

UNIDROIT 75th Anniversary Congress on Worldwide Harmonisation of Private Law and Regional Economic Integration : Hypotheses, Certainties and Open Questions

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I. – BASIC HYPOTHESES

Since the 1970s, we have – mainly, but not exclusively, under the impact of the law-and-economics movement – reverted to the noble curiosity to know more about how economics, both as regards its facts and assumptions, is related to the interpretation and making of the law. Not surprisingly, in most countries it has been the comparativists and internationalists who have taken the lead in asking pertinent questions and suggesting answers. However, their research has focused primarily on national law – from tort law to contracts and from antitrust law to banking or labour law. The work in the international private-law-formulating agencies has rarely been analysed from an economic point of view – neither its objectives, nor its methods, nor its costs, nor its results. There have been two noteworthy exceptions where the content of transactional law against the background of regulated markets in multi-jurisdictional systems has become the subject of systematic and sustained scholarly interest. The first concerns a federal system, the United States of America; the second a supranational entity *sui generis*, the European Economic Community in its various incarnations over time, most recently the European Union.

Yet it seems reasonably obvious that the harmonisation of private law, in particular commercial law, occurred against radically different backgrounds in 1926, on the one hand, and in 2001, on the other hand. The 1926 scenario was one where one region (Europe) consisted of independent, culturally homogenous countries, all of which aspired to participate in international trade. The second region was divided into two sub-regions (the Americas), each of which had cultural roots in and legal commonalities with European countries. The third region was colonised Africa. The remaining “regions” (Asia and the Pacific) were – and still are – not very meaningful geographical concepts identifying the largest parts of the globe where there were colonies and rather isolated independent States, only two of which participated in international trade and law making.

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75 years on, we see a European region dominated by a single market embedded in a constitutional framework which provides for private-law-making competences as one of its constituent features. In the Americas there are, apart from less visible associations of States, two free trade areas, NAFTA and MERCOSUR, the former with no institutionalised private-law related agenda, the latter more ambitious in this respect but for the time being, and for a number of reasons, only very marginally successful. On the other hand, the Organisation of American States (OAS) may be defined as a tent aspiring to offer a political home to the various Americas with no economic agenda but increasingly articulate private-law-related activities. In Western Africa, we see a monetary union with an ambitious programme to harmonise business law (OHADA); in Southern Africa, an association of States (SADC) which has yet to explore its potential to engage in private-law-making as a vehicle for economic co-operation and development; and lastly, in Asia and the Pacific regions, many important trading countries, a few of them actual or potential economic super-powers, have emerged without, however, as yet producing significant moves toward integration and showing no sign that the formulation of private law might become a common undertaking at the regional level.

In recalling the objectives of the private-law-formulating Organisations in 1926, the obstacles they encountered and the methods they employed, on the one hand, and in formulating our objectives, analysing our tools and accounting for costs and the benefits we produce in 2001, on the other hand, a few hypotheses may be helpful.

(1) In 1926, neither the general objectives, nor the choice of items on the work programme, nor the working methods would have been different whether European (or American) countries embarked on unification among themselves or between the European (or American) and other regions of the world. Both truly regional and "universal" (= "disguised" regional) projects of unification could be carried out within the same organisations and subject to the same parameters.

(2) By 2001, those European States that are also Member States of the European Union were carrying out a growing number of private-law-harmonising projects within the EC's/EU's constitutional framework, following its procedures and seeking to achieve its constitutionally defined goals of economic, legal and political integration. Even where there is no clear legislative competence on the part of the EC/EU, the examples of the *1968 Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters* and the *1980 Rome Convention on the Law applicable to Contractual Obligations* strongly suggest that they would proceed on a regional basis, guided by the regional political agenda which in turn is driven by the economic objectives. In other words, in a growing number of areas, Organisations such as the Hague Conference on Private International Law, UNIDROIT or UNCITRAL, while remaining the only or primary theatres of private law harmonisation in and for most regions of the world, are assuming a dramatically changed function for their European members: first, to

provide a bridge to the “rest of the world” and, second, to constitute a forum for sectoral efforts in areas where there is neither an unambiguous competence nor the political will to move forward even in its absence.

(3) UNIDROIT’s triennial work programme, which is determined on the basis of proposals and priorities indicated by Governments, would look different depending on whether the majority of proposals and comments were submitted by States from (a) the Asian-pacific region, (b) the Americas or (c) Europe.

(4) An instrument designed to create harmonised substantive law on (a) any technique to distribute goods and services, (b) the taking of security in securities, (c) the carriage of goods by air, (d) provisional measures in civil litigation, or (e) general principles of contract law, negotiated with the participation of EU Member States, would be fundamentally different from one negotiated among American or American and Asian-Pacific States.

II. – OBJECTIVES AND RESULTS OF THE CONGRESS

1. *General*

When the project first took shape in 1998, there was a plausible hypothesis: that regional economic integration among various groups of States which followed differing patterns in the pursuit of different objectives and at varying speeds was likely to have an ever greater impact on the worldwide modernisation and harmonisation of private law. There was, moreover, some evidence that the European Community’s newly acquired competences in the area of private international law and international civil procedure would profoundly redesign the parameters for work at the Hague Conference. Proposals by the UNIDROIT Secretariat to set up a task force charged with an in-depth study of these matters on a continuing basis initially met with interest from Governments *both* in Europe and the Americas. This interest however faded and it was decided to devote the Anniversary Congress to inquire further into this issue. The 2001 Cape Town Diplomatic Conference for the adoption of the *Convention on International Interests in Mobile Equipment* dramatically confirmed how little the European Commission, the Member States of the European Union and the other negotiating States were prepared to deal with some of the problems generated by the new line-up.

What did we learn from the reports, the round table discussions and the numerous interventions from the floor at this Congress?

First, there is more regional harmonisation taking place than many are commonly aware of. In some instances, it is not called for by any economic agenda, let alone a constitutional mandate and, absent inter-governmental fora, private institutions may take the initiative to formulate work programmes, carry out

preparatory research or even draft legislative texts. The Americas, and in particular the NAFTA region, were referred to in this connection.

Second, the existence side-by-side of worldwide and regional harmonisation does not necessarily generate tension and conflict. For example, the choice of a soft-law approach (model law, principles, legislative guides or similar types of instrument) at the universal level generally defuses concerns (and interest) at the regional level. Furthermore, where the addressees of an instrument prepared by one of the international Organisations are exclusively or primarily developing countries, no conflict with law-making in an industrialised region will arise. Again, where the Regional Economic Integration Organisation takes the instrument developed for worldwide use as a starting point or nucleus which it only adapts so as to cater more efficiently for regional specificities (examples are cross-border credit transfers and the return of stolen and illegally exported cultural objects), we are navigating in the unspectacular waters of proper co-ordination which sometimes works and sometimes does not.

It was the Amsterdam Treaty, *i.e.* the large-scale transfer of sovereign law-making competences from States to a Regional Economic Integration Organisation (the European Union), that triggered a qualitative leap and announced the dawn of the era of a multi-layer universalism and inter-regionalism. The latter will acquire clearer contours as soon as, for example, OHADA and EC Member States enter into negotiations on insolvency law (and the issue could have surfaced in Cape Town had the OHADA Member States Cameroon and Senegal raised it).

Third, issues of the relationship between universal instruments and regional instruments have to be systematically examined. Where, for example, a universal treaty authorises Contracting States to give regional agreements precedence for intra-regional purposes, the universal Organisation and its out-of-region Member States may have a notion as to whether an EC Regulation or Directive is to be treated as such an agreement. But is it for them to decide? While the supremacy of Community law over uniform private law Conventions, even if the latter were concluded prior to the EC Treaty, has been confirmed by the European Court of Justice and by Member States' courts and must now be accepted, many ancillary and incidental questions are far from being settled. Is there, for example, a duty for the EC to join universal negotiations where its Member States are negotiating – *ultra vires* – but where they might not be allowed to honour their commitments?

Fourth, the routinely asked question of whether it is preferable to start with harmonisation worldwide and later implement or modify it at the regional level (top-down approach) or to lay the foundations in the regions and then provide, if needed, for a universal roof (bottom-up approach) cannot be answered in a one-size-fits-all manner. The implications that have to be considered – one of them being the supremacy of EC law over Conventions just alluded to – are sufficiently manifold as to demand case-by-case analysis. Undoubtedly, the universal Organisations have to be

aware of their commitments to non-regionally bound Member States and go ahead with carrying out their mandate for worldwide modernisation of private law wherever that is required. It is for the Member States of the Regional Economic Integration Organisation to see to it that the region follows, if possible.

Fifth, those Regional Economic Integration Organisations on which States have conferred legislative powers ought to accede to the universal uniform law Organisations as a matter of urgency. The EC and the Hague Conference have initiated the consultations and negotiations aimed at such accession. Given the similarity between the Statutes of the Hague Conference and UNIDROIT and in the two Organisations' membership, EC accession to UNIDROIT could and should follow the same pattern.

Sixth, participants in the Congress were pleased to hear from the Commission's representative that the history of both the Cape Town Convention and the most recent negotiations in The Hague had convinced Governments and the Commission to ensure early involvement of the latter and better co-ordination among the former.

2. Contracts in general

The Reporter of this session shared the view of many commentators from industry and professional circles in the current European debate that harmonisation of general contract law was not necessary from an economic point of view. He did, however, support the work on a European contract law carried out in various private groups because it was intellectually useful and welcome as a political project. One speaker made the case for leaving the harmonisation of general principles of the law of commercial contracts to the universal Organisations. This was mirrored by another intervention arguing that consumer contract law for a number of reasons necessarily had to be dealt with at the regional level. In view of the dense regulatory regime that many consumer contracts are subject to in many legal systems, we may therefore legitimately ask whether contractual transactions in regulated markets are, in principle and subject to appropriate exceptions, generally more efficiently addressed by the domestic or the regional legislator in whom the regulatory power vests.

3. Sale of goods

The discussion of the relationship between universally unified sales law (CISG), one of the few (and probably the most apparent) success stories of the unification of private law, on the one hand, and built-in flexibility margins allowing for reasonable adaptation and interpretation of its principles, on the other hand, not only highlighted the unique quality of this particular instrument but also dispelled doubts as to whether the worldwide harmonisation process was sufficiently responsive to specific regional needs and whether legal monuments of these dimensions spelled petrification.

4. *Carriage of goods*

Harmonisation of the law of carriage of goods is still one of the intellectually most demanding topics, although much high-quality research has been invested in this branch of the law of contracts in regulated markets. Historically, both uniform transactional law and regional regulation were reactions to the carriers' ability to suspend the market mechanism at the shippers' peril. Moreover, it was the first time that uniform private law acknowledged the need specifically to address the situation in certain regions (non-European regions without significant fleets). These policies dominated international maritime law until 1978. Notwithstanding the international community's repeated efforts to (re-)establish uniformity, de-unificatory forces invariably proved the stronger. By contrast, in the law of carriage of goods by air, apart from liability limits, uniformity showed remarkable resistance. Other modes of transport, most notably road and rail transport, developed and maintained equally stable legal frameworks and, while not comparable in all aspects, they are in that both are subject to regional instruments. One speaker accordingly advocated that preference be given to regional harmonisation wherever regions coincide with operating areas for carriers and where uniform practices, documentation and rules of law have been developed and are widely accepted. This may indeed be an illustration for inter-regionalism (e.g. MERCOSUR – other regional Organisations in the Americas) which ought to be reflected in the work programmes as well as in the definition of the scope of instruments under consideration in bodies that encompass more than one region or regions and non-integrated individual States. Another speaker emphasised that, first, in the law of transport it had been empirically established that regulations and their stakeholders are stronger than freedom of contract and, second, that any regulatory programme pre-supposes that there is an underlying political will, e.g. aimed at achieving economic or even political integration.

We may speculate, therefore, whether in the medium and long run the international and/or regional Organisations will try to harmonise regulatory regimes or, on the contrary, dispose of regulatory bonds in favour of party autonomy. The European Community only recently turned its attention to transport law but is likely to provide clear illustrations of how regional economic policies, market regulation and transactional law are inter-connected.

5. *Secured transactions*

The law of secured financing, undoubtedly the branch of law where the international Organisations currently employ more resources than in any other area, was the subject of exceedingly wide-ranging analysis. The Reporter of this session noted that, while the numerous and significant efforts to develop regional (OHADA, OAS) and sectoral (security in mobile equipment, receivables, securities) instruments did not purport to achieve uniformity, they improved the "climate" for regional and domestic

law reform besides benefiting classes of businesses and countries that are in greater need of cheaper access to credit. The Moderator for his part pointed out that the astonishing successes in an area which, twenty years ago, seemed to be a desert or a minefield were attributable to the fact that credit markets had only now become truly international.

One contribution dealing with “The European Community and the Cape Town Convention” takes an eagle’s perspective and highlights three legislative choices and potential effects of the Cape Town instruments which, although of the highest constitutional and economic interest, have so far gone unnoticed. First, secured transaction law is a prime factor in determining the market power and competitiveness of individual and groups of creditors and debtors and their home States. While EC law currently does not impose equality of legislative environments with a view to avoiding market distortions among Member States, other Regional Economic Integration Organisations may consider such an approach, as may the EC at some junction in the future. That would restrict Member States’ freedom to adopt the instrument(s) and to make individual choices of credit-cost-related declarations, etc. Second, Regional Economic Integration Organisations are apparently granted less flexibility in implementing the Cape Town instruments than federal States. Was that the drafters’ intention? Third, the creation of a uniform, market-responsive secured transaction law at the worldwide level may eventually prompt a revision of the Regional Economic Integration Organisations’ internal competences because the availability of this type of security may be a precondition for successful liberalisation of certain markets (e.g. air transport and, more important, rail transport) which figure prominently on the EC agenda.

6. *Civil procedure*

The session on harmonisation of the law of civil procedure was – at this point in time unsurprisingly – the most complex, demanding and lively one. The reasons for this are manifold. To begin with, the EC has relatively new, extensive and hotly debated competences that are clearly a function of economic and political objectives and which the Commission uses energetically, and there are commentators both inside and outside Europe who see this as at least one of the reasons for the not unlikely failure of the proposed *Hague Convention on Jurisdiction and Recognition and Enforcement of Foreign Judgments*. Then, there is another vast region (the Americas) and one other Regional Economic Integration Organisation (MERCOSUR) where the production of texts on civil procedure is thriving. As one speaker noted, the EC’s powers in this area after Amsterdam are properly characterised as “nominally regional” and “disguised federal”, thereby reminding us that, where private law is a component of an entity’s constitution, traditional approaches to co-ordinating regional and international legislation become insufficient.

The Reporter of this session focused on the need to harmonise the substance of civil procedure as a pre-requisite for sustainable development of international civil procedure. Indeed, the Hague Conference's laudable and relentless efforts to create a worldwide regime for jurisdiction and recognition and enforcement arguably fell victim to two opposing camps' being unable to shed prejudices and understand the reality of modern civil litigation beyond the law on the books and spectacular personal injuries cases. One speaker addressed the phenomenon of "contractualisation" of civil procedure, first practised in appellate commercial litigation in France but with a potential to spread to other European and North American jurisdictions. It was pointed out that the ALI/UNIDROIT *Principles and Rules of Transnational Civil Procedure* might contribute to civil litigation's catching up with arbitration given that the latter was not the appropriate dispute resolution mechanism for all cases and all parties.

7. Cultural property

Should the constituents of markets, *i.e.* freedom of contract, free circulation of resources and regulated competition be the basis of "art law"? The participants in the round table dealing with this question unanimously concluded that they should not. Not, because the market's only criterion is the price, and because emotion, sense of identity, etc. do not normally have a price and should be shielded from being tagged with one. Not, because certain systemic features of today's arts and antiquities trade (free riders due to colonisation, pillage, looting, etc.) make it impossible actually to define them as markets, and because effective regulation is impossible or unaffordable. Does private law alone provide adequate rules for the protection of cultural property? Again, the answer was no. The *1995 UNIDROIT Convention on the Return of Stolen or Illegally Exported Cultural Objects* could therefore only be a complementary instrument, as indeed was its drafters' intention.

As to the question of whether art protection law was more appropriately developed at the regional or the universal level, the speakers drew attention to several aspects. First, the EC Regulation combined with the EC Directive and the implementing national legislation, compact as they may appear, do not really reflect a regional approach but provide for the mutual recognition of Member States' national policies. Second, if the objective is to protect the regional cultural heritage (*e.g.* in the Meso-America or Inca regions), then only the region can define the policy approach and the legal techniques to be employed. Third, while the objects of the art trade are intrinsically national/local/tribal, etc., the problem of theft and illicit trade is global. Since source countries and market countries have vastly differing protection levels and are frequently not situated in the same region, further efforts should primarily be made on the worldwide stage.

III. – OPEN QUESTIONS AND FURTHER HYPOTHESES

Not surprisingly, not all questions asked received a satisfactory reply. Many new questions were added to the list which the organisers and the participants had drawn up in their minds prior to the Congress. Moreover, further hypotheses could be formulated which in turn called for further analysis. For example, the relationship between transactional law and market regulation was repeatedly addressed. Market regulation in turn is regional in Europe, but in other regions efforts to include, for example, maritime transport regulation into the remit of the regional Organisation (NAFTA) have been defeated by fierce lobbying on behalf of protectionist beneficiaries. The broader question needs to be asked, therefore: what kind of market does a regional Organisation really envisage? Experience – referred to in presentations and discussions or part of the Organisations' institutional memories – suggests that harmonisation of transactional law is unlikely to be successful where the type of transaction contemplated is heavily conditioned by regulatory, tax, or similar considerations for which the harmonising Organisation – be it universal or regional – does not have jurisdiction or competence and where there is no political will to confer such competence on that body. Examples which could be cited are UNIDROIT'S not too successful 1988 *Convention on International Financial Leasing* (too closely linked with tax law), the planned but subsequently shelved Franchising Convention (touching upon tax law, competition regulation, labour law, intellectual property law and consumer protection regulation), the law of carriage of goods where transactional law *pretends* to be universal but is unable to live up to this promise because market regulation is national or regional. Similarly, where the 1995 Cultural Property Convention fails to be accepted, it is either because regulatory objectives differ sharply and because public law is either so predominant as to defeat even the constitution of markets or, conversely, totally unregulated markets are effectively defended by the beneficiaries of such lawlessness.

We could go on, as the Congress could have gone on. This, however, was not our intention, as the invitation clearly states. The Congress was meant to be a starting point, the papers presented, the discussions that followed and these conclusions were meant to be a quarry where our sister Organisations, our friends and we ourselves find blocks and modest pieces – material for further work. May this volume serve that purpose.