Part I

Introduction

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Towards a Theoretical Framework for Contractual Certainty in Global Trade

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REGULATION AND SUPPORT OF ECONOMIC BEHAVIOUR

THE GLOBAL ECONOMY obviously suffers from enormous problems. It divides the world between the 'haves', who command the industrial, technological and financial heights, and the 'have nots'. It exploits natural resources to a maximum and resists environmental regulation. It violates human rights in disregarding health problems both at the levels of production and consumption. Similar concerns are raised in the current crisis of the financial markets since August 2007, when millions of institutional and private investors became aware of the risks of trusting the managers of their banks. The deficient formal system of monitoring the US financial market has disastrous consequences for most financial institutions worldwide. Conditions for US mortgages that are too generous and financial innovations for hiding these risks quickly lead to a global decline of growth rates. Whereas this list of sins could be easily extended, the equally obvious virtue of the global economy is its dramatic growth in recent decades.[1] Global business interacts efficiently despite the heterogeneity of social, economic and legal cultures which, according to widespread assumptions, causes insecurities and uncertainties. Breaches of contracts may occur more frequently and business relationships may be terminated more often in international than in domestic trade. However, most business people engaged in exporting or importing

[1] In global terms, the annual average compound growth rate between 1913 and 1950 was less than 1%. The following 23-year period was one of strong international trade expansion with annual compound growth averaging 7.9%, which then eased off to 5.1% over the 25-year period 1973—98 (<http://www.globalmarketbriefings.com> accessed 17 June 2008).

products or services seem to operate in a sufficiently predictable environment allowing successful ventures into the global market.

The ongoing debates about the declining role of the nation-state, the importance of multinational enterprises, the phenomenon of codes of conduct and the participation of none-governmental organisations (NGOs) in all kinds of regulatory regimes all refer to the (in the opinions of business people: ugly) face of regulatory governance. It is blamed as irrelevant to full employment, harmful to resource allocation and growth, counter-productive in a globalised market and harmful to income distribution (Shipman, 1999: 390–438). Deregulation, privatisation and 'minimising the state' are strategies recommended as recipes in order to reduce the over-extended role of government in the economy. At the same time, a different debate emerges in economic literature and reports of international financial institutions referring to public (state) responsibilities in supporting and securing market exchanges (Webb, 1999; Shihata, 1997). This style of government, the coordination (support) function of institutions, aims at establishing certainty and trust and the reduction of transaction costs.

The seemingly paradoxical picture of cultural/institutional diversity and contractual efficiency of cross-border business transactions has become an interesting research subject and this book will try to make a contribution to the debate. Cultural and institutional diversity has led to countless initiatives of state and/or private actors establishing legal and informal regimes towards corporate social responsibility in the global economic system. These are activities which try to deal with the above-mentioned social problems caused or aggravated by the globalisation of the economy. If successful, on the one hand, they limit the freedom of doing business, but on the other hand, they reduce some of the uncertainties in a world of multiple regulators. All other uncertainties of economic exchanges, despite regulatory interventions, continue to affect business people and are considered largely part of their way of life: business opportunities, innovations, markets, etc. Some ('developed') nation states also intervene in this 'private' realm of doing business, intending to facilitate contract enforcement. Through private law, the state offers a set of background norms and processes that can be used by private parties to make claims against each other. Private international law (consisting of domestic rules principally concerned with applicable law, jurisdiction of courts, and recognition and enforcement of judgments in civil disputes with aspects that cross jurisdictional borders) and unified private law (like the United Nations Convention on Contracts for the International Sale of Goods (CISG)) aim to extend this support for enforcement of cross-border contracts. The actual use of these 'facilitative' or 'enabling' instruments varies between legal cultures, between industries and social strata, leading to legal debates about best solutions (which is since Roman times the justification of legal scholarship) and legal initiatives to spread these best solutions worldwide

(which also has a long tradition and is currently practised by the World Bank and many other international, state or private institutions).

More recently, the debates go beyond the details of best solutions by questioning the underlying assumption that an economy requires this legal support in order to be successful (mostly measured in growth rates) and efficient. Mainly (legal and economic) sociologists and economists take part in these debates, whereas legal science and neo-classical economy remain unaffected in their strong positions in favour of or against this assumption. For academic as well as for practising jurists, law is constitutional for society in general and for the economy in particular (ubi societas, ibi ius). Consequently, world trade 'needs' an international commercial law (Gopalan, 2004; World Bank, 2005). By contrast, neo-classical economy assumes that economic actors have no need for normative guidance in making rational decisions in markets. They have clear and consistent preferences and are able to render judgement on the probability of future outcomes. Neo-classical economics, with its reliance on the invisible hand paradigm, does not need institutions for efficient markets (Shipman, 1999: 429; critical North, 2005: 13). Neither of these two extreme positions explains the variance of economic behaviour within societies, let alone in a comparison of economic cultures and the world economy. The sociologists and economists currently involved in studying the role of law in the economy with more analytical and mostly empirical methodologies make use of Max Weber's insights on this subject, of New Institutional Economics, Evolutionary Economics and anthropological studies on the role of interpersonal relations and networks. These disciplines meet in 'varieties of capitalism' and 'law and economic development' research and have produced in the last decade knowledge highly relevant both for both theory and practice. In studying the role of law in the global economy (which may be characterised as a 'developing' economy), it seems a good choice to take this knowledge as a frame of reference. The project leading to this book was just another occasion where disciplines located between the aforementioned extreme positions of doctrinal law and classical economics met, attempting both to follow their own agenda and learn from like-minded research in the academic neighbourhood.

CURRENT DEBATES ON LAW AND ECONOMIC DEVELOPMENT

In most social systems of production and exchange, the *coordination* (*support)* function of institutions occupies an important position, whereas regulatory aspects in fact play a minor role. In some sectors of economics and sociology it is common knowledge that market exchanges are not only contractually organised: they are embedded in social relationships and are also largely dependent on external coordination (governance). From this

perspective, state law is one (although not the only) coordination structure and current debates on public-private modes of regulation also apply (Grande, 2005). Some states have established such structures or are in the process of creating them. Other states—either purposefully or due to lack of resources—refrain from building structures for market exchanges. Comparative economic sociology (Hollingsworth and Boyer, 1997) has provided many examples of cultural differences in organising markets. Support structures are in some cultures predominantly established by horizontal modes, whereas in others they are established by vertical modes of economic coordination. Horizontal modes of coordination are markets and communities; vertical modes are firms and the state. In addition—placed between the horizontal and vertical modes—networks and associations contribute to the governance system. Regulatory states, dominant developmental states, business corporatist states and inclusive corporatist states (Hall and Soskice, 2001) each develop distinctive ways of organising the institutional environment of the economy. Frequently made assumptions that the models can be ranged on efficiency and rationality scales are not supported by comparative economic research. A single best way to economic growth does not seem to exist (Boyer and Hollingsworth, 1997). Additional 'varieties of capitalism' (Hollingsworth and Boyer, 1997) emerge in globalised systems of exchange which develop their own culture and structure. This may then have repercussions on the economies of all nation states which take part in global trade regimes. Furthermore, globalisation may lead to new institutional arrangements.

Law and economic development research uses similar complex and comparative approaches in order to understand how economic behaviour is coordinated in situations of uncertainty. More attention than in comparative economic sociology is laid on the specific role of law as a potential support structure for the economy. Its central interest revolves around the questions of whether Max Weber's thesis needs qualification that 'modern' law characterised by formal legal rationality is uniquely suited to the demands of capitalism, and whether the relative informality that is so often said to characterise business relationships suggests that social institutions can provide at least a substantial portion of whatever stability and predictability capitalist development requires. Weber's idealised picture of how law operated in Germany, his 'England problem' and currently the narrow assumptions of promoters of the rule of law—biased again by an idealised picture of how law operates in the United States—are under scrutiny. In addition, economic theory contributes to this debate through the increasing influence of new institutional economics, which brings institutional structures and processes, explicitly including law, back into the picture.

We distinguish between and elaborate on five approaches which contribute to the debate on the role of law in economic development: (i) classical

sociology of law; (ii) law and development; (iii) economic sociology; (iv) institutional economics; and (v) social capital discourses.

Max Weber is the classical reference for the argument that formal rational law, a politically independent bureaucracy and a predictable judiciary are prerequisites for a modern economy organised in anonymous markets (Trubek, 1972). A rational legal system should be autonomous from other social structures. It should be composed of systematically observable norms and rules that are purposively constructed. Such norms and rules must be applied with principled consistency to produce a system of predictable, systematic, formal and rational law,

autonomous from prevailing political or religious considerations. The current discussion points in somewhat different directions: not only is Weber himself seen as much more open to informal and discretionary institutional support for the economy (Treiber, 1989; Gessner, 2007; Dorbeck-Jung, this volume), but his calculability and predictability premise is considered less relevant for economic performance (Heydebrand, 2007; Scheuerman, 1999; Teubner, 1997; Dorbeck-Jung, this volume). Like Peerenboom (2002), most participants in the actual reformulation of Weberian approaches—instead of insisting exclusively on state support and legalisation—search for 'the right combination of private and public ordering'. These new perspectives do not try to prove Weber wrong, but simply take dramatic changes in all developed or developing societies and their economies into account.

Law and development (Galanter and Trubek, 1974; Gardner, 1981; Carty, 1992; Cao, 1997; Larson-Rabin, 2007)—originally a scholarly movement which transformed later into a massive assistance programme of international financial institutions—initially gave priority to the role of the state in the economy and the development of internal markets. The perspective on law as an instrument for effective state intervention and regulation shifted in the 1990s to an approach more interested in legal certainty and legal structures facilitating market exchanges. Trubek (2006)—who himself was and still is one of the prominent activists of the movement— critically describes these two consecutive phases as inefficient and even counterproductive due to their application of an idealised Western rule of law concept, a strong belief in universal institutional models for market exchanges and the possibility of legal transplants imposed from the top. He currently perceives and advocates a third phase which considers the local context and local institution, avoids the 'one size fits all' approach and incorporates a social agenda in policy recommendations. Economic development requires the protection of human rights in addition to an effective system of property, contract, labour, bankruptcy, commercial codes, personal rights laws and other elements of a comprehensive legal system that is effectively, impartially and cleanly administered by a well-functioning, impartial and honest judicial and legal system. The

role of private ordering in the third phase is not made explicit, but does not seem to be considered particularly relevant. Law and development is—at least predominantly—a legal agenda with recommendations for state policy-makers and international development assistance institutions.

Economic sociology always had as major intellectual sources Karl Marx, Max Weber and Karl Polanyi, with their discussion of legal elements in economic structures. However, for some decades the interest in law as a constitutive element of economic phenomena in modern society has been lost (Swedberg, 2003). The main research areas were organisations, enterprises, associations, networks, personalised economic relations, and informal norms and rules. In opposition to classical economics and its fictitious model of the rational and well-informed *homo economicus*, economic sociologists emphasised economic behaviour being embedded in social structures, cultural patterns and close-knit relationships. This private-order focus has only recently been amalgamated with economic (Zafirovski, 2000; Nee, 2005) and sociology of law (Swedberg, 2003) approaches, together with research on varieties of capitalism (Hollingsworth and Boyer, 1997)—the latter adequately covering all three disciplines. Most explicit in his interest in law and public rather than private governance structures is the economic sociologist Neils Fligstein (2001), who states bluntly that without law, states and the ability to find non-predatory legal methods of competition, firms cannot exist.

Institutional economics is among those approaches which have a quite balanced view on informal and formal governance structures. Douglass North (1990) explains economic performance as a dependent variable of efficient institutions. If the measurement of quality of whatever it is that is being produced or exchanged, the analysis and comparison of price, the enforcement of contracts and so forth cause transaction costs, economic actors can be, and in reality generally are, supported by institutions which reduce the investment in situations of choice. He posits that rationality, in the sense that economists talk about, works best when the choices of the players are most limited. As North (1999) notes: 'Markets have to be structured'. Whereas private, informal rules structure large sectors of the economy, these institutions tend to be legal institutions in impersonal markets. This balanced view gets somewhat lost in the literature where North's followers tend to focus their attention on formal institutions (for a critical discussion, see Knowles, 2005; Evans, 1995). It also gets lost in the course of research commissioned by policy-makers and international development institutions. By definition, private ordering and informal rules are not 'engineerable'. They cannot be created, imposed and legislated. This is why institutional economics appears to be biased in favour of legal institutions. Institutional economics also has a neo-liberal reputation because it is in the policy context more often used for creating opportunities for business (enabling law) than setting up constraints on business (regulatory law).

Although social capital approaches are similar to and overlap with discourses on informal institutions in institutional economics, they have their own research tradition across academic disciplines (Bourdieu, 1986; Coleman, 1988; Putnam *et al*, 1993; Lin, 2001; for an overview, see Woolcock, 1998). Higher levels of social capital—defined as the degree of trust, cooperative norms and associational memberships or networks in a society—are observed to influence economic performance: either improving performance by increasing the number of mutually beneficial trades, solving collective action problems, reducing monitoring and transaction costs and improving information flows (Knowles, 2005) or, on the contrary, prevent the market from functioning well. They can be ruinous not only for society at large (eg mafia communities), but even for the members of cooperative associations and interpersonal networks. As Dasgupta (2005, 12) notes, although networks and markets often complement each other:

> [T]here is nothing good or bad about interpersonal networks: other things being equal, it is the *use* to which a network is put by members that determines its quality.

A large number of studies have been carried out in order to assess these uses, in particular under the umbrella of the World Bank (which offers its own social capital website). The social capital is located somewhere between the individual and the state, the latter creating a positive or negative framework for its organisation and its influence on economic exchange. Effective states deliver rule-governed environments strengthening local organisations and institutions; ineffective states may cause the atomisation of society, leaving no space for self-organisation at the bottom. Most relevant are discourses on synergetic cooperation between public and private institutions (Evans, 1997), where state agencies rather than limiting local initiatives form dense networks of ties that connect state and social capital—making sure that embeddedness does not degenerate into clientelism, corruption and rent-seeking. Particularly in third-world communities, social capital is considered a resource that is at least latently available for economic development. State/network linkages seem to have played a central role in the transformation of East Asian economies from low-productivity agrarian to the most rapidly growing industrial regions of the world.

There is rich empirical literature produced or referred to in all of the above discourses. To mention only some examples: studies on the coordination through trust (Macaulay, 1963; 1985; Burt, 2001; McMillan and Woodruff, 1999) led to important theoretical discourses on relational contracting (eg Williamson, 1985). Equally important is empirical research on networks as a substitute for impersonal third-party institutional support that guarantees contracts and private property. Studies on the role of law

in economic development have been carried out in Asia and Africa, as well as in Western and Eastern Europe. Feenstra *et al* (2001) deal with Taiwanese and South Korean business groups; Fafchamps (2004) with ethnic networks and indigenous market institutions in Sub-Saharian Africa; Kali (2001) with business networks in Eastern Europe; Aoki and Patrick (1994) with the Japanese Main Bank System (see a critical discussion in Miwa and Ramseyer, 2002; and Milhaupt, 2002); Milhaupt (2001) deals more generally with corporate governance in Japan; Kirman (2001) with the fish-market in Marseille; Padgett (2001) with the Renaissance Florentine Banking System; Greif (1993) with Mediterranean traders from the eleventh century known as the Maghribi; and again Greif (2006) with medieval trade. Finally, the compensation of weak court systems by endogenous dispute resolution institutions have been studied by Gessner (1976; 1984) in Mexico, and by Hendrix (1997) and Hendley (2001) in Russia. Dixit (2004) makes use of these and similar empirical data for law and economics and for his theory on behavioural consequences of lawlessness.

Recently, Trebilcock and Leng (2006) have made an extremely useful effort to summarise this empirical knowledge with regard to whether the existence of a formal contract law and enforcement regime significantly contributes to economic growth. They found that the existing empirical evidence on the correlation between a country's economic growth and legal enforcement of contracts suggests a strong correlation only in the financial sector. It turns out that both the proponents of contract formalism and of contract informalism offer supporting bodies of theory and empirical evidence, but that both risk overstating, or at least over-simplifying, their cases. In evaluating the literature from a developmental point of view, they conclude:

> … that at low levels of economic development, informal contract enforcement mechanisms may be reasonably good substitutes for formal contract enforcement mechanisms. At higher levels of development, however, informal contract enforcement may become an increasingly imperfect substitute due to the presence of large, long-lived, highly asset-specific investments, as well as the prevalence of increasingly complex trade in goods and services that often occurs outside of repeated exchange relationships (at 1519).

Even these cautious attempts at generalising empirical research are challenged by the success stories of East Asian economies. Japan, South Korea, Taiwan and in particular China, with their rates of economic growth unknown in Western industrialised countries in the latter half of the twentieth century:

> … failed to put judiciaries and problem-solving lawyers at the center of the governance process, failed to serve as convenient fora for private litigation to enforce property and contract rights, failed to protect minority shareholder

> rights, failed to take intellectual property rights, competition law, or insolvency law very seriously, and failed to legalise state-private sector relations through constitutional and administrative law (Ohnesorge, 2007: 290).

Most experts on Asian law agree that the 'Asian miracle' was accomplished largely without legal support on the private, administrative or constitutional law levels. Explanations were sought in particularities of the political system (Trebilcock and Leng, 2006, on China), in the absence of social conflict due to a homogeneous population (Trebilcock and Leng, 2006, on Japan), in substantive rationality approaches conducing to reasonable choices and trade-offs (Ohnesorge, 2007) and in cultural preferences for extra-legal relationships (Upham, 1987).

According to Ohnesorge (2007) and Mayeda (2006), East-Asian economies should not be treated as exceptional cases. Instead, they should be understood as alternatives to Western modernism and open our eyes to different normative systems that promote and coordinate social systems of production and exchange using alternative trajectories. To the extent that legal, sociological or economic theories on the role of law in the economy cannot accommodate the North-east Asian experience, they are considered inadequate. Ohnesorge's careful analysis of current knowledge on law and economic development leads to the conclusion that no general theory is available which either requires or rejects law as a constitutive institution for the operation of the economy. Max Weber's 'England problem' is today's 'China enigma'.

One issue that is not widely addressed in the literature on contract enforcement and development is the role of law, business coordination and contract enforcement in contemporary international trade. Since international trade has a comparably weak legal infrastructure and similar growth rates to East-Asian economies, this phenomenon of the 'world trade miracle' deserves equal attention and should be considered to be a similar theoretical challenge as the China enigma.

INTERNATIONALISATION OF MARKETS AND CONTRACTUAL CERTAINTY

The purpose of this collection is to build on this interdisciplinary exercise by: (i) adding some more empirical evidence to ongoing debates regarding enabling structures for *international* business; and (ii) critically reviewing and discussing some of the propositions in the literature which contain interesting hypotheses on the effects of the *internationalisation* of markets on market coordination institutions. Although the literature discussed above is a rich source for theory and empirical practices, its approaches and observations cannot easily be generalised with regard to the international field because actors and the social context differ in many important

ways. In the global economy, there is no 'developmental state' (as in Asian national economies) and little interference by international financial institutions. Economic actors tend to be strong and experienced. Lawlessness is not always compensated by existing social norms, and culture is less relevant for either impeding or supporting market-efficient institutions. These and more differences between the domestic and global contexts will have to be elaborated in each of the papers collected in this volume.

There is little theoretical guidance for studies on the internationalisation of markets. From the position of economic sociology, Whitley (2003a) points to emergent global institutions for contract enforcement; Teubner (1997), as a prominent representative of systems theory, takes merchant law and the processes of international commercial arbitration as examples of how global functional systems are generating 'global law without a state'; and Hadfield (2001; 2002) suggests from an economic perspective that in order to achieve market efficiency, commercial and corporate law should be privatised. The competition of different private legal regimes is advocated as a first-best solution. In contrast are proponents of the law merchant (Berger, 2001), who advise the recognition of autonomous commercial norms by state courts. Our research question of whether law explains the 'world trade miracle' is only marginally addressed by these theoretical debates. If one looks for empirical research on the coordination of business exchanges in international markets, there is not much more to report. Dezalay and Garth (1996) provide useful information about the working of international arbitrators and their reluctance to create an autonomous *lex mercatoria*. Trebilcock and Leng (2006:1541) in their evaluation of empirical studies—after complaining that 'new institutional economics' scholars have paid inadequate attention to investigating the impact on contract enforcement mechanisms brought by the expansion of international trade and growing trend of economic globalisation—mention some studies on transnational business networks and on the increasing use of barter in both international trade and transition economies which their authors consider an optimal institutional response to contract enforcement problems in both settings. Berkowitz, Moenius and Pistor (2004) present evidence that a country's domestic legal institutions have strong explanatory power for its integration in international markets. Countries with higher ratings on rule of law scales experience greater international trade flows.

About one-half of the contributions to the present volume emerge from the Collaborative Research Unit, 'Transformation of the State', at the University of Bremen, Germany.[2] Previous research frequently referred to

[2] <http://www.sfb597.uni-bremen.de/?SPRACHE=en> accessed 17 June 2008. This large research project is funded by the *Deutsche Forschungsgemeinschaft* and generously supported by the University of Bremen.

in this volume documents the emergence of our topic and our emphasis on empirical studies.[3] The support function of domestic courts (Germany, Italy, the United States) for cross-border exchanges was the object of our initial curiosity (Gessner, 1996), followed by empirical research on cross-border debt-collection, cross-border maintenance claims, social security claims of European migrant workers, international disputes in the London reinsurance market, cross-border money transfer in the European banking sector and on support offered by (German) consulates and chambers of commerce abroad (Gessner and Budak, 1998).[4] The third publication in this series (Appelbaum, Felstiner and Gessner, 2001) offers—in addition to more theoretical debates[5]—empirical insights on international law firms, Chinese business networks (*guanxi*) and international arbitration. Sosa (2007)—the most recent dissertation emanating from the Bremen 'Transformation of the State' project—provides a balanced picture of the role of contract law in international business exchanges.

Our new volume now adds research on the coordination of international business in the diamond industry, the timber trade and the software industry by mid-sized and mega law firms, and by accounting firms.

A careful evaluation of this emergent empirical knowledge is useful in order to arrive at a better theoretical understanding of global law and global non-legal institutions in the worldwide varieties of capitalism (Gessner, 2007). It helps to avoid the selective use of data as it best fits the author's purposes—a fallacy particularly evident in globalisation of law discourses. It is fascinating to speculate about the 'world society' or 'global law', but this should be complemented by more down-to-earth—although mostly less spectacular—empirical research in areas affected by globalisation, in particular the economy. A complex understanding of coordination institutions of modern economies allows theory building about current or future changes in market coordination caused by globalisation processes.[6]

[3] Research started in the social science department of the Max Planck Institute for Comparative and Private International Law in Hamburg and was taken up when the entire department moved to a more interdisciplinary environment at the University of Bremen.

[4] During this project phase, dissertations with rich empirical data were written by Budak (1999), Grotheer (1998), Stammel (1998) and Vial (1999).

[5] These debates are structured on a continuum between universalist and particularist support institutions: law, *lex mercatoria*, law firms and networks (Gessner, Appelbaum and Felstiner, 2001). This is a differentiation also used in contributions to this volume.

[6] Comparative law, legal theory and legal history also deal from their perspectives with our topic (Michael and Jansen, 2006; Jansen and Michaels, 2007) and participate in conferences with similar titles ('Beyond the State? Rethinking Private Law' (Hamburg, 12/13 July 2007)). Despite being largely complementary, these legal discourses should develop separately from social scientific approaches in this early stage of reflection.

CONTRIBUTIONS TO THIS VOLUME

Empirical Studies

Diamond Trade

Barak Richman updates our knowledge about the diamond trade, the most frequently used example of a community of traders who coordinate their exchanges autonomously and have completely 'opted out of the legal system'. Recent developments challenge this trade, which has been stable for nearly a millennium. Indian diamond manufacture and trade traditions re-emerged with the opening of global market opportunities and the advantages of lower wages compared to wages paid in high-income nations, where Jewish diamond networks have operated in recent centuries. Consumer demands for a control of 'conflict diamonds' sold by African military warlords brought scrutiny to the previously secretive DeBeers monopoly and led to an international programme to certify the origin of each diamond. In addition, as a response to both developments, Richman describes revolutionary changes in the DeBeers marketing strategies from wholesale distribution to a vertically integrated marketing strategy supported by global branding campaigns. Whereas the Indian ethnic network using community institutions and ethnic-based extra-legal sanctions may be orchestrated similar to the Jewish diamond trade with no need for state law and public courts, the other two developments require legal regulation and contract law. Richman's surprising finding—similar to some of Konradi's observations in the timber trade—is that globalisation has brought more law, not less, to an industry that has been historically lawless.

Timber Trade

Wioletta Konradi has chosen the timber industry for a study on the governance of global business exchanges. She finds a mix of relational mechanisms and support structures ranging from trust in long-term relations, reputational sanctions in business networks, branch norms, autonomous commercial norms created by the International Chamber of Commerce and state law. Contract enforcement by third parties plays—as is common in business everywhere—a marginal role. Arbitration is popular (although the number of cases seems to be declining), whereas state courts are used less frequently for conflict resolution (mostly debt collection) in exchanges beyond the traditional (Western or Organisation for Economic Cooperation and Development (OECD)) timber markets. As her comparison with the diamond trade shows, the timber trade is far from reaching a

kind of regulatory autonomy which, as Richman observes, is slowly disappearing even in previously close-knit communities such as the (Jewish) diamond traders community. This picture of economic institutions and economic behaviour supports most assumptions of economic sociology and institutional economics and is also shared by those approaches which Konradi calls traditionalist. No one holds or has ever held a position that contract enforcement is only possible by way of state support and through the application of state law. In search of traditionalists, one would rather find approaches at the opposite end—those which defend a complete autonomy of market behaviour from state and legal support—such as classical economy. Konradi offers valuable details of industry self-regulation, suggesting in her conclusions that this phenomenon is neither recent nor positively related to globalisation. Most interesting is her outlook on future developments. The data seem to indicate that globalisation has weakened private governance structures of the timber industry and that the cooperation between the state and private actors in developing support structures will increase considerably in the future.

Software Industry

Thomas Dietz and Holger Nieswandt summarise in their chapter an empirical study of contract enforcement in worldwide cooperations within the software industry. The software development carried out for German companies by Bulgarian, Indian and Rumanian firms appears to have a legal structure, since complex contracts are negotiated with choice of law and also mostly arbitration clauses. However, legal contract enforcement is almost impossible for the same uncertainties described in most other chapters in this volume. Some large firms have legal departments, but they do not take their controversies to domestic courts. Equally absent in this branch of business are autonomous rules of a *lex mercatoria* type. If disputes are arbitrated, it is (German) law which applies. Reputation and business network information— in most situations—puts enough pressure on contracting parties to honour previous agreements. The authors' most interesting finding is the bilateral contract management facilitated by almost daily electronic control, adaptation of expectations and reorganisation of next steps within the contractual cooperation. It seems as if high-speed information creates a kind of cognitive attitude to those unforeseen events which in previous non-electronic centuries have been defined as normative clashes, breach of contract and fraud. If the exchange cooperation develops in a way which was not anticipated, a speedy change of strategies on both sides mostly helps to avoid disappointments and

turning to a 'naming, blaming, claiming' automatism.[7] This phenomenon of cognitive management of disappointments can certainly be generalised beyond the exchange within the trans-national software industry and may become a style element of a forthcoming global legal culture.[8]

International Law Firms

Fabian Sosa's detailed description and analysis of the handling of international cases in a German mid-sized law firm is the result of a unique opportunity of a participant observation. This method is generally (and more so in studying a legal context) far superior to data collection through interviews. The chapter provides an insider perspective of lawyers struggling with the uncertainties of cross-border arbitration. The transactions do not leave the sphere of influence of the law firms at any time. Lawyers draft complex contracts which are often the basis of coordination. They advise their clients on all matters concerning settlement, litigation or arbitration and they participate in the arbitration procedure as representatives of the parties or, if not involved as party representative, as arbitrators.

In all of those activities, state law is relevant, but somewhat shifted to the background. It is not the law—not even its shadow—nor the law merchant which offers the necessary institutional support for doing business, but the lawyer in his or her role as a manager of uncertainty. The typical client of a mid-sized law firm is a mid-sized company which has little experience in matters of international dispute resolution and no knowledge of foreign law or private international law. However, the company trusts the law firm to find an acceptable solution. Sosa not only describes the ways in which an experienced law firm earns this trust, but also how inexperienced law firms only pretend to be knowledgeable in international matters and advise a quick settlement in order to avoid embarrassing failures in dealing with foreign lawyers, foreign courts or experienced arbitrators. This study is complementary to other studies of the international legal profession, which deal mainly with the mega law firm advising big businesses with its huge experience and manpower. Sosa's participant observation is also complementary to research which conceives international arbitrators as an elite group with internal struggles rather than a profession with its specific methods as mediators and decision-makers.

[7] As the authors point out, they rely heavily on legal-sociological knowledge, in this context on Felstiner, Abel and Sarat, 1980.

[8] This again is a reference to legal sociology (Luhmann 1971; 1982).

International Investment and Financing

John Flood and Eleni Skordaki introduce us to the strange and (to most of us) unfamiliar world of real-estate finance. If the reader hardly understands this complex process of structuring 'pan-European' real-estate transactions and cross-collateralisations and if he or she is lost in the transaction structure of Canary Wharf 2001 financing given in Figure II, he or she only supports the authors' arguments: this world of capital flows and investment is impenetrable, opaque and uncontrollable, not only for the normal citizen, but also for most lawyers and even state bureaucrats. This gives a few specialised law firms (according to the authors, predominantly English firms) in collaboration with the Big Four accounting firms, banks and credit rating agencies a dominant position over all other actors like the Brussels administration, state regulatory agencies or tax offices. Security (for the money lent by the banks) is the main purpose of these efforts, but to call it legal certainty would seem overstated and a little euphemistic. State law and—in the case of the Sharía-compliant transactions— religious law are tools used unscrupulously in order to set up autonomous structures serving the interests of profit-seeking investors. Specialised law firms do not only support these cross-border capital flows, they create enabling structures without which investors would be confined to their domestic markets. The paper is written by two insiders, and so like Sosa's study, is a unique socio-legal opportunity for understanding the practice and the growing structural relevance of the legal profession.

Theoretical Debates

State-society Synergies in Economic and Legal Sociology

Volkmar Gessner starts by reviewing approaches in informal as well as formal and in endogenous as well as exogenous elements of market coordination. Market coordination may in part be achieved by contract enforcement institutions, but requires in addition a complex set of property rights protection institutions. They form the infrastructure of a market, a framework which is constitutive for any exchange before, during or after the specific transaction takes place. In a modern market economy, this protection is predominantly achieved through a *legal* infrastructure, although cultural institutions have an influence and informal (legal cultural) implementation patterns support or hinder the legal institutions to create the required trust in market relations. The importance of law as a constitutive element means that the state is a core player in establishing the institutional framework for markets. This constitutes then a description of the situation before the markets became more and more globalised and

new actors and global institutions ready to replace or complement the traditional legal infrastructure emerged. A number of theories of change deal with this possible new situation and the role that the state plays in it, using as indicators most frequently contracts, international lawyering, dispute settlement, *lex mercatoria* and arbitration. Gessner concludes that there is no general theoretical consent or sufficient empirical evidence that nation-state support for the globalising economy is significantly changing by developments in the contract enforcement field. Such speculations under-estimate the complexities of social systems in general and of social systems of production in particular. Sufficiently complex theories for understanding domestic as well as global support for market exchanges seem to be those offered by economic sociology, in particular by Neil Fligstein.

Gralf-Peter Callies recognises the existence of non-state normative orders in the transnational sphere as a social reality and attempts to reconstruct a legal approach beyond what he defines as traditional and transnational legal thinking. For the former, only state law has legal quality and the assumed weakness of state law in global dealings is deplored as lawlessness. For the latter, the private order created mostly by economic actors in order to facilitate global exchanges also qualifies as law. A critical discussion of both approaches is based on the normative argument that private and public law, coordination and regulation cannot be separated and that state law and non-state normative orders have comparable legal qualities. Neither lawlessness, with its lack of institutional support, nor private legislation, with its insufficient justice elements and protection of public goods, is a desirable model for global ordering. Callies prefers a model of transnational civil regimes which intermingles public and private governance mechanisms. This is, of course, a familiar and appreciated perspective for legal sociology and equally for economic sociology: both use this model of an institutional mix even for domestic legal cultures. Such a common perspective between normative and descriptive approaches seems to be a rare coincidence and will facilitate interdisciplinary cooperation between law and the social sciences in understanding and shaping global legal cultures—although all of those problems connected with the 'living law' concept will also be shared.

Efficient Private Legal Regimes in Law and Economics

Gillian Hadfield further develops her previously published—and in this volume frequently discussed—premise that the law governing commercial transactions need not be provided by the state, taking issue in particular with Callies' evolutionary perspective of emerging mixed public-private governance regimes generating transnational civil order. Distinguishing between the economic and democratic functions of law, she perceives a

potential for identifying legal rules or mechanisms the functions of which are, or can be treated as, exclusively to achieve efficiency: the maximisation of gains from trade and the best use and allocation of resources. The rules governing contracts between corporate entities, for example, have only an efficiency dimension—even when fairness or due process emerge as a component of what the private market produces. Hadfield then emphasises that this efficiency dimension does not imply that the entire relationship is allocated to a private legal sphere. Three distinct ways are discussed in which privatising some aspects of commercial law will inevitably involve and may require elements of public law: legal services in adjudication and rule enforcement, a legal infrastructure of institutions and procedures without which contractual 'self-enforcement' cannot work, and public monitoring of market imperfections through, for example, competition law. In Hadfield's view, the public law elements directed to improving the efficiency of private legal regimes can and should be distinguished from those nation state or transnational regulatory institutions which aim to achieve democratic legitimacy.

Institution Building in Evolutionary Economics

Jörg Freiling's starting point is an institutional gap for international economic transactions. This approach follows the argument of new institutional economics in so far as institutional support is considered necessary for saving transaction costs. However, Freiling then takes his own direction by assuming that nation states are unable, unwilling or at least too slow to create the institutional structures, depriving business people of exogenous governance structures and forcing them to organise their own private order if they want to 'go international'. Important variables are business types, since needs for a specific governance structure vary according to what is exchanged: a product in a spot market, a product in a long-term relationship, a project or a system of prospective solutions. This process of institution building is analysed with the tools of evolutionary economics and their concepts of variation, selection and retention. The evolution is complex and characterised by trial and error and by historical accidents and contingencies. Second-best solutions and inefficiencies are maintained due to path dependencies, inertia, lack of information and—quite uncommon in economic discourses—due to the exercise of power. However, in the paper, somewhat pushed to the background, the variables used for analysing the evolution of economic institutions may also help to understand legal developments and the efforts of nation states and international agencies to build secure structures for global trade and for individual businesses. The approach does not seem superior to institutional economics in explaining the emergence of efficient institutions, but it offers interesting variables and better hypotheses for explaining the long life of

inefficient institutions. Cooperation with legal sociology with its long tradition in researching this subject looks promising for both disciplines.

Updating Max Weber's Theory of Legal Certainty

Bärbel Dorbeck-Jung questions familiar concepts of legal certainty and goes back to the sources. Max Weber's most influential assumption that legal infrastructures facilitate modern capitalist developments by creating legal certainty (in the sense of a general, abstract, clear, hierarchic, coherent, uniform, predictable and stable legal order based on the state's monopoly of organised violence) is explained in the context of his economic sociology and confronted with its challenges. According to sophisticated and ongoing debates, Weber's model of the affinity between formal rational law and modern capitalism has lost its explanatory value due to globalisation processes, the emergence of multinational enterprises, technological innovations, decreasing relevance of nation states, legal pluralism and the decreasing role of legal instruments in public governance. Dorbeck-Jung, although supporting most of these challenges and suggesting a re-conceptualisation of economic needs for calculability and legal certainty, believes that Weber's 'iron cage' metaphor is not representative for his much more complex approach allowing for the recognition of non-state support structures for the economy and the materialisation of law (as opposed to formal law, which Weber is mostly identified with). A careful reading of Weber's great 90-year-old *oeuvre* still seems to be helpful in understanding legal developments in times of globalisation.

Wolf Heydebrand examines the concepts of contractual certainty and efficiency in global-local interaction in the historical context of pre-national, national, supra-national and post-national phases of economic globalisation and legal development. This analysis suggests that the goal of achieving contractual certainty was integral to the liberal legalism and formalism of the nienteenth century continental European nation states and their bureaucracies, but was gradually superseded by the goal of contractual efficiency in the post-national context of the late twentieth and early twenty-first centuries. The analysis also suggests that the assumption of the trans-historical stability and continuity of socially embedded legal and economic institutions is problematic in view of the disembedding consequences of globalisation. Temporarily established institutions and relatively autonomous practices may be exposed to a reversal of their embedded status under the impact of the pervasive neo-liberal quest for transnational economic and legal efficiency.

Some Important Limitations of our Collection

The contributions to this volume offer a variety of answers to our research question: why international trade prospers without a clear and predictive support structure comparable to institutions in economically successful nation states. The institutional gap is filled partly by law firms, trade associations and arbitrators, but also by a reliance on networks and close inter-firm relationships. This last aspect is reinforced by revolutionary developments in the field of information and communication technologies which enable companies to control certain actions of their exchange partners in real time. Legal support is present almost everywhere, but to a lesser degree than in domestic exchange relations, since economic actors tend to build their own structures that they can rely on and make future actions somewhat more predictable. Since this social organisation of distrust comes at considerable costs, only relatively wealthy firms are able to shield themselves from the risks and disappointments of global trade. One only has to compare the *de luxe* arbitration described by Sosa (2008, in this volume) with the picture of bread and butter litigation of international cases in domestic courts (Gessner, 1996). If our case studies offer mostly success stories of global uncertainty management, a caveat is necessary: the losers of globalisation are not represented in our sample. In order to obtain a balanced picture, one should also read previous research published within the Bremen project on 'small peoples' problems' in enforcing cross-border claims (Gessner and Budak (eds), 1998: 191–324). Schnorr (1994) observes the desperate situation of small law firms and sole practitioners in dealing with international cases, and Petzold (1996) describes the miserable legal support for 'small people' provided by consulates and foreign chambers of commerce. In Sosa's sample (2007), many cases are reported where inexperienced firms suffer losses in their import and export trades, and Gessner *et al* (2001:19) discuss a number of publications where international legal practice is presented as a failure rather than as an example of autonomous management of trust. A position of economic power prevents the breach of a contract by the weaker party. The best way towards contractual certainty is the establishment of dependency relations. More research in this direction will reveal that the success stories in this book, as well as the aggregate numbers of international trade expansion given in footnote 1 above, have to be taken with caution. The same applies to cultural elements in the social organisation of distrust like Russian, Italian and East-Asian ethnic networks, in particular *guanxi* networks of Chinese communities which have been extensively discussed in our previous collection on the legal culture of global business transactions (Appelbaum *et al*, 2001). The present volume only addresses this cultural aspect with regard to Jewish networks in the diamond industry.

Like domestic exchanges studied by authors of law and economic development research, global exchanges are also characterised by a mix of positive and negative experiences with institutional support structures. Theory building reflects this controversial picture and can at the current state of knowledge hardly be more ambitious than what has been attempted in the final part of this volume. The varieties of capitalism prevent us from formulating a universal theory.

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