Worldwide Harmonisation of Private Law and Regional Economic Integration – General Report

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I. – INTRODUCTION

In 1997, the Treaty of Amsterdam conferred upon the European Community the power to harmonise private international law. It did not take long before Professor STRUYCKEN, the chairman of the Dutch State Committee on private international law which operates as a steering body in the framework of the Hague Conference on Private International Law, identified this new competence on the part of the Community as a threat to the Hague Conference, warning of "the shadows of Brussels over The Hague".[1] A more recent statement by the Secretary-General of UNIDROIT, Herbert KRONKE, appears less concerned and more detached. He pointed out that we know little about the relationship between the universally harmonised modernisation of private law and the regional approximation of laws.[2] Both views, however, signal the growing importance of conflicts between regional and universal harmonisation activities. Since they result from rather incidental and heterogeneous observations of the relationship between universal and regional harmonisation, it is appropriate to take a closer look at the historical evolution of that relationship and the forms it takes (*infra*, II). Some practical examples will provide illustrations of such conflicts (*infra*, III), while the subsequent section will seek to analyse some of the problems arising out of these at the law-making stage (*infra*, IV). Some comments related to such conflicts at the stage of adjudication will conclude this overview (*infra*, V).

II. – THE EVOLUTION OF UNIVERSALISM AND REGIONALISM

The links between States at the regional level are sometimes, but not always, closer than those at the universal level. As a consequence, there has been long-standing debate from the very beginning of the unification of private law in the second half of

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1 A.V.M. STRUYCKEN, "Het verdrag van Amsterdam en de Haagse Conferentie voor internationaal privaatrecht – Brusselse schaduwen over Den Haag", *Weekblad voor privaatrecht, notariaat en registratie*, 2000, 735.

2 Herbert KRONKE, "Ziele-Methoden, Kosten-Nutzen: Perspektiven der Privatrechtsharmonisierung nach 75 Jahren UNIDROIT", *JuristenZeitung*, 2001, 1149, 1155.

the 19th century as to whether certain matters should be dealt with at the global or rather at the regional level. In this historical overview of the resulting legal development, three phases can be discerned: the first may be referred to as regionalism in disguise, the second as the rise of universalism, and the third as the dawn of inter-regionalism.

1. The first phase : regionalism in disguise

At first glance, the co-existence of regional and universal unification of laws appears to have a long tradition going back to the second half of the 19th century. In fact, the first countries to embark upon the road towards unification of private law and in particular of private international law were some Latin American States which, in 1878, concluded the Treaty of Lima. This contained a fairly comprehensive codification of international law in the fields of private law, civil procedure and criminal law. Some years later, in 1889, the Congress of Montevideo approved no fewer than eight conventions dealing *inter alia* with private international law and the law of civil procedure, with copyright, patent and trademark law. While the treaties in the conflict of laws arena precede the adoption of similar conventions at The Hague some years later, the instruments dealing with intellectual and industrial property rather echo the previous European Conventions of Paris (1883) and Berne (1886).[3]

What appears more relevant in our context is the refusal of several Latin American States, in those years, to participate in congresses to be held in Europe on the universal unification of laws. This South American reserve sprang from a concern that such a rapprochement would imperil the sovereignty of individual States as well as the principles of national legislation.[4] This attitude had a strong impact on institutions set up to promote the unification of private law and based in Europe. Despite their universal vocation and aspirations, the activities of bodies such as the Hague Conference on Private International Law or the International Institute for the Unification of Private Law (UNIDROIT) were confined to Europe for a long time. Their bid for universality[5] could not be satisfied until the USA and other States of the Western hemisphere acceded to them in the wake of the World War II.[6] Until then, other parts of the world made no contribution either.[7] Summing up, it seems fair to say that for the most part, the 125-year history of the unification of private law was characterised by a two-track regional

3 For more details see Jürgen SAMTLEBEN, *Internationales Privatrecht in Lateinamerika*, Mohr (Tübingen), 1979, 11, 15 s.

4 See SAMTLEBEN, *ibid.* at 13.

5 Reflected by the arrangement in, and characterisation by Jan KROPHOLLER, *Internationales Einheitsrecht*, Mohr (Tübingen), 1975, 43, 57, 59.

6 The USA acceded to the Hague Conference in 1964, Argentina in 1972, Brazil in 1972, etc. UNIDROIT, too, was joined by the USA in 1964, *cf.* KROPHOLLER, *ibid.* at 57.

7 The first non-European State to participate in a Hague Conference was Japan, in 1904; when the Hague Conference was reorganised in 1951, Japan was still the only extra-European country amongst the founding States, see Hans ARNOLD, "Japan und die Haager Konferenz für IPR", *JuristenZeitung*, 1971, 19-21; and see the list of the founding States in *Bundesgesetzblatt* (BGBl.) 1959 II, 981.

harmonisation independent one from the other – one in Europe and one in the Americas – rather than by a conflict between an allegedly universal but Europe-based unification and regional efforts in the Western hemisphere.

These observations may appear oversimplified, but they are essentially confirmed by a closer look at the pre-war ratifications of, and accessions to, some early substantive law conventions. In 1940, the Paris Union Convention on the protection of industrial property of 1883 was in force for 32 States, 21 of which European.[8] The 1886 Revised Berne Copyright Convention had been ratified and acceded to by 26 States, and only seven of them were extra-European countries.[9] The 1929 Warsaw Convention on international air transport had been implemented by 27 countries, 21 of which European and only six non-European States.[10] The only exception are the 1924 Hague Rules on bills of lading; in 1940, no fewer than 30 out of the 48 Contracting Parties were extra-European countries. However, this exception does not prove the existence of a world-wide unification of private law at the time, since the vast majority of the 30 extra-European States were colonies and other dependent territories to which Britain and France had extended the operation of the Convention.[11] These observations relate to areas of the law which have an inherent global dimension and not to matters such as road transport which, by the nature of things, do not require unification beyond continental confines.[12] The reported data also support the view that throughout the first phase, the unification of private law was essentially regional in character.

2. The second phase : the rise of universalism

Things changed after World II, and in particular from the 1970s onwards. The reasons for the rise of universalism were manifold: the loss of influence of the European powers at the universal level, the corresponding increase of power of other regions, the quest of dozens of newly independent States intent on building their own legal systems for equal participation in diplomatic exchange, the growing gap between East and West and the consequential rise in lobbying activities of both sides in international organisations, the improvement of international transport and communication networks which allowed for unprecedented growth in international exchange and trade from which a need for universal legal co-ordination and harmonisation ensued, and the like.

8 See *Reichsgesetzblatt* (RGBl.) 1903, 147; see < http://www.wipo.int/treaties/ip/paris/index.html > for the status.

9 See *RGBl*. 1887, 493; see < http://www.wipo.int/treaties/ip/berne/index.html > for the status.

10 See *RGBl*. 1933 II, 1039; see < http://www.icao.int/cgi/goto_leb.pl?icao/en/leb/treaty.htm > for the status.

11 See *RGBl*. 1939 II, 1048; see < http://www.comitemaritime.org/ratific/brus/bru05.html > for the status.

12 For road transport, two separate Conventions exist in the Eastern and Western hemispheres, *i.e.* the *Convention on Contracts for the International Carriage of Goods by Road* (CMR), done at Geneva on 19 May 1956, *BGBl.* 1961 II, 1119, which is in force for virtually all European and some neighbouring States, see < http://untreaty.un.org > , and the *Inter-American Convention on Contracts for the International Carriage of Goods by Road*, done at Montevideo on 15 July 1989, *RabelsZ*, 1992, 56, 170-175, not yet in force.

There are several pointers to the rise of universalism in the domain of private law: the installation, in the framework of the United Nations system, of a number of institutions with a global purview such as the International Maritime Organisation, the International Civil Aviation Organisation, the United Nations Conference on Trade and Development etc.; the creation of the United Nations Commission on International Trade Law (UNCITRAL) as a separate and non-political body attached to the General Assembly and devoted to the improvement of international business law; the accession of the United States and various other American countries as well as a number of African and Asian States to the existing institutions, in particular to the Hague Conference on Private International Law and to UNIDROIT. Both these institutions have attempted to leave behind their erstwhile Eurocentric orientation – and have succeeded to some extent.[13]

As to the international instruments, two observations can be made with regard to this second phase of uniform private law: first, the number of ratifications of and accessions to several of the pre-existing international conventions has greatly increased, thereby imparting to these instruments a truly universal character. Thus, the number of participating States as regards the above-mentioned Conventions on intellectual property, maritime and airborne transport is well over a hundred.[14] Second, some new conventions have been concluded which can boast world-wide approval. In particular, the Convention on the International Sale of Goods (CISG), which is the first example of successful unification of a core component of substantive private law.[15]

At the same time, the rise of universalism has drawn attention to the potential for conflict that may occur between universal, regional, and bilateral conventions. These issues have naturally not only formed the subject of thorough scholarly analysis,[16] but they have moreover produced a number of clauses which have become familiar in more recent treaties. These clauses seek to reconcile conflicting conventions by giving priority to the *lex posterior*, the *lex prior*, the *lex specialis* or the *lex favorabilior*. In the absence of such clauses and sometimes even despite their incorporation, the solution is far from clear. It should be pointed out that these problems are not limited to the conflict between universal and regional conventions; they will therefore not be contemplated in depth in this context.

13 As to the Hague Conference, see Jürgen BASEDOW, "Was wird aus der Haager Konferenz für Internationales Privatrecht?", in: Thomas Rauscher/Heinz-Peter Mansel (eds.), *Festschrift für Werner Lorenz zum 80. Geburtstag*, Sellier (München), 2001, 463, 467, 475 s.

14 For the status of these Conventions, see *supra* notes 8-11.

15 *United Nations Convention on Contracts for the International Sale of Goods* (CISG), done at Vienna on 11 April 1980, *BGBl*. 1989 II, 586; for the present status (61 participating States) see < http://www.untreaty.un.org > .

16 Ferenc MAJOROS, *Les conventions internationales en matière de droit privé*, vols. I, II, Pedone (Paris), 1976, 1980; *id.*, "Konflikte zwischen Staatsverträgen auf dem Gebiet des Privatrechts", *RabelsZ*, 1982, 46, 84 *seq.*; Paul VOLKEN, *Konventionskonflikte im internationalen Privatrecht*, Schulthess (Zürich), 1977.

3. The third phase : the dawn of inter-regionalism

A third phase of international uniform law has been sparked by another change in the relevant players in the diplomatic arena. In the recent past, regional organisations have made their appearance that have availed themselves of legislative procedures to accelerate the unification process in their respective parts of the world. Thus, the institutional framework of MERCOSUR in South America certainly favours the adoption of uniform law instruments,[17] and this is even more true of the Organisation for the Harmonisation of Business Law in Africa (OHADA), whose Council of Ministers is empowered unanimously to adopt uniform law instruments which take effect in all Member States, apparently without any further ratification procedure at the national level.[18] While these institutional innovations foster the production of regional law, they do not generally impair national sovereignty as the ultimate source of legislation and they do not affect the right of Member States to negotiate and conclude international conventions. Conflicts between the regional instruments and the existing universal treaties are therefore not all that different compared to traditional conflicts of conventions.

The case of the European Community is quite different. A first glance at its extensive private law legislation [19] might suggest that the European Community is just another and more efficient device to bring about the unification or harmonisation of laws. Indeed, there is of course ample evidence for the proposition that the Community has succeeded in implementing harmonisation in areas where all previous attempts to put into effect international treaties had failed. What is more important for the universal unification of laws, however, is that the European Community, over and beyond these legislative mechanisms, is endowed with legal personality (Article 281 EC), and that certain provisions of the Treaty, such as Article 310, empower it to conclude international agreements with one or more States or international organisations. The European Court of Justice has even enlarged the treaty-making powers of the Community by the recognition of so-called implied powers. It is now firmly established that the Community is competent to conclude international agreements even in the absence of an express affirmation by the Treaty if it is vested with internal legislative competence in a given area.[20] The details of those powers are still in dispute, but it is common ground that there is an external authority of the Community insofar as it has

17 On the institutional framework of MERCOSUR, see Ulrich WEHNER, *Der Mercosur*, Nomos (Baden-Baden), 1999. The essential treaties and other instruments are published and translated into German in: MAX-PLANCK-INSTITUT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT, *Rechtsquellen des Mercosur,* vols. I, II, Nomos (Baden-Baden) 2000.

18 See Joseph ISSA-SAYEGH, "Quelques aspects techniques de l'intégration juridique: l'exemple des actes uniformes de l'OHADA": *Unif. L. Rev. / Rev. dr. unif.*, 1999, 5 *seq.*; for the international instruments adopted by OHADA and the underlying treaty, see < http://www.ohada.com/textes > .

19 See the collection of instruments in: Jürgen Basedow (ed.) *European Private Law – Sources,* vols. 1-3 (1999, 2000 and 2002).

20 European Court of Justice, Judgment of 31 March 1971, case 22/70 (*AETR-EART*), [1971] *European Court Reports* 263 para. 15/19.

made use of its internal legislative powers and insofar as a treaty concluded with third States may affect the operation of existing Community legislation. Depending on the particulars, such external competence may even be exclusive of that of individual Member States.[21]

It follows that the European Community is in fact a new player in the diplomatic arena where treaties, and in particular universal treaties on the unification of private law, are negotiated. The growing body of internal European Community legislation in the field of private law is reflected by the simultaneous growth of its external competence. In the light of the great numerical significance of European countries for the unification of private law in the past, their obligations under Community law – which may go as far as to refrain from participating in international negotiations – indicate a further and decisive step into a new era of unification of private law. Organisations from other regions of the world may perhaps follow in the future, and this would change the entire institutional framework of international negotiations into inter-regional negotiations. For the time being, however, the European Community is the only organisation that has the power to intervene in international negotiations and which must therefore be taken into account by States and international organisations interested in the unification of private law.

The preceding observations can be summarised as follows: the need for harmonisation of private law has always been felt most clearly within the regions where transboundary social and commercial exchange is particularly intense. World-wide unification has been a kind of free-rider of that need for many years. After World War II, demand for universal harmonisation has grown considerably, however, and now requires more and more initiatives which have an inherently global dimension. The economic and technical changes which have given rise to globalisation [22] guarantee the continuity of that development. However, universal harmonisation is slow and has to cope with many divergent interests. Therefore, the unaltered and even increased demand for regional harmonisation will more and more frequently be satisfied by efficient legislative procedures, a kind of fast-track harmonisation at the regional level. As a consequence, this will generate inter-regional conflicts sooner or later which can be accommodated by inter-regional harmonisation. The mandate of the European Community to negotiate treaties at the universal level is a first step in that direction.

III. – ILLUSTRATIONS

What has been explored in theory above, can be illustrated by the following examples of conflicting instruments. Apparently, three types of conflict can be distinguished: traditional conflicts of (inter-regional and universal) Conventions; conflicts between

21 For a fuller discussion, see Trevor HARTLEY, *The Foundations of European Community Law*, 4th ed., Oxford University Press (Oxford), 1998, 157 *seq*.

22 See Jürgen BASEDOW, "The effects of globalization on private international law", in: Jürgen BASEDOW / Toshiyuki KONO, *Legal Aspects of Globalization*, Kluwer (The Hague), 2000, 1, 2-4.

regional fast-track legislation and international Conventions; and conflicts between supranational regional instruments and international Conventions. A closer look will reveal that conflicts of the second kind will be equivalent either to those of the first or of the third type.

1. Traditional conflicts of Conventions

A traditional conflict of Conventions is highlighted by the co-existence, in the field of arbitration, of the universal *United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards* of 1958 [23] and two inter-American Conventions, one on *International Commercial Arbitration* of 1975 (Panama Convention),[24] the other on the *Extraterritorial Validity of Foreign Judgements and Arbitral Awards* of 1979 (Montevideo Convention).[25] While conflicts between the Panama and U.N. Conventions do not appear to be very numerous, they are generally decided on the basis that the regional Convention is given priority as the *lex specialis*.[26]

Matters grow more complicated when it comes to conflicts between the 1979 Montevideo Convention and the U.N. Convention. Some authors advocate the application of the U.N. Convention as the *lex posterior* in countries such as Argentina, Paraguay and Uruguay which ratified that Convention after the Montevideo Convention was implemented.[27] But this order of events may be accidental and the corresponding interpretation of the *lex posterior* principle depending on the time of ratification or accession is rather artificial. With regard to Conventions dealing with international civil litigation or arbitration, a substantive criterion should be preferred, *i.e.* the purpose of such Conventions to facilitate co-ordination between different legal systems. Hence the principle of maximum efficacy (*lex favorabilior*) should prevail, as is explicitly ordered by the Bolivian legislation implementing the 1979 Montevideo Convention.[28] Whatever the final outcome, the problems encountered in this context are of a very traditional nature. They flow from the fact that a State has committed itself towards other States in two or more international treaties with potentially overlapping scopes of application. This is the type of conflict which is characteristic of the second phase of the unification of private law, *i.e.* the rise of universalism.

23 Done at New York City on 10 June 1958, *United Nations Treaty Series* (UNTS) 330, 3 = *BGBl.* 1961 II, 122.

24 Done at Panama City on 30 January 1975, Organisation of America States (OAS), *Treaty Series* No. 42; for the status see < http://www.oas.org/juridico/english/sigs/b-35.html > .

25 Done at Montevideo on 8 May 1979, OAS, *Treaty Series* no. 51; for the status see < http://www.oas.org/juridico/english/sigs/b-41.html > .

26 Jan KLEINHEISTERKAMP, "Conflict of Treaties on International Arbitration in the Southern Cone", in: Jan Kleinheisterkamp / Gonzalo Lorenzo Idiarte (eds.), *Avances del derecho internacional privado – Liber Amicorum Jürgen Samtleben*, Fundación de cultura universitaria (Montevideo), 2002, 667, 678; Albert Jan VAN DEN BERG, *The New York Arbitration Convention of 1958*, Kluwer (Deventer), 1981, 103.

27 KLEINHEISTERKAMP, *ibid.* at 686.

28 *Idem* at 687.

2. Regional fast-track instruments and international Conventions

(a) *MERCOSUR* – In 1991, Argentina, Brazil, Paraguay and Uruguay concluded the Treaty of Asunción on the *Common Market of the South* (MERCOSUR) [29]. Inspired by the model of the European Union, the four States created an institutional framework aimed at accelerating integration and economic growth. This treaty has triggered a great many initiatives for the unification of laws in various areas, among them arbitration. One of the various measures adopted by the 1992 Protocol of Las Leñas was MERCOSUR Council Decision No. 5/92 containing a Protocol on co-operation and judicial assistance in civil, commercial, labour, and administrative matters which also deals with the recognition of arbitral awards.[30] The relationship between this instrument and the pre-existing international Conventions, both at regional and universal level, naturally gives rise to further questions [31] which may appear novel, since the MERCOSUR instrument is designated as a "decision", not as another Convention. However, the MERCOSUR terminology, which contains echoes of the supra-national legislation of the European Community, is misleading. First, acts of secondary MERCOSUR legislation such as decisions will usually have to be implemented in national law before they take effect.[32] Second and as a matter of fact, Decision 5/92 is a Protocol which even needs to be ratified by Member States and therefore does not differ from a traditional Convention.[33] It follows that the conflicts between such acts and traditional international Conventions do not pose any new problems either.

(b) *OHADA Uniform Acts* – This appears to be different in the case of the uniform acts adopted by the *Organisation for the Harmonisation of Business Law in Africa* (OHADA). One of the achievements of that organisation is a *Uniform Act on General Commercial Law* which contains a Book V on commercial sales. Its rules sometimes differ from the corresponding provisions of CISG. Thus, in contrast to Article 50 CISG, the buyer of defective goods is not entitled to reduce the price under Articles 249 *seq*. of the Uniform Act, while under Article 254 a claim for avoidance of the contract may only be filed in court, not implemented by a private declaration by the buyer as is possible under Article 49 CISG. Finally, the Uniform Act replaces the national sales laws and cannot be avoided by appropriate contract clauses, while Article 6 CISG explicitly allows such contractual exclusion of CISG.[34]

29 *Tratado para la Constitución de un Mercado Común*, *hecho en la Ciudad de Asunción el 26 Marzo 1991*, published and translated into German in MAX-PLANCK-INSTITUT, *supra* note 17, at 13.

30 *Protocolo de Cooperación y Asistencia Jurisdiccional en Materia Civil, Comercial, Laboral y Administrativa*, *hecho en el Valle de Las Leñas el 27 junio 1992*, published and translated into German in MAX-PLANCK-INSTITUT, *supra* note 17, at 213.

31 *Cf.* KLEINHEISTERKAMP, *supra* note 26, at 688 *seq*.

32 See Jürgen SAMTLEBEN, "Der MERCOSUR als Rechtssystem", in: Jürgen Basedow / Jürgen Samtleben (eds.), *Wirtschaftsrecht des MERCOSUR – Horizont 2000*, Nomos (Baden-Baden), 2001, 51, 69 *seq*.

33 See Arts. 33 *seq*. of Decision 5/92, *supra* note 30.

34 Jean René GOMEZ, "Un nouveau droit de la vente commerciale en Afrique", *Recueil Penant*, 1998, 145, 147.

Such conflicts in substance raise the question of the scope of application of the conflicting instruments. Articles 202 to 205 only deal with the subject matter of the Book on sales, which is by and large the same as that of CISG. The geographical scope of application of the entire Uniform Act is conditional upon whether the merchant – be it a natural or legal person – is established in the territory of a Contracting State of OHADA (see Article 1). The significance of this rule for the application of the provisions on commercial contracts is not quite clear, but it appears to follow that a seller established in the Republic of Guinea, which is a Contracting State to both CISG and OHADA,[35] is subject to both, at least in its transactions with other Francophone African countries. CISG will be applicable by virtue of its Article 1(1)(b) as the law of the seller, and the OHADA Uniform Act on general commercial law will govern those transactions under its Article 1 and in view of its purpose to unify the law of sales throughout the OHADA member States. This conflict could be accommodated by Article 90 CISG in favour of the Uniform Act which can be viewed as an "agreement" for the purposes of that provision.

But what about a transaction between a seller from Guinea and a buyer established outside the OHADA region? Here too, both instruments might be applicable. The issue of such conflicts has not been tackled expressly. A solution might be inferred from Article 10 of the basic OHADA Treaty which confers a direct and overriding effect upon the uniform acts in respect of previous or subsequent enactments of *internal laws.* But it is not clear whether this provision also purports to deal with conflicts between uniform acts and other international commitments of single Contracting States. If it does not, the conflict outlined above cannot be said to differ very much from a traditional conflict of Conventions.

Just as in the traditional cases, the acting entities are Nation States, and the main difference with the conflicts discussed previously consists in the fact that the OHADA uniform acts are adopted using a kind of fast-track procedure, *i.e.* by unanimous decision of a Council of Ministers, and take effect without any ratification procedures being required at the national level. It appears doubtful whether this really comes down to a transfer of sovereignty;[36] it might also be viewed as an authorisation by national Governments to legislate without any control by national institutions, and in particular, national parliaments. In the latter case the uniform acts could hardly be said to differ very much from international agreements. Therefore, the solution of a conflict between the OHADA Uniform Act and CISG will probably have to make use of the same general principles which have been outlined above in respect of the traditional conflicts of Conventions, until the Common Court of Justice and Arbitration of OHADA hands down a decision on the actual significance of Article 10 of the OHADA Treaty. A finding of that court that the uniform acts, under Article 10 of the basic OHADA Treaty, take priority over international Conventions to which the single OHADA Member States are

35 For the status of the OHADA Uniform Acts, see the OHADA homepage, *supra* note 18; for the status of CISG, see *supra* note 15.

36 In this sense, ISSA-SAYEGH, *supra* note 18, *Unif. L. Rev. / Rev. dr. unif.,* 1999, 15 at para. 33.

Party would, however, change the situation. It would then come close to what is already the state of the law in Europe.

3. Supranational regional instruments and international Conventions

(a) *European Community law and uniform law Conventions* – A new quality of relations between regional and universal instruments is indicated by some recent legislation of the European Community. Such legislation may adopt different forms, and it may be either in line with or opposed to international Conventions. In some cases, as for example during the preparation of the consumer sales directive,[37] the European Commission took an international Convention like CISG as a blueprint for its own act.[38] The interest in international harmony reaching beyond Community borders may be strong enough to cause express reference being made in the Community Act to the international Convention and to produce almost complete identity of texts. Such is the case of the Community Directive relating to the transport of dangerous goods by road [39] which practically extends the scope of application of the previous European Convention on the matter [40] to intra-State transport. Alternatively, the Community may also, by adopting appropriate legislation, work towards the ratification of international Conventions by the single Member States; this has happened with regard to some instruments related to shipping.[41] While, in the previous cases, the Community rather supports and affirms the policies expressed in international Conventions, problems may arise when those international instruments come into conflict with Community law or policy. Take the example of rules on jurisdiction and the recognition and enforcement of judgements which are contained in so many private law Conventions. While those rules appear to be necessary supplements of international liability regimes, there will always be an overlap with the detailed Community regulation on that matter.[42]

37 *Directive (1999/44/EC) of the European Parliament and of the Council of 25.5.1999 on Certain Aspects of the Sale of Consumer Goods and Associated Guarantees*, *Official Journal of the European Communities (OJEC)*, 1999 L 171/12.

38 *Cf.* Dirk STAUDENMEYER, "Die EG-Richtlinie über den Verbrauchsgüterkauf", *Neue Juristische Wochenschrift*, 1999, 2393 s., observes a "basic tendency of the Directive ... to maintain conformity with CISG as much as possible." The author took part in the preparation of the directive.

39 *Council Directive 94/55/EC of 21.11.1994 on the Approximation of the Laws of the Member States with regard to the Transport of Dangerous Goods by Road*, *OJEC*, 1994 L 319/7 (see recital 2 in particular).

40 *European Agreement Concerning the International Carriage of Dangerous Goods by Road* (ADR), done at Geneva on 30.9.1957, *BGBl*. 1969 II, 1489.

41 Art. 3 of *Council Decision (2002/762/EC) of 19.9.2002 authorising the Member States, in the interest of the Community, to sign, ratify or accede to the International Convention on Civil Liability for Bunker Oil Pollution Damage*, 2001 (The Bunkers Convention), *OJEC* 2002 L 256/7; *Council Recommendation of 26.6.1978 on the Ratification of Conventions on Safety in Shipping*, *OJEC*, 1978 L 194/17; *cf.* Rüdiger WOLFRUM, "Die Europäische Gemeinschaft als Partei seerechtlicher Verträge", *Archiv des Völkerrechts* 32, 1994, 317, 325 for further references.

42 *Council Regulation 44/2001/EC of 22.12.2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters*, *OJEC*, 2001 L 12/1.

In view of the precedence of Community law over national law, including the international commitments of Member States,[43] conflicts arising from such overlap have to be cleared lest the international instrument lose its practical effect. So far, two solutions have been explored: the Community may either leave the whole negotiation process to the Member States and confine itself to the adoption of legislation that sets forth the conditions for an eventual ratification of the international Convention by the Member States "in the interest of the European Community"; this option was chosen with regard to the 1996 *Hague Custody Convention*[44] and the *International Convention on Civil Liability for Bunker Oil Pollution Damage* of 2001.[45] Alternatively, the Community may also join the negotiation process and try to bring the content of the international instrument in line with its own law and policy before eventually becoming a Contracting Party to the new Convention; this way has been paved by appropriate ratification and accession clauses in the 1996 *World Copyright Convention*,[46] in the 1999 *Montreal Convention on International Air Transport*[47] and in the recent *UNIDROIT Convention on International Interests in Mobile Equipment* signed at Cape Town in 2001.[48] It is easy to see that the first of these options is a risky endeavour for the international community. It will be negotiating a treaty with single Member States of the European Community, possibly acting *ultra vires* although this will be unclear at the time of negotiation. Thus, the treaty might contain commitments which the EC Member States will not be allowed to honour due to some subsequent EC legislation. It follows that the international community should have a strong interest in the implementation of the second option, *i.e.* participation by the Community as such in international negotiations lest commitments accepted at diplomatic Conferences be qualified by internal legislation at a later stage.

(b) *The example of the air transport liability regime* – The most conspicuous example of such qualification is the adoption of *EC Regulation No. 2027/97 on air carrier liability in the event of accidents*.[49] It is well-known that the liability limits established by the 1929 Warsaw Convention[50] have been long outdated. Except for

43 As can be inferred from Art. 307 EC; generally on the supremacy of Community law, see HARTLEY, *supra* note 21 at 218 *seq*. and at 178-180 on the conflict between international agreements and EC law.

44 See the Proposal for a Council Decision authorising the Member States to sign in the interest of the European Community the *Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children* (the 1996 Hague Convention), COM (2001) 680 final of 20.11.2001.

45 See Art. 2 of the Council Decision 2002/762/EC, *supra* note 41.

46 See Arts. 17(2) and (3) of the World Intellectual Property Organization Treaty, done at Geneva on 20 December 1996, *OJEC*, 2000 L 89/8.

47 Art. 53(2) of the *Convention for the Unification of Certain Rules for International Carriage by Air*, done at Montreal on 28 May 1999, *OJEC*, 2001 L 194/38.

48 Art. 48 of the *Convention on International Interests in Mobile Equipment*, done at Cape Town on 16 November 2001 – text at < http://unidroit.org/english/conventions/mobile-equipment.pdf > .

49 *Council Regulation 2027/97/EC of 9.10.1997 on Air Carrier Liability in the event of Accidents*, *OJEC*, 1997 L 285/1.

50 See *supra* note 10.

the 1955 Hague Protocol,[51] attempts to raise those limits to amounts which would appear acceptable by today's economic and social standards have failed again and again. Under these circumstances, the Community adopted Regulation 2027/97 to implement a provisional liability regime which was to remain in force until a modernised universal regime took effect. The Regulation basically deprives Community air carriers of the privilege of limiting their liability, but allows them to do so to an amount of 100 000 SDR if they can successfully prove to have taken all necessary measures to avoid the damage or that it was impossible for them to take such measures, *i.e.* in the case of no-fault liability.

The International Air Transport Association (IATA) challenged, in the English High Court, the validity of an Order which the British Government had issued to ensure implementation of Regulation 2027/97. Plaintiff alleged Regulation 2027/97 to be invalid as it required Member States to act in breach of their obligations under the Warsaw Convention. The Court held that the Warsaw Convention did not permit Contracting States to impose upon their own air carriers a liability exceeding that established by the Convention and that Regulation 2027/97 was therefore in conflict with the Warsaw Convention.[52] In an elaborate opinion with ample references to the case law of the European Court of Justice the judge however upheld the Regulation. His principal argument was derived from Article 307(2) EC (formerly Article 234(2)) which provides that, to the extent that pre-existing international agreements are not compatible with the EC Treaty, "the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established." As pointed out by the learned judge, this provision in fact presupposes the validity of EC legislation despite its being in conflict with international commitments of the Member States.[53]

This opinion has been questioned by commentators,[54] but it appears to be in line with the constant practice of the European Court of Justice. Its effect is the affirmation of the supremacy of Community law over Conventions on uniform private law even if the latter were concluded prior to the EC Treaty. This may be deplored, but lacking an authoritative universal dispute settlement concerning the interpretation of uniform law Conventions, it has to be accepted as a fact by the international community. Instead of lamenting the decline of uniform law, we should rather think about appropriate measures which might help to preserve or re-establish the international legal order.

51 Hague Protocol of 28 September 1955, *BGBl*. 1958 II, 293.

52 *R. v. Secretary of State for the Environment, Transport and the Regions, ex parte IATA* no. 2, [1999] 2 *Common Market Law Reports*, 1385, 1395 s. (Q.B.D.).

53 *Idem* at 1399-1401.

54 See Lorne S. CLARK, "European Council Regulation (EC) No. 2027/97: Will the Warsaw Convention Bite Back?", *Air & Space Law* 26, 2001, 137 *seq*.; Wolf MÜLLER-ROSTIN, "Auf dem Wege zu einem neuen Warschauer Abkommen?", *Transportrecht*, 1998, 229, 232 *seq*.; Michel FOLLIOT, "La modernisation du système varsovien de responsabilité du transporteur", *Revue française de droit aérien*, 1999, 409, 416 s.

IV. – SOME CONSEQUENCES FOR THE INTERNATIONAL LAW-MAKING PROCESS

The appearance, in the diplomatic arena, of new actors which, while not States, may have a strong impact on, and even the final say in certain matters raises several problems. These are connected to the need for integration of the new actors into the negotiation process and call for a response on the part of the international community.

The use of Agreements as an instrument of co-ordination depends on the powers of the parties to implement what they promise. As applied to international relations this means that an international treaty, *i.e.* an agreement concluded *inter nationes*, relies on the assumption that the sovereign legislative power is vested in the Nation State. It follows that Nations which transfer part of their legislative powers to supranational organisations will become less attractive to the international community as potential treaty-making partners. Conversely, the international organisations to which these powers are transferred will gain importance for third States. Sooner or later, the international community will insist on those organisations being integrated into the international law-making process. This implies two changes in the present structure of the international system: first, supranational organisations such as the European Community would have to be integrated into the existing international law-making bodies, and second, they would have to be admitted as Parties to international Conventions.

1. The European Community as a member of uniform law organisations

At present, many institutions in the field of uniform law are in the habit of inviting representatives of other regional and universal institutions as observers to meetings of working groups and diplomatic Conferences in the run-up to the adoption of international instruments. This allows for a flow of information between the participating international organisations and helps to co-ordinate their work. However, the role of an observer is essentially passive. Although it may be handled in a flexible way, observers have no right to propose motions or to participate in a vote on the adoption of a text. This role is not adequate for participants such as the European Community in fields where they can avail themselves of their own legislative powers.

The practical consequence of its position as an observer is that the Community uses its prerogatives in order to co-ordinate, behind the curtain, the views and positions of its Member States. The representatives of third States will be surprised by the unexpected harmony of views professed during the negotiations, and they will not be particularly amused to find that these views cannot be altered by an open discussion without further co-ordination back-stage.[55] Open participation of the European Community as a full member in such uniform law organisations and

55 *Cf.* the very low-key account of the negotiations on the world-wide recognition Convention at The Hague by Arthur T. VON MEHREN, "The Hague Jurisdiction and Enforcement Convention Project Faces an Impasse – A Diagnosis and Guidelines for a Cure", *Praxis des internationalen Privat- und Verfahrensrechts* (*IPRax*), 2000, 465.

respective negotiations would reflect the transfer of internal legislative competence and would re-establish the value of such negotiations.

The implementation of this proposal will, however, run into legal difficulties since the statutes of most uniform law organisations do not admit members other than States. This applies, for example, to the *Hague Conference on Private International Law* [56] or to various specialised agencies of the United Nations such as the *International Maritime Organisation* [57] or the *International Civil Aviation Organisation*.[58] The statute of UNIDROIT appears to be more flexible in referring to the participation and accession of "governments" instead of "States".[59] Expressions like "corporate governance" or "governing council" indicate that the term government is not necessarily connected to sovereign States, but may include the governing bodies of regional economic integration organisations such as the European Community. On the other hand, the purpose of UNIDROIT is *inter alia* "to prepare gradually for the adoption by the various States of uniform rules of law", and it is not clear whether this would also refer to the preparation of instruments which are to be adopted by organisations such as the European Community. An overhaul of the statutes of international organisations in the light of regional economic integration should therefore be undertaken in time.

Such overhaul would be all the more appropriate as the admission of international organisations as members of other international organisations would affect their basic structure. So far, the rules on membership and the various procedures are governed by the basic principle of equal sovereignty of States: by and large, all members have the same rights and obligations. This would obviously change if the European Community were to become a member of UNIDROIT or the Hague Conference since the EC Member States would indirectly gain additional weight by virtue of that accession. The various rules on representation in administrative bodies of the respective organisations, on financial contributions, on voting etc. would have to be adjusted. On the other hand, the admission of regional organisations to universal organisations would allow the latter to adopt a new role in global law-making: they could become the forum for an exchange of views between different regional organisations and co-ordinate the law-making process at the regional level. If our prediction that international relations will be supplemented and partly replaced by inter-regional relations in the future is correct, then co-ordination between the different regional organisations will be urgently required.

56 *Statut de la Conférence de La Haye de droit international privé*, fait à La Haye le 32 octobre 1951, *UNTS* 220, at 121 = *BGBl*. 1959 II, 981 (see Art. 2).

57 *Convention on the International Maritime Organisation*, done on 6 March 1948; as amended, *UNTS* 289, at 3; 607, at 276; 649, at 334 = *BGBl*. 1986 II, 423 (see Arts. 4 *seq.*).

58 See Arts. 91-93 and Arts. 43 *seq.* of the *Convention on International Civil Aviation*, done at Chicago on 7 December 1944, *UNTS* 15, at 295 = *BGBl*. 1956 II, 411.

59 See Arts. 2(2) and 20(1) of the Statute of UNIDROIT, dated 15 March 1940, Vertragssammlung des Auswärtigen Amtes 32 A, 441.

2. The European Community as a Contracting Party to uniform law Conventions

Whatever the answer to the issue of membership, the European Community even now has the power to influence and even block the adoption of certain international instruments by its Member States. As pointed out *supra*, the best way to accommodate that new situation would be to open these instruments to ratification by the Community. For that purpose, appropriate provisions must be inserted into the uniform law Conventions. Such provisions have emerged from a development which began more than thirty years ago in areas such as fishing, commodities, world trade, and the law of the sea, where the European Community's external competence has been recognised for a long time.[60] The latest version of such clauses does not explicitly refer to the European Community but to organisations of regional economic integration which are endowed with legislative competence for the subject matter of the respective Convention. In case of ratification or accession, that regional organisation is required to make a declaration concerning its competence which if not contradicted by Member States of that organisation, will be deemed to be accepted.

While this type of clause has already been added to some uniform law Conventions,[61] it is by no means generally approved and cannot be regarded as a general principle or a custom implied in international Conventions. Thus, neither the UNCITRAL *Convention on the Assignment of Receivables* of 2001 [62] nor the Hague *Convention on the International Protection of Adults* of 2000 [63] admit participation of entities other than States. While such shortcomings may be avoided in future international instruments, it is difficult to cure them in the Conventions of the past. A feasible although risky solution would probably be the tacit approval, by the Contracting Parties, of a declaration of accession by the European Community; as a subsequent practice, such tacit approval could have the effect of modifying the original Convention.[64]

The accession dauses outlined above do not solve all the problems. They do not upgrade the role of the regional organisations in the course of negotiating a universal treaty; they confer rights upon regional organisations which become effective *after* the adoption of a treaty, but do not necessarily entitle such organisations to vote or bring motions while it is being prepared. Moreover, the new accession clauses carry the risk of split ratification by the regional organisation and its Member States. So far, the European Community has avoided that risk by issuing internal rules providing for the deposit of the ratification instrument by the Community only after the Member States

60 For more details see Jürgen BASEDOW, "Die Europäische Gemeinschaft als Partei von Übereinkommen des einheitlichen Privatrechts", in: Ingeborg Schwenzer (ed.), *Festschrift für Peter Schlechtriem*, Mohr-Siebeck (Tübingen), 2003, sub III 2.

61 See *supra* notes 46-48.

62 See UN Doc. A/CN. 9/XXXIV/CRP.1/Add. 13 of 5 July 2001, Art. 34.

63 Reproduced in *RabelsZ* 64, 2000, 752.

64 *Cf.* Wolfram KARL, *Vertrag und spätere Praxis im Völkerrecht*, Springer (Heidelberg), 1983, 198 *seq.*

have taken the appropriate measures for the implementation of the treaty and have ratified the treaty themselves.[65]

Another difficulty arises in the context of the minimum number of ratifications required before a treaty takes effect. It goes without saying that ratification by a regional organisation cannot be counted for that purpose in addition to ratifications by its Member States. But suppose a regional organisation deposits its ratification instrument before all of its Member States have done so; could its instrument be counted in that situation? Other difficult cases may be imagined which, however, cannot be dealt with in this context. A more thorough reflection should perhaps be carried out by a common working group of the international organisations dealing with uniform private law.

V. – SOME CONSEQUENCES AT THE STAGE OF ADJUDICATION

1. Internal and international fact situations

If States and regional organisations are put on an equal footing as Contracting Parties to an international Convention, the traditional borderline between internal and international fact situations is blurred. It is sometimes both the objective and the consequence of regional economic integration that transborder fact situations within the integration area are subject to the same legal regime as purely internal cases of the single Member States. An example is provided by the internal market in the European Community, which has given rise to numerous enactments, such as the Regulation on air carrier liability in case of accidents,[66] which no longer distinguish between international and internal cases. However, the application of many traditional uniform law Conventions presupposes the presence of some kind of international element. It follows from the equation of States and regional economic integration organisations that transborder fact situations which are entirely located within the territory of a regional economic integration organisation are internal affairs of a Contracting Party and do not come within the scope of application of the international Convention.

As a practical consequence, the new Montreal Convention on international carriage by air would not be applicable to intra-Community flights such as a link between Rome and Paris. In order to avoid such an outcome, the equation of States and regional economic integration organisations has been explicitly excluded in Article 53(2) of the Montreal Convention in respect of the geographical scope of application of that instrument.[67] The authors of the Montreal Convention have in fact analysed each provision of their treaty in view of the aforementioned equation and have restricted its purview by not less than seven exceptions. This is different in the

65 See, *e.g.*, Art. 2 and Recital 4 of *Council Decision of 16.3.2000 on the approval, on behalf of the European Community, of the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty*, *OJEC*, 2000 L 89/6.

66 See *supra* note 49.

67 See *supra* note 47.

case of the UNIDROIT Convention on International Interests in Mobile Equipment; its Article 48(3) also provides for an equation of States and regional economic integration organisations, but only "where the context so requires." [68] It is questionable whether this flexible provision can cope with the need for precision which is inherent in the law of secured transactions and which otherwise has had such a visible impact on the Cape Town Convention. International legislators would be well advised to follow the example of the Montreal Convention and to analyse carefully the extent of the equation of States and regional organisations.

2. Regional courts and international Conventions

Regional economic integration organisations have their own institutional framework which may have to deal with international Conventions ratified by that regional organisation. Thus, the European Court of Justice has repeatedly held that treaties concluded by the European Community with third States or international organisations form an integral part of Community law.[69] Such Conventions are regarded as "acts of the institutions of the Community" which are subject, as to their interpretation, to the jurisdiction of the Court of Justice (see Article 234 EC).[70] The Court has also pointed out that provisions contained in international Conventions of the Community which are liable to be directly applied must not produce different effects depending on whether institutions of the Community or of single Member States are called upon to enforce them. It is up to the Court to guarantee the uniform application of such Conventions within the whole Community.[71]

While the resulting decisions cannot be binding outside the European Community, they will certainly have considerable authority in third States. The reasons for this are threefold: first, the absence of an authoritative supranational interpretation of uniform law Conventions is perceived as a serious deficit by many judges. Second, litigation dealing with uniform private law Conventions usually does not involve strong national interests; therefore, judges outside the European Community would basically be prepared to follow a European precedent if based on persuasive arguments. Third, the multi-linguistic practise of the European Court of Justice would allow judges all over the world to read the opinions of the European Court in a language which they can understand.

It would therefore appear not unlikely that the European Court system could acquire a key role in the application of uniform law Conventions and that it would attract litigation from all over the world. This perspective might disconcert the legal

68 See *supra* note 48.

69 European Court of Justice, Judgment of 30 April 1974, case 181/73 (*Haegeman v. Belgium*), [1974] *E.C.R.* 449 para. 5; judgment of 26 October 1982, case 104/81 (*Hauptzollamt Mainz v. Kupferberg*), [1982] *E.C.R.* 364 para. 13.

70 See recently in respect of the TRIPS Convention, European Court of Justice, 14 December 2000, joint cases C-300/98 and C-392/98 (*Parfums Christian Dior et al.*), [2000] *E.C.R.* I-11307 para 33.

71 See para. 14 of the Kupferberg opinion, *supra* note 69.

industry in some extra-European countries which have traditionally refrained from committing themselves to international dispute settlement mechanisms and induce those States to change their minds and accept, in future Conventions, some kind of institutional framework which would allow for a neutral and supranational interpretation of the respective instruments.

VI. – CONCLUSION

1. This article explores the changing needs for the unification of private law throughout its history, identifying three phases of the unification movement. During the first phase, the scope of unification was essentially regional, even if hidden behind global ambitions. Profound changes of the international environment after World War II brought about the rise of true universalism which, however, entailed a slow-down of the unification process. We are now at the beginning of a third phase which may be described as the dawn of inter-regionalism. It is characterised by the appearance, in the diplomatic arena, of new regional players, in particular the European Community, but also institutions such as OHADA, MERCOSUR, etc. which can avail themselves of more efficient harmonisation procedures. While the need for unification of private law is still felt very clearly at the regional level, universal unification, previously a kind of annex of regional unification, is now more often urgently required in its own right. This explains the increase in the number of conflicts between regional and universal instruments.

2. The article seeks to illustrate these theoretical findings by concrete examples which are ascribed to the second and third phases of unification. It deals with conflicts of arbitration Conventions in the Americas, with tensions between CISG and the OHADA Uniform Act on General Commercial Law in Africa, and with conflicts arising between international conventions such as the Warsaw Convention on international air transport and Community law. It points out that fast-track legislative procedures as employed by regional organisations do not, as such, confer a new quality upon the conflicts between regional and universal instruments. The material change is brought about by the transfer of legislative competences to regional organisations, by the supranational character of regional law such as that of the European Community and by the supremacy of its law which explains the particular nature of relations between Community law and international Conventions.

3. It is especially the latter type of conflict which gives rise to some new issues, both at the stage of treaty-making and that of adjudication. These problems are connected to a rise of inter-regionalism, *i.e.* to the co-existence of States and regional organisations as actors in the diplomatic arena. This author advocates a general overhaul of the statutes of universal uniform law organisations with a view to allowing membership to regional integration organisations. At the stage of treaty-making, the admission of such regional organisations as Contracting Parties to universal Conventions should be considered. The article advocates caution so as to avoid the unqualified equation of States with regional organisations and calls for a broader

reflection on the pertinent issues in the framework of a common working group set up for this purpose by the universal uniform law organisations themselves.

4. Further problems arise at the stage of adjudication. In particular, the borderline between purely internal cases and international fact situations to which uniform law Conventions traditionally relate, is blurred. Here again, a detailed analysis of the equation of States and regional organisations is required. Moreover, the existence of supranational courts of justice at the regional level may give rise to problems. While the European Court of Justice is competent to interpret international Conventions ratified by the European Community, its opinions will obviously not be binding outside the Community. However, they may have strong persuasive authority world-wide. Rather than adhering to a eurocentric vision of uniform law, this article advocates a renewed effort in favour of universal mechanisms or – even better – of a single body able to provide an authoritative interpretation of uniform law instruments.