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Legal and Administrative Studies

Proceedings of Conference Legal, Political and Administrative Consequences of Romania's Accession to the European Union

BUCUREŞTI,
17-18 Mai 2018

PRO UNIVERSITARIA
BUCUREŞTI 2018

ISSN 2601-0836
978-606-26-0993-1

CUPRINS

International legal harmonisation in theory and practice

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Legal harmonisation in international law is composed of common legislative development, consistent implementation, and uniform interpretation of legal texts across jurisdictions. These three different stages are under the authority of and subject to the influence of different state and non-state actors contributing towards a multi-dimensional concept of contemporary legal development.

The current legal harmonisation process diverges from the processes started hundreds of years ago. In the present days lawmaking and domestic implementation have become more sophisticated. A variety of methods may now be used to frame and implement uniform rules. However, the object of developing legal certainty and predictability is still the main driving force of international harmonisation efforts. The work of legal harmonisation nowadays encompasses a large number of bodies - both governmental institutions and private sector representatives.[3]

States, as primary actors of international law, develop and ratify treaties to regulate international relationships, with input from NGOs and industry lobbying groups representing public and private interest. Legal harmonisation can then occur at a domestic, regional, or international level, as states commit to respect and enforce the particular rights and obligations envisaged by the treaties, implementing international law and ensuring that their domestic law is compatible with the international regulation.[4] However, the potential of domestic courts to implement and enforce international norms in accordance with their intended purpose has remained largely divergent,[5] challenging the success and efficiency of legal harmonisation efforts. In any country, the judiciary is one of the most important

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[5] Alam, M. Shah, *"*Enforcement of International Human Rights by Domestic Courts in the United States. *Annual Survey of International & Comparative Law* 10.1, 2004, p. 3.

institutions discharging the protective responsibility of legal rights of the state and its citizens in the international arena, and implementation of international law at that level is often inconsistent with the intended harmonisation purposes.

This paper will analyse the first two stages of legal harmonisation, namely legal development and implementation, on one hand from a theoretical, and on the other hand from a practical perspective mainly through the lens of the work done by the UNCITRAL in harmonising international trade law. This paper will theorise on the possible reason behind the challenges faced by the harmonisation efforts and propose a potential solution in the form of an independent, neutral platform to serve as a bridge between the different actors influencing the process at these different stages. While divergent interpretation is also a significant challenge for practical legal harmonisation, the role of the judiciary and case law remains outside the scope of the present paper, to be analysed in a separate publication.

Developing legal texts towards harmonisation of international trade regulation

Due to rapid globalization and regional integration, the development of international trade law and the international organizations dealing with private and commercial law are facing a range of challenges.[6] The driving force behind the phenomenon of globalization is not governmental policy but private initiative, such as expanding markets; global competition; increasing mobility of individuals, companies, goods, services, and capital; and developing of means of communication and instant sharing of information through the media and the Internet.[7] The result is a variety of new international legal issues not only between states, but also between private and commercial parties, usually involving the legal systems of more than just one jurisdiction.

The impact of globalization on private international law constitute a particular subject that has been widely researched by scholars,[8] but has not always been within the scope of international organisations established to harmonise international law. Initially, private commercial law and especially investment law were not within the focus of the United Nations (UN), the main purpose of which

[6] Rodrik, Dani, *"*How far will international economic integration go?*"Journal of Economic Perspectives* 14.1, 2000, pp. 177-186.

[7] Brown, Tony, *"*Challenging globalization as discourse and phenomenon.*"International Journal of Lifelong Education* 18.1, 1999, pp. 3-17.

[8] Basedow, Jurgen, *"*Worldwide harmonisation of private law and regional economic integration-General report.*"Unif. L. Rev. ns* 8, 2003, p. 31; *See* Bazinas, Spiros V, *"*Harmonisation of international and regional trade law: The UNCITRAL experience.*"Unif. L. Rev. ns* 8, 2003, p. 53; *See also* Kronke, Herbert, *"*UNIDROIT 75th Anniversary Congress on Worldwide Harmonisation of Private Law and Regional Economic Integration: Hypotheses, Certainties and Open Questions.*"Unif. L. Rev. ns* 8, 2003, p. 10; *See also* Andersen, Camilla Baasch, *"*Defining uniformity in law.*"Unif. L. Rev. ns* 12, 2007, p. 5.

in the legal sphere was the development of public international law.[9] However, later it became obvious that to foster balanced relations among states, decrease poverty and promote the economic prosperity of the nations of the world, the UN needed to advance the rule of law among nations as well as trade, as an important principle of international peace and stability.[10] Therefore, it was important to provide countries, in particular developing ones, with the legal tools to involve them in the productivity of international or domestic trade, and international investors to protect their interests and investments in such countries. Accordingly, the UN recognised that for trade to prosper, countries ought to have laws that support contemporary contract practices and ensure the rule of law and contract discipline in commercial transactions.[11]

In the early 1960s, UN Member States considered the drafting of rules regulating international trade which could benefit from the different contributions of countries with diverse legal, social and economic systems. The result of that consideration was the creation of the UN Commission on International Trade Law (UNCITRAL). Since that time, UNCITRAL has become the core legal body within the Organization in the area of international trade law,[12] leading the harmonisation of international trade law globally through a concentrated effort. The formation of UNCITRAL was a significant step toward the unification and harmonisation of international trade law,[13] one of its most visible successes being in the harmonisation of arbitration laws.[14]

The area of dispute resolution and arbitration has famed UNCITRAL in many circles of international commercial practice.[15] UNCITRAL is the legal body behind encouraging business entities and investors to make use of alternative dispute resolution (ADR) to remove barriers created by state court proceedings based on domestic codes of civil proceedings. As major texts, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the UNCITRAL Model Law on International Commercial Arbitration and the UNCITRAL Arbitration Rules are a good example of promoting a particular

[9] Teubner, Gunther, *"*Global Bukowina: legal pluralism in the world-society", 1996.
[10] Von Glahn, Gerhard, and James Larry Taulbee, *Law among nations: an introduction to public international law*. Routledge, 2017.
[11] One of the first efforts of the UN in the area of trade law was the negotiation in 1958, on the initiative of the International Chamber of Commerce, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.
[12] Sono, Kazuaki, *"*UNCITRAL and the Vienna Sales Convention.*"The International Lawyer,* 1984, p. 7-15; *See also* Honnold, John. *Uniform law for international sales under the 1980 United Nations Convention*. Kluwer law international, 2009.
[13] Horvath, Eva, *"*A Handy Tool for the Settlement of International Commercial Disputes.*"Penn St. Int'l L. Rev.* 27, 2008, p. 783.
[14] *Ibid*.
[15] Dezalay, Yves, and Bryant G. Garth, *Dealing in virtue: International commercial arbitration and the construction of a transnational legal order*. University of Chicago Press, 1996.

dispute resolution mechanism and shaping public acceptance of the system by providing world-wide legal recognition to it. The New York Convention has boosted the acceptance and practice of commercial arbitration by creating a global legal framework recognising arbitration as a valid dispute resolution method and the resulting awards as legally binding and enforceable across jurisdictions. As there are currently 159 member states to the Convention[16], the uniform legal framework created by the success of the Convention naturally leads to an undisputed success of arbitration as well. Similarly, the Arbitration Model Law is recognized as a major source for procedural harmonisation because it is an international instrument that has been adopted by a great number of countries[17] and its rules are ingrained in the international arbitration community and the image of real arbitration practice. Its main goal is to provide a fair and efficient framework for international dispute resolution.[18] A similar success story is currently being developed for mediation through the development of 'instruments on enforcement of international commercial settlement agreements resulting from mediation',[19] demonstrating that legal harmonisation is both the cause and the effect of practical developments in a field.

Divergence among various domestic procedural regulations is a source of insecurity and indeterminacy in international commercial disputes, which justifies the UN's movements toward harmonisation in this field.[20] International bodies such as the UNCITRAL, the International Institute for the Unification of Private Law (UNIDROIT), The Hague Conference and others are called upon to form legal structures that allow for a necessary coordination between legal systems and interaction among courts and other governmental organs, for an effective legal harmonisation. These structures are necessary, first, because there is a rising demand to remove legal barriers arising from the present blend of state-based private and commercial legal systems, and second, because they are needed to protect values and interests at jeopardy, such as cultural property. International institutions and organizations are indispensable in building stepwise worldwide international commercial and private law, thus creating a global legal frame or structure that provides important commercial and personal protection.

[16] As of July 2018 – *see* http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NY Convention_status.html

[17] As of July 2018, 80 states are considered to be 'Model Law countries' – *see* http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html

[18] General Assembly Resolution 40/72 (11 December 1985) Recital 4; General Assembly Resolution 61/33 (4 December 2006) Recital 5.

[19] See UNCITRAL Report of Working Group II (Dispute Settlement) on the work of its sixty-eighth session (New York, 5–9 February 2018), A/CN.9/934, available at http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html

[20] For example, the UN General Assembly adopted the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards in 1958.

Dynamic communication by UNCITRAL with the UN Member States, while not limited to official tasks but stretched to include an agreed list of specialists and academics in the subject areas involved, can create a very valuable network of information exchange, bridging regional differences. Regional integration is in some measure a demonstration of globalization because the intensity of expanding markets and mobility naturally penetrate neighbouring countries even more than remote countries.[21] However, regional integration is also an endeavour to return some measure of governmental regulation and control, and indeed a new common regional individuality, to emerging societies and markets. Considering the nature of the forces at the function, this certainly heads to regional activity in private and commercial law. Such kind of activities can be observed in all regions of the world, from Asia to Africa and from Europe to Latin America, and consequently, the relationship between regional and global rulemaking is becoming a global issue and becoming a key issue for all organizations.

The Hague Conference may be a good example of the impact of European integration[22] on its techniques and methods of rulemaking, and even on its institutional framework.[23] The challenge of globalization and integration for the relevant stakeholders is to work towards the correct balance between three scales of lawmaking and law implementation: national, regional and global. Where possible, solutions for global issues are discussed and disputed at the global scale, although there should be versatility to permit for extra legislative activity at the national and the regional scales.[24] Global law-making is, however, only one aspect of creating a harmonised legal framework to effectively support predictability and efficiency in trade. The effective implementation at domestic level of the instruments developed at international level can just as equally 'make or break' the effort of any such harmonisation.

Implementing harmonised legislation

International conventions and treaties are considered as the main mechanism for the international unification of domestic private law,[25] together with model laws and legislative guidelines. However, it is not an easy process to implement those conventions and treaties into the domestic system. The process of ratification, depending on whether the country has a monist or dualist system, may

[21] Mittelman, James H, *The globalization syndrome: Transformation and resistance*. Princeton University Press, 2000.

[22] European integration is the process of industrial, political, legal, economic, social and cultural integration of states wholly or partially in Europe.

[23] Shore, Cris, *Building Europe: The cultural politics of European integration*. Routledge, 2013.

[24] For example, Hague conventions consistently provide for respect for legal pluralism, whether based on territorial or personal standard, at the national scale.

[25] Franck, Susan D, "The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions*."Fordham L. Rev.* 73, 2004, p. 1521.

entail several formal stages, involve numerous authorities and sometimes take several years to complete, which in turn leads to an extended provisional period between the ratification of international conventions or treaties and their entry into force and actual domestic implementation.[26] International law does not prescribe how any country binds itself to treaties or conventions. Each nation decides what steps are necessary for that to occur. Some countries' law provides that treaties or conventions can become binding without legislative action.[27] When this mode of implementation is used, there is no place for state law.

UNCITRAL became very successful in promoting harmonisation among states who understood that harmonisation and unification of international trade law involves a high level of specialized skills and dynamic negotiations, which UNCITRAL mastered effectively by welcoming international non-governmental organizations and non-state actors with relevant skills and knowledges during the negotiations.[28] However, it was not enough to reach uniformity through a convention that might be ratified by states, as harmonisation faces difficulties when the states resist to ratify international instruments touching upon their familiar domestic procedure law. Many jurisdictions are facing the same challenges.

International organizations do not have the power to legislate. Representatives of members taking part in international negotiations have personal and diplomatic commitments to each other that they will try to have final proposals implemented, but the success of proposals for international law necessarily depends upon what happens when the proposals are taken up domestically. Each national legal system determines, in its own way, the manner of implementation of international agreements. The situation of the countries is similar in many respects, where lawmaking authority is divided between a central government and the governments of smaller territorial units.

Implementation occurs at two stages. At a formal level, an international or uniform text is implemented when States adopt it through ratification or enactment into domestic legislation. At a practical level, implementation occurs when those standards and texts are taught to students, used by practitioners and applied by courts. The legal harmonisation work of a drafting agency, therefore, does not end with the finalisation and adoption of a text, but includes raising awareness of it and promoting its correct implementation.[29] In addition,

[26] Chinkin, Christine M, *"*The challenge of soft law: development and change in international law.*"*International & Comparative Law Quarterly 38.4, 1989, pp. 850-866.
[27] Reitz, Curtis R, *"*Globalization, International Legal Developments, and Uniform State Laws.*"Loy. L. Rev.* 51, 2005, p. 301.
[28] Rubino-Sammartano, Mauro, *"*Developing Countries vis-a-vis International Arbitration.*"J. Int'l Arb.* 13, 1996, p. 21.
[29] Jose Angelo Estrella Faria, Future Directions of Legal Harmonisation and Law Reform: Stormy Seas or Prosperous Voyage, 14 Unif. L. Rev. 5, 2009.

international conventions are not flawless,[30] and with the harmonisation process itself full of difficulties, they become an easy target for disapproval by domestic readers. The ultimate end users of international texts are educated and familiar with their own domestic laws and therefore, might highlight the advantage of domestic law over the creation of international discussions and conferences,[31] which may effectively frustrate the harmonisation process. International conventions and treaties are also difficult to amend in cases needing accommodation to economic change or development of practice or technology.[32] Even after amendments are agreed upon, another problem may arise when amending protocols may not be ratified by all the original signatory States, resulting in a complex patchwork of Contracting Parties.[33]

Accordingly, problems in formal implementation have two main sources: low acceptance of uniform texts at the domestic level, and insufficient coordination in foreign assistance to domestic law reform. With regard to the first impediment, one must recognise that uniform law instruments typically attract little political interest. Their main purpose being to facilitate the business activities to which they relate, 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.[34]

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

[30] Farnsworth, E. Allan, *"*Unification and Harmonization of Private Law.*"Can. Bus. LJ* 27, 1996, p. 48.
[31] Hobhouse, J.S, *"*International conventions and commercial law: The pursuit of uniformity.*"Law Q. Rev.* 106, 1990, pp. 530-534. 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".
[32] Rosett, Arthur, *"*Unification, harmonization, restatement, codification, and reform in international commercial law.*"Am. j. Comp. L.* 40, 1992, p. 683.
[33] A.O., Alan, D. Rose, *"*The challenges for uniform law in the twenty-first century.*"Uniform Law Review-Revue de droit uniforme* 1.1, 1996, pp. 9-24.
[34] *Ibid.*

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.[35] 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. It is not surprising, therefore, that the ultimate success of legal harmonisation is very much dependent on the harmonisation of the various roles the different stakeholders and active actors play in the legal harmonisation effort.

Harmonising the role of the actors influencing legal harmonisation

The important challenge for legal bodies like the UNCITRAL is to inform the society worldwide that all negotiated multilateral instruments such as conventions, principles, model laws and legislative directives in the area of commercial law, of judicial cooperation, of access to justice and dispute resolution in civil and common matters exists to cater for global needs.[36] For this reason, the need for cooperative work of the organizations, multilateral institutions and regional organizations such as MERCOSUR[37] and OHADA,[38] is vital to provide information on these instruments in order to assist with implementation and application of international instruments.[39]

From an institutional point of view, it is important to also 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 international 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 non-governmental 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

[35] *Ibid.*
[36] Gabriel, Henry Deeb, "Advantages of Soft Law in International Commercial Law: The Role of UNIDROIT, UNCITRAL, and the Hague Conference, THe."Brook. J. Int'l L. 34, 2008, p. 655.
[37] MERCOSUR is a South American trade bloc established by the Treaty of Asunción in 1991 and Protocol of Ouro Preto in 1994.
[38] Organisation for the Harmonization of Corporate Law in Africa (OHADA) is a system of corporate law and implementing institutions adopted by seventeen West and Central African nations in 1993 in Port Louis, Mauritius.
[39] Deeb *op.cit.*

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, beyond the development of 'soft law' materials originating exclusively from the private sector. 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.

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.

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".[40] 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 legal harmonisation process also faces an imprecise idea that it is a purely theoretical process, poor of practical value and in due course followed only for the glee of academics or the researchers.[41] In the mix of such misconceptions and procedural challenges at both drafting and implementation stages of the process, neutral organisations could play the catalyst that enhances communication and provides a bridge between governmental, non-governmental, academic and private entities, acting as a platform where the differing approaches and perceptions can effectively work together towards a unified effort of legal harmonisation.

One such entity has been established and is successfully functioning in Australia since 2013. The UNCITRAL National Coordination Committee for Australia (UNCCA) is a private initiative, grassroot-like organization created with the endorsement of the UNCITRAL, to bring together the academic, private sector, judiciary and government stakeholders working in the field of international trade law within Australia. Built on the voluntary contribution of its fellow members, UNCCA secures an ongoing dialogue between these otherwise isolated

[40] Kronke, Herbert, *"*Which Type of Activity for Which Organization-Reflections on UNIDROIT's Triennial Work Programme 2006-2008 in Its Context.*"Unif. L. Rev. ns* 11, 2006, p. 135.
[41] Kronke, Herbert. *"*Methodical freedom and organizational constraints in the development of transnational commercial law.*"Loy. L. Rev.* 51, 2005, p. 287.

segments through conferences, seminars and lectures, and the establishment of so-called Expert Advisory Committees (EACs) researching and formulating policy recommendations in areas of law currently in work at the UNCITRAL. The organization is also actively contributing to the presence of Australia at the UNCITRAL by sending delegates to the sessions of all six Working Groups.

While policy documents and input into the legislative developments at UNCITRAL are within the sphere of control of government bodies, private practitioners and academics have much to contribute to the development of harmonised trade laws both regionally and globally. UNCCA now provides the vehicle for those interested and capable to participate in that contribution in key UNCITRAL areas. By sending delegates as observers to the UNCITRAL Working Group sessions, UNCCA fellows are also able to directly contribute to the development of legal harmonisation instruments, investing a much larger sphere of expertise into the process than otherwise available exclusively from the relevant government agencies. As a neutral platform sitting at the crossroad between private and public sector and academia, UNCCA is also capable of avoiding and even diffusing the tension between conflicting political and personal agendas potentially tainting the collaboration of the relevant stakeholders. The first of its kind globally, the UNCCA model has since been replicated through similar National Coordination Committees in India and Japan, with the prospect of more to follow. The successes of the past four years demonstrate that this innovative type of organisation gathering unbiased brain power in an independent environment can successfully serve the ultimate goal of legal harmonisation free of political and industry lobbying. Whether the structure can withstand the challenges common to all private organisations dependent on voluntary contributions and collaboration is something for the coming years to tell.

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