1 An introduction to commercial law

- What is commercial law?
- History and development of commercial law
- Sources of commercial law

What is commercial law?

It is customary for a commercial law text to begin by posing the question 'What is commercial law?' However, perhaps a better opening question is to ask whether or not commercial law as a distinct legal topic actually exists. The following much-quoted passage from Professor Sir Roy Goode indicates that, depending on the scope of the question, the answer may in fact be no:

> Does commercial law exist? Are there unifying principles which bind the almost infinite variety of transactions in which businessmen engage, marking these off from other types of contract?...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.[1]

If no such unifying principles exist, then commercial law as a distinct topic cannot be said to exist, and it will merely amount to a 'label which is useful for gathering together diverse material with no obvious home of its own, so as to aid exposition on a lecture course or in a textbook, or for the better organisation of the business of the High Court of Justice...but no more'.[2]

The vast majority of commentators (including Goode), however, firmly believe that such unifying principles do exist (these are discussed later in this chapter) and that not only is commercial law a distinct topic, but that it is one that 'flourishes...adapting itself constantly to new business procedures, new instruments, new demands'.[3] Unfortunately, whilst there is little doubt that commercial law exists, it is much more difficult to define its parameters as, unlike other countries, the UK has not sought to establish a commercial law code. Instead our body of commercial law can be found in a collection of 'ill-assorted statutes bedded down on an amorphous mass of constantly shifting case law'.[4]

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1. Roy Goode and Ewan McKendrick, *Goode on Commercial Law* (4th edn, Penguin 2010) 1347.
2. Len S Sealy and Richard JA Hooley, *Commercial Law: Text, Cases and Material* (4th edn, OUP 2009) 6.
3. Roy Goode and Ewan McKendrick, *Goode on Commercial Law* (4th edn, Penguin 2010) 1347.
4. ibid.

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So, if commercial law does exist, then what is it? The scope of the subject has ensured that no universally accepted definition exists, but numerous definitions have been advanced, including the following:

- Goode has defined commercial law as 'that branch of law which is concerned with rights and duties arising from the supply of goods and services in the way of trade'[5] and as 'the totality of the law's response to the needs and practices of the mercantile community'.[6]
- Gutteridge states that commercial law encapsulates 'the special rules which apply to contracts for the sale of goods and to such contracts as are ancillary thereto, namely contracts for the carriage and insurance of goods and contracts the main purpose of which is to finance the carrying out of contracts of sale'.[7]
- Sealy and Hooley state that '[c]ommercial law is the law of commerce. It is concerned with commercial transactions, i.e. transactions in which both parties deal with each other in the course of business.'[8]

It is clear from these definitions that no author has sought to provide a precise and specific definition of what commercial law is, preferring instead to offer broad comments about the scope and purposes of the subject. This is both unsurprising and welcome. It is unsurprising as the sheer scope and breadth of commercial law ensures that it is not amenable to a succinct, yet exhaustive definition. It is welcome because the topic is one that must constantly evolve. As Sealy and Hooley state:

> Commercial law is a pragmatic and responsive subject which looks to facilitate the commercial practices of the business community. As those practices change and develop, often to accommodate new technology, the contents of commercial law may change and develop with them. A rigid definition of the scope of the subject would only inhibit this process.[9]

Accordingly, a precise and rigid definition of commercial law is of little aid. Perhaps what is more important is an understanding of the purposes of commercial law or, as Goode referred to them in the passage discussed previously, the 'unifying principles'.

Principles of commercial law

It has been stated that '[t]he primary function of commercial law…is to accommodate the legitimate practices and expectations of the business community in relation to their commercial dealings'.[10] This leads us to ask what the expectations of the business community are. Four principal expectations can be identified, namely (i) predictability; (ii) flexibility; (iii) party autonomy; and (iv) efficient dispute resolution.

5. ibid 8. 6. ibid 1347.
7. Harold C Gutteridge, 'Contract and Commercial Law' (1935) 51 LQR 91, 91.
8. Len S Sealy and Richard JA Hooley, *Commercial Law: Text, Cases and Material* (4th edn, OUP 2009) 4.
9. ibid.
10. Roy Goode, 'The Codification of Commercial Law' (1988) 14 Mon LR 135, 148.

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Predictability[11]

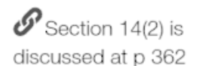
As Lord Mansfield has stated '[i]n all mercantile transactions, the great objective should be certainty'.[12] Commercial transactions can require a significant amount of planning and it is important that business persons can engage in transactions without undue fear that those transactions will be set aside. In order for this to be the case, commercial law must exhibit several characteristics:

- The law must be clear. If a statute is drafted poorly or if the reasoning behind a legal judgment is vague, ambiguous, or misguided, then business persons will be unable to rely on it. This is even more important where a transaction is standard and is entered into many times, or where the subject matter of a transaction is of high value or unique.
- The law must be applied consistently and set aside sparingly. Whilst the law must be free to develop to deal with evolving situations, businesses must be free to transact on the basis that settled law will not be changed without due reason.

Litigation is expensive, and predictable law helps businesses organize their activities so as to avoid costly legal breaches. Should a dispute arise, predictable law helps the dispute to be resolved more speedily and cheaply. In some cases, however, applying the law in a predictable fashion may lead to an unfair result being imposed on one or more of the parties. In such a case, should fairness or predictability be the dominant consideration? Goode is firmly of the opinion that the latter consideration will usually triumph:

> in a contest between contract and equity in a commercial dispute, contract wins almost every time; and I suspect that one reason why foreigners so frequently select English law, rather than Continental law, to govern their contracts and English courts to adjudicate their disputes is that they know where they stand on the law and can rely on judges experienced in commercial transactions to give effect to their understanding.[13]

However, this does not mean that the law always favours predictability over fairness. For example, s 14(2) of the Sale of Goods Act 1979 implies a term into contracts of sale providing that goods will be of satisfactory quality. Clearly, the word 'satisfactory' is a very wide term and it may be difficult to predict whether or not a product that has some form of imperfection will be deemed unsatisfactory by the courts. However, this lack of predictability is an unfortunate, but necessary, consequence of the need for s 14(2) to be flexible and to provide a fair outcome for purchasers of goods.


Section 14(2) is discussed at p 362

Flexibility

Whilst the business community desires laws that are certain and predictable, it is also important that the law is flexible so that it can react to evolving and novel commercial practices. The problem that arises is that laws that are predictable are often

11. Many texts use the term 'certainty', but, as Goode correctly notes (see Roy Goode, 'The Codification of Commercial Law' (1988) 14 Mon LR 135, 150), litigation is rarely certain and so the term 'predictability' is preferable.

12. *Vallejo v Wheeler* (1774) 1 Cowp 143, 153.

13. Roy Goode, 'The Codification of Commercial Law' (1988) 14 Mon LR 135, 149.

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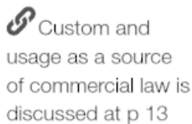
inflexible, and laws that are flexible are often unpredictable, but the businessperson 'wishes to have his cake and eat it; to be given predictability on the one hand and flexibility to accommodate new practices and developments on the other'.[14] Striking a balance between predictability and flexibility is a difficult task and one that the courts are not always best placed to undertake.

Commercial law aims to provide flexibility in two ways. First, the law affords businesses considerable party autonomy (this is discussed in the next paragraph). Second, the courts can recognize and give effect to the customs, practices and trade usages of the business community. Custom and usage as a source of law is discussed later in this chapter.


Custom and usage as a source of commercial law is discussed at p 13

Party autonomy

Lord Devlin has stated that '[t]he function of the commercial law is to allow, so far as it can, commercial men to do business in the way they want to do it'.[15] This results in the courts giving significant weight to two legal concepts:

1. *Freedom of contract*: The parties are free to agree the terms of the contract that will govern their relationship or, to put it more simply, 'businessmen should be free to make their own law'.[16]
2. *Sanctity of contract*: As the parties are free to contract, it follows that the courts should give effect to the terms of the contract and should not be quick to invalidate contractual terms freely entered into. Accordingly, the courts will seek to uphold commercial contracts, unless the terms are overly restrictive or oppressive, in breach of statute, or if they offend principles of public policy.

By upholding the validity of contracts freely entered into by the parties, the law is made more certain, as the parties can expect their bargains to be upheld. This in turn 'facilitates the conduct of trade',[17] or as Lord Goff famously stated:

> Our only desire is to give sensible commercial effect to the transaction. We are there to help businessmen, not to hinder them: we are there to give effect to their transactions, not to frustrate them: we are there to oil the wheels of commerce, not to put a spanner in the works, or even grit in the oil.[18]

However, the law's respect for party autonomy is not absolute and, over the past forty years, Parliament has passed several notable pieces of legislation that strongly curtail freedom of contract in certain areas, with notable examples being the Consumer Credit Act 1974, the Unfair Contract Terms Act 1977, and the Unfair Terms in Consumer Contracts Regulations 1999.[19] In turn, these statutes have resulted in increased intervention from the courts in certain areas. However, as Bradgate correctly notes, these statutes tend to apply more to consumer cases and not to what he terms 'pure' commercial law cases.[20] For example, certain provisions of the Unfair Contract Terms Act 1977 do not apply to many forms of commercial contract, such

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14. ibid 150. 15. *Kum v Wah Tat Bank Ltd* [1971] 1 Lloyd's Rep 439 (PC) 444.
16. Roy Goode, 'The Codification of Commercial Law' (1988) 14 Mon LR 135, 149.
17. *Schroeder Music Publishing Co Ltd v Macaulay* [1974] 1 WLR 1308 (HL) 1316 (Lord Diplock).
18. Lord Goff, 'Commercial Contracts and the Commercial Court' [1984] LMCLQ 382, 391.
19. SI 1999/2083.
20. Robert Bradgate, *Commercial Law* (3rd edn, OUP 2005) 6.

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as (i) contracts of insurance; (ii) contracts involving the creation of patents, trademarks, and copyrights; (iii) charterparties; and (iv) contracts involving the carriage of goods by ship or hovercraft.[21]

→ charterparty: a written agreement whereby a person hires a ship, usually for the purpose of transporting goods

Efficient dispute resolution

A sound system of commercial law should aim to minimize the number of cases that need to go to court, and UK commercial law's availability of self-help remedies (such as the exercise of liens, or the ability to rescind contracts) can help achieve this. There will, however, always be instances when recourse to the courts is unavoidable and, in such cases, it is important that the parties have access to a system of dispute resolution that is quick and inexpensive. The law's answer is to provide a specialist court, namely the Commercial Court.

→ lien: the right to hold the property of another until an obligation is satisfied

The Commercial Court was formally established in 1970[22] and is a separate court of the Queen's Bench Division of the High Court. It consists of around fifteen nominated judges, all of whom are experts in commercial law matters and will hear cases relating to both national and international disputes. In line with the earlier discussion, the procedures of the Commercial Court[23] tend to be more flexible than those of the High Court generally (for example, many of the rules relating to case management in the High Court do not apply to the Commercial Court). The work of the Commercial Court is often extremely complex, with around 80 per cent of its cases involving a party that derives from outside the Court's jurisdiction.[24] The reason for this is that many parties choose to resolve their disputes in the Commercial Court and, as such, it is inundated with work (which is another reason why it is granted its own flexible procedural rules).

History and development of commercial law

Origins

The origins of our system of commercial law can be found in a medieval body of laws known as the *lex mercatoria*. Throughout the Middle Ages, merchants would travel throughout Europe engaging in trade at fairs and markets. If a dispute arose, it was important that it could be resolved quickly, and in accordance with the customs of the merchants themselves. The importance of this international trade[25] and the need for a body of practical rules governing trade led to the development of the

→ *lex mercatoria*: 'law merchant'

21. Unfair Contract Terms Act 1977, Sch 1. In some cases, these contracts will be covered in relation to persons who deal as consumers.

22. Administration of Justice Act 1970, s 3(1). However, the origins of the court can be traced back to a Commercial List that was established in 1895.

23. See the Civil Procedure Rules 1998, Pt 58.

24. Judiciary of England and Wales, *Report of the Commercial Court and Admiralty Court 2005–06* (2006) 2.

25. The importance of international trade was recognized as far back as the Magna Carta 1215, with Art 41 stating that '[a]ll merchants shall have safe and secure exit from England, and entry to England, with the right to tarry there and to move about as well by land as by water, for buying and selling by the ancient and right customs'.

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lex mercatoria, a body of laws that was based on those customs and practices of merchants that were common throughout Europe. Accordingly, the *lex mercatoria* was characterized by those features that were regarded as essential by merchants, namely it should be international in flavour, it should not be overly technical,[26] it should be applied based on the realities of commerce, and it should allow for the speedy resolution of disputes.

Not only were disputes resolved based upon the customs and practices of merchants, but the merchants themselves were involved in resolving the disputes. The *lex mercatoria* was applied via a series of specialist courts (such as the courts of the fairs and boroughs,[27] and the staple courts) that consisted of juries comprising equally of English and foreign merchants.[28] The *lex mercatoria* was commonly applied throughout most European countries and, by the fifteenth century, it was described as 'a law universal throughout the world'.[29] As Sealy and Hooley note:

> It was during this period that some of the most important features of modern commercial law were developed: the bill of exchange, the charterparty and the bill of lading, the concepts of assignability and negotiability, the acceptance of stoppage in transit and general average.[30]

The *lex mercatoria* and the common law

The precise relationship between the *lex mercatoria* and the common law is open to debate. Originally, the perception was that the *lex mercatoria* was a separate body of laws that developed independently of, and often differed from, the common law, but the more modern view appears to be that:

> [t]he medieval law merchant was not so much a corpus of mercantile practice or commercial law as an expeditious procedure especially adapted for the needs of men who could not tarry for the common law…Like the justice of the Chancery, it offered an exemption from, or a short circuit through, the delays of due process.[31]

The fifteenth century witnessed the beginning of a movement that would result in the abolition of the merchant courts and the incorporation of the *lex mercatoria* into the common law. By the fifteenth century, business in the merchant courts had dwindled and the majority of commercial law cases were heard in the Court of Admiralty. However, by the seventeenth century, the majority of commercial litigation would move from the Court of Admiralty to the common law courts, largely due to the work of Sir Edward Coke CJ. This was achieved by use of the action of

26. To avoid cases becoming overly technical, it was often the case that lawyers were not permitted in cases involving commercial law issues.

27. These courts were also knows as courts of piepowder, which derives from the French *pieds poudrés*, which means 'dusty feet', referring to the dusty feet of merchants as they travelled throughout Europe.

28. The equal rights given to foreign merchants derived from the *Carta Mercatoria* 1303, a charter granted by Edward I that provided foreign traders the right to free trade, protection of the law, and exemption from certain tolls and charges.

29. Yearbook 13 Edw IV 9 pl 5.

30. Len S Sealy and Richard JA Hooley, *Commercial Law: Text, Cases and Materials* (4th edn, OUP 2009) 14–15.

31. JH Baker, 'The Law Merchant and the Common Law' (1979) 38 CLJ 295, 301–2.

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assumpsit and by partially incorporating the *lex mercatoria* into the common law. Although Coke CJ stated in 1628 that 'the lex mercatoria is part of the law of the realm',[32] it was only a partial incorporation, and the common law courts continued to apply common law principles, with occasional modifications that mirrored the *lex mercatoria*. A more complete incorporation of the *lex mercatoria* did not occur until the late seventeenth and early eighteenth centuries under Holt CJ and, in particular, Mansfield CJ. By the time he retired, Mansfield CJ had completed the task of fully incorporating the *lex mercatoria* into the common law—a task he performed so well that one commentator has stated:

➔ *assumpsit*: a common law action that could be brought where an undertaking was breached

> the reform which Lord Mansfield carried out...was ostensibly aimed at the simplification of commercial procedure but was, in fact, much more; its purpose was the creation of a body of substantive commercial law, logical, just, modern in character and at the same time in harmony with the principles of the common law. It was due to Lord Mansfield's genius that the harmonisation of commercial custom and the common law was carried out with an almost complete understanding of the requirements of the commercial community, and the fundamental principles of the old law and that marriage of ideas proved acceptable to both merchants and lawyers.[33]

Codification[34]

By the nineteenth century, the *lex mercatoria* had been fully incorporated into the common law and a significant body of commercial law case law had been established. Unfortunately, this resulted in a mass of commercial law that was inaccessible and, in certain areas, lacked consistency. Accordingly, Parliament, following calls from the commercial community, decided to embark upon a programme of codification. Many European countries were also codifying their commercial law and, as most European countries had a civil law system, they established commercial codes that aimed to embrace all commercial law in one place. English law did not adopt an all-encompassing commercial code, but instead passed a series of Acts of Parliament, with each Act focusing on one particular area. This resulted in the passing of the Bills of Exchange Act 1882, the Factors Act 1889, the Partnership Act 1890, the Sale of Goods Act 1893, and the Marine Insurance Act 1906. It is a testament to the drafters of these Acts that all of these Acts are still in force today, with the exception of the Sale of Goods Act 1893 (which, in any case, was largely reproduced by the Sale of Goods Act 1979). That many other countries based their commercial codes on the provisions of these Acts[35] is further proof of the quality of their drafting.

➔ codification: the process whereby the law is collected and restated in statute

Whilst the codification of commercial law doubtless made the law more accessible and consistent, it did have one negative side-effect. As noted, a key feature of the *lex mercatoria* was its cross-border consistency and the fact that it harmonized commercial law throughout many European countries. As countries established and

32. Sir Edward Coke, *The First Part of the Institutes of the Laws of England* (1628) folio 182.
33. Clive M Schmitthoff, 'International Business Law, A New Law Merchant' in RSJ Macdonald (ed), *Current Law and Social Problems* (University of Toronto Press 1961) 137.
34. For a detailed account, see Alan Rodger, 'The Codification of Commercial Law in Victorian Britain' (1992) 109 LQR 570.
35. For example, the Sale of Goods Act 1893 heavily influenced the USA's Uniform Sales Act.

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amended their commercial codes and statutes, they began to focus increasingly on the commercial law issues that arose in their own countries. The result was that the harmonization of the *lex mercatoria* was lost and national laws began to diverge (although there are still areas of strong consistency).

Consumerism

The Industrial Revolution had a profound impact upon our system of commercial law. Production of consumer goods increased notably, as did the disposable income of the workforce. As trade in consumer goods increased, the provision of credit to consumers also rose sharply. These developments, along with the establishment of the welfare state post-World War II, had a notable effect on our system of commercial law. Specifically, it resulted in the courts recognizing that the traditional underpinnings of commercial law, notably the freedom and sanctity of contract discussed earlier, would not be appropriate in all cases. With the rise of consumerism, the courts could not assume that the parties to a contract were of equal bargaining power, and it was realized that weaker parties would require protection if the law were to remain just.

The result was the creation of a body of law that aimed to protect consumers. The principal common law contribution was the development of the law of negligence following *Donoghue v Stevenson*,[36] whilst Parliament passed a raft of consumer protection legislation. The past fifty years have been notable for the sheer mass of consumer legislation that has been passed, with notable examples being the Trade Descriptions Act 1968 (now largely repealed), the Fair Trading Act 1973 (also largely repealed), the Consumer Credit Act 1974, the Unfair Contract Terms Act 1977, and the Consumer Protection Act 1987. The process of consumer law protection is still going strong, as evidenced by more recent pieces of legislation, such as the Consumer Protection from Unfair Trading Regulations 2008.[37]

The result has been the recognition of consumer law as a distinct legal topic in its own right[38] (as opposed to being a form of commercial law that was applied in specific instances), but it does not follow from this that the two areas of law have developed separately. In some cases, the distinction between consumer and commercial transactions has been maintained (e.g. the Sale of Goods Act 1979 still distinguishes between consumer and non-consumer sales), but there is concern amongst many academics and businesses that consumer law is unduly influencing commercial law, which in turn has resulted in 'the steady degradation of English commercial law statutes'.[39] For example, Sealy and Hooley contend that:

> There must be some cause for concern as to how far consumer protection principles should be allowed to interfere in purely mercantile arrangements.

36. [1932] AC 562 (HL). 37. SI 2008/1277.

38. Although this text and its accompanying Online Resource Centre will cover certain consumer law topics (e.g. consumer credit, product liability), it will focus primarily on commercial law as it affects businesses. Students wishing to explore consumer law in more detail should consult a specialized consumer law text.

39. Michael Bridge, 'What is to be Done About Sale of Goods?' (2003) 119 LQR 173, 177.

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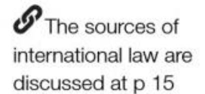
The interventionist approach of consumer protection legislation appears to be at odds with the essential needs of the business community.[40]

International harmonization

As noted, the international nature of commercial law became eroded as the UK courts incorporated the *lex mercatoria* into national law and European countries created their own commercial law codes. However, beginning in the mid-nineteenth century, commercial law once again began to take on a more international flavour through the development of EU law and, in particular, transnational commercial law. These sources of international law are discussed later in this chapter. Here, the reasons behind the growth of transnational law and its purported benefits will be discussed.


The sources of international law are discussed at p 15

As noted, transnational commercial law originated in the mid-nineteenth century, but it was only in the latter half of the twentieth century that it actually became a reality. It arose following the realization that an 'international transaction cannot be treated the same way as a domestic one',[41] or, as Bradgate put it, 'international trade needs an international legal response'.[42] The following example demonstrates the problem.

Eg ComCorp Ltd

ComCorp Ltd enters into a contract with The Netherlands Trading Co (a company based in Amsterdam) to purchase a particular piece of machinery. Agents of the two companies sign the contract in France. A problem develops with the piece of machinery and ComCorp decides to terminate the contract and seek reimbursement of the purchase price. The Netherlands Trading Co refuses to refund the purchase price. ComCorp commences proceedings, alleging that English law governs the transaction. The Netherlands Trading Co states that Dutch law governs the transaction. Neither party is willing to allow French law to govern the contract.

Having a sound system of transnational law in place could avoid this situation arising. Indeed, increased harmonization of laws can bring about a number of potential advantages:[43]

- Divergent national laws can act as a barrier to cross-border commerce. Conversely, harmonized laws can help facilitate international trade.
- Harmonization can help fill the gaps in domestic law by providing laws in those areas where no domestic law exists.

40. Len S Sealy and Richard JA Hooley, *Commercial Law: Text, Cases and Materials* (4th edn, OUP 2009) 17.

41. Roy Goode, Herbert Kronke, and Ewan McKendrick, *Transnational Commercial Law: Text, Cases and Materials* (OUP 2007) 19.

42. Robert Bradgate, *Commercial Law* (3rd edn, OUP 2005) 14.

43. For a more detailed discussion of the advantages of harmonization of commercial law, see Loukas A Mistelis, 'Is Harmonization a Necessary Evil? The Future of Harmonization and New Sources of International Trade Law' in Ian F Fletcher, Loukas A Mistelis, and Marise Cremona (eds), *Foundations and Perspectives of International Trade Law* (Sweet & Maxwell 2001) 21.

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- It can reduce the instances where a conflict of laws arises (as in the example given) and provide a neutral form of law with which to resolve a dispute.
- It can improve the clarity of the law by replacing a series of divergent national laws with a single set of transnational laws. This in turn can save time and expense and reduce the number of cases that are heard in the national courts (especially in those courts that are the preferred destination for 'forum shoppers').
- Transnational law can act as an impetus for domestic law reform as 'reforms can be more easily achieved once a provision has been adopted at international level'.[44]
- Transnational law is often translated into several languages, and so is more accessible than national law.

Nevertheless, the process towards harmonization of law has not been smooth and it has been resisted strongly.[45] Despite this, there exists a significant body of transnational commercial law that will be discussed later in the chapter. First, however, it is important to appreciate the domestic sources of commercial law.

Sources of commercial law

Having discussed the definition, history, and purposes of commercial law, the final part of this chapter moves on to look at the principal sources of commercial law, beginning with sources of domestic commercial law.

Contract

It has already been noted that party autonomy is a key feature of any system of commercial law. The principal means of providing parties with the autonomy they desire is by permitting them to negotiate and set the terms of the transaction themselves. It follows from this that the primary source of commercial law is the contract that exists between the parties. In essence, by agreeing the terms, obligations, and rights that will govern the transaction, that transaction is governed by law that has been largely created by the parties themselves. The role of the legal system is simply then to enforce the terms that the parties have freely entered into, or render unenforceable those terms deemed unfair or contrary to public policy.

It should, however, be noted that not all the terms of the contract will be freely and individually negotiated (largely because this would take too much time). The parties will usually negotiate certain key terms such as price and date of performance, but the remaining terms may be imposed by one party upon the other through the use of standard form contracts. In a commercial setting, this usually poses no issues and, in such cases, the courts will be reluctant to invalidate the terms of

44. ibid.

45. For a discussion of why harmonization has been resisted, see Roy Goode, 'Reflections on the Harmonization of Commercial Law' in Ross Cranston and Roy Goode, *Commercial and Consumer Law—National and International Dimensions* (Clarendon 1993) 24–7.

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standard form contracts without good cause.[46] Conversely, where standard terms have been imposed by a business upon a consumer, then the law adopts a much more paternalistic approach.

Custom and usage

As Lord Lloyd has stated '[i]n the field of commercial law … the custom of merchants has always been a fruitful source of law'.[47] Indeed, as has been discussed, the *lex mercatoria* was based largely on the customs of merchants. However, with the expansion of commercial law legislation (both transnational and domestic), does custom and usage still play an important role in commerce? The answer is undoubtedly yes.

The courts are responsive to the needs of commercial parties and can take into account any relevant customs or usages when interpreting commercial contracts and determining disputes. The most common way to give effect to a custom or usage is via the implication of a term into the contract, but in order for this to occur, the court will need to be satisfied that the relevant custom or usage is certain and reasonable.[48] Even if these conditions are satisfied, a term will not be implied if it would conflict with the express terms of the contract.[49] Accordingly, through careful drafting (e.g. through the inclusion in the contract of an entire agreements clause),[50] the parties can limit the ability of the courts to imply terms into the contract.

➜ **entire agreements clause:** a term of a contract which provides that the written terms provide the totality of the terms and that no further terms can be added

Domestic legislation

The process of commercial law codification that began in the nineteenth century has resulted in domestic legislation (both primary and subordinate) becoming an extremely important source of commercial law. However, the philosophy behind domestic commercial legislation has evolved over time. In the nineteenth and early twentieth centuries, Parliament, like the courts, prioritized the notions of freedom and sanctity of contract and so legislation adopted a laissez-faire approach that sought to give effect to the will of the parties involved.

Due to the influence of consumerism, much modern commercial legislation is not so liberal and adopts a strong interventionist function. There are many examples:

Consumerism is discussed at p 10

- The provision of credit to consumers is stringently regulated by the Consumer Credit Act 1974.
- Exclusion clauses and limitation clauses are strictly regulated by the Unfair Contract Terms Act 1977.
- Producers of defective goods can be held liable under the Consumer Protection Act 1987, even if they were not at fault for the defect.

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46. Roy Goode and Ewan McKendrick, *Goode on Commercial Law* (4th edn, Penguin 2010) 12, state that certain standard form contracts are so widely used that they can be regarded as akin to 'non-parliamentary statutes'.

47. *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349 (HL) 394.

48. For a more detailed discussion of the implication of terms, see Edwin Peel, *Treitel on the Law of Contract* (13th edn, Sweet & Maxwell 2011) 222–35.

49. *Les Affréteurs Réunis Société Anonyme v Walford* [1919] AC 801 (HL).

50. See e.g. *Exxonmobil Sales and Supply Corporation v Texaco Limited (The Helene Knutsen)* [2003] EWHC 1964 (Comm), [2003] 2 Lloyd's Rep 686.

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- The Unfair Terms in Consumer Contracts Regulations 1999 can render contractual terms unenforceable if they are deemed to be unfair.

Case law

The sources of law noted in the preceding pages would lack much of their force were it not for the courts. Contracts need to be upheld and enforced. Trade customs and usages need to be recognized, usually by implying terms into contracts. Legislation needs to be interpreted and applied. The courts perform all these roles and so case law forms an extremely important source of commercial law, and certain areas of the law are dominated by case law. For example, apart from the occasional piece of legislation, the law of agency is a creation of the courts and judges established virtually all the major principles of agency law. Despite this, case law as a source of commercial law is being constrained in certain areas by other sources of law. As Goode notes:

> In analysing commercial law cases, it is important constantly to bear in mind the diminishing role of the common law in defining contractual obligations and the growing impact of enacted law and of government intervention and EC directives and regulations.[51]

Equity

Lord Browne-Wilkinson once stated that 'wise judges have often warned against the wholesale importation into commercial law of equitable principles inconsistent with the certainty and speed which are essential requirements for the orderly conduct of business affairs'.[52] Lindley LJ was of the opinion that if the courts were to extend certain equitable doctrines to commercial law, then they would be 'doing infinite mischief and paralysing the trade of the country'.[53] From these statements, it is clear that, at least historically, the courts have been cautious in allowing equity to permeate too deeply into commercial law principles. For example, the courts are extremely reluctant to state that commercial parties owe fiduciary obligations towards one another on the ground that this would unduly interfere with the contract the parties have freely entered into.[54]

However, it has been argued that this caution is a thing of the past and that modern commercial law is much more willing to adopt equitable principles. As one academic has contended, 'Equity's place in the law of commerce, long resisted by commercial lawyers, can no longer be denied. What they once opposed through excessive caution, they now embrace with excessive enthusiasm.'[55] Equity's contribution to commercial law has manifested itself in several ways:

- As noted, contract is perhaps the primary source of commercial law, and equitable principles permeate the law of contract in several ways, including:

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51. Roy Goode and Ewan McKendrick, *Goode on Commercial Law* (4th edn, Penguin 2010) 16.
52. *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 (HL) 704.
53. *Manchester Trust v Furness* [1895] 2 QB 539 (CA) 545.
54. See e.g. *Kelly v Cooper* [1993] AC 205 (PC).
55. Sir Peter Millett, 'Equity's Place in the Law of Commerce' (1998) 114 LQR 214, 214.

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(i) equitable remedies such as liens, rescission, and specific performance are available in certain cases (e.g. rescission is usually available where a party has been induced into entering into a contract as a result of a misrepresentation);
(ii) the courts may be willing to provide a remedy to a party that has entered into a contract through duress, or where the bargain entered into is deemed unconscionable;
(iii) the courts may be willing to enforce certain promises via the doctrine of promissory estoppel.

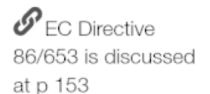
- Whilst the courts may be reluctant to state that parties to a commercial contract occupy a fiduciary relationship, the courts will enforce fiduciary obligations if the parties expressly intended such obligations to arise.[56]
- Trusts are regularly used in certain areas of commercial law. For example, if a customer provides advance payment for goods or services and, before the goods or services are provided, the provider of the goods/services becomes insolvent, then the advance payments may be held on trust for the customer.[57] This is important as this will allow the customer to recover the monies advanced in priority to the other general creditors.

International commercial law

An understanding of the domestic sources of commercial law would not be complete without an understanding of the sources, and influence, of international commercial law.

European Union law

On 1 January 1973, the UK became a Member State of the European Community (or European Union as it is now known) and, in doing so, it agreed to recognize and enforce EU law.[58] This in turn has had a significant impact on English law in general, but aside from a few notable pieces of EU legislation (such as EC Directive 86/653[59] on commercial agents), the impact of the EU upon the private rights of commercial parties has been 'almost negligible'.[60] Instead, EU law in this area has focussed more on the rights of consumers, with Art 169 of the Treaty on the Functioning of the European Union providing that the Union shall 'promote the interests of consumers and … ensure a high level of consumer protection'. Notable pieces of EU consumer legislation include:


EC Directive 86/653 is discussed at p 153

- Directive 85/374/EEC,[61] which led to the passing of Pt 1 of the Consumer Protection Act 1987;

56. See e.g. *Don King Productions Inc v Warren* [2000] Ch 291 (CA).
57. See e.g. *Re Kayford Ltd* [1975] 1 WLR 279 (Ch).
58. European Communities Act 1972, s 2(1).
59. Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents [2006] OJ L382/17.
60. Roy Goode, *Commercial Law in the Next Millennium* (Sweet & Maxwell 1998) 88.
61. Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products [1985] OJ 210/29.

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- Directive 1993/13/EC,[62] which led to the passing of the Unfair Terms in Consumer Contracts Regulations 1994[63] (now repealed and replaced by the Unfair Terms in Consumer Contracts Regulations 1999);
- Directive 1999/44/EC,[64] which led to the passing of the Sale and Supply of Goods to Consumers Regulations 2002;[65]
- Directive 2005/29/EC,[66] which led to the passing of the Consumer Protection from Unfair Trading Regulations 2008;[67]
- Directive 2011/83/EU, which significantly enhances a number of consumer rights. Member States must implement this Directive by December 2013—at the time of writing, the UK has yet to implement the Directive.

International conventions and model laws

The EU is not the only international body that seeks to create, promulgate, and harmonize the law. Several other intergovernmental bodies exist, of which the two most notable are the United Nations Commission on International Trade Law (UNCITRAL)[68] and the International Institute for the Unification of Private Law (UNIDROIT).[69] The principal contribution of these bodies is the creation of international conventions and model laws.

Many of these Conventions are discussed in Part IV of the book, which focuses on international trade

A significant number of international conventions exist, with notable examples being (i) the 1980 Vienna Convention on Contracts for the International Sale of Goods; (ii) the 1983 Geneva Convention on Agency in the International Sale of Goods; (iii) the 1988 UN Convention on International Bills of Exchange and International Promissory Notes; (iv) the 1995 Convention on Independent Guarantees and Stand-By Letters of Credit, and; (v) the 2001 Convention on the Assignment of Receivables in International Trade. The important point to note regarding international conventions is that they bind no country, unless they are incorporated into domestic law by legislation. The UK was closely involved in the development of many of these conventions. It is therefore unfortunate that the UK fails to ratify many of these international conventions. For some, such as Lord Hobhouse, this is a cause for celebration, as he contends that:

> These conventions are inevitably and confessedly drafted as multi-cultural compromises between different schemes of law. Consequently they will normally have less merit than most of the individual legal systems from which they have been derived. They lack coherence and consistency. They create problems about their scope. They introduce uncertainty where no uncertainty existed

62. Council Directive 1993/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L95/29.

63. SI 1994/3159.

64. Directive 1999/44/EC of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees [1999] OJ L171/12.

65. SI 2002/3045.

66. Directive 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market [2005] OJ L149/22.

67. SI 2008/1277.

68. For more information, see <www.uncitral.org>.

69. For more information, see <www.unidroit.org>.

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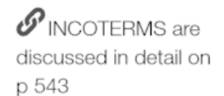
> before. They probably deprive the law of those very features which enable it to be an effective tool for the use of international commerce.[70]

For others, the UK's refusal to ratify is a cause for regret. For example, Goode states that '[w]e seem unable to organise our affairs so as to reap the fruits of our own arduous labours'.[71] An often-cited example is UNCITRAL's 1980 Vienna Convention on Contracts for the International Sale of Goods, which, at the time of writing, has been ratified by seventy-eight states (including the vast majority of the world's major trading states). The UK has not ratified it and is the most notable absence from the list of signatory states.

In addition to conventions, these bodies also create model laws that, as their name suggests, provides a set of laws that states can choose to adopt (in full or in part) if they so wish. An often-cited example is UNCITRAL's 1985 Model Law on International Commercial Arbitration, which significantly influenced the Arbitration Act 1996.

Mention should also be made of the International Chamber of Commerce (ICC)[72] which, unlike UNCITRAL and UNIDROIT, is not an intergovernmental body and so the uniform rules and trade terms that it creates are not aimed at governments, but are instead aimed at contracting parties. For example, the ICC's international commercial terms (or INCOTERMS as they are known) provides a set of model terms that can be used in international commercial transactions. These terms are updated regularly[73] and tend to reflect existing trade practice and the most commonly used trade terms.


INCOTERMS are discussed in detail on p 543

Transnational commercial law[74]

EU law, international conventions, model terms, and uniform trade rules constitute the formal framework of commercial law harmonization, but there are also more informal practices evolving, as the following quote indicates:

> The common practice of merchants may establish an uncodified international trade usage. The courts of one jurisdiction may decide to adopt a principle established in another or may reach the same point independently. In each case, the result is the same, the internationalization of what was at one time a purely local rule.[75]

The rules and principles that result from the combination of formal and informal harmonization efforts have been labelled as transnational commercial law, with a more precise definition of the term being '[t]hat set of private law principles and rules, from whatever source, which governs international commercial transactions and is common to legal systems generally or to a significant number of

70. Lord Hobhouse, 'International Conventions and Commercial Law: The Pursuit of Uniformity' (1990) 106 LQR 530, 533.

71. Roy Goode, *Commercial Law in the Next Millennium* (Sweet & Maxwell 1998) 94.

72. For more information, see <www.iccwbo.org>.

73. At the time of writing, the most recent update is INCOTERMS 2010, which constitutes the eighth update to the terms.

74. For more, see Roy Goode, Herbert Kronke, and Ewan McKendrick, *Transnational Commercial Law: Text, Cases and Materials* (OUP 2007).

75. Roy Goode and Ewan McKendrick, *Goode on Commercial Law* (4th edn, Penguin 2010) 19–20.

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legal systems'.[76] With the growth of transnational commercial law, it has been argued that the historical regionalization of commercial law has been reversed and that transnational commercial law effectively constitutes a new *lex mercatoria*. Ultimately, this contention can be doubted on the ground as many of the rules and principles mentioned earlier can only be enforced if they are implemented by legislation or recognized through judicial decisions. Conversely, the *lex mercatoria* consists of a body of rules that are binding and, as Goode states, if a principle, usage, or custom requires external recognition to become binding, then 'it is not truly *lex*'.[77]

Conclusion

The chapters that follow will discuss the various specific areas of commercial law, but a full understanding of these specific areas is only possible if you appreciate the purposes of commercial law and the principles upon which commercial transactions are based. Accordingly, by discussing the aims and purposes of commercial law, you will better appreciate why these laws have come to be and whether or not they fulfil the aims discussed in this chapter.

Many commercial law transactions (especially those involving the sale of goods) concern the passing of property from one person to another. Accordingly, chapter 2 will discuss what property is and the concepts of ownership and possession.

Practice questions

1. 'Commercial law often has to balance competing aims. It is not possible to provide laws that are both certain and flexible and there is little doubt that English commercial law favours certainty over flexibility.'

Discuss the validity of this statement.

2. 'Equity has no place in commercial law. Business persons require certainty in their dealings and the imposition of equitable principles upon commercial transactions will render the law unacceptably uncertain.'

Do you agree with this statement? Provide reasons for your answers.

Further reading

Roy Goode, 'The Codification of Commercial Law' (1988) 14 Mon LR 135

- Provides an excellent account of our commercial law system, focusing on whether or not UK commercial law should be codified. Also contains an excellent discussion on the purposes of an effective commercial law system.

76. Roy Goode, Herbert Kronke, and Ewan McKendrick, *Transnational Commercial Law: Text, Cases and Materials* (OUP 2007) 4.

77. Roy Goode, 'Rule, Practice and Pragmatism in Transnational Commercial Law' (2005) 54 ICLQ 539, 549.

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Roy Goode, Herbert Kronke, and Ewan McKendrick, *Transnational Commercial Law: Text, Cases and Materials* (OUP 2007) ch 1

- Provides an account of the history and development of commercial law, focusing on the evolution and sources of transnational commercial law.

Sir Peter Millett, 'Equity's Place in the Law of Commerce' (1998) 114 LQR 214

- Provides an excellent discussion of why and how equity has contributed to the development of commercial law.

Alan Rodger, 'The Codification of Commercial Law in Victorian Britain' (1992) 109 LQR 570

- Provides a detailed account of the process of codification of commercial law that began in the nineteenth century.

Len S Sealy and Richard JA Hooley, *Commercial Law: Text, Cases and Materials* (4th edn, OUP 2009) ch 1

- Provides an accessible, but detailed, introduction to commercial law.

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