

THE INTERLEGALITY OF TRANSNATIONAL PRIVATE LAW

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I

PRIVATE LAW AND THE PLURAL NORMATIVE ORDERS OF TRANSNATIONAL GOVERNANCE

This article describes transnational private law as a decentralized and intermediate form of transnational governance that recognizes and manages the multiplicity of norms generated by plural normative systems in our contemporary world society. These include international and municipal state systems, nonstate social systems, and private ordering by parties. Consistent with an approach that views globalization as changing the nature of the sovereignty of states,¹ the article draws on the rich tradition of private law, considered with its international dimensions, to find both a concrete example of and a model for understanding the complex role of the state in the plural normative orders of the “postnational constellation.”² In this task, this article views private law understood in its international context as exemplary of an intermediate level of transnational governance.³

With a focus on the plural normative orders of international business transactions, the article discusses how transnational private law⁴ addresses the

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1. See, e.g., SASKIA SASSEN, *LOSING CONTROL? SOVEREIGNTY IN AN AGE OF GLOBALIZATION* (1996) (describing challenges posed by globalization for fundamental principles of the modern state).

2. See JURGEN HABERMAS, *THE POSTNATIONAL CONSTELLATION* (2001).

3. Transnational governance is defined as including “various and untraditional types of international and regional collaboration among both public and private actors.” *TRANSNATIONAL GOVERNANCE AND CONSTITUTIONALISM* ix (Christian Joerges et al. eds., 2004). The task of linking private international law with transnational governance is here identified with Christian Joerges; his work is acknowledged and discussed in Robert Wai, *Conflicts and Comity in Transnational Governance: Private International Law as Mechanism and Metaphor for the Relationship Among the Plural Orders of Transnational Social Regulation*, in *CONSTITUTIONALISM, MULTILEVEL TRADE GOVERNANCE AND SOCIAL REGULATION* 229, 247–51 (Christian Joerges & Ernst-Ulrich Petersmann eds., 2006).

4. In this article, transnational private law is understood primarily as the combination of domestic private laws and private international law. Transnational law is often more expansively defined to include a broad range of norms including, for example, public international law, national public laws, and the rules of nonstate organizations like corporations. See, e.g., Philip C. Jessup, *TRANSNATIONAL*

limits of theoretical understandings of global business norms informed by global legal pluralism. Not only is transnational private law one important normative regime of international business, but it is also identified as providing a good analytical model for understanding the interrelationship among plural norms. In contrast to leading accounts of global business relations, this article's account of transnational private law emphasizes the plural character of each of the multiple legal regimes of international business, whether state law or nonstate law. Connected with that plural character of state and nonstate normative orders, this model describes a view of the normative interrelationship not simply as a place of harmonization, but also as a place of productive normative contestation.

Transnational private law is used as a frame to consider private international law together with private law.⁵ An appreciation of private law as concerned with the relationship among plural and transnational normative orders is obscured because subjects of private law and private international law are typically considered separately.⁶ When viewed together, a sense of the long-established task for private law of relating normative orders that challenge state boundaries becomes clearer.

Viewing transnational private law in this way, the connection among private law, global legal pluralism, and transnational governance of business relations is made clearer. The concept of transnational governance posits that, in our "partially globalized world,"⁷ a multiplicity of often overlapping forms of cross-border and subnational governance, including state and nonstate forms, creates governance beyond traditional state models but short of world government. Transnational private law plays a significant role in global business, whether through the facilitation of international business transactions or through the regulation of such transactions by transnational private litigation or by regulatory standards included as terms of private international contracts. This

LAW 1–16 (1956). Such a concept of transnational law is too broad for the focus of this article on the role of private laws; for further discussion, see Robert Wai, *Transnational Private Law and Private Ordering in a Contested Global Society*, 46 HARV. INT'L L.J. 471, 471–72 (2005).

5. In this article, private law means state laws such as contract law, tort law, and property law. Private international law means state laws related to issues of jurisdiction, choice of law, and recognition of enforcement of judgments, in private-law disputes with connections to more than one legal jurisdiction. This article is premised on the value of viewing these two kinds of law together, as further discussed *infra* IV.

6. In North America, private-law subjects are treated as core first-year law-school topics; private international law is almost inevitably an upper-year, elective course. Courses in the law of international business transactions are intended to cover the range of different kinds of relevant laws, including some reference to both private law and private international law. See, e.g., INTERNATIONAL BUSINESS TRANSACTIONS: A PROBLEM-ORIENTED COURSEBOOK (Ralph H. Folsom et al. eds., 7th ed. 2004). In treating so many topics, the risk is that a refined sense of the private-international-law regime (or any other single regime) is lost, even in the most sophisticated socio-legal accounts; for example, there is little discussion of private international law in the excellent volume by JOHN BRAITHWAITE & PETER DRAHOS, GLOBAL BUSINESS REGULATION (2000). Equally important, the interrelationship among these multiple kinds of global business norms is often poorly articulated.

7. ROBERT KEOHANE, POWER AND GOVERNANCE IN A PARTIALLY GLOBALIZED WORLD (2002).

function for transnational private law endures because most global economic activity remains embedded in configurations of state laws and institutions.⁸ In this sense, both state and nonstate normative orders related to international business remain plural regimes; there is no complete separation of either the state or the nonstate orders. If that is the case, the regulatory function of private law in a global era includes the subtle task of coordinating both state and nonstate normative orders. By foregrounding the centrality of both state and nonstate norms, private law provides a useful corrective to a tendency in doctrinal-law scholarship to focus on state norms, and the tendency in leading works of global legal pluralism to emphasize nonstate normative orders.

Finally, in addition to its role as an important governance regime of world society, transnational private law provides a model for understanding the interaction among state and nonstate normative systems more generally in a world of global legal pluralism. A focus on transnational private law recognizes the plural nature of governing norms, and then addresses the interrelationship among those plural systems of norms. In this respect, transnational private law exemplifies the concept of interlegality described by Boaventura de Sousa Santos as the “different legal spaces superimposed, interpenetrated and mixed in our minds, as much as in our actions, either on occasions of qualitative leaps or sweeping crises in our life trajectories, or in the dull routine of eventless everyday life.”⁹

This article advances a distinct view of interlegality, emphasizing that with plural orders one should expect an interrelationship of normative contestation as much as an interrelationship of harmonization or unification. Transnational private law as transnational governance highlights that some degree of contestation and conflict is the legitimate function of law as a place for disputation. The legitimacy of private law indeed comes importantly from that role: law, including private law, is not only about the efficient facilitation of transactions. It also is related to how individual actors in our global society can disagree about the right thing to be done in a particular transaction and to seek financial compensation and deterrence, for example, to stop a polluting plant or bad work practices. In addition, through the public functions of state processes, private-law disputes can publicize contestable behavior in the broader society. This communication can also involve contestation at a more general ideational level of policies advanced by business or by state, or efforts to reframe public debate about the relative priority among goals such as regulation, distribution, and efficiency.¹⁰

8. This embeddedness is clearly uneven in terms of its locational distribution. *See, e.g.*, Saskia Sassen, *The State and Globalization*, in *THE EMERGENCE OF PRIVATE AUTHORITY IN GLOBAL GOVERNANCE* 91 (Rodney Bruce Hall & Thomas Biersteker eds., 2002).

9. BOAVENTURA DE SOUSA SANTOS, *TOWARD A NEW LEGAL COMMON SENSE* 437 (2d ed. 2002).

10. The ideational function of private law is discussed further in Wai, *supra* note 4, at 481–84.

II

BUSINESS NORMS IN AN ERA OF GLOBAL LEGAL PLURALISM

Global legal pluralism offers an excellent conceptual frame for understanding normative contestation across and among the different state and nonstate normative orders of contemporary global society. Striking analyses have been provided that highlight the challenge associated with the growth of multiple normative orders in the current global society. For instance, the account of interlegality quoted above comes from Santos's pathbreaking work on global legal pluralism.

However, leading accounts of global pluralism have so far not provided the tools to fully capture the nature of the interrelationship among these different orders. Two leading accounts of global legal pluralism in the business context by Santos and Gunther Teubner illustrate the challenge in modeling the relationship of this complex normative terrain. Whereas both provide brilliant descriptions of the existence of plural orders, and both recognize issues of interlegality,¹¹ both fail to provide a full account of the interpenetration, overlap, and linkage among different normative orders in the business context. More careful attention to the role of private law, particularly in connection with private international law, offers a corrective to these accounts and may signal a way forward in understanding the coexistence of, and complex normative relationship among, the multiple state and nonstate orders of global legal pluralism.

A. Business Norms in Postmodern Global Society

The normative framework for contemporary business transactions is clearly varied, including state laws, public international law, private international law, and various normative orders associated primarily with nonstate institutions or private ordering. The observation that the terrain of global business law is plural is consistent with traditional approaches both to the field of the law of international business transactions and to leading socio-legal analyses of global business.¹² However, it has proved difficult to model how the normative aspects of such a plural terrain for global business fit together. Global legal pluralism would seem to offer a good theory for this task.¹³

The early and leading work on globalization of law by Boaventura de Sousa Santos illustrates the broad challenge for constructing a new legal common

11. An earlier version of the passage from Santos concerning interlegality is cited with approval in GUNTHER TEUBNER, *LAW AS AN AUTOPOIETIC SYSTEM* 107 (1993).

12. See generally BRAITHWAITE & DRAHOS, *supra* note 6.

13. For an informative use of legal pluralism in the analysis of issues of jurisdiction and globalization, see Paul Schiff Berman, *The Globalization of Jurisdiction*, 151 U. PA. L. REV. 311 (2005); see also Ralf Michaels, *The Re-state-ment of Non-State Law: The State, Choice of Law, and the Challenge from Global Legal Pluralism*, 51 WAYNE L. REV. 1209 (2005) (discussing pluralism and private international law). In contrast with the Berman and Michaels articles, the focus of this article is more on how a consideration of legal pluralism can illuminate issues of interlegality among plural orders, especially when combined with an examination of underlying state private law.

sense in a world society that has seen the growth of multiple normative orders associated with globalization. Santos argues that global legal scholarship should shift attention from “the somewhat sterile debate about relative weight of transnational and national factors to a more promising one on the increasing internal heterogeneity of state regulation.”¹⁴ Santos identifies an expansive and diverse array of contemporary emergent legal fields including European law, *lex mercatoria*, migration, human rights, and *jus humanitatis*. In his influential conceptualization, Santos classifies forms of globalization as hegemonic globalization from above—in the forms of globalizing localisms and localizing globalisms—and counter-hegemonic globalization from below, including subaltern cosmopolitanism and the common heritage of mankind.¹⁵ He advocates for the development of a cosmopolitan legality arising out of the counter-hegemonic forces, represented, for example, in social movements such as human-rights networks.¹⁶

Santos is clear that this is a theoretical conceptualization and that in practice the forms of globalization are more cross-cutting and intertwined.¹⁷ However, a weakness in this conceptualization is that his survey of plural orders tends to result in flattened, simplified accounts of each particular order and in an unfortunate segregation of the analysis of the different kinds of orders. This is especially evident in his discussion of global business law, with its focus on *lex mercatoria*.¹⁸

Santos is caught up with the idea of *lex mercatoria* as “global capital’s own law,”¹⁹ evidencing a globalized localism of laws helpful to the capital interests of the North. In his account, *lex mercatoria* arises from the needs and practices of transnational commercial and corporate actors and their supporting institutions to create a “deterritorialized set of normative principles and rules,” including norms aimed at “circumventing submission to national laws and to the traditional conflict of laws.”²⁰ The *lex mercatoria* is sustained by a global legal culture exemplified by global (especially U.S. corporate) law firms and international commercial arbitration.²¹ In his analysis, it is nonstate *lex mercatoria* that is as likely to drive state law as vice-versa, as in the protection of private-property interests through state laws.²²

In emphasizing the singularity of the *lex mercatoria*, especially as a force of hegemonic globalization, Santos fails to situate it within the broad array of state public and private laws that regulate business law, such as competition policy or tort law. Santos mentions the role of private law only in passing, through a

14. SANTOS, *supra* note 9, at 199.

15. *Id.* at 179–82.

16. *Id.* at 180–82, 458–93.

17. *Id.* at 166.

18. *Id.* at 206–15.

19. SANTOS, *supra* note 9, at 208.

20. *Id.* at 209–10.

21. *Id.* at 212–14.

22. *Id.* at 211–12.

reference to private international law as a competing system developed by states to deal with growth of earlier *lex mercatoria*.²³ Contrary to his concept of interlegality, Santos does not consider the degree to which many nonstate norms are reflected in or reflect state-law norms, nor does he attend to the complexity of the heterogeneous nature of merchant practice itself.²⁴ Nor does he note that relevant business contracts, including standard form contracts, refer to state-law norms as well as to nonstate norms.²⁵

The resulting account of the *lex mercatoria* is unfamiliar to any business actor or business lawyer operating in the current international sphere. Santos notes the suspicion of common-law lawyers with respect to accounts of *lex mercatoria*, which he thinks odd given the reputation of the common law for attending to legal practice.²⁶ But it is as plausible to argue that attention to actual practice explains the skepticism of common lawyers toward expansive claims for the *lex mercatoria*.²⁷

Santos moves on, however, to elaborate a variety of other forms of global legal fields, including the human-rights regime, migration law, and common-heritage regimes. But, again, the problem is that these are set up as countervailing, separate normative orders, rather than interpenetrating orders. This reduces the utility of the analysis for a field such as the law of international business transactions.

B. Systems Theory and Global Merchant Law Without the State

Systems theory seems ideal for better understanding the normative functions of transnational private law because it focuses on the plural nature of normative orders in contemporary society and because it views social systems as centrally about communications.²⁸ Its focus on the internal self-understanding of social systems is a welcome advance for rigorously analyzing the normative character of nonstate social systems and for identifying connections and conflicts among different normative orders. However, systems accounts ultimately emphasize the closed, autopoietic nature of social systems, which rejects an internal perspective on normative orders that is itself a pluralist one.

23. *Id.* at 209.

24. To recognize the role of private law, one need not argue against some concept of hegemonic globalization. Santos could plausibly have used his own frame of global localisms to trace the projection of private-law values from influential state systems like New York or the United Kingdom, rather than an amorphous set of nonstate *lex mercatoria*. Such a global localism could be a tool of competing state interests or of private interests.

25. See Ralf Michaels, *The True Lex Mercatoria: Law Beyond the State*, 14 *IND. J. GLOBAL LEGAL STUD.* 447 (2007).

26. SANTOS, *supra* note 9, at 213.

27. A similar response to the skepticism toward *lex mercatoria* among actual practitioners is found in a leading volume on the subject, KLAUS PETER BERGER, *THE CREEPING CODIFICATION OF THE LEX MERCATORIA* 5–6 (1999).

28. See generally NIKLAS LUHMANN, *SOCIAL SYSTEMS* (John Bedmarz & Dirk Baecker trans., 1995).

Consistent with pluralism, systems theorists observe the growth of various kinds of nonstate-based social systems in modern society. A starting premise of systems analysis based on “second-order” observation is that social practices, rather than an abstract or ideal theory of law, determine the boundaries of normative systems. Thus, the boundaries of social systems are based on the criteria used by the social system itself. This kind of openness to the normative content of social systems, therefore, includes an opening to social systems broader than state legal regimes.

In contemporary global society, Gunther Teubner argues that the normative orders associated with each of these emergent functional systems—of international business practice, of multinational corporations, of human-rights communities, of ecological networks—are as significant as nation-state legal regimes.²⁹ These systems generate, through a process of autopoiesis, closed communicative codes of legality and thereby challenge any conception of global law premised on primacy of existing state orders. More recently, Fischer-Lescano and Teubner argue that this fragmentation of global society also limits any efforts in public international law to find unity and harmonization based on traditional state-law forms.³⁰ Such a view of the primacy of nonstate orders in global society resonates with analyses from a political-economy perspective that identify the dramatic rise of private authority in the transnational business area.³¹

In his provocative 1997 argument, Teubner observes that global functional differentiation is occurring such that state legal systems are being replaced by autopoietic social systems, “global law without a state,” which use (a) a binary code of legal-illegal and (b) reproduction by a symbol of global (not national) validity.³² The primary example that Teubner references is the *lex mercatoria* founded on a basis of a self-validating (and paradoxical) contract. From the founding contract, as stabilized through increasingly elaborate structures of hierarchy, temporalization, and externalization,³³ the *lex mercatoria* produces the operative closure required for an autopoietic system, even if the system remains vulnerable to the economic exigencies of its coupled economic regime, is episodic in character, and relies much on “soft law.” Teubner does not emphasize the connection between perceptions in the system of the validity of the contract and the potential enforcement of the contract in any state system; rather, he emphasizes that the system simply accepts the contract as its foundation and resolves the “paradox of a self-validating contract” through the

29. Gunther Teubner, ‘Global Bukowina’: *Legal Pluralism in the World Society*, in *GLOBAL LAW WITHOUT A STATE* 3 (Gunther Teubner ed., 1997).

30. Andreas Fischer-Lescano & Gunther Teubner, *Regime Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, 25 *MICH. J. INT’L L.* 999, 1007–08 (2003–2004).

31. See, e.g., A. CLAIRE CUTLER, *PRIVATE POWER AND GLOBAL AUTHORITY* (2003).

32. Teubner, *supra* note 29, at 17.

33. *Id.* at 15–17.

articulation of merchant norms, *lex mercatoria*, and private dispute resolution, most obviously commercial arbitration.³⁴

The 1997 argument demonstrates in a concentrated way the tendency in social-systems analysis to push sociological foundations to extremes of characterization. Teubner starts with the reasonable observation that there may be multiple kinds of law at work: what he refers to as political, legal, and social law production. But his understanding of fragmented globalization gives “different relative weights” to different norm productions.³⁵ In particular, global economic law is understood as a “highly asymmetric process of legal self-reproduction.”³⁶ He notes that one can identify numerous phenomena that, “in accordance with traditional positivist theories—have a clearly national and international basis,” such as national commercial codes or the UN Convention on Contracts for the International Sale of Goods.³⁷ But his account nonetheless proceeds to excessively focus on the singularity of the nonstate side of the business regulatory order. He refers to the “*lex mercatoria propria*.”³⁸ Through this term, which is not commonly used even in the specialized *lex mercatoria* literature, Teubner purges the practice of any impure elements. Even the shadow of state law disappears from a role in this system.

Respecting both the dispute-settlement procedure of arbitration and the substantive governing law of *lex mercatoria*, Teubner’s account of the role of the state is purified to include the single emphasis on the self-validating contract, in which in turn there apparently is no reference to (or expectation of) state process, state law, or even bargaining in the shadow of state law.³⁹ Contract, whether deferred to by state law or, after some point, automatically understood as constitutive in its own right by parties, becomes both the moment of connection to established state law and its moment of separation. This is a memorable moment, but one that is also fraught. Most obviously, this account fails to explain the role of either public regulation or private law, such as tort law, in protecting and intruding interests of third parties from the effects of these consensual relations. Even as between contractual parties, as elaborated below, state law and process remains present in constituting the private ordering between contractual parties. With respect to contractual dispute settlement, the analysis obscures the role of state law in sustaining the procedures of arbitration.

This partial account mutates what the actual law merchant, in the sense of norms followed by business actors and their advisors, is about. “Second-order observation” is supposed to allow legal practices—rather than, for example, an

34. *Id.* at 15–19.

35. *Id.* at 11.

36. *Id.*

37. Teubner, *supra* note 29, at 12.

38. *Id.*

39. See Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979) (discussing the role of law in providing a framework for divorce negotiations and settlements outside of the courtroom).

abstracted, pure legal theory—to decide the boundaries of law. Most observers would see that transnational business actors do not engage in the use of a purely a-national *lex mercatoria propria*—whether customary norms or contractual norms—in isolation from the state system.⁴⁰ Teubner notes the vehement rejection of theories of *lex mercatoria* by “mainly British and American lawyers” who seem rather attached to the importance in practice of sovereignty.⁴¹ He dismisses this skepticism as reflecting a kind of false consciousness related to “a legal world still conceptually dominated by the nation-state.”⁴² But if the actual practitioners disbelieve the account of a pure nonstate *lex mercatoria*, should not second-order observation attend?

III

THE COMPLEX NORMATIVE CHARACTER OF INTERNATIONAL BUSINESS

A. Plural Normative Expectations in International Business

The skepticism of legal practitioners concerning *lex mercatoria*, let alone a *lex mercatoria propria*, suggests that there has been no autopoietic separation of normative expectations of transnational business actors of the kind imagined by systems theory. Clearly, significant norms are generated in nonstate sources, whether through contracts, particular trades, or more institutionalized nonstate venues such as the International Chamber of Commerce.⁴³ But business actors continue to expect a blend of state and nonstate norms, and state and nonstate processes, including for dispute settlement.

This state of normative expectations aligns with accounts of complex “affective relationships” in an era of multiculturalism and globalization.⁴⁴ Norms correlate to underlying material conditions involving substantial overlap among different social networks. The overlaps are various. There is significant sociological and normative overlap between state and nonstate systems. There also remains significant overlap in both membership and subject matter among different functional systems such as business and labor networks. In addition, functional systems may be cross-cut by nonstate-based ethnicities and

40. Even leading advocates of *lex mercatoria* rely on state sources to bolster the plausibility of its reality and its relevance; for example, see the discussion of the “creeping codification” concept in BERGER, *supra* note 27.

41. Teubner, *supra* note 29, at 10.

42. *Id.*

43. See, e.g., International Chamber of Commerce, Official Rules for the Interpretation of Trade Terms, ICC Publication No. 560 (2000) [hereinafter ICC, Incoterms]; International Chamber of Commerce, Uniform Customs and Practice for Documentary Credits, ICC Publication No. 600 (2007) [hereinafter ICC, UCP].

44. Roderick A. Macdonald, *Access to Justice in Canada Today: Scope, Sale and Ambitions*, in ACCESS TO JUSTICE FOR A NEW CENTURY: THE WAY FORWARD 19 (Julia Bass et al. eds., 2005).

nationalities, such as transnational Chinese or Jewish business networks, further complicating the blend of norms in play.⁴⁵

In countering an excessive focus on state law, pluralist accounts of global business should not ascribe to nonstate norms a fixed facticity that denies either the reality of concurrent normative systems or the contested and open-textured nature of any particular normative system.⁴⁶ This is a constant risk that pluralist work in anthropology has addressed.⁴⁷ Such an account of plural and contested norms also seems necessary to reflect sophisticated contemporary accounts of identity and culture, in which national, ethnic, and professional identities matter, but are plural, complex, dynamic, and the subject of critical struggle.⁴⁸

B. Interlegality and Normative Contestation

In the contemporary global order, participants in any particular order are more likely to be aware of the multiplicity of potentially competing normative systems, and, if so, it can be said that in a plural transnational society, normative systems operate in the shadow of each other.⁴⁹ If this is the state of normative expectations, a better model of global legal pluralism is captured in the idea of interlegality identified by Santos, although not applied by him in his discussion of global business norms.

When there is awareness of multiple normative systems, there is also greater sense among participants of the possibility of overlap and conflict, and thereby a recognition of the contested nature of any single normative order. This in turn helps to reinforce the insights identified by critical legal theory that the normative code of any particular social system is rife with contradictions, gaps, and ambiguities.⁵⁰ Similarly, the overlap in membership reinforces the possibility

45. See generally RULES AND NETWORKS: THE LEGAL CULTURE OF GLOBAL BUSINESS TRANSACTIONS 325–420 (Richard Appelbaum et al. eds., 2001) (discussing the role of Chinese *guanxi* networks in international business transactions); Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115, 140–42 (1992) (describing how diamond merchants opt out of the legal system by creating an alternative system based on ties that include homogenous-group-based extralegal contractual regimes among Jewish merchants); JANET LANDA, TRUST, ETHNICITY, AND IDENTITY: BEYOND THE NEW INSTITUTIONAL ECONOMICS OF ETHNIC TRADING NETWORKS, CONTRACT LAW, AND GIFT-EXCHANGE (1994) (analyzing ethnic trading networks from the perspective of new institutional economics).

46. See Jeremy Webber, *Legal Pluralism and Human Agency*, 44 OSGOODE HALL L.J. 167 (2006) (providing a conception of legal pluralism attentive to human disagreement).

47. See Sally Merry, *Legal Pluralism*, 22 LAW & SOC'Y REV. 869, 875–76 (1988). In the colonial context, anthropologists have demonstrated that the received or constructed account of local law and norms was simplified, including through the lens of western ideas about legal coherence. See generally, e.g., SALLY FALK MOORE, SOCIAL FACTS & FABRICATIONS: “CUSTOMARY” LAW ON KILIMANJARO, 1880–1980 (1986).

48. AFTER IDENTITY xviii–xix (Dan Danielsen & Karen Engle eds., 1995); see also JAMES CLIFFORD, THE PREDICAMENT OF CULTURE (1988) (tracing the contested and hybrid nature of culture in the twentieth century).

49. See Merry, *supra* note 47, at 880–86; Marc Galanter, *Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law*, 19 J. LEGAL PLURALISM 1, 23–24 (1981).

50. See, e.g., Duncan Kennedy, *From the Will Theory to the Principle of Private Autonomy: Lon Fuller's “Consideration and Form,”* 100 COLUM. L. REV. 94, 94–95 (2000).

of collisions of functional rationalities and policy priorities that strain the credibility of the idea of a single shared code of legality or normativity.⁵¹ Individual members become carriers of different mixes of norms from system to system, constantly testing dominant norms of each system by providing argumentative bite to latent or minority normative strands within each order. Moreover, awareness of interlegality and the plural nature of a society in any particular normative order—whether state law, custom, religion, or merchant practice—counters the tendency toward normative closure.

Normative contestation should be viewed as an important function for transnational law, not simply a problem that is in need of resolution. This runs counter to strong tendencies in contemporary private law favoring decisional harmony and the efficient facilitation of commerce as the goal of international trade and business law.⁵² The norm of contestation is a deeply social commitment and a normal part of most societies.⁵³ Room for such contestation is a means in many legal systems for achieving regulatory goals—for example, to correct for problems of externalities on third parties. But more broadly, contestation allows normative challenges to be made, reflecting tensions between different values of the normative order; such contestation can be an important foundation for a legitimate political order based on the competition and deliberation among different norms.

Venues for contestation are especially important transnationally because of regulatory and governance gaps that exist in our global society.⁵⁴ For example, transnational private litigation in state courts can provide an opportunity to seek retribution and compensation, to make arguments, to publicize bad conduct, and generally to contest behavior of private actors, such as multinational corporations that engage in cross-border conduct. This kind of contestation is needed to address governance gaps opened up in the international order where many problems are globalized but political and legal forms remain primarily situated in the nation-state, where national governments tend to be parochial in their regulatory focus, and where

51. See Gunther Teubner, *Altera Pars Audiatur: Law in the Collision of Discourses*, in LAW, SOCIETY AND ECONOMY: CENTENARY ESSAYS FOR THE LONDON SCHOOL OF ECONOMICS AND POLITICAL SCIENCE 1895–1995 149, 152 (Richard Rawlings ed., 1997) (identifying discourses of “politicisation, moralisation, scientification and economisation”).

52. In the field of private international law, see, e.g., Ronald A. Brand, *Recognition of Foreign Judgments as a Trade Law Issue: The Economics of Private International Law*, in ECONOMIC DIMENSIONS IN INTERNATIONAL LAW 592 (Jagdeep S. Bahadari & Alan O. Sykes eds., 1997); MICHAEL J. WHINCOP & MARY KEYES, POLICY AND PRAGMATISM IN THE CONFLICT OF LAWS (2001) (adopting an economic approach to conflict of laws).

53. See, e.g., LAURA NADER, THE LIFE OF THE LAW: ANTHROPOLOGICAL PROJECTS 117–67 (2002) (contesting the ideology of the “harmony legal model”). Nader observes that in many societies “disputing may be a means to harmony and to autonomy and self-determination; and conflict may be part of the struggle in life that keeps people bound together.” *Id.* at 125. For two further examples taken from very different contexts, see ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW (2001) and ROBERT A. KAGAN, LAWSUITS AND LITIGANTS IN CASTILLE 1500–1700 (1981).

54. See Wai, *supra* note 4, at 478–81.

international institutions, such as the World Trade Organization, are only weakly empowered to address the full range of cross-border problems that arise in a global society. Such contestation through private law can also be understood as serving a communicative function in advancing broader policy debates in the global context; for example, high-profile litigation cases concerning foreign business conduct related to environmental or human rights, such as in extraction industries in Sudan, Burma, or Ecuador, can help to raise general issues about corporate social responsibility in a global context.⁵⁵

Attention to a more open and complex account of transnational normative systems may also be a route toward social solidarity beyond the nation-state.⁵⁶ Systems-theory accounts of law are sometimes interpreted as examples of movement beyond old public-private distinctions of state law to a “transparent and democratic process of constant, free and open interaction among singularities, which through their communication produces common norms.”⁵⁷ However, as Jurgen Habermas notes, autopoietic accounts of social systems ultimately share the challenge of social theories comprised only of individual rational-choice actors, namely “[t]he total absence of any intersubjectively shared values, norms or processes of understanding.”⁵⁸ The focus in this article is on the way in which plural normative orders are often internally plural and interlegal and are further linked by cross-cutting membership. Though perhaps falling short of a community of interest, one consequence of intertwined normative orders is the creation of possibilities for productive contestation within and across those orders. In such an account, conflict of norms is viewed less as a problem in need of resolution; contestation instead becomes a normal part of building the legitimate foundations for a global society.

C. Normative Conflict in Plural Orders and the Role of the State

Structurally, the nature of a dispute will push parties to find alternative argumentative veins in any normative tradition. Where there is overlapping membership, this tendency is reinforced as actors will constantly be looking to avoid normative closure and seek recourse outside of any single social system, including state laws. The same impulse will push parties toward “forum-shopping” in the sense of both venue and substantive law.⁵⁹ Forum-shopping, overlapping jurisdiction, and governing laws are of course familiar to conflict-of-laws scholars and practitioners, although usually they are characterized as

55. See Craig Scott & Robert Wai, *Transnational Governance of Corporate Conduct Through the Migration of Human Rights Norms: The Potential Contribution of Transnational Private Litigation*, in *TRANSNATIONAL GOVERNANCE AND CONSTITUTIONALISM* 287 (Christian Joerges et al. eds., 2004).

56. See *COSMOPOLITICS: THINKING AND FEELING BEYOND THE NATION* (Pheng Cheah & Bruce Robbins eds., 1998).

57. MICHAEL HARDT & ANTONIO NEGRI, *MULTITUDE: WAR AND DEMOCRACY IN THE AGE OF EMPIRE* 204, n.125 (2004) (citing Teubner, among others).

58. HABERMAS, *supra* note 2, at 142.

59. See Keebet von Benda-Beckmann, *Forum Shopping and Shopping Forums: Dispute Processing in a Minangkabau Village in West Sumatra*, 19 *J. LEGAL PLURALISM* 117 (1981).

problems to be solved. From a perspective committed to normative contestation, there may be reasons to view this consequence and use of pluralism as positive. In this respect, there are analogies to the turn to transnational venues and norms practiced by transnational advocacy networks and international-human-rights actors.⁶⁰

When there is self-conscious awareness of the plural nature of participants' memberships, not only is movement among venues possible, but expectations develop respecting how the different normative systems operate together. These can include expectations respecting rules on how to choose among systems or expectations about venues for dispute resolution. In this context, the state returns to play a significant role.

When disputes as to the mix between different normative systems exist, disputants expect state courts to play the role of arbiter of questions of jurisdiction and governing law. Of course, full adjudication in civil courts is the exception, not the norm, in business disputes.⁶¹ Robert Mnookin and Lewis Kornhauser have identified that bargaining and outcomes often occur in the "shadow of the law."⁶² More generally, Marc Galanter has observed that the courts provide "a background of norms and procedures against which negotiations and regulation in both private and governmental settings takes place."⁶³ The notion of conduct in the shadow of the law has been foundational to broader study of alternative dispute resolution, but the insight is more generally made with respect to legal pluralism.⁶⁴

In performing this oversight function with respect to disputes, including in situations where social systems overlap, state legal institutions retain a core role in a partially globalized world. This oversight function, which may not be needed or used by parties in every dispute but which remains in the background, reflects that parties share a general ambivalence toward the state form, including in a global context. The state appears as "both remedy and poison" with respect to globalization.⁶⁵ Populations still look to states to address problems generated by international markets, flows of people, and security threats, even as they see that the states are themselves the source of concentrated violence, inefficiency, corruption, and exclusion of nonresidents.

60. See MARGARET KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS* (1998); Thomas Risse & Kathryn Sikkink, *The Socialization of International Human Rights Norms Into Domestic Practices: Introduction*, in *THE POWER OF HUMAN RIGHTS: INTERNATIONAL NORMS AND DOMESTIC CHANGE* 1, 18–19 (Thomas Risse et al. eds., 1999) (developing the "spiral model" of interaction of international human-rights norms and domestic practices, including "boomerang patterns" comprised of efforts by transnational actors to bypass states and search out external or international sources to pressure states).

61. See, e.g., Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 *AM. SOC. REV.* 55, 61–62 (1963).

62. Mnookin & Kornhauser, *supra* note 39.

63. Galanter, *supra* note 49, at 6.

64. *Id.*

65. Jacques Derrida, *Autoimmunity: Real and Symbolic Suicides*, in *PHILOSOPHY IN A TIME OF TERROR* 85, 124 (Giovanna Borradori ed., 2003).

Santos and others imagine an alternative transnational politics that moves away from a fixation on the coercive power of the state and focuses on other diverse forms of politics that spring as much from practices of social contestation.⁶⁶ However, given the current state of expectations and practice in each of the different transnational areas of world society, state forms of sovereignty, for all their problems, often remain the most effective and legitimate forms of dispute settlement. Transnational governance will need to rely on the maintenance of roles for both state and nonstate systems in governance.

IV

TRANSNATIONAL PRIVATE LAW—VIEWING PRIVATE LAW AND PRIVATE INTERNATIONAL LAW TOGETHER

To demonstrate how state and nonstate levels interact in constituting the normative character of transnational governance, this section considers private law and private international law together under the rubric of transnational private law.⁶⁷ Viewing the two fields together clarifies that private-law systems have already been very much involved in addressing both state and nonstate systems of normative ordering in a cross-border context.

A. Private Law and Nonstate Norms

It is impossible to articulate the regulatory function of private international law without a sense of the regulatory functions of the underlying private laws.⁶⁸ An awareness of underlying private law is also necessary to recognize private law's important function of relating state to nonstate normative orders, including in a cross-border context.

Private law has long wrestled with the existence of private ordering and multiple social orders. For example, Eugen Ehrlich viewed commercial law as exemplary of the living law, which “dominates life itself even though it has not been posited in legal propositions.”⁶⁹ He notes of the commercial law that it was the one branch of law based “not merely incidentally, but throughout on actual usage.”⁷⁰ The dynamism of commercial practice constantly pushes beyond the adjustments to commercial law made by legislator and judge. For example,

66. Alternative regimes premised on a noncoercive politics not based on the state are described, for example, in the political anthropology of PIERRE CLASTRES, *SOCIETY AGAINST THE STATE: ESSAYS IN POLITICAL ANTHROPOLOGY* (1974).

67. See Wai, *supra* note 4, at 471–72. A similar critique of conflict of laws and its relation to the substantive law has been made with a very different response of turning to *lex mercatoria*. See BERGER, *supra* note 27, at 10–17, 30.

68. See Robert Wai, *Transnational Liftoff and Juridical Touchdown: The Regulatory Function of Private International Law in an Era of Globalization*, 40 COLUM. J. TRANSNAT'L L. 209, 232–38 (2002).

69. EUGEN EHRLICH, *FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW* 493 (Walter Moll trans., reissue 1962).

70. *Id.*

Ehrlich notes that, even at his time, the important source of commercial law is not the judicial decision, but rather the “modern business document.”⁷¹

The transnational dimension of commercial-law development is often underappreciated. Commercial laws have borrowed extensively from private ordering, customs, and standards developed by merchants engaged in cross-border trade, including in the sale of goods (for example, with respect to implied terms and to price-delivery terms), carriage of goods (including bills of lading and maritime insurance), and international payments and finance (bills of exchange and letters of credit).⁷² The transnational dimension of private law is arguably even more influential if one considers the complex global movements in ideas of law across national systems.⁷³

With the modern rise of nation-states, legislators and judges made efforts to simultaneously draw significant content from merchant practice into law while modifying that content to further state interests and concerns.⁷⁴ Customary practice was almost always modified as it became common law through common-law courts or through legislation such as commercial codes. This “nationalization” process provided state procedures for participants seeking third-party enforcement through private-law adjudication, but it also introduced various state considerations, such as constraints on enforcement of private agreements that were illegal or contrary to public policy.⁷⁵ This subtle and delicate balance between customary practice and state policies continues to characterize private law.

B. The Transnational Private Law of Contract

The complex role of private law in the mediation of private ordering, including in transnational context, is nowhere more evident than with respect to contract. Contract law is not typically framed as concerned with the relationship among plural orders. Instead, contract seems to be about the specific terms and conditions for enforcement of agreements between individuals involved in particular transactions. However, significant traditions of contract emphasize the social and institutional context for contract, such as work on relational

71. *Id.* at 495.

72. *See, e.g.,* BRAITHWAITE & DRAHOS, *supra* note 6, at 51–52. Cross-border economic innovations and practice has also pushed the limits of traditional private-law doctrine. For example, both bills of lading and letters of credit have influenced core common-law doctrines related to privity and consideration. *See* ANSON’S LAW OF CONTRACT 421–23 (J. Beatson ed., 27th ed. 1998). Similar influences on the common law of contract by transnational commercial relations are found with respect to *force majeure* and frustration of contract. G.H. TREITEL, *FRUSTRATION AND FORCE MAJEURE* (2d ed. 1994).

73. *See, e.g.,* Duncan Kennedy, *Two Globalizations of Law and Legal Thought: 1850–1968*, 36 SUFFOLK U. L. REV. 631 (2003) (describing globalizations in the structure of law and legal consciousness in the periods 1850–1914 and 1900–1968).

74. CUTLER, *supra* note 31, at 108–41.

75. *Id.*

contracts.⁷⁶ For example, Hugh Collins interprets contractual regulations as concerned with framing the self-government of social relations between parties.⁷⁷ Although social-contract theory may no longer suffice to capture the political foundations for society in general, contract clearly is used to set both substantive and procedural rules for governance of particular social relations and associations. Examples of procedural measures include inspection, monitoring, outside verification, complaint processes, mediation, and all the way through to arbitration and dispute settlement. Teubner builds from such governance features of contract to an autopoietic vision of contract as a “self-reproducing system of communicative interaction between contractual partners.”⁷⁸

Contract performs a similar spectrum of governance functions in international business. Contracts have been the foundation for the arrangement of core international business transactions, whether they are international sales or the many kinds of arrangements that surround sales transactions, such as carriage, insurance, or payment. A typical international-business-transactions text will identify contract as a central device for managing the potentially complex multiplicity of kinds of laws and norms related to sales transactions.⁷⁹ A broader governance role for contract is more clearly in view in more sustained forms of business transactions such as investment transactions, in which contracts like shareholders’ agreements, joint-venture agreements, franchise agreements, or distribution agreements are core sources of the legal obligations of relevant parties.

The relation of both sales and investment contracts to plural orders is highlighted by general contractual clauses that incorporate into the relation an extensive set of background or default norms developed by a particular social order. Standard examples are references to the norms of various shipping associations with respect to maritime insurance,⁸⁰ to the Incoterms for delivery terms in international sales of goods,⁸¹ and to the Uniform Customs and Practice for Documentary Credits (UCP).⁸² Forum-selection clauses and choice-of-law clauses are likewise examples of contractual provisions that have a clear

76. See IAN R. MACNEIL, *THE NEW SOCIAL CONTRACT: AN INQUIRY INTO MODERN CONTRACTUAL RELATIONS* (1980) (discussing modern contractual relations as significantly involving relational contracts).

77. HUGH COLLINS, *REGULATING CONTRACTS* (1999).

78. TEUBNER, *supra* note 11, at 117.

79. For example, such agreements are the foundations for most of the problem exercises for various forms of business problems in part two of DETLEV VAGTS, *TRANSNATIONAL BUSINESS PROBLEMS* (1998).

80. SCHMITHOFF’S *EXPORT TRADE: THE LAW AND PRACTICE OF INTERNATIONAL TRADE* 351–52 (Leo D’Arcy et al. eds., 10th ed. 2000).

81. ICC, *Incoterms*, *supra* note 43.

82. ICC, *UCP*, *supra* note 43. Through contractual choice, parties can also choose provisions of international treaties, such as the United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, 1489 U.N.T.S. 3, even when the treaty has not been implemented by the states relevant to the transaction.

governance role in specifying the venue for dispute settlement and the background state laws that will govern the international business relation. Finally, clauses selecting international commercial arbitration provide for dispute settlement in an international, but nonstate, venue. A sense of separation from state processes of governance increases as more and more of both background substantive law and dispute-resolution procedures are subject to private choice.

An end point in this spectrum of contract as governance in international business relations is that a concept of self-validating contract finds Teubner's analysis of global merchant law without a state.⁸³ The self-validating contract as a vehicle for reflexive regulation in the domestic context becomes, in the cross-border context, a fundamental challenge to the relevance of sovereign law. In particular, contract is seen as the central "legal" device that links together transnational systems of private actors—such as among transnational business actors or within multinational corporations—that straddle national borders and regulate themselves, not according to any national laws, but rather according to the autopoietic norms of the social system itself. Contract is the device not only for self-regulation, but also for the separation of a social relation from state-law processes.

C. Foregrounding the Transnational Nature of Private Law: Bringing Private International Law Into Private Law

A focus on private law makes clear the sense in which private law mediates the relationship of state law to nonstate normative orders, but viewing private law in isolation from private international law obscures continuities of concern in relating state private-law systems to foreign legal systems. Considering private law and private international law together permits a greater appreciation of the manner in which state private law has had a cosmopolitan concern in dealing with the existence of plural orders, including foreign states.

Considering private law and private international law together also discloses structural similarities in approach to subjects that straddle both fields, such as treatment of arbitration clauses. Analytical habits developed in one area influence the other. Recently, significant analysis of contract has emphasized the degree to which private contractual relations are understood as governance relations.⁸⁴ It may be that analysis based on the relationship between sovereigns has a larger and more pervasive influence on legal reasoning, including respecting "private" associations.⁸⁵ Ehrlich, for example, observed that "in actual fact the entire private law is a law of associations."⁸⁶

83. Teubner, *supra* note 29.

84. See COLLINS, *supra* note 77.

85. See, e.g., Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8 (1927). For a striking example of the parallels operating at the level of legal consciousness, see DUNCAN KENNEDY, *THE RISE & FALL OF CLASSICAL LEGAL THOUGHT* 40–43, 255–60 (1975, 2006).

86. EHRlich, *supra* note 69, at 43.

Factoring in private international law, transnational private law has not only followed customary practice and allowed significant party autonomy respecting articulating customized nonstate norms or incorporating such norms, but private law appears to extend that openness to use by private parties of norms (and processes) drawn from foreign legal systems. Three standard examples of private-international-law questions highlight the normalcy of “foreign” norms in private law.

First, even basic questions of jurisdiction highlight an unusually cosmopolitan concern with foreign interests and practices. For a domestic court to even ask this question, especially when guided only by common-law rules, is for that court to identify the possibility of its own limits. The issue of jurisdiction of course is more general, as in federal or municipal law.⁸⁷ But in the context of private international law, jurisdictional issues involve a state institution responding not to any hierarchy of sovereign structures, but more to the existence of another, parallel-level foreign legal system with connections to a particular dispute.⁸⁸ That a court might decline to hear a claim, for example, for reasons of *forum non conveniens* or comity, is clearly an effort to manage considerations of the existence of concurrent normative authorities.

Second, respecting choice of law, the unexceptional situation in which a domestic court might assume jurisdiction but then apply the law of another system shows an acceptance of the concurrent authority of foreign law that defeats any parochial image of private law. That a local court might sometimes apply foreign law makes it also much less surprising that the institution might engage in the same application respecting developed sets of nonstate yet transnational norms, such as those developed by particular merchant groups. This sense of concurrent plural systems is reinforced by the possibility of mixing different applicable laws through practices of *dépeçage*, permitting the application of different laws to different parts of a complex transaction.⁸⁹

Third, there has been increasing recent emphasis on the role of contractual choice regarding questions of jurisdiction and choice of law. Forum-selection clauses and choice-of-law clauses are now typically enforced in contemporary private law.⁹⁰ The enforcement of arbitration clauses selecting international

87. For an intriguing example, see the account of local *favela* law in SANTOS, *supra* note 9, at 134–37. The local Residents Association engages in careful consideration of questions of jurisdiction in dealing with both dispute prevention and dispute settlement. Through jurisdictional decisions, the local association augments its authority, but also manages its relation to other legal authorities, here the Brazilian state.

88. Jurisdictional issues in private international law are commonly understood as concerned with the “vertical” relation of state to individual parties rather than the “horizontal” relation of state to other legal systems; for a discussion of this distinction, and an identification of it as related to differences in paradigm between the United States and Europe, see Ralf Michaels, *Two Paradigms of Jurisdiction*, 27 MICH. J. INT’L L. 1003 (2006).

89. See, e.g., Rome Convention on the Law Applicable to Contractual Obligations arts. 3(1), 4(1), June 19, 1980, 1605 U.N.T.S. 80, at 81–82 (Article 3(1) states, “[T]he parties can select the law applicable to the whole or a part only of the contract.”). In the specific context of international contract, see PETER NYGH, *AUTONOMY IN INTERNATIONAL CONTRACTS* 122–38 (1999).

90. NYGH, *supra* note 89.

commercial arbitration rather than domestic civil litigation is a further development in this direction, showing how similar policy reasoning emphasizing the autonomy of parties and facilitating international commerce can sustain party choice of both nonstate and foreign state processes.⁹¹

To an outside observer, these features of private international law are quite impressive examples of tolerance in the face of plural normative orders. The two basic questions of conflict of laws—jurisdiction and choice of law—and the willingness to distinguish the two, evidence a modesty of private law in the face of coexisting legal orders. This is different from a hierarchical order of constitutional requirements respecting federalism or the division of powers, even if some minimal requirements in the conflict of laws are sometimes found in constitutional requirements.⁹² It is different as well from public international law, in which restraints on jurisdiction and applicable law come from the customary or conventional practice in the sovereign-state system.⁹³ In private law, there are far fewer hierarchical requirements to act with comity toward other legal systems.

All of these practices reflect a sophisticated, critical disaggregation in transnational private law of simple conceptions of sovereignty. To separately consider matters of governing law and jurisdiction, to assign different applicable laws to different aspects of relations, to see a role for private-party choice in deciding these questions, are all responses to complexity that see the possibility of creative mixing. Within this context of private international law, it is less surprising that private law demonstrates suppleness in relation to nonstate normative orders. An overall picture of a transnational private-law regime emerges as concerned with the interrelationship among different normative orders. Transnational private law appears as a regime of surprising tolerance and of conditional cosmopolitan hospitality.⁹⁴

91. *Id.*

92. This is true not only in the United States, but also increasingly in foreign jurisdictions. The dramatic constitutionalization of private international law in Canada has occurred relatively recently, through cases such as *Morguard Invs. Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077 (Can.), and *Hunt v. T&N plc*, [1993] 4 S.C.R. 289 (Can.). For a discussion of these cases, see Robert Wai, *In the Name of the International: The Supreme Court of Canada and the Internationalist Transformation of Canadian Private International Law*, 39 CAN. Y.B. INT'L L. 117 (2001).

93. There are some relevant international treaties, most significantly the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 38, but the bulk of private-international-law rules are not the subject of international treaty. In this respect, the challenges to the more ambitious effort at the Hague Conference on Private International Law to draft an international convention on jurisdiction and recognition and enforcement of foreign civil judgments is revealing, resulting in a treaty of more limited scope, the Hague Convention on Choice of Court Agreements, June 30, 2005; see RONALD A. BRAND & PAUL M. HERRUP, *THE 2005 HAGUE CONVENTION ON CHOICE OF COURTS AGREEMENTS: COMMENTARY AND DOCUMENTS* (2008).

94. Derrida, *supra* note 65, at 128.

V

THE DELICATE BALANCE OF TRANSNATIONAL
PRIVATE LAW IN TRANSNATIONAL PLURAL ORDERING

Transnational private law has always had the task of relating state policy and processes to other forms of social ordering. In its most successful forms, for example with respect to letters of credit, private law has anticipated and satisfied private-actor preferences and expectations while influencing and guiding private ordering, customary norms, and nonstate sources. Private ordering now includes state-law norms and processes as part of normal practice and expectations. This is partly because of the power and utility of state law (for example, in providing third-party enforcement and background norms), but also because state private law has been responsive to the varied desires of private-party participants.

In part III I argued that an important part of the space for state influence comes because the nature of even consensual transactions is not always, over time, one of clear cooperative benefit. Systems analyses based on shared functional objectives diminish the degree to which potential conflict remains pervasive, with third parties but even as between parties to consensual transactions. Conflicts do arise, especially *ex post*, and are not always resolvable in a voluntary fashion. The efficiency gains from third-party enforcement exist because of limits on Coasean bargaining and the challenge of transactions costs, especially given imperfections in information, incomplete insurance markets, and limits on strategic bargaining.⁹⁵ This is consistent with the observation from critical legal studies and legal realism about the incomplete and always contestable structure of even the most elaborated system of norms of a state system. Teubner's foundational self-validating contract, like a social contract between the parties for all time and across all space, is clearly limited by the constraints on perfect bargaining and exchange, something parties themselves face at the moment of their first conflict. The result is that private ordering both presents situations of conflict over contestable norms and may require a third party to resolve disputes. State courts and norms can and do play this role.

Beyond such limits on the capacity for complete bargaining with perfect foresight, the insights of constructivist theory must be taken on board. Many kinds of interests and identities shift in the context of an ongoing relationship. The idea of what constitutes interest is malleable, especially if there is recognition of the plural identities and goals of the various participants in any particular social system. Ideas about private interest, like ideas about national interest, can shift through processes of normative engagement grounded in complex social processes. The result is that law can play an important

95. DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE, AND ECONOMIC PERFORMANCE 27-36 (1990).

constitutive role, including at the level of personal, group, and even national identity.⁹⁶

This constant but dynamic role of the state in formation of normative expectations among private actors creates room for values other than strictly facilitative ones. This is clearest in those areas of international commercial practice in which state laws continue, even after this long period of time, to provide important substantive rules. For example, in the area of letters of credit, the well-established and elaborate set of customary norms of commercial practice in the UCP are mostly silent respecting the important fraud exception, and different state laws have developed variations on that.⁹⁷ More generally, the UCP assumes a backdrop of contract laws in various jurisdictions that determine questions of validity of the underlying bargains between the relevant parties.

The process of adjustment is constant and mutual. Even after absorbing many mercantile norms into its laws, the state process must remain open to the changing functional needs and normative expectations of business actors. To do otherwise would be to encourage flight from the state system (either permitted or illicit) and to discourage potentially productive private ordering. The constrained characteristic of governance through private law is evident from its distinct regulatory structure for enforcement. Private-law regulation is dependent on private decisions by nonstate actors to bring claims, but also to engage in private ordering in the shadow of the law. Because it is not “command and control regulation,” private law depends on indirectly influencing private ordering and claims through its structure of incentives, and thus must ensure that its content and procedures accord with the expectations and other priorities of private actors. This distinctive character of private-law regulation is a source of both weakness and strength.

The delicate balance and process of mutual adjustment remains the central challenge for private law in the transnational context. State private law should retain a real presence in the transnational normative order by reinforcing the understanding of participants in the various social systems that the state system is both responsive to and constitutive of cross-border private ordering.

96. See BILL MAURER, RECHARTING THE CARIBBEAN: LAND, LAW, AND CITIZENSHIP IN THE BRITISH VIRGIN ISLANDS 256 (1997).

97. ICC, UCP, *supra* note 43; SCHMITHOFF'S EXPORT TRADE: THE LAW AND PRACTICE OF INTERNATIONAL TRADE 210–13 (Leo D'Arcy et al. eds., 10th ed. 2000).