Editorial Article: The Future of the Commercial Contract in Scholarship and Law Reform – A Work in Progress

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This special issue showcases a selection of the contributions presented at the second annual conference on 'the future of the commercial contract in scholarship and law reform' which is an ongoing research project and platform for the discussion and advancement of commercial contract law at the Institute of Advanced Legal Studies in London. The issues discussed include general aspects of commercial contracts as a separate contract type, aspects of business ethics and collaboration, the evolution of international commercial contract law to date and the Europeanisation of contractual dealings with traders and dispute settlement. Furthermore, as the author reports, special observations were extended at the conference to commercial law remedies as a role model for consumer and general contract law, the problem of overlap created by a proliferation of uniform law conventions, historical and cultural 'baggage' in the treatment of international and uniform law and the role of states as contractual partners in investment disputes.

I. Introduction

This special issue presents work undertaken by scholars who have taken part in an ongoing academic project entitled "The Future of the Commercial Contract in Scholarship and Law Reform" hosted by the Centre for Corporate and Financial Law (CCFL) at the Institute of Advanced Legal Studies (IALS), School of Advanced Studies, University of London. The project started in August 2016. Papers contained in this issue were presented at the second annual conference held at IALS on 20th October 2017 which was attended by participants in the project as well as further leading academics working in this field of law. Keynote speakers included Professor Jan Dalhuisen (King's College London and University of Lisbon), Professor Juergen Basedow (Director em., Max-Planck-Institute for Comparative and International Private Law, Hamburg, Germany) and Professor Ewan McKendrick (University of Oxford). The aim of the research project is to raise awareness of the subject of the commercial contract as a type of contract requiring certain treatment, legal rules or adjudication that may differ from non-commercial contractual relations and to provide a platform for academic discourse. This is in the light of very active and fruitful

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research and legislation in the complementary field of consumer law in the past decades which has led to a wealth of legislation both at European Union (EU) and national law levels. The latest example is the UK Consumer Rights Act 2015 which is a comprehensive legislation replacing many traditional legal rules including in parts the Sale of Goods Act 1979 (SGA) and perpetuating the newly established dichotomy of trader and consumer.[1] Other than most continental European jurisdictions the UK does not maintain a separate law merchant or commercial courts. This tradition is very much alive, though, in Germany, France and further afield in Japan where reforms of the civil code which were largely prompted by considerations of consumer protection or – in Europe – the implementation of respective EU Directives have exacerbated potential clashes with pre-existing commercial law which remains unchanged. This problem was highlighted by work submitted by Catherine Pédamon and Antonios Karaiskos in the course of the project.[2] The law merchant is regarded and practiced as a *lex specialis* in these jurisdictions so that special rules of merchant law prevail over more general rules of civil and contract law. Based on this hierarchy the question arises whether international commercial contract law can take precedence over national commercial contract law according to the *lex specialis* doctrine. The research project therefore encourages enquiries into the role and nature of international, transnational and uniform commercial law. At transnational level, commercial contract law has performed a pioneering role in the shape of formal and informal rules of substantive contract law. Conventions on the international sale of goods, on the formation of contracts and on aspects of international transportation by air, sea and road have been around for the longest period of time[3] compared to similar codifications in consumer or general contract law.[4] The research project therefore initially invited research on the definition of contracts as commercial or non-commercial, on the question of whether commercial contract law ought to merit a separate discipline or contract type at all and whether this should be sector specific as is the practice in EU legislation or universal. In a second step, the focus was directed at the nature of substantive contract law in the form of public international law, uniform law conventions, and generally the interface of public, particularly treaty law, and private law in the context of commercial contracts. This second focus is a particularly complex field

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[1] I have commented on this in detail in Maren Heidemann, *Identities in Contract: Merchant Law in Europe and the Future of European Contract Law* 23 Maastricht Journal of European and Comparative Law 667 (2016).

[2] An edited volume has emerged from the project at IALS, Maren Heidemann and Joseph Lee eds., *The Future of the Commercial Contract in Scholarship and Law Reform: European and Comparative Perspectives* (Springer, 2018), forthcoming, containing the respective contributions.

[3] See for the historic development and context of uniform law Juergen Basedow, *Uniform Private Law Conventions and the Law of Treaties* 11 Uniform Law Review 731 (2006); Juergen Basedow, *Stand Und Perspektiven Des Einheitsrechts* 81 Rabels Zeitschrift 1 (2017).

[4] That is if European Union legislation on consumer contract law can be classed as international or transnational law for that matter. Projects like the Principles of European Contract Law (PECL) and the Draft Common Frame of Reference (DCFR) and most recently the (now withdrawn) Common European Sales Law proposal (CESL) concentrate on contract law in a general sense without distinction as to consumer or business contracts, save CESL which introduced distinct rules.

of enquiry. Neither section of the research project was therefore expected to yield definitive or exhaustive responses to the research questions within the first year. It is intended, instead, that the project can be continued in order to provide an ongoing platform for debate and development of academic insight and guidance for future legislation and reform in this area of law. The present 'Brexit' activities of the British government and UK Parliament provide an obvious field of application of such enquiry as international law will have to extend beyond established forms of EU law in the future and engage more actively with other transnational forums such as the Hague Conference on Private International Law (the Hague Conference), the Institute for the Unification of Private Law (UNIDROIT) or the United Nations (UN).

II. The Research Questions and Answers

1. Commercial Contract as a Separate Contract Type

As to the first question whether the commercial contract is a separate contract type and should be governed by a special set of rules, the answer can be gathered from the fact that it is being governed by a separate body of law and adjudication in many countries. In a way it could be said that even the UK has now owned up to a special regime of commercial contract law by excluding so called business to consumer (B2C) contracts from the general law, leaving the former to govern business to business (B2B) and, interestingly, consumer to consumer (C2C) transactions.[5] This method of defining commercial contract law by inverse conclusion rather than by explicit definition is prevalent in current national law making as opposed to historic approaches in the German and French legal traditions.[6] The reluctance to provide a formal qualification leads to the question of whether there is anything substantially distinctive in commercial contracts that merits a specialised law. The most obvious example for such a material difference has to be the level of risk taken in commercial, and particularly international commercial contracts where performance is exposed to typical perils that will not occur to the same extent in domestic settings. The aspect of risk is one of the most distinctive features of the commercial, or the professional contract for Professor Dalhuisen who has commented on this extensively in the literature including in his contribution to our research project.[7] The reasons are to be found in the sheer scale of the transaction or its complexity in regard of the involvement of third parties which can be seen most clearly in shipping cases involving string sales for instance or insurers in salvage cases. Other examples will include instances

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[5] See section 24 of the Explanatory Notes to the UK Consumer Rights Act 2015 "Impact on existing legislation".

[6] See Heidemann (2016), n 1 above.

[7] Jan H Dalhuisen, *What Does the Transnationalisation of the Commercial Contract Mean? Is There a New Model and Are There Minimum Standards? Is There a Law and Economics Perspective?*, in Heidemann and Lee, n 2 above.

of civil unrest, currency fluctuations or piracy to name but a few. Counterbalancing these perils and associated risks, commercial contracts benefit from possibilities of mitigation or a time scale that consumer transactions will typically not afford, such as cover transactions, reputational issues of prioritising and salvaging ongoing business relationships and the general 'win some lose some' philosophy of trade. These interests are often reflected in standard contracts by way of hardship and force majeure clauses providing for supervening events. These clauses provide an example for the impact of international commercial law making an inroad into modern general contract law and serving as a blueprint for contemporary legislation in an unanticipated way. Conference participants were introduced to the general law of hardship in UK commercial shipping law by Professor Jason Chuah and in particular to the role of the duty to mitigate loss serving as a basis for those hardship rules which are often found in standard contracts issued by British trade associations. Uniform laws subsequently picked up on hardship as a typical risk in international commercial contracts and provided rules to settle the conflicting interests in such cases. Rather unexplained is the then following transposition of those rules into general national contract law in the course of law reform of civil codes across the European continent. Catherine Pédamon gave a comprehensive account of the use and wording of the respective rules in the new French civil code, and in fact, her co-authored monograph on the subject[8] provides an important basis for further discussion of this complex remedy available to modern shoppers in many European countries. The German rule on hardship is to be found in section 313 of the Civil Code (*Buergerliches Gesetzbuch,* BGB) which was reformed with effect from 2000. It seems to emulgate three different doctrines in its three paragraphs; the change of the basis of a transaction, supervening events as well as certain aspects of error. Remedies arising from hardship rules include a duty to renegotiate as well as the option of judicial intervention and contract adaptation upon the parties' application. A pre-condition is the prior exclusion or non-acceptance of the risk that materialises into the hardship on the part of the aggravated party. This sets the rules apart from *force majeure* clauses. Interestingly, the practical application of this rule which appears at first sight to be a typical rule in international commerce is more onerous in the context of complex transactions with many affected parties such as shipping cases involving owners, charterers, insurers and freight consignees, as Jason Chuah explained. The hardship rule, originally designed for international commercial contracts, has therefore morphed into a more attractive consumer contract rule in general contract law where it is expected to provide flexibility where the rigid rules of the common law with their traditional rules on termination and damages seem overly harsh. This may not apply across the board in commercial contracts, though, bearing in mind that long term contracts, such as construction contracts require more flexibility than one-off transactions in the sale of goods. Construction contracts typically contain renegotiation and adaptation clauses in order to provide

[8] Catherine Pédamon and Jason Chuah, *Hardship in Transnational Commercial Contract: A Critique of Legal, Judicial and Contractual Remedies* (Uitgeverij Paris BV, 2013).

for changed circumstances as they may inevitably occur in the course of a project.[9] David Christie had commented on the practice of co-operation and flexibility under selected industry standard form contracts at the initial project conference in September 2016.[10] He set out the aspirations and pitfalls arising from a 'plain English approach' in modern standard form contracts which are designed to encourage co-operation and problem solving at planned stages of the long term project. The absence of legal clarity and accuracy can thereby often exacerbate arising conflicts rather than prevent them. Again, this contract practice has found interest in general relational contract theory outside the immediate commercial context. A 'duty to co-operate' had expressly been introduced into the now withdrawn CESL proposal.[11] Questions remain in the area of distinction between co-operation duties, joint ventures and other forms of organised collaboration that may be regarded as a form of partnership or other business organisation in some jurisdictions. In sum, this can certainly be identified as a large area of law inviting further enquiry and observation.

2. Commercial Contract at the Interface of Public and Private Law

The main focus of the second part of the research programme and the conference in October 2017 was on the interface between public international and substantive private law. This is a very complex enquiry which will still have to be addressed by public international lawyers, too. Professor Basedow gave an overview over the historic development of treaties in the area of commercial contract law since the late nineteenth century and the role of the 1969 Vienna Convention on the Law of Treaties (VCLT) as well as the role of horizontal interpretation of uniform law conventions. The enquiry has to include the choice of legal instrument for the provision of private commercial law for cross border trade as well as the uniform application and appropriate interpretation of uniform law conventions. Professor McKendrick summarised the evolution of transnational commercial law to date and the remaining challenges. The proliferation of uniform law conventions can lead to unwanted effects in that there are growing areas of overlap (as presented by S Louizou). These can be difficult to resolve given the limited possibilities of gap filling methods in current doctrine. The present author and issue editor introduced her concept of using object and purpose of uniform law conventions to clarify the meaning of individual rules and to improve the effectiveness of uniform law. The position of uniform law conventions at the interface between contract and treaty law invites more pioneering enquiry into their legal nature and interpretation.

Indeed, the topic of autonomous interpretation emerged as an area of special interest with scholars participating in this part of the enquiry. Radosveta Vassileva reflects

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[9] *Channel Tunnel Group Ltd v. Balfour Beatty Construction Ltd and Others*, [1993] 2 WLR 262, [1993] 1 All ER 664, [1993] AC 334) being a good example of such a case.

[10] David S Christie*, Capturing Collaboration in Construction Contracts in Their Commercial Context* in Heidemann and Lee, n 2 above.

[11] COM(2011) 635 final, Art. 3 of Annex I, the actual Sales Law.

on the specific challenges encountered in post-communist states such as Bulgaria and the 'homeward trend' in the application of uniform law. Lorenza Mola and Cristina Poncibo explore Art. 31 VCLT further for it to play a decisive role in order to give effect to the uniform law provisions available to cross border trade within a national jurisdiction. Interpretation in the context of the public/private interface was also at the heart of the discussion around investment contracts and stability clauses. Sara Hourani analysed the difficulties arising from the public law nature of the contractual partner in particular. The obligations of the state partner under national public law can be in conflict with the private law nature of the contract concluded with a private investor and their interest in the integrity of their investment. This may be protected by rules of both private law as well as public international law for instance through bilateral investment treaties. Again, the role of the VCLT can be explored to resolve the tension at this very dynamic and controversial interaction between public and contract law.

Contract law, both national and international, can be influenced by public policies in a number of ways. Corporate Social Responsibility (CSR) receives increasing attention in the face of growing pressure on the work force producing for global production chains as well as environmental and further issues of welfare arising from interlinking and integration of production on a global scale (A. Andhov). Control mechanisms and counterbalancing often remains national where the problem is global. Contract law can play a role by developing liability systems reinforcing informal and voluntary schemes deployed by states in order to raise awareness in consumers and encourage market mechanisms to address issues of public concern and public policy that may not be enforceable relying solely on the established legal systems within nation states. Achieving public policy aims with the means of private law is at the heart of these considerations. Likewise, where the state owns enterprises public policy may require privatisation in the same spirit as can be seen in the wake of the sovereign debt crisis in Greece (Th. Papadopoulos). Public regulation acts as a driving force for initiatives of divestment and internal corporate re-structuring using means of private law. The intricate role of large scale public policy aims such as public welfare, international monetary stability and state budget control to be fostered by private law forms of acting continues to pose a doctrinal challenge. The role of EU law as a hybrid between international and national public (administrative) law is exposed in this particular context more than in any other. Daniele D'Alvia explores this area taking a comprehensive look at the wide range of formal and informal norms created at international and transnational level, especially in financial and security markets. He observes how these rules use private forms of self-organisation and voluntary commitment in pursuit of typical public policy aims on a global scale such as financial stability, crime prevention and the functioning of the markets in terms of competition policy. He submits that the global economic order has a potential to amalgamate public policies and private law acting and provides a legal framework to facilitate global financial services and risk taking. A somewhat complementary project is pursued by the EU in the area of dispute settlement in trader to consumer relationships (D. Anagnostopoulou). Here, the public regulator steps in to provide a

platform and governing body of law for use in non-judicial dispute settlement. The public policies behind this service are cost effectiveness, including through the use of modern technology, the creation of a level playing field and increased access to justice. Again, means of private law such as voluntary commitment and flexible agreement are resorted to in order to take advantage of the potential that party autonomy promises. Similar mechanisms that are observed in commercial contracts are employed in this form of alternative dispute settlement (ADR). Parties are encouraged to move away from the rigid *pacta sunt servanda* principle and find solutions in adaptation to (subsequently) changed circumstances. The process is provided and managed by publicly facilitated forums, the electronic ADR platforms and service providers.

III. Outlook

There are some fundamental rule of law issues to be resolved in traditional uniform law and other more modern international commercial law such as investment dispute settlement and transnational business ethics. Academic work on the interface between public and private law as well as on the taxonomy of commercial law remains important to give meaningful answers to current challenges of the law relating to commercial contracts. We are grateful to the directorate at IALS and Professor Mads Andenas who is director at the CCFL for their ongoing support of this research network and project.