

Cambridge University Press

978-0-521-19252-1 - Making Transnational Law Work in the Global Economy: Essays in Honour of Detlev Vagts

Edited by Pieter H. F. Bekker, Rudolf Dolzer and Michael Waibel

Excerpt

[More information](#)

Introduction: a *Festschrift* to celebrate Detlev Vagts' contributions to transnational law

PIETER H. F. BEKKER, RUDOLF DOLZER AND
MICHAEL WAIBEL

This *Festschrift* honours Professor Detlev Vagts and celebrates his profound scholarly contributions to and influence on the study and practice of transnational law over the last half-century.

On the occasion of his recent retirement from the Harvard Law School faculty and his eightieth birthday, the book brings together a wide range of leading scholars and practitioners from around the globe with a personal connection to the honouree: his colleagues at Harvard Law School and the American Society of International Law (ASIL, especially its Journal), as well as academics, judges and practitioners, many of them former students of Detlev Vagts, with whom his rich life and career have intersected. The book spans the entire spectrum of modern transnational law.

Soon after graduating from law school, Detlev Vagts realised that in the new reality of international relations, law may more readily be understood as extending beyond the classical State system. Philip Jessup, in his famous Storrs Lectures at Yale in 1956, labelled this phenomenon 'transnational law', which he defined as 'all law which regulates actions or events that transcend national frontiers. Both public and private international law are included, as are other rules which do not wholly fit into such standard categories.'¹ The increasing mobility of people, capital and goods required an expansion of the legal horizon beyond classical public international law and a State-centred view of norm-making. Since then, transnational law has moved to the centre of the law curriculum everywhere. For decades, it has been central to law practice in major world centres.

¹ P. C. Jessup, *Transnational Law* (New Haven, CT: Yale University Press, 1956).

Cambridge University Press

978-0-521-19252-1 - Making Transnational Law Work in the Global Economy: Essays in Honour of Detlev Vagts

Edited by Pieter H. F. Bekker, Rudolf Dolzer and Michael Waibel

Excerpt

[More information](#)

2 PIETER BEKKER, RUDOLF DOLZER AND MICHAEL WAIBEL

Detlev Vagts became one of the founders of transnational law, alongside other legal giants such as Philip Jessup and Myres McDougal, and he played a central role in the transnational legal revolution, as described in the tribute by his Harvard colleague and contemporary Henry Steiner (chapter 2). Harvard Law School recruited Detlev Vagts in the old-fashioned way: seemingly out of the blue, he received a telephone call one day from Dean Erwin Griswold inviting him to join the Harvard faculty. In 1959, he became an assistant professor of law at his *alma mater*, eight years after graduating with his LLB in the class of 1951. He received tenure in 1962.

In 1984, having been the Eli Goldston Professor of Law for four years, Detlev Vagts was appointed Bemis Professor of International Law, the first chair of international law at Harvard Law School. George Bemis (1816–78), a prominent Boston lawyer, had endowed the Bemis professorship at the end of the nineteenth century. Bemis prescribed that the holder of the chair shall ‘aid the popular and professional understanding [of that special department of study and practice that is international law]. In that sense I should desire him to be not merely a professor of the science but a practicable co-operator in the work of advancing knowledge and good-will among nations and governments . . . [T]he incumbent should have had some official connection with public or diplomatic life, or at least have had an opportunity by foreign travel or residence to look at the United States from a foreign point of view, and so to estimate it as only one of the family of nations.’

Detlev Vagts’ predecessors in the Bemis chair were the first Bemis professor, Edward H. Strobel (1897–1908), Jens I. Westengard (1915–18), Manley O. Hudson (1923–54) and Louis B. Sohn (1961–81). As the fifth Bemis Professor of International Law (1984–2005), Detlev Vagts played a central role in broadening the notion and understanding of international law and redefined its centre of gravity. He pioneered a comprehensive view, including not only classic interstate relations, but also the varied forms of non-governmental actors and institutions which emerged over the course of his academic career. The tribute by William Alford in this volume (chapter 1) highlights Detlev Vagts’ many contributions to Harvard.

The first edition of his classic casebook entitled *Transnational Legal Problems* appeared in 1968 (with Henry Steiner; 2nd edn. 1976; 3rd edn. 1986; 4th edn. 1994, adding Yale’s Harold Hongju Koh as co-editor). In its current edition, the book stands for a happy cooperation between Harvard and Yale. This cooperation is characteristic of the open and all-inclusive approach for which Detlev Vagts has stood throughout his life.

Cambridge University Press

978-0-521-19252-1 - Making Transnational Law Work in the Global Economy: Essays in Honour of Detlev Vagts

Edited by Pieter H. F. Bekker, Rudolf Dolzer and Michael Waibel

Excerpt

[More information](#)

INTRODUCTION

3

The first edition of *Transnational Business Problems* followed in 1986 (with William Dodge and Harold Koh as co-authors, 2nd edn. 1998; 3rd edn. 2003; 4th edn. 2008).

In the 1990s, Detlev Vagts served with distinction as Co-Editor-in-Chief of the *American Journal of International Law (AJIL)*, which is widely considered to be the world's leading scholarly journal devoted to public international law. In that capacity, he worked closely with his Co-Editor-in-Chief, Theodor Meron.

The influence of the transnational law school on the academy has been profound and lasting. Today, a number of scholarly student-run journals which are devoted to international and comparative law feature the word 'transnational' in their title. Examples include the *Columbia Journal of Transnational Law* (published by New York's Columbia Law School since 1961), the *Vanderbilt Journal of Transnational Law* (published by Vanderbilt University School of Law in Nashville since 1971,² after having appeared as *The Vanderbilt International* between 1967 and 1971), *The Transnational Lawyer* (published by California's University of the Pacific McGeorge School of Law since 1988), *Transnational Law & Contemporary Problems* (a journal of The University of Iowa College of Law first published in 1991) and the *Journal of Transnational Law & Policy* (published by the Florida State University College of Law since 1992). As these journals demonstrate, 'transnational' has come to replace 'international' or 'public international law' in US academic parlance.

This collection of transnational law essays is published at a time when the very concept of transnational law has been challenged in certain corners of the world. Just how controversial transnational law can be in the twenty-first century was demonstrated in connection with the confirmation hearings of Yale Law School Dean Harold Hongju Koh for the post of Legal Adviser to the US Department of State in 2009. The Legal Adviser is the highest-ranking international lawyer in the United States, advising the US Secretary of State on national security law, human rights law and the legal aspects of international engagements and representing the United States before international bodies and tribunals. Soon after Dean Koh was nominated by US President Barack Obama in March

² The first re-named edition aptly featured a lead article by Philip Jessup. P. C. Jessup, 'The Development of a United States Approach Toward the International Court of Justice', *Vanderbilt Journal of International Law*, 5 (1971–2), 1–46. For a transnational law perspective on the role of the International Court of Justice, see Pieter Bekker's chapter 23 in this volume.

Cambridge University Press

978-0-521-19252-1 - Making Transnational Law Work in the Global Economy: Essays in Honour of Detlev Vagts

Edited by Pieter H. F. Bekker, Rudolf Dolzer and Michael Waibel

Excerpt

[More information](#)

4 PIETER BEKKER, RUDOLF DOLZER AND MICHAEL WAIBEL

2009, he faced heavy criticism from some American groups and politicians in the US Senate for his transnational approach to the law. Indeed, Koh's nomination provoked hysteria in some circles. 'Transnationalist' became a fighting word. Notwithstanding the efforts of these groups to derail Koh's appointment during four months of attacks and wrangling over his thinking on transnational law, the US Senate voted 62–35 (60 votes being necessary) to confirm him on 25 June 2009. We are grateful to Harold Koh for having agreed to write the foreword for this book honouring his co-author and friend.

At a time when the transnational law concept is under attack and international law scholarship on both sides of the Atlantic appears to be drifting further apart than ever, Detlev Vagts remains one of the few able and willing to bridge that gap. As a formidable generalist across the range of international legal problems, from international business transactions to human rights to classic public international law, he is a firm believer in an international rule of law which applies equally to all international law actors. He represents the finest American tradition of seeking legal solutions to transborder problems in public and private law, or indeed in new bodies of law, regardless of the old conceptual distinctions between private and public international law.

Early in his career, Detlev Vagts' personal background (his father Alfred, a prominent German history professor, moved his family to the United States in political protest against the rise of the Third Reich in Germany) and his immediate familiarity with both the Common law and the Civil law systems, together with his keen knowledge of the political and social context on both sides of the Atlantic, helped him develop a comparative and transnational perspective.

The overall theme of this book is the regulation of the global economy, whether of interstate relationships setting economic and monetary policy or of individual conduct of an economic nature, through a transnational law approach. Globalisation has transformed the study and practice of transnational law, just as transnational law has changed the approach to the regulation of cross-border dealings between the various subjects of international law. It has broken down the last remaining barriers of compartmentalised legal thinking. Yet, there has been a surprising dearth of recent works devoted to general transnational law, aside from specialist areas such as foreign investment law. As a result, the growing legal complexity resulting from a patchwork of jurisdictions is often ill understood. The time has come to take stock, and assess the potential and prospects of transnational law in the age of globalisation. Besides

Cambridge University Press

978-0-521-19252-1 - Making Transnational Law Work in the Global Economy: Essays in Honour of Detlev Vagts

Edited by Pieter H. F. Bekker, Rudolf Dolzer and Michael Waibel

Excerpt

[More information](#)

INTRODUCTION

5

honouring one of the finest transnational lawyers of his generation, this is the primary aim of the book.

This book covers the core subjects of transnational law, which have been divided into three broad areas: (I) International Law in General; (II) Transnational Economic Law; and (III) Transnational Lawyering and Dispute Resolution. As the Bibliography of Detlev Vagts at the end of this volume demonstrates, our honouree has made important contributions in each of these areas, and continues to do so even at the age of eighty.³

The individual contributions in this book re-evaluate established fields of transnational law, such as the protection of property and investment. At the same time, the book explores new areas of law which are in the process of detaching themselves from the nation-state, such as global administrative law and the regulation of cross-border lawyering; it examines the implications of decentralised norm-making and diffusion and the proliferation of dispute settlement mechanisms on the international plane; and it analyses the rising backlash against global legal interdependence in the form of demands for preserving State legal autonomy.

The primary audience of this book is scholars and specialists in international law. We hope, however, that this book will be of interest to a wide array of scholars with a comparative and interdisciplinary outlook, including international relations theorists and social scientists, and that it will foster further study of transnational law in all its aspects.

What is perhaps the most remarkable feature of the project underlying this book is that it has brought together more than thirty lawyers from different legal systems and nationalities. Their common bond is a personal connection with and affection for the honouree. Detlev Vagts' life intersected with their careers in various ways, whether as young students/scholars⁴ or as seasoned colleagues from academia and practice. A glance at their names, backgrounds and accomplishments in the list of contributors (p. xi) gives but a small indication of the influence which Detlev Vagts has had on the legal profession, and on fellow lawyers, the world over.

One such lawyer was the late Thomas W. Wälde (1949–2008), a German jurist and world-renowned scholar in international energy law

³ See D. F. Vagts, 'The Financial Meltdown and its International Implications', *AJIL*, 103 (2009), 684–91.

⁴ At least twenty-three of the thirty-five authors who have contributed to this book have earned one or more law degrees from Harvard Law School.

Cambridge University Press

978-0-521-19252-1 - Making Transnational Law Work in the Global Economy: Essays in Honour of Detlev Vagts

Edited by Pieter H. F. Bekker, Rudolf Dolzer and Michael Waibel

Excerpt

[More information](#)

6 PIETER BEKKER, RUDOLF DOLZER AND MICHAEL WAIBEL

who had studied with Detlev Vagts at Harvard (LLM 1973). In April 2008, after securing Detlev Vagts' blessing, Thomas Wälde approached fellow European Pieter Bekker, one of the editors of this volume, about paying the ultimate tribute to their academic mentor and long-time friend in true German fashion: publishing a collection of essays honouring Detlev Vagts' contributions as a scholar and teacher in the form of a *Festschrift*, also known as a *liber amicorum*. At a meeting in New York City in August 2008, Bekker and Wälde quickly agreed on the title for the book and embarked on an ambitious project which would bring together friends and admirers of Detlev Vagts from around the world, especially Europe and the United States, the two continents which are the most closely associated with the honouree. It was agreed to assign priority to 'new voices' – 'the next generation' of scholars and scholarly practitioners – most of whom Detlev Vagts taught personally, at Harvard and elsewhere. It is this generation of lawyers which has profited the most from his teaching and writings.

This project would not have got off the ground were it not for Thomas Wälde's characteristic energy and drive. After his untimely death in October 2008, Rudolf Dolzer and Michael Waibel agreed to take his place and see this project through to completion. The editors of this volume represent three generations of Detlev Vagts' Harvard students – Rudolf Dolzer (LLM 1972, SJD 1979), Pieter Bekker (LLM 1991) and Michael Waibel (LLM 2008). The editors have arranged for all royalty proceeds from this book to be paid to The Energy, Petroleum, Mineral and Natural Resources Law & Policy Education Trust, an educational fund established in Thomas Wälde's memory at the University of Dundee (Scotland), where he occupied his Chair.⁵

The editors wish to thank Cambridge University Press and its dedicated staff, especially Finola O'Sullivan, for publishing this special collection of essays in honour of Detlev Vagts – a gentle giant of the law to whom the editors and contributors, and indeed the international legal profession at large, will forever be indebted.

⁵ Those interested in contributing directly to the Fund are advised to contact the Fund's Administrator, Christine Hulbert, at The Centre for Energy, Petroleum and Mineral Law and Policy, University of Dundee, Carnegie Building, Dundee DD1 4HN, Scotland.

Cambridge University Press

978-0-521-19252-1 - Making Transnational Law Work in the Global Economy: Essays in Honour of Detlev Vagts

Edited by Pieter H. F. Bekker, Rudolf Dolzer and Michael Waibel

Excerpt

[More information](#)

1

Detlev Vagts and the Harvard Law School

WILLIAM P. ALFORD

When we think of people who form the foundation of august educational institutions, such as Harvard Law School, our attention, understandably, turns first to official leadership and others very much in the public eye. That ought not to obscure the immense and varied contribution that Detlev Vagts, notwithstanding his characteristic and heartfelt modesty, has made to the life of his law school over the past half-century.

From his initial appointment to the Harvard Law School faculty in 1959 through his two-decade-long tenure (1984–2005) as holder of the Bemis Professorship (Harvard's earliest in international law and a position in which he took great pride), Detlev has been someone who instinctively and imaginatively cut across existing boundaries – disciplinary, national and other – long before that became as fashionable as it now is. That willingness to defy convention, albeit in a mannered fashion, took many forms, but perhaps the most noteworthy involved the development and launching of several courses that greatly enriched the Harvard curriculum and helped cement the School's reputation for innovation in international legal studies during the second half of the twentieth century. Two, in particular, stand out.

Together with his friend and colleague Henry Steiner, Detlev in the late 1960s seized upon the challenge posed by Philip Jessup in his celebrated 1956 Storrs Lectures to devise a pioneering course that they entitled 'Transnational Legal Problems', which both discerned patterns of legal interaction across jurisdictional lines that did not fit neatly into the existing fields of public and private international law, and that engaged learning from beyond the law itself to illuminate these patterns. (For more on the transnational legal problems project, please see Steiner's chapter 2 in this volume.) By the 1970s, it had become a hallmark for Harvard's legions of students interested in the larger world and a national resource via a casebook by the same name that was widely

Cambridge University Press

978-0-521-19252-1 - Making Transnational Law Work in the Global Economy: Essays in Honour of Detlev Vagts

Edited by Pieter H. F. Bekker, Rudolf Dolzer and Michael Waibel

Excerpt

[More information](#)

adopted throughout the United States (and that for its fourth edition added as co-author Harold Hongju Koh, subsequently US Assistant Secretary of State for Democracy, Human Rights and Labor; Dean of Yale Law School, and now Legal Adviser, US Department of State).

A second major contribution of Detlev to the Harvard curriculum has concerned the role of the legal profession in a global setting. At a time when international law courses did not address professional responsibility issues, and professional responsibility courses did not address international issues, Detlev, with customary foresight, understood how vital and how vexing this area would be. The result was a prescient course on the legal profession in a transborder setting and a set of course materials drawn from multiple jurisdictions and informed by his keen understanding of the businesses, governments and people with whom lawyers work.

Nor were these his only innovative contributions to the Harvard Law School curriculum. As early as 1962, Detlev was teaching a seminar entitled 'International Aspects of the Corporation', and even as he moved toward retirement in the early years of the twenty-first century, he continued to offer a course on 'Transnational Business Problems' that eventuated in the well-regarded casebook by the same name, co-authored with William Dodge and Harold Koh.

Detlev's crossing of boundaries took a variety of other forms – again to the great benefit of his School. As several other chapters in this volume will demonstrate, through the reach of his scholarship internationally, his editorship of the *AJIL*, his service as Counselor on international law in the US Department of State and his role as lecturer and arbitrator across the world, Detlev enhanced Harvard's reputation immeasurably. Closer to home, along with Arthur von Mehren and Peter Murray, he was central to the Law School's engagement with Germany, both through his thoughtful scholarship and through his many links to academics in his father's native land. And yet closer to home, for years, Detlev served as the Law School's bridge to a world some denizens of the 02138 zip code might describe as even more foreign – namely, the Harvard Business School.

His accomplishments on these broader stages and the concomitant demands on his time notwithstanding, Detlev has always been and still is unqualifiedly generous with his time for colleagues (senior and junior alike), students and visitors, particularly from abroad. To this day, Detlev remains my most faithful informant about China, my principal area of specialisation, at least weekly sending me clippings from a wide range of

Cambridge University Press

978-0-521-19252-1 - Making Transnational Law Work in the Global Economy: Essays in Honour of Detlev Vagts

Edited by Pieter H. F. Bekker, Rudolf Dolzer and Michael Waibel

Excerpt

[More information](#)

publications, such as *Science* and *Scientific American*, lest I miss an important new development. He remains a regular and valuable participant in faculty workshops, routinely finding constructive ways in which to offer younger colleagues wise advice. When a gap arose in the leadership of the Law School's International Tax Program following the retirement of its extraordinary leader, Oliver Oldman, Detlev unselfishly stepped in to head it for two years, rather than leave its fellows, most from developing nations, in the lurch. As busy as he was, he always found time for the large numbers of students he guided through doctoral dissertations, LLM theses and other papers (several of whom have achieved positions of prominence themselves) and to advise the *Harvard International Law Journal* and other student activities concerning matters international. It is no surprise that he retains the gratitude of so many students, not only for his immense learning but his genuine kindness, and that invitations to participate in this *Festschrift* were so readily accepted.

The Law School and its students are fortunate for Detlev Vagts' presence for so many years and I congratulate him on this volume in his honour, in which it has been a privilege to participate.

Cambridge University Press

978-0-521-19252-1 - Making Transnational Law Work in the Global Economy: Essays in Honour of Detlev Vagts

Edited by Pieter H. F. Bekker, Rudolf Dolzer and Michael Waibel

Excerpt

[More information](#)

2

Constructing and developing transnational law: the contribution of Detlev Vagts

HENRY J. STEINER

During the fifteen years following the Second World War, ‘transnational’ (activities, enterprises, organisations, networks, movements, processes, law) had not yet become a household word – even in academic households. But the times were propitious for its coinage and rapid evolution as a commonly used descriptive term with ever-broadening references. With its distinctive form of stability among major States imposed by the Cold War, this period and the following decades witnessed dramatic recovery from the war’s massive devastation. It gave birth to many intergovernmental organisations and multinational companies, as well as to new practices and rules for international finance, international trade and investment, peacekeeping and human rights. These years generated heightened international flows of goods and capital and new types of international intercourse. Traditional classifications of the many bodies of law and kinds of transactions germane to international life bowed to the new circumstances and to a fresh vocabulary. The term ‘transnational’ emerged as a winner.

Such was the period of Detlev Vagts’ university education, military service and brief but instructive career as a practising lawyer involved with international corporate and financial transactions, all a prelude to his almost fifty years of professorial engagement with this new and volatile world. Much of Detlev’s teaching and scholarship fell comfortably within the developing idea or category of the transnational. His work transcended the boundaries of any one of the component fields included in the concept of transnational law. It increasingly embraced several of these components, emphasising their interconnections within an increasingly complex web of transactions and norms. In the process, Detlev’s published writing clarified and enriched the idea of the transnational.