat ambiguous standard.¹²¹

Under political pressure, the requirement that generally accepted soft law also be neutral and balanced was added to the Hague Principles.¹²² Whether that addition actually increases legitimacy is unclear; if anything, it might increase ambiguity.¹²³ Professor Michaels argues, for example, that there is no clear basis to assess whether any given body of soft law is neutral and balanced.¹²⁴ This Article's normative framework will focus simply on whether the soft law is generally accepted, without that addition.

3. Trade Code.

The UCP gains legitimacy not only by being generally accepted. It also is a trade code: “an international body of trade practice that is commonly adopted by international and domestic letters of credit and as such is the ‘law of the transaction’ by

118. INT'L CHAMBER OF COMMERCE, I.C.C. PUB. NO. 600, UNIFORM CUSTOMS AND PRACTICE FOR DOCUMENTARY CREDITS (2007).

119. See *History*, INT'L CHAMBER OF COMMERCE, <https://iccwbo.org/about-us/who-we-are/history/> [<https://perma.cc/7AJH-7N7Y>] (describing the ICC as a private-sector organization that strives to set global standards for business).

120. Besides the UCP, the UN's Universal Declaration of Human Rights is another obvious case. See Universal Declaration of Human Rights, *supra* note 2.

121. MILLS, *supra* note 66, at 505 (arguing that what general “[a]cceptance on an ‘international, supranational or regional level’ . . . means is opaque”); Michaels, *supra* note 7, at 59 (arguing that, in most contexts, “generally accepted” is a “vague standard”). Professor Mills explains why that standard is ambiguous:

It is unclear, for example, whether this [standard] requires acceptance only by those subject to the non-state rules, or by society in general—the former might not be enough to establish that the rules are generally considered legitimate, but the latter might be too difficult to satisfy. Islamic law, for example, is certainly accepted by Muslims (albeit subject to different interpretations), but its application is broadly rejected in most Western states—it is unclear whether it would satisfy this test.

MILLS, *supra* note 66, at 505.

122. See *infra* notes 130–32 and accompanying text.

123. See MILLS, *supra* note 66, at 506 (explaining why the neutral-and-balanced “criterion is . . . likely to present difficulties in application”).

124. Michaels, *supra* note 7, at 57–68.

agreement of the parties.”¹²⁵ Relatively few bodies of soft law, however, represent trade codes or are likely to be redacted into trade codes in the foreseeable future.¹²⁶

4. Other Possible Ways To Achieve Legitimacy.

Another way for soft law to achieve legitimacy is for national law to explicitly authorize its application. In the United States, for example, the UCC authorizes parties to make their letters of credit subject to the UCP: “the liability of an issuer [of a letter of credit] is governed by any rules of custom or practice, such as the [UCP], to which the letter of credit . . . is expressly made subject.”¹²⁷ If a nation explicitly were to authorize parties to choose a particular body of soft law as their sovereign debt contract’s governing law, that choice would be enforceable—at least in that nation’s courts. Explicit authorization of soft law, however, is unusual.

Arguably,¹²⁸ soft law might also achieve legitimacy by being fair.¹²⁹ Under the Hague Principles, for example, the European Union feared that allowing parties to choose generally accepted soft law—the originally proposed standard—still could give rise to “the proliferation of unfair unilateral rules.”¹³⁰ To address potential unfairness, the EU required that such soft law also be

125. U.C.C. § 5-101 cmt. (AM. LAW INST. & UNIF. LAW COMM’N 2017).

126. Professor Alvarez suggests an area where soft law might become redacted into a trade code: “developments with respect to digital data where hard law is severely lagging behind real world commercial/technical developments.” E-mail from José Enrique Alvarez, Herbert & Rose Rubin Professor of Int’l Law, N.Y. Univ. Sch. of Law, to author (Dec. 17, 2018) (on file with author).

127. U.C.C. § 5-116(c).

128. Jurisprudentially, fairness signals legitimacy. See THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 25–46 (1995). Some nonetheless might argue that fairness is a necessary but insufficient condition for legitimacy.

129. See *supra* notes 114–15 and accompanying text (arguing that the legitimacy of soft law should be judged by its fairness, not by the reputation of the organization promulgating it). Efficacy might also arguably be viewed as a basis of legitimacy of soft law. See Janet Koven Levit, *Bottom-Up Lawmaking Through a Pluralist Lens: The ICC Banking Commission and the Transnational Regulation of Letters of Credit*, 57 EMORY L.J. 1147, 1155 & n.10 (2008) (arguing that the efficacy of soft law can be a basis for it to harden into hard law).

130. Saumier, *supra* note 46, at 12–13.

“neutral and balanced.”¹³¹ As observed, however, it is unclear how to determine that.¹³²

Indeed, absent a body of soft law being manifestly fair,¹³³ it is unclear how to determine its substantive fairness. The inability to assess substantive fairness may well force the legitimacy analysis back to one of institutional trust¹³⁴—effectively a test of procedural fairness. Professor Michaels thus argues that fairness “must be understood in a formal, not a substantive way,” permitting soft law to “be chosen only when it has been formulated by an agency that is, with regard to the parties, neutral.”¹³⁵ That test could be met, he contends, if “an agency could claim to represent either all parties (like the ICC with regard to commercial actors) or none (like UNIDROIT).”¹³⁶

Because private organizations can promulgate soft law,¹³⁷ procedural fairness should not be limited to trust in intergovernmental organizations.¹³⁸ It should also extend to the private sector, reflecting an evolution from the “assumption that state representatives most legitimately represent the people” to recognition that “[i]n an increasingly complex society . . . authority flows from other sources too, both public *and* private, in particular, expertise, knowledge, or acceptance by affected stakeholders.”¹³⁹ Professor Michaels implicitly recognizes this by using the example of the ICC, a private-sector organization,¹⁴⁰

131. As discussed, Article 3 of the Hague Principles now includes this neutral-and-balanced requirement. *See supra* notes 29, 122 and accompanying text; *see also* Michaels, *supra* note 7, at 55.

132. *See supra* notes 123–25 and accompanying text.

133. This would require the soft law to be very obviously and clearly perceived as fair. *See Manifestly*, CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/dictionary/english/manifestly> [<https://perma.cc/8457-N77C>] (defining “manifestly” as “very obviously”). In this sense, manifest fairness, like pornography, may be characterized by an “I know it when I see it” test. *See Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

134. *See supra* note 109 and accompanying text.

135. Michaels, *supra* note 7, at 58.

136. *Id.* at 59 (describing this as “a relative concept of neutrality: Islamic law becomes neutral and balanced as between Muslims but loses that character as between a Muslim and a non-Muslim”).

137. *See supra* note 119 and accompanying text (discussing soft law promulgated by the ICC).

138. *Cf. supra* note 114 and accompanying text (explaining why soft law produced by intergovernmental organizations might not even enhance democratic legitimacy).

139. Pauwelyn et al., *supra* note 9, at 742.

140. *See supra* notes 118–19 and accompanying text.

as meriting institutional trust.¹⁴¹ Professor Symeonides likewise observes that soft law drafted by an impartial academic organization could have legitimacy.¹⁴² A fairness test for legitimacy logically should turn, therefore, on the neutrality of the body promulgating the soft law, whether or not that body is governmental.¹⁴³

Arbitration precedents might also inform the question of legitimacy.¹⁴⁴ Parties to arbitration “have always had the power to authorize the arbitral tribunal to decide their dispute *ex aequo et bono*, that is, according to what is just and fair, without reference to any state law.”¹⁴⁵ Therefore, Professor Symeonides argues, “[a] fortiori, [those] parties have the power to authorize the [arbitral] tribunal to decide according to a designated set of non-state norms.”¹⁴⁶ These considerations, however, largely parallel the prior discussion of legitimacy. The “just and fair” condition would appear to be subject to the same lack of clarity about how a body of soft law should be assessed to be fair, possibly forcing the legitimacy analysis back to one of institutional trust.¹⁴⁷ The “nonstate norms” condition suggests the body of soft law should

141. See *supra* note 136 and accompanying text.

142. SYMEONIDES, *supra* note 18, at 406–07 (noting also that soft law proposed by a partisan private organization would, in contrast, lack legitimacy).

143. This Article does not adopt a more aggressive view of fairness suggested by Michaels and Symeonides; rather, it presumes fairness if the contracting parties are sophisticated. Symeonides observes, for example, that “[o]nce the weak parties are segregated and protected, then one can allow the contractual choice of non-state norms in all other contracts” Symeonides, *supra* note 97, at 226. Similarly, Michaels observes that “it is not clear at all why the parties, whose autonomy is otherwise emphasized, must be restricted to the choice of a balanced law at all.” Michaels, *supra* note 7, at 58. Under that presumption, soft law chosen by sophisticated parties to business contracts would always be deemed fair. See *supra* note 97 and accompanying text (restricting this Article’s analysis to sophisticated parties to business contracts).

144. Recall that significant precedent supports choosing soft law as governing law for purposes of arbitration. See *supra* note 18 and accompanying text.

145. SYMEONIDES, *supra* note 18, at 409.

146. *Id.* Professor Symeonides elsewhere suggests that allowing non-state-law choice of law in arbitration “can be defended [in the abstract] on grounds of contractual intent . . . since an arbitration agreement reflects the parties’ explicit intent to go outside the state judicial system” Symeonides, *supra* note 97, at 225.

147. See *supra* note 134 and accompanying text.

be accepted as a norm, which implies it should have at least some general acceptance.¹⁴⁸

The possibility, however, that arbitration might require less of a practical showing of legitimacy for choosing soft law raises an interesting “bootstrap” question: should the fact that a body of soft law provides that all disputes thereunder be resolved through arbitration justify choosing that soft law as governing law? The Model Law itself provides, for example, that “[a]ll disputes arising [thereunder] shall be resolved by binding arbitration before a panel of three arbitrators.”¹⁴⁹

The answer would appear to be no. The arbitration exception applies to the rules by which arbitrators actually adjudicate a dispute.¹⁵⁰ The exception does not appear to apply to choosing the substantive rules that govern the rights and obligations of contract parties in the first place.¹⁵¹ The mere fact that a contract contemplates arbitration of disputes should not be a basis for altering the underlying rights and obligations of the parties.¹⁵² Altering rights on that basis could cause confusion; for

148. Cf. Symeon C. Symeonides, *Contracts Subject to Non-State Norms*, AM. J. COMP. L. 209, 211 (2006) (arguing that “what makes the [arbitration agreement’s selecting of] nonstate norms binding is not the parties’ volition alone, but rather the willingness of a state to enforce a contract that incorporates these norms”).

149. SCHWARCZ, *supra* note 14, app., ch. V, art. 10, § 1.

150. See SYMEONIDES, *supra* note 18, at 487 (explaining that parties have wide power to choose the law *to be applied by the arbitral tribunal*). The Model Law itself provides that flexibility:

The arbitration shall be governed by [generally accepted international arbitration rules of (name of neutral international arbitration body)] [the rules of the International Centre for Settlement of Investment Disputes/ International Centre for Dispute Resolution/ International Chamber of Commerce International Court of Arbitration/ specify other international arbitration organization]. Notwithstanding Article 10(2), if all the parties to an arbitration contractually agree that such arbitration shall be governed by other rules, it shall be so governed.

SCHWARCZ, *supra* note 14, app., ch. V, art. 10, §§ 2–3.

151. An arbitration agreement or clause pointing to a specific governing law (e.g., the Model Law) does not necessarily determine the law that will govern the contract outside of the arbitration process. For example, the doctrine of separability, observed in the United States as well as in many transnational and foreign arbitration regimes, holds that the law governing an arbitration agreement or clause can be separate from the law governing the main contract. SYMEONIDES, *supra* note 18, at 473.

152. *But see* Christopher R. Leslie, *The Arbitration Bootstrap*, 94 TEX. L. REV. 265, 266 (2015) (finding that firms have committed arbitration bootstrap-

example, if an arbitration provision is not upheld and the dispute goes to a court, the parties' rights and obligations could be retroactively changed.¹⁵³

Ironically, the potential for arbitration itself to cause that confusion militates in favor of courts respecting a choice of soft law as governing law. Although arbitral tribunals respect a choice of non-state law,¹⁵⁴ a court that finds an arbitration agreement invalid and hears the same dispute on the merits rarely would give effect to that choice of law—thereby altering the parties' rights.¹⁵⁵ If courts respected a choice of soft law, however, those rights would not become altered (thereby avoiding confusion).¹⁵⁶

5. Proposing a Choice-of-Law Framework.

Synthesizing the foregoing analysis, sophisticated parties to business contracts should have the right to choose soft law as governing law¹⁵⁷ if (1) the choice of law does not create significant externalities (or the social benefits of that choice are likely to exceed those externalities);¹⁵⁸ (2) the soft law is clear and accessible;¹⁵⁹ and (3) the soft law has legitimacy by virtue of being either generally accepted,¹⁶⁰ promulgated by a respected independent and unbiased organization, or manifestly fair.¹⁶¹

ping by including substantive contract terms having nothing to do with arbitration (e.g., statute of limitations and reduced damages) in arbitration clauses in the hope that courts will enforce them based on the Supreme Court's extreme deference to arbitration clauses).

153. Cf. Saumier, *supra* note 46, at 19–21 (citations omitted) (observing that if “parties have included [an arbitration] choice of law clause in their contract designating [a body of soft law] to govern their contract, this choice would not be effective if a dispute is brought before a State court. . . . What might justify this inconsistency in the State's own approach to choice-of-law in international commercial contracts?”).

154. See *supra* notes 145–47 and accompanying text.

155. See E-mail from Alex Mills, *supra* note 9; *supra* notes 145–47 and accompanying text.

156. E-mail from Alex Mills, *supra* note 9.

157. This right to choose soft law as governing law includes, of course, the right to choose soft law as all or part of the governing law. See *supra* note 30 and accompanying text.

158. These restrictions on externalities provide a safe harbor, not an absolute condition, because significant externalities do not always limit freedom of contracting. See *supra* notes 101–02 and accompanying text.

159. See *supra* note 83 and accompanying text.

160. *Supra* Part II.C.2.

161. Legitimacy also should require the soft law not to be manifestly unfair.

III. SHOULD SOFT-LAW INCORPORATION BY REFERENCE BE ENFORCEABLE?

As an alternative analytical framework, next consider incorporating soft law by reference into a contract. Technically, incorporation by reference is not a choice-of-law rule.¹⁶² It is “merely a shorthand way of drafting the contract, equivalent in legal effect to cutting and pasting the text of those rules [of soft law] into the pages of the contract.”¹⁶³

The analysis of whether soft-law incorporation by reference should be enforceable first addresses autonomy and freedom of contracting and then addresses legitimacy.

A. AUTONOMY AND FREEDOM OF CONTRACTING

Reflecting widespread contract-law precedent,¹⁶⁴ the Restatement observes that parties may incorporate by reference extrinsic material.¹⁶⁵ The Restatement goes further than most such precedent, however, by including “provisions of . . . foreign law” as an example of extrinsic material: “[P]arties, generally speaking, have power to determine the terms of their contractual engagements. They may spell out these terms in the contract. In

Assuming the contracting parties are sophisticated (so they do not take unfair advantage of each other), the condition that the choice of soft law not create significant externalities (or the social benefits of that choice are likely to exceed those externalities) should assure there is no manifest unfairness. *See supra* notes 128–31 and accompanying text.

162. *See, e.g.*, RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(1) cmt. c (AM. LAW INST. 1971) (stating that incorporation by reference “is not a rule of choice of law”).

163. MILLS, *supra* note 66, at 23.

164. Incorporation by reference traces back over a century. *See Incorporation*, BLACK’S LAW DICTIONARY 613 (2d ed. 1910) (defining “incorporation by reference” within the definition of “incorporation”). Incorporation by reference is also an integral concept in “traditional contracts.” Richard Raysman & Peter Brown, *Incorporation by Reference Provision in Related Agreement Allows for Enforcement of Warranty Disclaimer in Subsequent Software License*, LAW.COM: N.Y. L.J. (May 7, 2018), <https://www.law.com/newyorklawjournal/2018/05/07/incorporation-by-reference-provision-in-related-agreement-allows-for-enforcement-of-warranty-disclaimer-in-subsequent-software-license/> [<https://perma.cc/BJF2-AJCN>].

165. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(1) cmt. c (articulating the principle justifying Subsection (1), which allows application of a chosen state law to govern the contractual rights and duties if “the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue”).

the alternative, they may incorporate into the contract by reference *extrinsic material which may, among other things, be the provisions of some foreign law*.¹⁶⁶

If parties may incorporate by reference provisions of foreign law, they also should have the right, by analogy, to incorporate by reference soft law.¹⁶⁷ Both represent rules of conduct that, absent such incorporation by reference, would be unenforceable.¹⁶⁸

A more normative analysis also supports that view. Because incorporation by reference is not a choice-of-law rule,¹⁶⁹ the party-autonomy jurisprudence should not apply.¹⁷⁰ The freedom-of-contracting jurisprudence should apply, however, because incorporation by reference is contractual.¹⁷¹ Logically, that freedom-of-contracting jurisprudence would apply to incorporating soft law by reference the same way it applies to choosing soft law as governing law.¹⁷² That, in turn, should lead to a similar conclusion: that the incorporation by reference of soft law into business contracts should be respected under contract theory.¹⁷³

However, because the party-autonomy jurisprudence does not apply,¹⁷⁴ incorporating soft law by reference would not gain

166. *Id.* (emphasis added).

167. See Symeon C. Symeonides, *The Scope and Limits of Party Autonomy in International Contracts: A Comparative Analysis*, in PRIVATE INTERNATIONAL LAW: CONTEMPORARY CHALLENGES AND CONTINUING RELEVANCE 101, 127 n.155 (Franco Ferrari & Diego Fernandez Arroyo eds., 2019) (arguing that the extrinsic material referenced in that Restatement comment “can also be a . . . collection of non-state norms”).

168. See Andre Sobczak, *Are Codes of Conduct in Global Supply Chains Really Voluntary? From Soft Law Regulations of Labour Relations to Consumer Law*, 16 BUS. ETHICS Q. 167, 171 (2006) (“Corporate codes of conduct are usually considered as ethical commitments without any legal effect. At best, they form part of the category of soft law, and constitute norms without legally binding effect . . .”).

169. See *supra* note 162 and accompanying text (identifying the restatement provision distinguishing choice-of-law doctrine from incorporation by reference).

170. Cf. *supra* notes 60–72 and accompanying text (discussing party autonomy as choice-of-law doctrine).

171. Robert Whitman, *Incorporation by Reference in Commercial Contracts*, 21 MD. L. REV. 1 (1961) (describing incorporation by reference as a device for alleviating contractual complexity).

172. See *supra* notes 96–105 and accompanying text (detailing limitations inherent in freedom-of-contracting jurisprudence).

173. See *supra* Part II.B (concluding that a soft-law choice of law should be respected under freedom of contracting).

174. See *supra* notes 169–71 and accompanying text (referring to a Restatement provision distinguishing between party autonomy and incorporation by reference).

a possible advantage provided by that jurisprudence: the ability of the chosen soft law to avoid the application of mandatory rules imposed under local law.¹⁷⁵ Professor Michaels explains the distinction:

This is an important difference. *If a body of rules is merely incorporated, the whole contract (including the incorporated rules) remains governed by a state's law, including its mandatory rules.* Where, by contrast, a body of rules is chosen in the sense of choice of law, that body becomes the applicable contract law . . .¹⁷⁶

The Restatement also illustrates this difference. It would exclude, for example, an incorporation by reference of an unrelated state's law into a trust agreement in order to pay the trustee a commission that would exceed the maximum permitted local-law rate.¹⁷⁷

In reality, this difference is likely to be insignificant for several reasons. Party autonomy is itself limited by private international law, which respects overriding mandatory rules of local law.¹⁷⁸ Also, for reputational and other reasons, parties to business contracts rarely would want, much less try, to disobey mandatory rules of local law.¹⁷⁹ Most companies in fact make special efforts to demonstrate that they are socially responsible.¹⁸⁰ Furthermore, there is “not a large difference” between issues that parties could resolve explicitly by contract (and thus could be resolved through incorporation by reference) and those that are subject to mandatory rules.¹⁸¹

175. See *supra* notes 85–93 and accompanying text (discussing the capacity of party-autonomy jurisprudence to override mandatory provisions of local law).

176. Michaels, *supra* note 7, at 44 (emphasis added).

177. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 cmt. c, illus. 4–5 (AM. LAW INST. 1971) (detailing a hypothetical wherein an attempt to incorporate an unrelated state's law is excluded).

178. See *supra* note 87 and accompanying text (discussing the deference paid by private international law to mandatory local law).

179. See, e.g., Kevin Jackson, *Global Corporate Governance: Soft Law and Reputational Accountability*, 35 BROOK. J. INT'L L. 41, 85–87 (2010) (discussing tenacious attacks on the reputation of global companies accused of trying to circumvent mandatory local laws, addressing such things as child labor, fair wages, and workplace conditions).

180. *Id.* (discussing how companies have been affirmatively protecting their reputations by voluntarily taking steps to demonstrate accountability and corporate social responsibility). Technology has greatly increased the public dissemination of information, undermining a company's ability to hide socially irresponsible action, even if it occurs in a distant part of the world, and reinforcing “reputation [as] a valuable commodity.” *Id.* at 86.

181. Symeonides, *supra* note 97, at 223; cf. KESTRA, *supra* note 88, at 24 (observing that “[m]andatory rules do not—as of yet—play an important role in

B. LEGITIMACY

The Restatement of Conflict of Laws does not require a legitimacy standard for incorporating extrinsic material by reference.¹⁸² That makes sense: because incorporation by reference is “merely a shorthand way of drafting the contract,”¹⁸³ any material that could have been written directly into the contract should be able to be incorporated into the contract by reference.¹⁸⁴ Therefore, soft law that could be directly written into a contract and made part of its terms should be able to be incorporated into that contract by reference.¹⁸⁵

Legitimacy nonetheless should require that the incorporated-by-reference soft law be clear and accessible.¹⁸⁶ That would enable the soft law to be identified and found with clarity,¹⁸⁷ and also would reduce the burden on courts.¹⁸⁸

the discussion concerning the impact of the [European Convention on Human Rights] on private international law”).

182. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(1) cmt. c (detailing parameters of incorporation by reference by declining to impose a legitimacy standard).

183. See *supra* note 163 and accompanying text.

184. This can become complicated where the incorporation by reference is dynamic, automatically applying to the latest version of the incorporated material. Normally, incorporation by reference is retrospective, applying only to a version of the incorporated material in existence at the time the contract is doing the incorporation by reference. For a detailed discussion of the difference, see Daniel Schwarcz, *Is U.S. Insurance Regulation Unconstitutional?*, 25 CONN. INS. L.J. 191 (2018) (showing how states delegate substantial powers to the National Association of Insurance Commissioners (NAIC), a private body, by dynamically incorporating by reference NAIC materials).

185. This logic provides yet another reason why UCC § 1-302 should not be limited to incorporation by reference. See *supra* note 20. If that section were so limited, incorporation by reference under the UCC would be restricted to soft law promulgated by leading intergovernmental authorities or to trade codes such as the UCP. See *supra* note 22 and accompanying text.

186. Because the choice-of-law analysis addressed this requirement in the context of discussing party autonomy, it was already taken as a given when discussing legitimacy. See *supra* notes 78–83 and accompanying text.

187. See David Owens, *Can Outside Material Be Incorporated by Reference into Local Development Regulations?*, COATES’ CANONS: NC LOCAL GOV’T L. (May 5, 2014), <https://canons.sog.unc.edu/can-outside-material-be-incorporated-by-reference-into-local-development-regulations/> [<https://perma.cc/K83M-2L3A>] (observing that “many courts have stated a general rule allowing incorporation by reference if the document to be incorporated is sufficiently identified and made a part of the public record”).

188. See *supra* note 80 and accompanying text (discussing how inaccessible or unclear use of soft law would increase courts’ burden, thereby undermining

C. PROPOSING AN INCORPORATION-BY-REFERENCE
(ALTERNATIVE) FRAMEWORK

Synthesizing the foregoing analysis, sophisticated parties to business contracts should have the right to incorporate soft-law rules into the contract by reference if (1) that incorporation by reference does not create significant externalities (or the social benefits of that incorporation by reference are likely to exceed those externalities); and (2) those rules are clear and accessible.¹⁸⁹ Although any rules so incorporated would be overridden by applicable mandatory rules of local law, parties to business contracts rarely would want to disobey such mandatory rules.¹⁹⁰

It sometimes might be ambiguous whether a contract is purporting to choose soft law as governing law or to incorporate that soft law by reference.¹⁹¹ Language stating that a contract is “governed by” or “subject to” particular soft law should evidence choosing that soft law as governing law.¹⁹² In the event of doubt, however, a court should make the final determination.¹⁹³

Next, this Article applies these frameworks to the Model Law, as an example of soft law.

the policy goal of judicial efficiency).

189. *Supra* note 102 and accompanying text (asserting insignificant externalities should not preclude clear and accessible incorporation by reference); *supra* notes 78–83 and accompanying text (recognizing the need for accessibility to avoid harming judicial economy).

190. See Arthur Nussbaum, *Conflict Theories of Contracts: Cases Versus Restatement*, 51 YALE L.J. 893, 908 (1942) (“There is some truth in the centuries-old doctrine that parties contracting in a given territory must not disobey prohibitions set up by the law of that territory.”).

191. See *supra* note 20 and accompanying text (discussing the ambiguity of whether certain quoted language constitutes a choice of soft law or merely an incorporation of that soft law by reference).

192. HAGUE PRINCIPLES, *supra* note 11, cmt. ¶ 4.3 (asserting that the use of the phrases “governed by” or “subject to” “meet the requirements of an express choice”).

193. See Peter V. Pantaleo et al., *Rethinking the Role of Recourse in the Sale of Financial Assets*, 52 BUS. LAW. 159, 164 (1996) (arguing that if there is doubt whether a given transfer of financial assets constitutes a sale or a secured loan, the court could make the final determination). In making that determination, the court might also consider giving second-best respect to the parties’ intentions by re-characterizing a non-enforceable choice of soft law as an incorporation of that soft law by reference. See *id.* at 185–87 (arguing that if a court finds that a given transfer of financial assets would be unenforceable as a sale, it should re-characterize that transfer as (at least) a secured loan).

IV. APPLYING THE CHOICE-OF-LAW AND INCORPORATION-BY-REFERENCE FRAMEWORKS

Section A below applies the choice-of-law framework to the Model Law, as an example of soft law. Section B thereafter applies the incorporation-by-reference framework to the Model Law. These applications illustrate why choosing soft law as governing law and incorporating soft law by reference can provide flexible and practical alternatives to treaty-making.

A. CHOOSING THE MODEL LAW AS GOVERNING LAW

Under this Article's framework, sophisticated parties to business contracts should have the right to choose soft law as governing law if (1) the choice of law does not create significant externalities (or the social benefits of that choice are likely to exceed those externalities); (2) the soft law is clear and accessible; and (3) the soft law has legitimacy by virtue of being either generally accepted, promulgated by a respected independent and unbiased organization, or manifestly fair. Using this framework, this Part considers whether parties to sovereign debt contracts should have the right to choose the Model Law as part of their governing law.¹⁹⁴

Parties to sovereign debt contracts are invariably sophisticated, consisting of institutional creditors and debtor-states.¹⁹⁵ If those parties agree to choose the Model Law as part of their governing law,¹⁹⁶ by definition they would bear no externalities.¹⁹⁷ Nor would there be externalities to subsequent holders of the sovereign debt, who derive their rights from the original debt contract and thus implicitly consent to its terms. Choosing the Model Law as part of the governing law also would be unlikely to impose externalities—much less, significant externalities—on

194. Most relevant to this analysis, the Model Law would allow a supermajority vote of creditors to change critical contract terms without necessarily getting every affected party's consent. SCHWARCZ, *supra* note 14, app., ch. III, art. 7(2).

195. See *supra* note 98 and accompanying text.

196. To avoid law-change risk, any choice of law should lock in a specific version, by date, of the Model Law.

197. Parties who disagree with that choice in order to try to preserve their ability to act as rent-seeking holdouts could, technically, suffer externalities. However, the law should not protect the ability to unreasonably extract value from other parties in a debt restructuring. Schwarcz, *supra* note 45, at 374.

others.¹⁹⁸ Other creditors of the debtor-state would be unaffected because the Model Law, by its terms, only affects the rights and obligations of creditors that contractually consent to it.¹⁹⁹ Empirical data on supermajority-voting collective action clauses (CACs) also indicate that the most important provision of the Model Law—its supermajority voting—would be unlikely to increase, and may even lower, overall sovereign-debt borrowing costs.²⁰⁰

If anything, choosing the Model Law as part of the governing law would produce benefits. Designed to help a debtor-state restructure its unsustainable debts,²⁰¹ the Model Law would reduce the social costs of sovereign debt crises, the need for sovereign debt bailouts, and the risk of systemic contagion from a debtor-state's default.²⁰² Furthermore, the Model Law would help to solve the problem of inadvertent variation, identified by Professor Gelpern. She argues that because "international policy initiatives to prevent and manage financial crises rest on the assumption that sovereign debt contracts follow a generally accepted standard," those initiatives "would make no sense in the

198. In general, soft-law choice of law would be unlikely to create significant externalities in a business context, where transactions typically operate within well-developed norms and customs. Those norms and customs may even contribute to developing mandatory rules of local law and private international law. Absent the granting of collateral, for example, soft law would probably contravene those mandatory rules if it gave special payment priority to particular creditors because "[t]he equality of creditors norm is widely viewed as the single most important principle in American bankruptcy law." David A. Skeel, Jr., *The Empty Idea of "Equality of Creditors,"* 166 U. PA. L. REV. 699, 700 (2018).

199. SCHWARCZ, *supra* note 14, app., ch. I, art. 1(1). ("This Law applies where, by contract or otherwise, (a) the law of [this jurisdiction] governs . . . the debtor-creditor relationship between a State and its creditors . . .").

200. See Michael Bradley & Mitu Gulati, *Collective Action Clauses for the Eurozone*, 18 REV. FIN. 2045, 2045 (2014) (finding that the inclusion of supermajority-voting CACs in sovereign debt contracts actually leads to a lower cost of capital); cf. JOSEPH E. STIGLITZ ET AL., CTR. FOR INT'L GOVERNANCE INNOVATION, FRAMEWORKS FOR SOVEREIGN DEBT RESTRUCTURING 1 (2014) (arguing that uncertainty due to the absence of an effective debt-resolution framework "increases the costs of borrowing" for sovereigns).

201. See *supra* note 14 and accompanying text; see also SCHWARCZ, *supra* note 14, app., pmbl. ("The Purpose of this Law is to provide effective mechanisms for restructuring unsustainable sovereign debt so as to reduce (a) the social costs of sovereign debt crises, (b) systemic risk to the financial system, (c) creditor uncertainty, and (d) the need for sovereign debt bailouts, which are costly and create moral hazard.").

202. Schwarcz, *supra* note 45, at 347–48.

absence of standardisation.”²⁰³ She finds, however, that “sovereign bond contracts are not nearly as standardised as market participants and policy makers seem to suggest.”²⁰⁴ This inadvertent variation “can make contracts internally inconsistent, vulnerable to opportunistic lawsuits and errors of judicial interpretation. Variation could also make debt instruments less liquid, especially during periods of market stress.”²⁰⁵

To reduce variation, she advocates “a more centralised, modular approach to [sovereign debt] contracting, whereby a subset of widely-used non-financial terms would be produced by an authoritative third party (a public, private, or public-private body) and incorporated by reference in individual transactions.”²⁰⁶ The ability to include the Model Law as governing law would help to facilitate that modular approach.

The Model Law should also meet the standard of being clear and accessible. It has been clearly codified.²⁰⁷ It also has been fully vetted by many of the world’s leading experts in sovereign debt restructuring.²⁰⁸ And it is publicly available on the Internet, without charge.²⁰⁹

The Model Law additionally should meet the legitimacy standard of being either generally accepted, promulgated by a respected independent and unbiased organization, or manifestly fair. It is promulgated by CIGI, a highly respected independent and unbiased think tank.²¹⁰ Also, its key provisions, which focus on supermajority voting,²¹¹ reflect *generally accepted* aspirational best practices for sovereign debt restructuring. They parallel, for example, the supermajority-voting CACs²¹² proposed by the International Capital Market Association (ICMA),²¹³ which

203. Gelpern, *supra* note 83, at 23.

204. *Id.*

205. *Id.*

206. *Id.*

207. See SCHWARCZ, *supra* note 14.

208. See *id.* at 5 n.2 (naming the members of the International Insolvency Institute (III) Working Group on Sovereign Insolvencies and the CIGI ILRP Working Group on Cross-Border and Sovereign Insolvencies who vetted the Model Law).

209. See *generally id.* (stating that materials are “[a]vailable as free downloads at www.cigionline.org”).

210. See *supra* note 13 and accompanying text.

211. See SCHWARCZ, *supra* note 14, app., ch. III, art. 7 (“Voting on the Plan”); *cf. supra* note 194 (discussing supermajority voting).

212. See *supra* note 200 and accompanying text.

213. See *Collective Action Clauses*, INT’L CAP. MKT. ASS’N, <https://www>

are already included in numerous sovereign debt contracts.²¹⁴ Their inclusion does not appear to raise, and may actually lower, a debtor-state's funding costs.²¹⁵ The treaty establishing the European Stability Mechanism, an intergovernmental financial institution "[committed to] ensuring the financial stability of the euro area,"²¹⁶ even mandates that supermajority-voting CACs be included "in all new euro area [long-term] government securities."²¹⁷

The Model Law thus fits well into this Article's normative framework for choosing soft law as governing law.²¹⁸ Parties to sovereign debt contracts therefore should have the right to choose the Model Law as part of their governing law.²¹⁹ Reality, however, does not always follow scholarly norms. The legitimacy of choosing the Model Law as governing law and its political acceptability would be increased, for example, by also gaining sup-

.icmagroup.org/Regulatory-Policy-and-Market-Practice/Primary-Markets/primary-market-topics/collective-action-clauses/ [https://perma.cc/738D-4ZTC]. When included, such CACs would enable a specified supermajority, such as two-thirds or three-quarters, of the contracting parties to amend the principal amount, interest rate, maturities, and other critical repayment terms. Steven L. Schwarcz, *Sovereign Debt Restructuring: A Bankruptcy Reorganization Approach*, 85 CORNELL L. REV. 956, 1003–04 (2000).

214. See, e.g., Anna Gelpern, Professor of Law, Georgetown & Senior Fellow, Peterson Inst. for Int'l Econ., Presentation to PEIF Research Group Meeting: Sovereign Debt Contracts and Sovereign Debt Policy (Apr. 1, 2017), <https://piie.com/system/files/documents/gelpern20170401ppt.pdf> [https://perma.cc/RVZ3-RM9L] (observing based on IMF data that supermajority-voting CACs had been included in \$1.032 trillion of sovereign bonds as of October 2016).

215. See *supra* note 200 and accompanying text.

216. Treaty Establishing the European Stability Mechanism, at 2, Feb. 2, 2012, T/ESM 2012-LT/en.

217. *Id.* art. 12(3).

218. Although the above analysis does not demonstrate that the Model Law is manifestly fair, it does not need to because it satisfies at least one—if not two—of the other criteria for demonstrating legitimacy. Cf. Schwarcz, *supra* note 45, at 359–60 (discussing why the Model Law is not unfair to holdouts).

219. Because the Model Law focuses on sovereign debt restructuring, parties to sovereign debt contracts may well want to choose other law (e.g., the debtor-state's local law, or New York or English law) to apply absent a debt restructuring. This Article's framework would accommodate that. See *supra* note 30 and accompanying text.

port from sovereign debt stakeholders²²⁰ or from high-reputation international organizations like UNIDROIT and UNCITRAL.²²¹

B. INCORPORATING THE MODEL LAW BY REFERENCE

Under this Article's framework, sophisticated parties to business contracts should have the right to incorporate soft-law rules into the contract by reference if (1) that incorporation by reference does not create significant externalities (or the social benefits of that incorporation by reference are likely to exceed those externalities); and (2) those rules are clear and accessible.²²² Parties to sovereign debt contracts invariably are sophisticated.²²³ The Model Law is clear and accessible.²²⁴ The provisions of the Model Law should not create significant externalities.²²⁵ There is little doubt, therefore, that those parties should have the right to incorporate the Model Law by reference.²²⁶ Furthermore, because of its lower legitimacy

220. Pauwelyn et al., *supra* note 9, at 742 (observing that legitimacy "flows from [among] other sources . . . acceptance by affected stakeholders"); *supra* note 109 and accompanying text (discussing consultation with stakeholders as part of the process for obtaining trust, and hence legitimacy).

221. *Cf. supra* notes 113–15 and accompanying text (analyzing the extent to which such support would increase legitimacy and enforceability). Another way to increase the Model Law's legitimacy would be to persuade nations to enact legislation explicitly authorizing the Model Law to be chosen as governing law. *See supra* note 127 and accompanying text (observing that another way for soft law to achieve legitimacy is for national law explicitly to authorize it).

222. *See supra* notes 186–89, 196–200 and accompanying text.

223. *See supra* note 98 and accompanying text.

224. *See supra* notes 186–89 and accompanying text.

225. *See supra* notes 196–200 and accompanying text.

226. One might ask whether incorporating the Model Law by reference could introduce such a degree of discretion as to create legitimacy concerns. For example, the Model Law creates a voting process. Although that process is unlikely to require significant discretion, its Supervisory Authority might have to exercise minimal discretion. That exercise of discretion should not, however, undermine legitimacy; legitimacy is created by the parties agreeing to abide by decisions of the Supervisory Authority in accordance with the Model Law. *See* Tom R. Tyler & Gregory Mitchell, *Legitimacy and the Empowerment of Discretionary Legal Authority: The United States Supreme Court and Abortion Rights*, 43 DUKE L.J. 703, 718 (1994) (analyzing how the exercise of discretion is legitimized). In general, though, legitimacy is inversely proportional to discretion. *Cf.* Bryane Michael & Say-Hak Goo, *Hard Corporate Governance Law in a Soft Law Jurisdiction* (Univ. of H.K. Faculty of Law, Research Paper No. 2018/007, 2016), https://papers.ssrn.com/sol3/papers/cfm?abstract_id=3101276 [<https://perma.cc/M44M-MACR>] (explaining why corporate governance rules can be enhanced by being concrete and specific).

requirements,²²⁷ incorporating the Model Law by reference should be easier to accomplish than choosing the Model Law as governing law.

To the extent parties incorporate the Model Law by reference into new sovereign debt contracts, incorporation by reference should also be as effective as choice of law. Although soft-law incorporation by reference would be subject to applicable mandatory rules of local law, choice of law would be limited by private international law, which respects overriding mandatory rules of local law.²²⁸ As discussed, there may be little difference between such mandatory rules and overriding mandatory rules.²²⁹ Also, at least for new sovereign debt contracts, nothing in the Model Law should contravene either category of mandatory rules. Furthermore, for reputational and other reasons, parties to sovereign-debt and other business contracts may not want to disobey any such mandatory rules.²³⁰

However, incorporating the Model Law by reference into *existing* sovereign debt contracts could be more difficult than choosing the Model Law as the governing law of those contracts. The Model Law's supermajority voting would contravene contracts that require unanimity to change key payment terms such as principal amount, interest rate, and maturities.²³¹ Although it ultimately would be a matter of contract interpretation, amending that unanimity requirement by incorporating the Model Law by reference would likely itself require a unanimous vote of the contracting parties.²³²

227. Compare *supra* Parts II.C.1–4 (discussing the legitimacy requirements for choosing soft law as governing law), with *supra* notes 182–86 and accompanying text (discussing the de minimis legitimacy requirements for incorporating soft law by reference).

228. See *supra* note 87 and accompanying text (distinguishing between mandatory rules and overriding mandatory rules in private international law).

229. See *supra* notes 178–82 and accompanying text (noting how this distinction is less important in practice).

230. See *supra* notes 179–81 and accompanying text (explaining the reputational reasons for following mandatory rules).

231. See *supra* note 213 and accompanying text (explaining the supermajority provisions promoted by the International Capital Market Association).

232. A related question would be whether the proposed amendment incorporating the Model Law by reference is specific enough to overcome the contractual language requiring unanimity for changing those terms. See Royce de R. Barondes, *Side Letters, Incorporation by Reference and Construction of Contractual Relationships Memorialized in Multiple Writings*, 64 BAYLOR L. REV. 651, 709 (2012) (“Another commonly applied principle of contract interpretation is

In contrast, the parties to an existing sovereign debt contract technically should have the right to choose the Model Law as governing law by whatever requisite non-unanimous (e.g., majority) vote allows amendment of the governing law. Once chosen as governing law, the Model Law's supermajority voting would, by its terms, supplant the unanimity requirement for changing the key payment terms.²³³ Besides raising an issue of first impression,²³⁴ the effectiveness of the Model Law's supermajority voting to supplant the unanimity requirement would be subject to any applicable overriding mandatory rule of local law, such as sanctity of contract.²³⁵ Any such mandatory rule that otherwise preserves unanimity, however, arguably should not protect rent-seeking holdouts, such as an investor that purchases sovereign debt at a deep discount in order to demand payment in full lest it veto a debt restructuring.²³⁶

Although this Article uses the Model Law to illustrate soft law's application, it does not analyze the extent to which choosing the Model Law as governing law or incorporating it by reference could solve the problem of unsustainable sovereign debt.²³⁷ Nonetheless, that choice of law or incorporation by reference should at least help to solve that problem and the problem of

that, where there is a conflict between a general provision and a specific provision, the latter controls.”).

233. See *supra* note 194 (discussing how the Model Law would allow supermajorities to change contract terms).

234. That issue could be framed in the abstract as follows. Assume a business contract requires a majority vote to amend its governing law but a unanimous vote to change certain payment terms. If the requisite majority votes to change the governing law to one that explicitly allows supermajority voting to change those payment terms, would that be effective to enable supermajority voting to change those payment terms?

235. Recall that private international law respects overriding mandatory rules of local law. See *supra* note 87 and accompanying text.

236. See Schwarcz, *supra* note 45, at 374–76; see also *supra* note 197 (arguing that limitations on externalities should not protect rent-seeking holdouts). Rent-seeking means seeking to increase one's share of existing wealth without creating new wealth. See Christina Majaski, *Rent Seeking*, INVESTOPEDIA (Aug. 28, 2019), <https://www.investopedia.com/terms/r/rentseeking.asp> [https://perma.cc/3NU7-K7DP].

237. Professor John Pottow suggested at the Michigan Law Conference, for example, that attempts to incorporate by reference or to choose the Model Law might signal to creditors that the debtor-state implicitly contemplates a debt restructuring, motivating them to block the attempt. Michigan Law Conference, *supra* note 4. Professor Henry Gabriel also observed that such attempts might face the hurdle that the Model Law is new, potentially unfamiliar, and lacks a successful track record. *Id.*

inadvertent variation.²³⁸ It also should help to make the Model Law more generally accepted, which would increase its legitimacy and incrementally help to develop sovereign-debt-restructuring norms.²³⁹ Even the UCP, the leading example of soft law having sufficient legitimacy to be chosen as governing law,²⁴⁰ was originally promulgated in 1933 and took decades to become generally accepted.²⁴¹

CONCLUSIONS

This Article analyzes an innovative use of soft law²⁴²: as the governing “law” of business contracts. The topic is timely and important because parties to financial and commercial transactions increasingly look to soft law to guide their conduct, yet soft law’s lack of enforceability can undermine predictability. Allowing parties to choose soft law as governing law would increase predictability by making the soft law enforceable against those parties.

Starting with a handful of narrow precedents, the Article builds a normative framework for choosing soft law as governing law. As a foundation, the Article analyzes conflicts of law, party autonomy, and the fundamental underpinnings of choice of law. It then tempers that analysis by examining how the limits of freedom of contracting should restrain party autonomy. Thereafter, it examines the legitimacy needed to persuade governments to enforce a soft-law choice of law. Based on that analysis, the Article argues that sophisticated parties should have the right to choose soft law to govern all or part of their business contracts if three conditions are met: (1) the choice of soft law does not create significant externalities (or its social benefits are

238. See *supra* notes 201–07 and accompanying text (noting arguments for the benefits of the Model Law as part of the governing law).

239. See *supra* note 56 and accompanying text (arguing that the adoption of soft law can provide an incremental and practical approach to developing norms, which governments may later codify into hard law); *supra* notes 106–08 and accompanying text (explaining the importance of legitimacy in allowing enforcement).

240. See *supra* notes 116–19 and accompanying text (noting the widespread acceptance of the UCP).

241. FRANS P. DE ROOY, DOCUMENTARY CREDITS 9–11 (1984).

242. Recall that soft law refers to a set of rules not yet enacted into law by any governmental body. See *supra* note 6 and accompanying text (recounting the general consensus among experts at the Michigan Law Conference); see also *supra* note 11 and accompanying text (observing that using soft law as governing law would be novel).

likely to exceed those externalities); (2) the soft law is clear and accessible; and (3) the soft law has sufficient legitimacy by virtue of being generally accepted, promulgated by a respected independent and unbiased organization, or manifestly fair.

The Article also compares the right to choose soft law as governing law with the right merely to incorporate that soft law by reference into business contracts. Sophisticated parties should have that lesser right even if the soft law lacks legitimacy, so long as the soft law's rules could have been written directly into the contract and made part of its terms.

Finally, the Article applies its analysis to a real-world example of soft law: a sovereign-debt-restructuring model law proposed by an independent and non-partisan international think tank. This helps to illustrate other differences between choice of law and incorporation by reference. For example, soft law that is incorporated by reference would be subject to all mandatory rules of local law, whereas soft law chosen as governing law would only be subject to "overriding" mandatory rules of local law. That difference, however, can be subtle; courts do not always clearly distinguish mandatory rules of local law and overriding mandatory rules.²⁴³

243. See, e.g., *supra* notes 86–93, 174–82 and accompanying text (explaining why courts may well interpret a mandatory local-law rule protecting infants as an overriding mandatory local-law rule and noting reputational reasons why private actors may adopt mandatory rules).

APPENDIX A—APPLYING THE FRAMEWORKS TO OTHER
SOFT-LAW EXAMPLES

This Appendix applies the Article's choice-of-law and incorporation-by-reference frameworks²⁴⁴ to other soft-law examples. To avoid repetition, the examples assume (with one exception²⁴⁵) sophisticated parties to business contracts.

A. APPLYING THE FRAMEWORKS TO THE INCOTERMS RULES

The Incoterms Rules are a codification by the ICC²⁴⁶ of internationally accepted definitions and rules of interpretation for common commercial terms used in contracts for the sale of goods.²⁴⁷

Parties should have the right to choose the Incoterms Rules as governing law if (1) that choice of law does not create significant externalities (or the social benefits of that choice are likely to exceed those externalities); (2) the Incoterms Rules are clear and accessible; and (3) the Incoterms Rules have legitimacy by virtue of being either generally accepted, promulgated by a respected independent and unbiased organization, or manifestly fair. That choice of law would be unlikely to create significant externalities because the Incoterms Rules represent internationally accepted definitions and rules of interpretation. The Incoterms Rules are clear and accessible because they have been codified by the ICC and are available online (albeit for a relatively modest fee) from the ICC Store.²⁴⁸ The Incoterms Rules should have legitimacy because (among other reasons) the ICC is a highly respected neutral organization.²⁴⁹ Accordingly, parties

244. The choice-of-law framework is set forth *supra* notes 157–62 and accompanying text. The incorporation-by-reference framework is set forth in Part III.C.

245. See *infra* note 257 and accompanying text (describing soft law written by credit card associations).

246. Recall that the ICC is the International Chamber of Commerce, a private-sector organization. See *supra* notes 118–19 and accompanying text (introducing the ICC).

247. See *Incoterms Rules*, INT'L CHAMBER OF COMMERCE, <https://iccwbo.org/resources-for-business/incoterms-rules/> [https://perma.cc/QX4Q-SBEQ].

248. See *Incoterms 2020*, INT'L CHAMBER OF COMMERCE, https://2go.iccwbo.org/incoterms-2020-eng-config+book_version-Book/ [https://perma.cc/QX4Q-SBEQ] (stating the fee as 40.00 euros for the e-book version and 45.00 euros for the print edition).

249. See *supra* notes 119, 136, 140–42 and accompanying text (explaining the ICC's global reputation).

should have the right to choose the Incoterms Rules as governing law.

Parties should have the right to incorporate the Incoterms Rules by reference if (1) that incorporation by reference does not create significant externalities (or the social benefits of that incorporation by reference are likely to exceed those externalities); and (2) those Rules are clear and accessible. The prior paragraph already has established that the Incoterms Rules should satisfy those conditions. Accordingly, parties should have the right to incorporate those Rules by reference.

B. APPLYING THE FRAMEWORKS TO THE TRANSLEX-PRINCIPLES

The TransLex-Principles are a Web-based synthesis of principles and rules of transnational commercial law, collected and organized in the form of “black-letter law” by the Center for Transnational Law (CENTRAL) at the University of Cologne School of Law, Germany.²⁵⁰

Parties should have the right to choose the TransLex-Principles as governing law if (1) that choice of law does not create significant externalities (or the social benefits of that choice are likely to exceed those externalities); (2) the TransLex-Principles are clear and accessible; and (3) the TransLex-Principles have legitimacy by virtue of being either generally accepted, promulgated by a respected independent and unbiased organization, or manifestly fair. That choice of law would be unlikely to create significant externalities because the TransLex-Principles are based on *lex mercatoria*,²⁵¹ a system of principles and rules of behavior that has evolved consensually among merchants.²⁵² The TransLex-Principles are clear and accessible because they are available online, for free, and are codified as black-letter

250. See *Translex-Principles*, TRANS-LEX, [https://www.trans-lex.org/principles/of-transnational-law-\(lex-mercatoria\)](https://www.trans-lex.org/principles/of-transnational-law-(lex-mercatoria)) [<https://perma.cc/TW3G-HSQF>]. Professor Dr. Klaus Peter Berger is one of the principal scholars behind CENTRAL. See Prof. Dr. Klaus Peter Berger, *L.L.M.*, DEUTSCHE INST. FÜR SCHIEDSGERICHTSBARKEIT, <http://www.disarb.org/en/0/mitglieder/selbstdarstellung/klaus-peter-berger-id51> [<https://perma.cc/HZP8-UNGA>].

251. See Klaus Peter Berger, *The Lex Mercatoria (Old and New) and the Translex-Principles*, TRANS-LEX, https://www.trans-lex.org/the-lex-mercatoria-and-the-translex-principles_ID8 [<https://perma.cc/8W2S-GAC3>].

252. See, e.g., U.C.C. § 1-103 cmt. 2 (AM. LAW INST. & UNIF. LAW COMM'N 2017). The UCP itself is an ICC codification of the *lex mercatoria* of international letters of credit. See Corne, *supra* note 117, at 55 (recognizing the UCP as a manifestation of *lex mercatoria*, codifying customs, and practices of banks).

law.²⁵³ The TransLex-Principles also should have legitimacy because they are promulgated by the University of Cologne School of Law, a respected and neutral academic institution. Accordingly, parties should have the right to choose the TransLex-Principles as governing law.

The prior paragraph has already established that the TransLex-Principles should satisfy the conditions for incorporation by reference. Accordingly, parties should have the right to incorporate those Principles by reference.

C. APPLYING THE FRAMEWORKS TO PROBLEMATIC EXAMPLES OF SOFT LAW

Soft-law rules tend to be aspirational or to reflect best practices,²⁵⁴ but even “best practices” can be problematic.²⁵⁵ To show the limits of the Article’s frameworks, consider the following problematic examples of soft law. For each example, parties should have the right to choose that soft law as governing law if the framework’s three conditions are met: (1) that choice of law does not create significant externalities (or the social benefits of that choice are likely to exceed those externalities); (2) the soft law is clear and accessible; and (3) the soft law has legitimacy by virtue of being either generally accepted, promulgated by a respected independent and unbiased organization, or manifestly fair. They also should have the right to incorporate that soft law by reference if conditions (1) and (2) are met, without the need to satisfy condition (3).

In the first problematic example, assume condition (1) is not met because choosing the proposed soft law would create significant externalities (and the social benefits of that choice would not be likely to exceed those externalities). This assumption would be atypical for a choice of soft law in business contracts.²⁵⁶ It might occur, however, if the soft law is prepared by a large

253. See *supra* note 250.

254. See *supra* note 6 and accompanying text (reflecting on the consensus opinion of soft law experts at the Michigan Law Conference).

255. See, e.g., Patricia Katopol, *Maybe Best Practices Aren’t: How Survivorship Bias Skews Information Gathering and Decision-Making*, 32 LIBR. LEADERSHIP & MGMT., Nov. 2017, at 1 (discussing how best practices can be biased).

256. See *supra* note 198 (developing this explanation more fully); see also *supra* notes 196–200 and accompanying text (explaining why soft law choice of law would be unlikely to create significant externalities).

trade association dealing with consumers.²⁵⁷ In that case, regardless of the other conditions, the parties should not have the right to choose that soft law as governing law. Nor should they have the right to incorporate that soft law by reference.

In the second problematic example, assume condition (2) is not met because the proposed soft law is not clear and accessible. This might occur, for example, if that soft law is not clearly codified or not publicly available. In that case, regardless of the other conditions, the parties should not have the right to choose that soft law as governing law. Nor should they have the right to incorporate that soft law by reference.

In the third problematic example, assume condition (3) is not met because the proposed soft law lacks legitimacy. This might occur, for example, if that soft law is neither generally accepted, promulgated by a respected independent and unbiased organization, or manifestly fair. In that case, regardless of the other conditions, the parties should not have the right to choose that soft law as governing law. Nonetheless, they should have the right to incorporate that soft law by reference into their business contract if conditions (1) and (2) are met. Incorporation by reference does not require the legitimacy condition required for choice of law.

257. *E.g.*, Symeonides, *supra* note 167, at 126 (discussing soft-law rules drafted by credit-card associations and applicable to credit-card holders who had no participation or input in the drafting of those norms and observing that it “is not unreasonable to assume that in drafting these norms, the ‘association’ was not overly solicitous of the interests of [the] credit card holders”). The above example is the one exception to this Appendix’s assumption of sophisticated parties to business contracts. *See supra* text accompanying note 245.