

JÜRGEN BASEDOW

Uniform Law

*Max-Planck-Institut
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Jürgen Basedow

Uniform Law

Legal Responses to Globalisation

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About this Book

In the last decade or so of his life, a life that ended so suddenly and prematurely on 6 April 2023,¹ Jürgen Basedow set out to compile his immense knowledge and breadth of analysis in those three areas of law which may perhaps count as his main foci: private international law, European private law, and uniform law.² The first of these efforts was his General Course for the Hague Conference on Private International Law. There, he presented, in a veritable tour de force, contemporary private international law as a combination of private ordering and public regulation in response to globalisation.³ The full manuscript was too long for the *Recueil des Cours* and appeared, in full, as a separate monograph.⁴ The second work, just as innovative and even more voluminous, was a monograph dedicated to EU private law – not just as a set of legal instruments and doctrines, but as a living legal order based on certain principles and defined by its specific mechanisms of implementation and enforcement at least as much as by its substance.⁵

This book was supposed to be the third of these volumes – a book on legal unification and uniform law. Basedow’s interest in this topic began with the earliest article in his long list of publications (on the Incoterms); it continued in his habilitation on the unified law of transportation contracts and in numerous other publications; it resurfaced in his extensive introduction to a symposium on the topic; and it manifested itself a final time in one of his last articles, published posthumously, on the uniform interpretation of uniform

¹ Numerous obituaries were published, the one Eva-Maria Kieninger and I authored can be found at *RabelsZ* 87 (2023), 229–235.

² In a fourth area, which one may call the law of market organisation, Basedow compiled a collection of previously published articles into a book: Jürgen Basedow, *Mehr Freiheit wagen – Über Deregulierung und Wettbewerb* (2002). The book’s title inspired the name for a *Festschrift* dedicated to Basedow by his students on the occasion of his retirement from the position of Director of the Hamburg Max Planck Institute: “Mehr Freiheit wagen” – *Beiträge zur Emeritierung von Jürgen Basedow* (2018).

³ *The Law of Open Societies – Private Ordering and Public Regulation of International Relations*, *Rec. des Cours* 360 (2013) 9–515.

⁴ *The Law of Open Societies – Private Ordering and Public Regulation in the Conflict of Laws* (2015).

⁵ *EU Private Law – Anatomy of a Growing Legal Order* (2021).

private law conventions.⁶ When he died – in the midst of his work on the present book – he left behind the planned table of contents for the entire book, in addition to some 380 pages of manuscript, many of them already edited and ready for publication. This raised the question of what to do with the manuscript. On the one hand, it was clearly unfinished. Important sections were missing, though it cannot be said how much more material Basedow planned to add. On the other hand, what was there was a formidable body of scholarship in an area, uniform law, which had not seen such comprehensive treatment in a long time, let alone treatment based on such broad knowledge and original thought.⁷ Though parts of the volume pick up on elements from earlier publications, the existing manuscript nonetheless goes far beyond those previous works: Basedow treats his subject comprehensively and with a keen sense for the whole. It would be a loss if that breadth of knowledge and insight were not made public.

The decision on what to do with the manuscript was easily and quickly reached by Basedow's students (in consultation with Basedow's widow). A harder decision was how to address the unwritten sections. Should the work of completion be allocated among his students? But this would not only have prolonged the time until publication, it would also have created the insurmountable task of trying to guess what Basedow himself would have written – and it would have held the risk that internal coherence could not be achieved. Basedow had worked thoroughly from the beginning, and no more than a few scattered notes exist on the intended substance of the unwritten sections.

Should the remaining sections be filled through republication of articles Basedow had already written? That would not have been possible. Of course, Basedow had previously published in the areas missing from his written manuscript. But the combination of these previous publications would not achieve the coherence that Basedow evidently strived for, a coherence that he achieved in those sections that are finished. More importantly, Basedow was not a scholar who would readily recycle previous material: he constantly

⁶ Die Incoterms und der Container oder wie man kodifizierte Usancen reformiert, *RabelsZ* 43 (1979), 116–146; *Der Transportvertrag, Studien zur Privatrechtsangleichung auf regulierten Märkten* (1987); *Internationales Einheitsprivatrecht im Zeitalter der Globalisierung*, *RabelsZ* 81 (2017), 1–31; *Uniform Interpretation of Uniform Private Law Conventions: On Treaty Law, Global Jurisprudence and Procedural Safeguards*, *N.Y.U. J. Int'l L. & Pol.* 56:1 (2024), 1–28. For a comprehensive bibliography of Basedow's publications on legal unification and uniform and harmonised law, with the exclusion of EU law, see below p. 413.

⁷ Appearing around the time of Basedow's death was *Morten M. Fogt, Choices, Limits and Consequences of Harmonisation of Commercial Law – The Circle of Law Harmonisation* (2023).

rethought what he had written before, and he certainly would not have adopted any of his earlier writings unaltered in this monograph.

In the end, the decision was taken to leave the unwritten portions out altogether. This includes a section on “private uniform law” (with the Incoterms as one example), a chapter titled “Achievements and Clusters of Uniform Law” (essentially an analysis of uniform law instruments in specific sectors), and a chapter titled “Implementation and Application” (including subsections on dispute settlement bodies, interpretation, and evolution of the law). The unfinished part of the table of contents in its original design can be found as *Addendum I* towards the end of the book. There you can also find, as *Addendum II*, a curated bibliography of Basedow’s publications on uniform law, divided into those on the general framework and those on specific sectors (and excluding those on European law).

Jannis Gries, Jürgen Basedow’s last student researcher, not only compiled both these addenda but also fulfilled the arduous task of preparing the existing manuscript for publication, a task he also undertook for other Basedow articles that were finished at the time of his death but not yet prepared for publication. Jannis deserves our gratitude for this work and his name appears on the title page in recognition of his efforts. Thanks are also due to Christian Eckl and his team at the Hamburg Max Planck Institute, whose regular task of finalising texts for publication was especially challenging in this case. As with many recent publications by Jürgen Basedow, Michael Friedman has taken care of the language editing, and thanks also go to Eva Wirth, who has assisted the author for many years in the secretary’s office. The final formatting of the manuscript and the type-setting for publication in the Institute’s series has been carried out by Janina Jentz. It is thanks to all their contributions that this book – an important addition to academic literature and a testament to its author – can now be published.

Ralf Michaels

Director, Max Planck Institute for Comparative and
International Private Law, Hamburg

Foreword

Franz Schubert's Symphony No 8, the "Unfinished Symphony", was written years before the composer's early demise. Jürgen Basedow's present monograph was actually a work in progress when, in 2023, he passed away unexpectedly. Fortunately, his colleagues at the Hamburg Max Planck Institute decided to finalise the manuscript in the sense of carefully editing it, where necessary, without, however, disturbing the substance – a wise decision as readers will have the benefit of following the unaltered exposition and reasoning, almost hearing the master's voice.

While there are two superb monographs on the very "general doctrines" and "methods" of uniform law in German (the earlier, ground-breaking one published half a century ago; the more recent one focusing on the *canones* of uniform interpretation) and while there are two other works of the finest Italian scholarship addressing, specifically, the interpretation of conventions, Jürgen Basedow's book is up-to-date and is encyclopaedic in approach. Moreover, and importantly, it is in English and is therefore accessible to and capable of bearing fruit throughout the relevant community globally.

As attentive students hailing from common law countries will become aware when reading an Italian or a German treatise or when engaging in debates with their civil law peers, the latter will characterise legal studies as "science" and a line of reason regarding any specific legal issue up for analysis as "scientifically" more (or less) logical, coherent or compelling rather than as more (or less) sound, reasonable, or simply better. In this – historically grounded – sense, the present work is exquisitely scientific in nature: systematic, methodical, tracking reality and avoiding all kinds of bias or ideology. As already stated, it is encyclopaedic, and indeed in every conceivable way it goes far beyond the scope of René David's 1971 (!) contribution to the International Encyclopedia of Comparative Law. That said, the symphony is unfinished. Not only because it is focused on overarching general issues, and doctrines, but also because the author's plan to round off the enquiry into non-binding unification with a section on "private uniform law" – on which, as a young researcher in 1979, Basedow made his first appearance on stage with a thought-provoking article on the Incoterms – as well as with two major chapters titled "Achievements and Clusters of Uniform Law" and "Implementation and Application" fell victim to his premature death. Either one of these

chapters might have comprised a more detailed and elaborate discussion of a number of more recent findings, one of them being that instruments primarily designed to achieve a uniformity of private law ever more often contain elements of public law, in particular regulatory law, relating to matters such as the setting up of registries, the establishment of technical standards, and the framework for the co-operation of governmental agencies or administrative or judicial intervention. This, too, is a consequence of an enhanced functional approach to rule-making.

The first part (“Foundations”) is devoted to clarifying Basedow’s concept of uniform law, explaining at the same time why the author insists on flying the flag of “uniform law” despite its unfulfilled promises, its feather-ruffling quality in many politically relevant quarters, and the availability of conceptually narrower and terminologically more cautious and less committed alternatives, such as harmonised or transnational law. The reason, unsurprisingly, is the conceptual rigour and ambition of the author’s endeavour. While, for example, the 1980 CISG, the Protocol on matters specific to aircraft equipment to the 2001 Cape Town Convention on international interests in mobile equipment, the 1980 Hague Child Abduction Convention, the 2019 ASEAN Agreement on Electronic Commerce, the Principles of Reinsurance Contract Law, and the Conflict of Laws in Intellectual Property Principles can all be characterised as being geared at, or even achieving (some, or more) *uniformity*, none of the alternative competing labels could have subsumed all the various instruments. Other sections of this part address, importantly, both the “movers” of legal unification, such as economic considerations, and the “obstacles”, such as the – theoretical, non-quantifiable, and much overrated – costs of activities in this field.

The second part (“Framework and Types of Uniform Law”) presents, firstly, an arguably complete inventory of the relevant actors, comprising the leading intergovernmental organisations, such as UNIDROIT, UNCITRAL, the Hague Conference on Private International Law, and WIPO as well as the myriad – and to many unknown yet highly important – private organisations such as BIMCO, ISDA, or ICANN. Secondly, the forms (prototypes), the extent (e.g., minimum harmonisation v. full unification), and the varying intended scope of legal unification are described.

After tentatively perusing the volume or completing a reading of the work, every reader will, depending on his or her professional background and the objectives pursued (be it research and learning, preparation for participating in negotiations, or implementation of an instrument in domestic law), identify one or more favourite, or most useful, chapters. To many, it will no doubt be Part V (“Non-Binding Unification”), with its fascinating multitude of types of instrument – model laws, legislative guides, principles and restatements, best practice guides, recommendations, etc. To me – as is professionally pre-conditioned – Parts III (“Uniform Law and Municipal Law”) and IV (“Binding

Unification – Treaties”) are, respectively, the conceptually most challenging and the practically most “useful” chapters. As regards Part IV, Professor Sir Roy Goode famously observed that “[i]t is a curious phenomenon [...] that our writers on international law in general and treaty law in particular, never ever refer to private law conventions”. Rather than speculating about the reasons (although I do harbour a suspicion), I wish to place on record the recommendation that governmental negotiators, judges, and practitioners in pursuit of a treaty’s domestic implementation, as well as scholars dealing with treaty-based uniform law, turn to the eighty pages devoted to this type of instrument. Once a state’s constitutionally competent organs have made the decision to adopt a law-making treaty, or *traité-lois*, the challenges of its effective integration into municipal law are numerous – and sometimes daunting. On the other hand, “integration” is a coat of many colours, and both the traps of failing involuntarily and the loop-holes permitting a cunning evasion of the international obligation assumed by a treaty’s adoption are similarly manifold. Again, the present work does not overlook any of them.

In summation, this is – notwithstanding its encyclopaedic and, in the best tradition, scientific character – a book reflecting Jürgen Basedow’s biography, his personality, and his scholarly curiosity and passions, as one can easily recognise through the conspicuous presence of examples from the law of transport, maritime law, insurance law, and the law of intellectual property, even in places and contexts where other types of transaction and other fields of political concern and ordering might have been more eye-catching or fashionable. It is a wonderful testament to the third strand of the author’s internationalist scholarship, alongside EU private law and the conflict of laws.

Herbert Kronke

Emeritus Professor of Law, Heidelberg University
Formerly Secretary-General, UNIDROIT

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Abbreviations

ACHR	American Convention on human rights
AC	Appeal Cases
AD	Anno Domini (in the year of the Lord, after Christ was born)
ADHGB	Allgemeines Deutsches Handelsgesetzbuch
AEC	ASEAN Economic Community
ALI	American Law Institute
ALJR	Australian Law Journal Reports
Am. J. Comp. L.	The American Journal of Comparative Law
Am. J. Int. L.	The American Journal of International Law
Ann. Air & Sp. L.	Annals of Air and Space Law
App. Body	Appellate Body (WTO)
Arbitration	The International Journal of Arbitration, Mediation and Dispute Management
ASEAN	Association of Sout-East Asian Nations
Asia Pac. L. Rev.	Asia Pacific Law Review
Asian J. L. Soc.	Asian Journal of Law and Society
ATR	Avions de Transport Régional
Austr. L. Journ.	Australian Law Journal
B2B	Business to Business
BAG	Bundesarbeitsgericht
BerDtGesIntR	Berichte der Deutschen Gesellschaft für Internationales Recht
BFH	Bundesfinanzhof
BFHE	Entscheidungen des Bundesfinanzhofs
BG	Bundesgericht (Switzerland)
BGB	Bürgerliches Gesetzbuch
BGBI.	Bundesgesetzblatt
BGH	Bundesgerichtshof (Germany)
BGHZ	Entscheidungen des Bundesgerichtshofs in Zivilsachen
BIMCO	Baltic and International Maritime Conference
BIRPI	Bureaux internationaux réunis pour la protection de la propriété Intellectuelle
BR-Drs.	Bundesrat – Drucksache
BSG	Bundessozialgericht
BSGE	Entscheidungen des Bundessozialgerichts
BT-Drs.	Deutscher Bundestag – Drucksache
Bull. civ.	Cour de cassation, Bulletin des arrêts, chambres civiles
Bull.EC	Bulletin of the European Communities
BVerfG	Bundesverfassungsgericht

BVerfGE	Entscheidungen des Bundesverfassungsgerichts
BW	Burgerlijk Wetboek (Civil Code, Netherlands)
c.	caput, chapter
CAFTA	Central American Free Trade Area
CARICOM	Caribbean Community
Cass.	Cour de cassation (France)
Cass. it.	Corte di cassazione (Italy)
CC	Civil Code, Code civil, Codice civile
CCJA	Cour commune de justice et d'arbitrage (OHADA)
CCV	International Convention on travel contracts
C.com.	Code de commerce
ccTLD	country-code Top Level Domain
ch.	Chapter
Chi. J. Int. L.	Chicago Journal of International Law
CEMAC	Communauté économique et monétaire de l'Afrique centrale
CIETAC	China International Economic and Trade Arbitration Commission
CIDH	Corte interamericana de derechos humanos
CIDIP	Conferencia de Derecho Internacional Privado – Inter-American Conference on Private International Law
CIEC	Commission internationale de l'état civil
CIF	Cost, insurance, freight
CIM	Règles uniformes concernant le contrat de transport international ferroviaire des marchandises (Appendice B à la Convention [CO-TIF])
CIS	Commonwealth of Independent States
CISG	United Nations Convention on contracts for the international sale of goods (1980)
CIV	Règles uniformes concernant le contrat de transport international ferroviaire des voyageurs (Appendice A à la Convention [COTIF])
CJEU	Court of Justice of the European Union
CLC	International Convention on civil liability for oil pollution damage
Clunet	Journal du droit international
CMI	Comité Maritime International
CMNI	Convention de Budapest relative au contrat de transport de marchandises en navigation intérieure
CMR	Convention relative au contrat de transport international de marchandises par route
COAG	Council of Australian Governments
col.	Column
Colum. J. L. & Arts	Columbia VLA Journal of Law and the Arts
Colum. J. Transnat'l L.	Columbia Journal of Transnational Law
Colum. Sci. & Tech. L. Rev.	Columbia Science and Technology Law Review
COM	[European] Commission Document
COMESA	Common Market for Eastern and Southern Africa
Commw. L. Bull.	Commonwealth Law Bulletin
Conn.	Connecticut
COTIF	Convention relative aux transports internationaux ferroviaires

C/P	Charter Party
CPI	Code de la propriété intellectuelle
CSR	Corporate Social Responsibility
D.	Recueil Dalloz Sirey
DDR	Deutsche Demokratische Republik (German Democratic Republic, former East German State)
Denv. J. Int'l L. & Pol.	Denver Journal of International Law and Policy
D.H.	Dalloz Hebdomadaire
Dir.	Directive (EU)
Dir. Mar.	Il diritto marittimo
Diss.	Dissertation
DSU	Dispute Settlement Understanding (The understanding on rules and procedures governing the settlement of disputes, WTO)
DtZ	Deutsch-deutsche Rechts-Zeitschrift
EC	(Treaty on) European Community
ECFR	European Company and Financial Law Review
ECHR	European Convention on Human Rights, European Court of Human Rights
ECOWAS	Economic Community of West African States
ed./eds.	edition, editor(s)
EEA	European Economic Area
e.g.	exempli gratia, for example
EJCCL	European Journal of Commercial Contract Law
Elon L. Rev.	Elon Law Review
Emory Bankr. Dev. J.	Emory Bankruptcy Developments Journal
ERCL	European Review of Contract Law
et seq.	et sequuntur, and following
etc.	et cetera, and so on
E.T.L.	European Transport Law
ETS	European Treaty Series
EU	(Treaty on) European Union
EuR	Europarecht
Eur. J. Law & Econ.	European Journal of Law and Economics
Eur. J. Legal Stud.	European Journal of Legal Studies
EuZW	Europäische Zeitschrift für Wirtschaftsrecht
FAO	Food and Agricultural Organization of the United Nations
FDI	Foreign Direct Investment
Fed. Reg.	Federal Register (USA)
FIATA	Fédération internationale des associations des transitaires e assimilés
FIDIC	Fédération internationale des ingénieurs conseils, International Federation of Consulting Engineers
FLC	Frontiers of Law in China
fn.	Footnote
FOB	Free on board
Ford. Corp. L. Inst.	Fordham Corporate Law Institute

Ford. Int'l L. Journ.	Fordham International Law Journal
FTA	Free Trade Agreement
Ga. J. Int'l & Comp. L.	Georgia Journal of International and Comparative Law
GAAP	Generally Accepted Accounting Principles (initially only USA)
GAFTA	The Grain and Feed Trade Association
GATT	General Agreement on Tariffs and Trade
GEDIP	Groupe européen de droit international privé
GNSO	Generic Names Supporting Organisation
GRUR	Gewerblicher Rechtsschutz und Urheberrecht
GRUR Int.	Gewerblicher Rechtsschutz und Urheberrecht – Internationaler Teil
gTLD	generic Top Level Domain
Harv. L. Rev.	Harvard Law Review
Harv. Negot. L. Rev.	Harvard Negotiation Law Review
HGB	Handelsgesetzbuch (Commercial Code, Germany)
Hofstra L. Rev.	Hofstra Law Review
HP	Hague Principles on choice of law in international commercial contracts
H.R.	Hoge Raad (Netherlands)
IAEA	International Atomic Energy Agency
IASB	International Accounting Standards Board
IATA	International Air Transport Association
IBA	International Bar Association
ICANN	Internet Corporation for Assigned Names and Numbers
ICAO	International Civil Aviation Organisation
ICC	International Chamber of Commerce
ICJ	International Court of Justice
IDEA	The Law Review of the Franklin Pierce Center for Intellectual Property – The Intellectual Property Law Review
i.e.	id est, that is
IFRS	International Financial Reporting Standards
IHR	Internationales Handelsrecht
ILA	International Law Association
ILA Rep. ... Conf.	International Law Association, Report of the ... Conference
ILC	International Law Commission
ILM	International Legal Materials
ILO	International Labour Organisation
IMCO	International Maritime Consultative Organisation
IMF	International Monetary Fund
IMO	International Maritime Organisation
Ind. J. Gl. L. Stud.	Indiana Journal of Global Legal Studies
Int. Comp. L. Q.	International and Comparative Law Quarterly
Int. Encyc. Comp. L.	International Encyclopedia of Comparative Law
Int. Insolv. Rev.	International Insolvency Review
Int. J. Const. L.	International Journal of Constitutional Law
Int. Law.	The International Lawyer

IOSCO	International Organisation of Securities Commissions
IP	Intellectual Property
IPRax	Praxis des Internationalen Privat- und Verfahrensrechts
IPRspr.	Die deutsche Rechtsprechung auf dem Gebiete des Internationalen Privatrechts im Jahre ...
IRLE	International Review of Law and Economics
ISDA	International Swaps and Derivatives Association
ISO	International Organization for Standardization
ITLOS	International Tribunal for the Law of the Sea
ITU	International Telecommunication Union
Jap. YB Int'l L.	Japanese Yearbook of International Law
J. Bus.L.	Journal of Business Law
J. Cont. East Asia Stud.	Journal of Contemporary East Asia Studies
JCP	Juris-Classeur Periodique. La semaine juridique – édition entreprise & affaires
JIEL	Journal of International Economic Law
JIPITEC	Journal of Intellectual Property, Information Technology and Electronic Commerce Law
JIPLP	Journal of Intellectual Property Law & Practice
J. Legal Stud.	Journal of Legal Studies
J. Mar. L. & Com.	Journal of Maritime Law and Commerce
JORF	Journal officiel de la République Française
JPIL	Journal of Private International Law
JZ	JuristenZeitung
L. & Cont. Probl.	Law and Contemporary Problems
La. L. Rev.	Louisiana Law Review
Law Libr. J.	Law Library Journal
LIEI	Legal Issues of European Integration
LLMC	Convention on limitation of liability for maritime claims, 1976
LMCLQ	Lloyds Maritime and Commercial Law Quarterly
LNTS	League of Nations Treaty Series
Mercorsur	Mercado Común del Sur
Mich. J. Int'l L.	Michigan Journal of International Law
Minn.	Minnesota
Mod. L. Rev.	The Modern Law Review
Mon.	Moniteur belge – Belgisch Staatsblad
MPEPIL	The Max Planck Encyclopedia of Public International Law
MTO	Multimodal transport operator
NAFTA	North American Free Trade Agreement
Ned.Jur.	Nederlandse Jurisprudentie
Neth. Int. L. Rev.	Netherlands International Law Review
NGO	Non-Governmental Organisation
NJ	New Jersey
NJW	Neue Juristische Wochenschrift
Nord. J. Int. L.	Nordic Journal of International Law

NPE	New Political Economy
NSW	New South Wales
N.Y.U. J. Int'l L. & Pol.	New York University Journal of International Law and Policy
N.Y. U. L. Rev.	New York University Law Review
OAS	Organisation of American States
OECD	Organisation of Economic Cooperation and Development
OHADA	Organisation pour l'harmonisation en Afrique du droit des affaires
OHADAC	Organisation pour l'harmonisation du droit des affaires au Caraïbe
OJ	Official Journal of the European Union
OSJD, OSShD	Organisazija Sotrudnitschestwa Shelesnych Dorog
OTC	Over the counter
OTIF	Organisation intergouvernementale des transports internationaux ferroviaires
p.	page
para.	paragraph
PC	Privy Council
PCA	Permanent Court of Arbitration
PCC	Parliamentary Counsel's Committee (Australia)
PCIJ	Permanent Court of International Justice
PECL	Principles of European Contract Law
PEICL	Principles of European Insurance Contract Law
PICC	Principles of International Commercial Contracts (UNIDROIT)
PRICL	Principles of Reinsurance Contract Law
Proc. Am. Soc. Int. L.	Proceedings of the American Society of International Law
Pub. L.	Public Law (US)
RabelsZ	Rabels Zeitschrift für ausländisches und internationales Privatrecht
Rec. des cours	Recueil des cours de l'Académie de droit international de La Haye
REIO	Regional Economic Integration Organisation
Reg.	Regulation (EU)
Rep.	Reports
Rev. Der. Transp.	Revista de Derecho del Transporte
Rev. int. dr. comp.	Revue internationale de droit comparé
RG	Reichsgericht
RGBL.	Reichsgesetzblatt
RGZ	Entscheidungen des Reichsgerichts in Zivilsachen
Riv. dir. int. priv. proc.	Rivista di diritto internazionale privato e processuale
RIW	Recht der Internationalen Wirtschaft
RS	Recueil systématique du droit fédéral (Switzerland)
Scan. Stud. L.	Scandinavian Studies in Law
SDR	Special Drawing Right (of the IMF)
SEC	Securities and Exchange Commission (USA)
sec.	section
SI	UK Statutory Instruments

SMGS	Soglaschenije o Meshdunarodnom Shelesnodoroshnom Grusom Soobstschennii [Agreement on the international carriage of goods by rail]
SMPS	Soglashenije o Meshdunarodnom Shelesnodoroshnom Passhirsksom Soobstschennii [Agreement on the international carriage of passengers by rail]
SOLAS	International Convention for the safety of life at sea
Stat.	Statutes at Large (US)
Stb.	Staatsblad
Syracuse J. Int. L. & Com.	Syracuse Journal of International Law and Commerce
Tex. Int. L. J.	Texas International Law Journal
TFEU	Treaty on the functioning of the European Union
TLD	Top Level Domain
TranspR	Transportrecht
TRIPS	Agreement on trade-related aspects of intellectual property rights
Tul. J. Int'l & Comp. L.	Tulane Journal of International and Comparative Law
Tul. L. Rev.	Tulane Law Review
UCT	Universal Coordinated Time
UEMOA	Union économique et monétaire ouest-africaine
UGB	Unternehmensgesetzbuch (Austria)
UK	United Kingdom of Great Britain and Northern Ireland
UKSC	United Kingdom Supreme Court
ULFIS	Convention relating to a uniform law on the formation of contracts for the international sale of goods (1964)
ULIS	Convention relating to a uniform law on the international sale of goods (1964)
ULR	Uniform Law Review
UNCITRAL	United Nations Commission on International Trade Law
UNCLOS	United Nations Convention on the law of the sea
UNCTAD	United Nations Conference on Trade and Development
UN-ECE	Economic Commission for Europe of the United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organisation
UNIDROIT	International Institute for the Unification of Private Law
UNODC	United Nations Office on Drugs and Crime
UNTS	United Nations Treaty Series
UPCA	Agreement on a Unified Patent Court
UPU	Universal Postal Union
UrhG	Urherbergesetz (copyright law, Germany)
US	United States of America
U.S.C.	United States Code Annotated
USSR	Union of Soviet Socialist Republics
Vand. J. Transnat'l L.	Vanderbilt Journal of Transnational Law
VCLT	Vienna Convention on the law of treaties
Vill. L. Rev.	Villanova Law Review

VJ	Vindobona Journal of International Commercial Law and Arbitration
vol.	volume
Wake Forest J. Bus. & Intell. Prop. L.	Wake Forest Journal of Business and Intellectual Property Law
Wayne L. Rev.	Wayne Law Review
WCT	WIPO Copyright Treaty
WHO	World Health Organisation
WIPO	World Intellectual Property Organisation
WLR	Weekly Law Reports
WMO	World Meteorological Organisation
WMU J. Mar. Aff.	World Maritime University Journal of Maritime Affairs
World Comp.	World Competition – Law and economics review
WPPT	WIPO Performances and Phonograms Treaty
WTO	World Trade Organisation
Yale L. J.	Yale Law Journal
YAR	York Antwerp Rules
YB ILC	Yearbook of the International Law Commission
YB Mar. L.	Yearbook Maritime Law
YB PIL	Yearbook of Private International Law
ZaöRV	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht
ZChinR	Zeitschrift für chinesisches Recht
ZEuP	Zeitschrift für Europäisches Privatrecht
ZHR	Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht
ZJapanR	Zeitschrift für Japanisches Recht
ZSavGerm	Zeitschrift der Savigny-Stiftung für Rechtsgeschichte – Germanistische Abteilung
ZVersWiss	Zeitschrift für die gesamte Versicherungswissenschaft
ZVglRWiss	Zeitschrift für vergleichende Rechtswissenschaft

Introduction

Uniform law is often neglected in legal scholarship and education. In some areas, it may even appear as a blank space. Various disciplines deal with specific subjects covered by uniform law, but there is very little overarching analysis. Labour law specialists usually make some reference to ILO Conventions; commercial lawyers will be interested in the law of sales and the rules on security interests and commercial paper; tax lawyers dwell upon questions emerging from the application of double taxation treaties; IP lawyers look into the numerous international conventions in this field; and public international law experts generally focus on the operation of treaties, though – with the exception of human rights treaties – they will hardly ever focus on the substance of those instruments and they will blend out those parts of uniform law which are not laid down in international treaties. Conflicts lawyers are attentive to international instruments which assign legal relations to a specific national law or to the courts of any given country, but once that task is accomplished the matter is left to other specialists. Some specialists make general statements about uniform law in their respective field of specialisation, without however looking into sectors of the discipline outside that area.

The reasons behind this general finding are partly rooted in excessive specialisation: a particular interest in the detailed rules and specific issues of one discipline is often paired with a complete lack of interest in other areas of the law. Many specialists are not interested in the characteristic features inherent in the structure of uniform law, features which result from the desire to overcome the limitations of national or sub-national laws. Uniform law makes use of tools that cut across the traditional divisions of the law: some of these tools concern the actions of States which have, over time, become the object of an independent area of the law – public international law. Uniform law is cherished by lawyers specialising in administrative or constitutional law, i.e. in areas of the law that concentrate also on State action. For other lawyers, it is not the tool of unification that matters but the harmonising result and its fit with corresponding rules of national law and other bodies of regulation; while commercial lawyers do not ignore States, they generally try to solve problems by private means wherever possible. Still others consider all kinds of law as being primarily instrumental to some social and economic end such as social

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equality or tax reduction – an approach that determines their selection of questions relating to uniform law.

3 All these different approaches overlap: private action, collective action and State action can be found in several areas of uniform law. The various methods are used in view of a common target, which is the removal of any territorial or personal limitations that may attach to legal rules, limitations which emerge from the restrictions of power. The type of action employed for the unification of the law often impacts the substance of the rules and principles of uniform law and also their application in legal practice. It is therefore necessary for all individuals working in this discipline to understand the general structures of uniform law as a counterpart to the diversity of the laws that arise from nation-states and their sub-entities.

4 It is the purpose of this book to provide the reader with information about the general framework of uniform law: to clarify the concept; to explain the pros and cons of legal unification; to describe the relevant actors who promote uniform law; to analyse its various forms, its extent and its scope; to describe its relation with, and embeddedness in, municipal law; to shed light on the operation of treaty law and public international law for uniform law conventions; to present a short inventory of the achievements of the uniform law movement as far as conventions are concerned; to provide a survey over the tools and operation of non-binding unification; and to lay out the procedural framework and the guidelines for the implementation and application of uniform law.

5 The background of this attempt is the author's firm belief that the historical changes that are usually designated as globalisation will continue their advance forward, perhaps not with the same speed but in the same direction. While decentralised law-making is an inescapable consequence of a global order built on sovereign States, our world of open frontiers, intensified migration and cross-border exchange of goods and services will demand an ever greater harmonisation of rules and principles, and this need will continue to result in uniform law. This explains the subtitle of this book: uniform law is a legal response to and even part of globalisation and it is perhaps the most important response. Contrary to some assertions, legal unification will likely proceed in what may seem an erratic – rather than systematic – manner. Some references to more recent forms of uniform law will explain this prediction.

6 Legal unification is targeted by multiple actors pursuing a variety of objectives. There are international agreements and organisations that deal with problems arising between States exclusively. This applies for instance to the delineation of sovereign spheres, to military pacts, to trade agreements, to aviation agreements and to other treaties involving a channeling and limitation of State sovereignty. And there are international organisations which are not charged with the drafting of binding rules at all, their having instead the task of preparing the background for national policies or assisting governments in

capacity building and the development and implementation of programs which are not part of legislation, although they may be essential prerequisites for the subsequent unification of the law. A prime example is the Organisation of Economic Co-operation and Development (OECD); while it has elaborated a few conventions, it mainly supports national policy-making by means of comparison, benchmarking and standard-setting. Such institutions are not addressed by this study.

The present book is confined to an analysis of the body of instruments that aim to lay down private rights and obligations as well as the institutions which promote and apply such texts. This does not necessarily limit the enquiry to private law, and the study also includes topics which are usually assigned to public law. It is a common occurrence that certain objectives are targeted by a mix of private and public law; the distinction has lost much of its former significance. The focus on rules and principles relevant for private rights and obligations takes account of the particular importance of private persons for globalisation. Private persons, not States, are the drivers of this movement. Migration from one country to the other, which is increasing in its various forms, promotes the quest for legal unification. Capitalists seeking a higher return on their investment in other countries demand a similar harmonisation of the legal frameworks bracketing their transactions, and so do traders who try to benefit through arbitrage from the unequal scarcity of resources and the different price levels in different markets. Whatever their activities are, the involved individuals soon encounter obstacles imposed by different laws beyond the border. Uniform law is an essential tool for global activities of all kinds.

Part I

Foundations

As compared with other areas of the law, uniform law is of a rather recent origin. It cannot be said to be a generally accepted subject of legal learning, nor is it generally welcomed by lawyers in all countries, who do not always have the same understanding of the subject. The analysis should therefore set out with a conceptual clarification (below para. 2 et seq.) before laying out the reasons that promote uniform law (below para. 93 et seq.) and the obstacles to its successful creation (below para. 188 et seq.).

1

I. Concept

1. Survey

This book deals with uniform law in a general and comprehensive sense, not confined to any specific sector or area of the law. In this respect it differs from many important contributions to legal literature which focus on explanations of, and comments on, individual texts such as the Convention on contracts for the international sale of goods (CISG),¹ the Convention on Contracts for the carriage of goods by road (CMR),² or the Montreal Convention for the unification of certain rules for international carriage by air.³ The scope of other publications is wider and extends to a whole area of related instruments, such as those on international intellectual property,⁴ international labour law,⁵ international carriage of goods⁶ or even international commercial

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¹ *Schlechtriem/Schwenzer* (eds.), *Schlechtriem & Schwenzer, Commentary on the UN Convention on the International Sale of Goods (CISG)* (2016); *Lookofsky*, *Convention on Contracts for the International Sale of Goods* (2020).

² *Clarke*, *International Carriage of Goods by Road* (6th ed. 2014).

³ *Dempsey/Milde*, *International air carrier liability* (2005); *Giemulla/Schmid* (eds.), *Frankfurter Kommentar zum Luftverkehrsrecht* (2016 et seq.).

⁴ *Frankel/Gervais*, *International Intellectual Property* (2016); *P. Goldstein/Trimble*, *International Intellectual Property Law* (2019).

⁵ *Servais*, *International Labour Law* (2017), p. 53 et seq.; various authors in *Ales/Bell/Deinert/Robin-Olivier* (eds.), *International and European Labour Law* (2018), see in particular p. 375 et seq., 602 et seq., 840 et seq., 906 et seq., 1049 et seq., 1321 et seq., 1492 et seq.

law in a more general sense.⁷ Such treatises are of great significance for legal practice and as introductory textbooks for the respective field in legal education. But they can hardly provide insights into the general principles governing the emergence and handling of uniform law in different fields. For achieving that aim, it is important to stake out the field of analysis, i.e. the concept of uniform law.

- 3 Ever since the late 19th century, uniform law has attracted scholarly interest. The designations of the phenomenon and the conceptual approaches differed, however (below para. 4 et seq.). Due to the liberal spirit prevailing in the period of its emergence, academic treatment has always focused on issues of private law, which still provides the main subject matter for its scholarly analysis, although the increasing number of instruments establishing uniform law on issues of criminal law and public law strikes the eye (below para. 17 et seq.). While this book focuses on uniform law in the international arena, the unification of laws has been and still is a serious problem within many countries; internal and international unification are related to one another. Internal unification is not only a parallel to international unification, it may also be a rival and determine the possible success of the latter (below para. 35 et seq.). Unification occurs in multiple contexts: on a bilateral basis between two States, in groups or “clubs” of States and on a multilateral basis (below para. 52 et seq.) It is often confined to regions or sub-regions, but it is often of a universal character (below para. 61 et seq.).

2. Designations and conceptual approaches

a) Uniform law as treaty-based law

- 4 The creation and existence of common rules has been designated in very different ways. Initially, this body of law was characterised in accordance with the tool used for creating uniformity, i.e. the international treaty. In the first pertinent book published in 1894, the author refers to a “nombre [...] considérable d’arrangements diplomatiques [...] ou conventions.”⁸ A similar identification of uniform law with the most important instrument used for its production, i.e. the international convention, can be found in legal literature ever since; many authors confine their analysis to this type of uniform law.⁹

⁶ Ramberg, *The Law of Transport Operators in International Trade* (2005); Bokareva, *Uniformity of Transport Law* (2019).

⁷ Goode/Kronke/McKendrick (eds.), *Transnational Commercial Law* (2015); Heide-mann, *Transnational Commercial Law* (2019).

⁸ Poinsard, *Études de droit international conventionnel* (1894), p. 11.

⁹ See, for example, Bariatti, *L’interpretazione delle convenzioni internazionali di diritto uniforme* (1986); Torsello, *Common Features of Uniform Commercial Law Conventions* (2004); Gruber, *Methoden des internationalen Einheitsrechts* (2004), p. 14.

The treaty-based approach encompasses all unification efforts of the early years, at a time when other forms of uniform law had not yet been explored. It is also appropriate for academic enquiries which focus on treaty-related aspects of unification, e.g. the comparison of concepts used in various conventions in related fields¹⁰ or the application of treaty law to uniform law conventions.¹¹ But it does not mirror the full range of attempts at unification that can be ascertained at present. It does not exclude *private* efforts: the production of contract forms and drafts of standard conditions which have acquired worldwide acceptance and are in common use reflecting the reality of the law in business sectors such as the export trade, charters of vessels, marine insurance or plant construction. Legal uniformity has also grown through new policy initiatives of *public* organisations that, instead of drafting binding conventions, propose model laws, publish sets of generally accepted principles or present legislative guides which the States addressed may use as blueprints for their own legislation, thereby approximating their laws to each other.

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b) *Transnational law*

Against this backdrop legal writers have turned to a new and more comprehensive concept called transnational law, usually employed in the context of business transactions as transnational commercial law.¹² According to an authoritative definition, this phrase is used

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“to denote that set of private law principles and rules, from whatever source, which governs international commercial transactions and is common to legal systems generally or to a significant number of legal systems.”¹³

On a similar note, *Heidemann*, in explaining the term “transnational”, advocates the

“observation of law that is not made within the nation states and by national legislatures, but by organisations and private law makers, which either span across national boundaries or effectively reach a transnational sphere of influence.”¹⁴

The confinement to the commercial significance of transnational law is helpful for business-related subjects and, thereby, for a large sector of legal prac-

¹⁰ See *Torsello*, Common Features of Uniform Commercial Law Conventions (2004) and *Ferrari*, ULR 5 (2000) 69, 76 et seq.

¹¹ See *Bariatti*, L’interpretazione delle convenzioni internazionali di diritto uniforme (1986), p. 251 et seq.; *Gruber*, Methoden des internationalen Einheitsrechts (2004), p. 64 et seq.

¹² *Goode/Kronke/McKendrick*, Transnational Commercial Law (2015); *Heidemann*, Transnational Commercial Law (2019).

¹³ *Goode/Kronke/McKendrick*, Transnational Commercial Law (2015), para. 1.03 at p. 4; see also *Kronke*, Rec. des cours 369 (2014) 9, 24.

¹⁴ *Heidemann*, Transnational Commercial Law (2019), p. 7.

tice, but it is obviously too narrow for the whole range of harmonised law including collisions of vessels, intellectual property or family law which have been targeted by unification efforts as well.

- 7 Would the more general designation as *transnational law* be appropriate where the usual reference to commercial life is deleted? The term indicates that the relevant rules are binding not only within a national territory and/or that they apply to transactions and cases that have a cross-border dimension. What appears less appropriate is the connection of the term with the nation-state; according to the term and its definition, even a rule of transnational law seems to be defined, although in a negative or delimiting sense, by the existence of nation-states as the true source of law. While the nation-state is pivotal for international conventions and many other rules of law, it is not necessarily the point of reference for private unification attempts. Standard forms primarily result from the drafters' intention to produce complete commercial agreements that make any reference to national law redundant regardless of whether the pending case is of a purely domestic purview or has some international connection. Referring to the nation for the designation of such rules of law therefore appears contradictory. What the standard forms have in common with other tools of harmonisation is the purpose and effect of creating a uniform legal framework for the transactions and situations covered.

c) *Uniformity*

- 8 Thus, the distinct feature of uniform law is neither its creation through international treaties nor its existence outside and regardless of nation-states; it is its uniformity which requires some further analysis. Uniformity relates to common *rules*, not to the outcome of judicial decisions; an identical outcome may occur even where the underlying rules diverge in two countries since a case may be allocated to different parts of the legal systems involved; it may for example be considered as contractual in one jurisdiction and as sounding in tort in another; yet courts dealing with analogous cases may come to the same result in both jurisdictions. In comparative law, this observation has given rise to what has been called the *praesumptio similitudinis* concerning the final decision of a dispute.¹⁵ In the present context, that presumption, resulting from legal construction and the corresponding assessment of specific facts, does not, however, justify the assumption of a uniformity of the law.
- 9 It is noteworthy that some authors, instead of addressing uniform law as such, rather deal with the *unification* of the law, i.e. the *process* which brings about an approximation or convergence of laws. The focus on this process

¹⁵ The term was coined by Zweigert/Kötz, *An Introduction to Comparative Law* (1998, reprint 2011), p. 40.

emerges from the corresponding titles of publications¹⁶ and may be due to the appraisal by these authors that the task of unification is the key problem while the subsequent handling of uniform law, i.e. its interpretation, application and revision, appears to be less difficult or not to differ very much from what is well known from national law. Whatever the reason may be, the experience of the post-World War II period shows that this appraisal is excessively narrow. Uniform law poses serious problems not only at the stage of its creation, and it also deserves particular attention as a specific *body of law*.

Uniformity is not identical to *sameness* or to a high degree of similarity. The sameness of rules and principles may result from an extension of domestic rules imposed on another country as it happened many times in periods of occupation and colonisation.¹⁷ Such an imposed sameness often comes to an end when the underlying regime of power terminates. Sameness can also result from a voluntary reception of the laws of a country by another State that lacks a consistent law or wants to modernise existing rules.¹⁸ Such receptions have occurred time and again in legal history. France was particularly successful as an “exporter” of legislation; the codes of the Napoleonic era inspired many countries in Europe, Latin America, the Middle East and in Asia.¹⁹

However, the reception of foreign law, though creating uniformity at the time of legislation, does not give rise to uniform law in the proper meaning of this term. When Ecuador (1861)²⁰ and Nicaragua (1867)²¹ took over the Chilean Civil Code drafted by *Andrés Bello*, this initially brought about harmony but did not prevent later amendments at the national level. When Turkey shaped its own code of obligations on the model of the Swiss Code in 1926, this happened because the Swiss model, enacted less than 20 years before, enjoyed great authority, its promising modern solutions in simple phrasings and being accessible in several authoritative languages.²² The intention of the Turkish legislature was certainly not to unify Turkish and Swiss law nor to abandon Turkish autonomy in legislation, a conclusion no less true even if Turkish lawyers have followed Swiss legal developments closely and studied Swiss legal literature over the many subsequent years.

¹⁶ *Demogue*, L'unification internationale du droit privé (1927); *David*, The International Unification of Private Law (1971).

¹⁷ *Goode*, Reflections on the Harmonisation of Commercial Law (2018), p. 3.

¹⁸ *Kropholler*, Internationales Einheitsrecht (1975), p. 3.

¹⁹ See the numerous national reports in *La circulation du modèle juridique français*, in *Travaux de l'Association Henri Capitant des amis de la culture juridique française*, tome XLIV (1993) and, in particular, *Sacco*, Rapport de synthèse (1993).

²⁰ *Bustamante Muñoz/Lovato*, Ecuador (1973), ch. E-3.

²¹ *Argüello*, Nicaragua (1971), ch. N-40.

²² See e.g. *Müller-Chen/Müller/Widmer Lüchinger*, Comparative Private Law (2015), para. 269 et seq.

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- 12 It follows from these considerations that uniform law requires, beyond a sameness or similarity of the rules and principles, something in addition: What is needed is the common motivation of the law-makers involved, i.e. the intention of all those participating in the process of unification that the rules and principles should be and remain common to all territories involved.²³

d) Law and programs

- 13 Uniform law is law; as such it is amenable to being applied by national or international courts and administrative authorities. Legal rules provide guidance for the outcome of disputes without any need for further political decision-making. Agreements between States may often adopt the form of legal instruments, while they contain non-binding formulations which lay down an intermediate state of deliberations achieved on the way towards a final goal. Such agreements are of a programmatic nature; they are not yet law. Uniform law is often part of a lengthy and more comprehensive integration program manifested in intermediate documents that lack the character of law.

- 14 For example, States commit themselves in an international agreement to “strengthen co-operation”, to “ensure free trade”, to allow “free transit” or to “promote adherence to the rule of law”. It is only in later documents that they lay down what “free transit” means in terms of technical and safety requirements concerning the vehicles used, or that they determine the legal provisions which are to be respected and the procedures designed for the “adherence to the rule of law”. The programmatic commitments are often significant steps on the way towards legal unification, but they are not yet law. While it is at times admittedly difficult to draw the borderline between program and law, this is essential in the international arena and for the scholarly treatment of uniform law, which must draw a distinction between legal issues and matters that are to be left to diplomacy.

e) Unification and harmonisation

- 15 Uniform law is sometimes distinguished from *harmonised* law; the latter is said only to reduce the legal differences between national laws, which are affected much less than in unification. Harmonisation is also designated as approximation, i.e. a process effecting the convergence of the laws. At closer sight, the difference between unification and harmonisation is, however, not

²³ *Demogue*, L'unification internationale du droit privé (1927), p. 11; *Kropholler*, Internationales Einheitsrecht (1975), p. 1; *Goode*, Reflections on the Harmonisation of Commercial Law (2018), p. 3 referring to the *motivation* of harmonisation; *Matteucci*, Rec. des cours 91 (1957) 383 requires an “*élaboration collective*” (p. 387) and a “*volonté commune*”.

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