The Harmonization of International Commercial Law

Silvia Fazio

KLUWER LAW INTERNATIONAL
Table of Contents

Foreword by Professor Mads Andenas xv

Preface xix

Acknowledgements

Chapter 1
The World Scenario and the Approximation of Law 1

I The Emergence of a Global Economic Order 1

II Political Governance in a Global Society 4
   A The Crisis of the Concept of the Nation State 4
   B Governance in a Transforming Society 6
   C The Regionalization of Governance 7

III The Legal Impact 8
   A The ‘Import’ and ‘Export’ of Laws 8
   B Standardization of National Law 10
   C International Law and the Emergence of a Contemporary\n      \textit{Lex Mercatoria} 11

IV Conclusion 15
# Table of Contents

## Chapter 2

### Vehicles for Harmonization of Law

17

**Introduction**

**I Soft Law**

A The Adoption of Soft Law in International Relations

17

B Soft Law: The Forms of Its Incorporation in the International Legal System

19

C The Nature of Soft Law

20

D The Efficacy of Soft Law as International Law

21

E Soft Law and Its Links with Other International Law-Making Processes

22

**II Customary International Law-Making**

23

A The Definition and Creation of Customary International Law

23

B The Ability to Create Customary Law

26

C Identification of Relevant State Practice for the Creation of Customary Law

27

D The Concept of 'Instant' Customary Law

28

E Treaties as a Source of Customary International Law

29

**III Multilateral Treaties**

30

A International Treaty-Making

30

B Reservations: An Obstacle for the Uniform Application of Treaties

32

**IV International Law-Making and the Activities of International Organizations**

34

**V The Role of Multinational Enterprises in the Harmonization of Laws**

37

**VI The Influence of Developments in Information Technology on the International Law-Making Process**

38

**VII Conclusion: Towards a Formless International Legal Corpus**

39

## Chapter 3

### Regionalization and Standardization of Law

41

**Introduction**

41
# Table of Contents

I  Trade Oriented Integration: An Historical Approach 41  
A  Ancient History to the Merchant Guilds and the Development of Cities 41  
B  The Impact of Islam 44  
C  The Role of the Jews 45  
D  Colonialism 45  
E  The Benelux Economic Union 48  

II  An Historical Overview of Regional Integration: The Case Studies of the EU and the Mercosur 49  
A  European Union 49  
B  Mercosur 53  

III  The Process of Regionalization 55  
A  The Causes of Regional Integration 55  
B  Types and Characteristics of Regional Integration Initiatives 61  
1  Free Trade Areas 61  
2  Customs Unions and Deeper Forms of Regionalism 61  
3  Regional Institutions 62  

IV  Regionalism and Globalization 63  
A  WTO Requirements on Regional Trade Agreements 63  
1  Article XXIV 64  
2  Enabling Clause 64  
B  Conflicts between Regional Integration and the WTO Policy on Global Trade Liberalization 65  
C  Open Regionalism 70  

V  Conclusion: The Co-existence of Regional and Multilateral Integration 72  

Chapter 4  
Regional Corporate Law Harmonization: The EU and the Mercosur 73  

Introduction 73  

I  Historical Background 74  
A  European Union 74  
B  Mercosur 75  

II  The Driving Forces of Harmonization of Company Law 77  
A  The Case Study of the EU and the Mercosur 77
III Primary Legislation
B Mercosur: Asuncion Treaty Framework and Member States' Domestic Legislation 87

IV Secondary Legislation
A EU Vehicles for Company Law Harmonization 91
B The EU Directives on Company Law Harmonization 96
C Mercosur Vehicles for Law Harmonization 102
D Mercosur Secondary Legislation in Corporate Matters 106

V The Creation of Regional Corporate Bodies
A The Establishment of Transnational European Bodies: The EEIG and the 'Societas Europaea' 108
B Establishment of Transnational (Bi-national) Corporate Bodies in South America 114

VI Conclusion: The Learning Process of Regional Corporate Harmonization 117

Chapter 5
The Infrastructure of Capital 119

Introduction 119

I International Cross-Border Handling of Capital: An Overview 119

II Cross-Border Transactions in the European Union 127
A Historical Development and Legal Nature of EC Law on Movement of Capital 127
B EC Primary Provisions on Movement of Capital 129
C The EC Directive on Free Movement of Capital 133
D EC Secondary Legislation on Cross-Border Payments and Transfers 134

III Conclusion 137

Chapter 6
The Phenomenon of Development: International and Regional Approaches to Banking and Financial Law 139

Introduction 139
Table of Contents

III Communitaire Theories 172
   A Communitaire Justifications 173

IV Concessionary Theories 174
   A The Company as a Mere Fiction 174
   B The Body Politic: Theories of Constitutionalism 175
      1 Corporate Constitutionalism 175
      2 The Free Floating Company: The Dual Concessionary Theory 177
   C Justifications from a Concessionary Perspective 178

V Conclusion 179

Chapter 8 Corporate Governance 181

   Introduction 181

I The International Corporate Environment and the Development of Corporate Governance 181
   A Corporate Concentration 181
   B Negative Externalities and the Operations of Multinational Corporations 183
   C Corporate Social Responsibility 183
   D Corporate Control and Issues of Corporate Governance 184
   E Transparency and the Necessity of International Standards of Corporate Governance 185

II Corporate Governance: The Case Study of the UK 186
   A Background 186
   B The Combined Code 2003 188
   C Legal Status of the Combined Code 2003 and Complementing Legislation 190

III Corporate Governance Developments in the EU 191

IV International Initiatives in Terms of Corporate Governance 193
   A The OECD Principles of Corporate Governance 2004 193
   B International Corporate Governance Network (ICGN) 194
   C Governance of Corporate Groups and Multinational Enterprises 194

V Enforceable Corporate Governance Legislation: The Case Study of the US 198
# Table of Contents

## VI Corporate Governance in Latin America: The Case Study of Brazil

A Origins of Corporate Governance in Brazil 199
B Brazilian Initiatives on Corporate Governance: Background 202
C The Brazilian Institute of Corporate Governance and the Code of Best Practice 203
D The Policy of ‘Bovespa’ and the New Market 204
E CVM Recommendations 205
F Initiatives Involving Corporate Governance for State-Owned Corporations 205
G OECD White Paper on Corporate Governance in Latin America 206

## VII Conclusion 207

## Chapter 9

**International Legal Standards and the Inclusion of Emerging Countries in the Globalized Order: The Case Study of Brazil** 209

Introduction 209

I The Contemporary Brazilian Democratization Process 210

II The Consolidation of Brazilian Institutions 212

III Brazil’s Active Role as a Leader of Emerging Countries within International Organizations and the WTO 215

IV Legal Developments in Brazil and the Ratification of International Conventions 216

V Conclusion 221

VI Interview with Dr Fernando Henrique Cardoso (President of Brazil from 1995 to 2003), recorded on 16 August 2005 at his residence in São Paulo 222
Conclusion
Legal Pluralism and the Creation of Standards within the Process of Globalization: Analytical Summary and Theoretical and Practical Implications

I Main Findings
A Approximation of Law in the Global Arena
B International Multilateral Law-Making and Its Vehicles
C Contemporary Issues Regarding Regionalism and Multilateralism
D Movements of Capital and Legal Persons
   1 Capital Movements and Financial Regulation
   2 Movements of Legal Persons and the Harmonization of Corporate Law
   3 Harmonized Corporate Vehicles
E The Role of Corporations in the Global Society
   1 Corporate Governance and Social Responsibility
F Inclusion in the Global Scenario: How Emerging Countries Are Coping with the Global Order

Bibliography

Index