

# SECTORAL FRAGMENTATION IN TRANSNATIONAL CONTRACT LAW

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*The transnational commercial law literature has long told a story in which globalization yields ever-increasing legal harmonization. This Article argues that it is a mistake to equate globalization with harmonization. Even as the law of commercial relationships continues to globalize, it will split along industry sector lines. National boundaries will matter less and boundaries between industries will matter more, with one law for financial services, another for oil and gas, another for software, and so on. Borrowing a term and a conceptual framework from the public international law literature, the Article calls this phenomenon “sectoral fragmentation.”*

*State governance declines in importance compared with private governance, the borderless and sector-specific structure of commercial communities is being recapitulated in formal contract law. This Article describes the forces driving sectoral fragmentation and the specific legal mechanisms through which it occurs. It concludes by exploring the consequences of sectoral fragmentation for contract law and for the regulation of cross-border commercial activity more generally.*

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“[I]nternational . . . law . . . manifests a desire for unity and universality, based on the common needs and interests of the international economic community. As such, it does not accord with a fragmentation of the international legal framework and encourages the use of unifying legal notions, such as . . . general principles of law, or truly international public policy.”<sup>1</sup>

“[T]he increasing importance of particularism in law, especially in commercial law, comes from pressure exercised by merchants to have their legal affairs treated by specialized experts.”<sup>2</sup>

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|  |     |
|--|-----|
| I. INTRODUCTION .....  | 144 |
| II. THE CONCEPT OF LEGAL FRAGMENTATION .....   | 147 |
| III. FRAGMENTATION, PRIVATE GOVERNANCE, AND TRANSNATIONAL<br>LAW .....                             | 153 |
| A. Proliferation of Sources of Law .....   | 154 |
| B. Codification of Distinct Legal Sub-Fields .....   | 157 |
| C. Fragmentation Through Incomplete or Ineffective<br>Harmonization of Law .....                   | 158 |
| D. Proliferation of Adjudicative Bodies .....  | 160 |
| IV. SECTORAL FRAGMENTATION OF TRANSNATIONAL CONTRACT<br>LAW .....                                  | 162 |
| A. Private Governance and Fragmented Contract Law .....  | 165 |
| B. Mechanisms of Fragmentation of Contract Law .....   | 172 |
| 1. Generation of industry-specific rules of law .....  | 173 |
| 2. Wide application of trade usages as direct sources of<br>rights and obligations .....           | 178 |
| 3. Industry-wide choice of specific national laws .....  | 183 |
| 4. Choice of Specialist Adjudicative Bodies, Especially<br>Arbitral Tribunals .....                | 185 |
| V. CONCLUSION: POLITICAL AND NORMATIVE IMPLICATIONS OF<br>SECTORALLY FRAGMENTED CONTRACT LAW ..... | 190 |

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1. BRUNO OPPETIT, *PHILOSOPHIE DU DROIT* 119 (1999), quoted and translated in EMMANUEL GAILLARD, *LEGAL THEORY OF INTERNATIONAL ARBITRATION* 42 (2010).

2. YVES DEZALAY & BRYANT G. GARTH, *DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER* 117 (1996) (citation omitted).

## I. INTRODUCTION

Much of the literature on transnational law indulges in a technocratic utopianism, hailing the dawn of a new era of globally-harmonized, efficient contract law that evolves at the speed of business.<sup>3</sup> Henceforth, we have been promised, national borders will no longer be arbitrary speed bumps along the forward path of international commerce. Implicit in this account is the assumption that legal globalization means legal unification. But, in reality, the future of contract law will be as fragmented as the past; it will just be fragmented differently. This Article argues that a specific and previously-unidentified type of legal differentiation is gaining momentum within contract law: even as the law governing commercial contracts increasingly harmonizes across territorial boundaries, it will increasingly fragment along boundaries between industry sectors. In other words, the old distinctions are indeed breaking down, but they are changing rather than disappearing.

Adapting a term coined in the public international law context, I call this phenomenon “sectoral fragmentation.” Distinctions between different kinds of contractual relationships (sales of goods, leases, franchises, joint ventures, etc.) will matter less, as will the nationalities of the contracting parties and the place(s) where the contract was formed and performed. The industry context within which the contract is concluded will matter more. Or to put it differently: *what type* of contract is implicated in a dispute will gradually become less significant in determining the applicable rules, while the *subject matter* of the contract will become more significant. In a sectorally fragmented legal regime, contracts for the purchase of crude oil by a refiner and for the purchase of office paper by the same refiner may have identically written terms (*mutatis mutandis*), but will be interpreted differently, will have different terms implied into them (including their dispute resolution provisions), and will have different rules for determining the remedies available and how damages are to be calculated.

Contracting practices have always varied from industry to industry, so to the extent that private governance prevails over public governance, the law will necessarily become differentiated along sectoral lines. The rise of private, contractual governance, already documented in the legal and political science literature, is part of the sectoral fragmentation picture.<sup>4</sup>

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3. Cf. Ralf Michaels, *Dreaming law without a state: scholarship on autonomous international arbitration as utopian literature*, 1 LONDON REV. INT'L L. 35 (2013) (describing the utopian character of much of the literature on international commercial arbitration).

4. See generally Peter Vincent-Jones, *Contractual Governance: Institutional and Organizational Analysis*, 20 OXF. J. LEG. STUD. 317 (2000) (exploring the role of contract as

What is new is that the structures of private governance are now recapitulated in formal contract law, including in laws promulgated by states.<sup>5</sup> Sectoral fragmentation of law is thus evidence corroborating the proposition that the balance of regulatory power has shifted from public to private governance, and is also an example of the more subtle incorporation of private perspectives into public governance. Public regulation of contracts is not withering away, but state lawmaking processes are increasingly relegated to validating, incorporating, and supplementing privately-generated standards.<sup>6</sup>

Scholars of transnational law have argued that the positive law is being “suffocated” in the era of globalized commerce, as commercial relationships are increasingly conducted beyond the reach of national laws and courts.<sup>7</sup> This Article argues that no such suffocation is occurring; instead, in a reverse of the traditional conception, formal contract law is being remade in the shadow of private contracts.<sup>8</sup>

Whatever one’s scholarly or political agenda, it is important to understand sectoral fragmentation. Most academic writing on transnational law focuses on three issues: the *nature* of transnational law as law (its legality), the *sources* of transnational law, and the *processes* by which transnational laws are promulgated.<sup>9</sup> Largely missing from this theorizing is the *content* of transnational legal rules, which is seldom considered outside of studies of specific industries or supply chains. By identifying the

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a governance mechanism).

5. Other areas of commercial law, such as those relating to property interests (including secured transactions), remain more territorially bound; they are therefore less globalized and less sectorally fragmented than contract law. This article deals only with transnational contract law.

6. Gregory Shaffer, *Theorizing Transnational Legal Ordering* 16–17 (U.C. Irvine Sch. of L., Legal Stud. Research, Paper No. 2016-06, 2016), <http://ssrn.com/abstract=2734318> [<https://perma.cc/3CEE-C4QN>].

7. See, e.g., Peer Zumbansen, *Transnational Private Regulatory Governance: Ambiguities of Public Authority and Private Power*, 76 LAW & CONTEMP. PROBS. 117, 122 (2013) (stating that “[o]ne view insists on emphasizing and lamenting the alleged weakness of (the state’s) regulatory law that finds its most persuasive illustration in the triumphant proliferation of private norm-setting and suggests that law cannot escape death by suffocation in the oxygen-free atmosphere of globalization.”).

8. Credit for coining the memorable phrase that private agreements are made “in the shadow of the law” belongs to Mnookin and Kornhauser. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

9. See generally Shaffer, *supra* note 6 (describing enforcement of rules by private and public organizations). For example, Zumbansen states that the “deliverable” of his theoretical approach “is to lay bare the *processes* through which views are being formulated, through which they become dominant or defeated, institutionalized or squashed.” (emphasis added). Zumbansen, *supra* note 7, at 134.

phenomenon of sectoral fragmentation, this Article shows why what appears to be a gap in the literature is actually a reflection of the changing structure of contract law. There will not be *any* single, global set of rules that will constitute transnational contract law. Instead, much of the law will be structured as a set of distinct but overlapping parallel bodies of law, each applicable to a different industry sector.

The phenomenon of sectoral fragmentation is a specific example of the broader trend toward greater complexity and specialization in contract law. Although it is impossible to predict the consequences of these developments with certainty, there will inevitably be winners and losers. In general, commercial parties prefer to be governed by specialized law applied by specialists. Particularism in law increases efficiency by better aligning legal outcomes with commercially reasonable ones; it permits parties to rely more on standard terms and usages (and thereby reduce transaction costs on individual contracts), while minimizing the risk that their intentions will be misinterpreted *ex post* by a court or arbitral tribunal.<sup>10</sup> Different industry sectors involve different types of contractual relationships and are subject to different risk profiles; it would be surprising if a single set of rules for contractual interpretation, say, or for damages calculation yielded efficient results for all sectors. These benefits should not be underestimated.

But there are potential drawbacks as well. Complexity in law, especially when doctrinally complex law is applied by diverse specialist tribunals, inhibits the ability of public authorities to regulate commercial activity. Sectoral fragmentation is also likely to privilege incumbent firms by increasing the barriers to entry into an industry sector, which may create harmful disincentives to innovation. The normative divisions that

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10. Importantly, particularism need not be achieved through a proliferation of highly specific, codified rules. This is the core insight behind the neoformalist movement in contract law theory. The neoformalists argue that predictability and economic efficiency are best served by a spare, formal approach in rulemaking, which emphasizes standards over rules and therefore gives wide scope to trade usages. See, e.g., David Charny, *The New Formalism in Contract*, 66 U. CHI. L. REV. 842, 843 (1999) (stating that “[t]he current situation . . . calls for reflection on the role of formalism in the current understanding in contract law.”); Robert E. Scott, *The Case for Formalism in Relational Contract*, 94 NW. U. L. REV. 847, 847-48 (2000) (reviewing the academic debate and describing and assessing “three alternative strategies for interpreting relational contracts”); James G. Wilson, *The Morality of Formalism*, 33 UCLA L. REV. 431, 461 (1985) (neoformalism “may eventually create a body of doctrine that is slavishly and improperly followed.”); William J. Woodward, Jr., *Neoformalism in a Real World of Forms*, 2001 WIS. L. REV. 971 (2001) (considering how neoformalism in contracts might operate in the real world); Thomas C. Grey, *The New Formalism* (Stan. Pub. L. & Legal Theory, Working Paper No. 4, (1999), [http://papers.ssrn.com/paper.taf?abstract\\_id=200732](http://papers.ssrn.com/paper.taf?abstract_id=200732) [<https://perma.cc/3FCV-WFAM>] (explaining how an institutional conception of the rule of law gives coherence and unity to different strands of the new formalism)).

accompany legal specialization contribute to a breakdown in common standards as a general matter; this conceptual phenomenon, accompanying a shift in the balance of power from public to private governance, threatens the rule of law.

Sectoral fragmentation plays out as a theme running through various phenomena related to globalization and the development of transnational law. It is largely a self-sustaining phenomenon, and it may not be possible for any group of policymakers to change its course. It is therefore all the more important to come to grips with its trajectory. “A richer understanding of transnational legal ordering facilitates both critique and reform. Otherwise scholars are blind to how law operates, and they replicate that blindness in their teaching, their scholarly work, and their normative prescriptions.”<sup>11</sup> In other words, there is no way back to a world without globalization, so we had best set about understanding the world with it.<sup>12</sup>

This Article explores the phenomenon of sectoral fragmentation: its causes, its characteristics, and its consequences. Part II describes the concept of fragmentation as developed in public international law, and argues for its relevance to the evolution of private law. Part III sets out the four main mechanisms or processes through which legal fragmentation has occurred in the public international law context, and shows that these processes are all operative in transnational contract law. Part IV argues that sectoral fragmentation is an inevitable consequence of the rise of transnational commercial communities as the key drivers of transnational legal rule-making; it then explains how the mechanisms set out in Part III lead specifically to sectoral fragmentation. Finally, Part V, the Conclusion, briefly speculates as to the broader political and normative consequences of a sectorally fragmented transnational contract law.

## II. THE CONCEPT OF LEGAL FRAGMENTATION

The concept of fragmentation was developed in the public international law literature, and has been a preoccupation of that academic community for more than a decade. The literature is large and continues to grow, but the key document is a 2006 report published by the International Law Commission (“the ILC Report”).<sup>13</sup> The gist of the report is that public

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11. Shaffer, *supra* note 6, at 21.

12. Peer Zumbansen, *Law after the Welfare State: Formalism, Functionalism and the Ironic Turn of Reflexive Law*, 56(3) AM. J. COMP. L. 769, 770 (2008) (citing Martti Koskenniemi, *International Law in Europe: Between Tradition and Renewal*, 16 EUR. J. INT’L L. 113 (2005)).

13. *Fragmentation of International Law: Difficulties Arising from the Diversification*

international law at one time constituted a more-or-less coherent and systematic body of rules governing state interactions; then, as global civil society became divided into specialized and autonomous “spheres of social action,”<sup>14</sup> international law lost its previous coherence and become fragmented.

The ILC Report describes fragmentation as encompassing two related phenomena: normative and institutional fragmentation. Normative fragmentation refers to the proliferation of distinct sub-fields within international law, each somewhat autonomous from the others. These sub-fields both encompass a range of non-state actors previously not considered subjects of international law, and apply to a wider range of conduct than international law previously regulated.<sup>15</sup> Institutional fragmentation refers to the proliferation of separate international and non-national rule-making bodies, tribunals, and other institutions associated with these sub-fields; each applies distinct bodies of rules and none has any power to overrule any of the others.<sup>16</sup> The ILC Report chose to consider only normative fragmentation, on the ground that “[t]he issue of institutional competencies is best dealt with by the institutions themselves.”<sup>17</sup> This choice met with justified criticism.<sup>18</sup> Normative and institutional fragmentation can be distinguished conceptually and do not necessarily occur in tandem, but they cannot be separated in practice because both are driven by the same forces and because they reinforce each other.<sup>19</sup> Normative fragmentation leads to calls for specialized adjudicative bodies, yielding institutional fragmentation. The divergent jurisprudence of these bodies and the divergent perspectives of the specialist bars associated with them in turn generate

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*and Expansion of International Law*, finalized by Martti Koskenniemi, Int’l Law Comm’n, Rep. on the Work of Its Fifty-Eighth Session, U.N. Doc. A/CN.4/L.682 (Apr. 13, 2006) [hereinafter *ILC Report*].

14. *Id.* at 7.

15. Examples include the emergence of partly self-contained regimes of international investment law, environmental law, trade law, and human rights law.

16. Examples include the arbitral tribunals that preside over investor-state disputes, the International Tribunal for the Law of the Sea, the WTO Appellate Body and panels, the various international criminal tribunals, and human rights tribunals like the European and Inter-American Courts of Human Rights.

17. *ILC Report*, *supra* note 13, ¶13.

18. The reaction shows the public international law community’s continued dedication to the “unity” and “universality” of international law. *See, e.g.*, Christian Leathley, *An Institutional Hierarchy to Combat the Fragmentation of International Law: Has the ILC Missed an Opportunity?*, 40 N.Y.U. J. INT’L L. & POL. 259, 271-304 (2007) (explaining that fragmentation undermines the reliability and credibility of international law).

19. *See, e.g.*, Anne van Aaken, *Fragmentation of International Law: The Case of International Investment Protection*, 17 FINNISH Y.B. INT’L L. 91, 93 (2006) (discussing the structural factors that hinder the harmonious interpretation of international investment law).

further normative fragmentation.

For many public international lawyers, fragmentation is cause for concern, since it threatens the “unity,” “universality,” “systematicity,” and “coherence” of international law.<sup>20</sup> Koskenniemi and Leino have called unease over the loss of coherence in international law a “postmodern anxiety,”<sup>21</sup> bound up as it is with unease about the breakdown of traditional normative orders in all aspects of society.<sup>22</sup> However, worries about fragmentation are not merely the preoccupations of anxious postmodern intellectuals — fragmentation really does have the potential to harm the legitimacy of international law as a system of law:

The concern with fragmentation is not just a concern with our intellectual ability (or inability) to conceptualize, systematize, or order the law . . . . It is also a concern over political realities . . . . The intellectual concern is that fragmentation can lead to the loss of a comprehensive understanding. The political concern is that fragmentation can prompt the decline of international law into technocratic and particularistic discourse.<sup>23</sup>

To be sure, others are more sanguine. The opposing camp tends to see fragmentation of international law as simply a function of greater specificity of legal rules, itself a sign that international law is maturing.<sup>24</sup> For these

20. See, e.g., Tomer Broude, *Fragmentation(s) of International Law: on Normative Integration as Authority Allocation*, in *THE SHIFTING ALLOCATION OF AUTHORITY IN INTERNATIONAL LAW: CONSIDERING SOVEREIGNTY, SUPREMACY AND SUBSIDIARITY: ESSAYS IN HONOUR OF PROFESSOR RUTH LAPIDOTH* 101-10, 104 (Tomer Broude & Yuval Shany eds., 2008) (stating that “[a]uthority fragmentation . . . and norm fragmentation . . . are the warp and weft of the complex fabric that is international law.”); Benedetto Conforti, *Unité et fragmentation du droit international: “glissez, mortels, n’appuyez pas!”*, 111 *REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC* 5 (2007) (arguing that concerns over fragmentation are overblown, and that fragmentation poses no significant risk to the legitimacy of international law); Pierre-Marie Dupuy, *A Doctrinal Debate in the Globalisation Era: On the “Fragmentation” of International Law*, 1 *EUR. J. LEGAL STUD.* (2007) (attempting to define the contours of the fragmentation of international law); Bruno Simma, *Universality of International Law from the Perspective of a Practitioner*, 20 *EUR. J. INT’L L.* 265, 265 (2009) (describing “international rules, (particularly judicial) mechanisms, and international institutions which serve the purpose of reconciling heterogeneous values and expectations by means of international law”).

21. Martti Koskenniemi & Päivi Leino, *Fragmentation of International Law? Postmodern Anxieties*, 15 *LEIDEN J. INT’L* 553, 553-56 (2002); see also Gunther Teubner, *“De collisione discursuum: Communicative Rationalities in Law, Morality and Politics”*, 17 *CARDOZO L. REV.* 901, 901 (1996) (stating that fragmentation “haunts us”).

22. Annelise Riles, *The Anti-network: Private Global Governance, Legal Knowledge, and the Legitimacy of the State*, 56 *AM. J. COMP. L.* 605, 605 (2008).

23. Ralf Michaels, *Private Lawyer in Disguise? On the Absence of Private Law and Private International Law in Martti Koskenniemi’s Work*, 27 *TEMP. INT’L & COMP. L.J.* 499, 511 (2013); see *infra* notes 200-203 and accompanying text.

24. See, e.g., Georges Abi-Saab, *Fragmentation or Unification: Some Concluding*



commentators, “this complexity is necessarily a reason for complaint. Simplicity is not per force a value in itself.”<sup>25</sup> They ridicule the notion that international law can be reduced to the collective content of a small set of core sources, likening it to the debunked theory that “the law could simply be reduced to what the National Parliament had established.”<sup>26</sup> This school of thought seems to adopt the reflexive or neo-functional conception of laws as the self-referential products of social systems, and therefore as politically neutral tools of technocratic management.<sup>27</sup> Since modern society is complex and pluralistic, public international law too must be complex and pluralistic.

The term “fragmentation” has not caught on much outside the public international law context. However, analogous debates have occurred with respect to transnational private law.<sup>28</sup> To a large extent, the global private law community shares the universalizing ethos of the public international law community. As Smits notes, especially in civil law jurisdictions, “[f]or most scholars, the traditional picture is one in which private law is a coherent, unitary, and national system.”<sup>29</sup> Systematicity and coherence have historically been hailed as the great strengths of the civil codes, and the same ideals have manifested in the transnational law sphere. There have been strenuous efforts to make transnational law as coherent and unitary as national laws were understood to be.

Admittedly, the fragmentation metaphor is an imperfect fit with the phenomenon of sectoral fragmentation. While international law began from a (possibly apocryphal) condition of unity and became more differentiated

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*Remarks*, 31 N.Y.U. J. INT’L L. & POL. 919, 925 (1999) (stating that “the multiplication of specialized tribunals is, by itself, a healthy phenomenon. . . . the term ‘proliferation’, with its negative connotations, is misleading.”). A third group is sanguine for a different reason, arguing that international law is re-converging. See, e.g., A FAREWELL TO FRAGMENTATION: REASSERTION AND CONVERGENCE OF INTERNATIONAL LAW (Mads Andenas & Eirik Bjorge, eds., 2015) (containing various scholarly contributions exploring the re-convergence of international law).

25. Sylvia Ferreri, *General Report: Complexity of Transnational Sources*, 1 EUR. REP. PRIV. L. 3, 12 (2012).

26. *Id.* This “classical” notion of law has been in retreat since the beginning of the twentieth century and has now been entirely retired from the field of intellectual battle.

27. Zumbansen, *supra* note 12, at 796. See Niklas Luhmann, *Some Problems with Reflexive Law*, in STATE, LAW AND ECONOMY AS AUTOPOIETIC SYSTEMS 389 (Gunther Teubner & Alberto Febbrajo eds., 1992) (critiquing this perspective as improperly (or at least prematurely) deriving legality from broader values).

28. Michaels, *supra* note 23, at 501.

29. Jan Smits, *Dutch Report: Coherence and Fragmentation of Private Law*, 1 EUR. REV. PRIV. L. 153, 155 (2012). This conception has always been less widely shared by common law scholars than among civilians.

over time,<sup>30</sup> contract law has never experienced a globally unified legal order, normative or institutional. Instead, since at least the Peace of Westphalia, private law has been divided along state boundaries, and contract law specifically has long been internally differentiated on a functional basis, with different sets of rules for different kinds of transactional relationships.<sup>31</sup>

Nevertheless, fragmentation is a useful lens through which view trends in the development of private law. First, it helps to bring attention to structural considerations. Law must be internally differentiated somehow or else it cannot be conceptualized or consistently applied. Perhaps because of its pervasiveness, the importance of how law is organized is often underappreciated;<sup>32</sup> it can inform assumptions and otherwise guide thinking about individual legal problems in ways that are difficult for us to perceive because they operate below the level of deliberate thought.

Second, thinking in terms of fragmentation reminds us that, although the law must be subdivided somehow, when new divisions are introduced, something is gained but something is also lost. It is worth paying attention to the knock-on effects of reorganizations of the law even if, like with sectoral fragmentation, the shifts are largely organic and self-propelled.

Third, and most important for present purposes, the public international law literature on fragmentation provides a useful rubric for identifying the mechanisms that contribute to or hinder fragmentation in law. The public international law literature identifies four main processes by which fragmentation occurs: proliferation of sources of legal rules, codification of distinct legal sub-fields, incomplete or ineffective efforts at harmonization, and proliferation of adjudicatory bodies. The first three collectively constitute normative fragmentation, and the fourth represents institutional fragmentation. As will be discussed below, these four processes of normative and institutional fragmentation can all be observed in the context of transnational contract law.

The academic and practitioner discourse on transnational commercial law, especially contract law, continues to tell a story of harmonization and unification, mostly as a by-product of the drive for greater efficiencies in international commerce.<sup>33</sup> Indeed, much of the scholarly commentary on

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30. That is, the International Court of Justice and, before it, the Permanent Court of International Justice applied bodies of rules that were small in number, conceptually coherent, and global in scope.

31. See *infra* notes 89-93 and accompanying text.

32. The one major exception is the role of characterization of legal rules in conflict of laws, a highly contested and theoretically rich area.

33. See, e.g., Bryan H. Duzin, *Anarchy, Order, and Trade: A Structuralist Account of Why a Global Commercial Order is Emerging*, 47 VAND. J. TRANSNAT'L L. 1049, 1053 (2014) (arguing that "[t]he basic structure of trade drives toward convergence — a fact that may be

globalization of contract law has a celebratory quality.<sup>34</sup> The current, triumphant, state of transnational law represents the culmination of more than a century of legal unification efforts. The numerous uniform law projects, going back domestically at least to the foundation of the American Law Institute in 1923, and internationally to the establishment of the Hague Conference on Private International Law in 1893, “provide ample evidence . . . that there has always been a substantial need for the transnationalization of the legal relationships of international commerce.”<sup>35</sup> It is also easier to reach consensus on commercial regulation than in other areas of law, because costs and benefits can be more clearly anticipated<sup>36</sup> and because the basic regulatory requirements of trade are the same everywhere.<sup>37</sup> Today, however, all areas of private law are increasingly harmonized at the global level; contract law is exemplary only in that it began globalizing earlier and has proceeded farther.

Nevertheless, modern contract law displays both normative and institutional fragmentation, just as modern public international law does. In domestic jurisdictions, contract law is no longer as systematic as it once was,<sup>38</sup> and transnational law is significantly more divided than national law.<sup>39</sup> The phenomenon of fragmentation has played out differently in the transnational contract law context than it has in public international law, but they are fundamentally the same phenomenon.

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discerned as much on the macrolevel of state actors as it is on the microlevel of private parties.”). Duzin does acknowledge that market-induced uniformity is not perfect and is often overstated. *Id.* at 1076.

34. Zumbansen, *supra* note 12, at 770; *see also* Shaffer, *supra* note 6 (providing several examples that showcase the benefits of transnational law).

35. KLAUS PETER BERGER, *THE CREEPING CODIFICATION OF THE LEX MERCATORIA* 34 (2d ed. 2010).

36. Bryan H. Duzin, *Anarchy, Order, and Trade: A Structuralist Account of Why a Global Commercial Order is Emerging*, 47 VAND. J. TRANSNAT’L L. 1049, 1087 (2014). Duzin gives the example of European Union law, which began as a succession of commercial agreements but now encompasses many areas of public and private regulation. *Id.* at 1087-88.

37. *Id.* at 1068.

38. *See, e.g.*, Jay M. Feinman, *Relational Contract Theory in Context*, 94 NW. U. L. REV. 737, 738-39 (2000) (arguing that “The scope of neoclassical law is residual and fragmented. There is still a unitary body of contract principles (the rules of formation, validation, performance, and remedies), but the law is residual in that it no longer attempts to encompass all consensual transactions. Labor law and corporate law, for example, are no longer within the scope of contract. The law also is fragmented, in that the unitary principles are not necessarily applied in the same way in all types of cases. We have seen the recognition of transaction types—for example, the law of sales is part of the general law of contract but marked off for separate treatment.”).

39. *See infra* section III.B.

The globalization boosters' mistake is to equate globalization with unification. In fact, the phenomenon of "convergence" coupled with "informed divergence" is a hallmark of many areas of globalization<sup>40</sup>—what Glenn calls "sustainable diversity" among disparate legal traditions.<sup>41</sup> But beyond this, globalization is not a unitary process. It occurs in different ways at different speeds in different aspects of society. The typical picture of transnational contract law as characterized by harmonization or unification is therefore not incorrect *per se*, but it is incomplete. Overall harmonization can coexist with sustained or even increased fragmentation in specific areas. Indeed, multiple kinds of fragmentation can occur simultaneously and overlap with each other; the term fragmentation is itself fragmented. In this Article, I argue that territorial unification (i.e., globalization) and sectoral fragmentation are driven by the same forces and therefore accompany each other.

### III. FRAGMENTATION, PRIVATE GOVERNANCE, AND TRANSNATIONAL LAW

The public international law literature identifies four mechanisms by which legal fragmentation occurs: proliferation of sources of legal rules, codification of distinct legal sub-fields, incomplete or ineffective harmonization, and proliferation of adjudicatory bodies. Part III explains the four mechanisms of fragmentation, illustrating each with examples from transnational contract law. It shows that transnational contract law can fairly be described as fragmented. In a sense, this is hardly surprising; contract law was never a global unity, as public international law is purported to have been. Nevertheless, it demonstrates the falsity of claims that economic globalization and the legal unification movement have led to simplification and unification of contract law. Part III also shows that, with respect to transnational contract law, all four mechanisms of fragmentation can be traced to the rise of private governance, and to the international commercial law community's response to increasing complexity.<sup>42</sup> This discussion

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40. These terms were coined and elucidated by Anne-Marie Slaughter; see ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (2004) (giving a detailed account of global politics in transformation).

41. H. PATRICK GLENN, *LEGAL TRADITIONS OF THE WORLD* 378 (4th ed. 2010).

42. See generally THE EMERGENCE OF PRIVATE AUTHORITY IN GLOBAL GOVERNANCE (Rodney Bruce Halland & Thomas J Biersteker eds., 2002) (arguing that, while states were traditionally considered to be the only legitimate actors in international relations, this position can no longer be maintained); TIM BÜTHE & WALTER MATTLI, *THE NEW GLOBAL RULERS: THE PRIVATIZATION OF REGULATION IN THE WORLD ECONOMY* (2011) (explaining that the internationalization and privatization of rulemaking has been motivated not only by the

serves as background for the exploration of sectoral fragmentation in Part IV.

#### *A. Proliferation of Sources of Law*

Starting in the mid-twentieth century but gaining in momentum ever since, the sources of private law rules have proliferated in both number and type. In addition to state and sub-state governments, there are now at least four types of actors promulgating legal rules governing commercial relationships: supranational governmental entities like the European Union, technocratic non-governmental and inter-governmental bodies like United Nations Commission on International Trade Law (UNCITRAL) and the International Institute for the Unification of Private Law (UNIDROIT), adjudicative bodies — both permanent like the WTO Appellate Body and ad hoc like international arbitral tribunals — and private groups like NGOs and trade associations.<sup>43</sup>

The result is that persons engaged in cross-border private legal relationships — from those who have children with nationals of other states, to travelers who vacation in foreign countries, to multinational corporations — now find that those relationships are governed by a multitude of rules: private and public, national and international, formal and informal. In the commercial sphere, the most significant aspect of this broader phenomenon is the rise of private contractual governance in transnational rulemaking. The concept of contractual governance embodies the socio-legal insight that contracts often regulate a wide range of behavior in ways that are distinct from their legally binding character,<sup>44</sup> and that contracts themselves therefore take on the character of governance, especially where common sets of standard terms are shared across members of a commercial network.<sup>45</sup>

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economic benefits of common rules for global markets, but also by the realization that government regulators often lack the expertise and resources to deal with increasingly complex and urgent regulatory tasks).

43. Roger Cotterrell, *What is Transnational Law?*, 37 LAW & SOC. INQUIRY 500, 518 (2012) (stating that “[m]uch transnational regulation and policy formation now develops through the work of innumerable associations, organizations, or corporate bodies engaged in setting and developing standards.”). See generally Gunther Teubner, *Breaking Frames: The Global Interplay of Legal and Social Systems*, 45 AM. J. COMP. L. 149, 157 (1997) (detailing the rise of private rule-makers in transnational law).

44. The ur-text of this field of contracts scholarship is Stewart Macaulay, *Non-Contractual Relations and Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963). See HUGH COLLINS, *REGULATING CONTRACTS* (1999) (providing a comprehensive theory of contract working from this perspective).

45. See, e.g., Vincent-Jones, *supra* note 4 (exploring the role of contract as a governance mechanism).

The proliferation of sources in itself leads to fragmentation, but the larger factor is that these different sources of governance partially overlap and scarcely coordinate with each other. Different aspects of private law “are dealt with by different ‘lawgivers’ without an overall responsibility for coherence and unity in the hands of one overarching institution. This has led to diverging substantive norms, all with an equal claim to validity.”<sup>46</sup> In the political science literature, this phenomenon is referred to as “multilevel governance”, and is associated with the breakdown of traditional state-centric conceptions of the international order.<sup>47</sup>

Aside from the organs of the European Union—themselves under pressure from Brexit and divisions among member states—dynamism in transnational rulemaking increasingly lies with private entities operating as transnational regulatory networks: industry associations, individual parties engaged in contracting, committees of experts, and NGOs and IGOs like the Hague Conference on Private International Law and the International Chamber of Commerce.<sup>48</sup> In other words, within the multilevel system of governance that predominates in international private law, non-state actors are increasingly prominent.<sup>49</sup> Thus far, rules generated through private governance processes have served largely to fill gaps in public governance, but now private governance has moved beyond gap-filling and is dominating more broadly. Industry associations have been particularly active in international rulemaking, both in promulgating rules themselves and in shaping the development of treaties and other international instruments.<sup>50</sup>

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46. Smits, *supra* note 29, at 166.

47. Gary Marks et al., *Competencies, Cracks and Conflicts: Regional Mobilisation in the European Union*, 29 COMP. POLIT. STUD. 164, 167 (1996) (defining multilevel governance as “overlapping competencies among multiple levels of governments and the interaction of political actors across those levels.”).

48. See Stavros Gadinis, *Three Pathways to Global Standards: Private, Regulator, and Ministry Networks*, 109(1) AM. J. INT’L L. 1, 6-9 (2015) (identifying three sources of global standards: states, private industry groups, and NGOs).

49. BÜTHE & MATTLI, *supra* note 42; Riles, *supra* note 22.

50. See, e.g., Melissa J. Durkee, *Astroturf Activism*, 69 STAN. L. REV. 201 (2017) (detailing various ways that corporations disguise their lobbying through use of “astroturf” nonprofit associations); Melissa J. Durkee, *The Business of Treaties*, 63 UCLA L. REV. 264 (2016) (describing the role of business actors in treaty drafting generally); Sarah Dadush, *The Internal Challenges of Associational Governance*, 111 AJIL UNBOUND 125 (2017) (describing the normative dynamics within industry associations that affect their capacity to act as governance mechanisms); Kishanthi Parella, *Outsourcing Corporate Accountability*, 89 WASH. L. REV. 747, 753–56 (2014) (noting that corporations are increasingly responsible for regulating throughout their “global value chains”); Larry Catá Backer, *Private Actors and Public Governance Beyond the State: The Multinational Corporation, the Financial Stability Board, and the Global Governance Order*, 18 IND. J. GLOBAL LEG. STUD. 751, 762–72 (2011) (stating that businesses self-regulate through regulatory arbitrage and through creating rules

The rise of private governance is partly due to a stagnation in formal international rulemaking<sup>51</sup> and partly due to an active or passive delegation of regulatory power by states to supranational and private organizations.<sup>52</sup> In many quarters, this delegation is motivated by a neoliberal belief in “state institutions’ incompetence to properly order society” and a corresponding faith in “society’s quasi-natural powers to self-regulate its affairs”.<sup>53</sup> Skepticism about the need for and effectiveness of public regulation of private relationships is most prevalent with respect to commercial transactions.<sup>54</sup> In line with the libertarian (or at least neoliberal) ethos that pervades much of this literature, Druzin argues that market reciprocity, while an imperfect enforcement mechanism, “is sufficient to sustain legal order where central enforcement mechanisms are lacking, which is largely the case in the international context.”<sup>55</sup> The upshot is that “[a] space has been created, outside the normative reach of municipal authorities and international agencies established by treaties or conventions, for new agencies to elaborate the emerging *ratio* of transnational law.”<sup>56</sup>

This does not mean, however, that transnational law is entirely autonomous from state law and state courts. At minimum, transnational law, regardless of its origin, depends on states for enforcement.<sup>57</sup> But even before disputes arise and judgments must be enforced, transnational law is

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for their supply chains); Mark J. Sundahl, *The “Cape Town Approach”: A New Method of Making International Law*, 44 COLUM. J. TRANSNAT’L L. 339, 341, 344 (2006) (describing the role of commercial parties, specifically airplane manufacturers, in guiding the drafting and driving the adoption of the 2001 Cape Town Convention on International Interests in Mobile Equipment).

51. Joost Pauwelyn, Ramses A. Wessel & Jan Wouters, *When Structures Become Shackles: Stagnation and Dynamics in International Lawmaking*, 25(3) EUR. J. INT’L L. 733, 734-38 (2014). Pauwelyn et al. identify three reasons for this slowdown: “saturation” such that treaties already exist in many areas, “backlash” to treaty-making after the wave of new treaties in the 1990s, and the financial crisis, which has made American and European leadership more preoccupied with domestic problems and cautious about entering into new international obligations and structures. *Id.* at 738-44.

52. Shaffer, *supra* note 6, at 9.

53. Zumbansen, *supra* note 12, at 799.

54. *Id.* at 803.

55. Druzin, *supra* note 36, at 1058.

56. Cotterrell, *supra* note 43, at 517.

57. See Lawrence Friedman, *Erewhon: The Coming Global Legal Order*, 37 STAN. J. INT’L L. 347, 356-7 (2001) (arguing that sets of contractual provisions with quasi-statutory effect, like the Hague-Visby Rules and the UCP, do not on their own constitute autonomous norms created within the international economy, since “all such customs and practices have to be validated somehow by national courts applying what they consider to be national law or rules that national law recognizes—or, as is often the case, the law that the parties to a contract may have stipulated”).

strengthened when it is transposed into national laws.<sup>58</sup> As Michaels observes, states may directly incorporate transnational law into their domestic systems by ratifying a convention or enacting legislation based on an international model law, may treat transnational laws as facts in domestic litigation (such as when international commercial norms are treated as trade usage or customary law), and may permit private parties to choose to be governed by transnational law over national law (by enforcing arbitral awards applying transnational law).<sup>59</sup> Whichever way transnational rules enter national law, it is states' adoption or acceptance of transnational rules that confers legal validity (in the positivist sense) upon them.<sup>60</sup> At the same time, these processes import the greater fragmentation of the transnational space into domestic legal systems, ratifying and reinforcing the multilevel character of transnational rulemaking.

### *B. Codification of Distinct Legal Sub-Fields*

The second mechanism of fragmentation identified in the literature arises from the promulgation of increasing numbers of codifications, each pertaining to different kinds of private relationships. These often overlap, but also leave aspects of private relationships ungoverned by any transnational rules.<sup>61</sup> As a result, similar relationships may be governed by national rules, transnational rules, or some awkward combination of the two. Moreover, these codifications may be adopted or accepted by some states and not others, increasing fragmentation along state boundaries beyond the level that existed before the codification was introduced.<sup>62</sup>

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58. Even in areas dominated by private contractual governance, the state continues to play an important role. See, e.g., Tehila Sagy, *What's so Private About Private Ordering?*, 45 LAW & SOC'Y REV. 923 (2011) (discussing three well-known cases of private ordering by market communities).

59. Ralf Michaels, *The True Lex Mercatoria: Law Beyond the State*, 14 IND. J. GLOBAL LEG. STUD. 447, 461 (2007).

60. Cotterrell, *supra* note 43, at 520; see also Michaels, *supra* note 59, at 465 (stating that "[h]owever, the law that we find is not truly autonomous from the state in any meaningful sense. Rather, we observe a continuous competition and interplay between state and non-state institutions.").

61. José Angelo Estrella Fera, *The Relationship Between Formulating Agencies in International Legal Harmonization: Competition, Cooperation, or Peaceful Coexistence?*, 51 LOYOLA L. REV. 253, 272 (2005) (stating that "duplications or even contradictions — real or potential — persist, and sometimes the compromise to avoid them is translated in a complex (some might even say 'artificial') delimitation of the respective field of application of the various instruments being prepared by each organization in question.").

62. Smits, *supra* note 29, at 156. For example, in the United States, the reception of the Uniform Commercial Code (U.C.C.) and the Restatement (2d) of Contracts have differed remarkably. The U.C.C. or nearly all of it has been adopted by every state, while the uptake



The piecemeal way in which transnational rules have been enacted creates a fragmentation of its own, with different aspects of the same legal relationship potentially governed by multiple national and international laws. As a result, the work of uniform law bodies like UNCITRAL and the Hague Conference on Private International Law “has not been rewarded by true simplification: in reality the many efforts by numerous players have produced the paradox of an increase in the number of instruments.”<sup>63</sup> The “creeping codification” of transnational private law<sup>64</sup> has in practice led to the same kind of systemic incoherence in domestic law that scholars have decried with respect to fragmentation of international law.<sup>65</sup>

### *C. Fragmentation Through Incomplete or Ineffective Harmonization of Law*

Laws that have been formally harmonized may fragment (or remain fragmented) when states make reservations to them<sup>66</sup> or enact different versions of them,<sup>67</sup> or when state courts apply different language versions of them<sup>68</sup> or apply them in disparate ways in line with their own distinct national

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of the Restatement has been far more uneven. David V. Snyder, *Private Lawmaking*, 64 OHIO ST. L.J. 371, 378-84 (2003).

63. Ferreri, *supra* note 25, at 14. Private law within national systems has also fragmented in this way, with codifications of distinct aspects of domestic law, but domestic laws benefit from relatively unified mechanisms for rule-making, rule-implementing, and rule-enforcing. See, e.g., Mel Kenny, *Globalization, Interlegality and Europeanized Contract Law*, 21 PENN ST. INT'L L. REV. 569, 570 (2003) (stating that “[f]urther exacerbating fragmentation . . . a feature of recent national law-making in Civil law jurisdictions has been the passing of increasingly specific laws, especially in consumer protection, outside the general codified law of contract.”); Lucie Cheng & Arthur Rosett, *Contract with a Chinese Face: Socially Embedded Factors in the Transformation from Hierarchy to Market*, 5 J. CHINESE L. 143 (1991) (describing the “fragmentation” of Chinese contract law into distinct codes and statutes for distinct types of contractual relationships — between individuals, between agricultural collectives and farmers, and between units of socialist production — and then the further fragmentation of the law of commercial contracts into rules regulating purely domestic transactions and those regulating transactions with a foreign element).

64. BERGER, *supra* note 35.

65. Sandeep Gopalan, *New Trends in the Making of International Commercial Law*, 23 J.L. & COM. 117, 133 (2004).

66. CISG-AC Declaration No. 2, “Use of Reservations under the CISG”. Rapporteur: Professor Dr. Ulrich G. Schroeter. Adopted by the CISG-AC following its 18th meeting, in Beijing, China, on 21 October 2013, available at <https://www.cisgac.com/cisgac-declaration-no2/> [<https://perma.cc/73H6-DJFB>].

67. Gopalan, *supra* note 65, at 128.

68. See, e.g., Harry M. Flechtner, *The Several Texts of the CISG in a Decentralized System*, 17 J.L. & COM. 187 (1998) (arguing that the adoption of uniform international rules with multiple language versions can contribute to inconsistent interpretations of international

laws and traditions. This last phenomenon, often referred to as the “homeward trend,” is the subtlest but also the most difficult to remedy.<sup>69</sup> As Ferreri wryly observes, “[i]n some judicial settings, a certain contradiction can be detected between lip service paid to the ‘enrichment’ deriving from legal pluralism and actual judicial practice that sometimes simply ignores complexity by leaving aside solutions deriving from the international source rules that ought be applied.”<sup>70</sup>

This problem arises with all efforts to establish internationally uniform laws. However, it is felt particularly keenly within the EU. The literature on European integration is rife with concerns that harmonization of some areas of law but not others, and divergent application of EU laws by national courts, will leave Community law fragmented.<sup>71</sup> The European Commission itself invoked this concern in its “Action Plan” for “A More Coherent European Contract Law,” writing that one of the goals of Community law is to “avoid conflicting results and . . . define abstract legal terms in a consistent manner allowing the use of the same abstract term with the same meaning for the purposes of several directives. As such, it should indirectly remedy the fragmentation of national contract laws and promote their consistent application.”<sup>72</sup>

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laws).

69. JOHN HONNOLD, DOCUMENTARY HISTORY OF THE UNIFORM LAW FOR INTERNATIONAL SALES 1 (1989); see also Larry DiMatteo et al., *The Interpretive Turn in International Sales Law: An Analysis of Fifteen Years of CISG Jurisprudence*, 24 NW. J. INT’L L. & BUS. 299, 437-39 (2004) (describing the “persistence of homeward trend”).

70. Ferreri, *supra* note 25, at 15.

71. See, e.g., Matthias Storme, *The Foundations of Private Law in a Multilevel Structure: Balancing, Distribution of Lawmaking Power, and Other Constitutional Issues*, 1 EUR. R. PRIV. L. 237, 244 (2012) (stating that “distribution of powers can lead to more or less homogeneous or to very fragmented domains of jurisdiction.”); Nicole Stolowy & Severine Schrameck, *The Contribution of European Law to National Legislation Governing Business Law*, 2011, 6 J. BUS. L. 614, 626-27 (2011) (expressing concerns over a lack of consistent application of European laws and regulations by national courts of EU member states); Ugo Mattei & Fernanda Nicola, *A ‘Social Dimension’ in European Private Law? The Call for Setting A Progressive Agenda*, 41 NEW ENG. L. REV. 1, 12 (2006) (stating that “the non-uniform implementation of directives by Member States leads to inconsistencies and fragmentation of contract regimes, creating different legal rules for the same commercial situation.”); Dominik Kallweit, *Towards a European Contract Law: For a Prosperous Future of International Trade*, 35 VICTORIA U. WELLINGTON L. REV. 269, 280 (2004) (stating that “a large body of Community legislation regarding contract law is already in place. It is commonly accepted that this legislation is fragmented and partly inconsistent.”).

72. Commission of the European Communities, *Communication from the Commission to the European Parliament and the Council, A More Coherent European Contract Law: An Action Plan* 15 (2003), available at <https://publications.europa.eu/en/publication-detail/-/publication/9cf842b8-a9a1-4407-b791-312435c014c6> [<https://perma.cc/W9NU-PT2H>].

*D. Proliferation of Adjudicative Bodies*

The complexity generated by these forces in turn generates calls for greater technical expertise (and concomitantly greater specialization) in regulatory and adjudicative bodies. In particular, national courts are often criticized as incompetent to handle complex cross-border disputes and keep up with fast-moving developments in international commerce.<sup>73</sup> One response has been the establishment of specialist business courts of various kinds. In most cases, such courts only have jurisdiction over a dispute because the parties' contract includes an express choice of the forum. To this extent, even national courts rule by virtue of party autonomy rather than state power. Prominent examples include the Chancery Court of Delaware, the Technology and Construction Court in London (a subdivision of the High Court of Justice of England and Wales), and the Singapore International Commercial Court.

The rationales given for many specialist courts show that they are motivated by an ethos that prefers private ordering to state intervention, and which sees the role of law and the state as limited to the facilitation of individual autonomy.<sup>74</sup> For example, the website of the Singapore International Commercial Court states that it was established in order to offer litigants "the option of having their disputes adjudicated by a panel of experienced . . . specialist commercial judges," and that "it seeks to provide parties in transnational business with one more option among a suite of viable alternatives to resolve transnational commercial disputes."<sup>75</sup>

Specialist courts therefore have both the institutional capacity and an incentive to stay within the "boundaries" of the particular disputes that are brought before them, but less institutional capacity or incentive to reassert universal norms or keep watch over the conceptual coherence or systematicity of the law. This is not to say that specialist courts never reach beyond the confines of their associated bodies of law to vindicate more broadly-applicable principles; however, they are likely to do so strategically, rather than as a general policy or in the service of maintaining overall coherence.<sup>76</sup>

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73. ALAN REDFERN ET AL., LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 26 (4<sup>th</sup> ed. 2004) (arguing that courts are "unaccustomed to international commercial transactions and . . . [their] laws and practices are not adequate to deal with them.").

74. Zumbansen, *supra* note 12, at 774.

75. *Establishment of the SICC*, SINGAPORE INT'L COMM. CT., <https://www.sicc.gov.sg/about-the-sicc> [<https://perma.cc/GQ7J-59Z5>].

76. On the role of specialist adjudicative bodies, especially arbitral tribunals, in promoting sectoral fragmentation, see *infra* notes 79-84 and accompanying text. On the

Many commercial parties exercise their autonomy to opt out of court systems altogether and, instead, to resolve disputes by arbitration or some other form of alternative dispute resolution. The popularity of arbitration is often overblown,<sup>77</sup> but it undoubtedly plays a prominent role in the resolution of cross-border commercial disputes, especially in certain industry sectors (such as construction and energy).<sup>78</sup>

Arbitral tribunals are likely to abet fragmentation even more than specialist national courts. The arbitral system places a high priority on party autonomy as a matter of social norms, not just rules.<sup>79</sup> Parties opting for arbitration have almost total freedom to choose the substantive and procedural rules that will govern their dispute, as well as the arbitrators who will apply those rules.

Even when the same rules apply in arbitration that would apply in national courts, use of arbitration is likely to lead to greater fragmentation because arbitral decision-making systematically diverges from judicial decision-making. A small but growing body of literature has shown that, due to the international arbitration field's distinct professional culture,<sup>80</sup> its systemic biases,<sup>81</sup> arbitrators' economic and other incentives,<sup>82</sup> the social

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drawbacks to specialist tribunals, in particular the risk of tunnel vision and industry capture, see *infra* notes 217-222 and accompanying text.

77. Thomas Dietz, *Does International Commercial Arbitration Provide Efficient Contract Enforcement Institutions for International Trade?*, in *INTERNATIONAL ARBITRATION AND GLOBAL GOVERNANCE: CONTENDING THEORIES AND EVIDENCE* (Walter Mattli & Thomas Dietz, eds., 2014); Michael McIlwrath & Ronald Schroeder, *The View from an International Arbitration Customer: In Dire Need of Early Resolution*, 74(1) *ARBITRATION* 3 (2008); Theodore Eisenberg & Geoffrey P. Miller, *The Flight from Arbitration: An Empirical Study of Ex Ante Arbitration Clauses in the Contracts of Publicly Held Companies*, 52(2) *DEPAUL L. REV.* 335 (2006-2007).

78. As indicated by *Corporate choices in International Arbitration: Industry Perspectives*, PRICEWATERHOUSECOOPERS 7, <https://www.pwc.com/gx/en/arbitration-dispute-resolution/assets/pwc-international-arbitration-study.pdf> [<https://perma.cc/2NJH-QALX>]. To the extent that arbitrators and judges apply the governing laws in a divergent manner, a disparity between industries in the use of dispute resolution methods itself contributes to sectoral fragmentation. As will be discussed in this section, there is reason to believe that arbitrators and judges have distinct perspectives that may lead them to apply the same laws differently.

79. JOSHUA KARTON, *THE CULTURE OF INTERNATIONAL ARBITRATION AND THE EVOLUTION OF CONTRACT LAW* 78 (2013).

80. *Id.*

81. Stavros Brekoulakis, *Systemic Bias and the Institution of International Arbitration*, 4(3) *J. INT'L DISP. SETTLEMENT* 1 (2013).

82. Thomas Schultz, *Arbitral Decision-Making: Legal Realism and Law & Economics*, 6(2) *J. INT'L DISP. SETTLEMENT* 231 (2015); Thomas Schultz & Robert Kovacs, *The Rise of a Third Generation of Arbitrators? – Fifteen Years After Dezalay and Garth*, 28(2) *ARB. INT'L* 161, 165-68 (2012).

structure of the profession,<sup>83</sup> and the collegial dynamics of arbitral tribunals,<sup>84</sup> arbitrators are likely to reach different decisions than national courts, even when applying the same law. The lack of any appellate hierarchy within international commercial arbitration, and the very limited basis on which national courts may overturn or refuse to enforce an award, mean that few opportunities exist to counteract these tendencies.<sup>85</sup> Thus, specialized adjudication, itself a product of legal fragmentation, leads to greater fragmentation.

#### IV. SECTORAL FRAGMENTATION OF TRANSNATIONAL CONTRACT LAW

As Part III has shown, the existing literature amply describes the *how* of private law fragmentation. However, it has done little to illuminate the *what*. Commentators speak in terms of decreasing systematicity or coherence and increasing complexity. But the question remains: what will a fragmented contract law actually look like? In what specific ways will it be less systematic or more complex? What will be the content of the new and newly-globalized rules of law? Part IV provides a partial answer to these questions: transnational contract law is fragmenting into different bodies of rules for different industry sectors.

Since before there was legal enforcement of commercial contracts,<sup>86</sup> merchants in different industries have developed their own conventions and standard terms. Thus, to the extent that governance is shaped by private contract, it has long varied from industry to industry. Traditionally, however, courts analyzed all different types of transactions under the broad rubric of “contract law.” There are notable exceptions, such as the laws that govern divorce agreements, employment contracts, and consumer contracts. However, these tend to arise with respect to relationships that society deems worthy of close regulation, either because they relate to important social norms (as in family law) or because of the potential for abuse of a dominant position (as in consumer and employment law). Under national legal

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83. Sergio Puig, *Social Capital in the Arbitration Market*, 25(2) EUR. J. INT’L L. 387 (2014).

84. Todd Tucker, *Inside the Black Box: Collegial Patterns on Investment Tribunals*, 7(1) J. INT’L DISP. SETTLEMENT 183 (2016).

85. KARTON, *supra* note 79, at 236-237.

86. In the common law, at least since actions for assumpsit and wholly executory bilateral contracts were recognized, beginning with *Slade’s Case* (1602) 4 Co. Rep. 92b, (1602) 76 ER 1074. See JOHN H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 333-34 (4th ed. 2002) (discovering writs of assumpsit from as early as 1360). Previously, the only available action for breach of a commercial agreement was for recovery of a money debt. *Id.* at 329.

systems, most agreements between commercial parties continue to be addressed by courts under broadly-applicable rules of contract law, although precedents dealing with similar categories of contracts are more analogous and therefore more likely to constitute binding precedents (in a common law system) or make up a *jurisprudence constante*.<sup>87</sup>

Now, however, even as contract law is unifying across national boundaries, it is fragmenting across sectoral boundaries. The sectorally fragmented character of private contracts is being recapitulated in public governance.

Sectoral fragmentation occurs whenever rulemaking entities (whether private or public, national or international, formal or informal, regulatory or legislative or adjudicative) adopt legal rules that yield different outcomes on analogous transactions in different industry sectors. I label such rules “industry-particularist,”<sup>88</sup> while “generalist” rules apply to one or more categories of transactions across all areas of commerce.

To clarify, sectoral fragmentation is distinct from the notion that different rules may apply to different types of transactions — what one might call functional differentiation within contract law. Although a lease of commercial real estate and a sale of goods between merchants are both contracts, and both involve a transfer of property interests in return for money, they describe different commercial relationships with distinct purposes and characteristics. It would be unremarkable for them to be governed by different rules and contain different sets of implied terms. For example, a commercial lease might be subject to an implied term guaranteeing a right of re-entry for the lessor under specified circumstances, a term that would make little sense in a sale of goods contract; similarly, the relational character of a lease and the one-off character of a lump-sum sale might call for different rules of interpretation.<sup>89</sup> Functional fragmentation yields different bodies of rules depending on *which kinds* of interests are conferred under the transaction, while sectoral fragmentation yields different

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87. *Jurisprudence constante* is a form of precedent in French law, according to which legal doctrines may emerge by accretion from a consistent line of cases, rather than from a single judgment. French law thus achieves “unification and stability of judicial activity” similar to that prevailing in common law jurisdictions without a doctrine of *stare decisis* or of judge-made law generally. Michel Troper & Christophe Grzegorzczuk, *Precedent in France*, in INTERPRETING PRECEDENTS 103, 137 (D. Neil MacCormick & Robert S. Summers, eds., 1997).

88. Van Howeling uses the word “atomism” to describe roughly the same concept. Molly Shaffer Van Houweling, *Author Autonomy and Atomism in Copyright Law*, 96 VA L. REV. 549 (2010).

89. See Scott, *supra* note 10 (highlighting the benefits of formalism in contract law).

bodies of rules depending on *who* confers and receives those interests.<sup>90</sup>

Contract law has long been internally subdivided on a functional basis. In civil law jurisdictions, civil and commercial codes and codes of obligations typically categorize contracts in this way, and establish distinct sets of mandatory and derogable rules for each type of transaction. Identifying the functional category of the contract is therefore the first step in contract litigation in civilian systems.<sup>91</sup> Although common law jurisdictions have not engaged in such efforts to systematically categorize contracts via legislation (with the important exception of the United States in the form of Uniform Commercial Code), common law doctrines and statutory regimes that deal with subsets of contract law also tend to define their scope of application according to the function of the transaction involved.<sup>92</sup> Transnational rulemaking activities have also proceeded on the basis of establishing sets of rules for particular categories of transactions.<sup>93</sup>

The kind of particularism considered here — the industry-centric particularism that is related to sectoral fragmentation — describes something different. It would mean, for example, that a contract for the sale of crude oil from a producer to a refiner and a contract for the sale of office paper from a manufacturer to the same refiner are governed by distinct bodies of legal rules, even though they both constitute cross-border sales of goods between commercial entities, because one sale involves oil and the other involves stationery. Industry-particularism is the micro-level doctrinal expression of the macro-level phenomenon of sectoral fragmentation; fragmentation is to governance as particularism is to rules.

This Part describes the ways that the four modes of fragmentation described above in Part III play out in the transnational commercial context, in particular how contractual governance drives the increasing prominence of industry-particularist rules of contract law. It is divided into two sections. The first argues that commercial networks will tend to drive sectoral

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90. Note that consumer protection law is excluded from the analysis here, although it is a potentially important part of the overall picture; this article deals only with relationships between commercial parties.

91. See, e.g., BARRY NICHOLAS, *THE FRENCH LAW OF CONTRACT* 47 (2nd ed. 1992) (stating that the first step taken by French courts during contract litigation is to characterize the contracts).

92. The most obvious example is the U.C.C., which is organized on exactly this basis: Article 2 deals with sales, Article 2A with leases, Article 3 with transfers of negotiable instruments, and so on.

93. Examples include three UN Conventions originally promulgated by UNCITRAL: the Convention on Contracts for the International Sale of Goods, the Convention on the Assignment of Receivables in International Trade, and the Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea.

fragmentation because they benefit from the development of globally-harmonized, industry-particularist bodies of substantive law. Accordingly, legal orders dominated by private governance, in particular transnational contract law, are likely to become sectorally fragmented. The second section describes the primary mechanisms by which private governance generates industry-particularist rules: industry-particularism can arise from the promulgation of rules that apply only to one industry sector across multiple classes of transactions, from the application of flexible rules that yield different outcomes depending on the commercial context of the contract at issue, from the application of different national laws in different industries, and from the use of specialized adjudication, especially arbitration.

*A. Private Governance and Fragmented Contract Law*

Business enterprises operating in the same sector, regardless of their nationality, often have more in common with each other than they do with other enterprises from the same state. Businesses in the same sector deal with similar types of technical problems (and therefore develop common technical expertise), are subject to similar risks and economic pressures, and contract repeatedly with each other or with the same suppliers or customers. In other words, the modern global economic system is less geographically differentiated and more sectorally differentiated. The only question is whether contract law will also “shift . . . from a state-based structure to an economy-based structure.”<sup>94</sup>

The prevailing approach in transnational law scholarship sees differentiation in law as a reflection of the differentiation of global society — different social groups operate relatively autonomously from each other, and therefore exhibit distinct senses of what kinds of conduct are acceptable. Roughly the same argument can be put in various ways. In legal scholarship, this view is most associated with Teubner,<sup>95</sup> who writes that “[i]nternal

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94. Michaels, *supra* note 59, at 465. He continues:

“As long as commercial law reflects the political system, it remains state law because the internal differentiation within the political system concerns the boundaries between states. If, by contrast, commercial law reflects the economic system, then it concerns both state and non-state norms and institutions because the internal differentiation of the economy concerns not the boundaries between state and non-state, but rather the boundaries between different sectors of the economy.” *Id.* Note that Michaels’s concern is with the source of the rules; by contrast, I am concerned with the scope of application of the rules. For present purposes, what matters is whether a given body of rules is particularist or generalist and, if particularist, how it defines the scope of relationships to which it applies; it does not matter whether the rules derive from state or non-state sources.

95. See, e.g., GUNTHER TEUBNER, CONSTITUTIONAL FRAGMENTS: SOCIETAL



differentiation of law can be seen as a response to the fragmentation of society in various systems and discourses.”<sup>96</sup> Similarly, Cotterrell describes “networks of community” as the loci of transnational rule-making.<sup>97</sup> Such networks are defined objectively by “stable sustained interactions” between members of the community and subjectively by a “sense of attachment” among community members.<sup>98</sup> These lead to the development of “web[s] of [common] understanding[.]” that can, over time, gain the force of law.<sup>99</sup>

Outside the legal academy, Sassen<sup>100</sup> argues that national, international, and transnational (including private) processes of institutional and normative formation are dynamically related to each other, forming multiple and overlapping “global assemblages” made possible by modern information technology.<sup>101</sup> These assemblages constitute distinct social spheres that integrate territorial and de-territorial, vertical and horizontal, private and public ordering processes.<sup>102</sup> In the constructivist international relations literature, Adler describes “communities of practice,”<sup>103</sup> which “consist of people who are informally as well as contextually bound by a shared interest in learning and applying a common practice.”<sup>104</sup> Such a common practice, “in turn, [is] sustained by a *repertoire of communal resources*, such as

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CONSTITUTIONALISM AND GLOBALIZATION 162-66 (Gareth Norbury trans., Oxford Univ. Press 2012) (noting an instance of fragmentation of transnational law in intellectual property regulation); Gunther Teubner & Peter Korth, *Two Kinds of Legal Pluralism: Collision of Transnational Regimes in the Double Fragmentation of World Society*, in REGIME INTERACTION IN INTERNATIONAL LAW: FACING FRAGMENTATION 23-25 (Margaret A. Young ed., 2012) (highlighting the development of an international conflict of laws doctrine in response to a change in technology); 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 (2004) (explaining Teubner’s theory of intersystemic conflict of laws and how it supports a shift away normative-based laws).

96. Teubner, *supra* note 21, at 916.

97. See generally ROGER COTTERRELL, LAW, CULTURE AND SOCIETY; LEGAL IDEAS IN THE MIRROR OF SOCIAL THEORY 68-73 (2006) (discussing the emergence of communities, in particular the factors that lead them to coalesce); Roger Cotterrell, *Transnational Networks of Community and International Economic Law*, in SOCIO-LEGAL APPROACHES TO INTERNATIONAL ECONOMIC LAW: TEXT, CONTEXT, SUBTEXT 133 (Amanda Perry-Kessaris, ed., 2013).

98. COTTERRELL, *supra* note 97, at 70.

99. *Id.* at 73.

100. Sassen is difficult to pigeonhole, but most of her appointments have been in sociology departments.

101. SASKIA SASSEN, TERRITORY, AUTHORITY, RIGHTS: FROM MEDIEVAL TO GLOBAL ASSEMBLAGES (2006).

102. *Id.*

103. EMANUEL ADLER, COMMUNITARIAN INTERNATIONAL RELATIONS: THE EPISTEMIC FOUNDATIONS OF INTERNATIONAL RELATIONS 15 (2005).

104. *Id.*

routines, words, tools, ways of doing things, stories, symbols, and discourse.”<sup>105</sup>

Once common practices begin to be adopted, they can become self-sustaining due to network effects. As a number of scholars have observed, legal culture and standardized legal practices can function as networks in the economic sense.<sup>106</sup> The most important economic characteristic of network goods is that the goods’ value increases the more users adopt it, so that joining the network benefits not only the joiner, but also all the other members of the network. This gives rise to what has been called the “tippy” quality of markets for network goods. “If a particular network succeeds in attracting more and more adherents, a virtuous cycle will ensue, and the market will ‘tip’ in favour of that set of specifications and its suppliers. Less successful competing networks will conversely enter into a vicious circle with fewer and fewer adherents.”<sup>107</sup> The impact of network effects is such that, “[a]s customary methods of conducting business become more deeply entrenched and widely followed, the system becomes progressively easier to maintain and the process more difficult to reverse . . . . [S]tandardization only encourages further standardization.”<sup>108</sup>

Whichever vocabulary one adopts, these studies make clear that the structure of transnational law is pluralistic and polycentric; it corresponds to the structure of the overlapping national, subnational, and transnational communities that contribute to it.<sup>109</sup> Functional differentiation is therefore inherent to the logic of the transnational. Kjaer describes three distinct but overlapping organizational logics: the territorial logic of the nation-state, the functional logic of the transnational community, and the traditional

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105. *Id.* at 15 (emphasis in original).

106. Most notably Ogus. See Anthony Ogus, *The economic basis of legal culture: networks and monopolization*, 22(3) OX. J. LEG. STUD. 419-34 (2002) (arguing that “the acknowledged characteristics of ‘legal culture’, a combination of language, conceptual structure and procedures, constitute a network which . . . reduces the costs of interactive behavior.”).

107. *Id.* at 422.

108. Druzin, *supra* note 36, at 1084.

109. Legal pluralists have long recognized that “people belong to (or feel affiliated with) multiple groups and understand themselves to be bound by the norms of these multiple groups.” Paul Schiff Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155, 1169 (2007). Bruce L. Benson, *The Law Merchant Story: How Romantic is it?*, in LAW, ECONOMICS, AND EVOLUTIONARY THEORY 68 (Peer Zumbansen and Galf-Peter Calliess eds., 2011); Peer Zumbansen, *Defining the Space of Transnational Law: Legal Theory, Global Governance, and Legal Pluralism*, 21 TRANSNAT’L L. & CONTEMP. PROBLEMS 305, 325 (2012); see also Harlan Grant Cohen, *Finding International Law, Part II: Our Fragmenting Legal Community*, 44 INT’L L. & POLITICS 1049, 1064 (2012) (“Legal communities can often overlap, as they did in colonial societies where colonial and indigenous law often lived side-by-side, vying for control.”).

stratificatory logic of pre-modern society.<sup>110</sup> Given the social complexity of modern society, the transnational logic of functional differentiation is deepening and strengthening at the expense of the nation-state's territorial logic.<sup>111</sup>

The fragmentation of public international law can be seen in the same light. As Cohen describes it, “[a] single international law community is being replaced by separate, overlapping legal communities with significantly different views of law and legitimacy.”<sup>112</sup> Even private law in domestic legal systems has fragmented into different laws for different communities.

The compartmentalization of the classic general law of tort into a law of specialized torts, for example, seems an irreversible state of affairs, to which the law reacts by providing differentiated solutions for specific interests and social fields. Nowadays, legal doctrine develops different theories of tort for different social fields, and this is no accident. The practice of the courts has destroyed the old unity of law guaranteed by doctrine and has replaced it by a multiplicity of fragmented legal territories that live in close contact with their neighboring territories in other social practices.<sup>113</sup>

The transnational setting “opens up a vista on endless confrontations and conflicts between different interest formations, rationalities, and stakes.”<sup>114</sup> To determine the form that transnational contract law is likely to take, it is therefore necessary to identify the social networks that will “win” these confrontations and conflicts by exerting the greatest influence on transnational contract law rules. These will not necessarily be the largest networks, or the ones with the largest number of powerful or influential members, but rather the networks that are the most cohesive and exhibit the most intensive sustained interaction—in other words, the networks that exhibit the strongest network effects.<sup>115</sup>

With respect to contract law, state networks may be unable to provide reliable frameworks of institutional or normative design suited for international commercial communities. It may be unreasonable to subject highly globalized webs of commercial relationships to the conflicting and

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110. POUL F. KJAER, *CONSTITUTIONALISM IN THE GLOBAL REALM: A SOCIOLOGICAL APPROACH* (2014).

111. Cotterrell, *supra* note 43, at 503; Ralf Michaels, *Global Legal Pluralism*, 5 *ANNUAL REV. L. & SOC. SCI.* 243 (2009).

112. Cohen, *supra* note 109, at 1053; *see also* Michael Waibel, *Interpretive Communities in International Law*, in *INTERPRETATION IN INTERNATIONAL LAW* (Andrea Bianchi *et al.* eds., 2014) (noting how the development of international law has been affected by the characteristics of its interpreters).

113. Teubner, *supra* note 21, at 916 (quotations omitted).

114. Zumbansen, *supra* note 7, at 131.

115. *See supra* notes 106-108 and accompanying text.

sometimes parochial or idiosyncratic rules of national legal systems, while the prospects for concerted state action are not good. In the past, a few powerful states were able to work in concert to create and shape international legal orders like the GATT and IMF, which to a large extent served their own interests.<sup>116</sup> Today, however, the “traditional” powers enjoy less leverage at the very institutions they created, and overlapping tangles of conflicting interests have slowed global-scale international rulemaking to a crawl.<sup>117</sup> Even where widespread consensus on basic principles exists, rulemaking processes can take years and the establishment of institutions for coordinated enforcement years more, by which time global commercial patterns may have already moved on to a new paradigm. It is exactly in such circumstances, where there is a mismatch between markets and law, that non-state-centric transnational legal orders are most likely to spontaneously emerge.<sup>118</sup>

Thus, the most influential networks are those composed of the transnational (regional or global) community of businesses working in the same industry sector. Globalized industries exhibit the stable sustained interactions, sense of attachment, and webs of common understandings that Cotterrell identifies as the hallmarks of distinct communities.<sup>119</sup> The structure of these sectoral networks will determine the evolution of transnational contract law.

Commercial parties are apt to prefer industry-particularism in law, although they may not conceive of the issue in those terms. When disputes arise, third party adjudication is usually a last resort; it is only worth the time and money if negotiations and non-legal sanctions are ineffective. When commercial parties do enter into adjudication, it should be fast, cheap, private, predictable, fair, and enforceable.<sup>120</sup> Speed, cost, privacy, and

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116. TERENCE C. HALLIDAY & GREGORY SHAFFER, *TRANSNATIONAL LEGAL ORDERS* 26-27 (2015).

117. See Pauwelyn, *supra* note 51, at 734-38 (citing a range of statistics that show a slowdown in formal international rulemaking); *id.* at 742 (attributing this slowdown in part to the greater number of states actively involved in formal international rulemaking processes and a flattening of power differentials among them).

118. HALLIDAY & SHAFFER, *supra* note 116, at 27.

119. See *supra* notes 94-97 and accompanying text. As Druzin observes, “In many ways, communities of merchants are like small communities. It is well acknowledged that reputational costs and repetition are sufficient in small groups to bring about stable social ordering.” See Druzin, *supra* note 36, 1063 (citing Ellickson’s classic study of ranchers in Shasta County, California); ROBERT ELICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE BUSINESS DISPUTES* (1994).

120. See, e.g., Joshua Karton, *A Conflict of Interests: Seeking a Way Forward on Publication of International Arbitral Awards*, 28(3) *ARB. INT’L* 447, 458-61 (2012) (explaining the current state of affairs within the international commercial arbitration system

enforceability are procedural matters, so predictability and fairness are the only matters related to the contract law that governs the substance of disputes.

Fairness is often subjective, but when commercial parties think of a fair outcome from a dispute resolution process, they probably mean a commercially reasonable result similar to the state of affairs that would have arisen if the contract had not been breached, or at least if the other party had been cooperative in reaching a settlement. This stands in contrast to conceptions of fairness in terms of deontological or consequentialist morality, or corrective or distributive justice.

Fairness cannot be entirely separated from predictability. A predictable result that is known to all in advance is likely to be seen as fair because parties can and will have ordered their affairs with the rule in mind. “As a general rule, business persons dislike uncertainty because it makes it difficult to plan. . . . [P]arties are likely to value certainty and predictability, including the application of known legal principles.”<sup>121</sup> Predictability also means efficiency. If the outcomes of an adjudicative process are predictable, legal counsel can provide sound advice to their clients and commercial parties in general on how to price their prospective performance when negotiating contracts, as well as how to act in performing or deliberately breaching a contract. When disputes do arise, settlements are both more likely to be reached and easier to price accurately.<sup>122</sup> In short, legal certainty reduces transaction costs.<sup>123</sup>

The dangers of unpredictability are multiplied when commerce crosses borders. Counterparties may operate on the basis of different implicit norms, which means that parties must either invest more resources in specifying contractual terms in greater detail, or alternatively accept a greater risk that the adjudicator of an eventual dispute may adopt an adverse interpretation of the contract.<sup>124</sup>

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in terms of conflicts between party and systemic interests).

121. Cindy G. Buys, *The Tensions between Confidentiality and Transparency in International Arbitration*, 14 AM. REV. INT’L ARB. 121, 136 (2003).

122. See, e.g., Joshua Karton, *The Arbitral Role in Contractual Interpretation*, 6(1) J. INT’L DISP. SETTLEMENT 1, 28 (2015) (stating that the better parties can predict how an arbitral tribunal will decide, the more likely they are to reach a settlement).

123. See, e.g., Joshua Karton & Lorraine de Germiny, *Has the CISG Advisory Council Come of Age?*, 27 BERK. J. INT’L L. 448, 448-49 (2009) (“A well-functioning commercial system requires a high degree of legal certainty; businesses will hesitate to enter into contractual relationships if they are unable to forecast the risks associated with breakdowns in those relationships.”).

124. All contract drafting is a matter of balancing specification costs against interpretive error costs. The more extensive and specific the terms of a written contract, the more likely it is that the contract actually reflects the common intention of the parties, and that in an

Cross-border commerce also brings the uncertainty created by conflict of laws rules into the commercial relationship. For example, it is often observed that the choice of law process has traditionally been marred by complexity and uncertainty,<sup>125</sup> although the near-universal enforcement of choice of law agreements and the increasing resort to presumptions about the parties' intent makes choice of law more predictable than in the past.<sup>126</sup> Such uncertainty imposes systemic costs: "Uncertainty at the time of contracting means that the parties cannot easily determine the standard of conduct to which they should conform or how to price contract rights and duties . . . . Uncertainty about choice of law at the time of litigation can increase both the costs and frequency of litigation."<sup>127</sup> Higher transaction costs can deter commercial parties from entering the cross-border market altogether.<sup>128</sup>

Where there is no clear system of judicial hierarchy capable of imposing consistent application of predetermined rules (as in transnational law), predictability can be achieved two ways: through bright-line (non-discretionary) rules or through rules that directly enforce the expectations of commercial parties, such as adjudication according to trade usages or good faith. To the extent that bright-line rules exist, commercial parties would prefer them to be simple and clear, but also derogable and derived from commercial practice. Indeed, much of the legislation on contract law, at least for commercial contracts, relies on this twin notion of incorporation of business practice and derogability. The bulk of Uniform Commercial Code (U.C.C.) provisions were drafted in accordance with the "incorporation strategy"; — that is, the rules set out in the U.C.C., especially in Article 2, are often codifications of trade usages or are otherwise patterned on business

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eventual dispute, the adjudicator will interpret the contract consistently with that intention. However, drafting and negotiating complex written provisions is expensive. *See, e.g.,* Jody S. Kraus & Steven D. Walt, IN DEFENSE OF THE INCORPORATION STRATEGY, in THE JURISPRUDENTIAL FOUNDATIONS OF CORPORATE AND COMMERCIAL LAW 199 (Jody S. Kraus & Steven D. Walt eds., 2000) (arguing that incorporation of commercial norms for gap-filling purposes helps lower transaction costs). Adding an international dimension to the scenario increases the risk of interpreter error; this incentivizes greater up-front expenditure to control the meaning of contracts, but increased specification costs chill commercial deal-making. Lisa Bernstein, *Custom in the Courts*, 110 NW. U.L.J. 63, 105 (2015).

125. BERGER, *supra* note 35, at 10.

126. This is especially the case in EU jurisdictions covered by the Rome I Regulation. At least with respect to contractual disputes, the modern choice of law process is often clear and straightforward. Gilles Cuniberti, *Three Theories of Lex Mercatoria*, 52 COLUM. J. TRANSNAT'L L. 369, 392-93 (2014).

127. Larry E. Ribstein, *Choosing Law by Contract*, 18 J. CORP. L. 245, 253-54 (1993).

128. *See, e.g.,* J.J. Callaghan, *UN Convention on Contracts for the International Sale of Goods: Examining the Gap-Filling Role of CISG in Two French Decisions*, 14 J.L. & COM. 183, 185 (1995) ("Enhancing certainty in the realm of international sales will greatly facilitate the flow of international trade and serve the interests of all parties engaged in commerce.").

practices.<sup>129</sup> When legal rules are derived from commercial practice, they are likely to be seen as reasonable and predictable; when legal rules are derogable, they permit commercial parties to adapt the rules to their particular circumstances, reducing risk and increasing profitability.

For their part, rules that directly enforce the expectations of commercial parties by privileging trade usages and good faith will inevitably be industry-particularist because standard practices vary by industry. Such rules are contextual rather than bright-line, and therefore may appear to be unpredictable or even arbitrary. However, they are predictable to commercial parties because they are rooted in the context within which those parties operate. Moreover, they are likely to be perceived as fair because they yield the outcomes that commercial processes would normally produce if both parties act reasonably and are motivated to cooperate.

In sum, industry-particularism, especially at the global level, provides commercial parties with efficiency, predictability, and (their sense of) fairness. Since networks of commercial parties are the most dynamic forces in transnational legal rulemaking, transnational contract law will increasingly reflect the sectoral divisions of the global economy.

### *B. Mechanisms of Fragmentation of Contract Law*

Sectoral fragmentation of transnational contract law has proceeded through at least four distinct mechanisms. First and most directly, industry-specific transnational legal rules (typically promulgated by trade

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129. See, e.g., Jürgen Basedow, *The State's Private Law and the Economy: Commercial Law as an Amalgam of Public and Private Rule-Making*, 56 AM. J. COMP. L. 703, 706 (2008) (observing that legal systems frequently enact new rules that are codifications of existing business practices); see also Kraus & Walt, *supra* note 124 (arguing that commercial practices should often be decisive in contractual interpretation); Clayton P. Gillette, *Harmony and Stasis in Trade Usages for International Sales*, 39 VA. J. INT'L L. 707, 707–09 (1999) (concluding that custom should be used in contractual interpretation, despite its limitations). Many leading scholars of contract law — and not only those who subscribe to “law and economics” type priorities for the design of contract law rules — support the incorporation strategy, along with a formalist approach to the interpretation of contract terms. In addition to Kraus & Walt and Gillette, see Charles J. Goetz & Robert E. Scott, *The Limits of Expanded Choice: An Analysis of the Interactions between Express and Implied Contract Terms*, 73 CAL. L. REV. 261 (1985) (weighing the costs and benefits of an increase in the use of state-created contract formulations and contextual incorporation). See also Scott, *supra* note 10 (recognizing the benefits of both incorporation and formalist approaches). But see Woodward, *supra* note 10 (acknowledging that formalism might be justified in theory, but arguing that its increased use will not improve contractual interpretation in practice). The best-known opponent of the incorporation strategy is Lisa Bernstein, whose critique is based primarily on empirical evidence that trade usages are not as certain or as widely followed as the incorporationists appear to assume. Lisa Bernstein, *supra* note 124.

associations and other non-state actors) have taken on greater importance, harmonizing practices within each industry (regardless of the nationality of the parties) and increasingly differentiating industries from one another. Second, trade usages and other context-specific contract law rules are increasingly privileged above rules of general applicability in individual cases governed by national and transnational law. Third, widely-used standard terms that choose the law of a particular country have effectively made specific national laws the *de facto* global laws for different industries. Fourth, specialist adjudicative bodies, especially international arbitral tribunals, tend to prefer industry-particular solutions.

### 1. Generation of industry-specific rules of law

The most direct and obvious way for contract law to fragment sectorally is the promulgation of industry-specific rules of contract law. This corresponds most closely to the standard concept of fragmentation in the public international law and private law literature, since it comes directly from the multiplication of private sources of transnational rules. In keeping with the variety of their sources, these rules can take various forms. Here are the most common:

- Comprehensive standard form contracts that constitute a form of global governance by virtue of their widespread adoption by participants in a globalized industry sector, regardless of their nationality.<sup>130</sup> A good example is the set of construction contracts forms developed by FIDIC (the International Federation of Consulting Engineers).<sup>131</sup> In disputes where the contracting parties adopt one of the FIDIC forms, the contract is frequently so comprehensive that the dispute can be resolved without resort to any exogenous rules of law (except, of course, the rules that govern the enforceability and interpretation of contracts).

- Sets of alternative standardized contract terms from which parties can choose. The best-known example is the “commercial terms” used in sale of goods contracts—the three-letter acronyms such as FOB or FAS that each encode suites of obligations of buyer and seller (and, indirectly, carrier) related to transportation of the goods. The commercial terms were developed largely through the practices of English shipping clerks and the case law of

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130. For a discussion of standard contracts as a form of governance, see chapters by Axel Metzger, Hugh Collins, Thomas Ackermann, Giesela Rühl, and Andreas Engert, in *REGULATORY COMPETITION IN CONTRACT LAW AND DISPUTE RESOLUTION* (Horst Eidenmüller ed., 2013).

131. The various FIDIC forms are summarized at <http://fidic.org/bookshop/about-bookshop/which-fidic-contract-should-i-use> [<https://perma.cc/FK74-PJ2V>].



the English courts. However, they are today best known in the codified form of the INCOTERMS promulgated by the International Chamber of Commerce (ICC). The INCOTERMS' widespread use in sales and shipping contracts gives them the character of global private governance. They have also taken on the character of legal rules through their application; in international sale of goods disputes, tribunals have held that use of one of the three-letter acronyms constitutes incorporation of the INCOTERM meaning of that acronym (as opposed, for example, to the English common law meaning). In this way, the INCOTERMS have grown beyond private governance and become incorporated into public governance through state entities.

▪ Self-contained sets of rules, drafted in the style of statutes. A frequently-cited example is the Uniform Customs and Practices for Documentary Credits (UCP), also promulgated by the ICC. References to them (whether in contracts, regulations, or judgments) often use the language of choice of law, such as a term in a letter of credit providing that the instrument is “governed by UCP”; however, they are better understood as constituting contractual terms incorporated by reference and enforceable between the parties on that basis. Properly speaking, they have no legal force except to the extent that they are incorporated into private contracts. In some cases, these kinds of rules are incorporated by states into their national regulations or legislation or adopted as default rules in case law. For example, the 1968 “Hague-Visby Rules” relating to the carriage of goods by sea (formally the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading) were codified in some states as schedules to pre-existing legislation.<sup>132</sup> In England, the House of Lords formally recognized the Hague-Visby Rules as applicable by default to international bills of lading.<sup>133</sup> Revisions promulgated under the auspices of UNCITRAL in Hamburg (1978) and Rotterdam (2009) represent modern industry practice but have not yet been widely adopted by states.<sup>134</sup>

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132. For example, in some countries, the Hague-Visby Rules relating to the carriage of goods by sea have been codified as schedules to pre-existing domestic legislation. *See, e.g., Carriage of Goods by Sea Act, 1991* (Cth), sch 1 (Austl.) (codifying the Hague-Visby Rules in the Australian Carriage of Goods by Sea Act through a schedule); *see also* Marine Liability Act, S.C. 2001, c 6, Part 5 and Schedule 3 (Can.) (incorporating the Hague-Visby Rules into the Marine Liability Act by virtue of a schedule).

133. *JJ MacWilliam Co. Inc. v. Mediterranean Shipping Co., SA* [2005] UKHL 11, [2005] 2 AC 423.

134. G.A. Res. 63/122, annex, United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (Dec. 11, 2008) (“The Rotterdam Rules”), <http://www.rotterdamrules2009.com/cms/index.php> [<https://perma.cc/7ZTD-8UDE>]; these represent a significant step forward in that they are the first set of shipping rules that

▪ “Common law” principles arising from the decisions of international tribunals on international commercial disputes. These go under various names (*lex mercatoria*, general principles of international commercial law, etc.) and their vitality and legitimacy are debated. However, the existence of at least a few substantive principles of law that are regularly followed in international adjudication is undeniable. Of these, the most successful exist with respect to specific types of transactions or specific industry sectors, such as the *lex petrolea*<sup>135</sup> and *lex sportiva*. More loosely, commentators agree that a *de facto* system of precedent (technically non-binding but normally followed) now exists in some areas of international contract law, especially with respect to sports.<sup>136</sup>

▪ Codes of best practices and product standards enacted to help harmonize business operations. These may be incorporated directly into contracts by dominant parties (in individual contracts or throughout a supply chain), but they also may be drafted by industry groups and not intended to assume a coercive character. Either way, they are often binding on market participants in practice and, in disputes, may be decisive evidence of trade usages.<sup>137</sup>

Except for case law, these forms of lawmaking all involve some kind of codification of standard practices. Transnational contract law as a whole

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extend to shipment by both land and sea, so that the Rotterdam Rules for the first time make it possible to have a single set of rules apply to all stages of shipping of goods from the seller’s premises to the buyer’s premises.

135. The seminal publication on the topic describes published arbitral awards as “the source material from which customary law may be drawn.” R. Doak Bishop, *International Arbitration of Petroleum Disputes: The Development of a “Lex Petrolea”* (Centre for Petroleum & Mineral Law & Policy, Discussion Paper No. DP 12, 1, 1997), reprinted in 23 Ybk. Comm. Arb. 1131, 1131 (1998); see also Thomas C.C. Childs, *Update on Lex Petrolea: The Continuing Development of Customary Law Relating to International Oil and Gas Exploration and Production*, 4 J. WORLD ENERGY L. & BUS. 214, 214-15 (2011) (describing *lex petrolea* as “legal rules developed by arbitral tribunals. . . that reflect the specific characteristics of the international exploration and production industry.”).

136. The same is true of some distinct areas of public international law. For example, consistent lines of authority functioning somewhat like national systems of precedent have been identified in investment treaty arbitration and WTO dispute resolution.

137. See, e.g., Thomas Dietz & Holger Nieswandt, *The Emergence of Transnational Cooperation in the Software Industry*, in CONTRACTUAL CERTAINTY IN INTERNATIONAL TRADE 87 (Volkmar Gessner ed., 2009) (examining the role of contract enforcement institutions in cross-border software development contracts); Edward Elgar, PRIVATE STANDARDS AND GLOBAL GOVERNANCE (Axel Marx et al. eds., 2012) (evaluating the legitimacy, efficiency, and extent of privately-generated standards); HARM SCHEPEL, THE CONSTITUTION OF PRIVATE GOVERNANCE: PRODUCT STANDARDS IN THE REGULATION OF INTEGRATING MARKETS (Hugh Collins et al. eds., 2005) (assessing the function of private standards in modern governance).

is sometimes characterized as codified trade usages,<sup>138</sup> but this is too reductionist. Codification efforts inevitably go beyond the simple setting down of standard practices. They require intense negotiation even among parties with broadly similar experience and outlook. Bernstein cites various studies to the effect that claims of widespread trade usage are overblown, from the medieval era to the modern day.<sup>139</sup> Parties within a common industry often did not share significant common understandings of the same obligations unless and until they organized themselves to codify a set of standard practices. These codification efforts were characterized by significant disagreement and compromises.<sup>140</sup> In other words, codification of trade usages is rule-creation, not just rule-transcription.

Transnational rule-creation necessarily implies a degree of fragmentation, since it involves a range of non-state sources of law, although it does not necessarily involve sectoral fragmentation. After all, *lex mercatoria* — the quintessential “autonomous” transnational law — is conceived as constituting the law of global commerce as opposed to domestic commerce — that is, the rules of international trade writ large, as opposed to the rules of particular globalized industries.<sup>141</sup>

But the utopian project of establishing a general common law of international commerce, truly autonomous from state law, has not proceeded very far. For the present, at least, state approval and cooperation is a necessity.<sup>142</sup> To the extent that *lex mercatoria* has any real-world impact, it

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138. See, e.g., Cristián Gimenez Corte, *Lex Mercatoria, International Arbitration and Independent Guarantees: Transnational Law and How Nation States Lost the Monopoly of Legitimate Enforcement*, 3 TRANSNAT'L L. THEORY 345, 348 (2012) (stating that “[t]he *lex mercatoria* is a transnational expression of one source of law: customary law. A customary rule may arise out of a generalised repetition of similar practices, over a certain period of time. In the case of the *lex mercatoria*, these common practices develop through contracts, in particular international commercial contracts.”).

139. Lisa Bernstein, *Merchant Law in a Modern Economy* 3-12 (Coase-Sandor Inst. for Law and Econ., Working Paper No. 639, 2013). These studies are controversial. See, e.g., Clayton P. Gillette, *Harmony and Stasis in Trade Usages for International Sales*, 39 VA. J. INT'L L. 707, 710 n.10 (1999) (criticizing the premises upon which Bernstein rests her conclusion); see also William J. Woodward, *Neoformalism in a Real World of Forms*, 2001 WISC. L. REV. 971, 984 (2001) (claiming that Bernstein's conclusion is overly broad and unwarranted). However, according to Bernstein, no contradictory empirical studies have been published.

140. *Id.*

141. See Cuniberti, *supra* note 126 (describing *lex mercatoria* as a reflection of international custom and norms).

142. Cf. Michaels, *supra* note 59, at 466 (stating that “[i]f there is an autonomous legal system of international commerce, then it transcends the divide between state and non-state law, and its autonomy is not from the state but rather from other parts of the law, many of which remain national.”).

is because states are willing to enforce arbitral awards applying it.<sup>143</sup>

Perhaps more importantly, commercial parties have repeatedly demonstrated their antipathy toward *lex mercatoria*. In the vast majority of arbitrations where the contract contains a choice of law provision, the parties nominate the law of some state. Data from the ICC shows that, on a consistent basis, fewer than 2% of parties whose contracts contain ICC arbitration clauses expressly choose to be governed by non-national rules.<sup>144</sup> Of the remainder, an unknown but likely significant portion select a treaty or other codified instrument such as the United Nations Convention on Contracts for the International Sale of Goods (CISG) or UNIDROIT Principles of International Commercial Contracts (“UNIDROIT Principles”), leaving a tiny remainder of cases expressly choosing *lex mercatoria* or general principles as the governing law. Of these, most are the products of awkward compromises between private parties and government entities, where the contracting parties cannot agree to be bound by the same national law.<sup>145</sup>

The likely source of commercial parties’ continued preference for national laws is the wild uncertainty that *lex mercatoria* represents. Its notorious vagueness means that it can be applied arbitrarily, rendering it “highly unlikely that it meets the needs of international merchants”.<sup>146</sup> Even if, as Gaillard argues, one should see *lex mercatoria* as a comparative method for deriving legal rules, rather than a set of rules in itself,<sup>147</sup> this would still give adjudicators enormous flexibility.<sup>148</sup>

Where transnational law has met with favor, it has been in codified forms that can be read, understood, and applied in a predictable manner.<sup>149</sup> These codifications have been undertaken primarily by industry players and industry groups,<sup>150</sup> which have drafted contract terms, product standards, measurement conventions, and so on. Unsurprisingly, these differ based on

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143. David W. Rivkin, *Enforceability of Awards Based on Lex Mercatoria*, 9 ARB. INT’L 67 (1993).

144. Cuniberti, *supra* note 126, at 399 (summarizing data from several years of the ICC International Court of Arbitration’s annual statistical reports, and observing that these statistics may actually overstate the number of contracts that chose non-national rules of law). On the laws favoured by parties to international commercial arbitrations, see Gilles Cuniberti, *The International Market for Contracts: The Most Attractive Contract Laws*, 23 NW. J. INT’L L. & BUS. 455 (2014).

145. Gimenez Corte, *supra* note 138, at 355.

146. Cuniberti, *supra* note 126, at 384.

147. Emmanuel Gaillard, *Thirty Years of Lex Mercatoria: Towards the Selective Application of Transnational Rules*, 10 ICSID REV.—F.I.L.J. 208, 226 (1995).

148. Cuniberti, *supra* note 126, at 391.

149. KARTON, *supra* note 79, at 130.

150. The one significant exception is the EU.

the industry involved and its particular circumstances. They are not only more specific than *lex mercatoria*, but are also likely to be more tailored to the needs of the particular industry than national laws.<sup>151</sup> In this way, the transnational rulemaking process tends toward sectoral fragmentation.

## 2. Wide application of trade usages as direct sources of rights and obligations

Trade usages may not in themselves constitute legal rules, but they act like legal rules to the extent that the law directs adjudicators to decide according to them. Trade usages have two functions in contract law, one interpretive and one gap-filling. These are conceptually distinct, although in practice the line between them is often unclear. Some legal systems do not distinguish between them, seeing gap-filling as an aspect of interpretation.

To the extent that usages supply unspecified contractual terms into contracts, as opposed to clarifying the meaning of terms that the parties have specified, they constitute a freestanding source of contract law rules. When the law privileges those rules over default rules derived from statutes or case law, it effectively prioritizes private ordering over public ordering. Since standard practices — in both contract drafting and performance — vary from industry to industry, trade usages as sources of legal obligations are also sector-specific.

National legal systems have long been friendly to the introduction of evidence of industry practice when interpreting contracts. In civil law jurisdictions, where courts are directed to consider all evidence that may be useful to determine a contract's meaning, trade usages are considered as a matter of course. In common law jurisdictions, evidence of practices established within the relevant industry or between the contracting parties is admissible to interpret contracts under well-recognized exceptions to the parol evidence rule.

However, courts in recent years have relied heavily on evidence of industry practice, not just when determining the intention of the parties, but also to define the content of matters not expressly or impliedly specified in a contract. This is sometimes referred to as “contextualized adjudication” — the phenomenon of courts considering the commercial context of a transaction in adjudicating disputes.<sup>152</sup> Contextualized adjudication inevitably leads to sectorally fragmented law.

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151. Cuniberti, *supra* note 126, at 393-94.

152. See, e.g., Bernstein, *supra* note 124, at 63 (arguing against contextualized adjudication involving the ready incorporation of trade usages).

A good example from outside the United States is the landmark House of Lords judgment in *Transfield Shipping Inc. v. Mercator Shipping Inc. (The Achilleas)*.<sup>153</sup> The case considered the measure of damages for late redelivery of a chartered ship. The charterers redelivered the ship nine days late, and the owners experienced a substantial loss on the next charter of the ship (the “follow-on fixture”) because the next charterer canceled its contract with the owners, market rates having dropped significantly in the meantime. The owners argued that the charterers owed damages based on the loss of the higher rate for the entirety of the next charter, while the charterers argued that these losses were too remote, and that they owed only the difference between the market rate and the charter rate for the nine-day period of delay.

A consistent line of precedent supported the view that damages could be claimed for lost profits on the entirety of the follow-on fixture, and an arbitral tribunal and the lower courts held that the owners could recover all of the damages they claimed. In the abstract, loss of profits from a follow-on fixture is a reasonably foreseeable — even highly likely — consequence of late redelivery of a ship. However, the House of Lords held that determinations of remoteness must be made not on the basis of reasonable foreseeability, but instead “upon the intention of the parties (objectively ascertained) because all contractual liability is voluntarily undertaken.”<sup>154</sup> It was not contested that the “settled understanding” of the shipping industry was that damages for late delivery should be limited to the period of delay. Accordingly, the court reasoned that the parties could not have intended that charterers should assume responsibility for the entirety of the follow-on fixture:

If one considers what these parties, contracting against the background of market expectations found by the arbitrators, would reasonably have considered the extent of the liability they were undertaking, I think it is clear that they would have considered losses arising from the loss of the following fixture a type or kind of loss for which the charterer was not assuming responsibility.<sup>155</sup>

In this judgment, the House of Lords effectively raised the commercial context of the deal above general law when determining the scope of liability arising under a contract, justifying this decision by reference to the

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153. [2008] UKHL 48, [2009] 1 AC 61.

154. *Id.* at para. 12. The decision was unanimous although the reasoning was not. The speeches of Lord Hoffman and Lord Hope of Craighead emphasized this factor and have been taken as the leading speeches. On the approaches taken by the different Lords, see Greg Gordon, Hadley v. Baxendale *Revisited*: *Transfield Shipping Inc. v. Mercator Shipping Inc.*, 13 EDINBURGH L. REV. 125, 127-29 (2009).

155. *Transfield Shipping Inc.*, [2008] UKHL 48, at para. 23.

consensual nature of contractual liability. The decisive point was the expectations of commercial parties in the particular context of charter contracts in the shipping industry.<sup>156</sup> The common law's famous "reasonable person" was displaced in favour of something much more specific: not even the "reasonable ship charterer," but the presumed intention of the specific ship charterer in the individual case.<sup>157</sup> Subsequent cases have cited *The Achilles* to hold that determinations of remoteness in other industries should be made based on the commercial expectations of members of the industry.<sup>158</sup> As a result, the scope of contractual liability for damages has become a context-specific inquiry that varies depending upon the line of business of the parties to each dispute.<sup>159</sup>

When we look to transnational law, the impact of the contract's commercial context — whether as a source of information on the parties' intentions for the purposes of contractual interpretation, as the decisive factor in the application of a doctrine like remoteness, or most directly as the source of contractual terms implied from trade usage — is even stronger. The major

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156. See Edwin Peel, *Remoteness Re-Visited*, 125 (Jan) L. Q. REV. 6, 9 (2009) (concluding that "[i]n *The Achilles* . . . the damages claimed were too remote because, although a lost fixture was foreseen as not unlikely, the presumption that the losses flowing from it could be recovered was rebutted by the particular context of the market in which they occurred . . .").

157. *The Achilles* appears to have been accepted in a range of Commonwealth jurisdictions, with the notable exception of Singapore, where the Court of Appeal rejected the novel conception of remoteness and reaffirmed of the traditional *Hadley v. Baxendale* "rule of law" approach. See *MFM Restaurants Pte. Ltd. v. Fish & Co. Restaurants Pte. Ltd.*, [2010] SGCA 36, [2011] 1 SLR 150 (explicitly rejecting the holding in *The Achilles* and maintaining the traditional approach articulated in *Hadley*); see also Mindy Chen-Wishart, *Legal Transplant and Undue Influence: Lost in Translation or a Working Misunderstanding?*, 62 INT'L & COMP. L.Q. 1, 4 n.16 (2013) (characterizing *MFM Restaurants* as a rare exception to the general rule that, in Singapore, English contract and commercial judgments are "overwhelmingly accepted as persuasive and routinely applied to like effect").

158. See, e.g., *John Grimes P'ship Ltd. v. Gubbins*, [2013] EWCA (Civ) 37, [2013] B.L.R. 126 (CA) (holding that the liability of a contractor for construction delays in a falling real estate market turned on whether there was a general understanding or expectation in the property world that a party in the defendant's position would be taken to have assumed responsibility for such losses).

159. Although this result was revolutionary in England, it does not seem striking from an American point of view. For example, in the United States, consequential damages may generally be recovered where the breaching party had "reason to know" of such damages at the time of contracting, a test that was adopted into U.C.C. § 2-715(2)(a) (2002). However, this provision overturned an older common law rule that consequential damages are recoverable only where there was "tacit agreement" to their recovery. The tacit agreement test traces back more than a century to Justice Holmes's decision in *Globe Refining Co. v. Landa Cotton Oil Co.* 190 U.S. 540 (1903). But see Clayton P. Gillette, *Tacit Agreement and Relationship-Specific Investment*, 88 N.Y.U. L. REV. 128 (2013) (arguing that the tacit agreement test is superior to the reason-to-know test).

transnational contract law instruments all direct tribunals to give significant weight to commercial context in contractual interpretation and to trade usages as sources of legal rights and obligations.

The CISG is illustrative. Under CISG article 8(3), when interpreting contracts, due consideration is to be given to “all relevant circumstances of the case, including the negotiations, any course of conduct or performance between the parties, any relevant usages, and any subsequent conduct of the parties.”<sup>160</sup> More importantly, article 9(2) provides:

The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.<sup>161</sup>

This provision has been held to mean that, unless expressly disclaimed, usages themselves impose binding obligations on the parties, even when the parties are not aware of them. As one court applying article 9(2) held, “the usages and practices of the parties or the industry are automatically incorporated into any agreement governed by the Convention, unless expressly excluded by the parties.”<sup>162</sup> They prevail over contrary provisions in the CISG itself (except for a small number of mandatory provisions)<sup>163</sup> and have even been held to prevail over the apparent plain meaning of provisions in the parties’ contract.<sup>164</sup>

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160. Inclusion of an entire agreement clause (also called a merger or integration clause) may bar evidence of trade usages, but only if the parties intend it to have that effect. CISG Advisory Council (CISG-AC) Opinion No. 3, *Parol Evidence Rule, Plain Meaning Rule, Contractual Merger Clause and the CISG*, 23 October 2004. Rapporteur: Professor Richard Hyland, Rutgers Law School, Camden, NJ, USA at para 2.2.

161. United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, S.Treaty Doc. No. 98-9 (1983), UN Doc. No. A/CONF 97/19, 1489 U.N.T.S. 3.

162. CLOUT Case No. 579 [U.S. District Court, Southern District of New York, 10 May 2002], available at [www.cisg.law.pace.edu/cisg/wais/db/cases2/020510u1.html#vi](http://www.cisg.law.pace.edu/cisg/wais/db/cases2/020510u1.html#vi) [<https://perma.cc/29EA-QQBH>].

163. See, e.g., CLOUT Case No. 425 [Oberster Gerichtshof, Austria, 21 March 2000], available at [www.cisg.at/10\\_34499g.htm](http://www.cisg.at/10_34499g.htm) [<https://perma.cc/6BVB-CTVK>] (refusing to overturn a trial court decision that relied on an industry usage that differed from the default rules in the CISG); CLOUT Case No. 240 [Oberster Gerichtshof, Austria, 15 October 1998] (remanding for a trial court to determine whether usages alleged to prevail in the lumber trade were widely known and regularly observed in that industry).

164. ICC Case No. 9443 of 1998, 4 JOURNAL DU DROIT INTERNATIONAL 1106-112 (2002). This is, however, the minority position. Most courts have held that, since party autonomy is a fundamental principle underlying the CISG, contractual terms prevail over usages. See, e.g., Hof van Beroep Antwerpen, Belgium, 24 April 2006, English translation available at <http://cisgw3.law.pace.edu/cases/060424b1.html> [<https://perma.cc/P3NK-XY7P>] (holding that the usages should only govern if the contract does not contain a clear term); CLOUT Case



Moreover, under the CISG but not the national law of many states, a party relying on a usage need not prove that the other party was actively or constructively aware of it, but only that it is widely recognized in the relevant industry and geographical region.<sup>165</sup> In other words, market entrants effectively have an obligation to inform themselves of usages in the industry.<sup>166</sup>

The same principle — that usages observed in the industry automatically apply unless expressly excluded, even if it cannot be proven that the parties actually or constructively knew of the usages — can also be found in the UNIDROIT Principles<sup>167</sup> and the Principles of European Contract Law.<sup>168</sup> The online CENTRAL compilation of *lex mercatoria* rules, Principle I.2.2, states a similar rule.<sup>169</sup> This reversal of the standard posture in most domestic legal systems indicates what is often thought of as the greater deference to trade usages in transnational than in national contract laws. But it goes beyond deference; the treatment of trade usages in transnational contract law instruments is such that they act like derogable statutory rules. They apply broadly to contracts entered into by parties from the same industry, regardless of whether the parties actively or impliedly considered them.<sup>170</sup> As such, they can be overridden only by express

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No. 292 [Oberlandesgericht Saarbrücken, Germany, 13 January 1993] (finding insufficient evidence of a usage contrary to the plain language of the contract); Treibacher Industrie, A.G. v. Allegheny Technologies, Inc., 464 F.3d 1235 (11th Cir. 2006) (holding that the parties' apparent interpretation of a term as revealed through their particular course of dealing prevailed over a contrary usage widely observed in the industry).

165. See, e.g., CLOUT Case No. 240 [Oberster Gerichtshof, Austria, 15 October 1998] (holding that, when applying the CISG, courts should examine whether usages are widely known and regularly observed in an industry, as opposed to inquiring into the specific knowledge the parties had of that usage).

166. Martin Schmidt-Kessel, *Article 9*, in SCHLECHTRIEM & SCHWENZER COMMENTARY ON THE UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG) 191 (3d English ed., Ingeborg Schwenzer ed., 2010). Under CISG art. 9(2), if it can be shown that a relevant usage is “objectively known”, then a “lack of due care” is imputed to a party that claims ignorance of the usage. *Id.* at 191. Note, however, that at least one court has held that commercial parties are only bound to industry usages if they have continuously transacted business in the industry for a considerable period of time. CLOUT Case No. 425 [Oberster Gerichtshof, Austria, 21 March 2000], also available at [www.cisg.at/10\\_34499g.htm](http://www.cisg.at/10_34499g.htm) [<https://perma.cc/H778-YLKQ>].

167. Art. 1.8, which repeats verbatim the language of CISG art. 9(2).

168. Art 1:105(2) (“The parties are bound by a usage which would be considered generally applicable by persons in the same situation as the parties, except where the application of such usage would be unreasonable.”).

169. Berger, K. (2018). *The Lex Mercatoria and the TransLex-Principles*. Trans-lex.org. Available at: [https://www.trans-lex.org/the-lex-mercatoria-and-the-translex-principles\\_ID8](https://www.trans-lex.org/the-lex-mercatoria-and-the-translex-principles_ID8) [<https://perma.cc/M9NL-8KHE>].

170. If a usage is widely observed in an industry, then *ipso facto* the parties should be

agreements to the contrary or by supervening laws of a mandatory or non-derogable character. The treatment of trade usages in transnational law thus contributes directly to the sectoral fragmentation.

### 3. Industry-wide choice of specific national laws

The third mechanism by which sectoral fragmentation of contract law may occur is the pervasive choice of individual national laws by parties from particular industries, such that different national laws become the *de facto* global laws of different industries. This form of sectoral fragmentation is an underappreciated aspect of transnational contractual governance, less glamorous and more straightforward than the formal promulgation or informal evolution of transnational law rules. It is largely a consequence of the near-universal enforcement of contractual choice of law clauses in modern private international law.<sup>171</sup> Parties may exercise their autonomy in choice of law to choose non-state rules, but they are more likely to choose to be governed by the law of some national jurisdiction. To the extent that parties in different industries consistently choose different national laws, the effect is sectoral fragmentation.<sup>172</sup>

Parties generally exercise their autonomy over the applicable law by choosing to be governed by the law of one party's home state or that of a small number of established states.<sup>173</sup> In some sectors, a particular national law is chosen so frequently that it has effectively become the global law of the industry.<sup>174</sup> The best example, one with a long history, is the adoption of

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considered to have impliedly considered that usage.

171. See PETER NYGH, *AUTONOMY IN INTERNATIONAL CONTRACTS* 13 (1999) (referring to the "triumph of party autonomy" as evidenced by the fact that all European Economic Community states had enshrined the principle of autonomy for choice of law); SYMEON C. SYMEONIDES, *CODIFYING CHOICE OF LAW AROUND THE WORLD: AN INTERNATIONAL COMPARATIVE ANALYSIS* Chapter 3 (2014) (describing the triumph of party autonomy with respect to choice of law).

172. Arato has made a similar point relating to public international law; he argues that corporations have acquired the power to create primary rules of international law, in part because of the ability of investors to effectively choose which investment treaties will apply to their investments by making investments through special purpose vehicles incorporated in states that have agreed to treaty terms favourable to the investor's rights in the given transaction. Julian Arato, *Corporations as Lawmakers*, 56(2) HARV. INT'L L.J. 229 (2015). I submit that this phenomenon is analogous to the ability of private parties to choose the law that will govern their relationship, often successfully avoiding application of unfavorable mandatory rules of the national law that would otherwise apply.

173. See generally Cuniberti, *supra* note 144 (showing empirically that parties' preferences are generally homogenous, opting for the laws of a few jurisdictions that dominate the international market for contracts).

174. The most comprehensive general treatment of this phenomenon to date is ERIN A.

English law for charter parties and other international shipping contracts.<sup>175</sup> This history is preserved in the standard form contracts most frequently used for shipping contracts, those issued by the Baltic and International Maritime Council (BIMCO), all of which provide for application of English law.<sup>176</sup>

Preferred national laws can shift over time, as states may compete to promote their laws and courts.<sup>177</sup> For example, if a given state enacts a pro-insurer regulatory regime, insurance companies will rush to include a choice of that state's law in their standard forms.<sup>178</sup> This enhances sectoral fragmentation because of the interplay with territorial fragmentation along state boundaries.

Even when transnational law governs the entirety of a dispute, industry preferences for particular national laws may have an indirect influence. For example, a dispute over a sale of goods contract governed by the CISG will often require reference to other bodies of legal rules, since the CISG by its own terms governs only "the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract."<sup>179</sup> Matters such as the capacity of the parties to contract or the parties' property rights in the goods must be determined according to the national law or laws that would otherwise apply but for the application of the CISG. The CISG is not a comprehensive legal system, and operates within the context of one or more broadly-applicable bodies of law.

Similarly, if the parties adopt a privately-generated set of rules, such as the ISDA Master Agreement used in securities transactions, this may

O'HARA & LARRY E. RIBSTEIN, *THE LAW MARKET* (2009).

175. As noted by Lord Wright in *Vita Food Products v. Unus Shipping Company* [1939] AC 277, 290.

176. Available at <https://www.bimco.org/Chartering/Documents.aspx>. All of the BIMCO standard forms also provide for arbitration in London, which means that the English Arbitration Act would govern arbitrations arising from them. See also Wendy Miles, *Do England's expansive grounds for recourse increase delay and interference in arbitration?*, 80(1) *ARBITRATION* 35, 43-44 (2014) (describing how standard clauses may lead to the involvement of English courts in an arbitration that was chosen precisely to avoid those courts).

177. It is not controversial that some degree of regulatory competition exists with respect to contract law, but its extent may be overstated. See Cuniberti, *supra* note 126; Stefan Vogenauer, *Regulatory Competition Through Choice of Contract Law and Choice of Forum in Europe: Theory and Evidence*, in *REGULATORY COMPETITION IN CONTRACT LAW AND DISPUTE RESOLUTION* 227 (Horst Eidenmüller ed., 2013) (both presenting empirical evidence that commercial parties often do not consider the actual content of national contract laws when they make a choice of law).

178. For example, in the US, most consumer credit contracts are made subject to the laws of South Dakota or Delaware, states that have enacted laws favorable to creditors. O'HARA & RIBSTEIN, *supra* note 174, at 145-48.

179. Convention for the International Sale of Goods Art. 4.

indicate a desire to subject their transaction to non-state norms. However, it does not necessarily show that they intend that this private regime should be entirely self-sufficient. After all, no matter how complex and detailed such standard form contracts or sets of rules may be, they normally *also* include a choice of law clause providing for the choice of some national law. This “shows that the parties recognize that their contract remains governed by a national law and that the source of their power to design a private normative regime is a rule of that national law that recognizes the freedom of contract.”<sup>180</sup>

Finally, as discussed above,<sup>181</sup> codified transnational rules are often drafted by (or at least with the input of) private commercial actors. Since transnational rules are typically borrowed from existing national models (either picking and choosing preferred doctrines<sup>182</sup> or forging compromises between them),<sup>183</sup> to the extent that particular national laws are dominant, that dominance may be reflected in the choices made by the drafters of transnational rules.

#### 4. Choice of Specialist Adjudicative Bodies, Especially Arbitral Tribunals

When the adjudicative bodies that apply legal rules proliferate, normative fragmentation inevitably follows institutional fragmentation.<sup>184</sup> Normative fragmentation need not occur along sectoral lines, but in practice, the specialized adjudicative bodies that apply transnational contract law in cross-border business disputes are likely to promote sectoral fragmentation.

Specialist business tribunals, whether judicial or arbitral in structure, tend over time to adopt commercial perspectives. Only individuals with relevant commercial law experience (and who therefore have a long history of representing business interests) are likely to be appointed. Once appointed, they are likely to hear only from counsel to commercial entities.

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180. Cuniberti, *supra* note 126, at 375.

181. *See supra* Section III.B.1.

182. Such as the adoption of *Nachfrist* doctrine into the CISG and UNIDROIT Principles from the law of Germanic states. *See, e.g.*, Ulrich Magnus, *The Vienna Sales Convention (CISG) between Civil and Common Law—Best of all Worlds?*, 3 J. CIV. LEG. STUD. 67, 86-87 (2010) (describing how the CISG utilized the German concept of *Nachfrist*, taking parts of doctrine when useful and otherwise leaving them aside).

183. Such as the awkward and still-contested status of good faith in the CISG. *See, e.g.*, Bruno Zeller, *Good Faith — The Scarlet Pimpernel of the CISG*, 7 INT'L TRADE & BUS. L. ANN. 2 (2000) (noting that although the CISG mandates good faith interpretation of the convention itself, it does not define what good faith involves).

184. *See supra* Section III.D.

Such tribunals therefore tend to give priority to trade usages over blackletter principles, which, for the reasons described above, necessarily leads to sectoral fragmentation.<sup>185</sup>

These characteristics are particularly evident in the mode of transnational dispute resolution that is most flexible and most tied to the business community: international commercial arbitration. Arbitrators are private contractors; they provide a service (resolution of disputes) and are compensated for that service by their clients (the disputing parties).<sup>186</sup> The bulk of international arbitration practitioners see their collective and individual role as serving the interests of commerce, and the interests of the parties who appear before them. As G  linas puts it, “[i]nternational arbitration exists to serve the needs of international business.”<sup>187</sup> Lord Mustill takes the argument a step further: “[c]ommercial arbitration exists for one purpose only: to serve the commercial man. If it fails in this, it is unworthy of serious study.”<sup>188</sup> The connection between arbitration and sectoral fragmentation is strong and clear enough that it deserves special attention. If commercial parties in general prefer an industry-particularistic contract law, arbitrators are apt to deliver it even when the parties to a given arbitration do not ask for it.

Arbitrators have long prided themselves on possessing a commercial mentality, augmented by deep industry knowledge, and surveys confirm that industry expertise is one of the most important factors in arbitral appointments.<sup>189</sup> Hermann declares: “It is fundamental to arbitration that it should solve disputes according to commercial practice and common sense,

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185. See *supra* Section III.B.2.

186. This is not to say that arbitrators act *only* as service providers, or that they ought to do so. At minimum, arbitrators are not service providers in the ordinary sense, since they must serve both disputing parties, who have opposing interests. See, e.g., CATHERINE A. ROGERS, *ETHICS IN INTERNATIONAL ARBITRATION* 346-49 (2014) (rejecting the idea that arbitrators are service providers on the ground that such a view would ignore their adjudicatory role). Nevertheless, arbitrators are often described as “agents” of the parties. See, e.g., GARY BORN, *INTERNATIONAL COMMERCIAL ARBITRATION* 1607-09 (3d ed., 2009) (arguing that while arbitrators serve the interests of both parties, they should not be considered agents of either party).

187. Fabien G  linas, *Arbitration and the Challenge of Globalisation*, 17(4) J. INT’L ARB. 117, 117 (2000).

188. Michael Mustill, *The New Lex Mercatoria: The First Twenty-Five Years*, 4(2) ARB INT’L 86, 86 (1988). See also Yves Fortier, *The New, New Lex Mercatoria, or, Back to the Future*, 17(2) ARB INT’L 121, 121 (2001) (characterizing Mustill’s statement as “the essential creed of the commercial arbitrator”).

189. Schultz & Kovacs, *supra* note 82, at 165-68; 2010 *International Arbitration Survey: Choices in International Arbitration*, White & Case and Queen Mary University of London 26, available at [http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2010\\_InternationalArbitrationSurveyReport.pdf](http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2010_InternationalArbitrationSurveyReport.pdf) [<https://perma.cc/GZ83-XUG5>].

arriving at a result considered fair in a particular business community.”<sup>190</sup> Collins contrasts the “commercial reasoning” employed by arbitrators with the “private law reasoning” employed by courts:

Private law reasoning is relatively closed to the competing normative considerations governing contractual behaviour outside the discrete communication system provided by the formal contract itself . . . Commercial arbitration appears to be favoured precisely because it can provide . . . reasoning which marries adjudicated outcomes with business expectations more closely.<sup>191</sup>

The primary practical manifestation of this commercial mentality is the primacy given in arbitral awards to arguments based on trade usages and commercial reasonableness.<sup>192</sup> In an apparent exception to their normal deference to party autonomy, arbitral tribunals sometimes apply trade usages when the parties have not raised them and may find that a trade usage governs even absent evidence that the parties were aware of it.<sup>193</sup>

Institutional rules of arbitration — which are drafted by committees of senior arbitrators and counsel — reflect the systemic bias of the international arbitration system in favour of trade usages. In a 2000 survey, Drahozal found that thirty-two of the forty-four largest commercial arbitration institutions require arbitrators to take trade usages into account, regardless of the applicable law.<sup>194</sup> Article 21 of the ICC Rules of Arbitration is typical. 21(1) provides that the parties “shall be free” to agree on the applicable rules of law, and that in the absence of such an agreement, the tribunal “shall apply the rules of law which it determines to be appropriate.”<sup>195</sup> Article 21(2) then provides that the tribunal “shall take account of the provisions of the contract . . . and of any relevant trade usages.”<sup>196</sup> Thus, the ICC Rules require tribunals to apply the governing rules of law, the contract, and trade

190. A.H. HERMANN, JUDGES, LAW, AND BUSINESSMEN 221 (1983).

191. Collins, *supra* note 44, at 187.

192. On the affinity of international arbitrators for trade usages, see KARTON, *supra* note 79, at 112-14. Cremades makes a similar observation: “[i]nternational arbitrators have always been closer, and thus more familiar with, the usages and practices of international commercial trade than local judges.” Bernardo M. Cremades, *Overcoming the Clash of Legal Cultures: The Role of Interactive Arbitration*, in CONFLICTING LEGAL CULTURES IN INTERNATIONAL ARBITRATION 167 (Stefan N. Frommel & Barry A.K. Rider, eds., 1999).

193. On the place of trade usages in transnational contract law generally, see *supra* Section IV.B.2.

194. Christopher R. Drahozal, *Commercial Norms, Commercial Codes, and International Commercial Arbitration*, 33 VAND. J. TRANSNAT’L L. 79, 112 (2000).

195. Int’l Chamber of Commerce Arbitration Rules, Art. 21(1) (effective as of Mar. 1, 2017), available at <https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/> [<https://perma.cc/QJ9E-VC2R>].

196. *Id.* at Art. 21(2).

usages as hierarchically equal sources of the legal rights and obligations of the parties.

Similar language appears in modern national arbitration legislation, reflecting the increasing prominence of trade usages in national law described above.<sup>197</sup> Prior to 1985, references to trade usages in national arbitration statutes were rare.<sup>198</sup> However, most statutes enacted or amended since 1985 contain provisions requiring arbitrators to take trade usages into account.<sup>199</sup> These changes are partly motivated by a neoliberal trust in private ordering by commercial communities, and partly by inter-state competition to attract arbitration business.<sup>200</sup>

In short, arbitrators' identification with business attitudes and interests means that trade usages have played and will continue play a prominent role in international arbitral decision-making, regardless of the applicable law. Since determination according to trade usages is inherently more industry-particularized than decision according to broadly-applicable contract law principles, any increase in the share of cross-border commercial disputes resolved by arbitration is likely to lead to greater sectoral fragmentation.

In some sectors where arbitration is particularly popular, sectoral fragmentation has already arrived. For example, *ex aequo et bono* determination is common in contract disputes administered by the Court of Arbitration for Sport ("CAS"), although it is rare in all other commercial sectors.<sup>201</sup> Over time, the decisions of CAS tribunals have developed into a coherent (albeit not comprehensive) *lex sportiva*, despite the lack of any doctrine of binding precedent and despite the broad discretion granted to tribunals by *ex aequo et bono* determination.<sup>202</sup>

197. See *supra* Section IV.B.2.

198. Drahozal, *supra* note 194, at 118.

199. English translations of these statutes are collected in INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION (Jan Paulsson ed., 2010). This trend is traceable in part to the enactment since 1985 of over seventy statutes based on the UNCITRAL Model Law, which includes a provision to this effect, art. 28(4).

200. On competition between states for arbitration business, see KARTON, *supra* note 79, at 68-71. Competition for disputes exists in other areas as well. See, e.g., Matthew D. Cain & Stephen Davidoff Solomon, *A Great Game: The Dynamics of State Competition and Litigation*, 100 IOWA L. REV. 465 (2015) (describing competition among U.S. states to attract merger litigation to their courts); LYNN M. LOPUCKI, *COURTING FAILURE: HOW COMPETITION FOR BIG CASES IS CORRUPTING THE BANKRUPTCY COURTS* (2005) (describing competition among U.S. states to attract bankruptcy litigation).

201. *Ex aequo et bono*, also referred to as amiable composition (the terms are synonymous as generally construed), means that the tribunal may decide purely on its sense of fairness, without reliance on any legal rules. On the rarity of amiable composition, see KARTON, *supra* note 79, at 152-53.

202. See, e.g., LEX SPORTIVA: WHAT IS SPORTS LAW? (Robert C. R. Siekman & Janwillem Soek eds., 2012) (discussing whether international sports law is a separate discipline);

Similarly, it is now common to see references to a *lex petrolea* in arbitrations relating to the oil and gas industry. The concept was proposed some time ago,<sup>203</sup> but has recently attracted greater attention among both commentators and practitioners, especially in investor-state arbitrations.<sup>204</sup> Like the *lex sportiva*, the *lex petrolea* is almost entirely an arbitral phenomenon; it has been developed by arbitrators, and international arbitral awards are its primary “source material.”<sup>205</sup>

As with all areas of adjudication, normative fragmentation leads in turn to demands for greater formal or informal specialization by arbitrators and counsel.<sup>206</sup> Arbitrators increasingly identify (that is, market) themselves not by expertise in “international arbitration law” generally, but in disputes arising from particular industries. Arbitral institutions and other industry groups have furthered this trend, in large part by promulgating lists of arbitrators with verified expertise in particular sectors. For example, the International Center for Dispute Resolution of the American Arbitration Association publishes an “Energy Arbitrators List,” which contains the names of arbitrators from around the world who hold relevant qualifications and experience for managing disputes in the energy sector.<sup>207</sup> The Institute for Energy Law recently published its own list of energy arbitrators;<sup>208</sup> nominees must complete a questionnaire about their arbitration and energy

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Michael Beloff, *The Specificity of Sport—Rhetoric or Reality?*, 2012, 4 INT’L SPORTS L. REV. 97 (2012) (explaining the development of consistent rules through accretion of arbitral precedents); Lorenzo Casini, *The Making of a Lex Sportiva by the Court of Arbitration for Sport*, 12 GERMAN L.J. 1317 (2011) (explaining that the *lex sportiva* is sometimes referred to as the *lex ludica*, or law of games).

203. It was first raised by the government of Kuwait in the *AMINOIL* arbitration. *Government of the State of Kuwait v. American Independent Oil Co. (AMINOIL)*, Award of May 24, 1982, IX YBK. COMM. ARB. 71 (1984), Para 155.

204. See, e.g., Carmen Otero Garcia-Castrillon, *Reflections on the law applicable to international oil contracts*, 6(2) J. WORLD ENERGY LAW & BUS. 129 (2013) (discussing the formation of the legal regime surrounding oil contracts); Mary B. Ayad, *Harmonization of Custom, General Principles of Law, and Islamic Law in Oil Concessions*, 29(5) J. INT’L ARB. 477 (2012) (describing the legal principles incorporated into contracts for oil exploration in the Middle East); Kim Talus et al, *Lex petrolea and the internationalization of petroleum agreements: focus on Host Government Contracts* 5(3) J. WORLD ENERGY LAW & BUS. 181 (2012) (explaining the relationship between *lex petrolea* and international petroleum agreements); Childs, *supra* note 135, at 214 (summarizing the major arbitral rulings regarding oil and gas contracts).

205. Bishop, *supra* note 135, at 1133.

206. Zumbansen, *supra* note 12, at 799.

207. Energy Arbitrators List Home Page, <http://energyarbitratorslist.icdr.org/> [<https://perma.cc/C9CF-RYFU>] (last visited Nov. 23, 2018).

208. IEL Energy Arbitrators List, The Center for American and International Law, <http://www.cailaw.org/institute-for-energy-law/arbitrator-search.html?viewAll=1#search-top> [<https://perma.cc/RQ7L-KABM>] (last visited Nov. 23, 2018).



industry experience and knowledge to be listed.<sup>209</sup> Some major industry-specialist international arbitral institutions already exist, such as the long-standing London Maritime Arbitration Association, the well-established Court of Arbitration for Sport, and the recently-founded PRIME Finance;<sup>210</sup> additional institutions of this kind are likely to be established, just as specialist courts and judicial lists have multiplied in recent years.<sup>211</sup>

#### V. CONCLUSION: POLITICAL AND NORMATIVE IMPLICATIONS OF SECTORALLY FRAGMENTED CONTRACT LAW

The trends and influences described above suggest that transnational contract law will trend increasingly away from differentiation across national borders and toward differentiation along industry sectors. The widespread acceptance of contract law principles that favour commercial context, trade usages, and good faith will abet industry particularism, and distinct bodies of law will continue to coalesce that govern different types of commercial relationships. These rules may have their origin in contractual and other private governance mechanisms, but will be adopted into formal contract law — domestic and transnational — through rulemaking or adjudicative processes. Institutions will be established or will change to cope with and cater to this normative fragmentation, as will the international commercial bar, leading to institutional fragmentation. In short, transnational contract law will increasingly exhibit sectoral fragmentation, both normatively and institutionally.

The primary driver of sectoral fragmentation is private enterprise acting through contractual governance and private rulemaking bodies. Businesses tend to prefer particularist rules because such rules are likely be predictable, economically efficient, and commercially sensible to members of a given

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209. Arbitrator Qualification Criteria, The Center for American and International Law, <http://www.cailaw.org/media/files/IEL/ArbitratorList/arbitrator-qualifications.pdf> [<https://perma.cc/F2RT-GERA>] (last visited Nov. 23, 2018).

210. Prime Financed Disputes About Us Page, <https://primefinancedisputes.org/page/about-us> [<https://perma.cc/WRM3-5NAB>] (last visited Nov. 23, 2018). The name PRIME Finance was chosen specifically to advertise the industry-specific expertise of its arbitrators; it stands for “Panel of Recognised International Market Experts in Finance”.

211. Two prominent examples of recently-established specialist courts on the international stage are the Dubai International Financial Centre Courts (<https://www.difccourts.ae/about-courts/> [<https://perma.cc/8TYB-MP9Z>]) and the Singapore International Commercial Court. See Singapore International Court Committee, *Report of the Singapore International Commercial Court Committee*, (2013), <https://www.mlaw.gov.sg/content/dam/minlaw/corp/News/Annex%20A%20-%20SICC%20Committee%20Report.pdf> [<https://perma.cc/926K-LK64>] (providing the report of the committee establishing the court).

industry. Generation of particularist rules may also provide opportunities for businesses to avoid regulations that increase costs or decrease contractual autonomy.

One would therefore expect contract law particularism to be most advanced in areas where private governance is strongest: highly globalized industries in which a fairly small and homogeneous group of market participants repeatedly transact with each other on the basis of variations on standard form contracts and frequently resort to arbitration to resolve disputes.<sup>212</sup> Indeed, this is exactly what has occurred, as with the oil and gas industry (*lex petrolea*), and with certain internationally popular sports such as soccer, ice hockey, and the Olympic disciplines (*lex sportiva*). Some other commercial sectors that share these characteristics long ago developed their own fragmented bodies of substantive law and corresponding institutions. The best example is shipping, which has for centuries been a globalized industry with a homogeneous group of market participants who contracted repeatedly with each other using established forms and resorting frequently to arbitration in the case of disputes.<sup>213</sup>

These phenomena are not entirely unprecedented, but to find precedents we may have to reach far back in (at least Western) history, to an era when the various trade guilds—stonemasons, carpenters, shippers, and the like—observed relatively uniform Europe-wide rules outside of state laws and particular to their crafts, rules that were enforced and developed by private specialist tribunals that met at trade fairs.<sup>214</sup> This system arose in the Middle

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212. In industries where there is one dominant standard form or a very small number of dominant forms, such as with the FIDIC forms in the construction industry, there is less development of particularist legal doctrines than in industries without a dominant form contract. Near-complete particularization will have been achieved through private contracting alone, so there will be less pressure for particularistic legal rules to develop through legislation or case law.

213. Of course, the treatment of maritime disputes — commercial or otherwise — as governed by a distinct body of law has a much longer history, a fact that aided in the development of distinct rules and institutions for commercial disputes that involved shipping.

214. See Emily Kadens, *Order within Law, Variety within Custom: The Character of the Medieval Merchant Law*, 5 CHI. J. INT'L L. 39-66 (2004) (discussing the laws dealing with merchant customs and practices dating back to the Middle Ages); LEX MERCATORIA AND LEGAL PLURALISM: A LATE THIRTEENTH-CENTURY TREATISE AND ITS AFTERLIFE (Mary Elizabeth Basile et al. eds., 1998) (describing the legal framework of the Law Merchant in England under King Edward); Charles Kerr, *The Origin and Development of the Law Merchant*, 15 VA. L. REV. 350 (1928-1929) (tracing the Law Merchant back to ancient times); John H. Baker, *The Law Merchant and the Common Law*, 38 CAMB. L. J. 295, 299 (1979) (collecting references to the Law Merchant in medieval English texts). Modern interest in the medieval *lex mercatoria* seems to originate with WYNDHAM ANTIS BOWES, *THE ROMANCE OF THE LAW MERCHANT: BEING AN INTRODUCTION TO THE STUDY OF INTERNATIONAL AND COMMERCIAL LAW WITH SOME ACCOUNT OF THE COMMERCE AND FAIRS OF THE MIDDLE AGES*

Ages and persisted, to some extent, until the consolidation of modern centralized states in the 18th century.<sup>215</sup> The history is contested, and I do not intend to wade into the debate on the extent to which the “medieval *lex mercatoria*” constituted a coherent legal system.<sup>216</sup> However, even if it is only partly accurate, consideration of this history offers a tantalizing prospect: perhaps, whenever states either cannot or will not adopt and enforce commercially reasonable rules of general application, business organizations fill the gap. If this is correct, then any decline of nation-states as the sole *loci* of legal orders will inevitably yield differentiation along other boundaries—sectoral boundaries, in the case of contract law. The state-centric era that began with the Peace of Westphalia may be merely an extended interlude, and the world now be returning to pre-modern structures.

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This concluding section reviews the positive and negative consequences of sectoral fragmentation. The analysis is not comprehensive and is intended to serve only as a broad overview of the kinds of consequences one might expect from sectoral fragmentation. To a large extent, the phenomena described in this Article are self-perpetuating, and would be difficult if not impossible to reverse. Accordingly, the main goal of this Article has been to understand sectoral fragmentation, rather than to give it a thumbs up or thumbs down.

However, before listing the consequences of sectoral fragmentation, it is worth noting that the beneficial consequences accrue largely to market participants, while the detriments are more broadly distributed across society. In other words, sectoral fragmentation of law leads to greater freedom and efficiencies for the commercial sector (which may benefit society as a whole), but also imposes negative externalities on those who are

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(1923).

215. See WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND v. I, 75, 264 (1769) (stating that “a particular system of customs . . . called the custom of merchants, or *lex mercatoria* . . . is allowed for the benefit of trade, to be of the utmost validity in all commercial transactions . . .” because, “as these are transactions carried on between subjects of independent states, the municipal laws of one will not be regarded by the other. For which reason the affairs of commerce are regulated by . . . the law merchant or *lex mercatoria*, which all nations agree in and take notice of.”).

216. Nikitas E. Hatzimihail, *The Many Lives – And Faces – of Lex Mercatoria: History as Genealogy in International Business Law*, 71, L. & CONTEMP. PROBS. 169, 178 (2008); Albrecht Cordes, *The Search for a Medieval Lex Mercatoria*, 5 OX. U. COMP. L. FORUM (2003), <http://ouclf.iuscomp.org/the-search-for-a-medieval-lex-mercatoria/> [<https://perma.cc/2R4K-Z6CU>]; Nicholas H. D. Foster, *Foundation Myth as legal formant: The medieval Law Merchant and the new Lex Mercatoria*, FORUM HISTORIAE IURIS (18. Mar. 2005), <http://www.forhistiur.de/2005-03-foster/> [<https://perma.cc/U6AV-4GF7>].

subject to the law without having had a role in generating it, in particular consumers and workers.

To an extent, sectoral fragmentation is simply evidence of the maturation of transnational contract law, as the law evolves and increasingly reflects the complexity of the pluralistic, polycentric society it shapes and is shaped by. Such maturation carries significant benefits, both for the commercial parties governed by particularized legal regimes and for society generally.

First, particularist laws are more predictable and lead to greater efficiency.<sup>217</sup> Since the market is the primary social institution implicated by contract law, this should mean more efficient markets. A contract law that reinforces the prevailing practices of commercial parties, holding to account parties that deviate from those standards, will more accurately align the incentives of transacting parties with economically efficient outcomes. Since no single approach is likely to be efficient for all types of transactions and all industry sectors, particularized contract law reduces transaction costs.<sup>218</sup> This should, in turn, encourage both a greater volume of trade and a broader distribution of the benefits of trade through a lowering of barriers to entry. A sectorally fragmented law presided over by specialists is also more likely to keep pace with fast-changing business dynamics. There is some empirical evidence for these propositions, in the form of studies of specialist business courts that have been established in some U.S. states.<sup>219</sup>

Second, being judged according to the standards of one's own community is, in a real way, more fair than being judged according to blanket standards.<sup>220</sup> The actual peer group of today's large commercial enterprises

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217. The same argument has been made with respect to the emergence of specialized sub-disciplines of public international law: "Law making and law enforcement by specialized organizations are likely to lead to better law. Regulatory competition may increase efficiency and provide a laboratory for the development of new legal instruments." Joost Pauwelyn, *Bridging Fragmentation and Unity: International Law as a Universe of Inter-Connected Islands*, 25 MICH. J. INT'L L. 903, 904 (2004).

218. No single approach is likely to be efficient for all types of transactions and all sectors. See Aditi Bagchi, *The Political Economy of Regulating Contract*, 62 AM. J. COMP. L. 687 (2014) (emphasizing that each regime's choice to use either mandatory *ex ante* or default *ex post* rules to regulate contracts is a function of the political and economic factors present in its transactional environment).

219. See John F. Coyle, *Business Courts and Interstate Competition*, 53 WM. & MARY L. REV. 1915, 1976-79 (2012) (suggesting that specialized business courts render more accurate and satisfying judgments than generalist courts).

220. An analogy might be to medical malpractice law, where specialists are judged according to the standard of conduct considered reasonable for members of their specialty, or to obscenity prosecutions, where decency is judged according to the standards of the community where the allegedly indecent acts or statements were made.

is the international community of businesses in the same industry, not other businesses from their home states.<sup>221</sup> It is therefore more fair (or at least will be perceived to be more fair) to apply to members of a given industry particularized rules that align with the standard practices of that industry, especially when those rules can be more accurately applied to deliver relief from hardship in exceptional cases. Similarly, it would be more just to apply a common set of transnational rules than to apply any one national law to a transnational community.

Third, particularized law can improve buy-in by reducing parties' resentment at rules that were designed to cover a wide range of circumstances, or which evolved in a market context that no longer exists, and which therefore lead to unreasonable results in particular circumstances. This in turn can increase the confidence of commercial parties in the legal system and promote the rule of law.

Fourth, sectoral fragmentation may make more sense than the alternative, which is not true globalism but state fragmentation. Since the rise of nation-states, contract law has been fragmented along state boundaries, but history shows that this is not a necessary or necessarily beneficial state of affairs. Shifting to sectoral boundaries would render differences between national laws irrelevant. This would reduce incentives for forum shopping and for a regulatory race to the bottom, which would benefit consumers, employees, and civil society generally.

Despite these benefits, sectoral fragmentation may in the end be more threat than opportunity. It poses risks both for the legal system generally and for the commercial parties that use it. Since certain categories of commercial parties may be harmed by sectoral fragmentation, it should not be considered as simply a consequence of raw corporate power wielded at the expense of the state.

First, there are the well-known drawbacks to specialization, especially in the context of adjudication.<sup>222</sup> As the old joke has it, a specialist is

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221. Similarly, the lawyers who work on high-stakes commercial disputes, whether through litigation, arbitration or some other form of ADR, have more in common with each other than with the body of legal practitioners in any one jurisdiction. See ROGER COTTERRELL, *THE SOCIOLOGY OF LAW: AN INTRODUCTION* 186 (2d ed. 1992) (arguing that "it [is] difficult to see any significant bonds of common experience and interest" between "the high prestige corporation lawyer and the sole practitioner in a large American urban centre"); see also KARTON, *supra* note 79, at 23 (claiming that practitioners of international arbitration have unique characteristics for which they should be classified as an independent international community, as opposed to a subset of the legal community of a particular country).

222. On the pros and cons of specialist courts in general, see, e.g., Nuno Garoupa et al., *Assessing the Argument for Specialized Courts: Evidence from Family Courts in Spain* 24(1) INT'L J. L. POL'Y & FAM. 54 (2010) (finding little evidence that specialized courts are capable

someone who “knows more and more about less and less.” Specialization carries with it the risk of tunnel vision. Opportunities for cross-fertilization from other fields of law will be lost, even where conglomerates operate across industry sectors. The development of the law can stagnate, especially where cases are not accorded precedential value (as in arbitration) or where adjudicators do not draw on precedents established in cases involving different industry sectors.<sup>223</sup> Rule-makers and adjudicators who preside only over disputes arising from a single industry can lose touch with the commonalities among industries and the broad principles that should apply to all transactions. The result may be the proliferation of increasingly complex sets of esoteric rules that make sense only to insiders.<sup>224</sup>

The same can occur to the legal practitioners who work in the area, in particular the international arbitration bar: the bar and judiciary may splinter into a hermetic castes, each with its own distinct values, jargons, and loyalties, unable to understand or empathize with the others.<sup>225</sup> As Teubner writes, “[i]t is no more the fragmentation of universal justice in different national laws that haunts us, but the fragmentation of universal rationality into a disturbing multiplicity of discourses.”<sup>226</sup> In this context, it is precisely the technical expertise of specialists that is the problem. For example, Ginsburg and Wright argue (in the context of assessing proposals for specialist antitrust courts), that:

Whereas the specialist brings to the court a depth of knowledge about the subject that enables the judge immediately to place a new issue in its evolutionary context . . . generalists by definition have a breadth of

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of concluding litigation faster than general courts); *see also* Jeffrey W. Stempel, *Two Cheers for Specialization*, 61 BROOK. L. REV. 67 (1995) (evaluating the efficacy of specialized courts, their effect on the quality of decisions, whether the negativity surrounding them is warranted, and a proposed future structure). On specialist international commercial courts, *see, e.g.*, Denise H. Wong, *The Rise of the International Commercial Court: What Is It and Will It Work?*, 33(2) CIV. JUST. Q. 205 (2014) (explaining the characteristics of the Singapore International Commercial Court, how it came into existence, and the challenges that it will face).

223. In a much-discussed 2016 speech, the Lord Chief Justice of England and Wales lamented that diversion of commercial cases from litigation to arbitration was reducing opportunities for the courts to develop and explain English commercial law. Lord Thomas of Cwmgiedd, Lord C.J. of Eng. and Wales, *Developing Commercial Law through the Courts: Rebalancing the Relationship between the Courts and Arbitration* (Mar. 9, 2016).

224. *Cf.* Zumbansen, *supra* note 109, at 320-21 (“As . . . functionally differentiated problem areas and spheres of human and institutional conduct evolve in response to a combination of external impulses and their own particular logic, the law governing these constellations becomes deeply entwined in these complex, layered constitutions.”).

225. Admittedly, there is much more commonality of values in the commercial arena than in other areas of law, at least among Western legal systems.

226. Teubner, *supra* note 21, at 901.

experience upon which to draw . . . .

. . . [E]xposure to other areas of the law may give the generalist insights unavailable to a specialist but nonetheless helpful in penetrating an argument or seeing an issue in a broader context, perhaps one that implicates limitations upon government institutions . . . . Thus, replacing a generalist court with a specialized court may entail trading a lower rate of error for a higher degree of bias . . . .<sup>227</sup>

Second, an overly particularized contract law will interfere with national and international efforts to regulate private activity in order to advance the public good — which, after all, is the purpose of contract law. This interference occurs in both rule-making and rule-applying processes. When governance shifts from public to private, stakeholders other than corporations (such as consumers, environmental groups, and civil society organizations) lose opportunities to exercise discursive power.

At the same time, fragmentation increases the logistical costs and difficulties of regulation, and makes it harder for the public sector to match the private sector's expertise. Sectoral fragmentation reconceptualizes the relevant authority as technical rather than legal, even in legal contexts, which hinders the capacity of the state to formulate, administer, and apply the law. Since most (or all) states are unable to match the private sector for technical sophistication, structural fragmentation strengthens private governance at the expense of public governance by making states less competent to regulate. Any such weakening of state governance capacity will, in turn, lead to greater calls for privately-generated rules and private, specialized regulation, yielding further structural fragmentation.

Establishing specialized public regulatory and adjudicative bodies to cope with sectorally fragmented law will not necessarily protect the public interest, since specialized adjudicative bodies are particularly subject to systemic biases. Tribunals that adjudicate only a narrow category of disputes will have neither the capacity nor the incentive to ensure that the rulings they issue in individual cases align with the interests of a broad range of stakeholders.

Arbitral tribunals are particularly susceptible to issuing rulings that make internal sense —they achieve commercially reasonable results between the parties — but do not take into account the public good. Indeed, many would argue that it is simply not the role of private arbitrators to account for the public good, or to uphold the law in a general sense. But

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227. Douglas H. Ginsburg & Joshua D. Wright, *Antitrust Courts: Specialists versus Generalists*, 36 FORDHAM INT'L L.J. 788, 803-04 (2013).

whether the specialized adjudicators are privately selected on an *ad hoc* basis or publicly employed with life tenure, only individuals with the requisite expertise will be appointed. Where the adjudicative institutions are fragmented by industry sector, work in or with the corporations operating that sector will be the only way to gain such expertise.

Even outsiders who come to the sector later in their careers may come to share the systemic biases of their institutions. Through continued exposure to repeat players (such as specialist counsel), adjudicators come to trust them and to adopt their perspectives.<sup>228</sup> Such a bias will not necessarily be anti-regulation or anti-public interest, but commercial parties will likely play an outsized role, either indirectly by influencing the composition of the specialist bar or directly by appointing arbitrators congenial to corporate interests.

Third, the opacity of fragmented law creates barriers to entry. New market entrants would be foolish to commence operations without extensive consultation with specialists, especially since a law that prioritizes trade usages may bind entrants to observe industry practices with which they are unfamiliar and which they may not be able to identify by consulting publicly-available materials. The winners in such a situation are the established market actors (and, as always, the lawyers), stifling disruptive innovation and encouraging oligopolies. One of the main benefits of enforcing trade usages is that usages evolve immediately along with commercial practice, so that the outcomes can shift with changing business practices, faster than legislation or even case law can follow. But if the standard practices of the incumbents become “rote and encrusted” — standardized terms that are continually adopted without any particular meaning attached to them by the parties to individual contracts<sup>229</sup> — or become codified through private or public rulemaking processes, it may be more difficult to adjust these rules or standards along with the changing commercial context.

Moreover, established industry players will have participated in trade association or public rulemaking activities, and so will have had an opportunity unavailable to new entrants to shape the rules that govern their industry. It would be surprising if incumbents did not take advantage of this opportunity to try to enact rules that might protect them from competition—to exercise the greater discursive power that a sectorally fragmented legal environment provides to them in order to codify *their* way of doing things as *the* way of doing things. This problem is exacerbated if, as Bernstein has

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228. *Id.* at 802-03.

229. Stephen J. Choi, Mitu Gulati & Robert E. Scott, *The Black Hole Problem in Commercial Boilerplate*, 67 DUKE L.J. 1, 8-15 (2017).



shown in a more limited context, usages are typically proven by the testimony of employees rather than by statistical data or expert witnesses.<sup>230</sup> The repeat players thus have the opportunity to create the data upon which courts will later rely.<sup>231</sup>

Relatedly, fragmented contract law creates barriers to understanding of the law for industry outsiders — whether they are new entrants to the industry, government regulators or judges, generalist lawyers, or other stakeholders such as customers and employees.<sup>232</sup> If the outcomes in the leading cases can be understood only by those who have knowledge of both the relevant statutes and precedents *and* the relevant industry standards, it becomes more difficult for non-specialists to access the law.<sup>233</sup> Obscurity of the law harms its popular legitimacy and hinders access to justice. In international commercial arbitration, the fact that most arbitral awards are confidential already privileges the “insider” law firms that have extensive in-house records of arbitral awards, and can therefore make more informed choices about which arbitrators to appoint and how to frame their arguments. Fragmentation of contract law would only exacerbate the inequality of arms between large firms with established international arbitration practice groups and smaller firms, especially those from developing states.

Fourth, and possibly of greatest concern, is the risk that common standards will become degraded to the point that the rule of law itself is impaired. To an extent, this concern is simply a variation on the familiar debate between rules and standards, and is neither surprising nor dangerous.<sup>234</sup> That is, the more an area of the law is dominated by specific rules rather than general standards, the more open it is to charges that the forest has been lost for the trees. Nevertheless, normative and institutional

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230. Bernstein, *supra*, note 126, at 67.

231. *Id.*

232. Cf. Helge Dedek & Alexandra Carbone, *Canadian Report*, 20 EUR. REV. PRIV. L. 81, 88 (2012) (“Complexity of transnational sources has another, one might say, less lofty aspect — the application of law is simply made technically more difficult by the proliferation of transnational law and transnational legal ‘sources’, particularly the multiplicity of international instruments.”).

233. My own experience in teaching contract and commercial law reinforces this point. Cases that turn on trade usages are difficult to teach, and the judgments are often highly unsatisfying to students. In my role as an educator, the best I can do is expose students to the various ways in which trade usages matter, and exhort them never to forget the potentially decisive character of usages when, in their careers after they graduate, they draft contracts or litigate commercial disputes.

234. See Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 547 (2003) (discussing how default rules and standards in contract law should be drafted in order to avoid the application of inefficient and irrelevant default provisions).

division of the degree described in this Article, along with the associated shift in regulatory power from the public to private spheres, goes beyond simply rules versus standards. Sectoral fragmentation may in fact “transform the legal regime into an assemblage of islands of dispute resolution, each with its distinct professional, ideological, and institutional allegiances, and none (or very few) concerned with upholding the premise of an equal and general rule of law.”<sup>235</sup> This is the fear at the heart of arguments that the unity and systematicity of the law must be preserved.<sup>236</sup> The rule of law is ultimately meaningless if similarly positioned members of a community are not governed by the same standards.<sup>237</sup> If fragmentation continues to extremes, we may give up the rule of law for a law of rules.

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235. Ori Aronson, *Out of Many: Military Commissions, Religious Tribunals, and the Democratic Virtues of Court Specialization*, 51 VA. J. INT’L L. 231, 259 (2011).

236. See *supra* notes 20-23 and accompanying text (discussing different aspects of the fragmentation of international law).

237. This concern reflects an arguably outdated conception of the unity of private law. Smits observes, “Except for systematic purity, such consistency serves the important goal of establishing equality before the law (and thereby legal certainty): only if rules and principles are applied in a uniform way, similar cases can be treated alike. . . . Leaving aside the accuracy of this past view, it is abundantly clear that this view no longer represents present-day private law.” Smits, *supra* note 29, at 155-56.