Defining Uniformity in Law

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INTRODUCTION

In our world of globalisation – a term originally stemming from the science of economics, but which all sociological disciplines seem to have taken to heart – we have seen the diffusion of laws and efforts to achieve legal convergence resulting in attempts to create laws that are internationally “uniform”. But very rarely do we see attempts to define what this means.

The following seeks to conduct a systematic analysis of the term “uniform” in an effort to produce a working definition of the term, and to frame an understanding of how best to deal with uniform laws in a legal context. This analysis rests on five pillars.

Section I begins with terminological explorations of the word “uniform”, consulting sources ranging from the dictionary, to preambles of uniform laws, and the terminology used in the contexts of globalisation and harmonisation of law. From this we glean an intermediary definition of uniformity as the result of specific instruments, of whatever origin or form, which deliberately aim to create similar effects.

Section II builds on Section I by examining the historical background of harmonisation and its goals. It raises the important point that modern uniformity differs from some older historical examples of objectives of uniformity in that it is voluntarily shared law, and it analyses the pros and cons of the harmonisation process in law. Finally, by looking at the lawmaking goals and the political goals of uniform laws, we see that there are varying degrees and that the intermediary definition must encompass the concept of varying degrees.

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Section III investigates many different forms of unification in law, and emphasises the varying degrees of uniformity introduced in Section II. Several points are drawn from the analysis of UCC, EU law, ECHR, CISG, UCP 500, etc. to contribute to the intermediary definition. Most importantly, it demonstrates that the origins of law or regulations of legal phenomena is largely irrelevant in the context of unification.

Section IV defines uniformity by drawing together the observations in Sections I-III above. It stresses the importance of recognizing the unique nature of uniform laws, and defines them as specific legal rules or instruments of some form [not necessarily defined as law in all jurisdictions] deliberately designed to be voluntarily shared across boundaries of different jurisdictions which, when applied, result in varying degrees of similar effects on a legal phenomenon. It then introduces one of the most significant components of such shared laws, the jurisconsultorium, which is defined as the sharing of scholarly and case-law-based sources of legal understanding and interpretation.

Section V looks at the problems of dealing with the relativity of the term "uniform" and offers some (limited) guidance as to how to establish a given level of uniformity, and where to set a minimum value for this variable.

I. TERMINOLOGICAL EXPLORATIONS OF "UNIFORM"

The terminology of the dictionary

The first place to look for a definition of a word is a dictionary. But a dictionary definition is not very helpful in defining the term "uniform" as it applies in law.

One source tells us:

UNIFORM
1a. Always the same; unchanging; unvarying. b. Without fluctuation or variation; consistent; regular. 2. Being the same as another; identical; consonant.¹

Such a definition will not function in a legal context. An absolute "always the same" application of any law is an impossibility. Totally consistent legal application with no variation is an absurdity, as there will always be

differences in the application of the law, within the boundaries of regions or single jurisdictions. Even in a country as small as Denmark, there are variations in the application of the law from the Western High Court on the Mainland to the Eastern High Court on the main island.\(^2\) Moreover, regional differences aside, the same case is never guaranteed to be resolved exactly alike before two different – human and susceptible – judges. And it is also extremely doubtful whether the same judge on different days, in different moods and hearing slightly different arguments from counsel, is guaranteed to reach the same result. Absolute identical results will never be reached.

The dictionary definition is not completely unhelpful; however, as it provides the basic understanding that we are concerned with something consistent which creates similarity, if we soften the term and modify “being the same” to “being similar”.

But focussing on the similarity, raises the question “similar to what?” which in turn initially splits the issue of uniform law into two separate categories: similarity of legal texts (textual uniformity, analysed in section IV below) and similarity of legal results of the application of such texts (applied uniformity). Both are relevant, but function on different levels, and both require a definition of uniformity, although the latter – for reasons outlined below – would seem closer to the core meaning of uniformity and the goals of it.

A definition based on similarity in result may be helpful in defining this term, but it will not, however, suffice for any understanding of its meaning in law, it raises too many questions of how, what, when, why in isolation with no parameters to clarify it.

The terminology of the preambles of uniform law

The major promulgators of legal uniformity are another natural source of further definition of the term “uniform”: UNCITRAL defines uniformity as that which removes barriers in international trade,\(^3\) and UNIDROIT is an institute

\(^2\) The example of Denmark was chosen for the author’s familiarity with it, having been trained in law there. For a stark example of differences between the two High Courts in applying law, see the cases from the Danish Law Reports: U81.8990 and U83.6520, as opposed to U88.410V on the issue of the extent of declarations of rights and obligations over freehold-owned apartments (eksigibilitet af pantsitindelige servitutter i ejendeligheder). For more information, see Ulrik Rammekskov Bang-Pedersen, “Sameje om last ejendom”, Gadslu (1996).

\(^3\) See the Preamble to the CISG: “... contribute to the removal of legal barriers in international trade and promote the development of international trade ...”
for the unification of law, seeking to co-ordinate national private laws. Both these wordings strongly suggest that the concept of unification of law rests on the bringing together of legal systems, of finding common ground acceptable to all. This suggests collaborative compromise.

But if we define uniform law as those laws which bring different legal systems together in a median compromise of rules, we ignore the fact that the vast majority of uniform law is created on the basis of only one or two legal systems and usually of a single ideal, namely liberal democracy or capitalism. Without necessarily adhering to the Fukuyama thesis, it is nevertheless an undeniable fact that the past decades of global convergence have not been marked by compromise but by the acceptance of – for lack of a better term – “western” ideology. So, regardless of the wording of the preambles phrased by some promulgators of uniform law, these noble ideals of applicability and compromise between legal systems (while undeniably true to some extent) are not the main focus of uniform law. Rather, it is the establishment of similar/same rules for application in different jurisdictions which is the core, and the coordination of laws is evidenced in the way law is used. This is strong support for the supposition that the definitions of uniform law are to be found in a result-based framework and in the applied uniformity.

The terminology of globalisation

Further help in defining the term “uniformity” may be found if we limit our interpretations to a given area within which we know the term to operate. We must try to frame a terminological definition of the term within a more confined sphere.

Professor Michael BRIDGE, humorously, provides such a sphere:

4. Taken from the descriptor on the <www.unidroit.org> homepage: “UNIDROIT seeks to harmonize and co-ordinate national private laws and to prepare for int’l adoption of uniform rules of private law.”

5. The Fukuyama thesis prescribes that: “[l]iberal democracy is the only ideology left in the greater part of the civilised world” and “[f]or a very large part of the world, there is now no ideology with pretensions to universality that is in a position to challenge liberal democracy and no universal principle of legitimacy other than the sovereignty of the people”: F. FUKUYAMA, The End of History and the Last Man (1992); see also P. De Cruz, Comparative Law in a Changing World, Chapter 14 (New World Order), 2nd ed., Routledge-Cavendish (1999), especially at 483.

6. Even the lex mercatoria, discussed in limited detail in Section IV of this paper, has come under fire as being “nothing more than an effort to legitimise as ‘law’ the economic interests of Western corporations”; see TOOKE, Mixed International Arbitration (1990), 96: “It would appear that the so-called lex mercatoria is largely an effort to legitimise as ‘law’ the economic interests of Western corporations.”
"Uniform law represents a part of that phenomenon that we call globalisation, a word that means so many different things to so many different people and ought on that account to be used sparingly, perhaps with a modest financial forfeit that upon sufficient accumulation will be paid over to charitable purposes. Those of us participating in one or more of the incremental efforts to bring about uniform law are, fortunately, sufficiently obscure to be spared the attentions of anti-globalisation protesters." 7

Notwithstanding the political ramifications of such anti-globalisation, the term “uniform” does often falls into the category of globalisation, which has been labelled the “buzzword of the 1990s”. 8

The intensification of worldwide social relations has, over the past decades, found its way into the world of law via the phenomenon of globalisation. 9 In the wake of this perception follow concepts to define the laws that form part of this globalisation process. Within the sphere of this phenomenon, a multitude of other terminology is trying to find a place. If we accept that international “uniform law” is part of the globalisation process in law, a common assumption, 10 then we may come closer to a definition of the term by exploring the definitions of other terminology of this group.

There are, as Michael Bridge correctly points out above, a multitude of various contexts in which the word “globalisation” is understood and used. Globalisation is defined by some as a de-nationalisation process, even as a “non-nationalisation”. 11 If, however, we isolate our definition and confine it to the area of lawmaking, we find an outstanding definition, which has been embraced by other scholars, 12 formulated by Niklas Luhmann.

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8 See The Economist (1997), 103. The term originates in the science of economics, but has found a multitude of applications.
9 See A. Giddens, The Consequences of Modernity (1990), 64.
10 See Zweigert & Kötz, An Introduction to Comparative Law, 3rd ed., Oxford (2004), 24; Bridge, supra note 7, 55-89; De Cruz, supra note 5, and many more. While there are examples of uniform laws that are not global (see Section 6 infra), the term is commonly used in the context of modern globalisation of law.
He defines the process of law in globalisation as a process of law where:

"... functional criteria increasingly replace geographic ones, with nation-states’ traditional law-generating organs diminishing in importance in determining legal significance, regulation and evolution." 13

This is an excellent working definition of globalisation, and it clearly separates the phenomenon into two distinct categories:

(1) the new origin of this globalised lawmaking (the promulgator of globalised law as a non-traditional lawmaker), and

(2) the new focus of this globalised lawmaking (its functional criteria).

Despite the obvious fact that the above definition does not, in itself, help in defining the term “uniform”, an examination of the terminologies of these two components may assist in clarifying and defining “uniformity” in the context of globalisation.

The terminology of the origins of global lawmaking

As the word “international” has been worn thin by daily use, and is taken to mean anything involving more than one nation, other terms for globalised law are sought. In comparative legal terminology, there has been much emphasis on devising terms for the new breed of lawmaking in defining the globalised laws, but they reflect the degree to which the sovereignty of States in relation to this new breed of law has been in focus. Prominent scholars have suggested a multitude of terms for globalised law stemming from law-generating organs other than nation-States; “non-national”, 14 “post-national” and “transnational”, 15 all of which illustrate the lack of involvement in the creation of these laws by traditional national/domestic legislatures or courts. One scholar even coins the term “sub-national law”, which evokes false associations of a hierarchy of laws where globalised international laws are beneath the traditional national laws. 16

13 Niklas Luhmann, Das Recht der Gesellschaft, as translated by Vivian Curran (supra note 12).


15 Both found liberally in Habermas, Joerges and Sand, Transnational Governance and Constitutionalism (2004).

Slaughter offers us another definition of globalised international law from untraditional and more international sources, namely “transgovernmental” law:

“Nation states today are disaggregating into ... functionally separate parts. These parts – courts, regulatory agencies, executives and even legislatures – are networking with their counterparts abroad, creating a dense web of relations that constitutes a new transgovernmental order.”

With this definition, Slaughter incorporates involvement from nation-states in lawmaking at a level of cooperation, placing the emphasis on the definition on functionality (as does Luhmann) and convergence. This accurately portrays the promulgation of those uniform laws which are not necessarily created with no involvement from Governments, but where the role of the traditional lawmaker has been changed and altered to one of cooperation. As it abstains from the use of any term referring to the word “national”, it could perhaps also be argued that it can stretch to include domestic unification procedures in law, with references to the non-national regional governing agencies cooperating to unify, but – as discussed in Section IV below in respect of the UCC – this is probably stretching the label too far.

All the above definitions of globalised international law – while accurately describing many international laws which are also “uniform” – do not bring us any closer to an understanding of what the term really means. These definitions focus on the origin of law, but regardless of how these origins are described, none of them leads us to a clearer definition of what the process of unification is about. The section of globalised law which purports to establish a “uniformity” of law must focus on the establishment of a community of law to be properly defined. So we abandon these attempts to categorise globalised law in terms of promulgation terms as helpful to the definition of “uniformity”. But this abandonment is in itself telling for the definition of uniform law. As none of the terms focusing on the origin of laws or rules were helpful in determining the term “uniformity”, we can draw the conclusion that the term “uniformity” takes its core meaning from outside any definition of origin of law. In other words: its definition is not concerned with any issues of sovereignty, internationality, or even its globalised nature.


18 Note, however, that while the definition of the term remains unaffected by these aspects, its application is very much dependent on them.
will even – in terms of origin - exist outside a framework of globalised law as evidenced by the fact that domestic uniform laws exist.

The terminology of the focus of global lawmaker

We turn, therefore, to the second criterion of globalisation as defined by Luhmann, the functional criterion which is the new basis for the focus of lawmaking in a globalised process.

This criterion focuses on the function of law, a very result-based focus. And remembering the (much too broad) softened linguistic definition of “uniform” from the dictionary, we are defining a term associated with creating something similar.

In the context of globalised law, there are many different legal terms descriptive of attempts to create rules with a certain similar function. If we examine terms which focus on the establishment of a communal law, we are presented with a number of further possibilities to understand globalisation and uniformity.

The term “legal convergence”

With the term “legal convergence” we approach one definition of the process of attaining similar results in differing legal regimes in different context. But the term describes the reciprocal changes of legal systems in order to reach a compromise of similarity, and is commonly used to describe the alleged mutual eradication of differences between common law and civil law.

Neither the concept of convergence, nor the bridging of legal families, help us to define uniformity directly. However, if we see uniform laws as an element of convergence, we come closer to a description of the core of “uniformity” as it defines the process by which legal systems are becoming similar. It is, however, a very wide term which will accommodate all manner of similarity, and all manner of means by which these different similarities are attained, regardless of whether they are deliberate, voluntary or not.

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20 The oversimplification of labelling legal systems into legal families as a desperate act of comparative methodology is explained in Section IV of this paper in Modern Uniformity as a Unique Discipline in Law.
The term “legal diffusion”

Similar results, where business practice or legal rules are similar by legal transplantation, legal borrowing or inspiration, can be said to be part of legal diffusion. The term was re-introduced into comparative terminology by William TWINING the better to align the topic of legal convergence with social science. He writes:

"... the study of diffusion of law has proceeded under many labels including reception, transplants, spread, expansion, transfer, exports and imports, imposition, circulation, transmigration, transposition and transfrontier mobility of law ... I shall use the term “diffusion” to cover all of these ..." 21

While the above terms are far from synonymous,22 they all refer to the changing of a legal system due to influences from outside its geographic borders, and it is interesting that Twining does not include unification or harmonisation in this category; rather, he refers to uniform laws as a basis which promotes diffusion but omits them from the term. Although some forms of “uniformity” might be said to be a subcategory of the general diffusion of law, as a form of imposition of law, this article will adopt a slightly narrower working definition of legal diffusion, by opposing the two.

The convergence of legal systems via a diffusion of law is a development which affects a given legal system after it has been influenced by another,23 with no deliberate goal of creating any uniformity based on a specific set of rules or laws. Indeed, it could be argued that diffusion often has no goals, but that it is a natural process. WATSON argues – using the term legal transplants – that this is the most natural way for law to develop,24 and has been since the

23 See TWINING, supra note 21, at 13: “Diffusion is generally considered to take place when one legal order, system or tradition influences another in some significant way.”
24 See generally Alan WATSON, Legal Transplants (1974) (rev. ed. 1993). The term has sparked much (unnecessary) discussion with those who view this metaphor very literally and point out that the close relationship between law and culture makes transplantation an impossibility (Pierre Legrand, Otto Kahn-Freund a.o.), but Twining’s introduction of the term “legal diffusion” will hopefully end this – essentially terminological – debate. For more on the subject of legal transplants, see NICK FOSTER / Camilla ANDERSEN (Eds.), The Journal of Comparative Law 1, Vol. 2 (forthcoming), which contains papers from the 2005 Legal Transplant Symposium where prominent comparatists (Andenas, Legrand, the Seidmans, Watson, Twining, Samuel, Butler, a.o.) debate the issue.
Babylonian Tables. As the dissemination of legal ideas and rules with no devised goal of establishing any identified form of legal coherence, any similarity in law which may result from this process is not based on the same identified legal rules, and we can thus set it apart from the modern cooperative transgovernmental efforts deliberately to create similarity of rules based on a specific instrument.

This distinction between uniformity and diffusion may be exploring the limits of the utility of taxonomy on a practical level, but a close analysis does assist in the definition of uniform law. The dissemination of concepts and ideas, which leads to a desire for and the possibility of the creation of uniform laws, is undoubtedly an example of diffusion of culture, ideology, and – to some extent – law. But the main identifying trait of uniform laws lies in the creation of something new and deliberate with the promulgation of instruments which are labelled uniform. As an example, consider the relationship between Austria and Germany. The Austrian legal system is a decentralised procedural regional system, very similar to that of Germany. Moreover, the Commercial Codes of Germany and Austria are virtually identical, and the Austrian legal tradition looks to German case law for guides to interpretation. Moreover, German case law can have a persuasive effect on Austrian Courts. In the codification of Austrian law there has been much borrowing from German law, and a high degree of similarity is attained because of this legal diffusion. But it is not correct to say that Austrian and German Commercial Codes are uniform laws for Austria and Germany. There is no single shared instrument which deliberately sets out to establish similar results across these jurisdictions. If contrasted with the Scandinavian sales laws, which are deemed uniform despite the fact that these jurisdictions very rarely lend persuasive value to the decisions of courts in sister States, the main difference is that these new sales laws were developed in unison between these States as a deliberate attempt to create shared laws which would produce similar effects. They are not the result of the adoption of rules or laws based on any existing rules or laws exported from another State.

Hence, if separating the terms diffusion and uniformity terminologically, we must define uniformity as the result of specific shared instruments which

25 See O.C. Giles, in Uniform Commercial Law (1970), 35, n. 29: "Germany and Austria provide an example of this [uniformity] in respect of their practically identical commercial codes. This uniformity has been maintained without compulsion, for since there is very little Austrian caselaw on the matters regulated by the Austrian code, Austrian lawyers largely rely on relevant German case law"; with reference to Ferdinand Melchior, Die Auslegung des HGB in Deutschland und in Österreich.
deliberately aim to create similar effects, and legal diffusion as the processes of legal convergence or transplantation which may well create a similarity of rules or laws, but are not based on the same shared instrument which deliberately aims to produce such an effect.

The term “harmonisation”

Another term which is frequently used in the context of globalisation, but is not as widely defined as legal diffusion, is harmonisation, which is often wielded as a collective descriptor in legal disciplines for all attempts to bring about some form of legal similarity, including uniformity. Uniform laws are perceived as a sub-category for some scholarly attempts to categorise harmonisation techniques, with the uniform law as a goal and the harmonisation as a process. Based on the intermediary definition above, it would then be logical to assume that those harmonised laws which reach a high degree of similarity in the effect that they produce on a given legal phenomenon could be labelled “uniform”.

As a sub-category of “harmonisation”, uniformity encompasses different degrees of unity of law, and the scholarly discussion of whether they encompass the same will probably never be resolved. There is much logic in the conclusion that to harmonise aims at a lesser legal equality than to unify; however, the application of the two terms over the past decade has been characterised by some degree of arbitrariness: often we say “uniform” when we should be saying “harmonised” if we apply the above logic. A particularly astute example of this is found in the realm of the European Union which, with its introduction of supranational laws throughout the legal jurisdictions of member States, reaches very similar results but under the label of “harmonisation”; it only rarely applies the term “uniform”. One possible reason for this is advanced in Section III on supranational law. But of course, this does not further attempts to clarify the meaning of the terms if their scholarly definition above is accepted.

The terms “hard law / soft law” / “softer law” – outdated?

In the treatment of international law, including harmonised or uniform law as part of the globalisation process, many scholars operate with a categorisation

of hard/soft/softer law. See, for instance, Professor MISTELIS, who uses it to categorise harmonised laws (which he does not seem to distinguish from uniform laws). The same scholar, however, subsequently admits that uniform laws can be comprised of components from either category of law:

“This thesis understands as hard law international treaties or conventions or any form of national legislation. Uniform laws are of a hybrid nature, while model laws, restatements, legal guides, and model rules fall under the ambit of soft law.”

Uniform law is, indeed a hybrid of many forms of lawmaking, and some uniform results in legal context are not comprised of law at all, as evidenced above. So what of these categorisations?

In international law, hard law will typically be defined as forms of legislation, soft law will typically be defined as model laws, and softer laws will typically comprise of standard business practice, with the degree of hardness referring loosely to the degree of flexibility of the law or legal phenomenon in question. But this categorisation may not make much sense any longer.

Consider two examples:

The hard law of the 1980 Vienna Convention on Contracts for the International Sale of Goods (hereinafter referred to as the CISG) may be deemed hard as it is a piece of legislation, but it is very soft in reality. There is no monitoring institution and no political pressure to ensure uniformity in its application. The CISG also has a very soft built-in hierarchy which adapts to individual contracts and party autonomy (Article 6) and trade practice established by parties as well as trade customs (Article 9).

On the other hand, the softer laws of the standard business practice can be very hard indeed in a political environment where, for example, the World Bank exerts its influence over the emerging economies. Consider the UCP 500, which, as explained below, applies almost identically to all letters of credit as a commercial presumption – it is debatable whether it is even law and it would definitely be categorised as “softer”, yet it applies with no flexibility other than the party autonomy which banks may allow (but rarely do). This softer law of standard banking practice is, in effect, one of the

hardest pieces of international legal governance, as there is no flexibility in its application in practice.

The fact is that, regardless of their usefulness in other contexts, these hard/soft/softer labels of traditional international law do not lend themselves to the hybrid of uniform law in a globalised context; primarily because uniform laws are not defined by their origin or form, but rather by the results which they aim to achieve. That is not to say that the form and origin are not significant – they are central to understanding the individual uniform law and its individual level of uniformity, which will be demonstrated in Sections II and III, but not to its focus, as defined by Luhmann, in a globalised context.

One such focus, as examined above, is the creation of similar results, which we defined as the effect of specific instruments with deliberate aims of similarity. Another focus, however, is the general aim of specific uniform laws and rules. For such a specific analysis, we need to look more broadly at the objectives of unification and the contexts of various forms of uniform law to define the focus more closely in Section II.

An intermediary and terminological definition of “uniform”

If we accept the preceding argumentation, then we can deduce the following:

- The dictionary appoints a meaning of creating something which is similar to something else, but its precise definition cannot be employed in the context of law.
- The terminology of globalisation distances the term “uniform” from any particular origin.
- The terminology of hard/soft law categorisation distances the term “uniform” from the form it takes.
- The terminology of globalisation and an analysis of the preambles of uniform laws encourage a result-based definition.
- Comparisons with other terminologies of result-based definitions encourage definitions of uniform law as deliberate and shared, and indicate a high degree of similarity in result.

From this we glean an intermediary definition of uniformity as the result of specific instruments, of whatever origin or form, which deliberately aim to create similar effects.

But this is not an adequate definition. We are still no nearer to determining what kind of result or which degree of similarity, nor have we
adequately defined how similarity should be assessed.

To clarify this intermediary definition, we must look at other aspects of the term "uniformity"; its objectives and its means.

II. OBJECTIVES OF MODERN UNIFORMITY

Consider the following statement:

"There shall not be one law at Rome, another at Athens, one now, another hereafter, but one everlasting and unalterable law shall govern all nations for all time ..."

Cicero, De Republica, 3.22.33

If we accept that Cicero is describing uniform law as we have defined it in our intermediary definition above, by referring to a deliberate (shall) law which produces similar (unalterable) results across various jurisdictions of the Roman Empire (Rome and Athens), then we accept that the concept of uniform law stems from the time of Roman law.

It has also been argued that James I, King of England and Scotland, introduced uniformity to these two nations when he proposed to unify them under a single legal system in the early 16th century. And it can certainly be argued that the English law system as it spread throughout the colonies of the British Empire created a kind of uniform law by way of the "common law" system.

But we must distinguish between modern unification of law and the historical examples given above on one important point. Modern unification of laws is a political, voluntary process whereby different jurisdictions elect to share a set of rules – it is not imposed upon them. The creation of uniform texts and results is thus a deliberate goal, not a side-effect of conquest or colonisation. The defining element is the voluntarily sharing of laws.

But even for modern unification of laws, the concept is not a new one. From the first meeting of the Hague Conference on Private International Law in 1883, to the establishment in 1926 of the International Institute for the Unification of Private Law (UNIDROIT) and until today, the international instruments working to bring the world’s legal systems together by creating similar shared voluntary rules to apply across jurisdictions are many and

29 See DE CRUZ, supra note 19, at 23, who also points out that Francis Bacon was instrumental in preventing this unification. As a note of interest, England and Scotland have very different legal systems to this day.
varied. And what we deem “modern” unifications of trade law have roots in Ernst Rabel’s vision in 1936. 30

So the question is: What makes independent jurisdictions choose to unify their laws with those of others? Why is the concept so popular today in a globalised context? What is the point of uniformity, forced or voluntary – what do Cicero and Ernst Rabel both envision? But more importantly, what are the goals of existing modern uniform laws? If we can determine the goals of uniformity, its advantages and disadvantages, then we can perhaps move closer to a narrower definition of the concept.

Why unify?

At the proceedings of the UNCITRAL Congress in May 1992, former UNCITRAL Secretary and prominent scholar, John Honnold, spoke on the “goals of unification”. He stated:

“What goals [...] call for special emphasis? Let us consider these four: (i) clarity; (ii) flexibility, (iii) modernisation; and (iv) fairness. These, from the very beginning, have been the goals of UNCITRAL.” 31

And, at the same Congress, Secretary-General of the United Nations Boutros Boutros-Ghali stated in his opening address:

“... the standardisation of international trade law promises to be one of the most important means of facilitating international exchanges and thereby fostering economic development.” 32

These statements demonstrate two things.

First, it shows us two ways of viewing the goals of unification. On the one hand, there is the macro-goal of promoting economic development through the use of similar rules to encourage trade and industry – we can call this the political goal. On the other hand, there is a much more specific micro-goal of

30 Ernst Rabel, Das Recht des Warenverkaufs (1936); in support of this see Zweigert / Kötz, An Introduction to Comparative Law, 25; also John Honnold, “On the Road to Unification of the Law of Sales”, 2 Forum Internationale (1983), 5, where he notes that: “The 1964 Hague Conventions will be superseded by the 1980 Vienna Convention. But we should not forget the debt owed to the great European scholars who, half a century ago, dared to think of a uniform law for international trade and who carried out the basic work which led to the 1964 Hague Conventions. The Conventions finalized in 1964 laid the basic foundation for the more modern structure which was built in the last decade.”

31 In UNCITRAL’s Uniform Commercial Law in the Twenty-First Century (United Nations, 1992), 11.

32 Idem, at 1.
establishing clear, flexible, modern and fair rules that can be applied across borders – we can call this the lawmaking goal. Naturally, these two goals are indelibly linked: the political goal cannot be accomplished if the lawmaking process has not met its goals and attained the necessary success for the political goal to come within reach.

Second, it demonstrates that the political goals of proposed uniform laws are dependent upon the area in which the law is created. The UNCITRAL laws share a common political goal of economic advancement, as they are all related to trade law and economic development. But in other areas of law, the political goals will be very different and, as a consequence, so will the lawmaking goals. And this can affect the determination of the similarity of result, in other words, of the uniformity itself. So the concept of uniformity will vary between different instruments of textually uniform laws.

One of the most obvious advantages of the creation of similar law is a practical one: certainty. Consider the words of Lord Justice KENNEDY, back in 1909:

"The certainty of enormous gain to civilised mankind from the unification of law needs no exposition. Conceive the security and the peace of mind of the ship-owner, the banker, or the merchant who knows that in regard to his transactions in a foreign country the law of contract, of movable property, and of civil wrongs is practically identical with that of his own country." 33

Modernisation and standardisation of law does seem to be tied to the question of predictability and certainty, foreseeability and insight. The idea that if we apply similar rules or similar concepts it becomes possible for an individual, whether a trader, legal practitioner 34 or a scholar, to predict and foresee what types of rule apply in a given situation and – perhaps more importantly – to take steps to understand them, since they are similar to those applied in one’s own State.

The preambles to uniform legislative and non-legislative instruments all refer to uniform rules as the solution to a problem. See, for instance, the preamble to the CISG which states:

"... the adoption of uniform rules which govern contracts for the international sale of goods and take into account the different social, economic and legal


34 In the present paper, the term “legal practitioner” or “practitioner” is used as a description of those who work with the law in practice as opposed to in theory, i.e. judges, arbitrators, advocates, solicitors, barristers, etc.
systems would contribute to the removal of legal barriers in international trade and promote the development of international trade...”

And the more recent UNCITRAL Convention on the Assignment of Receivables in International Trade (hereinafter: Assignment Convention):35

“The Contracting States,
Reaffirming their conviction that international trade on the basis of equality and mutual benefit is an important element in the promotion of friendly relations among States,
Considering that problems created by uncertainties as to the content and the choice of legal regime applicable to the assignment of receivables constitute an obstacle to international trade,
Desiring to establish principles and to adopt rules relating to the assignment of receivables that would create certainty and transparency and promote the modernization of the law relating to assignments of receivables, while protecting existing assignment practices and facilitating the development of new practices,
Desiring also to ensure adequate protection of the interests of debtors in assignments of receivables,
Being of the opinion that the adoption of uniform rules governing the assignment of receivables would promote the availability of capital and credit at more affordable rates and thus facilitate the development of international trade,
Have agreed as follows ...”

The quest for certainty is evident from these preambles – uniformity seeks to provide insight into applicable rules and predictability as to the outcome of disputes; equal results from equal rules. This is meant to “remove barriers in trade” or “promote availability of capital and credit” through “certainty and transparency”. Certainty in contracts is the key, and in this respect the notions of Lord Justice Kennedy have not changed one iota. And as we see the political goal of uniform commercial laws expressed as a need for economic development, the material considerations are in focus.

However, Lord Justice Kennedy also emphasises another objective for uniformity:

“I do not think that the advocate of the unification of law is obligated to rely solely upon such material considerations, important as they are. The resulting moral gain would be considerable. A common forum is an instrument for the peaceful settlement of disputes which might otherwise breed animosity and violence ... [i]f the individuals who compose each civilised nation were by the

35 UN Doc. A/56/17, Annex I. The text of the Convention was approved by the Commission on 5 July 2001, and adopted by the General Assembly without any changes.
unification of law provided, in regard to their private differences or disputes abroad with individuals of any other nation, not indeed with a common forum (for that is an impossibility), but with a common system of justice in every forum, administered upon practically identical principles, a neighbourly feeling, a sincere sentiment of human solidarity (if I may be allowed the phrase) would thereby gradually be engendered amongst us all – a step onward to the far-off fulfillment of the divine message, “On earth peace, goodwill toward men.”

So, at least at the turn of the last century, unification of laws was seen to be the creation of a communal legal brotherhood, which in addition to meeting certain functional criteria and producing predictability in a given field, could also promote peace. While such a consideration will probably rarely be at the forefront of the commercial lawyer’s mind, it is true for all uniform law that they create a legal cooperative community and with that community, comity in its application. It is also expressed in the preamble to the Assignment Convention, supra, as a way of promoting “friendly relations”. However, although a contribution to the attainment of world peace may be an effect of unification of laws, and even an expressed effect, the author would venture the opinion that in a modern context, this is for the most part a side-effect. A politically very positive side-effect, but a side-effect nevertheless. It is certainty and economic development that are the central goals in trade law, if the preambles are any indication.

But why uniformity in law? Certainty would not seem, on the face of it, to require legal equilibrium and similar rules. This is also achieved in commercial law through the exercise of party autonomy and by thorough contract drafting between parties where they take everything into account and create their own predictable laws. This, however, represent a prohibitively expensive negotiation and drafting process, and even agreement on drafting

36 Lord Justice Kennedy, supra note 33. This aspect of unification goals is gratefully stolen from John Felemegas, see infra note 37.


38 Expressed even for the CISG, see UN Doc. A/CN.9/ER.A/1970: “International trade is one of the most important factors in economic development and as such, a means of promoting understanding and peace among peoples.”

39 According to U.N.C.I.D. Uniform Rules of Conduct for Interchange of Trade Data by Tele-transmission, I.C.C. Publication No. 452 (1988), at 7: “… paper documentation and procedures represent as much as 10 per cent of goods value …” In reality, transaction costs vary between the different jurisdictions. In India, they are estimated at 12% of the total cost of trade (see Hindu
Defining Uniformity in Law

words in a contract may not mean a meeting of minds as words can have different meanings.40 Meeting on common ground can make drafting much cheaper.41 More importantly, a common understanding of some basic legal notions can be a necessary prerequisite to contracting in the first place. Moreover, domestic laws may not always adequately address international problems.

An example from a complex discipline in law illustrates the overall usefulness of harmonisation: in Private International Law, there has always been a lofty – and usually recognised as utopian – goal to strive for a situation where jurisdiction and choice-of-law rules always lead to the same application of rules; in other words regardless of where in the world a case is lodged, the venue and choice of law issues would result in the same forum selection and jurisprudential application. This is far from becoming reality,42 but even if it were, it would not adequately meet the needs behind the quest for certainty, as foreseeability and predictability might be met, but the need for insight would not. For example, even if it were possible to use Private International Law accurately to predict the choice of law, this law would still be the domestic rules of one of the parties, and the other party would – in all likelihood – not be able fully to comprehend these rules, or even be able to become familiar with them without local specialist knowledge. In the drafting process, it would be difficult to foresee the basis of the contract, and more

Business Line article at <http://www.thehindubusinessline.com/ew/2003/04/16/stories/2003041600180300.htm>, whereas many countries estimate these costs at around 4-7% of the value of cross-border trade. Negotiating and drafting form a substantial part of this transaction cost.


41 We have yet to see any clear statistics from the realm of law and economics statistics which prove that uniform laws cut transaction costs, but it seems to be an assumption throughout much of the literature.

42 The globalisation attempts made by the working group of the abandoned Hague Convention on International Jurisdiction and Foreign Judgments in Civil and Commercial Matters may be viewed at <http://www.hchch.net/>. Optimism for the project as globally embracing diminished after it became apparent that the United States of America would not ratify the Convention for reasons based on constitutional limitations, and it was ultimately abandoned, leaving the Convention on Choice of Court Agreements (2005).
Importantly, it would be difficult to foresee what gap-filling rules would apply if a problem with a contract were to surface. Some might then inject that this problem might be solved by choice-of-law clauses, but this would necessitate that the parties reach agreement on a set of domestic rules which it might be difficult for at least one of the contracting parties to gain insight into. Moreover, solving the problem of predictability and insight by way of choice-of-law clauses would require those drawing up a contract to cover every possible problematic aspect of their deal — a nearly impossible task, as it is always hard to foresee what will go wrong if anything does. Private International Law does not, and cannot, hold the key to the problem of predictability in contracts in itself, even in its most perfect (utopian) state.

And so, wishing to bring the world together under foreseeable rules, the drafters of uniform law seek to make international rules which are similar, if not equal, making different legal systems meet on common ground in isolated areas of law.

When UNCITRAL was convened in 1966, it was to promote “the progressive harmonization and unification of the law of international trade.”43 And scholars and practitioners worldwide accept this need for global as well as regional unification, often unquestioningly,44 in an array of different areas of the law: from the United States Uniform Sports Agents Act 45 to the question of how goods are carried by sea.46

Admittedly, some areas of unification and harmonisation have more merit than others — while it may be difficult for all to understand the need for a harmonisation of the curvature of cucumbers in the EU regime,47 the need to smooth out some of the inherent bumps in international trade by serving as a bridge over the idiosyncrasies of different legal systems is a worthwhile goal in serving trade, industrialisation and economic growth.

43 General Assembly Resolution 2205 (XXI) of 17 December 1966, I Yearbook, 65.
44 Although criticism of the harmonisation taking place in the EU regime is voiced on occasion, this criticism is largely anti-European and not so much anti-harmonisation. See Geoffrey Martin (Head of the European Commission in the United Kingdom) in European Business Journal, London. Vol. 8, No. 2. (1996), 26-31, where he addresses anti-Europe stories in Britain: “some are amusing and some may even contain a kernel of truth but most are plain wrong and some are simply made up.”
It can, however, still at times be difficult to understand the point of unification and harmonisation. Do we really gain better insight into a very different legal system because it applies rules which are similar to our own at face value? This false familiarity can breed misunderstandings and mistakes which would not have occurred had the system been completely different.48

One of the more astonishing aspects of unification, harmonisation and other legal equality labels is their almost unquestioned status as being desirable.49 In an article by Dr Loukas Mistelis entitled “Is Harmonisation a Necessary Evil?”,50 the need for harmonisation is not questioned but accepted and the means toward it are analysed; instead, the “evil” is not assessed. There are isolated voices raised in objection to harmonisation, but these are “increasingly a dying breed”.51

In the specific case of uniform international sale law, CISG, there have been a myriad of articles and scores of commentaries, but the present author has found precious few that question the concept of uniformity itself. Some criticise the uniformity of the CISG,52 and many question the Convention’s applied uniformity in case law commentaries,53 but very rarely is the overall wisdom of unifying questioned; rare is any criticism of the goal itself or the

48 This concept of false familiarity is also labelled “faux amit”, see Vikki ROGERS, “Beware of Faux Amis: The Importance of Uniform Terminology in International Sales Law”, Center for Transnational Law (Eds.), Law and Practice of Export Trade, Quellen: Münster (2001) 29-32.

49 See Arthur C. ROSETT, “Unification, Harmonisation, Restatement, Codification and Reform in International Commercial Law”, 40 American Journal of Comparative Law, 683: “these efforts [to bring the commercial law of the world together] bear a number of labels and the general assumption is that all of them are desirable, consistent elements of a coherent plan to support economic transactions with a legal structure that encourages enterprise and reduces cost.”

50 In Fletcher / Mistelis / Cremona (Eds.), Foundations and Perspectives of International Trade Law, Sweet & Maxwell (2000).


need to justify it – and those that do criticise are primarily concerned with championing legal diversity in the face of supranational regulation within the EU. Where international trade law is concerned, the prevailing opinion seems to be that the surge in international commercial commerce has fuelled a need for uniform laws in the interest of certainty, and bridging gaps between the sales laws of different legal communities. This is illustrated by the preambles above, as well as by many scholars. In the realm of global harmonisation of international sales, the concept of unification of laws is a foundation which is rarely questioned and never shaken.

There are, however, a number of "pros" and "cons" that should be weighed up regarding harmonisation as a whole amongst the "dying breed" of anti-unification supporters.

**Facing criticism of uniformity of law**

Numerous objections are raised by HOBHOUSE, and summarised well by COPALAN. There are several arguments that are so Anglo-centric as to make

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54 Those that do are mostly concerned with the unification of European contract law, and champion diversity over harmonisation in the context of supranational law. See, for example Pim HAAK [Chief Justice of Supreme Court of the Netherlands], “Accommodating legal diversity in the European Union” (11 July 2002), at: <http://www.rechtspraak.nl/noge_raad/main.htm>, and Horatio MUIR WATT, “Experiences from Europe: Legal Diversity and the Internal Market”. 39 Texas International Law Journal (Spring 2004), 429-465.

55 J.S. HOBHOUSE, “International Conventions and Commercial Law: the Pursuit of Uniformity”, 106 Law Quarterly Review (1990), 531. The points of criticism are summarised by COPALAN, supra note 51, and are worth restating: 1. International Conventions are inevitably drafted as multicultural compromises between different legal orders and will hence be enervated, inconsistent, and incoherent. 2. The systemic faults in international drafting deprive the instrument of the force that is required for it to be an effective tool to tackle the problems of international commerce. 3. The pursuit of uniformity is an idealistic notion, since national laws are premised on different traditions and assumptions. 4. Any uniformity that is achieved is born with an inherent hollowness caused by the realization that national courts will interpret the instrument in the backdrop of their own legal systems with the resultant divergences of interpretation. 5. To expect that judgments from other jurisdictions would be easily available or accessible is to be overly optimistic. 6. This quest for uniformity uncovers the reality that where uniformity is not achieved, a “diplomatic uniformity” is sought to be hammered out, very often in clever guises. One widely adopted tactic is that of a rule immediately emasculated by an equally broad exception. This results in the production of an inadequate legal tool without any commensurate gain. 7. Non-English versions of rules are frequently vague and lacking in comprehensible meaning. 8. International Conventions have an extremely prolonged gestation period, are very difficult to amend, and the signatories are prisoners to it until a new convention is created. 9. National laws are easier to amend and can respond more effectively to the demands of changed circumstances. 10. Diversity in of itself is a great virtue. It affords the opportunity to choose the best amongst a host of
little sense to a non-English lawyer. For instance, the notion that the non-English versions of rules are frequently vague and lacking in comprehensible meaning is offensive in context to the non-English lawmaker, so let us assume that Hobhouse means that non-English rules are incomprehensible to him.

Notwithstanding these Anglo-centric arguments, there are many worthwhile observations against harmonisation, which basically all fall into two main categories:

(A) The diversity of legal cultures and traditions means that uniform international laws are full of compromise, hollow, hammered out with broad exceptions, expensive and difficult/impossible to make or translate, and once created, no uniform text will reach a uniform result as judgments are not available transnationally (on the assumption that all uniform law is a common law), and

(B) Diversity in itself is a great value, removing it prevents a healthy choice of laws and undermines legal cultures.

Essentially, this is all one argument, that of legal diversity, which applies on two levels:

(1) Diversity makes unification difficult and misleading (an argument of lawmaking), and (2) Diversity is worth keeping and should not be removed (an argument of both lawmaking and political ideals).

Regarding the first argument, it seems defeatist to abandon the pursuit of a goal because there are stumbling blocks to its achievement in terms of lawmaking. The slower diffusion of law as a means of natural evolution and convergence of legal systems through legal transplants might be more attractive, as it retains the clear diversity of national legal orders, and does not face the problems which uniform laws do in the making. On the other hand, it does not necessarily create very similar results if the influences of the varying domestic legal systems are not removed from shared laws. The difficulties of unification of law are being faced, with varying degrees of success.56 But those who advocate we abandon the pursuit of unification because of these — admittedly serious — difficulties of legal divergence in lawmaking do not comment on the objectives of uniform law, but on the strength of the promulgators who seem to have managed in the face of such difficulties.

The second argument, that diversity should be maintained, is a more serious objection to unification, and applies both on a political and on a lawmaking level.

On a political level, the quest for certainty at any price may well be questioned: must all legal systems conform to the norm of that which the majority find acceptable? Should we accept the uniformity of fingernail-lengths by chopping all fingers down to a standardised size? 57 The argument here is very much one centred on the interest in maintaining the legal cultural diversity in existence. This brutal metaphor of finger-chopping is apt, and adequately describes the volatility of the topic. Especially in the framework of the EU, the notion of vanishing cultural diversity in the wake of legal convergence and unification is sensitive and highly political. And in developing countries, the perception of forcible incorporation of western ideals in law has led to severe concerns of cultural survival. These concerns are very valid and understandable, but as this is a tender political subject which is not central to the topic of this paper, this paper will try to avoid it and elegantly side-step it by addressing the other aspect of the diversity argument.

On a lawmaking level, critics of the unification wave might well argue that we can never remove the idiosyncrasies of different legal systems with attempts at harmonisation, and that by attempting to do so by imposing rules which appear to be the same we are lulled into a false security, making certainty in contracts an even more unattainable goal than if a completely different set of rules were investigated, and a “local” expert consulted. 58 Moreover, in commercial law we can argue that by maintaining legal diversity we allow for commercial players freely to chose between the existing laws available, and we can let the players in the “markets” of laws determine which work best for them.

To these two points of criticism, there are two counter arguments. First of all, regarding the freedom to choose laws in the commercial legal markets, this is not affected by uniform laws as party autonomy reigns supreme in all aspects of commercial laws. The national laws do not disappear, and if parties wish to choose them (or completely different rules such as standard forms which they create themselves) as the applicable law in any given aspect of

57 A metaphor shamelessly stolen from Herbert KRONKE’s presentation of a paper for the 1st Schmitthoff Symposium at the Centre for Commercial Law Studies, London (1999), printed version available in Flechtnar / Mistelis (Eds.), supra note 50.

their dealings they can still do so. This author has yet to come across an instrument in commercial law that would not respect party autonomy extensively. Limitations on party autonomy are not found in international substantive commercial laws, but in the mandatory statutory laws or principles of the otherwise applicable domestic laws. Second, while concerns that a false sense of uniformity is being created are valid, this is in fact an argument that says that the semblance of uniformity is greater than the actual uniformity. This can be alleviated on two fronts: the misleading semblance of uniformity as achieving total similarity can be clarified, through commentary and better definitions of uniformity as varying degrees of similarity and relative functional criteria. And, equally importantly, the applied uniformity can be improved. The two concepts of uniformity can thus be converged to a greater extent. Much is being done to accomplish the latter point, in legal scholarship. On the former, a clearer definition of “uniform” throughout all scholarship should be encouraged.

In favour of unification in commercial law

To counter any points of criticism, however, there is one undeniable concept which supports the notion of harmonisation: the notion of profit. Particularly in international trade law (and in most areas of commercial law) we find one overpowering universal truth, namely the quest for making money; as much money as possible.

It is this quest for profit from lucrative contracts which lies at the core of all trade, and one of the most expensive fringe costs of international commercial contracting is the prohibitive cost of contract negotiating and drafting. With similar legal rules forming the backdrop of contract negotiations, understanding may be come by more easily and negotiations for

59 To name but a few examples, Art. 1.1 of the UNIDROIT Principles of Commercial Contracts 2004 sets out that “the parties are free to determine their own contract” and a very similar rule is found in Art. 1:102 in the Principles of European Contract Law (PECL). In the Uniform Customs and Practices for Documentary Credits 1993 (UCP 500), over half of the substantive provisions state “unless the parties declare otherwise”, and Art. 1 ensures that parties can deviate from them in the documentary letter of credit should they wish to do so. This is expressed generally in the CISG in Art. 6, and to some degree also in Art. 9. Exceptions may be found in consumer protection regulations (where these are classified as “commercial”), or in regionalised governance of unfair contract terms, but where the equality of bargaining power in core commercial areas is an assumption, the above statement is true.

60 In the realm of international sales, see – amongst others – BAASCH ANDERSEN, supra note 56, and the emphasis on various commentaries to this uniform text; also FLECHTNER, supra note 40, 167-217.
drafting may be shorter – and more importantly: cheaper. Thus, if traders speak the same basic language they save money – and saving money means making more of it.

Another economic point in favour of unification of commercial laws is the more macro-economic argument that as trade is encouraged based on common legal understanding, new markets emerge or become more accessible, and in turn different sectors of industry flourish.61 This argument is an extension of the political argument of “removing barriers in trade”, as phrased by the preamble to the CISG.

Readers will have gathered that the author of this paper, as an international commercial lawyer, is a strong supporter of the quest for uniformity in the areas of law where business shows a real need for or derive benefit from it. In this author’s subjective definition, commercial law essentially caters to the needs of the business community and society as a whole, by providing the statutory boundaries for party autonomy as morality of society dictates, thus enabling the greatest freedom within these boundaries for business to grow and develop in the pursuit of profits and economic growth. Thus, if world trade benefits from a uniform law, it should be encouraged and aided. The added benefit of achieving legal community with the side-effect of peace-making is certainly also worth taking into consideration. Gratuitous harmonisation, as seen in the framework of the EU, however, should be viewed with caution. But this article will not digress on that issue here – suffice it to say that objectives of uniform law must be viewed in connection with their context, and both their political and lawmaking goals must be assessed.

Conclusions on the objectives of uniformity

Based on the above, we can add to the definition of uniform laws that in a modern context they are voluntarily shared.

We also see that the general concept of uniformity becomes difficult to define when approached in terms of goal and objective. The main reason for this is the diversity of legal disciplines operating with uniform laws, which span a multitude of different political goals which will define the context and meaning of the text in question.

Moreover, different contexts and political goals of law will affect the lawmaking goals and the realistic level of similarity which the proposed form

of uniformity may reach. It becomes important to express that uniformity is not an absolute similarity but a variable, so we see that our intermediary definition has to encompass the concept of varying degrees.

To try to determine which factors will influence this variable, we need to examine various forms of uniform law in various areas of law.

III. - FORMS OF UNIFORMITY

Throughout the history of the modern world of contract law, there have been several different approaches to harmonising law and attaining "uniform" results. Either through legislature - supranational or otherwise -, restatement, model laws, or through other non-legislative means.

The intention is to demonstrate that there are a multitude of differing techniques to create laws or legal phenomena which are labelled as "uniform", and they exist in many different forms. Most are transgovernmental as defined in Section I above, but some are of domestic origin, some supranational, some non-governmental and some spring from trade or banking practices.

National unification of diverse jurisdictions by private drafting – UCC

As evidenced in Section I above, "uniform law" need not be globalised or transgovernmental if we operate with the result-based definition. Domestic uniform law does, however, require a legal pluralism of jurisdictions for a uniform result to span across. Such an example is found in the United States of America, where the different states have different jurisdictions for contract and commercial law in most areas. The Uniform Law Commissioners have drafted a cornucopia of varying laws which the individual US state can voluntarily adopt and adapt. In the field of commercial law, the best known

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62 For more information on the early history of the quest to harmonise sales law, see P. Schlechtriem, "Bemerkungen zur Geschichte des Einheitskaufsrechts", in Schlechtriem (Ed.), Einheitliches Kaufrecht und Nationales Obligationenrecht (1987), 27.

63 For an overview of the different bodies promoting the unification and harmonisation of (commercial law), see Herbert Dolzer, "International Agencies for the Formulation of Transnational Economic Law", in Norbert Horn / Clive M. Schmitthoff (Eds.), The Transnational Law of International Commercial Transactions (1982), 61 ff.

64 As a note of interest, the fifty American states do not even share the same legal family, as the state of Louisiana can be labelled civil law, whereas the remainder are common law.

65 The Uniform Law Commissioners have drafts in process of subject matters ranging from the Uniform Sports Agency draft to the Uniform Child Witness Testimony by Alternative Methods Act - for more information consult: <http://www.law.upenn.edu/bill/ulc/ulc.htm>.
example would be the *Uniform Commercial Code* (UCC), which is restated regularly and forms the backbone of American commercial law. There is no common American Commercial Code, however, as the pick-and-mix of the UCC means that the states have varying versions or aspects adapted to their own state jurisdiction. In effect, this uniformity is not different from globalised uniformity, except for the element of internationality. It might be argued that such unification of law across jurisdictional boundaries in a nation large enough to embrace legal pluralism can still be labelled "transgovernmental" as there is cooperation in the enactment of these uniform laws between the state "governments", but this is likely to stretch the label too far. This is merely a regional globalisation within the boundaries of a single nation. And so the need to differentiate between domestic and international globalisation surfaces, but solely to the extent of defining the region and explaining why the element of transgovernmentalism is absent.

The American legal unification procedure is very much like nation States adopting soft law rules — and very unlike the avenue which the European Union (EU) pursues with its supranationality and attempts to create a European Civil Code.

**Supranational law — regional unification by ceding of sovereignty**

The easiest way by far, in terms of drafting and supervising, of promoting allegedly uniform rules is where binding instruments are imposed on a legal system by a supranational instance — like the EU regulations in Europe which harmonise law to such a degree that it becomes more or less uniform upon drafting, as member States have ceded sovereignty. When the regulations for harmonisation come as set texts supranationally, there is an advantage in the applied uniformity in that recourse can be had to a whole system to monitor the application of the texts, such as the European Court of Justice (ECJ) and the European Commission, as well as constant revisions and updates. There is, however, very little flexibility in this system, and critical voices have been raised to indicate a tendency to over-regulate. The political problems of decentralising legislation to such an extent that laws are promulgated solely within the EU regime are an entirely separate chapter of problems. But in terms of achieving a degree of similarity in the applied results (i.e. as we tentatively defined uniformity supra), this method of creating supranational hard law is by far the highest-reaching. By having recourse to the ECJ, deviant applications of proposed uniform laws can be admonished, and any judge

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66 As defined by Slaughter, supra note 17.
unsure of aspects of the new laws can phrase questions for guidance to the institutions monitoring the application of these laws. Interestingly, in terminological terms the uniformity of law under the EU regime is often labelled “harmonisation”, not uniformity, despite the fact that it has achieved the highest level of legal equation generally, on a global scale. The reason for this mislabelling is closely tied to the political volatility of unification in a supranational context, as touched upon supra. To render the unification of laws in Europe more palatable to those wary of the cessation of sovereignty, the term “harmonisation” is employed as a more pleasant term for the “public relations marketing” of unification. This may be a clever way to market the notion, but in terms of clarifying the taxonomy of this area of law, it creates unnecessary confusion.

Regional unification and minimum standards

The Council of Europe has a somewhat similar approach to harmonising European Human Rights: member States ratify a Convention which is then monitored by the Court of Human Rights in Strasbourg: the Court scrutinises human rights violations and ensures a dynamic interpretation of the Convention. This system, however, is not a rigid one. First of all, it has a built-in “margin of appreciation” in central provisions, which ensures a certain freedom for States to decide certain issues for themselves. Second, the text is subject to a dynamic interpretation, which can change the meaning of the text in time. In other words, the ECHR is not a set uniform text, and it was never meant to be one, despite the reference in the preamble to unifying a standard of human rights. But it meets this requirement, by setting uniform standards of human rights which are to be observed as a minimum. So it is uniform legislation to some degree, albeit a flexible and varying degree of a “minimum standard”.

The fact that this uniform minimum standard of human rights is neither labelled as uniform nor global (but solely regional) does not prevent the


66 This margin applies to the provisions on certain personal freedoms in private and family life (Art. 8), freedom of thought, religion and conscience (Art. 9), freedom of expression and freedom of association (Arts. 10 and 11). The margin is found in Section 2 of all these provisions where the State may interfere with them as prescribed by law and where “necessary in a democratic republic” in the interest of the public.

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results it has obtained from being “uniform”. It is not by the wording of rules, conventions or preambles that uniformity is defined, but in the similarity of the results which it deliberately produces.

Model laws – do they entail uniformity?

Another path to harmonisation is the adoption of Model Laws 69 – these serve as examples for States as well as for practitioners and individuals, and even for supranational organs,70 as exemplary laws on particular issues. They may serve as the basis of,71 or inspiration for,72 State legislature on the topic in question. Additionally, since the model laws – in their original form – are “stateless”, parties in trade may chose to appoint model laws as applicable in international contracts to meet on “middle ground”, and Arbitral Tribunals may choose to appoint their provisions in conflict resolution.

The main political advantage here is the total flexibility of the texts, which makes them universally attractive. But it is this very high level of flexibility which can lead us to question whether model laws can be generally categorised as “uniform law”. The texts may change in different countries to such an extent that they do not, in fact, reach similar results.

It could be argued that such varying texts are closer to the core of legal diffusion, which we defined in Section I above as the dissemination of law but not the attainment of uniform law. They may merely form a source of inspiration in shaping law reform, and as such the result created is not one of “uniformity”, as it is neither necessarily similar nor shared or deliberate to a


71 For example, legislation based on the UNCITRAL Model Law on Electronic Commerce has been adopted in Australia, Bermuda, Colombia, France, Hong Kong Special Administrative Region of China, Ireland, Philippines, Republic of Korea, Singapore, Slovenia, the States of Jersey (Crown Dependency of the United Kingdom of Great Britain and Northern Ireland) and, within the United States of America, Illinois.

72 Uniform legislation influenced by the UNCITRAL Model Law on Electronic Commerce and the principles on which it is based has been prepared in Canada (Uniform Electronic Commerce Act, adopted in 1999 by the Uniform Law Conference of Canada) and the United States (Uniform Electronic Transactions Act, adopted in 1999 by the National Conference of Commissioners on Uniform State Law).
high degree. However, where laws in several jurisdictions are based on a model law, the similarities attained, as well as the deliberateness of efforts to create shared rules are considerable.

Another – somewhat fragile – point to be considered is that the promulgators of model laws have varying goals in mind for the texts they produce; some model laws are produced to address a specific substantive legal issue with speed and efficiency by creating new rules for a newly arisen phenomenon in law – it could be argued that the Model Law on Electronic Commerce falls into this category as its main aim seems to be to facilitate paperless trade via a doctrine of functional equivalence, and not one of creating uniform results.\(^{73}\) But does it then fulfil the criterion of deliberateness to separate uniform phenomena from the legal convergence of legal diffusion? Other model laws, on the other hand, promulgate rules to govern a long-existing phenomenon in the hope of inspiring law reform and change in order to promote more similar results in various jurisdictions. The 2002 UNCITRAL Model Law on Conciliation arguably fits into this category.\(^{74}\) The answer to the above question is thus that it will depend on the individual model law and to what extent it intrinsically aims at uniform and shared results.

Consequently, the classification of model laws as “uniform” will differ according to their goal and their deliberateness in aiming at similar results, as well as the degree of the actual result attained. The second point brings with it an interesting conclusion: in our definition of “uniform” we had to entertain the notion that uniformity had to be of varying degree, but in our attempt to categorise model laws we also entertained the notion that if the similarity is very slight, then there is no uniformity, in other words, a minimum standard for using the term.

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73. Although the Preamble does refer to the standard UNCITRAL aim of unification and harmonisation, the main aim as reflected by the user guide and web-page is: “... to facilitate the use of modern means of communications and storage of information. It is based on the establishment of a functional equivalent in electronic media for paper-based concepts such as ‘writing’, ‘signature’ and ‘original’. By providing standards by which the legal value of electronic messages can be assessed, the Model Law should play a significant role in enhancing the use of paperless communication.” See <http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/1996Model.html>.

74. According to its description: “... the Model Law provides uniform rules in respect of the conciliation process to encourage the use of conciliation and ensure greater predictability and certainty in its use. To avoid uncertainty resulting from an absence of statutory provisions ...”, see <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2002Model_conciliation.html>.
Customary law

The principles of trade law, merchants' law, general principles of trade law – these are all terms indicative of types of customary law. Non-codified principles of law, intangible and unpredictable, these rules have been significant in international trade for many years, and have been defined by Roy GOODE as:

"Conscious or unconscious parallelism, a body of codified and un-codified principles and rules which cross national borders." 75

The present article purposefully abstinents from the use of the term *lex mercatoria*, given that this label is currently hotly debated in legal history. Lord MUSTILL defines this label as a:

"... widely discussed topic, which attractively combines novelty, generalization and the opportunity for controversy." 76

He also notes that:

"The *Lex Mercatoria* has sufficient intellectual credentials to merit serious study, yet it is not so generally accepted as to escape the sceptical eye." 77

While some perceive the modern *lex mercatoria* to be a reinvention of the law merchant of the Middle Ages moulded on the Roman *jus gentium*, others – such as Nick FOSTER – seem convincingly to substantiate that in the Middle Ages it was originally nothing more than a set of procedural rules. Moreover, regardless of its disputed origins and myths, definitions of *lex mercatoria* vary from claims that it is a "new law" of international business practice outside the framework of traditional laws to notions that it is an outdated concept with a "mythical view of a transnational law", to hostile

80 See GOLDMAN, supra note 78.
notions that it is solely a ruse for the "economic interests of Western corporations".82

To avoid this hotly debated label, the present author offers instead two labels: codified customary law and non-codified customary law.

The rules of customary laws are significant for trade law; they are produced in trade where the rules are needed by the people who apply them. Either in the form of standard business practice or standard form contracts,83 they may produce similar results for a given legal phenomenon across jurisdictional boundaries, and are argued to be part of the unification process of law because of this attained effect.84

But it can equally be argued that where they are not codified, principles of business practice that create similar results cannot be defined as "uniform" in the sense defined supra despite the similar results reached, because the deliberateness of the rules in question is not certain, nor are there any clear shared rules. In other words, although they reach similar results, these results are not created with any uniformity in mind, but are part of a legal diffusion of good business practice. However, to counter this argument, it can be said that the very establishment of good business practice is deliberate on the part of industry players in the interest of creating predictability and certainty. And if we accept the fact that, for the definition of "uniform" we are not concerned with the origin of the rule that creates the similar effect,85 then the deliberate creation of certainty in a given area of trade by the business community satisfies the requirement of planned and shared uniformity.

Moreover, even non-codified trade usage is a significant factor in international trade, and often respected by courts even where parties have not specifically agreed to apply them through contract terms or choice of law – for instance, the CISG hierarchy makes it clear that trade usage supersedes the Convention by way of Article 9.

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83 Examples may include Lloyds Policy of Marine Insurance, the ICC Model Commercial Agency Contract or the ICC Model Distribution Contract.
85 As argued in Section 1 of this paper.
Hence, rules do not have to be codified in order to be classified as “uniform” as long as those who apply them use them in the same way; however, it is difficult to examine their content and application in a scholarly context.

However, there also exist codified versions of customary law. The lack of predictability and insight offered by non-codified rules was thought unsatisfactory, and uniformity was sought through some attempts at restating contract principles as a part of customary law in the form of non-binding instruments, i.e. unification without actual legislation.86

The first major such effort resulted in the UNIDROIT 87 Principles of International Commercial Contracts,88 and hot on their heels followed the Principles of European Contract Law (PECL). The latter was intended as uniform contract building block for future measures of the European Communities,89 but both sets of Principles are used in practice where parties refer to them as the law of the contract, and the PECL may even serve as model law for future attempts to harmonise domestic European commercial codes.90 Such codified trade usages in contract law are not formulated as binding instruments, but operate under the same considerations as model laws (see above) in terms of flexible application. They do, however, meet the requirement of deliberateness: in their very codification lies an implicit need to promote the similarity of the non-codified custom. So it is the question of how the codified custom is applied that will determine the question of whether it is uniform, in accordance with the requirement of reaching a certain degree of similar result.

We here clearly see confirmed that it is in the application of rules that the key to uniformity is found, and not in their drafting.

87 The International Institute for the Unification of Private Law. Located in Rome, it is an independent intergovernmental organisation founded in 1926 to: “...study the means for the harmonisation and coordination of private law between states ...”, see Art. 1 of the UNIDROIT Statute.
88 For more information on the UNIDROIT Principles, see Michael Joachim BONELL, An International Restatement of Contract Law, 2nd ed. (1997).
90 See BONELL, supra note 88, at 5.
Defining Uniformity in Law

Codifications of non-law – uniform law?

Another example, closely linked to the concept of trade usage, is the establishment of a business practice which cannot be classified as “law” in a classic sense – at least not in all jurisdictions.91 Consider the Uniform Customs and Practice for Documentary Credits 1993.92 The documentary letter of credit – deemed by English judges to be the “life blood of international commerce” 93 – is a common payment mechanism in international trade which is now almost exclusively governed by the UCP 500. Although the rules themselves decree that they only apply to credits which appoint them,94 their applied success in banking practice is such that no credit is opened without these rules governing the credit, and Roy Goode writes in his new edition of the English “Commercial Law” that there is a commercial presumption that the UCP 500 always applies to documentary letters of credit.95 The rules themselves, however, are a codified set of rules for banks – a handbook with rules to govern a credit should the bank choose to use them. They are based on existing banking practice and common law principles from primarily English practice, and codified by the International Chamber of Commerce (ICC).

They attain an astonishing level of “uniformity” in accordance with our intermediary definition in Section 1, and if we consider the varying degree of similar results which uniformity entails, the degree of similarity in this case is very high as there is practically no diversity in the application of the UCP 500 between those banks worldwide that operate under its auspices. In this regard, it is not relevant whether the banking practice document which it in reality entails can be deemed “law” (and thus whether they can be deemed “uniform

91 As to English law, see generally Colin MANCHESTER, Exploring the Law, Sweet & Maxwell (2000), esp. Part 3 which traces the evolution of law.

92 ICC Publication No. 500 (UCP 500), soon to be replaced by the Uniform Customs and Practice for Documentary Credits 2006, ICC Publication No. 600, the drafting of which has just been completed.


94 See Art. 1 of the UCP 500, which prescribes: “The Uniform Customs and Practice for Documentary Credits, 1993 Revision, ICC Publication No 500, shall apply to all Documentary Credits ... where they are incorporated into the text of the credit.”

95 See GOODE, supra note 75. Interestingly, this is a departure from the 1995 edition which prescribed that the applicability of the UCP 500 could not be assumed. This illustrates the speed at which the commercial assumption of the applicability of these rules has escalated.
law"). But it is interesting to note that due to the tremendous success in implementing these rules of banking practice, they are treated as “law” in academic legal disciplines – they attain a uniform result in an area of law, i.e. the governing of documentary credits. The secret of their “success” in this respect is the effectuation of sound rules for the use of a business sector which is in a position to use them.

The fact that uniformity in an area of law can be attained through rules which are not law is yet another affirmation that the origin of “uniform” rules is incidental.

**Contributing to the intermediary definition of “uniform”?**

As evidenced by the above, these approaches to obtaining alleged uniformity all have their advantages and disadvantages, from practical points of view, and they help us to identify certain important traits of “uniform law” with these significant observations:

- Confinement to a national or regional sphere does not prevent rules from being “uniform” (UCC, EU, ECHR).
- Supranational unification reaches a high degree of similarity of result (EU, ECHR) as it can monitor the similarity with which the rules are applied.
- Cross-jurisdictional minimum standards (ECHR) can be expressed as “uniform” in terms of similarity of results.
- The lack of a “uniform” label (ECHR) will not prevent a set of rules from being uniform. Neither does the existence of a label guarantee it (UNIDROIT, PECL, UNCITRAL Model Law on Electronic Commerce); although it will indicate a satisfaction of the deliberateness requirement. But it is in the application of rules that we can determine any similar effect created, and thus any uniformity.
- Rules do not have to be codified to be classified as “uniform” as long as those who apply them share them, i.e. use them in the same way; however, it is difficult to examine their content and application (non-codified trade customs).
- Uniformity in law does not have to stem from rules which are “law” (UCP 500).

A look at these diverse forms of uniformity has confirmed that the origin and form of rules is not significant, in accordance with the non-geographic emphasis of the working definition of globalisation by Luhmann. But it has
also evidenced a high degree of variety in the concept of uniformity of laws. We have to recognise that for these laws or legal rules, the concept of uniformity and thus similarity of result when applied, is one of variable degrees.

IV. DEFINING UNIFORMITY AND INTRODUCING THE JURISCONSULTORIUM

The findings of the preceding Sections emphasised that the form and origin and label of the rules in question was not relevant in determining whether they are “uniform” in accordance with our result-based definition.

While this is true, we should still remember that we have also established that there are varying degrees of similar results to a legal phenomenon attained. In a world with an increasing number of uniform rules, the nature, origin and form of the rule adopted is relevant to the determination of one of the most difficult questions relating to uniformity, namely the degree to which a similar result is deliberately created.

As evidenced above, both in the result-based definition of “uniform” and in the examination of customary law and the ECHR, the key to a working definition of “uniform” law lies in focusing on the application of the rules created and the degree of similarity that is deliberately reached in a respect of a given legal phenomenon.

Essentially, in the words of Ralph AMISSAH, the founder of the <lexmercator.com> website:

“The selection of uniform rules and uniform laws is not enough, as this does not ensure their uniform application, without which the purpose of establishing uniform law is largely defeated.” 96

Any promulgated text of law is just words until it is applied as law. And any drafted text purporting to be a uniform law is nothing until it is applied uniformly as law. It is in the sphere of application that uniformity is created, not in that of drafting. The drafting can attempt to facilitate uniformity by reconciling legal traditions, but it does not create an applied similarity in law by the creation of words which may not necessarily create any legal similarity at all – it merely creates a textual uniformity, described infra.

Uniform laws are nothing but texts on the basis of which different jurisdictions can try to establish results which may be uniform or equal

bearing in mind the functional criteria and the result-based focus of our terminological definition of “uniform”; it is the way the rules are applied rather than the way in which they exist in a vacuum that is most significant.

A working definition of “uniformity”

Thus, if we sum up these conclusions, we can improve the intermediary definition of “uniform” from Sections I and II:

We can define “uniformity” as the varying degree of similar effects on a phenomenon across boundaries of different jurisdictions resulting from the application of deliberate efforts to create specific shared rules in some form.

These jurisdictions need not be multinational as long as they represent some legal pluralism and thus some need for deliberate unification of law, as there is no prerequisite in the “uniform” label for any transgovernmental (to use Slaughter’s term, supra) dimension. Moreover, as evidenced by the existence of uniform rules (outlined in Section III supra) which are not necessarily defined as law, the label “uniform” also exists outside any sphere of legal regulations.

It also exists inside this sphere, however, and our abovementioned definition would mean that:

We can define “uniform laws” as specific legal rules or instruments in some form [not necessarily defined as law in all jurisdictions 97] deliberately designed to be voluntarily shared across boundaries of different jurisdictions which, when applied, result in varying degrees of similar effects on a legal phenomenon.

And due to the lack of a need to exclude any single-nation uniform laws from this definition (see for instance the application of the Uniform Commercial Code throughout the different state jurisdictions of the United States of America, Section III supra), we then need to differentiate between “uniform domestic laws” such as the UCC, and “uniform international laws”, such as the CISG, as both are included in the term “uniform”.

While this is a useful working definition of the term up to a point, its main weakness is the fact that it has to accommodate “varying degrees” of similar effect. It does not shed any light on the extent to which similar results

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97 The definition of “law” is one of the larger headaches of comparative lawyers. As explained in Section III below, this paper takes a relatively broad approach to the definition. It is also not beneficial to this paper to define the concept transnationally. Suffice it to suggest that the label “law” in this context is not important as long as the scope and extent of the rules or phenomena under prospective unification are clearly defined and agreed.
are to be attained. In terms of law, the concept of "uniformity" is a label, not of equality, but of similarity, and like the concept of similarity there are numerous different degrees or standards of uniformity. This weakness of definition is thus not one that can be remedied in a general context. A set degree of uniformity cannot be defined for all uniform law, as the term is one of relative standards. So to approach a more specific definition of uniform, we need to focus on a particular uniform law.

Textual uniformity

If we retain a result-based definition of uniformity, to illustrate the functional criteria, and define it as the effect that a specific instrument has, then there can be no actual uniformity until a certain level of similarity of result has been created by that instrument. This means that rules or laws labelled "uniform" are not technically uniform at all in the sense contemplated by our definition above, until they have been applied cross-jurisdictionally and created similarity in respect of the intended legal phenomenon. While it is thus true that "uniform words do not create uniform results", as pointed out by Honnold, we need a working definition for these uniform words which propose to attain uniformity.

SCHLECHTRIEM distinguishes a "unity achieved at a verbal level" (the rules as provided by the drafters) from the "uniform understanding" and uniform interpretation" (the commentary and application of these rules).

Inspired by the concept of this verbal unity of minds and these uniform words, the emphasis is strongly on the language of the text of the instrument in question: the uniform texts as opposed to a uniform application. We can thus define these rules which strive to attain uniformity by applying the label textual uniformity.

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98 In support of the relativity of uniform standards, see FLECHTNER, supra note 40.
101 This term also accords with the way in which Harry Flechtner talks of "textual non-uniformity" when comparing the different texts of the six official languages of the CISG and their meanings, but Flechtner uses it to indicate the level of similarity between the texts in question. By inference, if they did have the same meanings linguistically, then these texts would (together) represent a textual uniformity. An instrument with only one official text will thus, by definition, always represent a single textual uniformity. See FLECHTNER, supra note 40.
Textual uniformity is thus not uniformity at all, but an expressed goal towards it. Only the application of textual uniformity will reveal whether similar results are reached and whether the goal of uniformity, of varying degrees, is reached and the textual uniformity thus becomes actual. But it must be noted that textual uniformity is also a question of degrees of similarity, just like applied uniformity, and not an absolute.

When different translations or texts of the same document with equal official status exist, nuances of difference in meaning in these texts are bound to occur, as language is not a precise science, and the challenges of legal multi-linguism are many and varied. FLECHTNER labels this a “textual non-uniformity”, using uniformity as a word indicating total similarity in this context (our dictionary definition). Such differences may, naturally, affect the way scholars and practitioners working in these different languages interpret and use given provisions, so the degree of textual uniformity affects the degree of uniformity.

Modern uniform law as a unique discipline in law – the jurisconsultorium

If we consider the statement by Cicero in Section II of the present article, and if we accept that this means that the concept of “uniform law” goes back two millennia, then we admit that it is an ancient discipline in law. However, as we frame the definition of the term under the umbrella of the more modern concept of globalisation, it becomes a unique discipline in the context of legal convergences in a technologically shrinking world, namely one of economic growth in trade law.

Consider this quote by John Honnold:

“We should expect (and insist) that tribunals construing an international convention will appreciate that they are colleagues of a world-wide body of jurists with a common goal.”

This means that practitioners applying any international uniform convention must recognise that they share it with colleagues in other jurisdictions, and that its development is a communal evolution requiring a

102 For more information on legal linguistics – also referred to as law and language, see the Legal Linguistics Association of Finland (University of Lapland) with numerous very useful links, available at <http://www.ulapland.fi/home/lexling/>. A forthcoming book, Comparative Legal Linguistics by Heikki E. Mattila (ISBN 0754648745) is expected in Nov 2006.

103 FLECHTNER, supra note 40.

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unique approach very different from the (differing) applications of domestic law in varying jurisdictions.

It is thus this author’s submission that central to the understanding of any definition of uniform law is the understanding that uniform law is a shared law, and thus a discipline in law set apart from any other.

Using Luhmann’s definition of globalisation, and accepting that uniform international laws are part of the phenomenon of globalisation of law, we see a strong emphasis on functional criteria – in Section I this is one of the first clues to the definition of the term as being result-oriented. But we also see a contention that geographic significance has diminished. This is a logical consequence of increased contacts between markets, companies and individuals across national borders – nationality has ceased to be significant. In the words of Spanogle:

“Any business person can tell you that the Global Economy is here. The necessity to produce wherever it is most advantageous, and then to market and compete all over the world, is hardly news to them. It does still seem to be news to much of the legal profession, however, and to many in legal education.”

This aspect is not unique to Luhmann’s definition of globalisation – some even contend “the death of geography”.

If the traditional (geographic) legal boundaries of legal orders are not to apply to globalised uniform laws, then it is not an overstatement to say that uniform laws on a global scale are a new form of law, in a new legal order beyond the nation-States.

One aspect of this new legal order is that if it is global, then it attempts to function across the divides of legal families. The division of legal systems into families is, admittedly, a greatly simplified labelling of diverse and complex jurisdictions, as the American and Australian legal systems can be said to be as different as the French and Egyptian legal systems, despite the first two being categorised together as “common” and the latter together as “civil”.

105 See Section I of this paper.


108 See Mathias Reimann, “Beyond National Systems: A Comparative Law for the International Age”, 75 Tulane Law Review (March 2001), 1103. Reimann makes the point that comparative scholars need to rethink the way they consider law in order to accommodate this new form of law.
However, as Honnold points out:

"... comparative studies often refer to the approaches of 'common law' and 'civil law' systems - a necessary but desperate measure to avoid unmanageable fragmentation of the subject." 109

So, if we over-generalise for the purposes of this article, we can briefly analyse the "civil lawyer" and the "common lawyer" and their general views on the functions of law, and some useful observations can be made.

For instance, if we accept that global international uniform laws exist outside the sphere of any overarching legal order as new legal regimes, we see some startling differences in the way in which this concept is approached by common and civil lawyers. Mireille Delmas-Marty is referred to by Vivian Curran as "decrying" the lack of an overarching legal order.110 This is a point of view that Curran astutely describes as being a notion which illustrates how civil lawyers are accustomed to familiar legal theories and principles in defined legal systems, whereas common lawyers, by definition, are more accustomed to sharing law outside the boundaries of nation-states, by way of the communal law of the Commonwealth.

Whether decrying it or applauding it, the existence of "law", using a broad definition of the term,111 existing outside the normal framework of nation-State law is a reality which common lawyers and civil lawyers have to take on board regardless of how they respond to the notion. We can refer to it as a new dimension in lawmaking, which must be incorporated into material and thinking. Reimann writes of law beyond national systems, and states that:

"True integration of transnational regimes into our agenda, however, takes more than just adding their description to our inventory of legal systems. It requires that we also learn to compare how law works in the national and the international context and that we explore the interplay between these levels. Thus our

109 Honnold, supra note 104.
110 Vivian Curran refers to Mireille Delmas-Marty, Pour un droit commun (2004), in her A Comparative Perspective of the CISG. The author of the present paper has relied on Vivian’s interpretations of Ms Delmas-Marty as her French is far superior to mine.
111 For the purposes of this paper, the concept of law will be considered a broad one, and borderline cases of what constitutes law will not be resolved, but sidestepped by the inclusion of the terms "rules" and "legal phenomena". Specifying a general criteria for the definition of "law" is not beneficial in the present context of trans-jurisdictional unification. Suffice it to say that a broad conception of law is needed to encompass the various definitions across the board of different legal families. For more on definitions of law, see William Twining, "A Post-Westphalian Concept of Law", 37 Law and Society Review, 199-257.
discipline [comparative scholarship] acquires a new dimension." 112

Reiman is right – these laws should not be categorised in existing boxes of legal thinking, but need a whole new discipline. Scholarship certainly must embrace this. And where uniform law is concerned, it is vital that the judiciary and legal counsel as well as scholars be aware of this, and treat trans-governmental uniform law differently from other types of law. When operating with uniform international law, the mindset has to change to encompass a different playing field.

Röszész takes a very pessimistic view of the judiciary’s ability to embrace this:

"Every judge in every country is a sovereign interpreter of the text, and the judge became a judge by learning the system of law of his own country. And as the speediest bird is unable to fly out of itself, so the judge is unable to forget the law that he has learned." 113

However, even if he is correct that established judges are leopards who cannot change their spots – a point which this author submits is not correct as evidenced by the existing jurisconsultoria established in some areas of some uniform laws 114 – then judges must retire at some point, and if they could not learn to embrace a new discipline of uniform laws, then we can expect the newer generations to have done so.

Consider the words of the most significant English commercial lawyer of our century, Roy Goode:

"If the harmonization process is to have any hope of acceleration it is essential for law schools to reduce their preoccupation with national law and their assumption of its superiority over other legal systems and to revert at least in some degree to the internationalism of medieval law teaching. It is primarily by the spreading of awareness of foreign legal systems among our students that we can hope to accelerate the process of harmonization and to produce practitioners and judges of the future prepared to look beyond the horizon of their own legal system." 115

112 Reimann, supra note 8.
114 In the realm of the CISG, there has been a certain degree of successful application of the concept of a shared law and a jurisconsultorium: see Camilla Baasch Andersen, "The Uniform International Sales Law and the Global Jurisconsultorium", 24 Journal of Law and Commerce, Vol 2, 159-179.
115 R.M. Goode, supra note 26, 24-27.
These words, intended for harmonisation as a whole, are doubly true for the application of uniform law. It must be recognised that it cannot be applied like other international law with any exploration of the boundaries of its application, nor can it be treated as domestic law which is exclusive to one jurisdiction or region. And to start this process of identifying this discipline in law schools addresses the need for education of the lawyers of the future, if they are not to be taken aback by these new legal orders.

This awareness in application of uniform law is especially true in the area of international commercial law. For other uniform international laws in the field of, for example, public international law, monitoring institutions and bior multi-lateral treaties can/do often ensure correct application and uniformity is, at least to some degree, protected in the application of rules, laws and guidelines. For most commercial law, no such help or framework exists, and uniformity is not monitored or guided by anything except the fact that the law is deemed “uniform”. There have been numerous suggestions for the establishment of a Court collectively to monitor the application of uniform private laws since 1911, when Hans WEHBERG first suggested it, and more recently under the auspices of UNCITRAL in 1992 when Louis SOHN suggested a tribunal, and at the Verona Conference in 2003 when Filip DE LY suggested a similar Court modelled on the European Court of Justice — but to date no such Court has materialised.

So, without monitoring and guidance, the practitioner must find an alternative path to uniformity. In the application of uniform commercial law it is essential therefore that the practitioner (the judiciary and the practitioner) grasp that he/she is applying a law that is:

(a) cross-jurisdictional, i.e. it must be free from any influences (caselaw or legal theory) which are idiosyncratic to one of the jurisdictions that the law encompasses,

and

(b) uniform, i.e. it must be congruent in its application at the

116 Hans Wehberg seems to have been the first to suggest such a tribunal: see H. WEHBERG, *Ein Internationaler Gerichtshof für Privatklagen* (1911), 23.


international level to such an extent that its cross-jurisdictional and autonomous nature is respected,

and

(c) shared, i.e. it must be acceptable to all who take part in its application.

There must be no homeward trend when uniform laws are interpreted, neither in terms of sources nor in interpretational principles. They must ideally be applied and used free from any influences by domestic laws. The key to understanding this is the element of communality; if we share laws, we need also to share the way we use them if they are to reach similar results, and developing them idiosyncratically by grafting them onto our own non-shared systems or regionally-shared systems is not promoting a communal application.

The tool to achieve a shared community is the establishment of a cross-jurisdictional “common law”. We can label this tool a shared interpretational sphere, or a jurisconsultorium, because jurists consult with one another, either in scholarly contexts or by referring to each other’s precedents across jurisdictional boundaries.

Thus Vikki ROGERS and Albert KRITZER:

“A global jurisconsultorium on uniform international sales law is the proper setting for the analysis of foreign jurisprudence on terminology of international sales.” 119

They use this concept to denote the need for cross-border consultation in deciding issues of uniform law. It is an excellent descriptive term for the phenomenon of meeting of minds across jurisdictions in the shaping of international uniform law. It should be emphasised that the concept is not one which denotes a particular body, but rather a basis of interpretational sharing which can apply to practitioners and scholars alike. It can be defined as a concept of sharing and consultation across borders and legal systems in the aim of producing autonomous interpretation and application of a given uniform law.

Very rarely – although occasionally good examples crop up – do we see instances where courts or tribunals recognise the uniqueness of applying uniform law.

See, for example, the classic example of the House of Lords in *Fothergill v. Monarch Airlines* on the interpretation of the Warsaw Convention on the Liability of Air Carriers, wherein the Lords clearly set out that uniform international law is unique and must be treated uniquely. And on the other side of the Atlantic Ocean, the United States Supreme Court decided in the *Air France v. Saks* case concerning the meaning of the term “accident” under the Warsaw Convention that judicial decisions from other countries interpreting a treaty term are “entitled to considerable weight.” This premise was restated more recently in another case on the same Convention by the United States Supreme Court in the *El Al* case.

It should be noted that there is, however, a significant, evidenced difference in the mindset of judges applying public international laws and those applying private law domestically when an international outlook is required. In the field of public international law, the scale of the law is larger and more international; the public law requirement to be bound by an instrument will invariably weigh on the judge. In private law, the scenario is different, the contract is between individuals, and the international element may not seem as overriding. But it is submitted for the present article that, if uniformity is to be obtained, then regardless of any private law element the uniqueness of uniform laws must be recognised by way of a jurisconsultorium.

There is, however, some justification for these mindsets of the judges, as it is true that not all uniform law is intended to be imbued with the same level of uniformity. The different means of promulgating uniform law and their respective intended levels of uniformity are vital to understanding the laws themselves.

**V. – RELATIVITY OF UNIFORMITY**

However uniformity is attempted, whichever means are applied and however it is viewed, many problems and questions arise once the term “uniform” has been used to describe the goal or legal standards set to promote predictability, foreseeability and insight.

One of the first problems which surfaces is: how is uniformity to be achieved? Section III *supra* dealt with the different means of harmonisation and uniformity of law, and Section V introduces the jurisconsultorium as a

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tool to achieve a certain degree of similarity of application. But this notion of
degree of similarity opens a complex issue of uniform law: to what extent
must the rules be equal? To what degree must the certainty of (often) rigid
predictability outweigh the reasonableness of flexibility?

The textbook answer to the latter question would seem to be that rules
that are uniform must be interpreted equally before all courts and tribunals
wherever they are applied. However, as already mentioned in Section I supra
in defining uniformity, absolute, non-fluctuating applications are a utopian
ideal. Even within the boundaries of a smaller community there will always be
an element of individual subjectivity and influence when a judge decides a
case, and unless one and the same never-changing person takes all the
decisions, based on the same norms, influencing factors and thought-
processes, interpretations will never be perfectly uniform.

This is all the more true for uniform laws that apply across boundaries of
very different cultural, historical and legal backgrounds.

So how uniform is "uniform"? Professor SUNDBERG once wrote, in
connection with general problems of uniformity in the Warsaw Convention,
that where uniformity was concerned:

"... a margin of imperfection is not necessarily an actual defect as long as it does
not invite plaintiffs to go "shopping" for the most generous jurisdictions. Details
therefore can be allowed to vary if the basic conceptualism is retained." 123

This may be a good yardstick for measuring minimum standards of
uniformity in some aspects of the law, but where commercial law is
concerned this certainly sets the intended level of uniformity very high, as the
slightest difference in interpretation may mean a shift in monetary
compensation and thus make so-called forum shopping attractive to one or
both parties. In fact, according to some scholars, forum shopping is inevitable
in commercial law,124 and it can even be described as the counsel's duty
where another forum may favour his client.125 It is undeniable that not only

123 Jacob W.F. SUNDBERG in Air Charter 1963, referred to by O.C. GILES in Uniform
124 Franco FERRARI, "International Sales Law and the Inevitability of Forum Shopping: A
125 Illustrative is the debate between Professors Juenger and Opeskin. See Friedrich
JUENGER, "What's Wrong with Forum Shopping?", 16 Sydney Law Review (1994), 5-31; Brian
OPESKIN, "The Price of Forum Shopping: A Reply to Professor Juenger", ibid.; and Friedrich
JUENGER, "Forum Shopping: A Rejoinder", ibid.
divergences in the application of the purported uniform law but also differences in procedural rules and discovery rules, etc. may affect forum shopping, and rightly so.\textsuperscript{126}

Given this inevitability of forum shopping, this author is forced to modify a previously expressed view. Some of my earliest publications applied Sundberg's definition of forum shopping as a minimum standard for the application of uniform laws.\textsuperscript{127} I should like to exercise a prerogative to modify this view somewhat, as I have since come to understand the nuances of forum shopping in commercial law, and the inevitability of it, but must maintain that Sundberg's ideology can be retained for commercial law. Viewed in isolation, it is an unrealistically high goal to set for commercial laws, where it is an inescapable reality as procedural rules and rules of discovery can have significant influence on the outcome of cases, even where the same substantive law is used.\textsuperscript{128} In other words, forum shopping within the CISG States sharing a uniform law is not necessarily a compromise affecting uniformity as such, and moreover it is arguably counsel's duty to seek the most favourable venue.

But the considerations behind Sundberg's reasoning are mirrored in this quote from John Honnold:

"[The settlement of disputes would be complicated and litigants would be encouraged to engage in forum shopping if the courts of different countries persist in divergent interpretations of the Convention."

Consequently, Sundberg's excellent guideline for the limits of any flexibility with regard to uniformity is of very limited value if transplanted to the field of international commercial law as a whole, but it works well if seen as a theoretical minimum standard of uniformity where solely looking at divergences in the application of the purported uniform law as the cause of any forum shopping. If we focus on the basic conceptualism remaining the same, within a margin of deviation in application, the law is still uniform.


\textsuperscript{128} For more information, see FERRARI, supra note 124, 169-192, and on forum shopping in general, see (amongst many others), Friedrich JÜNGER, "Forum Shopping, Domestic and International", 63 Tulane Law Review (1989), 553.

\textsuperscript{129} See John HONNOLD, "Uniform Laws for the International Sales under the 1980 UN Convention" (1991), 142.
Moreover, and perhaps more importantly, laying down general standards for all uniform laws is not possible. To paraphrase George Orwell:

Everyone is created equal, but some are more equal than others.  

With a bit of poetic license, this may apply to the application of “uniform” legal texts as well as it may apply to the questions of personal freedom for which it was allegorically intended, and convert to: “All uniform law is created uniform, but some is more uniform than others”. Uniformity is not an absolute, despite its linguistic meaning, just as equality is not an absolute in Orwell’s political meaning. The similarity of result, stemming from our intermediary definition, is a variable.

In other words, the level of uniformity which is intended for different uniform laws differs greatly, and in the preceding Section we saw various factors which may relate to this:

(A) their setting, national or international,
(B) their drafting forum, process and monitoring of application, and:
(C) their general aim and subject area, the political goal and the lawmaking goal.

A set level of uniformity will be impossible to establish or define for all uniform laws. The question: “how uniform is uniform?” cannot be answered until we know specifically which uniform law we are dealing with. Each uniform law, whether international or domestic, will set its own level.

Some scholars have recently published papers categorising levels of uniformity. Professor Robert SCOTT categorises uniformity as formal or substantive, and discerns different functions of uniformity as either interpretive or standardising, “creating broadly suitable default rules.”  The concept of strict uniformity has also surfaced. However, uniformity levels are set on a sliding scale and do not easily fit into boxes, and it makes more sense to treat each individual uniform instrument as unique in the investigation of its particular uniformity.

But – perhaps most importantly – regardless of the level of uniformity, it is essential that we embrace the concept of uniform laws as a unique and

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130 George Orwell, Animal Farm (1944).
individual discipline, requiring a special approach – namely one which utilises a shared jurisconsultorium from the jurisdictions where the given uniform law is shared.

DEFINIR L’UNIFORMITE EN DROIT (Résumé)

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Depuis que nous sommes entrés dans l’ère de la globalisation – terme à l’origine de nature économique mais que toutes les disciplines sociales semble avoir repris à leur compte – nous assistons à des efforts et à une tendance législative visant à réaliser une convergence juridique, et à des lois “uniformes” au niveau international. Mais il est en fait assez rare que l’on s’interroge sur ce que ce dernier concept signifie.

Cet article se propose de réaliser une analyse systématique du terme “uniforme” et de tenter d’élaborer une définition pratique du terme de façon à mieux appréhender les droits uniformes. Cette analyse repose sur cinq piliers.

La Section I procède à un examen terminologique du mot “uniforme” en puisant à des sources diverses allant du dictionnaire aux préambules de lois uniformes, et en se référant à la terminologie utilisée dans les contextes de la globalisation et de l’harmonisation juridique. Nous arrivons ainsi à une définition intermédiaire d’uniformité comme étant le résultat d’instruments spécifiques, quelle que soit leur forme ou leur origine, qui visent à créer des effets similaires.

La Section II enchaîne en examinant l’historique de l’harmonisation et ses buts. Elle souligne que l’uniformité moderne diffère de certains exemples historiques plus anciens d’objectifs d’uniformité en ce qu’il s’agit d’un droit volontairement partagé, et elle analyse les avantages et les inconvénients du processus d’harmonisation juridique. Enfin, en considérant les buts législatifs et politiques des lois uniformes, il apparaît qu’il y a des degrés variables, élément qui doit être intégré dans la définition intermédiaire.

La Section III se penche sur les nombreuses formes différentes de l’unification juridique, et met en lumière les degrés d’uniformité visés à la Section II en se référant à des exemples empruntés au UCC, au droit européen, à la Convention européenne des droits de l’Homme, à la CVIM, aux UCP 500, etc., qui complètent la définition intermédiaire. Surtout, elle montre que l’origine d’une loi ou d’un texte

réglementaire est sans incidence déterminante dans le contexte de l'unification.

La Section IV définit l'uniformité en élaborant les observations des Sections I-III. Elle souligne l'importance de reconnaître la nature unique des lois uniformes, et les définit comme règles ou instruments juridiques spécifiques dans une forme [non nécessairement définie comme loi dans tous les pays] visant à être volontairement partagée au-delà des frontières de pays différents et qui, dans leur application, produisent des effets similaires mais à des degrés variables sur un phénomène juridique. Elle présente ensuite l'un des éléments les plus significatifs de ces lois partagées, le "jurisconsultorium", défini comme la mise en commun de sources doctrinaires et jurisprudentielles d'analyse et d'interprétation juridique.

La Section V envisage les problèmes dérivant de la relativité du terme "uniforme" et offre une orientation (toutefois limitée) sur la façon de parvenir à un degré d'uniformité donné, et de déterminer le niveau minimum pour cette variable.