1

Introduction

Gary Low

There have been increasing and stronger calls for greater integration of many Asian economies, either within the confines of ASEAN or on a more geo-economically strategic scale that would include major Asian jurisdictions like China, Japan, and Korea. A number of key personalities within the regional legal fraternity have advanced views that such integration ought to occur through the harmonization of legal rules, arguing among others that in so doing uncertainty and other transaction costs would be reduced and commercial confidence within the region concomitantly increased. That commercial law has come under the lens as a particularly suitable candidate for harmonization is, in a sense, unsurprising. It is for one ostensibly seen as a technical and relatively uncontroversial area of law, as opposed, for instance, to public law. For another, or probably for that precise reason, this area has been the historical choice for attempts at harmonizing substantive law – think of the CISG, the UCC in the United States, or the recently proposed CESL in the European Union.

This edited volume brings together eminent and promising scholars and practitioners to investigate what convergence and divergence mean in their respective fields and for Asia. Interwoven in the details of each tale of convergence is whether and how convergence ought to take place, and in so choosing, what are the attendant consequences for that choice. In an endeavour such as this, one finds familiar friends in the form of the West as a comparator for Asia (Engert, Durovic and Howells, Jacobs), although Michaels warns of the pitfalls of even this choice.

Castellani starts off the volume by recognising that the diversity of laws are a reflection of the differences across pluralistic societies. He then devotes the entire length and breadth of his contribution to examining how the model of uniform law has been used time and again to overcome these differences. His thesis, convincingly argued, echoes the beginning of this introduction: that uniform law's appeal (using the example of UNCITRAL) is that it is technical and pro-commerce, and at the same time, the inclusive process by which uniform law is drafted facilitates near-universal political acceptance.

To critics, this is the weakness that is uniform law – vague and ambiguous terminology borne of political disagreement. Castellani sees this same characteristic as one of synergy, a process which reflects consensus and compromise as and when needed. No stranger to the process, one's impression is that Castellani is not so much optimistic as he is pragmatic (perhaps the highest compliment a common lawyer can pay to his civilian colleague). This comes out in the way he highlights the deficiencies in uniform law and argues how to resolve them – or what he calls the 'adoption' gap. Scholars of uniform law have frequently lamented that this is a problem borne of unfamiliarity and suspicion. Castellani agrees and goes further, examining the problem using examples from the Vienna Sales Convention and the UNCITRAL Model Law on Electronic Commerce. For jurisdictions to accept uniform law, they must play a meaningful part in the process and they must be assured of sufficient technical assistance to help facilitate implementation. If one agrees with Menon's call for greater legal and economic integration within Asia, then Castellani's contribution is his roadmap on how to achieve it.

Godwin follows on and investigates convergence in financial law within ASEAN and the greater Asia region through the adoption of the UNCITRAL Model law on Cross-Border Insolvency as well as relevant UNIDROIT Principles. While it is generally accepted that this Model Law is an example of successful convergence in financial law, there is a significant degree of divergence between jurisdictions in terms of the modifications that have been made to the Model Law when it is incorporated into domestic legislation.

His contribution assesses the effectiveness of model laws as a methodology for legal convergence, identifies the reasons for divergence in the adoption of the Model Law and reflects on what those reasons reveal about the challenges facing legal convergence generally. Godwin's assessment harkens back to Castellani's opening statement – that diversity is the outcome of deliberate policy choices. This is evident where jurisdictions have differed in terms of the nature and extent of the relief that will be granted to assist in foreign insolvency procedures, the relevance of public policy in providing a ground on which recognition or relief should be refused and the significance of concepts such as the centre of main interests, or 'COMI'. In his words, the experience of the Model Law supports the comment by Bathurst CJ that it is 'undesirable to strive for uniformity in all areas of the law' and also the comment by Menon CJ that convergence must take account of the 'undulating legal terrain that results from differences in the national legal systems'. While Godwin sees merit in convergence (through adoption of the Model law), this does not mean he treats divergence as undesirable – there is value in deliberate choice and also the rigours of regulatory competition.

Hwang's is the last in this series of contributions investigating the role of Model Laws – in this case, the UNCITRAL Model Law on International Commercial Arbitration together with the 1958 New York Convention. Arguably the cornerstones of international arbitration. This chapter asks whether it would be prudent for Asian

states to subscribe to these two instruments, reversing the current trend of a poor and slow take-up rate. Given the reality that corporations located in Asia will enter into arbitration agreements with counterparts both inside and outside that region, Hwang posits that ratification of the New York Convention and the adoption of the UNCITRAL Model Law is preferable to the path of fashioning a regional set of arbitration rules. At the same time, he acknowledges that criticism has been directed at various aspects of those instruments, such as the lack of a modernised, efficient, and universal enforcement procedure under the New York Convention. The chapter demonstrates how perceived shortcomings and concerns can be satisfactorily addressed through a clever exercise of discretion when Contracting States domesticate and courts are called upon to interpret the relevant legal provisions. Some of these solutions are in fact already being used to good effect by Singapore, Hong Kong, Malaysia, and Australia. Continuing and where necessary elaborating such national practices is salutary, as doing so obviates the need for revision and instead confirms the effectiveness of the Convention and Model Law as modern models for legal convergence in Asia.

In the chapter that follows, Cafaggi spotlights private actors and their incredibly important role in a scene where most rules are non-mandatory. He examines the different regimes at play in producing and enforcing voluntary standards: are they converging or diverging? Are the convergence or divergence regarding procedural or substantive standards? What are the determinative factors? In answering the questions posed, Cafaggi helps delineate the conditions upon which regulatory cooperation or integration contributes towards convergence or divergence of transnational standards.

Engert's chapter marks a turn from producers of uniform laws to that of the market at large. He applies a classic economic analysis to the question of legal convergence: he looks at standards competition or 'network effects' as a framework to evaluate the promise of voluntary law unification. As a complement to the much-discussed field of contract law, the analysis is extended to company law as another reference field. There, the European Union (EU) has to offer some mixed experience with voluntary unification in company law. The analysis of market standardization in private law leads to the following main conclusions: There is a strong case for voluntary law unification as opposed to any kind of mandatory standardisation. While the market can fail at achieving desirable standardisation, it provides some assurance against severe mistakes. Engert posits, on the balance, that the risk of serious error in forced unification would appear to be significantly greater. Promulgating an optional set of legal rules at the international or supranational level can help to promote desirable standardisation in the marketplace. At the same time, existing national laws can also serve as international standards and even have certain advantages over an additional international or supranational regime. Under suitable conditions, fostering jurisdictional competition can be a suitable alternative for advancing unification in private law. The reader would do well to contrast this view with that of Castellani's, in that

Engert does not presume the necessity of uniform law within the plurality that is the market for laws.

The conversation then returns to what some private lawyers might say is the crux of any legal marketplace – contracts. Durovic and Howells agree, and having been involved in the European debate, they see contract law as a *prima facie* obvious candidate for harmonization within Asia. Against that backdrop, this chapter holds up the European experience as a cautionary tale for the prospective 'Asianisation' of contractual rules. While rightfully considered as providing the most advanced example of regional harmonization in this domain, the chapter demonstrates that the EU has actually achieved relatively little over the course of a process spanning more than three decades as far as binding norms are concerned. Those pieces of legislation that have been adopted have a piecemeal character and primarily deal with selected aspects of consumer law. Repeated attempts to adopt a comprehensive settlement all were abandoned sooner or later, typically due to the difficulty of securing the requisite political agreement. Extrapolating to the Asian setting, Durovic and Howells recommend against over-ambitious projects for contract law convergence. The considerable variety in legal traditions, marked differences in the state of national economies, and the absence of a regional judicial body to help supervise and interpret common rules as compared to the EU setting all suggest that achieving even partial convergence will be an uphill task. The greatest chances of success, if any, are to be had in specialised or innovative areas of contract law such as consumer law or possibly digital content.

Qu's contribution takes us to East Asia, where, in late 2005, China adopted a new Company Law which sought to boost foreign investment. A problematic practice under the old regime consisted of companies investing profits in or guaranteeing debts of unrelated companies. The motivation to take on such liabilities was often found in personal financial interests or connections of directors, CEOs or controlling shareholders. This could make companies appear financially solvent while they could, in reality, be on the brink of bankruptcy. Worse, the existence of such unrestricted debt guarantees often would only become known once insolvency or bankruptcy proceedings were underway, to the detriment of the company's legitimate creditors. In response, the revised Company Law stipulates procedural limits that circumscribe the ability for companies to invest in or act as guarantors for third-party companies. Qu's contribution scrutinises whether the revised Company Law, through its Article 16, has been able to deliver the expected protection of company assets and has helped create a more secure climate for investors, in light of rapidly growing numbers of loan disputes that have resulted in adjudication in recent years. The chapter addresses how the language of parts of Article 16 has meant that there is considerable room for judicial discretion and the determinants that can account for decisional outcomes in surety contracts. It suggests that a case can be made for a further revision of this part of China's company law to achieve concordance with

the approach under the common law as it stands in Hong Kong, Australia, Singapore, and the United Kingdom.

With economist Basu Das, we turn our sights to the ASEAN Economic Community (AEC). It is at a crossroads where policy implementation is a matter of crucial significance. At the end of 2015, though ASEAN announced a significant achievement rate of 93 per cent, effective implementation has remained patchy and there is growing concern among end users that ASEAN has fallen short of its aspiration of 'single market and production base'. This chapter postulates that economic conflicts among countries and firms within ASEAN states have resulted in regional policy documents that are too broadly framed, with flexibilities and loopholes, thereby negatively affecting the course of implementation. While some firms – such as foreign MNCs doing business in the region – firmly supported liberalisation, SMEs and other domestic-focused enterprises requested protection in the face of increased competition. The interests of ASEAN countries as regards extent of liberalisation and facilitation measures moreover differed, given their varied economic structures and uncertainties on the expected gains attendant on closer gains from economic integration. The national character of implementation has meant that organisational conflicts between government agencies and bureaucrats have to date further distorted the realisation of ASEAN policies and agreements on the ground. Basu Das concludes by offering some policy recommendations to reverse the current trajectory, including the need for improved communication between government agencies and end-users; more systematic matching between AEC objectives, headline commitments and concrete measures; and a rethinking of resource allocation among government agencies entrusted with implementation.

Although the fields of law within this book are clearly commerce-related, the successful adoption, implementation, and enforcement are entirely dependent on a robust adherence to rule of law. This is in terms of both institutions and attitude. But how to realise this? No less eminent a jurist than Jacobs tackles the issue of the rule of law in Asia head on. In his contribution, he first examines the composite elements of the rule of law, with reference works by leading constitutional theorists, and queries how far this normative concept has universal application. Next, Jacobs argues that the rule of law should be key to the legal order in Southeast Asia, and in particular to the market freedoms under ASEAN Economic Community. The chapter also discusses how respect for this concept is to be ensured. This, among others, requires a delicate balance to be struck between the importance of securing uniform interpretation of transnational legal rules, and their effective application and allowing States a necessary margin for manoeuvre. The chapter illustrates how the Court of Justice and the EFTA Court in Europe, the Caribbean Court of Justice and regional courts for transnational economic organisations in Latin America and in Africa have sought to do so and assesses the relevance or otherwise of those models for South-east Asia.

When the argument is made that laws of different jurisdictions or fields (should) converge, we concomitantly describe what the end result is or ought to be. As seen in the previous chapters, the EU provides an obvious example (or lesson) of what Asia is confronted with. Five decades of 'an ever closer Union' has informed the European discourse as to what European legal integration means. This common foundation is often referenced to Europe's common history, religion and culture. Ralf Michaels asks: What is meant by 'Asia'? And when we speak of Asian law, what makes law Asian? Is there an Asian identity comparable to European identity and therefore similarly useful as a justification for unification projects? If so, what does it look like? And if so, does this make Asia more like Europe, or less so? Or is this question itself already a mere European projection?

In what follows, noted comparatist Michaels attempts to shed light on what 'Asian' law means through meticulous detail and analysis of the major modern Asian unification projects in its post-war history – the UPICC inspired Principles of Asian Contract Law (of which this editor was once a member), the Studies in the Contract Laws in Asia (whose approach is akin to that of the Trento Common Core). Through this, Michaels ably unpacks the meaning behind 'Asian' laws: it could in truth simply be a Western import; or it is a call to recall and institutionalise values and attitudes that predate and survived Western colonialism; or it could be a vehicle for what is essentially propagation of the laws and values of an historically dominant Asian hegemon (like China or Japan).

And in his search for answers, he takes the reader down unexpected paths. He seems to find the erstwhile comparison between Europe and Asia (or East and West) too binary and unhelpful – so what if Asian law is European . . . or not? Drawing on Asian scholarship, he offers a novel injection into the legal discourse on convergence: Asian law as method. To Michaels, 'The West is neither dominant over nor absent from Asia'. He suggests a possibility 'to move beyond a focus on the West, and at the same time to overcome ideas of Asian homogeneity'. In other words, Michaels advocates a decentring of the West from studies into Asian legal convergence. The West and East are neither subject nor object but only method. They are 'no longer one but many parts that are in dialogue with each other, no longer recipient or opponent of Western law and instead co-producer of modernity and of modern law. In this, the West has at least as much to learn from Asia as Asia did from the West.'

It is in the spirit of these comments that the contributions within this book make the necessary steps towards engaging with the West, and in so doing, it is hoped, defining what it means to be East.

2

Uniform Law and the Production and Circulation of Legal Models

Luca Castellani[*]

1 INTRODUCTION: UNIFORM LAW AND LEGAL PLURALISM

The law constantly evolves in response to the needs of human societies. Legal evolution is seldom based on innovation (that is, the production of an original legal rule); more often, rules circulate from one legal system to another. To better understand the dynamics of the circulation of legal models, it is useful to identify the sources of those models.[1]

The diversity in human societies leads necessarily to legal pluralism – that is, the coexistence of different legal systems that give expression to the beliefs and values of a social group.[2] In particular, commercial law recognizes contractual agreements,

[*] The views expressed herein are those of the author and do not necessarily reflect the views of the United Nations.

[1] Among comparative lawyers, the Italian "School of Trento" has significantly contributed to discussing the circulation of legal models: R Sacco, Legal Formants: A Dynamic Approach to Comparative Law (1991) 39 *American Journal of Comparative Law*, 1, 1–34 (Installment I), 343–401 (Installment II). See also A. Watson, *Legal Transplants: An Approach to Comparative Law*, 2nd ed. (Athens: University of Georgia Press, 1993); M. Graziadei, Comparative Law as the Study of Transplants and Receptions, in M. Reimann and R. Zimmermann (eds.), *The Oxford Handbook of Comparative Law* (Oxford: Oxford University Press, 2006), pp. 441–475; M. Graziadei, Legal Transplants and the Frontiers of Legal Knowledge (2009) 10 *Theoretical Inquiries in Law*, 2, 723–743. D. Berkowitz, K. Pistor, and J. F. Richard, Economic Development, Legality, and the Transplant Effect, William Davidson Working Paper Number 410 (September 2001). For a discussion of legal transplants from the perspective of game theory, see N. Garoupa and A. Ogus, A Strategic Interpretation of Legal Transplants (2006) 35 *Journal of Legal Studies* 2, 339–363.

The 18th General Congress of the International Academy of Comparative law (Washington, DC, 2010) featured the topic "Legal Culture and Legal Transplants." An electronic edition of the national reports presented on that occasion, prepared by the Isaidat Law Review for the Società Italiana di Ricerca nel Diritto Comparato (SIRD), provides significant information on legal transplants in several jurisdictions: Special Issue 2: Legal Culture and Legal Transplants (2011) 1 *ISAIDAT Law Review* 2, available at www.isaidatlawreview.org/index.php/isaidat/issue/view/5.

[2] The literature on legal pluralism is significant. Early contributions include L. Pospisil, *The Anthropology of Law: A Comparative Theory* (New York: Harper & Row, 1971); J. Vanderlinden, Return to Legal Pluralism: Twenty Years Later (1989) 28 *Journal of Legal Pluralism* 149–158; P. S. Berman, Global Legal Pluralism (2007) 80 *Southern California Law Review* 1155–1237. On legal pluralism and the circulation of legal models, see W. Twining, Diffusion of Law: A Global Perspective (2004) 49 *Journal of Legal Pluralism* 1–45.

which are considered non-State law in a pluralistic perspective, as a particularly relevant source of rights and obligations.[3] Such recognition takes place through the principle of freedom of contract, which aims at accommodating traders' needs by addressing both legal predictability and legal flexibility.[4] The place of State law in commercial law may accordingly be residual.

At a first glance, uniform law may seem at odds with the pluralist nature of commercial law.[5] While uniform law ideally aims at establishing legal uniformity, legal pluralism denies that possibility.[6] However, it is necessary to frame realistically the goal of uniform law. Uniform law does not always or necessarily aim at universal legislative unification. On the contrary, it promotes the principle of freedom of contract by providing default rules while giving private parties the possibility to vary them.[7] Moreover, uniform law may enable free choice of the law governing the commercial relationship. As a result, the uniform law enacted by States[8] promotes legal diversity, especially when adopted in jurisdictions where the principles of freedom of contract and freedom of choice of the applicable law are less recognized.

This chapter discusses certain aspects of the production and circulation of uniform commercial law, including by providing examples relating to sales law and the law of electronic transactions. It is argued that uniform law has become increasingly important in the production and circulation of legal models. Hence it is desirable to make the uniform legislative process more efficient and effective.

[3] See, for example, S. Nystén-Haarala, Legal Pluralism and Globalising Business Contracts, in P. Wahlgren (ed.), *Law without State. Scandinavian Studies in Law* (Stockholm: Jure Law Books, 2016), pp. 297–315; F. Inocêncio, Direito do Comércio Internacional: a Emergência da Nova Lex Mercatoria (2017) 10 *Revista do Direito de Língua Portuguesa* 49–74, at 62–65.

[4] Recently, the principle of freedom of contract has been compressed by an emerging third need: the protection of the weak party. That need is paramount in consumers' law, and its extension to small- and medium-sized enterprises has been suggested in the proposal for a Common European Sales Law (Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, Brussels 11.10.2011 COM [2011] 635 final). That proposal was not adopted.

[5] Several definitions of uniform law have been suggested. Some focus on the lawmaking process and others on the outcome of that process. Reference is here made to a legislative text prepared in a dedicated forum for application across different jurisdictions. Because of its broad applicability, the law is considered "uniform" (as opposed to local). In particular, this chapter discusses modern commercial uniform law – that is, uniform law dealing with civil and commercial matters produced in the twentieth and twenty-first century.

[6] But see V. Mak, Globalization, Private Law and New Legal Pluralism, Jean Monnet Working Paper 14/15 (2015), available at http://jeanmonnetprogram.org/wp-content/uploads/JMWP-14-Mak.pdf; J. Coetzee, A Pluralist Approach to the Law of International Sales (2017) 20 *Potchefstroom Electronic Law Journal*, available at https://journals.assaf.org.za/per/article/view/1355.

[7] S. Gopalan, The Creation of International Commercial Law: Sovereignty Felled? (2004) 5 *San Diego International Law Journal* 267–322.

[8] Additionally, uniform law may be applied without connection to State law, especially in arbitral proceedings.

2 THE EVOLUTION OF UNIFORM LAW

Uniform law has undergone significant changes over the last forty years. It was originally conceived to operate at the international level so as to overcome barriers to trade arising from national legislation. The traditional justification for uniform law is based on the desire to facilitate international trade, which is considered an engine of economic growth and social stability. While knowledge of foreign legal systems may present challenges, all concerned parties may access uniform law on an equal footing. Increased legal predictability reduces transaction costs.[9] Legal uniformity should therefore be pursued by adopting uniform legislative texts with as few departures from the original as possible.[10] As a result, the negative effects arising from the coexistence of multifarious national commercial laws would be reduced or eliminated.

In that original conception, legal unification is pursued at the international level through the negotiation and adoption of treaties.[11] Early uniform law treaties include the Convention for the Unification of Certain Rules of Law relating to Bills of Lading (Brussels, 1924),[12] the Convention Providing a Uniform Law for Bills of Exchange and Promissory Notes (Geneva, 1930),[13] and the Convention Providing a Uniform Law for Cheques (Geneva, 1931).[14] Evidence of that original goal may be found in the mandate of the United Nations Commission on International Trade Law (UNCITRAL), which refers to "the promotion of the progressive harmonization and unification of the law of international trade,"[15] and in the name of the International Institute for the Unification of Private Law (UNIDROIT).

However, the influence of uniform law on State law was already present in those early days as legislators were often inspired by uniform models when embarking on domestic law reform. That influence highlights a second powerful argument in favor of uniform law: uniform law may improve the existing law.[16] That argument has become more evident as uniform lawmaking has shifted focus from international to national law reform.

In the early days, uniform law texts were prepared or, at least, finalized in ad hoc diplomatic conferences. The importance attributed to uniform law in facilitating trade suggested the establishment of dedicated intergovernmental bodies providing

[9] See e.g. C. P. Gillette, *Advanced Introduction to International Sales Law* (Cheltenham: Edward Elgar, 2016), pp. 5–6.

[10] Variations resulting from the operation of the principle of freedom of contract are, of course, excepted.

[11] On the drafting of treaties by experts (including in the commercial field), see J. E. Álvarez, *International Organizations as Law-Makers* (Oxford: Oxford University Press, 2006), pp. 304–316.

[12] League of Nations, Treaty Series, Vol. 120, p. 155.

[13] League of Nations, Treaty Series, Vol. 143, p. 257.

[14] League of Nations, Treaty Series, Vol. 143, p. 355.

[15] United Nations General Assembly Resolution 2205 (XXI), section I.

[16] S. Kozuka, The Economic Implications of Uniformity in Law (2007) *Uniform Law Review* 683–695, at 687–690.

a permanent negotiating forum for uniform texts as well as adequate secretarial support. The first session of The Hague Conference on Private International Law (HCCH) took place in 1893, and the HCCH became a permanent intergovernmental organization in 1955. UNIDROIT was established in 1926 as an auxiliary organ of the League of Nations,[17] and UNCITRAL was established by the United Nations General Assembly in 1966.[18] The availability of permanent fora and secretariats had a positive effect on expanding and preserving specialized expertise and on consolidating and improving working methods.

Core features of uniform lawmaking include a high level of technical expertise among uniform law drafters, and their supporting bodies; the use of the comparative method; inclusiveness through broad stakeholder participation; and decision-making by consensus or ample majority. Those features aim at facilitating the acceptance of uniform law by all States and other lawmaking bodies.

The comparative approach is used to assess and overcome the distance between national models. That approach allows identifying those common elements in national laws that may provide the basis for the uniform rule. Often, the identification is based on the legal rule's function, since apparently different rules may address the same socioeconomic problem in a similar manner, while rules that appear to be identical but for a minor detail, possibly contained in case law or in secondary legislation may lead to significantly different outcomes.

The principle of universal participation in the drafting process requires the representation of all world regions and types of legal and economic systems to ensure that relevant issues are taken into account so that the resulting legislative text is suitable for all jurisdictions and economic systems. Universal participation was particularly important in 1966 when UNCITRAL was established because uniform law drafting processes already in existence were not perceived as sufficiently inclusive by a number of countries, particularly Socialist and newly independent States.[19] UNCITRAL, which was set up at the suggestion of Hungary, then a Socialist country, could address the matter by adopting the United Nations' decision-making process, designed to take into consideration all States' views.

A turning point in uniform law drafting took place in 1985 with the completion of the UNCITRAL Model Law on International Commercial Arbitration, which quickly became a global success. Since then, work on soft law instruments such as model laws and guidance texts has greatly increased, shifting the focus of legislative

[17] A founding multilateral agreement was again concluded in 1940.

[18] United Nations General Assembly Resolution 2205 (XXI), Establishment of the United Nations Commission on International Trade Law. UNCITRAL is the only specialized intergovernmental body in the field of uniform law with universal participation.

[19] The drafting of the Convention Relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods, 1964 (ULF; United Nations, Treaty Series, vol. 834, p. 169) and of the Convention Relating to a Uniform Law on the International Sale of Goods, 1964 (see section 3.4.1 below) may be cited as examples of only partially inclusive processes.