



The nature, history, and sources of commercial law

13/02/2024

The Nature of Commercial Law

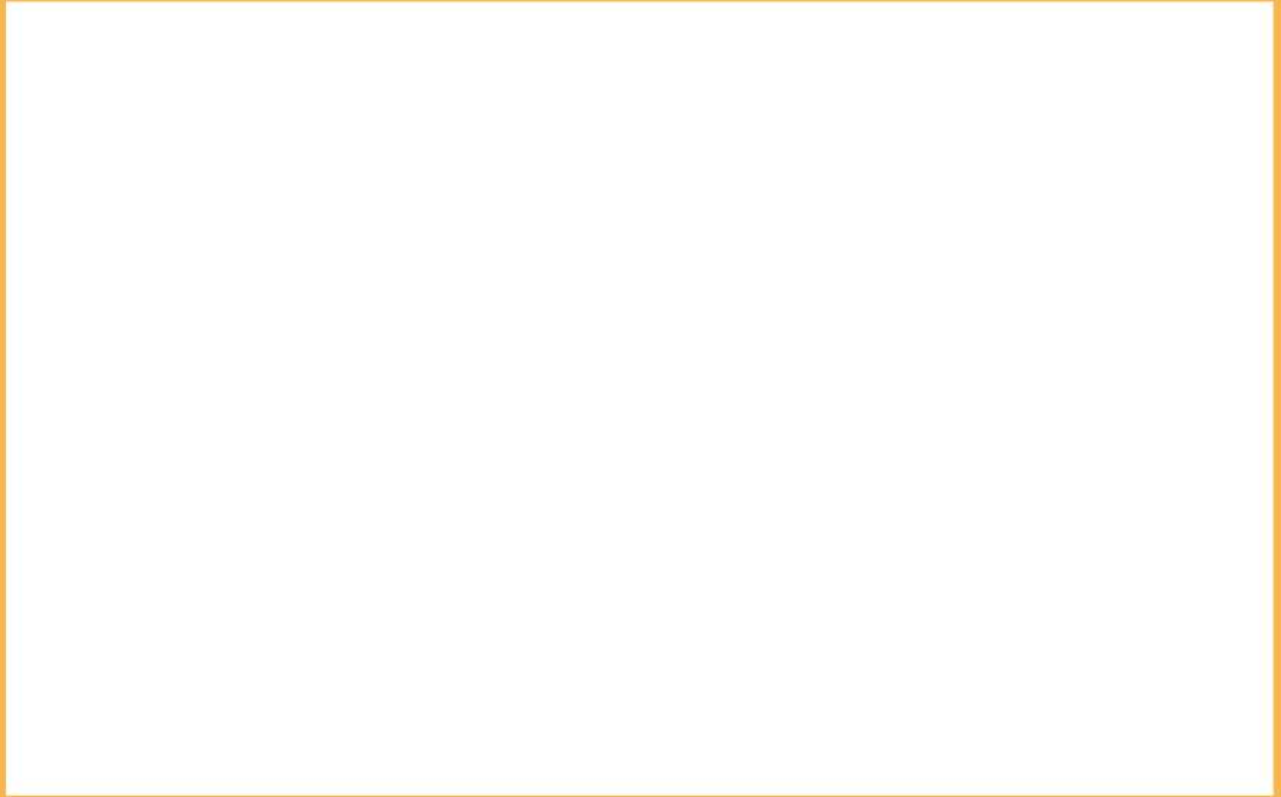
- Three definitions
- What drives commercial law
- Commercial law and civil law
- The transition from planned economies to market economies

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What drives commercial law?

A medieval example: Bill of exchange

A later example: Bill of lading

A modern example: Securitization

Commercial Law and Civil Law

As a generalization commercial contracts are governed by the general law except so far as this is qualified by rules particular to commercial transactions.

The transition from planned economies to market economies

Within the constraints prescribed by law, parties are free to conclude bargains, to acquire property, to accumulate wealth, and to pursue the goals of a capitalist society.



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The History of Commercial Law

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The early and medieval codes

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Sumerian Law

The Code of Hammurabi

Bill of Exchange

Silk Road

Maritime Law (The Rhodian Maritime Code)

Crusades

Characteristics of the medieval law merchant

Characteristics of the medieval law merchant

- (1) Objectivity:** '... a movement away from mere custom in the sense of usage (patterns of behaviour) to a more carefully defined customary law (norms of behaviour).'
- (2) Universality:** that is, the law merchant was cosmopolitan and transnational in character.
- (3) Reciprocity of rights:** procedural and substantive fairness in entry into an exchange.
- (4) Participatory adjudication:** the judges were elected from among the merchants themselves.
- (5) Integration:** a coherent and integrated body of rules governing the rights of parties to transactions, particularly after reduction to writing.
- (6) Growth:** the organic growth of commercial instruments and institutions.¹

The nationalization of commercial law

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The consequences were fourfold: the narrowing of university legal education; the development of separate national laws for international trade; the decline of the law merchant; and the growth of private international law as a branch of national law to determine, in cases involving a foreign element, questions of jurisdiction, the applicable law and the recognition and enforcement of foreign judgments.

So by the end of the eighteenth century, commercial law had lost much of its international character and coherence

The return to internationalism and the growth of transnational commercial law

There came a growing recognition that an international commercial transaction cannot be treated in the same way as a domestic one. Typically, the parties come from different jurisdictions with different laws and commercial practices, and they may have different expectations.

Laws fashioned for a purely domestic transaction are not necessarily well adapted to a cross-border transaction.

The perceived benefits of harmonization

- it facilitates commerce with the lifting of barriers resulting from the complexities of different legal regimes.
- harmonisation of international commercial law creates a legal framework tailor-made for international transactions, disregarding differences in the regulation of domestic transactions.
- harmonisation normally produces neutral law, e.g. the CISG is a system of international sales law which is compatible with both civil and common law.
- harmonisation often fills a legal vacuum by providing rules in a field where national law was previously non-existent, e.g. UNCITRAL Model Law on Electronic Commerce,
- effective harmonisation substitutes a single law for a proliferation of national laws and thus within the given field dispenses with the need to resort to conflict of laws rules and the opportunity these give for forum shopping.
- harmonisation of law with the collateral reduced conflict of laws results in significant reduction of transactional costs.
- in a field of law where conflict of laws has little or no role to play, there is increased predictability and legal certainty and consequent reduction of legal risk.
- for a number of legal systems harmonisation of law bears fruits of law reform.

The growth of regionalism

European Union, a group of 28 states which conducts much of its business in 24 official and working languages. But there has been a considerable volume of regional harmonization outside the EU, occasioning much debate as to whether this is beneficial as bringing together laws of countries linked by geography for the mutual advantage of all members of the region or whether its effect is to weaken the process of harmonization at international level.



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Sources of National Commercial Law

Contract

Usage

Suppletive rules of common law

Domestic legislation



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The Nature and Sources of Transnational Commercial Law

- Is there an autonomous transnational commercial law?
- The lex mercatoria and the conflict of laws
- The sources of transnational commercial law

Title

**Is there an autonomous transnational
commercial law?**



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The World is Watching



Where are You?



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Question time



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