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Reflexive Transnational Law

The Privatisation of Civil Law and the Civilisation of Private Law

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Abstract

The author examines the emergence of a transnational private law in alternative dispute resolution bodies and private norm formulating agencies from a reflexive law perspective. After introducing the concept of reflexive law he applies the idea of law as a communicative system to the ongoing debate on the existence of a New Law Merchant or *lex mercatoria*. He then discusses some features of international commercial arbitration (e.g. the lack of transparency) which hinder self-reference (autopoiesis) and thus the production of legal certainty in *lex mercatoria* as an autonomous legal system. He then contrasts these findings with the Domain Name Dispute Resolution System, which as opposed to Lex Mercatoria was rationally planned and highly formally organised by WIPO and ICANN, and which is allowing for self-reference and thus is designed as an autopoietic legal system, albeit with a very limited scope, i.e. the interference of abusive domain name registrations with trademarks (cybersquatting). From the comparison of both examples the author derives some preliminary ideas regarding a theory of reflexive transnational law, suggesting that the established general trend of privatisation of civil law need to be accompanied by a civilisation of private law, i.e. the constitutionalization of transnational private regimes by embedding them into a procedural constitution of freedom.

I. Introduction

What is transnational law?¹ With the rise of the modern territorial state a very strong tradition of defining law as the law of a nation state was established, i.e. a domestic legal system where lawmaking is ultimately legitimized by the national sovereign, and which is administered by the state's court system. Matters related to more than one country, hence, are regulated by "(public) international law", i.e. a [186] body of rules that control or affect predominantly the rights of states in their relation with each other, and successively the rights of international organisations and even of individuals in their relations to states when public international factors are involved. This "law of nations" is based on international treaties, general principles of law, and the customs and usages of civilized nations as generally accepted as binding and enforceable by the participant nations and as expressed in the decisions of international tribunals and (in Europe) the opinions of text writers.² On the other hand

1 The work on this article was funded by the VolkswagenStiftung. The part on *lex mercatoria* was presented in October 2001 in Münster at the CENTRAL Conference on "Transnational Business in the Age of Globalization", further research was conducted in Winter 2001/02. The related work of Dirk Lehmkuhl (The Resolution of Domain Names vs. Trademark Conflicts: A Case Study on the Regulation Beyond the Nation State, *Zeitschrift für Rechtssoziologie* 2002, 61 ff.) and the fundamental work of Mathias Albert (Zur Politik der Weltgesellschaft, Identität und Recht im Kontext internationaler Vergesellschaftung, Weilerswist 2002) were published after submission of this text, but could be taken into account during a revision in summer 2002. The work of Carl Peter Kleidat on *lex mercatoria* and systems theory, which was awarded with a study prize in February 2002 (see the report of Machura, *ZfRSoz* 2002, 149, 153), was not available to the author. I wish to thank Mathias Albert, Klaus Peter Berger, Dirk Lehmkuhl, Lord Mustill, Gunther Teubner and Peer Zumbansen for discussion and comments.

2 On the concept and evolution of (public) international law see: Verdross/Simma, *Universelles Völkerrecht*, 3rd ed., Berlin 1984 at 1-7; Ipsen, *Völkerrecht*, 4th ed., München 1999, at 1 et seq.;

“private international law” – with the exception of some international treaties harmonisation (e.g. the Rome Convention) and uniform private law (e.g. the CISG) – essentially is a set of domestic rules regarding the conflict of national private laws applicable to cross-border transactions.³ The law of nations, thus, is a law between nations (*ius inter gentes*), thereby stressing the political competition between sovereign nation states rather than global interdependence.

The meaning of the prefix “trans-“ as distinguished from “inter-“ is “across, beyond, through”. Transnational thus indicates something which extends or goes beyond national boundaries. The concept of „transnational law“ as first articulated by Phillip C. Jessup, Judge of the International Court of Justice, comprises all law which regulates actions or events that *transcend* national frontiers. It includes both civil and criminal aspects, what is known as public and private international law, as well as both public and private national law. Moreover, transnational situations may involve not only states, but individuals, corporations, and other groups.⁴ In this perspective transnational law is conceived more broadly than (public) international law, by means of a functional definition addressing all kinds of cross-border issues and stressing the role of private actors in an increasingly interdependent and globalized world. Several U.S. journals dedicated to this concept, consequently, publish material on all aspects of international and comparative law, both public and private.⁵

In the context of international commercial law, however, the term transnational law is used in a different, much more specific way: transnational (commercial) law here denotes a *third category of law* somewhere in between the traditional dichotomy of **[187]** municipal laws and (public) international law,⁶ i.e. an autonomous legal system beyond the state, based on general principles and rules of law, derived from a functional comparative analysis of the “common core” of domestic legal systems (e.g. the UNIDROIT Principles of International Commercial Contracts and the like)⁷, and also based on the usages and customs of the international business community (e.g. standard contract forms, general business conditions, etc.)⁸, and administered by international commercial arbitration.⁹ This New Law Merchant or *lex mercatoria* is, of course, the most prominent example for the general trend of the privatisation of civil law.¹⁰ The concept of a third-level of transnational law beyond municipal and

Seidl-Hohenveldern/Stein, *Völkerrecht*, 10th ed., Köln 2000, at 1, and at 12 et seq. (on its distinction from related fields like private international law).

3 See Kegel/Schurig, *Internationales Privatrecht*, 8th ed., München 2000, at 4-24 (on the concept and its distinction from public international law), 69 et seq. (on harmonization and uniform law); Kroppholler, *Internationales Privatrecht*, 4th ed., Tübingen 2001, §§ 1, 8, 9, 12.

4 Jessup, *Transnational Law*, 1956, at 2 et seq.

5 Vanderbilt Journal of Transnational Law (<http://law.vanderbilt.edu/journal/history.html>); Columbia Journal of Transnational Law (www.columbia.edu/cu/jtl/); Journal of Transnational Law & Policy (www.law.fsu.edu/journals/transnational/); Transnational Law & Contemporary Problems (www.uiowa.edu/).

6 Berger, *The Creeping Codification of the Lex Mercatoria*, Kluwer 1999, at 40, 42f.

7 Bonell, *The UNIDROIT Principles and Transnational Law*, in: Berger (ed.), *The Practice of Transnational Law*, Kluwer 2001, 23-41.

8 Garro, *Rule-Setting by Private Organizations, Standardization of Contracts, and the Harmonization of International Sales Law*, in: Fletcher/ Mistelis/ Cremona, *Foundations and Perspectives of International Trade Law*, London 2001, 310.

9 For an exhaustive overview of the debate see Berger, *The New Law Merchant and the Global Market Place*, in: Berger (ed.) (supra note 7) 1-22.

10 See Hadfield, *Privatizing Commercial Law*, Regulation 2001, 40-45, available at

(public) international law may, however, be generalized in that there are all kinds of spontaneous or formalised, private or hybrid, transnational legal regimes, including, but not limited to commercial law.¹¹ Such “functional, overlapping and competing jurisdictions”¹² evolve around specific problems in functionally differentiated parts of global society, i.e. their emergence is issue-focused and conflict-driven. The resulting transnational legal pluralism¹³ may be understood as a result of the normative vacuum that is left by national and public international law in a globalized world.¹⁴

Whereas the former, very broad concept of transnational law became quite popular in the general context of increasing global interdependence, and lately as well with contributions addressing the issue of extraterritorial effects of domestic [188] laws,¹⁵ it did not prevail in legal doctrine of either public or private international law.¹⁶ The reason might be found in its vague ambiguity, for it is not the law but rather the regulated issues which are transnational.¹⁷ On the other hand, the latter concept of a third-level, autonomous legal system ultimately based in private autonomy seems to be quite an exciting idea, which in respect of *lex mercatoria* has attracted for more than forty years over and over again the interest and contributions of learned writers in private law and jurisprudence, and which at the same time is of eminent importance not only to the practice of international commerce, but generally within the context of global governance.¹⁸

(<http://www.cato.org/pubs/regulation/regv24n1/hadfield.pdf>).

- 11 Teubner, Global private regimes: Neo-spontaneous law and dual constitution of autonomous sectors in world society? in: Ladeur (ed.) *Globalization and Public Governance*, Cambridge University Press, Cambridge 2001; see as well the contributions to Teubner (ed.), *Global Law Without a State*, Aldershot (Dartmouth) 1997.
- 12 The Idea of FOCJ was coined by Frey/Eichenberger, *The New Democratic Federalism for Europe*, Edward Elgar 1999.
- 13 Teubner, *Global Bukowina: Legal Pluralism in the World Society*, in: Teubner (ed.) (supra note 11) 3-28; K. v. Benda-Beckmann, *Transnational Dimensions of Legal Pluralism*, in: W. Fikentscher, *Begegnung und Konflikt – Eine kulturanthropologische Bestandsaufnahme*, München 2001.
- 14 Berger (supra note 9) at 14; G. Calliess, *Globale Kommunikation – staatenloses Recht*, in: Anderheiden/Huster/Kirste, *Globalisierung als Problem von Gerechtigkeit und Steuerungsfähigkeit des Rechts*, ARSP Beiheft 79, Stuttgart 2001, 61-79; Lehmkuhl (supra note 1).
- 15 For the sociological debate on a “new transnationalism”, transnational NGOs, transnational firms, and a global civil society see Heins, *Der neue Transnationalismus*, Frankfurt/Main 2001; for a use of the term transnational law in a very broad sense, indicating in the tradition of Huntington (*Transnational Organizations in World Politics*, in: 25 *World Politics* (1973) at 333-368), that such law with respect to its non-multilateral sources rather is a geographical extension of OECD-Members legal culture than a global law, see Günther, *Rechtspluralismus und universaler Code der Legalität: Globalisierung als rechtstheoretisches Problem*, in: Wingert/Günther (Hrsg.), *Die Öffentlichkeit der Vernunft und die Vernunft der Öffentlichkeit*, FS Habermas, Frankfurt/Main 2001, 539 et seq; for the use of the term in the context of German and European administrative law see Ruffert, *Der Transnationale Verwaltungsakt*, in: 34 *Die Verwaltung* (2001) at 453-485; see also Horn (*The Use of Transnational Law in the Contract Law of International Trade and Finance*, in: Berger (ed.) (supra note 7) at 67), who confines the term to transnational sources of law, thereby excluding domestic laws, but as opposed to Berger still including public international law like the CISG or other treaties as well as the supranational European law, i.e. the EU and EC treaties and EC regulations, but not the EC directives which have to be implemented by national laws.
- 16 See Seidl-Hohenveldern/Stein (supra note 2) at 14; Kegel/Schurig (supra note 3) at 23; Kropholler (supra note 3) at 95.
- 17 See Horn (supra note 15) at 67.
- 18 In the context of internet governance see e.g. Perritt, *Cyberspace Self-Government: Town-Hall Democracy or Rediscovered Royalism*, 12 *Berkeley Tech. L. J.* 413 (1997); Perritt, *The Internet is*

For the purposes of this article *transnational law*, therefore, shall be *defined* as a third-level autonomous legal system beyond municipal and public international law, created and developed by the law-making forces of an emerging global civil society, founded on general principles of law as well as societal usages, administered by private dispute resolution service providers, and codified (if at all) by private norm formulating agencies.

Such a definition of transnational law is, of course, heavily contested in the realm of traditional legal theory, and even non-dogmatic legal positivists accept it at most as a quasi-legal phenomenon of soft-law, existing in the shadow of the national [189] legal systems only.¹⁹ In the following I intend to show how the theory of reflexive law might contribute to the debate on transnational law. After introducing the concept of reflexive law (II.), I shall apply it to the concept of law and social norms (III.) in order to discuss some features of international commercial arbitration, which from a reflexive law perspective are crucial in the evolution of *lex mercatoria* towards an autonomous legal system (IV.). I then briefly introduce the ICANN/WIPO Domain Name Dispute Resolution Process as a highly formalized system of transnational (trademark) law (V.). From the comparison of both examples I finally draw some conclusions as to the general concept of reflexive transnational law, which combines the established trend of the privatisation of civil law with a civilisation of private law (VI.).²⁰

II. The Concept of Reflexive Law

The term “reflexive law” was coined by Gunther Teubner in 1982.²¹ Published shortly before Helmut Kohl became German chancellor, the article was written in a context, where the social-liberal dreams of a political reform of society, guided by scientific-rational planning and implemented by social-engineers through the means of law, had collapsed some years ago and the only alternative rising from the dust of general disillusionment with a supposedly omnipotent government were the neoliberal and neoconservative programmes of Thatcherism and Reaganomics. Under these circumstances reflexive law was a somewhat clairvoyant anticipation of the late-nineties ideas of Tony Blair and Gerhard Schröder as to a “third way” between market and state: a civil society basically regulating itself, supported, if necessary activated, but essentially merely framed and supervised by the State.²² That is to say “regulated self-regulation”²³ is the core political concept behind reflexive law.

Changing the Public International Legal System, 88 KY L. REV. 885 (2000); Grewlich, Conflict and good Governance in Cyberspace, Multi-level and Multi-actor Constitutionalisation, in: Engel/Keller (ed.), Governance of Global Networks in the Light of Differing Local Values, Baden-Baden 2000, at 237 et seq.; Calliess (supra note 14).

- 19 See Stein, *Lex Mercatoria, Realität und Theorie*, Frankfurt/Main 1995; Berger (supra note 6) ch. 2. at 43 et seq.
- 20 The term Civil Law is used in a broad sense, comprising not only private law but as well all kinds of business law like commercial, intellectual property, and competition law etc. While I took my examples here from commercial and trademark law, in another context I shall apply this concept to cross-border consumer contract law. For some preliminary ideas see Calliess (supra note 14).
- 21 Teubner, *Reflexives Recht*, Archiv für Rechts- und Sozialphilosophie (ARSP) 1982, 13 ff.
- 22 The „third way“ rhetoric draws on the ideas of A. Giddens, *Beyond Left and Right. The Future of Radical Politics*, 1994; Germ. *Jenseits von Links und Rechts*, Frankfurt/Main 1997.
- 23 See the contributions to Berg et al. (ed.), *Regulierte Selbstregulierung als Steuerungskonzept des Gewährleistungsstaates*, Die Verwaltung Beiheft 4, Berlin 2001; Schulz/Held, *Regulated Self-*

However, [190] reflexive law is not meant to be a political concept in itself. Like self-regulation it is a concept which potentially fits all kinds of policies, from neo-conservative subsidiarity, over neo-liberal spontaneous ordering in free markets, to neo-socialist or communitarian ideas of democratic self-government in small and cosy parts of society.²⁴

In terms of legal theory reflexive law is quite a German concept in that it is built – again as a kind of third way - on the descriptivist Systems Theory of Niklas Luhmann²⁵ and the normativist Discourse Theory of Jürgen Habermas²⁶. Although Teubner's 1989 book on "Law as Autopoietic System"²⁷, in which the concept of reflexive law is elaborated, seems to be somewhat cynical and, therefore, is perceived to be a mere application of Systems Theory, there is still a lot of normative hope to be found in it. That is to say, "self-regulation" symbolizes Kant's perception of "freedom and autonomy as self-legislation" whereas "regulated" represents Hegel's hope for solidarity and rational integration of society through the State.

Teubner makes a creative use of these theories by stressing the similarities rather than the differences between them.²⁸ These common grounds are: Both Luhmann and Habermas reconstruct modern society as a communicative system, thus putting the focus neither on individuals and their actions nor on social structures and organisations, but on the process of communication. Social structures like norms, organisations, and institutions are produced and reproduced in these communicative processes. Since it is impossible for a social theory to predict the actual outcome of these manifold and highly complex processes, the emphasis is on the structures and rules which govern communication. The object of both theories, therefore, is the meta-rules and meta-structures constituting the communication society, be that the procedural discourse rules of Habermas, or the structures of social systems and subsystems of Luhmann.

So how come the term "reflexive law"? The use of "reflexive" as an adjective to law is ambiguous, thereby perfectly symbolizing the intended undecidedness of the concept in terms of "Discourse vs. Systems Theory". The implications are threefold:

[191] (1) "Reflexive" describes "an action that is directed back upon itself". For the purposes of Systems Theory "reflexivity" is defined as the application of a process to itself, e.g. "thinking of thinking", "communicating about communication", "teaching how to teach" etc. In the context of law reflexivity could be "making laws on law-making", "adjudicating on adjudication", or "regulating self-regulation". It is obvious, that the focus of reflexive law in this context is on procedural rather than

Regulation as a Form of Modern Government. Study commissioned by the German Federal Commissioner for Cultural and Media Affairs. Interim Report (October 2001), (www.humanrights.coe.int/media/documents/interim-report-self-regulation.pdf)

24 Teubner, *Recht als autopoietisches System*, Frankfurt/Main 1989, at 81; Engl. *Law as Autopoietic System*, London 1993.

25 Luhmann, *Soziale Systeme*, Frankfurt/Main 1984; Engl. *Social Systems*, Stanford UP 1995; Luhmann, *Das Recht der Gesellschaft*, Frankfurt/Main 1993.

26 Habermas, *Faktizität und Geltung*, Frankfurt/Main 1992; Engl. *Between Facts and Norms*, MIT Press 1996.

27 Teubner (*supra* note 24).

28 In his recent work, however, Teubner draws more on Derrida than on Habermas: see Teubner, *Economics of Gift - Positivity of Justice: The Mutual Paranoia of Jacques Derrida and Niklas Luhmann*, 18 *Theory, Culture and Society* (2001), 29-47; Teubner, *The King's Many Bodies: The Self-Deconstruction of Law's Hierarchy*, 31 *Law and Society Review* (1997), 763-787.

substantive law, or as H.L.A. Hart²⁹ put it, on secondary rather than primary rules. It follows that the term reflexive law on the level of norms marks rules of competence and jurisdiction, of form and procedure, all of which constitute the communicative processes by which society (including its legal system) is regulating itself. In other words, reflexive law deals with constitutions in a broad, non-technical sense.³⁰ A good comparison can be seen in the contemporary work being done under the label of New Constitutional Economics.³¹

(2) Another meaning of “reflexive” is “marked by or capable of reflection”, referring to “reflexion” in its philosophical meaning of introspective contemplation or consideration of some subject matter. Here one can find the normative implications of reflexive law as being connected with a concept of rationality. However, rationality is not understood as a quality of norms, but rather as communicative and systems rationality. In a nutshell, decision-making in a reflexive legal system is marked by adequate deliberation or reasoning as well as by reflection on the specific function and limits of law in modern society.³² Teubner suggests that such reflection would lead to a non-interventionist model of the state and of law, the latter of which essentially limits itself to what we can call the constitutionalization of self-regulation.³³

(3) Finally, a third meaning of “reflexive” is “a relation that exists between an entity and itself”, i.e. a concept of self-reference. This leads us to the very basic concept of autopoiesis. Again in a nutshell: Autopoiesis is the self-reproduction of a system out of its own components. If a social system by definition consists of communications, then autopoiesis marks nothing else but the features of the system which provide for enduring communication, so that the system will not come to a sudden halt. The implications for law as an autopoietic system are as follows: the core operations of the legal system, defined by itself (i.e. in secondary norms) as legal acts, e.g. adjudicating, legislating, contracting and the like, must be linked with each other in a way that the mere existence of one such act provokes others, making [192] reference to the first and thereby literally producing each other. An example for such an interlinkage of legal acts is the reference to precedent or *stare decisis*, by which a judgement selectively refers to some other judgements, thereby evoking the impression that it is a product of the quoted judgements. Another example is the strange interrelation between statute and judgement, where the binding act of law-making produces the court decision, which at the same time by means of interpretation in the hermeneutic circle first of all produces and reproduces the norm.³⁴

29 Hart, *The Concept of Law*, Oxford 1961.

30 Teubner, *Global private regimes* (supra note 11); Teubner, *Contracting Worlds: The many Autonomies of private Law*, 9 *Social and Legal Studies* (2000), 399-417.

31 Brennan/Hamlin, *Constitutional Economics*, in Newman (ed.), *The New Palgrave Dictionary of Economics and the Law*, vol. I (1998), 401-410.

32 See for a possible combination of communicative and systems rationality G. Calliess, *Prozedurales Recht*, Baden-Baden 1999, at 169 et seq.; Teubner might be more sceptical with regard to communicative rationality though.

33 Teubner (supra note 24) ch. 5. and (supra note 30).

34 Teubner (supra note 24) ch. 3, at 56; Luhmann, *Das Recht der Gesellschaft* (supra note 25), ch. 2; for an introductory summary and analysis of these concepts see G. Calliess (supra note 32) at 122-141 and 145-152.

III. Between Law and Social Norms

In order to conceptualise transnational law I shall now explain the differences, resulting from a reflexive law approach to our reflections on the concept of law and the qualities distinguishing it from social norms. I start with a brief introduction into international commercial arbitration and the related idea of a New Law Merchant.

Arbitration is a kind of alternative dispute resolution, where the parties essentially agree to submit a dispute for binding decision to a private judge, chosen by them.³⁵ Domestic arbitration laws accept such arbitral awards as final, i.e. their validity may be contested in state courts on very limited grounds only, and provide for their enforcement, if certain minimum rule-of-law conditions regarding deliberate consent to the arbitration clause and fair trial are met. Basically the arbitral tribunal decides the case on the same legal grounds as would a municipal judge. However, especially with high value disputes, arbitration is chosen because it might be cheaper, and since there are no stages of appeal, it is also quicker than litigation. In addition, arbitral proceedings are non-public³⁶ and the arbitrators can be selected according to the necessary technical and legal expertise.

With regard to disputes resulting from cross-border transactions there are even more advantages. Whereas the parties in the private international law framework have to subject themselves either to the jurisdiction of the courts of the other [193] party's home country or to a neutral venue,³⁷ where both of them are not familiar with the law and procedure, in international commercial arbitration they can choose a neutral and convenient seat and procedure for their arbitration as well as competent arbitrators with the necessary language skills. Moreover, under the 1958 New York Convention such arbitral award is easily enforceable in more than 120 jurisdictions, while an equivalent means for domestic judgements is still pending.³⁸

35 An Introduction is given by Berger, *Understanding International Commercial Arbitration*, in: Center for Transnational Law (ed.), *Understanding Transnational Commercial Arbitration*, Münster (quadis) 2001, 5-41; for the advantages of arbitration see as well De Ly, *Commercial Law as a Refuge from Contract Law: A Comparative and Uniform Law Perspective*, 45 *Wayne L. Rev.* (2000) 1825; for the transnational dimension see Lehmkuhl, *Structuring Dispute Resolution in Transnational Trade: Competition and Co-evolution of Public and Private Institutions*, in: Djelic/Quack (eds.), *Globalisation and Institutions - redefining the Rules of the Economic Game*. Edward Elgar (forthcoming).

36 Which does not necessarily mean confidential: Fortier, *The Occasionally Unwarranted Assumption of Confidentiality*, 131 *Arbitration International* (1999), 15.

37 For a thorough transaction cost analysis see Mankowski, *Europäisches Internationales Privat- und Prozessrecht im Lichte der ökonomischen Analyse*, in: Ott/Schäfer (ed.), *Vereinheitlichung und Diversität des Zivilrechts in transnationalen Wirtschaftsräumen*, 2002, 118-151, promoting the advantages of European harmonisation (Rome Convention) and cooperation (Brussels Regulation) in limiting forum shopping; for the limits of harmonisation approaches see Ferrari, *'Forum Shopping' Despite International Uniform Contract Law Conventions*, 51 *International and Comparative Law Quarterly* (2002), 689-707.

38 The "Convention on the Recognition and Enforcement of Foreign Arbitral Awards" as well as its status are available at (<http://www.uncitral.org/en-index.htm>). See also Nienaber, *The Recognition and Enforcement of Foreign Arbitral Awards*, in: Center for Transnational Law (ed.) (supra note 35), 99-123; Information on the future "Hague Convention on International Jurisdiction and Foreign Judgements in Civil and Commercial Matters" is available at (<http://www.hcch.net/e/workprog/idgm.html>); see as well Zekoll, "Could a Treaty Trump Supreme Court Jurisdictional Doctrine?": *The Role and Status of American Law in The Hague Judgments Convention Project*, 61 *Alb. L. Rev.* (1998) 1283; Black, *Commodifying Justice for Global Free Trade: The Proposed Hague Judgments Convention*, 38 *Osgoode Hall L.J.* (2000) 237; Traynor,

The idea of a New Law Merchant, i.e. a transnational commercial law as described above, is related to international commercial arbitration insofar as domestic courts as a general principle of private international law are not allowed to apply non-national law,³⁹ while the 1985 UNCITRAL Model Law on International Commercial Arbitration, which was incorporated into many national arbitration laws, provides that the arbitrators shall apply the “rules of law” the parties have chosen.⁴⁰ It is generally accepted that the parties to an arbitration agreement may choose general principles of law, the UNIDROIT Principles of International Commercial Contracts, or the Lando Principles of European Contract Law, as applicable law.⁴¹ For this reason, the only practical evidence of an evolving New Law [194] Merchant can be found in arbitral awards, which refer to *lex mercatoria* or at least apply transnational rules and general principles of law.⁴²

However, the mere fact that there are some general principles of law applied as “rules of law” in international commercial arbitration does not necessarily indicate that there is a *lex mercatoria* qualifying as an autonomous legal system.⁴³ The traditional approach in jurisprudence refers to a legal system as a body of norms. Consequently the first 25 years of the debate over a “New Law Merchant” was dedicated to the question of which norms (if any) are part of or form this *lex mercatoria* and where these norms stem from.⁴⁴ On this level of norms there are, generally speaking, two ways of giving an answer:

- (1) First of all, a reach for the stars, to abstract natural law: general principles of law, human rights, the decalog, the common core of legal systems and the like. Obviously the UNIDROIT and Lando Principles belong to this category.

An Introductory Framework for Analyzing the Proposed Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters: U.S. And European Perspectives, 6 Ann. Surv. Int'l & Comp. L. (2000) 1.

- 39 E.g. Art. 3 of the Rome Convention, see Michaels, *Privatautonomie und Privatkodifikation. Zu Anwendung und Geltung allgemeiner Vertragsprinzipien*, 62 *RabelsZ* (1998), 580-626; Grundmann, *General Principles of Private Law and Ius Commune Modernum as Applicable Law?*, *Festschrift für Buxbaum*, 2000, 213-234.
- 40 Art. 28 para. 1 of the Model Law, which is available at (<http://www.uncitral.org/en-index.htm>).
- 41 Berger (supra note 6) at 78 et seq., 143 et seq. (on the UNIDROIT Principles), 194 et seq. (on the Lando Principles), both Principles are reprinted in the annexes (312 et seq.); for the UNIDROIT Principles see also Bonell (supra note 7) at 25 et seq.; for the Lando Principles see Lando, *Salient Features of the Principles of European Contract Law: A Comparison with the UCC*, 13 *Pace Int'l L. Rev.* (2001) 339 ; Blasé, *Die Grundregeln des Europäischen Vertragsrechts als Recht grenzüberschreitender Verträge*, Münster (quadis) 2002; see as well DiMatteo, *Contract Talk: Reviewing the Historical and Practical Significance of the Principles of European Contract Law*, 43 *Harv. Int'l L.J.* (2002) 569 ; and the critique to the « liberal internationalism » at Wai, *Transnational Liffoff and Juridical Touchdown: The Regulatory Function of Private International Law in an Era of Globalization*, 40 *Colum. J. Transnat'l L.* (2002) 209.
- 42 See Berger (supra note 9) with a lot of examples; Derains, *Transnational Law in ICC Arbitration*, in: Berger (ed.) (supra note 7) 43-51; for empirical evidence see Berger et. al., *The CENTRAL Enquiry on the Use of Transnational Law in International Contract Law and Arbitration*, in: Berger (ed.) (supra note 7) at 91-113, and Annexes I-III, at 133-224, and Annex IV with examples of choice of law clauses in international contracts, referring to general principles of law, at 227-228.
- 43 See the overview on the debate in Berger (supra note 6) at 89 et seq.; Gaillard, *Transnational Law: a Legal System or a Method of Decision-Making?*, in: Berger (ed.) (supra note 7) 53-65.
- 44 Mustill, *The New Lex Mercatoria: The First Twenty-Five Years*, *Arbitration International* 1988, 86.

- (2) Alternatively a step into the muds of facticity, i.e. concrete natural law: the essence or nature of things, custom, living law, etc. Here we find standardised contract terms, trade customs and the like.

The problem with these approaches is that they instantly provoke some standard positivist objections regarding (a) the definition of a validity test for such norms (i.e. Hart's rule of recognition), (b) the legitimacy of law-making, (c) the completeness of a system of norms, and (d) the enforcement of these norms.⁴⁵ [195] Whereas the enforcement problem can easily be overcome within the framework of arbitration by reference to the UNCITRAL Model Law on International Commercial Arbitration, respective national arbitration laws, and the 1958 New York Convention⁴⁶, the issues of validity, legitimacy and completeness result in a vicious circle of theoretical strange loops and tautologies.⁴⁷ It is for this reason that the New Law Merchant during the last decades developed mainly in practice under the auspices of "Cartesian pragmatism", as Klaus Peter Berger has so aptly put it.⁴⁸

Now what are the possible contributions of the reflexive law approach? First of all, Systems Theory is obviously a useful analytical tool in the debate on transnational law, since it claims that law and politics in general are two separate and independent social systems.⁴⁹ The intertwining of law and politics in the constitutional nation state in this perspective is rather a very modern and special case in social evolution. A "Global Law without a State" is thus a phenomenon which Systems Theory is readily prepared to conceptualise.⁵⁰

However, more important are the differences which result from the shift of the theoretical focus from the level of norms to the level of communication.⁵¹ Suddenly things are very easy, for all law is positive law, i.e. is valid by decision only.⁵² To form a legal system one basically needs three communications, each raising a normative claim for validity (i.e. prescriptive speech acts): (1) a claimant (ego), (2) a defendant (alter), and (3) a court (alter ego, generalised other).⁵³ These communicative acts

45 For a discussion of the objections against the Lex Mercatoria-Doctrine see Berger (supra note 6) ch. 2, p. 44-110; see as well Grundmann (supra note 39); Schroeder, Die lex mercatoria – Rechtsordnungsqualität und demokratische Legitimation, in: Witt et al. (Hrsg.), Die Privatisierung des Privatrechts, Jahrbuch Junger Zivilrechtswissenschaftler 2002, Stuttgart (forthcoming).

46 See Berger (supra note 35) and Nienaber (supra note 38).

47 See e.g. Zumbansen, Piercing the Legal Veil: Commercial Arbitration and Transnational Law, 8 European Law Journal (2002) 400-432.

48 Berger (supra note 9) at 3; for a very rich study on the development of lex mercatoria in the practice of international commercial arbitration, based on empirical research see Dezelay/Garth, Dealing in Virtue, Chicago UP 1996.

49 Luhmann, Das Recht der Gesellschaft, ch. 9.

50 See Teubner (supra note 13); G. Calliess (supra note 149).

51 See for the following Luhmann, Das Recht der Gesellschaft, especially ch. 2., ; Teubner (supra note 24) ch. 3.

52 Luhmann, Das Recht der Gesellschaft, at 280.

53 See G. Calliess, Das Tetralema des Rechts, ZfRSoz 2000, 293, 304 et seq. The term „court“ does not necessarily signify a "states court", but includes functional equivalents. However, a single decision (see Albert, Legalisation or Global Law Formation? On the Evolution of Law in World Society, presentation at the CENTRAL Conference on "Transnational Business in the Age of Globalization" Münster, October 2001; see as well Albert supra note 1) will not suffice, even not if it is a decision of an independent third party (for the fundamental role of the "third party" see von Trotha, Was ist Recht? Von der gewalttätigen Selbsthilfe zur staatlichen Rechtsordnung, ZfRSoz 2000, 327 ff.; on the central role of the courts in systems theory see as well Vesting, Kein Anfang und kein Ende, JURA 2001, 299, 303). A legal system will need some kind of institutionalized

constitute a legal system by using the code legal/illegal (lawful/unlawful). There is no need for norms, at least not for a complete set of rules. Norms will just come [196] naturally with the decisions, i.e. as the *ratio decidendi* of adjudication. Norms as the structure of a legal system are thus produced by communication, as a by-product of processing legal acts. However, a single judgment might not be sufficient to produce a norm, for norms are abstract. They are generalisations of several judgments, and they are more stable than a single case decision.

Here it comes back to autopoiesis, which we defined as the mutual and perpetual referencing of different legal communications. The generation of norms is subject to the *logics of remembering and forgetting*, i.e. the selectivity of the communication process, by which some communicative offers for connection are accepted through reference by subsequent communications and others simply fall into oblivion.⁵⁴ Norms thus are *condensed and confirmed* in the enduring process of legal discourse.⁵⁵ To give an example, on the one hand there are judgments which somehow become “leading cases” or even passages from textbooks, quoted over and over again, while on the other hand there might be formal positive statutes which are not applied over a period of 25 years. Which norm is more valid, the latter or the former? For a lawyer from a Common Law background the answer might not be too puzzling.

As a result, it can be said that all that is required for *lex mercatoria* to become a legal system is a court that adjudicates it, and – even more important – a large collection of disputes offered by the international commercial community for decision under the code of law merchant (i.e. by referencing in choice of law clauses of international commercial contracts). *Lex mercatoria* as a system of norms will then flourish quasi automatically (or autopoietically) by means of condensation and confirmation.

IV. Transnational Law in Action 1: *Lex Mercatoria*

Now what are the features of the New Law Merchant, which from a reflexive-law perspective should be highlighted as crucial in its development towards an autonomous legal system? To start with the courts, since they form the centre of a legal system:⁵⁶ Where precisely do we find the courts deciding on and thereby condensing and confirming the rules of a New Law Merchant? The national court systems are not allowed to apply non-state law. Only arbitral tribunals under certain arbitration laws may do so, if the parties have chosen to subject their dispute to general principles of law and the like. The problem with arbitration is a lack of continuity and publicity, which hinders or even prevents the autopoiesis of *lex mercatoria*. To give an example, take a quote of Thayer on the Ancient Law Merchant:

decision making process, providing for “enduring communication” (i.e. autopoiesis) as described below.

54 “Structures come into reality only, by being used for the interconnection of communicative events; norms only, by being, implicitly or explicitly, quoted; ... Therefore, an enormous and primary ability of adaptation of a system lies simply in forgetting ...: Luhmann, *Das Recht der Gesellschaft*, at 46 (translation by the author).

55 Luhmann, *Das Recht der Gesellschaft*, at 127 (“logics of condensation and confirmation”).

56 Luhmann, *das Recht der Gesellschaft*, ch. 7.

[197] “The voices of the consuls of the sea in Genoa and Barcelona found a ready echo in the maritime tribunals of Bristol and Ipswich, where the court sat on the beach and dispensed justice to passing mariners between tide and tide.”⁵⁷

Here we see a court as a physically localised institution, offering its dispute resolution services. It sits on the beach, close to demand at the dispute-market, thus providing easy and quick “access to justice”. The Ancient Law Merchant was developed in 12th century Europe by commercial courts, which as a general rule were institutionalised very close to the dispute-markets, e.g. as “consulate” or “staple” courts at municipal markets and trade fairs, or as “admiralty” courts at the seaports, and which decided very quickly (“piepowder courts” or “from tide to tide”).⁵⁸ But dispute resolution is only a service provided, not an end in itself. A legal system has the function of producing certainty in normative expectations for a community subjected to its jurisdiction.⁵⁹ For “Certainty is so essential, that law cannot even be just without it”, as Francis Bacon observed.⁶⁰ Or in terms of New Institutional Economics, law is all about reducing transaction costs.⁶¹ However, norms and thus certainty can only be generated if the legal system provides for self-reference, thus starting the process of condensation and confirmation of norms according to the logics of remembering and forgetting.

One possible feature of a legal system, enabling autopoiesis, is a locally institutionalised court, which develops a kind of collective or institutional memory.⁶² Under the very basic rule of formal justice, i.e. treating alike cases alike, the court on the beach mentioned by Thayer will start its own legal history and decide recurring disputes by reference to its own precedents (*stare decisis*).⁶³ Thus, over time there will evolve a body of norms making up “the law of the land” within the jurisdiction **[198]** of the court. Even within elaborated national legal systems like German law there can be found some relics of such “law of the land”, i.e. where federal legislation is applied by district courts without any further stages of appeal.⁶⁴ It follows that a local court is the smallest autopoietic legal system one could think of.⁶⁵

57 Thayer, Brooklyn Law Review, 1936, 139, 141; quoted by Berger (supra note 9) at 4.

58 See Berman, Law and Revolution. The Formation of the Western Legal Tradition, 1983; German: Recht und Revolution, 1991, at 546 et seq.

59 Luhmann, Das Recht der Gesellschaft, ch. 3. If the notion of a „legal system“ implies a minimum duration over time (stablerness), it follows that there cannot exist any legal system which fails to fulfill its societal function, i.e. “no law without legal certainty”.

60 Francis Bacon, De Dignitate et Augmentis Scientiarum, engl. translation, Works V (edited by J. Speddings et al.), London 1869, 8th Book, Titel I, Aphorism 8.

61 See generally Richter/Furubotn, Neue Institutionenökonomik, 2nd ed., Tübingen 1999, at 9 et seq.; for international commerce see Schmidchen/Schmidt-Trenz, The Division of Labour is limited by the extent of the Law, 1 Constitutional Political Economy (1990), 1-22; Streit/Mangels, Privatautonomes Recht und grenzüberschreitende Transaktionen, 47 ORDO (1996), 73-100; Schmidchen, Lex Mercatoria und die Evolution des Rechts, in: Ott/Schäfer (ed.) (supra note 37) 1-31; for an transaction cost approach to international E-Commerce see Calliess, Rechtssicherheit und Gerechtigkeit im elektronischen Welthandel, in: Donges/Mai (Hrsg.), E-Commerce und Wirtschaftspolitik, Stuttgart 2001, 189 ff.

62 On the notion of a “social memory”, see Luhmann, Das Recht der Gesellschaft, at 118 et seq.

63 For the role of formal justice (treating alike cases alike) and precedent in autopoiesis see Luhmann, Das Recht der Gesellschaft, at 114.

64 Every “Landgericht” has its own “Landrecht”, indicating the specific practice of interpretation of norms only known amongst the involved local legal professionals.

65 Luhmann, Das Recht der Gesellschaft, at 324 (with regard to the German “Amtsgericht”).

Another feature implied in Thayer's example is that the court at the beach sits in public, thereby allowing its rulings to be spread via an oral tradition by the observing mariners and finally to be echoed by other tribunals and vice versa. As a result of such discursive interconnectivity, a transjurisdictional body of marine rules emerges, constituting a decentred legal system with local courts as its subsystems. The importance of this communicative function of public proceedings (as opposed to the traditional stress on public control over the court) is highlighted by the fact that adjudication on commercial matters in Germany since the 13th century and for a long time thereafter did not take place in a "court", indicating a place enclosed by buildings or walls, but in a *Gerichtslaube* (latin: *laubia*), i.e. a covered space with arched openings to three sides like an arcade, built directly next to the municipal market place, often as the ground floor of the town hall.⁶⁶

If we take a look at today's practice of international commercial arbitration, however, we find de-localised and non-public proceedings of ad hoc tribunals put together by selection of the parties for a single case. No self-reference, no self-observation, no autopoiesis in sight? Well, as Niklas Luhmann would suggest, we ought to search for functional equivalents to continuity and publicity.

Regarding continuity in international commercial arbitration we may find such functional equivalents in the different arbitration institutions. Strikingly, these institutions quite often call themselves "courts" like the London Court of International Arbitration or the International Court of Arbitration of the ICC. Although the latter is not a court, since the decision of a case under the ICC Arbitration Rules remains with the arbitral tribunal which is still put together ad hoc by the parties, it provides an institutional framework which may be suitable for autopoiesis. Article 27 of the ICC Rules provides that each award before signing shall be submitted in [199] draft to the Court.⁶⁷ The Court exercises a revision with regard to the form of the award, i.e. binding approval, and a supervision with regard to the substance, i.e. it may give non-binding advice.⁶⁸ The mere fact of a central body auditing every award, including those applying *lex mercatoria*, may imply the existence of an institutional memory as described above.

But this memory remains *private*. It does not contribute to legal autopoiesis as long as the generated rules are not published. Under Art. 27 the Court could, for instance, provide precedent to tribunals dealing with *lex mercatoria* as a kind of information service from its files. But there is no evidence for a corresponding practice. An equivalent, at least in the earlier times of arbitration dominated by European academics, was possibly the fact that the international arbitration community was organised as a kind of sophisticated club, where arbitrators knew

66 Famous examples are the *Gerichtslaube* of Freiburg of 1278 (for the interesting mixture of municipal and merchant law in medieval Freiburg see Berman (supra note 58) at 586, indicating that the merchants, which founded the city, were dispensed (free) of the laws of the land and subjected to the Law Merchant only.), the 13th century one of Berlin, which was moved in 1861 to the park of the castle in Babelsberg (a picture is available under http://www.suedwestweb-berlin.de/struktur/c_indiv/d01872.html), and the one in the old trade house ("Kaufhaus") in Lüneburg. The advantage of a covered space as opposed to the court on the beach or under a tree (*Gerichtslinde*) was simply the court's ability to sit despite bad weather: see Köbler, *Bilder aus der deutschen Rechtsgeschichte*, München 1988, at 151-156.

67 Derains (supra note 42).

68 In practice, however, the Court exercises control over the form of the awards in respect of its enforceability only, but never gives advice on the merits of a case (I owe this information to Lord Mustill).

each other and the insider knowledge on *lex mercatoria* could be handed over informally. However, since international arbitration became big business and U.S.-based law firms got involved, this might not be sufficient anymore.⁶⁹

On the other hand, publicity does not necessarily mean public proceedings. The judgments of the Federal Court of Justice in Germany (BGH), for instance, are published generally in an anonymous form regarding the parties and facts of the case, and often as well in a short form with respect to the legal arguments, revealing the *ratio decidendi* rather than any case-specific details. There is something similar as well in international commercial arbitration, e.g. when awards are published by the ICC and other arbitration institutions or involved arbitrators report on their decisions in law journals.⁷⁰ But the reported material is still limited and not easily available, thus impeding the evolution of another feature of autopoiesis, the self-observation of a legal system through legal doctrine at universities, which play an important role in systematizing the material offered by adjudication, and in handing down the knowledge of a legal system to generations of lawyers to come.⁷¹

Another means of promoting transparency in a legal system is the publication of a list of rules and principles of law, often combined with the systematisation of such rules by academics. The UNIDROIT- and Lando-Principles certainly belong in this context of “codification”. They find their historical precedents in the compilations [200] of law published by “private” monks in the 11th century, the time when the Western legal tradition was founded, as Harold Berman in his book on *Law and Revolution*⁷² argued, and when, according to Luhmann, the autopoiesis of law emerged for the first time.⁷³ Such private codifications mark the decisive evolutionary move from an oral to a textual tradition of law, which reverses the equilibrium of remembering and forgetting in the system.⁷⁴ Despite their purported non-binding character, these principles are binding to the arbitral tribunal, once they are referenced in a choice of law clause. And suddenly there are not too few norms, but there may be too many, so that the arbitral tribunal finds itself in a situation so well known to judges, i.e. where the norm text has to be modified by means of interpretation in order to do justice to a single case.

However, these compilations of principles are somehow too abstract, in that they are not derived from actual adjudication but from the common core of legal systems as perceived by some famous comparative lawyers. If norms come into reality rather by application, a step further is the CENTRAL List⁷⁵, which combines the principles with references to arbitral precedent in *lex mercatoria*, thereby somehow reflecting the tradition of the courts of the Ancient Law Merchant to publish the rules and principles as applied in their jurisdiction, e.g. the Rolls of Oléron or the “Consolato del

69 On the informal tradition of arbitral awards see Berger, *The International Arbitrators’ Application of Precedents*, 9 *J.Int.Arb.* 1992, at 5, 21. For the sociological aspects of the development of international arbitration see Dezelay/Garth (*supra* note 48) at 100 et seq. (on U.S. Litigators and European Academics).

70 Berger (*supra* note 6) at 62 et seq. listing the different publication organs and stating, that the practice of publishing awards will soon almost equal that of domestic court judgements.

71 This last feature, being very important in German law, is not a *conditio sine qua non* in terms of autopoiesis, since the English legal system does quite well without it.

72 Berman (*supra* note 58) at 81 et seq.

73 Luhmann, *Das Recht der Gesellschaft*, at 62.

74 Luhmann, *Das Recht der Gesellschaft*, at 245-256.

75 Berger (*supra* note 6).

mare” of Barcelona.⁷⁶ Moreover, in terms of providing free and easy access to systematic knowledge of *lex mercatoria* and thereby enabling self-reference, the CENTRAL Transnational Law Database launched on the Internet in autumn 2001⁷⁷ seems to be a further milestone on the road to the New Law Merchant as an autopoietic system.

But all these lists become valid law only by reference of the parties to an international commercial contract. And here the New Law Merchant is competing with other national private law jurisdictions. At the end of the day, the international commercial community and, even more important, its legal advisors have to be convinced that the New Law Merchant is a competitive legal system: that it is – as opposed to being merely a tool of alternative dispute resolution – a normative system reducing transaction costs in global business by generating legal certainty.⁷⁸ [201] From the reflexive law perspective, the decisive step from “Merchants of Law” (i.e. dispute resolution service providers) to “Moral Entrepreneurs” (i.e. constructing certainty in an autonomous legal system) is all about communication.⁷⁹ The underlying constructivist approach implies that the coming into existence of *lex mercatoria*, i.e. its “impossible reality” is measurable by the number of references made to it in legal discourse. In other words, if emerging legal certainty in *lex mercatoria* is a public good produced as a pro-bono side-effect of international commercial arbitration,⁸⁰ then the fundamental law of charity applies: “do good, and talk about it”.

V. Transnational Law in Action 2: Uniform Domain Name Dispute Resolution

At this point I intend to introduce another example of a transnational legal system, the ICANN Domain Name Dispute Resolution Process. The Internet Corporation for Assigned Names and Numbers (“ICANN”) is a private not-for-profit organisation, responsible, among other things, for the management of the domain name system, i.e. the global addressing system of the Internet. Domain names are the human-friendly form of the numeric Internet Protocol (IP) addresses. With the commercialisation of the Internet⁸¹ they acquired significance as business identifiers

76 Berman (supra note 58) at 537, 559.

77 Available under www.tldb.de; for the comparable online database UNILEX see infra at note 123.

78 If you like, this is the democratic part of systems theory: communications submit themselves to the code of one social subsystem (e.g. law) or they just do not (and then maybe submit themselves to the code of another subsystem). See Luhmann, *Das Recht der Gesellschaft*, at 69, 72 (regarding the choice not to refer to the legal code but to alternative dispute resolution), and 74. The same holds true for competing legal systems: choice of law is nothing else but (law) consumer sovereignty, and an unfavourable legal system will somehow go bankrupt, if it does not attract a sustainable amount of communications in the competition of jurisdictions. This is exactly what happened to the “Ancient Law Merchant” when the national legal systems were adapted to the needs of modern commerce in 19th century Europe: see Stein (supra note 19) at 17, 27 et passim.

79 For the lucky notion of “Merchants of Law as Moral Entrepreneurs” in the context of international commercial arbitration see Dezelay/Garth (supra note 48) at 33 et seq.

80 In the context of norm production in common law R. A. Posner observed “the character of precedents as a by-product of the litigation process” (*Economic Analysis of Law*, 5th ed. 1998, § 20.2, at 588); see as well Luhmann, *Das Recht der Gesellschaft*, at 306: “gleichsam mit linker Hand”.

81 Hutter, *The Commercialization of the Internet. A Progress Report*, in: Engel/Keller (ed.), *Understanding the Impact of Global Networks on Local Social, Political and Cultural Values*,

and, as such, have come into conflict with intellectual property rights. Domain name disputes arise largely from the practice of cybersquatting, i.e. the pre-emptive registration of trademarks by third parties as domain names. Cybersquatters exploit the first-come, first-served nature of the domain name registration process in order to put the domains on auction or to offer them directly for sale to the company involved at prices far beyond the cost of registration.

On proposal of the U.S. Government⁸² the World Intellectual Property Organization (WIPO) in 1998 undertook an extensive international process of consultations on the interference of the domain name system with trademarks, especially with a view to establishing a quick, efficient, and cost-effective on-line dispute resolution [202] procedure for domain name disputes.⁸³ While an interim report considered arbitration in respect of any intellectual property dispute arising out of a domain name registration, the final report recommended a mandatory administrative procedure limited to cybersquatting, which was held to be an undoubted infringement of general principles of trademark law as expressed both in international treaties and national case law, and which was universally condemned throughout the consultation process.⁸⁴ Issues not related to trademarks were postponed to be considered in a second consultation process, since the law with respect to trade names, geographical indications and personality rights is less evenly harmonised throughout the world.⁸⁵

As a result, in 1999 ICANN adopted its Uniform Dispute Resolution Policy (“UDRP”),⁸⁶ which all registration service providers, accredited by ICANN as registrars for the generic Top-Level-Domains “.com”, “.org”, and “.net”, incorporated by reference in the registration agreements with their customers, i.e. the domain name holders.⁸⁷ According to the UDRP the registrar will cancel or transfer a registered domain name to a third party (the “complainant”), if it receives an order of an administrative panel of an ICANN-approved dispute resolution service provider to do so, and the registered holder (the “respondent”) has not commenced a lawsuit against the complainant challenging the panel decision within ten business days after its reception by the registrar. The panel shall issue an order of transfer, if the complainant has proved each of the following three elements: (i) the contested domain name is identical or confusingly similar to a trademark or service mark in which the complainant has rights; and (ii) the respondent has no rights or legitimate interests in respect of the domain name; and (iii) the domain name has been registered and is being used in bad faith.⁸⁸

Baden-Baden 2000, 73-92.

82 See the U.S. Department of Commerce “White Paper” of 5 June 1998, available at (<http://www.icann.org/general/white-paper-05jun98.htm>).

83 Seventeen consultation meetings were held in 15 different cities throughout the world, and written submissions were received from 334 governments, intergovernmental organizations, professional associations, corporation and individuals. See the Report on the First WIPO Internet Domain Name Process, available at (<http://wipo2.wipo.int/process1/report/index.html>).

84 See First WIPO Report at No. 174.

85 The Report on the Second WIPO Domain Name Process is essentially calling for a decision of the international community on a harmonization of the respective laws as a prerequisite for a uniform dispute resolution policy. The Report is available at (<http://wipo2.wipo.int/process2/report/>).

86 Available at (<http://www.icann.org/dndr/udrp/policy.htm>).

87 For the implementation process see (<http://www.icann.org/udrp/udrp-schedule.htm>).

88 See Paragraph 4 a of the UDRP, while circumstances giving evidence of (ii) and (iii) are outlined

The Rules for UDRP (the “Rules”)⁸⁹ provide for an expedited procedure. The complaint is decided on the basis of the written statements and documents submitted (Rule 15 a). If the respondent fails to submit his response within twenty days after reception of the complaint, the panel decides based upon the complaint (Rules 5 a, e, 4 c, and 14 a). Further statements are allowed only if requested by the panel [203] in its sole discretion (Rule 12), and in-person hearings (including hearings by teleconference, videoconference, and web-conference) are conducted by the panel as an exceptional matter only (Rule 13). In addition, the approved dispute service providers in their supplementary rules may set up word limits for certain parts of the complaint and the response, which in the case of the WIPO as the leading dispute resolution provider under the UDRP, are five thousand words.⁹⁰

After two years of experience with the UDRP it is generally said to be an overwhelming success, at least with regard to the number of cases decided and, thus, predominantly for the holders of trademarks, who obviously welcomed an efficient tool for transnational dispute resolution, instead of having to rely on highly complex multi-jurisdictional litigation.⁹¹ Of course, a lot of critique has been raised as well, e.g. rule of law and fair trial issues with regard to the very expedited procedure,⁹² or in respect of the competition between different dispute resolution providers purportedly resulting in a “race” towards trademark friendly decisions,⁹³ or simply as to the limited scope of the UDRP, favouring trademark rights over other legitimate interests.⁹⁴

For the purposes of this article, however, the interesting question is if the UDRP constitutes an autopoietic legal system, a kind of transnational trademark law. Since there are no contracts between complainants and respondents, the administrative procedure first of all is not arbitration and, thus, does not participate in the advantages of finality and enforcement under national arbitration laws and the New [204] York Convention. However, such a legal framework is not necessary for enforcement, since the panel decisions are enforced by the registrars, legally by means of termination of the registration agreement with the respondent, and factually

in paragraph 4 b and c.

89 Available at (<http://www.icann.org/dndr/udrp/uniform-rules.htm>).

90 See § 10 of the WIPO Arbitration and Mediation Center supplemental rules, which are available at (<http://arbiter.wipo.int/domains/rules/supplemental.html>); in 2001 about 60 % of all cases under the UDRP were filed with WIPO: see (<http://www.wipo.int/pressroom/en/releases/2002/p303.htm>).

91 As of January 2002 a total of 3457 gTLD-cases were filed with WIPO, of 3157 decided cases 64 % resulted in a transfer of the contested domain, 15.5 % of the complaints were denied, and 20 % of the complaints were withdrawn: see (<http://arbiter.wipo.int/domains/statistics/results.html>).

92 Donahey, *The UDRP and the Absence of the Rule of Law*, 4 *Journal of Internet Law* (2000), at 15; Thornburg, *Fast, Cheap, and out of Control: Lessons from the ICANN Dispute Resolution Process*, 6 *J. Small & Emerging Bus. L.* (2002) 191.

93 This “race” is said to be the reason why E-Resolution, which was the second ICANN approved provider after WIPO, ceased to offer the service in autumn 2001 since too little disputes were initiated with it. See Geist, *Fair.com?: An Examination of the Allegations of Systemic Unfairness in the ICANN UDRP*, (<http://aix1.uottawa.ca/~geist/geistudrp.pdf>); Geist, *Fundamentally Fair.com? An update on bias allegations and the ICANN UDRP*, (<http://aix1.uottawa.ca/~geist/fairupdate.pdf>)

94 See Hancock, *An Assessment of ICANN's Mandatory Uniform Dispute Resolution Policy in Resolving Disputes Over Domain Names*, *JILT* 2001 (1), available at (<http://elj.warwick.ac.uk/jilt/01-3/hancock.html>); White, *ICANN's Uniform Domain Name Dispute Resolution Policy In Action*, 16 *Berkeley Tech. L.J.* (2001) 229; Lehmkuhl (supra note 1); and the very thorough analysis and critique at Fromkin, *ICANN's "Uniform Dispute Resolution Policy". Causes and (Partial) Cures*, 67 *Brooklyn L. Rev.* (2002) 605.

simply by cancellation or transfer of the contested domain in the electronic registry. Compliance of the registrars with panel decisions in turn is guaranteed by virtue of ICANN's monopoly on the accreditation of registrars for the generic top-level domains.⁹⁵

With regard to finality, the fact that the panel decisions are not binding to national courts does not mean that the administrative procedure is not a legal one. First of all, national court rulings share this non-finality in that they are final and enforceable within the limits of their jurisdiction only.⁹⁶ Secondly, the vast majority of panel decisions is never contested in national courts, perhaps because cybersquatters consider their chances for redress to be very low.⁹⁷ And finally, the legitimacy of the administrative procedure as a whole is based on its non-finality, since the argument of deliberate consent of the respondents to their subjection to the procedure under the registration agreements does not prevail due to the fact, that the UDRP is unilaterally imposed on the domain name holders again by virtue of ICANN's monopoly power.⁹⁸

[205] The administrative procedure is an adversarial court-like procedure, where the panel as an independent third party decides the case in accordance with the Policy, the Rules and any rules and principles of law that the panel deems applicable (Rule 15 a). However small the scope of the procedure may be, in that it essentially applies only one single substantive norm, i.e. the UDRP definition of cybersquatting, in practice highly complex questions are involved such as the extent to which non-registered common law trademarks may constitute rights of complainants, especially in the case of governmental organisations,⁹⁹ famous personal names,¹⁰⁰ city

95 On the competitive implications of the unilateral imposition of the UDRP by ICANN on the registrars see A. Michael Froomkin and Mark A. Lemley, ICANN and Antitrust, TPRC Conference Draft 2001, available at (<http://arxiv.org/ftp/cs/papers/0109/0109075.pdf>), p. 46 et seq.

96 On the pending Hague Convention see supra note 38.

97 A list of appealed UDRP cases is available at (<http://www.udrplaw.net/UDRPAppeals.htm>). However, Froomkin (supra note 94) suggests, that time limits for respondents to bring a claim to a states court are simply too short.

98 See supra (note 95). The ICANN equivalent DENIC, administering the German country code top-level-domain ".de", was held to be at least market dominant under section 20 of the German Anti Trust Code (GWB): see OLG Frankfurt, Wettbewerb in Recht und Praxis (WRP) 2000, at 214 f. Since the UDRP is enclosed into the general business terms of the registrars by means of a dynamic reference only, it is to be doubted that a valid arbitration clause under art. 2 of the New York Convention, or section 1031 ZPO respectively, could be constituted thereby. Furthermore, with regard to respondents which hold a domain name as consumers, such arbitration clause might be held void either under section 1031 para. 5 ZPO (requiring for consumer arbitration clauses the form of a separate agreement with a personal or electronic signature) or under section 307 BGB, which implements the European Unfair Contract Terms Directive 93/13/ECC, if the panel decisions were meant to be final without the option of an appeal to domestic courts. The Annex to Art. 3 Para. 3 of the Directive, giving examples of unfair terms, in No. 1 q) states, that clauses which limit or exclude the consumers right to litigate (which is guaranteed under Art. 6 of the European Human Rights Convention), especially by directing him exclusively to an alternative dispute resolution system which does not qualify as arbitration under the arbitration laws, are unfair, which might be true as well in case of commercial domain holders.

99 See WIPO Case No. D2001-1401, Bundesrepublik Deutschland (Federal Republic of Germany) v. RJG Engineering Inc., stating that "Bundesinnenministerium" is a common law trademark.

100 See e.g. WIPO Case No. D2000-0210: Julia Fiona Roberts v. Russell Boyd, which was appealed without success; see generally Falzone, Playing the Hollywood Name Game in Cybercourt: The Battle over Domain Names in the Age Of Celebrity-Squatting, 21 Loyola of Los Angeles Entertainment Law Review (2001), at 289; Isaac, Personal Names and the UDRP: A Warning to Authors and Celebrities, 12 Entertainment Law Review (2001).

names,¹⁰¹ athletic organisations,¹⁰² and other organisations which usually do not register trademarks; how a conflict of competing trademarks registered in different jurisdictions is to be solved;¹⁰³ if parody web-sites should be allowed or not¹⁰⁴, etc.

In terms of legal autopoiesis, the fact that according to Paragraph 4 j of the UDRP all panel decisions are published in full over the Internet¹⁰⁵ is of paramount importance. The system allows for quick and easy access to prior panel decisions and, although not binding as precedent, it has become commonplace for parties and panelists in later proceedings to cite prior UDRP decisions as if they carried some precedential value.¹⁰⁶ As a consequence, very soon after the initiation of the process there emerged a set of leading cases, determining the further evolution of the system, [206] while most panel decisions simply fell into oblivion.¹⁰⁷ The selectivity of remembrance in the evolutionary process of condensation and confirmation of norms is thus the central feature, by which the system is enabled to cope with the above mentioned complexity of the involved substantive questions. However, such evolutionary development cannot prevent contradictory decisions and the introduction of an appellate panel was already proposed.¹⁰⁸

VI. Reflexive Transnational Law

In this final part I shall draw some conclusions from the comparison of both *lex mercatoria* and the UDRP as transnational legal systems, leading to the proposition of the following two theses with regard to a general theory of a reflexive transnational law in world society:

Within the general framework of globalisation there can be observed a trend towards the privatisation of civil law, established by the emergence of functionally specialised transnational legal systems. From a reflexive law perspective the decisive step of a transnational private regime from a social norm arrangement providing a form of alternative dispute resolution to a transnational legal system producing legal

101 WIPO Case. No. D2001-0047: Brisbane City Council v. Warren Bolton Consulting Pty Ltd.

102 Jones, Protecting your "SportsEvents.com": Athletic Organizations and the Uniform Domain Name Dispute Resolution Policy, 5 West Virginia J. Law & Tech., No. 2, 2001.

103 See Hancock (supra note 94), at 20 et seq.; King, The "Law That It Deems Applicable": ICANN, Dispute Resolution and the Problem of Cybersquatting, 22 Hastings Communications and Entertainment Law Journal (2000), at 453.

104 Katz/Carnahan, Battling the "CompanyNameSucks.com" cyberactivists, 13 Intellectual Property & Technology Law Journal (2001), at 1-7.

105 WIPO cases are available at (<http://arbitrator.wipo.int/domains/decisions/index.html>); The web site Domain Name Law Reports (www.dnrl.com) allows users to search through UDRP decisions of all dispute resolution service providers; The page (www.udrplaw.net) provides systematized access and commentary.

106 Levy, Precedent and Other Problems with ICANN's UDRP Procedure, The Domain Name Law Reporter, 2001 (<http://dnrl.com/reporter/levyicann.shtml>); Hancock (supra note 94) at 21. WIPO panel decisions even use hyperlinks.

107 Bettinger, Online-Schiedsgerichte für Domainnamensstreitigkeiten: Eine Bestandsaufnahme der ersten 1000 Entscheidungen, Wettbewerb in Recht und Praxis 2000, at 1109-1116.

108 Donahey, A Proposal for an Appellate Panel for the Uniform Domain Name Dispute Resolution Policy, 18 Journal of International Arbitration (2001), 131-134; Helfer/ Dinwoodie, Designing Non-National Systems: The Case of the Uniform Domain Name Dispute Resolution Policy, 43 William and Mary Law Review (2001), 141-273, at 250 et seq.

certainty is all about self-referential communication, i.e. the autopoietic reproduction of a communication system.

In the context of global governance such transnational legal systems may contribute substantially to the common good, provided they are embedded in the procedural framework of a civil constitution, enabling self-regulation and at the same time promoting the reflection of public and third party interests. The necessary civilisation of private law takes place in a dual process of constitutionalisation: internally the self-organisation of global private regimes is accompanied by the phenomenon of hierarchical self-binding, leading to the emergence of a spontaneous constitution, and externally control is exercised in a heterarchical multilevel system of mainly procedural public international law frameworks, more or less co-ordinated national legislation, and multi-jurisdictional court supervision.¹⁰⁹

[207] 1. The Privatisation of Civil Law

What is striking when comparing the above discussed examples of transnational private regimes in terms of legal autopoiesis, is the fact that the two years of practice with the UDRP, as compared with the four decades of evolution in New Law Merchant, has led to a resounding amount of certainty and complexity within the system. So why that success? First of all, the UDRP is made for the Internet and uses the tools of modern communication, thereby not only enabling, but rather actively promoting self-reference. Unprecedented in legal history, the existence of the transnational trademark law is entirely virtual in that all elements of the system are processed on-line, from the quasi-legislative Policy and Rules, over the contractual foundations in the registration agreements and the adjudicative part of the panel decisions, to self-observation by legal writers in on-line journals and special web-sites. The transaction costs of getting involved with the system are exceptionally low, and hence, access to justice, very easy. Secondly, the UDRP was rationally planned and constructed as a highly formalised system from the outset. By virtue of ICANN's monopoly power it could be implemented unilaterally as a mandatory procedure.

The dilemma of *lex mercatoria*, on the other hand, is that its coming into existence is dependant on contract parties' choice of law, which in turn is dependant first of all on *lex mercatoria* being (at least perceived as) existent. This vicious circle of "the better it works, the better it works", which in terms of evolution made the initial start-off quite unlikely, could be overcome only by literally "talking it into existence" counterfactually.¹¹⁰ *Lex mercatoria* is a kind of legal parasite, which developed by piggy-backing on international commercial arbitration. Successful as it might have been, I hope to have shown that the prerequisites of legal autopoiesis (institutional memory, publicity), implied in the drive of such a parasite towards an autonomous

109 For the idea of a dual constitution see Teubner, Global private regimes (supra note 11).

110 This being the reason, why – at least in the earlier times quite rightly – *lex mercatoria* was seen as a kind of legal Loch Ness monster – occasionally in the headlines as a result of a purported sighting but ultimately non-existent (see Molineaux, Journal of International Arbitration 2000, at 147), or as a "Myth" (see Delaume, The Myth of the Lex Mercatoria and State Contracts, in: Carbonneau (ed.), Lex Mercatoria and Arbitration, Rev. Ed., Kluwer 1998, 111). For a funny evidence of "counterfactually talking into existence" see Lowenfeld, Lex Mercatoria: An Arbitrator's View, in: Carbonneau (ed.), Lex Mercatoria and Arbitration, 71-91, at 83: "Perhaps ... the three arbitrators, like hundreds of international arbitrators before them, did not realize that they were applying *lex mercatoria*."

legal system, somehow tend to establish a tension with respect to the inherent virtues of arbitration (informal, non-public).¹¹¹ For the further development of *lex mercatoria* towards legal certainty it might be a good idea, for instance, to establish a World Commercial Court (WCC) as a private (you and me), hybrid (ICC) or international public (UN) institution, which would undertake revisions with regard to the law, but not to the facts of arbitral awards applying *lex mercatoria*. The delay involved with a stage of appeal would, however, be contrary to the intent [208] of arbitration, i.e. to provide for quick and efficient dispute resolution – which is true as well for the UDRP.

As a result it can be said that both in transnational commercial and trademark law there can be observed the phenomenon of legal autopoiesis. In terms of the further development of such autonomous legal systems it is important not to transplant the formal institutions known to us from traditional national legal systems without reflecting on the distinct function these systems fulfill in global business as service providers, which is predominantly the efficient resolution of transnational disputes. Any measure intended to promote the emergence of legal certainty, thus, should not contravene the competitive advantage of transnational law over multi-jurisdictional court litigation. The concept of transnational law, therefore, has to pay attention to functional equivalents to traditional legal institutional arrangements.

2. The Civilisation of Private Law

The focus of this article has been mainly on the third notion implied in the term reflexive law, i.e. self-reference or autopoiesis. I conclude with some remarks on the first and second meaning of reflexive law, i.e. reflexivity and reflexion.¹¹² Reflexive law is not a mere reflection of the practice of transnational commerce, as if it would only *mirror* societal usage and norms, which was the case, for instance, with the famous *Sachsenspiegel*, a private compilation of medieval customary law.¹¹³ Reflexive law strives towards much more ambitious goals in that it enables and promotes societal self-regulation by providing for the necessary public legal framework for private ordering, for instance in the national arbitration laws and the 1958 New York Convention. At the same time this framework fulfills the function of a “constitution of freedom” as intended by ordo-liberalism and new constitutional economics,¹¹⁴ and [209] that is not only enabling but also setting up the limits of self-

111 See for this tension Berger (supra note 6) at 62.

112 See supra II. It has to be stressed that the intent of this article was mainly to demonstrate the possible contributions of the reflexive-law approach to the question, if the phenomenon of transnational law could and should be conceptualized as an autonomous legal system beyond the nation state, i.e. hard law rather than soft law. The positive answer to this question does not indicate, that the autonomous legal systems we can find on the transnational plane are praised as the perfect solution to our problems. To the contrary, the here promoted perception of private regimes as emergent hard law seems to be a prerequisite for asking the right questions with regard to the necessary constitutionalization of such regimes.

113 “>Mirror of the Saxons< this book shall be titled, since with it the law of the Saxons will become generally known, like the women see their faces in a mirror” (transl. gpc): Eike von Repgow, *Der Sachsenspiegel*, (about 1230), edited by Schott, 3rd ed., Zürich 1996, Vorrede in Reimpaaren.

114 Kerber/Vanberg, *Constitutional Aspects of Party Autonomy and Its Limits – The Perspective of Constitutional Economics*, in: Grundmann/Kerber/Weatherill (ed.), *Party Autonomy and the Role of Information in the Internal Market*, Berlin/New York 2001, at 49-79.

regulation and trying to modulate the regulated discourse towards a reflection of third party interests and of common or public good.¹¹⁵

Thus, the national arbitration laws and the New York Convention not only provide for the international enforceability of arbitral awards, but at the same time subject such public recognition of private justice to certain rule-of-law conditions concerning deliberate consent to arbitration and fair trial. In the case of the UDRP such a public law framework may be found in the option of an appeal to a court of mutual jurisdiction.¹¹⁶ Here it comes to regulation of self-regulation, i.e. the reflexive context of private justice. Several U.S. District Courts decided not to be bound by the outcome of the ICANN administrative proceedings and to give no deference to the panel decisions.¹¹⁷ This, however, does not imply, that the UDRP is ignored or set aside as irrelevant by the courts. On the one hand the non binding character of panel decisions as opposed to arbitral awards is absolutely within the intent of the UDRP. On the other hand in deciding on the merits of the case the courts pay due attention to the arguments delivered by the panels.¹¹⁸ As Robert Alexy observed for the German legal system, it is exactly the non binding status of precedent, which somehow counterintuitively highlights the importance of deliberation and reason giving, i.e. discursive rationality in adjudication.¹¹⁹ Strikingly, the WIPO panel decisions are very thoroughly drafted, especially in hard cases. In providing good reasons [210] the panel decisions express the intent, to satisfy not only the parties (procedural justice), but eventually a court of appeal (persuasive precedent).

Reflexive law, however, is a very indirect method of regulation. To give an example, no-one is permitted from performing “private” arbitration outside the public law framework of the national arbitration laws and the New York Convention, as it is the case with the UDRP. Reflexive law promotes the application of minimum rule-of-law standards in alternative dispute resolution by means of incentives rather than command and control. It sets up a framework for finality and public enforceability, which is perceived by the international arbitration community as an “offer that cannot be refused”. Institutional experiments and social norm arrangements are not excluded, but the majority of cases is absorbed by the established suction towards the public law framework. Reflexive regulation thus is not only open to innovation, but

115 For the constitutional elements in reflexive law see Teubner (supra note 11), for similar ideas of a public law framework for international private ordering see Perrit (supra note 18), and in the perspective of New Institutional Economics Brousseau, Internet Regulation: Does Self-Regulation Require an Institutional Framework? Paper presented at the 5th Annual Conference of the International Society for New Institutional Economics, September 13-15, 2001, Berkeley, California (<http://www.isnie.org/ISNIE01/Papers01/brousseau.pdf>).

116 On the relation of non-national and national systems see the analysis of Helfer/ Dinwoodie (supra note 108), at 252 et seq.; and the critique at Froomkin (supra note 94); for the role of courts in the supervision of self-regulation see generally Wiethölter, Zum Fortbildungsrecht der richterlichen Rechtsfortbildung, *KritV* 1988, 1-28.

117 See e.g. the appeal to WIPO Case No. D2000-0505: *Excelentísimo Ayuntamiento de Barcelona v. Barcelona.com Inc.* On February 22, 2002, the United States District Court for the Eastern District of Virginia rendered a decision upholding the WIPO decision. The Court’s ruling is available at (<http://www.udrplaw.net/Barcelona.pdf>), see on deference at page 4-5 with further references; for an overview see Sorkin, *Judicial Review of ICANN Domain Name Dispute Decisions*, 18 *Computer & High Tech. L.J.* (2001) 35.

118 See the Ruling (supra note 117), at 5 et seq., where the Court cites the First WIPO Report for the non-binding character, but in the following reasoning on the merits of the case is heavily quoting and drawing on the argumentation of the panel decision, which is upheld as a result.

119 See Alexy, *Theorie der juristischen Argumentation*, Frankfurt/Main 1983.

at the same time very effective in terms of enforcement. There is no need for public administrative surveillance with regard to the minimum rule-of-law standards since the arbitration community has a self-interest in compliance. The fact that the ICC International Court of Arbitration is reviewing every single award in respect of its enforceability under the New York Convention and has to give binding approval with regard to its form is a good example for the resulting self-enforcing arrangements.

However, the reflexive law framework as a procedural constitution¹²⁰ of transnational commercial law could go beyond the tools used up to now. In terms of promoting legal certainty rather than enabling arbitration as a means of alternative dispute resolution only, the erection of a World Commercial Court (WCC) could be part of such a constitution of international commerce. It should be kept in mind, however, that regulatory competition shall not be excluded thereby, and at the same time such a constitution of *lex mercatoria* should not interfere with the original *ratio* of arbitration. A WCC, thus, could be designed as a non-binding offer to international commerce, for example by providing a model choice of law (*lex mercatoria*) and arbitration clause with or without the option of an appeal to a WCC.¹²¹ If there is actual demand for legal certainty in global business, such a clause should prevail in the competition of jurisdictions. A WCC should, however, be institutionalised as a multilateral hybrid institution like ICANN or the WIPO Arbitration Center, thus providing for the necessary trust in expertise and independence. Taking the ICANN approach of accrediting selected dispute resolution service providers as an example, it might as well be an option for hybrid norm formulating agencies like UNIDROIT, [211] to accredit certain arbitral institutions or an appellate body with the authoritative interpretation and the generation of precedent with regard to the Principles.

The problem with UNIDROIT in this respect is that it is financially ill-equipped and its representatives feel unable to perform additional functions as e.g. the publication of arbitral awards or the like, since such “subsidiary activities” are “subject to extrabudgetary funding”.¹²² Blueprinting the above mentioned CENTRAL Transnational Law Database, which includes reference to arbitral awards into an open list of principles of *lex mercatoria*, the Centre for Comparative and Foreign Law Studies – a joint venture of the Italian National Research Council, the University of Rome I “La Sapienza”, and UNIDROIT – recently established the online-database UNILEX, providing case law and bibliography on the CISG and the UNIDROIT Principles.¹²³ The project was financed by the Italian National Research Council and the Milan National and International Arbitration Chamber. Since it is the international business community, which benefits from the transparency and legal certainty produced by this project, the question remains, however, why UNIDROIT does not

120 For the notion of a “procedural constitution of freedom” in the context of consumer protection in e-commerce see Calliess (supra note 14), on the related “procedural concept of the rule of law” see Calliess (supra note 32), ch. 3.

121 A model choice of law clause with regard to the submission of a contract to the UNIDROIT principles is available at (<http://www.unilex.info/dynasite.cfm?dssid=2377&dsmid=14278&x=1>). This model clause already provides for two different options and could easily be amended. On the idea of “politics of options” in the context of reflexive law see generally Teubner (supra note 24) at 115 et seq.

122 See the report of the Secretary General of Unidroit Kronke, Ziele – Methoden, Kosten – Nutzen: Perspektiven der Privatrechtsharmonisierung nach 75 Jahren UNIDROIT, Juristenzeitung 2001, 1149, 1156.

123 See www.unilex.info/. Edited by Michael Joachim Bonell, the database currently contains full text access to as much as 61 arbitral awards referencing the UNIDROIT Principles.

follow the example of WIPO, which unlike other specialized agencies of the United Nations is mostly self-financed and generated about 90 percent of its income in 2001 from international registration, database, dispute resolution and other services it provides to the private sector.¹²⁴ The WIPO Arbitration Center is, for example, the market dominant dispute resolution service provider accredited by ICANN under the UDRP.¹²⁵ Moreover, such approach would not necessarily imply that UNIDROIT itself provides such services. Additional funds could be generated simply by accrediting or licensing third party use of the Principles.

A problem with the mentioned online databases is, that they somehow have to get hold of the arbitral awards to be published and that the online reproduction of awards already published otherwise is subject to permission by the holders of copyrights.¹²⁶ In this context it seems to be somehow unjustified, that parties to international contracts and their arbitrators on the one hand make free use of the Principles provided by UNIDROIT, but on the other hand do not provide UNIDROIT with sufficient feedback and, in addition, that arbitrators or arbitral institutions do **[212]** even profit from copyrights on awards, which draw on these Principles. A solution to this problem, which could eventually even contribute to the funding of UNIDROIT, might be to amend the preamble of the UNIDROIT Principles (or Art. 1:101 of the Principles of European Contract Law respectively) as follows:

These Principles are subject to copyright protection. Parties to international contracts and arbitrators are licensed to make use of these Principles under the following condition: In expressly submitting a contract to these Principles the parties of the contract agree and irrevocably instruct the arbitral tribunal to provide UNIDROIT with a – where necessary in terms of business secrets etc. black-lined – copy of the arbitral award applying such Principles for confidential use by UNIDROIT in commenting on or amending the Principles and/or for the de-personalized publication of the ratio decidendi of such award.

Of course this is a preliminary idea, which would need further reflection. It is intended to illustrate that there are “private taxation” solutions to the problem of the funding (in terms of information and feedback, but potentially as well money) of norm formulating and other agencies, which contribute to legal certainty in the conduct of transnational business.

Enabling transnational legal systems is, however, only one aspect of the procedural constitution. The other aspect is concerned with the necessary limits to self-regulation in terms of public policies, e.g. „distributive justice, democratic political governance, or effective transnational regulation“.¹²⁷ In both examples of transnational law discussed in this article, the issue of the civilisation of private law might not seem to be very pressing. For the law of international commerce on the one hand is traditionally a field where little policy is involved. The idea of a self-regulation of commerce is a very old one and we have the feeling that there is no need for extensive regulation, since the merchants are considered to be able to protect themselves. The UDRP on the other hand does not directly interfere with

124 See www.wipo.int/about-wipo/en/.

125 Froomkin (supra note 94) at 231.

126 On the UNILEX Website, for example, the following language is contained: “The International Chamber of Commerce International Court of Arbitration has kindly granted permission to reproduce extracts from arbitral awards published in the ICC International Court of Arbitration Bulletin”.

127 See Wai (supra note 41) at 211, 231 et passim.

state regulation. Since the results of the administrative proceedings are not binding, the system can be regarded as a mere additional dispute resolution tool next to traditional litigation. In addition, cybersquatting is universally held to be unlawful. However, in the context of global governance the given examples are considered to be a kind of blueprint for modern forms of co-regulation between international governmental organisations, the industry, and civil society actors.¹²⁸ Co-regulation [213] of the Internet with regard to the protection of privacy, children, or consumers, for instance, involves issues which form an integral part of the protective state's policies in the traditional national framework. Here the commercialisation of the Internet led to the question of how consumers could be provided with an effective level of protection in cross-border contracts, where they are faced with the problems of multi-jurisdictional litigation. Under the label of promoting "Consumer Confidence in E-Commerce", currently there are established trustmark-schemes, codes of conduct, and online dispute resolution services in a self-regulatory effort of the Internet industry.¹²⁹ The private protection regimes thus created may soon evolve into new kinds of transnational legal systems, their constitutionalisation then being an important issue on the global agenda. The concept of a reflexive transnational law is intended to provide a theoretical framework for the solution of these legal challenges to come.

3. A Global Legal System or a Competitive Legal Pluralism?

I conclude with some remarks about a very difficult problem which was left more or less open by Luhmann and which of course cannot be solved within this article: when I talk about functionally specialized transnational legal systems in *plural*, how are they related with each other and with national legal systems or public international

128 See Desai/Redfern (Eds.), *Global Governance: Ethics and Economics of the World Order*, London 1995; Jayasuriya, *Globalization, Law, and the Transformation of Sovereignty: The Emergence of Global Regulatory Governance*, in: *Indiana Journal of Global Legal Studies*, Vol. 6 No. 2 (1999) p. 425; Abbott/Snidal, *Hard and Soft Law in International Governance*, *International Organisation* 54 (2000), 421 ff.; Yamamoto/Ashizawa (Eds.), *Governance and Civil Society in a Global Age*, Japan Center for International Exchange 2001; Anheier/Glasius/Kaldor (Eds.), *Global Civil Society 2001*, *Global Civil Society Yearbook*, Oxford UP 2001; OECD, *Co-operative Approaches to Regulation*. Public Management occasional Papers No. 18, 1997; similarly the "White Paper on European Governance" COM(2001) 428 final; see the contributions to Joerges et. al. (Eds.), *Mountain or Molehill? A Critical Appraisal of the Commission White Paper on Governance*, Jean Monnet Working Paper No. 6/01; in the context of internet regulation see also Grewlich, *Governance im Cyberspace – Regulierung globaler Netze im Systemwettbewerb?*, *RIW* 2000, 337 ff.; Engel/Keller (eds.) *Governance of Global Networks in the Light of Differing Local Values*, Baden-Baden 2000; Zinnbauer, *Internet, Civil Society and Global Governance: The Neglected Political Dimension of the Digital Divide*, 7 *Information & Security* (2001), 45 ff.; Farrell, *Hybrid Institutions and the Law: Outlaw Arrangements or Interface Solutions?*, *Zeitschrift für Rechtssoziologie* 2002, 25 ff.

129 For an introduction see Calliess (supra note 14); Perritt, *Dispute resolution in cyberspace: Demand for new forms of ADR*, 15 *Ohio State Journal on Dispute Resolution* (2000), S. 675 ff.; Carblanc, *Privacy Protection and Redress in the Online-Environment: Fostering Effective Alternative Dispute Resolution*, 2000 (http://www.oecd.int/subject/e_commerce); Hörnle, J., 'Online Dispute Resolution in Business to Consumer E-commerce Transactions', *The Journal of Information, Law and Technology (JILT)* 2002 (2); Davis, *Building the Seamless Dispute Resolution Web: A Status Report on The American Bar Association Task Force on E-Commerce and Alternative Dispute Resolution*, 8 *Tex. Wesleyan L. Rev.* (2002) 529; Anderson/Cole, *The UDRP - A Model for Dispute Resolution in E-Commerce?*, 6 *J. Small & Emerging Bus. L.* (2002) 235; De Bruin, *Consumer Trust in Electronic Commerce: Time for Best Practice*, 2002.

law? Do all these systems form part of a global legal system, and if so how could the unity of such a single system be represented?¹³⁰ Since legal communications [214] can be distinguished from non-legal ones and are processed all over the world, one could argue that there is a single global legal system which performs its operative closure as an autopoietic subsystem within “world society”¹³¹ simply on the basis of the usage of the legal code. However, this is only part of the story, since the mere reference to the general legal code constitutes a legal system in a very broad sense only. The operational closure of a legal system in its strict sense is performed on the basis of valid legal acts, i.e. actions which alter the legal situation (*Geltungslage*) as the starting point for further legal decisions, e.g. legislating, contracting, adjudicating and the like. Validity is the symbol for the unity of a legal system, since it symbolises the interconnectability of legal communications, i.e. the autopoiesis of the elements without which the operative closure of a legal system would not work.¹³² It follows that the decisive question in terms of the operative closure of a global legal system is: are there “validity-interfaces” between the different national, international, and transnational legal systems which enable interconnectivity amongst them and thus the autopoiesis of a global law?¹³³

I consider this question to be an empirical one, which cannot be answered sufficiently here. However, the organised professional decision-making system of a national legal system, with the courts in its centre and legislation and contracting at the periphery¹³⁴, as a general rule does not perceive foreign legal acts as valid law, unless international (mutual) recognition is explicitly provided for in national law. Of course, the existence of foreign law is not denied, but its relevance for decisions within the national system is neglected. Even where foreign law is taken into account at all, it often is treated as a fact to be proven (i.e. foreign reference) rather than a legal element to be (self-) referenced according to the rule *iura novit curia*.¹³⁵

[215] The same holds true for the relation of domestic legal systems with the above described transnational legal systems. If an arbitral tribunal decides as an *amiable compositeur*, the decision is not referencing the legal code at all, it is not law but *ex aequo et bono*. If the tribunal applies domestic law, the decision is just part of

130 Some “raw material” as to this question can be found with Luhmann, *Das Recht der Gesellschaft*, at 571 ff.; for more details see Teubner (supra note 11 and 13); Albert (supra note 1 and 53); Albert, *Entgrenzung und Globalisierung des Rechts*, in: Voigt (Hrsg.), *Globalisierung des Rechts*, Baden-Baden 1999; Fischer-Lescano, in this Volume.

131 Luhmanns concept of a single „world society“ is questioned by Helmut Willke (*Laterale Weltsysteme*, <http://www.uni-bielefeld.de/pet/lat-we2.pdf>) because of its lack of self-regulatory resources. His argument comes very close to my observation, that there is a lack of hard core autopoiesis in global law.

132 Luhmann, *Das Recht der Gesellschaft*, at 98 ff. (on validity), 107 f. (on legal acts)

133 In the global economic system e.g. such validity interface between national economies can be found in the fact that currencies are freely convertible (in former times the gold standard), so that payments as the basal economic operations are universally interconnectable (i.e. self-reference).

134 See Luhmann, *Das Recht der Gesellschaft*, at 145 ff., and ch. 7.

135 This is the case even with Private International Law, which is often quoted as an example for the application of foreign private law by domestic courts (*comitas*). Not only the English civil proceedings follow the “fact doctrine” but as well most of the roman-law countries treat foreign private laws as facts to be proved: see Hartley, *Pleading and Proof of Foreign Law: The Major European Legal Systems Compared*, *Int.Comp.L.Q.* 45 (1996), 271; While section 293 of the German Code of Civil Procedure (ZPO) provides that foreign law may be proved by the parties, the courts are held to be obliged to investigate its content on their own initiative and to apply it as law, see Kegel/Schurig (supra note 3) at 439 ff.

the domestic legal system where the arbitration has its seat. Once the tribunal makes reference to *lex mercatoria*, however, the decision takes part in a completely different discourse, which – under the above described conditions – may qualify as an autopoietic transnational legal system. Both domestic and transnational legal systems are, then, operationally closed; they may observe each other but there is no exchange of validity, no self-reference: domestic courts do not apply non-state law, a tribunal obliged by the choice of law of the parties to apply *lex mercatoria* may not apply domestic laws. Similarly an administrative panel decides a case in accordance with the UDRP and the Rules, while domestic courts give no deference to the panel decisions.¹³⁶ In other words: there is no *comitas*.

On the other hand, global law - despite the current trend towards a legalisation of international relations¹³⁷ - lacks the organised professional core of a decision making system as long as there are no courts with general jurisdiction.¹³⁸ A global legal system without jurisdiction, however, seems to be a *contradictio in objectu*: a lot of periphery without a centre.¹³⁹ In the absence of a sustainable amount of self-reference, however, global law simply does not qualify for operative closure, i.e. autopoiesis in the strict sense. What is left is a global legal system in the broad sense, i.e. a global legal discourse without a single validity-test (ultimate rule of recognition) [216] symbolizing its unity. Instead the global legal discourse is decomposed by a plurality of organised decision making systems, the number of which is – triggered by the described trend towards the privatisation of civil law – even growing. In my point of view the *unitas multiplex* of such global legal discourse¹⁴⁰ is described more adequately by the notion of a “competitive legal pluralism”, than with the term “global legal system”, where “system” in its systems theoretical meaning indicates an operative closure which is not (yet) observable.

136 See supra note 117.

137 See the contributions to International Organization 54, 3 (2000) on “Legalization and World Politics”; Zürn/Wolf, European Law and International Regimes: The Features of Law Beyond the Nation State, European Law Journal 1999, 272 ff.; Zumbansen, Die vergangene Zukunft des Völkerrechts, KJ 2001, 46 ff.; Faßbender, The United Nations Charter as Constitution of the International Community, in: *Colombia Journal of Transnational Law* 1998, 529 ff.; Uerpmann, Internationales Verfassungsrecht, JZ 2001, 565 ff.; v.Bogdandy, Verfassungsrechtliche Dimensionen der Welthandelsorganisation, KJ 2001, 264 ff.; the contributions to “Die Konstitutionalisierung der Welthandelsordnung”, *Berichte der Deutschen Gesellschaft für Völkerrecht* 40 (2001); and Brütsch, Verrechtlichung der Weltpolitik oder Politisierung des Rechts? Anmerkungen zum transnationalen Recht der Internationalen Beziehungen, in this Volume.

138 Of course there are many international jurisdictions, but they are functionally specialized, overlapping, and competing: see e.g. Ruffert, Zuständigkeitsgrenzen internationaler Organisationen im institutionellen Rahmen der internationalen Gemeinschaft, ArchVR 38 (2000), 129 ff.; Lehmkuhl (supra note 35) and Lehmkuhl, Multiple Providers of Governance Services: Settling Transnational Commercial Disputes (<http://www.iue.it/LAW/joerges/transnationalism/documents/Lehmkuhl-Mult-Paper.pdf>). The existing International Courts have strictly limited jurisdiction, there is no equivalent to the general jurisdiction of e.g. the German courts (“ordentliche Gerichte”), which is provided for in section 13 Gerichtsverfassungsgesetz.

139 Where already the “logics of form” tell us, that there cannot be a centre without a periphery and vice versa.

140 Teubner (supra note 11, 13, and 28 “The King's Many Bodies”) is using the term “global legal pluralism” and observes a deconstruction of law's hierarchy.