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# Commercial arbitration - a case of private transnational self-governance?

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# Commercial Arbitration – A Case of Private Transnational Self-Governance?

von
Dirk Lehmkuhl

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# Commercial Arbitration – A Case of Private Transnational Self-Governance?

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Januar 2000

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# Commercial Arbitration – A Case of Private Transnational Self-Governance?

**Abstract**

*The empirical* focus of this analysis is the patterns of interaction in transnational commercial trade and the settlement of its disputes. The first and most basic observation is that these patterns occur in the absence of any satisfactory legal order to regulate cross-border interaction between private individuals and organizations over and above that of single national legal systems. Instead, private institutions have emerged which not only administer privately developed economic mores, but which also adjudicate disputes in cross-border transactions. However, despite the emergence of a significant authority for private norm-generation and for independent private dispute settlement, governance of transnational trade is characterized by interdependencies of and dynamics between public and private contributions. In *theoretical* terms transnational trade, with its mechanisms of norm-creation and dispute settlement, presents an interesting starting point for examining patterns of ordering which exist beyond the nation state. It combines a governance perspective which focuses on the contributions made by a variety of actors to transnational political organization, with a law-informed approach which is concerned with the demise of what has been established as the Westphalian order, i.e. the monopolizing of legal developments by sovereign states.

# 1 Introduction[1]

The structures governing the operation of transnational trade and the settlement of its disputes encompass a variety of institutional arrangements of which the World Trade Organization (WTO) and its predecessor, the General Agreement on Tariffs and Trade (GATT) are the best known examples. The institutional constellation is, however, far more complex and involves public and private actors and institutions across different levels. Today, private institutions – with a history that partly pre-dates the international institutional framework created by public actors – not only complement the governance structures of international trade, but have surpassed public ones in importance for the international business community. In particular, international commercial arbitration is a device of immense practical importance for resolving international trade disputes. These private institutions facilitate international trade and help to provide transactional security and, as such, constitute an important factor in resolving specific social dilemmas in transnational business.

Traditionally states have developed two strategies for coping with the uncertainties linked with cross-border transactions. One the one hand they have codified efforts to co-ordinate their activities in international public law. International public law encompasses provisions concerning both the vertical and horizontal allocation of authority between states. The vertical allocation of authority defines the relationship between the general community and particular states, whereas the horizontal allocation of authority refers to the relationship between territorial communities regarded as equal. Despite the increasing importance of cases where states transfer clearly defined portions of authority to international or supranational organizations, the horizontal allocation of authority among states remains vital in the contemporary state-centred world (Chen 1989). In this respect the European Union and the World Trade Organization not only represent examples of a vertical transfer of state authority, they also provide a legal framework for private individuals' cross-border economic activities.

One the other hand private law, such as contract law or company law, is crucial for commercial transactions. However, since transnational commercial exchange by definition touches on the private law provisions of different legal systems, states have individually established private international law for deciding which of the various domestic laws should apply. At its core private international law compromises issues of jurisdiction, choice of law, the recognition and enforcement of foreign judgements. In methodological terms the concept of private international law centres on attempts to specify 'rules of collisions' or 'conflict rules' in order to 'localize' a legal relationship that touches on more than one national legal order (Reimann 1995; Stone 1995). In principle, however, these rules are not international in nature and there are as many private international law systems as there are

[1] For very helpful comments I would like to thank T. Börzel, B. Eberlein, C. Engel, A. Héritier, D. Kerwer, C. Knill, and W. Osthaus.

states (Malanczuk 1997, 72).[2] Despite states' efforts to establish common (international) rules of conflict, differences in national 'conflict of laws rules' and their application are an obstacle to international trade that significantly restricts private international law from fulfilling its primary function, which is to designate an appropriate municipal law to govern the provisions of an international contract and to adjudicate cases involving foreign actors (Houte 1995, 18f).

In other words no legal order exists above the various national legal systems for dealing with transborder interactions between private individuals and organizations. Neither public nor private international law provides a framework with a sufficient degree of transactional security for international business (Kronman 1985). Yet today, as in the past, the absence of an international regulatory framework which guarantees rights in a similar way to that of a national legal framework has not prevented economic actors from crossing borders. Instead, two phenomena have emerged as solutions to these problems. On the one hand trade codes (such as the *lex mercatoria moderna* or new law merchant) are furnished with normative power as they have proved capable of governing the behaviour of individuals in economic transactions both at national and transnational level. On the other hand private commercial arbitration as a mechanism for solving disputes in transnational trade is a device which continues to grow in importance. In the context of this research the most interesting aspect of these rules and institutions is that they do not derive from national or international legislation, but represent forms of self-governance of particular transnational communities which both pre-date and post-date national and international legislation on international transactions (Carbonneau 1990).

The central concern of this paper is firstly to describe these private forms of governance in transnational trade and secondly to interpret their significance for the relationship between public and private actors across different territorial and functional levels. Given this concern the paper has a twofold conceptional interest. On the one hand it relates to studies which analyze the ongoing process of internationalization. In this respect, the term 'governance without government' (Czempiel and Rosenau 1992) refers to the observation that *governments* no longer have the monopoly of legitimate order as they are no longer the sole source which exercises and controls authority. Rather, *governance* indicates a shift in the balance of power from governments and public actors to private individuals and groups. Thus, it circumscribes the creation of authority at various levels of society, within and outside the state, above and below it (Alcántara 1998, 111).

On the other hand, given that governance is ultimately concerned with the conditions for ordered rule and collective action, it presents an interdisciplinary starting point for studying the linkage between comparative international politics and international law. The disciplines represent different aspects of and perspectives on the same empirical phenomena (Beck 1996; Slaughter, Tulumello, and Wood 1998, 393). *Inter alia*, both disciplines must address

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[2] The United Nations Convention on Contracts for the International Sale of Goods (Vienna Convention), which came into effect in 1988, is an example of the creation of 'real' international rules of private law through international law.

in analytical and normative terms the devolution of an increasing range of responsiblities from the state to private governance regimes at transnational level. Whether through professional associations, private organizations or bilateral contracts, private actors have often established remarkable competencies in making and enforcing their own rules and in customizing their own modes of dispute settlement (Slaughter 1995). In this respect, cases of transnational self-governance differ significantly from well-known examples of societal self-governing at the national level.

At national level, a widespread phenomenon of modern societies is for private actors to engage in self-organising or self-regulatory arrangements, with the state lurking discretely in the background. This implies that public actors voluntarily withdraw from intervening in economic activities without generally sacrificing their principle authority. At transnational level, however, we often find examples of the opposite i.e. where private actors successfully gain significant authority; and states only subsequently try to catch up with the regulatory capacity of private actors and institutions.

In what follows we examine whether or not commercial arbitration is one of these cases. After a brief presentation of the main features of commercial arbitration we develop our argument, starting with the radical proposition that commercial arbitration is a private and autonomous ordering regime that is legally organized and operates beyond the nation state.[3] The autonomy of this private system finds twofold expression: firstly, it largely replaces state regulation in the generation of norms that guide the behaviour of economic actors and secondly, private mechanisms of dispute resolution mostly operate independently of the scrutiny of national court systems.

# 2 Private commercial arbitration in practice and theory

## 2.1 Why problems arise and how they are solved

The contemporary international system is composed of sovereign states each with its own socio-political institutions, legal order, and cultural communities. The heterogeneity of this constellation forms the backdrop for cross-border transactions. International economic exchange processes take place within a patchwork of legal systems and the "monopoly of power claimed by each state within her boundary. Collisions of norms and gaps between different norm systems then appear, an accord in decisions is often coincidental, and the assistance of the judicial and penal institutions in foreign countries is not at all a matter of course" (Schmidtchen and Schmidt-Trenz 1995, 16). At national level specific legal provisions, based either in civil or common law, guarantee property rights and their enforcement; such guarantees are however largely absent at international level.[4] In the face

[3] See for a similar interest already (Joerges 1974).

[4] The Berne Convention of 1886 however, established an international instrument for protecting copyrights; for intellectual property rights (Beier and Schricker 1996; Organization 1998).

of specific political and economic uncertainties, it is the development of a number of self-regulated institutions of private business which is usually credited with guaranteeing the extension of cross-border trade and transactional security. Amongst these institutionalised private safeguards that reduce the risks in international trade, the so-called *lex mercatoria moderna* or new law merchant on the one hand, and the various arbitrational organizations on the other are of key importance.

What is referred to today as *lex mercatoria moderna*[5] may be defined as an "institutional arrangement consisting of trade usages, model contracts, standard clauses, general legal principles and international commercial arbitration" (Volckart and Mangels 1996, 7). However, merchant law has never been a comprehensive body of provisions, nor is it so today; rather, it covers an enormous variety of sectoral and regional differences. Nevertheless, given the universality of basic principles such as good faith or reciprocity of rights, and its flexibility to adapt to sectoral or regional specifities, the merchants' norms have had a long and successful history in bridging the gap between the peculiarities and shortcomings of provisions created by public entities (Loewenfeld 1990, 149f).[6] Medieval law merchant antedates the emergence of the system of nation-states by several centuries[7]. It addressed merchants in special places such as fairs, markets, or seaports and also governed mercantile relations of intercity and overseas trade. It was distinct from local, feudal, royal, and ecclesiastical law, and its primary source (of origin and legitimization) was mercantile customs which were eventually administered not by professional judges but by the merchants themselves (Berman and Kaufman 1978, 225).

Historically the growth of cross-border commerce and the ascendancy of the *lex mercatoria* was accompanied by the creation of courts to adjudicate commercial disputes (Berman 1983, 346ff). Adjudicators were generally selected from the ranks of the merchants on the basis of their commercial expertise and objectivity. The phenomenon of 'merchant judges' was institutionalized by, for example, the Guild Courts of the Hanseatic League, the Guilds, the Champaign Fairs, Piepowder Courts or the English Court of Staples. All of these courts 'held substantial sway over matters of commerce', or 'provided justice to local merchants and strangers alike' (Trakman 1981, 16f). The development of these institutionalized forms of private adjudication was similar to that of law merchant i.e. a temporary decline in post-medieval times and a significant revival since the turn of the twentieth century, in particular after World War II (North and Thomas 1973). Alongside the growth in international trade the number of disputes has increased and, again, commercial arbitration has become the universally accepted method for settling international commercial disputes.

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5 The German term is *autonomes Recht des Welthandels*, see Großmann-Dorth 1929, Bonell 1978, Joerges 1979.

6 What is more – as will be described in section three – economic mores were frequently embodied in the law of public entities, cities, or states when the socio-political environment changed.

7 The history of maritime law, for example dates back to the Sea Law of Rhodes; it had been received by the Greeks and the Romans and was subsequently transmitted to Western Europe (Berman 1983; Berman and Kaufman 1978).

It is estimated today that about 90 per cent of all cross-border contracts contain an arbitration clause (Bernstein et al. 1998) so that arbitrational jurisdiction overrides the jurisdiction of states at international level (Dezalay and Garth 1996). While a large number of international trade associations have their own conflict resolution procedures (Benson 1999, 93; Bernstein 1996), old institutions administrating the contractual patterns of economic interaction have expanded and we have witnessed the rapid appearance of new institutions the world over. Amongst these, the International Court of Arbitration of the International Chamber of Commerce (Paris), the London Court of International Arbitration, the American Arbitration Association (New York), the Vienna Arbitration Centre, and the Arbitration Institute of the Stockholm International are the most prominent in providing institutionalized arbitration in the Western World.[8] The reforms of arbitration laws in recent years[9] demonstrates the increased importance of arbitrational procedures at both international and national level

Private commercial arbitration offers a number of advantages over litigation in state courts. Foremost among these advantages is the high degree of procedural flexibility in the choice of location and arbitrators. Both parties can influence the choice of the three arbitrators generally required, since they may name at least one of them; the third is then chosen by the first two arbitrators, or in some other manner (Bernstein et al. 1998, 204). Arbitrators are normally experts in the issue at stake. On the whole arbitration is less time consuming and more cost-effective, due in part to the fact that it generally only involves one procedure. Arbitration guarantees secrecy; neither the procedures nor the awards are open to the public which allows for better protection of commercially important information. Unlike public litigation, private arbitration has less effect on the general commercial relationship between the parties; if only a limited aspect of their frequently long term or complex commercial interaction is touched on, and these relations are highly valued by both partners, then they will prefer arbitration in order to prevent controversies which might arise out of one issue from casting a shadow over their entire interaction.

To sum up, cross-border transactions occur within a framework that is significantly different from that of domestic trade. Given the territoriality of law and its enforcement, a state can only ensure sufficient possessive security for its own constituency; it cannot provide transactional security beyond the state. In other words the dual function of private law in providing ‘possessive’ and ‘transactional’ security (Kronman 1985) largely ends at national borders. Hence the territoriality of law leads to a ‘constitutional uncertainty in international trade’ (Schmidtchen and Schmidt-Trenz 1995, 17). In the absence of an international authority or sufficiently binding rules at international level the property rights and other assets of economic actors who are engaged in international trade and investment are subject

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[8] For the Southeast Asian sphere see (Ong 1997) and for a critical assessment of the present, over-optimistic sentiment concerning the China International Economic and Trade Arbitration Commission (Chen 1996)

[9] For example in the UK 1979, France 1981, Belgium 1985; Canada 1986, The Netherlands 1986; Switzerland 1987; Spain 1988, Austria 1989, Hong Kong 1989; Russian Federation 1993; Hungary 1994, China 1994, Germany 1997.

to a particularly high level of risk. History shows the way in which private actors have always coped with this specific risk in their cross-border activities. Not only have particular sets of norms and rules developed outside the judiciary of public entities to help to safeguard contracts in transnational economic transactions, but a number of dispute settlement institutions has also emerged. Where do these findings fit into analytical concepts?

## 2.2 Theorizing arbitration

Commercial arbitration can be interpreted theoretically as a form of ordering in the absence of a hierarchically imposed order. Arbitration is thus a further example of the emergence of order without state created law (Bernstein 1992; Ellickson 1991; Henry 1983; Ostrom 1990). We can find three different explanations for the emergence and development of different constellations governing cross-border trade and its disputes. Firstly, the emergence of institutions such as law merchant and abitral organizations is explained as a response to the *transaction and information costs* as well as to commitment problems and the risk linked to cross-border trade (North and Weingast 1989, 19ff).[10] Secondly, *power-based explanations* focus on the degree to which contemporary private structures can build on past dominance of markets or issue areas by the firms that construct it (Cutler, Haufler, and Porter 1999, 352f). That is to say, it is not considerations of efficiency so much as the attempts made by powerful firms to reproduce their own dominance which forms the background for private governing structures.[11] Thirdly, *historical approaches* place the emergence of private norms and arbitral institutions in a longitudinal perspective so as to identify longer-term shifts in international political economy. As mercantile law experienced an organic growth during the period from the eleventh to the sixteenth centuries, merchant arbitration became "the accepted method of resolving disputes arising out of accounts" (Mentschikoff 1961, 85), thus routinizing adjudication of commercial disputes (Berman 1983).

These three factors are complementary rather than mutually exclusive, and combining them may help to overcome individual shortcomings. For example, an efficiency explanation cannot capture the shifting balance between public and private authority, because it cannot explain why political actors regulate private commercial interactions and dispute settlement in one instance and not in another (Cutler 1995, 394ff). Here, both the power-based and the historical explanations may provide insights to help the analysis, on the one hand by referring to the particular competitive advantages which either public or private actors have, or, on the other hand, by identifying the factors which historically assigned specific roles or functions to either public or private actors and institutions.

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[10] For variations of this approach see (Benson 1989; Greif 1989; Greif 1992; Greif, Milgram, and Weingast 1994; North and Weingast 1989; Schmidtchen 1995).

[11] See also (Auerbach 1983, 101ff; Cutler 1995; Kronstein 1963).

These considerations imply that the challenge in trying to come to grips with the patterns of contemporary transnational social order is that the relative importance of public and private actors across both functional and territorial levels must be taken into account. There is good reason to believe that the governance structures of transnational trade, i.e., commercial norms and the institution of arbitration have co-evolved, originally without the support, and often in spite of the interference, of the coercive power of public actors (Benson 1989). Over time, the relationship between public and private actors and institutions has shifted, with one side alternately overshadowing the other.

In this respect the settlement of disputes arising from transnational commercial trade is a good example of how private actors tend to assume the attributes and functions traditionally assigned to the realm of the state and its authority. Transnational order or, more precisely, the regulations for cross-border economic transactions may be interpreted as resulting from the co-operation of private actors in establishing a framework for their activities. In doing so private actors take over functions traditionally assigned to the state and its sub-units. To elaborate on this proposition we will address two important fields that traditionally represent core functions of the state, i.e. legislation and jurisdiction.

# 3 The privatisation of legislation

## 3.1 Private norm-generation old and new[12]

A historical examination of the problems of cross-border trade shows that the development of non-public norms and rules is anything but new. Merchants have always devised their own practices and rules, given the lack of sufficient protection afforded by their principles (Stoecker 1990). While the *ius gentium* of ancient Rome was tailored to the demands of commercial trade in the multicultural Roman Empire, the needs of an increasingly mobile sea-borne trade led to the creation of the cosmopolitan *lex mercatoria* of the twelfth and thirteenth centuries. From the outset the fulcrum of commerce has been custom rather than law. "Out of his own needs and his own views the merchant of the Middle Ages created the Merchant Law" (Mitchell cited in (Trakman 1980, 5f).[13] Actual law established by public authorities did little more than echo the existing customs of the merchant community. Its specific linkage to the Western legal tradition is expressed in the qualities it shared with other legal systems of the time such as objectivity, universality, reciprocity, participatory adjudication, integration and growth (Berman 1983, 341). The diffusion of these principles was reinforced by the mutual influence of private and 'publicly' created orders. As regards the principle of universality, for instance, one can say that cross-border trade, with its

[12] This study does not focus on other sources of the law of international trade, such as public controls imposed by individual governments or public controls established in bilateral or multilateral arrangements of states.

[13] For the importance of the Canon Law of Contract see(Berman 1983, 245ff).

cosmopolitan and transnational character, often dominated local trade. Thus, transnational mercantile law provided a model for commercial transactions and their regulations in general (ibid., 342). In other words, between the eleventh and sixteenth centuries, merchant practice was the primary source of regulation while law functioned as a secondary control over commerce. By increasingly gaining an universal character, this cosmopolitan system of law transcended the local diversity of the socio-political environment in which economic transactions were embedded.

However, this transcending of jurisdictions in turn changed the socio-political context, contributing finally to the rise of nation states in the post-medieval period (Berman 1983; Greif 1992; Spruyt 1994). The emergence of the nation-state was accompanied by the growth of new interests of state jurisdictions. The values of the *lex mercatoria* were embodied in national domestic legal systems which were in line with state policies, national interests and domestic mores (Trakman 1981). This 'nationalisation', which took place from the seventeenth century onwards, meant that private mechanisms were partly relegated to second place, while the specific legislative and judicial systems of the state predominated.

Thus, one might say that the customary norms and practices of those engaged in import and export within the transnational commercial community had a *de facto* governing and binding character prior to the nationalisation that took place from the seventeenth century onwards (Berman 1993). However, the pendulum is again swinging in the reverse direction as their innovative and flexible nature has again strengthened the autonomous status of mercantile norms in the twentieth century. Old rules and customs have been adapted to changing circumstances and, given the need for rules capable of guiding transactions, new norms and procedures have been created by a community increasingly involved in cross-border trading.

The question is how the norms of the business community have managed to fulfil their crucial functions, i.e. to warrant transactional security by achieving control over post-contractual behaviour and to acquire universal effect by transcending territorial-based legal heterogeneity. According to the initial proposition, this universalization is not publicly inspired but occurs within the framework of private activities. Indeed, in practice we find strong tendencies of deliberate efforts to shield private norm-setting, or more generally, private regulatory activities from state intervention (for the following see (Stein 1995, 35-52).

The first and, in quantitative terms, most important mechanism relates to the standardization of contractual provisions. Standardization of contractual provisions through model contracts or standardized clauses for specific transanctions often represent fully-fledged systems of provisions that positively replace national law in an encompassing way. In this respect standardized contracts govern almost the entire market for bulk products, and play an important role in international transport by sea and air, in the construction industry and in finance. In the context of the present study it is important to distinguish two ways in which the codification of these clauses with transnational reach occurs. One the one hand

standardization takes place within the realm of private organizations.[14] Transnational branch organization and interest associations frequently establish codes of conduct that combine general contractarian principles with sector- or sub-sector specific clauses. In addition to such sectoral codification of trade customs there are transnational private organizations with a more general approach. A good example of how a private organization managed – independently of public influence - to create influential, although legally non-binding, norms with universal reach are the International Commercial Terms (Incoterms) of the International Chamber of Commerce in Paris. The Incoterms codify contractual standards for the place of delivery and/or place and time of the passing of risk, such as "cost, insurance, freight (cif)" or "free on board (fob)". They aspire to harmonize the common practices of various countries and are regularly updated and, if necessary, revised. If agreed to by the contractual parties, both court decisions and arbitration awards recognize the contractual nature of the Incoterms' binding force (Houte 1995, 153).

On the other hand, however, it is not only private organizations that are active as 'formulating agencies' (Stein 1995) in overcoming national regulatory diversity. Other examples relate to state-created international organizations which are engaged in efforts to harmonize and unify law in international trade such as the "United Nations Commission on International Trade Law "(UNCITRAL) or the Economic Commission for Europe of the UN. The results of such publicly inspired efforts to harmonize private international law provisions are, for example, the UNCITRAL's model law of contract or, more recently, the "Principles of European Contract Law" written under the auspices of the Commission of the European Union (Michaelis 1998). Both compilations of principles constitute attempts to incorporate commercial practices and customs into domestic regulations that grant maximum scope to merchant autonomy and flexibility. As both compilations are designed to function as model laws for national legislation, they can serve as examples of how privately emerging anational norms and rules penetrate national laws.[15]

The second mechanism that represents private efforts to detach their activities from diverging national regulations relates to efforts to replace public regulations with contractural agreements which have a broad scope. Such self-regulatory or self-executing agreements are not restricted to substantial contract matters, but also include provisions of procedural concern including conflict resolution. All these provisions aim at maintaining the parties' interest throughout and after the agreement to contract. As self-executing contracting is quite demanding in terms of pre-contract negotiations, these forms of agreements are particularly likely to occur in business relationships which are of a long

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[14] Examples are branch associations such as the International Air Transport Association, the Fédération Internationale des Ingénieur-Conseils, the International Chamber of Commerce in Paris, the ICC Institute for International Business Law and Practice in Paris, the International Maritime Commission in Antwerp or the International Law Association in London.

[15] The "Principles of International Commercial Contracts" of the International Institute for the Unification of Private Law in Rome (UNIDROIT's principles), however, represent an important example of a publicly inspired concept on the basis of a legal comparative approach.

duration, such as in agreements to exploit raw materials or on the transfer of technical know-how.

The third mechnism, finally, is the institutionalization of cross-border activities within transnational organizations. Such organizational schemes take the shape, for example, of multinational organizations, transnational cartells or transnational interest associations (Knill and Lehmkuhl 1998; Kronstein 1967; Muchlinski 1997). How can we interpret these findings?

### 3.2 Private norm-setting and public sanctioning

The information presented so far shows the significant practical importance of private activities not only for the creation of norms but also for the far-reaching substitution of positive-public regulations in cross-border transactions. One might argue, however, that private norm-setting is anything but new, a classical example being technical standardization at both national and international level. The Deutsches Institut für Normung (DIN), the International Organization for Standardisation (ISO), the Committee for European Normalization (CEN), the European Committee for Electrotechnical Standardization (CENELEC) and the European Telecommunication Standard Institute (ETSI) are only a few examples of how technical standards – seen as *pars pro toto* for norm-setting activities – result from the intricate interactions of company business strategies, standards committees and processes of market diffusion (Knill and Lehmkuhl 1998; Ronit and Schneider 1999; Schmidt and Werle 1998). In most of these cases private actors who are active in standardization are provided with public authority delegated to them by public actors.[16] The objective of this delegation is mainly to increase efficiency and the acceptance of standardization outcomes by incorporating private expertise in the process of standard-making. Yet, it is precisely the *delegated* character of authority that makes the significant difference between these forms of norm-setting in more traditional trade, and norm-setting activities in international trade. In principle, the idea is that there is some kind of authoritative allocation of responsibilities and competences, and that where there is doubt, the state can intervene with its monopoly of legal and physical power to guarantee a certain degree of collective regulatory action.

By contrast it is precisely the absence of any monopoly of power that makes cross-border trade different from domestic trade. As a result of the restricted territorial nature of the 'protective state' (Buchanan 1975, 68f/ 85ff) private rules governing transactions across borders emerged. In the absence of a hierarchical order private solutions emerged to structure problematic constellations. Hence, it was not delegation by public actors which gave rise to private norm-generative authority, rather it was their very absence. Public actors do not delegate *ex ante* norm-creation capacities to private actors, instead, autonomous private action is only sanctioned *ex post* by public regulations. This holds true

[16] On the notion of delegating public authority to private actors see Offe 1981.

for both the historical processes and the development of the modern version of transnational mercantile regulations.

Since the seminal writings on commercial norms in the early 1960s, however, there has been a heated debate among lawyers as to the character of the new body of law merchant.[17] On the one hand, legislation is stressed as being the heart of law, thus minimising the role of customs. This view is indicative of a positivist approach based on the assumption that the origin and sanctions of all law are embodied in the will of the state, and that international law stems from the co-ordination of sovereign states (Berman 1996, 18; Coleman and Leiter 1996). In particular, this interpretation rejects the notion that in transnational business contracting parties can mould or conduct their exchange completely independently of government control by replacing national legal orders with their contracts' claim of transnational validity. Not only lawyers but also sociologists such as *Durkheim* have objected to the idea of *contrat sans loi*, by claiming that the binding force of any contract needs to be rooted in broader societal contexts (Durkheim and Simpson 1964, ch. 3).

By contrast, adepts of legal pluralism and sociological jurisprudence in particular accept the capacity of jurisgenerative power in innumerable human communities outside the formal boundaries of states.[18] The most radical interpretation, the theory of mercantile norms as an autonomous legal order in combination with the so-called delocalization theory, deliberately concedes the linkage between national laws and international trade. Reflecting the desire for a uniformity of norms and the regulation of international commercial arbitration, these approaches claim the existence of an autonomous legal character of merchants' laws which should not be subject to the potentially varying legal controls of states (Redfern and Hunter 1991, 82).

A different analytical focus argues that self-executing or self-regulatory contracts in particular establish a system of norms that can transcend national legal diversity and achieve global validity in a threefold way. First, as described above, self-executing contracts develop a hierarchy of 'primary rules', which regulate the future behaviour of the contracting parties, and 'secondary rules', which regulate the recognition of the primary rules, their interpretation and the procedures for conflict settlement (Teubner 1997, 16). Second, by referring to pre-existing standards and arbitral precedents on the one hand and future conflict settlement on the other, contractual agreements reduce contracts to one element in an ongoing process of norm-production, norm-development and norm application in which "the network of elements creates the very elements of the system" (ibid.). Put differently, commercial contracting can be interpreted as "decentralized law-making" (Cooter 1996) that extends itself into the past and into the future. Third, self-executing contracts establish a 'reflexive mechanism' (Banakar 1998; Stein 1995) that transforms the vicious circle of contractual self-validation into a virtuous circle of two legal processes – contracting and

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[17] For a discussion of whether or not the body of rules represents an autonomous legal system see amongst others (Bonell 1978; Carbonneau 1990; Dasser 1991; Goldman 1964; Mustill 1989; Schmidthoff 1982; Streit and Mangels 1996).

[18] (Dane 1996; Galanter 1981; Griffith 1986; Merry 1988; Teubner 1997)

arbitration (Teubner 1997, 16f). It is claimed that this transformation becomes possible through the establishment of arbitration outside the contract's internal arrangements. As quasi external institutions, arbitral tribunals not only judge the validity and fulfilment of contractual agreements, they also apply the norms of the 'formulating agencies'.

To conclude, according to these considerations, private actors have achieved the capacity to establish and develop norms designed to govern their behaviour. Hence, private and publicly created norms are competing norms rather than complementary norms. These norms originate in the first place in the interaction of private individuals and are only subsequently explicitly codified in the unification movement, or by 'creeping codification' (Berger 1996), either at global or European level. Decentralised forms of self-organization such as custom, self-enforcing contracts and other strategies of conflict avoidance of contracting parties tend to positively substitute public regulation (Stein 1995, 39ff), thus contributing to an authentically global law (Teubner 1997, 17). If one takes the consensus of individual contracts as the core of decentralised norm-creation (Berger 1996, 101), one might interpret the role of the formulating agencies as quasi-legislation. In this respect, one can speak of a constellation in which privately generated norms substitute public ones.

However, the capacity of these forms of self-organization to limit the reach of public regulation encounter a factor which, more than any other, distinguishes contemporary configurations from their medieval ancestors: the density of publicly created organizations at international level is much greater. On the one hand, formulating agencies not only encompass private actors, they also involve private and public actors and organizations. On the other hand, there are both international and supranational organizations involved in contributing to the codification of provisions governing international trade. They do so by either co-ordinating the private international laws of states or by codifying commercial customs. Hence, the commercial cross-border transactions of business actors do not take place in institutional isolation, rather they are embedded in an institutional environment characterized by states' efforts to catch up with the regulatory capacity of private actors.[19]

Put concisely, these final considerations lead us to partly reformulate the initial proposition. While decentralized business relations and private organizational schemes certainly have the advantage of being more flexible and responsive in their efforts to accommodate private parties' interests in contractual norms with transnational validity, private and public organizations complement each other in their efforts to institutionalize and universalize contractual standards. In what follows, attention is given to the second dimension of our initial proposition, i.e. the question of the independence from public scrutiny of private dispute resolution.

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[19] In this respect it might be interesting to question whether processes of political, economic and legal integration have any impact on the private self-regulatory capacity. The European integration process, with its far-reaching purpose of legal integration and harmonization, make Europe a good case in point.

# 4 Courts as support structures for private arbitration

The well-known exercise of *Staatsentlastung* by private associations describes phenomena whereby the state and its administration use private actors to fulfil specific tasks. For public actors, the participation of private actors in the formulation *and* implementation of public policies has the advantage of relieving the state of problems of legitimacy and control of its policies. Transnational commercial arbitration, by contrast, provides an example of a configuration in which the autonomy of private actors at transnational level has continuously increased, assigning only an auxiliary function to national courts.

## 4.1 The relationship between national courts and transborder arbitral adjudication

Although it is undisputed that transnational arbitration by far dominates court litigation in quantitative terms, the relationship between courts and state provisions *vis-à-vis* commercial arbitration has fuelled an intensive discussion. On the one hand, self-regulation and self-governance through contract, i.e. party autonomy[20] is regarded as a critical doctrinal and practical factor in liberating the international arbitral process from the regimes of national law (Pechota 1998). Its self-contained character is underpinned by the high degree of voluntary compliance with arbitral awards: although the confidentiality of arbitration proceedings makes exact statistical surveys difficult, it is assumed that about 90 per cent of all awards are settled voluntarily, with the loosing party abiding freely (Blaurock 1993, 257; Stumpf and Steinberger 1990, 175f). On the other hand, party autonomy regretably leads to a lawlessness in transnational arbitration, i.e. their secrecy, their procedural irregularity, and the fact that they are essentially divorced from national laws and national courts, isolates arbitral tribunals from otherwise applicable mandatory national laws (McConnaughay 1999).

Indeed, it would be beyond the scope of this study to arrive at a comprehensive assessment of the relationship between public and private arrangements. What is possible, however, is to elaborate on the question of whether private arrangements and the voluntary compliance of loosing parties take place under the shadow of law (i.e. arbitrational laws and court supervision), or whether the proposition on the dominance of private arrangements holds true.[21]

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[20] In the present context, party autonomy includes the choice of laws that govern both the formal and the material parts of the contract.

[21] However, this undertaking is complicated by the fact that international commercial arbitration takes place within four different systems of law: first, the law which governs the recognition and the enforcement of the agreement to arbitrate; second, the law which governs the actual arbitration proceedings; third, the set of rules which the arbitrational tribunal must apply to the substantive matters in dispute before it; and fourth, the law which governs the recognition and enforcement of the award of the arbitrational tribunal (Redfern and Hunter 1991, 1f). In what

*The supervisory role of courts*

The system governing the judicial enforcement of arbitrational awards must accommodate two conflicting interests: one limiting the court's review competence in order to allow the arbitration procedure to fully develop its merits (e.g. by increasing the parties' autonomy to choose the norms of arbitration), the other, the court's own interest in correcting failures and misuses by arbitrators and in enforcing any relevant mandatory rule of the respective jurisdiction (Stewart 1994, 163). The following overview provides evidence to support the proposition that in the context of transnational commercial arbitration the former interest significantly outweighs the latter.

Court supervision of arbitrational tribunals occurs in principle in two stages (Dasser 1991, 314ff). In the first stage, objections may be raised with respect to the procedural norms chosen. Here, a court may decide to give effect to the agreement to arbitrate or to annul an award rendered in its jurisdiction. The range of supervision is regulated by the respective national arbitration provisions. The second stage reviews foreign awards in the enforcement phase. Most contemporary arbitrational laws narrow the scope of the review at this final stage by containing a general regulation in favour of the enforcement of foreign arbitrational awards and by limiting the grounds on which enforcement of those awards may be refused (Carbonneau 1998a; Stewart 1994, 164).

The emergence of such a consensus is due in no small measure to the impact of the principal standard for the enforcement of arbitrational awards and agreements, i.e., the United Nations Convention on the Recognition and Enforcement of Foreign Arbitrational Awards of 1958 (Pechota 1998).[22] Yet, despite the clear trend towards an extension of arbitrational adjudicatory authority and a harmonization of basic notions and perceptions, which the internationalization of arbitration has brought about, this development has been uneven and even today there are still significant differences in the degree of autonomy from courts' judicial review granted by public regulations. While Portugal and Belgium, for instance, exclude the judicial review of transnational awards, and the French and Swiss statutory frameworks have further narrowed the scope for review, the U.S. courts have also increased the autonomy of the arbitrational process by removing all national law restraints on international arbitration. By contrast, British law is still reluctant to extend the autonomy of arbitration despite several amendments in both theory and practice.[23]

This also holds true for the provisions governing the first stage, i.e., the provisions framing the competence of courts in questions of arbitrability and of the law to be applied in arbitrational proceedings. Once again, the British position is at odds with the vast majority of other countries, and rejects the notion of arbitrational procedures which are wholly

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follows, particular attention is paid to the supervisory and supportive dimension of the role of courts.

[22] See (Redfern and Hunter 1991, 465ff) for other, regionally restricted treaties and conventions.

[23] For this diversity see, among others (Bernstein et al. 1998; Blessing 1992; Carbonneau 1998b; Drobnig 1990; Gottwald 1997; Stewart 1994); for a historical explanation of the British case see (Landes and Posner 1979).

unconnected to any national system of law (Huleat-James and Hunter 1997, 49). By contrast, and in much the same way as most European countries –the French provisions being the most liberal – the extensive US case law on the New York convention takes an increasing internationalist approach (but see (Donahey 1997; McConnaughay 1999). On the one hand, this restricts the extent to which arbitrational authority is subjected to the mandatory rules otherwise applicable in domestic arbitration. In Europe as in the USA, national courts enforce arbitrational awards based on the lex mercatoria, even where it is evident that a national law, which would otherwise have been applied, is thereby superseded (Carbonneau 1994, 122). On the other hand, the internationalisation of commercial arbitration, characterized by a restriction of judicial review together with an extension of the autonomy of the parties to chose the provision governing their disputes, has prompted a tendency for the municipal court system to be replaced by anational arbitration. The increasing autonomy of arbitrational adjudicatory authority is indicative of the predominance of private arrangements, which frequently assign only auxiliary functions to courts. A similar observation can be made with respect to the support activities of courts in arbitrational tribunals.

*The supportive role of courts*

The general trend towards an increasing degree of autonomy away from court control for tribunals in transnational commercial arbitration is reinforced by far-reaching amendments to national arbitration laws. These are designed to limit the supervisory role of courts by assigning to them a number of auxiliary or supportive functions

In a number of instances arbitrational institutions can be seen to be significantly predominant. For example, courts are only allowed to intervene in arbitral procedures on condition that the agreed procedure of the arbitral institution has been followed. In addition, courts are bound to supportive functions such as the enforcement of peremptory orders, the provision of necessary evidence, and the issuing of protective orders whether by injunction or otherwise. They are also bound to determine any question of law arising in the course of the proceedings which affects the rights of one or more parties (Bernstein et al. 1998, 2–70). Courts may also step in to gather information needed in the tribunal. British courts, for example, have the power to order the examination of a witness under oath before a special examiner appointed either by the court or by the British Consul in the country involved (ibid., 2–572)(Gottwald 1997, 70ff). An extreme case of this is American case law decisions which not only limit this supportive function to proceedings before American arbitration centres but also extend the supportive activities of courts to foreign arbitrational tribunals (Schlosser 1992, 60-63). A final example is the arbitrators themselves. It is quite common for judges in specialised courts, such as maritime transport, to be asked to arbitrate in private tribunals. Given their expertise in both the respective business at stake and legal matters, these judges seem to be well-suited for the job of private arbitrator in settling the disputes of cross-border transactions.

To sum up, as far as the validity of arbitrational agreements and the enforcement of arbitrational awards is concerned, private actors are faced with a paradox: although the

parties originally sought to avoid court litigation by agreeing on an arbitrational clause, they must, in the last instance, rely on domestic courts for the enforcement or rejection of their claims. Nevertheless, both international conventions and practice have steadily increased the autonomy of private arbitrational tribunals away from public supervision by courts. In addition, courts frequently function as supportive structures in arbitrational proceedings. Both the increasing autonomy of *arbitrational adjudication authority* and the supportive functions of courts seem to confirm the proposition that private actors and institutions which govern the jurisdiction of private cross-border commercial activities are, to a certain extent, predominant. However, we must bear in mind that even given the most progressive standard of arbitrational autonomy, transnational commercial arbitration only exists with the acquiescence of the 'sleeping watchdogs' who might wake up at any time, i.e. courts may intervene for one reason or another. Put differently, "the playing field is not a fair one", as courts may alter the interpretations of laws in ways that undermine the use of arbitration (Benson 1998, 284). For instance there is case where a supreme authority directed that there should be no arbitration in a matter where large financial sums are at stake. In another case, a state changed its provisions prohibiting an international type of arbitration of a state-controlled public utility in future (Blessing 1992, 83).

### 4.2 Private adjudicative authority "in the shadow of the future", and regulatory competition amongst states

Clearly, the description of the relationship between arbitrational tribunals and national courts provides interesting insights into the complex patterns of interaction between public and private arrangements in a domain traditionally monopolised by the state and its entities. First of all, it must be said that the successful enforcement of cross-border arbitrational awards turns a classical assumption on its head. Given the territoriality of law and the subsequent constitutional insecurity of trans-border exchange, it has been argued that probable, predictable, directly imposed costs of disobedience are higher in every mature domestic system than in its international counterpart (Bull 1977, 131ff). Hence, the high degree of voluntary enforcement of arbitrational awards comes as a surprise. In addition to the high degree of voluntary enforcement, the increasing discretion of private adjudication authority needs some explanation. Both aspects tend to confirm the proposition that private arrangements *vis-à-vis* states' regulatory efforts and their private international laws predominate. To explain these findings we draw on two mechanisms, a reputation-based mechanism 'in the shadow of the future', and the mechanism of regulatory competition amongst states.

First, at the heart of reputation-based explanations for voluntary acceptance of arbitral awards is a purely commercial mechanism designed to increase the transparency of the post-contractual behaviour of firms. It concerns the practice of associations blacklisting and publishing the names of recalcitrant members who fail to comply with the decision of an arbitrational tribunal. This rather draconian method of public shaming does not benefit the injured party, but it may cause substantial economic harm to the non-compliant party, and is

thus a powerful incentive for compliance.[24] However, one reservation in this is that the capacity of 'peer group' review as a mechanism of social control is decreasing. It is argued that nowadays it is only in associations where membership is a precondition for practising a particular 'trade' that a sufficient degree of pressure is applied to ensure that rules and judgements are complied with (Berger 1992, 17; Stoecker 1990, 105)

Notwithstanding this reservation, there is good reason to uphold the claim that reputation mechanisms still play an important role in the enforcement of arbitrational awards in contemporary constellations (Streit and Mangels 1996, 94). One important point that can be made in this respect is to refer to differentiated business communities rather than use the diffuse term 'merchant'. These specialised communities often encompass only a very limited number of actors who frequently know each other quite well. Single spot interactions are the exception rather than the rule. Participants are often linked by long-standing experience in their business relations and they implicitly recognize the distinction between relation-preserving and end-game norms (Bernstein 1996).

The importance that participants in these communities attach to their public image and good reputation can be seen in their reluctance to publish arbitrational proceedings and the respective rewards (or judgements) – particularly important for those accused of violating agreements. The reluctance even to allow arbitrational proceedings to be published anonymously can again be explained by the close familiarity of the participants of a specific business community. Being familiar with their respective infrastructure (e.g. technical features of ships that may be chartered), potential trading partners would easily recognise each other. Hence the shadow of the future (North) constitutes an important device and trade-inherent mechanism for compliance with contractual agreements and arbitrational awards. This "shadow of the future" crucially contributes to the emergence and maintenance of private adjudicatory authority, thus limiting the importance of the 'shadow of law' in the settlement of commercial disputes.

The second mechanism has also contributed to the increasing autonomy of arbitrational adjudicatory authority. As has already been mentioned, parallel to the continuing increase in foreign trade private commercial arbitration has become a growth industry and a distinct market, following the rules of supply and demand (Dezalay and Garth 1996). As such, international commercial arbitration is subject to economic policies of internationalization and liberalization and to the resulting regulatory competition. Regulatory competition of the national provisions of international commercial arbitration has been enhanced by forum-shopping activities which are practised by large international law firms in particular. Under pressure to provide their arbitrational centre for transnational dispute settlement with a framework which is most favourable to themselves, nation states have steadily amended their domestic regulations by expanding the discretion of party autonomy and by restricting

[24] In historical terms, foundation of a private mechanism of adjudication and its centralisation in merchant courts not only allowed to gather information on the creditworthiness of trading partners, but also functioned as a valuable reputation system (Greif 1993; Milgrom, North, and Weingast 1990).

the scope for the judicial review of arbitrational agreements and awards. This ‘scramble among Western European nations’ to compete for the arbitration business or this ‘open rivalry’ among developed and developing nations to provide attractive revenues for international arbitration (Mustill 1989; Park 1989) has significantly contributed to the important role of contemporary private transborder adjudication.

To sum up, the ‘shadow of the future’, in the shape of reputation-based mechanisms, together with regulatory competition between states and their domestic arbitrational provisions, has contributed to the ever-increasing autonomy of private adjudicatory authority. This authority constitutes an important feature of the governance structures of transnational trade and the settlement of its disputes. Transnational arbitration has succeeded in becoming a private authority that compensates to a large extent for the missing enforcement capacity of state actors so frequently noticed in analyses of international affairs. There is therefore good reason to stress the important role private actors play in the provision of public goods beyond the nation state.

However it would be going to far to claim that private adjudicatory authority is completely independent. Rather, the relationship is better understood as a constantly shifting one, and under certain circumstances we might witness inverse patterns. The London reinsurance market provides an example of a case in which the former capacity of private dispute regulation has increasingly eroded, thus fuelling a ‘back-to-the-courtroom’-movement since the late 1980s. Among the factors that rendered private structures unsuitable were the significant increase in the number of actors involved, a change in the business attitude of these actors and intensifying costs of compliance with the traditional established structures (Stammel 1998).

In addition it seems more appropriate to conceive of private and public arrangements as structurally coupled in a multiplicity of ways. This holds true for the provisions that govern the formal and material content of arbitration as well as for the mechanisms that safeguard the recognition and enforcement of arbitral awards. What is more, private commercial arbitration and the parties’ autonomy to decide on the formal and material content of their agreements take place in an environment in which states and courts still maintain their principle responsibility. States and courts can limit the scope of arbitration and of party autonomy. Although they are currently being pushed into the background, it can not be taken for granted that states and courts will tolerate the dominance of private transnational arrangements and institutions in the future. What has become known as a ‘second look philosophy’ in the United States of America, i.e. an increased awareness of courts of the principle superior importance of national mandatory law in relation to transnational agreements, indicates the embeddedness of private transnational arbitration in the uni, bi- or multilateral regulations of nation states. Hence, one has to rephrase the initial proposition that private transnational arbitration is independent. Rather, dispute settlement in transnational trade is governed by the dynamics of complex patterns of interaction and interdependence between private and public structures.

# 5 Conclusion

The issue of international economic transactions and the mechanisms of dispute resolution provides an intriguing case for quite a number of interesting questions in the broad context of research into the governance of internationalized states and societies. However, what has also become apparent is that different questions require quite different analytical foci and methodological approaches. For instance, a more historically-oriented approach might focus on the institutional differences between medieval and contemporary constellations thus implying a historical comparison, whereas the question of the circumstances in which private governance regimes emerge and are maintained would require a cross-sector comparison. What is more, the analytical foci must be accommodated in an appropriate way with explanatory approaches putting particular emphasis on transaction-cost-, power- or history-related factors in their analysis. Taking these considerations into account, the purpose of this conclusion is to highlight only a very few of the aspects that might be the focus of the research agenda which lies ahead. In this respect, the present study can be interpreted as an effort to delineate some aspects that an institutional analysis should account for, in order to elaborate on what can be meant by 'governance across multiple arenas' (Héritier 1999) or by polycentric governance (McGinnis 1999).

The starting point of the study is the observation that a 'protective state' is largely missing in internationalised environments, whereas at national level individual property rights are guaranteed by the domestic legal framework. This circumstance is of fundamental importance, as mechanisms which warrant possessive and transactional security are regarded as indispensable for rendering opportunistic behaviour suboptimal and for establishing incentives for production and trade. This is not to say that the state and the systems of states at international level no longer have a part to play. They do so, for instance, by setting the overall framework for trade patterns. However, while this framework is largely composed of a complex web of conflict rules created by multiple territorial states, a status of protection in the day-to-day business of firms derives from private authority rather than from the protective state. This private authority has two bases.

First, it is based on the ability to generate and develop norms which are both general enough to gain universal acceptance, yet specific enough to guide the interaction of specialised commercial interactions. These norms are internalized by those whom they are designed for, i.e. the respective business community and arbitrators who settle disputes in trade relations. Second, what makes the existence of a self-regulated private order amongst the international trade community even more pervasive is the existence of an ever-increasing number of arbitral tribunals all over the world which have the capacity to decide commercial disputes authoritatively. The high degree of voluntary compliance with private arbitral awards demonstrates that the set of rules constituting the new law merchant and the different private institutions of commercial dispute settlement are not just an appendix to authoritative ordering. Rather, these private norms and enforcement institutions have emerged outside the 'public domain' and are an essential and autonomous pillar of the overall governance structures of conflict resolution in international trade. As these private arrangements extend the reach of their agreements beyond those primarily involved, so they

increase their regulatory competence. Maritime transport is a well-researched example of private governance in this context (Cutler 1999; Zacher 1996).

What makes these private arrangements especially interesting for an analysis of 'governance across multiple arenas' is that they link local and global, decentral and more centralized, and public and private mechanisms of ordering in a particular way. In this respect, it is important to remember that it has proved necessary to rephrase the initial proposition. It is hardly possible to maintain the proposition that transnational commercial arbitration operates autonomously beyond the nation state. Instead, we have been able to delineate complex patterns and dynamics in the interaction between private and public arrangements at various geographical and functional levels. Hence, commercial arbitration confronts us less with a pure regime of private transnational governance, but rather with a system of a 'mixed parenatge', i.e. a system which does not build exclusively on either public or private contributions, but results from the combined contributions of state and private actors (Haufler 1995).

To conclude, one of the most considerable findings is that of a *pluralization of jurisgenerative locations and adjudicative authority*. This pluralization of sites of authority and control has prompted complex interactions as these locations or institutions are simultaneously *competing* as they fulfil equivalent functions and at the same time are *complementary* as they are mutually influencing and supporting each other. The presentation of the empirical findings has provided rich evidence of the interaction of multiple sites of authority.

The interaction and interdependence of pluralized centres of authority characterizes the patterns of norm-generation and enforcement in international trade. In terms of organizational theory, this web of interactions and interdependence is the functional equivalent to a comprehensive organization, when the latter is not achievable. It is hardly foreseeable that the system of states at international level will mould into such a coherent or comprehensible structure in the near future. Rather, the co-evolution and co-existence of multiple centres of authority might be expected, and it is the task of detailed empirical research to delineate the patterns of interactions and the distribution of competencies both across territorial and functional arenas and between public and private actors and institutions.

In this respect, transnational commercial arbitration might be a promising example for an interdisciplinary approach to the study of governance across multiple arenas. It breaks new ground in so far as it does not take a policy-oriented approach to the study of the respective contributions of public and private actors to ordering in internationalised environments. Rather, the present study operates at the interface between political and legal science: it focuses on the efforts of private actors to compensate for shortcomings in the private law of states and, finally, it identifies mechanisms of governance and their interaction under conditions of transationalization. Such an approach might not only contribute to a better understanding of the dynamics of globalization and its consequences for the overall picture of political organization involving state and non-state actors at various functional and geographical levels. It might also help to overcome the pre-dominant one-dimensional economic interpretation of commercial arbitration by analysing it in relation to the

framework of local, national and international structures and their embeddedness in political, cultural and economic life.

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