

Model EU and Pattern OHADA?

Edited by
PETER JUNG

Gesellschaft für Rechtsvergleichung e.V.

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Model EU and Pattern OHADA?

Perspectives of a Mutual Influence in
Commercial Law

Edited by
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Preface

The 39th conference of the German Society for Comparative Law was held from 12th to 14th September 2024 in Berlin under the general theme “Global South – Global North”. This volume contains all the papers presented at the working session of the Section for Comparative Commercial and Business Law on the topic “Model EU and Pattern OHADA? – Perspectives of a Mutual Influence in Commercial Law”. 140 years after the beginning of the so-called Berlin Conference concerning the Scramble for Africa, which formed a key event in the sinister history of colonisation, this comparative approach also reflects the paradigm shift in the relationship between Europe and Africa.

Today, the European Union (EU) and the Organisation pour l’harmonisation en Afrique du droit des affaires (OHADA) are the two most integrated supranational organisations in the world. On the one hand, OHADA was institutionally modelled on the EU. The association of Benin, Burkina Faso, Cameroon, the Central African Republic, Chad, Comoros, the Republic of Congo, the Democratic Republic of Congo, Côte d’Ivoire, Equatorial Guinea, Gabon, Guinea, Guinea-Bissau, Mali, Niger, Senegal, and Togo is governed by the Conference of Heads of State and Government, the Council of Ministers (Yaoundé), the Common Court of Justice and Arbitration (Abidjan) and the Permanent Secretariat (Yaoundé). On the other hand, the African organisation is more focused on the unification of business law across its Member States than on the establishment of a single market, to which the OHADA Treaty, unlike the TEU and TFEU, makes no reference. Based on an essentially French legal tradition, OHADA was able to go much further in the unification of commercial law, as evidenced by meanwhile eleven Uniform Acts relating to principally all aspects of general commercial, company, accounting, securities, insolvency and execution law, as well as arbitration and mediation. There are also two preliminary drafts on contract and labour law.

Against this background, the first question that arises is how much and which uniform law the players in a uniform market need and how this standardised law can be achieved. This question, which is currently being raised in the European Union in connection with the project for a European Business Code, will be addressed by *Matthias Lehmann* (Vienna). The history of OHADA as well as the institutional and legal-cultural conditions of legal harmonisation and unification in both economic areas will then be examined by *Paul Bayzelon* (Paris), who had the opportunity to participate, alongside African governments, in the implementation of OHADA in the early nineties. *Gérard Anou* (Greno-

ble) takes a closer look at the two key Uniform Acts relating to general commercial law and to commercial companies' law, and compares these acts with respective secondary law of the European Union. As OHADA is, apart from the English-speaking part of Cameroon, an association of former Belgian, French, German, Portuguese and Spanish colonies, it will be interesting to see whether the unification of business law can also be extended in the future to countries that have not been influenced by Civil Law. In this respect, the contribution of *Seyoum Yohannes Tesfay* (Addis Ababa/Berlin) deals with the influence of OHADA's Uniform Act relating to General Commercial Law on the Revised Commercial Code of Ethiopia. Considering that the Common Court of Justice and Arbitration also acts as a court of final appeal principally on all matters relating to the OHADA-Treaty or the Uniform Acts and that OHADA adopted Uniform Acts on arbitration and mediation in commercial matters, *Nestor Kouami* (Paris) looks at the legal framework for the judicial and alternative settlement of commercial disputes in OHADA and EU areas following a comparative approach. Finally, *Jean-Jacques Lecat* (Paris) presents a comparative analysis of commercial activity in the two supranational legal systems from the companies' point of view.

I would like to thank the speakers for their participation in the conference and for the publication of their contributions in this volume. I am also indebted to Mr David Ballmer for the linguistic review of the text, as well as Ms Esther Jundt and Ms Maria Schneider for their help with the printing. Ms. Paula Blank supported me as secretary of the working group in preparing the conference, for which I would also like to thank her warmly.

Basel, July 2025

Peter Jung

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From OHADA to the EU: How much uniform law is needed for a single market?

Matthias Lehmann

I. Introducing and Delineating the Topic

The European Union (EU) is a peculiar animal. Its core aim remains the single market, yet its private law rules are still scattered over 27 different Member States' legal systems. Throughout the history of the EU and its predecessors – the European Economic Community (EEC) and the European Community (EC) – the debate over the need for private law harmonisation or unification frequently flared up. While it has calmed down nowadays, it has never completely ceased¹. The need for private law unification is currently discussed in the areas of insolvency and capital markets, whereas in the past, other subjects have taken centre stage, such as corporate law or contract law. The debate seems dictated by the unpredictability of current events and political circumstances. A guiding rod is missing. This contribution seeks to fill this gap. It aims to clarify, at a theoretical level, how much uniform law is needed by giving reasons that are independent of time, place, and political preferences.

From the outset, some terminological clarification is in order. The term “uniform law” is used here in the sense of a rule applying throughout the market. Uniform law needs to be distinguished from “harmonised law”. Harmonised law is national law that is similar but differing in detail as a result of the national legislator's discretion of. A paradigm example of uniform law is an EU regulation², whereas a typical example of harmonised law is a national statute transposing an EU directive.

¹ Among recent publications on the subject, see e.g. *Francisco de Elizalde* (ed.), *Uniform Rules for European Contract Law?: A Critical Assessment* (Hart Publishing 2020); *Paula Giliker*, *Research Handbook on EU Tort Law* (Edward Elgar Publishing 2017); *André Janssen, Matthias Lehmann and Reiner Schulze*, *The Future of European Private Law* (Nomos 2023).

² A caveat must be made here. Recently, there has been a tendency of the EU legislator to leave certain issues within the scope of a regulation to the national legislator. An illustration is Article 35a of the Regulation on credit rating agencies (Regulation [EC] No 1060/2009 of the European Parliament and of the Council of 16th September 2009 on credit rating agencies, [2009] OJ L 302/1, as amended by Regulation [EU] 462/2013 of the European Parliament and of the Council of 21st May 2013, [2013] OJ L 16/1), providing for a civil liability regime, but leaving the definition of important notions such as “damage”, “intention” or “gross negli-

This contribution focuses on commercial law or, as it is sometimes called, business law. The reason for this focus is the vital role that this area plays in establishing a single market. Roy Goode, a master of the subject, has defined commercial law as

“that body of law which governs commercial transactions, that is, agreements and arrangements between professionals for the provision and acquisition of goods, services and facilities in the way of trade.”³

In his view, commercial law possesses four characteristics. First, it is based on transactions, not institutions; second, it is concerned primarily with dealings between merchants; third, it is centred on contracts and on the usages of the market; and fourth, it is concerned with a large mass of transactions in which each participant is a regular player⁴. The concept of business law is somewhat broader. In addition to commercial law rules, it also covers corporate law (business organisation) and other areas, such as intellectual property law. Over the course of this contribution, the essential elements of both commercial and business law will become clearer.

A further terminological clarification is necessary. When the expression “single market” is used in the following, what is meant is any market in which products (goods and services) as well as production factors (workers and capital) can move freely and independently of the participating state from which they originate. The concept of the single market underlying this contribution is thus identical to that of a “common market” that prevailed before the Single European Act in 1986, which introduced the term “internal market”; the change in terminology seems to have been induced by political considerations and not by a conceptual distinction⁵. A single, common or internal market must however be distinguished from a “free-trade zone”, which is characterised by an abolition of customs between the members, as well as from a “customs union”, which entails unified customs duties with regard to non-members⁶. Free-trade zones and customs unions do not necessarily require legal unification or even harmonisation of rules other than those concerning customs.

Finally, a further delineation is necessary. This contribution focuses on uniform *private* law rules, particularly commercial or business law. Regulatory

gence” to the national legislator, see Article 35a(4). This can hardly qualify as uniform law. Moreover, it also seems to be contrary to the purpose and function of a regulation, as defined by Article 288(3) Treaty on the Functioning of the European Union (TFEU).

³ Roy Goode, ‘The Codification of Commercial Law’, (1988) 14 Monash University Law Review 135, 141.

⁴ Ibid.

⁵ See Pierre Pescatore, ‘Some Critical Remarks on the Single European Act’, (1987) 24 Common Market Law Review 11 (criticising the notion “Internal Market” for being one-sided and based on an arbitrary selection of the Treaty objectives).

⁶ On free-trade zones and customs unions see Article XXIV General Agreement on Tariffs and Trade (GATT).

rules will only occasionally be touched upon. Of course, there can be no doubt that the unification of regulatory rules, in subjects such as competition, health and safety standards, or marketing requirements, is vital for the emergence and the functioning of a single market. It is left out in this contribution merely because the EU has already made great progress in enacting uniform rules in this regard. The same cannot be said of private law, where the diversity of Member States' laws still reigns. The question posed here concerns the extent to which this diversity endangers the proper functioning of the single market.

The remainder of this contribution is divided into two parts. The first will take stock of experiences made in other parts of the world, both geographically (by comparing existing modern legal systems) and historically (by comparing ancient legal systems). The second part will then provide analytical reasons when and why uniform laws are required for market integration.

II. Empirical Data: Comparisons in Space and Time

1. Single Markets and Private Law in the World Today

Looking around the world, one can observe that states aiming to integrate their economies typically resort to uniform commercial law. A striking example is the Organisation for the Harmonisation of Commercial Law in Africa (*Organisation pour l'Harmonisation en Afrique du Droit des Affaires* – OHADA), which has produced various uniform law acts. OHADA's most significant achievement to date is the Act on General Commercial Law⁷. It deals with all subjects one would expect in a national codification of commercial law. Among others, it includes rules on the status of the merchant and the entrepreneur; the commercial register; commercial leases; the transfer of business; intermediaries, such as brokers and agents; and sales contracts. Besides the Act on General Commercial Law, there are also uniform acts on company law and business interest groups, cooperatives, accounting law and financial information, carriage of goods by road, and secured transactions⁸. Even the law of enforcement and insolvency has been unified⁹.

⁷ OHADA, Acte uniforme du 15 décembre 2010 portant sur le droit commercial général.

⁸ OHADA, Acte uniforme révisé du 30 janvier 2014 relatif au droit des sociétés commerciales et du groupement d'intérêt économique; Acte uniforme du 15 janvier 2010 relatif au droit des sociétés coopératives; Acte uniforme du 26 janvier 2017 relatif au droit comptable et à l'information financière; Acte uniforme du 22 mars 2003 relatif aux contrats de transport de marchandises par route; Acte uniforme révisé du 15 décembre 2010 portant organisation des sûretés.

⁹ OHADA, Acte uniforme du 17 octobre 2023 portant organisation des procédures simplifiées de recouvrement et des voies d'exécution; Acte uniforme du 10 septembre 2015 portant organisation des procédures collectives d'apurement du passif.

Comparably high degrees of unification of commercial law can be found in other jurisdictions. One example is Spain. While the Autonomous Communities (*Comunidades autónomas*) may set idiosyncratic private law rules, commercial law is entirely unified. The Commercial Code (*Código de comercio*) applies throughout the whole country. The underlying intention seems to be the avoidance of obstacles to trade and commerce between the different Spanish regions.

A further example is India, where different versions of the Common law apply throughout the 28 states and eight territories. To prevent this legal diversity from impeding trade, the federal legislator has unified a vast number of legal rules. Among them are those on contract law, negotiable instruments, trusts, cooperatives, corporate law, labour law, copyright, trademarks, and competition law¹⁰.

These three examples are textbook models of commercial law unification. Their maximalist positions are not supported by everyone. Sceptics of uniform law will highlight the benefits of legal diversity, such as regulatory competition, the policy space of governments, or democratic self-determination. To cite just one example, many integrated markets, such as the US, do not have uniform rules on corporate law. However, this does not seem to create problems. On the contrary, the existence of different corporate laws creates the conditions of a laboratory in which the “best”, “optimal”, and “most efficient” rules will eventually prevail¹¹. This healthy kind of competition is lost through uniform law.

There are also instances where the degree of commercial law unification is more limited. In the absence of a comprehensive federal power to regulate private law issues, the federal states of the US have voluntarily coordinated their business law – except corporate law – through the activities of the Uniform Law Commission¹². The Commission is mainly active in the area of trade and commerce, with its most successful text being the Uniform Commercial Code (UCC). Currently, the UCC contains rules on sales and lease contracts, nego-

¹⁰ See Indian Contract Act 1872; Negotiable Instruments Act 1881; Trusts Act 1882; Cooperative Societies Act 1912; Trade Unions Act, 1926; Industrial Employment (Standing Orders) Act 1946; Industrial Disputes Act 1947; Minimum Wages Act 1948; Companies Act 1956; Copyright Act 1957; Trade Marks Act 1999; Competition Act 2002; Multi State Co-operative Societies Act 2002. These acts are reprinted in *Germano Franceschin and Francesco Misuraca*, India: Commercial, Customs and Tax Law (Wolters Kluwer 2011), Appendices.

¹¹ *Ralph K. Winter*, ‘State Law, Shareholder Protection, and the Theory of the Corporation’, (1977) 6 *The Journal of Legal Studies* 251, 254–258 (rejecting the “race to the bottom” theory according to which competition between state corporate laws would promote the law with the lowest standard of investor protection); *Frank H. Easterbrook and Daniel R. Fischel*, *The Economic Structure of Corporate Law* (Harvard University Press 1996) 213–216 (discussing the force of competition between states for incorporations); *Roberta Romano*, ‘The States as a Laboratory: Legal Innovation and State Competition for Corporate Charters’, (2006) 23 *Yale Journal on Regulation* 209 (showing how formulations tested successfully in one state are taken over by the vast majority of other states).

¹² Official title: National Conference of Commissioners on Uniform State Laws.

tiable instruments, bank deposits and collections, funds transfers, letters of credit, bulk sales, documents of title, investment securities, secured transactions, and controllable electronic records¹³. In comparison with the uniform acts of OHADA, this is only a fraction. Nevertheless, it seems that interstate commerce in the US is functioning reasonably well, which may be primarily due to the similarities of the Common law in general.

More examples of markets with partially uniform laws exist around the world. Canada, whose provinces variously follow the Common law or the Civil law tradition, has federalised the law on the sale of goods, bills of exchange, and personal property; the Uniform Law Conference of Canada (ULCC) has added an act on securities transfers¹⁴. Australia, despite having differentiated private law, has also federalised some parts of commercial law, in particular the sale of goods and personal property securities, in addition to consumer law¹⁵. The United Kingdom, which comprises three systems of private law (English law, Scots law, and the law of Northern Ireland), has enacted statutes that apply throughout the whole country, in particular in the area of bills of exchange and the sale of goods¹⁶.

A differentiated picture presents itself from this brief overview. Legal unification seems to be an essential pillar of market integration. This is particularly true for rules that are traditionally considered to be part of commercial law. Among the rules of commercial law that have been unified, the rules on the sale of goods and negotiable instruments, including securities, stand out. Even those states that do not dispose of a common private law have at least unified these rules. This has happened irrespective of whether there was a federal power for unification or not. Even those states whose constitution does not provide for such a power have unified their rules through voluntary coordination of the provinces or federal states.

2. Comparisons in Time

The preceding analysis of existing legal systems provides strong indications for a correlation between integrated markets and uniform legal rules. However, correlation must not be confused with causation. Even if there were causation, it remains unclear in which direction it operated, i. e. what was first: market in-

¹³ See the website of the ULC: <https://www.uniformlaws.org/acts/overview> (last visited on 10th July 2025).

¹⁴ See Sale of Goods Act 1978, Bills of Exchange Act 1985; Personal Property Act 1993, and Securities Transfer Act 2007. For context, see *Roderick J. Wood*, 'The Codification of Commercial Law', (2016) 79 Saskatchewan Law Review 179, 180–181 (mentioning that the first two go back to the English tradition, whereas the last two were heavily influenced by the US).

¹⁵ See *Dilan Thampapillai and others*, *Australian Commercial Law* (Cambridge University Press 2020).

¹⁶ See Bills of Exchange Act 1882; Sale of Goods Act 1979.

tegration or unification of commercial law. This hen-and-egg problem can most convincingly be overcome by a historical analysis. By going back in time, it can be shown that the introduction of uniform rules of commercial law typically preceded the emergence of common or single markets, and not the other way around.

Our journey starts in France at the end of the 17th Century. King Louis XIV's influential and energetic First Minister of State, Jean-Baptiste Colbert, brought forward two decrees on commerce on land and commerce on sea¹⁷. These acts laid the groundwork for trade within France and with other countries, at a time when the rest of French private law was still fragmented¹⁸. They set models not only for France but also for the rest of the world and were widely admired¹⁹. Their provisions were used as a basis for the French Commercial Code promulgated in 1807, three years after the French Civil Code. They were instrumental in paving the way for the strong national economy.

The next stop on our historical journey is Germany, which had been split up after the Napoleonic Wars, aggravating its fragmentation of private law systems until the adoption of a Civil Code in 1896. But commercial unification had commenced long before this date, even before the German unification of 1871. As early as 1861, the General Assembly of the German Confederation had suggested a "General German Commercial Code" (*Allgemeines Deutsches Handelsgesetzbuch* – ADHGB)²⁰. It was implemented by many member states, such as Prussia, Bavaria, and Austria. Before that, a General Act on Bills of Exchange had been adopted in 1848 by the short-lived National Assembly in Frankfurt

¹⁷ Ordonnance sur le commerce de terre (1673) (also known as the "Code Savary"); Ordonnance sur le commerce de mer (1681) (also known as "Ordonnance sur la marine"). On these acts, see *Yves Guyon*, *Droit des affaires*, vol. 1, 8th ed. (LGDJ 1994) 16; *Joël Monéger*, 'De l'Ordonnance de Colbert de 1673 sur le commerce au Code de commerce français de septembre 2000: Réflexion sur l'aptitude du droit économique et commercial à la codification', (2004) 18 *Revue internationale de droit économique* 171, 175–176.

¹⁸ Before the French Revolution, French law was fragmented between the North, where around 60 customary laws and more than 360 different local or particular laws applied, and the South, where Roman law applied as "written law" (*droit écrit*). See *Jacques Poumarède*, 'De la fin des coutumes à la survie des usages locaux – Le Code civil face aux particularismes', (2009) 1 *Histoire de la Justice* 173, 174.

¹⁹ See *Roger Houin*, 'Reform of the French Civil Code and the Code of Commerce', (1955) 4 *The American Journal of Comparative Law* 485 (commending the 'lucidity and precision of the style' of the codes and calling them 'monuments of law'); in a similar vein *Jean Chadelat*, 'L'élaboration de l'Ordonnance de la marine d'août 1681', (1954) 31 *Revue historique de droit français et étranger* 74 (highlighting the quality of style, expression and composition of the decree on commerce by sea). For a critical appraisal, see *Monéger* (n. 17) 178 (stating that the Code Savary contained nothing new).

²⁰ On the history and content, see *Ralf Heimann*, *Die Entwicklung der handelsrechtlichen Veröffentlichung vom ALR bis zum ADHGB* (Duncker & Humblot 2008) 236 et seq. "plain-Citation": "On the history and content, see Ralf Heimann, *Die Entwicklung der handelsrechtlichen Veröffentlichung vom ALR bis zum ADHGB*. (1. Auflage, Duncker & Humblot GmbH 2008

and enacted in individual states²¹. The objective of these codifications was to facilitate trade and cross-border commerce in the German-speaking parts of the former Holy Roman Empire, in a bid to increase the wealth of the participating states. They led to the emergence of a common market and closer integration. In the long run, this paved the way for political unification.

Remarkably, commercial law unification preceded economic and political integration in France and Germany, the two biggest EU member states. One may even go further back in time, to the Roman Empire, to witness the same phenomenon. The Romans did of course not adopt formal codifications of commercial law, as they were less interested in trading than in *consuming* the riches others had produced²². But to be able to do so, it was in their interest to stimulate trade among the provinces, and between the provinces and Rome. In this context, it is important to remember that Roman law consisted of two different sets of rules: the *ius civile* for relations between Roman citizens and the *ius gentium* for relations between non-Romans as well as between Romans and non-Romans²³. The *ius gentium* was developed by a special judge, the *praetor peregrinus*, who had jurisdiction over disputes involving foreigners²⁴. This judge did not have any knowledge of foreign laws, nor the intention to investigate them. In the absence of applicable rules, he developed new substantive rules *ad hoc*²⁵. These were rules for multi-state disputes that provided the necessary clarity and legal certainty so that commercial relationships could flourish. This body of law was later gradually incorporated into the *ius civile* and eventually codified by Emperor Justinian in the Digest²⁶. In this way, Roman civil law took over all the institutions, principles, and rules that fostered trade in the Empire for commercial relations with or without foreigners. It is probably no coincidence that it became the basis for the *ius commune*, which later governed medieval Europe and on which many continental legal systems are built to this day.

²¹ On the Allgemeine Deutsche Wechselordnung, see Manley O. Hudson and A. H. Feller, 'The International Unification of Laws concerning Bills of Exchange', (1931) 44 Harvard Law Review 333, 343.

²² Layton B. Register, 'Notes on the History of Commerce and Commercial Law. 1. Antiquity' (1913) 61 University of Pennsylvania Law Review and American Law Register 431, 434 (stressing that 'While the provinces produced, Rome consumed. Her commerce was one of importation.').

²³ For a certain time, there existed also a third set of rules, the *ius Latii*, for those living in Latium and in the colonies. The *ius Latii* disappeared when the Latins were made Roman citizens in about 150 AD. See Andrew D. E. Lewis, 'Ius Latii', Oxford Classical Dictionary (Oxford University Press 2015).

²⁴ Register (n.22) 436 (dating the appointment of the first *praetor peregrinus* back to the 512th year after the foundation of Rome); Symeon Symeonides, Choice of Law (Oxford University Press 2016) 46 (stating that the *praetor peregrinus* had jurisdiction over 'disputes with foreign elements, or at least between non-Roman citizens').

²⁵ Symeonides (n.24) 47.

²⁶ Register (n.22) 436 (mentioning the role of the "Perpetual Edict" in this context); Symeonides (n.24) 47.

3. Intermediate Conclusion

The upshot of the comparison in space and time is clear: the adoption of uniform rules governing commerce and trade typically precedes market integration. This is true both in modern laws and historically.

It is therefore all the more astonishing that the EU is not heeding the lessons lying right on its doorstep. It still thinks that it can “muddle through” with a variety of different Member State laws, which govern not only politically divisive areas such as family law and succession, but also commercial relations.

Critics may still be unconvinced. They may see the developments in other parts of the world and in Europe itself as pure coincidence. These developments, they could argue, do not demonstrate the impossibility of a different way, the “EU way”. They can support their view by pointing to the fact that the areas which have been unified vary from country to country and from time to time. This raises an important question: Is it really necessary to go for complete unification, or is it sufficient to unify just some areas of the law, and if so, which? This question cannot be answered empirically, but requires a thorough theoretical analysis.

III. Theoretical Analysis

1. Economics as the Benchmark

The comparative overview above has given no clear answer to the question of *how much* unification of the law is needed for a single market. Some single markets have been shown to feature a fully-fledged, comprehensive commercial law (OHADA and Spain being examples in point). Others limit themselves to some selective rules (the US, Canada, and Australia). Neither of the two types proves which rules are essential. Instead, we need a benchmark, which must be objective and neutral. Given that the unit of analysis is a market, it seems appropriate to use economics for this purpose. In particular, the economic analysis of the law provides a rich variety of arguments and criteria that can be used to evaluate the need for uniform law. Among them are, for instance, the benefits of limiting transaction costs to the strictly necessary and the opportunities arising through economies of scale.

So far, those who have analysed the need for uniform law from an economic viewpoint have come to negative conclusions²⁷. They stress the foregone bene-

²⁷ See e.g. *Larry E. Ribstein and Bruce H. Kobayashi*, ‘An Economic Analysis of Uniform State Laws’, (1996) 25 *The Journal of Legal Studies* 131; *Anthony Ogus*, ‘Competition Between National Legal Systems: A Contribution of Economic Analysis To Comparative Law’, (1999) 48 *International & Comparative Law Quarterly* 405; specifically for the European context

fits of regulatory competition as well as the problems and the costs of enacting uniform rules²⁸. These studies concern the market in general or some particular broad field, such as corporate law, where uniformity is less beneficial. However, they have not explored the areas in which uniform rules are indispensable or produce higher benefits than diverse national rules.

2. Secure Identification of the Applicable Law

One should not overestimate the need for uniform law. National law is not necessarily an obstacle to free trade. Where the applicable national law can be identified with certainty through clear and straightforward conflict-of-laws rules, individuals can adapt their behaviour accordingly. Modern conflict-of-laws rules allow parties to choose, among all legal systems, the one fitting their needs best, and to structure their relation around it. Free choice of law, or “party autonomy”, is a hallmark of modern conflict of laws and is recognised around the world²⁹. Party autonomy provides both individual freedom and legal certainty. It also guarantees that the most beneficial legal systems will be promoted over time, in the sense of regulatory competition that economists prefer.

Surprisingly, free choice of law also has a unifying effect. A national law which parties agree on repeatedly will over time become a standard. Examples are English law and New York law in areas such as financial, insurance, or maritime law. French and Swiss law enjoy a similar status in international commercial arbitration. Despite being national laws, these legal systems are well-known internationally. This lowers information and transaction costs.

Thus, a major hypothesis for our inquiry is this: where the national law is certain or parties can choose a certain law and effectively coalesce around a specific legal system, uniform law is not needed, or at least less needed than in other areas where such freedom does not exist, or parties find it difficult to agree on a specific law. It is time to test this proposition in a few areas.

Frank H. Easterbrook, ‘Federalism and European Business Law’, (1994) 14 *International Review of Law and Economics* 125.

²⁸ See *Ribstein and Kobayashi* (n. 27) 135–137 (taking the view that jurisdictional competition may produce more efficient results than uniform state laws and highlighting the danger of unequal implementation); *Ogus* (n. 27) 415–416 (stressing that the benefits of uniform law may be outweighed by the costs of formulating uniform principles, reaching agreement on them, and subsequently adapting national legal systems to them); *Easterbrook* (n. 27) 131 (underscoring the benefits of diverse corporate laws).

²⁹ *Russell J. Weintraub*, ‘Functional developments in choice of law for contracts’, (1984) 187 *Collection of Courses at the Academy of International Law* 239, 271 (calling party autonomy ‘perhaps the most widely accepted private international rule of our time’).

3. Third-party Effects

From what has been said before, it follows that the need for uniform rules is greatest where the applicable law is unclear and the parties cannot overcome this uncertainty by choosing the applicable law. A salient case is where third parties are involved. A choice of the parties typically does not have any effect on those who did not acquiesce to it, according to the old Roman adage “*res inter alios acta, aliis neque nocere neque prodesse potest*”³⁰. At the same time, it would be impossible to contract with all those potentially affected and agree on a single law. Not only would the transaction costs be prohibitively high, but some third parties that need to be bound by the choice may be unknown in advance. Hence, wherever such third-party effects are intended, uniform law is necessary to secure them.

Third-party effects are indispensable in the law of negotiable instruments, such as bills of exchange and cheques. These essential tools for cross-border commerce would not function without their effects on third parties. For instance, the transfer of the claim embodied in the instrument purports to have effects against third parties, such as the drawee, creditors, or insolvency administrators, no matter where they live or are established. This effect must be guaranteed by every state in which negotiable instruments are used. Also, negotiable instruments create liabilities towards future third parties: those who accept them are liable to any future holder. Again, this effect must work independently of the domicile or location of the third party.

Against this backdrop, it is hardly surprising that the law of negotiable instruments was an early case of private law unification. Whenever common markets were created, uniform rules on negotiable instruments were the first to be introduced³¹. Two of the first conventions on uniform law, concluded in the 1930s, aimed at creating worldwide uniform rules for bills of exchange and cheques³². This target was missed because Common law countries abstained from signing these conventions. Still, the ratification by many Civil law countries demonstrates a conviction that uniform rules on negotiable instruments are indispensable for trade.

Cheques and bills of exchange are today somewhat dated. But similar problems also arise in relation to securities, like shares or bonds. Their transfer is designed to produce effects against third parties. The acquirer of a share will

³⁰ See *Manuel C. Firic*, ‘The Concept of the Principle of Relativity of the Effects of the Contract: Regulation and Foundation’, (2020) 6 *Journal of Law and Public Administration* 119.

³¹ See *Allgemeine Deutsche Wechselordnung* supra II. 2; Article 3 UCC; the Australian and Canadian Bills of Exchange Acts supra II. 1; *Indian Negotiable Instruments Act 1881*.

³² See *Convention providing a Uniform Law for Bills of Exchange and Promissory Notes*, done in Geneva on 7th June 1930; *Convention providing a Uniform Law for Cheques*, done in Geneva on 19th March 1931.

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