

Future Directions of Legal Harmonisation and Law Reform : Stormy Seas or Prosperous Voyage ?

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*“Quem quer passar além do Bojador,
tem que passar além da dor.” ***

(Fernando Pessoa, *Mar Português*)

INTRODUCTION

The current context of the legal harmonisation process differs greatly from the conditions under which the process was started more than a century ago. Both rule-making and domestic implementation have become more complex. A wide range of tools may now be used to formulate and implement uniform rules. The aim of enhancing legal certainty and predictability is still the main driving force of international harmonisation efforts. However, experience with legal harmonisation and the growing interest in legal writings for the relationship between law and economics have produced additional arguments. Of particular relevance are arguments relating to the positive role of legal harmonisation and law reform in reducing transaction costs and facilitating business worldwide.

Furthermore, the work of legal harmonisation now involves a large number of organisations – both governmental institutions and private sector representatives. Also, the rise of supranational organisations, of which the European Union provides the ultimate example, has added a new element to the law-making process, with possibly far-reaching consequences.

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** In Jonathan Griffin’s translation, “whoever means to sail beyond the Cape must double sorrow – no escape” (Fernando PESSOA, *Selected Poems*, Jonathan Griffin (Ed.) 2nd ed., Penguin, London (2000)). A headland on the northern coast of Western Sahara, Cape Bojador is feared for its dangerous winds and difficult navigability. Numerous European vessels had disappeared in that region by the time the Portuguese navigator, Gil Eanes, finally succeeded in doubling the cape, in 1434, thereby opening the seas for European trade routes to Africa and India.

Finding adequate responses to the challenges that lie ahead requires a clear understanding of law reform, political sensitivity, imaginative strategic thinking, co-operative efforts and constant engagement. I believe that the resources already invested by member States in the legal harmonisation and law reform process amply justify this continued effort.

I. – PURPOSE AND SCOPE OF LEGAL HARMONISATION AND LAW REFORM

A. The changing environment and methods of legal harmonisation

The origins of the legal harmonisation process can be traced back to the second half of the 19th century. The influence of the major European codifications¹ was already making itself felt in nearly all continents, even in countries that had no history of colonial ties to the European continent. What statutory codification did for most countries in continental Europe and their counterparts overseas was achieved in common law jurisdictions by the wide dissemination of concepts and rules originating in the English legal tradition, producing a remarkably harmonious, albeit not uniform, legal family. The ultimate goal for many, however, was the unification of private law, which, in the words of Lord Justice Kennedy, would bring “enormous gain to civilised mankind.”²

The establishment, in 1926, of the International Institute for the Unification of Private Law (UNIDROIT) came at a time when the ideal of legal unification seemed unquestionable. Those early years of institutionalised legal harmonisation have been referred to as “the republic of scholars”, and in fact, the early work of UNIDROIT was developed “in an unconstrained, truly academic discourse among experts.”³ Recent years have seen significant changes and challenges to the traditional spirit, the old methods, the basic assumptions and the habitual players in the international harmonisation field.

¹ In particular the French *Code Civil* (1804) and the German *Bürgerliches Gesetzbuch* (1896, entered into force in 1900).

² “Conceive the security and the peace of mind of the shipowner, the banker, or the merchant who knows that in regard to his transactions in a foreign country the law of contract, of moveable property, and of civil wrongs is practically identical with that of his own country.” (Lord Justice KENNEDY, “The Unification of Law”, *Journal of the Society of Comparative Legislation*, vol. 10 (1909), 212 et seq. (214-15)).

³ Herbert KRONKE, “Methodical Freedom and Organisational Constraints in the Development of Transnational Law”, *Loyola Law Review*, No. 51 (2005), 287 et seq. (288-289).

1. Traditional assumptions, new players

The early era of legal harmonisation, which lasted until after World War II, has also been described as “regionalism in disguise”. Indeed, despite their universal vocation and aspirations, the activities of bodies such as the Hague Conference on Private International Law (“the Hague Conference”) or UNIDROIT “were confined to Europe for a long time.”⁴

What followed was a period of rising “universalism”.⁵ New organisations were established, including the United Nations Commission on International Trade Law (UNCITRAL), in 1966, and several other United Nations bodies. More countries outside Europe joined the Hague Conference and UNIDROIT, the number of ratifications or accessions to pre-existing treaties and conventions greatly increased, and new instruments were developed and gained worldwide acceptance.⁶

We now seem to have entered a third phase of legal harmonisation, which has been dubbed “the dawn of inter-regionalism”.⁷ Regional integration organisations, in particular the European Union, are increasingly active in the field of legal harmonisation. To the extent that these organisations assume exclusive competence over certain areas of law, they may also claim the authority to negotiate international uniform law instruments with States outside their region.⁸ In the future, this trend may affect the international rule-making process in a manner not yet anticipated, including, if organisations from other regions follow suit, by changing “the entire institutional framework of international negotiations into inter-regional negotiations.”⁹

⁴ Jürgen BASEDOW, “Worldwide Harmonization of Private Law and Regional Economic Integration – General Report”, Acts of the Congress to Celebrate the 75th Anniversary of the Founding of the International Institute for the Unification of Private Law (UNIDROIT), *Unif. L. Rev. / Rev. dr. unif.* (2003), 31 et seq. (32).

⁵ *Ibid.*, 33.

⁶ E.g., the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (“the New York Convention”) or the *United Nations Convention on Contracts for the International Sale of Goods* (“CISG”).

⁷ BASEDOW, *supra* note 4, 35.

⁸ This is already the case in the area of private international law since the European Union joined the Hague Conference.

⁹ BASEDOW, *supra* note 4, 36.

2. Criticism of the harmonisation process

The combined production of all organisations involved in private law rule making is impressive. Some even fear that, given the multiplicity of harmonisation projects, the process may have reached saturation point.¹⁰ However, at a global level, the truly successful binding instruments – measured in terms of actual ratifications or domestic enactments – remain the minority. This paradox has produced some pessimism about the legal harmonisation process and calls for a re-think of its goals and methods. There is a widely shared perception that “more harmonisation of law is useful” but that “in the light of practical difficulties experienced in the past new ways have to be explored in order to achieve that result.”¹¹

(a) Shortcomings of hard law

The techniques used by formulating agencies operate at different levels and involve different types of compromise or agreement to differ. They fall into three broad categories: *legislative* (conventions, model laws and model legislative or treaty provisions), *explanatory* (legislative guides and legal guides for use in legal practice), and *contractual* (standard contract clauses and rules).

Conventions have been the primary vehicle for the international unification of domestic private law. However, the obvious advantages of having a uniform text in force in all Contracting States are partly offset by a number of well-known limitations. Depending on the country, the process of ratification may require a number of formal steps, involve various authorities and take several years to conclude. This leads to a long interim period between the adoption of international conventions and their entry into force, as well as a very slow pace of domestic implementation. Another problem is that international conventions are difficult to amend in instances requiring

¹⁰ “In fact, one should worry at the prospect that the countless current projects of legal unification and harmonization could come to fruition as complete texts and that the stream of such texts might flow down to the already overburdened mills of national legislative organs. Above all, one must ask whether the ever more intricate patchwork of uniform law might not at the end overwhelm the capacity of practice to process new norms” (Heinz KÖTZ, “Rechtsvereinheitlichung – Nutzen, Kosten, Methoden, Ziele”, *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, vol. 50 (1986), 2 et seq. (5)).

¹¹ Arthur S. HARTKAMP, “Modernisation and Harmonisation of Contract Law: Objectives, Methods and Scope”, Acts of the Congress to Celebrate the 75th Anniversary of the Founding of the International Institute for the Unification of Private Law (UNIDROIT), *Unif. L. Rev. / Rev. dr. unif.* (2003), 81 et seq. (82).

accommodation to economic change or evolution of practice or technology.¹² Then, once amendments are agreed upon, there is also the risk that amending protocols may not be ratified by all the original signatory States, resulting in a sometimes complex patchwork of Contracting Parties.

The rigidity of the treaty-making process, and the lack of flexibility – if any – in adapting to domestic reality, often discourage States from adhering to international conventions.¹³ But there are also other reasons that explain why the task of promoting adoption of binding international instruments is becoming increasingly difficult. Like any other product of human labour, international conventions are not perfect,¹⁴ and the harmonisation process itself is full of hurdles. The search for consensus between different legal traditions often means that the preferred rule in a given legal system may be mitigated or abandoned altogether, especially when it is unlikely that it will obtain the support of other legal systems. International conventions then become an easy target for criticism by domestic readers, who point out the superiority of national law over the product of international negotiations – if not in substance, at least in style.¹⁵ Such criticism is often imbalanced, or oblivious to the deficiencies of the domestic legislative process.¹⁶ Nevertheless, it may effectively frustrate the harmonisation process.

¹² “As time changes and the law does not, “codifications become the enemy of substantive reform. In today’s world, any code that does not build a process for prompt and sustained reconsideration into its structure becomes part of the problem, not part of the solution” (Arthur ROSETT, “Unification, Harmonization, Restatement, Codification and Reform in International Commercial Law”, *The American Journal of Comparative Law* (1992), vol. 40, 683 et seq. (688)).

¹³ “At the international level, it is harder to persuade States to accede to a convention if the ‘price’ is so high at the outset. And, if this initial hurdle is overcome and a reasonable number of States do accede, amendment of that original convention then requires agreement from a much larger group of States if uniformity is to be maintained” (Alan D. ROSE, “The Challenges for Uniform Law in the Twenty-First Century”, *Unif. L. Rev. / Rev. dr. unif.* (1996), 9 et seq. (13)).

¹⁴ As pointed out by an experienced international negotiator, “of necessity unification and harmonization proceed slowly, by small steps, with imperfect achievements. It is unrealistic to expect anything approaching perfection” (E. Allan FARNSWORTH, “Unification and Harmonization of Private Law,” *Canadian Business Law Journal*, vol. 27 (1996), 48 et seq. (62)).

¹⁵ “These conventions are inevitably and confessedly drafted as multi-cultural compromises between different schemes of law. Consequently they will normally have less merit than most of the individual legal systems from which they have been derived” (J.S. HOBHOUSE, “International Conventions and Commercial Law: the Pursuit of Uniformity”, *The Law Quarterly Review*, vol. 106 (1990), 530 et seq. (533)).

¹⁶ In the words of another experienced commentator, “those who pick to pieces the open texture or verbal infelicities of an international convention rarely pause to consider how, when legislation prepared in a single legal system is generally so verbose, obscure and generally badly drafted, one can reasonably expect more of the product of many hands drawn from widely differing

Legal unification through binding instruments has also been criticised for producing “sub-optimal”, vaguely drafted rules for the purpose of achieving political compromise.¹⁷ Some suggest that it would be better simply to allow companies to “elect in and out of national commercial law systems” so that “States thus could compete for legal business on the basis of the attractiveness of their rules and dispute resolution procedures, rather than coerce their subjects to follow any one system of commercial law.”¹⁸

(b) *Unification: why and for whom?*

The legal harmonisation process also suffers from the distorted perception that it is a purely theoretical exercise, deprived of practical value and ultimately pursued only for the delight of academics or the occupation of bureaucrats. Legal harmonisation has traditionally been justified by the assumption that it removes “legal obstacles to trade” and therefore contributes to economic growth. Unfortunately, this postulate of the international harmonisation effort¹⁹ has never been empirically substantiated, and may in fact have given “too much weight to the legal aspect of trade in general and the importance of a unified legal background in particular.”²⁰

On a different but related note, legal unification through binding instruments has also been accused of being the product of “private legislators” heavily influenced by lobbying groups seeking to promote their economic interests, and working in an environment of scant accountability.²¹

legal systems with different cultures, legal structures, and methods of legal reasoning and decision making, entailing maximum flexibility, co-operation and compromise” (Roy GOODE, “Reflections on the Harmonisation of Commercial Law”, *Unif. L. Rev. / Rev. dr. unif.* (1991), 54 et seq. (73)).

¹⁷ Steven WALT, “Novelty and the Risks of Uniform Sales Law,” *Virginia Journal of International Law Association*, vol. 39 (1999), 671-705.

¹⁸ Paul B. STEPHAN, “The Futility of Unification and Harmonization in International Commercial Law”, *Virginia Journal of International Law Association*, vol. 36 (Spring, 1999), 743 et seq. (789).

¹⁹ For example, in the preamble to Resolution 2205 (XXI), which established UNCITRAL, the United Nations General Assembly recalled its “belief” that “divergences arising from the laws of different states in matters relating to international trade constitute one of the obstacles to the development of world trade.”

²⁰ HARTKAMP, *supra* note 11, 82.

²¹ See Paul B. STEPHAN, “Accountability and International Lawmaking: Rules, Rents and Legitimacy,” *Northwestern School of Law Journal of International Law & Business*, vol. 17 (1997), 681 et seq.; see also Alan SCHWARTZ / Robert E. SCOTT, “The Political Economy of Private Legislatures”, *University of Pennsylvania Law Review*, vol. 143 (1995), 9 et seq.

B. Re-affirming legal harmonisation in the 21st century

Doubts about the harmonisation process are not entirely new, and not every criticism is justified or reasonable. However, at times of growing budgetary constraints, claims that legal harmonisation leads to legal fragmentation and economic inefficiency need to be taken seriously. Thus, it is wise for formulating agencies to “welcome” and take into account any scrutiny of its “approaches” and “toolbox”.²² Finding adequate responses to sensible criticism may demand action at various levels.

1. The need to revise and improve working methods

As a starting point, it is important for formulating agencies to recognise the limits of the instruments they produce and the possible shortcomings of their working methods. It has been said that the future of harmonisation of contract law, for instance, will consist of “some kind of interaction between the binding law of international conventions or directives/ordinances on the one hand and the new phenomenon of Principles of Contract Law on the other hand.”²³ In other words, formulating agencies need to become more flexible in choosing instruments and in conceiving ways in which “hard” and “soft” law may best supplement one another.

(a) Choice and nature of instrument

In the early days, there may have been too much emphasis on the use of conventions, which may be partly explained by the ideal quest for legal codification, which was the intellectual cradle of the unification process. The complexity of today’s world suggests, however, that conventions should be used with parsimony, preferably in areas of mandatory law. Overuse of conventions, leading to a low level of ratification or lack of interest by the major trading nations, carries with it the risk of discrediting the treaty-making process. International organisations active in the field of legal harmonisation seem to have recognised that international conventions should be reserved for special cases that require uniformity. This trend should continue. If a greater degree of flexibility is desired and is appropriate to the subject matter under consideration, a different unification technique would, in most cases, be preferable.

²² KRONKE, *supra* note 3, 295.

²³ HARTKAMP, *supra* note 11, 82.

When an international convention is the instrument of first choice, it is also important to consider the amendment process. In principle, draft amendments can be proposed by the same organisation that developed the original instrument. Permanent bodies with universal membership, such as the General Assembly of the United Nations, might conceivably play a greater role in the future as substitutes for the costly and cumbersome diplomatic conferences, conceivably even for the amendment of instruments prepared in other fora. At this point in time, however, States are unlikely to accept any abbreviated procedure whereby amendments would automatically enter into force without the need for domestic ratification or acceptance.²⁴

Model laws are a more appropriate vehicle for the modernisation and unification of national laws whenever it is expected that States will wish or need to adjust the text of the model to accommodate local requirements that vary from system to system, or where strict uniformity is not necessary. It is precisely this flexibility that makes a model law potentially easier to negotiate than a text containing obligations that cannot be altered. UNCITRAL has had long and largely satisfactory experience with the production of model laws, some of which have become landmarks in their specific areas.²⁵ The recently adopted *UNIDROIT Model Law on Leasing*²⁶ is UNIDROIT's second experience with the preparation of a model law, helping to fill a gap in the Institute's record of achievements that has thus far been regretted.²⁷

Owing to its flexible structure, UNIDROIT is well suited to the preparation of model laws and similar instruments. UNIDROIT might also consider exploring

²⁴ The controversy over a proposed amendment procedure for the 2005 *United Nations Convention on the Use of Electronic Communications in International Contracts* showed that, despite some growing sympathy for simplified amendment procedures, several States are still reluctant to relinquish their sovereignty in this manner (see United Nations Commission on International Trade Law, Thirty-eighth session (Vienna, 4-15 July 2005), Summary record of the 804th meeting (U.N. document A/CN.9/SR.804), paras. 33-81; and *ibid.*, Summary record of the 805th meeting (U.N. document A/CN.9/SR.805), paras. 1-21).

²⁵ *E.g.*, the UNCITRAL *Model Law on International Commercial Arbitration* (1985), the UNCITRAL *Model Law on Electronic Commerce* (1996), or the UNCITRAL *Model Law on Cross-Border Insolvency* (1997).

²⁶ The adoption of the Model Law by a joint session of the UNIDROIT General Assembly and the Committee of governmental experts for the preparation of a draft model law on leasing (Rome, 10-13 November 2008) provided the first opportunity in the history of UNIDROIT for the Institute's full membership to become involved in the preparation of a legal instrument other than within the framework of a diplomatic conference.

²⁷ Within UNIDROIT, until 2002 the "phenomenon of the model law [had] not flourished yet" (HARTKAMP, *supra* note 11, 81).

the flexibility of model laws to a greater extent than UNCITRAL, for instance, has done. Greater use of variants and alternative solutions may help accommodate particular concerns of different legal traditions. Future model laws could indeed contain partial variants for adoption in different legal systems.

Alternatively, where the negotiation of a global instrument does not seem to be feasible, formulating agencies could co-operate more closely with regional organisations in developing regional models, along the lines of assistance provided by UNIDROIT in the preparation of the OHADA draft Uniform Act on Contract Law. Such assistance would be of significant value even for regions showing greater legal uniformity (such as the MERCOSUR or Andean regions), as it could avoid the crystallisation of regional solutions that drift away from international trends.

UNIDROIT has not yet prepared legislative guides or recommendations. Nevertheless, these techniques would seem to be ideally suited for an organisation with a flexible structure such as the Institute's. UNIDROIT could also prepare comprehensive legislative guides for the implementation of its various instruments.

The experience gained with the *UNIDROIT Principles of International Commercial Contracts* and the *ALI/UNIDROIT Principles of Transnational Civil Procedure* demonstrates that "the formulation of international rules of general law that are of a higher level of abstraction is best left to scholars," as Governments find it "of little interest to engage in a project not intended to lead to a legally operative instrument."²⁸ Products of this nature, and products similar to what in UNCITRAL practice are called "Legal Guides", are ideally suited to an organisation like UNIDROIT. UNIDROIT would also be an appropriate forum for the formulation of model contracts or model rules. When it is not feasible or necessary to develop a standard or model set of contract rules, an alternative may be a *legal guide* giving explanations in respect of contract drafting.²⁹

(b) *Participation in the rule-making process*

From an institutional point of view, it is important to consider the role of the private sector in the harmonisation of laws. The usefulness of standard clauses and contract terms in the creation of a "common language of inter-

²⁸ KRONKE, *supra* note 3, 291.

²⁹ Such as the *UNIDROIT Guide to International Master Franchise Arrangements* (Second Edition, 2007).

national trade” is well-known. The International Chamber of Commerce (ICC) and other, similar institutions have made a remarkable contribution in this field. Most formulating agencies have, over the years, maintained a very good level of co-operation with the ICC and nongovernmental organisations in general, and they have often participated in the work of intergovernmental bodies. However, an exchange of ideas out of the formal context of intergovernmental meetings, in the form, for instance, of more or less periodic briefings with the private sector, could be explored further. Consultations of this type might offer a meaningful forum for identifying practical needs for further harmonisation and devising the best ways to approach them. Enhanced transparency of proceedings, for example, by issuing press releases or reporting the results of such consultations, could help ease possible concerns about undue influence by lobbying groups.

Formulating agencies are still too closely associated with the romantic and somewhat impractical “republic of scholars”. They need to address this “image problem” if they wish to re-affirm their role in the years to come. One avenue that formulating agencies could explore further would be to make more use of economic impact studies before taking up specific projects.³⁰ This would make it easier to gain the support of private sector representatives and legal practitioners for proposed new projects.

Formulating agencies could also join forces to launch a broad study on the economic benefits of legal harmonisation in general.³¹ Paradoxically, the extensive contacts between formulating agencies and the academic world could be particularly useful in this type of study. The availability of general economic impact studies may be instrumental in removing preconceived ideas about the harmonisation process and gaining domestic support for specific uniform law projects.

2. Focus on domestic law reform

Facing up to criticism of the uniform law process provides an opportunity for formulating agencies to renew their methods and refocus their work in a long-term perspective. One aspect, as described above, is closer scrutiny of

³⁰ As was done by UNIDROIT in connection with the Cape Town Convention (see Heywood W. FLEISIG, “The Proposed UNIDROIT Convention on Mobile Equipment: Economic Consequences and Issues”, *Unif. L. Rev. / Rev. dr. unif.* (1992), 253 et seq.).

³¹ Such a project could have several of the elements proposed by Jeffrey Wool at UNIDROIT’s 75th Anniversary Congress (Jeffrey WOOL, “Economic Analysis and Harmonised Modernisation of Private Law”, *Unif. L. Rev. / Rev. dr. unif.* (2003), 389 et seq.)

unification *stricto sensu* by incorporating economic analysis in both rule-making and promotion. Another aspect relates to the interplay between the international harmonisation process, as traditionally understood, and domestic law reform.

The pursuit of harmonisation has traditionally focused on transactions that take place entirely or primarily in the international sphere. It has not yet fully plumbed the depths of the need for domestic law reform in transition economies and developing countries, particular in the era of globalisation.

(a) *Laws, institutions and economics*

New institutional economics pays increasing attention to the impact of the legal and regulatory framework on economic activity. Modern economic theory associates economic development with the quality of social institutions.³² Outdated laws and inadequate mechanisms for the enforcement of legal rights are now recognised as generating economic inefficiency and hindering sustainable economic development.

All market activities involve “transaction costs”.³³ Legal inefficiency may take the form of rules that allocate rights inefficiently, thus leading to higher transaction costs owing to the need to rearrange the initial allocation of rights. However, once the costs of carrying out market transactions are taken into account, it becomes clear that “such a rearrangement of rights will only be undertaken when the increase in the value of production consequent upon the rearrangement is greater than the costs which would be involved in bringing it about.”³⁴

A particular arrangement of rights may bring about a greater value of production than any other. But “unless this is the arrangement of rights established by the legal system, the costs of reaching the same result by

³² “Successful development policy entails an understanding of the dynamics of economic change if the policies pursued are to have the desired consequences. And a dynamic model of economic change entails as an integral part of that model analysis of the polity since it is the polity that specifies and enforces the formal rules.” (Douglass C. NORTH, “The New Institutional Economics and Development”, Washington University in St Louis, <<http://econpapers.repec.org/paper/wpawuwpeh/9309002.htm>>, 10 September 2007).

³³ They encompass elements such as the cost to “discover who it is that one wishes to deal with, to inform people that one wishes to deal and on what terms, to conduct negotiations leading up to a bargain, to draw up the contract, to undertake the inspection needed to make sure that the terms of the contract are being observed, and so on” (R.H. COASE, “The Problem of Social Cost”, *Journal of Law and Economics*, vol. 3 (1960), 1 et seq. (15)).

³⁴ *Ibid.*, 15.

altering and combining rights through the market may be so great that this optimal arrangement of rights, and the greater value of production which it would bring, may never be achieved.”³⁵ In these conditions, the initial delimitation of legal rights by the governing legal system does have an effect on the efficiency with which the economic system operates.

The economic function of contract law is to facilitate exchanges by allocating rights and obligations in a manner that reduces or does not increase transaction costs. At least in theory, contract law also serves to inform companies about the contingencies capable of frustrating an exchange, which in turn helps them plan their transactions prudently.³⁶ Lack of legal certainty – in itself a form of inefficiency – may occur whenever the laws are a “source of conflicts themselves” or fail to set “the right incentives to behave carefully.”³⁷ Inefficient rules contribute to higher transaction costs by encouraging litigation. Indeed, when both parties to a transaction have an interest in future, similar cases and the current legal rule is inefficient, the party held liable “has an incentive to force litigation.”³⁸

Laws that are outdated and that are not based on harmonised or transparent standards therefore pose an obstacle to economic growth and sustainable development. They increase commercial risks and transaction costs. They may also hamper the activities of commercial entities and restrict their participation in international trade. In such a legal environment, small and medium-sized enterprises with limited experience and access to legal advice often encounter particular difficulty in penetrating new markets, establishing new trade relations and resolving disputes in a predictable and efficient manner. In addition, investment can be severely affected or may not take place at all.

Outdated laws, inefficient regulation and malfunctioning institutions are a common problem in many developing countries. By undertaking to modernise the legal framework for domestic business and follow acceptable international standards, a country would signal its readiness to receive and promote foreign aid and investment. In the words of the former UN Secretary-General:

“There is a new global deal on the table: when developing countries fight corruption, strengthen their institutions, adopt market-oriented policies, respect

³⁵ *Ibid.*

³⁶ Richard POSNER, *Economic Analysis of Law*, 2nd ed., Boston, Little-brown (1977), 69.

³⁷ Lode VEREECK / Manuela MÜHL, “An Economic Theory of Court Delay”, *European Journal of Law and Economics*, vol. 10, No. 3 (2000), 243 et seq. (263).

³⁸ Vincy FON / Francesco PARISI / Ben DEPOORTER, “Litigation, Judicial Path-Dependence, and Legal Change”, *European Journal of Law and Economics*, vol. 20 (2005), 44 et seq.

human rights and the rule of law, and spend more on the needs of the poor, rich countries can support them with trade, aid, investment and debt relief.”³⁹

International efforts to improve the legal framework for business in developing countries and transition economies therefore work in two complementary directions: they help developing countries to promote domestic trade and industry, while giving legal certainty for and enhancing returns on the investments made by foreign companies.

Intergovernmental formulating agencies active in the area of private law provide an excellent forum for sharing positive experience with business regulation. Their status as public institutions, their lack of financial or political involvement, their balanced composition and neutrality are all valuable assets that confer a seal of confidence and authority upon their advice.⁴⁰ Once the synergies between legal harmonisation and law reform are identified, it becomes clear that there is great potential for uniform law-making bodies to make a significant contribution to facilitating a number of economic activities that form the basis of an orderly, well-functioning, open economy, thus helping developing countries fully to participate in the benefits of the global marketplace.

An initial roadmap may be found in the recommendations made by the high-level commission on Legal Empowerment of the Poor, which was created within the framework of the United Nations to examine in particular the relationship between exclusion, poverty and the law and to formulate recommendations on how the laws, institutions and policies governing economic, social and political affairs can be changed to help fight poverty. In its final report, the Commission invited the United Nations “and the broader multilateral system” to lend “their full support” to the process of “helping poor people lift themselves out of poverty by working for policy and institutional reforms that expand their legal opportunities and protections.”⁴¹ The broad mandate of UNIDROIT in the area of private law gives the Institute a wide range of topics worth exploring.

³⁹ Kofi ANNAN, “Help by Rewarding Good Governance”, *International Herald Tribune*, Wednesday, 20 March (2002), 8.

⁴⁰ “Closely associated with the demand for relevant information on areas of substantive uniform law and national implementation legislation and practice from developing countries and those opening up to a market economy are requests for specialised advice. The demand is for there to be available some independent and preferably central source. International institutions are quite often looked to in this context”, ROSE, *supra* note 13, 17.

⁴¹ COMMISSION ON LEGAL EMPOWERMENT OF THE POOR, *Making the Law Work for Everyone*, vol. I: Report of the Commission on Legal Empowerment of the Poor (UNDP: New York, 2008), 16.

(b) *International harmonisation and domestic law reform*

It is true that the classical reading of the mandate given to formulating agencies would limit their activities to harmonising private law at the international level, rather than to modernising domestic private law. A more constructive and forward-looking interpretation, however, would enable formulating agencies, where appropriate, to promote the modernisation of the law of particular groups of States in need of special assistance. In the same way that awareness of economic impact may strengthen the case for legal unification and harmonisation, the consistent integration of economic analysis in the harmonisation process enhances the role of formulating agencies in promoting domestic legal reform.

For a number of years now, UNCITRAL has prepared texts aimed at modernising the domestic legal environment for business and has produced a few very influential instruments.⁴² UNCITRAL has also run a technical assistance programme – albeit with limited resources – since the late 1980s.

Greater attention to law reform, as distinct from classical legal harmonisation, may open up a broad range of substantive areas of future work for UNIDROIT as well. In principle, this would preferably include instruments “based solely on commercial considerations and not in need of universal acceptability.”⁴³ The model law on leasing and the proposed legislative guide on trading in securities in emerging markets are examples of projects that fit well in this innovative line of work.

The list of substantive topics for possible future work by UNIDROIT is conceivably large and has already been drawn up by others.⁴⁴ In my view, one area that may deserve special focus concerns the operation of the judicial system. Indeed, despite the various conventions on judicial co-operation, to date no international instrument ventures into domestic court procedures. A first important step in this area was made with the 2004 *ALI/UNIDROIT Principles and Rules of Transnational Civil Procedure*. Arguably no

⁴² E.g., the UNCITRAL *Model Law on Procurement of Goods, Construction and Services* (1994), the UNCITRAL *Legislative Guide on Privately Financed Infrastructure Projects* (2000), the UNCITRAL *Model Legislative Provisions on Privately Financed Infrastructure Projects* (2003), and the UNCITRAL *Legislative Guide on Insolvency*.

⁴³ Herbert KRONKE, “Which Type of Activity for Which Organisation? Reflections on UNIDROIT’s Triennial Work Programme 2006-2008 in its Context”, *Unif. L. Rev. / Rev. dr. unif.* (2006), 135 et seq., 139.

⁴⁴ For instance, “company law, capital markets, insurance, and the law of regulated industries” (*ibid.*, 136).

harmonisation as such of rules of civil procedure may be needed or indeed be feasible in the near future. Yet in many countries, both developed and developing, there is an evident need for profound reform in procedural law and court management.

Judicial inefficiency may result from many factors, such as insufficient human and financial resources, unsatisfactory management practices or inefficient rules of civil procedure. Whatever its causes, judicial inefficiency generates high costs both in terms of public expenditure and direct transaction costs for the private sector. Furthermore, court inefficiency distorts the operation of contract rules and leads to indirect transactions costs, for example by encouraging futile litigation or inducing inefficient dispute settlement, both serving to discredit the legal system.

General research on litigation patterns has shown, for example, that “the total expected discounted costs of a trial for the [debtor] decrease as a result of increases in delay.” Hence, the debtor “will make a smaller settlement offer and [will] be more willing to go to trial”, with the additional incentive that the award granted by court is “entirely borne at the end of the trial and thus more heavily discounted.”⁴⁵ Opportunistic behaviour in litigation is further encouraged by the fact that a party bears only the costs directly related to the demand, but not the real cost of a trial. Indeed, it has been said that one reason for the “excess demand for trials” is the “incomplete internalisation of the external costs of court decisions, in particular total trial costs.”⁴⁶ Inefficient rules of procedure or inadequate or outdated court management practices lead to abuse by defendants and again to increased litigation, as recalcitrant debtors have no incentive to settle their obligations out of court. Large numbers of suits may then be filed for the sole purpose of delaying payment, which in turns further aggravates the existing backlog of cases, a phenomenon well-known in practice.

Arbitration is increasingly used as an alternative to provide more expeditious and professional settlement of commercial disputes, and UNCITRAL has a remarkable record of achievements to facilitate and promote out-of court dispute settlement methods.⁴⁷ However, arbitration cannot and will not displace the judiciary, in particular for purely domestic transactions. It is

⁴⁵ VERECK / MÜHL, *supra* note 37, 249-250.

⁴⁶ *Ibid.*, 261.

⁴⁷ Arbitration and mediation are more and more popular for commercial contracts, and they may even be indispensable for international contracts, as arbitral awards (unlike court judgements) enjoy nearly universal enforceability under the New York Convention.

unrealistic to expect that arbitration and mediation will significantly decongest the courts.⁴⁸ Judiciary efficiency remains, therefore, a major point of concern.

UNIDROIT might consider formulating legislative advice aimed at improving the functioning of civil proceedings, in particular in developing countries. Such a project would also demonstrate UNIDROIT's awareness of the need to take economic impact into account when establishing its work programme. Indeed, substantive business law is only one component of a country's legal system, and by itself no guarantee of economic benefit. The investment made in modernising substantive business law may be nullified if the inefficiency of procedural law stimulates breach of contracts and increases litigation. This is why it has been said that any harmonisation concentrating on the substantive law only "stops half way or even earlier."⁴⁹

UNIDROIT could build upon its successful experience with the "ALI/UNIDROIT Principles" and consider a project aimed at promoting a broader improvement of domestic court proceedings.⁵⁰ UNIDROIT is uniquely placed for such a project, which no other multilateral formulating agency could accommodate easily under its mandate.

⁴⁸ In the 1990s, for example, a continental strategy, funded by the Inter-American Development Bank, was developed to promote alternative methods of dispute resolution and reduce court congestion. Some evident achievements were noted: legislation on arbitration and mediation was modernised and harmonised in almost all the countries in the region and they have up-to-date laws that reflect international norms. Specialised human resources were trained in almost all the countries in the region. Qualified arbitrators and mediators are available, which was not the case at the beginning of the 1990s. But levels of congestion of courts are still high ("Managing complexity: ITC's experience in trade law technical assistance," paper presented by Jean-François Bourque at the UNCITRAL Congress "Modern Law for Global Commerce (Vienna, 9-12 July 2007), <<http://www.uncitral.org/uncitral/en/about/congresspapers.html>>, 10 March 2009).

⁴⁹ Gerhard WAGNER, "The Economics of Harmonization: the Case of Contract Law", *Common Market Law Review*, vol. 39 (2002), 995 et seq. (1022).

⁵⁰ The focus would indeed be the improvement of domestic procedures, not necessarily with a view to facilitating judicial co-operation and transnational procedures or to promoting international "harmonisation", aspects already suggested at the UNIDROIT 75th Anniversary Congress (see, in particular, Konstatinos KERAMEUS, "Some Reflections on Procedural Harmonisation", *Unif. L. Rev. / Rev. dr. unif.* (2003), 443 et seq.; Michael B. ELMER, "Brief Considerations on the Harmonisation of Civil Procedure in Europe and Worldwide", *ibid.*, 461 et seq.; and Vladimir PROKHORENKO, "Some Aspects of Unification of Civil Procedure Law", *ibid.*, 493 et seq.).

II. – INTERNATIONAL RULE-MAKING AND DOMESTIC IMPLEMENTATION

A. Co-ordination in rule-making

The large number of organisations and institutions involved at one level or another in the legal harmonisation process has led to well-known difficulties in the co-ordination of their work, with some instances of duplication of efforts, inconsistency of policy and the waste of resources attendant thereon.

The likelihood of conflicts has – at least in theory – increased in recent years as a result of a proliferation of efforts by various international organisations in the field of commercial law harmonisation. This phenomenon, which extends to several organisations, may be explained in part by the growing need for reform in international commercial law as a result of the intensification of global trade, foreign investment and regional economic integration.

1. Difficulties of international co-ordination

The main obstacles to an ideal level of co-operation in commercial law harmonisation include: inadequate institutional relationship between formulating agencies; imperfect interface between international negotiations and domestic authorities; and the growing role of regional organisations.

(a) *Co-ordination at a global level*

There have been several examples of good co-ordination between formulating agencies. The most famous and ambitious instrument of treaty-based harmonisation in the area of contract law, the *United Nations Convention on Contracts for the International Sale of Goods*, is one of them, as UNCITRAL would not have been able successfully to complete it if the ground had not been levelled by the extensive work done by UNIDROIT in the preparation of the Hague Uniform Laws.⁵¹

Another way in which co-operation can be achieved is through allocation of work among the various organisations, as is currently the case in the field of secured transactions between UNIDROIT (draft Convention on Substantive Rules regarding Intermediated Securities), the Hague Conference (*Law*

⁵¹ For example, the *Convention relating to a Uniform Law on the International Sale of Goods* (ULIS) (1964) and the *Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods* (UFIS) (1964).

Applicable to Certain Rights on Securities Held by an Intermediary) and UNCITRAL (*Legislative Guide on Secured Transactions*).⁵²

In a context of increased demand for legal harmonisation, it is clear that inter-agency co-ordination cannot create a web of monopolies where each organisation would claim to handle alone entire areas of law. Indeed, certain topics may require harmonising efforts at different levels or even in different fora simultaneously. All organisations especially devoted to legal harmonisation (Hague Conference, UNIDROIT, UNCITRAL) have in common a chronic lack of secretariat resources, which severely limits the number of initiatives they are capable of handling at any given time. Where further harmonisation cannot await the completion of work in one organisation, States may agree to ask another one to take up work on a related area.

However, there is no hierarchy or standing institutional arrangement between intergovernmental organisations. Thus it may happen that, even within the United Nations family, two different bodies (for example, a regional commission or a global conference) approve action plans or lines of work envisaging the formulation of uniform rules or other instruments relating to the same subject or a similar one. This is possible because different bodies may be composed of different Member States not in the habit of consulting the work programme of other bodies before approving their own.⁵³ Often, the same State is a member of different bodies, but communication between its representatives in each one of these may be less than ideal.

This is a problem even for the co-ordination between organisations having as close a relationship to one another as UNIDROIT, the Hague Conference and UNCITRAL, or between UNCITRAL and other bodies of the United Nations, such as the Economic Commission on Europe or UNCTAD. To some extent, the direct – almost collegial – relationship between the staff of the multilateral organisations more closely involved with harmonisation of private law, and the national experts who take part in their activities, has substituted for the lack of institutional ties and has had some success in

⁵² Needless to say, drawing the lines between respective projects is not always an easy task, as is evidenced by the time that was needed to arrive at a satisfactory interplay between the U.N. Receivables Convention and the UNIDROIT Convention on International Interest in Mobile Equipment and the UNIDROIT Convention on International Factoring.

⁵³ “There is a tendency to formulate proposals for uniform laws without adequate liaison among the various bodies involved in harmonization to ensure that each is kept informed as to the other’s projected programme of activity and that duplication of effort is avoided” (GOODE, *supra* note 16, 59-60).

preventing conflicts between formulating agencies.⁵⁴ Still, co-ordination could nonetheless be improved.

(b) *Domestic inefficiencies*

While a ministry, in most countries the Ministry of Foreign Affairs, is often in charge of the internal role of co-ordinating the country's position at multi-lateral organisations, this function may often involve various units within the same ministry. Furthermore, as regards regional integration organisations, the primary co-ordinating role is often allocated to other bodies, such as another ministry or the head of government. Sometimes the problem is aggravated because the liaison with, or even the representation of a country in, various bodies of the same institution is provided by different divisions or directorates within the same ministry.⁵⁵ Thus it happens more often than one would wish that two bodies belonging to the same organisation approve overlapping work programmes because the Member States' delegates were not adequately informed of the decisions taken elsewhere by their colleagues.⁵⁶

It is possible that States consider some level of competition between formulating agencies to be beneficial, as it allows them to make use of the agencies' comparative advantages and to decide in each case which is the one best suited to handle a given project. It is, of course, within the prerogative of sovereign States to make informed decisions as to the ideal allocation of work among existing organisations. However, not all is the result of extensive pondering. As suggested above, some duplication occurs because of inefficiency in domestic bureaucracies, and poor exchange of information among them.⁵⁷

⁵⁴ In fact, a former national delegate at uniform law conferences has noted that "[the] task of formulating new law rests on a small number of people, a few dozens, certainly less than one hundred, that at any given time are in charge of international negotiations of private law in the various States" (Jean-Paul BÉRAUDO, "La négociation internationale institutionnelle de droit privé (1^{ère} partie)", *Unif. L. Rev. / Rev. dr. unif.* (1997), 9 et seq.).

⁵⁵ This is the case, for example, of the liaison and representation function to various UN bodies (UNCITRAL, UNCTAD or UN/ECE, for example), which is usually ensured by the diplomatic personnel accredited at the seat of the body concerned (Vienna for UNCITRAL, Geneva for UNCTAD and UN/ECE).

⁵⁶ It has also been noted that it is "through ignorance of the activities of certain international organisations that the same or similar subjects subjects are proposed to other organisations" (BÉRAUDO, *supra* note 54, 16).

⁵⁷ In the case of European countries, this is compounded by the relative shortage of resources devoted to following up regional and global harmonisation initiatives, when compared

(c) *The role of regional organisations*

Except for the Council of Mutual Economic Assistance, which ceased to exist in 1991, all regional intergovernmental organisations involved with harmonisation of commercial law in the years following the end of World War II are still active today. Various other organisations have been created since 1966 (APEC, ASEAN, COMESA, MERCOSUR, NAFTA, OHADA, SADCC, to name but a few). They are all, in one way or another, involved in activities that have at least some component of trade law harmonisation. The emergence of these new international organisations or regional mechanisms of economic integration considerably increases the inherent difficulty of co-ordinating international harmonisation efforts.

The example of the European Union is a telling illustration of this new reality. The expansion of the European integration process over the past twenty years, accompanied by ever-broadening Community competences, has led to growing complexity in the administrative and decision-making structures of the European institutions, so that several Directorates-General – each assisted by different groups of experts and exposed to varying interest groups – may be involved in any given topic. It has also caused a significant increase in the number of legislative harmonisation projects in the area of commercial law or related topics.

It has, therefore, been noted that “[t]he transfer of sovereign competences for the creation of private law in certain areas from [twenty-seven] Member States to the European Union, the many uncertainties regarding the scope of that transfer, and the techniques to co-ordinate decision-making and interaction with the rest of the world, already all condition UNIDROIT's work significantly and will increasingly do so.”⁵⁸

2. Ways to improve international co-ordination

At the inter-agency level, one might consider deepening the informal consultation mechanisms between the various organisations specialised in legal harmonisation – for instance, in the form of a joint co-ordinating committee comprised of representatives of the respective secretariats and a

to the number of projects under way at the European Commission alone (José Angelo ESTRELLA FARIA, “Relationship between Formulating Agencies in International Legal Harmonization: Competition, Cooperation or Peaceful Coexistence? A Few Remarks on the Experience of UNCITRAL”, *Loyola Law Review*, vol. 51 (Summer 2005), 253 et seq. (280)).

⁵⁸ KRONKE, *supra* note 3, 298.

number of Member States appointed by each organisation. Closer co-operation might provide an opportunity to explore further the comparative advantages of various agencies (such as the specificity of mandate and the expertise of the Hague Conference, the academic network and the flexibility of the methods of UNIDROIT, the universality and the political authority of UNCITRAL), while avoiding duplication of effort.

Formulating agencies have but limited means of helping countries to improve domestic co-ordination mechanisms. Through their awareness of possible conflict areas, and through monitoring obvious deficiencies, however, they may gain an overview that some governments may lack. Formulating agencies could often take a more pro-active stance in bringing loopholes in domestic co-ordination to the attention of their Member States.

Ensuring adequate co-ordination with regional organisations may require a greater effort in view of their size, diversity and the variety of initiatives they deploy. Regional harmonisation is not incompatible with global harmonisation.⁵⁹ Ultimately, a handful of regional legal systems is still preferable to a myriad of national conflicting rules of private law. On the other hand, however, regional harmonisation is typically aimed at facilitating the functioning of regional markets and the regional common denominator may not always be the best basis for a global solution. Any external control of the risk of duplication or contradiction is also difficult, since this risk essentially depends on the extent of attributions and competences transferred to the organisation concerned by its Member States.

Ideally, the incorporation of regional organisations in a global negotiation process should be handled in such a way that it does not impede the formulation of region-specific rules while at the same time preserving, in the multilateral fora, the individual voices of the various legal traditions represented in those regions, whose legal influence may well transcend continental boundaries.⁶⁰

It is a paradox of the harmonisation process that it aims at removing differences, but derives its acceptability from diversity. The quality of international negotiations on private law questions, and the very authority of

⁵⁹ Olivier TELL, "La construction de l'espace unique européen en matière de justice face à l'harmonisation universelle de la procédure civile: propos réalistes d'un acteur européen", *Unif. L. Rev. / Rev. dr. unif.* (2003), 453 et seq. (455-458).

⁶⁰ The very possibility that European countries, of "great numerical significance" for the unification of private law, might eventually "refrain from participating in international negotiations" as a result of their regional obligations (BASEDOW, *supra* note 4, 36) should be of some concern to international formulating agencies.

formulating agencies, would be greatly diminished if their constituencies lost the benefit of the current wealth of time-tested solutions of legal families sharing their experiences in international negotiations. Formulating agencies should take an interest in contributing to the development of ways in which regional harmonisation might best be combined with global efforts.

B. Domestic implementation and promotion of texts

Domestic implementation occurs at two stages. At a formal level, an international standard or uniform text is implemented when States adopt it through ratification or enactment of domestic legislation. At a practical level, implementation occurs when those standards and texts are actually taught to students, used by practitioners and applied by courts. The work of a formulating agency, therefore, does not end with the finalisation and adoption of a text, but includes raising awareness of it and promoting its correct implementation.

1. Problems in formal implementation

Problems in formal implementation have two main sources: low acceptance of uniform texts at the domestic level and insufficient co-ordination in foreign assistance to domestic law reform.

(a) Low level of ratification

Uniform law instruments typically attract little, if any, political interest. Their sole purpose is to facilitate the business activities to which they relate. In most cases, the economic benefit is not easily – if at all – quantifiable. Being *useful* but – with a few exceptions – not strictly speaking *necessary*, uniform instruments in the private law area are not typically treated as a priority for domestic adoption. Furthermore, as States usually act according to the principle of reciprocity, and only move forward on certain matters after other key partners have moved in the same direction, international conventions may take several years to enter into force or be ratified by a sufficiently significant number of a countries.⁶¹

⁶¹ The pattern followed by the signatory States of the CISG offers an interesting example. From the nineteen countries that signed the Convention before 1 September 1981, only three ratified it in less than five years (France, Hungary and Lesotho), while most needed between five and ten years (Austria, Chile, China, Denmark, Finland, Germany, Italy, Norway and Sweden). Three countries took between ten and fifteen years to ratify the CISG (Netherlands, Poland and Singapore), and two have not yet done so (Ghana and Venezuela).

Domestic legislators and policymakers are usually charged with attending to the more immediate needs of their constituencies. They would not be expected to pay a great deal of attention to technical instruments in the commercial law arena which, as a result, often remain dormant for a number of years at various levels of domestic government. In many countries, this risk is compounded by the absence of standing bodies in charge of the periodic review of domestic laws with a view to formulating proposals for reform, modernisation and rationalisation. Where no such body exists, law reform is often handled in an *ad hoc* fashion. Specific proposals are made, as particular instances of legal deficiency are brought to the attention of ministries, courts or parliaments. The legislative steps that follow are usually subject to the vagaries of the domestic political process.

Experience shows that standing bodies in charge of domestic law reform can be instrumental in promoting adoption of uniform law instruments.⁶² Formulating agencies – and generally any international organisation interested in upholding and promoting the rule of law – should have an interest in promoting the institutionalisation of law reform mechanisms in countries that do not yet have them. Of course, this is a delicate area, as international organisations are not supposed to interfere with the constitutional and administrative structures of their Member States. Nevertheless, formulating agencies might play a useful role in promoting an exchange of experiences in the area of law reform across legal traditions with a view to encouraging the improvement of existing domestic structures and methods.

Continued contacts, briefing missions, seminars and similar events are needed to promote ratification at the domestic level. UNIDROIT has limited resources for promoting its instruments.⁶³ The Institute should nevertheless continue its efforts to persuade Member States that money spent in promotion is money well spent. Without appropriate promotion efforts, the time and resources invested by States in the preparation of uniform law instruments over several years run the risk of having been in vain. Increased co-ordination with law reform and technical assistance bodies may also supplement

⁶² The wide adoption of the UNCITRAL Model Law on Electronic Commerce among jurisdictions with common law influence (Australia, Canada, India, Ireland, Mauritius, New Zealand, Pakistan, Singapore, South Africa, Sri Lanka, United States of America; the Cayman Islands, Hong Kong SAR, the British Channel Islands, and the Turks and Caicos Islands) was in many instances facilitated by the existence, in most of them, of some standing body or commission in charge of law reform or domestic legal harmonisation.

⁶³ The Institute's "annual budget chapter for "promotion of instruments", in the words of the former Secretary-General, covers only "three transatlantic airfares" (KRONKE, *supra* note 3, 297).

UNIDROIT's own promotion activities. Furthermore, formulating agencies could pool their resources with a view to the joint promotion of their instruments, at least of those that are complementary.

Gaining the support of representatives of the private sector concerned with the relevant area of law also seems to be crucial, as it may help ease resistance within the domestic government instances involved or help expedite the internal approval process.⁶⁴

(b) Co-ordination of foreign assistance to law reform

Foreign assistance to domestic law reform is another area where lack of co-ordination is leading to repeated problems at the implementation level. Since the end of the cold war and the shift back to capitalism in the former Soviet Republics and Eastern European countries, there has been an incredible growth in international assistance to modernisation of domestic laws, either within the framework of bilateral assistance programmes (such as USAID and its various counterparts in industrialised countries) or under the country assistance programmes of multilateral financial institutions (such as the World Bank, the International Monetary Fund or the regional development banks).

For several years now, the activities of these institutions have extended well beyond financing traditional projects (infrastructure, health, education) to cover also the modernisation of various elements of the legal system of the receiving countries. Assistance to law reform has often included assistance to the preparation of draft legislation on commercial and business law matters, such as arbitration, company law, public procurement, bank guarantees or carriage of goods.

Everyone welcomes the fact that these forms of assistance exist and are available to countries that may need them. The problem lies in the way in which law reform projects are carried out. The consultants retained by the

⁶⁴ The declared intention of the Government of the United States of America to join the United Nations Convention on Use of Electronic Communications in International Contracts (see "China, Singapore, Sri Lanka Sign UN Convention on Use of Electronic Communications in International Contracts", U.N. Press Release L/T/4396, 6 July 2006; available at <<http://www.un.org/News/Press/docs/2006/lt4396.doc.htm>>, accessed on 12 September 2007), was backed by the support given to the Convention by the US Council for International Business ("Business Endorses UN Convention on Electronic Contracting", 11 July 2006, <<http://www.uscib.org/index.asp?documentID=3502>>, accessed on 12 September 2007) and the American Bar Association (ABA, Recommendation adopted by the House of Delegates on 7-8 August 2006, <<http://www.abanet.org/intlaw/policy/investment/unelectroniccomm0806.pdf>>, accessed on 12 September 2007).

donor have considerable freedom in making their legislative proposals for the recipient country. Thus, it is not surprising that we see here and there a clear preference for the law of the country or the area of origin of those consultants⁶⁵ and not necessarily for uniform law.

This becomes a matter of concern for uniform law formulating agencies to the extent that, depending on the level of knowledge of – or sympathy for – uniform law on the part of the international consultant engaged by the institution lending the assistance, the final result may be a new piece of national legislation that either deviates from or is in outright conflict with an existing uniform instrument on the same matter. This form of “reinvention of the wheel” is not only an unnecessary duplication of efforts, but also a significant waste of time and public resources.⁶⁶

Concrete efforts must therefore be made to improve co-ordination in foreign assistance to domestic law. Multilateral financial institutions and bilateral foreign aid agencies are not subject to co-ordination efforts by formulating agencies. Years of repeated exhortations by the General Assembly of the United Nations for greater co-operation between development aid agencies and international rule-making bodies, for example, have not noticeably improved their communication.

Ultimately, successful co-ordination depends on persuading the organisations involved of the advantages of co-ordinating the substantive aspect of their assistance to domestic law reform with the work of international formulating agencies. Two main courses of action may be pursued, conceivably at the same time: intensified direct contacts and briefing

⁶⁵ An assessment of foreign legal aid to law reform projects in the Russian Federation prepared for Princeton University points to the deficiencies of legal aid based on the advice of foreign experts who have no real knowledge of the recipient country and whose “frame of reference is the Western system”. Thus, they “tend to compare the Russian system to the one with which they are familiar and view any differences as faults of the Russian system.” This “proclivity towards self-replication” is “futile and can make cooperation more difficult” (“Project Report on the Role of Foreign Aid for Legal Reform Programs in the Russian Federation”, paper produced under the direction of Professor Stephen Holmes for the Graduate Policy Workshop on Legal Development Projects after Communism at the Woodrow Wilson School of Public International Affairs, January 1999, copy available with the author).

⁶⁶ “A considerable number of consultants is reproducing for Russia, the countries of Eastern and Central Europe and some of those of the former Indo-China versions of the codes of European and North American law. In some cases two or more separate consultants are working at the same time producing ‘competing’ drafts. Part of this ‘competition’ is driven by a desire to arrive at an outcome that is acceptable to a variety of foreign investors and trading partners” (ROSE, *supra* note 13, 14-15).

missions with the agencies concerned and interventions through the governments of their respective Member States. The final objective has been stated by the former Secretary-General of UNIDROIT in the following terms:

“It is hoped that [the World Bank and the International Monetary Fund], in their capacities of multilateral lender and facilitator of structural economic reform and good governance, will increasingly and where available make use of international instruments on commercial law elaborated with the expertise and under the auspices of UNIDROIT, the Hague Conference and UNCITRAL. The advantages in terms of greater legitimacy and acceptability of such instruments as opposed to legislation drafted *ad hoc* by private sector consultants – in many cases in all likelihood paired with lower costs – would appear to be obvious. Consequently, UNIDROIT should further develop and offer its capabilities on the worldwide market for legal reform with a view to being ever more clearly identified by the organisations just mentioned.”⁶⁷

To some extent, the risk of duplication may also be controlled at an early stage by involving as much as possible all multilateral financial institutions from the early phases of the formulation of a new text. The experience of UNCITRAL, for instance, shows that when the representatives of those institutions take part in the conferences that lead to the adoption of a uniform text, one can usually expect that at least the general lines of the uniform instruments will be taken into account in law reform programmes in the relevant area.⁶⁸

2. Practical implementation and follow-up activities

A uniform law instrument is of little value if it is not implemented in practice. Several obstacles may impede this objective. The application of uniform law may depend on domestic administrative instances or structures. Deficient institutional design, poor regulatory machinery, insufficient resources, and lack of training, among others, are known for frustrating the objectives of law reform. In other areas, uniform law instruments may be incorrectly applied or may even be avoided due to lack of knowledge by judges and practitioners.

⁶⁷ KRONKE, *supra* note 43, 140.

⁶⁸ This was at least what happened, for example, in connection with the implementation of the UNCITRAL *Model Law on Procurement of Goods, Construction and Services* (1994), which has since been actively promoted by the World Bank. Another example is the UNCITRAL *Legislative Guide on Privately Financed Infrastructure Projects* (2000) and its subsequent addition, the UNCITRAL *Model Legislative Provisions on Privately Financed Infrastructure Projects* (2003), projects in which the European Bank for Reconstruction and Development participated actively and whose implementation it actively supports (ESTRELLA FARIA, *supra* note 57, 276-277).

(a) *The dichotomy between legislation and practice*

The difficulties in obtaining parliamentary time and safe passage for a uniform law or other law reform initiative may be insignificant in comparison to the difficulties that lie in wait at the implementation stage if there are but few officials with an understanding of the new law and no institutional machinery capable of implementation. In addition to shortfalls in the implementation dimension, transition economies have provided examples of how deficiencies in enforcement can cripple both the perception and the reality of law reform initiatives.⁶⁹

As has been noted by the Deputy General Counsel of the European Bank for Reconstruction and Development:

“Historically, legal technical assistance tended to confine itself to the drafting of new laws or the revision of existing ones. Insufficient attention was given to how these laws would be implemented. However, a dominant feature of the commercial and financial laws in the region where EBRD operates is that there is a consistent and stubborn ‘implementation gap’. This is troubling because good laws that are not effective are deprived of the economic benefits they should bring.”⁷⁰

Greater assistance by formulating agencies in the implementation process may help ensure consistency with international standards and may provide an opportunity for channelling information on good practices and best ways to apply them. Indeed, implementation measures at the national level increasingly reflect a phenomenon that has been referred to as the “internationalisation of law making”, in which international obligations and standards directly or indirectly affect the domestic law reform process.⁷¹ In national law reform processes, comparative law analysis is increasingly recognised as a key ingredient. There is a significant element of comparative law analysis built

⁶⁹ For a discussion of how corporate governance rules in the transition States affect perceptions of legal systems in those countries, and how perceptions deteriorate in the face of enforcement difficulties, see Anita RAMASASTRY / Stefka SLAVOVA / David BERSTEIN, “Market Perceptions of Corporate Governance – EBRD survey results”, *Law in Transition* (Autumn 1999), 32-39.

⁷⁰ “Multilateral Organisations and Legal Technical Assistance: Learning from Experience”, paper delivered by the Deputy General Counsel of EBRD, Gerard SANDERS, at the UNCITRAL Congress “Modern Law for Global Commerce” (Vienna, 9-12 July 2007), <<http://www.uncitral.org/uncitralenabout/congresspapers.html>>, 10 March 2009.

⁷¹ Sir Kenneth KEITH, “Philosophies of Law Reform”, *Otago Law Review*, vol. 7, No. 1 (1989), 363-378 (370). Referring to New Zealand, the author states that “[a]bout one quarter of our public Acts give effect to or reflect in various ways our international obligations or international standards.”

into the preparatory work of formulating agencies, which may be usefully shared with countries engaged in law reform.

Of course, formulating agencies would seldom have expertise in all areas related to the practical implementation of their texts continuously available for addressing all needs of receiving countries. However, this should not in itself be an obstacle to more involvement in law reform. The formulation of joint programmes or implementation strategies in co-operation with other organisations involved in rule-making or law reform in a given area might allow for the development of a common approach to the implementation of specific standards or instruments (obviously suitably adapted to the country's context). The input of formulating agencies might be limited to general advice on the elements of such an approach or might – subject to the availability of resources – extend to a greater involvement in specific projects. At the very least, the secretariat of a formulating agency has a role to play as a “clearing house of information to know who the specialists in particular fields of law are.”⁷²

(b) *Bringing the law into real life*

Criticism of the harmonisation process often cites the absence of courts especially dedicated to the interpretation of uniform law as one reason for the limited progress made in international legal harmonisation. It is true that the experience with widely diverging case law on earlier uniform law texts⁷³ demonstrates how quickly an international instrument can be deconstructed by legal practice and judicial precedent. However, it is unlikely that States would agree to surrender jurisdiction to international courts.

A more realistic option to mitigate the possible negative consequences of diffuse judicial reading of uniform texts is to promote uniform interpretation. Formulating agencies have recognised this and have started very useful initiatives with a view to disseminating information on the application of uniform texts, for example through the UNILEX database maintained by UNIDROIT, or the CLOUT system and the CISG Digest developed by UNCITRAL. These initiatives should be expanded and further advanced in the future, with a view both to widening their coverage, supplementing each other without duplicating efforts, and enhancing their accessibility in a user-friendly manner.

⁷² ROSE, *supra* note 13, 17.

⁷³ Such as under the *International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading and Protocol of Signature* (Brussels, 25 August 1924) (“The Hague Rules”) or under the *Convention on Providing a Uniform Law for Bills of Exchange and Promissory Notes* (Geneva, 7 June 1930).

Additional measures to promote uniform interpretation might include supporting programmes for training judges (but possibly also for arbitrators or lawyers) in the interpretation and application of uniform law. This might take the form of seminars specifically dedicated to them or the elaboration of training programmes, a common syllabus or other forms of teaching materials that might be used for training purposes or be incorporated in the curricula of domestic academies or schools dedicated to the training or continuing education of judges.⁷⁴ Co-operation with universities and, in particular, with other international organisations with expertise in technical assistance and training for lawyers from developing countries, such as the Rome-based International Development Law Organisation (IDLO), might be explored with a view to developing joint programmes. Conceivably, standard teaching materials or a teaching plan for uniform law could be provided for inclusion in the curricula of law schools around the world.

It is interesting to note that in the United States, for instance, there have been relatively few reported decisions on the CISG by U.S. courts or involving U.S. parties, in the twenty years during which international sales involving parties located in the United States have potentially been subject to the Convention.⁷⁵ The most likely explanation is that U.S. legal counsel routinely have advised their clients to opt out of the CISG and choose U.S. domestic sales law as the law governing their international sales transactions. Although there seems to be some indication that “the wisdom of proffering this advice mechanically is now being questioned by U.S. lawyers”, this trend has not yet been reversed.⁷⁶ While there are several reasons for the practice of excluding the CISG (which incidentally is also observed in other Contracting States to the Convention), an informed decision as to the advantages or disadvantages of the Convention, as compared to the substantive law chosen instead, is rarely

⁷⁴ A similar suggestion was made by Professor Chiara GIOVANNUCCI ORLANDI in the paper “Legal harmonization in practice: teaching and learning uniform commercial law”, which she presented at the UNCITRAL Congress “Model Law for Global Commerce” (Vienna, 9-12 July 2007, available at <<http://www.uncitral.org/uncitral/en/about/congresspapers.html>>, 10 March 2009).

⁷⁵ For a discussion of the statistics on reported U.S. CISG cases, see Mathias REIMAN, “The CISG in the United States: Why It Has Been Neglected and Why Europeans Should Care” (paper from “The Convention on the International Sale of Goods – The 25th Anniversary: Its Impact in the Past – Its Role in the Future; German Society of Comparative Law – Private Law Division Conference 2005: 22-24 September 2005, Würzburg), *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, vol. 71 (2007), 115 et seq. (117-120).

⁷⁶ “Changing the Opt-out Tradition in the United States”, paper presented by Harry M. FLECHTNER at the UNCITRAL Congress “Modern Law for Global Commerce (Vienna, 9-12 July 2007), available at <<http://www.uncitral.org/uncitral/en/about/congresspapers.html>>, 10 March 2009.

the decisive factor. It is “sometimes ignorance, sometimes fear, sometimes a reluctance to change existing patterns – and be it for lack of time and resources to concentrate on something new” that in most situations leads to the exclusion of the CISG.⁷⁷

These findings underscore the importance and the need for information and training activities by formulating agencies. The experience of the European Union with academic exchange programmes seems to support the idea that early contact with foreign law and uniform law makes it unlikely that those future practitioners “will interpret international instruments and community law from a purely national perspective at a later stage.”⁷⁸ Formulating agencies have their role to play, in co-operation with universities, representatives of the Bar and the judiciary in forming tomorrow’s international practitioners.

CONCLUSIONS

The above considerations highlight the complexities of international legal harmonisation and the challenges of law reform. Maintaining the momentum gained in recent years and achieving concrete results in terms of actual implementation of standards developed by formulating agencies requires action at various levels.

The suggestions I have made above are neither entirely new, nor truly original. Taken all together they may also seem overly ambitious, especially when one considers the chronic financial penury of formulating agencies and the budgetary constraints under which their Member States operate. Of course, formulating agencies will not be able to cover all fronts at the same time. Yet, their role is too important to succumb to resignation. To some extent, the activities of formulating agencies in recent years already shows a determination on their part to react to the challenges they currently face.

Formulating agencies and their Member States are called upon to pursue these efforts, looking at imaginative ways for using their resources so as to bring them to fruition.

⁷⁷ “The practice of excluding the CISG: time for change? Comment on the limited use of the CISG in private practice (and on why this will increasingly change)”, paper presented by Eckart BRÖDERMANN at the UNCITRAL Congress “Modern Law for Global Commerce (Vienna, 9-12 July 2007), available at <<http://www.uncitral.org/uncitral/en/about/congresspapers.html>>, 10 March 2009.

⁷⁸ Jürgen BASEDOW, “The Renaissance of Uniform Law: European Contract Law and Its Components”, *Legal Studies*, vol. 18, No. 2 (June 1998), 121 et seq. (132).