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AMERICAN AND EUROPEAN COMMERCIAL LAW

*Clive M. Schmitthoff**

Commercial law is largely concerned with international trade. No branch of law suffers as much from the division of the world into many national legal systems as commercial law. That division is a serious obstacle to the international exchange of goods and services. On the international level – as in the home market – businessmen want to supply goods to their customers and make sure that they receive the purchase price, they want to build factories and installations, establish a proper distribution network for their goods or services, in brief, they want to get on with the business. But they do not wish to get entangled in legal snares, such as those created by the diversity of national laws. They rightly consider these legal problems as man-made artificial barriers impeding the flow of international trade. These legal barriers owe their existence to the exaggerated importance attributed to the national State in the 19th and first half of the 20th century. True, the lawyers have invented private international law to solve the problems arising from the diversity of national laws. They use the choice of law clause, under which the parties lay down in their contract the law governing the contract, as a partial conflict avoidance device.¹ But the world would be a better place if it were unnecessary to resort to private international law in international trade relations and if the law applying to these transactions were uniform throughout the world. “Unified law promotes greater legal predictability and security.”² Uniformity of law, in the areas in which it can be achieved, acts as a total conflict avoidance device.³

In response to these economic needs, there has always been a strong tendency in commercial law to unify and harmonise. Indeed, this is one of the typical features of modern commercial law. Sometimes these economic needs are reinforced by political designs, as was the case in the Germany of the 19th century and as happens today in the European Economic Community (EEC). The unification of commercial law was often the spearhead and precursor of economic and political unification.

It is intended in this essay to survey the tendency of commercial law to unify and harmonise in three areas, viz. in American law, in European continental law, and in the law of the EEC. It is necessary, however, first to define what is to be understood by unification and harmonisation of law and to examine how they can be achieved.

*LL.M., LL.D. (London), Dr. jur. (Berlin), Dres. jur. h.c. (Marburg and Berne), D.Litt.h.c. (Heriot-Watt), Barrister, Visiting Professor in International Business Law at the City University, Hon. Professor of Law at the University of Kent at Canterbury, Hon. Professor of Law at the Ruhr-Universität Bochum.

1. Clive M. Schmitthoff “Conflict Avoidance in Practice and Theory” in *The Preventive Law of Conflicts*, 21, *Law and Contemporary Problems* (1956), 429, 454.
2. Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* (translated by Tony Weir), (North-Holland, 1977), Vol. I., 30.
3. Clive M. Schmitthoff, *op. cit.* in n. (1), 432.

UNIFICATION AND HARMONISATION OF LAW**The Aims**

Unification and harmonisation of law are not the same. Both constitute the process of approximating several legal systems and achieving some measure of integration where previously there was diversity. But the aims are different. Unification aims at complete unity in substance and detail. A new law is made and substituted for the diverse national laws which existed before; they are repealed and replaced by the new law. Harmonisation is less ambitious; it aims only at the approximation of the fundamental principles of the various national laws but leaves undisturbed national divergences in matters not regulated by the harmonising law; these differences pertain normally only to matters of detail. Unification of law is especially useful where business transactions in a particular type of business are nearly uniform, as is the case in the field of transport by sea, air and land, or with respect to intellectual property, such as patents, trademarks and copyright. Harmonisation can be used to its best advantage where the various national laws which are to be integrated are founded on a different tradition or reflect different stages in the social and economic development. The difference between unification and harmonisation is clearly reflected in the Treaty of Rome which adopts both methods for the EEC. Article 3(g) of the Treaty provides that the activities of the EEC shall include "the approximation of the laws of Member States to the extent required for the proper functioning of the common market." This provision requires only the harmonisation of law in the EEC, and that only for a limited purpose. On the other hand, unifying measures can be carried out in the EEC under article 235 which states that if the Treaty has not provided for any action which the Community considers necessary, the Council of Ministers shall, acting unanimously, take the appropriate measures. The proposed statute of the European Company, which will have the same legal status in all Member States, is an illustration of an intended uniform regulation which, as has rightly been argued,⁴ can be introduced into the laws of the Member States by a regulation made under article 235. Other uniform measures can be introduced by convention under article 220 of the EEC Treaty. They concern, inter alia, conventions on the abolition of double taxation, a full faith and credit convention on the mutual recognition and enforcement of judgments in civil and commercial matters, and conventions on the mutual recognition of companies or firms, the retention of the legal personality in the event of transfer of their seat from one Community country to another, and the possibility of mergers across the frontiers. It is always important to ascertain whether it is the aim of the integrating legislative measure completely to unify or merely to harmonise.

The task of unification or harmonisation can best be carried out by competent comparative lawyers or by a team of comparative lawyers comprising lawyers versed in the various systems which it is intended to integrate. The pitfalls of conceptual and linguistic differences in the various legal systems can only be avoided by the application of the comparative method.⁵

4. Ivo Schwartz, "Article 235 and Law-Making Powers in the European Community", 27 *I.C.L.Q.* (1978), 614.

5. See C.M. Schmitthoff, "The Science of Comparative Law", in 7 *Cambridge Law Journal* (1939), 94.

The Methods

In modern commercial practice unification or harmonisation is mainly achieved by three methods, *viz.* international conventions, uniform laws and uniform rules, but, as we shall see later, in the EEC different methods of integration of law are used. An international convention is particularly suitable for the purposes of unification, and is used when it is intended to introduce the same mandatory regulation into several national legal systems. Thus, the Hague Rules relating to Bills of Lading were introduced into American law by the Carriage of Goods by Sea Act 1936 and were British law by virtue of the Carriage of Goods by Sea Act 1924 until in Britain they were repealed by the Carriage of Goods by Sea Act 1971, which gave effect to the Brussels Protocol of 1968 amending the Hague Rules (the amended Hague Rules are known as the Hague-Visby Rules). Uniform laws are actually model laws which admit a greater degree of flexibility in their adoption by the national systems; they operate by persuasion rather than by compulsion and will not normally achieve complete unification in every detail. The best illustration is here the American Uniform Commercial Code whose unifying effect will be considered in detail later. On the international level reference may be made to the two Uniform Laws on International Sales adopted at The Hague in 1964, the one on International Sales proper (ULIS)⁶ and the other on the Formation of Contract for the International Sale of Goods (ULFIS).⁷ Their international acceptance has been disappointing as they have been adopted by only a few States. Uniform laws are often preferred to the imposition of law founded on conventions because uniform laws are more easily adaptable.

Uniform rules are merely in the nature of model standard conditions. They must be embodied by the parties into their contract in order to be effective. Nevertheless, some of these uniform rules have proved to be astonishingly effective means of unification of international trade law. The Uniform Customs and Practice for Documentary Credits (1974 Revision), sponsored by the International Chamber of Commerce, have practically become world law; banks in more than 170 countries operate documentary credits under these uniform rules. Further, the UNCITRAL Arbitration Rules of 1976 have found a friendly reception and have begun to be adopted quite often.

In the EEC different methods of unification and harmonisation are used. The EEC is neither an alliance of sovereign States nor a federal State. It is a supranational regional organisation *sui generis*. The constituent Member States have transferred part of their sovereignty to the EEC but retained the greater part to themselves. That has enabled the EEC to devise its own methods of legislation. Directives are addressed to the governments of the Member States which have to give effect to them in their territories by national law. That means that directives are pre-eminently suitable as instruments of harmonisation. Regulations, on the other hand, have direct effect in the Member States and do not require their national enactment in order to be binding on the citizens of the Member States. Regulations are, therefore, particularly suited to become instruments of unification.

6. The abbreviation ULIS stands for Uniform Law on International Sales.

7. The abbreviation ULFIS means the Uniform Law on the Formation of Contracts for the International Sale of Goods.

Internal Unification

One can distinguish between unification and harmonisation on the international level and within a single State. It happens sometimes that different laws apply in a single State. Thus, the laws of the States of the United States show material differences. In the United Kingdom, the common law of England and Wales, Scotland, and Northern Ireland is different but as there is only one Parliament for the whole of the United Kingdom, the statute law is uniform unless an Act of Parliament states otherwise. The need for internal unification of commercial law is even greater than that for the unification of the law of international trade. The principles which apply to the internal unification are the same as apply to the international unification, except that total unification can be achieved, where the national interest so requires, by the method of national legislation and resort to cumbersome international conventions is not required. It has been said of internal unification:

Sometimes diverse rules within single states are unified; this may be called internal unification of law. This may happen when a central legislator creates a great codification, as in France after the Revolution, or in Germany after the founding of the Empire, or in confederations such as Switzerland, but we must also include the partial unifications which have been brought about in the United States through the introduction of "uniform laws" which any state is free to adopt (for example, the Uniform Commercial Code – now in force in all the states except Louisiana).⁸

Subsequent Loss of Uniformity

Uniform law stands in danger of losing its laboriously established uniformity by subsequent amendments. In the law relating to carriage by sea under bills of lading, we have at present the Hague Rules of 1921 (unamended), the Hague-Visby Rules which are the original Hague Rules amended by the Brussels Protocol of 1968, and the Hamburg Rules, sponsored by UNCITRAL and accepted by a United Nations Conference held at Hamburg in March 1978. The Hamburg Rules have not been adopted by any national law yet, but if that happens and as some States have not adopted the Hague-Visby Rules, three regimes will be operative at the same time. The court and the advising lawyer will have to inquire in every case which regime applies – the original Hague Rules, the Hague-Visby Rules or the Hamburg Rules. Similar is the position in the law relating to carriage by air. Here, as far as the United Kingdom is concerned, three regulations exist side by side, the original Warsaw Convention of 1929, the Warsaw Convention as amended by the Hague Protocol of 1955, and the non-Convention Rules; it depends on the places of departure, destination and breaks whether the one or the other regime applies.⁹

Even worse is the position with respect to the American Uniform Commercial Code (UCC). There exist four official texts, those of 1952, 1958, 1962 and 1972. Some jurisdictions, which had adopted the text in operation at the date of adoption, passed amending legislation to bring it into line with the later version. But in 1961 it was only Pennsylvania which had adopted the then current text of the UCC without amendment. In 1963, after 29 jurisdictions

8. Konrad Zweigert and Hein Kötz, *op. cit.* in n. (2), 30.

9. See Clive M. Schmitthoff, *The Export Trade*, (6th ed., Stevens 1975) 343.

had enacted the Code, only 13 jurisdictions had adopted it with less than 12 modifications. California and Ohio had made 116 and 76 amendments respectively.¹⁰ Particularly article 9, which deals with secured transactions sales of accounts and chattel paper has caused difficulty. But it should not be overlooked that the Code, in any version, is not "the last word"¹¹ and that it "may . . . be improved as experience under its provisions develops."¹² In order to meet that need a Permanent Editorial Board was constituted in 1961.¹³ It is responsible for the publication of official revisions of the Code from time to time.

For the UCC, the constitution of the Permanent Editorial Board has solved the problem of subsequent loss of uniformity, as far as possible. In international conventions the problem remains unresolved and the only way open is to try to persuade the signatory States to adopt the amended version and to repeal the earlier one, an attempt which has not proved to be always successful because to some signatory States the amended version might not be politically acceptable.

In EEC law the problem of subsequent loss by amending measures cannot arise, but a different problem exists: the different interpretation of a provision in an EEC directive or regulation by the national courts of the Member States. That problem is overcome by the creation of the Court of the European Communities at Luxembourg and the procedure by way of reference from the national courts to the Community Court which is provided for in article 177 of the Treaty of Rome.

The Unification of American Commercial Law

The characteristic feature of the American movement for unification of commercial law is the fact that it has not been promoted by federal legislation but rather by adoption of uniform laws by the individual States of the Federation.¹⁴ In the last resort, the American unification has its origin in the voluntary effort of the legal profession and academic world in the United States. Although it was enacted by the state legislatures, Professor E. Allan Farnsworth observes of the UCC:

The Code is itself a successful unification within a federal system of the law of many states. In contrast to commercial codes in most other legal systems, which have been enacted by a national parliament, the Uniform Commercial Code has become the law in forty-nine states through the process of enactment by the separate legislatures of each of those states. Although all of the states have a common law tradition, the process has often required a spirit of compromise.¹⁵

The movement for the unification of commercial law was promoted in the United States by two organisations, the National Conference of Commissioners on Uniform State Laws and the American Law Institute. The National

10. Schnader, "Looking Ahead at the UCC" 19 *Bus. Law* (1964), 771, 773.

11. As the Permanent Editorial Board observed in its Report No. 2 with respect to the 1962 Revision.

12. Report No. 2 of the Permanent Editorial Board, 1972 Official Text, p. XXIV.

13. Report No. 1, 1972 Official Text, p. XX.

14. In the preparation of the American law section I was assisted by Mr. Timothy J. Aluisse, a student of Notre Dame Law School. I wish to express my appreciation of his help.

15. E. Allan Farnsworth, "The Uniform Commercial Code and the Global Unification of International Trade Law," in *International Economic and Trade Law*, ed. Clive M. Schmitthoff and Kenneth R. Simmonds, 97, 100.

Conference of Commissioners on Uniform State Laws was organised by seven States, led by New York, in 1892. Today all States are represented on it. The Commissioners derive authority from appointments by the Governors of the States.¹⁶ The American Law Institute was founded in 1923 by a distinguished group of American lawyers; it has been responsible for the Restatement of American Law which runs into 22 volumes and was prepared between 1923 and 1944.¹⁷

The National Conference of Commissioners on Uniform State Laws promulgated between 1896 and 1933 the following model laws:

Uniform Negotiable Instruments Act	1896
Uniform Warehouse Receipts Act	1906
Uniform Sales Act	1906
Uniform Bills of Lading Act	1909
Uniform Stock Transfers Act	1909
Uniform Conditional Sales Act	1918
Uniform Trust Receipts Act	1933

The Uniform Negotiable Instruments Act and the Uniform Sales Act were modelled on British enactments, the Bills of Exchange Act 1882 and the Sale of Goods Act 1893. These two enactments had been drafted by Sir Mackenzie Chalmers, a British draftsman of outstanding quality. Most of the Uniform Acts had a wide acceptance in the various American States; two of them, the Uniform Negotiable Instruments Act and the Uniform Warehouse Receipts Act, were adopted in every jurisdiction of the United States;¹⁸ by 1956 the Uniform Sales Act had been adopted by 36 jurisdictions.¹⁹

In 1940, General William A. Schnader began to lobby for support with Professor Karl N. Llewellyn for the adoption of a comprehensive commercial code which would replace the various Uniform Acts sponsored by the Commissioners. "The concept of the [Uniform Commercial Code] is that 'commercial transactions' is a single subject of the law, notwithstanding its many facets,"²⁰ and should therefore be regulated by a single enactment. As a result of Schnader's and Llewellyn's efforts, work commenced on the UCC in 1942 as a joint project of the American Law Institute and the National Conference of Commissioners. Professor Llewellyn acted as chief reporter and Professor Soia Mentschikoff as Associate Chief Reporter. In 1951 the first official text of the UCC was adopted by the two sponsoring organisations and subsequently endorsed by the American Bar Association. The first State which gave effect to the UCC was Pennsylvania which adopted the 1952 official text in 1953, to be effective on July 1, 1954; later Pennsylvania reenacted the subsequent official texts of the Code. The State of New York adopted the Code in 1962, with effect from September 9, 1964, and Indiana adopted it in 1963, with effect from July 1, 1964.

Of great influence on the adoption of the UCC was the attitude of the local banking interests. In Pennsylvania the banking associations strongly

16. Robert Kramer, "The Uniform Commercial Code," in 1 *Bus. Law Rev.* (1954) 62, 63.

17. *Ibid.*, 62.

18. William Schnader, "The New Movement Toward Uniformity in Commercial Law: The UCC Marches On," 13 *Bus. Law* (1958) 646.

19. *Ibid.*, 647.

20. Uniform Commercial Code, 1972, Official Text, General Comment of the National Conference of Commissioners on Uniform Laws and the American Law Institute, X.

favoured the adoption of the Code which accounts for its early and unanimous acceptance by the Pennsylvania legislature. In New York, on the other hand, the banking institutions were more reticent. Emmett Smith, the vice-president of the New York based Chase National Bank, circulated a 94 page memorandum criticising the proposed Code.²¹ A commission, known as the N.Y. State Law Commission, was constituted in 1953, to study the draft and its report led to numerous amendments embodied in the 1958 official text. Professor Farnsworth states:

One State alone, New York, retained an army of consultants, held extensive public hearings, spent three years and \$300,000 (in 1955 dollars), and produced five volumes of commentary and criticism of the first official draft of the Code, resulting in substantial amendments and a new official draft.²²

In Indiana, bankers, being opponents to the Code, successfully thwarted a 1957 attempt to pass it in their State. They were also successful to stop a similar attempt in 1959²³ but, as already observed, in 1963 Indiana likewise enacted the Code.

Today the UCC is enacted, in various versions,²⁴ in all American jurisdictions.²⁵ The legislative history of the UCC is thus an unparalleled success story. From a somewhat fantastic academic project it has become the most progressive commercial enactment of the Western world, a dream which became reality.

The UCC deserves this success. It owes it to its inherent quality. It has three outstanding merits: it is modern in spirit, pragmatic in treatment, and comprehensive in conception. It has attracted world-wide attention. It has been translated into Russian and the article on Sales has been translated into French.²⁶ It has had a considerable influence on the re-drafting of ULIS and ULFIS by UNCITRAL. Naturally UNCITRAL has also paid due attention to the General Conditions of Delivery of Goods sponsored by the Council for Mutual Economic Assistance (CMEA, Comicon). Farnsworth lists four ways in which the Code may advance international codification:²⁷

1. by reducing the traditional common law resistance to codification,
2. by presenting many common law principles in a statutory form,
3. by formulating novel solutions to many troublesome problems in international trade law, and
4. by serving as an example of a successful unification of the laws of many different jurisdictions.

In the context of this essay, the outstanding feature of the American unification of commercial law is this. In a struggle lasting some 60 years the United States has progressed from piecemeal internal unification to the grand

21. Walter D. Malcolm, "Proposed Uniform Commercial Code: Report on Developments from May 1952 to February 1953," 8 *Bus. Law* (1953), 16.

22. E. Allan Farnsworth, *op. cit.* in n. (15), 101.

23. Walter D. Malcolm, "UCC: Reviews, Assessment, Prospect" 15 *Bus. Law* (1960), 369.

24. See p. 8, *ante*.

25. Louisiana, however, has only enacted Articles 1, 3, 4 and 5.

26. E. Allan Farnsworth, *op. cit.* in n. (15), 99.

27. E. Allan Farnsworth, *op. cit.* in n. (15), 97-100.

He also lists four ways in which the Code may retard international codification:

1. by suggesting impracticable expenditures of effort,
2. by affording American jurists an accessible set of norms,
3. by affording American jurists an advanced set of solutions, and
4. by setting a standard of comprehensiveness and detail.

design of a comprehensive modern commercial code, which reflects the economic position of the United States as one of the leading industrial world powers. The United States has thus demonstrated, though only in the internal sphere, that unification can be achieved, provided that there is a will to unify, and that will is combined with academic vision and practical experience.

UNIFICATION IN EUROPEAN CONTINENTAL LAW

It is intended first to review attempts at unification of commercial law in France, Germany and the Nordic countries. The development in France and Germany is typical of the whole of the European continental scene outside the socialist countries, except that the Nordic countries developed their own method of unifying commercial law. Thereafter three special problems will be considered, *viz.* the codification of commercial law in a general or a separate code, the concepts of the merchant and the mercantile act, and the central position of the commercial register.

In view of the fact that the legal tradition in Europe is older than in the United States, a brief excursion into history cannot always be avoided.

France

In the middle ages France was divided into many territories governed by princes and prelates and many different legal systems of local nature applied in France. The main difference was between the written law *droit écrit* which applied in the South and contained traces of Roman law, and the customary law (*coutumes*) which reigned in the North²⁸ and was more Germanic in character. There was no general reception of Roman law in France, as was the case in Italy and Germany. In course of time, the *Coutume de Paris* became increasingly important; it was published in 1510. But Voltaire who lived from 1694 to 1778 could still observe:

Is it not an absurd and terrible thing that what is true in one village is false in another? What kind of barbarism is it that citizens must live under different laws? . . . When you travel in this kingdom you change legal systems as often as you change horses.²⁹

The first steps towards the unification of French commercial law were taken by Jean Baptiste Colbert, (1616-1683), Comptroller-General of King Louis XIV; he was responsible for the adoption of the *ordonnance du commerce* (1673) and the *ordonnance de la marine* (1681). The former codified parts of commercial law, the latter parts of the law of the sea. The French professors René Rodière and Roger Houin refer to the marine ordinance as "*la plus belle des ordonnances de Colbert*".³⁰ "These great laws considerably lightened the labours of Napoleon's codifiers."³¹

28. But by virtue of the Ordonnance of Montils-les-Tours of 1454, the customary law, which relied on oral tradition, had to be recorded.

29. Voltaire, *Oeuvres* VII (1838) Dialogues p. 5; taken from Konrad Zweigert and Hein Kötz, *op. cit.* in n. (2), Vol. I, 73-74.

30. René Rodière et Roger Houin, *Droit Commercial, Actes de commerce et commerçants, Banque et Bourse*, 16th ed., Dalloz, Paris, 1970, 6.

31. Amos and Walton, *Introduction to French Law*, 3rd ed., Oxford, 1971, 30.

The ordonnances of Colbert were the forerunners of the final codification of French commercial law by Napoleon. He created the *Code de commerce* in 1807 and that code became operative on January 1, 1808. This code is still in force in France today but it has been modified by frequent legislative measures and amplified by court decisions. Without these fundamental modifications it would have been unworkable in the modern age of machines, technology and capital concentrations.³² The code is at present subject to revision. But the code, like the other four codes of Napoleon,³³ had an enormous influence on the laws of the European continent. René A. Wormser observes:

Napoleon's codes were translated into almost every Western and many Eastern languages, and a wave of code-making followed. The Austrian codification of 1811 and the German code, finished in 1896, are generally accepted as far superior, and the Japanese, in fashioning their code system, followed the German model. But these had the advantage of the experience of the intervening years and the Napoleonic precedent.³⁴

The leading idea of the French Commercial Code is that merchants are a class of persons separate from other citizens and are, therefore, under a separate legal order. Under French law only persons who are governed by commercial law can adduce any kind of evidence to prove their claims and can be made bankrupt.

Germany

The movement to the unification of German commercial law has definite political overtones. Like medieval France, Germany was divided into many smaller and larger sovereignties, with different legal systems; but, in Germany that state of affairs continued into the 19th century. After the successful conclusion of the war against Napoleon in 1815, the movement for German unity began to gather force. The idea of codification of German law was then controversial. Professor Thibaut demanded such codification of private, criminal and procedural law but the greatest German jurist of the 19th century, von Savigny, was opposed to it. In 1834 the German customs union (*Zollverein*) sponsored a uniform law on bills of exchange, and that law, the first unifying commercial law in Germany, was promulgated in 1848. In 1856 the German Confederation, (*Deutscher Bund*), which included the Austrian Empire, convened the first conference for the creation of a uniform commercial code. That code was published in 1861 and was adopted by most members of the German Confederation, including Austria and Prussia; it is still law in Austria. After the foundation of the German Empire (*Deutsches Reich*) in 1871, which, like its predecessor, the North German Federation (*Norddeutscher Bund*), excluded Austria, Germany prepared new codes on the five-code model of France and, in 1897, adopted the German Commercial Code which came into operation on January 1, 1900. It is still in force in the German Federal Republic, although it has been considerably amended. In particular, the part on companies has been superseded by the German Corporation Law of 1965, one of the most detailed and progressive company laws in Europe.

32. René Rodière et Roger Houin, *op. cit.* in n. (30), 8.

33. The five Napoleonic codes are: the civil code (1804), the code of civil procedure (1806), the commercial code (1808), the code of criminal procedure (1811) and the criminal code (1811).

34. René A. Wormser, *The Law* (New York, Simon and Schuster, 1949) 228.

The German unification of law is an amalgam of Romanistic and Germanic ideas. The principal representative of the Romanist school, also called the Pandectist School, was Bernhard Windscheid, and the protagonist of the Germanic school was Otto v. Gierke. The characteristic of the German codification is that of a magnificent logical structure, founded on abstract legal conceptions. It conveys the impression that preference is given to academic predilection of neatness (*Professorenrecht*), rather than practical considerations.

The unification of commercial law was used deliberately as an instrument for achieving political unity which, as has been observed, was finally achieved by the foundation of the German Empire in 1871.

The Nordic Countries

The law of the Nordic countries - Sweden, Denmark, Norway, Iceland and Finland - pertains neither to the common law nor to the France-Germanic legal families but has a character of its own. "Stimulated by a sense of their common historical and cultural heritage, as well as by an increase in mutual trade and the improvement of traffic, the Nordic States started to co-operate closely in the field of legislation in the last third of the 19th century . . . In 1872 a congress of Scandinavian jurists, convened in Copenhagen with the express purpose of advancing legal unification in Scandinavia, resolved that the first and most important goal was to unify the Nordic law of negotiable instruments."³⁵ Already in 1880 the unified law of negotiable instruments came into operation simultaneously in Sweden, Denmark and Norway. The maritime law of the Scandinavian countries was unified in 1891-1893. The sales law was the next subject to be unified, and the unified statute on the sale of movables came into force in Sweden in 1905, in Denmark in 1906, in Norway in 1907 and in Iceland in 1922. Then followed a unified Contracts Act which came into operation in Sweden, Denmark and Norway between 1915 and 1918. In addition, the following topics have been unified in individual enactments: the law relating to commission agents, trade representatives and commercial travelers, the law on installment sales, the law on insurance contracts, and the law on bonds. In spite of the formation of the Nordic Council in 1952, the zeal for unification appears to be no longer as strong in some of the Scandinavian countries as it was in the past³⁶ and there is no intention of creating a uniform commercial code. But progress has been made with the contemplated unification of company law.

The Scandinavian unification of many topics of commercial law has been undertaken after a careful comparative study of the relevant rules in the common law countries and the European continental legal systems, notably of Germany. The result is that most of the Nordic codifications are excellent. They are clear, simple and relatively brief. Dr. Mario Matteucci, then Secretary General of the International Institute for the Unification of Private Law (Unidroit, Rome), has expressed the view that the Scandinavian achievement should be a model for co-operation on the unification of commercial law in Europe.³⁷

35. Konrad Zweigert and Hein Kötz, *op. cit.* in n. (2), Vol. I, 288-289.

36. Jan Hellner, "Unification of Law in Scandinavia" in 16 *Am. J. Comp. L.* (1968) 88.

37. Mario Matteucci, "The Scandinavian Legislative Co-operation as a Model for European Co-operation," in *Liber Amicorum of Congratulations to Algot Bagge*, 1956, 136.

The Codification of Commercial Law in a General or a Separate Code

The first of the special problems which shall be indicated here is this: is it better to unify commercial law in a general code which also includes the law of contract or should it be contained in a separate code dealing only with the law of merchants and mercantile transactions?

The older method was to state commercial law in a separate code. This method was adopted by France, Germany, Italy, Belgium, Holland, and, following the French model, by many other countries of Europe and Latin America. Later, however, it was realised that commercial law is so closely connected with the law of contract that it cannot – and should not – be separated therefrom. For that reason more modern codifications have adopted the system of a unified code and abandoned the dualist method. Thus, Switzerland adopted a unified Code of Obligations on March 30, 1911, which came into operation on January 1, 1913 and was revised in 1936 and, in part, thereafter: in 1971 the section dealing with the contract of employment was modernised. The Swiss Code, together with other Swiss enactments, was introduced by Kemal Pasha into Turkish law and became the new Turkish Civil Code of 1926.

Italy, which formerly founded its law on the dualist method, significantly unified its civil and commercial codes in the *codice civile unificato* of 1942.

In the last analysis, the idea that commercial law should be codified in a special code, was founded on the concept of merchants constituting a separate class in society, as undoubtedly was the case in olden days. The transition to a unified system reflects the loss, by the mercantile community, of its status as a separate group in society and their integration into the general public engaged in commercial transactions.

The concept of the American Uniform Commercial Code is not at variance with these modern tendencies because in its article 1, which deals with General Provisions, it contains in fact many fundamental concepts of contract law. Nevertheless, in article 2 it includes some rules which apply only to “merchants” and in section 2-104 it contains a definition of “merchants”. The modern legislative tendency to provide special protective rules for the consumer has revived the old division of legal rules between those applying to persons who deal in goods professionally and rules which apply to persons who purchase goods for their own use, *i.e.* consumers. This tendency can be detected in the United Kingdom Supply of Goods (Implied Terms) Act 1973 and the Unfair Contract Terms Act 1977.

The Concept of the Merchant

In the European continental codifications, the question of what is “commercial” is, in the words of Professor Rudolf B. Schlesinger, “a matter of central importance.”³⁸ The French system uses as the central concept the commercial transaction (*acte de commerce*) and defines as a merchant a person who makes it his habitual profession to engage in commercial transactions.³⁹ The German Commercial Code starts with a definition of the merchant (*Kaufmann*) and attributes decisive weight to this personal quality; the German Code contains detailed provisions on who is a merchant *per se*, who should register in the

38. Rudolf B. Schlesinger, *Comparative Law*, 2nd ed. (London, 1960) 284.

39. *Code de Commerce*, art. 1.

commercial register as a merchant, and who may register in that quality. The French approach is described as the objective test, the German approach as the subjective test. Both approaches are fundamentally unsatisfactory: they are academic and over-refined and have led to obscurity. Rudolf B. Schlesinger rightly observes:

The draftsmen of most of the European and Latin-American commercial codes have attempted to blend the subjective and the objective criteria. The resulting mixed systems differ, however, greatly from each other. Even within a single jurisdiction, there is apt to be doubt and ambiguity, reflected in controversies among textbook writers and in conflicting judicial decisions.⁴⁰

Modern theory prefers the subjective theory and it is possible that, if the proposed reform of the French Commercial Code is carried out, France will likewise adopt that criterion. The American Uniform Commercial Code likewise inclines to the subjective theory, without - fortunately - indulging in the niceties and complications of the German Commercial Code. Interesting in this connection is the following official comment on the definition of "merchant" in article 2-104: "The term 'merchant' as defined here roots in the 'law merchant' concept of a professional in business."

The Central Position of the Commercial Register

The position of commercial law in the European continental systems is incomprehensible without due appreciation of the position occupied by the commercial register in those countries. The commercial register is kept in most countries by the lower local courts but in the Netherlands it is kept by the local chambers of commerce. In France, in addition to the local commercial registers, a national central register exists which is kept by the *Institut nationale de la propriété industrielle* in Paris.

The institution of the commercial register originated in Germany where it was developed from the guild rolls of the medieval cities and the German form of the register has served as a model for other continental countries. The commercial register was introduced into France only in 1919, but whereas the German register is kept by a judge, the French register is kept by a clerk (*greffier*); the German judge examines the entries but the French keeper of the register only records them.

The commercial register in the European continental countries is a general register. Every merchant, whether an individual or a company is - or, at least, should be - registered. In France every registration number is preceded by a letter. The letter A refers to physical persons and the letter B to companies and other legal entities. In Germany, merchants per se are merchants, whether they are registered or not, but merchants who should be registered are merchants only if registered; however, if they fail to register they are subject to a fine. Persons who may register become merchants only if their name is entered on the register. Companies are merchants in Germany by virtue of their form.

The publicity effect of registration in the commercial register is of great importance, as far as third parties are concerned. German law admits both a negative and a positive publicity effect: not only can a company or other registered merchant not rely, as against third parties, on a fact which ought

40. Rudolf B. Schlesinger, *op. cit.* in n. (38), 285.

to have been but was not registered, but also, if a fact has been registered and published, a third party is normally treated as having constructive notice of it. This regulation, it should be noted, is rather unfavourable to third parties. In France, the negative effect exists but the positive effect is not admitted. In other words, a fact that ought to be registered and published cannot be pleaded against a third party but the doctrine of constructive notice is not admitted. The third party thus enjoys greater protection in France than in Germany.

The commercial register, in the words of Rudolf B. Schlesinger, "facilitates the demarkation between merchants and non-merchants . . . [e]ntry in the register, or the lack of it, is one of the factors determining a person's status as a merchant."⁴¹

APPROXIMATION OF COMMERCIAL LAW IN THE EEC

The harmonisation and unification of certain aspects of commercial law is one of the most important instruments in the arsenal of the EEC to achieve its object of establishing a common market. The technique of approximation of laws of the Member States of the EEC has already been considered.⁴² Here it is necessary to indicate the subject areas to which this activity of the EEC extends.

The most important of these areas is company law. The EEC authorities are rightly of the opinion that without the approximation of national company laws the establishment of the common market is impossible. In this connection the EEC Commission speaks of "a common market for companies". Indeed, the approximation of national company laws is regarded by the EEC authorities as the spearhead of approximation of laws in the EEC. As the company is the most important form of business organisation in all Member States of the EEC, the approximation of the legal structure of the company is the central and most urgent legal task of the EEC. It has the same significance in modern times as the unification of the law of negotiable instruments had in the 19th century. The political character of the approximation of company law can be seen from the following observations in an EEC document:

At the Community level, it is necessary, in order to construct a common market for companies, to ensure that the Community framework will take proper account of the way in which relevant social and economic policies are developing in the Member States. Furthermore, the creation of a common market for companies is not an end in itself. It is only one means of achieving the Community's fundamental objectives which include a harmonious development of economic activities, including a fairer distribution of economic activity between the various regions of the Community, an increase in stability, and the improvement of the living and working conditions of the Community's citizens.⁴³

41. Rudolf B. Schlesinger, *op. cit.* in n. (38), 285.

42. See p. 6, *ante*.

43. "Employee Participation and Company Structure," EEC Commission, Discussion Document, 1975, Bull. Europ. Com., Suppl. 8/75, 8-9.

In its attempt to harmonise the national company laws, the EEC has been highly successful. The Commission has planned eight Directives of which the first four have already been accepted by the Council of Ministers and have been, or shortly will be, introduced into the company laws of the Member States. This convergence of company laws covers the following topics: the restriction of the ultra vires doctrine; the restriction of the grounds on which a company, once registered, can be declared null and void; a clear distinction between the private (close) and public company; the maintenance of capital; the requirement of a minimum subscribed capital for public companies; an approximation of the principles of the law on mergers and takeovers, uniform patterns of balance sheets and other public accounts for small, medium-sized and large companies; the structure of public companies, their boards and the problem of employee participation; groups of companies; group accounts; qualifications of auditors; the content, checking and distribution of prospectuses. This is a wide field of harmonisation. These endeavours of the EEC will eventually result in a practically uniform company law in all Member States, uniform apart from matters of detail which do not essentially affect the picture.

Other areas in which the EEC attempts to harmonise the commercial laws of the Member States include commercial agency, banking, insurance, product liability, and private international law relating to contractual obligations, but the categories of harmonisation are not closed. No project is at present under consideration on the creation of a uniform commercial code in the EEC, but it is possible that at a later stage in the development of the EEC such an ambitious project may be envisaged.

CONCLUSION

Mario Matteucci, one of the most distinguished jurists working on the unification of commercial law, wrote: "The practical achievements of unification, both on the international and the inter-federal level, have shown that commercial relations are more easily settled by means of uniform rules embodied in international treaties or model laws and model contracts than other legal relations."⁴⁴ The preceding examination has fully confirmed the accuracy of this analysis. The commercial laws of the United States and most countries of Western Europe have been unified on a national or regional basis in many areas, and beyond this we are witnessing in our time a progressive unification of the law of international trade on a world-wide level. In most instances these attempts at unification, where they proceeded to fruition, have been successful. They have made an invaluable contribution to the removal of artificial barriers obstructing the exchange of goods and the performance of services across the frontiers of national states. This contribution has served progress in human co-operation. It is of equal importance to that of science and technology in our age.

44. Mario Matteucci, "The Unification of Commercial Law," in (1960) *J.B.L.* 137.