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Commercial Law: is it Special?

1. Introduction

Jan Hellner was one of Sweden's greatest lawyers of the last century. His vast grip over an astonishingly large number of subjects and his ability to write in English, French, German, Swedish and occasionally in Spanish earned him a great reputation. Hellner was honoured with a Festskrift, but his many writings have never been assembled in Collected writings. For his friends this has not been a problem. Many were on the mailing list of his *Julskrifter*, which Jan Hellner compiled almost every year in the period 1972–2001. It is an honour to write in a volume dedicated to his memory. In this paper, I want to address a question which Hellner might himself have selected for this collection of essays[1]. It is the special – or not so special – position of Commercial Law. Is Commercial Law a separate subject? The issue may appear somewhat obsolete, but it is not[2]. The plans to harmonise private law on a European level will sooner or later bring it to the fore.

In the paper, I will remind readers why a separate Commercial Law has come into being (Nr. 2). The distinction may have both a formal (Nr. 3) and

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[1] See the Introduction to his *Kommersiell avtalsrätt*, 2d ed. (1987), p. 7.

[2] In the 1990s, I participated in a conference held in Zaragoza of Spanish Civil Law scholars and Commercial Law scholars, especially organised to bring the two groups together.

a substantive (Nr. 4) dimension. The integration of Civil and Commercial Law now apears to threathen the latter's independence. A threat to the independent position of Commercial Law has also been posed by Social and Economic Law (Nr. 5). Whatever the answer to these threats may be, could one not argue that Commercial Law is so strongly imbedded in the law, that it simply cannot lose its independence (Nr. 6)? The answer is no, but aid may come from an unexpected source: Consumer Law (Nr. 7). I will round off with some conclusions (Nr. 8).

Although I would have liked to present this analysis in a comparative way, time restraints have limited it to Dutch, French and German law, with an occasional reference to England, Italy and the United States. These restraints – and those of space – also prevent me from analysing in depth the various parts of Commercial Law independently.

2. Special rules for commercial transactions?

For historical reasons many jurisdictions distinguish between civil law and commercial law. Civil Law serves as the general private law for all transactions. Commercial Law is the special part for transactions between merchants (the subjective German approach) or for specific mercantile transactions (the objective French approach). The historical reasons are that Civil Law is of Roman origin, whereas Commercial Law encompasses the rules which were developed in medieval times (such as those on insurance, checks and the regulation of maritime law)[3]. The specific rules for commerce take two forms: there are substantive rules and there are formal rules. Let us first examine the formal rules.

3. Special jurisdictions

Several countries differentiate between adjudication of civil and commercial matters. In France commercial matters are heard by the *Tribunal de commerce*. The object of this special procedure is to provide business with a more rapid and more simple procedure than the ordinary tribunal could offer. Therefore, respresentation by attorneys is not compulsory, there is no obligatory attempt at mediation and the procedure is oral[4]. Unlike the ordinary courts, the *tribunaux de commerce* are composed of 3,000 elected

[3] Denis Tallon, Civil Law and Commercial Law, in: *Encyclopedia of Comparative Law*, VIII, Chapter 2, Tübingen, 1983.

[4] Loïc Cadiet, Emmanuel Jeuland, *Droit judiciaire privé*, 5th ed., Paris, 2006, p. 587.

judges (the *juges consulaires*) and hand down some 240,000 cases annually (as compared with 480,000 by the ordinary courts)[5]. In other countries, these distinctions were either never introduced, or have been or are on their way of being abolished. Two examples are the Netherlands and the United Kingdom. In the Netherlands, commercial courts were introduced under French occupation, but then were abolished. In the United Kingdom, Admiralty courts did have an independent position in the XIXth century[6], but since have been integrated in the ordinary judicial hierarchy. One must be careful, however. The example of the Netherlands is slightly misleading, because at the time when elsewhere commercial courts prospered, in the Netherlands a private alternative in the form of arbitration tribunals came into being. Functionally these tribunals are comparable to the French commercial courts.

4. Commercial codes

In the XIXth century it has become customary for European countries to enact a Commercial Code which has a position of its own, next to the Civil Code. Not everywhere has this become a tradition. Most of the common law countries have not codified Commercial Law – an exception is the United States, which has its Uniform Commercial Code. But that Code rather serves as a civil code for all transactions. Hellner has pointed out that Sweden does not possess a Commercial Code either. And in the newer codifications, such as those of Italy and the Netherlands, it has become fashionable to integrate civil and commercial law into one code. Does that mean the end of commercial law as a separate discipline? And what should a legislature do, when he is working from point zero, as has recently been the case in many formerly socialist countries and in the EU?

Let us find out what arguments have been brought forward in favour of the dichotomy. According to Canaris, the author of a leading German Commentary on Commercial Law, Commercial Law has the following three characteristics: it allows parties more freedom, there is an increased protection of reliance, and there are special duties of care, such as the obligation to inspect the delivered goods and file complaints within a short period[7].

[5] Loïc Cadiet (ed.), *Dictionnaire de la Justice*, Paris: Presses Universitaires de France, 2004 (Francis Kernaleguen), p. 949.
[6] Christian Joerges, On the Legitimacy of Europeanising Europe's Private Law, *Frankfurter Rundschau* 5 November 2002, also published in the *Global Jurist* (bepress).
[7] Claus Wilhelm Canaris, *Handelsrecht*, 24th ed., München: Beck, 2006, p. 6–7.

Canaris also mentions the need for speed and for legal certainty[8] and he emphasises the role of Commercial Law as a catalyst of legal development, especially with regard to the global harmonisation of law[9]. But in the end, he has to admit the 'große Zweifel (…) ob eine ausreichende Basis für eine eigenständige Kodifikation nach Art des HGB übrig bleibt'[10].

Are there other arguments in favour of a separate treatment? I now turn to some arguments advanced in favour of a special position of Commercial Law in the Netherlands. According to Du Perron, the bilateral XIXth century contract model is not fit for the complexities of modern business life, where networks of contracts require separate rules[11]. Although one must agree that many commercial transactions are highly complex, the same is true for various situations which traditionally are considered part of the Civil Law (because they already existed under Roman law), such as the various construction contracts when a building is planned.

The international character of business transactions is also often invoked. This may have been a valid argument in the XIXth and perhaps even the XXth century, but at present one finds that Civil Law, including Family Law, is also becoming international.

So indeed, there appear to be few if any valid reasons for having separate Codes for Civil Law and Commercial Law. Not only that: there are some major disadvantages in keeping the two apart. As Hartkamp observes: 'such a division clearly disrupts the unity and coherence of the system of private law as a whole'[12].

Integrating the two in a single Code, does not necessarily mean that Commercial Law loses its independence completely. Family Law has its own chairs, law reviews, specialised court chambers, even though in most countries it now is seen as part of the Civil Law (only in Central and East Europe was this different formerly). Why not should Commercial Law retain a similar position?

[8] Canaris, *o.c.*
[9] Canaris, *o.c.*
[10] Canaris, p. 13.
[11] C.E. du Perron, in: R.Q.J. Klomp and others, *Het eigen gezicht van het handelsrecht*, papers for the Vereeniging 'Handelsrecht', Deventer: W.E.J. Tjeenk Willink, 2000, p. 239–273.
[12] Arthur Hartkamp, The relation between civil law and commercial law, in: *Drie treden/Over politiek, beleid en recht/Festschrift Job de Ruiter*, Zwolle: W.E.J. Tjeenk Willink, 1995, p. 315, 316.

5. Social and economic law: no real threat

Civil law is not the only predator waiting to devour commercial law. Another possibility which has been promoted in the past is to combine private and public rules pertaining to economic life in a Social and Economic Law. This idea has especially become popular on the European level, but in several countries, it has also been advocated that Social and Economic Law should be recognised as a separate unit. It is always beneficial to engage in what is sometimes referred to as internal comparative law, that is comparison between the Civil Law and the Administrative Law or the Tax Law of the same country. Social and Economic Law appears to take care of such comparison within its own confines. But to the extent that it encompasses Commercial Law, this does not mean that this part of Private Law is thereby extracted from Private Law. As we saw in the previous paragraph, cutting off the links between Civil Law and Commercial Law is simply too high a price to pay.

6. Infrastructure: the entrenched position of Commercial Law

In many jurisdictions, Commercial Law has an entrenched position. Law faculties have separate chairs for Commercial Law, entrance to the bar requires knowledge of Commercial Law, there exist special Commercial Law Reviews and Law Reports. Special associations have been founded. More in general, the infrastructure of Commercial Law seems excellent. This may explain why some of the developments sketched in this paper have been met with some hostility by the occupiers of the entrenched positions. Discussions on the PhD thesis of Dutchman René Klomp on the Rise and fall of Commercial Law have sometimes indeed turned emotional. But not too much can be made out of this: such emotional arguments have also been used to retain Roman Law – as opposed to European Law – as the pivotal part of legal education. What also is remarkable is that in the Netherlands the issue has not resulted in all civil lawyers opting for one side, and all commercial lawyers for the other. When the Association for Commercial Law last discussed the subject, out of four papers, one written by a well-known civil layer, A.C. van Schaick, argued in favour of a separate Commercial Code, whereas a Professor of Commercial Law, M.M. Mendel, rather defended integration[13].

[13] R.Q.J. Klomp and others, *Het eigen gezicht van het handelsrecht*, papers for the Vereeniging 'Handelsrecht', Deventer: W.E.J. Tjeenk Willink, 2000, 273 p.

7. Consumer law: help from an unexpected side

One of the ironies of the rise and fall of Commercial Law is that precisely when its fall appeared inevitable, help was imminent. It is the advent of Consumer Law, which especially on the European level has served as a catalyst in harmonising private law. To illustrate the different dimensions on the national and the European level, it may suffice to point out that whereas on the national scene consumer protection is usually seen as of less importance than Private Law, in Brussels the reverse seems to be the case, in that the Directorate-General which is responsible for the harmonisation of Private Law actually is the one for Consumer Protection.

An ongoing debate concerns the position of Consumer Law, both on the national and the European level. In Europe, several authors opt for the first option. In Germany they include Frotscher[14], Joerges, Rösler[15] and Wiedenmann[16], in Italy Amato[17], and in Lithuania Ravlusevicius[18]. Personally, I have a strong preference for the second solution, which keeps an important part of Civil Law in the Civil Code and contributes to acceptance of the idea that freedom of contract is no longer the only paradigm of Contract Law[19]. In Austria the latter option is shared by Lurger[20], in Germany by Zimmermann[21], in Hungary by Vékás[22], in Slovakia by Rak and Cupaníková[23] and

[14] Pierre Frotscher, *Verbraucherschutz beim Kauf beweglicher Sachen*, PhD thesis Bayreuth 2004, Frankfurt: Lang, 2004, 320 p.

[15] Hannes Rösler, *Europäisches Konsumentenvertragsrecht/Grundkonzeption, Prinzipien und Fortentwicklung*, München: Beck, 2004, p. 247–250, 291–294.

[16] Kai Udo Wiedenmann, *Verbraucherleitbilder und Verbraucherbegriff im deutschen und europäischen Privatrecht/Eine Untersuchung zur Störung der Vertragsparität im Verbraucher-Unternehmer-Verhältnis und den Instrumenten zu deren Kompensation*, PhD thesis, Frankfurt: Lang, 2004, 325 p.

[17] Cristina Amato, *Per un diritto europeo dei contratti con i consumatori/Problemi e tecniche di attuazione della legislazione comunitaria nell'ordinamento italiano e nel Regno Unito*, Milano: Giuffrè, 2003, 522 p.

[18] Pavel Ravlusevicius, *Umsetzungskonzepte der EG-Verbraucherschutzrichtlinien*, Frankfurt: Lang, 2002, 267 p.

[19] See my paper 'Consumer Law and Private Law: the Case for Integration', in: Wolfgang Heusel (Ed.), *Neues europäisches Vertragsrecht und Verbraucherschutz*, Köln: Bundesanzeiger, 1999, p. 19–38.

[20] Brigitta Lurger, *Grundfragen der Vereinheitlichung des Vertragsrechts in der Europäischen Union*, Wien: Springer, 2002, 599 p.

[21] Reinhard Zimmermann, Consumer contract law and general contract law: the German experience, in: *Current Legal Problems* vol. 58 (2006), p. 415–489.

[22] Lajos Vékás, Über die anhängige Reform des ungarischen Zivilgesetzbuches, *Zeitschrift für Rechtsvergleichung, Internationales Privatrecht und Europarecht* 2004, p. 65–73.

[23] Pavol Rak, Petra Cupaníková, EU-Recht – Neuer Konsumentenschutz in der Slowakischen Republik, *Eastlex* 2000, p. 38–40.

in Spain by Cámara Lapuente[24]. On the European level, Joerges has argued that Europe is now at an important point: either consumer protection must be further worked out into a coherent system or it should be incorporated on equal footing in a Civil Code[25]. Obviously, when the movement for independent codifications of Consumer Law have their way, there will be less need for Civil Codes to contain protective devices and may indeed be said to become Commercial Codes!

8. Conclusion

Commercial Law is an integral part of Private Law. It does have some special characteristics, but that phenomenon is something which it shares with other parts of private law such as Consumer Law and Family Law. As Canaris espresses it: 'Was die wissenschaftliche Grundkonzeption dieses Lehrbuchs angeht, so ist sie entspechend meinem Verständnis des heutigen Handelsrechts (…) weiterhin stark von einer spezifisch bürgerrechtlichen Sichtweise geprägt, die sich keineswegs im Allgemeinen erschöpft, sondern immer wieder auch in Einzelheiten durchscheint oder durchschlägt'[26]. Private Law is so large a subject in the University curriculum, that a division in separate courses on Civil Procedure, Contract, Evidence, Family, Intellectual Property, Property and Tort, as well as Admiralty, Banking & Insurance, Company, Negotiable Instruments, Transport, etc. is well advised, provided that students are constantly reminded that these parts are interrelated.

As for the hearing of cases, a separate instance for commercial matters is in my view no longer warranted, although once again internal specialisation within a court may enhance efficiency and the involvement of lay judges with expert knowledge of trade and industry may also be useful. As for substantive law, the notion of a Commercial Code now also seems outlived. In Italy, the Commercial Code was formally abolished in 1942. In the Netherlands, the *Wetboek van Koophandel* has all but vanished. A danger here is the popularity of Consumer Law as the object of separate codification. Italy has

[24] Sergio Cámara Lapuente, EU contract and consumer law: true coordination?', in: Santiago Espiau Espiau, Antoni Vaquer Aloy (Eds.), *Bases de un derecho contractual europeo/Bases of a European Contract Law*, Valencia: Tirant lo Blanch, 2003, p. 577–587.

[25] Christian Joerges, On the Legitimacy of Europeanising Europe's Private Law, *Frankfurter Rundschau* 5 November 2002, also published in the *Global Jurist* and in German as *Der Europäisierungsprozess als Herausforderung des Privatrechts: Plädoyer für eine neue Rechts-Disziplin*, ZERP-Diskussionspapier 1/2006, Bremen, 2006, 51 p. and in *Festschrift für Andreas Heldrich zum 70. Geburtstag*, München: Beck, 2005, p. 205–224.

[26] Canaris 2006, p. V.

recently introduced such a code. Germany on the other hand has opted for integration of Consumer Law in its Civil Code. All important for future developments will be the choice which the EU is bound to make in the coming years. If a Consumer Code is proposed, then a logical further step would be to create a commercially oriented Private Law Code. For the reasons stated above, a combined approach in a Civil Code or Restatement should have our preference.

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