

# Modern Law for Global Commerce

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## Allocation of Work Among Formulating Agencies

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### INTRODUCTION

1. In any discussion pertaining to the harmonization or unification of trade law, it would be useful to begin by revisiting the reasons for these efforts. Human society in this world of ours is organized around states, each with its own unique legal system whose rules apply within its own territory but not outside. The world is a Babel of legal regimes, each applicable only within the confines of a small portion of the earth's surface. Thus when a person, or a transaction involving persons, whether natural or legal, crosses national boundaries, he or it is subjected to different rules in the different geographical areas where that same transaction occurs. Often it is not even possible to determine with certainty which legal regime, and thus which rules, would apply to that single transaction.

2. The application of different legal regimes or rules to the same transaction and, worse, the inability to determine which legal regime, if any, is applicable, leads to uncertainty of outcomes for all those involved in that transaction. This is whether that transaction is in respect of a personal relationship, such as marriage, divorce or adoption, or a commercial transaction such as the supply and purchase of goods and services. Whatever the transaction may be that takes place across national boundaries, the application of different legal rules raises the cost of that transaction. This may be in the form of an actual cost, such as the cost of obtaining legal advice from lawyers in different jurisdictions. Or it may be the cost of the uncertainty of outcomes, which is the result of not knowing which legal rule applies. All these are costs which are factored into the price, actual or notional, of the transaction.

3. The uncertainties that arise from the application of different legal rules to an international trading transaction constitute obstacles to that transaction, retarding its further expansion. Harmonizing or unifying the legal rules that apply to the same trade transaction as it crosses national borders makes for certainty of outcomes, reduces cost and removes obstacles to the further development of trade in that area.

4. The main objective of the United Nations is the preservation of world peace. It is strongly believed that increased international trade, which carries with it the increasing interdependency of nations as well as greater and better interactions between the peoples of the world is a strong contributing factor to world peace. Thus the strong support by the United Nations to all initiatives that would remove obstacles to world trade, such as initiatives to harmonize or unify the rules of international trade law.

## **“HARMONIZATION “/“UNIFICATION”**

5. The terms: “*harmonization*” and “*unification*” have been ascribed different meanings by different authors. A useful and comprehensive definition of “Unification” is that described by Kamba (as cited by Osborne, 2006), viz. “...the process whereby two or more different legal provisions or systems are supplanted by a single provision or system.” “Unification” is thus a very intrusive process. “Harmonization”, on the other hand, is “... a process whereby ... the effects of a type of transaction in one legal system are brought as close as possible to the effects of similar transactions under the laws of other countries“ (Goldring – cited by Osborne, 2006). Given that the multilateral environment requires the consent of states to any initiative to define the applicable laws to a trade transaction that cross national boundaries, and that states are often very jealous in safeguarding their own legal regimes, harmonization is the more practicable modality to achieve commonality of legal rules in different jurisdictions on the same subject-matter.

## **INTERNATIONAL AGENCIES FOR HARMONISATION OF TRADE LAW**

6. The numerous bodies currently involved in attempting to formulate harmonized or unified legal regimes for trade law can broadly be grouped into either Public, or Governmental bodies, and Private, or non-governmental bodies. Public bodies can be international bodies, such as agencies of the United Nations, UNIDROIT (Institute for the Unification of Laws) and the Hague Conference on Private International Law. Or they can be regional bodies such as the European Union, Association of South East Asian Nations (ASEAN) and the Commonwealth of Independent States. Private bodies include business groupings such as the International Chamber of Commerce, trade associations such as Comite Maritime international and the like. Private bodies may also include learned institutions with an interest in contributing to the harmonization and unification of international trade law, although it appears clear that scholars who work in this area have found that they can make much more substantial contributions through their involvement in Public bodies.

## **UNCITRAL**

7. The United Nations Commission on International Trade Law (UNCITRAL) occupies a special position among the many Public agencies devoted to the harmonization and unification of international trade law. This UN body was established by the General Assembly in 1966 with a mandate to further the progressive harmonization and unification of international trade law. What is often not recalled is that UNCITRAL was established specifically to enable developing countries to participate in the process of harmonizing and unifying international trade law. There was at that time concern that most international bodies involved in such activities, whether Public or Private, were dominated by the representatives of developed countries and that the interests of developing countries were not factored into their deliberations and the outcomes of their work. Thus the need for an international agency that is very much more inclusive.

8. UNCITRAL was established with a wide and ambitious mandate. But it did not have an exclusive mandate. When it was established, it was another institution in a field where several other well-established institutions, including Public institutions such as UNIDROIT and the Hague Conference on Public International law, were already operating, albeit with different modalities. At the time of its inception, there appeared to have been no effort made in its mandate to delineate the areas of harmonization/unification that UNCITRAL should focus on, or where the other agencies involved in similar activities should leave to UNCITRAL.

9. Since its inception, the achievements and outcomes achieved by UNCITRAL have been extremely impressive. Foremost among these are the UNCITRAL Arbitration Rules (1976), the Model Law on Arbitration (1985), the Convention on the International Sales of Goods (1980) and the Convention on Guarantees/Standby L/Cs (1995). In the area of shipping law, UNCITRAL produced the now widely used Hamburg Rules (1978). UNCITRAL was very much the leader in the area of electronic commerce with its major achievement being the Model Law on Electronic Commerce (1996), the Model Law on Electronic Signature (2001), and the Convention of the Use of Electronic Communications in International Contracts (2005). In the high-value area of government procurements, it produced the Model Law on Procurement

(1994). All these were in addition to numerous other treaties, model laws, legislative guides and other recommendations which addressed the whole range of international trade issues.

## **WORK OF OTHER AGENCIES**

10. During this same period, UNIDROIT worked on and formulated the 1984 - "Uniform Law on Formation of Contract" and on the "Uniform Law of International Sale of Goods" the Convention on International Financial Leasing (1988); Convention on International Factoring (1988) and the Convention on International Interests in Mobile Equipment (2001), (popularly referred to as the "Cape Town Convention). Parts of the Cape Town Convention duplicated in a different way the legislative regime offered by the UNCITRAL Convention on the Assignment of Receivables in International Trade. UNIDROIT is now working the Convention on Substantive Rules on Intermediated Securities, which moves forward the work undertaken and completed by the Hague Conference's PRIMA ("Place of Relevant Intermediary", or "Securities Held with Intermediaries") Convention (2006).

11. During this same period, the Hague Conference, which has its origins in the imperatives in Europe at the end of the 19th century to unify legal rules pertaining to personal status, has also been active in various initiatives to harmonize trade laws. Its achievements in this area during this time include the Law Applicable to International Sales (1986) and the recently concluded Choice of Court Convention (2005). Determining the proper forum for the determination of disputes between parties in different states is one of the most crucial issues in international trading transactions which require a common set of rules.

12. While UNCITRAL, UNIDROIT and the Hague Conference are Public trade law harmonization/unification agencies which espouse membership of the entire international community, other Public agencies with far limited membership are also active in similar activities. An example would be ASEAN, which is now actively engaging in a number of projects, some at the behest of international consultancy firms, to formulate harmonized legal regimes for its member countries in areas such as e-commerce, arbitration and legalization of documents. Other regional groupings engaged in similar activities include, obviously, the European Union, the Organization of American States and the Commonwealth of Independent States. Even within the UN system, notwithstanding the ambitious mandate conferred on UNCITRAL, regional UN groupings, such as the UNECE, have engaged in programmes akin to formulating a common legal regime for aspects to international trade. While the declared focus of Public regional groups is always to provide for the specific needs and requirements of their own regions, as these tend to be common internationally, the same solutions developed for the region can be offered internationally. So in effect, the efforts of regional groupings in this area are also efforts at formulating internationally applicable legal regimes to overcome the differences in national laws on various subject areas of trade law.

13. Apart from Public agencies, private agencies were also very active in formulating common rules for international trading transactions. Some of these rules are widely accepted and used. Foremost among these would be the Inco Terms developed by the International Chamber of Commerce. Other examples include the harmonized construction contracts developed by the International Federation of Consulting Engineers (FIDIC). The achievements of Private agencies, especially trade associations and business interest groups in formulating harmonized legal regimes for international trading transactions cannot be understated. However, as they are private rather than Public initiatives, they are established to further the interests of their membership rather than the wider public. Their outcomes would, not unnaturally, reflect their objectives. This sets them apart from what is expected from Governments and the Public agencies that Governments populate.

## **HARMONISATION / UNIFICATION WORLDWIDE**

15. A quick appreciation of the work and outcomes of the many Public and Private agencies currently involved in the harmonization/unification of international trade law reveals a rather confusing picture. There is no lead agency, although UNCITRAL, being an agency of the United Nations, enjoys greater recognition in many countries of the world. While each agency has its own working modalities and approach issues from its own perspective, which often are not the same as that of another agency, in many areas they are seeking solutions for the same issues and difficulties which are common to all international traders. While some attempt is made at co-ordination at the informal level, this appears to be dependent on personal relationships. There have been instances where agencies have interpreted co-ordination as meaning persuading another agency not to work in an area or on an issue that they are interested in working in. Because there is no single body having oversight of the numerous initiatives being undertaken by the different agencies, there is no compulsion to avoid duplication of work.

16. The fact that many different agencies all fully staffed and with highly qualified experts as regular participants, are seeking solutions for the same issues at the same time means an inevitable wastage of resources. What is potentially more serious is that each agency may formulate different solutions to the same common problem, and then promote their solution as the preferred solution to that problem. As each agency promotes its outcomes to the same international community, the fact that some states may be persuaded by some while other states are persuaded by others means that different legal regimes may be enacted domestically in order to bring about a common legal regime for that same transaction. The result is dis-harmonization rather than harmonization or unification of trade laws. This leads to exactly the same results that the proposed solutions are to mitigate, viz. confusion over applicable legal rules, increased cost and more obstacles to the expansion of world trade.

## **CONTRIBUTING FACTORS**

17. The reasons for the present situation among agencies involved in the formulation of harmonized/unified legal regimes for international trade are not difficult to discern. Foremost would be the numerous historical factors. Different agencies were established at different points in time in order to address perceived needs at that time. Over time, these agencies evolved a life of their own and identified their own objectives, which they then pursued. This is buttressed by the fact that all agencies tend to develop into institutions, each with their own fairly defined community of stakeholders. Among the most important stakeholders are their members. Equally important and influential stakeholders are the numerous experts who find in the agencies they are engaged in an appreciative forum for the application of their intellect. Once established as institutions, agencies operating in any arena find it difficult to reduce the space they currently occupy. If anything, their natural imperative is to expand that space.

18. Other major, and unsaid, factors for the present situation include a certain level of scholarly competition to come up with solutions to the same issues, national pride whereby states who have strong influences over a formulating agency would not like to see the influence of that agency diminished, and commercial imperatives whereby interested commercial groups seek the most sympathetic forum in order to formulate preferred commercial outcomes. Also, the personalities involved in different formulating agencies have great influence on the work of these agencies. So it is not difficult to see why there are overlaps and duplications with regard to many issues among agencies involved in the harmonization or unification of international trade law.

19. The present international scene in the field of harmonization/unification of international trade law means that many of the hopes underlying the establishment of UNCITRAL have not been fully realized. UNCITRAL is a body of states established to give developing countries a voice in this area of work. The fact that there are numerous other agencies working in the same area, many of which are composed of states, can only mean that UNCITRAL's voice and influence in the harmonization of trade law, is less than what was intended by its promoters. This may be because of insufficient appreciation among the members of United Nations of the reasons underlying the establishment of UNCITRAL. It may also be because of a code of commitment to these objectives. If so, then this would be sad.

## **LOOKING FORWARD**

20. To fully optimize efforts in the harmonization or unification of international trade law, there is a need for a new paradigm in the work of the numerous formulating agencies whether Public or private, regional or international. There should be clearer delineations of work between different agencies which would result in optimum utilization of resources, especially the intellect of experts. As all countries are engaged in international trade, there is an overarching need to ensure that all countries of the world, not just well-endowed states or states with articulate representatives, have a voice in the process of harmonization or unification of international trade laws. This is especially important for developing countries which do not have the resources to actively participate in a large number of law-formulating forums.

21. Any step to move forward to achieve this goal must be mindful of the will of states as expressed through the United Nations. Foremost in this regard is the basic principle that all states should have a role in formulating the legal regimes and rules that their people will be subjected to when trading with each other. Also, it is important to recall that Public and Private formulating agencies serve different interests and that the primary responsibility for the introduction of mandatory legal regimes rests with governments, and not with groupings of private commercial interests.

## **THE IDEAL WORLD**

22. In an ideal world, the process of harmonization or unification of laws, whether trade laws or laws pertaining to personal status, should be undertaken by a single agency and not a myriad of uncoordinated or even competing agencies. This may be an unrealistic expectation given that commercial interests will naturally press for legal rules and regime favourable to them through their respective trade groupings. But this is conceptually achievable among states, especially when those states are members of the same universal organization, namely the United Nations. For example, while UNCITRAL and UNIDROIT adopt different working modalities in formulating their respective outcomes and work with different interest groups, they address the same issues in broadly the same area, viz. international trade law. Many states are members of both. It does appear somewhat lavish and rather unfair to states with limited resources for both agencies to be operating separately. This is an issue for states who are members of both to address.

23. If indeed it is possible to establish a single Public body internationally for the harmonization or unification of trade laws, then this body can be mandated to co-ordinate the work of other regional and multi-lateral bodies in the same area. The success or otherwise of such efforts would, again, depend on the commitment of the states involved to the need for a co-ordinated effort in this area of work. Any body established to this end must be one that is both consultative and inclusive. It must take into account the views of all the stakeholders on an issue it is deliberating on, and where possible include them in its deliberations. Its work and processes must also give effect to the intent of the nations of the world expressed through the United Nations that any harmonized or unified legal regime or rules formulated by Public formulating agencies must provide for the interests of not just the developed world but developing countries as well.

## **CONCLUSION**

24. The present international scene in respect of the formulation of harmonized or unified legal regime and rules for international trade is very dynamic with numerous initiatives being undertaken by various formulating agencies. Many notable and successful outcomes have been produced, especially in recent years. There have however been overlaps and duplications of work in a number of areas and on particular issues. This means a wastage of resources and intellectual effort. The presence of numerous Public formulating agencies working in the same areas means that less resourced states in particular, developing nations are not able to participate effectively in the formulation of rules that affects them. This is contrary to the intent of the nations of the world as expressed in the establishment of UNCITRAL in 1966.

25. It is important that the work of formulating agencies in this area be optimized. The ideal solution would be if there is a single formulating agency with a mandate to co-ordinate the work of other Public agencies in this area. This is probably not a realistic expectation given the history and the long institutionalization of the major formulating agencies. The alternative is to establish regular forums whereby the work of the present agencies can be coordinated. Whether this can be achieved would depend on a host of factors, both institutional as well as personal. The determining factor in achieving this objective is the will of states, especially states who are members of the different formulating agencies and who participate actively in their work.

26. A forum to co-ordinate the work of the present formulating agencies would in effect be a vehicle for harmonizing or unifying the work of these agencies. It appears somewhat ironical that in order to effectively harmonize or unify the trade laws of the world, the agencies charged with this task must themselves first be harmonized or unified. Failure to achieve this would mean that the world must contend with the fact that the initiatives to put in place more harmonized and certain rules for the flow of international trade in order to remove obstacles to world trade would instead produce greater disharmony and thus additional obstacles to the continued expansion of trade among nations. The effect of these new obstacles in the area of international trade on the maintenance of world peace is a major factor that must be considered.

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