

# Model Law for Global Commerce

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## **Legal harmonization in practice: teaching and learning uniform commercial law**

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The discussion on the training for the legal profession is increasingly of great importance as demonstrated by, for example, the “International Forum on New Legal Education Method in the Global Society” held at the Kyoto Congress in 2006 and by numerous recent publications; what has drawn my attention and what I will speak about today is if there are or if there should be specific instruments or methods for training legal professionals who are to interpret and apply uniform commercial law.

It is not a mystery to anyone that it is important and necessary to develop uniform legislation as well as to deal with the problems and difficulties connected to it. Great results have already been obtained, but we all know very well that all the efforts for producing uniform legislation can be neutralized, or at least its efficacy greatly reduced, by the diverging interpretations and applications of these laws by the courts of different countries.

I use the Vienna Sales Convention as an example because with its 70 contracting states it is undoubtedly one of the most successful instruments.

Diverging interpretations and applications by different courts exist, for example, regarding Article 38(1) according to which, as you know, the buyer must examine the goods, or cause them to be examined, within as short a period as is “practicable in the circumstances”. This latter concept aims to ensure flexibility, thus allowing the period for examination of the goods to vary from case to case. Unfortunately, courts and commentators of different countries have interpreted this latter concept differently. In effect, some courts and commentators have attempted to establish presumptive time periods within which the buyer has to examine the goods, going from one week after delivery up to a month. This does not appear to be a sensible solution since, even though this approach may appear to guarantee uniformity, it creates a rigidity that does not allow for the flexibility aimed at by the Convention’s drafters to allow for justice in the individual case.

When looking at the existing court rulings, two different approaches can be discerned: that of those courts that attempt to ensure flexibility (as is the case in Italy) and those that, conversely, decide to use a more rigid approach by resorting to a “presumptive period” (as is the case in Germany).

As far as this issue is concerned, even the instruments provided by UNCITRAL for the promotion of the uniform application of the Convention, such as the Digest and CLOUT, can be insufficient because they merely illustrate the existing differences without taking any stand as to which solution is to be followed. Therefore, perhaps a common form of training would be a more powerful instrument for creating uniform application right from the start, that is, without having to later rectify the divergences in application.

My task here is to offer some ideas and proposals especially for lawyers, including in-house counsel, and I would also like to evaluate how UNCITRAL can have a role in legal education.

Actually, we should first address undergraduate students of law because, unfortunately, teaching uniform commercial law is still underdeveloped in most universities, and not only in Italy. For this reason,

UNCITRAL, just like each one of us, should never give up suggesting and encouraging the study of uniform law instruments in undergraduate programs. But even more so than UNCITRAL, probably the most effective measure in this regard would be a commitment made by all of the experts in this field.

In my opinion, UNCITRAL could intervene more directly in post-graduate education on two fronts: spreading knowledge of the existence of the Vienna Sales Convention and other instruments, on the one hand, and, on the other, offering “advanced” training for the legal professionals who already use these instruments and therefore must guarantee their efficacy, like judges, arbitrators and lawyers.

Two types of programs could be set up for reaching these objectives. One would be an LL.M. program, organized by what could be a kind of academy created for the very purpose of teaching uniform law, where young professionals can learn by discussing with colleagues and instructors from different countries. This would act as a starting point for a format that could be then reproduced in different parts of the world, promoting a future generation of legislators and jurists who will increase the production, spread and uniform application of shared rules: a project that certainly does not appear impossible, even if difficult. The other, a more plausible and immediate action that UNCITRAL could take, would be the creation of short courses of 10 days or simply workshops of three full-time days.

Before creating these programs, however, we would need to start thinking about the topics to be taught in them; in doing so, we must keep in mind that there are two main elements that should characterize them, namely methodology and knowledge of instruments.

As for knowledge of instruments, along with the usual topics taught in an LL.M. program aimed at participants working in the field of international commerce, courses should also be offered that deal with the main instruments of uniform commercial law both in terms of substantive law and in terms of instruments for dispute resolution. The institutions that produce such instruments are certainly known to everyone; they include, apart from UNCITRAL, the European Community, Unidroit, and the ICC. As regards to the sources of substantive law, they include most obviously conventions and model laws, but we cannot forget “codified practices”, such as the Unidroit Principles, the Incoterms of the ICC, and non-codified ones, such as *lex mercatoria* or international customs.

When it comes to dispute resolution, one should teach how to deal with international transactions in State court proceedings as well as alternative dispute resolution methods (both adjudicative and non-adjudicative). I do not think I have to stress the importance of a tool like international arbitration for resolving international disputes.

It is worth mentioning, however, that international arbitration has not yet reached the same level of quality everywhere (this is true, for example, regarding the preparation and impartiality of arbitrators). Guaranteeing a high standard would make arbitration more reliable in the eyes of the players in the international arena. As a consequence, the New York Convention as well as the relevant UNCITRAL instruments, such as the Model Law, cannot be disregarded either.

Another form of alternative dispute resolution, conciliation, is not yet “a reality”, but I think the time is ripe for it to become so as demonstrated by the elaboration of the Model Law on International Commercial Conciliation and the recent Draft of a European Directive.

In terms of methodology, we can consider two elements. First, it is necessary to train legal professionals to be familiar with the different legal systems of the countries where uniform norms are to be applied, to be acquainted with the different methodologies of interpretation, and how to properly dialogue with each other. In this respect we should consider teaching legal systems, *id est*, the categories or families into which all legal systems are generally divided (such as those suggested over the years by David, Constantinesco, Zweigert and Koetz). This would allow practitioners to more easily go beyond their own legal background and the idea that their legal system is the only one capable of solving a specific problem, thus making it easier for them to apply the uniform commercial law instruments in an autonomous and uniform way.

Second, my interest in legal training has led to discussing the issue with colleagues from different sectors as well as Roman law scholars, who have convinced me that Roman law could be a useful starting point.

As you know, nowadays Roman law scholars claim that their subject is not only a historical one but also one that can be used for the actual creation and interpretation of law. In short, in the ancient Roman world uniform norms regulating commercial exchanges were a constant presence: in the earliest period the Roman Republic evolved in the Mediterranean area and its merchants did business with merchants from other Italic cities, Punic ones, Greek cities, and with all the countries touching the Mediterranean. Their relations were governed by common commercial customs sanctified by bilateral treaties that even provided how to resolve disputes. Thereafter, during the centuries of the Roman Empire, it was Roman law, the law of the dominating state, that imposed itself as a uniform law across the entire territory of the Empire in order to better protect merchants, entrepreneurs and Roman bankers wherever they worked, bypassing potential problems arising from the differences existing between different legal systems, whose survival and autonomy was guaranteed by Roman domination.

Knowledge of the long and complex Roman experience is of great importance to us because it clearly shows us that establishing uniform norms must be accompanied by a common legal culture that makes uniform interpretation possible and, thus, uniform application. In fact, legal scholars had a fundamental role in developing rules in a rational manner by working out all the local variations. This conclusion is reinforced by what took place in medieval Europe, where a common commercial law could be applied in different countries, where legal scholars were working who had been educated in universities where the same legal culture was taught.

A group of Roman law scholars from at least 100 universities from different countries, led by professor Corbino (from Catania University), are working on a very interesting project called European Legal Roots. The scientific reasons of the project ELR are linked to the role Roman law can have in the definition process of a legal system that harmonizes, on historical grounds, the differences present in European private law due to the evolution of national civil law systems and of judicial practices. This ambitious harmonization perspective not only stems from important common historical 'roots', but it has (as it had in the past) a strong unifying ability. This is because this perspective refers not only to the reasons of assimilation and standardization but also to the creation of a potential single system of subjects who retain their distinct identities without forsaking a 'common' ground. In fact, the system itself is the result of different histories that come together through shared 'practices'.

To close my presentation, I would like to go back to the subject of creating short courses or workshops, based on the aforementioned principles of knowledge and methodology. In this case, the courses should be directed to professionals already working in the world of international commerce or who intend to work in that field, lawyers in particular but also judges and arbitrators. The target audience for these courses may also depend on the geographic areas where they are held and the phase of development of the country hosting them.

The underlying format could be four teaching modules, one on the main instruments of uniform commercial law such as the Vienna Sales Convention, the CMR etc., a second one on international arbitration and/or conciliation and their related instruments, as the main means of resolving international disputes, a third one on the proper methodological approach for producing and applying uniform law, and a fourth one would depend on the needs of the local law community.

The group of instructors should be made up of an UNCITRAL representative, two professors from countries other than the one holding the seminar, and a local professor. This combination, in my opinion, would foster exchanges and encourage students and instructors to compare their experiences, which is certainly useful for reaching the aforementioned objectives.

In this way – at least in the sectors directly touching uniform law – a shared legal culture could develop that – in the future – could lead to a gradual shift in the different national legal systems.