Problems on harmonization and unification of international commercial law[1]

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ABSTRACT

Considering the large amount of harmonizing/unifying instruments created artificially or spontaneously in the field of international commercial law, it is important to highlight the main difficulties that may be faced during the whole process regarding "their lives". This is so in order to grant them success. Therefore the issue dealt with in this paper concerns which problems emerge when harmonization and unification of international commercial law are sought; *i.e.* which difficulties should be taken into account when it comes to creating, incorporating and applying harmonizing/unifying instruments. Problems will be divided into two categories: (i) one including

[1] This paper consists in a short version of our Master thesis. Issues were identified and more deeply analyzed in our text presented and defended in Portuguese at the University of São Paulo Faculty of Law in May 2016 under the title: *Desafios da Harmonização do Direito do Comércio Internacional.* Available at: http://www.teses.usp.br/teses/disponiveis/2/2135/tde-25102016-162941/pt-br.php accessed on 08 January 2017.

problems accruing from the relationship between instruments and States; and (ii) other including problems accruing from the relation among instruments themselves.

1. Introduction

Considering the large amount of instruments created artificially or spontaneously aiming to harmonize and unify international commercial law, it is important to analyze which are the main problems arising from the present reality in order to deal with such issues and try to surpass their difficulties.

This paper highlights the main problems applicators in general (judges, arbitrators, etc), States, and International Organizations, including UNCITRAL, face when dealing with harmonization and unification of international commercial law. Consequently, the intention is that such problems are taken into account in order to improve the effectiveness of harmonizing/unifying instruments and mechanisms.[2]

Therefore, the subject issue of this paper concerns which problems emerge when harmonization and unification of international commercial law are sought; *i.e.* which difficulties should be considered when looking for efficient results on granting better-shaped-to-reality international commercial instruments,[3] since their creation until their application.

In this sense, problems can be divided into two categories: (i) one including problems accruing from the relationship between instruments and States; and (ii) other including problems accruing from the relation among instruments themselves. In the first category are included problems related to the drafting (and creation) of harmonizing/unifying instruments; their use (choice); their application by different applicators (judges, arbitrators); and situations that jeopardize their complete application, such as public policy issues and mandatory rules. In the second category are placed problems related to creation and drafting of instruments and their application.

[2] The word *Mechanism* is used for the purpose of this paper as the way all available instruments can be used in order to harmonize or unify international commercial law.
[3] The word *Instrument* is used for the purpose of this paper as rules containing any kind of command or guideline that can be used in order to harmonize or unify international commercial law. It means that the instrument may be used for a purpose different to the one it was created for.

However, before entering the subject itself, it is important to clarify some aspects concerning the terminology used, especially the terms *unification* and *harmonization*.[4] Unification takes place when (i) there is only one instrument to be applied; and (ii) the result of such application worldwide is similar enough that it leads to the avoidance of practical differences that may result in a specific choice of the applicator.[5]-[6]

Harmonization, in turn, has two meanings. The first one is used when an instrument works as model or source of inspiration to the creation or the application of another instrument in order to bring them closer and facilitate commercial relations. The second concerns harmonization seen as the harmonic coexistence of instruments.[7]

Therefore, any instrument can be used as a means of harmonization or unification, regardless the aim it was created for. Generally speaking, any source of international commercial law can be seen as a kind of harmonizing/unifying instrument. [8]

Considering the definition brought above, problems on harmonization/unification of international commercial law are any factors jeopardizing the fulfillment of at least one of the requirements of harmonization/unification as defined above.

Once unification requires (i) the existence of only one instrument (ii) applied similarly enough that the result of such application avoids practical differences, one may conclude that unification is not achieved if, regarding requirement (i), there is no harmonizing/unifying instrument to be applied or available instruments are not applied, or, regarding requirement (ii), the same instrument is applied differently, being this a reason for choosing one applicator or another.

Further, once harmonization requires the use of an instrument as model or source of inspiration in order to get them closer and facilitate commercial relations, problems arise when no instrument is

[4] It is possible to notice some terminological differences concerning texts written in different languages. Especially in French and in Portuguese three words are used*: harmonização/harmonization*, *unificação/unification* and *uniformização/uniformization*. In English, the large majority of authors, including International Organizations, use two words: harmonization and unification. In this sense, *unificação/unification* and *uniformização/uniformization* are treated as unification in this paper, as criteria used to treat them separately do not prevent their union. Also, such choice avoids misunderstandings regarding texts written in English.

[5] Such definition was based on the following texts: ANDERSEN, 2007; BOELE-WOELKI, 2010; KAMDEM, 2009; DOLINGER, 2008; OLIVEIRA, 2008; UNCITRAL, 1970, p. 13; MATTEUCCI, 1957; DAVID, 1968; BONELL, 1990; BOGGIANO, 2000; FARIA, 2009; DE LY, 1997; ANDERSEN, 2007, UNCITRAL Website <http://www.uncitral.org/uncitral/en/about/origin_faq.html#harmonization> (accessed on 08 January 2017); Unidroit Institute Website <http://www.unidroit.org/about-unidroit/overview> (accessed on 08 January 2017). Hague Conference Website <http://www.hcch.net/index_en.php?act=text.display&tid=26> (accessed on 08 January 2017).

[6] Although some authors use the expression *forum* shopping, it is not used here because, considering such concept and some divergences on its definition, some situations in which harmonizing/unifying instruments could be used would be left out.

[7] Such definition was based on the following texts: KAMDEM, 2009; BOELE-WOELKI, 2010; OLIVEIRA, 2008; LEBOULANGER, 2009; DAVID, 1968; UNCITRAL Website <http://www.uncitral.org/uncitral/en/about/origin_faq.html#harmonization> (accessed on 08 January 2017); Unidroit Institute Website <http://www.unidroit.org/about-unidroit/overview> (accessed on 08 January 2017); Hague Conference Website <http://www.hcch.net/index_en.php?act=text.display&tid=26> (accessed on 08 January 2017).

[8] Based on: BASSO, 2011, p. 24-114; GALGANO & MARRELLA, 2011, p. 193-304; and BORTOLLOTTI, 2009, pp. 9-122.

used as model or source of inspiration or if such use does not result in the facilitation of commercial relations. The same is true when instruments do not coexist harmonically.

In the following topics, every problem mentioned above will be dealt with individually.[9] However, before moving on to such analysis, it is important to highlight that the existence of harmonizing/unifying instruments does not mean diversity itself is a problem. The existence of multiple instruments available means applicators can choose the one that best fits their relation. In addition, propagation of such multiplicity of instruments will, at last instance, show which are better suited for each relation and which should not be kept. In other words, practice will show which critics to which instruments are correct and which are not. The most important is that the content of one instrument does not harm the existence of a multiplicity of possibilities and their application. The application of each instrument must be made consistently worldwide no matter the applicator chosen.[10] Further, it is important to bear in mind that harmonization and unification should be sought as a means for a further objective.[11]

2. Problems accruing from the relation between instruments and States

i. Drafting, creation (regarding only the relation with States) and incorporation of instruments

The first problem has its origins in the existence of different juridical systems.[12] Such differences usually lead to long discussions during the drafting of harmonizing/unifying instruments. Therefore, the careful choice of their characteristics can help facilitating their drafting process and the fulfillment of goals.[13] During such process, every state-representative tend to defend their States´ own interests, which may result in incompatibilities. When it comes to the drafting of soft law instruments, conversely, text incompatibilities are not that relevant because their binding force is given by the

[9] Critics to the creation and to the application of harmonizing/unifying instruments may also be considered a challenge as they could result in the non-application of instruments. Most common critics can be found on STEPHAN, 1999; GOPALAN, 2003; GOODE, 2003, item I; GOODE, 2005, p. 556; ROSETT, 1992, p. 688; DE LY, 1997, p. 529; SACCO, 2001, pp. 174-175. If on the one hand the above mentioned authors present critics, on the other, they also present suggestions to reduce them.
[10] SACCO, 1990, p. 2 e 15; SACCO, 2001, p. 175-180; LOSANO, 2007, p. 18; MISTELIS, 2000, p. 1068; ANDERSEN, 2007, p. 48-49; KRONKE, 2009, p. 708; BOISSÉSON, 1999, p. 598.
[11] BOELE-WOELKI, 2010, pp. 336-337.
[12] MATTEUCCI, 1957, p. 415.
[13] MATTEUCCI, 1957, p. 420

parties or States that can adapt the content if they want. Another difference regards drafters, who usually are not state representatives, but experts on the subject matter.[14]

The second problem relates to the decision of a state to become bound by an instrument or not. When it comes to bringing international and transnational instruments to state legal order, it is the state itself the one to take decisions, such as: to become part to treaties, to use model law texts when drafting domestic legislation, to allow arbitration procedures, etc.[15] Such decisions take into account multiple aspects that may impair the effectiveness of harmonizing/unifying instruments.

Some of them are: the existence of other priorities;[16] the reduced number of State-parties;[17] the reduced personnel available to represent the country in conferences or meetings where the drafting is made[18]; apprehension on the results of the application of instruments;[19] avoidance of costs (which arise from the training to apply a new instrument);[20] lack of foreseeability regarding results of application;[21] preference for domestic law;[22] and incompatibilities with domestic law (mandatory rules and public policy issues).[23]

Reservations[24] and differences resulting from some states being bound to a treaty and others not also lead to discrepancies in their application as the content made bound on each state changes.[25] However, if reservations were not allowed, it is likely treaty acceptance would be reduced.

Also, the way each State faces international and transnational instruments can be considered a problem, especially regarding the hierarchical level international law instruments are placed in each legal order.[26] When domestic law prevails over international instruments, international commercial relations may be given a legal treatment that is not consistent with best practices.

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[14] *Soft Law* is understood here as any kind of instrument that were not given binding force by the state. They depend on party autonomy to become binding. ABBUD, 2014, p. 13-14; For further issues on the subject: BONELL, 2005, p. 229*;* KAUFMANN-KOHLER, 2010, p. 2; DI ROBILANT, 2006, p. 500; ANDERSEN, 2007, p. 16; GABRIEL, 2009, p. 655; BOYLE,
1999, p. 901-902; GERSEN & POSNER, 2008, p. 6; KAUFMANN-KOHLER, 2010, p. 2; FLÜCKIGER, Alexandre. Why Do We Obey Soft Law?. in NAHRATH, Stéphane; VARONE, Frédéric (eds), Rediscovering Public Law and Public Administration in Comparative Policy Analysis: A Tribute to Peter Knoepfel, Lausanne: Presses polytechniques et universitaires romandes, 2009, p. 45–62 *apud* KAUFMANN-KOHLER, 2010, p. 2- 3; BASSO, 2011, p. 94-96; ABI-SAAB, 1993, p. 59-60.
[15] BOELE-WOELKI, 2010, p. 364.
[16] SONO, 2007, p. 2.
[17] SONO, 2007, p. 2; FARIA, 2009, p. 26
[18] BASSO, 2011, p. 49.
[19] SONO, 2007, p. 2.
[20] SONO, 2007, p. 2; FARIA, 2005, pp. 9-10.
[21] SONO, 2007, p. 2.
[22] FARIA, 2005, p. 9
[23] KLEINHEISTERKAMP in VOGERNAUER & KLEINHEISTERKAMP, 2009, p. 129-130; JAYME, 1995, p. 228; BODEN, 2002, p. 88; BASSO, 2011, p. 297-298; MCCLEAN, 2000; PIERRE MAYER, , 1998; BENNETT, 2002.
[24] BONELL, 1990, p. 866-867.
[25] FERRARI, 2002, pp. 703 e 704.
[26] BASSO, 2011, p. 50, footnote 77; CASSESE, 2013, p. 299-306.

In order to encourage states to become bound to a certain instrument, a provision containing an authorization to opt-out the entire text or to modulate its content may be considered a good idea. An example of such kind of provision is article 6 CISG.[27] The counterpart of such flexibility however is the existence of multiple possibilities of variation, harming the achievement of wider unification.[28]

Applicators may also avail themselves of provisions such as article 6 CISG when taking into account the limited scope of application of harmonizing/unifying instruments. In order to avoid *dépeçage*, national law may be preferred for it reaching a wider scope of application, so the same legal order is applied to all subjects dealt within the contract, which reduces the use of harmonizing/unifying instruments. [29]

It leads to the conclusion that harmonizing/unifying instruments, although having a limited scope of application, should be harmonized with the content of other harmonizing/unifying instruments, in order to encourage their choice. In this sense, the wider the scope of application of harmonizing/unifying instruments, the more parties feel encouraged to allow their application to their commercial relations.

Further, when bringing harmonizing/unifying instruments to the domestic legal order, their translation is an issue to care. The use of different translation methods may lead to text distortions and, consequently, to misunderstandings on their application.[30] Even if drafting techniques are different, efforts should be applied by domestic law drafters so harmonization is kept. [31]

Another delicate issue regards changes made to the original text due to update reasons.[32] The consent of all States may be required once more and, usually, enormous difficulty is faced to reach consensus again. Therefore, problems arising from outdated provisions should be resolved through interpretation techniques, either considering the current practice of international commercial law, or making use of most recent instruments containing provisions on the specific subject. Provisions on filling gaps may be used for this purpose too.[33] In this sense, the more harmonizing/unifying instruments are known around the world, the easier it will be to find a solution to update their text

[27] FERRARI, 2002, p. 700
[28] CISG-AC Opinion No. 16.
[29] KOEHLER & GUO, 2008, pp. 55-56.
[30] BONELL, 1990, p. 867.
[31] FARIA, 2005, p. 30-31.
[32] FARIA, 2005, p. 13.
[33] SCHWENZER & HACHEM In SCHLECHTRIEM & SCHWENZER, 2010, p. 134; FARIA, 2005, p. 13; BEAUMONT, 2010, p. 32.

without having to change the original text. Formulating agencies play a very important role in disseminating such knowledge.[34]

In addition, undue influence of domestic law on the application of international instruments must be avoided because such influence may harm the attainment of the aim pursued.[35]

ii. Application of harmonizing/unifying instruments

The application of harmonizing/unifying instruments is a fundamental step to reach harmonization and unification. Therefore, every aspect in their reaching will be analyzed separately.

As it was explained before, unification is reached when there is one instrument being applied and its application is similar enough that it avoids practical differences harming such application. Reaching harmonization, instead, means one instrument is used as a model or source of inspiration to others either through interpretation or drafting in order to facilitate commercial relations, or their harmonic coexistence.

Bearing these definitions in mind, one concludes it is the way the instrument is applied that determines whether it was used to harmonize or unify international commercial law.

Therefore, when analyzing the application of harmonizing/unifying instruments, the following aspects will be taken into consideration: (1) who is applying the instrument; (2) which instruments the parties are allowed to choose and which instruments the applicator is allowed to apply; (3) the relation of such instruments with others (especially the ones of domestic legal order, mandatory rules and public policy issues); (4) *stricto sensu* application of instruments.

As aspect (1) influences aspects (2), (3) and (4), our analysis will focus on aspects (2), (3) and (4), considering the applicator being a judge or an arbitrator when necessary.

[34] FARIA, 2009, p. 27; Reaching the same conclusion: DAWWAS & SHANDI, 2011; p. 841; BOSCOLO, 2016, *passim*; SCHLECHTRIEM, 2005, p. 29.; SONO, 2007, p. 6.
[35] MATTEUCCI, 1957, p. 423.

- Which instruments the parties are allowed to choose and which instruments the applicator is allowed to apply

Generally speaking, conflict of laws rules are strictly related to which instruments the parties are allowed to choose and to which instruments the applicator is allowed to apply.

In this sense, harmonizing/unifying instruments may be related to conflict of laws rules in three different forms: being the subject matter of such instruments, being the rule determining the application of harmonizing/unifying instruments on material rules, and filling gaps left by harmonizing/unifying instruments.[36]

As said above, some harmonizing/unifying instruments have as subject matter conflict of law rules. However, when it comes to international commercial law, material rules instruments are usually given preference, but it does not mean conflict of law instruments are not welcome.[37] In fact, the purpose conflict of law rules are built for has changed a little. [38]

Further, conflict of laws rules can be used to regulate the application of harmonizing/unifying instruments. Such rules can be seen from two different perspectives: (1) rules contained in the instrument that deals with its own application and (2) national conflict of law rules allowing or not the application of harmonizing/unifying instruments.

From the first perspective, conflict of law rules could fit for self-applicable instruments when states are bound to them,[39] but should not be used as the first option rule determining their own application because it could lead to distortions on the application of the instrument. Anyway, such instruments are ready to be applied and will be applied if application criteria are met.[40]

Instruments that are not self-applicable or although self-applicable are not being used as such (in case the state is not bound to them) depend on party autonomy to become applicable. Non-binding instruments, in turn, usually contain parameters that indicate situations to which they could apply, but still depend on party autonomy to be applied.

[36] JAYME, 1995, p. 57.
[37] JAYME, 1995, p. 252.
[38] DE LY, 1997, p. 534-535; BADÁN, 2012, p. 80 For example, recently the Hague Principles on Choice of Law in International Commercial Contracts were created.
[39] BADÁN, 2012, 43-44.
[40] BOELE-WOELKI, 2010, P. 396.

When it comes to the application of non-binding instruments, also said non-self-applicable, conflict of law rules play an important role[41] and dispute settlement provisions too. The large majority of states allow only the application of laws (and not *rules of law*) through conflict of law rules.[42] Therefore, the main problem impairing unification/harmonization concerns the recognition of legislative competence of other authorities by states.[43]

The dispute settlement method chosen plays also an important role. When parties choose arbitration, their scope of choice regarding the applicable *law* is wider. The application of soft law instruments can be authorized as it depends on party autonomy and, therefore, parties' choices.[44] If the controversy is submitted to domestic courts instead, state rules will set forth what is allowed or not.[45]-[46] In sum, the main concerns are (i) whether parties should be authorized to widely and freely choose (regardless the dispute settlement method chosen) and (ii) whether domestic judges should be authorized to widely and freely apply harmonizing/unifying instruments which the state is not bound to.

When it comes to filling gaps resulting from the incompleteness of harmonizing/unifying instruments, three perspectives are considered. One is wider and the other two are stricter. The wider regards the subject-matter of instruments. Differently from domestic law, harmonizing/unifying instruments concern a specific subject matter.[47] Therefore, commercial relations involving various subjects must be given coherent treatment considering every aspect concerned. Harmonizing/unifying instruments individually may not be considered sufficient. In this case, a possible solution is using multiple harmonizing/unifying instruments (when possible) or conflict of laws instruments.[48]

The two stricter perspectives are: (1) issues explicitly left out of the scope of the instrument and (2) issues in the scope of the instrument but not explicitly dealt within its text. Therefore, if some subjects cannot be dealt with within a unifying/harmonizing instrument, although related to it, they may be subject to rules that present at least some coherence to it. A text containing conflict of law rules that indicate the best solution is an option. Issues contained in the subject matter of the instrument, but not

[41] BOELE-WOELKI, 2010, p. 396.
[42] On the definition of law, see: MICHAELS, 2009, pp. 14-16; GRIGERA-NAÓN, 2001, p. 25-26.
[43] JAYME, 1995, p. 262-263; BERGER, 1999, p. 30-31. See also the official commentary to article 3 of the Principles on Choice of Law in Commercial Contracts (HPCL). Such instrument allows the parties to choose rules of law as long as they are "generally accepted" and are considered a "neutral and balanced set of the rules". This is so to try to keep parties' power balanced, otherwise one party could use its bargain power and impose its set of rules to the other. Available at <https://www.hcch.net/en/instruments/conventions/fulltext/?cid=135#text> accessed on 08 January 2017
[44] DE LY, 1997, pp. 538-539; BLACKABY, 2009, p. 226; BORN, 2009, p. 2154; BOELE-WOELKI, 2010, p. 396-430.
[45] BOELE-WOELKI, 2010, p. 400.
[46] Brazilian law is a very clear example of such difference.
[47] FERRARI, 2002, p. 698-699.
[48] MATTEUCCI, 1957, pp. 403-405; DE LY, 1997, p. 534.

receiving specific treatment, should be subject to a provision on filling gaps regarding this kind of situation.

Therefore, the main problem concerning the filling of gaps is granting coherence to the treatment of all issues concerned. Harmonic solutions are the aim to be sought and can be reached if harmonizing/unifying instruments present coherent contents and their use is allowed by the state.

- The relation of harmonizing/unifying instruments with mandatory rules and public policy issues

The relation between harmonizing/unifying instruments and mandatory rules and public policy issues is considered a problem because the last two limit party autonomy and act preventing the complete application of instruments in order to grant protection to national legal orders.[49]

Theoretically, when it comes to self-applicable instruments given binding force by the state, mandatory rules and public policy issues do not show if the instrument is applied for such a reason. This is so, because such issues should have been raised when the instrument was incorporated to the domestic legal order. Further, party autonomy is not used but to exclude their application. Therefore, conflicts with mandatory rules and public policy issues arise when a non-self-applicable instrument is applied.[50]

Thus, excluding cases related to the paragraph above, four issues concerning the conflict between mandatory rules and/or public policy issues and harmonizing/unifying instruments are the most relevant ones and will be considered here: (1) harmonizing/unifying instruments (soft law) applied as applicable law; (2) foreign law applied in a state whose national law is based on the same instrument as the foreign law; (3) provisions on mandatory rules and public policy issues contained in harmonizing/unifying instruments; and (4) public policy issues faced during proceedings for recognition and enforcement of sentences and awards.

(1) In case of conflict between soft law instruments and national mandatory rules or public policy issues, the latter ones prevail.[51] If the dispute settlement mechanism is arbitration, as

[49] BERAUDO, 2005, p. 104-105; BOGGIANO, 2000, p. XI.
[50] Issues arise regarding the underlying subject matter to which the instrument is applied, not the instrument itself. The compatibility of the instrument with the domestic legal order was analyzed when the state became bound to it.
[51] DE LY, 1997, p. 537.

arbitrators should deliver an enforceable award, mandatory rules and public policy issues are to be taken into account on a case by case basis in order to avoid problems of enforcement.[52]

(2) In case of application of foreign law, conflicts with mandatory rules and public policy issues may occur.[53] Therefore, the more the domestic law and the foreign law are harmonized, the less mandatory rules and public policy issues will show up.

(3) Provisions regarding mandatory rules and public policy issues and their conflict with applicable instruments are usually drafted to restrict the most the application of exceptions. As restrictive as their application may be, such kind of provision is always present, so exceptions are allowed and states feel encouraged to accept the application of harmonizing/unifying instruments.[54] In sum, states can avail themselves of an escape valve in order to protect their fundamental values and rules; but such protection should only be used in extreme cases.

(4) Countries with different levels of development may have different levels of protection and, consequently, more or less tight enforcement standards.[55] Treaties on recognition and enforcement of judicial sentences are rare.[56] Conversely, when it comes to arbitration, the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitration Awards plays a very important role, facilitating the global circulation of awards. Although its success, public policy issues are still responsible for discrepancies on its application.[57] Further, the rising idea of transnational public policy is also relevant.[58] On the one hand, difficulties arise regarding the definition of its content and the possibility of its application before state courts (as the concept was created in relation to arbitration). On the other, transnational public policy allows applicants to take into consideration largely protected

[52] PIERRE MAYER, 1998, p. 6. Some authors consider arbitrators must always take into account mandatory rules existing in every state where the parties might seek recognition and enforcement of the award because arbitrators have a duty to deliver enforceable awards. On the one hand: KLEINHEISTERKAMP in VOGERNAUER & KLEINHEISTERKAMP, 2009, pp. 133-134; BONELL, 2005, p. 248-249. On the other: MAYER, Pierre, La règle morale dans l'arbitrage international, in Études offertes à Pierre Bellet 379, ¶¶ 26-27 (1991), *apud* FOUCHARD & GAILLARD & GOLDMAN, 1999, pp. 881-882.

[53] MATTEUCCI, 1957, p. 420.

[54] Comments to HPCL (Art.11) https://www.hcch.net/en/instruments/conventions/fulltext/?cid=135#text accessed on 08 January 2017; PERMANENT BUREAU HCCH, 2009, p. 6-8. MAX PLANCK INSTITUTE , 2003, p. 82. It is important to keep in mind the exceptional character of such provisions, otherwise applicators may look for alternative ways to overcome them, leading to forum shopping and avoiding a proper solution to the core of the problem. See MUIR WATT & RADICATI DI BROZOLO, 2004.

[55] BASSO, 2011, p. 292. In the same sense: KLEINHEISTERKAMP in VOGERNAUER & KLEINHEISTERKAMP, 2009, pp. 133-134.

[56] BASSO, 2011, pp. 303-304.

[57] MAYER & SHEPPARD, 2003, Recommendations 1.b and 1.c; MUIR WATT & RADICATI DI BROZOLO, 2004, p. 92; BOISSÉSON, 1999, pp. 597-598.

[58] GALGANO & MARRELLA, 2011, p. 914-934.

interests, fostering harmonization.[59] Regional public policy is also an issue to care, as organizations might prefer considering regional standards instead of national ones.[60]

- *Stricto sensu* application of instruments

In this topic remaining issues on the application of harmonizing/unifying instruments will be considered, once all other impediments have already been dealt with on previous topics.

First, the focus is on unification, precisely on its requirement of application being done similarly enough by applicators so the choice of the applicator is not relevant to the result obtained.[61]

The main problems in this section are related to diverging interpretation of instruments due to language discrepancies[62] and the influence of domestic legal orders to the application of harmonizing/unifying instruments.[63]

Regarding language discrepancies, applying interpretation rules is the best approach. Such rules are usually found in the instrument text or in the 1969 Vienna Convention on the Law of Treaties. In relation to the influence domestic legal orders play, interpretation rules are also relevant, mostly the ones determining harmonizing/unifying instruments must be interpreted autonomously and considering their international character.[64] Further, the more information on such instruments is spread on the domestic level, the more correct their application will be. It is especially true when information is available on the judge´s mother-tongue.[65]

Initiatives on spreading knowledge on unifying/harmonizing instruments are very welcome and considered the best way to increase their adequate application. Databases containing doctrine, case law, and information on harmonizing/unifying instruments are very important too.[66] Courses are a great king of initiative too and should be directed not only to university students, but to graduated applicators that are unfamiliar to the field and anyone else interested in the subject.[67] However, efforts

[59] PIERRE MAYER, 1998, p. 5; For example: UN Global Compact. Disponível em <https://www.unglobalcompact.org/what-isgc/mission/principles> accessed on 08 January 2017.
[60] MAYER & SHEPPARD, 2003, Recommendation 1.c.
[61] Parallel proceedings (including arbitration) are included in the applicator's selection issues.
[62] BONELL, 1990, p. 867; ULRICH MAYER, 1998, pp. 588-589.
[63] MATTEUCCI, 1957, p. 423-424.
[64] ULRICH MAYER, 1998, p. 599; BONELL, 1990, p. 867
[65] BOSCOLO, 2016, section 2.B.iv.
[66] Some of them are available at: http://www.unilex.info/; https://www.uncitral.org/pdf/english/clout/CISG-digest-2012-e.pdf; <http://www.cisg.law.pace.edu/>; http://www.cisgac.com/; <http://www.cisg-brasil.net/> all of them accessed on 08 January 2017; BERGER, 1999, p. 233. (CENTRAL http://www.central-koeln.de/en_ID122 accessed on 08 January 2017) Regarding the CISG Advisory Council, see also: KARTON & DE GERMINY 2009.
[67] FARIA, 2009, pp. 33-34.

should be applied to increase the number of arbitral awards made available to applicators.[68] Considering the more specialized character of arbitration decisions, the publication of arbitral awards content could help spreading the most adequate fashion of applying harmonizing/unifying instruments.[69] Obviously, the confidentiality must be preserved.

Further, the creation of an international court to improve harmonization/unification of international commercial law is not recommended. This is so for two main reasons: there is no guarantee the existence of such a court leads to an adequate application of harmonizing/unifying instruments (as it is possible to verify from domestic courts);[70] and arbitration is a very used dispute settlement mechanism that would have to be banned if such court were to be effective; *i.e.* the creation of an international court would only fulfill its aims if arbitration was no longer used, what is not possible nor recommended.

Some initiatives on regional level were taken, such as in the European Union[71] and in the OHADA.[72] However, obstacles are faced when trying to grant cohesion and efficiency to the system, what shows a global initiative would be subject to difficulties too.[73]

Second, there is the possibility some instruments are used to aid the interpretation of others. We could call it "harmonizing interpretation". Any instrument may be used for this purpose.[74–75] The aim is bringing the content of such instruments into domestic law in order to encourage their use in the national level and bring new ideas to national law, fostering harmonization too.[76] In this sense, knowledge sharing is mandatory, so applicators can identify cases to which these *new* instruments may be used and, therefore, use harmonizing interpretation more frequently.

3. Problems accruing from the relation among Harmonization and Unification instruments themselves

The relation among harmonizing/unifying instruments takes place in mainly two ways: during their creation and during their application/interpretation. Every instrument may work as source of inspiration or model for others. In this sense, it is very important to bear in mind pre-existent

[68] DE LY, 1997, p. 545.
[69] DE LY, 1997, p. 545.
[70] ANDERSEN, 2007, p. 6-7; JAYME, 1995, p. 259.
[71] BIAVATI, 2009, p. 411-426; RIECHENBERG, 2004, p. 321.
[72] LEBOULANGER, 2009, pp. 548-549.
[73] ANDERSEN, 2007, p. 6-7; JAYME, 1995, p. 259.
[74] As seen on KULESZA, 2015, pp. 319-321.
[75] BIN, 1993, p. 475.
[76] BIN, 1993, p. 475-479.

instruments and their content in order to avoid collisions and contradictions and, consequently, grant cohesion to the system. Generally, during application, the level of compatibility of instruments varies according to their binding force and scope of application.

Considering the large quantity of instruments already created and, therefore, made available to applicators, new instruments should be based on deficiencies of the existing system.[77] Besides, the feasibility of the proposed solution should be analyzed.[78] Balance between diversity and harmonization/unification is important, as well as between rigidity and flexibility of rules.[79]

In this sense, formulating agencies should work together to optimize their activities and avoid the drafting of conflicting or overlapping instruments. They should take into account both formal and material characteristics of the instruments.[80]

Regarding global and regional instruments, it is important to define their scope of application very well, so initiatives created by one formulating agency are not lost due to others created in the opposite sense by another one.[81]

The "dialog of sources" [82] is the best approach to grant harmonic solutions when it comes to the application of more than one harmonizing/unifying instrument simultaneously. Hard law and soft law instruments should be used together in order to improve harmonic coexistence of instruments and the achievement of better practical results. The same is true considering the relation between harmonizing/unifying instruments and domestic law.[83]

4. Conclusion

Highlighting problems on harmonization and unification of international commercial law is the first step in order to optimize efforts to facilitate international commercial relations. Next step is taking such issues strongly into account when drafting, interpreting and applying harmonizing/unifying instruments. Formulating agencies play a very important role in this mission, such as States, all other

[77] BOELE-WOELKI, 2010, pp. 336-337.
[78] GOODE, 2003, item I.
[79] BERGER, 1999, p. 206-212; DE LY, 1997, pp. 523-536.
[80] FARIA, 2009, p. 22; BONELL, 1996, p. 245; DE LY, 1997, p. 536.
[81] KRONKE, 2004, p. 476-477; FARIA, 2009, p. 25; GARRO, 2015, pp. 2-5; MAYER, 2008, p. 400-401; BONELL, 1996, p. 233.
[82] JAYME, 1995, p. 259.
[83] BOELE-WOELKI, 2010, p. 344; BASSO, 2011, p. 98; KRONKE, 2004, p. 475; BOSCOLO, 2015.; VISCASILLAS, 1998, item VI.B. In the same sense KRÖLL & MISTELIS & VISCASILLAS 2011, p. 289-290; CISG-AC Opinion n.13, p. 21-22; AGRÒ, 2011, p. 733; BONELL, 2002, p. 348-349; ULRICH MAYER, 1998, p. 599; BADÁN, 2012, p. 50; KRONKE, 2014, p. 38.

applicators, and academics. Of course this is not an easy task as there are many interests and difficulties involved.

In this sense, the word that should guide works in this field for the next years is balance: balance between divergence and equality; balance between existing instruments and societies' new needs; balance between rigidity and flexibility; and last but not least, balance between party autonomy and State power. Bearing this in mind, activities should be focused on initiatives aiming at solving deficiencies of the existing system.

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