Theorizing a Transnational Contract Law: What Role for the CISG?

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ABSTRACT

This article investigates whether a coherent transnational contract law can be said to exist and examines the role of the Convention on Contracts for the International Sale of Goods ("CISG") within this framework. It begins by identifying five prominent cross-border contracting practices: isolated commercial transactions, trade association contracts, supply chain governance, sovereign debt, and investment arbitration, revealing a fragmented legal landscape. It then evaluates these practices through two distinct jurisprudential lenses. A strict legal positivist account, the paper argues, struggles to identify a unified transnational legal system due to a lack of systemic coherence and shared rule-making agency. In contrast, a contemporary jus commune approach is a more viable framework for conceptualizing a common law that transcends national borders. Beyond this analytical inquiry, the article raises normative concerns, highlighting how powerful actors in areas like sovereign debt and investment law often select favorable legal regimes, creating risks of injustice and domination. In this context, the CISG is presented as a comparatively balanced and transparent model for international lawmaking, suggesting that more traditional international conventions may offer a more equitable alternative to the often opaque and power-oriented arrangements that currently characterize transnational contracting.

INTRODUCTION

Contract law is an essential institution of the global economy. It structurally embeds capitalism across the planet.[1] It is a category of private law that makes the concept of "capital" possible.[2] Without the institution of contract, there can be no global economy. Without contract law, persons and firms conducting business across national borders would not be able to make binding commitments about the future.[3] Without it, there would be no trade, no supply chains, no cross-border finance, no foreign investment, and no intellectual property licensing. It is essential for the transfer of property rights across borders. It could be understood not only as a private law of transactions, but as a public law of governance.

But what contract law? Because the main understanding of law by lawyers today is positivist, contract law is, with few exceptions, understood as domestic law. It is firmly rooted as the municipal law of the state. As the Permanent Court of International Justice stated in the *Serbian Loans* case, "[a]ny contract which is not a contract between States in their capacity as subjects of international law is based on the municipal law of some country."[4] While some international investment arbitrators have disagreed, there really is no formal category of law known as "international contract law."[5] The international law canon tells us that contract law cannot exist as international law unless it can be recognized in an accepted source of international law. These principles have not stopped arbitrators from finding that international law has governed agreements between states and foreign investors, and so a form of internationalized contract law applies to investor-state dispute resolution.[6] The Convention on Contracts for the International Sale of Goods ("CISG"),[7] is an exception to this dichotomy. Absent a convention like the CISG, private international law provides the rules for choosing which municipal law applies to a sale of goods transaction.

These approaches to conceptualizing the law are understandable to the lawyer of this age only because of assumptions or presuppositions about

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1 *See, e.g.*, A. Claire Cutler, *Blind Spots in IPE: Contract Law and the Structural Embedding of Transnational Capitalism*, 31 REV. INT'L POL. ECON. 831 (2024).

2 KATHARINA PISTOR, THE CODE OF CAPITAL: HOW LAW CREATES WEALTH AND INEQUALITY (Princeton Univ. Press 2019); KATHARINA PISTOR, THE LAW OF CAPITALISM AND HOW TO TRANSFORM IT (Yale Univ. Press 2025).

3 *See* Robert Cooter, *The Costs of Coase*, 11 J. LEGAL STUD. 1 (1982).

4 Payment of Various Serbian Loans Issued in France (Serb./ Fr.), Judgment, 1929 P.C.I.J. (ser. A) No. 20/21, at 41 (July 12) [https://perma.cc/25QY-UMQD].

5 M. Sornarajah, *The Myth of International Contract Law*, 15 J. WORLD TRADE L. 187 (1981). Part II deals with disagreement about this basic proposition.

6 *See* HEGE ELISABETH KJOS, APPLICABLE LAW IN INVESTOR-STATE ARBITRATION: THE INTERPLAY BETWEEN NATIONAL AND INTERNATIONAL LAW 214 (Oxford Univ. Press 2013).

7 United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, 1489 U.N.T.S. 3 (entered into force Jan. 1, 1988) [https://perma.cc/PGR7-EAS7].

legal concepts that we hold automatically and accept without question. It is just how we conceive of law today. It is a state-centered positivist and historically contingent conception of law, with no real historical lineage before the mid-nineteenth century. We lawyers must work hard to remove this mental cage and to imagine a different sort of private law legal order that might exist, untethered from or at least less dependent on the positive law of the state. Can we escape this mental cage? Do we want to? What is stopping us from imagining a different sort of private law legal order that might exist, untethered from the positive law of the state?

There are many ways to answer this question. I will focus on two. The traditional international versus domestic law approach is to apply the rules of private international law and pick the domestic law that applies or apply the relevant convention if there is one. The traditional approach comports with the conventional international-municipal law division of responsibilities. In the approach of traditional legal analysis, the CISG served the role of harmonizing international sales law at the inter-state level so that transactors would not have to rely on private international law or a choice of law clause to pick the applicable municipal law.[8]

Another approach is in an investigation that does not focus on the formal international-domestic law distinctions but on a transnational legal ordering based on a normativity for law that does not rely only on the traditional formal sources of the law of the state. The issue for a transnational legal order is whether we can understand the CISG as a part of contract law as a transnational legal order on its own and separate from or beyond the aim of harmonization of national law.[9] What started as international law in the traditional approach—a treaty applicable to international sales—becomes part of an institutional ordering described as transnational contract law.

Can we conceptualize a transnational contract law? The first approach operates within an understanding of the law that we readily accept, with the centrality of the state and state-enforced legal positivism at the center of the discussion. The second approach requires us to rethink unexamined assumptions and reimagine what might be a legal order that relies on the state for some legal norms while also recognizing other norms produced by other institutions, or discovered outside of the bounds of positive law. What may be required for a transnational contract law, would be a system and not just a set of rules. We should have reasons to doubt our thought experiment will be successful, perhaps for reasons having to do with what Joshua Karton describes as "sectoral fragmentation."[10] And we may not want to

8 Klaas Hendrik Eller, *Transnational Contract Law*, *in* PEER ZUMBANSEN, THE OXFORD HANDBOOK OF TRANSNATIONAL LAW 513 (Oxford Univ. Press 2021).

9 *Id.*

10 Joshua Karton, *Sectoral Fragmentation in Transnational Contract Law*, 21 U. PA. J. BUS. L. 142 (2018).

unfetter contract law from the more robust demands of economic justice that may apply at the state level and which may affect the content of contract law that is applied in cross-border transactions.[11] But let us see how far we can go and what might be needed for such a transnational contract law to exist.

Part I of this article identifies five prominent practices in international contracting, in which contract law comes into play. It provides a framework for what are likely the more prominent uses of contract law in cross-border transactions. These practices are our evidence for determining whether a transnational contract law exists. Part II sets forth a theory for evaluating whether these practices may (or may not) give rise to a transnational contract law. Part II explains that while a transnational contract law may be difficult to find based on our current understanding of the nature of law, this does not mean that contract law has no role in the global economic order. To the contrary, its significance and impact at the global level is profound. The CISG plays an important role in these contract practices. The inability of international law to recognize this important role of contract law in the global order is a failing that must be overcome. In the current world of positivist dominance of conceptualizing legal order, international law suffers from a poverty of sources.

The stakes for identification of law operating in the transnational space are significant. If we do not do so, contract law operates in a murky context that makes it difficult to investigate injustice or to expose domination, exploitation, and other moral disorders in the law as it operates across borders. Investigating the role of contract law at the cross-border level reveals how power can be deployed in global contracting to favor the interests of investors and creditors at the expense of peoples in developing countries, or to mask global supply chain practices that exploit workers or damage the climate. Still, care must be undertaken to ensure that transnational legal orders relieve contract law from the sort of moral justification that is considered to be required for law that regulates the activities of fellow citizens. The CISG seems to suffer these problems less, as buyers and sellers of goods in the framework of isolated transactions—the transaction for which the CISG was envisioned—tend to have relative parity with one another,[12] though this is not always true. We see in the fragmented nature of the institution of contract at the cross-border level that

11 This is not the place to go through the longstanding debates in political philosophy on whether moral principles of distributive justice are relevant only within states and not in inter-state interactions, a debate started by John Rawls. *See* Gillian Brock & Nicole Hassoun, *Global Justice*, STAN. ENCYCLOPEDIA OF PHIL. (2023), https://plato.stanford.edu/archives/fall2023/entries/justice-global/ [https://perma.cc/S4AW-TKJF].

12 Alan Schwartz, *Karl Llewellyn and the Origins of Contract Theory*, *in* THE JURISPRUDENTIAL FOUNDATIONS OF CORPORATE AND COMMERCIAL LAW 12 (Jody S. Kraus & Steven D. Walt eds., Cambridge Univ. Press 1999).

when actors have relative equality towards each other, such as in some sale of goods transactions, a balanced international convention in the form of the CISG, applies. But when investor interests are relevant, the choice of law and forums for dispute resolution are biased towards investor interests.

I. CROSS-BORDER CONTRACTING IN ACTION

Contract practices at work at the global level are classifiable along five main lines. First, there is the law and practice of contract law in isolated commercial transactions. This isolated transaction framework can be understood as the archetypal form of transaction that dominates lawyer thinking about contract practices. The CISG originated in a context in which the isolated "one-off" transaction was seen as the norm, though it also accommodates repeat contracting in a relational framework. It is far from the only or most important contract transactional form at the cross-border level. Second, trade-association related contracts are contracts in which trade associations provide terms and conditions for contracts. Third, supply chain contracting is a particular kind of relational contracting in which corporate policy and interest group influence gets implemented in networks of contracts. It is also important to understand how supply chain governance is a form of public governance, in that it reflects a particular social choice to rely on the institution of contract to govern social relations. Fourth, the institution of contract plays an essential role in sovereign lending and in dealing with sovereign bond defaults and insolvencies. No collective action regime, in the form of a bankruptcy or insolvency law, exists to orderly restructure creditor claims for states. This makes contract law an extremely important institution that is very relevant to questions of distributive justice for debtor countries, usually poorer countries. Fifth, contract law plays an important role in investor-state dispute resolution. Do these sets of rules cohere in some way to produce a transnational contract law? Part II deals with this question. Part I furnishes the backdrop for understanding the role of contract in the cross-border context.

A. "One Off" Cross-Border Contracts

The literature on contract law distinguishes between "one-off" or "one-shot," discrete or isolated contracts between persons who have no relationship independent of the contract itself and relational contracts. In relational contracts, the relationship between the contract parties exists outside of the framework of the contract and is governed by other norms, including social norms and those that form within the relationship itself.[13]

13 Ian Macneil is the proponent of relational contract theory. *See* William C. Whitford, *Ian Macneil's Contribution to Contracts Scholarship*, 1985 WIS. L. REV. 546 (1985); IAN MACNEIL, THE NEW SOCIAL CONTRACT: AN INQUIRY INTO MODERN CONTRACTUAL RELATIONS (Yale Univ. Press

Though difficult to generalize, global supply chain contracts are probably a form of relational contracting.

When we think of the CISG we usually have in mind the discrete contract, not a relational contract. The CISG is seen as a paradigm law for dealing with isolated cross-border sale of goods transactions. It, like other forms of contract law, are designed around the notion of a single exchange.[14] This is not meant to be a criticism. And it does not mean that the CISG cannot adequately deal with relational contracts. As typical for modern sales law, it provides a generic framework in which to create and perform legally binding forward-looking commitments in the form of promissory legal obligations. CISG follows the standard incorporation strategy pioneered by the drafters of Uniform Commercial Code (UCC) article 2.[15] To the extent that the incorporation strategy facilitates relational contracting, the CISG will do so. Though so-called neo-formalists have criticized the incorporation strategy on a variety of grounds,[16] it remains the law in the CISG. Some commentators have argued that "classical" forms of contract law may not be well-suited to relational contracting, while others argue against so-called incorporation strategies in which merchant custom is freely accepted as substituting for legal rules.[17] The bottom line here is contract and sales law apply to all forms of contract practices. Whether they are more or less suitable for different practices is a different, normative as opposed to analytical, question.

If we assume that global supply chains take a relational form, the concept of the modern global supply chain did not exist when the CISG was negotiated. The travaux préparatoires for the CISG makes no mention of

1980); Ian Macneil, *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical and Relational Contract Law*, 72 NW. U.L. REV. 854 (1978); Ian Macneil, *Economic Analysis of Contractual Relations: Its Shortfalls and the Need for a "Rich Classificatory Apparatus*," 75 NW. U.L. REV. 1018 (1981); Ian Macneil, *Efficient Breach of Contract: Circles in the Sky*, 68 VA. L. REV. 947 (1982); Ian Macneil, *The Many Futures of Contracts*, 47 S. CAL. L. REV. 691 (1974). It is also worth reading Stewart Macaulay's work on relational contracting. *See* Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOCIOLOGICAL REV. 55 (1963); JEAN BRAUCHER, JOHN KIDWELL, & WILLIAM C. WHITFORD, REVISITING THE CONTRACTS SCHOLARSHIP OF STEWART MACAULAY: ON THE EMPIRICAL AND THE LYRICAL (Hart Publishing 2013).

14 Melvin Eisenberg, *Why There is No Law of Relational Contracts*, 94 NW. U.L. REV. 805 (2000).

15 Clayton P. Gillette, *The Law Merchant in the Modern Age: Institutional Design and International Usages Under the CISG*, 5 CHI. J. INT'L L. 157 (2004).

16 *See* John Linarelli, *Legal Pluralism and Commercial Law*, *in* OXFORD HANDBOOK OF GLOBAL LEGAL PLURALISM 689 (Paul Schiff Berman ed., Oxford Univ. Press 2020) (discussion of Lisa Bernstein's work); Eric A. Posner, *A Theory of Contract Law Under Conditions of Radical Judicial Error*, 94 NW. U.L. REV. 749 (2000); Robert E. Scott, *The Case for Formalism in Relational Contract*, 94 NW. U.L. REV. 847 (2000); David Charny, *The New Formalism in Contract*, 66 U. CHI. L. REV. 842 (1999). John Murray probably coined the term "neoformalism." *See* John E. Murray Jr., *Contract Theories and the Rise of Neoformalism*, 71 FORDHAM L. REV. 869 (2002). The discussion continues. Paul B. Miller, *The New Formalism in Private Law*, 66 AM. J. JURIS. 175 (2021); Felipe Jiménez, *A Formalist Theory of Contract Law Adjudication*, 2020 UTAH L. REV. 1121 (2020).

17 Read in particular the work of Lisa Bernstein, *see* Linarelli, *Legal Pluralism and Commercial Law*, *supra* note 16; Scott, *supra* note 16.

supply chains. The CISG was adopted on April 11, 1980, and entered into force on January 1, 1988,[18] when the institution of the modern global supply chain was just beginning to emerge. Even if the drafters had global supply chains in mind when preparing the CISG, for an international convention, the aim could hardly ever be breaking new ground in contract doctrine. The CISG is the product of negotiation among country delegates of diverse legal institutions. Its main purpose was to reduce the transaction costs for cross-border sale of goods contracts. The focus was on reducing legal diversity and to move away from private international law for selecting the law applicable to a contract. Contract law scholars in the United States distinguish between classical and "modern," "contextual," or "realist" contract law.[19] While the relevance of these distinctions for international law products such as the CISG is open to question, a plausible argument might be that all, or at least most, of the delegates were classical contract lawyers within their various legal traditions. The CISG offers a set of rules that we typically see in a sales law, many of which are default rules.

B. Trade Association-Related Contracts

In 2009, *Penn State Law Review* published an article of mine that identified the various plausible forms of transnational commercial law rules in existence.[20] One of the forms was "legislated law merchant," which I defined as:

> sets of rules of a legislative or regulatory character, promulgated by non-state actors . . . in a legislative or regulatory setting. They are usually produced as a single document in the form or an enactment or publication. They are usually intended to be codifications of customary practices. They can include but are not limited to standard form contracts. They can be transnational or domestic.[21]

These rules can be said to supplement the law of the state, or vice versa in that the law of the state may be seen as supplementing them. They tend to be very formal and strictly interpreted in dispute settlement sanctioned

18 *United Nations Convention on Contracts for the International Sale of Goods*, *supra* note 7.

19 *See, e.g.,* Jack Beatson & Daniel Friedman, *Introduction: From "Classical" to Modern Contract Law*, *in* GOOD FAITH AND FAULT IN CONTRACT LAW 3 (Oxford Univ. Press 1997).

20 John Linarelli, *Analytical Jurisprudence and the Concept of Commercial Law*, 114 PENN STATE L. REV. 119 (2009). There is a great deal of writing in this area. *See also* Joanna P. Brathwaite, *Standard Form Contracts As Transnational Law: Evidence from the Derivatives Markets*, 75 MOD. L. REV. 779 (2012); Mark R. Patterson, *Standardization of Standard Form Contracts: Competition and Contractual Implications*, 52 WM. & MARY L. REV. 327 (2010). Of course, anything by Schmitthoff on the subject is worth reading. *See, e.g.*, Clive M. Schmitthoff, *The Unification or Harmonisation of Law by Means of Standard Contracts and General Conditions*, 17 INT'L & COMP. L.Q. 551 (1968).

21 Linarelli, *Analytical Jurisprudence and the Concept of Commercial Law*, *supra* note 20.

by trade associations. As I explained in *The Economics of Uniform Laws and Uniform Law Making* in 2003:

> Commercial persons want what formalists call "legal certainty." In contracts entered into between established merchants, little room exists for open textured standards or balancing tests in which judges (or arbitrators) have significant discretion. Predictability is more important than fairness; that a commercial party can predict a legal outcome is usually more important than the fairness of the outcome. Remedies too are sometimes under-compensatory so long as they are predictable. Certainty in the law is achieved through formalism.[22]

David Charney has characterized this phenomenon as "trade association formalism."[23]

Trade association rules produce another set of rules that may be said to be part of a transnational contract law. Some trade associations, particularly British ones, may exclude the CISG from application.[24] This may be accomplished through a choice of law clause specifying English law. The United Kingdom has not ratified the CISG, and it is doubtful it ever will.[25]

C. Supply Chain Governance

In his 1937 article, *The Nature of the Firm*,[26] Ronald Coase offered the explanation that persons form firms to deal with transaction costs.[27] According to Coase, if transaction costs are lower in forming a firm rather than in contracting with others in a market, then they will form a firm. Alternatively, when transaction costs are higher in forming a firm rather than contracting out, individuals will contract out. This paper forms the core of several related fields of economics.

Coase's insight explains supply chain contracting. Producers decide where the lowest cost of productions are for components and assembly. They form supply chains in the form of networks of contracts to provide both goods, but also to specify production processes and standards that relate not only to the quality of the goods produced but also how they are

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22 John Linarelli, *The Economics of Uniform Laws and Uniform Lawmaking*, 48 WAYNE L. REV. 1387 (2003) (footnotes omitted).

23 Charny, *supra* note 16.

24 Linarelli, *The Economics of Uniform Laws, supra* note 22.

25 Johanna Hoekstra, *Political Barriers in the Ratification of International Commercial Law Conventions*, 26 UNIF. L. REV. 43 (2021).

26 Ronald Coase, *The Nature of the Firm*, 4 ECONOMICA 392 (1937).

27 *The Nature of the Firm* was Coase's undergraduate dissertation. It played an influential role in his winning the Nobel Prize for Economics. *See* R.H. COASE, THE FIRM, THE MARKET, AND THE LAW (Univ. Chi. Press 1988).

produced.[28] Chain leaders play a key role in supply chain contracting, even though they may not have privity of contract with the various actors in the chain. Supply chain contracts are interdependent.[29] The consequences that flow from breach affect not only the immediate contract parties but others in the chain.[30] Breach of contract may be the result of a failure of collective action by parties outside of the privity relationship of a particular contract in the chain.[31] Supply chain contracts are thus relational. Relationships beyond the parties in contractual privity matter.[32] Monitors may not be contracting parties with the monitored.[33] Sales are embedded within the chain and do not stand on their own.[34]

We know little about choice of law elections for supply chain contracts unless we do empirical work. Little if any such empirical work exists and none to my knowledge focuses on supply chains. The CISG can nevertheless play a major role in supply chain contracting, along with extra-legal norms created by non-governmental organizations and multinational enterprises on quality, safety, environmental, and labor standards relating to the production of goods. The problem seems to be one of drafting. If you want to consider the consequences of breach on downstream and upstream contract parties, want to focus more on correcting the problem than on damages, want monitors in place that are not immediate contracting parties, then draft the appropriate contract clauses. While no clear duty to cooperate exists apart from the doctrine of good faith included in the CISG, it is a fundamental maxim of contract drafting that parties should not rely on such open-textured standards but specify what they need in the contracts themselves. A classic procurement policy is flow-down clauses, in which

28 Fabrizio Cafaggi, *Sales in Global Supply Chains: A New Architecture of the International Sales Law*, *in* RESEARCH HANDBOOK ON INTERNATIONAL AND COMPARATIVE SALE OF GOODS LAW (Djakhongir Saidov ed., 2019).

29 *Id.* at 4.

30 *See* Alan Schwartz, *Keynote Address: Modern Supply Chains and Outmoded Contract Law*, 68 AM. U. L. REV. 1503 (2019) (discussing the unsuitability of remedies).

31 Cafaggi, *supra* note 28*,* at 24.

32 *Id.*

33 *Id.* at 10.

34 *Id.* at 3. Work by Cafaggi and Cafaggi & Iamiceli on global supply chain contracts includes Fabrizio Cafaggi, *The Regulatory Functions of Transnational Commercial Contracts: New Architectures*, 46 FORDHAM INT'L L.J. 1557 (2013); Fabrizio Cafaggi & Paola Iamiceli, *The Limits of Contract Laws: The Control of Contractual Power in Trade Practices and the Preservation of Freedom of Contract Within Agrifood Global Supply Chains*, *in* ESTUDIOS DE DERECHO CONTRACTUAL EUROPEO (Fernando Gomez Pomar & Ignacio Fernandez Chacon eds., 2022); Fabrizio Cafaggi & Paola Iamiceli, *Regulating Contracting in Global Value Chains: Institutional Alternatives and Their Implications for Transnational Contract Law*, 16 EURO. REV. CONT. L. 44 (2020); Fabrizio Cafaggi, *New Foundations of Transnational Private Regulation*, 38 J.L. & SOC. 20 (2011); Fabrizio Cafaggi, *The Many Features of Transnational Private Rule-Making: Unexplored Relationships Between Custom, Jura Mercatorum and Global Private Regulation*, 36 U. PA. J. INT'L L. 875 (2015).

contracts require the flow down of policies to other contractors in a chain.[35] These exist in abundance in supply chain contracting.

D. Finance: Sovereign Debt

New York and English contract law play an important role in dictating policy for states, particularly for emerging market or developing states that rely on bonds for finance. It may be difficult for those unfamiliar with sovereign bond finance to digest that the law and courts of a single state in the United States, albeit a particularly important one from the standpoint of global capitalism, has substantial power over countries that need dollars to finance their economies and societies. The majority of sovereign bond offerings mandate New York as the governing law, and New York courts as the governing courts, for disputes concerning the bonds.[36] English law plays a similar role. A distinctive minority of sovereign bond issues specify local law, the law of the debtor state. As for loans, the situation is not as clear, because loan terms and conditions are not disclosed in prospectuses and other disclosures required in regulated capital markets.[37]

With the rise of China as a sovereign lender has come a shift from bonds to loans in sovereign lending, though bonds remain an important borrowing mechanism. The distinction is important for knowing contract terms and whether choice of law clauses specify Chinese, English, or New York Law.

There is ready access to bond terms because bonds are contracts with specific promises that need transparency for fair pricing and risk assessment. Transparency is required by regulation such as the Trade Reporting and Compliance Engine of the Financial Industry Regulatory Authority in the United States, enabling investors to understand the fixed payments, maturity, issuer identity, and risks before buying or selling in the primary or secondary markets.[38] Federal securities regulations in the United States mandate transparency by requiring issuers to provide detailed information for public offerings, ensuring investors have material facts for fair valuation, even for sovereign bonds sold in major markets, often

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35 *See, e.g.,* Luca Tenreira, *The Drafting of Due Diligence Clauses by Global Lawyers: The Example of Flow Down Clauses*, 5 INT'L BUS. L.J. 453 (2022).

36 MITU GULATI & ROBERT E. SCOTT, THE THREE AND A HALF MINUTE TRANSACTION: BOILERPLATE AND THE LIMITS OF CONTRACT DESIGN (Univ. Chi. Press 2013); Brahima S. Coulibaly & Wafa Abedin, *Revitalizing the Global Architecture for Sovereign-Debt Restructuring: The New York State Legislature Steps In*, THE INT'L BANKER (Sep. 5, 2023), https://internationalbanker.com/finance/revitalizing-the-global-architecture-for-sovereign-debt-restructuring/ [https://perma.cc/SHU4-LBX6]; *see also* Geoffrey P. Miller & Theodore Eisenberg, *The Market for Contracts*, 30 CARDOZO L. REV. 2073 (2009) (noting that New York law is often chosen for contracts entered by publicly held corporations).

37 Lauren L. Ferry & Alexandra O. Zeitz, *China, the IMF, and Sovereign Debt Crises*, 68 INT'L STUD. Q. 1 (2024).

38 FINRA Rulebook, Rules 6710, 6730, 6750, 6760 [https://perma.cc/H2NZ-25YS]; Self-Regulatory Organizations, Exchange Act Release No. 34-43873, 66 Fed. Reg. 8131 (Jan. 23, 2001) [https://perma.cc/GNU7-A4X3].

through Securities Exchange Commission ("SEC") registration or exemptions like Rule 144A. These regulations compel governments to disclose data to attract capital, thereby making bond terms accessible for due diligence.[39]

For loans, there is no such mandated transparency. Some loans to sovereigns from Chinese entities contain obligations not to disclose terms or even the existence of the loan.[40] The China Eximbank requires the application of Chinese law and dispute resolution in China before the China International Economic and Trade Arbitration Commission (CIETAC).[41] The China Development Bank seems to require the application of English or New York law and specify various arbitration venues using the rules of the International Chamber of Commerce.[42] Belt and Road Initiative loans started out specifying the English law of contracts but now trend considerably towards the Chinese law of contracts, so that more than 70% of these loans state Chinese law in their choice of law clauses.[43]

No international organization regulates sovereign debt. The International Monetary Fund plays mainly a monitoring role and may step in during crises to provide short-term lending to countries, but the main institutions at work in sovereign debt in the form of bonds are those that regulate the capital markets, principally those in the City and London. Disputes about payments and defaults are litigated as debt contract cases in these financial capitals. The result is that investors will often have access to New York and English courts. Chinese loans usually specify arbitration in China for dispute resolution.[44]

Let's do a thought experiment and ask what the world would be like without bankruptcy law for individuals or in the corporate world. We would have to rely on contracts to restructure the finances of individuals and companies. Dare we even think of the collective action problems this poses for both debtors and creditors. Domestic bankruptcy law, moreover, plays an important role within states by providing debtors with a fresh start, rehabilitating debtors who have suffered from what may be characterized as

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39 Securities Act of 1933, 15 U.S.C. § 77e (registration requirements); § 77g (schedule B on disclosure requirements for sovereign bonds); § 77j (prospectus requirements) [https://perma.cc/6XQU-KPZB]; *see also* TSC Industries v. Northway, 426 U.S. 438 (1976) (legal standard for materiality requirement for disclosure purposes).

40 ANNA GELPERN ET AL., HOW CHINA LENDS: A RARE LOOK INTO 100 DEBT CONTRACTS WITH FOREIGN GOVERNMENTS 5-6, 22-25 (2021) [https://perma.cc/VYL5-96R6].

41 *Id.* at 8.

42 *Id*.

43 Michael Yip, *"Extraterritorial Observance": The Invisible Laws that Compete to Govern China's Belt and Road Loans*, HARV. INT'L L.J. ONLINE (Feb. 4, 2024), https://journals.law.harvard.edu/ilj/2024/02/extraterritorial-observance-the-invisible-laws-that-compete-to-govern-chinas-belt-and-road-loans/ [https://perma.cc/2DEZ-GFNB].

44 GELPERN ET AL., *supra* note 40, at 8.

bad brute luck.[45] It also provides for the equality of treatment among similarly situated creditors, and preserving going-concern value of firms in financial distress.[46] This is, however, not the reality for sovereign debt, or for sovereign debtors who cannot print dollars and must depend on debt in hard currency to finance their budgets and the well-being of their citizens. No bankruptcy law comes to the rescue of insolvent sovereigns. A state cannot file a petition for bankruptcy and impose a collective action process on creditors. There is no possibility of an automatic stay, the rejection of contracts or payments of preferences, restructuring of debt into payments of pro rata dividends to creditors based on their status, or statutorily based cramdowns.

If we look at the creditor composition for many sovereign bonds, we do not see the usual suspects we see in the corporate world of trade: creditors, banks, equipment lenders, receivables financing, inventory financing, and so on. Hedge funds dominate investment in sovereign debt.[47] The typical investment strategy of these funds is to buy bonds at a steep discount when they are already in default and then engage in holdout strategies based on strict interpretations of *pari passu* clauses to maximize payouts during attempts by the sovereign debtor at restructuring. The well-known *NML Capital Ltd. v. Republic of Argentina* saga is a prime illustration of this sort of hostagetaking.[48] The importance of contract law in this aspect of global finance is brought home by the fact that many sovereign bonds now contain

45 *See* John Linarelli, *Debt in Just Societies: A General Framework for Regulating Credit*, 14 REG. & GOV. 409 (2020).

46 A variety of proposals to develop a bankruptcy law regime for sovereign debt have gone nowhere. Start with the failed proposal of the International Monetary Fund for a Sovereign Debt Restructuring Mechanism. *See, e.g.,* Kenneth Rogoff & Jeromin Zettelmeyer, *Bankruptcy Procedures for Sovereigns: A History of Ideas, 1976-2001*, 39 IMF STAFF PAPERS 470 (2002); CHRISTOPHER G. PAULUS, A DEBT RESTRUCTURING MECHANISM FOR SOVEREIGNS: DO WE NEED A LEGAL PROCEDURE (Hart 2014); Steven L. Schwarcz, *Sovereign Debt Restructuring: A Model-Law Approach*, J. GLOBALIZATION & DEV. 1 (2016); Steven L. Schwarcz, *Sovereign Debt Restructuring: A Bankruptcy Reorganization Approach*, 85 CORNELL L. REV. 956 (2000); Patrick Bolton & Jeanne Olivier, *Structuring and Restructuring Sovereign Debt: The Role of a Bankruptcy Regime*, 115 J. POL. ECON. 901 (2007); Odette Lienau, *The Time Has Come for Disaggregated Sovereign Bankruptcy*, 37 EMORY BANKR. DEV. J. 599 (2021); Hal S. Scott, *A Bankruptcy Procedure for Sovereign Debtors*, 37 INT'L LAW. 103 (2003); Charles W. Mooney Jr., *A Framework for a Formal Sovereign Debt Restructuring Mechanism: The Kiss Principle (Keep it Simple, Stupid) and Other Guiding Principles*, 37 MICH. J. INT'L L. 57 (2015).

47 A great deal of literature has been published on this subject. *See, e.g.,* Xiang Fang, Bryan Hardy & Karen K. Lewis, *Who Holds Sovereign Debt and Why it Matters* (BIS Working Papers No. 1099, 2023); Julian Schumacher, Christoph Trebesch, & Henrik Enderlein, *Sovereign Defaults in Court* (Kiel Working Paper No. 2013, 2018); Martin Guzman & Joseph E. Stiglitz, *How Hedge Funds Held Argentina for Ransom,* N.Y. TIMES (Apr. 1, 2016), https://www.nytimes.com/2016/04/01/opinion/how-hedge-funds-held-argentina-for-ransom.html [https://perma.cc/D7MY-D72Z]; Tim R. Samples, *Rogue Trends in Sovereign Debt: Argentina, Vulture Funds, and Pari Passu Under New York Law,* 35 NW J. INT'L L. & BUS. 49 (2014); Christopher C. Wheeler & Amir Attaran, *Declawing the Vulture Funds: Rehabilitation of the Comity Defense in Sovereign Debt Litigation,* 39 STAN. J. INT'L L. 253 (2003); Mauro Megliani, *For the Orphan, the Widow, the Poor: How to Curb Enforcing by Vulture Funds against the Highly Indebted Poor Countries,* 31 LEIDEN J. INT'L L. 363 (2018).

48 NML Cap., Ltd. v. Republic of Argentina, 699 F.3d 246, 250 (2d Cir. 2012).

collective action clauses that allow a bondholder supermajority to agree to a restructuring that binds all bondholders.[49] Collective action clauses can provide some cramdown potential but are no substitute for bankruptcy rules. Bondholders may be able to buy a sufficient minority stake to nullify the effect of collective action clauses.[50] The addition of Chinese loans further complicates creditor composition, exacerbates coordination problems among creditors, and increases costs for borrowers.[51]

E. Investment Law and the Internationalized Contract

Contract law has played a significant role in the allocation of power as between host states and investors in investment arbitration. In the years when the New International Economic Order was in its ascendency and in the aftermath of its decline, some arbitrators ruled that the law of the contract in international investment disputes was international law as opposed to the domestic law of the host state.[52] The most notorious of these awards was that of Judge René-Jean Dupuy, sitting as a sole arbitrator in *Texaco Overseas Petroleum Company and California Asiatic Oil Co. v. The Government of the Libyan Arab Republic,*[53] in which Judge Dupuy ruled that the concession contract between the investor and the state of Libya was governed by international law. As Sornarajah explains, arbitrations in the 1950s and through the early 1970s:

> [W]ere to establish the sanctity of the contract assuring immunity from change by the use of the domestic laws [and to] affirm general principles as the law governing the contracts on the basis of a policy preference that investments would not flow freely into developing countries if their changeable domestic laws were applied to the contracts and that arbitration arising from the contracts must be subject to external tribunals as often provided for in the arbitration clauses in the contracts. In this manner, the

49 Diane Desierto, *Republic of Argentina v. NML Capital Ltd.: The Global Reach of Creditor Execution on Sovereign Assets and the Case for an International Treaty on Sovereign Restructuring,* EJIL TALK! (June 22, 2014), https://www.ejiltalk.org/republic-of-argentina-v-nml-capital-ltd-the-global-reach-of-creditor-execution-on-sovereign-assets-and-the-case-for-an-international-treaty-on-sovereign-restructuring/ [https://perma.cc/NL6W-5UFS].

50 *Client Alert: What to Expect in the Coming Wave of Sovereign Debt Litigation,* QUINN EMMANUEL (Jan. 4, 2023), https://www.quinnemanuel.com/the-firm/news-events/what-to-expect-in-the-coming-wave-of-sovereign-debt-litigation/ [https://perma.cc/73PZ-VZEZ].

51 Qi Liu & Layna Mosley, *Sovereign Risk and Chinese Capital: Bond Market Reactions to New Loans* (Sovereign Finance Lab, Working Paper 25-2, 2025); Sebastian Horn, Carmen M. Reinhart & Christoph Trebesch, *China's Lending to Developing Countries: From Boom to Bust,* 39 J. ECON. PERSPECTIVES 75 (2025); Illenin Kondo, Astghik Mkhitaryan, & Cesar Sosa-Padilla, *Borrowing from China and Sovereign Credit Risk,* 114 A.E.A. PAPERS & PROC. 148 (2024); Sebastian Horn, Carmen M. Reinhart & Christoph Trebesch, *China's Overseas Lending,* 133 J. INT'L ECON. 103539 (2021).

52 *See* MUTHUCUMARASWAMY SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 107-110 (Cambridge Univ. Press 2017).

53 Texaco Overseas Petroleum Co. v. Government of the Libyan Arab Rep., 17 I.L.M. 1 (1978).

> investment contract was lifted out of the sphere and scope of domestic law and subjected to an external sphere that was supranational or international. This internationalization of the investment contract was the process that the developed States worked on achieving. It was a principal facet of their strategy for investment protection. They promoted this strategy, but it was devised entirely through private means. It was an instance of international law-making through private sources, belying the fact that only States make international law through their practice or consent. The strategy of investment protection through contracts was engineered by multinational corporations initially. It received support from the developed States and came to be advanced as international law.[54]

While the question of the proper law for international investment disputes is a question with many variables, and there have been some moves towards this sort of internationalization of contracts into the 2000s,[55] attempts to develop an international contract law only for investment disputes may have abated.[56] Outside of investment arbitration, few have made an argument that a contract entered by a government would be governed by any law other than the domestic law of the relevant state.[57] Of course, the question is more complex than simply a binary division between international and domestic law for international investment arbitrations and in some cases both international and domestic law may apply.[58]

II. DEVELOPING A JURISPRUDENCE FOR A TRANSNATIONAL CONTRACT LAW

Is there a jurisprudence for transnational contract law? Divide this question into two. First, an analytical account will provide a conceptual analysis of whether we can elucidate an account for a transnational contract law as law as a phenomenon that includes but is not limited to the law of the state. Second, a normative account will provide a way to evaluate whether

54 Muthucumaraswamy Sornarajah, *Resistance and Dominance in International Investment Law, in* HANDBOOK OF INTERNATIONAL INVESTMENT LAW AND POLICY 2145 (Julien Chaisse, Leila Choukroune & Sufian Jusoh eds., 2021). The *locus classicus* on this question is Sornarajah, *The Myth of International Contract Law*, *supra* note 5.

55 Rep. of Ecuador v. Occidental Expl. & Prod. Co. [2005] EWCA (Civ) 1116 (Eng.); *see* James Crawford, *Treaty and Contract in Investment Arbitration,* 24 ARB. INT'L 351 (2008).

56 Patrick Wautelet, *International Public Contracts: Applicable Law and Dispute Resolution, in* TRANSNATIONAL LAW OF PUBLIC CONTRACTS (Mathias Audit & Stephen Schill eds., 2013).

57 *See id.* at 7, 26.

58 HEGE ELISABETH KJOS, APPLICABLE LAW IN INVESTOR-STATE ARBITRATION 213-270 (Oxford Univ. Press 2013); Julian Arato, *The Private Law Critique of International Investment Law,* 113 AM. J. INT'L L. 1 (2019); Julian Arato, *The Logic of Contract in the World of Investment Treaties,* 58 WM. & MARY L. REV. 351 (2016).

the rules and standards of a transnational contract law—if it exists—are or are not good, right, or just based on whatever standard we deem best to deploy to answer this question.

A. Analytical Accounts

Can the above contract practices be understood as a transnational contract law? How we proceed to answer this question will depend on what theory of law we select to answer it.

I use two theories to determine whether a transnational contract law exists. First, I will put in some tension a legal positivist account for a transnational contract law. Legal positivism is meant to be a general jurisprudence that does not require a state to elucidate what makes law or a legal system distinctive.[59] This may or may not be true, but it does not necessarily lead us to conclude that there is such a thing as transnational contract law in a positivist sense. Second, I will explore whether some non-legal positivist theory can support an argument for a transnational contract law. In this second account, I will explore whether there can be a *jus commune* for a transnational contract law without the metaphysical fiction of natural law.[60]

1. A Transnational Legal Positivist Account

First, let's explore the transnational account of legal positivism that I developed in 2009 in an article in *Penn State Law Review*.[61] This account was developed to test for the existence of a transnational commercial law. It can be adapted here. The theory is Hartian, in the sense that it requires the existence of primary and secondary rules, and hence the need for secondary rule agents who make primary rules. It is also early Razian, because it focuses on the systemic qualities of law, as law forming a "system," as a legal system.[62] These are stringent requirements, and perhaps unnecessary for a positivist account of transnational law. The requirement of a system can be understood as one involving "massively shared agency" among those

59 *See* Leslie Green, *Positivism, Realism, and Sources of Law, in* CAMBRIDGE COMPANION TO LEGAL POSITIVISM (Torben Spaak & Patricia Mindus eds., Cambridge Univ. Press 2021) (law as a "system of social rules"); David Lefkowitz, *Sources in Legal Positivist Theories, in* OXFORD HANDBOOK ON THE SOURCES OF INTERNATIONAL LAW (Samantha Besson & Jean D'Aspremont eds., Oxford Univ. Press 2017); Daniel Weinstock, *Legal Positivism,* 66 MCGILL L.J. 115 (2020) (legal positivism not restricted to state law). Of course, we can look to Kelsen for the proposition that law's validity derives from a basic norm independent of empirical facts and the sovereign. HANS KELSEN, PURE THEORY OF LAW (1934).

60 *See* Brian Leiter, *Politics by Other Means: The Jurisprudence of "Common Good Constitutionalism,"* 90 U. CHI. L. REV. 1685 (2023) (discussing the fiction of natural law).

61 Linarelli, *Analytical Jurisprudence and the Concept of Commercial Law, supra* note 20.

62 JOSEPH RAZ, THE CONCEPT OF A LEGAL SYSTEM (Oxford Univ. Press 1970). This book was based on Raz's PhD dissertation.

who are obligated to comply with the rules of the system.[63] The need for secondary rule agents is also a robust requirement, which informs that we just might need a state with officials of the state making rules under the usual procedures associated with rules of recognition. While we might be able to devise a more parsimonious account, it is worth the effort to use this layered theory to test the case for a transnational contract law.

In my *Penn State* article, I argued that any set of legal rules apt for designation as a legal system must meet five conditions: (1) acceptance by the participants in the legal order under investigation, the norm users, of the rules of the order as valid, binding, and authoritative; (2) systemic qualities of normative consequence within the legal order that make it intelligible or comprehensible to the participants; (3) secondary rules and secondary rule officials, though they can be distributed across different state and non-state hierarchies, who make or identify primary legal rules; (4) shared agency between secondary rule officials demonstrating sufficient mutual responsiveness and joint commitment to a legal system or order; and (5) primary rules dealing with issues that legal systems usually deal with, such as property, contract, and dispute resolution.[64]

A potential objection to this theory is that it is very domain specific. It is used here to determine whether a plausible case of a transnational positive law can be made about one domain of private law. Without the supremacy of the modern state in determining what constitutes a legal order, this fragmentation of law and law-giving communities is inevitable. In the transnational space, no single institution or readily identifiable authority with control over the production of law exists. This is a fact that must be accepted. So, for positivism to describe a legal order outside of the state or in which the state is but one participant, the fragmentation must be accepted as a given.[65]

In the above description of contract law in action at the cross-border level, it does not appear that conditions (2) and (4) are met. We can say with come confidence that condition (1) is met, that the participants in the above contract practices accept the contract rules they rely upon as valid, binding, and authoritative. But we do not see these rules as forming a system of law, as meeting the requirements of condition (2), as having systemic qualities of normative consequence within the legal order that make it intelligible or comprehensible to the participants. Condition (2) is certainly met within areas within the above contract practices. For example, environmental or health and safety standards that NGOs produce and that multinational

63 SCOTT J. SHAPIRO, LEGALITY 144, 204 (Harvard Univ. Press 2013). It would be well worth reading the work of philosophers Michael Bratman, Margaret Gilbert, and Raimo Tuomela on these points.

64 Linarelli, *Analytical Jurisprudence and the Concept of Commercial Law*, *supra* note 20, at 130.

65 *See id.*

enterprises incorporate into supply chain contracts meet condition (2). Secondary rule officials produce these standards, and they are obligatory for contracting parties operating within a particular industry to follow. But these do not extend beyond the relevant industry. Hart found these systemic qualities in the relationship between primary and secondary rules. Norm givers use secondary rules to identify valid legal rules for norm users. Norm users use rules of recognition to identify valid legal rules that norm givers create. Secondary rules of change work in a similar way. Secondary rules of adjudication give law-applying organs the authority to apply primary rules to resolve disputes for participants in the legal system. In a legal system, secondary and primary rules relate to one another in a way that are readily identifiable to the participants in the legal system, and the participants have beliefs and attitudes about an identifiable legal system in which these primary and secondary rules operate. We do not see these relationships cut across the fragmented domains of contracting in the cross-border space.

It would also be difficult to find the requirements of condition (4), shared agency between secondary rule officials demonstrating sufficient mutual responsiveness and joint commitment for a legal system. There is coordination in limited domains but not across them. We see some competition between legal orders. For example, New York and England may change or reform their law and courts to be more responsive to the interests of investors in sovereign debt.[66] But this is not the sort of shared planning agency between secondary rule officials demonstrating mutual responsiveness and joint commitment to a legal order, which condition (4) requires. In short, contract law is fragmented in the cross-border space.

2. A Contemporary Jus Commune?

In *Common Good Constitutionalism,* Adrian Vermeule controversially argues for returning constitutional law and adjudication to a classical legal tradition, framed around an Aquinian natural law tradition and the *jus gentium* and combined with Ronald Dworkin's approach to understanding law as a moral practice.[67] Is there a place for such thinking about contract law, and private law more generally? This section will require us to rethink

66 *See New York's Sovereign Debt Restructuring Proposals*, SQUIRE PATTON BOGGS (July 12, 2023), https://www.restructuring-globalview.com/2023/07/new-yorks-sovereign-debt-restructuring-proposals/ [https://perma.cc/7N83-SMXY]; FINAL REPORT N.Y. STATE BAR ASS'N'S TASK FORCE ON NEW YORK LAW IN INTERNATIONAL MATTERS (June 25, 2011), https://nysba.org/wp-content/uploads/2020/02/Task-Force-on-New-York-Law-in-International-Matters.pdf [https://perma.cc/3XHW-KG8A]; Lord Hodge DP, *The Rule of Law, the Courts and the British Economy*, U.K.S.C,https://supremecourt.uk/uploads/the_rule_of_law_the_courts_and_the_british_economy_54eaa5ca0a.pdf [https://perma.cc/HS8Z-C9JA].

67 ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM (Polity 2022). I do not endorse Vermeule's theory about constitutional law here.

some of our presuppositions about law and legal order. It is an exercise of our legal imagination. The approach of this section does not qualify as an attempt at describing what is. Rather, it is an attempt to get us to rethink how we order the legal world. I only suggest Vermeule's work as inspiration for a rethink and do not offer a similar jurisprudence.

I sketch out here a very brief and tentative *jus commune* approach to understanding law, designed to find a common law that elides the borders of the contemporary state.[68] The focus here on *jus commune* is methodological. It is an exercise in search of a legal method going back to well before the ascendancy of the natural law tradition found in Renaissance humanism and certainly predating the natural law arguments made in American courts in the 19th century. Before the rise of the modern state in the West and the ascendency of legal positivism, law connected to communities that were often not the result of political allegiance.[69] Law had no necessary or primary connection to state for many centuries. As James Gordley explains, "[b]efore the nineteenth century, jurists concentrated on bodies of law that had an authority that transcended political boundaries."[70] American judges even in the 19th century saw this as a basic feature of law. The legal method of jurists of the *jus commune* was philological.[71] It was a detailed investigation of doctrine through text. While the connection to Europe is apparent both historically and currently, it can be properly cosmopolitanized to be not only European in its scope. The approach to legal analysis of the medieval jurists was probably not much different from the legal analysis of today's lawyers, though with a focus on Roman sources and on the texts of jurists.[72]

With an adaptation of the method of *jus commune* jurists, we can avoid the metaphysical baggage of natural law. No foundationalist epistemologies or self-evident truths are needed. We can accept the fallibility of human reason. We can accept the relevance of morality to law, but we do not have to accept any school of thought about morality. We should assume that natural law reasoning is error prone.

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68 Searching for a *jus commune* has been a consistent theme particularly in the comparative law literature. Without citing to discussions about the law merchant and commercial law, *see* RUDOLF B. SCHLESINGER, FORMATION OF CONTRACTS: A STUDY OF THE COMMON CORE OF LEGAL SYSTEMS (Oceana Publ'n 1968); Vivian Grosswald Curran, *Harmonizable Common Law and Civil Law into Universalizable Common Law*, 2022 J. CRIM. SCI. & COMPAR. PENAL L. 243 (2022); RAOUL C. VAN CAENEGEM, THE BIRTH OF THE ENGLISH COMMON LAW (Cambridge Univ. Press 1988); MAURIZIO LUPOI, THE ORIGINS OF THE EUROPEAN LEGAL ORDER (Cambridge Univ. Press 2000); H. PATRICK GLENN, ON COMMON LAWS (Oxford Univ. Press 2007); Vivian Grosswald Curran, *On the Shoulders of Schlesinger: The Trento Common Core of European Law Project*, 11 EURO. REV. PRIVATE L. 66 (2003); Mauro Bussani & Ugo Mattei, *The Common Core Approach to European Private Law*, 3 COLUM. J. EUR. L. 339 (1996).

69 TAMAR HERZOG, A SHORT HISTORY OF EUROPEAN LAW 4 (Harvard Univ. Press 2018).

70 JAMES GORDLEY, THE JURISTS: A CRITICAL HISTORY 195 (Oxford Univ. Press 2013).

71 HERZOG, *supra* note 69.

72 GORDLEY, *supra* note 70.

Local law, or *jus proprium*, should be understood to be broadly consistent with the *jus commune.* It solves concrete local problems.[73] Universality enters at the level of a *jus commune* while there may be great diversity in the laws of various states. The *jus commune* can assist us in solving legal problems that transcend state borders. Of course, this might mean that we would have less of a need for private international law or conflicts of laws—areas of law that arose in the ascendancy of legal positivism in the 19th century. We do not have to address this question here.

The approach to contract law (and to commercial law) that a *jus commune* approach portends is that we cannot truly understand domestic contract law or the domestic law of the sale of goods if we look only to our own state law. Many law teachers who contend that law students learn the law of their own country better if they also study the law of other countries or who can thoughtfully reflect on the law of their country as falling within a history or tradition are already engaging in a form of *jus commune* methodology. Any of us who teach the CISG in our contracts or sales courses appreciate this point.

Can a transnational contract law be developed using these tools? To the extent that the CISG is used in cross-border sales,[74] this development has occurred or is in process for the sale of goods. Acceptance of the CISG by American lawyers is ultimately a matter of legal culture. Borrowing an insight from evolutionary psychology, culture is information that can affect an individual's behavior, acquired from other members of one's community, through education and other forms of social interaction.[75] Acceptance of the CISG or any other law starts in law school. Law faculties, at least those in the West, have been instrumental in establishing legal culture since the beginning of the law faculty in Bologna in the eleventh century.[76]

Other areas of law beyond the sale of goods may require a fundamental break from our current methods of organizing the law around power. For example, it would be difficult to dislodge New York and English law and courts from their roles in sovereign debt.

An excellent example of a contemporary version of the *jus commune* is the International Institute for the Unification of Private Law (UNIDROIT) Principles of International Commercial Contracts. Based on a survey of

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73 HERZOG, *supra* note 69.

74 *See* John F. Coyle, *The Role of the CISG in U.S. Contract Practice: An Empirical Study*, 38 U. PA. J. INT'L L. 195 (2016); John F. Coyle, *The Role of the CISG in Canadian Contract Practice: An Empirical Study*, 38 J.L. & COM. 65 (2020); *cf.* Ronald A. Brand, *The CISG: Applicable Law and Applicable Forums*, 38 J.L. & COM. 137 (2019).

75 PETER RICHERSON & ROBERT BOYD, NOT BY GENES ALONE: HOW CULTURE TRANSFORMED HUMAN EVOLUTION (Univ. Chi. Press 2005).

76 *See* JAMES A. BRUNDAGE, THE MEDIEVAL ORIGINS OF THE LEGAL PROFESSION: CANONISTS, CIVILIANS, AND COURTS (Univ. Chi. Press 2008).

usages of the Principles, Ralf Michaels has found one of the most remarkable uses of the Principles by judges and arbitrators even in the absence of party choice and even when parties choose other law.[77] He finds the Principles to be a "global background law" or a restatement of "global general contract law."[78] He explains that the Principles "should be viewed . . . as linked to a new *ius commune,* modelled after the old *ius commune,* the common law of continental Europe prior to the codification and nationalization of private law, or the common law prior to the twentieth century."[79] The Principles serve, Michaels argues, are not the applicable law in adjudication or dispute settlement, nor do they become national legislation. But they are used by judges and legislators to justify their decisions against a "global consensus" or "general benchmark" for legal argumentation and legislation.[80] According to Michaels, the Principles are a restatement of *jus commune.*[81] The UNIDROIT Principles are an important step towards making a contemporary *jus commune* visible and present to today's lawyers.

B. The Normative Question

So far, the discussion has only been about the analytical question of whether we can elucidate a system of contract law at the transnational level. The analytical question is important, for, among other reasons, improving our ability to determine whether a transnational contract law is in place, and if so, what its contents might be. Answering the analytical question gives us the opportunity to answer another question, whether the law that we have elucidated meets some external standard that we wish to apply to it to evaluate its merits. The usual standards for evaluating the law would be those of justice, welfare, rightness, or some non-moral standard such as economic efficiency. The aim here is provide only a tentative sketch of how to evaluate the operation of contract law transnationally from a moral point of view, and hence to focus on justice and on the moral aspects of domination or related concepts. There are other ways to conduct such an evaluation. The usual dividing lines of methodology divide between the liberal and the radical.

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77 Ralf Michaels, *The UNIDROIT Principles as Global Background Law*, 19 UNIF. L. REV. 643 (2014).

78 *Id.* at 657.

79 *Id.* at 658.

80 *Id.*

81 *Id.* at 662. For a discussion of the Principles as transnational law, *see* Michael Joachim Bonell, *The UNIDROIT Principles and Transnational Law*, 5 UNIF. L. REV. 199 (2000). For an article in this journal on the Principles and the CISG, written by the former UNIDROIT Secretary General, *see* Herbert Kronke, *The UN Sales Convention, the UNIDROIT Contract Principles and the Way Beyond*, 25 J.L. & COM. 451 (2006).

At the outset, a problem with the operation of contract law in cross-border contexts is that it is often masked or hidden. It is very difficult to know how it operates in the global economy. As A. Claire Cutler explains in the context of supply chain contracting: "The significance of private law in ordering the global political economy through GVC production has not been subject to significant legal analysis, forming a 'surprising lacuna' in GVC scholarship".[82] A rudimentary standard for a norm to qualify as law is that it is readily available or discoverable in the communities to which it applies.[83] Call this the publicity condition for law, or more accurately, a requirement for the rule of law. Contract as an important institution is hidden as a category of law governing global capitalism. Apart from the CISG, it does not neatly fit into a category of international law. Countries have not produced "contract treaties." The standard categories of law that are understood to govern the global economy are international in character, with the usual categories of international trade law and international investment law. But what these laws do is set the framework for contracting in the global economy. Without the institution of contract, trade and investment cannot get off the ground. Lawyers look to international human rights law to fix this problem, but human rights law has been notoriously ineffective in bringing any robust standards relevant to economic justice to bear on transactions.[84]

The contract law and practices outlined in part I disclose a disturbing pattern. Powerful interests use their power to select the contract law that best suits their interests. Hence, the divide and conquer strategy of selection of the law, courts or tribunals of countries in which capital markets are located to govern sovereign debt or the placing international investment contracts out of the reach of the local law of poor countries by declaring them to be subject to a fictional international contract law.[85] As for global supply chain contracts, we know very little about them. International trade and investment law moves the important questions of who gets what and why into the murky world of supply chain contracting. There has been no empirical study of choice of law in supply chain contracting. We cannot even say with any degree of certitude whether the leads in these chains consistently favor or require the application of the CISG.

82 Cutler, *supra* note 1, at 836.

83 For an influential account, *see* LON FULLER, THE MORALITY OF LAW (Yale Univ. Press 1964).

84 JOHN LINARELLI, MARGOT E. SALOMON & MUTUCUMARASWAMY SORNARAJAH, THE MISERY OF INTERNATIONAL LAW: CONFRONTATIONS WITH INJUSTICE IN THE GLOBAL ECONOMY (Oxford Univ. Press 2018).

85 Sornarajah, *The Myth of International Contract Law*, *supra* note 5.

CONCLUSION

This article sets forth a framework for exploring the idea of a transnational contract law. It first identifies the important kinds of transactions and contract practices that are most likely to be relevant. It then explores whether two very different theories of law, legal positivism, and a *jus commune* account, can help us to identify a transnational contract law. It then goes on to provide the outlines of a normative evaluation of transnational contract law. The first category of theorizing may be classified as analytical jurisprudence and the second as normative jurisprudence. The conclusions reached are that we may have some difficulty in finding a system of transnational contract law, but if we do, it presents us with some normative difficulties that need addressing.

In this discussion, the CISG plays a role but its status as a treaty and as a law that governs transactions between commercial buyers and commercial sellers make it less prone to contributing to injustice in the global economy. It may offer a lesson in how to internationalize contract law in a way that is transparent and does not unduly favor powerful interests. Perhaps what we need is less transnational law and more international law to govern the global economy, though that is offers us some new problems to deal with that go far beyond our discussion here.