

The Economic Implications of Uniformity in Law

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I. – INTRODUCTION

A hundred years ago, many lawyers believed that the law of individual nations could, and would, eventually become unified. In a well-known speech made in 1888, ZITELMANN advanced a case for “global law” (*Weltrecht*). According to his argument, because the formalities of legal provisions are common everywhere and the policy goals are, or are going to be, shared by every civilised nation, the law of every nation will in the end converge.¹

Since Zitelmann’s speech, considerable efforts have been made by many individuals and international Organisations to develop a unified law for all nations. These efforts have produced many uniform law instruments. Although some of these instruments have been “successful” (in that they are adhered to by many States²) most of them have attracted only a small number of States. The conclusion that can be drawn is that – contrary to the popular notion held in the nineteenth century – States have failed to take much interest in the unification of law.

This article addresses the question of why the unification of law has not become as prevalent as was expected. As it is difficult to determine the reason why something has not happened, the question is here addressed the other way round: under which conditions will a State, seeking to maximise its

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¹ Ernst ZITELMANN, *Die Möglichkeit eines Weltrechts: Unveränderter Abdruck der 1888 erschienenen Abhandlung mit einem Nachwort* (1916).

² The term “adhere to” is used to include every type of action by a State to implement the uniform law as applicable to its territory. If the uniform law is in the form of a Convention, ratification, acceptance, approval or accession is necessary. The enactment of a domestic law for implementation might also be needed, depending on the case. In the case of uniform law in the form of a model law, the action to be taken is domestic law-making.

benefits, have incentives to adhere to a uniform law? If the conditions implied by the model are ones that are rarely satisfied, then there is little chance that a uniform law will succeed. In order to definitively determine whether the model proposed in this article has predictive value, empirical research will have to be conducted. This, however, is not presented in this article.

Before embarking on an in-depth analysis, it should be noted that unification efforts have been made with respect to both domestic law and private international law. However, it should also be recognised that if unification were to be achieved with respect to both domestic law and private international law, it would be redundant. This is because the private law would be unnecessary if the domestic law were to be unified entirely.³ In this sense, private international law and the unification of domestic law affect the different “order” of the choice of law, using the distinction of the “first-order” and “second-order” rules by WHINCOP and KEYES.⁴ Uniform law provides a set of rules to replace the existing domestic law and eliminates room to choose between the domestic laws of States. Private international law, on the other hand, has traditionally been considered, at least in the Civil Law countries, as a body of rules that dictates which set of substantive law shall govern the case at hand.

The unification of private international law excludes the unpredictability with regard to the second-order rules but does not ensure that the substantive law that will govern any given case will be beneficial to the parties. Therefore, the unification of private international law is sometimes regarded as the second-best solution.⁵

II. – THE BENEFIT DERIVED PURELY FROM UNIFICATION

The unification of law has “normative” and “non-normative” components, as LEEBRON argues with regard to harmonisation.⁶ The former endorses the

³ Gerhard KEGEL / Klaus SCHURIG, *Internationales Privatrecht*, 9. Aufl. (2004), 5.

⁴ According to Michael J. WHINCOP / Mary KEYES (2001), *Policy and Pragmatism in the Conflict of Laws* (2001), 11-12, the distinction of first-order and second-order rules concerns the methods of decision-making. Second-order decision-making means “constraining decisions made at later times by reference to an earlier decision,” whereas first-order decision-making is “the conventional form of choosing action on the basis of costs and benefits.”

⁵ See Peter MANKOWSKI, “Europäisches Internationales Privat- und Prozessrecht im Lichte der ökonomischen Analyse”, in Claus Ott / Hans-Bernd Schäfer (Eds.), *Vereinheitlichung und Diversität des Zivilrechts in transnationalen Wirtschaftsräumen* (2002), 131-132.

⁶ Apparently David W. LEEBRON, “Claims for Harmonization: A Theoretical Framework”, 27 *Canadian Business Law Journal* (1996), 63, uses the term “harmonisation” in a very broad sense, including harmonisation of various regulations or even non-legal standards as well as the private law rules such as the law of contracts or sales of goods. The framework of

adoption of a uniform law because it is a “better” law than an existing law. In other words, the normative component of unification implies (or at least is alleged to imply) the improvement in the first-order rules. The latter component refers to the alleged benefits of unification found in the exclusion of the differences itself, not in the substance of the uniform law.

In most cases, the unification of law includes both normative and non-normative components at the same time. However, for the purposes of theoretical analysis, one can start with pure, non-normative unification, in which States adopt a uniform law only because of the benefit of sharing a common rule with other States, whatever the substance of that rule might be. Typically, the argument for unification has been made purely on the basis of its non-normative benefits.

If States have contradictory rules and the benefits of avoiding the contradiction are large enough there will be an incentive for States to choose to unify their laws. A simple example is the traffic rule providing on which side of the road a car shall drive. Neither the right-hand rule in continental Europe nor the left-hand rule in Japan and Britain has proven to be superior. However, the coexistence of both rules may impede the facilitation of international traffic. The situation can be described by using a simple game of “battle of sexes”. Figure 1 shows that both States would benefit if they chose to unify their traffic rules. The payoffs are exactly equal for both States in every matrix, implying that neither rule has a normative advantage. If both States refuse to give in to the other State and stick to their existing rules, possibly expecting the other State to concede, both will end up in a disadvantageous situation (causing an accident or deterring international traffic).

Figure 1. Traffic rules – left-hand side or right-hand side

	State B		
		Left	Right
State A	Left	(10, 10)	(-5, -5)
	Right	(-5, -5)	(10, 10)

However, the significance of such a non-normative benefit is entirely dependent upon the value of the benefits that a State will derive from uniformity versus the costs that a State will be required to pay to achieve uniformity. In the example of the traffic rules, the net benefits to States of avoiding the disadvantageous situation of (Left, Right) or (Right, Left) by

analysis, though, is useful for this article which limits its scope to the unification of private law.

choosing (Left, Left) or (Right, Right) is 15 (= 10 - [-5]). If these benefits are only negligibly beneficial when compared to the costs that the States will be required to pay when choosing the rule of the other State and changing their own rules, the incentives for States to adhere to the uniform rule are not large. In reality, this appears to have been the case with the traffic rules, as unification has not yet taken place. As pointed out by HARTKAMP, the costs of lack of unification may be smaller in a commercial trade situation because private parties can address most of the resulting inconveniences by agreement between themselves.⁷ Thus, except in a few cases, it is unlikely that a uniform law will be adhered to by States for solely non-normative reasons.

Non-normative justification may be more relevant to the unification of private international law.⁸ When courts of different States apply different laws to the same transaction, each party will resort to the more advantageous forum. The result can be two or more court decisions that are equally legitimate but contradictory. Just as in the case of the conflict of traffic rules, such a result is harmful to the facilitation of international trade.

The importance of the unification of private international law was addressed by the Hague Conference on Private International Law when it began its work on the Hague Securities Convention.⁹ According to the Explanatory Report of the Convention, the absence of uniform rules on conflict of law over the transactions of securities held with an intermediary has created legal uncertainties which imply the existence of a systemic risk to financial institutions serving as intermediaries. A Convention on the conflict of law was required to ensure *ex ante* legal certainty, which "is essential for the smooth operation of the financial markets."¹⁰ It appears that the impetus for unification in this instance was non-normative because the focus was more on the existence of uniformity rather than the substance of the chosen law.¹¹

⁷ Arthur S. HARTKAMP, "Modernisation and Harmonisation of Contract Law: Objectives, Methods and Scope", *Unif. L. Rev. / Rev. dr. unif.* (2003), 81, 82, points out that the expenses of legal advice are non-recurring and will "normally not bear too heavily on the exporter."

⁸ MANKOWSKI, *supra* note 5, at 124-126, also points out that the unification of private international law reduces incentives to forum shop and lessens transaction costs in international trade.

⁹ *Hague Convention on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary*, at <www.hcch.net/index_en.php?act=conventions.text&cid=72>.

¹⁰ Roy GOODE / Hideki KANDA / Karl KREUZER, *Explanatory Report on the Hague Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary* (2005), 17, No. Int-34.

¹¹ As the work on the Convention made progress, the issue of which law to choose as the uniform governing law emerged. The "look-through" approach was rejected and the idea of "PRIMA" (Place of the Relevant Intermediary Approach) that was preferred had to be modified

III. –UNIFORM LAW AS “BETTER” LAW

If a uniform law is unlikely to attract support for purely “non-normative” reasons, it is not surprising to find that most of the uniform law instruments have been motivated, at least in part, by the desire to improve the existing domestic law. In other words, many uniform law instruments have, at least in part, “normative” components. Good examples are transport law treaties.¹² The first International Convention concerning the Carriage of Goods by Rail, dating back to 1890, cannot be fully understood without recalling the natural monopoly of the railway industry at that time. The Hague Rules of 1924 on maritime transport¹³ have been a compromise between carriers that were relying on various exemption clauses and the cargo interests that requested their regulation. More recently, the 1999 Montreal Convention¹⁴ on carriage by air has been motivated by the desire to achieve full protection of passengers replacing the 1929 Warsaw Convention¹⁵ that aimed at giving the then infant airline industry a shield from unlimited liability.¹⁶

In the case of such “normative” unification, there is a good probability of adherence (ratification, accession, approval or other kinds of action as the case may be) by those States that have policy preferences in common. Some successful examples are found in the field of transport law: the above-mentioned Warsaw/Montreal Conventions,¹⁷ the *Convention on the Contract for the International Carriage of Goods by Road (CMR)*,¹⁸ as well as the

before it was finalised in the Convention (see GOODE / KANDA / KREUZER, *supra* note 10). Thus, the discussion became a normative one in the end.

¹² See, generally, Jürgen BASEDOW, *Transportrecht* (1987).

¹³ *International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading* (1924), 120 L.N.T.S., 187.

¹⁴ *Montreal Convention for the Unification of Certain Rules for International Carriage by Air* (1999), S. Treaty Doc. No. 106-45 (2000); see also M. MILDE, “Liability in International Carriage by Air: the New Montreal Convention”, *Unif. L. Rev. / Rev. dr. unif.* (1999), 835.

¹⁵ *Warsaw Convention for the Unification of Certain Rules for International Carriage by Air* (1929), 137 L.N.T.S., 11.

¹⁶ The modernisation of the Warsaw Convention was motivated by the finding that the limitation of liability for death or injury of passengers was being questioned. The idea of providing passengers with more protection acquired worldwide acceptance, as was evidenced by the rapid increase in the number of States Parties to the Montreal Convention. See Ludwig WEBER, “Recent Developments in International Air Law”, 29 *Air & Space Law* (2004), 280.

¹⁷ See *supra* notes 14 and 15.

¹⁸ *United Nations Convention on the Contract for International Carriage of Goods by Road* (1956), 399 U.N.T.S., 189.

Convention concerning International Carriage by Rail (COTIF) ¹⁹ with its Appendices. The Hague Rules also enjoyed widespread support until challenged by the Hamburg Rules ²⁰ that reflected the voices of States with other types of policy preferences, being more in favour of cargo interests.²¹

In reality the policy preferences of States are more likely to diverge than to coincide.²² This means that the unification of law is unlikely to be achieved even if there is a “normative” reason for it. The case of the unification of maritime law serves as a good example: the uniformity which was lost by the emergence of the Hamburg Rules has never been recovered.²³ As a result, many uniform law instruments have remained unpopular and attracted only a limited number of States Parties. Faced with this reality, doubts have been raised whether unification is really necessary when there exists no shared preference in policy among States and, therefore, there is little prospect for the participation of many States. Put another way, an international organisation engaged in the unification of law may benefit from being more selective in the subject of its work.²⁴

If it is the divergence in policy among States that frustrates the unification of law, the ordinary negotiation process of making compromises to

¹⁹ *Convention concerning International Carriage by Rail* (1980), 1397 U.N.T.S., 76.

²⁰ *United Nations Convention on the Carriage of Goods by Sea* (1978), 834 U.N.T.S., 107.

²¹ For a brief overview of the uniformity in the law on carriage of goods by sea in the past century, see Hannu HONKA, “Introduction”, in Hannu Honka (Ed.), *New Carriage of Goods by Sea*, Institute of Maritime and Commercial Law, Åbo Akademi University (1997) and Michael F. STURLEY, “Uniformity in the Law Governing the Carriage of Goods by Sea”, 26 *Journal of Maritime Law and Commerce* (1995), 553.

²² LEEBRON, *supra* note 6, lists many factors that make the policy preferences of States likely to diverge.

²³ Partly motivated by the desire to address this situation, UNCITRAL is currently working on the draft Convention on the Carriage of Goods [Wholly or Partly] [by Sea]. See Francesco BERLINGIERI, “A New Convention on the Carriage of Goods by Sea: Port-to-Port or Door-to-Door?”, *Unif. L. Rev. / Rev. dr. unif.* (2003), 265. The last published draft, as of 14 November 2007, is included in United Nations, Transport Law: Draft Convention on the Carriage of Goods [Wholly or Partly] [by Sea] (2005). Note by the Secretariat, A/CN.9/WG.III/WP.101.

²⁴ With regard to the inter-American unification of law by the Inter-American Specialized Conference on Private International Law (CIDIP), Cecilia FRESNEDO DE AGUIRRE, “Unifying the Law of Carriage of Goods: a View from MERCOSUR”, *Unif. L. Rev. / Rev. dr. unif.* (2003), 241, 250-251, voices the criticism that CIDIP-VI took up the promulgation of the uniform through bill of lading as its agenda without an imminent need for it. The public choice problem of international Organisations creating uniform law instruments in the process of a technocratic style was pointed out and analysed by Paul B. STEPHAN, “The Futility of Unification and Harmonization in International Commercial Law”, 39 *Virginia Journal of International Law* (1999), 743.

accommodate conflicting views to reach an instrument acceptable to all State delegates is futile at best. This is because such compromises do not resolve the conflicts in policy among States but merely mask such conflicts. This was the idea held in the process of drafting the *Cape Town Convention on Mobile Equipment* (UNIDROIT).²⁵

The Cape Town Convention provides the legal framework for asset-based financing. The primary idea is that the private autonomy (freedom of contract) between the financier and the borrower, as well as the private enforcement of security interests held by the former, enhances the possibility *ex ante* for the latter to have access to the capital market. Therefore, the borrower will be better off, rather than the opposite, by giving up judicial protection under the scheme.

The Working Group drafting this Convention undertook empirical research to examine how much benefit could be expected from introducing the framework of the Convention and how the benefit would be distributed among the borrower, financier and society in general (including consumers).²⁶ The Working Group opted for a “policy-based approach,” as opposed to “technical decision-making”. The rationale for this was that the unique features of the Convention should not be compromised by attempting to incorporate opposing viewpoints. It was felt that such an incorporation of opposing viewpoints would result in sacrificing the economic benefits of the Convention.²⁷ When opposition against a provision in the draft was raised, the choice of opting out was given rather than creating an acceptable provision by employing ambiguous wording.

The idea behind this approach is that the economic benefits of the Convention will be evaluated not by Government delegates but by the parties to transactions (industry) in each State. It is expected that a legal framework that brings financial benefits to such private parties will be supported by Governments that are responsive to their interests. As is evident, the idea is a

²⁵ *Convention on International Interests in Mobile Equipment* (2001), UN Doc. No. A/AC.105/C.2/2002/CRP.3.

²⁶ Anthony SAUNDERS / Ingo WALTER, “Proposed UNIDROIT Convention on International Interests in Mobile Equipment as Applicable to Aircraft Equipment Through the Aircraft Equipment Protocol: Economic Impact Assessment”, 23 *Air & Space Law* (1998), 339.

²⁷ Jeffrey WOOL, “Rethinking the Notion of Uniformity in the Drafting of International Commercial Law: a Preliminary Proposal for the Development of a Policy-based Unification Model”, *Unif. L. Rev. / Rev. dr. unif.* (1997), 46.

kind of a model "State competition for legislation." From this perspective, a Convention will be more efficient if the provisions are more explicit.²⁸

IV. –THE UNIFORM LAW ADHERED TO NOTWITHSTANDING ITS DEFICIENCIES

There is the possibility that a State will have an incentive to adopt a uniform law even when the law is not "better" as the first-order rule than its own domestic law and thus, when at first blush, it would appear not to make normative sense to adopt the law. The situation in which this is most likely to occur is when the uniform law will exclude the choice of a law of State B which is "worse" than both the domestic law of State A and the uniform law.

Suppose that State B has a law that will not benefit most parties in the course of normal commercial transactions. An example of this would be a contract law that permits only limited private autonomy. In this scenario, the law of State B (L^B) is "worse" than the law of State A (L^A). If, however, L^B gives an extraordinary benefit to a party under a certain condition (condition θ), which may itself be evidence that L^B is a bizarre law, a party that is likely to benefit under condition θ might prefer to choose L^B as the governing law. A likely case is a law under which a debtor (or a seller) can easily be declared to be faced with force majeure and exempted from performing its obligations.

Figure 2(a) shows the payoffs of the parties to a transaction, under the assumption that condition θ takes place at the probability 0.01 (1 %). Though it is obvious that L^A improves the total welfare, the seller may insist that the governing law be L^B . Whether L^B is chosen according to the wish of the seller depends on the bargaining power of both parties.

If both States adopt a uniform law and apply it to international trade between themselves, the chances of strategic behaviour by the seller can be excluded. The payoffs under the uniform law (L^U) are shown in Figure 2(b). The uniform law is the second-best solution, as it is not as efficient as L^A . However, the total welfare may still be improved if, but for the uniform law,

²⁸ The argument is too simplistic, because the superiority of the policy-based approach must be measured against the more acceptable uniform law produced by making compromises, not against the existing law with no uniformity benefits. As discussed in the body text below (V), the uniform law can have network externality in the sense that a State gains benefits by sharing the same legal scheme with many other States. If such network externality is large enough, the traditional diplomacy of making compromises may bring more benefits than the policy-based approach. The empirical research undertaken by the Aviation Working Group in the course of drafting the Cape Town Convention (SAUNDERS & WALTER, *supra* note 26) measured the benefits as compared with the existing law, not with a (hypothetical) version of the Convention with more compromises. This means that the benefits of the policy-based approach have not been fully examined.

the seller has good bargaining power and the chances of L^B being chosen as the governing law are large enough.

This finding is important because the uniform law inherently entails drawbacks and therefore may not be better than the existing domestic law, as such. A uniform law by its nature is novel as compared to a domestic law, which may have had a chance to develop over centuries. The number of cases interpreting and applying the rules will likely be much smaller when compared with the existing domestic law. The novelty of the uniform law will generate costs – as WALT pointed out with regard to the *United Nations Convention on Contracts for the International Sale of Goods* (CISG).²⁹ Walt argued that the costs consisted of agency costs of controlling lawyers by the parties, network externality and learning externality, the last of which was likely to be the true source of costs generated by the use of the novel uniform law. The above argument shows that a uniform law can be adhered to despite some drawbacks, if certain conditions are met.

Figure 2. The uniform law to exclude a “worse” law

(a) Payoffs under national laws

Not under Condition θ : $p(-\theta) = 0.99$

	L^A	L^B
Seller	300	300
Buyer	500	200

The benefits to the seller:
 $L^A: 0.99 \cdot 300 + 0.01 \cdot 100 = 298$
 $L^B: 0.99 \cdot 300 + 0.01 \cdot 1000 = 307$

The benefits to the buyer:
 $L^A: 0.99 \cdot 500 + 0.01 \cdot 700 = 502$
 $L^B: 0.99 \cdot 200 + 0.01 \cdot 0 = 198$

Under Condition θ : $p(\theta) = 0.01$

	L^A	L^B
Seller	100	1000
Buyer	700	0

Total welfare, being the sum of the benefits to the seller and the buyer:
 $L^A: [0.99 \cdot 300 + 0.01 \cdot 100] + [0.99 \cdot 500 + 0.01 \cdot 700] = 800$
 $L^B: [0.99 \cdot 300 + 0.01 \cdot 1000] + [0.99 \cdot 200 + 0.01 \cdot 0] = 505$

²⁹ Steven WALT, “Novelty and the Risks of Uniform Sales Law”, 39 *Virginia Journal of International Law* (1999), 671. The scarcity of cases is being overcome by international databases of cases interpreting CISG, such as Case Law on UNCITRAL Texts (CLOUT), at <http://www.uncitral.org/uncitral/en/case_law.html> and UNILEX on CISG and the UNIDROIT Principles, at <<http://www.unilex.info/>>.

(b) Payoffs under the uniform law

Not under Condition θ : $p(-\theta) = 0.99$

	L ^U	L ^A	L ^B
Seller	300	300	300
Buyer	300	500	200

The benefits to the seller:

$$L^U: 0.99 \cdot 300 + 0.01 \cdot 200 = 299$$

The benefits to the buyer:

$$L^U: 0.99 \cdot 300 + 0.01 \cdot 500 = 302$$

Under Condition θ : $p(\theta) = 0.01$

	L ^U	L ^A	L ^B
Seller	200	100	1000
Buyer	500	700	0

Total welfare, being the sum of the benefits to the

seller and the buyer:

$$L^U: [0.99 \cdot 300 + 0.01 \cdot 200] + [0.99 \cdot 300 + 0.01 \cdot 500] = 601$$

An explanation is still required as to why the same result cannot be achieved by private arrangements. It is evident from Figure 2 that private parties can negotiate the selection of law by one party compensating another party for choosing a less beneficial law. For example, in Figure 2, the buyer could compensate the seller for a certain amount between 9 (307-298) and 304 (502-198) and, by doing so, could persuade the seller to consent to choosing L^A as the governing law.

However, States may have an incentive to intervene in the negotiations between the parties. For example, in Figure 2, if State A has many potential buyers but few sellers it will adhere to the uniform law (L^U) and try to persuade State B to join in order to enable its buyers to save a large amount of compensation. Another possibility is that the buyer needs the credible commitment that the seller will not act opportunistically and try to resort to L^B *ex post*.

V. – OTHER ISSUES

In the previous sections, it has been demonstrated that under certain conditions States have incentives to adhere to uniform law. There are, however, a few issues that must still be discussed.

(a) The first issue is network externality. States may find it beneficial to join a scheme that is prevalent among many States regardless of the substance of the scheme. Therefore, network externality can be relied on as a purely non-normative argument for unification. This may especially be the case when the uniform law at issue concerns procedural rules. The popularity of the New York Convention,³⁰ the Hague Service Convention,³¹ as well as the Hague Evidence Convention³² are illustrative of the effect of network externality.

³⁰ *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (1956), 330 U.N.T.S., 38.

³¹ *Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in*

Network externality can be negative as well. Ironically, the more popular a Convention is, the more difficult it is to amend the uniform law in a timely manner. This has been a serious problem with transport law Conventions, where the amount of limit of liability has become inadequate with the passage of time since the Conventions were adopted. Even CMR, one of the most successful transport law Conventions, faces the difficulty of raising the limitation amount, which is now found to be “extremely low”.³³ The recent efforts of the United Nations Commission on International Trade Law (UNCITRAL) to include a provision in the draft Convention on electronic commerce that will authorise the use of electronic communications under some existing international instruments may be understood as attempts to address this negative externality issue.³⁴

(b) The second issue to be addressed is unification through non-legal rules. These instruments are sometimes called *lex mercatoria*. Contrary to the popular belief of most lawyers, from an economist’s point of view, there is little reason to distinguish these rules from the uniform law rules provided in international Conventions.³⁵ In fact some of these private rules, such as the *Uniform Customs and Practice for Documentary Credits* (UCP) of the International Chamber of Commerce (ICC) and the York-Antwerp Rules on general average have a large body of cases, as well as academic works, which

Civil or Commercial Matters (1965), at <www.hcch.net/index_en.php?act=conventions.text&cid=17>.

³² *Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters* (1970), at <www.hcch.net/index_en.php?act=conventions.text&cid=82>.

³³ Rolf HERBER, “CMR: UNIDROIT Should Not Let This Child Go!”, *Unif. L. Rev. / Rev. dr. unif.* (1998), 475 at 477-478.

³⁴ Article 9 of the *United Nations Convention on the Use of Electronic Communications in International Contracts* (2005) provides that the requirement in the law of a written form is met by an electronic communication if the information contained is accessible so as to be usable for subsequent reference. The provisions of this Convention are referred to in Art. 20 and declared applicable to the Conventions listed in the same paragraph, inclusive of the New York Convention on Foreign Arbitral Awards and the CISG.

³⁵ As pointed out by Eva-Maria KIENINGER, *Wettbewerb der Privatrechtsordnungen im Europäischen Binnenmarkt* (2002), 279-281, non-legal rules (*lex mercatoria*) cannot be an equivalent of national and international legal rules, since the former do not override the mandatory rules of the applicable law but rather are enforced only to the extent that the freedom of contract is admitted. The subject of the economic analysis shall be, therefore, the rules of the non-legal instrument as conditioned by the applicable mandatory rules. That being stated, the difference between legal and non-legal rules is not so significant in the economic analysis because the parties will not spend a significant amount in resorting to judicial procedure when they can achieve the same or better result through arrangements between themselves.

make them more foreseeable rules when compared with domestic law (which is rarely, if ever, applied to such transactions).

The difference between the uniform law and *lex mercatoria* may be found in the manner of the engagement of States. A State has no means to force the application of non-legal instruments, however great the incentives for adherence may be. At best, a State can merely ensure that such an instrument is enforced to the full extent under its law. This will be done by holding such instruments as being not against the mandatory provisions of its law. As compared with the cases examined in the previous sections, the engagement of States becomes remote. The logic, however, will not be substantially different.

(c) Thirdly, it needs to be noted that uniform rules, whether a uniform law or non-legal rules (*lex mercatoria*), eliminates the room for State competition in legislation.³⁶ Once a uniform law is adopted and widely accepted, it will be difficult for States to deviate from it. The lack of competition on legislation may not matter so much in the case of non-mandatory rules as the parties can opt out of the provisions of the governing law. It is, however, relevant in the case of internationally mandatory law, such as the law on consumer protection or bankruptcy law.³⁷ In such cases, the elimination of State competition for legislation is a cost of unification that must be set against the benefits examined in the previous sections.

The issue here is who is in the best position to find the most efficient rules. It might be argued that State competition for legislation is preferable to the unified rules that have been produced by drafters with limited resources. However, the efficiency of such a market has not been verified empirically. Therefore, the costs arising from the elimination of State competition cannot be evaluated precisely at this stage.

VI. –CONCLUSION

Despite the number of uniform law instruments produced during the last hundred years, the unification of the law of nations has not made great progress, at least not as great as was expected in the beginning. Some instruments have been very successful, while others have not. One may wonder what factors determine the success or failure of the uniform law. No general theory over this subject has been advanced.

³⁶ WHINCOP / KEYES, *supra* note 4, at 39.

³⁷ KIENINGER, *supra* note 35, at 283.

This paper has found three types of situations in which States will have the incentive to adhere to a uniform law. The first case is purely non-normative, where the coexistence of different rules is itself costly. The second case is where a uniform law, as compared with the existing domestic law, is an improvement in its substance, in which case the uniform law is likely to be chosen as a result of State competition. There can also be a third case, where the uniform law may be adhered to notwithstanding its flaws because it can exclude the possibility of a still worse law to be chosen. If we include network externality into the analysis, the list of such cases might become longer.

When the actual situation does not fall into one of the above categories, there is little chance that a uniform law will be successful. Thus, law-making bodies considering a new uniform law instrument might wish to examine the situation in advance and be more selective in choosing the subject of unification in order to enhance the probability that their product will have a significant impact in unifying the law of States throughout the world.³⁸



³⁸ The need for economic analysis in the process of international commercial law has already been advanced by Jeffrey WOOL (2003), "Economic Analysis and Harmonised Modernisation of Private Law", *Unif. L. Rev. / Rev. dr. unif.* (2003), 389. As argued by Luke NOTTAGE, "Legal Harmonization", in David Clarke (Ed.), *International Encyclopedia of Law and the Social Sciences* (2005), such a proposal on the methodology of law-making is not surprising at all when considered in light of the shift in thinking to market-oriented approaches, which parallels the political phenomena observed in the last couple of decades.