

## Does Commercial Law Have a Future?

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### I. GENERAL OBSERVATIONS

#### 1. *Two 150th Anniversaries*

It is not by accident that I proposed this subject for today's discussion. Commemorating 150 years of diplomatic relations between two economies – Japan and Germany – means commemorating 150 years of vital international trade between two countries. In 1861 these countries had not yet taken leading positions in global politics and commerce, but they have done so during this 150-year period in various respects and – as a priest at a wedding ceremony would say – in good days and in bad (in our case, even sombre) days.<sup>1</sup> On the whole, however, this period has been fruitful, indeed.

It is my privilege to take part in this conference on the instruments of our friendly cooperation: the Treaty of 1861, international trade, and international commercial law. And it is my particular pleasure to introduce to you a second birthday child born in 1861: the German Uniform Commercial Code (*Allgemeines Deutsches Handelsgesetzbuch*). This code was enacted ten years prior to the foundation of the German Kaiserreich and decades prior to our Civil Code. The Uniform Commercial Code of 1861 was produced by a nationwide delegates' conference. In the absence of central national legis-

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<sup>1</sup> For the period between the First World War and the end of the Second World War, see BAUM/TAKAHASHI, in: Röhl (ed.), *History of Law in Japan since 1868*, 2005, pp. 330, 362 et seqq.

lation, it was passed by the parliaments of the separate German states and later transformed into national law.<sup>2</sup> In 1897 it was brought in line with the new Civil Code after having left indelible footprints in German civil law jurisdiction. The result is the German *Handelsgesetzbuch*,<sup>3</sup> and this commercial code is nothing but a remnant of the Uniform Commercial Code of 1861. This means: It is as old as the treaty celebrated this year.

## 2. *Commercial Codes in Japan and Germany*

My subject reveals a number of parallels between our countries. The Civil Codes – both in Japan and Germany – are from 1896,<sup>4</sup> and they were immediately followed by the Commercial Codes in the respective countries (1899 in Japan, 1897 in Germany).<sup>5</sup> The history of our commercial codes is a history of decreasing influence. As I will point out later, a similar phenomenon can be verified with respect to many civil law countries. This observation leads to these questions: Does commercial law have a future? Has it lost its compelling force? Has it even lost its justification as a special subject of legislation, legal policy and academic research?

This was no concern in the 19<sup>th</sup> century. On the eve of birth of the German *Handelsgesetzbuch*, the famous commercial law professor *Levin Goldschmidt* tried to explain the inspiring impact of commercial law with a famous metaphor:<sup>6</sup> Private law is a river flowing through a valley, inhabited by people like you and me. Above the river we notice a majestic glacier: commercial law! And the secret source of the flowing water down in the valley – civil law in progress – is just the glacial stream pouring down from the summit of commercial law and nourishing what in the end soaks the ground of our civil law community.

Today, however, this wonderful metaphor might take a disillusioning turn. Travelling through the Alps and looking for the gigantic glaciers of the past, you will hardly find anything left but some dirty alpine meadows hardly covered by ice and producing a weary brook beneath. If this is what the global warming period has made of the glacier, it raises the question: Did something similar happen to commercial law?

## 3. *Congruence of Commercial Law and Commercial Codes?*

Speaking about commercial law might address different issues. At first glance, it could mean merely talking about commercial codes. The consequences would be: First, where

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2 See RAISCH, *Geschichtliche Voraussetzungen, dogmatische Grundlagen und Sinnwandlung des Handelsrechts*, 1965, pp. 47 et seq.

3 *Handelsgesetzbuch* of 10.5.1897, *Reichsgesetzblatt* p. 219.

4 KOZUKA, in: Baum/Bälz (ed.), *Handbuch Japanisches Handels- und Wirtschaftsrecht*, 2011, p. 141, 143.

5 *Ibid.*

6 GOLDSCHMIDT, *Universalgeschichte des Handelsrechts*, 3rd ed. 1891, pp. 11 et seq.

there is a commercial code, there is commercial law. Second, commercial law is what can be read in a commercial code. And third, it is up to national legislation to decide whether commercial law exists and which provisions belong to commercial law.

If this were true, (re)integrating commercial law rules into the Civil Codes would mean abolishing commercial law. As you may know, Italy took this step in 1942.<sup>7</sup> Consequently, the *Codice Civile* could be regarded as proof of the non-existence of commercial law in Italy. And with respect to England it would imply that there is no commercial law at all due to the traditional absence of a commercial code. However, when looking at English textbooks, we can find some interesting reflections about the existence of commercial law. Professor Goode asks this in his distinguished textbook:<sup>8</sup>

The absence of anything resembling a commercial code makes this question harder to answer than might be imagined. If by commercial law we mean a relatively self-contained, integrated body of principles and rules peculiar to commercial transactions, then we are constrained to say that this is not to be found in England.

And Professor Bradgate comments,<sup>9</sup> ‘Goode’s initial question is, of course, rhetorical. Commercial law exists, even if its ambit cannot be precisely described.’

I share this view in my textbook on German *Handelsrecht*,<sup>10</sup> pointing out that the existence of a commercial code is misleading students and academics about the fact that there is no coercive congruence between the commercial code and commercial law. This means that a commercial code may indicate, but only indicate, the existence and range of commercial law as a legal issue as long as we are convinced of the conceptual justification of commercial law as such. It will, however, never discharge us from the difficult task of exploring what commercial law is about. As a result, the question is the same in both common law countries and civil law countries. It aims at the nature of commercial law and the idea behind it. Does this idea exist?

## II. THE CONCEPTS OF NATIONAL COMMERCIAL CODES

### 1. *Historical Background*

a) The idea of commercial law is much older than the relevant codes as products of the 19<sup>th</sup> century.<sup>11</sup> In the early Renaissance, the trading centres in northern Italy, Germany, France, England and the Netherlands promoted translocal commerce. Simultaneously, big business needed – and produced! – a set of rules for translocal and transnational

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7 See TROIANO, in: Grundmann/Zaccaria (eds.), *Einführung in das italienische Recht*, 2007, p. 111.

8 MCKENDRICK (ed.), *Goode on Commercial Law*, 4th ed., 2009, p. 1347.

9 BRADGATE, *Commercial Law*, 3rd ed., 2000, p. 3.

10 KARSTEN SCHMIDT, *Handelsrecht*, 5th ed., 1999, pp. 16 et seq.

11 See RAISCH (Fn. 2), pp. 47 et seqq.

trade that found increasing acceptance as *lex mercatoria*.<sup>12</sup> Consequently, commercial law was – in contrast to the patchwork of political units – a translocal and even transnational affair ... depending on translocal recognition. The range of commercial law in this early period was never clearly defined by any authority, neither by the trading profession nor by academics or law courts and definitely not by legislation. But that did not matter. Nobody really cared about the definition of commercial law. Its existence and its relevance, however, were generally accepted. In my proper words, one might summarise this under the slogans ‘Commercial law is what commercial law does’ and ‘Commercial law does what it is asked for by business and trade’.

b) Things changed when legislation took possession of commercial law. The Prussian *Allgemeines Landrecht* of 1794 already contained some provisions about merchants as an advanced class of citizens and their staff and agents.<sup>13</sup> Real codification of commercial law took place after 1800, starting with the French *Code de Commerce* of 1807<sup>14</sup> and continuing throughout the whole century in many countries.<sup>15</sup> Codification, however, raised the question of whether there is any legitimacy behind the separation of civil and commercial codes. In most civil law legislations, a commercial code was no longer anything more than an appendix to civil law. As a result, legislation had to draw a line between both subject matters and consequently define: What is commercial law? From then on this question was a practically relevant challenge both for academic discussion and legal policy.

## 2. Attempts to Define Commercial Law

a) Contemplating the attempts of 19<sup>th</sup> century legislation to draw this separating line between commercial law and civil law, later research identified two competing concepts called *objektives System* (in my translation: the ‘instrumental approach’) and *subjektives System* (in my translation: the ‘entrepreneurial approach’).<sup>16</sup>

The instrumental approach (*objektives System*) appears rather natural: it is based on the existence of particular rules about the sale of goods, distribution and agency, transport of goods, financial transactions, etc. The aim of commercial law, from this perspective, should be to provide reliable rules for the benefit of production, trade and service.

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12 See the author’s contribution to the 2005 Tokyo conference in: Murakami/Marutschke/Riesenhuber (ed.), *Globalisierung und Recht. Beiträge Japans und Deutschlands zu einer internationalen Rechtsordnung im 19. Jahrhundert*, 2006, pp. 153 et seqq.

13 *Allgemeines Landrecht für die preußischen Staaten 1794*, §§ 475 ff. II 8 (= sec. 475 et seqq., part II, title 8).

14 See SONNENBERG / DAMMANN, *Französisches Handels- und Wirtschaftsrecht*, 3rd ed., 2008, pp. 1 et seqq., 29 et seqq.

15 See RAISCH (Fn. 2), pp. 25 et seqq.

16 See KARSTEN SCHMIDT, *Zerfällt das Handelsgesetzbuch?*, Festschrift Horn, 2006, pp. 557 et seqq.

This approach may be observed in common law and *lex mercatoria*, for example, but even in Spain as a civil law country.

The entrepreneurial approach (*subjektives System*) tackles the delimitation issue in a different way: it attempts to define the relevant addressees of commercial law rules doing business (*Kaufmann, Unternehmer, commerçant*). Their business – and only their business – as entrepreneurs is affected by commercial law. The challenge, therefore, is to define what an entrepreneurial business is.

Given this difference between the respective approaches, the following question is raised: Does national law commit itself to the first one or to the second?

b) The French and Spanish commercial codes are said to adhere to the instrumental approach, focusing on *actos de comercio* or *actes de commerce*. However, both legislations contain rules addressing the *comerciante* and the *commerçant* respectively.<sup>17</sup> In contrast to this approach, the German *Handelsgesetzbuch* is said to adhere to the entrepreneurial approach focusing on elaborate definitions of the so-called merchant (*Kaufmann*).<sup>18</sup> These old-fashioned definitions reflecting the business world of the 19<sup>th</sup> century have been modernised by case law during the last decades, in particular by a reform bill of 1998, which shows that legislation still favours the entrepreneurial approach.<sup>19</sup> The Turkish commercial code, which has recently been subject to a fundamental reform, follows this path.<sup>20</sup> Many provisions of the German *Handelsgesetzbuch*, however, contain nothing but special rules about commercial contracts. And perhaps this may hold true with respect to the Japanese code as well. As far as I had been informed in the past, this code adheres to the entrepreneurial approach. Recently, however, I learnt from Professor *Kozuka*'s impressive contribution to the distinguished handbook edited by Harald Baum and Moritz Bälz that the major approach focuses on commercial transactions. In addition, however, there are commercial transactions governed by the commercial code due to the profit motive of the parties or even due to their profit-driven entrepreneurial activity.<sup>21</sup> This appears to me to be close to the entrepreneurial definition. So, in the end, this legislative approach seems to be a mixed system, too.

In my view, the theoretical juxtaposition of two approaches, which are meant to exclude each other but never reach this aim, tells a lot about what commercial law is: it consists of particular provisions and unwritten rules deviating from the general line of civil law, and these rules can partly be justified by the addressee's involvement in busi-

17 E.g. Artt. 1 et seqq. Código de Comercio and Artt. 1, 6 Code de Commerce.

18 Sec. 1 et seqq.

19 See KARSTEN SCHMIDT (Fn. 10), pp. 48 et seqq.

20 For the details, see a publication on "Zwei Systeme – zwei Begriffe: kaufmännisches Unternehmen und Handelsgewerbe" by Duygu Damar (to be published in 2012); see also the recent presentation of the Turkish commercial code presented by Ünal Tekinalp at the Max Planck Institute conference on 29 October 2011 in Hamburg.

21 KOZUKA, in: Baum/Bälz (ed.), *Handbuch Japanisches Handels- und Wirtschaftsrecht*, 2011, p. 141, 145.

ness as such (the entrepreneurial approach) and partly by the need of entrepreneurial entities for specific rules about business transactions (the instrumental approach). This means that the existence of commercial law cannot be explained as a mono-causal phenomenon. And it means, in addition, that the shape of commercial law as a body of rules will never be as consistent as criminal law or civil procedure, for example, or even civil law.

### 3. *Commercial Law and Consumer Protection Law in Civil Law Countries*

During the last decades, however, a powerful competitor appeared on the scene and quickly gained ground in private law. The relationship between commercial law and civil law has become an even more difficult task since consumer protection, originating in national case law, is subject to increasing legislative activities in the EU and national policy. In Germany, most of the consumer protection rules had initially been enacted in small-sized separate acts, but were inserted in the Civil Code in the course of further legislation. This raises the question: What effect does this development have on commercial law? In the German Commercial Code there is an obviously outdated provision claiming applicability of commercial law even in consumer cases. Sec. 345 reads as follows: 'The provisions concerning commercial transactions apply in the same manner for both parties to a legal transaction that is a commercial transaction for at least one of the two parties, to the extent that these provisions do not provide otherwise.' Does this mean that commercial law tries to hijack consumer law? Obviously not.<sup>22</sup> It indicates that it is up to legislation to align the commercial code with current developments in the civil code, including consumer protection law. The general attention for consumer protection issues, however, should not make the legal profession lose sight of the still relevant need for modern commercial law rules, both national and international.

## III. THE SHAPE AND FUTURE OF COMMERCIAL LAW

### 1. *Commercial Codes: Going Down the Drain?*

In most countries we observe a dramatic split-off of company law provisions out of the commercial codes. Japan is a most impressive example for that. The modernised company law code of 2005/2006 aggregated the provisions about partnerships and corporate forms outside the commercial code.<sup>23</sup> The same phenomenon can be observed in many countries, such as Argentina and Spain. Argentina is a very good illustration for this

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22 See KARSTEN SCHMIDT, BGB-Verbraucherrecht und Handelsrecht, in: Schulze/Schulte-Noelke (ed.), Die Schuldrechtsreform vor dem Hintergrund des Gemeinschaftsrechts, 2001, pp. 143 et seqq.

23 See DERNAUER, Die japanische Gesellschaftsrechtsreform 2005/2006, ZJapanR 2005, pp. 123 et seqq.

phenomenon: The commercial code is older than the civil code.<sup>24</sup> Originally it contained – but in the course of the 20<sup>th</sup> century expelled – maritime law, insurance law, company law, securities law and the lion's share of the accounting provisions, to name a few. In Germany, stock corporation law was a dominant part of the commercial codes of 1861 (ADHGB)<sup>25</sup> and 1897 (HGB),<sup>26</sup> but shifted to separate Stock Corporation Acts in 1937<sup>27</sup> and 1965.<sup>28</sup> And the Limited Liabilities Company Code has been a separate act from the very beginning in 1892.<sup>29</sup> Austria did the same with the law of commercial agents<sup>30</sup> and other subjects before the Commercial Code was transformed and renamed as an Entrepreneurial Code in 2005.<sup>31</sup>

Obviously, this worldwide development in civil law countries leads to the question: Does it indicate a decline of commercial law altogether?

## 2. *Commercial Law as a Concept: Does It Exist?*

Looking for encouraging projects, the United Nations Commission on International Trade Law (UNCITRAL) necessarily comes to our minds. UNCITRAL certainly does produce concepts that qualify as commercial law issues, the most popular being the CISG. Yet an underlying general concept of the shape of commercial law as a legal discipline will hardly be found.

The need for a conceptual basis of commercial law can be shown by a look into the most elaborate German textbooks on the issue of this contribution, written by *Claus-Wilhelm Canaris* (Munich) and myself.

*Claus-Wilhelm Canaris* states in his most acknowledged academic textbook on German commercial law that commercial law as an integrated concept does not exist.<sup>32</sup> As an issue of legal education it is useless and only survives due to the existence of the Commercial Code.<sup>33</sup> In *Canaris'* eyes, the set of rules laid out in the Commercial Code should be distributed on the relevant chapters of the Civil Code or the respective acts of company or competition law, for example.<sup>34</sup> And this would be the end of commercial law as a merely transitional discipline which had definitely done its duty in the past.<sup>35</sup> If he is right, the academic profession should liquidate commercial law as an undertaking,

24 See KARSTEN SCHMIDT, *Handelsrecht* (Fn. 10), pp. 43 et seqq.

25 Artt. 207 et seqq.

26 Sec. 178 et seqq.

27 Aktiengesetz of 30.1.1937, Reichsgesetzblatt, p. 107.

28 Aktiengesetz of 6.9.1965, Bundesgesetzblatt, p. 1089.

29 Gesetz betreffend die Gesellschaften mit beschränkter Haftung of 20.4.1892, Reichsgesetzblatt, p. 477.

30 Handelsvertretergesetz of 1.3.1993, Bundesgesetzblatt No. 88/1993.

31 Unternehmensgesetzbuch of 1.1.2007, Bundesgesetzblatt No. 120/2005.

32 CANARIS, *Handelsrecht*, 24th ed., 2007, pp. 10 et seqq.

33 *Ibid.*, p. 13.

34 *Ibid.*, p. 16.

35 *Ibid.*, p. 16 (*transitorische Materie*).

produce a final account, and then close the books. If there is no justifying idea behind this issue, what is the sense of working on it in legal research?

My position, in contrast, is a different one. The re-integration of commercial law rules in the Civil Code would, in my eyes, not mean abolishing the concept of commercial law, if there is such a concept.<sup>36</sup> And this concept – as has already been pointed out – focuses on the identification of rules for business entities and business transactions.

#### 4. *From Commercial Law towards Business Law*

In my eyes, the focus of our legal subject should be defined in a more modern perspective.<sup>37</sup> The basic idea of commercial law, consisting of

- entrepreneurial rules and
- legal instruments for production, trade and distribution,

is still expedient and workable. The focus on entrepreneurial rules, however, is no longer based on the traditional stereotype of merchants as natural persons but on organised corporate entities. This concept is close to what Japan has learned from the famous commercial law professor *Karl Wieland*,<sup>38</sup> whose textbook on *Handelsrecht*, published in 1921, still has to be regarded as the dawn of modern business law.<sup>39</sup> Despite the ongoing separation of commercial codes and company law codes, commercial law and company law can coexist in closer proximity under the roof of business law. There is a natural link between company law rules, mainly consisting of corporate finance and governance on the one hand, and commercial law rules dealing with trade and protection of businesses on the other. If I am right in this respect, and if we are courageous enough to cope with the needs of business, my answer to the question in the title of my presentation is: Yes. Commercial law does have a future, if it is open to change and modernisation. If not, its decline will continue.

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36 KARSTEN SCHMIDT, *Handelsrecht* (Fn. 10), pp. 9 et seqq.

37 Ibid; see also KARSTEN SCHMIDT (ed.), *Münchener Kommentar zum Handelsgesetzbuch*, 3rd ed., 2010, vor § 1 No. 5 et seqq.

38 See BAUM/TAKAHASHI, in: Röhl, *History of Law in Japan since 1868*, 2005, pp. 330, 379 et seq.

39 See KARSTEN SCHMIDT, *Morgenröte des Unternehmensrechts? Ein Streifzug durch Wielands 'Handelsrecht' von 1921*, *Basler Juristische Mitteilungen*, issue 2/2008, pp. 61 et seqq.