Harmonisation of Secured Transactions Laws: A Comparative and International Perspective

Dr. Orkun Akseli
University of Newcastle School of Law

There is a commercial necessity in harmonising secured transactions law at international level. Facilitated access to low cost credit is said to drive economic growth according to studies conducted by the World Bank. There is a correlation between the facilitation of credit and lowering the cost of credit in the way that facilitated credit by harmonized and predictable rules, may reduce the cost of credit for small and medium sized enterprises in the emerging markets by minimizing the risk of the financier for not getting paid as the local rules may be ineffective or do not protect creditors at all.

Codification, harmonisation and unification are all interrelated but distinct subjects. Harmonisation leaves an opportunity for observation and testing, whereas uniformity does not and can be regarded as an imposition of one legal system for all. In any case, without harmonisation unification cannot be achieved and a truly uniform manner of interpretation is necessary for unification. Harmonisation can be by way of international conventions, legislative guides, legal reforms or model laws. Furthermore, within that perspective for the harmonisation of the law of secured transactions it is believed that flexibility is necessary. It is a well known fact that secured transactions laws are closely related to insolvency laws and any amendment in the law will affect well established insolvency laws. From that perspective, conventions or model laws may have rigid rules and they may lack the necessary flexibility which may have adverse effect on ratification decisions. One can argue, in that respect, a legislative guide such as the UNCITRAL Legislative Guide on Secured Transactions is a more acceptable method of harmonisation option among those indicated above.

International harmonisation activities have been influenced by the 19th century national codifications and the relatively recent codification of the American commercial law (the UCC). As a general proposition, it can be argued that international harmonisation of secured transactions resembles to 19th century codifications. In both cases with the increase of commercial relationships and market interdependency, the general aim of those activities has been the achievement of facilitation of commerce and credit. France (Code Napoleon), Germany (BGB) and the USA (UCC Article 9) have had impact on different jurisdictions. Some codes have been adopted as a whole along with case law and academic opinions in order to understand the rationale and spirit of the law (e.g. Swiss Code of Obligations and Civil Code to Turkish law-Legal transplants argument). Although adoption of laws
have been successful in some jurisdictions (e.g. Turkey), it did not in the others. All of these influential systems have affected recent international harmonisation activities of international formulating agencies (e.g. UN Convention on the Assignment of Receivables, UNCITRAL Legislative Guide, EBRD Model Law on Secured Transactions, Unidroit Convention on International Interests in Mobile Equipment) where, for instance, usage of a particular bit of UCC legislation can be found in the UN Convention on the Assignment of Receivables.

There are certain reasons for harmonisation of secured transactions laws. These can be summarised as harmonisation for facilitation of credit and lowering the cost of credit, modernisation of secured transactions laws for economic growth and foreign investment, reduction of transaction costs and the importance of intangibles as collateral.

What is most striking is that often harmonisation activities take place at a regional level rather than on a global level. In other words, these efforts target regional problems about secured financing rather than global problems. In this context, when efforts on the global and regional levels are considered, conflicts may occur between universal, regional, bilateral measures and even at the domestic law level, when a national legal provision and an international treaty on the same subject conflict.

The involvement of World Bank in the harmonisation of secured transactions is worth an elaboration. The World Bank subjects the extension of credit to law reforms in the emerging markets. Although the Bank’s International Finance Corporation (IFC) does not lend directly, its investment clients does and hence the pressure to modernise the law related to secured transactions.

---

The EU’s ‘external governance’ and legislative approximation by the neighbours: Challenges for the classic constitutional templates

Dr Anneli Albi
University of Kent

The voluminous interdisciplinary literature on the EU enlargement conditionality displayed striking differences in the way the legislative approximation was perceived within the then EU, and at the receiving end by the candidate countries. In the latter, the literature predominantly focused on the technicalities surrounding the process of harmonising national law to the EU acquis, coupled with the institutional adaptations and accession negotiations. The discourse within the ‘old Europe’ meanwhile had rather different undertones, with the rule transfer to the candidate countries being characterised in terms of the EU’s ‘external governance’ and even ‘imperialist’ aspirations. What seemed to be virtually missing from the literature was an inquiry into the legitimacy of the approximation process from the national constitutional perspective, which is notable given the prominence that constitutions came to enjoy in CEE countries after the reinstatement of their independent legal orders, and the high level of protection accorded to sovereignty. The recent transplant of EU pre-accession conditionality to the European Neighbourhood Policy countries, which enjoy no accession prospects, presents an even more intriguing case in terms of the constitutional legitimacy of approximation of domestic legislation to the norms of another polity. The proposed paper seeks to explore the extent to which the EU’s
external governance applies to the ENP countries, with a special focus on Ukraine. It will be contended that the phenomenon of extensive approximation of national legislation to external rules presents a novel challenge to the classic national constitutional models which have emerged to accommodate international and EU rules within sovereign legal orders. Hence a search for fresh solutions appears to be warranted in order to enhance the constitutional legitimacy of approximation.

Harmonisation with international human rights standards: British courts and the European Court of Human Rights

Merris Amos
Queen Mary, University of London

On 2 October 2000 the Human Rights Act (HRA) came fully into force in the United Kingdom empowering domestic courts to determine whether or not the activities of public authorities were compatible with the particular Articles of the European Convention on Human Rights (ECHR) to which it had given further effect. Rather than leave the matter completely to chance, the HRA contains some direction on how, in the HRA claims before them, courts are meant to deal with the 54 years worth of decision making which has flowed from the European Court of Human Rights, Commission, and Committee of Ministers. S.2 provides that a court or tribunal determining a question which has arisen in connection with a Convention right, must take into account these judgments, reports, decisions and resolutions, whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen.

It has been confirmed by the House of Lords that s.2 does not make this international jurisprudence directly binding on national courts. Nevertheless, it has been very warmly received. Building on the directive to courts contained in s.2, British judges have determined that although they are not bound to follow, the jurisprudence of the Strasbourg institutions should be followed as a matter of judicial comity. A point has been reached where it could even be argued that absent a strong reason, domestic courts are effectively bound by this jurisprudence.

The current position has a number of implications for the protection of human rights in the United Kingdom, both positive and negative and in this paper the principle of judicial comity with judgments of the ECtHR will be examined and assessed, and the advantages and disadvantages of the current approach for the protection of human rights in the United Kingdom will be considered. Suggestions will also be made in relation to the future development of the principle, in particular as to whether and how the British courts can reclaim some of their role from the ECtHR whilst continuing to respect and maintain those valid reasons surrounding the creation of the principle in the first place.
Uniform Commercial Law – An Example of a Global Jurisconsultorium

Dr Camilla Andersen,  
University of Leicester

With focus on the theory of harmonisation, one of the key questions is what we mean by “harmonisation” and the closely related term “unification”. There is no perfect definition of either term.

Defining the concept of “uniformity” in the context of commercial law is a complex task, as it is a term which has been used with a certain element of obscurity.\(^{(1)}\) Any attempt to clarify it involves terminological deliberations and a comparative analysis of the preambles of uniform laws and their aims.\(^{(2)}\) The present paper argues that:

1) Uniformity in law is different from a dictionary definition, as no laws are ever applied “always the same”,\(^{(3)}\) but it is concerned with establishing similarity, and a definition is therefore very result based.

2) The major promulgators of legal uniformity strongly suggest that the concept of unification of law rests on the bringing together of legal systems,\(^{(4)}\) so the result in question is the establishing of similar rules across divides of legal cultures.

3) Uniform law is a new form of lawmaking, with a different origin and a different focus,\(^{(5)}\) and it usually arises in a transnational context – or at least in a trans-jurisdictional context (the United States, for instance, being multi-jurisdictional as far as state law is concerned, applies uniform laws within the national boundaries).

4) It is not relevant whether a given set of uniform regulations can be classified as law in a given jurisdiction – the extremely difficult taxonomy of defining law is irrelevant in this context.\(^{(6)}\) One of the most successful instruments of so-called “uniform law” is a banking regulation (the ICC UCP 600 on Letters of Credit). What matters is that the result is a similar governing of a legal phenomenon.

5) The many different contexts, forms and political goals of law will affect the realistic level of similarity which the proposed form of uniformity may reach. It is important to note that uniformity is not an absolute but a variable, so we see that our intermediary definition has to encompass the concept of varying degrees.

6) Modern unification of laws is a political voluntary process whereby different jurisdictions elect to share a set of rules – not where it is imposed upon them, as opposed to historical uniformity (like Roman law,\(^{(7)}\) Common Law,\(^{(8)}\) or other colonial laws.) The element of voluntarily sharing is essential and defining.

And

7) It is not in the creation of texts which call themselves “uniform” that any actual uniformity in law is created, but in the successful application of such texts, where the success is determined by the degree of similarity attained.
Summing up on the above:

**We can define “uniformity” as the varying degree of similar effects on a phenomenon across boundaries of different jurisdictions resulting from the application of deliberate efforts to create specific shared rules in some form.**

It follows from this, that if we focus on the effects of law, then it is the degree of applied uniformity, and not the creation of uniform texts themselves, which define the uniform law.

One example of a uniform law in a global context (notwithstanding the UK’s reluctance to join the party) is the 1980 Vienna Convention on Contracts for the International Sale of Goods (CISG), which is currently in force in 70 different countries across the world, and often labelled a successful uniform law. But studies of the CISG show that it is often more successful in creating a uniform text than a uniform result.

Over the last decade, a specific concept regarding this Convention has been growing in momentum to ensure more uniformity in application. The notion that shared law needs to share its global scholarship and global precedents is winning favour with Courts in different national jurisdictions. Collectively, this can be described as the **global jurisconsultorium** of the CISG.

This paper will attempt to describe the nature and significance of this jurisconsultorium and outline some of the key cases applying it.

---------------

1) See Michael Bridge’s humour remarks in “Uniformity and Diversity in the Law of International Sale” in 15 *Pace International Law Review* (Spring 2003) 55-89: “Uniform law represents a part of that phenomenon that we call globalisation, a word that means so many different things to so many different people and ought on that account to be used sparingly, perhaps with a modest financial forfeit that upon sufficient accumulation will be paid over to charitable purposes. Those of us participating in one or more of the incremental efforts to bring about uniform law are, fortunately, sufficiently obscure to be spared the attentions of anti-globalisation protestors.”

2) For such an analysis, see Camilla B. Andersen “Defining Uniformity in Law” in (XII) *Uniform Law Review*, 2007-1 p. 5-57.

3) According to the *American Heritage Dictionary of the English Language*, New College Edition, uniform is defined as: **1.a. Always the same; unchanging; unvarying. b. Without fluctuation or variation; consistent; regular**

4) UNCITRAL defines uniformity as *that which removes barriers in international trade* (see the preamble to the CISG: “…contribute to the removal of legal barriers in international trade and promote the development of international trade…” and UNIDROIT is an institute for unification of law, seeking to co-ordinate national private laws (taken from the descriptor of the [www.unidroit.org](http://www.unidroit.org) homepage: “Unidroit seeks to harmonize and co-ordinate national private laws and to prepare for int’l adoption of uniform rules of private law.”).

5) See Niklas Luhmann, who defines the process of law in globalisation as a process of law where: “…functional criteria increasingly replace geographic ones, with nation-states’ traditional law-generating organs diminishing in importance in determining legal significance, regulation and evolution.” In Niklas Luhmann *Das Recht der Gesellschaft;* as translated by Vivian Curran.

6) For the purposes of this paper, the concept of law will be considered a broad one, and borderline cases of what constitutes law will not be resolved, but sidestepped by the inclusion of the terms “rules” and “legal phenomena”. Specifying a general criteria for the definition of “law” is not beneficial in the present context of trans-jurisdictional unification. Suffice it to say that a broad conception of law is needed to encompass the various definitions across the board of different legal families. For more on definitions of law, see William Twining *A Post-Westphalian Concept of Law* in 37 Law and Society Review, p. 199-257
7) See Cicero, *De Republica*, 3.22.33: ‘[T]here shall not be one law at Rome, another at Athens, one now, another hereafter, but one everlasting and unalterable law shall govern all nations for all time …’
8) De Cruz argues that James the First, King of England and Scotland, introduced uniformity to England and Scotland when proposing to unify them under a single legal system in the early 16th century, see *Comparative Law in a Changing World* p. 23.
9) As of 15 June 2008, the United Nations reports that 70 States have adopted the CISG.
10) For an example of very different application of norms in interpreting specific provisions of examination of goods and notification of non-conformity, see the CISG Advisory opinion no. 2, with case annex, available at: [http://www.cisg.law.pace.edu/cisg/CISG-AC-op2.html](http://www.cisg.law.pace.edu/cisg/CISG-AC-op2.html)

---

**Regulatory Competition vs Harmonisation: is there a third way?**

Stylianos Andreadakis  
University of Leicester

The creation of an internal market has been one of the primary objectives of the European Union. EU’s strategy of removing barriers has brought on the surface the issue of regulatory competition and it has significantly increased its significance. The pursuit of the optimal regulation has been the intention of all regulators worldwide and regulatory competition together with harmonization were highlighted as the best choices, especially for the field of corporate law. Race to the bottom and diversity of national laws opened the way towards a third solution. Reflexive harmonization, new type of harmonization, has been put forward and it is to be decided whether there is indeed a third way that can combine the regulatory competition with harmonization and provide an efficient solution.

---

**The Analytical Account of the Margin of Appreciation Doctrine as an Interpretive Device of the ECHR – A Variable Exception to the Process of Harmonisation?**

Dr. Yutaka Arai-Takahashi  
University of Kent

1. The Meaning of the Margin of Appreciation

2. Problems of the Margin of Appreciation Doctrine
   (i) undermining legal certainty;
   (ii) introducing subjective, non-uniform, or relativist standards of international law: moral relativism;
   (iii) risk of judicial double standard and unfairness;
   (iv) handicapping the development of judge-made law; and
   (v) risk of fostering a habit of non-accountability.
3. Rationales for the Margin of Appreciation
(i) judicial economy (the fourth instance doctrine);
(ii) subsidiarity;
(iii) recognition of the Strasbourg Court’s democratic unaccountability or its
deferece to national/local legitimacy (Cf. the “structural concept of the margin of
appreciation” (Letsas));
(iv) the discretion as to policy choices (socio-economic matters);
(v) the manifestation of the “moral choice” of the Strasbourg Court in preserving
value-pluralism against the conformist trend (Cf the substantive concept of the margin
of appreciation (Letsas));
(vi) Fairness in attributing responsibilities? and
(vii) Inter-Institutional Comity?

4. Harmonisation (Uniformity) v. Diversity?
4.1. Interpretive methods that facilitate harmonisation process
(i) evolutive interpretation (the robust review based on proportionality);
(ii) the European consensus rationale; and
(iii) the European autonomous standards.
4.2. The margin of appreciation doctrine as a diversity-sustaining, interpretive
device: Cf. “diachronic variability” of the doctrine and evolutive interpretation.

5. The Harmonisation of the ECHR Standards Based on the European
“Consensus” Rationale.
5.1. The minimum common denominator approach to harmonisation
5.2. The policy-driven approach to harmonisation
(i) overriding an existing common denominator among the member states and
asserting an a contrario, autonomous European standard;
(ii) asserting the existence of European consensus, even though the empirical data
are not rigorously tested.

6. The Analysis of the Processes in Which the Margin of Appreciation is Applied
The application of the margin of appreciation doctrine as an interpretive device can be
envisaged in the following processes:
(a) the process of fact-finding and ascertainment of fact;
(b) the process of determining the meaning and normative contents of either (i)
   indefinite norms (e.g. “protection of morals” etc) or (ii) inherently discretion-
given norms (“result-oriented norms”((Shany)))
(c) Discretion over the normative reach: ascertaining whether the scope of the
   rule or standard identified can be extended to cover, in what ways, and to what
   extent, a specific factual circumstance;

Post-interpretation stage:
The process of evaluating the means (types, suitability, proportionality etc) to achieve
desired social/public ends.
Evolutive interpretation or the margin of appreciation? - the discretion on choice of
means.

7. Theoretical Inquiries into the Process of Interpretation, and the Application of
the Margin of Appreciation

Ross Ashcroft
Queensland University of Technology, Australia

As with the European Union trying to harmonise laws in practice areas of particular concern, Australia too has seen the pressing need to harmonise areas of law. This is necessary to minimise the proliferation of legislative changes, which can have detrimental consequences for society and business, to increases of economic costs involved with obtaining advice or compliance with the law, and inability to keep track of what the law is. Proliferation of law can also have detrimental effects on legal education – requiring greater need for specialisations rather than general practitioners.

Of major concern in undertaking such a process is the regulatory framework which is adopted – whether it is indeed constitutionally legitimate to do so, especially in light of our ‘dualist’ legal system and whether such harmonisation will create a democratic deficit in the process. A secondary, but equally identifiable issue is the necessity of effectuating not only institutional changes, but also policy and substantive provisions within the law.

The proposed paper will specifically take the example of problems encountered in environmental regulation in Australia’s development, specifically in relation to sustainable development and property regulation. Problematic issues which have been experienced include: divergence in key vocabulary and application of such provisions; differences in the enforcement mechanisms adopted and information problems relating to inability to effectively trade across boarders. The analysis will also attempt to suggest possible solutions based on comparative examples.

The research will be undertaken in conjunction with an Australian Research Council grant seeking to advance sustainable development and environmental protection obligations in the field of property law. Ross Ashcroft holds a Master of Laws from Griffith University, Australia and a Master of Comparative Law, jointly from Adelaide University and Mannheim University (Germany). Ross Ashcroft currently works as a Senior Research Assistant, Queensland University of Technology Australia.

The Draft Academic Common Frame of Reference

Professor Hugh Beale
University of Warwick

In February 2008 the Interim Outline Edition of the draft Common Frame of Reference was published. This is the first published version of the Academic DCFR which is being prepared as part of the European Commission’s Action Plan on European Contract Law. This paper comments on the DCFR’s form, its coverage, its structure and its language. It seeks to explain that in part the characteristics are the result of the way in which the DCFR has been produced, drawing on earlier drafts, but it is argued that with the adaptations that have been made, the DCFR is appropriate for its intended purposes as a legislator’s tool box. These are, as stated in the Action
Plan, to provide fundamental principles, definitions and model rules; and to give the legislator “essential background information” over the whole field of obligations law. Its structure and language may seem elaborate and rather formal, but that is necessary to avoid repetition and to ensure accuracy.

**Beyond Francovich: Completing the Unified Member State and EU Liability Regime**

Professor Gerit Betlem  
University of Southampton

Gerrit Betlem: “Beyond Francovich: Liability for Breach of European Union Law”

This paper revisits the seminal Francovich judgment in order to gauge its potential for expansion beyond the sphere of European Community law to the wider context of European Union law. Focusing on key components of the harmonised State and EC liability regime e.g. role of fault, scope of protection, the paper explores possibilities for future developments based on recent important CFI judgments. The latter include its rulings on when a norm breached will be capable of conferring rights on individuals and the criterion for liability of the European Commission in its capacity as “watchdog”. Reflections will be made on what the ECJ/CFI have so far achieved in creating the ius commune regime for non-contractual liability of public authorities for breaches of EC law as well as extrapolations to possible future extensions of the regime. Some dicta of the ECJ are considered to be unhelpful whereas recent CFI pronouncements are pointing useful ways forward, it is argued.

**Harmonisation and The Rule of Law. Theoretical Troubles and New Hopes**

Giovanni Cogliandro  
University of Rome Tre

“The rule of law means the law of rules” (Justice Scalia): this is a classic statement of the rule of law inspired by the public choice theory of legislative and policymaking process. In jurisprudence the intellectual movement of the “rule based” International economic Order is an integral part of this broader background, strongly influenced from textualism (J. Zang).

The concept of the rule of law was recently analysed by Kramer, Raz, Marmor, Allan, Andenas, Dyzenhaus, Dworkin, Tamanaha, Fallon, Waldron and the most prominent scholars in the Anglo-American Jurisprudence in the last two decades and continues to undergo further scrutiny. In the European continental sphere today (but also in the work of Bellamy in England), the discussion is more focused on the neutralization of the political sphere implied by the judicial supremacy at the national and international levels: from the supremacy of the lawgiver, now the rule of law seems to have switched to the supremacy of the courts. Herein lies the importance and significance of the debate on Originalism in the USA.
Habermas and Ferrajoli stated that the Rule of Law is to be characterized as the “Democratic Rule of Law” or the “Constitutional Rule of Law”. Fundamental rights in their different taxonomy are now the backbone of the international jurisprudential debate on the Rule of Law, with the assumption that law is better understood as a functional complement to morality.

The constitutional rule of law (Fallon) is a dense formal model, whereas the rights conception of Dworkin or the liberal justice theory of Allan are examples of a thicker conception of the rule of law. In the last years the Kramer/Simmonds debate posed the question of the internal relation between the rule of law and morality, and the nightmare of a perfect rule of law in a tyranny. As Habermas stated the internal relation between the rule of law and democracy has been concealed long enough by the competition between legal paradigms that have been dominant up to the present.

In the usual list of principles associated with the concept of the rule of law (Fuller, Raz, Marmor, Bingham) there is no reference to contract law. The weakening of the distinction between the public and the private sphere makes the contract the main instrument of juridical innovation. Contract law is today an essential part of the international legality (Viola). From the Conference of New Delhi (in 1959, praised by Marsh and attached by Raz) the rule of law was analyzed in depth and is now possible to delivered a comprehensive concept of it.

The polyphony of the abovementioned conceptual definitions is vital for the possibility to give a philosophical description of the Rule of Law. It can be a starting point for the noble dream of the Harmonisation of the international or European law.

---

Harmonisation on the Enforcement of Arbitral Awards

Serhat Eskiyoruk
Institute of Advanced Legal Studies

Arbitration has gained significant importance and become widely effective in international commerce during the last decades, paralleling the rise of globalisation. As a dispute resolution method, the purpose of Arbitration is to provide a final and binding award for the parties on their dispute. There is also an implied term in arbitration agreements that the award given by the arbitral tribunal will be carried out by the parties without any delay. In addition, the international rules and institutional rules expressly provide the performance of arbitral awards.

Contrary to national courts, the arbitral tribunals are lack of coercive powers for the enforcement of their awards. When the tribunal renders the award, it becomes functus officio and cannot examine any post award process of arbitration. Unless the defendant carries out the arbitration award voluntarily, the award must take place through the national court. International conventions, particularly the New York Convention aim to make uniform the recognition and enforcement in international arbitration all over the world. While the New York Convention is referred as the “single most important pillar on which the edifice of international arbitration rests”(1), there are still gaps left for national laws.

Regarding to Article 3 of the New York Convention of 1958, “Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon.” Therefore, the
procedure of recognition and enforcement in a forum state will be under the procedural rules of that state. It is criticized that one of the main shortcomings of the New York Convention is “the obvious lack of an efficient, universal enforcement procedure.” (2) Since, there are detailed forms of procedures for the recognition and enforcement of arbitral awards which may vary from country to country and even province to province in a country.

Moreover, there might be some difficulties arising out of the application of the grounds for refusal. The interpretation and application of the refusal grounds for enforcement is under the law of the state where recognition and enforcement is sought. (3) It is seen that the application of the grounds for refusal may differ from country to country, even between the signatory states of the New York Convention. For instance, some countries (4) provide more limited grounds for the grounds for refusal, on the contrary some national courts may impose local requirement where the local system is unfamiliar with arbitration. It is also undesirable that the limitation period for enforcement varies depending on the national law.

These issues make us to discuss whether the harmonisation in arbitration has achieved or not, even with the existence of the New York Convention, which is referred as the “most effective instance of international legislation in the entire history of commercial law.” (5)

3 The New York Convention of 1958 Article V
4 France NCPC Article 1502, Netherlands CCP Article 1076

The Impact of WTO Appellate Body Jurisprudence on the Harmonization of Trademark Law in the European Union

Gail E. Evans
Queen Mary, University of London

This paper hypothesizes that recent trade mark jurisprudence of the WTO appellate Body and European Court of Justice demonstrates a new coherence that constitutes a possible means of realizing the substantive harmonization of intellectual property law. In the exposition of this argument, the paper draws upon case studies in trade mark protection, in order to analyze the respective roles of the two supranational courts as a matter of both substantive law and adjudicatory technique. The article concludes by offering an assessment of the character, legitimacy and potential shortcomings of the new transnational trade mark law.
The relationship between measures of minimum and measures of maximum harmonisation

Dr Amandine Garde
University of Exeter

The extension of Community competence has led to a multiplication of rules which have a dual purpose: to ensure the proper functioning of the internal market on the one hand and a high level of consumer protection on the other. Nevertheless, these rules rely on different methods to achieve their goal: some of them will be of minimum harmonisation (such as Directive 2007/65 on audiovisual media services which modernises the Television Without Frontiers Directive), whereas others will be of total harmonisation (such as Directive 2005/29 which bans commercial practices which are unfair to consumers).

This paper will explore how rules of minimum and total harmonisation interact with each other and the consequences this interaction may have for legal certainty. It will focus on the relationship between consumer protection and advertising rules, and more specifically on two areas that have recently given rise to vivid controversies: the regulation of product placement and the regulation of food advertising to children.

The Draft **UNCITRAL Convention on the Carriage of Goods by Sea** and arbitration: The road to autonomy of international law on carriage of goods?

Miriam Goldby
University of Surrey

UNCITRAL’s draft Convention on the Carriage of Goods by Sea once finalised will be the fourth major harmonisation effort in this area of law in less than a hundred years. The Convention’s immediate predecessor, the Hamburg Rules, experienced a number of problems at the stage of ratification, adoption and implementation by nation states and there are fears that the proposed new convention will fare no better. This paper will examine whether the provisions on arbitration in the Convention might permit its transnational application (through the use of appropriate choice of law and arbitration clauses) regardless of whether or not it proves popular with nation states, thus making it autonomous of national laws.

The possibilities and shortcomings of this approach will be explored within the context of the general impact made by international harmonisation of commercial law.
A Demandeur-Centric Approach to Transnational Commercial Law

Dr. Sandeep Gopalan
Arizona State University, USA

Recent scholarship on international agreement design has almost exclusively focused on the public international law area. The literature on regime design in the area of international private law lacks a solid theoretical foundation. Academic writing on public international law's state-centric approach is only amenable to crude transplantation and poses several puzzles in the international private law context. Resolving these puzzles is important because of the proliferation of transnational commercial agreements in areas that were traditionally the province of domestic law. This paper attempts to provide a starting point to address the theoretical vacuum. Part I argues that functionalist, liberal, and realist theories cannot fully explain transnational commercial law agreement design. Part II puts forth a demandeur-centric approach with the aid of examples that span the spectrum from hard law to soft law. Part III concludes that agreement design in transnational commercial law is premised on demandeur preferences and relative power. Ultimately, the choice of structure boils down to which parties are the demandeurs of the agreement. All else being equal, when the demandeurs are confident in their ability to achieve agreement and enforcement requires minimal state involvement, they will opt for non-convention vehicles. The choice of the convention form is predicated on their ability to co-opt states, when enforcement power is necessary. When demandeurs need state involvement, primarily in terms of recognition, or enforcement assistance, they are likely to structure agreements as conventions provided that they possess sufficient political influence to attain ratification.

International Commercial Harmonisation and National Resistance

Dr Maren Heidemann
University of Westminster

International contract and commercial law has recently been subject to reform through the process of judicial and commercial co-operation within the EU: A number of EU directives and regulations in the area of private and commercial law have been adopted or are being drafted and in the process of formal adoption. The complementary element to this growing effort of harmonisation and uniformisation in order to advance the internal market cross-border trade is of course the application of substantive legal norms forming part of international and transnational law. Without a culture of applying international and transnational legal rules, the process of harmonisation remains a ‘top-down’ process which might not achieve its ultimate objectives.

In the area of private and commercial law, three elements of applying law to cross-border situations can be identified and illustrated here:

- The skill, of applying substantive norms of transnational contract law,
- the willingness to acknowledge foreign legal concepts and draft legislation with a view to international instruments
• the appropriate consideration of foreign legal positions or even precedence in domestic proceedings in international matters.

1) The application of transnational contract law: skilful legislation and application is a prerequisite to unfold its potential

The application of transnational contract law requires two stages - questions of conflict of laws and questions of application of individual rules.

a) The conflict of laws position distinguishes between the area of state court litigation and arbitration. Legal doctrine had developed a mode of language whereby ‘law’ stands for the law of a state and ‘rule of law’ includes so called soft law which would comprise instruments like Model Laws, UNIDROIT principles, PECL or CISG.

The reform of the conflict of laws through the proposed ‘Rome I’ Regulation originally intended to allow in its Art 3(1) for certain non-state laws to govern international contracts (by way of express choice of law) by introducing a previously unused formula: ‘recognised internationally or in the Community’.

The idea of allowing ‘soft law’ to govern international contracts had already manifested in the UNCITRAL Model Law on International Arbitration. The reformed German code of civil procedure, however, does not reflect the effort of incorporating this Model into German law of arbitration.

In the UK, the Arbitration Act (1996) does leave room for the open choice corresponding to the Model. The generally sceptical attitude of the courts towards a choice of non-state law does not generally preclude this possibility. This is an appropriate basis for the development of commercial law and should not be restricted by the current wording of the Rome I Regulation.

A quantitative study shows a marginal use of non-state law in international arbitration. Nevertheless, it seems that choice of law clauses to the exclusion of national contract law are a regular occurrence and hence a need in commercial contracts, and given the high financial volume of international commercial arbitration this ought to be of concern to legislators. Transnational contract law is the response to the need for a specialised law for international commercial contracts, a form of lex specialis.

The concept of transnational contract law is still treated with great caution within national legal systems, and as a result is accompanied by a considerable degree of legal uncertainty.

• So, is the current legal framework the reason for the low numbers of awards based on non-national law?
• Is the low number of published arbitration awards based on non-state law a reason to abandon further reasearch into this matter or is it an indicator for a need to support this type of legal regime?

b) application of individual norms of transnational contract law

Much of the current problems in international trade law is based on misconceived aspects of private law which can be avoided by referring to jurisprudential foundations of each jurisdiction’s own tradition. Theories of contract law and general doctrine of construction can help overcome prejudices and seemingly insurmountable obstacles in the application of modern trade law.
2) ‘Resistance’ with extra-legal arguments: the horror alieni

   a) Even after the decisions of the ECJ on the matter of the freedom of establishment and free movement for companies, Germany still maintains a campaign style adversity against specifically English Limited Companies. Following a wave of formation of ‘Ltds’ by what is thought to be 46,000 (1) German small businesses, both private actors (2) and state authorities (3) started to disgrace this form of incorporation on suspicion that it would pose an enormous risk to creditors due to the lack of an impressive minimum share capital for the protection of creditors (4), a lack of personal liability of the directors and a dubious degree of truthfulness of the register at Companies House (5). The extent of this attitude clearly shows that irrational behaviour reigns rather than the principle of mutual recognition and non-discrimination, and the wrong subject is targeted by these campaigns. This problem illustrates the complex relationship between private law and the state.

   b) The exclusion of CISG is regularly recommended by leading scholars, and the occupation with transnational law is deemed to be a purposeful development of young scholars who want to create their own niche subject. Repeatedly, arguments against choices pointing away from Germany include the economic advantage and success of the City of London as a place of arbitration and the seat of wealthy law firms as an ulterior motive of canny lawyers to sway the judgement of naive recipients of advice.

3) The role of the legal understanding of the other side: international precedence, interpretation of treaties and comity

   a) application of a bilateral treaty: the silent partnership

   Between the UK and Germany there are considerable discrepancies as to the understanding of silent partnerships which are subject to Art of the DTT 1960. Some legal systems, such as the German subdivide silent partnership in plain ones and so-called atypical silent partnerships, English law does not know this distinction. Not surprisingly, this distinction is not expressly mentioned in the DTT (Only 4 DTTs concluded by Germany with other states include this distinction, the ones with Lux, NL, AU and Tunesia.). The German practice now classifies income and proceeds from sales of atypical silent partnerships as business profits, attributed to the permanent establishment of this entity, while the UK sees these earnings merely as dividends or simple debt collection. This discrepancy arises predominantly due to a flawed technique of applying rules of international law. The respective rules of the DTT are conceived by the German interpreters in the sense of a conflict rule, pointing to the full application of German law, rather than correctly as a substantive rule creating sources of income sui generis. This method is contrary to Art 31 (1) of the Vienna Convention on the Law of Treaties. Newer case law shows a shift towards an awareness of the significance of the legal position in the partner country.

   b) There are considerations within the framework of judicial co-operation whether judgements of supreme national courts can impact on the interpretation of Community law, for instance in insolvency proceedings.
Conclusion

It is important to raise the level of awareness of foreign law and transnational law in legal science and practice including legislation. The use of transnational law must be improved by suggesting practical methods of application of such law. Prejudices should be replaced by familiarity with concepts of combining different spheres of legal origin and law making.

Cases:
Application of non-state law
Halpern & Ors v Halpern & Anr [2007] EWCA Civ 291

Taxation of silent partnerships
Memec plc v Inland Revenue Commissioners (IRC) [1996] STC, 1336 Ch D.
Memec plc v Inland Revenue Commissioners (IRC)[1998] STC, 754 CA.
BFH (German Supreme Tax Court) Urteil vom (judgement of) 21.7.1999, BStBL II 1999, 812 = FR 1999, 1361
BFH-Urteil vom 17.10.2007 - I R 5/06

Legislation

- Contracts (Applicable Law Act) 1990
- Draft Council Regulation COM (2005) 650 final ('Rome I Regulation')
- Zivilprozessordnung (ZPO) (German Code of Civil Procedure), §1051

Literature
Maren Heidemann, Methodology of Uniform Contract Law: The UNIDROIT Principles in International Legal Doctrine and Practice, (Berlin Heidelberg: Springer, 2007)

1) This is said to be the unofficial count, dramatically called Dunkelziffer while about 7000 English private limited companies are registered in the German Handelsregister
2) Banks refusing to open accounts for 'Ltds'.
3) The Federal Ministry of Finance issued a ‘letter’ (instruction the tax offices’) that ‘Ltds’ were not to be recognised.
4) In Denmark this problem was apparently solved by effectively transferring the requirement of a minimum share capital into tax law to prevent Centros from registering in Denmark.
5) The practice of acquiring ‘shelf companies’ as well as the practice of having a separate registered and head office leads to the assumption that every British company is a ‘letterbox company’ and can’t be trusted. The register at Companies House is feared not to provide up-to-date information about the authorised representatives of the companies.


René Franz Henschel
University of Aarhus

This paper centres on the impact the CISG Convention has had on the national and international development of law. It focuses on the rules in Art. 35 CISG, as the contents of the provision has gained wide recognition in a number of jurisdictions. However, this recognition has resulted in changes and alternative expressions of the
legal contents of the provision. If the provision is used as a model for preparing national as well as international rules but is changed more or less extensively, the question is whether these rules have to be interpreted and applied in the same way as the Convention rules, or whether legislators intended the new rules to have different and separate contents and objectives. The following analysis will show that it is sometimes impossible to determine whether this was intended or not, and this leads to uncertainty as to the contents of the new rules. The thesis of this article is that these uncertainties can be avoided if the focus is shifted to the method used in preparing the new rules. This thesis should be seen against the background that doubts appear to arise because it is uncertain whether legislators intended consolidation with the rules in the CISG, or whether they intended proper codification based on the rules of the CISG – a difference that can explain the different interpretations of the contents of the new rules. Consequently, the focus should be on the method used in preparing the new rules based on the CISG. It is obvious that the method must be based on comparative tools. The point of departure is a famous article by Clive M. Schmitthoff from 1968: The Unification or Harmonisation of Law by Means of Standard Contracts and General Conditions. This article examines the development of international, common or uniform trade law regulations on the basis of what is described as a non-national, analytical-synthetic comparative method. This description of the method appears to be well suited to an analysis of the creation of rules based on the CISG, because there are many parallels between the creation of rules for the development of international uniform or harmonized law and the creation of rules based on international uniform or harmonized law.

Progressing ‘common constitutional traditions’ for the EU: the case of marriage for all

Jackie Jones
University of the West of England

Article 9 of the EU Charter of Rights and Fundamental Freedoms permits people to marry, according to the national laws of that country. This right is worded differently to the ECHR’s Article 12 right and thus may be interpreted in a different way. The European Court of Justice uses the concept of ‘common constitutional traditions’ as an interpretative tool. This can be compared to the traditionalist interpretations. The search for common constitutional traditions has led the court to find common laws on a variety of subjects, including human rights and fundamental freedoms. The right to marry is one such fundamental right. Looking at the laws and constitutions of different member states (the UK, Germany, Spain, France, Poland, Lithuania, the Netherlands, Belgium) can and should the ECJ interpret Article 9 (as well as other provisions) to mean same-sex couples have the right to marry the person of their choice despite the saving clause? Using some of the values inherent in the concept of dignity, it will be argued that the combination of dignity, free development of personality, substantive equality and positive rights means that the ECJ should interpret Article 9 inclusively, progressively and to take sexual orientation out of marriage. What are the consequences for the Union of such an interpretation? Can
In how far are national broadcasting orders converging as a consequence of European media law and policy?

Irini Katsirea
Middlesex University

The European Union policy in the audiovisual sector is guided by the alleged existence of a ‘European audiovisual model’. At the heart of this model lies the recognition that the production and distribution of audiovisual media services are not only economic, but also cultural activities calling for the protection of a range of objectives of general interest: cultural diversity, protection of minors, consumer protection, particularly in the field of advertising, media pluralism, and the fight against racial and religious hatred. It is considered essential, in the interests of the maintenance of these values, that the ‘European audiovisual model’ be founded on ‘a balance between a strong and independent public service sector and a dynamic commercial sector’.

This paper proposes to address the question whether the presumed ‘European audiovisual model’ really exists, whether cultural values still matter in national broadcasting policy. If so, the next question to be asked is whether these values are converging and whether they have been furthered or jeopardized by the involvement of the European Union in this area, mainly the Television without Frontiers (TwF) – now Audiovisual Media Services (AVMS) – Directive. This paper will draw examples from the broadcasting orders of four Member States: France, Germany, the Netherlands and the United Kingdom.

Even though Member States share a tradition of regulating broadcasting for the public interest, such regulation has been in demise in recent times. It has been challenged by the emergence of commercial television sworn to the market logic. The growth of satellite services, and more recently the internet, outpacing the power of governments to control the content of broadcast schedules, has put further strain on regulation for the public interest.

Broadcasting values represent the dirigiste model of social order according to which public interventions are necessary so as maintain the well-being of society and a certain quality of life. At the other end of the spectrum stands the liberal idea that cultural standards are no longer appropriate and that the viewers as consumers should have the last word. The faith in viewer sovereignty and the aversion to the so-called ‘paternalistic role’ of public broadcasting are indicative of a general ideological shift across Europe towards private and market-based answers.

Despite these trends, all of the abovementioned countries have included a similar catalogue of broadcasting obligations in their legislation. The similarity in the formulation of these obligations can be attributed to the harmonizing effect of the TwF Directive. However, the existence of a floor of minimum broadcasting standards at Union level cannot detract from the fact that there are considerable differences between the broadcasting laws of the Member States. The countries under examination protect broadcasting standards with different intensity and employ
diverse means to this end. This is not surprising given that these standards have grown with the broadcasting systems of the Member States, and are hence greatly informed by the historical, social and political context in which these were born.

The diversity of these broadcasting systems also accounts for the different forms and methods each Member State has chosen in order to implement European Union rules. By focusing on broadcasters’ cultural obligations, the principle of separation of advertising from editorial content, the protection of minors and the right of reply, this paper will demonstrate that in some respects national legislation exceeds the standards set by the TwF Directive, while in others it still lags behind. This is not least due to the fact that even the minimum standards adopted at EU level are sometimes hard to reconcile with the basic constitutional tenets of national broadcasting orders.

The Fallacy of the Common Core: Polycontextualism in Surety Protection - a ‘hard case’ in harmonisation discourse

James Devenney & Mel Kenny
University of Durham

This contribution addresses the treatment of surety agreements across the EU in the broader context of initiatives aimed at creating both a single market in financial services and at improving the coherence of European private law. It is argued that, by focusing on this ‘hard case’, that we can gain important insights into just how ‘common’ or ‘uncommon’ the core of European private law truly is. The paper looks at the substantial equivalence of the concept of the surety agreement across Europe: functioning as a unilateral guarantee of secondary and accessory liability and the common concern identified to protect the surety. The paper also identifies how common interests can be served through consumer protection: inadequate protection may lead to life-long indebtedness and heightens the risk of default faced by creditors. Despite these common understandings and interests, the paper uncovers the divergent treatment of surety protection in the Member States. The paper explores the relationship between substantive and procedural protection, how relative protection can be assessed and how adoption of higher levels of protection may compromise the interests of both surety and creditor. The contribution rejects the case made for a broad exercise in codification in complex areas of law, and argues, instead, the continued relevance of a combination of vertical measures of harmonisation and judicial convergence.
Harmonisation of business law: the experience of Africa

Jimmy Kodo
University of Paris

In order to attract more investors in their countries, sixteen African states signed the Treaty on the Harmonization of Business Law in Africa, which created the Organisation of Harmonisation of Business Law in Africa (OHBLA – OHADA in French). More than a decade after the entry into force of this treaty, I undertook an examination of the extent to which the Uniform Acts issued under the treaty are implemented by judges across member-states. This paper will present findings from my doctoral research on the reception and application of OHBLA Uniform Acts in national courts.

My research has found that, in most cases, the Uniform Acts are properly implemented. As the treaty allows, national judges contribute widely to the building of the sources of harmonized law where a legal vacuum exists. Nevertheless, the legitimacy of legislation giving more power to the Common Court of Justice and Arbitration (CCJA) is questioned, as many judges are reluctant to cede their power of decision-making to the CCJA. Supreme Courts of some member states have challenged the authority of the CCJA, deciding cases that are outside their competence since entry into force of the treaty.

The post accession Harmonization with EC law in the Republic of Cyprus: Constitutional Constraints and Gaps

Dr Constantinos Kombos
University of Cyprus

The harmonization with EC law is an ongoing and continuous process that requires legislative initiative and judicial intervention when construing national law in the light of Community law obligations. In the context of the Republic of Cyprus one can observe unexpected and unfortunate delays, judicial conservatism and legislative inertia. Specifically, the constitutionally significant matter of accommodating the principle of supremacy of EC law has been approached by the Supreme Court in a conservative, unimaginative and literal way, thus triggering a constitutional amendment that expressly provides for the supremacy of EC law. Therefore, the lessons from Solange I, Brunner, and Factortame have not been followed in terms of adopting an elastic approach that is not solely founded on textual provisions. The outcome has been a major surrender of judicial supremacy in favor of the ECJ. Paradoxically, the same approach has not been adopted in relation to Art. 234 EC where the Supreme Court insisted on a legislative intervention to allow the use of preliminary reference, but in a very centralized and controlled manner that entails a right of appeal against decisions to refer or not by lower courts before the Supreme Court. So far no preliminary reference has been submitted, while the Supreme Court missed the opportunity to pave the way in a case where there was a majority decision by the court and which concerned the interpretation of a directive granting rights to non-citizens of the EU that have resided for more than five years in a Member State.
The submission of the paper is that the approach by the legislative branch has been influenced by the Supreme Court’s approach and the legislative initiatives of harmonization in terms of major constitutional matter touching the autonomy of the national legal order have been either restrictive or in effect concessions to the EC legal order. In other words, it seems that there is no clear line of reasoning that is followed consistently, thus endangering the process of harmonization without protecting divergence.

**ENISA and New Forms of Approximation: Towards a Transnational Theory of Harmonisation?**

Emilia Korkea-aho  
University of Helsinki

This paper explicates the representations of agency governance as part of EU level harmonisation. It aims at conceptualising how different forms of New Governance (NG) can contribute to the harmonisation process and whether they are capable of avoiding the ills of the earlier internal market approaches to harmonisation. Whilst seeking answers the paper gives a detailed evaluation of the ENISA case, which demonstrates the dynamics of the agency governance and its potential role in the future’s harmonisation. Harmonisation within the values of NG constitutes a potentially legitimate vehicle. However, in order to provide a more systematic analysis of agency governance, it is worth contrasting agency governance with the new approach to technical harmonisation, i.e. standardisation, which emerged in the mid 1980s. Although the suggested comparison spans several years and accordingly different and, to a certain extent disparate, phases of Community developments, the relationship between EU and its Member States has remained in the essence of the whole debate. That point made, the paper considers what theoretical implications the emergence of agency governance has for the supranational paradigm of harmonisation and which account would complement it. As to the latter, it is argued that transnationalisation implies a response to the need for a change of paradigm and a theoretical explanation of the harmonisation process initiated and sustained by new forms of governance.

**Procedural harmonization in the EU’s GMO Authorization Framework**

by Mihail I. Kritikos  
University of Exeter

The establishment of minimum harmonization rules in the field of modern EU environmental regulation has been conceived through the centralised prescription of procedural rules. The proceduralised approach to harmonization seeks a uniform organisation of the decision making structures at the national level, whilst granting substantive discretion to the Member States on how best to achieve the legislative objectives. The paper asks whether proceduralisation has achieved its harmonisation objective in the Deliberate Release Directive (DRD 2001/18), and whether it has done
so through the declared paradigm of centralisation of procedure / decentralisation of substance. To this end, the paper examines the authorisation practice as it has been shaped during the last 20 years against the various centrifugal tendencies evidenced in the various MS and the Commission’s declared commitment to the protection of the internal market object. Particular attention is paid to the role of the European Food Safety Authority and the normative effects of its opinions on the allocation of powers between the Community and the national levels. The paper finds evidence of the failure of this new form of governance to deliver harmonious implementation outcomes and to establish a uniform authorisation framework. Whilst the proceduralised approach has been apparent in the design of the DRD, it is argued that this new form of harmonisation has in fact been gradually associated with a substantive centralisation of genetic engineering regulation through the establishment of EU institutional structures for the provision of scientific expertise in fields of risk regulation.

“The Common Frame of Reference in European contract law: an inspired idea or a distraction?”

Katherine Lim
BPP Law School

The Common Frame of Reference has been awash in controversy ever since its inception. Originally proposed by the European Commission as an attempt to deal with issues surrounding the divergence of national contract laws, the Common Frame of Reference (CFR) includes common fundamental principles of contract law, definitions of key concepts, and model rules. The CFR is intended to be used as a "toolbox" to improve existing Community contract law, in particular the acquis (consumer protection directives), as well as an aid in drafting future legal instruments.

One major criticism of the CFR is that its primary purpose lacks clarity. If it is intended as a "toolbox" for better legislation, how would this raison d'être fit in with the other two goals? The second area of concern is that there is much nervousness arising from the potential spectre of a European civil code. Although the Commission has stated that it has no intention to propose a civil code that would harmonise the contract laws of Member States, fears have been expressed that what initially would start off as optional may later become mandatory. Finally, the scope of ambition of the CFR has been criticised: is it either necessary or practicable for the CFR to attempt to reform the whole of contract law, when the Commission in practice is most likely to need this clarification for consumer protection measures? In other words, is the CFR an inspired idea or a distraction?

It will be argued that the CFR, through its programme of revising both the consumer acquis as well as wider contract law, has the potential to benefit the internal market among member states. However, in doing so, the Commission must clarify how it intends the CFR to work in practice, as many questions remain unanswered, particularly with respect to the "optional instrument" – and pose a risk of hiding the merits of the CFR under a bushel. I will conclude with an analysis of how the interface between the optional instrument and mandatory national laws may feasibly co-exist.
Harmonisation and Regulatory Differentiation within the European Internal Market – Examining the European Harmonisation Process with Specific Regard to Article 95 EC

Isidora Maletić

This paper purports to explore the theory and practice of harmonisation by using as a test case a pivotal legislative provision of the European Treaty. Article 95, which enables the Community institutions to adopt measures for the approximation of Member State provisions relating to the establishment and functioning of the internal market, constitutes one of the most powerful instruments for the advancement of European harmonization. However, there seems to be a fundamental divergence between the theory and practice of harmonization under this provision. Under the Treaty, it is envisaged that, in theory, the process of harmonisation therein will be complemented by the possibility for derogation contained within the same provision enabling Member States, under carefully delineated circumstances, to maintain or introduce national measures on a number of specified grounds even following harmonization. Nevertheless, in practice this notification procedure, encapsulated by paragraphs four to nine of Article 95 EC, ‘has proved to be relatively infrequently invoked and its use even less frequently authorised’(1). It is the object of this paper to analyze, in the light of a recent ruling(2), to what extent this discrepancy between the theory and practice of harmonization under Article 95 EC has resulted in a loss of regulatory differentiation, and to investigate more generally how harmonization under this provision, which characterizes much of the European legislative agenda, may be reconciled with regulatory variation at national level.

2) See Case C-439/05 Land Oberosterreich v Commission [2007] ECR I-7141, concerning national provisions banning the use of genetically modified organisms notified by Austria pursuant to Article 95.

International Competition Law Harmonisation and the WTO: Past, Present And Future

Dr Jurgita Malinauskaite
Brunel University

The globalisation process together with technological advancements, improvements in e-commerce, liberalisation of capital movement, investment and privatisation programs have spurred a surge in cross-border businesses. As markets become increasingly international, so do anti-competitive practices by firms. In a global world where multinational companies become dominant, national competition authorities face difficulties in regulating trans-national anti-competitive activities.
Hence, the harmonisation of international competition law has evolved into a topic of significant contemporary importance.

The first part of this article will discuss the effects of globalisation on competition. The process of economic competition often stretches beyond the borders of a single country, as many jurisdictions apply extraterritorial principles to deal with anti-competitive effects. Globalisation and therefore extraterritorial effect of competition laws bring various national competition laws into contact and sometimes confrontation. This is why the issue of international competition law have arisen. The second part of the article will be devoted to the WTO, its past attempts to introduce international competition law and its failure. Finally, the emphasis of the last part will be on the benefits of international competition law harmonisation: is international competition law desirable? If yes, is it achievable, as to whether the notion of “one size fits all” could be the best solution for competition law in an international context? The question will also be raised as to what are the strengths and limitations of the WTO in harmonising and enforcing international competition law. The article will conclude that the creation of an international system of antitrust is unlikely to appear on the horizon in the near future.

The CFR and Credit Securities – a suitable case for treatment?

Professor Gerard McCormack
University of Leeds

This paper looks at the possible content of a Common Frame of Reference (more provocatively called a European Civil Code) in the realm of credit securities. In particular it asks whether the most comprehensive international standard – the United Nations Commission on International Trade Law (UNCITRAL) Legislative Guide on Secured Transactions – is suitable for adoption at the European level to form the basis of the Common Frame of Reference (CFR). The UNCITRAL Legislative Guide has not yet gone through all the UN approval stages but its present content is likely to reflect its final form. The paper begins by adding to the growing literature examining the need for a CFR/European Civil Code but focuses the debate on the possible application of the CFR to credit securities.

Harmonisation of European takeover regulations as affected by legal systems, legislative process, and national transposition of the Takeover Directive.

Jonathan Mukwiri
University of Leicester;
University of Buckinghamshire

This paper assesses whether the Directive 2004/25/EC on Takeover Bids produces a harmonising effect on how takeovers are regulated in the European Community. The Directive aimed at protecting the interests of shareholders by making takeover safeguards equivalent throughout the Community and by preventing patterns of
corporate restructuring within the Community from being distorted by arbitrary differences in corporate governance cultures. This paper concludes that the Directive, as implemented by Member States, fails to achieve its harmonising aims and has produced no harmonising effect on takeover regulations in the Community. In assessing the lack of harmonising effect, the paper examines both the practical and the theoretical dimensions of the factors defeating harmonisation of takeover regulations. On a practical dimension, the paper examines a number of factors including the lack of detailed provisions in the Directive, the discretion in the Directive for Member States to impose stringent rules beyond the minimum standards, the Directive allowing Member States to opt out/into the core provisions contained therein, and the protectionist manner in which some Member States have transposed the Directive. On a theoretical dimension, the paper concentrates on the effects on harmonisation caused by the diverse legal systems and the politicised legislative process that led to the adoption of the Directive.

The Europeanisation of Private Law Through the Looking Glass of Legal Transplants - A New Analysis of the Harmonisation Project

Dr Leone Niglia
University of Aberdeen

What can scholarship on legal harmonisation learn from accumulated knowledge on legal transplants? This paper answers this question by proposing a rationalisation of the project of legal harmonisation in the area of private law grounded upon scholarship on legal transplants. It is a three-step argument. First, the paper re-assesses the process of harmonisation through directives on the basis of classical findings of scholarship on legal transplants in other areas. Second, on the basis of this re-reading, the paper argues for the availability of certain techniques that would allow legislatures and courts to remedy the many failures of the harmonisation project (in relation to its poor effectiveness: cf. e.g. Niglia 2001 and 2003; Micklitz 2005; Reimann 2001). Third, the paper explains why legislatures and courts should adopt the suggested techniques. It does this not on the basis of an abstract theoretical standpoint but in relation to the contingent conditions in which the harmonisation process happens to take place today. It is submitted that legislatures and courts should adopt the proposed techniques in order to promote better and responsive regulation. From this vantage point, the paper argues that a central role should be played by scholars, and proposes a reorientation and redefinition of the field in line with the requirements of 'better regulation' and 'responsive regulation'. The paper is part of a series of articles that proposes a new theoretical framework for understanding the Europeanisation of private law: the first article has been published in American Journal of Comparative Law (2006), 401).
From Sectoral Harmonisation to a European Code within one Generation?

Annette Nordhausen
University of Manchester,

European Consumer Law has a short, but impressive history, starting from rather marginal importance to recent discussions about a further harmonisation or even the development of a European Consumer Code. All these developments have happened within a rather short time and show not only the substantive changes in consumer protection, but also more general issues, like changes in Community aims and objectives from purely economic factors to increased relevance of non-economic factors such as consumer protection.

The legislative competences have been widened and legislative measures have not only become more numerous, but also different in style and scope. All developments and discussions in the area of consumer contract law have to be seen in the wider context of general contract law – for European developments this includes the various contract law projects.

This paper will first analyse the development of substantive European consumer contract law (including developments in the underlying consumer policy) and the use of different legislative techniques (minimum / full harmonisation, specific / framework directive).

The second part will discuss the ongoing consumer acquis review and identify the existing problems due to a lack of harmonisation or incoherent harmonisation in certain areas. Despite problems in the harmonisation, certain general principles can be identified (transparency of statements and contractual terms, prohibition of misleading information, information obligations, cancellation rights, and enforcement) and these will be discussed in more detail.

The third part will analyse the draft Common Frame of Reference and Principles of European Contract Law in the area of consumer contracts, as well as other discussions surrounding these proposals, such as a European Consumer Code or even a European Civil Code. The principles identified under the current state of harmonisation will be compared and tested against the proposals, which will show the effects of the discussed proposals on the existing consumer contract law as well as the status of consumer contract law within the wider area of contract law.

Lex Mercatoria as Transnational Commercial Law: Is the claim that the Lex Mercatoria is preferentially for the ‘mercatocracy’ (1) true?

Adaora Okwor
University of Sheffield

As traditional boundaries collapse and the globe shrinks, countries are no longer as discrete as they once where. During the last century, all manner of universal co-operation among private institutions, governments and businesses have been necessitated both by technological advancement and other effects of globalisation. However, increasingly, the traditional conflicts of laws rules and public international law demonstrate their inadequacies in effectively dealing with the different kinds of challenges which globalisation presents. Consequently, the lex mercatoria has been
controversially publicised as a viable option to these other traditional legal systems - 'the most successful example of global law without a state'? (2)

The mercatocracy, described as an elite association engaged in the unification and globalisation of transnational merchant law, exercises a predominant influence “as the organic intellectuals of the transnational capitalist class.” (3) This assertion exposes a crisis of representation and legitimacy, because if the lex mercatoria truly is global law and therefore applies transnationally, should it be preferentially elite in its creation and origin? Would not this be unlike the medieval lex mercatoria which originated from merchants generally, irrespective of the commercial class to which they belonged and regulated their commerce?

Beginning with the response to challenges on its existence and provability, the harmonization of principles comprising the lex mercatoria has been epitomized by a number of legal instruments such as the UNIDROIT Principles of International Commercial Contracts and The Centre for Transnational Law List of Principles, Rules and Standards of the Lex Mercatoria.

This article aims to evaluate the legitimacy of the claim to transnationality that the lex mercatoria makes by evaluating these instruments of harmonisation based on their origin and use in practice. The first part will contain a concise outline of the development of the lex mercatoria and the nature of transnational law. The second part will review the source of the UNIDROIT Principles of International Commercial Contracts and The Centre for Transnational Law List of Principles, Rules and Standards of the Lex Mercatoria and identify the ways in which they have been used in the transnational commercial scene as a model for national and international legislation; as a guide in contract negotiations; as the law chosen by the parties to govern their contract; and as rules of law referred to in judicial and arbitral proceedings.


Models of Harmonisation of Environmental Criminal Law: Unification, Approximation, Co-operation or a Mixed Method?

Ricardo M. Pereira
University of Essex

The quest for a ‘high’ level of environmental protection in the European Union (EU) is dependent on the successful implementation and enforcement of EU legislation by Member States. Thus, despite the fact that the Community did not appear to have a mandate to impose the choice of instrument of implementation of Community Law on Member States, the decision of the European Court of Justice (ECJ) of 13 September 2005 (Commission v Council C-176/03) has established that while the Community does not have competence in criminal matters per se, the
Community institutions may require Member States to introduce criminal sanctions for the protection of the environment. The ECJ has therefore annulled a Framework Decision of the Council which aimed at harmonising the criminal sanctions for protection of the environment of Member States under the third pillar of the EU, rather than the first pillar - which allows the Commission and ECJ to exercise stronger enforcement powers and the European Parliament to have greater participation in decision-making.

The European Commission, which proposed the adoption of a Directive on the Protection of the Environment through Criminal Law in March 2001 and another in February 2007 following the ECJ 2005 decision, hopes that harmonisation will help improve the implementation deficit of EU environmental legislation and provide a strong deterrent against transboundary environmental crimes.

Yet even though the ECJ recognised in the Commission v Council 176/03 case that the Community has a limited competence in criminal matters (that is, to require Member States to introduce criminal sanctions against serious violations of environmental law), it has fallen short of finding that the EC has competence to specify the types and levels of penalties to the environmental offences harmonised at the EC level. The answer to this question only happened in 23 October 2007 in the follow-up Ship-Source Pollution case Commission v Council 440/05, in which the Commission challenged the legal basis of a Framework Decision of the Council of July 2005 2005/667/JHA to strengthen the criminal-law for the enforcement of the law against ship-source pollution (adopted by the Council under the third pillar). The ECJ annulled the Framework Decision as, being indivisible, it encroached on the Community’s competence, yet it also stated in clear terms that ‘the determination of the type and level of the criminal penalties to be applied does not fall within the Community’s sphere of competence’ (para. 70)

Following this decision, the Council has taken the 2007 ‘environmental crime’ directive proposal for discussion. In line with the ECJ decisions in cases 176/03 and 440/05, the Council has detached the provisions establishing the types and levels of penalties from the proposal(1), and is likely to adopt the directive under the co-decision procedure with the European Parliament(2). In its turn, the Commission proposed a directive on 11 March 2008 to amend the directive on ship-source pollution(3), introducing the requirement that sanctions for certain forms of ship-source pollution committed intentionally, recklessly or with serious negligence are of a criminal nature.

Despite those developments, if the Treaty of Lisbon 2007 is ratified, the provisions on the types and levels of criminal penalties could still be subjected to the ‘Community method’ typical of the first pillar(4). Indeed, the Treaty of Lisbon envisages the abolition of the third pillar and the transfer of criminal law matters to the first pillar.

These developments demonstrate that for the first time a supranational institution may be able to effectively enforce an obligation on national authorities to enact penal sanctions for environmental protection. That is in contrast with the fate of the “penal clauses” identified in a number of international environmental agreements, for which sanctions for non-implementation are lacking, or the still unsuccessful attempt by the Council of Europe to adopt a 1998 Convention on environmental crimes.

The objective of this paper is to analyse those developments in light of the different models of harmonisation of criminal law (unification, approximation, cooperation or a mixed model involving supranational and intergovernmental
components) and to identify which model would provide a suitable mechanism for harmonisation.

1 Council of the European Union, 6749/1/08 REV 1, DROIPEN 16 ENV 112 CODEC 246, 4 March 2008
4 Article 83 of the Treaty on the Functioning of the European Union (formerly EC Treaty), as amended by the Treaty of Lisbon. This Article is the successor to Article III-271 of the Draft Constitutional Treaty

---

**Legal Convergence around the World: Fact or Fiction?**

Dr. Antonios E. Platsas  
University of Derby

The proposed paper is concerned with whether or not legal convergence occurs around the world. The paper will question whether international and supranational instruments of law alone are sufficient for one to argue that legal systems actually converge. The analysis will initially concentrate on the developments at the main three regional poles of legal convergence (Europe, North America and the Pacific Rim). Further, the developments in other parts of the world will also be taken into account so that the current state of affairs there vis-à-vis convergence is addressed. The paper will additionally deal with certain international legal instruments which may purportedly achieve a minimum of legal approximation in world legal systems. Beyond this, the analysis will concentrate on the effect that such organisations as the IMF, the WTO and the World Bank Group may have on the convergence of legal systems as a worldwide phenomenon. The paper will then address what are the reasons for the fact that convergence remains a Chimera in certain parts of the world and what can be done in order for such a state of affairs to change.

---

**Harmonisation or Reflexive Coordination of Law and Policy? Thoughts on New Governance in the European Union**

Dr Ralf Rogowski,  
University of Warwick

The paper argues that coordination policies that foster the introduction of soft law have largely replaced harmonisation efforts in law and policy making in the EU. It analyses new forms of governance used in conducting coordination policies and assesses their impact on traditional forms of law in the areas of social and employment polices where a transformation from a rights-based to a policy-oriented agenda can be observed. It compares reflexive harmonisation and reflexive coordination and demonstrates that reform efforts of coordination policies reveal second order reflexivity in form of coordination of coordination.
From 2001 onwards, the European Commission has published a number of communications and action plans concerning the future of contract law in Europe. After consultation of civil society and other interested parties on the basis of those policy documents, the European Commission finally came forward with two measures, which are the Common Frame of Reference (hereafter: also the CFR) and a non-sector-specific instrument (also known as the optional instrument). This paper’s focus will be the CFR and the optional instrument will not be discussed.

In the documents mentioned the European Commission states that the CFR will consist of principles, definitions and model rules and it will be used as: “… a toolbox, when presenting proposals to improve the quality and coherence of the existing acquis and future legal instruments in the area of contract law. At the same time, it will serve the purpose of simplifying the acquis.” In other words, at this stage, the CFR will not provide any binding rules.

Upon request by the European Commission, a research network, the Joint Network on European Private Law (hereafter: the CoPecl network) produced a Draft CFR, which was presented to the European Commission in December 2007. The European Commission has reiterated that the final CFR will not be the same as the Draft CFR. After further consultation of the public it will decide on the final version of the CFR.

An important role during the drafting of the CFR has been played by stakeholders from industry and legal practise that form together the ‘CFR net’. During workshops in Brussels, the CFR net comments on drafts of the CoPecl network. Questions can be raised as to the way the workshops are organized, since the European Commission invites a limited number of stakeholders from the CFR net for the workshops, it chairs the workshops, it provides the minutes. Moreover, to facilitate the communication within the CFR net and with the researchers, a specific website is created for the CFR net, which is not open to the general public.

From the above it follows that the consultation of civil society and other interested parties is an important element of the CFR process. In this respect two modes of consultation can be distinguished. First, civil society and other interested parties have the possibility to react to the communications and action plans of the European Commission in the area of contract law. Secondly, within the CFR process, there is the CFR net, that comments on drafts of the Draft CFR.

Apart from Article 9 of the Protocol on the application of the principles of proportionality and subsidiarity, according to which the European Commission must consult widely before producing any legislation, there are no binding rules according to which the European Commission should do so. However, there informal rules which are included in communications and action plans, where the European Commission regulates its relationship with civil society.

The hypothesis of this paper is that the European Commission does not abide the rules which it sets itself in its communications concerning consultation of civil society. Before verifying this hypothesis, first a general overview of the discussion concerning the CFR will be given, that will focus on the consultation of civil society. Then, attention will be paid to the discussion concerning consultation of civil society.
and its role within the European legislative process in its broadest sense. Subsequently, the hypothesis will be tested by a detailed analysis of several questions which the European Commission posed the public in its communications on contract law, which in its turn will be considered in the light of the informal rules which the European Commission has set itself with respect to consultation of civil society in its actions plans and communications.


3 Apart from a wide consultation, Article 2 of Protocol on the application of the Principles of Subsidiarity and Proportionality to the Lisbon Treaty adds that the European Commission should take into account regional and local dimension where appropriate.


Comparative Law and European Harmonisation – a match made in heaven or Uneasy bedfellows?

Professor Dagmar Schiek, University of Leeds

The relation between EU legal harmonisation and comparative law seems contradictory. On the one hand, harmonisation has given a new and heightened relevance to comparative law. In particular the functionalist approach to comparative law has been described as having gained “a new life under the flag of common core studies” (Örücü 2007, 51), based on its universalist tendencies. Thus, comparative law and harmonisation may appear as a match made in heaven. On the other hand, critical approaches to comparative law, characterised by a predisposition for stressing diversity of socio-legal and cultural contexts of legal institutions, are sceptical of any mission to use comparative law for finding a best (and possibly uniform) European way to any issue. Hence, the question arises whether the increased relevance of comparative law functionalist style will lead to sacrificing more critical branches of comparative law (Nelken (2007, 31). From these perspectives, harmonisation may well resemble an uneasy bedfellow.

This paper will discuss whether there may be some scope for critical comparative law accompanying European harmonisation beyond this alleged antagonism. To that end, different uses of comparative law in relation to EU harmonisation will be analysed.

Making a short reference to the role of comparative law within ECJ case law, the paper will proceed to consider the role of comparative law in the legislative process at
Community level. These processes aim directly at harmonising law in most cases, and may thus demonstrate some dominance of “old school” functionalism. Further uses of comparative legal reasoning are to be found in the field of non-legislative processes towards EU harmonisation. The Open Method of Coordination and the development of model codes have been cited as examples of “new governance” in this respect. Here, there is some evidence of “new school” approaches to comparative law being used, precisely because the OMC is considered as an instrument to balance unity and diversity of national systems. Comparative law is also employed when analysing the results of harmonisation activities of the EU legislator. A wide variety of institutional arrangements in the field harmonised may lead to vastly different impacts of actual harmonisation. This has led to demands of new methods for comparative law within the context of European harmonisation, inter alia stressing the need to view law in context and regard the socio-legal system in which a specific legislative aim is embedded.

Last but not least, the paper will address uses of comparative law for interpreting national legislation implementing EU legislation, which are less frequently discussed to date. It has been suggested that a judge should consider foreign law if a piece of legislation has a foreign origin. This insight has not been applied to interpreting harmonised legislation systematically, though. Again, comparative legal reasoning may be useful to expose similarities and differences between legal orders.

Bibliography

Small states and EU harmonization

Dr Constantin Stefanou
Institute of Advanced Legal Studies

This paper will look at the process of harmonization in small states, using the recent experience of Cyprus' efforts to harmonise as a case study. Small states have unique problems related to the ability of their small civil services to transpose the 81,000 pages of the aquis. How can they overcome these problems and should they be treated differently? Perhaps more importantly, can small states implement effectively or does harmonization end with transposition?

Should the EU be attempting to harmonise national systems of labour law?

Dr Phil Syrpis
University of Bristol

The Commission and Member States appear to have taken a firm stand against what they term ‘total harmonisation’; and, to the extent that they advocate EU level intervention in the social field, have instead pursued either minimum standard-setting or coordination (both of which leave considerable scope for flexibility for Member
States and indeed for the social partners); or taken steps to ensure mutual recognition. This approach is broadly supported in the academic literature. There is a broad consensus that harmonisation in this field may be unattainable. However, some academic commentators make the further point that it is also undesirable. The intention of this paper is to investigate this second contention and to explore the reasons for which, and the extent to which, the harmonization of national labour laws and social policies may in fact be considered desirable.

Some consideration will be devoted to the meaning of the term ‘harmonisation’. However, the focus of the paper will be on separating out the economic, social and integrationist rationales for harmonisation; or to put this another way, the various respects in which differences between national systems of labour law may be thought to be problematic – in particular in the wake of the Eastern enlargement of the EU and the recent case law of the Court of Justice on the interface between national labour law systems and the economic freedoms (see in particular Viking, Laval and Rüffert). The consequences of the differences in approach of the Court and the EC legislature will be assessed.


Dr Christian Twigg-Flesner
University of Hull

When the European Commission decided to embark on the elaboration of a Common Frame of Reference on European Contract Law (CFR), it emphasised the importance of combining principles/model rules derived from both the national legal systems of the EU Member States and the acquis communautaire. The work of creating a Draft CFR was given to a Research Network which includes the Study Group on a European Civil Code and the Acquis Group. Both groups have undertaken their research work independently, with the Draft CFR put together by a team of editors taken from both groups.

The work of the Acquis Group is of particular interest, because it takes the restatement approach for creating common principles into unchartered waters: instead of a comparative approach based on various national jurisdictions, the “acquis approach” concentrates on principles that might be identified in the body of existing EC Law, primarily in the directives and regulations affecting aspects of contract law, but also in the jurisprudence of the European Court of Justice. There is clearly considerable value in a diagnostic exercise to establish just how much coherence there is (or is not) in the acquis communautaire, and it is also crucial that what is in the acquis is reflected in the CFR: one would think that matters in existing EC Law are common to all the Member States.

However, it is well known that the acquis is far from a coherent set of rules; it is piecemeal and often inconsistent. It is also not intended to be a free-standing set of rules, but one that depends on its effectiveness on a complex interaction with national laws. Moreover, the bulk of the acquis is found in the consumer law field, and there is very limited acquis on general contract law. Often, therefore, this research will entail identifying a “hidden principle”, evidence of which is only seen e.g., in a consumer
rule that apparently derogated from this. The task of identifying common principles in the existing EC contract law is therefore a tall order.

The Acquis Group has worked on this over the last three years or so, and has published a first volume of its research findings (Contract I, Sellier, 2007). This publication has not met with unequivocal approval. The purpose of this paper is therefore to reflect critically on the work undertaken within the Acquis Group, with a particular focus on the methodology adopted, the outcomes presented and the implications of this work for the further development of EC Contract Law, whether limited to a revision of the consumer contract acquis, or, ultimately, an “optional instrument” on European Contract Law.

---

**Modernising Company Law and Regulatory Competition: An Economic Implication**

Professor Junko Ueda
Shizuoka University, Japan

The aim of this article is to revisit some issues concerning competition of company laws between different jurisdictions. There has already been a volume of outstanding scholarly work on this theme from various perspectives. While the article stands out in a series of such distinctive work, it pursues an inter-jurisdictional framework of company laws; the focus of which is primarily on whether to compete and to compete to what extent. It seems, however, that a number of preceding studies have for the most part focused on jurisdictional competition within one political unit, irrespective of whether it is a nation-state or supranational organisation somehow to contribute to policy building for the unit. This article does not incline to any particular agenda-settings. Rather, it aims to provide a general, feasible framework to different jurisdictions world-wide, taking some economic considerations.

Section I of the article is devoted to clarifying some preliminary issues as to the elements of company law. Section II looks at the state competition or federalism debate developed in the United States of America (US) as a laboratorial example of competition within national law and generalises the issues to extract some economic points of thought. Section III, while keeping careful watch over inter-jurisdictional issues arising in a supranational entity like the European Union (EU) and elsewhere in the world, develops arguments for a desirable framework manufacturing a product of company law of ‘higher’ quality at global level.

---

**Democracy and the Shifting Balance of Public and Private Governance**

Dr Mary Vogel
King’s College London

In thinking about law today, it is sometimes said that there is more law but that the public institutions of the state appear to be playing a lesser role in it. Increasingly, one hears talk of the retreat of the state in favour of neoliberalism and of the blurring
of the boundary between public and private in criminal justice. Privatisation is advancing rapidly and practices of discretionary informality in the courts are on the rise. This paper argues that there is a shift underway in the balance between public and private power. It is one with powerful implications for accountability. Contours and dynamics of that shift are explored.

---

**One path and Many Directions**

Qianlan Wu
London School of Economics and Political Sciences
Institute of European Studies, Chinese Academy of Social Sciences

---Voluntary harmonization of competition regulations and the development of national competition regulation in the case of China

In the WTO July decision in 2004, the WTO General Council decided that the issue of competition law would not be one part of programme set out in the WTO Doha Declaration. The harmonization of competition regulation through the arena of international trade thus experienced serious setback.

However, in the years following the Doha round, many jurisdictions have adopted competition laws or considered doing so. More interesting, against the backdrop of variety of market economies developed in these countries, the competition laws adopted in these economies have shown to a certain extent convergence in the following aspects: firstly the structure of competition regulation mainly include regulating anti-competitive agreements, dominance and mergers. Secondly, the competition law has been enforced by one independent regulator or increasingly enforced by private litigation. Thirdly, the competition laws in these countries shows shifting of values in between social and economical goals based on fairness or others and pure efficiency concerns. In recent years, more competition authorities have chosen to emphasize on the efficiency concern and converged to adopt a more economics based approach in enforcing competition laws.

The reasons behind this voluntary convergence of competition regulation worldwide can be explained by various reasons, which include strong advocacy of their own competition regulation models by strong players in international trade, bilateral trade agreement, bilateral cooperation on competition law technical assistance.

The Anti-Monopoly Law (AML) adopted by China in 2007 is China’s first comprehensive competition law. The adoption of the AML has been driven partly by China’s WTO commitment, partly by the active communication in the EU competition dialogue between Brussels and Beijing and partly by the emergence of private and public competition restriction in the economy. As a result, the AML of China resembles to a large extent the regulation provided by EU competition law.

However, the analysis of AML of China shows that though China chose to converge its competition regulation with one of the dominant competition regulation models in the world, the social embeddedness of its national legal system decides that the law sets to pursue its own social and economic goals and the law is to be enforced by multi regulators jointly under the central government.
The paper plans to use the development of AML in China as a case study, in order to illustrate firstly the impact of voluntary harmonization of competition regulation on the development of national competition regulation, secondly the impact of social embeddeness of the national legal system on harmonization of competition regulation worldwide and thirdly if possible, what are the criteria which can be used to measure the extent and effectiveness of harmonization of competition regulation in world economies.

**Technical considerations in harmonisation and approximation: legislative drafting techniques**

Dr Helen Xanthaki  
Institute of Advanced Legal Studies

The paper will address considerations of national governments in the effort towards accession and effective membership to the EU; drafting techniques as per source of EU law; and techniques deriving from the experience of current member states.

**The TRIPS Agreement, Text Extrapolations Regarding Harmonisation of Intellectual Property Laws With Reference to the Impact on the Legislation of Arabic Countries**

Anan Shawqi Younes  
University of Leicester

This paper clarifying that, a thorough study of the foreign legal systems, as well as the legislative efforts of the organizations regarding intellectual and industrial property, could contribute to identify the legal matters that we face while dealing with electronic commerce and IP rights. Besides, the discussion of attained solutions will identify the required and most convenient resolution for the Arabic legislations case. Especially in its cooperation and planning to legislate the proper laws concerning intellectual and industrial property rights.

Actually, despite the fact that the intellectual and industrial properties are not dealt with; and some of them are recent and unclear. Nonetheless, there are a wide range of activities on the national and regional levels dealing with these matters. Internationally, we must consider The WTO, OECD, and UNICITRAL efforts. And regionally, we must consider The EU, APEC, FTFA efforts. On the other side, there are distinguished legislative efforts in several countries. Particularly, in countries that seek to join The WTO. A good instance, Arabic countries seeking to amend their trade marks laws, patents, industrial designs and copyrights in line with international standards in TRIPS agreement. This appears the importance of the WTO and its agreements, namely TRIPS, in harmonizing the legislations of its members, including and especially Arabic one, mainly in the scope of Intellectual Property and E-commerce.