Maren Heidemann · Joseph Lee *Editors*

The Future of the Commercial Contract in Scholarship and Law Reform

European and Comparative Perspectives

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Preface

This volume presents research undertaken during a research project initiated at the Institute of Advanced Legal Studies (IALS), School of Advanced Study, University of London. IALS provided an inspiring and friendly research environment where a series of successful events could be organised. We wish to thank Professor Mads Andenas for hosting this project at his Centre for Corporate and Financial Law giving scholars from all over the world the opportunity to participate. Special thanks go to the Institute's director, Jules Winterton, who very kindly supported this project over a period of over 2 years and to the staff at the IALS library and events administration, especially Ms Belinda Crothers, for their invaluable and indefatigable help and patience. We are also indebted to the University of Exeter for supporting the extension of the project.

London, UK
Exeter, UK
May 2018

Maren Heidemann
Joseph Lee

Foreword

The Autonomy of Commercial Law?

The commercial contract is not any autonomous phenomenon. It is subject to regulatory intervention and sometimes represents attempts to counteract or circumvent such intervention. It may be seen as a creature of domestic law or as an attempt to transcend it. It is subject to restatement and harmonisation, also at an international level with principles or conventions. The commercial transactions are increasingly of a cross-border and inter-jurisdictional nature. That applies to regulation of different kinds and the codification, restatement and harmonisation of commercial law itself. These parallel developments take place at varying speeds at the different levels. Party autonomy is important, but its role is only understood when account is taken of such developments.

Is a special and separate contract law for merchants in a global market necessary? Scholarship needs to develop the terminology, the doctrine and also the objectives which this law is based upon. For a long time, the choice of transnational law rules, which are often non-state law, has been marginalised and made ineffective in state court proceedings. EU reforms and proposals, including the now withdrawn Commission proposal for new Common European Sales Law, have circumvented this problem by proposing new general contract law to be used as national law. International practice in commercial dispute settlement will still remain at the forefront of promoting and modelling the use of transnational contract law.

The CCFL Research Project

This volume presents research undertaken during a research project at the Centre for Corporate and Financial Law (CCFL) at the Institute of Advanced Legal Studies (IALS), School of Advanced Study, University of London for almost 2 years. The CCFL was established in 1996, and I was its first director until 2000, and I took over

again in 2007. The CCFL continues to organise and host research programmes and events, drawing together scholars from all over the world and working on a range of current research topics in corporate and commercial law. Among the outcomes of the research activities at the Centre are the monograph *The Foundations and Future of Financial Regulation: Governance for Responsibility* (Routledge 2014) by Professor Iris Chiu at University College London and myself and the edited collection by Andenas and Deipenbrock (eds), *Regulating and Supervising European Financial Markets: More Risks than Achievements* (Springer, 2016).

Dr Maren Heidemann has played a core role at the CCFL with her research and supervision of PhDs.

The research project provides European and comparative perspectives on the future of the commercial contract. Its focus is on scholarship and law reform, and it is directed by Dr Heidemann. The research project and this book brought together scholars from over ten different jurisdictions all across the globe. The volume is edited by Dr Heidemann and Dr Joseph Lee. Dr Heidemann has conceived and directed the project. I have followed their careers and scholarship for many years and supervised their PhDs at the IALS and Nottingham. They have made important contributions to international commercial law in their PhD dissertations and later. Dr Heidemann's magisterial monograph is *Methodology of Uniform Contract Law*. The *UNIDROIT Principles in International Legal Doctrine and Practice* (Springer, 2007) is a classic, and her book *Does International Trade Need a Doctrine of Transnational Law?: Some Thoughts at the Launch of a European Contract Law* (Springer 2012) analysed commercial contract law both national and international in view of the proposed European contract law reform. Dr Lee's publications and research council-funded larger projects have made important contributions to financial and corporate law and also in the comparative analysis they provide.

The Dichotomies of Contract Law and the Future of the Commercial Contract

The project is concerned with two fundamental dichotomies of contract law. The first is that of commercial and private (in a narrow sense) contracts. The second dichotomy is of private (in the wider sense, including commercial law) law and public law. Some time ago, some would have ventured to formulate a third dichotomy: the domestic and the European and international. In commercial law, there was always the Law Merchant *or lex mercatoria*, with its own challenges to domestic law. And contractual freedom or private autonomy would provide grounds for moving outside the domestic law paradigm. The UNIDROIT Principles and the 1980 Vienna Convention on the International Sale of Goods (CISG) of Dr Heidemann's scholarship provides a core of a such supranational contract law.

The issues of the project are complex, and different jurisdictions deal with them in different ways. Some countries have comprehensive codifications for commercial

law covering in particular commercial contracts. The distinction between the private and the commercial is drawn in different ways. The relationship between commercial law and regulatory law is inherently difficult, and the doctrinal difficulties often reflect ideological and political positions. To domestic public and constitutional law the dichotomy may not have much relevance. Whether that applies to European or international law sources or not, they will not follow one of the domestic jurisdictions. German, French or common lawyers may read their systems into these sources, but that could lead one astray. At the international law level, there is some lead in harmonising aspects of commercial law, of which the UNIDROIT principles of Dr Heidemann's 2007 and 2012 monographs are but one. At the European level, consumer rights have been at the core. Both at international and EU level, much regulatory harmonisation has consequences for commercial law and may contribute to sectoral regulation which reflects the technical regular policy objectives and techniques applied in different fields. Exploring the public and public international law influence takes one to treaty interpretation, sources of law in the EU legal order and their effect in domestic law and a range of issues not traditionally seen as pressing in the commercial law context.

Financial and corporate law, Dr Lee's field, is one area where new specialised subfields of commercial contract law are emerging.

The CCFL Research Project and This Book

The first phase of the research project was on the definition and nature of the commercial contract. The commercial contract is distinct from non-commercial, private or consumer contracts. The commercial contract can also to be understood as a specialisation, a specific contract type. The second phase of the research project was on the interaction of public and public international law with substantive contract law in the commercial sphere. This interaction occurs, for instance, where contract law is codified in the form of an international treaty of which CISG is the most prominent example. Interaction also occurs where public policies influence private contract law or vice versa. The initial objective of the research project was to explore the scope of the subject and how it resonated with scholars and practitioners. The editors explain in their introduction how shared points of interest crystallised. They were in particular good faith, corporate social responsibility and contractual cooperation. They might not be the most prominent features of commercial contracts in anybody's imagination. That may be an outdated preconception.

The analysis of the future of the commercial contract falls into three main parts, as is explained in Dr Heidemann's introduction. Part I is on general theory and general aspects of commercial contract. Part II is on the commercial contract in practice with emphasis on good faith, collaboration and sustainability in commercial contracts. Part III is on the interface between public and private law in commercial contract law.

The book is timely. The chapters provide a rich source of critical analysis. The editors have managed to bring together a wide group of contributors in terms of scholarly interests and perspectives and to provide a structure for making a valuable and original book on the future of commercial law at the highest level.

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University of London Mads Andenas
London, UK
May 2018

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The Future of the Commercial Contract in Scholarship and Law Reform: An Introduction

Maren Heidemann

Contents

Abstract This chapter maps out our volume on the commercial contract law in scholarship and law reform. It starts by outlining the general distinction between commercial and non-commercial contract law and by introducing and critically reflecting on recent law reform in this area of law. It then moves on to introducing and contextualising the contributions which the chapters on Parts II and III of this

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volume make to scholarly debate of selected distinctive aspects of commercial contracts and of the interface of commercial contracts and contract law with public international law. The chapter concludes with an outlook and brief summary of the general findings of the research presented in this volume.

1 Introduction

Recent decades have seen new legislation in regard to contract law in countries worldwide, and also proposals put forward by the European Union (EU) in co-operation with academic scholars. Examples for the latter are the (later withdrawn) Proposal of the European Parliament and of the Council for a Regulation on a Common European Sales Law (CESL),[1] the Principles of European Contract Law (PECL)[2] and the Draft Common Frame of Reference (DCFR).[3] National jurisdictions around the world have enacted reform often responding to the need to implement or consolidate EU directives such as the UK with its Consumer Rights Act 2015, or responding to a general need to implement case law and to adapt their civil codes to the expectations of the modern civil and commercial environment such as France and Japan. All these emanations of new contract law are either based on a universal notion of contract or deal predominantly with consumer contracts. We therefore see a need to complement this activity with a focus on the commercial contract in scholarly research with a view to encouraging and informing further review and reform in the area of domestic and international commercial contract law. This chapter argues in Sect. 2 below that there has been a lack of reform in the area of traditional merchant law and commercial contract law and that the current identity based system of merchant and consumer law is an outdated concept for a modern legal system which wants to be fit for global commerce. Commercial contracts ought to be explored and defined as a separate contract type in scholarship. This volume offers a birds eye view of the potential scope of such a definition. Cross border dealings are not only a major field of application of a reformed approach to commercial contract but have also prompted the emergence of prototype rules over the past several decades which have entered general contract law and with it consumer contract law against all expectations and perhaps without sufficient premeditation in scholarship. Model contracts for domestic and international trade and more specifically rules relating to supervening events, hardship and general renegotiation duties have partly been developed by private service providers such as the International Chamber of Commerce (ICC) or national trade associations such as

[1] COM(2011) 635 final.

[2] Lando and Beale (2000). The full text can be accessed online among other sites at https://www.trans-lex.org/400200/_/pecl/.

[3] Von Bar and Clive (2010).

members of the International Federation of Consulting Engineers (FIDIC)[4] and partly by international organisations such as the Institute for the Unification of Private Law (UNIDROIT) in Rome and the United Nations Commission of International Trade Law (UNCITRAL). A universal approach to doctrine having critically evaluated these rules and assessed their value for general use should be complemented by sector specific rules. This is because the needs of international contractual business practice are not identical in all disciplines such as short term (sale of goods), long term (construction contracts) or international investment with state party involvement. This volume illustrates this by way of pinpointing selected problems taken from a range of jurisdictions across the world by looking at specialised contract types such as long term construction contracts, certain types of outsourcing, supplies, government bonds and securities as set out in Sect. 3 below. The role of public policy in commercial contract law is analysed in the context of corporate social responsibility, the notion of good faith and the protection of small and micro enterprises. A special focus is also directed at the role of domestic and international public law where it interacts directly with private substantive contract law and where states interact with private businesses directly. This is explained in Sect. 4 below. How do concepts of public international law as embodied in the 1969 Vienna Convention on the Law of Treaties (VCLT) for instance work in international commercial contract law? What is the role of international contractual dispute settlement where there are state parties involved? How is legal reasoning affected by the use of uniform law in the form of conventions?

2 The Structure of This Volume

This volume is organised in three parts. The first part contains contributions exploring the notion of merchant law and the commercial contract as distinguished from non-commercial contracts. Authors also highlight the role of commercial contracts within current settings of law reform at national and regional (European Union) level. The second part showcases selected specialised commercial contract types. The third part features contributions reflecting on the interface of public international and substantive commercial contract law from various angles. Some authors observe and explore a historic trajectory of a legal term commonly connected with commercial contracts and transactions morphing from a public into a private law concept.[5] Some focus is on the interplay of treaty law with private law and private dealings and the role of public international law reasoning in an international commercial context. This last part covers an area of legal discourse that has only been scarcely explored. The growing significance of global trade and cross border dealings conducted by private parties requires a lot more research into this type of interdisciplinary conceptual evolution. Instead, academic disciplines within the law—such as those of

[4] http://fidic.org/. See Christie in this volume.

[5] See D'Alvia and Oosterhuis in this volume.

private and public law—remain compartmentalised in this respect and stand in their own way when it comes to reconciling approaches practiced in public and private law with a view to furthering international law making, adjudication and dispute settlement. As the contributions in Part III illustrate, this may be necessary in order to reflect a historic shift from state acting to private party acting in international commerce.[6] Our research project therefore remains open to further engagement especially with this last aspect and considers itself a work in progress.

In the following, the three parts of the book are introduced with regard to their wider context and in some more detail.

3 Merchant Law in Law Reform (Part I)

Commercial contracts may be seen to form a special and separate contract type because they require specialised rules to a certain extent. This is true for both domestic and cross border (international) commercial contracts. These contracts are regularly exposed to risks that do not occur in a purely domestic and non-commercial setting. Examples are risks arising from long distance shipping, especially the carriage of goods by sea, changes in the law or factual circumstances in the course of the contractual performance (supervening events) or simply problems arising from the fact that the contracting parties are seated in different countries and have to deal with barriers arising from differences in their domestic law, international trade law or language related issues. Another difference to the domestic and non-commercial contract often arises from the content of the contract, either in relation to the actual goods traded or to be manufactured or the quality standard to be attained. This latter aspect can be explained by reference to the object and purpose of the contract.[7] Despite clear distinctive characteristics of the commercial contract no general definition of the commercial contract has been attempted in any jurisdiction. An illustration of this can be found in Articles 1 and 2 of the 1980 Vienna Convention of the International Sale of Goods (CISG), the scope provision. The CISG defines its scope using only the international aspect of the contract[8] expressly followed by an exclusion of purchases of household goods[9] and expressly excluding recourse to the 'commercial character' of the transaction.[10] This rule wants to avoid any clash

[6] See also Sect. 5 below.

[7] See Sect. 3.1 below and see Heidemann in this volume.

[8] Art. 1 (1) CISG: "This Convention applies to contracts of sale of goods between parties whose places of business are in different States:"

[9] Art. 2 CISG: "This Convention does not apply to sales: (a) of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use;…."

[10] Art. 1 (3) CISG: "Neither the nationality of the parties nor the civil or commercial character of the parties or of the contract is to be taken into consideration in determining the application of this Convention."

between those jurisdictions maintaining a formally separate commercial law and those who do not which could result in a distortion or dispute of the scope provision.[11] On the basis of this, *de lege lata*, it can therefore be said that the commercial contract is a separate contract type by inverse conclusion as it merits a separate law merchant or otherwise specialised codified law in many jurisdictions.

3.1 Nature and Models of Merchant Law: Identities vs. Purpose

Continental European jurisdictions traditionally maintain separate commercial codes and even separate courts as in France[12] and partly in Germany where it is common to run special commercial 'chambers' (panels) at higher civil courts to deal with commercial cases. The United States (US) maintain the Uniform Commercial Code (UCC) at federal level as a restatement and a guide or model for the individual states to refer to in their legislation and law reform, but not as formal law. Arising from historic practice and tradition, commercial laws can be said to broadly follow a German, a French or an Anglo-American (common law) model. National laws have developed particularities of their commercial laws which today form distinct categories. They can be traced back to these three spheres of origin. The German model is traditionally 'identity based' whereas the French model is essentially 'transaction based'.[13] The common law has not developed any explicit differentiation between commercial and non-commercial private law or contracts. It can be regarded as having developed mainly on the basis of commercial cases, though, and might therefore even be regarded as using the commercial contract as a default scenario for its contract law. Historically, merchant privilege and royal protection was needed for merchant activity and success. This was granted by the king or other sovereign as delegated. Merchant law therefore developed as an expression of a class based society and embodied a degree of separation and exclusivity attributable to that class. In this context, the French system of commercial law, developed during the Napoleonic codification effort following the French Revolution of 1789 at the start of the nineteenth century, has to be seen as epitomising the 'democratic' or 'republican' alternative to the German or monarchic tradition.[14] The essence of this is the focus on the transaction rather than the person. Rather than describing a class

[11] Interestingly, Herber and Czerwenka do not refer to the merchant and non-merchant dichotomy but only to the relationship with national consumer laws which may maintain diverging categories from CISG specifying personal use as an exception to its applicability, Herber and Czerwenka (1991), pp. 23–25.

[12] See Bell et al. (2008), pp. 453–480.

[13] See in detail Heidemann (2016).

[14] English merchant law was merged into general law in the seventeenth century and special adjudication displaced. See on this McKendrick (2016), pp. 3–8. For a more detailed account and a good read on the subject see also Plucknett (1956), pp. 657 et seq.

of people this new law describes the character of a transaction as commercial or non-commercial; the so called *actes commerçants,* commercial acts. These are listed as types of contracts at the start of the *Code de Commerce*, the French commercial code.[15] They either qualify as commercial just by falling under these rules or they are further distinguished by the purpose of the transaction ('in order to resell') as in the sale of goods. This method shows two important characteristics: it uses the purpose of the transaction as a defining factor and it offers a neutral definition deflecting attention away from the person and towards the transaction. Neither characteristic is currently used to define commercial or non-commercial contracts according to the prevailing method under European Union (EU) law nor indeed national law based thereon as of course traditional merchant law as practised in other national jurisdictions. Both aspects would, however, offer different, more modern and more promising solutions to the underlying tasks at hand. More modern, because modern societies follow the republican model and a citizen state rather than the monarchic one on which the old continental European laws are based. More promising, because the person centered, identity based approach yields odd and unconvincing results at times.[16] The resulting law has consequently become the target of widespread and undermining criticism in popular opinion which erodes not only the enacted law but also the legal principles it was meant to protect such as consumer protection, health and safety laws and a generally high standard in commercial and non-commercial contractual relations.[17] A re-evaluation of the underlying factors which merit a special law governing commercial or non-commercial (consumer) transactions is therefore needed and can be based on the above described method. The law enacted to govern such transactions will be a *lex specialis* deriving its justification only from the necessities identified as typical to commercial or non-commercial transactions. Otherwise contract law is universal and applies equally to all citizens who are no longer divided by separate classes and entitlements or restrictions in a modern state design. The person centered or identity based approach does not observe this principle when it designates 'consumers' as a group of contractual partners who require privileges or protections just because they are assigned this 'label' which is based on the general assumption that they are the 'weaker party'.[18] Small and micro businesses can be powerless and victimised in the face of large business organisations as the current investigation into the Royal Bank of Scotland's restructuring unit illustrates.[19] The same applies to the description of contractual parties as 'traders' or merchants. The characteristics assigned to these 'identities' are not static or permanent in a contractual context, nor are they meant to be on the

[15] See Articles L110-1(1) and (2) of the French *Code de Commerce,* CdC.

[16] See in detail Heidemann (2016), e.g. pp. 698–699 and similar Austen-Baker (2008).

[17] See Dalhuisen in this volume who suggests the recognition and promotion of 'minimum standards' in commercial contracts.

[18] See the critique of this assumption by Austen-Baker (2008).

[19] See the Guardian newspaper of 20 Feb 2018 at https://www.theguardian.com/business/2018/feb/20/mps-publish-full-unredacted-report-into-rbs-small-business-scandal. See also Sara Hourani in this volume.

part of the EU based legislature.[20] This is precisely why continental commercial codes do not contain special rulebooks on commercial contracts but only a few individual rules. The 'German style' codifications instead open with a more or less complex description of the merchant (or 'entrepreneur' in recent terms), which can be both a natural or legal person (corporation). This is the legacy of the class system which was restructured in the French Commercial Code by starting with the definition of the commercial transaction and defining merchants as those who carry out commercial acts and make this their profession or main source of income.[21] The purpose of the transaction is a defining factor in this exercise. The purpose binds the content or object of any contract and the contracting parties together. It forms the defining relationship which is suitable to form a distinction between commercial and non-commercial. Parties can be said to have a particular attitude or relationship to the object of a contract. They may for instance purchase an item for own personal use and wanting to keep it or they may purchase an item in order to resell it. Their expectations towards the item will differ in both cases and they will place value on different aspects of the contract, for instance the quality of the item or the packaging and transportation arrangements. The purpose of the transaction defines this relationship. It is not the status of the contracting party which requires a separate law to govern the transaction but the character of this relationship, in other words the transaction, its purpose and context. In this way, commercial contract law does not seek to govern persons but transactions of a particular nature. Only in this way is it possible to explain and apply transnational uniform contract law. A person centered approach needs to describe the person—a party to an international commercial contract—to be governed by a law reaching across borders. This brings up questions of citizenship and loyalty. These are, however, not the concern of transnational commercial contract law and cannot be resolved by it. Both national and transnational commercial contract law address transactions which set themselves apart from others by aspects of context and risk, not the contracting parties. Dalhuisen calls these commercial contracts professional contracts.[22] Based on the scope provision of CISG, a reformed word pair could then be professional and private contract, rather than commercial and consumer contract or trader and consumer in the identity based system. The merchant never had a formal designated counterpart in traditional legal terminology anyway.

3.2 The Role of Commercial Contract Law in Recent Law Reform Projects

Jurisdictions around the world have indeed undertaken law reforms in recent years which either change their law merchant directly or impacting on it more or less inadvertently.

[20] See on this Heidemann (2016). See also Austen-Baker (2008), pp. 61 and 64.

[21] Art. 121-1 CdC.

[22] Dalhuisen in this volume.

3.2.1 Reform of Civil and Commercial Codes in Germany and EU Consumer Law

In Germany, the latest reform of the Commercial Code (*Handelsgesetzbuch,* HGB) took place a while ago, in 1998, by way of the Trade Law Reform Act (*Handelsrechtsreformgesetz*, HRefG).[23] The aim of the reform was to simplify the existing law in particular the provisions on the definition of the merchant. Article 3 of the 1998 Reform Act removed the previous section 4 of the HGB and simplified section 2 HGB by making the merchant quality of a business the default position. This can now be disproved by a threshold provision which exempts smaller business which 'do not require a mercantile set up'. The reform was, however, by no means intended to fundamentally reform the approach taken by the HGB and shifting the starting point of the definition from the person or business (identity) to the transaction. The dichotomy merchant/non-merchant is integral to German law and affects many areas of civil and tax law. While it is not indispensable by any means, it has become an axiom of legal thinking in practice and in the minds of successive legislatures. Therefore, it must be all the more surprising that the German legislature has willingly accepted an overlapping dichotomy, that of consumer and trader brought about by EU law. This was implemented into the Civil Code[24] by way of the reform brought into effect from 2001. No explanation whatsoever is incorporated into the law as to how the relationship between the new character (identity) of trader relates to that of merchant. Clearly, a larger number of persons are caught by the notion of trader than qualify as merchants but without the safeguards and limitations that the definition of merchant is meant to maintain such as a threshold provision relating to scale and intensity of the trading activity. The qualification of a person or business as merchant entails a array of legal consequences embodied in the HGB such as reporting and accounting duties and standards spanning the life of a business from incorporation and registration to insolvency and the related criminal offences attached to a breach of some of these duties.[25] A trader, on the other hand, is in fact only a fleeting identity to be assumed mainly within one-off contractual relationships.[26] Imported from EU directives and regulations, the trader was originally always defined exclusively with regard to the respective EU legislation.[27] It was

[23] Federal Bulletin, BGBl. 1998 I Nr. 38, 1474–1484 (22 June 1998).

[24] Section 13 of the German Civil Code, *Buergerliches Gesetzbuch,* BGB.

[25] Only a merchant can commit insolvency offences.

[26] See Austen-Baker (2008), p. 61.

[27] Relevant EU Directives and Regulations open with a scope provision which stereotypically include the phrase '[f]or the purposes of this Regulation' or '[f]or the purposes of this Directive', see Heidemann (2016), pp. 679–681. Examples are Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, [1999] OJ L 171/12; Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours, [1990] OJ L 158/59; Recital 7 and Article 3 of the Proposal for a Directive of the European Parliament and of the Council on package travel and assisted travel arrangements, amending Regulation (EC) No. 2006/2004, Directive 2011/83/EU and repealing Council Directive 90/314/EEC, COM(2013) 512 final; Regulation (EC) No.

consequently not strictly required and distinctly unnecessary on the part of the German legislature[28] to create this new word pair of consumer and trader as counterparts as a permanent fixture in German civil law. It confirms, however, the continued allegiance to this identity based concept and a missed chance to move towards a more modern law merchant.[29]

3.2.2 Reform of the Commercial Code in Austria and the Role of EU Terminology

The Austrian equivalent to the German HBG which had been largely identical since the German usurpation of the country in 1938 was reformed in 2007 and renamed *Unternehmensgesetzbuch*, UGB, (Enterprise Code).[30] Just as in Germany, the reform does not do away with the person centered approach to the dichotomy. Instead, it brings the terminology in line with EU legislation which was largely incorporated into Austrian law by way of the 1979 Consumer Protection Act (*Konsumentenschutzgesetz*). It is important to take note of the difficulty of translating the EU terminology into German. The English word pair consumer and trader is not easily implemented in the German speaking jurisdictions precisely because they already use very similar words as technical legal terms. These terms do not have direct counterparts in English because none of the Anglo-American jurisdictions operates a formally separate law merchant or has developed words like businessman, trader or entrepreneur into formal legal language with defined legal consequences attached. The EU lingo, however, clearly avoids the development of a

261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/9, [2004] OJ L 46/1; Directive 94/47/EC of the European Parliament and the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis, [1994] OJ L 280/83; Directive 2008/122/EC of the European Parliament and the Council of 14 January 2009, [2009] OJ L 33/10; Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), [2008] OJ L 177/12; Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, [2001] OJ L 12/1; Regulation (EU) No. 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ('Brussels I Recast'), [2012] OJ L 351/1.

[28] And indeed the British in respect of the Consumer Rights Act 2015, see Sect. 3.2.3 below.

[29] Reforms of the HGB have been proposed as early as 1965 by Raiser and in 1975 by Raisch. Criticism of the existing structure is regularly voiced by scholars, to no avail, see Raisch (1965, 1975), Raiser (1969), and Schmidt (2005).

[30] The reform was effected by way of the *Bundesgesetz über besondere zivilrechtliche Vorschriften für Unternehmen (Unternehmensgesetzbuch – UGB)* as of 1 January 2007, available at www.ris.bka.gv.at/Dokument.wxe?Abfrage=BundesnormenDokumentnummer=NOR30004735; and enacted by the *Handelsrechts-Änderungsgesetz* (HaRÄG), Federal Bulletin (BGBl.) I Nr. 120/2005, available at www.ris.bka.gv.at/Dokument.wxe?Abfrage=BgblAuthDokumentnummer=BGBLA_2005_I_120.

formal and general definition of the word trader. The term is used interchangeably with the respective contractual party (seller, travel agent, airline, tour operator) in each of the directives (more rarely regulations) governing particular transactions such as time share contracts, travel or package holiday contracts or general consumer sales.[31] The legal instruments repeat the phrase 'for the purposes of this directive/regulation…' for each of their definitions thereby clearly avoiding the formation of a general meaning of the expressions used therein. The word pair consumer/trader can only be considered to have attained a customary meaning by usage but not by design.

Definitions of trader or consumer regularly incorporate an element of purpose, however, and thereby contain the promise of a new approach. EU law has the potential to serve as a pioneer for a transaction based method with the purpose of the transaction at the heart of a new definition. The insistence on fragmented and partly contradictory or at least inconsistent legislation in this area rather than proactively shaping a consistent methodology and reform is a disappointment. The recent consumer rights directive[32] could have provided an opportunity to make a fresh start in this area of law and even the Common European Sales Law (CESL) project could have been used to work on terminology and help nation states to adopt an updated version of the merchant/non-merchant dichotomy.[33] It has to be acknowledged, though, that the law as it has evolved is the result of a political process which had its origin in the early 1970s when the debate had been tinted by competing political tendencies.[34] This is regrettable and obviously means that entrenched and possibly obsolete viewpoints of a bygone era may get dragged along unchecked and unreviewed where they might not fit well any longer and not achieve the desired aims. These aims are of course to provide a legal framework for commercial dealings where needed which includes business to consumer (B2C) relations.

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[31] See note 26 above.

[32] Directive 2011/83/EU.

[33] See Anagnostopoulou in this volume.

[34] The 'consumerism' debate started in the early 1970s in the US and in Europe and linked the subject to general political debate which still hinders a meaningful political and academic review of underlying concepts. See for an early contribution to the concerns raised against 'consumerism' Powers (1971). A transaction based view would arrive at different results than the identity based approach in consumer law. 'Consumer' law would cover a wider spectrum of contracting parties including professionals acting 'in the course of their business' in some cases. This contradicts a person centered view that seeks to perpetuate the character of consumer as weak and in need of privileges and protection which is often seen as a political statement defending consumers against abusive and greedy business practices (and business people), a scenario of perpetrator and victim in short. While this aim is doubtlessly justified in a modern world of mass production on a global scale the attitude reveals a possibly inadvertent adherence to the old class system with static roles for model identities which is most definitely obsolete. Consumer law must not be a vehicle to introduce new class-like divisions and classifications of equal citizens. New law can be devised in new forms. The transaction based method is clearly a more modern version of the creation of the law merchant and can be used to devise complementary law for consumers. Similar considerations have been made in the law of (international) taxation but not followed through. See Heidemann (2016) and Heidemann in this volume.

3.2.3 Reform in the United Kingdom: The Consumer Rights Act 2015

It might appear strange to head a paragraph about commercial contract law with a consumer rights legislation. However, this rather new codification in a common law jurisdiction results in a novel situation which is most likely unintended and possibly largely unnoticed. The scope of the 2015 Consumer Rights Act covers only business to consumer (B2C) contractual relationships and thereby exempts them from the general or otherwise codified law and leaves for the first time in legal history, presumably, an explicit designation of the Sale of Goods Act 1979 (SGA) as well as the Unfair Contract Terms Act 1977 (UCTA) for business to business (B2B) and consumer to consumer (C2C) dealings only,[35] a type of law merchant for the sale of goods, without an express provision to this end in the SGA. The United Kingdom (UK) does not share the conundrum of civil law jurisdictions with a separate law merchant where the arrival of the trader/consumer dichotomy competes with a pre-existing merchant/non-merchant dichotomy. Not only is there no such system in the UK[36] but the largely uncodified case law based contract law allows an easy integration of the new codification in that it does not textually collide with pre-existing provisions.

3.2.4 Reform of the French and Japanese Civil Code: Standard Contract Terms

More recent reforms of the civil and contract law have been carried out in France (2016)[37] and in Japan (2017).[38] As with the above described jurisdictions, overlap is an issue which causes contradictions and discrepancies which the legislator has not resolved. While the reform of the *Code Civil* in France was among other things prompted by the need to implement EU provisions mainly concerning consumer protection law, it is interesting to see that the Japanese legislature felt motivated in a similar way to update and reform provisions on unfair terms, standard contract forms and contracting by adhesion. As Catherine Pédamon points out in her contribution to this volume, the general contract law as codified in the French Civil Code (*Code Civil*, CC) applies to commercial contracts, too, unless there are special provisions in the law merchant, mainly found in the *Code de Commerce,* CdC. This applies to all jurisdictions which maintain a formally separate commercial law. Commercial codes typically contain only a small number of contract law provisions that differ from general contract law such as rules about silent acceptance and the role of trade usages. The purpose of the commercial codes is to establish general

[35] See Explanatory Note No. 24 to the Consumer Rights Act 2015.

[36] The law merchant is used as reference to trade usages and customs in the Sale of Goods Act (SGA) 1979 section 62(2): 'the rules of the common law, including the law merchant, except in so far as they are inconsistent with the provisions of [the SGA] … apply to contracts for the sale of goods.'

[37] See Pédamon in this volume.

[38] See Karaiskos in this volume.

rules for the incorporation of businesses, the relationship between shareholders and directors, the proper running of the business including accounting and reporting duties, commercial registers and insolvency rules. The commercial contract is not usually seen as a separate contract type. Therefore the legal consequences attached to the 'status' of merchant are not predominantly contractual[39] but largely non-contractual obligations and duties. Nevertheless, modern consumer laws distinguish between B2B and B2C contracts based on the above mentioned identity based system. In Japan, it was felt that standard contract terms needed codification outside the already existing Consumer Contract Act[40] because there was no possibility for a judicial review of such terms other than on the basis of two general provisions of the Japanese Civil Code, the good faith provision and the provision on the validity and (un)enforceability of unlawful terms. As Karaiskos describes in his contribution to this volume, an imbalance as to information and negotiating power is not exclusive to B2C situations. These can occur in B2B contracts between large business partners and their smaller and dependent counterparts, often so called small and medium sized enterprises, SMEs.[41] Particular attention was given among other points to the validity of undisclosed standard terms[42] and surprising clauses. Both reforms in Japan and in France have in common that the impact of the new rules on pre-existing systems of consumer or merchant law was not preconceived or anticipated. There is no express rule explaining the intended relationship between new and existing rules even though clashes are obvious. Interestingly, in modern reform projects, certain concepts and individual rules which used to be typical for commercial contracts have been introduced on a general basis and therefore with effect for consumer contracts, too. This is true for rules providing for contract adaptation and renegotiation as in the French reform as well as in the area of standard terms for rules allowing undisclosed terms to be validly incorporated into general contracts as in the Japanese reform.[43] These rules may be derived from business practice, custom and usage (such as the acceptance of undisclosed terms) and found to be suitable for consumer contracts, too, or they were developed in the course of projects for international commercial contracts[44] and then transferred into domestic law reform of general contract law. While it may be concluded from this that commercial law assumes a pioneering or role model function, that might be a misconception. It is more likely that the effect remained unnoticed by law makers and that the failure to distinguish commercial and non-commercial transactions is at the heart of this development.

[39] Discounting incorporation agreements which are regarded as (multilateral) contracts in civil law jurisdictions.

[40] See further Karaiskos in this volume.

[41] See further on this imbalance Hourani in this volume.

[42] See also Dalhuisen in this volume.

[43] See Karaiskos in this volume at Sect. 6.

[44] Such as hardship rules in the UNIDROIT Principles for International Commercial Contracts, UPICC.

4 Scholarship on Selected Aspects of Commercial Contracts (Part II)

The contributions in Part II of this volume can serve to test some of the propositions revealed in Part I as analysed above. A closer look is taken at certain contractual remedies which were thought to be suited to commercial, perhaps especially international commercial contracts but now also appear in general contract law. Rules on hardship, for instance, are not only contained in the UNIDROIT Principles for International Commercial Contracts, UPICC, but also typically included in standard contract forms issued by international trade associations in order to meet risks which are frequently incurred in international transport and shipping but less frequently in a domestic non-commercial setting. Rules on hardship and supervening events had also developed in case law on general contract law in European jurisdictions as rules of last resort in order to respond to events of an extraordinary nature affecting the public at large such as the currency devaluations following the Great Depression in the late 1920s and early 1930s or housing shortages after World War I or the like. Both the latest German as well as the French reform of the Civil Code introduced a hardship rule into the Civil Codes whereby it was intended to restate case law in this area. In the German provision[45] this aim has been exceeded and it appears to roll three remedies into one thus overlapping with rules on error and mistake as well as elevating what was a rule of last resort to a standard remedy.[46] To what extent is it common and useful to resort to contract adaptation and extensive co-operation during contractual performance of commercial contracts? Therefore, to what extent is it useful to extend express hardship rules to general contract law thereby reinforcing a previously optional instrument for hedging against certain typical commercial risks?

4.1 Cooperation, Renegotiation and Contract Adaptation

As mentioned above, this will depend on the contract type. Long term contracts in the construction industry for instance require different parameters than contracts for the sale of goods or shipping contracts. While the latter often involve a fast moving pace and a multitude of parties affected by changes and adaptations who might not be parties to the contracts to be re-negotiated[47] the former are more commonly performed in a collaborative manner which is provided for in the contract terms. This type of contract drafting and performance is discussed by David Christie in this volume who is looking at the latest version of one of the standard forms of the UK Institution of Civil Engineers' New Engineering Contract (NEC). This industry

[45] Section 313 *Buergerliches Gesetzbuch,* BGB.

[46] See Pédamon in this volume.

[47] Examples are insurers, creditors and lenders.

standard form professes to use a 'plain English' approach seeking to meet the parties' requirements. Christie sees a downside in the lack of legal clarity in this approach and analyses the legal pitfalls of re-negotiation clauses, their relationship with contractual conditions and the role of relational contract theory. His analysis highlights the interface between contractual relationships and more sophisticated arrangements that might be regarded as partnerships, joint ventures or the like. In civil law jurisdictions, the aspiration to collaborate and co-operate fulfills the criterion of pursuing a common purpose which in turn is the very definition of a partnership (*Gesellschaft*, society, *société*). The German general rule reads as follows:

> Bürgerliches Gesetzbuch (BGB)
>
> § 705 Inhalt des Gesellschaftsvertrags
>
> Durch den Gesellschaftsvertrag verpflichten sich die Gesellschafter gegenseitig, die Erreichung eines gemeinsamen Zweckes in der durch den Vertrag bestimmten Weise zu fördern, insbesondere die vereinbarten Beiträge zu leisten.

The official English translation reads:

> By a partnership agreement, the partners mutually put themselves under a duty to promote the achievement of a common purpose in the manner stipulated by the contract, in particular, without limitation, to make the agreed contributions.[48]

A duty to co-operate is at the same time a rule that has been promoted and pursued in the context of the recent CESL proposal. Art. 3 of the Annexe I of CESL (the actual Sales Law) reads:

> Co-operation
>
> The parties are obliged to co-operate with each other to the extent that this can be expected for the performance of their contractual obligations.

Likewise, Art.1:202 of the Principles of European Contract Law, PECL, reads:

> [Duty to Co-operate]. Each party owes to the other a duty to co-operate in order to give full effect to the contract.

As much as it seems to be accepted that this rule is based on the general principle of good faith in contract it has been rightly criticized as too wide and allowing undue discretion for courts to determine contractual content that they consider just in any given situation.[49] This compromises foreseeability and legal certainty for contractual parties,[50] especially in view of the unclear boundary of the codified

[48] English translation officially endorsed by the Federal Ministry of Justice and available at https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p3170.

[49] See for instance Neumann (2012), p. 517. See also Association Henri Capitant (2008), p. 77; Weller (2009), p. 517; Eidenmueller (2008), p. 539; Eidenmueller et al. (2008).

[50] As well as potentially party autonomy.

cooperation duty with the traditional civil law definition of association or partnership.

At the same time, this example illustrates that these boundaries are by no means clear cut and require reflection by the parties and the judiciary in many more contexts. Joseph Lee and Chien-Chung Lin look at two further contractual contexts in this volume which are highly relevant in commercial practice. Prof. Lin analyses the specific arrangements made in industry operating world wide, so called original equipment manufacturing (OEM) in the context of information technology. The theory of the boundary of the firm is at the heart of this conceptual discussion.[51] How can arrangements be defined as one-off contractual relationships for the purpose of the made-to-order production and supply of digital content rather than as joint ventures or part of one and the same corporate entity and therefore corporate activity? Dr Lee's analysis picks up on the nature of the firm as a contractual versus an organisational (corporate) relationship *sui generis* as is preferred in common law jurisdictions. He uses the example of intra corporate arbitrations.[52] In both analyses, the contract plays a role as one out of several options to organise commercial activity. Ronald Coase was of course an economist[53] and not as such interested in the legal nature of the firm[54] or the contract. For lawyers his theories nevertheless provide important food for thought in respect of the distinction between contract and corporation. This distinction as analysed by Lin in this volume poses questions not only of managerial diligence but also of justice and the importance of awareness of theoretical underpinning.

4.2 Regulation and Self-Governance

The above mentioned questions of justice in a contractual context are normally left to traditional principles of contract law and market forces. Where imbalances among contracting parties are observed on a regular basis these internalised factors may not work as desired so that intervention on the part of the legislator (regulation) may be necessary. Sara Hourani is looking at contracts between supermarkets and their suppliers. These had come under scrutiny following protracted problems with supermarkets not paying on time and effectively imposing unfavourable terms on their suppliers due to their prevailing market power. The approach taken is a gradual one with some non-binding 'soft law' guidelines being adopted by the UK Competition Commission in the form of the 'Groceries Supply Code of Practice' which is accompanied by an enforcement body hosted by the Competition Commission. This approach is reinforced by existing legislation enacted upon implementation of the

[51] This discussion was started by Ronald Coase in the early twentieth century with his publication 'The Nature of the Firm', Coase (1937).

[52] See on this for instance Solinas (2014).

[53] And a winner of the Nobel Prize for Economics in 1991.

[54] Which is shown by the use of the term firm in the legally informal but economically relevant sense.

EU 'Late Payment' Directive 2011/7/EU, the Small Business, Enterprise and Employment Act 2015. Hourani carries out a comparative exercise among common law jurisdictions in order to find out what the trajectory of this legal protection might be after the UK has left the EU prospectively in 2019 and where such protection might lie in the traditional contract laws of those countries absent EU legislation. Alexandra Horváthová examines the potential of the contract and its theory and governing law itself for the achievement of a yet wider aspect of justice in the context of free trade, corporate social responsibility, CSR. Contractual imbalances which are recognised as causing effects materialising outside the contractual relationship, perhaps even far outside the home jurisdiction, might have to be counteracted by measures based on public policy. Both authors examine to what extent this external intervention might be pre-empted or complemented by arguing on a contractual basis and exploring the contract's full potential in order to achieve certain public policy goals. Andhov looks at the contractual relations of corporations and asks what values are present in contract law which might be invoked to counteract harmful practice in international commerce. This is an important complementary analysis to the existing efforts in many jurisdictions to install legislative safeguards responding to harmful practice and 'collateral' effects in international trade such as exploitative labour provision in production countries, unsafe production facilities, corruption and many more. Most countries have provided for 'soft law' codes of practice applied by a so called 'comply or explain' method in the absence of a convincing legal basis for mandatory rules. Due to obvious problems of attribution in the causation chain of events[55] a change in business culture is intended and a reliance of respected principles of ethics and morals in commerce and general contract law. These do of course exist. Scholars in many countries are working on legal analyses that might yield a convincing answer to the problem. In the meantime, a multitude of initiatives have led to the introduction of national and international reporting standards, prizes and awards in order to raise the level of protection and prevention of harmful effects of trade in the areas of human rights, environment and markets by way of voluntary compliance and economic incentive.[56] Commercial contract law offers certain inherent answers.[57]

[55] One tragic example is the collapse of the 'Rana Plaza' textile factory building in Dakha, Bangla-Desh in 2013 causing over 3500 people, mostly textile workers, to be killed or injured. The flagrant breach of building regulations that led to this disaster was of course not directly attributable to the Western retailers whose suppliers were based in the building. The moral and ethical involvement is compelling though and called once again for a response on the part of retailers, by politicians, consumers and campaigners.

[56] Examples are the United Nations Global Compact, the OECD Guidelines and the standards issued by the International Labour Organisation to name a few. In the UK, stock market listed companies are required to comply with the UK Corporate Governance Code as part of listing requirements or explain why they do not comply, see Listing Rules 9.8.6. (5) and (6) of the Financial Conduct Authority (FCA), the UK supervisory body for the stock market, available at https://www.handbook.fca.org.uk/handbook/LR/9/8.html. The UK has also adapted the Proceeds of Crime Act 2002 (sections 241 and 241A) by way of the section 13 of the Criminal Finances Act 2017 expanding forfeiture rules to assets obtained in connection with human rights violations. This may not have helped the Rana Plaza building collapse case, though. See for more detail on the subject of 'transnational governance' Gless (2015), pp. 45 et seq.; Calliess and Zumbansen (2012), pp. 181–247.

[57] See Andhov in this volume. See also Austen-Baker (2008) who describes these regulatory mechanisms of contract on page 73: "In short, the contractual norm of propriety of means, coupled with

4.3 Uniform Law and Cross Border Enforcement

Commercial contracts are more often exposed to cross border situations than private or consumer contracts. A functioning international system of contractual performance and dispute settlement is therefore essential for the functioning of international trade. To what extent is classic contractual performance and related enforcement possible and desirable in this context? To what extent is it in fact practiced? Dania Thomas looks into this important aspect of classical contract theory in the context of sovereign debt recovery. Contract law itself becomes an integral part of the financial product as well as of the commercial calculus as perhaps in no other context.[58] The history and current evolvement of sovereign debt recovery also allows strong insights into the public/private relationship between private law instruments such as securities and public policy suggesting a need for continued scrutiny of commercial acting of public bodies. International disparity of laws plays a significant role in these contractual relations[59] as they traditionally do in the area of purely private cross border secured credit transactions where enforcement depends on property law. Uniform law and harmonisation have not achieved very much here at this point in time. Classic conflict of laws is used in order to stipulate the applicable national law and to try to achieve smooth and economically beneficial outcomes. Muriel Renaudin sets out past and current efforts in the area of secured credit law and the pro's and con's of each possible form of legislation and regulation at transnational level and the prospects of each of the proposals to be formally adopted and to succeed. Uniform law, especially commercial contract law which has been so successful for the past five decades, is not taking hold in the area of property, insolvency and procedural law and can therefore not deliver tailor made rules for the creation and trade of financial products, collateral and securities at transnational level.[60]

5 Commercial Contract Law and Public International Law: The Cart Before the Horse? (Part III)

The third part of this volume sheds light on a number of aspects at the interface between private and public law in the context of commercial contracts.

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those of reciprocity and contractual solidarity, will tend to perform the role some seek to fill through regulation." Commentators generally do not consider the commercial or non-commercial nature of transactions, though. It is submitted here that the tension in consumer contracts or the failures of commercial dealings in a social context cannot be captured without making this distinction and analysing the characteristics of both commercial and private scenarios.

[58] See Thomas in this volume who throws a spotlight on recent activities of so called vulture funds and the wider practice in sovereign debt management.

[59] Practices like 'netting' do not rely on classic enforcement or performance or even offset, they are economically driven. See on this Lehmann (2017). Even within the EU classic contractual performance and traditional insolvency law seems to have been officially abandoned in the area of debt enforcement in banking relationships with the advent of the Bank Resolution Directive 2014/59/EU.

[60] See in depth Dalhuisen (2016) and Juutilainen (2018).