

Transnational Commercial Law

Sandeep Gopalan

*Associate Professor
Arizona State University College of Law*

William S. Hein & Co., Inc.
Buffalo, New York
2004

Library of Congress Cataloging-in-Publication Data

Gopalan, Sandeep.

Transnational commercial law ; Sandeep Gopalan.

p. cm.

Includes bibliographical references.

ISBN 0-8377-3231-X (cloth : alk. paper)

1. Commercial law. 2. Law—international unification.

I. Title.

K1005.G67 2004

346.07—dc22

2004052252

© 2004 by William S. Hein & Co., Inc.
All rights reserved.

Printed in the United States of America



This volume is printed on acid-free paper
by William S. Hein & Co., Inc.

DEDICATION

For Putul, muse extraordinaire

TABLE OF CONTENTS

Dedication	iii
Preface	ix
Chapter 1	
INTRODUCTION	1
1.1. The Nature of Harmonization	4
1.1.1. <i>Harmonization Defined</i>	7
1.1.2. <i>Historical Context</i>	10
1.2. Arguments for Engaging in the Process of Harmonization	11
1.2.1. <i>Divergent National Laws Cause Problems</i>	11
1.2.2. <i>National Laws May Be Inadequate for International Transactions</i>	16
1.2.3. <i>Modernization and Facilitation of International Trade</i>	17
1.2.4. <i>Reducing Costs</i>	23
1.2.5. <i>Providing a Neutral Choice of Law</i>	26
1.3. Arguments against Harmonizing National Commercial Laws ..	27
1.3.1. <i>Diversity Is a Virtue</i>	27
1.3.2. <i>Lack of Representative Capacity</i>	30
1.3.3. <i>Inferiority of the Harmonized Law</i>	32
1.3.4. <i>The Problem of Amendment</i>	34
1.3.5. <i>Self Preservation</i>	34
1.3.6. <i>The Problem of Loss of Harmony Due to Diverse Interpretation</i>	37
1.4. Uniformity or Best Solutions for Problems?	40
1.5. What to Harmonize?	41
Chapter II	
NEED FOR HARMONIZATION: TWO CASE STUDIES	
2.1. The Cape Town Convention	45
2.1.1. <i>Background</i>	47
2.1.2. <i>Problems Posed by Divergent National Laws</i>	48
2.1.3. <i>The Reduction of Costs</i>	51
2.1.4. <i>The Modernization of Underdeveloped Laws</i>	52
2.2. Demonstrating the Need for Harmonization by Empirical Evidence	56
2.3. Meeting the Need: The Solution	59

2.3.1. <i>Scope and Remit</i>	59
2.3.2. <i>Registration</i>	61
2.3.3. <i>Priority Rules</i>	63
2.3.4. <i>Default Remedies</i>	64
2.3.5. <i>Assignment</i>	67
2.4. The Hague Convention	68
2.4.1. <i>Background</i>	68
2.4.2. <i>Divergent National Laws Create Legal Risk</i>	69
2.4.3. <i>Meeting the Need: The PRIMA Approach</i>	73
2.5. The Hague Convention Solution	74
2.6. Conclusions	76

Chapter III

WHAT FORM IS THE PROCESS TO TAKE?

3.1. Various Instruments Can Achieve Harmonization	77
3.2. International Conventions	78
3.3. Restatements	85
3.3.1. <i>The UNIDROIT Principles</i>	91
3.3.2. <i>Efficacy of the UNIDROIT Principles</i>	93
3.3.3. <i>Principles of European Contract Law</i>	101
3.4. Model Laws	103
3.5. Standard Trade Terms and Model Contracts	105
3.6. Other Instruments	108
3.7. Conclusions	110

Chapter IV

INTERNATIONAL AND REGIONAL HARMONIZATION

4.1. The European Union: Regional Integration and the Need for Harmonization	114
4.1.1. <i>Reduction of Costs</i>	116
4.1.2. <i>Cultural Critique</i>	118
4.1.3. <i>Empirical Evidence of Need</i>	120
4.1.4. <i>Rebutting the Regulatory Competition Argument</i>	125
4.1.5. <i>Systemic Critiques</i>	126
4.1.6. <i>Competence</i>	127
4.2. Harmonization Efforts Currently Underway	129
4.2.1. <i>Restatements</i>	129
4.2.2. <i>Judicial Harmonization</i>	134
4.3. The American Experience	135
4.3.1. <i>NAFTA</i>	136
4.3.2. <i>The Organization of American States</i>	139
4.4. Other Regional Efforts	142
4.5. Competition or Collaboration?	142
4.5.1. <i>Regional Efforts Can Provide Impetus</i>	144

4.5.2. <i>Conflicts between Regional and International Harmonization</i>	145
4.5.3. <i>Impact on the Law-making Process</i>	149
4.5.4. <i>Impact on Scope of Application</i>	150
4.5.5. <i>Proliferation of Instruments</i>	151

Chapter V

ISSUES POST HARMONIZATION

5.1. Uniformity in Application	153
5.1.1. <i>Uniformity Is Threatened by Divergent National Interpretations</i>	154
5.1.2. <i>Ready Recourse to National Law</i>	155
5.1.3. <i>Consultation of Foreign Decisions</i>	162
5.1.4. <i>Need for an "International" and "Autonomous" Interpretation</i>	166
5.2. The Problem of Ratification	174
5.3. Indifference and Hostility to Harmonization Measures	176
5.4. Attaining Acceptability—Need for Salesmanship	178
5.5. The Problem of Amendment	178
5.6. Conclusions	179

Chapter VI

MECHANICS OF HARMONIZATION

6.1. Agencies that Work for Harmonization	181
6.2. Need for Coordination	183
6.3. The Influence of Interest Groups	188
6.4. Working Methods	190
6.4.1. <i>Questionnaires</i>	191
6.4.2. <i>Identifying the Subject Area</i>	192
6.4.3. <i>Drafting</i>	193
6.4.4. <i>Promotion of Products</i>	195
6.4.5. <i>Implementation</i>	197
6.5. Funding and Resource Constraints	200
6.6. Slow Pace of Work	203
6.7. Better Use of the Internet	205
6.8. Increasing Participation	206

Chapter VII

CONCLUSION	209
7.1. The Need to Limit Ambition	210
7.2. The Need for a Teleological Approach	211
7.3. The Need for an International Attitude to Drafting	213
7.4. The Need for Innovative Solutions	214
7.5. The Relative Unimportance of Sovereignty	216
7.6. The Centrality of Industry Involvement	218

APPENDIX I	
United Nations Convention on Contracts for the International Sale of Goods	221
APPENDIX II	
New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards	247
APPENDIX III	
Cape Town Convention on International Interests in Mobile Equipment	253
APPENDIX IV	
Preliminary Draft Protocol on Matters Specific to Space Assets	281
APPENDIX V	
The Hague Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary	295
APPENDIX VI	
United Nations Convention on the Assignment of Receivables in International Trade, 2001	307
SELECT BIBLIOGRAPHY	329

PREFACE

There has never been a better time to be an international commercial law scholar. The dockets of the various international agencies which work toward the creation of international legal instruments are burgeoning with projects, and not a day passes without some new development that impacts the conduct of international commercial transactions. It is indeed refreshing that, in contrast to previous decades, this heightened activity is not being spurred on merely by the grand ideas of law professors. Much of the current work on the harmonization front is driven by industry sectors and their representatives. This adds greater weight to the resulting products and increases the likelihood of these instruments supplanting national law, at least in respect to international transactions.

This book is an attempt at analyzing the creation and growth of transnational commercial law, primarily as a by-product of harmonization. There may be other methods by which transnational commercial law is created, but that is not the concern of this book. As is obvious, the canvas is broad, and this work can only be a start to the understanding of the factors that impact the process of harmonization. I have sought to tackle some of the key questions that arise when one is confronted by transnational commercial law, and have concerned myself more with the process of harmonization rather than with the substantive content of the individual instruments, except where the context demanded it.

In writing this book, I wish to acknowledge the help of several people: Prof. Sir Roy Goode, my D. Phil. Supervisor at Oxford, was always a source of ideas and inspiration. The book has profited from his insightful comments. I am grateful to Dr. John Rowett and the Rhodes Trust for supporting my research at Oxford. My family suffered my absent-mindedness and neglect without complaint while I worked on the manuscript and I am indebted to them for their support. I also owe a debt of gratitude to Putul, Deb & Anita Pal, Manoj Kolel, Bill Carmody, Joanne Gabrynowicz, Gary Weinstein, Robert Gaudet, and Saugata Mukherjee. I am grateful to UNIDROIT and UNCITRAL for permission to reproduce material in the appendices. Finally, I record my thanks to Sheila Jarrett, Suzanne Proulx, and the editorial team at William S. Hein & Co., Inc. for their help in getting the manuscript to print.

Sandeep Gopalan
The Queen's College
Oxford

