

The Harmonization of International Commercial Law  
The Harmonization of International Commercial Law  
The Harmonization of International Commercial Law  
**The Harmonization of International Commercial Law**  
The Harmonization of International Commercial Law  
The Harmonization of International Commercial Law  
The Harmonization of International Commercial Law

By Silvia Fazio

**KLUWER LAW**  
INTERNATIONAL

# **The Harmonization of International Commercial Law**

**Silvia Fazio**

**KLUWER LAW**  
INTERNATIONAL

*Published by:*

Kluwer Law International  
P.O. Box 316  
2400 AH Alphen aan den Rijn  
The Netherlands  
E-mail: [sales@kluwerlaw.com](mailto:sales@kluwerlaw.com)  
Website: <http://www.kluwerlaw.com>

*Sold and distributed in North, Central and South America by:*

Aspen Publishers, Inc.  
7201 Mc Kinney Circle  
Frederick, MD 21704  
United States of America

*Sold and distributed in all other countries by:*

Turpin Distribution Services Ltd.  
Stratton Business Park  
Pegasus Drive, Biggleswade  
Bedfordshire SG18 8TQ  
United Kingdom

ISBN 978-90-411-2587-3

© 2007 Kluwer Law International BV, The Netherlands

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, mechanical, photocopying, recording or otherwise, without prior written permission of the publishers.

Permission to use this content must be obtained from the copyright owner. Please apply to: Permissions Department, Wolters Kluwer Legal, 76 Ninth Avenue, 7th floor, New York, NY 10011, United States of America. E-mail: [permissions@kluwerlaw.com](mailto:permissions@kluwerlaw.com).

## Foreword by Professor Mads Andenas\*

Silvia Fazio has written an important book on the globalization and harmonization of international financial, corporate and commercial law. Dr Fazio has an unusual combination of qualifications for doing so. Having qualified as a lawyer in Brazil, Italy and Portugal, she is today a partner at Collyer Bristow solicitors in London where she is the Head of International Business at the firm. She holds many degrees, including a PhD from the Institute of Advanced Legal Studies in London, an LLM in International Law from Heidelberg, a Master's Degree in European Law from Bologna in addition to her first law degree from the University of São Paulo, Brazil.

International commercial law requires practitioners and scholars with a background from more than one jurisdiction. It is difficult to keep up with Dr Fazio, on any level, but most will recognize that sole jurisdictional training and practice is limiting to both the practitioner and scholar in modern commercial law. And commercial law is becoming international commercial law. The international transaction was in most areas an extraordinary occurrence. In many fields it is today becoming the ordinary and regular transaction. Even the previously clear and typical national transaction today in many instances has an international or regional dimension, for instance because the 'national' law that applies is subject to international harmonization, or because it is more directly affected by European Union or WTO law.

It is not only the limitation to one national jurisdiction which becomes untenable. The distinctions between public and private law are equally untenable. The international commercial practitioner knows this. Scholarship and teaching are catching up.

---

\* PhD (Cambridge) MA, DPhil (Oxford). Professor of Law, University of Leicester; Senior Fellow, Institute of European and Comparative Law, University of Oxford; Senior Research Fellow, Institute of Advanced Legal Studies, University of London; Honorary Fellow of, and former Director of, the British Institute of International and Comparative Law; Former Director of the Centre of European Law, King's College, University of London.

Dr Fazio's elegant book makes a contribution to this process, merging many very different perspectives, and adding much value in doing so. The book has two target audiences: the academic or postgraduate scholar, and the practicing lawyer in the fields of commercial, financial or corporate law. They will all benefit from this book which provides original and engaging international and comparative law perspectives.

Dr Fazio's focus is on the impact of globalization, regionalization and other processes of convergence on the standardization of commercial law. She compares how developed and emerging countries deal with the reception of new legal standards in a globalized order. The standards include those derived from public and private international law and in the areas of financial regulation, company law and corporate governance.

Dr Fazio argues that the globalization of markets is pushing aside the static, territorial boundaries for legal systems. Globalization and regionalization requires that law adapts more rapidly and efficiently. The new markets, structures and activities of financial institutions face increased risks and need new regulatory responses. The change is there at the basic level of contract law for individual transactions and at the institutional and regulatory level in terms of the organization of markets. Efforts to harmonize commercial law within the global order have resulted in a series of fragmented and *ad hoc* processes that are constructed according to multiple different interests and in order to preserve public policies in the face of transnational challenges.

This book subjects to systematic analysis the current state of commercial law from a global perspective. Dr Fazio identifies both the reasons that are fostering the harmonization process and she explains the ways in which it is developing. Her broad analysis includes a multitude of relevant elements which together constitute an exciting analysis. She addresses how emerging countries are absorbing international standards (with a special case study of Brazil). Her discussion of the impact of corporate activities on legal systems and the role of the corporation in promoting the standardization of laws includes the central issues of social responsibility and corporate accountability. She evaluates the traditional justifications for the regulation of the corporate world including the free trade v. 'fair trade' dichotomy. She analyses the impact of treaty reservations and different forms of treaty incorporation into national legal systems. She also discusses the interaction between regional trade agreements and the WTO system. The role of movement of capital and how this is reflected in international initiatives as well as in regional legislation and regulation and the co-operation among national financial authorities is given appropriate attention. She also has a broad analysis of the emerging new *lex mercatoria*. Her study of the role of professional associations such as the International Chamber of Commerce (ICC) and of the various legal vehicles that promote the spread of international standards emphasize s the influential role of soft law and the emergence of customs and practices side by side the case law developed by international judicial bodies. Her analysis includes a detailed comparison of the standardization of company law in the Mercosur and the European

Union, demonstrating the evolution of certain regional integration processes into complete new legal orders. As you will see from the book, it also benefits from the insights of the former Brazilian President, Dr Fernando Henrique Cardoso (President from 1995 to 2003) who has made an important contribution to this book.

The main question is how national legal systems react and adapt to the strong internationalization in a field such as international commercial law. The answer Dr Fazio would give us is that they do so rather badly. In her analysis of the different actors (legislators, courts, legal academic scholarship), she shows how national law struggles to find rational solutions. In many cases it is becoming an obstacle. The perspective of development and transition shows the particular difficulties that national systems can have in balancing the different considerations of international commercial law, development and national sovereignty. National legal scholarship does not usually assist much here. It is a pocket of particularly strong resistance to the use of international legal sources. And it is a resistance based on traditionalism and not on any balanced approach based on legitimate concerns for development or gradual transition. Legal scholarship does however have an important contribution to make. Dr Fazio makes one such contribution with this book.

The relationship between national laws and the different regional and international legal orders in the field of international commercial law is complex. It is a practically important field which lends itself to theoretical analysis. Dr Fazio also identifies and analyses the barriers found in national legal systems and the ways in which these can be overcome. She raises matters of method which goes far beyond commercial law and contributes to the understanding of law and the legal process at a more general level. Her own method in approaching this is new. It deserves attention from both scholars and practitioners.

# Preface

This book analyses the process of harmonization of laws from a commercial perspective. We identify the reasons that are fostering this process and seek to explain the ways in which it is developing. The analysis begins by placing the standardization of laws in the current economic and political order. The introductory focus is on the environment that favours the development of legal standards. Chapter 1 considers the transformations that have occurred in the legitimacy of society's values in the era after World War II. Likewise, political governance (as based on the model of the nation state) is questioned at a time when actors operate on an international scale and where economic factors are to be considered globally. The purpose of this brief analysis is to address the impact that economic, social and political changes may have on the harmonization of laws.

Chapter 2 moves onto a more technical legal approach, analysing the legal vehicles that promote the spread of international standards. Great attention is given to the role of soft law in international relations. Soft law is seen as a positive process capable of influencing national legislators and regulating areas that international players are unprepared to subject to more rigid forms of law. Chapter 2 also studies 'soft' foundations of more traditional sources of law such as customary law and treaties. Customary law is analysed as an important vehicle for standardization. The emergence of customs and the acquisition of '*opinio juris*' are studied alongside the case law developed by the International Court of Justice.

With respect to treaties, the emphasis is more on how treaty-making promotes legal standards and the impact that reservations and different forms of incorporation into national legal systems may have on the uniform application of treaties.

Other vehicles considered in Chapter 2 are the laws that emanate from the activities of international players other than States. In this respect, both the activities of International Organizations and of transnational corporations are analysed.

The entire Chapter 3 is dedicated to the impact of regionalism on the standardization of laws. It first introduces the subject, studying examples of trade-oriented forms of integration since ancient times. As contemporary examples,

the case studies of the European Union and the Mercosur are considered. The nature and characteristics of various forms of regional integration are illustrated by a comparative analysis of existing regional initiatives. In this regard, regionalism is considered at different levels of integration, from open initiatives to deeper forms of integration such as customs unions and the European Union itself. Regionalism is analysed as a process that is developing alongside globalization and we focus on the interaction between regional trade agreements and the WTO system.

Chapter 4 considers the case studies of the EU and the Mercosur and deals with regionalism and the standardization of laws in practice. The analysis focuses on the corporate law harmonization programmes of both regional blocs. The subject is introduced by comparing both initiatives from a historical perspective, investigating the driving forces behind harmonization of corporate law. The bulk of the chapter analyses how the standardization of company law is taking place in both the Mercosur and the European Union. In the case of the European Union, the main decisions of the European Court of Justice with respect to the application of EU primary legislation on the free movement of companies are analysed. As a linked subject, Chapter 4 considers the creation of regional corporate bodies such as the 'Societas Europaea' (SE) and the Brazilian-Argentinean bi-lateral company.

Chapters 5 and 6 deal with movements of capital and financial legislation, both at a regional level and on a multilateral scale. The focus of Chapter 5 is the transformation of movements of capital that followed the increased mobility of actors and trade in recent times. Movements of capital have intensified substantially and modified over the last decades. Chapter 5 aims to illustrate how such modifications were reflected in regulations, given that most of the regulations in this area were introduced by means of soft law. In this respect, there is an analysis of those that are considered the most relevant examples of international regulations, such as Basle Committee and UNCITRAL initiatives. At a regional level, the developments of primary and secondary EU legislation on movements of capital are addressed.

Chapter 6 deals with financial and banking regulations, analysing the transformation that has occurred in the structure and activities of financial institutions. In addition to new entrants to the market, it also analyses the phenomena of concentration and conglomeration of financial institutions. All of these factors have contributed to substantial transformations in the financial environment, increasing risks and the need for new regulatory responses. We study the different modalities of response, from the co-operation of financial authorities (of different countries) to the structural alteration of national financial services authorities. A variety of international initiatives are considered, including the regulatory initiatives developed by the Basle Committee, the IMF, the WTO/GATS and the OECD. From the regional point of view, we analyse the primary EU provisions on free movement of financial services and 'passport' systems with respect to the movement of financial institutions around the EU. The main EU banking directives are also subjected to analysis.



The principal objective of study in Chapter 7 and Chapter 8 is the role of the corporation in terms of promoting the standardization of laws. Chapter 7 considers the nature of the corporation itself and analyses, at a theoretical level, the existence and role of the corporation in society. It also assesses the differing justifications for the regulation of the corporate world, and considers the origins of the distinct approaches to corporate governance.

Chapter 8 has a more practical approach. It starts by addressing the transformation that corporations have been facing over the years, taking into consideration the movement of corporations around the world. The focus is on the impact of corporate activities on legal systems. It considers issues of social responsibility and corporate accountability, by addressing the problems that may arise from the activities of corporations throughout the world. The chapter illustrates mechanism of corporate control and corporate governance by analysing how corporate governance is evolving in different regions of the world. In particular, developments in corporate governance in the United Kingdom, the US and Brazil are considered. Furthermore, there is a commentary on international initiatives, such as the OECD and regional examples such as the EU.

Throughout this book a comparison is made between standards applied in the so-called developed world and those that are being put into practice in the emerging countries of Latin America. Chapter 9 takes the example of the Brazilian legal system as a study of how emerging countries are absorbing international standards. We introduce the subject by commenting on the suppression of the rule of law during Brazil's military dictatorship. We then move onto the Brazilian democratization process. The purpose is to explain the importance of democracy itself (and the existence of solid democratic institutions) for the enhancement of legal standards. We study the development of institutions in Brazil and the role of the country as a leader of emerging countries within International Organizations such as the WTO. Building up on this analysis of political and social transformations, legal developments are considered. Over the last 20 years Brazil has moved from possessing a low level of legal standards to a position where its standards are increasingly matching those of more developed countries. In this regard, Brazil has made use of creative solutions in order to overcome nationalism and other local obstacles. This chapter assesses the difficult process of implementing new legal standards and incorporating certain international conventions into the Brazilian legal system. In order to illustrate the difficulties encountered by a developing country like Brazil in introducing legal reform, Chapter 9 is concluded with an interview with the former Brazilian President, Dr Fernando Henrique Cardoso (President of Brazil from 1994 to 2003).

# Acknowledgements

I would like to thank Professor Barry Rider for his immense support and valuable advice. I would also like to thank Professor Mads Andenas for kindly contributing the foreword to this book.

I wish to express my gratitude to the former President of Brazil, Dr Fernando Henrique Cardoso, for contributing to this book through his interview. I would also like to thank the former Brazilian Finance Minister, Mailson da Nobrega, for sharing his knowledge with me.

In addition, I would like to show my appreciation to Rene Werner, José Mindlin and Syllas Tozzini for their support, suggestions and material.

Finally, I would like to thank my fellow partners at Collyer Bristow solicitors for their encouragement.

# Table of Contents

<b>Foreword by Professor Mads Andenas</b>	<b>xv</b>
<b>Preface</b>	<b>xix</b>
<b>Acknowledgements</b>	
<b>Chapter 1</b>	
<b>The World Scenario and the Approximation of Law</b>	<b>1</b>
Introduction	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 <i>Lex Mercatoria</i>	11
IV   Conclusion	15

<b>Chapter 2</b>		
<b>Vehicles for Harmonization of Law</b>		<b>17</b>
Introduction		17
I	Soft Law	17
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
<b>Chapter 3</b>		
<b>Regionalization and Standardization of Law</b>		<b>41</b>
Introduction		41

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

	<b>Regional Corporate Law Harmonization: The EU and the Mercosur</b>	<b>73</b>
	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	80
A	EC Treaty Provisions: Freedom of Establishment and the Mutual Recognition of Companies	80
B	Mercosur: Asuncion Treaty Framework and Member States' Domestic Legislation	87
IV	Secondary Legislation	91
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	108
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
<b>Chapter 5</b>		
<b>The Infrastructure of Capital</b>		<b>119</b>
	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
<b>Chapter 6</b>		
<b>The Phenomenon of Development: International and Regional Approaches to Banking and Financial Law</b>		<b>139</b>
	Introduction	139

I	Freedom of Establishment	140
A	Globalization, Consolidation and Conglomeration	140
B	New Entrants	143
C	Regulatory Responses	144
II	Main Objectives of Financial Sector Regulation	145
A	Prudential Conduct of Business and Systemic Regulation	145
B	Prevention of Financial Crime and Anti-Money-Laundering Legislation	147
C	Promotion of Adequate Competitiveness	147
III	The Approach of Financial Regulators to the New Financial Scenario	148
A	Liberalization of National Financial Regulations	148
B	Cross-Border Financial Trade: The Establishment of Banking and Financial Standards, Mutual Recognition and 'Passport' Systems	149
C	The New Institutional Structure of Financial Regulation as a Response to Financial Convergence	150
D	The Concept of Ring Regulation (Abstract)	152
IV	International Regulations	152
V	The Case Study of the EU: The Passport System and the Route to a Single Market	155
VI	Conclusion	158

## **Chapter 7**

### **Theories of the Company** **161**

	Introduction	161
I	The Regulation of Companies and the Justification for Corporate Governance	162
II	Contractualism	163
A	Aggregation of Individuals: Legal Contractualism	163
B	A Nexus of Contracts: Economic Contractualism	166
1	Managerialism	168
2	The New Economic Theory of the Firm	169
3	Contractualism: A Critique	169
C	Contractual Justification for Corporate Governance	170
1	The Shareholder as Regulator	171

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
 <b>Chapter 8</b>		
<b>Corporate Governance</b>		<b>181</b>
	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



VI	Corporate Governance in Latin America: The Case Study of Brazil	199
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
 <b>Chapter 9</b>		
<b>International Legal Standards and the Inclusion of Emerging Countries in the Globalized Order: The Case Study of Brazil</b>		<b>209</b>
	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