

A related aspect of unification, namely to overcome borders and their potentially disruptive effect, is well illustrated by the UNCITRAL Model Law on Cross-Border Insolvency (1997). By enabling judicial co-operation across borders and by granting recognition to foreign insolvency proceedings and representatives, the Law facilitates a good, co-ordinated business solution and thus helps to preserve assets and employment.

Yet another aspect of unification, namely to enable the global use of commercial or financial instruments or devices hitherto used only in some regions or countries, is well illustrated by the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (1995); the establishment of a reliable framework for these two instruments facilitates their interchangeability and interconnectivity and provides a level playing field worldwide.

A similar example is provided by the United Nations Convention on International Bills of Exchange and International Promissory Notes (1988). For such negotiable instruments, intended to circulate internationally, a coherent legal system (running with the instrument) is a must, in order to have consistency between the rights and obligations of all parties involved. By promoting modern features (e.g. instruments payable in monetary units of account, recognition of floating rates of interest), the Bills and Notes Convention is also a good illustration of the next UNCITRAL goal or answer.

II. Facilitation and modernisation (to overcome traditional legal obstacles to modern practices)

“Laws tend to lag behind business development and thus often create costly, if not insurmountable, obstacles”

While the idea of modernisation lay at the heart of the Hamburg Rules (1978) both in terms of technological adjustment to new transport techniques as well as legal advancement towards a fairer risk allocation, the most obvious example of a modernising, facilitating uniform law text is the UNCITRAL Model Law on Electronic Commerce (1996). It helps to remove legal obstacles such as paper-based form requirements of “writing”, “signature”, “original” etc. by recognising their functional equivalent in an electronic environment without, being technology-specific. Since such traditional obstacles are usually found in mandatory provisions of law, they cannot be removed by party agreement or contractual sets of rules but require new legislation.

The aim of establishing a more secure legal framework for electronic commerce equally underlies the current project of UNCITRAL to prepare uniform rules on digital and other electronic signatures. While a great deal may be left in this area to party agreement, including practice or system rules, the advantage of uniform standards suggests, and the need for regulating third-party effects and for providing cross-border recognition necessitate, legislative treatment.

In view of the dearth of national laws in this novel area, UNCITRAL’s work here is not classic unification of disparate national laws but “preventive unification” with a view to avoiding divergence of emerging national laws. That phenomenon was first encountered in the context of the UNCITRAL Model Law on International Credit Transfers (1992). At the time of its preparation, no country had a special law on the main area covered, namely the

new (“hi-speed, hi-value, low-cost”) electronic funds transfers, in fact only one was then preparing one (the U.S.A., to become Article 4A of the UCC).

The aim of removing traditional legal obstacles may not be very conspicuous in another current project of UNCITRAL, namely the draft Convention on Assignment in Receivables Financing; yet, it promises to be the main value of the future text (apart from its unification and cross-border recognition effect). It would eliminate such obstacles as the often found prohibition of bulk assignments or assignments of future receivables and similar prohibitions impeding the use of modern asset-based financing techniques like securitization, forfaiting, factoring or project finance and thus increase availability of lower-cost credit.

Especially in such projects aiming at enabling or facilitating modern practices, it is absolutely necessary to involve practitioners and other experts. In UNCITRAL’s work this has been done in a number of ways: first, there tend to be experts in many of the delegations of member States, then various interested international organisations actively participate as observers, including many non-governmental ones (e.g. ICC, ICCA, INSOL International, CMI, CFA, PASA, Factors Chain International). Moreover, the Secretariat often convenes expert group meetings and itself participates in many conferences, seminars, workshops devoted to discussions of UNCITRAL texts or projects.

This idea of a “private-public partnership” in the elaboration of universally acceptable legal texts characterises also what might be regarded as an informal division of labour between UNCITRAL as an intergovernmental formulating agency and a non-governmental creator of practice rules as, most prominently, the International Chamber of Commerce (ICC). Prime examples of supplementary texts are the above United Nations Sales Convention (CISG) and ICC’s Incoterms, praised by Professor Fouchard as an ideal combination of two complementary texts, as well as the above United Nations Guarantees Convention and such practice rules as the UCP500, URDG or the new ISP98. This latter example shows even clearer the need for both types of regulation: at the statutory level the long-term “constitutional framework” guaranteeing, within certain limits, party autonomy and regulating matters beyond the parties’ capacity (e.g. court competence, fraud exception) and the more detailed rules of practice tailored for the specific instrument (e.g. guarantee, commercial L/C or standby) and to be changed more rapidly. A similar example exists in the field of arbitration: at the statutory level the UNCITRAL Model Law and the 1958 New York Convention, again providing the hospitable legislative framework (or “constitution”) for arbitration, and at the contractual level innumerable sets of rules tailored for special arbitral institutions or types of trade.

III. Creation or enhancement of confidence and legal certainty

“As markets need the rule of law to function well (not the Law of the Jungle), investors and traders need confidence, legal certainty in their contractual relationships and a reliable conflict resolution system”.

UNCITRAL’s uniform law texts help to further investor or trader confidence in a number of ways. Since knowledge is a prerequisite of confidence, they help by overcoming the fear of foreign (strange or unknown) law by presenting a worldwide known quantity. The

prime example of the extreme value of this “hi-fi-factor” is the Model Law on International Commercial Arbitration. The easy reference to a familiar law is of particular importance here, since the typical situation of choosing the arbitration venue allows only minutes for explaining or exploring the procedural law of the place concerned.

Obviously, having a known and good law is not sufficient; what is needed in addition are competent arbitral administrators, arbitrators and understanding judges. The relevance of such capacity and infrastructure to the potential investor or trader is even greater when it comes to laws involving governmental agencies, such as the UNCITRAL Model Law on Procurement of Goods, Construction and Services (1994) or any law on BOT or similar concession-based relationships for which UNCITRAL currently prepares a legislative guide for privately financed infrastructure projects.

The Procurement Law enhances the confidence of potential suppliers or contractors by creating a transparent and efficient system that enables the State to get the best value for the public purse. Again, the good quality of the Law needs to be complemented by well-trained personnel in the various procuring entities and any administrative or judicial review bodies. The latter is, of course, true also outside the area of procurement; a considerable portion of investors’ confidence depends on the quality of the judicial system and the compliance with the “rule of law”.

This important confidence-building factor constitutes yet another reason for legislative approaches to uniform commercial law and against leaving everything to party-agreed soft law. While parties should, of course, have the widest possible freedom to lay down the rules of their dealings, any exclusive “Macrossoft law” would not be able to guarantee compliance with fundamental principles of fairness or the “rule of law” as well as the earlier-mentioned certainty about third-party effects and universal cross-border recognition of agreed standards.

C. CONCLUDING SUGGESTION

New Zealand might wish to launch an initiative within APEC to promote wider adherence of APEC member States to Conventions and Model Laws of UNCITRAL as well as other pertinent commercial law texts. A first step could be a conference or workshop featuring a presentation of such texts and a round-table discussion of prospects and concerns in the member States. The UNCITRAL Secretariat would be happy to assist in any such regional endeavour towards global unification.