

**From Sources to Impact: Contracts, Dispute Resolution Systems and Governance
in a World of Legal and Regulatory Pluralism.**

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While progress has been slow, scholars of regulation and regulatory capitalism are becoming more aware of the importance of international economic and commercial law in the governance of the global economy. The obstacles to an effective dialogue on the relationships between regulation, law, and governance are many, but two stand out – the unfamiliarity of most scholars of regulation and governance with the concepts and practice of international law, and a lack of a clear sense of how to think effectively about the interaction between law and regulation “beyond” the confines of the sovereign state. Neither of these obstacles can be overcome in one paper, but my aim is to contribute to addressing these challenges through an analysis of the changing patterns of legal dispute resolution in international business and commerce. Unlike the discussions of the nature and sources of international economic law, which dominate much analysis to this point, the issue of dispute resolution brings us into direct contact with some of the central concerns of the literature on regulation and governance – which rules and institutions govern the behavior of business, how are these rules made, interpreted, and changed, how effectively are they implemented, and how is the role of public policy implicated in the current global political economic system.

My approach to these questions centers on the role of institutional, jurisdictional, and normative pluralism as fundamental features of both the legal and regulatory environments of global markets. This pluralism creates a context in which there exist multiple sites and structures for the resolution of conflict between businesses, between states, and between states and businesses. In contrast to some accounts of global legal pluralism, however, I argue that there is constant interpenetration of actors, norms, and interests between different legal and regulatory regimes. The resulting interactions between different regimes and fora, in turn, generate a process of mutual adjustment that is a key factor driving the structure of governance in the global economy. Much of this is familiar to scholars of regulatory capitalism. A closer look at contemporary international commercial law, however, highlights the growing ability of actors in a dispute – particularly businesses – to use contracts to choose for themselves the forum, structure, and norms through which their disputes will be resolved. This development, and the significance of contract regimes in international commerce, raises important questions regarding the nature of regulatory governance in the global economy.

Regulatory Capitalism and the Debate over Legalization.

In a series of important recent articles and essays, Levi-Faur and his collaborators (2005) have advanced the notion that the contemporary political economy is best understood as “regulatory capitalism”. The aim of this construct is to emphasize that, in contrast to influential notions such as “de-regulation” and “the retreat of the state”, the defining feature of the past three decades has been the reconstruction of political and economic orders through the spread of regulation as a mode of governance. Regulatory capitalism is characterized by a number of features, of which the following are especially central to my discussion: “...a new division of labor between state and society, an increase in delegation, the proliferation of new technologies of regulation, the formalization of interinstitutional and intrainstitutional relations, and the “proliferation of mechanisms of self-regulation in the shadow of the state.” (2005: 13) These features have spread to

states throughout the global system, and increasingly characterize the structures designed to govern global political economic life. Regulatory capitalism, however, is not a uniform or seamless system of governance. Regulatory structures and practices intertwine with other approaches to governance, vary across states and sectors, and are especially fluid at the international level, where we see complex patterns of regulatory cooperation, conflict, and pluralism.

This conceptual framework captures many of the essential features of contemporary political and economic developments. It is especially valuable in emphasizing that the changes we have seen since the 1970's, usually grouped under the concept of "neo-liberalism", involve far more than just the expansion of market competition. Along with and necessary for this expansion, the regulatory capitalism model contends, have been fundamental changes in the ways in which public (and private) authority is constituted and exercised in society and economy. (Braithwaite, 2005) From this perspective, I would suggest, it is essential and perhaps inevitable that we begin to look more closely at the place of economic and commercial law in governing global capitalism. Law has been and remains a constitutive element in structuring markets and the relationships between states and business throughout the history of capitalism. Moreover, the various approaches to regulation in contemporary states place a heavy reliance – and in many cases a greater reliance – on legal rules and institutions as a tool for economic governance. Regulatory capitalism, it stands to reason, involves some fundamental changes in the content of commercial law, and in the ways it helps structure contemporary forms of governance.

Among social scientists who study regulation, there is indeed a growing body of work on the intersection of law and governance in the regulatory state. The analysis of the role of law in shaping regulation at the international or transnational level, however, has been stymied and overshadowed by the impact of the "legalization" research program, which emerged out of the work of an influential group of political scientists and international relations scholars. (Goldstein et al., 2000) This model conceptualizes emerging international legal orders as more or less institutionalized arrangements through which states resolve collective action obstacles and thus secure mutual benefits. In this approach, the primary reason that states promote legalization is to find ways for the effective collective governance of transnational economic and political processes, and to provide the means to resolve disputes through legitimate common norms. As this model views legalized regimes as contributing to a distinctive form of global governance – one which relies on the resolution of conflict through collective norms rather than interest or power-based bargaining – much of the analytical focus is on the conditions under which such regimes are effective in shaping the behavior of states. All instances of legalized relationships are measured against an ideal-type of a fully institutionalized regime, characterized by clear sources of authority in treaties and formal agreements, a dispute resolution system that uses the founding treaties to develop a coherent body of interpretation and precedent, and a reliable means for enforcing its rules.

This framework does highlight some of the main features of the changing and more prominent roles of international law in a variety of venues. But it fails to capture the

variety of ways in which law and legal processes shape the current political economy (Finnemore and Toope, 2001), and limits our ability to understand how law intersects with some of the key features of regulatory capitalism. Three aspects of the legalization model are particularly problematic. First, it remains state-centric, and tends to rely on the image of states as rather unitary actors in the international context. An understanding of both regulatory capitalism and international law, I will argue, require that we attend to the important role of non-state actors and the often fragmented nature of states in contemporary regulatory governance. Second, the functionalist logic behind the model tends to minimize the contingent and politically-infused nature of the process of regulation in the global political economy. Finally, and this is a point that I will develop in more depth below, the legalization model relies on domestic legal orders – where there is a final sovereign and established process for the making and enforcement of law – as a standard by which to judge the development of international legal regimes. The international legal and regulatory environments, however, are characterized by an irreducible plurality of authorities, rules, and regimes which makes the (hypothetical) standard of a coherent national legal order an inappropriate starting point for analysis or evaluation. (Brutsch and Lehmkuhl, forthcoming)

In the place of the legalization model, I propose an approach to the analysis of the role of international economic and commercial law which emphasizes the construction of transnational spaces, and the flows of capital, goods, and persons through these spaces, as a central feature of the global political economy. Following Sassen (1996, 2000), I focus on the structural rearrangement in the nature and operation of political and economic power that is part of the emergence of transnational relationships since the 1970s. This rearrangement, which centers on the reconfiguration of states to facilitate the deeper integration of markets, has been driven by and dependent upon the hegemonic position of the US state and financial markets. Two aspects of this project have been crucial for the analysis of the place of law in the global economy. First, it requires a substantial reform and reconfiguration of the legal structures and rules governing national and international markets. Second, to the degree that it has led to the emergence of networks of economic activity that escape traditional forms of control by the nation-state, it has generated a demand for new kinds of legal regimes to help shape and regulate transnational markets and activity.

In response, various actors – states, private business, professionals, etc. – have attempted to fashion new legal orders to stabilize and regulate these spaces and networks. This move to law involves the emergence of legal rules and standards, and the construction or revitalization of institutions (or “sites”) for the articulation and enforcement of legal rules. But these efforts add a new twist to the transnational political economy. Emerging legal processes and institutions engage new and various actors and interests in the governance of the global economy, which may modify and/or challenge the goals of hegemonic power. They also complicate the process of governance itself, by multiplying the sites and agents over which power and authority must be exercised. The result is a pluralism of legal institutions, norms, and orders that is a defining feature of the governance of transnational economic relationships. In addition to the state-based regimes, we can observe a variety of legal orders – public and private, national,

international, and transnational – of varying shape and dynamics, including the highly institutionalized World Trade Organization (WTO) dispute resolution system, the very informal world of commercial arbitration, and civil society compacts such as the forest certification system. Nor is there any necessary common trajectory in the development of these different kinds of legal systems; indeed, there are good reasons to believe that legal pluralism is a defining feature of legalization today. Moreover, these different orders (and the actors and institutions that constitute them) do not exist in isolation, but are in constant interaction with each other. There is not, nor will there likely be, any fixed allocation of issues or problems to specific autonomous orders.

This approach to the changing role of international law dovetails well with key features of the regulatory capitalism model. In this view, the various projects for legal reform and reconstruction can be seen as an integral part of the re-configuration of the rules, institutions, and practices through which economic relationships are governed and regulated. In addition, the emphasis on pluralism as a constituent feature of contemporary governance helps to deepen and focus our analysis of how regulatory capitalism plays out at the global or transnational level. From this vantage point, we can anticipate a constant process of regulatory competition, in which different actors and alliances work to establish and diffuse regulatory regimes which advance their own interests and normative projects for the organization of the global economy. A central political dynamic in regulatory capitalism, then, is the competition between different sets of rules, norms, and institutions for hegemony over sectors of the global economy, and over the overall direction of the global system. The challenge is to understand the dynamics of this competition so as to explain why certain legal and regulatory projects are successful, and others fail.

My aim in this paper is to highlight one increasingly important influence on the fate of competing regulatory and legal projects, the ability of the regulated to choose the rules and institutions by which they will be regulated. In one sense, this is nothing new in the analysis of regulation at the global literature. Scholars have long recognized and analyze the attempts of investors and corporations to shift assets and resources between and among jurisdictions to assure the most favorable tax and regulatory treatment. Indeed, this issue is central to one of the main debates in the globalization literature, the question of the “race to the bottom or top”. Analysts of international commercial and economic law, however, have identified a different kind of regulatory arbitrage increasingly important in shaping the way in which international business practices are governed. Centered in changing contract practices of “choice of law” and “choice of forum”, which make up the heart of private international commercial law, these developments are allowing private businesses to separate the question of the rules and institutions that will govern disputes over commercial activity (jurisdiction) from the location in which these activities take place. (Appelbaum, et al., 2001) These practices, which have developed with the encouragement and/or acquiescence of states, transform legal pluralism from a purely territorial phenomenon into one in which competing legal regimes coexist in a transnational context. In the following sections, I explore this development and its implications for our understanding of regulatory capitalism. In the process, I hope to

contribute to a deeper engagement between the theory of regulatory capitalism and the analysis of contemporary international law.

Contract Regimes in International Commercial Law and Practice.

As an institution for the private structuring of business relationships, contracts are one of a number of alternatives, including the internal hierarchy of corporate organization, market competition, and “community” norms of appropriate behavior. What is distinctive about how contracts work? In a path breaking article, Mark Suchman defines a contract as “...a formally documented arrangement for governing a voluntary exchange relationship in the shadow of the law.” (2003: 94) While it is common for lawyers to note that there is more to any contract than what is actually written, the document itself is at the core of the relationship. Suchman goes on to note that contracts can be analyzed in two ways. On the one hand, all contracts are embody a particular “governance technology”; they are designed “...to accomplish practical objectives in the governance of human transactions”. (100) At the same time, all contracts are a form of cultural symbol, which embody particular norms and values. If we look at the phenomenon of contracting more broadly, we can speak of “contract regimes,” which involve “...both the standardization and diffusion of technological innovations and the elaboration and institutionalization of cultural vocabularies.” (101)

Contract regimes, I suggest, make up a crucial tool or technology of business regulation in capitalist economies. They embody and instantiate strategies for the organization and governance of commercial practices, and work to diffuse these strategies within sectors and fields of economic life. But contract regimes vary across historical periods and across sectors/industries within any given period. In this paper, my focus is on larger patterns of contracting, which shape the relationship between contracting as a technology of governance in international commerce and its relationship to the role and jurisdiction of states in regulating this commerce.¹ In the following discussion, I contrast the traditional contract regime articulated in “classic” private international law with the emerging regime of private autonomy that is transforming the role of contracting as a form of governance in contemporary capitalism.

Classic Private International Law and the Conflicts of Law.

The challenge of the regulation of commercial activity that crosses jurisdictions is as old as commerce itself. The modern evolution of this issue has its roots in the European Middle Ages, during which merchants involved in long distance commerce developed their own institutions to resolve disputes, centered in the regular fairs and key trading cities. Over time, these early commercial courts – which were run by merchants themselves – developed a relatively coherent customary law of commerce know as the *lex mercatoria*. This law had its roots in Roman, northern Italian, and Arab legal

¹ To this point, very few social scientists have undertaken to look closely at contracts as a source of regulation and governance in the contemporary global economy. For a rare and important exception, see Perez (2002).

traditions, and was closely tied to notions of natural law. Early modern states in Europe initially recognized this law as autonomous from the legal systems they were developing to unify their territory internally, and sanctioned the existence and authority of separate sets of merchant courts with jurisdiction over international private commercial disputes.

Over the course of the 18th century, however, European states began to challenge this autonomy, and to assert that unified sovereign authority could not coexist with this independent legal system. (Cutler, 2003) By the 19th century, these states had successfully “nationalized” the law governing private international commerce, bringing disputes within the national legal system and incorporating only those aspects of the *lex mercatoria* that were commensurate with the principles of national law. But this reversal left unsolved the problem of how to regulate commercial activity that involved capital, goods, and persons across national boundaries. The modern discipline and practice of private international (commercial) law was developed to address this issue.² The key to this field of law, and the solution to the problem of the legal regulation of international economic activity, was the notion and theory of “conflicts of law.” The term itself encapsulates the problem; international commerce crossed jurisdictions, and was thus subject to conflicting legal regimes. When conflicts between the parties emerged, disagreement extended to the question of which legal rules (or “law”) were applicable, and which national courts was the appropriate venue (or “forum”) for resolving the dispute.

The solution adopted by the theory of conflicts of law, and which dominated private international law until recent decades, was to nationalize each dispute. Various approaches to this emerged and competed, but all shared the goal of developing rules to determine which state’s laws and institutions were the most appropriate to resolve any given dispute. The task was to determine in which state the economic activity in question was predominantly located, or to which state it had the most important connection. When parties to a dispute approached a court, the task facing the judge was to examine the contractual arrangements to determine which national legal order properly governed the business transactions. Depending on the approach to conflicts that court took, it could either refuse to hear the case (“inappropriate forum”) or attempt to apply the proper national law. Either way, the fundamental premise of this traditional conflicts of law, as Wiener has put it, “...is that a contract may not ‘float’ independent of any municipal system of law; rights can be acquired only under a particular municipal system of law, and therefore must be enforced with reference to that system.” (1999: 152)³ To put it

² In legal analysis, the difference between “private” and “public” international law is determined by the subjects of the law; private law regulates private (non-state) agents while public law regulates the behavior of states and state-constructed international organizations. The breaking down of this boundary is one of the defining features of the past three decades.

³ Interestingly, the conflicts of law approach has also been developed in great detail within US law to address the problem of economic activity in a national market divided into fifty separate “state” jurisdictions. I will come back to this parallel below, as it has been important in contemporary legal thinking about the regulation of international commerce.

another way, all contracts are governed by the law of one state, and all contractual disputes are to be resolved in the court system of that state.

The conflicts of law approach was meant to apply to most regular contracts in international commerce, and was invoked when there was a dispute concerning which state's laws and courts governed a contract or transaction. But it did allow one important exception: parties to a contract in international business could include in the contract a "choice of law" provision in which the parties agreed ahead of time which nation's law would govern the interpretation and enforcement of the contract. Eventually, "choice of forum" provisions would be added to contracts as well, specifying the jurisdiction to which the parties would bring their disputes; for the most part, the forum was determined by the applicable national law. These provisions were justified in the name of "party autonomy"; the parties to a business transactions should be given as much freedom as possible to carry on business the way they chose to. While this exception seemed to open a wide door around the conflicts of law rules, in practice its impact was relatively limited. First, while English law was well disposed to such provisions, Continental European and US courts remained very skeptical and resistant to allowing contracting parties set their own terms. Second, even where choice of law and choice of forum clauses were accepted, a significant limitation – known as the "public policy taboo" – was put on their use. In essence, this doctrine holds that parties could not use choice of law and forum clauses for the primary purpose of escaping the reach of any particular state's public policy, particularly "mandatory public laws", that would otherwise apply to the transaction. (McConnaughay, 1999) When courts found this to be the case, they were obliged to override the choice of law and forum provisions, and apply the usual conflicts of law approaches to the dispute.

Party Autonomy and the New Technology of Contracts.

Over the past four decades, however, the understanding and practice of the private international law of contracts has undergone substantial change. (Muir Watt, 2003; Wai, 2002) Most importantly, the notion of party autonomy has been extended to embrace a much wider scope for contracting parties to use choice of law and forum clauses to choose the legal order under which their contracts will be interpreted and adjudicated. In the current world of global commerce, businesses now have substantial freedom to contract around or out of legal constraints they dislike, a freedom that extends in some cases to fundamental aspects of public policy. (McConnaughay, 2001) In what amounts to a new contracting technology, businesses can choose the legal norms most conducive to their interests, and choose the dispute resolution system in which they are most comfortable. These developments gain even greater significance from the proliferation in legal orders and dispute resolution alternatives that have emerged over the same period of time. This new regime for international contracting, in turn, has been overseen and in many cases encouraged by new regulatory strategies of the major states in the global political economy.

Underlying this development are two related trends in the relationships between national courts and legal systems and the world of global business contracting. First, courts in the

US and parts of the EU have moved gradually in the direction of narrowing the scope of the “public policy” exceptions that can limit the ability of businesses to choose the law and forum that will govern their contracts. In turn, businesses and their lawyers are relying much more heavily on choice of law and forum clauses, in the process pushing the limits of what courts will accept under the rubric of “party autonomy”. This trend has been supported, in turn, by an emerging school of legal thought that views contractual choice of law and forum as a positive tool to promote regulatory competition among states. To this point, no major jurisdiction has gone that far. But cases such as the complex Lloyd’s of London bankruptcy litigation in the US show that certain courts are willing to reject a good deal of the traditional approach to the public policy exception. In these cases, US plaintiffs attempted to have choice of UK law and forum clauses in Lloyd’s standard insurance contracts invalidated on the grounds that these clauses violated rights the plaintiffs had under the US securities regulation regime. The claims were refused, however, on the grounds that UK law provided “equivalent” regulatory standards to US law. (Buxbaum, 2002; Wai, 2002) The ultimate status of this line of analysis remains uncertain, but it provides an important indicator of the impact of newer theories of party autonomy on the world of global business contracting.

Second, and much more significant, has been the widespread turn to private arbitration as the preferred tool for contractual dispute resolution. (Dezalay and Garth, 1996) While its roots go back to the early 20th century, the use of arbitration in global commerce took off in the 1950’s and 1960’s, and its central role in shaping commercial law in global commerce is now widely recognized. The basic arrangement here is that the parties to a contract agree that disputes will be submitted to private arbitration rather than being taken directly to any national court system, though arbitration decisions can then be appealed to courts. The crucial aspect of this system for current purposes is that the contractual parties can specify who the arbitrators will be, where the arbitration will take place (choice of forum), and the legal norms and procedural rules that will guide the arbitrators in interpreting contracts (choice of law). Arbitration clauses allow the contracting parties to disengage the governance of their relationships from the specific territorial and jurisdictional locations in which the commercial activity takes place. As such, it has become the most powerful influence in using and reworking legal pluralism in a transnational context.

Like the changing choice of law and forum practices, international commercial arbitration has developed in the “shadow” of state power. States have been central to its development in two ways. First, they have actively encouraged its development through international conventions. The most important of these was the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (commonly known as the “New York Convention”), in which signatory states agreed that their courts would defer to arbitral awards in international commercial disputes in all but the most limited exceptions. This agreement, to which 137 states are now signatories, provided significant legitimacy and power to the arbitral process, and is widely recognized as a key factor in the explosion of arbitration practice.⁴ The major exception to the enforcement

⁴ This figure, and a good resource for the text and history of the New York Convention, can be found at the UNCITRAL website – www.uncitral.org. (accessed 22 August, 2006)

of arbitration decisions, reflecting its emergence out of the world of private commercial law, was for decisions that were in conflict with the public policy/public law of any given state. As in the case of contractual choice generally, however, this limitation has in practice been rarely enforced. This reluctance by national courts to overrule arbitration outcomes, though, has been extended much farther than in the case of choice of law and forum. The US case is again instructive. In a series of decisions beginning in the 1970's, the US Supreme Court has ruled that arbitral decisions that involve some fundamental areas of regulatory policy – including anti-trust and securities regulation – must also be upheld by US courts, narrowing to the point of elimination the relevance of the public policy exception. (McConnaughay, 1999) These decisions have helped constitute a situation in which private businesses can choose much of the legal and regulatory framework in which their activities take place.

Why have states and their courts moved in these directions? As Wai (2002) points out in a detailed analysis of many of the key decisions, the overriding concern expressed by courts is the concern with facilitating the flow of international commerce. Party autonomy, and especially deference to arbitral arrangements, is seen as the *sine qua non* of a fluid and flexible conflict resolution system that is up to the demands of global commerce. In this sense, states have endorsed the contemporary wisdom of most participants in, and scholars of, the world of private international commercial law. But the situation is more complex than I have described so far. The world of contractual choice of regulatory schemes is embedded in a larger and pluralistic context of norm and institutional development, to which I now turn.

Contractual Choice and International Legal Pluralism.

The expansion of party autonomy and arbitration have taken place along with, and contributed to, the development of a range of normative models for business contracting and institutions for dispute resolution outside of national court systems. These models and institutions have resulted in a dense world of regulation and conflict resolution that goes far beyond the world of classic private international commercial law. In this section, I discuss four major aspects of this new contract regime – the influence of particular national legal models in private contracting, the informal world of private arbitration, the activities of business associations and organizations geared toward the “self-regulation” of international business, and the activity of states and international institutions in attempting to steer the direction of business regulation *via* private international law.

One central dynamic in the current contract regime is the influence of specific national legal regimes over particular sectors of global commerce. In many sectors and industries, this influence is exercised through the widespread choice of that state's law as the governing law for contracts in the industry. A good example of this is in global finance, in which the explosion of activity has made it a model of “statelessness” for many commentators. In practice, however, much of this activity has been centered in two locations, New York and London, which offer the most advanced and facilitative legal

and institutional contexts for financial activity. One important result of this is that most contracts involving international finance (in all of its forms), irrespective of the location of the actors, identify the law of New York State or the UK as the governing law of the contract. (Flood, 2002) As a result, the laws of these jurisdictions now play a major role in shaping how financial actors do business throughout the world. At the same time, this practice empowers the courts of these jurisdictions as regulators of global finance; their interpretation and application of law immediately affect contracts throughout the world, and they are often chosen as the site or forum for the resolution of disputes that emerge in regard to such contracts. Even when the parties choose arbitration as the tool of dispute resolution, New York or London law remains the parties' choice for how arbitrators should approach the dispute.

International commercial arbitration, for its part, is characterized by privacy and informality. Arbitrations are carried on by a relatively small group of experts made up of corporate lawyers, legal scholars, former businesspersons, and former national and international public officials. While arbitration has become a substantial business in which many law and consulting firms are now involved, the arbitrators in international cases are chosen by the parties on the basis of reference and reputation and form what is by all accounts a quite integrated network of professional expertise. Arbitral decisions are not public, and despite some recent efforts to publicize their findings, their complete analysis and reasoning are only available to the parties involved. Despite the lack of open records, though, most scholars (and commentators with expertise in the area) of international arbitration believe that the networks of arbitrators are important sources of emergent understandings of the proper ways of "doing business" in international commerce. To the extent that this is accurate, these networks play a growing role in shaping contract practices in international business, and in generating informal but powerful norms concerning the standards of business practice.⁵

But arbitration practice is less free floating than this would suggest. Over the past decades, a number of private or semi-private associations have emerged as important loci in which arbitrations take place, each with its own set of arbitration rules, procedures, and affiliated arbitrators. By far the most important of these is the International Court of Arbitration, a branch of the International Chamber of Commerce (ICC) located in Paris.⁶ The ICC is the oldest, best financed, and most influential business organization at the international level, and has been a leader in the development of and advocacy for international arbitration. It has developed a very influential set of rules and guidelines for arbitration, which must be used by those who contract for its services, and have been influential throughout the arbitration world. Other important arbitration fora include the American Arbitration Association (AAA), the London Court of International Arbitration,

⁵ However, this does not preclude the existence of significant conflict over these standards. Dezalay and Garth (1996), for instance, found important conflicts between Continental European and US arbitrators regarding to contractual analysis and practice in the 1980's and 1990's, as the latter entered into a world previously dominated by the former. While there is some work suggesting that these differences have been diminished over time, as of yet we have no solid basis for a conclusion on this issue.

⁶ See the ICC website at www.iccwbo.org (accessed 22 Aug., 2006).

and the Arbitration Institute of the Stockholm Chamber of Commerce. While much arbitration occurs outside of these institutions, the rules and norms that they use have significant influence on the practice of contract development and interpretation in international business.

In this context, it is important to note that the ICC has developed not just arbitration rules, but a variety of guidelines for contract formation and language in international commerce. Some of these are directed at specific industries, such as shipping and banking, but others are quite general. The most influential of the latter are the “Incoterms”, a set of uniform definitions for the key terms used in contracts for international trade and investment, which are widely accepted by businesses and courts and widely used in current practice. The ICC’s work is dominated by the representatives of the corporations and industries that support its work, which include most of the leading players in the global economy. In combination with its influence on arbitration procedure, the ICC (and the other private players) had become a central force in defining the legal norms by which international business takes place. But it is not alone; industry organizations in such areas as insurance/re-insurance and maritime transportation provide similar services and play similar roles in articulating and enforcing norms of contractual and business practice in the global economy. This phenomenon, in turn, parallels that of other business self-regulatory organizations within and across industries, a key feature of contemporary regulatory capitalism.

As states have opened new spaces for the governance of commercial life *via* private contracting, however, they have also worked in various fora to shape and influence the directions taken by the major actors. Much of this work takes place in the three major international organizations created by governments to “police” the world of private international law – the Hague Conference for Private International Law (“Hague Conference”), the International Institute for the Unification of Private Law (UNIDROIT), and the United Nations Commission on International Trade Law (UNCITRAL).⁷ While these institutions have different origins and structures, they share the task of generating shared norms for private international law and dispute resolution. Their products include formal international treaties which states are bound to implement, model legislation to guide state-level legal reform, and model guides to contract formation and dispute resolution. Beginning with the New York Convention and then the formation of UNCITRAL, their work has gradually shifted from resolving traditional issue in the conflicts of law to attempts to shape and steer contractual practice and enforcement in the current context of greater party autonomy and choice.

⁷ The Hague Conference dates back to the late 19th century, and was established to resolve conflicts of law issues among the civil law systems of continental European states. UNIDROIT was created in 1926 to promote more substantive harmonization of laws among the same legal systems; although it includes representatives of states, it is in principle a private international body of legal experts. UNCITRAL was formed in 1966 to provide a forum to address issues of private law harmonization outside the highly polarized venue of the United Nations Conference on Trade and Development (UNCTAD). It was only with the formation of UNCITRAL that non-European civil law states, especially the U.S., began to play an active role in international private law projects.

Among the wide range of topics these institutions have addressed, a few stand out as illustrative of the way their work intersects with the world of private commercial dispute resolution. The United Nations Convention on Contracts for the International Sale of Goods (CISG), adopted in 1980 and a product of UNCITRAL, attempts to provide a standard form, structure, and usage for such contracts, and has gained slow but growing acceptance from states (which agree to recognize its terms in their domestic court systems) and in private contracting. UNCITRAL's rules for international commercial arbitration, promulgated in 1976, are now widely chosen by contracting parties and arbitration forums as a leading international standard. Similarly, UNIDROIT's Principles of International Commercial Contracts, produced in 1994, has had a significant impact on the way arbitrators interpret contracts. (Brower and Sharpe, 2004) In more recent work, UNCITRAL has developed a Convention on the Use of Electronic Communications in International Contracts, and in 2005 the Hague Conference agreed to a Convention on Choice of Court Agreements, which aims to facilitate the recognition of these agreements (in private contracts) in the courts of member states. While the impact of such agreements varies significantly, they indicate the degree to which states are involved in attempting to shape the world of private commercial contracting and arbitration.

States are more than shapers of private international commercial law, however; they are increasingly involved as parties in the process of dispute resolution. The world-wide spread of investor-state treaties, from bi-lateral agreements to its institutionalization in regional agreements such as the North American Free Trade Agreement (NAFTA), has changed the boundaries and expanded the scope of the impact of private international law. While states' sovereign status alters any such arrangement, in many of these agreements they have agreed to submit disputes with private investors to arbitration outside of their national courts. In most cases, these arbitrations look much like standard private proceedings, with the parties choosing from among the same group of elite arbitrators and drawing on substantive and procedural guidelines that are not drawn directly from national legal models. Indeed, the World Bank's International Center for Investor State Disputes (ICISD) is now a major location for such arbitrations, and a source in itself for generating new models of law regarding commercial arbitration.

When examined together, then, these various practices, institutions, and actors constitute a complex and fluid contract regime in which global commercial relationships are deeply immersed. It is a world of plural and often competing legal regimes, with an impact that ranges beyond purely "private" economic activity to shape the way states and private actors address some fundamental issues of the regulation of the global economy. In this world, norms and strategies of governance are continually moving between private and public realms. While key national legal regimes shape private contracting practice, privately generated norms of contractual practice are often incorporated into public regimes through the influence of arbitration practice and industry associations approaches to self-regulation. This mutual interaction of norms, strategies, and authority, I suggest, provides a crucial factor shaping the development of regulatory capitalism.

Contract Regimes and the Regulation of International Business: Contemporary Legal Perspectives.

As scholars of regulation and regulatory capitalism, what are we to make to these developments? What implications do they have for the ways we think about the regulation of global business? In this section, I approach these questions by reviewing three analytical themes that can be drawn from the contemporary sociology of law and legal literatures. First, I look at party autonomy as delegated authority, and explore how this regime puts much of the control of the technology of contracting in the hands of parties. I then examine two major debates among legal scholars that respond to this situation. The first of these centers on the question of whether an emerging *lex mercatoria*, based on contractual choice and party autonomy, is putting international commerce out of the range of effective public regulation. The second debate concerns the relative merits of legal competition and harmonization in the global economy. While these debates have much to contribute to analysis of the above questions, I suggest, scholars of regulation need to look beyond them to fully grapple with the challenge of harnessing the contemporary contract regime for public purposes.

Contracting, Delegated Authority, and the Limits of Control.

The new contract regime of party autonomy, choice of law, and arbitration can be seen as a form of delegated authority. In this view, states have decided that their goal of promoting greater global economic integration is best promoted by allowing commercial actors a wide scope of freedom on choosing the legal frameworks best suited to their own projects. As in most theories of delegated authority, it would follow that states can limit and even re-claim aspects of this autonomy when it suits their interests. However, we know that this type of principal-agent relationship is not so easy to control; once authority and power is delegated, the structure of the relationship changes, complicating the ability of the principal to control the agent. This is certainly the case in the contemporary contract regime, which is characterized by an ongoing struggle over the way in which this technology is applied and the purposes towards which it is put. Indeed, there are a variety of simultaneous struggles in play – between different parties to contracts, among national jurisdictions, among international institutions, and between private parties and public authorities – concerning the law that will govern contracts and the ways in which contractual disputes will be settled.⁸

These conditions create significant obstacles for the control of private contracting, for two kinds of reasons. First, the pluralism of norms and regimes for contracts and arbitration is always generating new models of law, and is very difficult for any single actor or coalition of actors to control. We have seen an ongoing competition between

⁸ It is important to note here that contracting is also an increasingly important technology for the governance of the public sector, within the public sector, and between public agencies and service providers. (Cooper, 2003) I do not address this dimension of contracting directly, but it must be brought into any complete account of contracting as a technology of governance in regulatory capitalism.

different national legal regimes, tensions between national and international regimes, and a constant back and forth between public and private providers of norms and dispute resolution. And my account has only scratched the surface. As Snyder (2002) points out, global economic networks of production, finance, and distribution are governed by multiple sites of authority. The complexity of this system, which can best be understood through case studies of particular sectors and industries (sources?), works against the possibility of control in itself, and because it is a source of creative tension that constantly generates new structures and norms for contracts and conflict resolution.

Second, primary control over the technology of contracting is in the hands of the parties themselves – particularly corporations, lawyers, business strategists, and other business specialists. These are the actors who negotiate and write the contracts, in the process deciding how to incorporate elements of different contractual models and practices. There is a tension or paradox here. On the one hand, networks of corporate managers in specific industries, legal professionals, credit rating agencies, and others are central to the development, spread, and enforcement of sector and industry norms for contracting. Models of contracting technology – regarding choice of law, arbitration, etc. – come to dominate certain sites through these networks, and this does provide opportunities for actors to shape contracting practice. At the same time, however, these actors are strategists aiming to find the best way to use contracting technologies to promote specific agendas of their own. McBarnet (2002, 1988) has advanced this case with great sophistication in her analysis of the role of business lawyers. While they are always advancing and diffusing certain norms, lawyers (and other business actors) are constantly looking for ways to “work” and modify – and often circumvent – established norms in order to promote the strategic interests of their clients. Indeed, the ability to develop innovative strategies is a key characteristic of members of elite echelons of business professionals and corporate managers. As a result, the very processes by which contractual and legal norms are diffused and consolidated carries within it the sources that limit attempts to exert final control over the shape of contracting technologies.

These considerations, I suggest, provide us with a way of understanding how the world of dispute resolution works in a world of multiple models and regimes for contracting. Central to this world is a continuing process in which the providers of dispute resolution regimes – states, business associations, international institutions – attempt to mobilize or “enroll” business and professional networks into a regime or technology of dispute resolution.⁹ When successful – for instance, in the influence of New York and London law and courts in global finance or of the ICC in arbitration – these networks serve as key actors in diffusing support for that regime through shaping the contracting practices of colleagues and clients. These dispute resolution systems, then, spread throughout transnational networks and sites to influence commercial practice far beyond their particular geographic or sectoral origins. Through the process of contractual choice mediated by networks of corporate and professional specialists, models of business

⁹ I use the concept of “enrollment” in the same manner as it is employed by Braithwaite and Drahos (2000). In their account of global business regulation, actors use various strategies to “enroll” the support of centers and networks of power to advance their preferred approaches to economic governance.

regulation *via* contracting spread throughout the transnational political economy, compete for influence, and modify the structure of regulation in contemporary capitalism.

Party Autonomy as a New Lex Mercatoria?

The spread of contractual choice, party autonomy, and private arbitration as tools for the governance of global commerce has ignited a debate regarding the concept of a “new” or “modern” *lex mercatoria*. (see Appelbaum, et al., 2001) Proponents of this concept contend that this emerging regime of governance shared fundamental features with the system of merchant self-governance of medieval and early modern Europe. The combination of contractual freedom, the articulation of international standards for contract formation and interpretation, the willingness of domestic courts to recognize and enforce choice of law and choice of forum clauses, and the autonomy of international commercial arbitration amount to the emergence of a system of global commercial law developed, modified, and enforced by the commercial community itself. In its most radical forms, this argument suggests that private international commercial law is in the process of separating itself (or “lifting off”, in Wai’s (2002) phrase) from any significant link to or control by national legal orders and jurisdictions. Depending on the inclinations of individual scholars, this development is applauded or condemned for its implications for the promotion of liberty, efficiency, and/or equity.

From the perspective of the study of regulation, this argument is striking in its parallel to some influential analyses of globalization. It presents the same case as those scholars who contend that corporations and markets are in the process of escaping from the control of sovereign states, and that whatever regulatory structures are emerging in the global economy are shaped by and responsive only to the imperatives of corporate power and market freedom.¹⁰ For their turn, the legal scholars who are critical of the modern *lex mercatoria* thesis offer many of the same arguments that are common to critics of this view of globalization. In the view of these critics, the *lex mercatoria* thesis ignores the fundamental role of states in helping to create, sustain, and regulate the world of governance by private contract. This argument, which relies on the kind of evidence I have presented above, holds that states have been active in encouraging the regime of governance by private contract – recognizing choice of law and forum, encouraging private arbitration, working through bi-lateral and multilateral fora to promote party autonomy – while attempting to steer these development through the regulation of appropriate contract practices in global business. From this perspective, the system of governance by contract ought to be seen as much a regulatory tool promoted by states, relies ultimately on states for enforcement, and does not come anywhere close to an autonomous transnational system of law.

The case for a modern, independent *lex mercatoria* is further compromised by the breaking down of the sharp boundaries between private and public international economic law over the past two decades. I have left this trend out of the picture until this point, for the purpose of highlighting the significance of private contractual governance,

¹⁰ Cutler (2003) presents the best and most comprehensive attempt to link these arguments.

but they are essential for understanding where contract regimes fit into the larger regulatory environment of global capitalism. Developments in areas as diverse as internet commerce, intellectual property, financial markets, and industry structure (and the list could go on) have made it clear that the processes of private and public international commercial law-making can not be compartmentalized. Increasingly, these and other issues are the focus of simultaneous norm articulation and regulation in the world of private contracts and in the world of public international law arenas such as the World Trade Organization (WTO), the EU, NAFTA, the World Intellectual Property Organization (WIPO) and the International Corporation for Assigned Names and Numbers (ICANN). While private contracting regimes address issues such as intellectual property rights in a digital economy and the structure of complex financial transactions, public law regimes are turning to questions such as the fundamentals of contract and property law and the regulation of international insolvencies. Structurally, two domains are particularly important for understanding these interactions. In the area of financial regulation, states and other public bodies are advancing (and competing over) codes of and institutions for transnational securities governance. The competition regarding stock market listings and accounting standards has direct and substantial impact in shaping the calculations of private contracting agents in the choice of law and forum practices, and *vice versa*. In the area of development bank finance, the IMF, World Bank, and many regional banks have begun including standards for how domestic legal systems treat classic private law practices as part of their “conditionality” packages, while becoming important players in the world of arbitration. These (and many other) private and public law interactions shape not only the content of commercial law, but also the process, as public and private law-making and enforcement bodies are beginning to enter into closer operating relationships.

It is clear, then, that the image of an autonomous world of private international commercial law and contractual governance does not get us far enough. Once again, there is a clear parallel to the literature on regulation. The *lex mercatoria* thesis highlights the themes of private governance and self-regulation that have preoccupied many analyses of the current global system (and domestic regimes) as a form of neo-liberalism. The regulatory capitalism thesis argues, correctly in my view, that it is more accurate and analytically fruitful to see the current environment as one characterized by the emergence, diffusion, and evolution of new regulatory structures. In this view, the neo-liberal market governance approach captures only one aspect of what is going on, and presents it in a distorted frame. But this does not exhaust the debate regarding how best to understand the role of contractual governance in regulatory capitalism.

Legal Competition vs. Harmonization.

A second ongoing debate in the legal literature, one which focuses on the dynamics of contestation between public and private in international commercial governance, can help advance the analysis. This is the debate over the relative merits of regulatory and legal competition or harmonization. For a number of law and economics scholars, contemporary choice of law practices have the potential to stimulate a pattern of regulatory competition that can advance the adoption of more “efficient” regulatory

regimes across jurisdictions and subject areas.¹¹ Emphasizing areas such as anti-trust law and securities regulation, these scholars argue that states should further reduce or even eliminate limits on the ability of private parties to choose regulatory regimes irrespective of the location of their activity. Drawing on the experience in the US, where contractual choice of law and forum has led to “efficiency-generating” competition in corporate governance (with the well-known outcome of the dominance of the small state of Delaware as the preferred state for corporate charters), these scholars believe that allowing private parties to choose between competing regulatory frameworks will push public authorities towards more innovative and efficient regulatory systems. Moreover, this argument does not anticipate or prefer the emergence of one dominant regulatory regime in most areas. Rather, it envisions the existence of competing models appropriate to different forms of transactions and the interests of different parties. Legal pluralism, in this view, is the most efficient environment for regulatory governance and contractual choice.

The law and economics argument is usually directed at proposals to limit contract choice through the harmonization of commercial law. The project of legal harmonization has deep roots in private law, and is responsible for the creation and much of the continuing work of the Hague Conference, UNIDROIT, and UNCITRAL. More recently, there have been sustained attempts by public actors to harmonize aspects of public, regulatory law and policy to address pressing issues of regulation on the bi-lateral, regional, and multilateral levels. (Leebron, 1996; Wiener, 1999) These harmonizing projects are justified on two different grounds. Among policy-makers and some critics of contemporary capitalism, harmonization is necessary to effectively limit the potential for the abuse of economic power which created by the ability of global economic actors to use contractual choice and other mechanisms to move across national jurisdictions. These abuses can be grouped into two categories – criminal activity which attempts to escape across jurisdictions, and the potential for a regulatory “race to the bottom” as economic actors learn how to avoid any effective regulation, whether environmental, financial, tax, or anti-trust. In both cases, unlimited contractual choice poses unacceptable dangers of private power in and over public authority. There is a second (though not necessarily incompatible) argument for harmonization, which is especially influential among scholars of commercial law and officials of harmonizing institutions. This is the claim that regulatory and legal pluralism creates economic inefficiency, by forcing economic actors to adjust their operations to the varied and often conflicting demands of different jurisdictions. From this perspective, influential in the creation of unified internal markets from the US to the EU, international legal harmonization contributes to a more predictable and certain environment for business, thus allowing commercial actors to use resources much more efficiently.

A robust program of legal and regulatory harmonization would indeed greatly curtail the scope of contractual choice. What is interesting, however, is the limited support for such a program outside of certain legal reform circles. Careful analyses have shown that many

¹¹ For good examples of a large literature, see O’Hara and Ribstein (2000), Stephan (1999), and Whincop and Keyes (1997).

global businesses, despite their occasional complaints, have learned to adjust and indeed profit from legal pluralism; they tend to be concerned more about the costs of “bad” uniform laws and the possible efficiencies they may bring. Business, and McBarnet (2002) has emphasized, will play both sides of the pluralism/harmonization debate, as it suits their interests. States tend to be in a similar position, willing to pursue harmonization in certain contexts, but unwilling to give up the advantages of pursuing their own directions in business law and regulation. Combined with the structural causes of legal pluralism that I have discussed above, it is no surprise that the harmonization that we have seen is limited in its scope, sectoral in its focus, and always under challenge from emerging business strategies.

Bringing Contracts Back In.

These debates raise important themes and offer useful concepts for understanding the role of private contracting in regulatory governance. But they remain limited by the tendency to treat regulatory regimes as relative closed systems – private or public, different national and international regimes. Our real challenge, as I have suggested earlier, is to understand how “private” projects and interests become inscribed into, and diffused among, publicly organized or backed regulatory regimes. Contractual choice can be a powerful mechanism in this process, because of its role in shaping and diffusing understandings of “good” and “efficient” models of commercial law. To the degree that contemporary regulatory regimes, at both the national and international levels, aim at the promotion of more integrated flows of capital and goods, the choices of commercial actors – as reflected in patterns in the choice of law, model contracting provisions and definitions that are widely adopted in commercial practice, and the patterns of legal interpretation common to private arbitration – are likely to have a significant impact in the choices of policy-makers, as they attempt to figure out how to achieve their goals and combat the constant efforts of business to manipulate rules for its own ends. The networks that link actors throughout the various regulatory fields – public and private – in contemporary capitalism provide another vehicle for the diffusion of private norms; in most substantive areas of regulation, there is constant movement of actors between public and private sectors, and regular communication between them.¹² In these ways, the norms and technologies of the current contract regime are inserted deep into the processes of regulatory governance.

There is a critical approach to contractual choice, emerging from a number of private law scholars, that recognizes this kind of interaction. These critics accept the inevitability of legal pluralism and contractual choice, but explore new ways of thinking about using the tools of contract law to shape and steer their impact. (Buxbaum, 2002; Muir Watt, 2003; Perez, 2002; Wai, 2002) From this perspective, the efficiency justification for regulatory competition through contractual choice forgets that regulatory regimes that may be most “efficient” in the view of contractual parties may not be the most satisfactory in light of the broader goals of regulation. Unlimited contractual choice, in this view, threatens to

¹² I rely on my own research on contemporary private international commercial law making, which focuses on the area of commercial finance, as a source for these characterizations. See Cohen (forthcoming).

narrow the agenda of public regulation in unacceptable and unnecessary ways. The question of finding a remedy for this situation, though, opens up some important ways of thinking about business regulation. While these critics do suggest the need to return to stricter limits on contractual choice in some areas, such as traditional public policy goals, they also offer the idea of using the tools of contract law regimes to shape contractual choice in new ways. Their suggestions are hard for the non-specialist to evaluate, but they do follow the same path as the attempts of regulation scholars who are trying to think of new approaches to use delegated authority for public purposes. There is much potential overlap as well with the analysis of contracting as a tool of public service provision and regulation. The notion of contract regimes as a potential tool of regulation is one that opens a variety of new directions for thinking about the relationships between public authority and private actors, which may be of great relevance for policy makers and scholars alike.

While there are good reasons to be skeptical of how far contract regimes can be stretched in this direction, these suggestions open up a variety of fruitful directions for understanding what regulation is, and can be, in contemporary capitalism. Contractual choice, private dispute resolution, and legal pluralism have helped create a world in which multiple regimes for the governance of global business coexist and compete in a transnational context. In this situation, it is unlikely that simply limiting the scope of choice through some combination of national law and international cooperation will be successful in providing successful regulation of global business. Two promising alternative strategies approaches take on new significance in this context – the attempts of social groupings such as consumer, labor, human rights campaigners, and environmental organizations to use market pressures to force corporations to use their power over product chains to protect the rights of workers and the environment, and the emergence of “compacts” among corporations and social interests, such as the forest management initiatives. From the perspective I have advanced here, these can be understood as ways of reforming and using contract regimes to pursue public and social goals well beyond the traditional emphasis on economic efficiency. (Perez, 2002) As these examples suggest, we will need more creative engagement with the steering of private contractual choice and dispute resolution, and with the world of delegated and self-regulation more generally, to find a means to ensure that regulatory capitalism embodies the priorities of the public, and not just the projects of the regulated.

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