Transnationalizing Private Law – The Public and the Private Dimensions of Transnational Commercial Law

By Gralf-Peter Calliess & Moritz Renner[*]

A. Introduction

Transnational Commercial Law is an interdisciplinary research field which is concerned with the institutional organization of global economic exchange processes. From the perspective of institutional economics there are basically four different types of governance mechanisms which may be employed to institutionally support exchange. These are (1) uniform governance, where exchange is organized outside the market as intra-firm-trade and problems are solved by virtue of hierarchical coordination, (2) bilateral governance, where exchange between independent parties is self-stabilizing as long as the value of a continued relationship is higher than the profit from defecting, (3) trilateral private governance, where third-party institutions such as arbitration, reputation-based sanctions, and private norms are involved, and finally (4) trilateral public governance, where conflicts are solved by reference to state commercial law, courts, and public enforcement.[1]

Generally speaking, commerce is always institutionally embedded in a mixture of these public and private governance mechanisms. In domestic exchange processes, however, private governance takes place 'in the shadow' of a workable national legal system,

[*] *Gralf-Peter Calliess*, Ph.D. (law) University of Göttingen, Habilitation, University of Frankfurt, is Professor of Law at the University of Bremen, email: calliess@uni-bremen.de. He leads an interdisciplinary research project on "Legal Certainty and Fairness in Globalized Exchange Processes" at the DFG (*Deutsche Forschungsgemeinschaft* - German Research Foundation) Collaborative Research Centre "Transformations of the State" (http://www.sfb597.uni-bremen.de/). *Moritz Renner* is a Ph.D. candidate and former Research Associate in the said project. He now works at Humboldt-University, Berlin, email: moritz.renner@rewi.hu-berlin.de. An earlier version of this paper was presented at the 10th Anniversary Symposium of the German Law Journal "Transnationalizing Legal Cultures", Free University Berlin, 3 July 2009.

[1] *See* Oliver E. Williamson, *The Economics of Governance*, 95 AMERICAN ECONOMIC REVIEW 1 (2005) (Displaying the fundamentals of the institutional economics analysis of contractual exchange); ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 123-266 (1991). For an application to the field of transnational commerce, *see* Gralf-Peter Calliess, Thomas Dietz, Wioletta Konradi, Holger Nieswandt & Fabian Sosa, *Transformations of Commercial Law: New Forms of Legal Certainty for Globalized Exchange Processes?*, *in* TRANSFORMING THE GOLDEN AGE NATION STATE 83 (Hurrelmann, Leibfried, Martens & Mayer eds., 2007).

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whereas in international situations the public institutions are much weaker.[2] The reason is a lack of state cooperation in international commercial matters, e.g. with regard to the mutual recognition and enforcement of judgments or with regard to international harmonization of substantive commercial law.[3] Whereas public governance, thus, is territorially limited in effect, private governance is not. The mechanisms of uniform, bilateral or trilateral private governance work effectively across borders as well. Empirical research conducted in the framework of the Collaborative Research Centre (CRC) "Transformations of the State" at the University of Bremen[4] has revealed that economic globalization leads to both an internationalization and a privatization of commercial governance. In international trade the relative weight of public governance mechanisms decreases while the importance of private governance mechanisms increases as compared to commerce within the territorial limits of the nation state.[5]

In evaluating these developments from a normative standpoint, two questions arise: (1) Do new forms of privately produced institutions for cross-border commerce lead to the development of a commercial law beyond the state?, and if so, (2) is this transnationalization of commercial law problematic from the standpoint of public policy? The first question is discussed in the jurisprudential disputes surrounding the *lex mercatoria* or "New Law Merchant."[6] In another context we have contributed to this debate on the basis of empirical evidence collected in our research project at the CRC in Bremen.[7] We have argued that private governance regimes may qualify as (transnational) law subject to two conditions: First, potential disputes must be resolved by decision of a third party, and, second, the *ratio decidendi* of these decisions must be made public. Once precedents are publicly available they are integrated into the reasoning of later decisions, thus establishing a network of mutual communicative references. Legal norms come into

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[2] *See* AVINASH K. DIXIT, LAWLESSNESS AND ECONOMICS: ALTERNATIVE MODES OF GOVERNANCE (2004).

[3] *See* Gralf-Peter Calliess, *Value-added Norms, Local Litigation, and Global Enforcement: Why the Brussels-Philosophy failed in The Hague*, 5 GERMAN LAW JOURNAL 1489 (2004) (explaining the failed Hague Convention on the Recognition and Enforcement of Foreign Judgments); Dieter Schmidtchen and Hans-Jörg Schmidt-Trenz, *New Institutional Economics of International Transactions. Constitutional Uncertainty and the Creation of Institutions in Foreign Trade as exemplified by the Multinational Firm*, 9 JAHRBUCH FÜR NEUE POLITISCHE ÖKONOMIE 3 (1990) (elaborating more generally on the "constitutional uncertainty" of cross-border trade).

[4] Research program *available at* http://www.state.uni-bremen.de.

[5] *See* Calliess et al., *supra* note 1, at 99-103.

[6] *See* Peer Zumbansen, *Transnational Law*, in ENCYCLOPEDIA OF COMPARATIVE LAW 738 (Smits ed., 2006) (providing an overview of the discussion), *available at* http://ssrn.com/abstract=1105576. *Compare* Clive M. Schmitthoff, *International Business Law: A New Law Merchant*, 2 CURRENT LAW AND SOCIAL PROBLEMS 129 (1961); F. A. Mann, *Lex Facit Arbitrum*, *in* INTERNATIONAL ARBITRATION. LIBER AMICORUM FOR MARTIN DOMKE 157 (Sanders ed., 1976) (providing paradigmatic accounts of the different positions).

[7] *See* Gralf-Peter Calliess and Moritz Renner, *Between Law and Social Norms: The Evolution of Global Governance*, 22 RATIO JURIS 260 (2009), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1404160.

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existence as a mere by-product of this emerging discursive network of legal arguments. Transnational law thus develops as a self-referential system of communication (*autopoiesis*).[8] In the present article, however, we intend to analyze the second question: Is the emergence of a transnational commercial law problematic in terms of public policy?

B. Privatized Commercial Law and Public Policy

If the institutional foundations for commerce (in historical terms) *were*, (in theoretical terms) *can*, and (in fact) *are* provided not only by the state legal system, but also by private governance regimes, which sometimes qualify as law, then why should the state care about commercial law at all? This question can be considered from different standpoints. From a historical perspective it has been observed that the nation states in the course of the eighteenth and nineteenth centuries have built up a public institutional framework for commerce not only by modernizing their legal systems but also by incorporating many institutions and principles of the medieval *lex mercatoria* into their national commercial law.[9] From a more policy-oriented perspective, the emergence of a transnational commercial law raises fundamental issues as to the normative qualities of a "good private law order" which are to be fulfilled by any legal system. In this respect, it seems obvious that private law, especially the branch of commercial law, should primarily enable effective economic exchange by providing legal certainty for commercial relations and at the same time respecting the contracting parties' interests. This function may just as well be performed by private governance regimes. Matters get considerably more complicated, however, when it comes to questions of the "public interest" and the "common good" that private law relations necessarily touch upon.

It is well established that state courts, when they enforce commercial contracts and protect property rights, at the same time exercise public control functions by limiting the legal autonomy of commercial actors with regard to (1) public interests or public goods such as a workable competition or a stable currency, (2) the effects of contracts on third parties, e.g. on creditors outside the contractual relationship, and (3) the protection of weaker parties within the contract itself, such as the protection of consumers or employees against the unilateral exercise of private autonomy by economically dominant actors.

Conventional wisdom has it that only public institutions like state courts are in a position to exercise these public control functions. Purely private governance regimes, as implied, for

[8] *See* NIKLAS LUHMANN, LAW AS A SOCIAL SYSTEM (2004); GUNTHER TEUBNER, LAW AS AN AUTOPOIETIC SYSTEM (1993).

[9] *See* CLAIRE CUTLER, PRIVATE POWER AND GLOBAL AUTHORITY. TRANSNATIONAL MERCHANT LAW IN THE GLOBAL POLITICAL ECONOMY (2003); THOMAS DIETZ, INSTITUTIONEN UND GLOBALISIERUNG, Doctoral Dissertation, Bremen 2009, ch. 1 (*forthcoming*). This question is evaluated in more detail by Jens Mertens at the CRC in Bremen. *Available at* http://www.state.uni-bremen.de/homepages/mertens.

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instance, by the concept of a *contrat sans loi*[10] are regarded as highly problematic assuming that, in the words of the German *Reichsgericht*, "only an unconditional submission under a specific lawmaking authority . . . guarantees that the contractual relationship will be regulated, if necessary, against the selfish will of the economically stronger partner or of both partners, with regard to those public policy concerns that are based on general principles of law."[11]

The contrary view is taken, for example, by proponents of the *New Law Merchant*, who argue that transnational commercial law not only encompasses substantive legal norms in the interest of the contracting parties, but also creates its very own transnational public policy norms. Specifically, Gunther Teubner has proposed the idea that private governance regimes are bound to "auto-constitutionalize," i.e. to develop a body of higher-ranking norms functionally equivalent to national constitutional law.[12] Therefore, the argument goes on, there is nothing to fear from the transnationalization of law: Law beyond the state is in no way inferior to state-made law when it comes to accommodating public policy concerns. From this perspective, transnational law may even be depicted as being able to overcome the public/private distinction as such, by way of establishing more inclusive processes of regulation that involve both state and non-state, civil society actors.[13]

In the following paragraphs, we will argue that both accounts of the problem remain necessarily incomplete in that they both fail to reflect the complex interaction of public and private institutions in transnational law. Transnational law predominantly emerges in the very peculiar setting of international arbitration and is shaped by the international arbitrators' specific perspectives and methods of decision-making.[14] International arbitration enjoys a high degree of autonomy from the domestic legal systems, but it is at the same time not wholly independent from them. In this context, the long-standing doctrinal debate between the contractual and the jurisdictional theory of arbitration has been largely resolved in favor of a third alternative, the so-called "mixed or hybrid

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[10] *See* Henri Batiffol, *La loi appropriée au contrat*, *in* LE DROIT DES RELATIONS ÉCONOMIQUES INTERNATIONALES. ÉTUDES OFFERTES À BERTHOLD GOLDMANN 1(1982).

[11] Reichsgericht, JURISTISCHE WOCHENSCHRIFT 2058, 2059 (1936) (our translation).

[12] Gunther Teubner, *Global Private Regimes: Neo-spontaneous Law and Dual Constitution of Autonomous Sectors in World Society*, *in* GLOBALIZATION AND PUBLIC GOVERNANCE 71 (Teubner and Ladeur eds., 2004); Andreas Fischer-Lescano and Gunther Teubner, *Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, 25 MICHIGAN JOURNAL OF INTERNATIONAL LAW 999 (2004).

[13] *See* Gunther Teubner, *Contracting Worlds: The Many Autonomies of Private Law*, 9 SOCIAL AND LEGAL STUDIES 399 (2000).

[14] *See* Emmanuel Gaillard, *Transnational Law: A Legal System or a Method of Decision-Making?,* in THE PRACTICE OF TRANSNATIONAL LAW 53 (Berger ed., 2001).

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theory."[15] It is widely acknowledged by now that arbitral tribunals do not form part of any domestic jurisdiction but are still heavily influenced by and dependent on domestic procedural law and state courts. Similarly, on the level of substantive law, it is well-established that international arbitral tribunals are not bound by the conflict-of-law rules of their forum state but rather develop their own conflict-of-law rules on the basis of a comparative-law approach.[16]

In matters of commercial law, the relative autonomy of international arbitral tribunals is both guaranteed and limited by the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention),[17] which enjoys almost universal membership. Under the New York Convention all State Parties to the Convention must enforce awards rendered by international arbitral tribunals on their territory without *de novo* review as to their substance.[18] Recognition and enforcement may be refused only in a strictly limited number of situations, especially if such enforcement were contrary to the public policy of the country where enforcement is sought.[19] For the same reason, an arbitral award may be set aside by domestic courts under Art. 34 para 2(b)(ii) of the UNCITRAL Model Law on International Commercial Arbitration (UNCITRAL Model Law), on which the procedural law concerning arbitration is based in most states.

Thus, the New York Convention and the UNCITRAL Model Law establish a very limited oversight over international arbitration by state courts. Arbitral tribunals remain free to make decisions according to those rules of substantive law that seem appropriate for transnational commercial relations, especially based on the parties' choice of law and their legitimate expectations. But at the same time such tribunals are bound to take into account potential obstacles to the validity and enforceability of the resulting arbitral awards. The arbitration rules of the International Chamber of Commerce (ICC) in Paris, which is the leading provider of international commercial arbitration services worldwide, reflect this tension. According to Art. 17 para 1 of the ICC Arbitration Rules, "[t]he parties shall be free to agree upon the rules of law to be applied by the Arbitral Tribunal to the merits of the dispute. In the absence of any such agreement, the Arbitral Tribunal shall apply the rules of law which it determines to be appropriate." Article 35 of the Rules, in contrast, provides that "[i]n all matters not expressly provided for in these Rules, the Court

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[15] *See* JULIAN D. LEW, LOUKAS A. MISTELIS & STEFAN M. KRÖLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 78 (2003).

[16] *See* ground-breaking: Berthold Goldman, *Les conflits de lois dans l'arbitrage international de droit privé*, 109 REC. DES COURS 347 (1963).

[17] New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 38.

[18] *Id*. at Art. III.

[19] *Id*. at Art. V para. 2(b).

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and the Arbitral Tribunal shall . . . make every effort to make sure that the Award is enforceable at law." In addition, Art. 6 of the Internal Rules of the ICC Court of Arbitration foresees that all ICC arbitral awards are scrutinized by the ICC's central administrative body with regard to requirements of the "law of the place of arbitration."

On this basis, the status of public-policy related norms with regard to international commercial arbitration is highly tenuous. In domestic legal systems, public policy objectives are usually pursued by way of mandatory rules of law, i.e. legal norms that cannot be derogated from by agreement of the contracting parties.[20] In international commercial arbitration, however, it is unclear whether and, if so, which mandatory rules of law are to be applied by the arbitrator.[21] First, it can be argued that the international arbitrator is (by contract) bound to respect the will of the parties, but is not to be the guardian of any state's public policy.[22] Second, it is fundamentally unclear which legal system might serve as a point of reference for the arbitrator applying mandatory rules. Given that international arbitral tribunals do not have a *lex fori* in the conflict-of-laws sense of the term, to the international arbitrator "there is no foreign law,"[23] but at the same time "every law is foreign law."[24]

C. Empirical Evidence from ICC Arbitration

The question of how international commercial arbitration comes to terms with this state of affairs is, in the first place, an empirical one. Therefore, in the context of our above mentioned research project, we have analysed a large number of arbitral awards from three different regimes dealing with issues of public goods, fundamental rights, and the protection of weaker parties. At this point we cannot discuss the study at full length.[25] In

[20] *See* Thomas G. Guedj, *The Theory of the Lois de Police, A Functional Trend in Continental Private International Law - A Comparative Analysis with Modern American Theories*, 39 AM. J. COMP. L. 661, 661 (1991) (providing the status of mandatory rules in conflict of laws); Trevor Clayton Hartley, *Mandatory Rules in International Contracts: The Common Law Approach*, REC. DES COURS 266, 337 (1997).

[21] *See, e.g.,* Nathalie Voser, *Mandatory Rules of Law as a Limitation on the Law Applicable in International Commercial Arbitration*, 7 AM. REV. INT'L ARB. 319 (1996); Marc Blessing, *Mandatory Rules of Law versus Party Autonomy in International Arbitration*, 14 J. INT'L ARB. 23 (1997); Andrew Barraclough and Jeff Waincymer, *Mandatory Rules of Law in International Commercial Arbitration*, 6 MELBOURNE J. INT'L L. 205 (2005); Alan Scott Rau, *The Arbitrator and "Mandatory Rules of Law"*, 18 AM. REV. INT'L ARB. 51 (2007).

[22] *See* Yves Derains, *Public Policy and the Law Applicable to the Dispute in International Arbitration*, in COMPARATIVE ARBITRATION PRACTICE AND PUBLIC POLICY IN ARBITRATION 227, 240-1 (Sanders ed., 1987).

[23] *See* Derains, *supra* note 20, at 232.

[24] *See* Voser, *supra* note 19, at 330.

[25] This study was conducted by Moritz Renner, and the results are to be published in his doctoral dissertation; for preliminary observations *see* Moritz Renner, *Towards a Hierarchy of Norms in Transnational Law?,* 26 J. INT'L ARB. 533 (2009).

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order to give some tentative insights we will focus on three examples from international commercial arbitration. As two typical examples for the protection of public goods we took the prohibition of anti-competitive provisions in commercial contracts, which in the European Union is codified in Art. 81 EC-Treaty, and the prohibition of corruption, which is widely recognized in domestic private law systems. As an example for the protection of weaker parties we looked at the protection of commercial agents, especially under the European Commercial Agents Directive.[26] All three issues have frequently been brought before domestic courts and all three issues often become relevant in international arbitration proceedings.

I. Antitrust Law

Art. 81 EC Treaty provides that agreements restricting and distorting competition within the European internal market are "prohibited as incompatible with the common market." It is one of the main pillars of the European Union's "economic constitution." As such, it enjoys not only supremacy over the domestic law in the Member States of the Union but is also directly applicable to private law relations. Member State courts, therefore, must declare void private contracts that run counter to the mandatory provisions of European antitrust law. But what about arbitral tribunals? Can private actors, just by choosing arbitration, "opt out of regulation"[27] and circumvent public policy norms that would be applicable if the dispute was decided by a domestic court?

The role of antitrust law in international arbitration has been discussed for decades, mainly on the basis of two decisions by the US Supreme Court and the European Court of Justice (ECJ). In the 1985 *Mitsubishi* decision,[28] the US Supreme Court was asked to give effect to an arbitration clause in a contractual dispute between a Puertorican party and a Japanese party potentially involving antitrust claims under the US Sherman Act. In its "landmark decision,"[29] the Supreme Court ruled that the claims should be arbitrated by a tribunal sitting in Japan, as foreseen by the contract, and thus for the first time explicitly acknowledged the arbitrability of statutory claims. The Court, on the basis of a liberal federal policy favouring arbitration agreements, reasoned that the arbitral tribunal would enforce US antitrust law just as a domestic court would do.

[26] *See* Directive 86/653/EEC.

[27] *See* Erin Ann O'Hara, *Opting Out of Regulation: A Public Choice Analysis of Contractual Choice of Law*, 53 VAND. L. REV. 1551 (2000).

[28] *See* Mitsubishi Motors v. Soler Chrysler-Plymouth, 473 U.S. 614 (1985).

[29] *See* Sigvard Jarvin, *Arbitrability of Anti-Trust Disputes: The Mitsubishi v. Soler Case*, 2 J. INT'L ARB. 69, 77 (1985).

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The ECJ's 1999 ruling in the *Eco Swiss* case[30] can be seen as complementary to this decision. In this decision, the ECJ held that all courts in EU Member States were obliged to annul arbitral awards that were contrary to Art. 81 EC Treaty. As already mentioned, such annulment is possible for domestic courts of the country where the arbitral tribunal sits if the award is contrary to the country's public policy according to Art. 34 para 2(b)(ii) UNCITRAL Model Law. The ECJ argued that antitrust law formed an integral part of European public policy and might also constitute a ground for refusing the recognition/enforcement of arbitral awards under Art. V para 2(b) of the New York Convention.

Read together, both decisions show that state courts are willing to entrust international arbitral tribunals with the difficult task of safeguarding public policy interest, but at the same time are ready to step in as a court of last resort to control the resulting arbitral awards. However, this control is limited to specific stages of the proceeding and conditional upon the place (a) where the arbitral tribunal sits and (b) where the arbitral award is to be enforced. But as the place of arbitration may be chosen freely by the parties and the place of enforcement is not always foreseeable until enforcement actually takes place, domestic courts can effectively only provide little guidance to arbitral tribunals. This is especially so due to substantive differences in antitrust and competition law policies from country to country.

Nevertheless, empirical evidence demonstrates that international arbitral tribunals are willing and able to apply antitrust provisions in commercial disputes. In the last 15 years there have been numerous cases decided by ICC arbitral tribunals dealing with matters of competition law.[31] The reasoning for or against the application of antitrust norms in these cases, however, is not always convincing, although (or maybe rather: *because*) it is most often based on traditional conflict-of-laws arguments, which will be explained in detail below.

It is surprisingly rare that arbitral tribunals expressly argue with a potential intervention of state courts when applying antitrust law. In one of the few such cases,[32] the arbitral tribunal not only referred to the *Mitsubishi* decision but also considered that arbitrators "should always be concerned about the efficacy of their awards." The arbitral tribunal held these considerations to be sufficient for applying Art. 81 EC Treaty to a contract for which the parties have chosen New York State law as applicable.

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[30] *See* Case C-126/97, Eco Swiss China Time Ltd v. Benetton International NV (1999).

[31] *See, e.g.* ICC cases no. 6503, (1990), 122 J. DROIT INT'L (CLUNET) 1022-1031 (1995); 7146 (1992), Y.B. COM. ARB. XXVI 119–129 (2001); 7181 (1992), Y.B. COM. ARB. XXI 99–112 (1996); 7539 (1995), J. DROIT INT'L (CLUNET) 1030-1037 (1996); 7893 (1994), Y.B. COM. ARB. XXVII 139–152 (2002); 8423 (1994), J. DROIT INT'L (CLUNET) 1079-1082 (2002); 8626 (1996), J. DROIT INT'L (CLUNET) 1073-1079 (1999); 10988 (2003), J. DROIT INT'L (CLUNET) 1408-1417 (2006).

[32] *See* ICC Case No. 8626 (1996), J. DROIT INT'L (CLUNET) 1073-1079 (1999).

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Many arbitral awards concerning matters of antitrust law, in contrast, lack a thorough reasoning on the applicability of mandatory norms, which leads to troubling inconsistencies of the case-law. In a very similar case as the one just described,[33] an arbitral tribunal had argued that EC antitrust law was *not* applicable to a contract falling under the law of New York. Differently than under the federal *Mitsubishi* doctrine, it had reasoned, antitrust disputes were not arbitrable under New York State law.

Nevertheless, and for a very simple reason, in most cases arbitral tribunals take the applicability of mandatory antitrust norms for granted:[34] Usually antitrust provisions such as Art. 81 EC Treaty form part of the law applicable to the contract as a whole. In these cases, it is assumed that the parties have foreseen and agreed to the applicability of the mandatory norms of the law that they usually have chosen themselves. This argument is shared by large parts of the literature on international arbitration as well as in traditional conflict-of-laws discourse.[35] Thus, if for instance the parties have chosen Belgian law to be applicable to their contract, an international arbitrator would not hesitate to apply European antitrust law, as the latter forms part of the law of all EU Member States.

Obviously, this makes it possible for the contracting parties to choose a law that is more lenient with regard to antitrust issues than their home law or to escape the reach of a particular system of antitrust law. In traditional conflict-of-laws scholarship, this problem is generally solved either by a comprehensive governmental interest analysis[36] or by finding ways to apply "foreign" mandatory laws (*loi de police* method).[37] International arbitrators, however, are often reluctant to resort to those methods and to engage in a weighing of divergent public interests, although there are many attempts at adapting the

[33] *See* ICC Case No. 7893 (1994), Y.B. COM. ARB. XXVII 139–152 (2002).

[34] *See* ICC Cases No. 7146 (1992), Y.B. COM. ARB. XXVI 119–129 (2001); 7181 (1992), Y.B. COM. ARB. XXI 99–112 (1996); 7539 (1995), J. DROIT INT'L (CLUNET) 1030-1037 (1996) ; 8423 (1994), J. DROIT INT'L (CLUNET) 1079-1082 (2002); 10988 (2003), J. DROIT INT'L (CLUNET) 1408-1417 (2006).

[35] *See, e.g.,* Eric Loquin, *Les pouvoirs des arbitres internationaux à la lumière de l'evolution récente du droit de l'arbitrage international*, J. DROIT INT'L (CLUNET) 293, 342 (1983) (providing literature in international arbitration); LEW, MISTELIS AND KRÖLL, *supra* note 15, para 17-27; Voser, *supra* note 19, 340-1; Serge Lazareff, *Mandatory Extraterritorial Application of National Law*, 11 ARB. INT'L 137, 138 (1995); *see* Frederick Alexander Mann, *Conflict of Laws and Public Law*, 132 REC. DES COURS 107, 157 et seq. (1971-I) (providing the corresponding position of conflict-of-laws scholarship, especially the so-called *Schuldstatutstheorie*).

[36] *See* BRAINERD CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 48 (1963) (providing this approach's development in Anglo-American conflict of laws).

[37] *See* Guedj, *supra* note 18, (providing an overview of this approach that is dominant in the Continental European systems).

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loi de police method to the specific needs of international commercial arbitration.[38] Rather, international arbitral tribunals resort to the "law as a fact"-doctrine,[39] which allows them to take into account mandatory norms beyond the chosen law without, however, granting them force of law.

The application of mandatory norms in international arbitration is even more problematic where the parties have chosen to have their conflict decided not according to rules of law but by *amiable composition*, i.e. according to general considerations of equity. In such cases, the application of antitrust law might be flatly rejected as being contrary to the will of the parties. One arbitral tribunal sitting in Switzerland and deciding as *amiable compositeur*,[40] for instance, held that mandatory norms – be it of the place of arbitration or any other legal order – were generally inapplicable in such a proceeding. It went on to argue that specifically the EC Treaty provisions on antitrust law were not to be considered as they did not form part of "transnational public policy."

This concept of a public policy that is common to all legal systems and thus "truly international, or transnational,"[41] however, opens up a perspective for applying mandatory norms in international arbitration without having recourse to traditional conflict-of-laws methods. Transnational public policy is supposed to consist of the mandatory rules of law that have been recognized in arbitral practice as being common to all (civilized) legal systems,[42] thus referring to the non-dispositive core of the *lex mercatoria*.[43] Specifically in the field of antitrust law, however, which largely differs from country to country, it seems questionable whether such a common core of universal legal principles might provide guidance to international arbitral tribunals.[44]

[38] *See* JETTE BEULKER, DIE EINGRIFFSNORMENPROBLEMATIK IN INTERNATIONALEN SCHIEDSVERFAHREN: PARALLELEN UND BESONDERHEITEN IM VERGLEICH ZUR STAATLICHEN GERICHTSBARKEIT (2005) (providing the most comprehensive attempt so far).

[39] *See* A. A. Ehrenzweig, *Local and Moral Data in the Conflict of Laws*, 16 BUFF. L. REV. 55 (1966); H. H. Kay, *Conflict of Laws: Foreign Law as Datum*, 53 CAL. L. REV. 47 (1965).

[40] *See, e.g.,* ICC case no. 6503 (1990), J. DROIT INT'L (CLUNET) 1022-1031 (1995).

[41] *See* Pierre Lalive, *Transnational (or Truly International) Public Policy in International Arbitration*, in COMPARATIVE ARBITRATION PRACTICE AND PUBLIC POLICY IN ARBITRATION, 257 (Sanders ed., 1987).

[42] *See* id., 286.

[43] *See* Lambert Matray, *Arbitrage et ordre public transnational*, in THE ART OF ARBITRATION, 241, at 244 (Schultsz and van den Berg eds., 1982).

[44] For an optimistic perspective see Cathérine Kessedjian, *Transnational Public Policy*, in INTERNATIONAL ARBITRATION 2006: BACK TO BASICS? (van den Berg ed., 2007), 857, 868-9.

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II. The Prohibition of Corruption

While in the field of antitrust law there are only few commonalities between domestic legal orders, the prohibition of corrupt practices is universally accepted by domestic legal systems and international instruments alike. In international arbitration proceedings, the issue of a potential nullity of contracts due to corrupt practices is a recurring problem.[45] Here, it can be observed that arbitral tribunals increasingly rely on transnational rules and general principles of law. Arbitral tribunals have regularly held corruption to be "an international evil, being contrary to good morals and to an international public policy common to the community of nations."[46] Even where arbitral tribunals sit as *amiable compositeur*, they thus hold the general prohibition of corrupt practices to be non-derogable.[47] Sometimes they even rely on international conventions for justifying this stance.[48] The universal acceptance of such a prohibition can also be reflected within the "law-as-fact" approach, here leading to a facilitated consideration of "foreign" mandatory norms prohibiting corruption.[49]

In many cases, however, even the prohibition of corruption is not derived from general principles of law but from specific domestic law provisions. Just as with antitrust law, this is unproblematic as long as the mandatory provision in question forms part of the law chosen by the parties.[50] It is highly problematic, however, where the application of domestic law provisions beyond the chosen law stands into question. This is so because some legal systems, especially US law, foresee very harsh legal consequences for corrupt practices, such as triple damages under the US Racketeer Influenced and Corrupt Organizations ACT (RICO Act).[51] If, for example, one of the parties of a construction contract under Brasilian law claims triple damages under the US RICO Act, an arbitral tribunal will most likely decline the applicability of the pertaining RICO Act provisions.[52]

[45] *See, e.g.,* ICC Cases Nos. 5622 (1988), 19 Y.B. COM. ARB. 105–23 (1994); 6320 (1992), 20 Y.B. COM. ARB. 62–109 (1995); 6497 (1994), 24a Y.B. COM. ARB. 71–79 (1999); 7047 (1994), 21 Y.B. COM. ARB. 79–98 (1996); 8385 (1995), 124 J. DROIT INT'L (CLUNET) 1061–73 (1997); 8891 (1998), 127 J. DROIT INT'L (CLUNET) 1076–85 (2000); 9333 (1998), 129 J. DROIT INT'L (CLUNET) 1093–106 (2002).

[46] *See* ICC Case no. 1110 (1963).

[47] *See* ICC Case no. 8891 (1998), 127 J. DROIT INT'L (CLUNET) 1076–85 (2000).

[48] *See* ICC Case no. 9333 (1998), 129 J. DROIT INT'L (CLUNET) 1093–106 (2002).

[49] *See* ICC Case no. 5622 (1988), 19 Y.B. COM. ARB. 105–23 (1994).

[50] *See* ICC Cases no. 6497 (1994), 24a Y.B. COM. ARB. 71–79 (1999); 7047 (1994), 21 Y.B. COM. ARB. 79–98 (1996).

[51] 18 U.S.C. §§ 1961–1968 (2008).

[52] *See* ICC Case no. 6320 (1992), 20 Y.B. COM. ARB. 62–109 (1995) (examining meticulously the applicability of the RICO Act under the *loi de police* doctrine).

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III. The Protection of European Commercial Agents

The protection of weaker parties is one of the most disputed public policy issues in (international) contract law.[53] Similarly to antitrust law, this is a field where domestic policies differ widely, thus making the idea of an overarching transnational conception of protective norms delusive.[54] At the same time, it is a field where domestic courts and policy-makers seem unwilling to compromise: legal norms furthering social policy objectives are regarded and defended as shaping a society's collective identity and as defining for its overarching socio-political project.[55] The ECJ, therefore, has made it very clear in its 1998 *Ingmar* decision[56] that the weaker-party-protection norms in the European Commercial Agents directive form part of European public policy and must thus be applied to international contracts by the Member States courts irrespective of the law otherwise applicable.

The differences in domestic policies make it very hard for international arbitrators to develop their own stance towards the application of such norms. Nevertheless, the application of protective norms specifically on the field of commercial agency has been discussed in a number of arbitral awards.[57] Many of these awards date back to the time *before* the ECJ's *Ingmar* decision, which shows that arbitral tribunals seemed to tackle the issue on their own initiative, albeit with rather divergent results. An analysis of these decisions reveals a picture that is much similar to the other two fields of law discussed here. As long as provisions on the protection of weaker parties form part of the law chosen by the parties, their application is held unproblematic.[58] If, however, the parties have chosen the *lex mercatoria*[59] or other general principles of law,[60] or if the mandatory

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[53] *See generally* Bernd von Hoffmann, *Über den Schutz des Schwächeren in internationalen Schuldverträgen*, 38 RABELSZ 396 (1974).

[54] *But see* Gralf-Peter Calliess, *Transnational Consumer Law: Co-Regulation of B2C-E-Commerce*, in RESPONSIBLE BUSINESS: SELF-GOVERNANCE IN TRANSNATIONAL ECONOMIC TRANSACTIONS, 225 (Dilling, Herberg & Winter eds., 2008).

[55] *See* Fernanda Nicola/Udo Mattei, *A Social Dimension in European Private Law? The Call for Setting a Progressive Agenda*, 41 NEW ENGLAND L. REV. 1 (2006), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=961886.

[56] *See* ECJ case no. C-381/98 – *Ingmar GB.*

[57] *See, e.g.,* ICC Cases no. 6379 (1990), 27 Y.B. COM. ARB. 212–20 (1992); 6752 (1991), 28 Y.B. COM. ARB. 54–57 (1993); 7314 (1995), 23 Y.B. COM. ARB. 49–65 (1998); 7639 (1994), 23 Y.B. COM. ARB. 66–79 (1998); 8817 (1997), 25 Y.B. COM. ARB. 11–432 (2000); 12045 (2003), 133 J. DROIT INT'L (CLUNET) 1434–43 (2006); more general provisions of weaker party protection: 5030 (1992), 120 J. DROIT INT'L (CLUNET) 1004–16 (1993).

[58] *See* ICC cases no. 7314 (1995), 23 Y.B. COM. ARB. 49–65 (1998); 7639 (1994), 23 Y.B. COM. ARB. 66–79 (1998).

[59] *See* ICC case no. 5030 (1992), 120 J. DROIT INT'L (CLUNET) 1004–16 (1993).

[60] *See* ICC case no. 8817 (1997), 25 Y.B. COM. ARB. 11–432 (2000).

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norms in question form part of a legal order other than that chosen by the parties,[61] the applicability of such protective norms is usually declined.

In some cases, however, arbitral tribunals try to find their own ways for justifying an application of weaker-party-protection norms. In one case, where the parties had chosen the UN Convention on the International Sale of Goods (CISG) and the UNIDROIT Principles of International Commercial Contracts (UNIDROIT Principles) to be applicable to their contract, the tribunal argued that the provisions of the EC Commercial Agents directive were nonetheless applicable because they were incorporated into the home legal orders of both parties.[62] In a similar vein, one tribunal even argued that the application of the EC directive was justified because it had been chosen as the applicable law by the parties themselves,[63] a reasoning that would be inconceivable under traditional conflict-of-laws doctrines.

D. Analysis: Dialectical Constitutionalization

At a first glance, our short overview of arbitral practice reveals two things. First, international arbitral tribunals do apply public policy norms. Second, this application of public policy norms is neither wholly determined by state oversight nor do arbitral tribunals seem capable of developing a consistent conception of public policy completely on their own. Although there are attempts at carving out a genuinely transnational public policy, so far this conception's reach remains limited to gross violations of universally accepted general principles of law. In many fields of regulatory law, however, international arbitration must reflect a fundamental discord of national policy approaches. One way of resolving this dilemma is to complement the general principles of transnational public policy with conflict-of-laws norms, by establishing meta-rules for the application of mandatory norms from different domestic law sources.[64] Transnational public policy, therefore, is a multi-layered concept that includes both general principles of law and conflicts rules referring to specific domestic conceptions of public policy.[65]

Institutionally, the emergence of this concept of public policy relies on processes of "dialectical regulation,"[66] on a dialogue of different private and public actors. On the one

[61] *See* ICC cases no. 6379 (1990), 27 Y.B. COM. ARB. 212–20 (1992); 6752 (1991), 28 Y.B. COM. ARB. 54–57 (1993).

[62] *See* ICC case no. 8817 (1997), 25 Y.B. COM. ARB. 11–432 (2000).

[63] *See* ICC case no. 12045 (2003), 133 J. DROIT INT'L (CLUNET) 1434–43 (2006).

[64] Renner, *supra* note 23, at 552-4.

[65] *See* Robert Wai, *Transnational Private Law and Private Ordering in a Contested Global Society*, 46 Harv. Int'l L. J. 471 (2006).

[66] *See* Robert B. Ahdieh, *Dialectical Regulation*, 38 CONN. L. REV. 863 (2006).

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hand, it is the very autonomy of international arbitration from the domestic legal systems outlined above that allows for a transnationalization of public policy based on general principles of law. On the other hand, international arbitral tribunals must rely on domestic conceptions of public policy in many areas of law and thus engage in a dialogue with both state courts and domestic legal doctrine.[67] So far, this dialogue is limited to specific stages of the arbitral proceeding. It would be greatly furthered if both domestic courts and arbitral tribunals were more willing to tame the "unruly horse"[68] of public policy. Above all, this means that public policy considerations should not be dissolved into mere moral argument and political sensitivities, but carved out as a genuinely legal concept. Only then can it be processed with the means of argumentation that legal discourse provides for. This becomes especially apparent where, as in the field of anti-corruption norms, arbitral tribunals begin to extensively rely on earlier arbitral awards, on precedents by state courts, and even on doctrinal literature.[69] In such decisions, the seemingly elusive concept of public policy begins to show clear outlines in the form of well-defined prerequisites and legal consequences. It can thus be relied upon as well as contested in the parties' allegations and potentially scrutinized in an ensuing court proceeding.

Teubner therefore rightly observes that it is the "juridification"[70] of transnational spheres that creates both the need and the possibility for a reflection of public policy issues. It is the "juridification, pluralization, and privatization" of law that, in the first place, raises the questions which public policy tries to answer.[71] But as soon as a dispute is resolved by a third party and with recourse to legal norms rather than *ad hoc* and *ad hominem*, decisions must be justified. This justification, in turn, presupposes a specific mode of argumentation that balances the need for legal consistency with the demands of single-case adequacy.[72] At this point, the arguments in a transnational setting of dispute resolution become *legal* arguments. Yet these arguments are never completely detached from domestic legal discourse, but embedded in a complex network of argumentation in which state law continues to play a dominant role. It is in this sense that the emergence of transnational public policy, as an instance of the constitutionalization of transnational commercial law,

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[67] *See* Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L. J. 191 (2003); Fischer-Lescano and Teubner, *supra* note 12, at 1039.

[68] Richardson v Mellish [1824] 2 Bing 229, at 252.

[69] *See* ICC Case No. 8891 (1998), 127 J. Droit Int'l (Clunet) 1076–85 (2000) (providing detailed analysis).

[70] *See* Gunther Teubner, *Juridification: Concepts, Aspects, Limits, Solutions*, in JURIDIFCATION OF SOCIAL SPHERES, 3 (Teubner ed., 1987) (providing details on the concept).

[71] *See* Cutler, *supra* note 9, at 17-31.

[72] *See* Moritz Renner, Kontingenz, Redundanz, Transzendenz? Zum Gerechtigkeitsbegriff Niklas Luhmanns, Ancilla Iuris 60 (2008) (explaining a systems-theory inspired account of this eternal jurisprudential problem), *available at* http://www.anci.ch/doku.php?id=beitrag:renner.

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can be regarded as a dialectical process involving public and private elements. Questions of public policy cannot (yet) be answered without recourse to the outcome of political processes that (still) predominantly take place within the structures of the nation state and are reflected in domestic mandatory law. In the process of legal "bricolage"[73] that arbitral tribunals therefore must engage in, the distinction between public and private modes of regulation as well as between domestic and transnational policies becomes increasingly permeable; international arbitral tribunals and state courts are bound to interact ever more closely.

E. Outlook

The emergence of *transnational public policy norms*, thus, demonstrates that law beyond the state can neither be reduced to a purely private affair nor can it be satisfactorily described as a mere delegation of public functions by state authorities. Rather, it is the very interaction of private actors and public regulators that leads to the emergence of these norms. The relative weight of private and public elements in the rudimentary economic constitution beyond the state largely depends on the question whether the juridification of transnational commercial relations will be followed by an institutionalization of political representation in the transnational arena. So far, the transnational arena, especially in matters of international commerce, lacks fora where public policy concerns could be meaningfully articulated and disputed. Arbitral proceedings are confidential and still many arbitral awards are never published, while the elaboration of international instruments only seldom fulfils even the basic requirements of democratic participation. However, the example of investment arbitration under the Convention for the Settlement of Investment Disputes (ICSID Convention)[74] shows that this can be changed. Under the ICSID Convention, arbitral tribunals have decided to accept *amicus curiae* briefs by interested non-governmental organizations representing the public interest, and procedural reforms in 2006 have made the proceedings more open and transparent. Such developments at least hint at the possibility that the emergence of a transnational public policy might indeed go along with a transnationalization of public spheres, in the sense that political and civil society actors find ways to voice their concerns in the very places where law beyond the state is made.

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[73] CLAUDE LÉVI-STRAUSS, LA PENSÉE SAUVAGE (1962).

[74] *See* Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, March 18, 1965, 4 I.L.M. 524 (1966).

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