

INTRODUCTION

Jorge SÁNCHEZ CORDERO*

A. THE INTERMEDIATE CONGRESS

The International Academy of Comparative Law undertook the endeavor for the first time in its history to organize an Intermediate Congress held in Mexico City from 13 to 15 November, 2008. The Intermediate Congress took place under the best auspices. It was attended by distinguished representatives of international organizations such as: Dr. Hans Van Loon Secretary General of The Hague Conference on Private International Law; Dr. Herbert Kronke, former General Secretary of the International Institute for the Unification of Private Law (UNIDROIT) and Dr. Kolek Boutora-Takpa, Permanent Secretary of Organisation pour l'Harmonisation du Droit des Affaires (OHADA). Other major national organizations also attended the Congress, such as the National Conference of Commissioners on Uniform State Laws of the United States of America (American Uniform Law Conference) and the Uniform Law Conference of Canada. (Conférence pour l'Harmonisation des Lois au Canada).

This Intermediate Congress was honored by the presence of the Chief Justice of the Mexican Supreme Court who chaired the inaugural session. The Intermediate Congress was organized according to the following topics:

A.-National Unification of Laws in Federal Systems. General Reporters: Professors Mathias Reimann and Daniel Halberstam. University of Michigan, Ann Arbor.

B.- Arbitration. General Reporter: Professor Horacio Grigera Naon. American University, Washington D.C.

C.- Criminal Procedure and Civil Rights. General Reporters: Professors Chrisje Brants and Stijn Franken, University of Utrecht.

* Jorge Sánchez Cordero holds a PhD in Law from the University Pantheon-Assas, Paris II, member of the Governing Council of the International Institute for the Unification of Private Law (Unidroit) and current director of the Mexican Center of Uniform Law.

D.- The Convention on the International Sale of Goods and its Impact on National Contract Law. General Reporter: Professor Franco Ferrari, University of Verona.

E.- Conflict of Laws Conventions and their Reception in National Legal Systems. General Reporter: Professor Inès Weinberg de Roca. Buenos Aires/The Hague.

F.- The Protection of Cultural Objects. General Reporter: Professor Toshiyuki Kono. University of Kyushu, Fukuoka.

G.- The International Unification of Private Law – Achievements and Perspectives. Professor Herbert Kronke, former Secretary General of UNIDROIT.

For the closing session, it was a privilege to have Professor George Bermann, President of the International Academy of Comparative Law, as the chair.

B. GENERAL CONSIDERATIONS

The choice of the theme deserves an introduction in order to place into perspective the excellent work and the subsequent enriching discussions that took place during this Intermediate Congress.

It is commonplace to speak of the phenomenon of globalization that has been facilitated by recent technological and economic changes, which are expected to continue¹, resulting in a more refined globalization. However, it is not so commonplace to systematically analyze this process which is held mostly in legal systems that coexist in free trade areas where trade and social permeability are particularly intense².

It is therefore useful to compare the recent experiences of harmonization and uniform legislation that have occurred at a global level. In this trend, one can mention the United States of America, the People's Republic of China and the Commonwealth of Independent States (CIS), whose central apex is the Russian Federation. Their experiences are particularly interesting because

¹ Basedow, Jürgen. "General Report. Worldwide Harmonization of Private Law and Regional Economic Integration", *Uniform Law Review*, Unidroit, NS, 2003, vol. VIII, 1/2, p. 36

² *Ibidem*. p. 36

they constitute regions and nation-states that develop their business rules in radically different socio-cultural contexts. It goes without saying that the European Union is one of the highlights in this respect. As it is well known, it is a conglomeration of nation-states whose diversity could be explained by its attachment to a plurality of national legal traditions but where a great impetus in legislative uniformity³ can be easily identified.

In this same context the region of the Asia-Pacific Economic Cooperation (APEC) should be mentioned. In this region a significant movement towards uniform legislation has not yet occurred, largely because it consists of a number of nation-states with significantly different socio-economic structures and legal traditions. There are however, isolated circumlocutions that can be seen as the first attempts in this context. The Pacific Economic Cooperation Council (PECC), which brings twenty nation-states together in the region, is an independent non-governmental organization associated with APEC. It acts as an observer and was founded in 1980 and it has had a permanent secretariat in Singapore since 1990. PECC operates through national tripartite committees: businessmen, academics and government officials. Its function is to foster cooperation, exchange of information and analysis of case studies. In May 1992, PECC proposed greater regional cooperation in the harmonization of international trade law in the Pacific region. The endeavors are clear: cost reduction in cross-border operations, acceleration in the movement towards harmonization in the region and stimulation of inter-regional trade and investment.⁴

In the Americas, the emergence of a significant number of trading regions is evident with the North American Free Trade Agreement (NAFTA),⁵ Central American Free Trade Agreement (CAFTA) and MERCOSUR⁶ among others. However the unsteadiness of the works of the Inter-American specialized Conference of International Private Law (CIDIP), operating within the Organization of American States (OAS) and their lack of influence in the region should also be kept in mind.

³ Bonell, Michael, Joachim. "Modernisation and Harmonization of contract law: objectives, methods and scope", *Uniform Law Review*, NS, vol. VIII, 2003, 1/2, p. 91.

⁴ Rose, A. O. y Alan, D., "The Challenges for Uniform Law in the Twenty-First Century", *Uniform Law Review*, Unidroit, vol. 1, 1996, 1, p. 9.

⁵ The NAFTA treaty was signed December 17th.1992 and published in Mexico in the *Diario Oficial de la Federación* December 20th, 21st and 27th. 1993, respectively and entry into force on January 1st. 1994

⁶ Mercosur was established by the treaty signed in the city of Asunción, March 26th. 1991 between Argentina, Brazil, Paraguay and Uruguay.

Finally, on the African continent, the Organisation pour l'Harmonisation en Afrique du Droit des Affaires (OHADA) emerges as a primary harmonization effort.⁷

In a synoptic account, the international community is seen as a very complex mosaic of legal systems that respond to very different legal traditions. If the analysis of the notions of uniformity and harmonization of law is placed in different historical episodes, it will provide a better perspective and understanding of their changing nature. These notions are substantially different according to the analysis developed on the cusp of the twentieth and the twenty-first centuries. The concepts of harmonization and legal uniformity have distinct legal consequences in radically different historical scenarios.⁸

In the late-nineteenth and early-twentieth centuries we had a mosaic of fiercely independent countries in the Americas, whilst the culturally homogenous had intense commercial ties. Similarly, it was easily noticeable in the region that, from the outset, two clearly defined legal subsystems existed, both with deep and common European roots, but substantially different in their legal composition.⁹

Africa was a region dominated by colonialism and the remaining regions, Asia and the Pacific were imprecise geographical notions that were comprised of colonies or independent states that were marginally involved in international trade as well as in the construction of the universal legal culture.¹⁰

⁷ L'Organisation pour l'harmonisation en Afrique du droit des affaires, was founded by the contract signed, October, 1993 in Port Louis, Mauritius, and entered into force September 1995. Since December 31st. 2000 it has been ratified by 16 countries that are: Guinea-Bissau; Senegal; Central African Republic; Mali; Comoros; Burkina Faso; Benin; Nigeria; Ivory Coast; Cameroon; Togo; Chad; Congo; Gabón; Equatorial Guinea and Guinea.

⁸ Kronke, Herbert. "Unidroit 75th. Anniversary Congress on Worldwide Harmonization of Private Law and Regional Economic Integration: Hypotheses, Certainties and Open Questions", *Uniform Law Review*, UNIDROIT, NS, 2003. vol. VIII, 1 and 2, p. 11.

⁹ *Idem.*

¹⁰ *Idem.*

C. THE ORIGIN OF THE CONCEPT OF HARMONIZATION AND UNIFORMITY

The tradition and the need for harmonization and uniformity of law are not recent. The first signs emerged in the second half of the nineteenth century in certain specific geographic regions. In fact, the first impetuses for the unification of law can be clearly identified in the legal subsystem of Latin American countries in the 1878 Treaty of Lima¹¹ which never entered into force. This treaty contained fairly comprehensive codifying subjects such as private law, private international law and civil procedure, among others¹². In the Montevideo Conference of 1889, organized as a sequel to the diplomatic conferences held in Paris in 1883, and in Berne in 1886, no less than eight conventions were signed on private international law, international civil procedure, copyright, intellectual property, trademarks and patents, international criminal law, legal practice and international trade law.¹³ Notwithstanding that these events must be considered isolated cases; they can be interpreted as the first indications of a uniform law movement in the Americas.¹⁴ Therefore, it is safe to say that the evolutionary trends of uniform law, before World War II were an essentially regional and localized first step, either in Europe or the Americas.

One element of the analysis is the nationalist component that steered the spirit of the Latin American countries. Indeed, in Latin American states in the late-nineteenth and early-twentieth centuries, the conception was that their active participation in European-based international organizations would significantly limit their sovereignty and undermine their principles of national law. This prevalent nationalist view dominated their spirit¹⁵ and persisted for a prolonged period, having a significant international impact. Latin American countries primarily aimed to strengthen their political independence through the unification of law and the development of national legislation. The application of law within the limits of the state was a

¹¹ The Lima Congress 1877-1978, concluded with the Treaty of Lima signed by Argentina, Bolivia, Chile, Costa Rica, Ecuador, Peru and Venezuela but never entered into force and was only ratified by Peru. In Pérez Nieto, Leonel. *La tradition territorialiste en droit international privé dans les pays d'Amérique Latine*, Dordrecht, Martines Nijhoff Publishers, 1985, p. 369

¹² *Idem*.

¹³ The participant countries in this congress were Argentina, Bolivia, Brazil, Chile, Paraguay, Peru and Uruguay. Only Chile and Brazil did not ratify these treaties. *Idem*.

¹⁴ Basedow, Jürgen. *Op. Cit.*, supra note 1, p. 32. in the same sense.

¹⁵ *Idem*.

conditio sine qua non in safeguarding national sovereignty and consequently the exclusion of applying foreign law.

In spite of the pretension of formal universal international organizations, their performance in practice, was merely regional, as shown by the minimum amount of ratifications of or accessions, if any, to international instruments by Latin American countries.¹⁶

In support of this thesis one should also bear the conclusions of the 1889 Montevideo Congress in mind which are undeniable proof of this nationalist sentiment. The central discussion was that the power and influence of international economic agents prevailed in international trade and "... any other approach to the problem that tends to obviate this reality", it was argued, "Threatens the national interest"¹⁷.

This period of time deserves a final thought; the traditional conception was that the form of "international conventions" was the most appropriate technique for the uniformity of private law and private international law."¹⁸ Indeed, in a relatively small and "civilized" international legal community, the ratification and approval by the legislative bodies were foreseeable. It should be added to the analysis that the attitudes in international negotiations in different fields, such as the international conventions' entry into force, were quite predictable.¹⁹ This contrasts greatly with the current situation, in which a real explosion of nation-state active participation in international forums and consequently in the construction of international business order can be easily perceived. The quantitative element substantially modified the international convention's origins as the suitable vehicle in the drafting of Conventions referring to conflict or substantive rules and resulted in jeopardizing them.

After the Second World War the concept of uniform law took on a greater degree of universality which has flourished, particularly since the 1970s. There are various causes: the decline in the influence of European powers at the global level, the emergence of other powers, the blossoming of dozens of newly independent states, among others²⁰.

¹⁶ *Ibidem*, p. 33

¹⁷ *Ibidem*, p. 33.

¹⁸ Basedow, Jürgen. "Uniform Law Conventions and the Unidroit Principles of International Commercial Contracts", *Uniform Law Review*, Unidroit, NS, vol. V, 2000, 1, p. 129

¹⁹ *Idem*.

²⁰ Basedow, Jürgen. *Op. Cit.*, supra note 1, p. 33.

To place the analysis in perspective, the international community has grown from 58 members, which was the largest number of nation states recorded in the heyday of the League of Nations in 1937 to 184 members in the United Nations in December 1995, although there still remain a number of micro-states such as Tuvalu and Kiribati in the Pacific which are not members of the United Nations. In the vast majority of these new states, the sense of nationalism prevails and is reflected in its legislation, regardless of their legal legacy, yet much of their private law systems come from former colonial powers.

It was just after World War II that Latin American countries and the United States of America accessed specialized international agencies such as the Hague Conference on Private International Law²¹ and the International Institute for the Unification of Private Law (UNIDROIT)²². It was an era when new *ad hoc* international organizations were created, such as the International Maritime Organization²³, International Civil Aviation Organization (ICAO)²⁴, and the United Nations Commission on International Trade Law (UNCITRAL) in the United Nations system,²⁵. It was precisely in this last forum, in Vienna in 1980, that the United Nations Convention on Contracts for the International Sale of Goods was approved. This Convention is currently being enforced in 62 countries, and comprises two thirds of all world trade. It also constitutes the first major effort in the universal systematization of the general principles of contracts²⁶ with the last international organization being the World Trade Organization (WTO).

Finally, in the last quarter of the twentieth century and the beginning of the twenty-first, the emergence of free trade areas has been recognised; some have been perfectly well-defined and others are in the process of becoming so. The pattern of the European Union, eponymous as a free trade region, is one of the major models to be followed. Nevertheless uniformity appears as a basic notion in new organizations such as the Organisation pour l'Harmonisation en Afrique du Droit des Affaires (OHADA)²⁷.

²¹ For more information, consult the site www.hcch.net.

²² For more information, consult the site www.unidroit.org

²³ For more information, consult the site www.imo.org.

²⁴ For more information, consult the site www.icao.org

²⁵ For more information, consult the page www.uncitral.org

²⁶ Basedow, Jürgen. *Op. Cit.*, supra note 1, p. 35.

²⁷ Supra note 7

The free trade trilateral or bilateral conventions or agreements prevailing in the Americas, such as NAFTA²⁸, CAFTA, MERCOSUR²⁹, better known as the “commercial spaghetti”, merit a most profound analysis.

It is noted that at this late stage there is, in commercial institutional regions, a clear trend in the transfer of business legislative powers to supranational bodies³⁰, whose effects in the near future will provoke a redefinition in trade negotiations, and the reconstruction of the *ad hoc* international bodies, among others.

It is precisely in legal integration where the transfer of state powers to an international organization, gifted with powers of decision and supranational competition is more clearly seen.³¹ Insofar as this legal integration process is deepened, trade negotiations are strengthened with the representative bodies of trade regions. They are beginning to have, precisely, a greater weight in international organizations themselves; at the same time, there is a significant decline in the interest of trade negotiations isolated with nation-states belonging to these commercial areas. It is obvious that the concepts of harmonization and uniformity of law in this new context are also a transformation of substance.

In the European Union the community institutions have been vested with legal authority³² to conclude international agreements with one or more nation-states or international organizations³³. It must be added that the European Court of Justice has even extended powers of negotiation of the Union through the mechanism of "implicit" powers.³⁴ Henceforward the European Union has the competence to conclude international agreements even in the absence of an explicit mandate in the Treaty of the European Union, if it has jurisdiction at all in these specific areas.³⁵ Moreover, the

²⁸ Supra note 5.

²⁹ Supra note 6.

³⁰ See in this respect Article 61 of the Amsterdam Treaty which entered into force January 1st. 1999. Official Journal of the European Community No. C340 November 10th. 1997.

³¹ Cornu, Gerard. *Vocabulaire juridique*, 8a. ed., París, Association Henri Capitant, Presses Universitaires de France, 1987, p. 468.

³² See in this respect article 281 of the Constitutional Treaty of the European Community Publisher in the Official Diary of the European Community C325 December 24th. 2002 which states: "The Community shall have legal personality".

³³ See article 310 of the Constitutional Treaty of the European Community Publisher in the Official Diary of the European Community C325 December 24th. 2002 that states: "The Community may conclude with one or more states or international organizations agreements establishing an association involving reciprocal rights and obligations, common actions and special procedures".

³⁴ Basedow, Jürgen...General Report...*Op. Cit.*, supra note 1, p. 36.

³⁵ *Ibidem*. p. 36

European Court of Justice has held that treaties concluded by the European Union with either third-party countries or international organizations are part of community law.³⁶ These conventions are considered "acts of the European Community institutions" and thereby fall under the jurisdiction of the European Court of Justice which is responsible for ensuring their uniform application³⁷ in the entire territory of the community³⁸.

Therefore, it is safe to say that in certain cases, the nation-states that belong to well-defined commercial areas and agree to international trade commitments with third States might even be acting *ultra vires*³⁹

D. THE DEBATE OF HARMONIZATION AND UNIFORMITY

A clear consequence of the phenomenon of globalization is the increased intensity of the debate on the basic notions of harmonization and uniformity of legislation which are inextricably linked to interstate or cross-border trade⁴⁰.

In this regard, one of the main debates is if legislative harmonization or unification fosters economic prosperity⁴¹. It has been argued that uniformity significantly reduces the competition between legal systems and regulatory provisions and that competition between legal systems deters harmful fossilized legal inefficiencies that could be perpetuated by a legal system, because of a lack of competition, brought about by harmonization or uniformity⁴².

Currently, the receipt of legal mechanisms is not attributed to elements of nationality but to convenience and necessity⁴³. In any analysis it must be considered that uniform law is not an end in itself, but a response to practical

³⁶ *Ibidem*. p. 47

³⁷ See article 234 of the Constitutional Treaty of the European Community Publisher in the Official Diary of the European Community C325 December 24th. 2002

³⁸ Basedow, Jürgen. *General Report...., Op.Cit.*, supra note 1, p. 47.

³⁹ *Ibidem*. p. 41.

⁴⁰ There are, therefore, some authors that argue that harmonization does not necessarily result from economic imperatives or statutory mandate. See Kronke, Herbert. *Op. Cit.*, supra note 8, p. 15.

⁴¹ Hartcamp, Arthur S., "Modernization and Harmonization of Contract Law : Objectives, Methods and Scope", *Uniform Law Review, Unidroit, NS*, 2003, vol. VIII, I and 2, p. 82.

⁴² Borba Casella, Paulo, "Economic Integration and Legal Harmonization, with special reference to Brazil", *Uniform Law Review, NS*, vol. III, 2 and 3, 1998, p. 293.

⁴³ *Ibidem*. p. 293.

needs⁴⁴. On a more general basis, it should be pondered that the law, and more specifically commercial law, is not a value in itself,⁴⁵ but it contributes to strengthening economic and cultural values of a society. Still, the unification of law not only responds to economic or financial interests but also recognizes political and cultural interests. In any process of legal integration as is *verbi gratia* the directives of the European Union, legislative harmonization has an undeniable political and social value. In summary, harmonization and unification of legislation, when they occur, are cultural assets of great importance⁴⁶.

To enable a better understanding of the intended scope of this analysis, we must first convene about the notions of harmonization and uniformity, though it must be admitted that they themselves are subject to intense controversy⁴⁷.

Despite their constant semantic changes, it can be argued that the notion of harmonization is to unify legislative assemblies, either through the development of a new law, or through the design of rules and principles that enable an approximation between two or more legal systems. Harmonization entails a legislative process that make rules compatible. These rules come from different backgrounds and often from different periods of time. Harmonization modifies legislation in force in order to make it more consistent with new provisions.⁴⁸ The immediate effect of harmonization is to reduce the differences and divergences between the laws⁴⁹. It has been upheld that the harmonization process should refer exclusively to the conflict rules that are inherent in private international law that do not alter substantive law⁵⁰.

In the process of legislative uniformity, some concern has arisen to conceptually distinguish unification from uniformity. Unification replaces national legislation standards with rules previously agreed on; the purpose is to eliminate any conflict of laws by having an identical text. The conflict of

⁴⁴ *Ibidem*. p. 304.

⁴⁵ Hartcamp, Arthur S. *Op. Cit.*, supra note 41, p. 84

⁴⁶ *Ibidem*. p. 84

⁴⁷ In this context it has been postulated that the basics are harmonization, standardization and uniformity. Borba Casella, Paulo, *Op. Cit.*, supra note 42. p. 288.

⁴⁸ Cornu, Gerard, *Op. Cit.*, supra note 31. p. 423.

⁴⁹ Issa-Sayeh, Joseph, "Quelques aspects techniques de l'intégration juridique l'exemple des actes uniformes d'Ohada", *Revue de Droit Uniforme*, Unidroit, 1999, vol. IV, I, p. 6.

⁵⁰ Borba Casella, Paulo. *Op. Cit.*, supra note 42, p. 288.

law problem, however, can not be completely overcome since it is difficult to reach absolute unification or universal interpretation or enforcement⁵¹.

Unification replaces dissimilar laws previously in force with a single text. The notion of unification is more comprehensive as can be seen in substantive legal integration as it tends to eliminate differences in legislation. This is achieved through the introduction of a single text written with identical terms by the member nation states of a specific free trade area or by an international organization. The feasibility of the legal text's identity depends on a number of diverse elements: the degree of economic integration, the legal nature of the member states' system within one economic region⁵², the nature of the subject that is intended to be made uniform, among others. Finally, as Professor Tallon puts it, integration at its height will end up undermining the legal autarchies⁵³.

Uniformity for its part has two aspects as it can refer to both conflict and substantive rules. Uniformity is more profound than harmonisation, but less profound than unification⁵⁴.

In these processes, the weighting of the origin of the harmonization or uniformity is crucial. They should give answers to basic questions such as the origin of the rules subject to harmonization or uniformity, the economic reasons which prompted its creation, if these rules belong to a traditional set of rules and to what extent, and whether they should be adapted to satisfy new economic conditions⁵⁵, among others.

It is also compulsory to consider if rules to be harmonized or made uniform are designed to meet new social expectations or remain "neutral" to these.

Harmonization and uniformity can have different foci; they can be universal or simply regional. A multitude of elements of diversity ultimately converge; in fact the differences in a given region may well be geographical, economic, cultural or be specific to a legal system which belongs to a socio-economic reality of a specific nation⁵⁶. Harmonization can have various levels, it can be aimed at the elimination of the main differences between

⁵¹ *Ibidem*, p. 288

⁵² Cornu, Gerard. *Op. Cit.*, note 31, p. 884.

⁵³ Tallon, Denis. "Quel droit comparé pour le XXI^{ème} Siècle?" *Revue de Droit Uniforme*, Unidroit, NS, vol. III, 2 and 3, 1998, p. 704.

⁵⁴ Borba Casella, Paulo. *Op. Cit.*, supra note 31, p. 291.

⁵⁵ *Ibidem*, p. 159.

⁵⁶ *Idem*.

national regulations, or induce only a minimum of common solutions, and its scope can also be very different: to create common rules in specific areas.

One of the crucial aspects of the harmonization process is the choice of the legal area to be considered. It has been frequently observed that at the universal level this choice can be attributed to academic and intellectual leaders⁵⁷, who presided over decision centers either in governmental or international organizations. While the legal area could have academically seductive options it was a case of rejection, if not a frank indifference on the part of market agents.

The result is predictable; international instruments either do not enter into force, or the market agents do not consider them as a legal reference to regulate their contractual relations. In addition in many cases the parameters of study areas are subject to constant change.

Professor Goode⁵⁸ expresses this well:

“treaty collections are littered with conventions that have never come into force, for want of the number of required ratifications, or have been eschewed by the major trading States. There are several reasons for this: failure to establish from potential interest groups at the outset that there is a serious problem which the proposed convention will help to resolve; hostility from powerful pressure groups, lack of sufficient interest of, or pressure on, governments to induce them to burden still further an already over-crowded legislative timetable; mutual hold-backs, each State waiting to see what others will do, so that in the end none of them does anything...”

The final approach is to emphasize that although the choice of a feasible specific legal area for harmonization or uniformity is important, it is just as important to consider whether the policies of nation states are also reconcilable in these specific areas.

It would, however, be wrong to associate the fate of the harmonization or unification of private law in the interests of market operators or to try to draft very flexible rules or principles of *soft law*, in highly sensitive areas. Aspects related exclusively to legal culture in the processes of

⁵⁷ Kronke. Herbert. *Op. Cit.*, supra note 8, p. 17.

⁵⁸ Goode, Roy. "International Restatements of Contract in English Contract Law", *Uniform Law Review*, Unidroit, NS, II, vol. II, 2, 1997, p. 232.

harmonization should be addressed and its nature must be written with great detail to ensure consistency⁵⁹.

To be successful, international conventions of private international law or private law, must be innovative and provide solutions to the needs of both individuals and economic agents involved in international trade⁶⁰.

In this context, more than a century ago Mancini⁶¹ argued that in order to be effective, even if limited to certain areas, a universal legal system should be confined to general principles and rules regardless of specific national circumstances. It seems that this argument would be accurate today: uniformity requires shared cultural identities and values⁶².

Though the above arguments are meaningful, recent experiences also need to be considered. At the global level⁶³ it is necessary to admit that *hard law* international conventions, whose orthodoxy comes from the past, have not been efficient enough in the harmonization of private law and private international law. The causes are varied and its analysis is beyond the limits of this introduction. It could, however, account for some that are mentioned most often: preparation of a multilateral convention requires a significant amount of time and is generally very expensive, if one adheres to the obtained results. In trade negotiations there are compromises⁶⁴ and they reflect prevailing international conventions in the expression of the lowest common denominator⁶⁵ of national interests, which international negotiators are willing to grant⁶⁶. This compromise has been aptly described as "minimalist" approach.

The term "minimalist" has the following distinctive features: *a)* The lifting of a list of equivalent terms in the nation-states in which legislation is intended to standardize; *b)* The classification codes and statutory provisions that correspond to these terms; *c)* Identification of the common denominator of these rules and finally *d)* The formulation of new rules consistent with

⁵⁹ Kronke, Herbert, *Op. Cit.*, supra note 8, p. 17.

⁶⁰ *Ibidem.* p. 20.

⁶¹ Cited by Borba Casella, Paulo. *Op. Cit.*, supra note 31, p. 291.

⁶² *Idem.*

⁶³ Calus, Andrzej. "Modernisation and Harmonization of contract law: focus on selected issues." *Uniform Law Review*, NS, vol. III, 1 and 2, 2003. p. 159.

⁶⁴ Goldring, John, "Globalisation, National Sovereignty and the Harmonization of Laws", *Uniform Law Review*. Unidroit, NS, vol. III, 2/3, 1998, p. 448.

⁶⁵ Bonell, Michael Joachim. *Op. Cit.* supra note 3. p. 94.

⁶⁶ Goldring, John. *Op. Cit.* supra note 64, p. 448

those common denominators⁶⁷. This "minimalist" approach that prevails in *hard law* conventions is summarized in the drafting of "official" or "binding" rules. In this approach, other types of rules are considered uncertain to be made uniform. This approach overlooks the disparity of conflicting interpretations of those laws or that of their common denominators by courts, arbitrators and contracting parties. Needless to say that it ignores the law created on a daily basis within the contractual or legal practice.

These characteristics of *hard law* international conventions, severely limit its innovative potential and its ratification also causes a unique problem: there are few conventions that come into force as this requires a certain number of ratifications⁶⁸. Finally, when one considers that the multilateral convention should be modified, it is necessary to reinitiate the same process. Therefore updating these conventions is not very flexible. It must be added that the international community has shown little ability to update international instruments even if they have undergone changes of substance⁶⁹.

The "minimalist" approach contrasts with the approach of achieving the best business rule. The agents in international trade long for maximum uniformity. This approach maintains that uniformity must not be diminished in coming from the state but supported by business practices and habits⁷⁰.

Other forms in the creation of the order of international business have been explored. In those legal systems or free trade regions with the absence of organic institutions the form of "model law" must be discussed, prior to adoption by the legislative bodies of each nation-state, or prior the formulation of international instruments whether conflict or substantive law, which attempts to systematize trade practices such as International Commercial Terms (INCOTERMS), developed by the International Chamber of Commerce of Paris, model contractual clauses, restatements, or legislative and contractual guidelines.

⁶⁷ Kozolchyk, Boris. "The Unidroit Principles as a Model for the Unification of the Best Contractual Practices in the Americas", The UNIDROIT Principles: A common law of the contracts for the Americas? Interamerican Congress. Valencia, Venezuela, 6 to 9 November 1996. *Uniform Law Review. Acts*, p. 98.

⁶⁸ Farnsworth, E. Allan. "Modernization and Harmonization of Contract Law: an American Perspective", *Uniform Law Review*, NS, vol. V111, 1/2, 2003, p. 106. In the same sense see Calus, Andrzej. *Op. Cit.*, supra note 63, p. 160.

⁶⁹ Kronke, Herbert. *Op. Cit.*, note 8, p. 18.

⁷⁰ Kozolchyk, Boris. *Op. Cit.* supra note 67, p. 94.

In this context, model law and the arbitration rules should be mentioned, as these endeavors developed within UNCITRAL⁷¹ have had markedly successful results⁷².

The importance of INCOTERMS is its acceptability to a large number of nation-states; this is a clear example of the legal instruments subject to the regime of *soft law*. The effect of its uniformity on relative legislation in the international community is not only formal, but a legal framework that serves as reference for the settlement of disputes in arbitration as accepted terms and practices. In dispute settlement it provides the necessary legal uniformity that allows a high degree of predictability in foreign trade transactions and thus legal certainty.

In the legislative guides' own merits, appraisal lies precisely in the balance of legal and economic content. Indeed, from its outset, the legislative guides consider the diversity of legal systems to offer alternative solutions for parts in specific contracts. In this way it tries to overcome the adverse consequences arising from differences in legal standards.⁷³

The legislative guide provides important foundations for economic valuations of contractual elements in specific transactions. In this context, the legal elements that are introduced in the legislative guide are not exhausted by the prospect of eliminating the consequences of the differences in domestic laws. They constitute a method to single out contractual terms which are of great legal relevance⁷⁴. In the same way the contractual guide is particularly useful.

All these are forms of non-binding legal texts that have been called "narrative rules" have become the core of the legal system of *soft law*⁷⁵.

The legal texts subject to this system, though devoid of a binding legal character, begin to exert an enormous influence over market players' conduct and result in significant changes in business practices. Therefore its importance can not be ignored.

⁷¹ See the site www.uncitral.org.

⁷² Mexico incorporated the model arbitration law into its Commercial Code according to the Diario Oficial de la Federación July 22nd. 1993.

⁷³ Calas, Andrzej. *Op. Cit.*, note 63, p. 161.

⁷⁴ *Idem*.

⁷⁵ Jayme, Eric, *Rechtsbegriffe und Kunstgeschichte: En neues Recht zum Schutz von Kulturgut*, Internationales Kulturerguterschulz.

This construction of “narrative rules” or *soft law* has been challenged in the recent past. The process of removing barriers to international trade has led nation-states to amend their contract law and adopt or adapt these model laws, restatements or legislative or contractual guides developed by prestigious international organizations such as UNIDROIT and UNCITRAL.

These instruments also meet other objectives: advising parties in international transactions and offering diverse solutions to national laws, both in training and in the implementation of contracts. In these cases, the importance of this “indirect” harmonization lies in the adoption of uniform solutions, especially in the optional or additional rules that differ significantly from one legal system to another⁷⁶.

Equally, in a very marked way, like narrative standards subject to the legal system of *soft law*, the Principles of International Commercial Contracts (UNIDROIT Principles), adopted in May 1994 by the Governing Council of Unidroit may be cited.

Apart from the discussion of the nature that is contained in the particulars of each provision of the UNIDROIT Principles, it generally could be argued that this body of law offers a “neutral” legal system of rules. This is to say that the UNIDROIT Principles could overcome deficiencies or omissions in private law conventions. But they equally mean that the Principles offer an alternative to national laws that are designed to resolve local disputes without which international or even national trade transactions would barely be solved⁷⁷.

The above arguments encounter one of their supporting points in the origin of the UNIDROIT Principles. The initial working group was composed of distinguished jurists pertaining to different jurisdictions. Their diverse law perspectives were essential in a transnational debate and therefore excluded any priority of binding law from a particular legal system and ensured its international character. The convergence of different legal minds and their reconciliation in obtaining the best business rule are some of the greatest contributions in this collective work that was enriched significantly in 2004.

It can be debated whether the UNIDROIT Principles are general enough to conclude that they are indeed general principles of law. It can be argued in this context that the general character does not come from its content but

⁷⁶ Calus, Andrzej. *Op Cit.*, supra note 63, p. 161

⁷⁷ Basedow, Jürgen. *Op. Cit.*, supra note 18, p. 137.

from its acceptability by different nation-states⁷⁸. In sum, it is safe to say that the UNIDROIT Principles can be considered as general principles of law, to the extent that there is evidence of their acceptance by the international community. The debate over legal nature is summarized by Professor Basedow⁷⁹:

"...Their normative quality can only be assessed by a new theoretical reflection. It has to cross the traditional borderline between law and fact, between precepts and habits, and it must overcome the positivist concept that lawmaking is the exclusive prerogative of the State, to the effect that normative texts can only produce a binding effect if they have been approved in the proper constitutional manner...".

From a different perspective, the adoption of the form has been upheld as one of the basic approaches in this process of harmonization and is part of the dilemma between, on one hand, the legal certainty and on the other, flexibility and adaptability. The form of convention, which generally should be understood as a legal codification, satisfies the first proposition, as the various forms of the system of *soft law* satisfy the requirements of the second proposition⁸⁰.

With the previous approach the convenience of elaborating conflict or substantive rules in the process of harmonization has been expressed. In this regard, it is thought that the extent to which conflict rules provides solutions for disputes is less satisfactory, therefore strengthening the need for uniform law conventions.⁸¹

Finally, legislative harmonization or uniformity requires a policy of harmonization or uniformity, and consequently, a rethinking of the notion of national sovereignty. Legislative harmonization or uniformity can only be reconciled with national sovereignty when the state legislature agrees to adopt a law that could be identical or similar to the one of another or more nation-states. This is only possible if the nation-state obeys societal interests, and one of the substantive interests would be the elimination of barriers to international trade⁸². In this way in harmonizing or making its internal law

⁷⁸ *Ibidem* p. 132

⁷⁹ *Ibidem*, p. 132.

⁸⁰ Kronke, Herbert. *Op. Cit.*, supra note 57, p. 19.

⁸¹ *Idem*.

⁸² Goldring, John. *Op. Cit.*, note 54, p. 449.

uniform the national state declines the right to implement different objectives in its domestic policy.

E. - CONCLUSIONS

It is safe to say that conflicts of law impede the course of average daily life. Therefore the various reasons for endorsing uniformity or harmonization are straightforward. Uniform law signifies cultural unity, that is to say it removes obstacles and misunderstandings in a society that strives for harmony. Uniformity means that comparable cases are not handled differently; it implies the elimination of uncertainties and avoids nuisances inherent to conflicts of law in a certain space and time. In sum, the employment of uniformity for the purpose of drawing together national legal systems or making them compatible is the pathway that represents great possibilities for moving forward.

The abstract nature of the law demands uniformity. Uniformity is hindered if multiple solutions are formulated for two identical hypotheses. These are the possibilities of uniformity. But uniformity has no intention of ignoring the existence of languages, knowledge and habits - in sum, the culture of humankind. National traditions are deep rooted in a society that continually seeks diversity. The challenge consists not only of selecting new elements or advanced ideas that can ensure a positive result in law improvement, but also to skillfully plait these new elements into the texture of domestic legislation and into the traditional environment of law activity.

The legal solutions of law are numerous as they are the result of variation. It is safe to say that the huge scientific advances of the West can be explained by their diversity, in contrast with other societies. The reality that law is invariable must be excluded from the jurist rhetoric. Long gone are the times when laws were etched in stone in an attempt to render them eternal. Advocating diversity does not bring about the elimination of uniformity and the undertaking of uniformity does not result in the eradication of diversity. This is the symbiosis of uniformity and diversity, which alas, demonstrates the limits of uniformity.