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International 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.¹

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The 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.²

**INTRODUCTION**

The mass of rules, practices, principles, and mores that we call “the law” has traditionally been analyzed, categorized, applied, and taught according to the type of relationship affected: administrative law for disputes arising out of the administrative power of the state vis-à-vis its citizens; family law for disputes arising out of relationships between biological and legal relatives; tort law for disputes arising out of relationships between (legal) strangers; contract law for disputes arising out of voluntary agreements between (mostly) non-relatives; and so on. This seems an intuitive way of thinking about law, and the most efficient way to teach it.

But once distinctions have been drawn and distinct sets of rules applied to distinct types of relationships, the lines between the fields harden, as each develops its own particular emphases and specialized jargon. Under contract law, the motivations of the parties are largely irrelevant, while in criminal law, determining the accused’s subjective intent is crucial. Depending on which body of law applies, “deemed” can mean “forced to conclude”, “assumed”, or “decided by exercise of discretion”. These variations are justifiable based on the different aims and purposes of different areas of law, but there is no doubt that they contribute to a fragmentation of the law into discrete and sometimes mutually inconsistent sub-disciplines.

Much of the literature on transnational law indulges in a technocratic utopianism, hailing the dawn of a new era of globally-harmonized, efficient commercial law that evolves at the speed of business.³ Henceforth, we have been promised, national borders will no longer serve as arbitrary speed bumps along the forward path of international commerce. But globalization does not mean unification, and the future of commercial law will be as fragmented as the past. This article argues that a specific and previously-unidentified type of fragmentation is gaining momentum within commercial law: even as the law of commercial relationships increasingly globalizes, it will increasingly fragment along industry sector lines. In other words, the old distinctions are indeed breaking down, but they are changing, not disappearing.

Adapting a term coined in the public international law context, I call this phenomenon “sectoral fragmentation”. Distinctions between different kinds of commercial relationships (sales of goods, leases, franchises, joint ventures, etc.) will matter less, but boundaries between industry sectors 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 commercial legal regime, a contract 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.

Sectoral fragmentation plays out as a common theme running through a variety of phenomena related to globalization and the development of transnational law. From a theoretical point of view, it may be understood in terms of interest-based theories of international cooperation, and as a specific instance of a broader trend toward functional differentiation within the international legal system. In addition, the phenomenon of sectoral fragmentation is consistent with autopoeitic theories of law, which see law as an emergent and self-sustaining property of distinct social groups.

Contracting practices have always varied from industry to industry, so private governance is inherently fragmented on sectoral lines. Now, however, the structure of private governance is recapitulated in public governance, as formal contract law increasingly incorporates industry practices. 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 may simply validate, incorporate, or supplement privately-generated standards. Far from being “suffocated” in the era of globalized commerce, contract law is being remade in the shadow of contract.

An investigation of sectoral fragmentation also helps to fill a gap in the literature on transnational law. 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. Largely missing from this

4 These theories posit that the dominant form of international cooperation is shifting from state-centric structures to transnational groups defined by common interests. See infra, Section III.A.
6 Gunther Teubner and Niklas Luhmann are the best-known proponents of this school of thought. See, e.g., GUNTHER TEUBNER, LAW AS AN AUTOPOEITIC SYSTEM (1993). NIKLAS LUHMANN, A SOCIOLOGICAL THEORY OF LAW (1985, English translation of RECHTSSOZIOLOGIE (1972). Whether such theories are normatively attractive is a different matter, one that is largely beyond the scope of this article but is briefly addressed infra, in Part III.
10 See generally Shaffer, supra note 7. 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.” Zumbansen, supra note 8, at 134.
theorizing is the content of transnational legal rules, which is seldom considered outside of studies of specific industries or supply chains.\textsuperscript{11} What rights and obligations will be provided by privately-generated transnational law, and how will it be organized? Whatever one’s scholarly or political agenda, answers to these questions are needed. “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.”\textsuperscript{12} In identifying the phenomenon of sectoral fragmentation and describing its features, this article provides a partial answer to these questions.

This article explores the phenomenon of sectoral fragmentation: its causes, its characteristics, and its consequences. Part I describes the concept of fragmentation and its relationship to theories of transnational governance. Part II argues that sectoral fragmentation is an inevitable consequence of the rise of transnational commercial communities as the key drivers of transnational legal rule-making, and sets out the mechanisms by which private governance leads to sectoral fragmentation of law. Finally, Part III, the Conclusion, briefly explores the broader political and normative consequences of a sectorally fragmented transnational contract law.

I. 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”).\textsuperscript{13} The gist of the report is that public international law at one time constituted a more-or-less coherent and systematic body of rules governing state interactions; as global civil society has become divided into specialized and autonomous “spheres of social action”,\textsuperscript{14} international law has 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 encompass both a range of non-state actors previously not governed by international law, and apply to a wider range of conduct than international law previously regulated.\textsuperscript{15} 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.\textsuperscript{16} The ILC Report chose to consider only normative fragmentation, on the ground that

\begin{itemize}
\item\textsuperscript{11} Cite some examples.
\item\textsuperscript{12} Shaffer, supra note 7, at 21.
\item\textsuperscript{14} Id. at para. 7.
\item\textsuperscript{15} Examples include the emergence of partly self-contained regimes of international investment law, environmental law, trade law, and human rights law.
\item\textsuperscript{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.
\end{itemize}
“The issue of institutional competencies is best dealt with by the institutions themselves.”

This choice met with justified criticism. Normative and institutional fragmentation can be distinguished conceptually and do not necessarily occur in tandem, but they cannot be separated in practice because they both are driven by the same forces and reinforce each other.

For many public international lawyers, fragmentation is cause for concern, since it threatens the “unity”, “universality”, “systematicity”, and “coherence” of international law. Koskenniemi and Leino have called concern about the loss of coherence in international law a “postmodern anxiety”, bound up as it is with anxieties about the breakdown of traditional normative orders in all aspects of society. However, worries about fragmentation are not merely the feverish 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.

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. For these commentators, “… complexity is not necessarily a...
reason for complaint. Simplicity is not perforce a value in itself.\textsuperscript{25} 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.”\textsuperscript{26} 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;\textsuperscript{27} 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 law.\textsuperscript{28} 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, “For most scholars, the traditional picture is one in which private law is a coherent, unitary, and national system.”\textsuperscript{29} Systematicity and coherence have traditionally been seen 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.

While public international law began with a (possibly apocryphal) unity\textsuperscript{30} and has subsequently fragmented both normatively and institutionally, commercial law began as territorially fragmented across national boundaries but has long worked toward normative (if not institutional) unification. The numerous uniform law projects, going back at least to the 1913 Franco-Italian Code of Obligations, “provide ample evidence … that there has always been a substantial need for the transnationalization of the legal relationships of international commerce.”\textsuperscript{31} 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\textsuperscript{32} and because the basic regulatory requirements of trade are the same everywhere.\textsuperscript{33} 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. There is no way back to a world without globalization, so we had best set about understanding the world with it.\textsuperscript{34}

In general, though, the discourse on transnational commercial law, continues to tell a story of harmonization and unification, mostly as a by-product of the drive for greater

\textsuperscript{26} Id. This “classical” notion of law has been in retreat since the beginning of the 20\textsuperscript{th} century and has now entirely retired from the field of intellectual battle.
\textsuperscript{27} Zumbansen, supra note 5, at 796. For a critique of this perspective as improperly (or at least prematurely) deriving legality from broader values, see Niklas Luhmann, Some Problems with Reflexive Law, in STATE, LAW AND ECONOMY AS AUTOPOIETIC SYSTEMS 389 (Gunther Teubner & Alberto Febbrajo eds., 1992).
\textsuperscript{28} Michaels, supra note 23, at 501 (observing that the debates over fragmentation in the public international law literature also “bear specific affinities to private law discourse”, although the terminology employed often differs).
\textsuperscript{29} Jan Smits, Dutch Report: Coherence and Fragmentation of Private Law, 2012,1 EUR. REV. PRIV. L. 153, 155 (2012). This conception has always been less widely shared by common law scholars than among civilians.
\textsuperscript{30} That is, the International Court of Justice and Permanent Court of International Justice applied bodies of rules that were small in number, conceptually coherent, and global in scope.
\textsuperscript{31} KLAUS PETER BERGER, THE CREEPING CODIFICATION OF THE LEX MERCATORIA 34 (2d edn. 2010).
\textsuperscript{32} Bryan H. Druzin, Anarchy, Order, and Trade: A Structuralist Account of Why a Global Commercial Order is Emerging, 47 VAND. J. TRANSNAT’L L. 1049, 1087 (2014). Druzin 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 1087-1088.
\textsuperscript{33} Id. at 1068.
\textsuperscript{34} Zumbansen, supra note 5, at 770, citing Martti Koskenniemi, International Law in Europe: Between Tradition and Renewal, 16 EUR. J. INT’L L. 113 (2005).
efficiencies in international commerce.\(^{35}\) Indeed, much of the scholarly commentary on globalization of commercial law has a celebratory quality.\(^{36}\) However, modern commercial law displays both normative and institutional fragmentation, just as modern public international law does. In domestic jurisdictions, commercial law is no longer as systematic as it once was,\(^{37}\) and transnational law is significantly more divided than national law.\(^{38}\) The phenomenon of fragmentation has played out differently in the transnational commercial law context than it has in public international law, but they are fundamentally the same phenomenon.

The globalization boosters mistakenly equate globalization with unification. In fact, the phenomenon of “convergence” coupled with “informed divergence” is a hallmark of many areas of globalization—what Glenn calls “sustainable diversity” among disparate legal traditions.\(^{40}\) 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 commercial 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 different 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 will therefore accompany each other.

### II. Legal Fragmentation, Private Governance, and Transnational Law

The literature identifies four main types of fragmentation, or four routes by which fragmentation occurs: proliferation of sources of legal rules, codification of distinct legal subfields, incomplete or ineffective harmonization, and proliferation of adjudicatory bodies. With respect to transnational commercial law, all four can be traced to the rise of private governance, and to the international commercial-legal community’s response to increasing complexity.\(^{41}\) Despite the dominance of uniform law initiatives in the history of transnational legal codification, the story of transnational commercial law is ultimately a story of fragmentation.

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\(^{35}\) See, e.g., Druzin, supra note 32, at 1053 (arguing that “The basic structure of trade drives toward convergence—a fact that may be discerned as much on the macrolevel of state actors as it is on the microlevel of private parties.”). Druzin does acknowledge that market-induced uniformity is not perfect and is often overstated. Id. at 1076.

\(^{36}\) Zumbansen, supra note 5, at 770. See also Shaffer, supra note 7.

\(^{37}\) See, e.g., Jay M. Feinman, *Relational Contract Theory in Context*, 94 NW. U. L. REV. 737, 738-39 (2000) (“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.”).

\(^{38}\) See infra section III.B.

\(^{39}\) These terms were coined and elucidated by Anne-Marie Slaughter; see *A NEW WORLD ORDER* (2004).


A. Proliferation of Sources of Law

Starting in the mid-20th 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.42

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 behaviour in ways that are distinct from their legally binding character,43 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.44

The proliferation of sources in itself leads to fragmentation, but the larger factor is that these different sources of legal governance overlap partially 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.”45 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.46

Aside from the organs of the European Union, 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

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45 Smits, supra note 29, at 166.
46 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”).
NGOs like the Hague Conference on Private International Law.\textsuperscript{47} In other words, within the multilevel system of governance that predominates in international private law, non-state actors are increasingly prominent.\textsuperscript{48} Thus far, rules generated through private governance processes have served largely to fill gaps in public governance, but now private governance has moved beyond those gaps and is dominating more broadly.

The rise of private governance is partly due to a stagnation in formal international rulemaking\textsuperscript{49} and partly due to an active or passive delegation of regulatory power by states to supranational and private organizations.\textsuperscript{50} This delegation is largely 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, without undue and ill-fitting intervention by public authorities”.\textsuperscript{51} Skepticism about the need for and effectiveness of public regulation of private relationships is most prevalent with respect to commercial transactions.\textsuperscript{52} 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.”\textsuperscript{53} 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 \textit{ratio} of transnational law.”\textsuperscript{54}

This does not mean, however, that non-state transnational law is entirely autonomous from state law and state courts. At minimum, transnational law, regardless of its origin, depends on states for enforcement.\textsuperscript{55} But even before disputes arise and judgments must be enforced, transnational law is strengthened when it is transposed into national laws.\textsuperscript{56} 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, they may treat transnational law as facts in domestic litigation (such as when international commercial norms are treated as trade usage or customary law), and they may permit private parties to choose to be governed by transnational law over national law (by enforcing arbitral

\textsuperscript{47} The academic literature on this topic has proliferated in the last decade. For a brief summary, see Stavros Gadinis, \textit{Three Pathways to Global Standards: Private, Regulator, and Ministry Networks}, 109(1) AM. J. INT’L L. 6-9 (2015).

\textsuperscript{48} See BÜTHE & MATTLI, supra note 41); Riles, supra note 22.

\textsuperscript{49} Joost Pauwelyn, Ramses A. Wessel & Jan Wouters, \textit{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 cautions about entering into new international obligations and structures. \textit{Id.} at 738-44.

\textsuperscript{50} Shaffer, \textit{supra} note 7, at 15 (arguing that when such delegation occurs, “states become agencies that implement rules of extra-state origin”).

\textsuperscript{51} Zumbansen, \textit{supra} note 5, at 799.

\textsuperscript{52} Id. at 803.

\textsuperscript{53} Druzin, \textit{supra} note 32, at 1058.

\textsuperscript{54} Cotterrell, \textit{supra} note 42, at 517.

\textsuperscript{55} See Lawrence Friedman, \textit{Erewhon: The Coming Global Legal Order}, 37 STAN. J. INT’L L. 347, 356–7 (2001). Friedman argues that sets of contractual provisions with quasi-legal power, like the Hague-Visby Rules and the UCP, do not on their own constitute autonomous norms created within the international economy: “In the end 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.”

\textsuperscript{56} Even in areas dominated by private contractual governance, the state continues to play an important role. See, \textit{e.g.}, Tehila Sagy, \textit{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).
awards applying transnational law).\textsuperscript{57} 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.\textsuperscript{58} But these processes also 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 type of fragmentation identified in the literature arises from the promulgation of increasing numbers of codifications, each enacting rules for different kinds of private relationships and cross-border transactions. These often overlap, but also leave aspects of private relationships ungoverned by any transnational rules.\textsuperscript{59} 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.\textsuperscript{60}

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.”\textsuperscript{61} (Private law within national systems has also fragmented in this way, with codifications of distinct aspects of domestic law,\textsuperscript{62} but at least domestic laws begin from a presumption of unity and benefit from relatively unified mechanisms for rule-making, rule-implementing, and rule-enforcing.) As a result, what Berger has called the “creeping codification” of transnational private law\textsuperscript{63}


\textsuperscript{58} Cotterrell, *supra* note 42, at 520 (“… contemporary *lex mercatoria*, developed through private arbitration practice and sometimes described as an autonomous non-state transnational commercial law, in fact involves a continuous competition and interplay between state and non-state institutions.”). See also Michaels, *supra* note 57, at 465 (“However, 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.”).

\textsuperscript{59} José Angelo Estrella Feria, *The Relationship Between Formulating Agencies in International Legal Harmonization: Competition, Cooperation, or Peaceful Coexistence?*, 51 LOYOLA L. REV. 253, 272 (2005) (“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.”).

\textsuperscript{60} Smits, *supra* note 29, at 156.

\textsuperscript{61} Ferreri, *supra* note 25, at 14.

\textsuperscript{62} See, e.g., Mel Kenny, *Globalization, Interlegality and Europeanized Contract Law*, 21 PENN ST. INT’L L. REV. 569, 570 (2003) (“Further 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 statutes for distinct types of contractual relationships (between individuals, between agricultural collectives and farmers, between units of socialist production), and then the further fragmentation of the law of commercial contracts into purely domestic and those with a foreign element).

\textsuperscript{63} BERGER, *supra* note 31.
has led to the same kind of systemic incoherence in domestic law that scholars have decried with respect to fragmentation of international law.64

C. Fragmentation Through Incomplete or Ineffective Harmonization of law

Third, laws that have been formally harmonized may fragment (or remain fragmented) when national courts make reservations to them,65 enact different versions of them,66 apply different language versions of them that are inconsistent,67 or apply them in disparate ways consistent with their own distinct national laws and traditions. This last phenomenon, often referred to as the “homeward trend”, is the subtlest but also the most difficult to remedy.68 As Ferreri wryly observes, “In 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.”69

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 continued disparate application of uniform laws by national courts, will leave Community law fragmented.70 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.”71

D. Proliferation of Adjudicative Bodies

66 Gopalan, supra note 40, at 128.
69 Ferreri, supra note 25, at 15 (expressing concern that, if national legislatures amend uniform law instruments when they adopt them, the result will be harmonization that can “at best be fragmented”).
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. 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 function as expressions of party autonomy rather than public regulation. Prominent examples include the Chancery Court of Delaware, the Technology and Construction Court of the High Court of England and Wales, and the Singapore International Commercial Court.

The rationales given for 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. 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”. For these reasons, specialist courts have great institutional capacity and incentive to stay within the “boundaries” of the particular disputes that are brought before them, and little institutional capacity or incentive to reassert universal norms or keep watch over the conceptual coherence or systematicity of the law.

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, but it undoubtedly plays a prominent role in the resolution of cross-border commercial disputes, especially in particular industry sectors (such as construction and energy).

Arbitration is likely to abet legal 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. 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

\[^{72}\text{Zumbansen, supra note 5, at 799.}\]
\[^{73}\text{Id. at 774.}\]
\[^{74}\text{http://www.sicc.gov.sg/About.aspx?id=21.}\]
\[^{76}\text{As indicated by the 2013 International Arbitration Survey: Pricewaterhouse Coopers Queen Mary University of London 7, available at http://www.pwc.com/gx/en/arbitration-dispute-resolution/index.jhtml. To the extent that arbitrators and judges apply the governing laws in a divergent manner, a disparity between industries in the use of dispute resolution methods itself contributes to sectoral fragmentation. As will be discussed in this section, there is reason to believe that arbitrators and judges have different perspectives that may lead them to apply the same laws differently.}\]
\[^{77}\text{Joshua Karton, THE CULTURE OF INTERNATIONAL ARBITRATION AND THE EVOLUTION OF CONTRACT LAW 78 (2013).}\]
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, its systemic biases, arbitrators’ economic and other incentives, the social structure of the profession, and the collegial dynamics of arbitral tribunals, 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. Thus, specialized adjudication, itself a product of legal fragmentation, leads to greater fragmentation.

III. SECTORAL FRAGMENTATION OF TRANSNATIONAL CONTRACT LAW

As the review above 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 fragmented commercial 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 II provides a partial answer to these questions: transnational commercial law fragment into different bodies of rules for different industry sectors.

Since before there was legal enforcement of commercial contracts, 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 of course, 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 are relate to important social norms (like family law) or because of the potential for abuse of a dominant position (as in consumer and employment law). Under national legal 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 or make up a jurisprudence constante.

What is now changing is that, 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.

78 Id.
82 Todd Tucker, Inside the Black Box: Collegial Patterns on Investment Tribunals, 7(1) J. INT’L. DISP. SETTLEMENT 183 (2016).
83 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 333-334 (4th edn. 2002). Previously, the only available action for breach of a commercial agreement was for recovery of a money debt. Id. at 329.
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,” while “generalist” rules apply broadly to one or more categories of transactions across all areas of commerce.

To clarify, I am not concerned with the notion that different rules may apply to different types of transactions—what one might call functional fragmentation of 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 entirely unremarkable for them to be governed by different rules.

Indeed, contract law has long been subdivided on exactly this functional basis. In civil law jurisdictions, the contract sections of civil and commercial codes and of obligations laws typically categorize contracts in this way, and impose different sets of mandatory and derogable rules on different types of transactions. Categorizing the contract is typically the first step in contract litigation in civilian systems. Although common law jurisdictions have not engaged in such efforts to systematically categorize contracts via legislation (with the important exception of the US 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. Transnational rulemaking activities have also proceeded on the basis of establishing rules for particular categories of transactions.

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 be 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 I 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 globalized commercial networks will tend to drive sectoral fragmentation because they benefit from the development of globally-harmonized, industry-particularist bodies of substantive law. Accordingly, legal orders dominated by private governance, like transnational commercial 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

84 Note that consumer protection law is excluded from the analysis here, although it is a potentially important part of the overall picture; this chapter deals only with relationships between commercial parties.
86 The most obvious examples are the Sales of Goods Acts, which involved some of the earliest efforts at codification of the common law of contract. In the United States, the Uniform Commercial Code is organized on this basis: Article 2 deals with sales, Article 2A with leases, Article 3 with transfers of negotiable instruments, and so on.
87 Examples include the UN Conventions on Contracts for the International Sale of Goods, the Assignment of Receivables in International Trade, Contracts for the International Carriage of Goods Wholly or Partly by Sea,
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 issues (and therefore develop common technical expertise), are subject to similar risks and economic pressures, and contract repeatedly with each other or with the same kinds of 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.”

The prevailing approach in transnational law scholarship sees functional differentiation in law as a reflection of the functional differentiation of global society—different social groups operate relatively autonomously from each other, and therefore exhibit distinct senses of what kinds of rules are rational and what kinds of conduct are acceptable. Roughly the same argument can be put a variety of ways. In legal scholarship, this view is most associated with Teubner, who writes that “Internal differentiation of law can be seen as a response to the fragmentation of society in various systems and discourses… ”. Similarly, Cotterrell describes “networks of community” as the locus of transnational rule-making. Such networks are defined objectively by “stable sustained interactions” between members of the community and subjectively by a “sense of attachment” among community members. These lead to the development of “webs of common understanding” that can, over time, gain the force of law.

Outside the legal academy, Sassen 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”

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88 Michaels, supra note 57, 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 Michael’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 a rule derives from state or non-state sources.


90 Teubner, supra note 21, at 916.

91 See generally ROGER COTTERRELL, LAW, CULTURE AND SOCIETY; LEGAL IDEAS IN THE MIRROR OF SOCIAL THEORY 68-73 (2006); Cotterrell, supra note 42.

92 Sassen is difficult to pigeonhole, but most of her appointments have been in sociology departments.
made possible by modern information technology. These assemblages constitute distinct social spheres that integrate territorial and de-territorial, vertical and horizontal, private and public ordering processes. In the constructivist international relations literature, Adler describes “communities of practice”, which “consist of people who are informally as well as contextually bound by a shared interest in learning and applying a common practice.” Such a common practice, “in turn, [is] sustained by a repertoire of communal resources, such as routines, words, tools, ways of doing things, stories, symbols, and discourse.”

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 a network in the economic sense. The most important economic characteristic of networks is that the network’s 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.” The impact of network effects is such that, “As 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. In simple terms, the emergence of standardization only encourages further standardization.”

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. 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 stratificatory logic of pre-modern society. Given the social complexity of modern society,

93 SASKIA SASSEN, TERRITORY, AUTHORITY, RIGHTS: FROM MEDIEVAL TO GLOBAL ASSEMBLAGES (2006).
94 Pincite needed.
96 Id. at 15 (quoting William M. Snyder, Communities of Practice: Combining Organizational Learning and Strategy Insights to Create a Bridge to the 21st Century, Community Intelligence Labs (August 1997), http://www.co-i-l.com/coi/knowledge-garden/cop/cols.shtml). The concept of communities of practice was originally developed in the work of Jean Lave and Etienne Wenger on education and learning theory. Id. at 15 fn 116.
97 Id. at 15 (emphasis in original).
99 Id. at 422.
100 Druzin, supra note 32, at 1084.
101 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 Graff-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.”).
the transnational logic of functional differentiation is deepening and strengthening at the expense of the nation-state’s territorial logic.  

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.”

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.

The transnational setting “opens up a vista on endless confrontations and conflicts between different interest formations, rationalities, and stakes”. 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 the generation and content of 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.

With respect to contract law, state networks “cannot provide reliable frameworks of institutional or normative design” to be transposed into the transnational arena. Rather, 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 identified as the hallmarks of distinct communities. The structure of these sectoral networks will determine the evolution of transnational contract law.

Commercial parties prefer industry-particularism in law, although they may not conceive of the issue in those terms. 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,

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103 Cotterrell, supra note 42, at 503 (“… fragmentation seems a growing feature of law in general, so that the concept of legal pluralism, its use once largely confined to sociological scholars and especially legal anthropologists, is now part of the everyday discourse of well-informed jurists.”); Ralf Michaels, Global Legal Pluralism, 2009,5 ANNUAL REV. L. & SOC. SCI. 243 (2009).

104 Cohen, supra note 101, at 1053. See also Michael Waibel, Interpretive Communities in International Law, in INTERPRETATION IN INTERNATIONAL LAW (Andrea Bianchi et al. eds., 2014).

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

106 Zumbansen, supra note 8, at 131.

107 See supra note 98-100 and accompanying text.

108 See supra note 89 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.” Druzin, supra note 32, 1063 (citing Ellickson’s classic study of ranchers in Shasta County, California; ROBERT ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE BUSINESS DISPUTES (1994).
fair, and enforceable. Speed, cost, privacy, and 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, they probably mean a commercially reasonable result similar to what they would have received from the commercial relationship if the contract had not been breached, or at least what they would have received from negotiation if the other side 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… parties value certainty and predictability, including the application of known legal principles.” If the outcomes of adjudication are predictable, legal counsel can provide sound advice to their clients and commercial parties in general know better how to act and how to price their contracts. When disputes do arise, settlements are both more likely to be reached and easier to price accurately.

The dangers of unpredictability are multiplied when commerce crosses borders. Counterparties may operate on the basis of different implicit norms, increasing the risk of disputes. When disputes arise, the dispute resolution process, the applicable law, and the enforceability of an eventual judgment may be unclear. For example, it is often observed that the choice of law process has traditionally been marred by complexity and uncertainty, 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. 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.” Higher transaction costs can deter commercial parties from entering the cross-border market altogether.

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

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111 See, e.g., Joshua Karton The Arbitral Role in Contractual Interpretation, 6(1) J. INT’L DISP. SETTLEMENT 1, 31 (2015).
112 BERGER, supra note 31, at 10 (citing various German-language sources characterizing choice of law in courts as “a jump in the dark”).
113 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).
115 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.”); 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.”).
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 derogable and derived from commercial practice. 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 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.

Industry-particularism, especially at the global level, provides commercial parties with both 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 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 each other. 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-particularist 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:

116 Patterning bright line rules on prevailing commercial practices has a long pedigree in codification projects in several jurisdictions. See Lisa Bernstein, The Questionable Basis of Article 2’s Incorporation Strategy, 66 U. CHI. L. REV. 710 (1999) (describing the approach taken by the drafters of Article 2 of the Uniform Commercial Code as the “incorporation strategy” because it was intended to incorporate commercial norms into legal rules).
• **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. A good example is the set of construction contracts forms developed by FIDIC (the International Federation of Consulting Engineers). 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 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. In England, the House of Lords formally recognized the Hague-Visby Rules as applicable by

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117 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).

118 The various FIDIC forms are summarized at http://fidic.org/bookshop/about-bookshop/which-fidic-contract-should-i-use.

default to international bills of lading. Revisions promulgated in Hamburg (1978) and Rotterdam (2009) under the auspices of UNCITRAL represent modern industry practice but have not yet been widely adopted by states.

- **“Common law” principles** arising from the decisions of international tribunals on international commercial disputes. These go under various names (lex mercatoria, general principles of 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 and lex sportiva. More loosely, commentators agree that a de facto system of precedent (i.e., technically non-binding, but normally followed) now exists in some areas of international contract law, especially with respect to sports.

- **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 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.

Except for case law, these forms of lawmaking all involve some kind of codification of standard practices. Transnational contract law as a whole is sometimes characterized as codified trade usages, 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. Parties within a common industry often did not share significant common

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120 Ji MacWilliam Co Inc v Mediterranean Shipping Co SA (The Rafaela S) [2005] UKHL 11; [2005] 2 AC 423 (HL).

121 The seminal publication on the topic describes published arbitral awards as “the source material from which [this] 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 XXIII 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(3) J. WORLD ENERGY L. & BUS. 214 (2011) (describing lex petrolea as “legal rules developed by arbitral tribunals … that reflect the specific characteristics of the international exploration and production industry”).

122 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.


124 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(4) TRANSNAT’L LEG. THEORY 345, 356 (2012) (“… with a view to imbuing them with more certainty, these usages of trade have been collected and written, and to a certain extent codified and ‘positivised’, by international organisations of traders, such as, quintessentially, the International Chamber of Commerce (ICC).)”

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. 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.

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. To the extent that *lex mercatoria* has any real-world impact, it is because states are willing to enforce arbitral awards applying it.

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—97.7 per cent, according to one study—the parties nominate the law of some state. An unknown but likely significant percentage of the remaining contracts 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. Moreover, of the cases where contracting parties do choose *lex mercatoria* or general principles as the governing law, most of these come about due to awkward compromises between private parties and government entities, where they cannot agree to be bound by the same national law.

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”. 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, this would still give adjudicators enormous flexibility.

Where transnational law has met with favour, it has been in codified forms that can be read, understood, and applied in a predictable manner. These codifications have been

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126 See Cuniberti, supra note 113.
127 Cf Michaels, supra note 57, at 466. (“If 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.”)
130 Gimenez Corte, supra note 124, at 355.
131 Cuniberti, supra note 113, at 384.
133 Cuniberti, supra note 113, at 391.
134 Karton, supra note 77, at 130.
undertaken primarily by industry players and industry groups, which draft contract terms, product standards, and so on. Unsurprisingly, these differ based on 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. 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. When state law privileges trade usages over default rules, 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 law 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 relevant evidence when interpreting contracts, 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 when applying general rules of contract law. This is sometimes referred to as “contextualized adjudication”—the phenomenon of courts considering the commercial context of a transaction in adjudicating disputes. Contextualized adjudication inevitably leads to sectorally fragmented law.

A good example is the landmark House of Lords judgment in Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas). 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 profits on the entirety of the follow-on fixture, 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 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.” It was not contested that the “settled understanding” of the shipping industry

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136 The one significant exception is the EU.
137 Cuniberti, supra note 113, at 393-94.
138 See, e.g., Bernstein, note 124, at 1.
140 Ibid 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
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.141

In this judgment, the House of Lords effectively raised the commercial context of the deal above general law when determining the scope of contractual liability, justifying this decision by reference to the 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.142 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.143 Subsequent cases have cited The Achilleas to hold that determinations of remoteness in other industries should be made based on the commercial expectations of members of the industry.144 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.

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 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

approaches taken by the different Lords, see Greg Gordon, Hadley v Baxendale revisited: Transfield Shipping Inc. v Mercator Shipping Inc., 13(1) EDINBURGH L REV. 125, 127-9 (2009).

142 See Edwin Peel, Remoteness re-visited, 125(Jan) L. Q. REV. 6 (2009) (“In The Achilleas … 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.”)
143 The Achilleas 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. MFM Restaurants Pte Ltd v Fish & Co Restaurants Pte Ltd [2010] SGCA 36; [2011] 1 SLR 150. See Mindy Chen-Wishart, Legal transplant and undue influence: lost in translation or a working misunderstanding?, 62(1) INT’L & COMP. L.Q. 1, 4 fn 16 (2013) (characterizing MFM Restaurants as a rare exception to the general rule that, in Singapore, English contract and commercial decisions are “overwhelmingly accepted as persuasive and routinely applied to like effect”).
144 See, e.g., John Grimes Partnership 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).
negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties. 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.

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”. They prevail over contrary provisions in the CISG itself (except for a small number of mandatory provisions) and have even been held to prevail over the apparent plain meaning of provisions in the parties’ contract.

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. In other words, market entrants effectively have an obligation to inform themselves of usages in the industry.

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 and the Principles of European Contract Law. The online CENTRAL compilation of lex mercatoria rules, Principle I.2.2, states a similar rule. 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

145 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 4.7.

146 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.

147 See, e.g., CLOUT Case No. 425 [Oberster Gerichtshof, Austria, 21 March 2000], available at www.cisg.at/10_34499g.htm; CLOUT Case No. 240 [Oberster Gerichtshof, Austria, 15 October 1998].

148 ICC Case No. 9443 of 1998, [2002] JOURNAL DE DROIT INTERNATIONAL 1106. 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; CLOUT Case No. 292 [Oberlandesgericht Saarbrücken, Germany, 13 January 1993]; CLOUT Case No. 777 [U.S. Court of Appeals (11th Circuit), United States, 12 September 2006].

149 See, e.g., CLOUT Case No. 240 [Oberster Gerichtshof, Austria, 15 October 1998].

150 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 edn., Ingeborg Schwenger 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.) 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. CLOUT Case No. 425 [Oberster Gerichtshof, Austria, 21 March 2000], also available at www.cisg.at/10_34499g.htm.

151 Art. 1.9, which repeats verbatim the language of CISG art. 9(2).

152 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.”).

153 http://www.trans-lex.org/903000/.
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, and they are overridden only by express agreements to the contrary or by supervening mandatory law. 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. 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.

Parties generally exercise their autonomy over the applicable law by choosing to be governed by one party’s home state or one of a small number of established states. In some sectors, a particular national law is chosen so frequently that it has effectively become the global law of the industry. The best example, one with a long history, is the adoption of English law for charter parties and other international shipping contracts. This history is preserved in the standard form contracts most frequently used for charter parties and other shipping contracts, those issued by the Baltic and International Maritime Council (BIMCO), all of which provide for application of English law.

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155 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 unfavourable mandatory rules of the national law that would otherwise apply.

156 See generally Cuniberti, supra note 130.

157 The most comprehensive general treatment of this phenomenon to date is Erin A. O’Hara & Larry E. Ribstein, The Law Market (2009).

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

159 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).
Preferred national laws can shift over time, as states may compete to promote their laws and courts.\footnote{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 130; 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).} If a particular state develops a law that is, for example, pro-insurer, then insurance companies will rush to include a choice of that state’s law in their standard forms.\footnote{For example, in the US, most consumer credit contracts are made subject to the law of South Dakota or Delaware, states that have enacted laws favourable to creditors. O’HARA & RIBSTEIN, supra note 184, at 145-148.} 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.”\footnote{Art. 4.} 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 transaction, this may 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 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.”\footnote{Cuniberti, supra note 113, at 375.}

Even when transnational law governs the entirety of a dispute, industry preferences for particular national laws may still have an indirect influence. As discussed above,\footnote{See supra Section III.B.1.} 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\footnote{Such as the adoption of Nachfrist doctrine into the CISG and UNIDROIT 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).} or forging compromises between them\footnote{See supra Section III.B.1.}), To the extent that particular national laws are dominant, that dominance may be reflected in the choices made by the drafters of transnational rules.

\footnote{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).}
4. Choice of Specialist Adjudicative Bodies, Especially Arbitral Tribunals

When the adjudicative bodies that apply legal rules proliferate, normative fragmentation inevitably follows along with this institutional fragmentation. Such fragmentation need not occur along sectoral lines, but in practice, the specialized adjudicative bodies that apply transnational commercial 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 those 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. Such tribunals are therefore likely to give priority to trade usages over blackletter principles, which, for the reasons described above, necessarily leads to sectoral fragmentation.

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). The bulk of international arbitration practitioners see their collective and individual role as to serve the interests of commerce, and of the parties who appear before them. As Gélinas puts it, “International arbitration exists to serve the needs of international business.” Lord Mustill takes the argument a step further: “Commercial arbitration exists for one purpose only: to serve the commercial man. If it fails in this, it is unworthy of serious study.” 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 commercial law, therefore, 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. Hermann declares: “It is fundamental to arbitration that it should solve disputes according to commercial practice and common sense, arriving at a result considered fair in a particular business community.” 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 communications system provided by the formal contract itself.... Commercial arbitration appears to be favoured precisely because it can provide ... reasoning which marries adjudicated outcomes with

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167 See supra notes 18-19 and accompanying text.
168 See supra Section III.B.2.
169 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 346-349 (2014). Nevertheless, arbitrators are often described as “agents” of the parties. See, e.g., GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION 1607-1609 (3d edn., 2009).
business expectations more closely.” Surveys confirm that industry expertise is one of the most important factors in arbitral appointments.

The primary practical manifestation of this commercial mentality is the primacy given in arbitral awards to arguments based on trade usages and commercial reasonableness. 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 actually aware of it.

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. 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.” Article 21(2) then provides that the tribunal “shall take account of the provisions of the contract … and any relevant trade usages.” Thus, the ICC Rules require tribunals to apply the governing rules of law, the contract, and trade 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. Prior to 1985, references to trade usages in national arbitration statutes were rare. However, most statutes enacted or amended since 1985 contain provisions requiring arbitrators to take trade usages into account. 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.

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

175 On the affinity of international arbitrators for trade usages, see Karton, supra note 77, at 112-114. Cremades makes a similar observation: “International 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 (Sebastian N. Frommel & Barry A.K. Rider, eds., 1999).
176 See, e.g., ICC Case No. 7661 of 1995, XXII YBk. COMM. ARB. 149, para 17 (1997) and consolidated ICC Cases Nos 6515 and 6516 of 1994, XXIVa YBk. COMM. ARB. 80, para 15 (1999). On the place of trade usages in transnational commercial law more generally, see supra Section III.B.2.
178 See supra notes 138-144.
179 Drahozal, supra note 177, at 118.
180 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 approximately seventy statutes based on the UNCITRAL Model Law, which includes a provision to this effect, art. 28(4).
decision-making, regardless of the applicable law. Since determination according to trade usages is inherently more industry-particul arized 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. 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.

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, but has recently attracted greater attention among both commentators and practitioners, especially in investor-state arbitrations. 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”.

As with all areas of adjudication, normative fragmentation leads in turn to demands for greater formal or informal specialization by arbitrators and counsel. 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. The Institute for Energy Law recently published its own list of energy arbitrators; nominees must complete a questionnaire about their arbitration and energy industry experience and knowledge to be listed. 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 recently-founded PRIME Finance; more are

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182 *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 77, at 152-153.


186 Bishop, *supra* note 121, at 1131.

187 See *supra* note 72 and accompanying text.

188 http://energyarbitratorslist.icdr.org/.


likely to be established, just as specialist courts and judicial lists have multiplied in recent years.  

**IV. CONCLUSION: POLITICAL AND NORMATIVE IMPLICATIONS OF SECTORALLY FRAGMENTED CONTRACT LAW**

The trends and influences described above suggest that the rise of contractual governance will lead contract law, especially but not exclusively transnational contract law, to lean increasingly toward industry sector particularism. The widespread acceptance of contract law principles that favour commercial context, trade usages, and good faith will abet this kind of particularism, and distinct bodies of law will continue to coalesce that govern different types of commercial relationships. These rules will have their origin in contractual and other private governance mechanisms, but may have been adopted into formal contract law. Institutions will be established or will change to cope with and cater to this normative fragmentation, as will the commercial bar, including the international arbitration bar. In short, transnational contract law will exhibit sectoral fragmentation in both the normative and institutional dimensions.

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

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 by the mid-nineteenth century was already 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 case of disputes.  

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191 Two prominent examples on the international stage are the Dubai International Financial Centre Courts (http://www.difc.ae/difc-courts-0) and the soon-to-open Singapore International Commercial Court. See the report of the committee establishing the court, available at https://www.mlaw.gov.sg/content/dam/minlaw/corp/News/Annex%20A%20%20SICC%20Committee%20Report.pdf.

192 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 will 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.

193 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.
The rate of contract law fragmentation is likely to accelerate in the short term. Parties working in the energy sector prefer arbitration partly because they can get arbitrators who understand their business and will give them the kind of justice they expect, and arbitrators gain expertise in those areas of business because they have a lot of arbitrations in them. Even in sectors where arbitration is not as popular, we may still see sectoral fragmentation through the adoption of legal principles that emphasize the commercial context of agreements, through the codification of trade usages into national and transnational laws, through the adoption of specific national laws by specific industries, and through the proliferation of new tribunals and ADR institutions (as, for example in a variety of recent initiatives to establish dispute resolution centres devoted to financial transactions, most notably PRIME Finance, whose name was chosen specifically to advertise the industry-specific expertise of its arbitrators194).

This concluding section reviews the positive and negative consequences of sectoral fragmentation. Before listing those consequences, it is worth noting that the benefits of sectoral fragmentation largely accrue to market participants, while the detriments are more broadly distributed across society. In other words, sectoral fragmentation of law can lead to greater freedom and efficiencies for some, but imposes negative externalities on those who are subject to the law without having had a role in generating it, such as consumers and workers. Sectoral fragmentation therefore does tend to support the notion that the rise of contractual governance represents a shift of normative power from the public to the private sector—that globalized law is both a cause and symptom of the decline of the welfare state.

A. Pros

Sectoral fragmentation is, to an extent, simply evidence of the maturation of transnational contract law, that it 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 efficient.195 There is some (albeit limited) empirical evidence for this proposition, in the form of studies of specialist business courts that have been established in some US states.196 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.197 A sectorally fragmented law presided over by specialists is also more likely to evolve to keep pace with fast-changing business dynamics.

194 http://primefinancedisputes.org/about-us/. “PRIME Finance” stands for “Panel of Recognized International Market Experts in Finance”.
195 The same argument applies to the development 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).
197 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).
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. 198 The actual peer group of today’s large commercial enterprises is the international community of businesses in the same industry, not other businesses from their home states. 199 It is therefore more fair to subject members of a given industry to particularized rules that align with the standard practices of the 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. Historically, contract law has been fragmented along state boundaries; 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.

B. Cons

Despite these undeniable benefits, sectoral fragmentation may in the end be more threat than opportunity. It poses risks both for the legal system generally and for commercial parties that use that system. For this reason, sectoral fragmentation is not simply an expression of raw corporate power at the expense of the welfare state. Law’s autopoietic character means that commercial parties, too, are subject to the legal expression of their social context, which they may not be able to overcome even with coordinated action.

First, there are the well-known drawbacks to specialization, especially in the context of adjudication. 200 As the old joke has it, a specialist is 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, and development of the law can stagnate. 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

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198 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.

199 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 within any one jurisdiction. See, e.g., KARTON, supra note 77, at 23; ROGER COTTERRELL, THE SOCIOLOGY OF LAW: AN INTRODUCTION 186 (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”).

that should apply to all transactions. The result may be the proliferation of increasingly complex sets of esoteric rules that make sense only internally and only to insiders.\textsuperscript{201}

The same can occur to the legal practitioners who work in the area, in particular the international arbitration bar; there is the risk that the bar and judiciary will splinter into a set of hermetic castes, each with its own distinct values, jargons, and loyalties, unable to understand or empathize with the others. As Teubner writes, “It 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.”\textsuperscript{202} 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 experience upon which to draw…. exposure 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.\textsuperscript{203}

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. 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. Private governance leads to structural fragmentation, which in turn strengthens private governance by making states less competent to regulate.

Establishing specialized public regulatory and adjudicative bodies to cope with 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—that is, 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 whether the specialized adjudicators are privately selected on an \textit{ad hoc} basis or publicly employed with life tenure, only individuals with the requisite expertise will be appointed.

\textsuperscript{201} Cf Zumbansen, \textit{supra} note 101, at 320-321 (“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.”).

\textsuperscript{202} Teubner, \textit{supra} note 21, at 901.

Over time, there are likely to be fewer and fewer avenues in which to acquire that expertise. 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.

But even outsiders who come to the sector later in their careers may come to share the systemic biases of their institutions. Though continued exposure to repeat players (such as specialist counsel) adjudicators come to trust them and to adopt their perspectives.\textsuperscript{204} Such bias need not necessarily be systematically anti-regulation or anti-public interest, but commercial parties will likely play an outsize role, either indirectly by influencing the composition of the specialist bar or directly by appointing arbitrators congenial to corporate interests.

Third, while a particularized contract law may help to reduce litigation, it may also increase the cost and unpredictability of those disputes that do make their way to arbitration or to court. Cases that turn on trade usages may be more fact-dependent and involve greater evidentiary burdens on the litigants than cases resolved according to broadly applicable rules.

Fourth, 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.

Relatedly, fragmented commercial law creates barriers to understanding of the law.\textsuperscript{205} If the outcomes in the leading cases can be understood only by those who have knowledge of both the relevant statutes and precedents \textit{and} the relevant industry, it becomes more difficult for non-specialists to access the law.\textsuperscript{206} Obscurity of the law harms the law’s 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 the commercial law would only exacerbate the inequality of arms between the large firms that act regularly in international arbitrations and smaller firms, especially those from developing states.

Fifth, and possibly of greatest concern, is the risk that common standards will become degraded to the point that the rule of law itself is harmed. Normative and institutional fragmentation may “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

\textsuperscript{204} \textit{Id.} at 802-803.

\textsuperscript{205} Cf Helge Dedek & Alexandra Carbone, \textit{Canadian Report}, 2012(1) 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.").

\textsuperscript{206} My own experience in teaching contract and commercial law reinforces this point. Case 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 to 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.
This is the fear at the heart of arguments that the unity and systematicity of the law must be preserved. The rule of law is ultimately meaningless if similarly positioned members of a community are not governed by the same standards. If fragmentation continues to extremes, we may give up the rule of law for a law of rules.

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208 See supra notes 20-23 and accompanying text.

209 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.