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Organising the Firm

Theories of Commercial Law, Corporate Governance and Corporate Law

Chapter 3
Theory of Commercial Law: Past Approaches

3.1 Introduction

We can start seeking the new ways by studying the theory of commercial law first. We can begin with past approaches. A new theory will be proposed in Chap. 4.

Commercial law has something to do with firms. One might assume that there could be a connection between theories of commercial law and theories of the firm. Unfortunately, there has not been any such connection in the past. There are two reasons for this: the sorry state of commercial law theory; and the phenomena studied in commercial law research.

No theory. A few years ago, a law and economics journal published an issue containing papers presented at a conference on commercial law theory and the CISG.[1] The objective of the conference was to bring together commercial law scholars from the United States and Europe to explore different methodological approaches for analysing the CISG. But although the conference should also have been about commercial law theory, none of the papers spelled out the contents of such a theory or theories.

[1] The "Conference on Commercial Law Theory and the Convention on the International Sale of Goods (CISG)" was hosted by New York University School of Law in Florence, Italy, on October 14–16, 2004. The papers were published in 25(3) Int'l Rev L & Econ (2005). Related topics had already been discussed in Kraus JS, Walt SD (eds), The Jurisprudential Foundations of Corporate and Commercial Law. Cambridge Studies in Philosophy and Law. Cambridge U P, Cambridge (2000). In 2001, Harvard Law School hosted a symposium titled "Law, Knowledge, and the Academy". The papers presented at the symposium were published in 115 Harv L Rev (2002) pp 1277–1431. In Germany, related topics were discussed in Engel C, Schön W (eds), Das Proprium der Rechtswissenschaft. Recht – Wissenschaft – Theorie. Mohr Siebeck, Tübingen (2007). One can also mention "Beyond the State – Rethinking Private Law", a joint conference of the American Journal of Comparative Law and Rabels Zeitschrift. For conference reports, see Flohr M, Beyond the State? Rethinking Private Law. Symposium in Hamburg am 12. Und 13. Juli 2007, RabelsZ 72 (2008) pp 391–396; for articles, see 56 Am J Comp L (2008) pp 527–844.

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The absence of a commercial law theory in papers presented at a conference on commercial law theory might seem odd but reflects the fact that the work of academic lawyers is, to a very large extent, “untheorised”.[2] There is no commercial law theory.

One could, therefore, say that commercial law is not scientific enough and that it is just a “discursive formation” which has crossed neither the threshold of positivity nor the threshold of science.[3]

The perspective. There is a connection between the lack of a commercial law theory and the perspective chosen by commercial law academics. Obviously, it is impossible to formulate a theory of any kind without generalisations concerning the occurrence or non-occurrence of certain phenomena under investigation, and it is impossible to formulate meaningful generalisations, unless the phenomena have been defined narrowly. It is argued here that the root and cause of the problem is that mainstream commercial law research is *norm-based*. Norm-based research cannot lead to a meaningful theory of commercial law, because virtually any legal rules can, in a market economy, influence the behaviour of firms in one way or another.

Moreover, one cannot expect any meaningful connection between commercial law theory and theories of the firm, unless both study the same phenomena. But this is not the case, as norm-based research focuses on legal rules rather than the firm.

Purpose. The purpose of this chapter is to give a brief overview of present approaches to research in the extremely wide area of commercial law and discuss some of the reasons for the absence of a general commercial law theory. The purpose of Chap. 4 is to propose a commercial law theory that chooses the perspective of the firm and is management-based rather than norm-based.

3.2 Research Perspectives and Approaches

For obvious reasons, most legal research has as its starting point legal rules and can thus be described as *norm-based*. This applies even to commercial law. Commercial law is often broadly defined as a group of loosely connected rules, norms or customs governing trading and commercial activities. It is understood to mean roughly the same thing as business law. In some countries, commercial law in the narrow sense means the rules and norms contained in a particular commercial code. In most countries, however, commercial law is a vast subject, drawing on all streams of private and public law.[4]

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[2] Posner RA, Legal Scholarship Today, Harv L Rev 114 (2002) pp 1314–1326; Engel C, Schön W (eds), Das Proprium der Rechtswissenschaft. Recht – Wissenschaft – Theorie. Mohr Siebeck, Tübingen (2007).

[3] Foucault M, L’Archéologie du Savoir. Éditions Gallimard, France (1969).

[4] See Goode RM, Commercial Law in the Next Millenium. The Hamlyn Lectures. Forty-ninth Series. Sweet & Maxwell, London (1998) p 8.

Theories. The mainstream paradigm is that legal research must be norm-based. As a result, there has never been a general theory of commercial law setting out the principles that describe legal phenomena in the context of commercial exchanges (*commercial law theory in the narrow sense*).[5]

In commercial law research, it is customary to use theories developed in other fields of law, or in other areas of social sciences (*imported theories*). To use theories imported from social sciences is characteristic of legal science in the US. After the realist revolution of the 1930s, US legal scholarship became specialised according to the separate social sciences. The resulting position has been described as follows: "It is accepted today, virtually universally, that the legal system can be best understood with the methods and theories of the social sciences."[6]

Research approaches. Different imported theories tend to be combined with different research approaches. One can distinguish between five broad mainstream research approaches in commercial law, each with its own imported theories: analysis of the history of commercial law; the doctrinal analysis; comparative law and the approximation of laws; philosophy of law; and economic analysis.[7] (One can also add proactive law as the sixth research approach, see below.)

Research methodologies. There are also a number of research methodologies. Legal phenomena can be studied from many disciplinary perspectives ranging from history to economics. The customary research methodologies developed in other areas of social sciences can be used even in the study of legal phenomena.

Research perspectives. In addition to the choice of a theory, a research approach, and a research methodology, commercial law research is, of course, limited by the choice of research questions. This choice is greatly influenced by four choices relating to the *perspective*: the audience and purpose of commercial law research;

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[5] See also Druey JN, The practitioner and the professor – is there a theory of commercial law? In: Tison M, De Wulf H, Van der Elst C, Steennot R (eds), Perspectives in Company Law and Financial Regulation: Essays in Honour of Eddy Wymeersch. International Corporate Law and Financial Market Regulation. Cambridge U P, Cambridge (2009).

[6] Priest GL, Social Science Theory and Legal Education: The Law School as University, J Legal Educ 33 (1983) pp p 437. Moreover, Priest writes: "In 1930, prior to the realist revolution, future specialization in legal scholarship might have suggested increasingly detailed and narrow treatises addressing traditional legal subjects. Today, authorship of the legal treatise has been cast off to practitioners. The treatise is no longer even a credit to those competing on the leading edge of legal thought. Instead, legal scholarship has become specialized according to the separate social sciences."

[7] Each article published in 25(3) Int'l Rev L & Econ (2005) represented at least one of those research approaches (with the exception of philosophy of law). For a collection of articles with different research approaches, see also Gillette CP (ed), The Creation and Interpretation of Commercial Law. The International Library of Essays in Law and Legal Theory. Ashgate, Dartmouth (2003). The articles contained in Kraus JS, Walt SD (eds), *op cit*, mainly represented the areas of philosophy of law and economic analysis of law. The articles published in 56 Am J Comp L (2008) pp 527–844 mainly focused on the philosophy of law.

and the users and use of commercial law.[8] These choices are interrelated and very important for the purposes of the proposed theory of MBCL.

As the term implies, the *audience* of commercial law research means the category of people to whom the research is directed (addressed) and whose information needs the researcher tries to satisfy (clients of law firms, university professors, drafters of state laws, judges, or other parties).[9]

The audience is chosen for a certain *purpose*, the purpose of the research (provision of legal advice, writing a doctoral thesis, amendment of state laws, drafting a reasonable precedent, obtaining a favourable judgment, and so forth).

The *user* of commercial law means the category of people applying information about commercial law for the purposes of their own decision-making. Users of commercial law range from judges and arbitrators, who act as external adjudicators in legal proceedings, to lawyers, who try to assess the outcome of legal proceedings, and to in-house counsel, who try to manage the legal framework of the firm.

Users are not the same thing as the audience (the addressees). For example, a lawyer can write a memo on the interpretation of section 3 of a certain Act to a client firm. In this case, the client firm is the audience. A first-instance court can be chosen as the user, as state law is interpreted according to the rules and practices applied by the court. We can take another example. A junior researcher can write her doctoral thesis about the "efficiency" of section 3 of the same Act. The primary audience of the research is the researcher's university. The user of law is typically the legislator or the courts of the researcher's country. A third example would be an in-house counsel writing an internal memo on a compliance program made necessary by section 3. In this case, the firm is both the audience of the research and the user of commercial law.

The users of law need information about law for a certain *purpose*. The question of the user of commercial law is therefore linked to the question of the *use* of commercial law. The main distinction here is the distinction between the normative, simulated and non-normative use of law. (a) Law has traditionally been used in a *normative* way. For example, public authorities adopt legal rules and define them as binding for the parties to whom they apply (legislation). Courts are bound by these legal rules. Courts use information about norms to interpret them and to apply them to the facts of the case (enforcement). Firms use law in a normative way by trying to comply with it, and by trying to make others comply with it (regulatory compliance, contractual compliance, conflict resolution). (b) Such normative use of law can also be *simulated*. It is simulated by legal scholars, lawyers, and other parties who

[8] Compare Wendehorst CC, The State as a Foundation of Private Law Reasoning, Am J Comp L 56 (2008) p 602 distinguishing between different forms of legal reasoning: "Legal reasoning can take four different basic perspectives, which may be described as the internal, the external, the sovereign, and the subordinate perspective. Each of them has its own goals, its own patterns of argumentation, and its own tools for coping with plural and fragmented sources."

[9] See also Cheffins BR, Using Theory to Study Law: A Company Law Perspective, CLJ 58(1) (1999) p 199.

interpret norms without being bound by them themselves.[10] (c) In addition, information about normative rules can be used in a *non-normative* way. Typically, legal rules are used in a non-normative way when legal phenomena are studied in non-legal sciences such as economics or history, or for non-doctrinal research purposes in legal sciences. Public authorities can, in a non-normative way, design internal processes for the management of legislation, assess the quality of existing legislation, and plan new legislation. Firms can gather information about legal rules and practices in order to design internal processes for the management of legal affairs, assess the effect of legal rules on cash flow and risk, and plan the legal framework for their activities. The non-normative use of rules is often followed by their normative use.

Traditional norm-based commercial law research customarily chooses one or two categories of *users* of commercial law: (a) external *adjudicators* such as judges and arbitrators, and parties who deal with them (and simulate how external adjudicators would use norms) (*de lege lata*, what the law is); and (b) external *rule-makers* such as the state or private organisations (*de lege ferenda*, what the law ought to be). Typically, both user-categories *use* rules in a *normative* way.[11]

Traditional commercial law research does not typically choose *firms* as users of law. This is even where firms form its intended audience. Simply put, norm-based commercial law research focuses on legal rules that are, or should be, applied by the court. Only in rare cases does commercial law research deal with the *non-normative* use of legal things by firms; there is relatively little research on the legal objectives of firms and on the use of legal tools and practices in the management of firms.[12]

Now, the absence of a theory of commercial law and the choice of the perspective of external adjudicators or rule-makers are likely to have increased the variation of mainstream research approaches. In the following, the strikingly heterogeneous mainstream research approaches will be discussed briefly. Although well-known, studying the main points of the mainstream approaches is necessary for pedagogical reasons and because it will help to understand:

- The lack of a reasonably exact definition of commercial law
- The path-dependency[13] of commercial law research and its focus on "law"

[10] See already Wendell Holmes O Jr, The Path of the Law. Harv L Rev 10 (1897) pp 457–478 (prediction theory).

[11] Eidenmüller H, Effizienz als Rechtsprinzip. Die Einheit der Gesellschaftswissenschaften 90. Mohr Siebeck, Tübingen (2005) p 1 arguing that the two perspectives are that of the legislator and that of the judge: "Recht kann man insbesondere aus zwei Perspektiven betrachten: aus derjenigen des *Gesetzgebers* und aus derjenigen des *Richters*." For similar views, see Posner RA, Frontiers of Legal Theory. Harvard U P, Cambridge, Mass (2001); Engel C, Schön W, Vorwort. In: Engel C, Schön W (eds), *op cit*, p XII.

[12] See also Epstein RA, Let "The Fundamental Things Apply": Necessary and Contingent Truths in Legal Scholarship, Harv L Rev 115 (2002) p 1288 stating: "Nothing that we say or write here will, or should, alter the brute fact that much academic scholarship services the internal operations of the legal profession."

[13] Posner RA, Frontiers of Legal Theory. Harvard U P, Cambridge, Mass. (2001) p 145 (finding the legal profession the most "past dependent" of the professions). See also Mestmäcker EJ, A Legal

- That mainstream research approaches are interrelated
- The failings of mainstream commercial law research
- The need to design a theory of commercial law
- The differences between mainstream commercial law research and the theory proposed in Chap. 4

Past research perspectives and approaches, embedded and non-embedded. There are currently six important research approaches in commercial law. Five of them can be described as norm-based. They focus on: the history of commercial law; doctrinal analysis; comparative law and the approximation of laws; the philosophy of law; and the economic analysis of law. The sixth is not norm-based but focuses on the practices of firms. It is called preventive or proactive law.

Past research approaches have been regarded as embedded or non-embedded depending on the choice of the theoretical framework. "Embedded" means embedded in theories of legal science. "Non-embedded" means embedded in the theories of other social sciences.[14] One can see this distinction in a new light when one takes into account the purpose of the research.

The distinction seems to be a matter of degree depending on the purpose of the research. (a) When the purpose of the research is to simulate the normative use of law, the research is customarily embedded in the interpretation rules of the chosen jurisdiction. This is the core of embedded research and traditional jurisprudence.[15] However, such research can also be embedded in the theories of other social sciences. For example, quantitative methods can be used to predict the behaviour of judges. (b) When law is used in a normative way, it is customarily embedded in theories of legal science, but it can also be embedded in theories of other social sciences depending on the user. For example, economic theories customarily influence legislative reforms in company and securities markets law.[16] However, economic theories tend to play a lesser role when judges apply rules adopted by the legislator. (c) When the purpose of the research is the non-normative use of law,

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Theory without Law. Walter Eucken Institut, Beiträge zur Ordnungstheorie und Ordnungspolitik 174. Mohr Siebeck, Tübingen (2007) p 56.

[14] Rakoff TD, Introduction to Symposium: Law, Knowledge, and the Academy, Harv L Rev 115 (2002) p 1279 (distinguishing between "embedded" and "non-embedded" legal scholarship); Fleischer H, Gesellschafts- und Kapitalmarktrecht als wissenschaftliche Disziplin – Das Proprium der Rechtswissenschaft. In: Engel C, Schön W (eds), *op cit*, pp 52–53 (commenting on the distinction made by Rakoff); Fleischer H, Zur Zukunft der gesellschafts- und kapitalmarktrechtlichen Forschung, ZGR 4/2007 pp 501–502.

[15] Wendell Holmes O Jr, The Path of the Law. Harv L Rev 10 (1897) pp 457–478. See also Larenz K, Über die Unentbehrlichkeit der Jurisprudenz als Wissenschaft. Walter de Gruyter, Berlin (1966) p 12: "Die Aufgabe der Rechtswissenschaft … ist eine dreifache. Sie legt die Gesetze aus, sie bildet das Recht gemäß den der Rechtsordnung immanenten Wertmaßstäben und den in ihr liegenden gedanklichen Möglichkeiten fort und sie sucht immer aufs neue die Fülle des Rechtsstoffes unter einheitlichen Gesichtspunkten zu erfassen."

[16] See, for example, Fleischer H, Zur Zukunft der gesellschafts- und kapitalmarktrechtlichen Forschung, ZGR 4/2007 p 504.

theories of other social sciences can sometimes prevail, but legal research will always be embedded in theories of legal science.

3.3 Analysis of the History of Commercial Law

One of the perspectives from which one can study commercial law is to examine its historical origins. Legal history is a science with its own specific tools. Sources in legal history range from texts to other data such as archives, statistics, or even inscriptions. The mix of sources depends on the context, and the use of each source can require a different methodology.

Time frame, area of commercial law. Studies in the history of commercial law can be limited to a certain period of time, a certain area of commercial law, or both.

The classic work in this area is Goldschmidt (1891),[17] a presentation of the general history of commercial law – and so far the only one of its kind. Most works focus on particular aspects of the history of commercial law and choose a shorter time frame. For example, Goldschmidt was the supervisor – Doktorvater – of Max Weber's doctoral thesis.[18] Weber discussed the history of commercial partnerships in the Middle Ages. He became later known as one of the founders of sociology. Of recent works, one can mention Goetzmann and Rouwenhorst (2005),[19] which focuses on financial instruments and contracts that have survived through history, as well as Skeel (2001) and Mann (2002), which study the history of American bankruptcy laws.[20]

Law, commercial practices. "Law" can be defined in various ways, and studies in the history of commercial law can focus on different aspects of "law". It is customary to study rules and regulations that are *enforceable* ex post by the state or other third parties in an organised way and by using socially acceptable procedures (legal enforceability). It is also possible to focus on the history of *international* commercial law such as foreign trade laws, commercial treaty law, international conventions, maritime laws, and lex mercatoria.

Early commercial law. It is not the purpose of this book to study the history of commercial law as such. Because of the path-dependency of notions of commercial law, it is nevertheless useful to discuss some main points.

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[17] Goldschmidt L, Handbuch des Handelsrechts. Erste Band. Erste Abtheilung. Universal-geschichte des Handelsrechts. Erste Lieferung. Ferdinand Enke, Stuttgart (1891). For a discussion of the impact of Goldschmidt's work, see Whitman J, Note, Commercial Law and the American Volk: A Note on Llewellyn's German Sources for the Uniform Commercial Code, Yale L J 97 (1987) pp 156–175.

[18] The thesis formed part of Weber M, Zur Geschichte der Handelsgesellschaften im Mittelalter. Nach südeuropäischen Quellen. Eure, Stuttgart (1889).

[19] Goetzmann WN, Rouwenhorst KG (eds), The Origins of Value. OUP, Oxford (2005).

[20] Skeel DA Jr, Debt's Domain. A History of Bankruptcy Law in America. Princeton U P, Princeton Oxford (2001); Mann BH, Republic of Debtors. Bankruptcy in the Age of American Independence. Harvard U P, Cambridge London (2002).

Generally, one could say that the roots of commercial law can be traced back to the roots of civilisation itself. Specialisation and the loss of self-sufficiency meant that people needed to exchange goods and services. In Mesopotamia, this led to the invention of writing, credit, and interest.[21] Later, parts of the Code of Hammurabi laid down rules designed to regulate commercial exchanges.

Research in the history of commercial law customarily starts with *Roman law*, in particular classical Roman law, and Justinian's Corpus iuris civilis, which codified classical Roman law. Both provided for an advanced law of obligations. After centuries of decline, the study of Roman law was revived in Italy in the twelfth century. Bologna scholars known under the name of Glossators developed a civil law system called ius commune, the common learned law of the whole of the West. In the nineteenth century, von Savigny, the most famous representative of the Historical School or Pandectistic School, interpreted Roman law and showed how it lived on in local German customs.[22]

However, the Roman and Byzantine economies were agrarian, and Roman law was not designed for commercial practice. Most of commercial law was developed much later.

Lex mercatoria. Commercial law started to develop independently of Roman law in the Middle Ages as *lex mercatoria*.[23]

Chronologically, lex mercatoria was divided into three stages,[24] although the stages may be a matter of taste.[25] The first was the period of *customary* commercial law from the twelfth to the fifteenth centuries. The driving force was the Italian mercantile community. The second was the period of *incorporation* of lex mercatoria into the various municipal or state systems of law. As a result, lex mercatoria was, to a large extent, replaced by national commercial codes and the regulation of commercial exchanges by the state.[26] The third stage was the modern

[21] Van de Mieroop M, The Invention of Interest. Sumerian Loans. In: Goetzmann WN, Rouwenhorst KG (eds), The Origins of Value. OUP, Oxford (2005) pp 17–18.

[22] von Savigny FC, Das System des heutigen römischen Rechts (1840–1849).

[23] See, for example, Van Caenegem RC, Johnston DEL, An Historical Introduction to Private Law. Cambridge U P, Cambridge (1992) 83–85.

[24] Schmitthoff CM, International Business Law: A New Law Merchant. In: Chia-Jui Cheng (ed), Clive M. Schmitthoff's Select Essays on International Trade Law. Martinus Nijhoff Publishers / Graham & Trotman, Dordrecht (1992) pp 21–22. Originally published as Schmitthoff CM, International Business Law: A New Law Merchant. In St J MacDonald R (ed), 2 Current Law and Social Problems. University of Toronto Press, Toronto (1961).

[25] See, for example, Michaels R, The True Lex Mercatoria: Law Beyond the State, Ind J Global Legal Stud 14:2 (2007) p 448.

[26] See, for example, Trakman LE, The Law Merchant: The Evolution of Commercial Law. Fred B. Rothman & Co., Littleton, Colorado (1983). See also Scott HS, The Risk Fixers, Harv L Rev 91 (1978) p 738: "In any case, statutory rules are principally designed to alter rather than to 'codify' the existing legal regime. They reflect concern with the ability of various transactors, whether merchants or consumers, to protect themselves in the marketplace, and they are ultimately distributional in character. Since they are designed to alter the existing order or to remedy market failure or inefficiency, statutory commercial rules are unlikely to be optional - mere backstops for existing merchant practices."

lex mercatoria characterised by the existence of large multinational firms, international rule-making organisations, and other *global players*.

We can have a closer look at the second stage as the stage that explains much of the absence of a commercial law theory (for the third stage, see Sects. 3.4 and 3.5).

Codification. From the sixteenth century, there were attempts to systematise the body of first-stage rules according to jurisprudential criteria. The first national commercial code was the French Ordonnance sur le Commerce (1673). It was complemented by Ordonnance sur la Marine (1681). In these ways, customs and usages of merchants were embodied in French law.[27] In addition to French law, Dutch commercial laws and practices played an important role in continental Europe.

Continental European countries can thank France for laying the foundations for much of the legislation and doctrinal research in this area. After the French revolution, five legal codes ("les cinq codes") were adopted under Napoléon I between 1804 and 1810. Code civil, the 1803 civil code, was complemented by Code de commerce, the 1807 commercial code. Code civil and Code de commerce shaped commercial law in continental Europe in four main ways. First, they were adopted in countries ruled by the French: Italy, the Netherlands, Belgium, Spain, Portugal, and the left bank of the Rhine. Second, they were used as a model in German codifications (1896 BGB and 1897 HGB). Third, German law was used as a model in countries such as Austria, Switzerland, and the Nordic countries (and even in Asian countries such as Japan and China). Fourth, Code civil and Code de commerce determined the distinction between general private law and commercial law still applied in continental Europe.

On the other hand, the French-German model also means that commercial law lacks general principles and does not exist as an independent field of law. Whereas Code civil contained provisions of general application, Code de commerce provided for exceptions applicable to merchants (commerçant) or to particular commercial contracts. In France, the general principles are based on Code civil rather than Code de commerce. In Germany, the general principles are based on the 1896 BGB, which codified the general private law, rather than the 1897 HGB, which provides for exceptions applicable to merchants (Kaufmann).[28] In both countries, one can distinguish between commercial law in the narrow sense (questions regulated by the commercial code) and in a broad sense (commercial questions regulated outside the commercial code). The legal developments in France and Germany were representative of what happened in continental Europe.[29]

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[27] Trakman LE, *op cit*, p 25.

[28] This can be contrasted with the earlier 1861 Allgemeines Deutsches Handelsgesetzbuch (ADHGB) of the German Federation. As the ADHGB was not complemented by a general private law code, it regulated many questions belonging to general private law.

[29] Trakman LE, *op cit*, p 25.

In England, the use of medieval lex mercatoria was restricted in various ways. Commercial practices had to comply with rules of positive law.[30] Lord Mansfield is regarded as the founder of English commercial law.[31] He pioneered the reception into English law of the practices of continental and British merchants (international lex mercatoria). However, there is no commercial code in England. The concept of commercial law can therefore be used in an open and flexible way.[32] The history of commercial law may have influenced even recent views on its role.[33]

3.4 Doctrinal Analysis

Judging by commercial law textbooks, commercial law research is predominately *doctrinal*. It is about *interpreting* certain parts of law. One can distinguish between national commercial law, private international commercial law, lex mercatoria, public international commercial law, transnational commercial law, and EU law.

National commercial law. Most commercial law research is about interpreting national law. Such doctrinal research does not help to develop a global commercial law theory.

First, the choice of the legal issues that fall within what is regarded as commercial law is jurisdiction-specific and depends to a large extent on convention. There is thus a difference between the doctrinal approach (which is jurisdiction-specific and not functional) and the comparative approach (which is functional and not jurisdiction-specific to the same extent, see Sect. 3.5).

In countries that have adopted a particular commercial law code, the scope of commercial law in the narrow sense depends on the scope of the code (Code de commerce, Handelsgesetzbuch, the Uniform Commercial Code, and so forth). This also means that commercial law discourse can be jurisdiction-specific.

For example, the HGB contains rules on business forms, financial information (bookkeeping, accounting, auditing), and commercial contracts. The U.C.C. does not contain rules on business forms and financial information, but does focus more on financial contracts. From a functional perspective, HGB and the U.C.C. are not comparable (Table 3.1).

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[30] *Ibid*, p 27.

[31] Especially for his work in cases such as: Pillans & Rose v Van Mierop & Hopkins [1765] 3 Burr 1663; and Carter v Boehm [1766] 3 Burr 1905. Lord Mansfield was born William Murray in Scotland in 1705.

[32] See Goode RM, Commercial Law in the Next Millenium. The Hamlyn Lectures. Forty-ninth Series. Sweet & Maxwell, London (1998) p 8.

[33] See Goode RM, The Wilfred Fullagar Memorial Lecture: The Codification of Commercial Law, Monash U L R 14 (1988) p 148 (arguing that the primary function of commercial law is "to accommodate the legitimate practices and expectations of the business community in relation to their commercial dealings").

Table 3.1 The HGB and the U.C.C.

HGB	U.C.C.
First book *Merchants*, second book *Business Entities and the Silent Company,* third book *Accounts*, fourth book *Commercial Contracts*, fifth book *Sea Trade*	Article 1 *General Provisions*, Article 2 *Sales*, Article 2A *Leases*, Article 3 *Negotiable Instruments*, Article 4 *Bank Deposit*, Article 4A *Funds Transfers*, Article 5 *Letters of Credit*, Article 6 *Bulk Transfers and Bulk Sales*. Article 7 *Warehouse Receipts, Bills of Lading and Other Documents of Title*, Article 8 *Investment Securities*, Article 9 *Secured Transactions*

Of course, commercial law discourse can spread across borders. The commercial law discourse of one country can be adopted in another country, and the classification of certain legal issues as commercial law issues in one country can become a legal transplant abroad. For example, the HGB has influenced commercial law discourse in countries that belong to the German legal family and in the Nordic countries.[34]

But if commercial law discourse is jurisdiction-specific and commercial law is not really the same thing in different jurisdiction, it is difficult to develop a general commercial law theory applicable in all jurisdictions.

Second, national conventions may prevent the development of jurisdiction-specific commercial law theories.

This can be illustrated with the French–German model. According to this model, commercial law in the narrow sense consists of "exceptions" to the regulation of dealings in general. As a result, it has virtually no general principles of its own. If it has such principles, they can relate to two things. They can relate to the scope of the commercial law exceptions, and define terms such as "merchant" (commerçant, Kaufmann), "commercial activity" (Gewerbebetrieb), "undertaking" (Unternehmen), and "consumer" (Verbraucher).[35] In addition, each particular

[34] Mäntysaari P, En teoretisk referensram för handelsrätten, TfR 2011.

[35] According to the French-German model, commercial law is basically defined as rules applicable to certain parties (according to German terminology, it as a "subject-based system") rather than rules applicable to certain categories of transactions generally (it is not an "object-based system"). For example, the German discussion about the definition of commercial law has focused on whether the commercial law exceptions should apply just to "merchants" or even to the wider category of "undertakings". See Zöllner W, Wovon handelt das Handelsrecht? ZGR 1/1983 pp 82–91 (generally). According to traditionalists, commercial law is "particular private law for merchants" ("Sonderprivatrecht für Kaufleute"). For the traditional view, see Canaris CW, Handelsrecht, 24. Auflage. C.H. Beck, München (2006). Some define commercial law as "external private law for undertakings" ("Außenprivatrecht der Unternehmen"). See Schmidt K, Vom Handelsrecht zum Unternehmens-Privatrecht? JuS 1985 pp 249–257; Schmidt K, Zerfällt das Handelsgesetzbuch? Eine Gedankenskizz zur Zukunft des Vierten Buchs. In: Berger KP, Borges G, Herrmann H, Schlüter A, Wackerbarth U (eds), Zivil- und Wirtschaftsrecht im Europäischen und Globalen Kontext / Private and Commercial Law in a European and Global Context: Festschrift für Norbert Horn zum 70. Geburtstag. de Gruyter Recht, Berlin (2006). See already

sector of commercial law can have its own set of general principles not shared by other sectors.

This means that commercial law in the narrow sense is not regarded as an independent branch of law. In the broad sense, it consists of various independent branches of law each with its own set of public policy objectives, sector-specific regulation, general principles, and terms. They are complemented by the general principles applied to all private-law or public-law transactions.

In common law countries, attempts have been made to define other kinds of general principles for commercial law. For example, Goode has proposed the following principles of commercial law: party autonomy; predictability; flexibility; good faith; the encouragement of self-help; the facilitation of security interests; the protection of vested interests; and the protection of innocent third parties.[36] However, such principles do not seem to differ from the legal principles that apply to private-law or public-law transactions in general.[37]

One can therefore say that the emergence of a commercial law theory has, in particular in continental Europe, been hampered by two things: the almost exclusive focus on rules applied by a state's courts and the notion that commercial law consists of "exceptions" applicable to certain parties. That notion was first adopted two centuries ago and has clearly become outdated.[38]

Private international commercial law. The doctrinal analysis of commercial law is not limited to the substantive provisions of a certain country's laws. Textbooks in international commercial law always discuss the matter of governing law and related questions such as prorogation agreements (choice-of-law clauses), the international jurisdiction of courts, and dispute resolution in international contracts. Compared with the interpretation of national commercial law, foreign materials and international materials such as international conventions and treaties play a more important role in the process of interpreting rules of private international commercial law.

Modern lex mercatoria. In addition to research in private international commercial law, there is a vast amount of research in what is called *modern lex mercatoria*

Raisch P, Geschichtliche Voraussetzungen, dogmatische Grundlagen und Sinnwandlung des Handelsrechts. C.F. Müller, Karlsruhe (1965); Raisch P, Die rechtsdogmatische Bedeutung der Abgrenzung von Handelsrecht und bürgerlichem Recht, JuS 1967 pp 533–542. In 2005, the latter view was adopted in Austria when the Austrian Handelsgesetzbuch (HGB) was amended and renamed Unternehmensgesetzbuch (UGB, Business Enterprise Code).

[36] Goode RM, The Wilfred Fullagar Memorial Lecture: The Codification of Commercial Law, Monash U L R 14 (1988) pp 135–157.

[37] Compare DCFR, Principles.

[38] See Zöllner W, Wovon handelt das Handelsrecht? ZGR 1/1983 pp 82–91; Baumann H, Strukturfragen des Handelsrechts, AcP 184 (1984) pp 45–66; Neuner J, Handelsrecht — Handelsgesetz — Grundgesetz, ZHR 157 (1993) pp 243–290.

(the third stage of lex mercatoria). Schmitthoff and Goldman are regarded as the founding fathers of lex mercatoria as a modern area of law.[39]

Modern lex mercatoria is to some extent codified. For example, the International Chamber of Commerce (ICC) has played an important part in the codification and unification of customs and usages in international trade and commerce: most commercial lawyers have used INCOTERMS, the Uniform Customs and Practices for Documentary Credits, and the Uniform Rules for Demand Guarantees in addition to other codified practices or model terms published by the ICC. There is also what is known as "creeping codification" through the drafting of lists of rules and principles of lex mercatoria.[40]

However, there is no international consensus on what modern lex mercatoria means, or how it should be defined, or whether it really exists in the first place.[41]

Most tend to agree on what lex mercatoria is not: It is not national legislation.[42] According to the least ambitious definition, lex mercatoria consists of usages and settled expectations that can be taken into account when interpreting contracts under the governing law. However, this definition would leave the concept of lex mercatoria rather meaningless, as any usages and expectations of the parties can be taken into account when interpreting contracts (in particular in civil law countries which do not apply the parol evidence rule).[43] According to a more ambitious view, it is a system of principles and rules generally accepted in international commerce, or even an autonomous legal order, created by parties involved in international commercial relations.

For the purposes of this book, it is neither necessary nor meaningful to discuss the possible definitions of this vague concept in more detail.[44] It suffices to say that lex mercatoria can be understood as certain kinds of *external rules* (state or non-state) that apply to contracts.

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[39] Schmitthoff CM, The Unification of the Law of International Trade, JBL 1968 pp 105–119; Goldman B, Lex Mercatoria, Forum Internationale 3 (1983) pp 3–7. See also Hatzimihail NE, The Many Lives—And Faces—of Lex Mercatoria: An Essay on the Genealogy of International Business Law, Law & Contemp Probs 71 (2008) pp 169–190.

[40] Berger KP, International Economic Arbitration. Studies in Transnational Economic Law 9. Kluwer Law and Taxation Publishers, Deventer (1993) p 543; Berger KP, The Creeping Codification of the Lex Mercatoria. Kluwer Law International, The Hague (1999); Lando O, The Harmonization of European Contract Law through a Restatement of Principles. Centre for the Advanced Study of European and Comparative Law, University of Oxford (1997) p 20.

[41] See, in particular, Mustill MJ, The New Lex Mercatoria: The First Twenty-Five Years. In: Bos M, Brownlie I (eds), Liber Amicorum for the Rt. Hon. Lord Wilberforce, PC, CMG, OBE, QC. Clarendon Press, Oxford (1987). Published also as Mustill MJ, Arbitration International 4 (1988) pp 86–119.

[42] See Ramberg J, International Commercial Transactions. ICC, Kluwer Law International, Norstedts Juridik Ab, Stockholm (1998) p 20.

[43] See Articles 8 and 9 of the CISG.

[44] There is a vast amount of literature. See, for example, Michaels R, The True Lex Mercatoria: Law Beyond the State, Ind J Global Legal Stud 14:2 (2007) pp 447–468.

Public international commercial law. Many international organisations have played an important role in the development of international treaties and conventions in the area of commercial law. The interpretation of such treaties and conventions is a wide research area. Typically, public international law has its own methodology for the interpretation of international treaties and conventions. The principles of international treaty law are embodied in the 1969 Vienna Convention on the Law of Treaties. International trade law, Law of the Sea, international aviation law, and international environmental law are some of the branches of public international law.

EU Law. Finally, one should mention EU Law. The doctrinal analysis of the regulation of commercial transactions under Community law is an important area of commercial law. Although the Community Treaties are basically treaties under public international law, they create a new legal system, and the European Court of Justice has emphasised that they are not necessarily interpreted in the same way as ordinary treaties.[45] Some provisions of Community law have direct effect in the Member States.[46] Furthermore, the interpretation of primary and secondary Community law influences the interpretation of Member States' laws.[47]

3.5 Comparative Law and the Approximation of Laws

The third main research approach is that of comparative law and the approximation of laws. The comparative aspects of commercial law, the convergence of commercial laws, and the analysis of national provisions of law are closely connected in modern commercial law research. Modern commercial law research is increasingly comparative and functional rather than limited to the legal sources of just one country.[48]

Comparative law. One can distinguish between comparative law in the narrow and broad sense. Both remained rare for a long time, although comparative law does have long roots.[49]

In the broad sense, it is possible to take the contents of foreign law into account without applying the comparative legal method as such.[50] Foreign law is often

[45] See Case 270/80 Polydor [1982] ECR 329; Case 104/81 Kupferberg [1982] ECR 3641, paragraphs 28–31.

[46] Case 26/62 Van Gend en Loos [1963] ECR 1.

[47] See Case C-106/89 Marleasing [1991] ECR I–4135.

[48] Eidenmüller H, Forschungsperspektiven im Unternehmensrecht, ZGR 4/2007 p 486; Merkt H, Die Zukunft der privatrechtlichen Forschung im Unternehmens- und Kapitalmarktrecht, ZGR 4/2007 pp 540–541.

[49] See Hug W, The History of Comparative Law, Harv L Rev 45 (1932) pp 1027–1070.

[50] An early example of this approach in international law is Grotius H, De jure belli ac pacis libri tres (1625).

taken into account in the context of legal dogmatics or national rule-making for the purpose of improving local law.[51]

In the narrow sense, comparative law is a research area with its own methodology. Comparative law in the narrow sense is a relatively late phenomenon. It started to flourish in continental Europe in the 1920s. Lambert and Rabel belong to its pioneers.[52] In the field of commercial law, the first major comparative study was probably Rabel (1936 and 1957–1958).[53] European integration, Community law, and the approximation of Member States' laws have brought comparative aspects to mainstream commercial law research.[54]

The comparative legal method. One can distinguish between micro-comparison and macro-comparison in the field of traditional comparative law. In micro-comparison, the *functional method* is the mainstream legal method.[55] The purpose of the functional method is simply to facilitate the comparison of comparable things. It means the comparison of sets of all legal things that share the same chosen function. The functional method is not suitable for macro-comparison.

Comparative empirical study of law. Traditional comparative law is complemented by the comparative *empirical* study of law. Unlike the functional method of traditional comparative law that tries to include all legal factors that

[51] Kadner Graziano T, Die Europäisierung der juristischen Perspektive und der vergleichenden Methode – Fallstudien, ZVglRWiss 106 (2007) pp 248–249: "Seit Inkrafttreten der großen Kodifikationen im 19. und frühen 20. Jahrhundert diente der Blick auf ausländische Rechtsordnungen in erster Linien dem Zweck, Lücken der nationalen Kodifikationen zu schließen, Anregungen für die Auslegung des eigenen Rechts zu erhalten oder Defizite dieses Rechts zu beheben. Ausgangs- und Bezugspunkt für den Vergleich war jeweils das eigene nationale Recht, das auf diese Weise verbessert oder dessen Lücken geschlossen werden sollten."

[52] In 1920, Lambert founded the Institut de droit compare in Lyon. L'Académie internationale de droit comparé (the International Academy of Comparative law) was founded in 1924. In 1926, Rabel founded the Kaiser-Wilhelm-Institut für ausländisches und internationales Privatrecht in Berlin, now the Max Planck Institute for Comparative and International Private Law in Hamburg. In the same year, L'Institut international pour l'unification du droit privé (Unidroit, the International Institute for the Unification of Private Law) was set up in Rome as an auxiliary organ of the League of Nations. In 1931, Lévy-Ullmann and Capitant founded the Institut de droit compare of the University of Paris.

[53] Rabel E, Das Recht des Warenkaufs. Eine rechtsvergleichende Darstellung. Band I–II. de Gruyter, Berlin and Leipzig (1936) / Mohr, Tübingen (1957–1958). One can also mention Almén T, Das skandinavische Kaufrecht. Carl Winters Universitätsbuchhandlung, Heidelberg (1922).

[54] Kadner Graziano T, Die Europäisierung der juristischen Perspektive und der vergleichenden Methode – Fallstudien, ZVglRWiss 106 (2007) p 249: "Bei allen auf Europäisierung des Privatrechts gerichteten Initiativen kommt der rechtsvergleichenden Methode eine Schlüsselrolle zu."

[55] Zweigert K, Kötz H, Einführung in die Rechtsvergleichung auf dem Gebiete des Privatrechts, 3. Auflage. Mohr Siebeck, Tübingen (1996) is a standard work on comparative law and the functional method. For the functional method, see also Husa J, Farewell to Functionalism or Methodological Tolerance? RabelsZ 67 (2003) pp 419–447; De Coninck J, The Functional Method of Comparative Law: Quo Vadis? RabelsZ 74 (2010) pp 318–350.

share the same function, the empirical study of law means that legal phenomena are reduced to a small number of variables that can be given a numeric value.[56] It can also take the form of qualitative comparative analysis (QCA).[57]

Related concepts include law and economics, law and finance, and legal origins.[58] (a) The comparative empirical study of law and *law and economics* share the use of quantitative research methods. The difference is that law and economics focuses on the overall social welfare and does not need to compare different jurisdictions. (b) There is a bigger difference between the comparative empirical study of law and *law and finance*. Whereas the former means the use of particular numerical and statistical methods, law and finance is a research area. The best-known study in the area of law and finance is La Porta et al (1998).[59] (c) The *legal origins* approach is in the intersection point of comparative empirical study of law and law and finance.[60] There is a stream of research in law and finance explaining differences between the financial markets of different countries by the presumed quality of each country's legal system. In other words, "legal origins matter". In corporate governance research, this approach can suffer from a common law bias.[61]

Attempts to increase convergence. As indicated above, the comparative aspects of commercial law and attempts to increase the convergence of commercial laws are closely related. The laws of different countries are often compared in order to propose better rules or common rules, or to explain why divergence is the better alternative and why country A should not adopt the rules or concepts of country B.

[56] Lieder J, Legal Origins und empirische Rechtsvergleichung. Zur Bedeutung des Rechts für die Entwicklung von Kapitalmärkten und Corporate-Governance-Strukturen, ZVglRWiss 109 (2010) p 228.

[57] Herala N, Use of Qualitative Comparative Analysis (QCA) in Comparative Law. Acta Wasaensia 124, Universitas Wasaensis, Vaasa (2004) p 17: "Qualitative comparative analysis, or QCA, combines two ways of simplifying complexity. It both examines similarities and differences between a limited number of cases, and it inspects relations between variables (Ragin 1987:XIII). QCA could be described as a variable-oriented qualitative comparative method." See also Ragin CC, The Comparative Method: Moving Beyond Qualitative and Quantitative Strategies. U Cal P, Berkeley Los Angeles London (1987).

[58] Lieder J, Legal Origins und empirische Rechtsvergleichung. Zur Bedeutung des Rechts für die Entwicklung von Kapitalmärkten und Corporate-Governance-Strukturen, ZVglRWiss 109 (2010) pp 228–230; Eidenmüller H, Forschungsperspektiven im Unternehmensrecht, ZGR 4/2007 pp 486–495.

[59] La Porta R, Lopez-de-Silanes F, Shleifer A, Vishny RW, Law and Finance, J Pol Econ 106 (1998) pp 1113–1155. See also Djankov S, La Porta R, Lopez-de-Silanes F, Shleifer A, The law and economics of self-dealing, J Fin Econ 88 (2008) pp 430–465; Djankov S, Glaeser E, La Porta R, Lopez-de-Silanes F, Shleifer A, The New Comparative Economics, J Comp Econ 31 (2003) pp 595–619.

[60] Lieder J, Legal Origins und empirische Rechtsvergleichung. Zur Bedeutung des Rechts für die Entwicklung von Kapitalmärkten und Corporate-Governance-Strukturen, ZVglRWiss 109 (2010) pp 229–230.

[61] See *ibid*, pp 216–264.

There are constraints on the adoption of foreign rules, practices and other institutions. For example, foreign rules could become "legal irritants" because of complex linkages between institutions.[62] This contributes to path dependency.

However, rules applicable in one country are often adopted or used as a model in another country (reception of laws,[63] legal transplants[64]). This is customary in countries belonging to the same legal family (for example, the French, German, common law, or Nordic legal families). Depending on the area of law, rules applicable in one country may be used as a model even globally: "The reception of foreign legal institutions is not a matter of nationality, but of usefulness and need. No one bothers to fetch a thing from afar when he has one as good or better at home, but only a fool would refuse quinine just because it didn't grow in his back garden."[65] For example, Anglo-American rules and concepts have been transplanted into the laws of many countries in recent years, and many "legal platforms" are based on them.[66]

In addition, there can be common rules at the international level (international conventions, international model rules) or regional level (for example, Community law and legal co-operation between the Nordic countries). International attempts to unify commercial laws were first successful in the area of transport law, sale of goods, and commercial arbitration. There is now a large number of international conventions regulating commercial transactions.

In the European Union, the process of creating the internal market has required the approximation of selected parts of the Member States' laws. The acquis communautaire contains a vast amount of rules leading to the convergence of the regulation of business. Community law is particularly important in matters relating to access to markets, competition, consumer protection, intellectual property, labour law, and the integration of capital markets (financial reporting, financial disclosure obligations, corporate governance).

Transnational commercial law. Transnational commercial law is a broad concept related to the convergence of laws.[67] It means the body of law that governs

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[62] Aoki M, Toward a Comparative Institutional Analysis. The MIT Press, Cambridge, Mass. (2001) p 17.

[63] See Watson A, Aspects of Reception of Law, Am J Comp L 44 (1996) pp 335–351.

[64] Watson A, Legal Transplants: An Approach to Comparative Law. Scottish Academic Press, Edinburgh (1974); Watson A, Legal Transplants and European Private Law, 4.4 ELECTRONIC JOURNAL OF COMPARATIVE LAW, http://www.ejcl.org/ejcl/44/44–2.html (2000).

[65] von Jhering R, Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung. Breitkopf & Härtel, Leipzig (1852–1865). Cited in Zweigert K, Kötz H, Einführung in die Rechtsvergleichung auf dem Gebiete des Privatrechts, 3. Auflage. Mohr Siebeck, Tübingen (1996) § 2 II. Translation from Xanthaki H, Legal Transplants in Legislation: Defusing the Trap, ICLQ 57 (2008) p 661.

[66] For "legal platforms", see Mäntysaari P, The Law of Corporate Finance. Volume II. Springer, Berlin Heidelberg (2010) pp 9–12.

[67] For the concept of transnational law, see Jessup PC, Transnational Law. Yale U P, New Haven (1956).

international commercial transactions and results from the convergence of national laws. In other words, it is law that is common to a number of jurisdictions because of international conventions, the adoption of uniform rules, or lex mercatoria.

3.6 Philosophy of Law (Jurisprudence)

Lex mercatoria, the existence of different categories of overlapping regulatory systems, the harmonisation of laws, and the problem of what to compare as functional equivalents in comparative law have given rise to two particular questions in the area of *philosophy of law* (jurisprudence). The first question belongs to *analytic* jurisprudence: What is law in this context? The second is a question of *normative* jurisprudence: What are the jurisprudential foundations of commercial law, or on what grounds should one regulate commercial phenomena?

Law. There is a large amount of literature particularly in the areas of comparative law and transnational commercial law on the nature of "law".[68] However, the nature of "law" has become a relevant issue even in mainstream research in private law,[69] and research in corporate and commercial law is no exception.

In comparative law, this question is linked to two things. The first is the functional method. What phenomena should one compare as "legal" phenomena? The second is socio-legal research in "legal pluralism", that is, the existence of overlapping legal systems which apply simultaneously.[70]

As regards substantive corporate and commercial law, the nature of law is a modern issue because of three simultaneous and overlapping trends.[71]

First, states have privatised or outsourced much of the regulation of business. Standard-setting by the FASB, IASB, and the Basel Committee on Banking Supervision are examples of outsourcing required or supported by laws.[72] The widespread use of corporate governance codes and the comply-or-explain principle is an example of flexible industry self-regulation.

Second, states have started to rely on non-traditional ways to adopt rules. For example, the EU uses the Lamfalussy process, a four-level, comitology-based

[68] One can refer to any textbook on comparative law or transnational commercial law.

[69] See also 56 Am J Comp L (2008) pp 527–844 ("Beyond the State – Rethinking Private Law").

[70] See, for example, Teubner G, Substantive and Reflexive Elements in Modern Law, Law & Soc'y Rev 17 (1983) pp 239–285; Teubner G, The Two Faces of Janus: Rethinking Legal Pluralism, Cardozo L Rev 13 (1992) pp 1443–1462; Teubner G, Global Bukowina: Legal Pluralism in the World-Society. In: Teubner G (ed), Global Law Without a State. Aldershot, Dartmouth (1997); de Sousa Santos B, Law: A Map of Misreading. Toward a Postmodern Conception of Law, J L & Soc'y 14 (1987) pp 279–302.

[71] See, for example, Kalss S, Maßgebliche Forschungsfelder in der nächsten Dekade im Bereich des Gesellschafts- und Kapitalmarktrechts, ZGR 4/2007 pp 523–526.

[72] Regulation 1606/2002 (IAS Regulation); Directive 2006/48/EC and Directive 2006/49/EC (the Capital Requirements Directive).

regulatory approach for financial services. Increased reliance on expert bodies (such as the Committee of European Banking Supervisors, the Committee of European Insurance and Occupational Pensions Supervisors, and the Committee of European Securities Regulators[73]) and documents with different normative qualities can raise questions of the nature of law.[74]

Third, there is a trend of pluralisation and internationalisation of sources of law.[75]

The jurisprudential foundations of commercial law. The jurisprudential foundations of corporate and commercial law are another matter. A US scholar wrote that you are likely to receive a blank stare if you ask a law professor about them.[76] There is hardly any literature.

One of the rare attempts to fill the void was to refer vaguely to "efficiency".[77] In the European context, it would nevertheless be wrong to accept "efficiency" as the normative goal for state law.

First, efficiency is too complex as a normative goal.[78] Efficiency is only relative or fictive efficiency as it can only be assessed by reducing complex phenomena to a small number of variables. What should one take into account when assessing efficiency?

Second, it is unclear what the efficiency of commercial law means. Virtually any legal rule can influence the behaviour of firms directly or indirectly in a market economy that upholds the rule of law. The relevant legal framework depends on the commercial context, and there is a vast amount of different commercial contexts. This means that there is a vast amount of relevant combinations of rules forming the legal framework of commercial transactions. Which combination of rules would one take into account when assessing efficiency?

Third, existing regulation of commerce cannot be explained by mathematically rational (Zweckrationalität) "efficiency" arguments alone. In the words of Goode, "the law cannot be concerned solely with economic efficiency as the yardstick by which to measure the success of social goals".[79] For example, the regulation of

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[73] Commission Decisions 2001/527/EC, 2004/5/EC, and 2004/6/EC establishing CESR, CEBS, and CEIOPS, respectively.

[74] Eidenmüller H, Forschungsperspektiven im Unternehmensrecht, ZGR 4/2007 p 488; Kalss S, *op cit*, pp 523–525.

[75] Merkt H, Die Zukunft der privatrechtlichen Forschung im Unternehmens- und Kapitalmarktrecht, ZGR 4/2007 p 533.

[76] Posner EA, Book Review: Kraus, Jody S., and Walt, Steven D., eds., The Jurisprudential Foundations of Corporate and Commercial Law, Ethics 112 (2002) pp 626–628.

[77] Kraus JS, Walt SD, Introduction. In: Kraus JS, Walt SD (eds), *op cit*, p 1: "Efficiency is the dominant paradigm in contemporary corporate and commercial law scholarship. The jurisprudential foundations of corporate and commercial law, then are the foundations of efficiency analysis." For a critique, see Posner EA, *supra*.

[78] See also Kornhauser LA, Constrained Optimization. Corporate Law and the Maximization of Social Welfare. In: Kraus JS, Walt SD (eds), *op cit*, p 89.

[79] Goode RM, Commercial Law in the Next Millenium. The Hamlyn Lectures. Forty-ninth Series. Sweet & Maxwell, London (1998) p 29.

commerce has various and seemingly contradictory objectives in EU law. Most of them deal with what is regarded as reasonable or moral (Wertrationalität). The relative weight of different objectives depends on the context, the interests that regulation seeks to protect, and high-level goals such as sustainability, fairness, and high quality of life.[80] Another example is provided by the Draft Common Frame of Reference (DCFR). The DCFR distinguishes between "underlying principles", which are "all pervasive within the DCFR" and consist of freedom, security, justice, and efficiency, and "overriding principles", which are "of a high political nature".[81]

Fourth, the high-level objective of legal norms is often thought to be facilitating justice as fairness (Rawls 1971).[82]

The jurisprudential foundations of non-state law. The jurisprudential foundations of commercial law raise even more difficult questions in the case of non-state law. For example, they could include the following: "From where could legal rules and arguments derive their legitimacy, if not from the state's authority?"[83]

3.7 Economic Analysis

Doctrinal analysis and economic analysis are the two dominant research approaches in contemporary commercial law scholarship. In Europe, doctrinal analysis prevails. In the US, economic analysis of law has been extremely influential.[84]

Coase[85] and Calabresi[86] are regarded as the pioneers of modern law and economics. Posner (2007)[87] and Cooter and Ulen (2007)[88] can be mentioned as examples of standard textbooks in law and economics. There is also what can be

[80] See Article 2 of the Treaty on European Union and Articles 7–14 of the Treaty on the Functioning of the European Union.

[81] DCFR Intr. 14–16.

[82] Rawls J, A Theory of Justice. Harvard U P, Cambridge, Mass (1971).

[83] Jansen N, Michaels R, Private Law and the State. Comparative Perceptions and Historical Observations, RabelsZ 71 (2007) p 356.

[84] See Posner RA, The Decline of Law as an Autonomous Discipline: 1962–1987, Harv L Rev 100 (1987) pp 761–780; Dau-Schmidt KG, Brun CL, Lost in Translation: The Economic Analysis of Law in the United States and Europe, Colum J Transnat'l L 44 (2006) pp 602–621.

[85] Coase RH, The Problem of Social Cost, J Law Econ 3 (1960) pp 1–44.

[86] Calabresi G, Some Thoughts on Risk Distribution and the Law of Torts, Yale L J 70 (1961) pp 499–553.

[87] Posner RA, Economic Analysis of Law. Seventh Edition. Wolters Kluwer Law & Business, Austin, Texas (2007).

[88] Cooter R, Ulen T, Law and Economics. 5th International Edition. Pearson/Addison-Wesley, Boston, Mass. (2007).

described as a canon of law and economics articles and other works customarily referred to in legal education.[89]

In the economic analysis of commercial law, efficiency concerns predominate. Economic analysis of law is primarily a theory for law-makers.[90] However, a certain legal rule can influence a large number of decisions and different kinds of decisions. It can be difficult to develop a legal rule that is simultaneously efficient in different contexts.[91]

3.8 Preventive or Proactive Law

Finally, one can briefly mention preventive law and proactive law. Preventive law focuses on the prevention of legal risks and disputes.[92] Proactive law tries to promote what is desirable and prevent what is not desirable by doing something in advance.

However, both approaches are problematic. They are not based on theory. Neither do they have ambitions to formulate a theory. Moreover, the objectives of firms do not include the prevention of legal risks and disputes. On the contrary, firms manage risks in the normal course of business by avoiding, transferring, mitigating, or accepting them. To promote what is desirable and prevent what is not desirable is obviously too vague to give firms any guidance. There is nevertheless a Nordic School of Proactive Law, and the European Economic and Social Committee has given an opinion supporting the proactive law approach.[93]

3.9 The Reasons for the Absence of a General Theory of Commercial Law

The reasons for the absence of a general theory of commercial law can be summed up as follows: the fact that commercial law research is norm-based; the existence of many jurisdictions each with its own rules; the existence of many areas of law each

[89] See Whaples R, Morris AP, Moorhouse JC, What Should Lawyers Know about Economics? J Legal Educ 48 (1998) pp 120–124; Fleischer H, Grundfragen der ökonomischen Theorie im Gesellschafts- und Kapitalmarktrecht, ZGR 1/2001 pp 1–32.

[90] Eidenmüller H, Effizienz als Rechtsprinzip. Die Einheit der Gesellschaftswissenschaften 90. Mohr Siebeck, Tübingen (2005) p 13.

[91] See Kornhauser LA, Constrained Optimization. Corporate Law and the Maximization of Social Welfare. In: Kraus JS, Walt SD (eds), *op cit*, p 90.

[92] Louis M Brown was first to introduce the approach by this name in Brown LM, Manual of Preventive Law. Prentice-Hall, Inc., New York (1950).

[93] Opinion of the European Economic and Social Committee on ‘The proactive law approach: a further step towards better regulation at EU level’ (2009/C 175/05).

with its own legislative objectives; the existence of various research approaches each with its own imported research methodologies; and tradition.

Legal rules. If the starting point is rules applied and interpreted by the court, it becomes impossible to develop a general commercial law theory. There cannot be a ”norm-based” theory of commercial law, because there are too many rules influencing the behaviour of firms.

Many areas of law. Furthermore, each traditional branch of commercial law is governed by its own rules, and rules belonging to different branches of commercial law are typically designed to further different public policy objectives. For example, one can easily see that rules governing consumer sales, company law matters, intellectual property, competition, international banking, electronic commerce, and business taxation can further very different legislative objectives. It can be difficult to find meaningful common denominators for all such rules even in just one jurisdiction.[94] The traditional branches of commercial law are likely to drift apart even more as the amount and sophistication of regulation increases (the legislator fine-tunes its sector-specific public policy objectives and adopts more sector-specific rules).

Many jurisdictions. It is even more difficult to design a norm-based commercial law theory that would make sense in all countries. The “bottom up” approach (inductive reasoning) would not work on a global scale in norm-based research, because each jurisdiction has its own rules and public policy objectives. The “top-down” approach (deductive reasoning) would not work, because there is no generally accepted global definition of commercial law and each jurisdiction has its own classification of rules as belonging to commercial law or other areas of law.

Research approaches. In practice, the path-dependency of commercial law research has contributed to the fact that the existing research approaches have been perceived as sufficient. Obviously, a scholar happy with one of the research approaches (and one of the general research methodologies imported from other areas of law or social sciences) does not simultaneously need any competing research approach (or research methodology) designed for commercial law in particular. Indeed, there is a vast amount of research in the area of commercial law although there is no particular generally accepted theory of commercial law.

[94] Compare Basedow J, The State’s Private Law and the Economy–Commercial Law as an Amalgam of Public and Private Rule-Making, Am J Comp L 56 (2008) pp 714–718 arguing that state [commercial] law has the following functions: the provision of dispositive legal rules; assignment of property rights; protecting the market; and compensation for market failures. However, the functions listed by Basedow do not seem to explain the regulation of company law, tax law, and labour law matters sufficiently, although matters belonging to such areas of law are very important for commercial enterprises.

3.10 The Main Failings of the Mainstream Approaches

The mainstream research approaches are nevertheless inadequate. Some of their failings are obvious. First, norm-based research approaches have been unable to *define* commercial law, because there is a vast amount of rules applicable to firms belonging to various branches of law.[95] Second, norm-based approaches have been unable to *explain* on what grounds certain topics should fall within its scope. Third, focusing on legal rules adopted by external regulators such as the state for a large number of transactions has meant that the mainstream approaches have not been effective in explaining the *behaviour of firms* or giving an individual firm *guidance* about what to do in a particular situation.[96] Fourth, focusing on legal rules has made the mainstream approaches very *jurisdiction-specific*. Generally, one could say that the "strictly legal point of view"[97] has been too strict.

[95] See Goode RM, Commercial Law in the Next Millenium. The Hamlyn Lectures. Forty-ninth Series. Sweet & Maxwell, London (1998) p 8.

[96] See, for example, Eidenmüller H, Forschungsperspektiven im Unternehmensrecht, ZGR 4/2007 pp 484–499 in which the only information needs that seemed to matter were the information needs of the legislator.

[97] See, for example, Ernst W, Gelehrtes Recht – Die Jurisprudenz aus der Sicht des Zivilrechtslehrers. In: Engel C, Schön W (eds), *op cit*, pp 30–31.