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CHAPTER 1

Defining the Subject Matter

'Transnational commercial law' as a term is not self-explanatory. It has not yet become a technical term in legal scholarship and practice. This first chapter therefore explains what the term means and what the subject matter of this book comprises.

1.1 Terminology

1.1.1 Transnational Research in Law and Other Disciplines

The term 'transnational' is used in connection with many different branches of the law as well as by other disciplines, such as sociology, philosophy and politics. Each of these disciplines seeks to provide answers to questions generally arising in our 'globalised world'. Enquiries range from general questions of justice in the area of poverty, human rights and the situation of individuals to political interaction among governments and international organisations, both state and non-governmental, and general enquiries into legal theories and the philosophical origins of the law. The expression 'transnational law' is used in connection with contract law and adjudication but also with public international law, corporate law and regulation.[1] Perhaps one of the most active enquiries into transnational contexts has been made in connection with transnational corporate governance.[2] This is to be understood in a variety of contexts: legal, organisational and political. The United Nations entertained a

[1] See, for instance, Yannis Papadopoulos, 'The Challenge of Transnational Private Governance: Evaluating Authorization, Representation, and Accountability' (2013) LIEPP Working Paper 21. http://www.sciencespo.fr/liepp/sites/sciencespo.fr.liepp/files/WP8.pdf; Michael Zürn, André Nollkaemper and Randy Peerenboom (eds), *Rule of Law Dynamics: In an Era of International and Transnational Governance* (CUP 2014).

[2] See, for instance, Marie-Laure Djelic and Kerstin Sahlin-Andersson (eds), *Transnational Governance: Institutional Dynamics of Regulation* (CUP 2008); Mark Fenwick, Steven Van Uytsel and Stefan Wrbka (eds), *Networked Governance, Transnational Business and the Law* (Springer 2014); Bastiaan Van Apeldoorn, Andreas Nölke and Henk Overbeek, 'The Transnational Political Economy of Corporate Governance Regulation: A Research Outline' (2003) *Working Papers Political Science* 5 <http://www.fsw.vu.nl/en/Images/The_transnational_political_economy_of_corporate_governance_regulation_a_research_outline_tcm250-42724.pdf>; Peer Zumbansen, 'Neither "Public" nor "Private", "National" nor "International": Transnational Corporate Governance from a Legal Pluralist Perspective' (2010) 6 *CLPE Research Paper Series* 5.

specialised research unit on this issue endorsing the expression 'transnational corporations'.[3]

1.1.2 Transnational, International, Global

The question arises what sets the term 'transnational' apart from the more traditional terms: 'international' or 'global'? Authors give different explanations for their choosing of 'transnational'. In the context of this book, the term 'transnational commercial law' is chosen to distinguish the subject matter from that of international commercial law. The term 'international' is understood as denoting the interaction of governments on a diplomatic and intergovernmental level.[4] The formation of the United Nations, for example, was done by state governments agreeing and signing a treaty, the UN Charter.[5] In this way, a great number of international organisations, such as the World Trade Organisation (WTO) and the European Union (EU), have come into existence, as have an even greater number of international treaties forming part of international law. International law is therefore traditionally concerned with the law applicable to states and their diplomatic and legal interactions and obligations and of course the entirety of written and unwritten laws that we call the law of the people or more technically public international law.[6] While it is accepted that not only states but also individuals can be subjects of international law,[7] many are concerned that this traditional classification of legal debate does not adequately reflect the complex realities of our globalised world. Globalisation is perceived as a result of a growing means of communication, travel and interaction not only on the level of governments but also among citizens and corporate entities directly, without the permission or facilitation of

[3] Khalil A. Hamdani and Lorraine Ruffing (eds), *United Nations Centre on Transnational Corporations: Corporate Conduct and the Public Interest* (Routledge 2015). The United Nations Conference on Trade and Development still publish their journal *Transnational Corporations.*

[4] See Malcolm N. Shaw, *International Law* (7th edn, CUP 2014) 1; James Crawford, *Brownlie's Principles of Public International Law* (8th edn, OUP 2012) 115 et seq; Jan Klabbers, *International Law* (CUP 2013) 67 et seq.

[5] The Charter of the United Nations, signed in New York on 26 June 1945. Text available at http://www.un.org/en/charter-united-nations/.

[6] See Jan Klabbers (ed.), *International Law* (CUP 2013) 3.

[7] For instance, they are the subjects of substantive rights conferred by the UN Human Rights Convention, the European Convention on Human Rights, diplomatic protection or treaties such as modern Double Taxation Conventions acknowledging the interest of the individual in the proper application (see Mads Andenas, 'Reassertion and Transformation: From Fragmentation to Convergence in International Law' (2015) 46(3) *Georgetown Journal* 685, 713; Georgio Gaja, 'The Position of Individuals in International Law: An ILC Perspective' (2010) 21(1) *European Journal of International Law* 11; Maren Heidemann, 'Comparative Interpretation Standards in Uniform International Law, Comparative Sciences: Interdisciplinary Approaches' in Nikolay Popov and Alexander W. Wiseman (eds) *Emerald Group Publishing Limited* (2015) 13 et seq), although they lack procedural rights in the form of their own legal standing as they have in European Union law in a limited form (see Paul Craig and Grainne De Burca, *EU Law: Text, Cases, and Materials* (5th edn, OUP 2011) ch. 14). See also ch. 13.

states and governments. Scholars and officials have therefore adopted the term 'transnational' to indicate that their subject matter reaches across national boundaries but does not necessarily involve the interactions of states and governments. In the case of corporations, in addition to the expression 'multinational', the term 'transnational' points to the reach of activity of a corporation rather than to its ownership. Various disciplines study the implications of this transnational but not necessarily global trading and acting. Topics of study range widely, including questions of how to structure and manage transnational corporations internally, how to regulate them in terms of benefiting from their trade successes as well as enforcing a public market order against them, how to tax them and how to protect private individuals, employees, land owners and victims of accidents from the results of their actions.[8] Viewpoints can include sociological phenomena as well as historical, political, economic or legal developments and analyses. One central observation made by most transnational researchers is that, while states act within the confines of their territorial boundaries and with the instruments of traditional international law, the problems often escape this 'toolbox'. Therefore, alternative transnational instruments are developed. In the field of law, this leads to the observation of law that is not made within the nation states and by national legislatures but by organisations and private lawmakers, which either span across national boundaries or effectively reach a transnational sphere of influence.

1.2 The Transformation of Societies and the Formation of National Law

Closely related to this observation is the idea of transnational societies or communities that exist beyond state entities and do not identify themselves with such national origins. Examples are 'cyber communities', users of social media networks, and also international traders. Jan Dalhuisen describes the latter phenomenon in his seminal three-part treatise on transnational commercial law.[9] From this description of law and societies beyond state territories arises a corresponding concern on the part of state legislatures and their representatives. As Dalhuisen has pointed out on numerous occasions,[10] the doctrinal foundations of our present legal system, and I would submit certainly all of our European societies as a whole, lie in the mid nineteenth century and in the

[8] For more on this, see ch. 10.

[9] Jan H. Dalhuisen, *Dalhuisen on Transnational Comparative, Commercial, Financial and Trade Law, Volume 1: Introduction – the New Lex Mercatoria and Its Sources* (5th edn, Hart 2013) 220 et seq. He emphasises the importance of 'flows in goods, services, information, technology, and money', which necessitate transnational commercial law rather than the above-mentioned potentially national communities, *Dalhuisen on Transnational Comparative, Commercial, Financial and Trade Law, Volume 1* (6th edn, Hart 2016) 353, 355.

[10] See, for instance, Jan H. Dalhuisen, 'Custom and Its Revival in Transnational Law' (2008) 18(1) *Duke Journal of Comparative and International Law* 339; Jan H. Dalhuisen, 'The Relevance of the Academic Model for the Modern Lex Mercatoria' (2012) *Opinio Iuris* <http://opiniojuris.org/2012/04/05/the-relevance-of-the-academic-model-for-the-modern-lex-mercatoria/>.

monarchic states that we then had. It was then and there that the idea of nation state and subsequently nationalism was formed and exacerbated. We are reluctant to think further back in history and revisit alternative practice of statehood and government or even governance which tolerated non-territorial orders of communities and societies and accepted different forms of personal allegiance on the part of individuals towards the sovereign of any given territorial entity.

1.2.1 The Role of Merchants in Political and Legal History

It was this earlier practice that enabled the occurrence of merchant communities that settled in the territory of one country and followed their own set of rules, even entertaining their own adjudication, as did the merchants of the medieval Hanseatic League[11] or, under different circumstances, the East India Company of the seventeenth century. The arrival of nationalism coincided with the European political liberalisation and unification movements of the nineteenth century and so led to Roman law, the so-called ius commune, slipping away into oblivion. The residual and revived[12] Roman law had been used across Europe as a fallback rule to complement highly fragmented state legal orders, especially in private law, and to provide a measure for law reform in particular areas. The use of Latin in scholarship and especially law helped communication across the whole of Europe and its rather numerous sovereign principalities throughout the many centuries after the actual historic Roman usurpers had left. Roman law also helped to establish a worldly legal order assertively alternative to canonic law, the church's legal order. During the age of the nation state, which can be said to have begun with the demise of the Holy Roman Empire of German Nation in 1806, when the Austrian Emperor stepped down from his role and with the end of the Napoleonic wars in 1815, and to have completed its manifestation in 1871, with the eventual formation of the new German Empire under Prussian leadership when the German states began several decades of political and legal struggle for uniform national German codifications, especially in the area of civil and commercial law. National unity was

[11] For a history of the Hanseatic League and trade across Europe, see, for example, Phillippe Dollinger, *The German Hansa* (D. S. Ault and S. H. Steinberg tr., Macmillan 1970); Uwe Ziegler, *Die Hanse: Aufstieg, Blütezeit und Niedergang der ersten europäischen Wirtschaftsgemeinschaft* (Fischer Scherz 1996). '... while Germany has quite a literature upon the subject of the Hanseatic League, as indeed is to be expected, for it is upon her soil that it took its origin, there is no work in English with which I am acquainted, which even pretends to embody a history of the League or those portions of its history wherein England has played a more or less prominent part. This I desire to remedy; and it is because I believe that the subject affords a fertile field of investigation, from an English point of view, that I now venture to challenge attention for it.', C. Walford, 'The Operation of the Hanseatic League in England', (Reform & Codification of Laws Association, Nations Representation Conference, 1879) 149.

[12] Roman law was used in the form that was researched and published by the Bolognese 'glossators', scholars at the University of Bologna, Northern Italy, who specialised in the restoration and reformulation of the pandectists' legacy of the historic Roman Empire. Due to the Europe-wide span of this Empire and its legacy of high culture, the authority of this historicised law was silently recognised by most European legislatures; see Franz Wieacker, *A History of Private Law in Europe* Part Five (Clarendon Press 1995) 280 et seq.

an important aim for the revolutionary forces[13] wanting a national parliament and a democratic constitution. Revolutionary France had long succeeded in this endeavour with the creation of the so-called Napoleonic codes, the *Code Civil* and the *Code de Commerce*, two very accomplished and highly successful codifications commissioned by Napoleon himself that were conceived to epitomise truly republican law[14] – so much so that the German states previously occupied by France insisted on retaining this law when they joined the new Federation and later Empire. The political struggle for unity on the European continent that had been preceded by the French Revolution and ensuing Napoleonic occupation had of course left the old European monarchies feeling deeply threatened by this undercurrent of civil unrest that ran through practically all decades of the nineteenth century. Their successful achievement of securing their power by accommodating constitutional changes and modernisation without loosening their grip resulted in what we now know as the unity of law and state. This important doctrine describing the validity and legitimacy of law is based on the premise that law is made exclusively within the formal lawmaking process of a state, this state being modelled on the nation state comprising a nation occupying its territory and exercising exclusive sovereign power within that territory. This also means that law is valid only inside the state territory. One sovereign cannot legally bind another one, so national law must end at the state boundaries. In a wider context, this theory finds a historical basis in the so-called Westphalian model of statehood and sovereignty,[15] which will be dealt with in more detail in Chapters 2 and 3 on lawmaking. In the context of the nineteenth century nation state, it means that the newly established and reorganised powers wished to assert themselves and their sovereignty over both their subjects/inhabitants and their peers by way of their lawmaking powers, taking authority away from the former smaller sovereign states and entities and combining it in the hands of newly formed united and uniformed nation state organs comprising a much bigger people. Thus, Germany, Italy, Spain, Greece and gradually the nations of the Austrian Empire remodelled themselves largely as we know them today, albeit not always within today's territorial boundaries. A desire to follow the rule of law rather than allowing a sovereign prince to act unchecked and arbitrarily is also an important driving force behind this idea of law. Transparency and predictability of the lawmaking process were important cornerstones of reform. At the height of this development, legal positivism[16] and the unity of law and state marginalised previously and still valid concepts of a more universal idea of law and justice.

[13] Violent clashes with governmental forces erupted in many states of the German confederation and in Austria during 1848–49.

[14] The Code Civil expressly established equality before the law for all citizens regardless of their social status, for the first time in history.

[15] See, for instance, Jan Klabbers, *International Law* (CUP 2013) 5; Ernst-Ulrich Petersmann, 'Reforming Multilevel Governance of transnational public goods through Republican constitutionalism? Legal Methodology Problems in International Law' (2017) 12(33) *Asian J. WTO & Int'l Health L & Pol'y* 37.

[16] The idea that only written and formally adopted black letter law is law and should prevail in interpretation methods in courts and scholarship in a rather literal reading.

Expressions of the latter are of course the undisputed existence and observance of customary law and other unwritten forms of law such as the common law of the Anglo-American jurisdictions and the law of the people, or public international law. Dalhuisen speaks of statist (codified and territorial) and non-statist (unwritten and non-territorial) laws to distinguish between the two poles of these different concepts of law.[17]

1.2.2 Law in the New Reality of Nation States in a Globalised World of Trade

Much of the work of transnational legal studies is aimed at revisiting this pre-existing position of legal doctrine and overcoming the limitations in legal thinking[18] that have befallen international scholarship with the advent of the nation state. Since this time, we have created modern societies and states that are built on different parameters. Instead of maintaining law relating to separate social classes based on status and privileges, we insist today on equality before the law as a basic constitutional right and strive to provide equality also in an economic and material sense in the form of maximum welfare for all. The states themselves have continued to exist within their territories but many of the underlying concepts and societal realities have changed. Transnational legal theories seek to analyse the law with a view to providing law for this new type of society and statehood. This is discussed in more detail in Chapters 2 and 3.

Typical problems that our modern societies are facing as a result of technical developments and political liberalisation include questions of liability and attribution of physical and environmental injury and damage as well as expropriation and impact on property and fair taxation.[19] One reason for the perceived injustices and difficulties of resolving these problems by traditional legal

[17] *Dalhuisen on Transnational Comparative, Commercial, Financial and Trade Law: Volume 1* (Hart 2016) 353, 354.

[18] Most recently, Miguel Maduro, Kaarlo Tuori and Suvi Sankari (eds), *Transnational Law: Rethinking European Law and Legal Thinking* (CUP 2016).

[19] The range of examples of these issues is vast, and a detailed description or evaluation is far beyond the scope of this book: from the 1984 chemical accident in Bhopal, India, through many shipping and oil exploration accidents, such the 1989 Exxon Valdez average and the 2010 BP oil rig Deepwater Horizon disaster to the more recent accident of the collapsed Rana Plaza factory building in Dhaka, Bangladesh, in 2013 and countless incidents of 'land grabbing' in Africa and Southern America; we also know a series of corporate cases where victims of asbestos mining and processing battle for adequate compensation. See, for instance, *Adams and Others v Cape Industries Plc. and Another* [1990] Ch. 433 and *David Brian Chandler v Cape Plc* [2012] EWCA Civ 525. 'Fair taxation' is an ongoing concern on an international platform within the OECD but also nationally, with public debate being conducted in the UK in Parliament and in the media regarding the contributions made by global companies like Google, Starbucks and Amazon to the national tax revenue. On the latter issue, see *BBC* article 'Starbucks, Google and Amazon Grilled over Tax Avoidance' *BBC News* (12 November 2012) and Margaret Hodge, 'The New Robber Barons: Margaret Hodge on How Starbucks, Amazon and Goldman Sachs Are Ripping Billions off British Taxpayers…While Our Civil Servants and Tax Chiefs Are Helping Them' *Daily Mail* (10 September 2016). See also ch. 10.

means is the territorial limitation of the national laws. By looking at corporate laws in more detail,[20] it becomes clear that the expression 'multinational company' is misleading in that we will always look at a network of companies and corporate entities which owe their existence exclusively to the law of only one jurisdiction and do not as such span across-borders. They act in a multitude of jurisdictions only in an economical sense by attributing profits according to their ownership and profit distribution agreements rather than according to a direct legal link that often fails to attribute direct liability for unwanted effects of their business activities. Even though the law may not find fault with the acting of individual companies and their representatives, a strong sense of injustice prompts much of the academic enquiry into the nature and implications of cross-border trading, developing the notion of transnational corporate structures and other less formal relationships and acting. The attention is thereby moving away from state and government acting (international relations) towards the behaviour of private actors, natural or legal persons whose actions reach across national boundaries, activities that can be more accurately described as transnational acting. The idea behind this expression is that the origin of one action performed in one place has its effect across (trans-) borders in another place inside another jurisdiction. The expression also allows for the possibility that the effects of those actions may not span the entire globe and may therefore not be global. The object of transnational corporate law would therefore be rules that apply to corporations across-borders[21] (as opposed to national state laws, which do not). Examples are rules made by international organisations such as the Organisation for Economic Co-operation and Development (OECD),[22] which due to the above-described understanding of formal law will often be non-binding sets of rules that corporations adopt on a voluntary basis. Such rules can relate to ethical standards but also to accounting standards or simply to efficient governance. Outside the study of law, observations can focus on de facto developments such as lobbying activities or ways of interacting between corporations and their customers and business partners. These will often be referred to as transnational because they are not referring to government acting and interacting but to the behaviour of private actors across-borders. These observations often lead to suggestions as to how states should and could control and curtail the behaviour of those actors if such behaviour is perceived to be damaging.[23] Transnational regulation would be such a field of enquiry: How can rules be made to apply across national boundaries in order to counteract the negative effects of too much free roaming and libertarian trading?

[20] See ch. 10.

[21] See ch. 10, s. 10.2.2.1.

[22] For instance, the G20/OECD Principles of Corporate Governance, endorsed at the 2015 G20 summit in Antalya; English text accessible at http://www.oecd-ilibrary.org/governance/g20-oecd-principles-of-corporate-governance-2015_9789264236882-en.

[23] See ch. 10, s. 10.5.2.

1.3 Transnational Commercial Law

The specific elements of transnational commercial law arise foremost from the nature of contract law and international trading.

1.3.1 International Trade Law and Commercial Contract Law

Rather than speaking of international commercial or trade law, we call it transnational law because, as explained above, we are looking in particular at legal rules that have effect across national boundaries and therefore provide a uniform source of law. Some of this law has therefore been referred to as uniform law in past decades, which saw the emergence of scholarly and legislative efforts that aimed to provide such law for international trade.[24] Some of the law covered in this book is also at the same time international law in the above-described sense because it is the product of state negotiations and international treaties. One of the challenges to legal theory arises from this, and obstacles result therefrom in practice. The simultaneous function of some of this international commercial law as treaty law and substantive contract law has been unaddressed by scholarship for a long time and will be analysed in the next two chapters of this book. Therefore, and without wishing to overcomplicate the terminology, it is important to consciously distinguish the legal nature and intended use of rules of law as either international or transnational. The subject matter of the present book is also to be distinguished from international trade law, which commonly concerns itself with public international law (treaty law) that governs international trade. Again, this is meant from the perspective of state actors who negotiate and create legal obligations between themselves in the area of trade which is of course performed by private actors – another contradiction and source of tension in legal theory. Examples are import and export rules that each individual state maintains and that are to be observed by enterprises operating within that state's boundary. This can mean imposing embargoes,[25] for instance, which raises a question of constitutional importance when it comes to prescribing a trader's choice of contractual partner. Is this an admissible interference with freedom of contract and private property rights? States can impose and internationally agree to certain terms about what goods can be imported into a country and what taxes and tariffs will be levied. These are public rules and regulations that affect the actions of private enterprises.

'Transnational commercial law' has been chosen as a term for the subject of this book in order to distinguish it from transnational studies in other disciplines and to select that area of law that deals with the substantive private law

[24] See comprehensively Juergen Basedow, *Internationales Einheitsprivatrecht im Zeitalter der Globalisierung* 81 (RabelsZ 2017) 1–31.

[25] Embargoes are export or import prohibitions adopted by governments in respect of a range of goods and in respect of target countries, usually for political, not economic reasons. Frequently, this involves a ban on arms trade or raw materials.

governing transactions of traders when they conduct business across-borders. These transactions will be mostly contracts. The focus here is therefore on cross-border commercial contract law and its enforcement and the enforcement of the contracts themselves. It is called transnational because the focus is on such rules of law that are designed to provide a uniform source governing transactions beyond national boundaries. This law is sometimes state law, sometimes international law and sometimes non-state law or so-called soft law. The nature of these different uniform sources of law and why they deserve further study is the subject of the next two chapters.

Before delving into this more technical explanation of the legal nature of uniform law and other law governing cross-border business transactions, we will look at the actual physical and legal environment modern trade operates in at this point in time.[26]

1.3.2 Why Merchant Law?

1.3.2.1 The Historical Component

International trade has a long history. Merchants have travelled long distances throughout much of human history in order to find and bring goods back to their homelands. We find early testimony of this activity in ancient history, in medieval sources and all through the ages up to the present day. Famous narrative accounts of merchant travel have been left, for example, by Marco Polo, and we also have geographical witnesses in the form of historic trade routes such as the Silk Road across the Asian continent and the Hellweg (Salt Route) that runs from the centre of the European continent (leaving the Rhine river near Koblenz) north-eastwards towards the Baltic Sea. Whether these merchants were travelling by sea or by land, their journey was usually perilous. They were exposed not only to the elements but also to piracy, pillory and other forms of robbery, plunder and obstruction. And, of course, the states or territories they travelled through would impose various forms of taxes and tariffs for passing through their boundaries and rivers and over their bridges. This made trading expensive, and it was often uncertain whether the merchants and their wares would arrive back where they had set out from. For investors in the ships and merchandise, it meant a risk of loss. From this risk arose the insurance industry. But before examining the risk, we have to recognise the legal environment in which the trade took place.

There are two types of law that govern trade. These could largely be called public and private rules even if they do not strictly fit into this pattern. The public rules of past legal orders can be called enabling rules (but not in the present technical meaning of the term, as explained in Chapter 2) that were issued by the monarch or other sovereign of the particular territory to enable traders to carry out their business. The other type is rules that govern the actual

[26] s. 1.14.

transactions between merchants, their contractual relations. Today we would call this substantive private law.

Rules of the former type, the public type, were needed in the legal orders of past centuries because of the class-based system of the feudal societies of those times. Many persons, such as peasants and other subjects, were not free to choose their occupation or even to go where they wanted or leave the territory of their respective landlord and enter that of another. Personal liberty and the right to roam are achievements of our present day constitutional and democratic states, which are mostly based on equality and the rule of law. Before this was achieved by way of revolutions and other political struggle and debate, the feudal principals would have to grant liberties, privileges and freedoms to their subjects for them to be able to benefit from their goods, services and merchandise either inside or outside of local boundaries. Feudal landlords would grant market privileges to towns and cities to enable them to hold markets within their walls and to enable individual merchants to travel in and out of the territory with their goods and other valuables. The merchants had to be exempted, either formally or by way of tacit consent and toleration, from local restrictions on travelling and on moving money and goods around. The motivation for the monarch to do this was, of course, his dependence on finance from successful trading and banking to maintain power and to pursue military ventures. In addition, there was a motivation to establish a good market order for the benefit of traders and the general public to achieve standards of measurements, accountancy, bookkeeping and food safety. Of such purpose were the famous Ordinances issued by Louis XIV of France.[27]

Rules of the latter type, the private type, were created over time by the traders themselves. Such rules established contract law applicable to their transactions and procedures for settling disputes as well as bodies of adjudication. From the Middle Ages onwards, a number of such rules survive. For example, sets of rules were adopted by the municipal states around the Mediterranean Sea, such as Venice and Genoa, Malta and many Greek islands, and by the cities of the Hanseatic League in the northern part of Europe, and so came to be endorsed by a sovereign entity through its official lawmaking process.[28] However, these sets of rules and others were also used by traders by way of custom or express reference even if they did not belong to those political

[27] The king issued a decree, the *Ordonnance de Commerce* of 1673, which is commonly seen to be the first commercial code of modern times. See generally on this historic development Paolo Grossi, *Das Recht in der europäischen Geschichte* (C. H. Beck 2010) 119–23; Mathias Schmoeckel, *Rechtsgeschichte der Wirtschaft: seit dem 19. Jahrhundert* (Mohr Siebeck 2008) at No. 141.

[28] A table displaying a large number of these local laws which were recognised at the time in chronological order is provided by Leone Levi in L. Levi, *Commercial Law, Its Principles and Administration Or, The Mercantile Law of Great Britain Compared with the Codes and Laws of Commerce of the Following Mercantile Countries: Anhalt, ... Wyrterburg, and the Institutes of Justinian* (W. Benning & Company 1851).

entities. This diverse and fragmented legacy of merchant rules, the substantive and procedural private law of the time, is now known as the *lex mercatoria*, the Latin expression for law merchant.[29]

1.3.2.2 Substantive Rules of Merchant Law

As this opening chapter is concerned with defining the subject and its terminology, a distinction should be made between different uses of the term '*lex mercatoria*'. In the first place, this term refers to the historical collection of the above-described rules. As the subject of a law merchant created by traders for international trade has acquired fresh interest from scholarship in recent decades, the expression 'new lex mercatoria' has been created in order to refer to similar rules of the present day. Exactly what rules these are, however, is subject to vivid debate. Therefore, the more technical expression 'transnational commercial law' is preferred in this book, and an attempt will be made in the following paragraph to explain to what extent and why the 'lex mercatoria' is such a controversial concept and term.[30]

The first question we have to answer is why a special law merchant is needed, as distinguished from other law. The reference to the merchants is not purely descriptive – it also entails a substantive component. As can be seen from the above brief description of merchants in history, the way they carried out international trade led to the establishment of specific rules that were prompted by the fact that they travelled and traded. The fact that they travelled meant that they were physically disconnected from their countries of origin and that they were dependent on their own means of protecting themselves but also free to settle their own disputes and to set their own rules that applied to the community they actually lived in. It is important for the understanding of the origin of the law merchant and the historical *lex mercatoria* to recall that traders in medieval times often lived in their own settlements located within cities or territories in foreign countries where they were allowed to live by their own internal rules, much like extraterritorial areas. This was true for the merchants of the medieval Hanseatic League, who maintained settlements in Novgorod, London and Bergen.[31] These were fenced or walled areas of warehouses and dwellings where the merchant community stayed during their campaigns to acquire, store, exchange and ship their goods. They lived by strict

[29] A concise and pleasant read on the history of merchant law in English is provided by Theodore Frank Thomas Plucknett, *A Concise History of the Common Law* (Little, Brown & Company 1956, reprinted 2010) 657 et seq. For the development of English merchant law, see Royston Miles Goode and Ewan McKendrick, *Goode on Commercial Law – 4th Edition Edited and Fully Revised by E. McKendrick* (Penguin 2010) ch.1. For a list of mercantile laws in use between the tenth and nineteenth centuries, see Leone Levi, *Commercial Law, Its Principles and Administration, Or The Mercantile Law of Great Britain Compared with the Codes and Laws of Commerce of the Following Mercantile Countries: Anhalt, ... Wyrterburg, and the Institutes of Justinian* (W. Benning & Company 1851) vol 1, part 1, 34–36.

[30] See ch. 6.

[31] See John Linarelli, 'How Trade Law Changed: Why It Should Change Again' (2014) 65 *Mercer L. Rev.* 621, 628.

social rules and maintained their own adjudication bodies. They were exempt from many of the laws of the lands they lived in. This may be surprising when seen from today's perspective of nation states that are more thoroughly based on territorial sovereignty, a concept that is known as the Westphalian model.[32] Another later example of merchants needing to make do without the enforcement and adjudication powers of their home jurisdiction is the European colonial merchants who travelled far across the globe setting up permanent trading posts, such as the East India Company (1600–1858) and comparable organisations created by Dutch, French and Portuguese merchants. The fact that they traded and that they traded internationally meant that they needed rules that addressed specific issues that would typically arise only in commercial contracts and more specifically in international commercial contracts. It is this latter criterion which is the basis for a separate merchant law today[33] and which is also the main reason for the existence of transnational commercial law as maintained in this book. The former criterion of merchants forming separate communities is seen here as no longer a relevant basis for separate merchant law in the present day,[34] but it is nevertheless arguably at the heart of much of the controversial debate around the lex mercatoria and its individual aspects, especially the issue of non-state law.

Transnational commercial law as forming the subject of this book is law that specifically relates to international commercial transactions. It is distinguishable from general private law and contract law as well as from national private law and contract law. It is private law that applies to and arises around commercial contracts with a cross-border element. Again, it is necessary to distinguish two further categories of such law: a functional, normative element and a substantive content-related element. The functional element of the rules describes their legal nature, for instance as national or transnational, hard law or soft law, as will be explained in the next two chapters. The substantive element describes the content of the rules, which can be said to make them transnational commercial law.

1.3.2.3 Merchant Law Today

As mentioned above, this substantive content-related element remains the same throughout history and to the present day. Traders use their own rules as they relate to specifically commercial transactions, and in addition to the commercial nature of their transaction, there may be an international aspect also. What can be different in commercial contracts as opposed to non-commercial ones, and what can be different in international commercial contracts as opposed to domestic ones?

[32] See ch. 2, s. 2.2; ch. 6, s. 6.3.1.3. On this notion, see also John H. Jackson, *Sovereignty, the WTO and Changing Fundamentals of International Law* (CUP 2006), esp. Chapters 2 and 4.

[33] See also Jan H. Dalhuisen, *Dalhuisen on Transnational Comparative, Commercial, Financial and Trade Law* (6th edn, Hart 2016) vol 1, 354.

[34] See ch.6 for further discussion.

Substantive Merchant Law

The object of commercial contracts will often be something that non-traders, for simplicity we might call them consumers, will never handle, sometimes not even know of. This can be true of many raw materials, such as metals, gases, aggregates, be it for production or even foodstuffs, feeding stuffs such as grains and oils and semi-finished products, or components for the car, aviation or space industries or high technology. Another factor will be quantities. Households will not handle goods traded in bulk on container ships or by railway carriages or in vast numbers. The speed of trade will also be a defining characteristic for commercial transactions. Goods can be bought and sold through exchanges within fractions of a second. The same consignment of cargo on board a ship is often bought and sold many times before it arrives at its port of destination, so-called string sales.[35] Closely related to this more technical side of trading are transportation, warehousing and payment. All these elements require knowledge of the technicalities of each stage of the trade and will involve specialised terminology, especially abbreviations, which will be irrelevant and largely unknown to a non-merchant buyer or seller. The international element of these components adds more elements that are specific to those transactions. Important examples arise from the nature of long-distance travel and transportation, often by sea, and so they will involve potential exposure to natural disasters (often referred to as *force majeure* or 'acts of God' denoting that these events are beyond human control) and human-caused interferences, such as the outbreak of hostilities, embargoes, disastrous currency devaluations or other political upheavals leading, for instance, to the arrest of a ship, the confiscation of cargo or equipment, the detention of crew or others, all of which would represent an impediment to the fulfilment of contractual obligations. International commercial contracts will therefore contain clauses covering these contingencies which by their nature do not occur with such likelihood within a purely domestic or non-commercial setting. Such clauses, referred to as *force majeure* clauses, cover supervening events and provide for allocation of risk. The international context also involves one more important requirement: choice of law and choice of jurisdiction clauses for dispute settlement.[36] These clauses, often called 'boilerplate clauses', will play an important part within the course of this book, as will clauses dealing with the choice of dispute settlement mechanism (which are a standard feature of all commercial transactions, both domestic and transnational). Parties to commercial contracts can, as can any contracting party, opt to have their disputes settled before an arbitration tribunal rather than a state court. Commercial parties will often do so to preserve discretion and improve control over the cost and time spent on a dispute.[37]

[35] Michael Bridge has illustrated this impressively in his description of 'The 1973 Mississippi Floods: "Force Majeure" and Export Prohibition' in E McKendrick (ed.), *Force Majeure and Frustration* (Lloyds of London 1991).

[36] See ch.7.

[37] See ch.10.

Formal Merchant Law

Following the history of merchants and merchant law in Europe, most European countries have developed and maintained separate commercial codes. During the so-called codification movement of the nineteenth century in the jurisdictions of the European continent, these commercial codes were enacted alongside the newly drafted civil codes. The first of these was the French 1804 *Code Civil* and the 1807 *Code de Commerce*. The Austrian Empire and the German Empire followed suit, and so did Italy and Spain. The revised versions of these codes enacted towards the end of the nineteenth century are still the basis for the current commercial codes of Spain, Austria and Germany. Italy integrated its commercial code into the civil code, as did the Netherlands. England and the UK did not go down this route and have neither a specific written commercial code nor a separate notion of merchant law. Instead, specifically merchant law, as it was practised by medieval merchants and their tribunals, was proactively integrated into general contract and private law by English judges, especially Lord Mansfield, and it has to be noted that English contract law is to a great extent formed on the basis of commercial cases and so incorporates much of the special nature of this law on a general basis. In the US, another common law jurisdiction derived from the English legal system, there is an interesting hybrid in the form of the Uniform Commercial Code (UCC) which is a so-called restatement, a written collection of rules appearing like a codification but non-binding and intended as a model for individual states to adopt or base their laws on. As for the content of these codifications of merchant law, they follow one of two principal models: the so-called subjective and objective approaches. The subjective approach takes the commercial instrument or commercial act as a starting point, for instance the warehousing contract or the commercial sale or purchase of goods or immovable property. The objective approach has the merchant as a starting point and opens with a definition of merchant. The subjective approach is followed by the French commercial code and the objective one by the current German commercial code and the current Austrian commercial code. Some codifications, like the Spanish commercial code and the predecessor of the current German code, used an intermediate approach, which is still sometimes referred to as subjective. Jurisdictions which have been modelled on one of these European laws maintain these same distinctions.

Identities versus Transactions – No Commercial Contract Type

Despite the decisive formal separation of civil and commercial law in European jurisdictions, there is generally no distinction between commercial and non-commercial contracts. The concept of contract is understood to be universal in this respect. The above mentioned special law merchant as codified separately in many jurisdictions does not comprise contract law rules in particular, even though there are indeed some rules of contract law that apply only between merchants or to merchant transactions. Commercial codes establish rules that merchants have to observe when setting up and running their businesses, such

as accounting and reporting duties and standards, rules relating to registration of businesses and companies, forms of incorporation and naming, commercial agency and insolvency offences. While the concept of merchant as an identity or status serving as a connecting factor has been criticised in scholarship over time as being obsolete and derived from outdated class systems, many legal effects actually depend on this technical term in European legal systems. Not only does this hinder fundamental reform in this respect, but it also explains the continued relevance and presence of merchant law in continental European jurisdictions and legal thinking.[38]

1.3.3 Merchant Adjudication – No International Commercial Court

An aspect of the historical situation of merchants that does not feature as strongly and visibly as the substantive merchant law does is the separate adjudication process that traditionally applied.[39] Regional courts often maintain special chambers of merchant matters as part of their regular organisational structures with specialised professional judges presiding and assisted by lay judges recruited from business.[40] Trade disputes can also be settled by arbitration. Commercial arbitration is an important and vibrant element of trade and especially so in international trade. However, it is not always publicly visible and has had to struggle to obtain guarantees before the state adjudication system. The permissibility of arbitration and the enforceability of arbitration awards are now subject to the New York Convention,[41] and most national laws provide comprehensive and liberal arbitration laws. Prior to this, private and voluntary forms of dispute settlement were often viewed with suspicion and competitiveness by the state and by state courts and judges.[42] One of the main reasons for the existence of commercial arbitration and international commercial arbitration is precisely the absence of specialised commercial courts. This is particularly true on an international level. There are international adjudication bodies established mostly by international or supranational organisations like the United Nations (UN) with the International Court of Justice (ICJ) based in The Hague or the European Union (EU) with its Court of Justice of the European Union (CJEU) based in Luxembourg, or according to the terms of international treaties like the European Convention on Human Rights (ECHR)

[38] For a more detailed comparative account of European merchant law, see Maren Heidemann, 'Identities in Contract – Merchant Law in Europe and the Future of European Contract Law' (2016) 23(4) *Maastricht Journal of European and Comparative Law* 667–701.

[39] For the development of merchant courts in England and their integration into the state court system and law, see Roy Goode and Ewan McKendrick, *Goode on Commercial Law* (4th edn, Penguin 2010) ch. 1, ss. 1–3, esp. pp. 6, 9.

[40] For French law (which is often the model for other continental laws), see John Bell, Sophie Boyron and Simon Whittaker, *Principles of French Law* (OUP 2008) 48.

[41] The UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958. Text available at http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf.

[42] See ch. 12.

with the European Court of Human Rights (ECtHR) based in Strasbourg. All these courts have been granted jurisdiction under public international law treaties and statutes based thereon. They sit to hear matters arising under those conventions and treaties. For instance, the ICJ hears disputes arising under the Charter of the UN; the CJEU hears cases arising under the EU Treaties; and the ECtHR hears cases arising under the ECHR. There is currently no international treaty establishing an international court to hear matters arising out of private international commercial contracts. Even though there are public international law treaties and conventions establishing law relating to international commercial contracts and transactions such as the UN Convention on Contracts for the International Sale of Goods (CISG), there is no dedicated adjudicating body which would be entrusted with hearing cases brought under CISG. Because CISG is a UN Convention, the ICJ does have jurisdiction to hear cases arising under it. However, individual traders arguing about contractual rights and obligations arising under CISG do not have procedural standing before the ICJ. It is for states to enforce treaty obligations. Whether an obligation arising out of a commercial contract concluded under CISG is in fact a treaty obligation is highly debatable. Another defining question in connection with CISG is what interest a state can have in enforcing CISG and against whom. Furthermore, many of the rules relating to international commercial contracts, such as the UNIDROIT Principles of International Commercial Contracts (UPICC), are not conventions and may not even be law according to some legal doctrine.[43] Far from using their own dedicated international commercial court, therefore, international traders resort to international commercial arbitration if they do not wish to take their disputes before national courts, where one of the first questions to be answered will always be that of the applicable law by which the dispute should be decided: Should it be national contract law of the state where the trial court is located (the law of the forum) or should it be the dedicated tailor-made rules of law that the traders may have expressly chosen to govern their contract but that are not recognised as admissible to do just that before a state court?[44] Finally, the enforceability of the award or judgment obtained by the prevailing party is highly important for the litigants. If it is an arbitration award, it may be appealed against and may need to be enforced through the channels of state judiciary, and if it is a national court's judgment, it may need to be enforced in yet another country and will depend on recognition and enforcement there.[45]

1.4 The System of World Trade Today

As described above, many political, social, legal and physical factors influence the success or failure of trade. These include the freedom and ability to travel;

[43] See ch. 3 for further discussion.
[44] See ch. 7.
[45] See ch. 3, s. 3.3.

the availability of a supportive legal system; the presence or absence of import or export barriers and associated customs and taxes (so-called trade barriers); and the availability and quality of a physical infrastructure to allow communication, travel and transportation. In all of these areas, we have seen tremendous progress and achievements over the past seventy years, starting even before the end of World War II, from 1944 onwards. Performing a great jump in the narrative from the medieval times recalled above to our last seven decades, we may not know all the differences to our present day in detail. We can, however, compare our time in more detail with that of the immediately preceding era, starting around 1800, when developments with regard to successful and prosperous world trade were going in the opposite direction, leading to great wealth for some but to famine and poverty for many. The first event of note for international trade in the nineteenth century was the Napoleonic barrier of continental trade with the British Isles.[46] This caused significant disruption and forced traders, governments and populations to adjust. In 1830, many German states joined the 'Zollverein', the first European customs union, to enable the free flow of goods to be shipped up and down the river Rhine. Customs, or tariffs, constituted an important impediment to the flow of goods and made them expensive, and therefore, many goods remained unaffordable for much of the population. Another component of trading is money. Through much of the early twentieth century, currencies were subject to restrictions with respect to cross-border activities. This was partly due to the prevalent model of national economics, which relied on the idea of a kind of annual stocktaking in the form of creating a trade balance. This included the currency, which was understood as a national asset. Economies were expected to maintain a surplus of their own currency.[47] As can be seen from events from the start of the nineteenth century, as sketched out above, economic measures were used for political ends. This was and still is true also for trade restrictions and currency policies. We still see embargoes imposed to achieve political aims. During the decades leading up to World War II, however, countries were systematically using markets to build up assets at the expense of other economies and, in the case of Germany, to accumulate wealth to spend on militarisation. Companies and businesspeople were trading ruthlessly in financial instruments and on the stock markets due to a lack of legislation relating to transparency and publicity, especially in relation to stock market – listed company shares in the US. This led to the 1929 stock market crash and ensuing worldwide economic crisis on an unprecedented scale and eventually to what we call The Great Depression in the late 1920s and early 1930s.[48] It is often said that the worldwide economic crisis initially caused by the Wall Street stock market crash in 1929, with the mass scale unemployment,

[46] In force 1806–13.

[47] For a brief overview of this period, see Andreas F. Lowenfeld, *International Economic Law* (OUP, 2008) ch. 7.

[48] See ch. 10.

currency devaluation and super inflation that followed in countries around the world, was an important cause of World War II.

1.4.1 Bretton Woods

The catastrophe of World War II finally led some world leaders, such as US president F. D. Roosevelt and UK prime minister Winston Churchill, to pursue and instigate a new order for world trade. This new order that still very much serves as the basis for our present world trade system. This was in its main part formulated at a United Nations[49] conference in Bretton Woods, New Hampshire, in 1944.[50] The institutions and treaties initiated at Bretton Woods were based[51] not on serving national interests only but on the understanding that co-operation and co-ordination of economic interests would foster world trade and with it the chance of prosperity and welfare for all people and would thus help prevent the impoverishment and hostilities that the twentieth century had seen repeatedly on a gigantic scale. At Bretton Woods, two main world trade systems were established: one dealing with currencies and monetary balances between states and the other dealing with the policies enabling and governing actual international trade. The former system was formed by the foundation of the International Monetary Fund (IMF) and the World Bank, and the latter system was initiated by the General Agreement on Tariffs and Trade (GATT) concluded in 1947. GATT was started in place of the originally envisaged International Trade Organisation (ITO), for which no support of national governments, in particular the US Congress, could be secured. GATT therefore existed not as an institution but as a succession of negotiation rounds for which the US president had authority under the Trade Expansion Act and which were each named after the place of their commencement.[52] It was applied on the basis of its Protocol of Provisional Application, thus continually avoiding any requirement for ratification by national parliaments. The eighth and last one of these rounds commenced in Uruguay in 1986 and resulted in the eventual formation of the WTO in 1994 in Marrakech.[53] The history of GATT and the workings of the WTO are of particular interest for the context of this book. GATT is an

[49] The Charter of the UN was actually signed in June 1945.

[50] A comprehensive account of the history of the Bretton Woods institutions, including GATT and the WTO, is given by Andreas F. Lowenfeld, *International Economic Law* (OUP 2008).

[51] Legally evidenced in the Preamble to the General Agreement on Tariffs and Trade (GATT) of 1947.

[52] With the exception of the Fifth and Sixth Rounds, the 1958 Dillon Round and the 1963 Kennedy Round.

[53] The WTO was formed by way of the Agreement establishing the World Trade Organisation (Marrakech Agreement) in 1994, which incorporates not only GATT in its 1994 version but also GATT 1947 by way of its Art. XVI and Section 1 (a) of GATT 1994 and also the new General Agreement on Trade in Services (GATS) achieved during the Uruguay Round, which extended the mechanism to cross-border services such as banking and health treatment and introduced sector-specific agreements that removed the possibilities to set off or barter concessions across sectors, as is the practice under GATT regarding trade in goods.

international treaty under which many other treaties have been agreed over the course of more than sixty years. In these treaties, states and, in some cases, multitudes of states (customs unions), such as the EU, agree terms that apply to the import and export of goods from one jurisdiction to another. Jurisdictions are thereby conceived as markets,[54] which is why the EU appears as the negotiator for its common market[55] rather than all its member states separately, even though it is not a state. The aim of GATT has been to enable free trade rather than prohibit or restrict the free flow of goods. The only acceptable restriction on trade is to be by way of tariffs, that is import or export duties, and not by way of quantitative restrictions. The so-called Most Favoured Nation Treatment, embodied in the opening Article of GATT 1947, is the chosen method by which to gradually reduce or eliminate tariff barriers. An intricate system of offering commitments by states in relation to specified goods and tariffs and a corresponding system of voluntary compliance and lawful retaliation for non-compliance (countervailing measures) has helped to progress and maintain this system against the odds and through phases of stagnation and stand-offs. The trade itself is of course conducted mainly by private companies even if some states, such as some Arab states and (formerly) communist countries in relation to oil- and gas-related contracts, trade through state agencies. The benefit that the state parties to the GATT agreement expect from this private trade is revenue through taxes and the general welfare of their citizens.

1.4.2 Dispute Settlement – Diplomatic Jurisprudence at the Interface of Private and Public Law

The challenge and main priority for individual states is to optimise market conditions for 'their' traders, and this often leads to measures that are perceived as protectionist. This is also often the case with measures that are not predominantly and expressly directed at traders but which serve to protect the environment or pursue other non-trade ends.[56] Again, the way in which disputes arising around such measures are settled is of interest in this context. As in all public international law, even with the arrival of the WTO Dispute Settlement Body,[57] the crucial point remains the enforcement of the findings, recommendations and reports created by the appointed panels. In the absence of something like a 'world police', there is simply no way to force state parties to comply with the findings of any international adjudication body, including the International Court of Justice (ICJ), if they choose to ignore them. It is down to reason

[54] See also ch. 6, s. 6.3.2.2 for further discussion.

[55] Since the 1958 Dillon Round.

[56] See, for instance, the Shrimp/Turtle case (United States – Import Prohibition of Certain Shrimp and Shrimp Products) WTO Dispute DS58; materials available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds58_e.htm.

[57] Established by way of Art. II (3) of the Agreement establishing the World Trade Organisation (Marrakech Agreement) adopting the Dispute Settlement Understanding in its Annex 2.

and insight and ultimately to political and diplomatic considerations that states may recognise and pursue. Lowenfeld uses the expression 'diplomatic jurisprudence'.[58] GATT and the WTO demonstrate the interface of private trading, public policies and state acting and with it the interface of private law and public law, as explained in Chapter 4. They illustrate the interest of the state in private acting and the degree of control it retains over private trade. They illustrate the dependency of private trading on state acting, and they also allow comparisons between private acting and state acting. The dynamics of conflict and dispute settlement in the area of international trade reveal interesting similarities between private actors and state actors that may allow conclusions for the theory of transnational commercial law. This is illustrated by research such as that carried out by Thomas Dietz, which analysed the contractual relations and enforcement strategies of traders acting in the absence of a truly transnational law and judicial infrastructure.[59] Just as in international relations, reputational networks play a decisive role in giving effect to commitments and obligations. A commercial attitude prevails in both scenarios, which is often perceived as ruthless materialism[60] rather than as a reliable driving force and balancing mechanism between opposing interests.

1.4.3 Borderless Society?

The physical environment for international trade is defined by vastly expanded facilities for communication, travel and transportation with the arrival of digital and electronic communication, the growth in air traffic and much technological advance in shipping and road carriage. What have remained are of course the barriers between states in the form of boundaries and restrictions to cross them. These are legal barriers to trade. Both GATT and the EU have addressed the issue by raising free trade to be the ultimate objective, with trade restrictions no longer being seen as acceptable means of political and economic interaction. The member states of the EU have committed themselves to downright guarantees of this objective by way of the Four Freedoms complemented by the Schengen Agreement,[61] which now effectively allows unlimited roaming

[58] Lowenfeld, p. 142, quoting Robert E Hudec, 'The GATT Legal System and World Trade Diplomacy' (1970) 4(5) *Journal of World Trade Law* 615.

[59] Thomas Dietz, *Global Order Beyond Law – How Information and Communication Technologies Facilitate Relational Contracting in International Trade (International Studies in the Theory of Private Law)* (Hart 2014); see also Thomas Dietz, 'Contract Law, Relational Contracts, and Reputational Networks in International Trade: An Empirical Investigation into Cross-Border Contracts in the Software Industry' (2012) 37(1) *Law & Social Inquiry* 25.

[60] Often in connection with animal welfare or workers' rights.

[61] 'Consolidated version of the Treaty on European Union – Protocol (No. 19) on the Schengen acquis' Official Journal 115, 09/05/2008 P. 0290–0292. The Schengen Agreement on the abolition of border controls was integrated into the EU Treaties by Protocol No. 19 to the Treaty of Amsterdam, integrating the Schengen agreements into the 'acquis' and making the adoption of this mandatory for new accession states under its Art. 8. The UK and Denmark rely on exemptions because they did not conclude or accede to the Schengen Agreement. They have a right to opt in.

rights of persons throughout the territories of the EU member states who joined Schengen.

We can therefore say that we have come close to a vision of a borderless society in regard to the environment for international trade. This is not an idealistic impression, ignoring the difficulties and existing cases of using markets for political aims, but it has turned into a daily reality for the majority of businesses operating worldwide using digitised channels to buy, sell and deliver goods and services often within less than seconds and benefiting from the removal of previously maintained charges and prohibitions in relation to imports and exports. Despite the extensive activity of states in relation to international treaties and organisations supporting international trade, the law underlying individual transactions is still predominantly domestic. Not surprisingly, this aspect of the law relating to international trade remains outside the scope of interest that states extend to the matter. The reason may be not just that the provision of a corresponding transnational infrastructure delivering centralised private dispute settlement and enforcement would solely benefit private traders and therefore not incentivise states to act but also that it would require the states to vest powers in a designated dispute settlement body. The history of GATT and the WTO shows how hard this process is and how much concession and dogmatic battle it requires.

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