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The transnational and the local in the comparative law of finance: technics, politics, and the functions of commercial law

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ABSTRACT

In the absence of a global regulator, transnational financial law emerges from the combination of national laws and the contractual practices developed by networks of private, public and hybrid private-public actors who contribute to the engineering and (self-)regulation of financial services largely through contracts. The theoretical question arises whether the process of transnationalisation might determine the dominance of economic rationality over other considerations, and whether a possible nationalisation of the transnational might instead produce a repoliticisation of the economic. Against this background, the article focuses on some of the instruments of transnational financial self-regulation, and considers how these interact ambivalently with local laws and judicial practices. By looking at the role of private law institutions and considering national litigation over financial contracts in different jurisdictions, the article reveals tensions between different objectives, ultimately raising questions about the function of commercial law both within and beyond the state.

KEYWORDS Financial services; private autonomy; lex mercatoria; commercial law; financial litigation

1. Introduction

As the phenomena of globalisation and financialisation have grown in importance[1] and capital has seemed capable of challenging state sovereignty,[2] the state has been seen as less able to control finance and has become one of its users rather than its sole regulator. If markets require a legal infrastructure

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[1] The history of finance and its relevance for the state is obviously much older, an overview is provided by C Kindleberger, *A Financial History of Western Europe* (Routledge, 1984).

[2] M Hardt and A Negri, *Empire* (Harvard University Press, 2000) exploring the shifts in concepts of sovereignty and state authority in the context of increased economic globalisation. See also S Sassen, *Losing Control? Sovereignty in an Age of Globalization* (Columbia University Press, 1996), pointing out how the increasing influence and power of global capital markets over states.

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and, despite attempts at international institutionalisation,[3] a single global regulator is still not present,[4] the regulatory gap is filled by networks of private, public and hybrid private-public actors[5] who contribute to the engineering and (self-)regulation of financial services. Despite some regulatory backlash in the wake of the global financial crisis,[6] these networks remain central to the international architecture of financial regulation.[7]

There are considerable limits to what such transnational law[8] of finance, and more generally transnational commercial law,[9] can achieve without the backing of state law, but this is not the place to repeat the main points of the rich theoretical literature on the relationship between state and transnational law.[10] For its more limited purposes, this paper takes as its starting point what Ralf Michaels has critically discussed in his insightful analysis of the *lex mercatoria*: state and non-state elements interact to such an extent that the question of the legal/non-legal or public/private divide becomes redundant in practice[11] at least from the perspective of commerce; while a more significant, though not exclusive, dichotomy from that angle seems to be one between the economic and the political. Outside the perspective of the state, 'law merchant appears not as non-state law but rather as non-political law'.[12] Thus, '[c]ommercial law is distinguished not from the state but from

[3] G Ferrarini and P Saguato, 'Regulating Financial Market Infrastructures' in N Moloney, E Ferran and J Payne (eds), *The Oxford Handbook of Financial Regulation* (Oxford University Press, 2015); L Garicano and RM Lastra, 'Towards a New Architecture for Financial Stability: Seven Principles' (2010) 13(3) *Journal of International Economic Law* 597. For academic proposals, see E Avgouleas, *Governance of Global Financial Markets. The Law, the Economics, the Politics* (Cambridge University Press, 2012) 429 ff.

[4] A plurality of institutions is involved, see RM Lastra, *International Financial and Monetary Law* (Oxford University Press, 2015).

[5] This is not specific to transnational law only, as a similar situation can be found within the EU, for a discussion in that context see A Galán and S Law, 'The Emergence of European Private Law and the Plurality of Authority' (2017) 7(4) *Transnational Legal Theory* 499.

[6] F Cafaggi, 'The Architecture of Transnational Private Regulation' Osgoode CLPE Research Paper Series Vol 08 No. 05, 2, suggesting that the crisis 'has redefined the balance between public and private, eroding but certainly not eliminating the role of private regulation'.

[7] J Biggins and C Scott, 'Licensing the Gatekeepers? Public Pathways, Social Significance and the ISDA Credit Derivatives Determinations Committees' (2015) 6(2) *Transnational Legal Theory* 370, at 371. With regard to finance, and differently from other fields, it is therefore still not entirely true that the 'three revolutions' in telecommunications, transportation, and in the formation of global financial markets have spurred 'the development of a new international political order' and an 'institutionalisation of international law' as it appeared before the global financial crisis, see EO Eriksen and JE Fossum, 'Europe at a Crossroads: Government or Transnational Governance?' in C Joerges, IJ Sand, and G Teubner (eds) *Transnational Governance and Constitutionalism* (Oxford, Hart, 2004) 119–120.

[8] In this paper, transnational law is understood largely as transnational private law. For a theory of transnational law developed from a private law perspective, G Calliess and P Zumbansen, *Rough Consensus and Running Code: A theory of Transnational Private Law* (Hart, 2010).

[9] The article employs terms such as transnational commercial law and *lex mercatoria* interchangeably. More precise distinctions could of course be adopted, see for an overview of conceptions O Toth, *The Lex Mercatoria in Theory and Practice* (Oxford University Press, 2017) 31.

[10] An overview of positions regarding the *lex mercatoria* is offered by G Teubner, 'Global Bukowina: Legal Pluralism in the World Society' in G Teubner (ed), *Global Law without a State* (Dartmouth, 1997).

[11] R Michaels, 'The True Lex Mercatoria: Law Beyond the State (2007) 14(2) *Indiana Journal of Global Legal Studies* 447.

[12] *Ibid*, 467.

political law, especially constitutional law and regulatory law'.[13] While commercial law is at least to some extent globalised, constitutional law and regulatory law remain largely local. The *prima facie* separation of the two—the 'economic' and the 'political' rather than the transnational and the national—nevertheless produces tensions[14] that become especially visible in the law and practice of financial services: while states have an interest in the development of, and participation in, global financial markets, the economic rationality of the financial system and private regulation can also be disruptive of legal categories and social considerations, triggering legal change or producing externalities that may need to be addressed by the state. More concretely, tensions between objectives such as economic and legal certainty, market efficiency, investor protection, fiscal discipline and financial stability are occasionally brought to the fore by litigation. The analysis of the practice of transnational financial law thus ultimately raises questions about the function of commercial law both within and beyond (but 'not without'[15]) the state, ie, whether this body of rules is merely intended to provide the techniques to serve a (transnational) economic rationality that finds expression in supposedly neutral forms of private law while political considerations are somewhat artificially relegated to (national) public law; or whether this dichotomy is deceptive, even in an apparently technical and commercially oriented area.

Against this background and combining insights from different fields of research in transnational and commercial law, this article focuses on some of the instruments of transnational financial self-regulation and then considers how these interact with local laws, revealing tensions between the processes of transnationalisation of law and nationalisation of transnational law through judicial practices. The article initially introduces some of the instruments of transnational financial law, and then examines how those play out locally. To highlight this transnational/local interaction, particular attention is paid to an analysis of litigation over derivatives contracts—in particular, swaps—in a few jurisdictions where the interplay between regulatory objectives becomes more apparent. The paper then turns to the question of further transnationalisation by decoupling litigation from the local level.

In doing so and considering litigation over some financial contracts, the article illustrates elements of conflict in the politics of transnational financial law,[16] reflecting on the role of private law institutions and

[13] *Ibid*, 464.

[14] 'This tension between an essentially state-based political system and a transnational economy explains the tension within the law. Traditionally, the law reflected the structure of the political system: legal systems were national systems', *ibid*, 465.

[15] *Ibid*, 447.

[16] On the politics of transnational economic governance more in general and with examples from other areas, see the contributions in A Claire Cutler and T Dietz (ed), *The Politics of Private Transnational Governance by Contract* (Routledge, 2017), based on the notion that '[l]argely unregulated by states,

ultimately questioning the portrayal of transnational commercial law as exclusively economic.[17] It should also be noted that, while similar dynamics are at play in other sectors of the financial market, the analysis in this paper is largely focused on derivatives, so that its findings should be generalised to other sectors only with particular caution.

2. From statute to contract

It is tempting to claim that in so-called post-industrial and financialised global economies there is less need for legal reform by the state than in the industrial age,[18] because the main instrument of innovation is no longer the statute but the contract.[19] Financial services such as derivatives are a clear example of this, as Sir Roy Goode describes:

> [t]he derivatives market has given rise to a wondrous array of contractual and securitisation devices which enable market participants to package financial assets, loans and investments in whatever way best suits their needs to secure such benefits as hedging, arbitrage, reduction of balance sheet assets and the minimisation of tax liabilities. And, astonishingly, not a single one of these commercial devices was the creature of statute.[20]

Rather than suggesting a diminished relevance of the law, however, this development highlights its importance: as the legal theory of finance points out, in fact, finance is legally constructed[21] and largely relies on private law concepts. While a wide range of aspects could be mentioned in this respect—think of the relationship between securitisation and property law—the focus here is on two topical aspects: private autonomy and

contracts determine winners and losers in the global economy and thus have profound distributional consequences', A Claire Cutler and T Dietz, 'The Politics of Private Transnational Governance by Contract. Introduction and Analytical Framework', *ibid*, 1.

17 In line with P Zumbansen, 'Piercing the Legal Veil: Commercial Arbitration and Transnational Law' (2002) 8(3) *European Law Journal* 400, 419, noting that the 'conception of an ostensibly pure, private law, free from political intervention and influence, is directly derived, however, from a nineteenth-century perception of an alleged divide between an *apolitical* market society on one side and the State on the other […] This imagery continues to guide the interpretation and understanding of transnational phenomena, regardless of what we, by now, could have learned about the mutual involvement of public law and private law, which must in fact be seen as an irreversible historical experience'.

18 The evolving role of private law in the context of industrialisation is discussed, specifically with reference to the German experience, by F Wieacker, *Industriegesellschaft und Privatrechtsordnung* (Frankfurt am Main, Athenäum-Fischer-Taschenbuch-Verlag, 1974).

19 F Galgano, 'The New Lex Mercatoria' (1995) 2(1) *Annual Survey of International & Comparative Law* 99, 102.

20 R Goode, *Commercial Law in the Next Millennium* (Sweet & Maxwell, 1998) 11.

21 K Pistor, 'A Legal Theory of Finance' (2013) 41 *Journal of Comparative Economics* 315, referring back to JP Bradley, *Miscellaneous Writings of the Late Hon. Joseph P. Bradley* (Hardham) 1902. The point was also made earlier by Galgano 'The New Lex Mercatoria' (n 19) 99: 'Financial products are created and exist only as a result of the expert use of juridical concepts. Once, contracts were used for the circulation of goods, but today they are also used in the creation of financial products. A shrewd arrangement of words – since contracts are made with words – can create wealth'.

choice of law and forum. Both are obviously crucial and deeply ingrained elements of modern commercial law,[22] but their use is more problematic than harmonious views of a new *lex mercatoria* might suggest. Comparative private law scholarship has in fact become increasingly sceptical of these principles: approvingly discussing the work of Katharina Pistor[23] and reviving an older and powerful proposal by Ugo Mattei,[24] Martijn Hesselink for instance suggested recently that a new 'progressive code' focused on general private law and with a highly mandatory character should restrict both private autonomy and choice of law.[25] Why have these principles become —again—so controversial?

Let us first take a closer look at the relevance of private autonomy for transnational financial law. As a preliminary point, it should be noted that transnational networks are often created by agreement and often make use of the forms offered by private law.[26] Both public and private actors participate in these networks, some of which have a distinctly more public design, while others have a more private one. An example of the former category is IOSCO, the International Organization of Securities Commissions, whose members are largely public authorities, and which has obvious quasi-regulatory functions, as the EU Commission itself has noted.[27] On the other side of the spectrum, the International Swaps and Derivatives Association (ISDA) has a remarkably private configuration, as its 'primary members' are financial firms. Moreover, the ISDA architecture has become increasingly complex over time: since 2009, it has included Determinations Committees,

[22] In the 1960s already, Schmitthoff elevated freedom of contract to the foundation of world trade law and regarded the freedom to choose the applicable law as a natural consequence of autonomy: CM Schmitthoff, 'Das neue Recht des Welthandels' (1964) 28 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 47, 68–69. The passage is quoted and strongly criticised by Teubner, 'Global Bukowina' (n 10) 18, who rejects the predominant role that Schmitthoff attributes to national law.

[23] K Pistor, *The Code of Capital. How the Law Creates Wealth and Inequality* (Princeton, 2019).

[24] U Mattei, 'Hard Code Now!' (2002) 2(1) *Global Jurist Frontiers* 1. In the context of the debate at the time on a possible European Civil Code, Mattei argued for both a more political rather than technocratic process and a 'hard code' as opposed to 'soft law' instruments.

[25] MW Hesselink, 'Reconstituting the Code of Capital: Could a Progressive European Code of Private Law Help Us Reduce Inequality and Regain Democratic Control?' (2022) 1 *European Law Open* 316, 325.

[26] This is not to say that the conceptual categories of private law are also best suited to grasp the phenomenon of networks, see G Teubner, *Networks as Connected Contracts* (Hart, 2011), developing a legal concept of 'connected contracts' to apply to hybrid phenomena that cannot be reduced to entities such as the corporation.

[27] N Moloney, *EU Securities and Financial Markets Regulation* (Oxford University Press, 3rd edn, 2014) 681. IOSCO's involvement with the EU is notable in the development of post-crisis rules on credit reference agencies (N Moloney, *EU Securities and Financial Markets Regulation*, *ibid*, 685, with reference to Commission, Communication on Investment Research and Financial Analysts (2006) (COM (2006) 789) (the 2006 Investment Research Communication).), in the investor protection rules laid down in MiFID II (see A Marcacci, 'The EU in Transnational Financial Regulatory Arena. The Case of IOSCO' in M Cremona and HW Micklitz (eds) *Private Law in the External Relations of the EU* (Oxford University Press, 2016)) and, together with the Basel Committee on Banking Supervision, IOSCO is responsible for the development of standards for the new regulation of securitisation practices translated into law by the EU securitisation regulation (Regulation (EU) 2017/2402 laying down a general framework for securitisation and creating a specific framework for simple, transparent and standardised securitisation).

partly composed of derivatives dealers,[28] with the power[29] to make binding determinations on the occurrence of a 'credit event'.[30] However, as mentioned above, the emphasis on the public/private divide is not fully illuminating, especially outside the conceptual categories of the state,[31] so that the different actors could be better described in terms of the function they perform in the architecture of international financial regulation than in terms of their structure.[32]

More importantly, some of the main instruments of transnational regulation of finance are standard contractual terms—or framework agreements—which become binding only insofar as they are referred to in contracts concluded by the parties.[33] Those parties are theoretically free to modify the terms as they are incorporated into their contract, but, significantly, this is unlikely to happen as it would increase transaction costs and undermine the benefit of standardisation.[34] One of the best-known and most relevant instruments in this sense—in fact the one which enjoys 'celebrity status' in the transnational law debate[35]—is the ISDA Master Agreement (hereafter MA),[36] which standardises the documentation for over-the-counter derivatives transactions. Admittedly, this standardisation technique is hardly surprising to contract lawyers: after all, many contracts routinely incorporate standard terms drafted by trade associations or similar bodies. Nevertheless, the practical relevance of the MA is demonstrated by the fact that over 90% of OTC derivatives worldwide are governed by it.[37] This means that a private agreement has *de facto* become the central instrument

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[28] This raises conflict of interests concerns, as discussed in D Awrey, 'The Limits of Private Ordering within Modern Financial Markets' (2014) 34 *Review of Banking and Financial Law* 183.

[29] On the functions of the Determination Committees and suggesting that they have a more systemic function than ensuring transactional security, J Horst, 'Lex Financiaria. Das transnationale Finanzmarktrecht der International Swaps and Derivatives Association (ISDA)' (2015) 53(4) *Archiv des Völkerrechts* 461.

[30] For an analysis of DCs, Biggins and Scott (n 7).

[31] G-P Calliess and M Renner, 'Between Law and Social Norms: The Evolution of Global Governance' (2009) 22 *Ratio Juris* 260, 265, applying a systems-theoretical framework to *lex mercatoria* among other things instead.

[32] C Brummer, *Soft Law and the Global Financial System. Rule making in the 21st Century* (Cambridge University Press, 2015) 69 ff, proposes distinctions between agenda setters (Financial Stability Board), sectoral standard setters (IOSCO) and specialist standard setters (ISDA).

[33] J Braithwaite 'Standard Form Contracts as Transnational Law: Evidence from the Derivatives Markets' (2012) 75(5) *Modern Law Review* 779. For an analysis of the evolution of this instrument, P Cornut St-Pierre, 'Eligible Financial Contracts and the Many Faces of Derivatives: A Brief History of the ISDA Master Agreement' (2015) *Annual Review of Insolvency Law* 617.

[34] D Wielsch, 'Global Law's Toolbox: Private Regulation by Standards' (2012) 60(4) *American Journal of Comparative Law* 1075, 1086.

[35] Braithwaite (n 33) 784.

[36] As a concise explanation, 'the ISDA architecture, which combines a Master Agreement with accessory documentation for each transaction, while allowing for all relevant transactions to be collectively netted and set off, if a default event occurs and the parties decide to exercise their closeout rights', R Cranston, E Avgouleas, K van Zwieten, C Hare, T van Sante, *Principles of Banking Law* (Oxford University Press, 3rd edn, 2018) 15.

[37] S Henderson, *Henderson on Derivatives* (LexisNexis UK, 2nd edn, 2010) 203.

of (self-)regulation of economically and socially critical transactions.[38] In light of this, and further blurring the line between statute and contract, the question has been raised as to whether its standard terms should be legally interpreted as a statute rather than a contract.[39] It can be noted that English courts—which are important actors in this context for the reasons that will be discussed later—take particular account of both the universal application of the MA and the need for certainty that pervades commercial law and practice.[40]

Nonetheless, a reading that reduces private transnational regulation to a mere expression of private autonomy is ultimately deceiving, as emphasising the consensual and cooperative nature of transnational relations ends up obscuring the 'compensatory and regulatory functions of underlying private law'.[41] It is well known to scholars that contract law is not just about the abstract recognition and passive acceptance of autonomy and the distribution of rights and obligations between the subjects privy to the agreement. Contracts also have systemic consequences and some of the clauses contained in the MA have been shown to be capable of destabilising the financial systems as a whole,[42] conflicting with sensitive public policy considerations. It is thus clear that '[w]hen a financial contract stands accused of causing the global financial crisis and threatening the break-up of Europe, the political stakes in its interpretation are huge, quite apart from its micro- and macroeconomic significance'.[43] When these contractual arrangements involve public authorities, the political stakes are particularly

[38] P Saguato, 'Private Regulation in the Credit Default Swaps Market: The Role of ISDA in the New Regulatory Scenario of CDSs' in F Cafaggi and GP Miller (eds) *The Governance and Regulation of International Finance* (Elgar, 2013) 32.

[39] SJ Choi and GM Gulati, 'Contract as Statute' (2006) 104 *Michigan Law Review* 1129. At 1162, to highlight a possible consequence of this approach: 'Swap contracts that incorporate ISDA terms, for example, incorporate only a snapshot of the ISDA terms current as of the date of the contract itself. If ISDA changes its terms or definitions, these changes only come into effect for subsequent contracts', while the proposed interpretative approach would provide 'a mechanism for market-based bodies to change the meaning of standardized terms not only for subsequent contracts but also for the pool of pre-existing contracts'.

[40] As noted by Blair J, '[i]n interpreting widely used standard form financial contracts of this kind, the court has regard among other things to the need for predictability, recognising the diverse circumstances of the very large number of individual transactions in which the contracts are used. Contractual certainty is particularly important in this type of situation', *Lehman Brothers International (Europe) (in administration) v Exxonmobil Financial Services BV* [2016] EWHC 2699 (Comm) at [103]. Briggs J considered it 'axiomatic' that the MA should 'as far as possible be interpreted in a way that achieves the objectives of clarity, certainty and predictability, so that the very large number of parties using it know where they stand', *Lomas v JFB Firth Rixson Inc* [2010] EWHC 3372 (Ch), at [53]. Moreover, 'A standard form is designed for use in a wide variety of different circumstances. It is not context-specific. Its value would be much diminished if it could not be relied upon as having the same meaning on all occasions. Accordingly the relevance of the factual background of a particular case to its interpretation is necessarily limited', Lord Millet at [7] *AIB Group (UK) Plc v. Martin and Another* [2001] UKHL 63.

[41] R Wai, 'Transnational Private Law and Private Ordering in a Contested Global Society' (2005) 46(2) *Harvard International Law Journal* 471, 474.

[42] E Sedano Varo, *Financialisation and the Vanishing of the Rule of Law*, PhD dissertation, 2021, on file with the author, underlining the maximising impact on moral hazard.

[43] A Gelpern and M Gulati, 'CDS Zombies' (2012) 13 *European Business Organization Law Review* 347, 349.

high and the risk of conflict with public policy considerations is greater. For instance, discussing the systemic consequences of a famous ISDA Determinations Committee's decision regarding the occurring of a 'credit event'[44] when at the height of its sovereign debt crisis Greek introduced collective action clauses[45] in its bond contracts, John Biggins and Colin Scott have noted that these private structures 'have the capacity, albeit relatively infrequently, to assume key roles in broader market events with a wider interest and implication, especially where the subject matter is a sovereign or a nationalised financial institution'.[46]

3. A transnationalisation of financial law?

The most characteristic developments in the global financial market thus appear to have taken place without the need for statutes and by recourse to the categories of general private law, in particular the contract.[47] In this respect, the contract might *prima facie* seem to have functionally replaced the statute. Beneath the surface-level functional likeness, however, there lies an obvious but significant contrast. Unlike statutes, contracts concluded by private parties legitimately reflect their own interests rather than public interests. When the two conflict, the latter normally prevails and courts—drawing on a variety of doctrines of both general private law and regulatory private law—will not uphold transactions that contravene mandatory rules. Unless, of course, national law itself is changed, possibly through statute.

The fact that general law changes to accommodate commercial practices is not new: even the current categories of general private law have undergone a process of 'commercialisation'[48] and have to some extent been adapted to the

[44] For an overview of the issues and analysis, J Zettelmeyer, C Trebesch, M Gulati, T Monacelli and K Whelan, 'The Greek Debt Restructuring: An Autopsy' (2013) 28(75) *Economic Policy* 513; A Gelpern and M Gulati, 'CDS Zombies', *ibid*, 370.

[45] These are clauses that allow a supermajority of bondholders to accept the restructuring. While they facilitate the restructuring of sovereign debt, CACs may impose losses on investors and can therefore lead to complex litigation. On the resulting litigation in some countries, see S Grund, 'The Legal Consequences of Sovereign Insolvency. A Review of Creditor Litigation in Germany Following the Greek Debt Restructuring' (2017) 24(3) *Maastricht Journal of European and Comparative Law* 399.

[46] Biggins and Scott (n 7) 387.

[47] R Goode, 'Creativity and Transnational Commercial Law: from Carchemish to Cape Town' (2021) 70(1) *International & Comparative Law Quarterly* 1, 28: 'businessmen and their lawyers seek to overcome barriers to efficient cross-border trade and finance by devising legal rules that bypass established doctrine in order to resolve the problems'.

[48] In France, where there is a separation between civil and commercial code, the expression '*commercialisation du droit civil*' refers to the growing influence of commercial law techniques on civil law. The phrase was used in particular by G Ripert, *La commercialisation du droit civil français* (Belgrade, 1934), although that influence was noted earlier already: see, on the occasion of the centenary of the Code civil, C Lyon-Caen, 'De l'influence du droit commercial sur le droit civil depuis 1804', in Société d'études législatives, *Le Code civil 1804–1904, Livre du centenaire*, 1 (Rousseau, 1904) 225. For a recent discussion with reference to the Italian experience, where the expression mostly alludes to the generalisation of commercial law solutions following the unification of the law of obligations and the creation of a single Civil Code in 1942, see M Libertini, 'La c.d. commercializzazione del diritto privato' (2022) *Rivista italiana per le scienze giuridiche* 283. In common law jurisdictions, Lord

needs of commercial practice—although typically those of an industrial rather than post-industrial economy. What is more interesting to note here is the direct influence that private actors can have on this process of legal change. Occasionally, in fact, national laws have had to change according to the indications of international private actors and their needs.[49] Staying with the current debate, the academic spotlight has again been placed on the activities of ISDA, which has been accused of influencing national laws to the point of acting as a *de facto* co-regulator:[50] a private organisation co-opted by sovereign states which, as Katharina Pistor suggests, 'have lost control over the governance of global finance'.[51] Various scholars have noted that ISDA has embarked on an ambitious and successful activity of 'pressuring'[52] national governments to reform national law to ensure that all provisions of the MA are enforceable[53] as well as to influence and curb supranational regulatory initiatives.[54] This has been technically achieved in a variety of ways at both political and judicial levels, including the submission of *amicus curiae* briefs in relevant US and Canadian cases,[55] and active support for judicial activity in the UK.[56] A striking

Mansfield (1705–1793) is generally credited with the clearer incorporation of the law merchant into the common law; on his approach to mercantile law, NS Poser, *Lord Mansfield. Justice in the Age of Reason* (Mc-Gill-Queen's University Press, 2013) 220.

[49] Of course, this might be regarded as an instance of the usual interaction between public and private: 'Private and public actors directly and indirectly negotiate with each other, so that transnational private regulation can be viewed in the shadow of public law, and (to turn the conventional metaphor on its head) public law can be viewed in the shadow of transnational private regulation.[…] Public law often follows transnational private lawmaking, whether by incorporating and validating private standards, acquiescing to them, or complementing and supporting them', G Shaffer, 'Theorizing Transnational Legal Ordering' (2016) 12 *Annual Review of Law and Social Science* 231.

[50] For a discussion of some of these problems, J Biggins and C Scott, 'Public-Private Relations in a Transnational Private Regulatory Regime: ISDA, the State and OTC Derivatives Market Reform' (2012) 13 *European Business Organization Law Review* 309. More generally on the legitimacy problems of transnational private regulation, C Scott, F Cafaggi and L Senden, 'The Conceptual and Constitutional Challenge of Transnational Private Regulation' (2011) 38(1) *Journal of Law and Society* 1.

[51] Pistor (n 23) 152.

[52] JH Dalhuisen, *Dalhuisen on Transnational Comparative, Commercial, Financial and Trade Law. Volume 2* (Hart, 2019) 754, suggests that the EU Financial Collateral Directive of 2001 was adopted 'under pressure from the financial services industry, especially the International Swap Dealers Association (ISDA)', with reference to ISDA EU Collateral Report (2000).

[53] M Renner and A Ledinger, 'Credit Contracts and the Political Economy of Debt' in B Lomfeld, A Somma and P Zumbansen (eds), *Reshaping Markets. Economic Governance, the Global Financial Crisis and Liberal Utopia* (Cambridge University Press, 2016).

[54] J Karremans and A Héritier, 'The Emergence of Transnational Hybrid Governance: How Private Risks Trigger Public Intervention' in A Héritier and MG Schoeller (eds), *Governing Finance in Europe. A Centralisation of Rulemaking?* (Elgar, 2020) 137.

[55] JB Golden, 'The Courts, the Financial Crisis and Systemic Risk' (2009) 4(1) *Capital Markets Law Journal* 141, 145, more extensively in JB Golden, 'The Future of Financial Regulation: The Role of the Courts' in IG MacNeil and J O'Brien (eds), *The Future of Financial Regulation* (Bloomsbury, 2010) 83.

[56] In the Court of Appeal case of *Lomas & Ors v JFB Firth Rixson Inc & Ors* [2012] EWCA Civ 419, ISDA was granted permission to intervene. The decision upheld the validity of a MA clause on payment obligations in case of an Event of Default on the part of the party due to receive the payment (in that case, Lehman Brothers) and, the ISDA commented, 'essentially confirmed ISDA's position on all significant issues': 'ISDA Welcomes the English Court of Appeal's Decision to Uphold ISDA Master Agreement in LBIE Judgment' https://www.isda.org/2012/04/03/isda-welcomes-the-english-court-of-appeals-

example is represented by the reforms of insolvency law to allow close-out netting,[57] probably the most hotly debated aspect of the agreement.[58] Close-out netting is a useful tool for financial institutions and, by reducing their credit risk, is sometimes presented as being conducive to greater overall financial stability: in the event of default by one party, the mechanism allows the contractual relationships between the parties to be terminated and the debts and credits between them to be offset, resulting in a single final amount payable by one or the other, thereby reducing risk and possibly the need to enter into insolvency proceedings. As such, however, the practice is also likely to conflict with the provisions of insolvency laws—most notably the anti-deprivation and the *pari passu* principles—which may regulate the effects of insolvency on existing contracts in a different way, with a view to increasing the debtor's estate to be distributed among all creditors in accordance with an order of preferences inspired by precise policy considerations.[59] For this reason, the practice is controversial and subject to different legal treatment in different jurisdictions. As ISDA itself noted,[60] while it was allowed in England—where its compatibility with basic principles was nonetheless also debated[61]—explicit legislative reform was required in other countries to ensure the full enforceability of the MA. The ISDA Model Netting Act—which is 'a model law intended to set out, by example, the basic principles necessary to ensure the enforceability of bilateral close-out netting, including bilateral close-out netting on a multibranch basis, as well as the enforceability of related financial collateral arrangements'[62]—is now followed by a large number of jurisdictions.[63]

decision-to-uphold-isda-master-agreement-in-lbie-judgment/. The case offers 'a graphic a graphic illustration of the limitations of standard forms—even those with the undoubted stature of the ISDA forms—and provide very real examples of how even the most tried and trusted documentation can come under pressure if an insolvency causes them to be tested in the courts. In the event, the ISDA forms 'survived' the test of litigation but few would have predicted that they could come under such exacting examination not only as regards interpretation but even as regards validity', R McCormick and C Stears, *Legal and Conduct Risk in the Financial Markets* (Oxford University Press, 3rd edn, 2018) 146.

57 Pistor (n 23) 148.

58 Braithwaite (n 33) 779.

59 For an illustration of the difficulties raised, see the UK Supreme Court case *Belmont Park Investments Pty Ltd v BNY Corporate Trustee Services Ltd* [2011] UKSC 38, involving the ISDA Master Agreement, where at [79] the Court considered that 'in borderline cases a commercially sensible transaction entered into in good faith should not be held to infringe the anti-deprivation rule'.

60 D Mengle, ISDA Research Notes, The Importance of Close-Out Netting, Number 1, 2010, 4.

61 *Lomas & Ors v JFB Firth Rixson Inc & Ors* [2012] EWCA Civ 419. The case offers 'a graphic a graphic illustration of the limitations of standard forms—even those with the undoubted stature of the ISDA forms—and provide very real examples of how even the most tried and trusted documentation can come under pressure if an insolvency causes them to be tested in the courts. In the event, the ISDA forms "survived" the test of litigation but few would have predicted that they could come under such exacting examination not only as regards interpretation but even as regards validity', McCormick and Stears, *Legal and Conduct Risk in the Financial Markets* (n 56) 146.

62 https://www.isda.org/book/2018-model-netting-act-and-guide/.

63 R Goode, H Kronke, E McKendrick, *Transnational Commercial Law. Texts, Cases and Materials* (Oxford University Press, 2015) 384.

This process of legal change—importantly concerning both general private law and regulation, thus downplaying the relevance of possible dichotomies between the two—can certainly be seen as an example of transnationalisation of the law.[64] However, while it may demonstrate the 'increasingly *customary nature* of the ISDA rules',[65] the development also puts pressure on local laws that may have to take into account a wider range of interests, both of a public and a private—such as the above-mentioned interests of other creditors in insolvency proceedings—nature. This suggests the need to shift the focus from the transnational standard-setting activities and their conceptualisation in theoretical terms, and to look more closely at the practice that takes place at the national 'level' instead; after all, already in the debate on the historical *lex mercatoria*, a more attentive analysis of local laws challenged the alleged entirely transnational nature of the phenomenon and painted a more complex picture.[66] The remaining part of this article attempts to do so by considering national litigation over financial contracts and its implications for the transnationalisation of law. In fact, if an economic rationality prevails at the transnational level through contractual practices, the fact that these may ultimately have to be adjudicated and possibly reinterpreted in national contexts might create an opportunity for re-politicisation in the form of a nationalisation of transnational law. In other words, a process whereby rules rooted in transnational law are interpreted differently in the light of national laws and its conflicting objectives. At the same time, choice of jurisdiction appears to limit this possibility, paving the way to battles for jurisdiction. The next part will look at this interaction in more detail.

4. Transnational law and national litigation

Domestic case-law is very important for financial services.[67] This seemingly uncontroversial statement may in fact be counterintuitive if, as noted above, financial law is subject to trends of transnationalisation that would imply at least some degree of self-sufficiency instead. Focusing on the approaches of

[64] JH Dalhuisen, *Dalhuisen on Transnational, Comparative, Commercial, Financial and Trade Law. Volume 3. Financial Products, Financial Services and Financial Regulation* (Hart, 2019) 410.

[65] 'The increasingly *customary nature* of the ISDA rules, especially of the Swaps and Derivatives Master, may further enhance the status of contractual netting in bankruptcy everywhere as a matter of transnationalisation of the law', JH Dalhuisen, *Dalhuisen on Transnational Comparative, Commercial, Financial and Trade Law. Volume 3*, *ibid*, 403.

[66] E Kadens, 'The Myth of the Customary Law Merchant' (2012) 90 *Texas Law Review* 1153, suggesting that the common understanding of the law merchant is incorrect, as that law was not primarily based on custom, but on both contract and statute.

[67] See exhaustively on the topic, J Braithwaite, *The Financial Courts. Adjudicating Disputes in Derivatives Markets* (Cambridge University Press, 2020) and J Biggins, '"Targeted Touchdown" and "Partial Liftoff": Post-Crisis Dispute Resolution in the OTC Derivatives Markets and the Challenge for ISDA' (2012) 13 (12) *German Law Journal* 1297.

the English judiciary, and challenging the assumption that commercial parties prefer to avoid national courts, Jo Braithwaite noted that cases on the MA provide evidence of 'how the national courts can support and reinforce the private practices that underpin the ISDA documentation'.[68] However, as the financial sector becomes more important and reveals unexpected social consequences, courts are increasingly called upon to resolve disputes and adjudicate between different interests. If transnational standards aim at economic efficiency and certainty, the courts must apply rules that are inspired by a plurality of values, including the protection of investors and public finances. A comparative legal question then arises: how do national courts interact with rules rooted in transnational practices, and to what extent, rather than a 'transnationalisation of law', does a possible 'nationalisation of transnational law' take place? To answer this question, it is useful to look at national litigation on derivatives. One particular type of derivative contract has been at the centre of the litigation, and it is this contract that will be considered here: the swap. Not only is this type of transaction largely rooted in transnational law due to the above-mentioned MA, but it has also given rise to politically and socially sensitive disputes in several countries.

The first and probably most revealing thing to note when approaching this topic is that credit default swaps have long been at the centre of highly controversial disputes. In fact, 'modern financial products [...] have encountered problems integrating into the law, wherever'.[69] The widespread nature of the problem already indicates a difficulty that goes beyond the merely technical. National laws were reluctant to recognise the validity of swaps and struggled to determine conclusively whether the contracts served a legitimate function or were instead 'speculative' in nature. In part, this difficulty is still with us today. The most sensational example in this regard is, of course, the 1991 UK case of *Hazell v Hammersmith and Fulham London Borough Council*[70], when the highest court in the land held that local authorities lacked the capacity to enter into swap contracts, deemed to be speculative in nature, and had therefore acted *ultra vires*.[71] Among the most authoritative commentators, Sir Roy Goode presented it as an instance of 'tension between market interest and public interest'.[72]

[68] Braithwaite, 'Standard Form Contracts' (n 33) 800. On the necessity of using national courts, also R Wai, 'Transnational Liftoff and Juridical Touchdown: The Regulatory Function of Private International Law in an Era of Globalization' (2002) 40(2) *Columbia Journal of Transnational Law* 209, 265.

[69] JH Dalhuisen, 'The Applicable Law In International Financial Disputes And The Status, Powers And Reasoning Of International Financial Arbitrators', King's College London Law School Research Paper No. 2014-28, 1, drawing the conclusion that international arbitration is desirable.

[70] *Hazell v Hammersmith and Fulham LBC* [1992] 2 AC 1.

[71] For a legal analysis of the case and its implications, see E McKendrick, 'Local Authorities and Swaps: Undermining the Market?' in R Cranston (ed) *Making Commercial Law. Essays in Honour of Roy Goode* (Clarendon, 1997).

[72] Goode (n 20) 53. Later, at 55, also described as a conflict between form and substance.

The case has an obvious political dimension and was received negatively—in fact 'caused widespread consternation'[73]—not only because of strictly legal aspects but also due to its politics, with fears that the decision would damage London's reputation for international financial markets.[74] Apart from the legal point decided—which has incidentally been largely overcome by the reform of the powers of local authorities—'[i]ts place in history is earned not by its legal, but by its political, significance'.[75] The social environment of the decision must also be considered: the facts of the case are representative of the tendency of local authorities in the UK in the 1980s to turn to the financial market in a context where government policies had constrained public spending[76] and where the circulation of capital had been favoured by the 'big bang' reform. This had contributed to the development of a 'confident, can-do society for those who were fortunate enough to remain in work and ride the wave',[77] until, of course, the House of Lords decision put a (temporary) stop to what the banks had come to regard as the new routine.[78] As financialisation led local authorities, not unlike individuals, to enter into financial contracts, the law took an ambivalent attitude to those transactions. It took time, state legislation and legal battles to reach a certain level of financialised legal consciousness.[79]

Although less spectacular in their scope and implications, similar contrasts between the need to promote economic certainty and the need to protect the investor routinely emerge in disputes where the investor is a private subject. In these cases, too, the significant volume of litigation can be linked to financialisation trends as financial services have been offered

[73] Goode, Kronke, McKendrick (n 63) 7.
[74] Goode (n 20) 57.
[75] McCormick and Stears (n 56) 348.
[76] M Loughlin, *Legality and Locality. The Role of Law in Central-Local Government Relations* (Oxford University Press, 1996) 323–4: 'Local authorities have traditionally raised the finances they need to undertake their functions from four main sources: rates, fees and charges, grants from central government, and by borrowing […] Much of the post-war growth in local government expenditure has been financed by central government grants. By the mid 1970s, however, this trend was causing the Government some concern and during the 1980s the Government took action to reduce the burden on the central Exchequer of local government programmes. In an attempt to reduce these burdens, the Government introduced a great number of changes to the system of local government finance: the real value of central government grants steadily reduced throughout the decade'; J Braithwaite, 'Thirty Years of Ultra Vires: Local Authorities, National Courts and the Global Derivatives Markets' (2018) 71(1) *Current Legal Problems* 369, 376.
[77] McCormick and Stears, *Legal and Conduct Risk in the Financial Markets* (n 56) 359. See also in this regard P Augar, *The Death of Gentlemanly Capitalism: the Rise And Fall of London's Investment Banks* (Penguin, 2000).
[78] McCormick and Stears (n 56) 359.
[79] See in this regard P Cornut St-Pierre, *La fabrique juridique des swaps. Quand le droit organise la financiarisation du monde* (Paris, Presses de Sciences Po, 2019); P Cornut St-Pierre, 'La qualification juridique des swaps comme site d'une lutte globale pour le droit' (2016) 62(1) *McGill Law Journal* 79–109, discussing how financial lawyers resisted qualifying swaps on the basis of established legal categories in order to avoid regulation.

to more individuals,[80] which in turn can be linked to political economy considerations inspired by the need to promote consumer demand.[81] In the EU and the UK, the instrument that has become most relevant in this context is MiFID. The instrument is worth recalling in this context also because of its link with IOSCO. Following the collapse of Lehman Brothers, civil courts in Europe often invalidated swaps for breach of suitability requirements or for breach of the duty to advise with care and skill. Despite their supranational roots, these rules can receive different interpretations when they interact with national laws,[82] and a comparative analysis reveals differences between jurisdictions: for example, the Spanish Supreme Court has taken a more protective approach than English courts in swap mis-selling disputes, holding that unless the client is a professional investor, the firm has a positive duty to facilitate the client's understanding of the risks of financial instruments.[83]

5. Transnationalising financial litigation?

The adjudication of different interests through national litigation could be seen either as a threat to the certainty of financial law or, alternatively, as a possibly highly imperfect instrument for re-embedding economic rationality in broadly speaking political (as in non-economic) rationality. Indeed, a tool for rebalancing the tension between the market and the public interest in favour of the latter, allowing greater consideration to be given to a wider range of regulatory objectives. If that is the case, then—in order to promote unfettered economisation—it would be necessary to try to remove litigation from its social environment. There are two main techniques through which this result can be pursued (but not necessarily achieved). In line with what John Biggins, drawing on an article by Robert Wai,[84] described as 'targeted touchdown' and 'partial liftoff',[85] one is to ensure that disputes are resolved through the potentially more favourable substantive law and jurisdiction of a country other than the one in which

[80] D Kingsford-Smith and O Dixon, 'The Consumer Interest and the Financial Markets' in N Moloney, E Ferran, and J Payne (eds), *The Oxford Handbook of Financial Regulation* (Oxford University Press, 2015).
[81] C Crouch, 'Privatised Keynesianism: An Unacknowledged Policy Regime' (2009) 11(3) *The British Journal of Politics & International Relations* 382.
[82] A certain degree of divergence is allowed by EU law itself in an attempt of reconciling uniformity with the autonomy of Member States. Notably in a decision originating from a swap mis-selling dispute, the CJEU held that it is for the Member States to establish the contract law consequences of violation of MiFID rules. CJEU, *Genil* v. *Bankinter*, Case C-604/11. It should be noted that different jurisdictions take different views on whether breaching a regulatory duty triggers civil remedies, see the contributions in O Cherednychenko and M Andenas, *Financial Regulation and Civil Liability in European Law* (Edward Elgar, 2020).
[83] F Della Negra, *MiFID II and Private Law: Enforcing EU Conduct of Business Rules* (Bloomsbury/Hart, 2019) 147.
[84] Wai (n 68).
[85] Biggins (n 67).

the dispute arises; the second is to resort to arbitration. Private autonomy is again the instrument through which this result is sought, in particular through one of its most characteristic expressions in private international law: choice of law and forum.[86] The choice of a law which is detached from the place where the dispute arose and from its social environment may, at least in theory and without taking into account the actual limitations imposed by current private international law,[87] favour the application of an abstract rationality concerned with certainty rather than more contextual societal considerations. For that reason, party autonomy remains a divisive issue, despite its wide acceptance and seemingly—yet, as noted above, by now wavering—'unquestioned support'.[88]

This potential for controversy is well illustrated once again by financial litigation. In her study of the 'financial courts', Jo Braithwaite notes that while the first wave of derivatives litigation focused on issues of nullity, capacity and *ultra vires*—as exemplified by the *Hazell v Hammersmith* decision—the second wave, following the standardisation driven by ISDA, has been preoccupied with issues of jurisdiction.[89] The battle for jurisdiction is fought not only by contracting parties seeking an advantage, but more broadly by jurisdictions themselves in the context of competition between legal orders. New York State law and English law[90] are the two applicable regimes referred to in the MA. To promote the supposed advantages of English law to international investors, most notably the Law Society of England and Wales emphasises not only freedom of contract[91] (English courts are reluctant to imply a term into a commercial contract where it is not necessary and, as has been noted, '[w]ith standard form documentation such as ISDA agreements, drawn up by financial trade associations, the bar for meeting these tests is set very high'),[92] but it significantly reassures the interested international reader that '[i]n one recent international case, the Court of Appeal confirmed that express agreement to jurisdiction in

[86] It goes without saying that choice of law and choice of forum are different concepts, but in the rest of this paper and for the sake of argument a precise distinction between them won't be made.

[87] For a discussion of the regulatory function of private international law in this regard, see R Wai, 'Transnational Liftoff and Juridical Touchdown' (n 68).

[88] H Muir Watt, '"Party Autonomy" in International Contracts: From the Makings of a Myth to the Requirements of Global Governance' (2010) 3 *European Review of Contract Law* 250, suggesting how the image of freedom of choice as a foundational principle serves precise economic interests. See also H Muir Watt, 'The Global Governance Implications of Private International Law' in P Zumbansen (ed), *The Oxford Handbook of Transnational Law* (Oxford University Press) 893.

[89] J Braithwaite, *Financial Courts* (n 67) 294 referring to *Berliner Verkehrsbetriebe (BVG) Anstalt des Öffentlichen Rechts v JP Morgan Chase Bank N.A. and JP Morgan Securities Ltd* [2010] EWCA Civ 390, at [1], Aikens LJ: 'Credit default swap arrangements are giving rise to litigation again. As is so often the case in commercial disputes, the first battle is over jurisdiction'; J Braithwaite, 'Thirty Years' (n 76) 389.

[90] Although Brexit might have an impact on this weakening UK's place in the geopolitical map, J Braithwaite, *Financial Courts* (n 67) 339.

[91] Law Society, 'England and Wales. A World Jurisdiction of Choice' (2019) 4.

[92] R Cranston et al, *Principles of Banking Law*, cit., 206, with reference to *Lomas & Ors (joint administrators of Lehman Brothers International (Europe)) v. JFB Firth Rixson Inc.* [2012] EWCA Civ 419.

standard derivative documentation will readily be upheld'.[93] This is a crucial political message to be read against the backdrop of choice of law and forum litigation in various countries. To illustrate the relevance of this statement, we can briefly refer to the Italian swaps litigation which is on-going before English and Italian courts. Of course, the facts and legal issues involved are extraordinarily technically complex—involving both administrative law and private law aspects—and thus only a largely simplified overview aimed at highlighting some underlying trends will be possible here. Consequently, the purpose of that overview is not to assess the correctness or even desirability of the conclusions reached by some judicial decisions as opposed to others, but to emphasise the continuing social sensitivity of certain financial transactions and the conflict between regulatory objectives.

In the early 2000s, Italian local authorities made extensive use of derivatives for hedging purposes. At the onset of the global financial crisis, those same authorities, struggling to repay unsustainable debts, sought to walk away from these commitments. In particular, they claimed that they lacked the authority to enter the contracts and that the banks had misrepresented the risks associated with the transactions. As a testament to the political sensitivity of the issue, the saga led in 2013 to a legal prohibition for local authorities to enter into such contracts, except in limited circumstances.[94] The Italian Constitutional Court considered previous restrictions on the use of derivatives by local authorities to be justified by the need to limit public debt, as some transactions are of an 'objectively dangerous nature for the balance of regional and local finance'.[95] In fact, following a reform in 2001 that constitutionalised a legislative provision from the previous year, the Italian Constitution itself stipulates that local authorities 'may resort to indebtedness only for the purpose of financing investment expenditures'.[96] Importantly, a later constitutional reform in 2012—rooted in the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union—further restricted this form of indebtedness by requiring compliance with the balanced budget rule. In view of both the public law restrictions on the possibility of concluding such transactions and the private law interpretations of the need to disclose information, the Italian courts—and most notably the *Corte di Cassazione* with a famed, although debated, decision—declared certain complex and non-transparent speculative financial contracts concluded by local authorities to be null and void.[97] Through this mixture of legislative, constitutional and jurisprudential precepts largely inspired by the socially and politically sensitive objective of

93 Law Society (n 91) 23.
94 L. 147 of 2013, Art. 1(572).
95 Corte Costituzionale, Sentenza 52/2010.
96 Art. 119(7).
97 Corte di Cassazione, *Banca Nazionale del Lavoro S.p.A v Commune di Cattolica* n. 8770 2020.

limiting public indebtedness, Italian law therefore appears to have taken, at least partially, a more cautious approach to these transactions. How would the application of English contract law affect the validity of the transaction instead?

The relevance of the choice for the English legal system is well illustrated by a decision of the English Commercial Court in the *Busto Arsizio* case.[98] The court had to decide whether an Italian municipality had the legal capacity to enter a swap contract with an international bank. The municipality claimed that it did not have the authority to do so as, in line with the aforementioned judgment of the *Corte di Cassazione*, the contract was void. Applying Italian law on the question of capacity and not being bound by a decision of the Supreme Court of another country—'particularly in the context of a civilian law system'[99]—the Commercial Court interpreted the Italian Constitution as not imposing 'any limits on the use of derivatives'[100] and held that the local authority did have capacity. By virtue of the clause in the MA, the contract itself was governed by English law and thus deemed to be valid. Furthermore, even if the contract were found to be void and therefore unratifiable under Italian law, under English law the contract appeared to have been made with apparent authority and was therefore deemed to have been ratified.[101]

It should be recalled that the idea of choice of law as embodied at least in European private international law[102] does not create an unfettered freedom to opt out of one's own legal system.[103] This remains the case despite some thought-provoking academic arguments in favour of a more liberal approach aimed at increasing individual freedom.[104] The question of whether there is an element of internationality or whether the transaction is purely domestic has the potential to lead to conflicts between interpretations adopted by

[98] *Deutsche Bank v Comune di Busto Arsizio* [2021] EWHC 2706 (Comm).

[99] *Ibid*, at [108].

[100] *Ibid*, at [186]. At [195]: 'I conclude that Article 119 does not *per se* prohibit Italian local authorities from entering into derivative contracts of a "*speculative nature*"'.

[101] The Court noted that 'were the proper law to be Italian Law Busto would win this argument […] However, matters are by no means so favourable to Busto if, as DB contends, the applicable law for any ratification argument is English Law', *ibid*, 375, 376.

[102] In particular Rome I Regulation No 593/2008 on the law applicable to contractual obligations, recital 15 and Art. 3(3).

[103] The expression was made famous by L Bernstein, 'Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry' (1992) 21 *Journal of Legal Studies* 115, referring however largely to arbitration within a given industry.

[104] J Smits, 'A Radical View of Legal Pluralism' in L Niglia (ed.), *Pluralism and European Private Law* (Hart, 2012), presenting the freedom to opt out of one's set of rules as a radical instrument of freedom in the context of the debate on multiculturalism, yet with 'public policy' limits. In the same vein, there are also arguments for a broader recognition of freedom of choice in other areas, such as family law, where the principle is more limited, see K Kroll-Ludwigs, *Die Rolle der Parteiautonomie im europäischen Kollisionsrecht* (Mohr Siebeck, 2013).

courts in the UK and in the EU,[105] all the more so in the post-Brexit scenario where the UK can depart from the philosophy of EU private international law.[106] While the need for an element of internationality appears as an obstacle to transnational finance, one can detect an important development in this respect. This is illustrated most clearly by the *Dexia* case.

Unlike the *Busto Arsizio* case, *Dexia* involved a (seemingly) domestic transaction between an Italian bank and an Italian municipality, involving a swap contract used to restructure the municipality's debt.[107] Initially, the English Commercial Court[108] accepted the Italian municipality's objection that, despite the choice for English law in the MA, all relevant elements of the transactions were more closely connected with Italy. Therefore, Italian mandatory law should apply, including investor protection rules which might have led to the invalidation of the transaction. However, the Court of Appeal held, based on its previous case law,[109] that the mere fact that the MA governed the interest rate swap contract implied an international element. This made it impossible to conclude that 'all other elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen',[110] thus preventing the application of Italian mandatory laws. As noted by Moritz Renner, the most characteristic feature of the case is the way in which the MA was conceptualised: the reference to this transnational instrument was enough to give the case an international dimension sufficient to remove the dispute from national law.[111] The Court's conclusion that the incorporation of the MA gave the contract 'an international element rather than a domestic element associated with any particular country'[112] was furthermore reinforced by a rather curious linguistic consideration: 'the form signed by the parties was in the English language, despite that not being the first language of either party'.[113]

In this way, the potential for different national interpretations of transnational practices is greatly reduced, but so is the state's power to regulate them. However, the strategy of choosing the jurisdiction of a third country

[105] P Ostendorf, 'The Choice of Foreign Law in (Predominantly) Domestic Contracts and the Controversial Quest for a Genuine International Element: Potential for Future Judicial Conflicts between the UK and the EU?' (2021) 17(3) *Journal of Private International Law* 421.
[106] Following Brexit, the UK acceded to the Hague Choice of Court Agreements Convention 2005, to which the EU is also a party. As a result, EU Member States will still have to recognise the choice for UK courts. In terms of choice of law, the EU Rome I Regulation has been incorporated into the UK as retained EU law, and it can be amended by the UK.
[107] *Dexia Crediop S.p.A. v Comune di Prato* [2017] EWCA Civ 428, discussed among others by P Ostendorf, 'The Choice of Foreign Law' (n 105) and M Renner, 'Transnational Law' in S Grundmann, H-W Micklitz, M Renner (eds), *New Private Law Theory. A Pluralist Approach* (Cambridge University Press, 2021) 473, through the categories of Teubner , 'Global Bukowina' (n 10).
[108] *Dexia Crediop S.p.A and Comune di Prato* [2015] EWHC 1746 (Comm).
[109] *Banco Santander Totta SA v Companhia de Carris de Ferro de Lisboa SA* [2016] EWCA Civ 1267.
[110] Art 3(3) of EU Rome I Regulation.
[111] Renner (n 107).
[112] *Dexia Crediop S.p.A and Comune di Prato* [2015] EWHC 1746 (Comm) at [132].
[113] *Ibid*.

is not yet optimal for uncoupling disputes from their social environment and its laws. Indeed, national judges may still adopt solutions that are perceived as somewhat undesirable: despite its negative reception and its peculiar facts, the *Hazell v Hammersmith* decision still quintessentially illustrates a 'legal risk' in this sense.[114] This is further increased by the more cautious approach of national courts to certain financial products in the aftermath of the global financial crisis. As John Biggins pointed out, not even the resolution of disputes in the New York and English courts—which have occasionally reached different conclusions—has been 'sufficient in itself to prevent national public court 'interpretative interference' on key issues for the private regulatory regime. Furthermore, the threat of such interference following the collapse of Lehman Brothers has been resurrected on a scale which could be a thorn in the side of the industry'.[115]

In fact, further complicating over-simplified portrayals of contrasts between the approaches of common law and civil law jurisdictions, the English Commercial Court more recently held that an Italian local authority lacked the capacity to enter into a swap contract and that the transaction was therefore void.[116] In this occasion, the English Court did accept the decision of the Italian *Corte di Cassazione* as evidence to support the claim of the Municipality of Venice that it lacked the authority to enter into swaps for speculative purposes. The decision is likely to have important consequences for banks and, as the Court itself recognised, 'potentially profound implications for the sanctity of English law contracts';[117] even if on closer examination there seems to remain a gap between the Italian and English courts on this issue.[118] At the time of writing of this article, in any case, an appeal is outstanding.

Given these 'legal risks', a clearer disembedding could be achieved by resorting to the second strategy and thus by removing disputes entirely from national courts transferring them to international arbitration.[119] While it is not always possible to avoid courts in the context of retail financial transactions, the use of arbitration is more likely in the context of wholesale financial contracts, unless the dispute involves general points of

[114] Braithwaite (n 67).

[115] Biggins, '"Targeted Touchdown" and "Partial Liftoff"' (n 67) 1327, with reference to J Black and D Rouch, 'The Development of the Global Markets as Rule-Makers: Engagement and Legitimacy' (2008) *Law and Financial Markets Review* 218.

[116] *Banca Intesa Sanpaolo Spa & Anor and Comune di Venezia* [2022] EWHC 2586 (Comm).

[117] *Ibid*, at [2].

[118] D Maffeis, 'I derivati in Italia e a Londra: la change of position e la perdurante distanza tra giurisprudenza italiana e inglese' (2022) *GiustiziaCivile.com* - https://giustiziacivile.com/banca-finanza-assicurazioni/articoli/i-derivati-italia-e-londra-la-change-position-e-la-perdurante

[119] Schmitthoff, 'Das neue Recht des Welthandels' (n 22) 71, already noted, with regard to international commerce, that 'die Möglichkeit vollkommener Loslösung internationaler Handelsverträge von nationalen Rechten' is 'praktisch undenkbar ohne die Entwicklung einer Weltschiedsgerichtsbarkeit in internationalen Handelssachen'.

law that need to be clarified by a court.[120] Notably, while ISDA initially favoured dispute resolution in the courts, even going so far as to train judges in the interpretation of the MA, it now appears to have shifted to supporting arbitration, and points to a relatively new tribunal—the Panel of Recognised International Market Experts in Finance (P.R.I.M.E. Finance)—as the preferred centre for dispute resolution.[121]

Whereas a general focus on the systematics of an autonomous transnational law might favourably see in this development clear traces of the emergence of a new *lex mercatoria*, a more critical view pointed out that this body was established when, in the wake of the global financial crisis, a number of national cases began to engage more critically with derivatives.[122] Indeed, the creation of the body is also justified by its proponents by pointing to unclear and conflicting interpretations of the MA by English and New York courts and the fact that such discrepancies create uncertainty[123] and possibly even systemic risk.[124] The use of arbitration to deal with international financial disputes thus remains controversial: as Jan Dalhuisen—himself an expert within P.R.I.M.E. Finance—put it, 'informed international arbitrators will be much concerned with the promotion of the commercial flows, liquidity, and better risk management at that level. But finance is policy heavy, reason why an expansive view of arbitrators' powers and their role generally may remain here controversial and the call for greater supervision of them (not appeal) more urgent'.[125]

It is too early to draw definitive conclusions in this regard, and more research is needed specifically on derivatives arbitration.[126] In general, it is known from research in other areas that arbitration does not rely exclusively on autonomy and that there is room for the application, or even development, of mandatory law and customs[127] as well as for public policy considerations.[128] Additionally, one could be reassured that

[120] For a discussion of the relation between arbitration and litigation particularly focused on P.R.I.M.E. Finance, S Malik, 'The Empire Strikes Back: Derivatives Disputes, the Financial List, Test Case Scheme and Arbitration' (2021) 16(3) *Capital Markets Law Journal* 251.

[121] Biggins, '"Targeted Touchdown" and "Partial Liftoff"' (n 67) 1298; Pistor, *The Code of Capital* (n 23) 146.

[122] Pistor (n 23) 146.

[123] J Ross, 'The Case for P.R.I.M.E. Finance: P.R.I.M.E. Finance Cases' (2012) 7(3) *Capital Markets Law Journal* 221.

[124] JB Golden, 'The Courts, the Financial Crisis and Systemic Risk' (2009) 4(1) *Capital Markets Law Journal* 141.

[125] Dalhuisen (n 69) 5.

[126] Most recently, P Leonard and H O'Donnell, 'Arbitration in Derivatives Contracts' (2022) 39(1) *Journal of International Arbitration* 61, also pointing out the need for more empirical research.

[127] JH Dalhuisen, 'Legal Orders and their Manifestation: The Operation of the International Commercial and Financial Legal Order and its Lex Mercatoria' (2006) 24(1) *Berkeley Journal of International Law* 129; M Renner, *Zwingendes transnationales Recht. Zur Struktur der Wirtschaftsverfassung jenseits des Staates* (Nomos, 2011), analysing international arbitration in various domains to highlight the development of transnational mandatory rules.

[128] M Renner, 'Private Justice, Public Policy: the Constitutionalisation of International Arbitration' in T Dietz and W Mattli (eds), *International Commercial Arbitration and Global Governance: Contending*

P.R.I.M.E. Finance's arbitrators include highly competent professionals and socially aware academics—even if the fact that ISDA members hold senior positions within this body has raised concerns about impartiality.[129] Yet the development should be approached with some caution, keeping into account the problematic aspects which have long been known in other areas of international economic law: what raises concerns there is not the existence of arbitration as such in the abstract, but the fact that, in disputes pitting private subjects against public authorities on investment matters, arbitration places private and public interests on an equal footing, which could in effect be a prelude to subordinating the latter to the former.[130]

6. Conclusion

Reflecting on the recognition of commercial practices in a common law whose integrity he generally sought to preserve,[131] Edward Christian made sceptical remarks at the end of the eighteenth century that may have acquired new relevance today: the Cambridge professor noted that while various aspects of mercantile practice were already accepted in the general law of the land, the expression *lex mercatoria* 'very unfortunately led merchants to suppose that, all their crude and new-fangled fashions and devices immediately become the law of the land: a notion which, perhaps, has been too much encouraged by our courts'.[132] The process of incorporation of the historical, or mythical, law merchant into domestic law did recognise the innovation and the ingenuity of the law merchant, but at the same time it subjected it to at least the possibility of a balancing against a range of policy considerations. By contrast, there is a risk that the modern transnational

Theories and Evidence (Oxford University Press, 2014). H Collins, '"Flipping Wreck": *Lex Mercatoria* on the Shoals of *Ius Cogens*' in S Grundmann, F Möslein and K Riesenhuber (eds), *Contract Governance: Dimensions in Law and Interdisciplinary Research* (Oxford University Press, 2015) 404, however doubts that similar principles could develop in transnational financial law largely due to the lack of a specialised tribunal dealing with similar issues and seeing for this reason with optimism at the initiatives which led to P.R.I.M.E. Finance. See the comments by H Eidenmüller, 'Lex Mercatoria, The ISDA Master Agreement, and Ius Cogens: Comment on H. Collins, 'Flipping Wreck: *Lex Mercatoria* on the Shoals of *Ius Cogens*' in S Grundmann, F Möslein and K Riesenhuber (eds), *Contract Governance*, *ibid*.

[129] Malik (n 120) 260.

[130] It is also often read against the backdrop of 'neoliberalism' as an evolving tool to limit the regulatory powers of the state: M Sornarajah, 'The Neo-Liberal Agenda in Investment Arbitration: Its Rise, Retreat, and Impact on State Sovereignty' in W Shan, P Simons and D Singh (eds), *Redefining Sovereignty in International Economic Law* (Hart, 2008).

[131] On Edward Christian's legal philosophy, see MH Hoffeimer, 'The common law of Edward Christian' (1994) 53(1) *Cambridge Law Journal* 140, 153, who notes that, despite aspects that might suggest an almost early instrumentalist approach, 'Christian's vision of the common law was paradoxically informed by an extreme anti-developmentalist commitment to natural law' and that he viewed it as a 'changeless source of rules'.

[132] In a note to Blackstone's *Commentaries on the Law of England*, quoted by JH Baker, 'The Law Merchant and the Common Law Before 1700' (1979) 38(2) *Cambridge Law Journal* 295, 299.

financial law could ultimately amount, rather than a mere separation of the economic from the political, to the economisation of the political, if not the sterilisation of commercial law, stripped of any consideration—investor protection, to name but one—other than economic certainty and market efficiency as understood by some market players.

If that is the case, one might expect a possibly Polanyian reaction in the form of a renationalisation of the transnational as an instrument to restore the primacy of the political over the economic, or to give greater consideration to regulatory objectives that might otherwise be subordinated to the need for economic certainty. It is also against this background that the ongoing battle for jurisdiction in cases involving derivatives can be read. However, such a response may not be fruitful, partly because it risks reinforcing stereotypical visions of national law, and partly because it assumes too strongly a somewhat necessary separation between the economic and the political. A complete separation of the economic from the political, rather than undesirable, remains more fundamentally impossible. On the one hand, seemingly apolitical techniques themselves obviously serve specific interests, which casts a shadow on their proclaimed neutrality.[133] On the other hand, even if transnational regimes were to be understood as autonomous and depoliticised, Gunther Teubner warned years ago that '[i]n the long run its depoliticized origin and its apolitical character cannot protect *lex mercatoria* from a repoliticization. On the contrary: the juridification of economic relations provokes political interferences'.[134] Whether or not this process is conceptualised as an 'interference'—which presupposes two communicating yet distinct systems[135]—traces of such a (re)politicisation can be found in the practice of financial law.

What emerges more clearly is the necessity of a politicisation of the transnational instead. This calls into question the very role played by commercial and, more broadly, private law techniques in the politics of finance. Although deeply rooted in legal consciousness, the tools of commercial and private law —as a long realist and critical legal tradition but also legal history remind us —are not neutral:[136] they are the battleground of legal struggles and remain open to scholarly and judicial re-examination. They can be the techniques

[133] A Claire Cutler, *Private Power and Global Authority: Transnational Merchant Law in the Global Political Economy* (Cambridge University Press, 2003) 6, discussing the historical *lex mercatoria*, noted that 'the law merchant operated historically to serve first private merchant communities and later nation-states in the processes of capital accumulation and state-building. In so doing, it privileged corporate interest'.

[134] Teubner (n 10) 21.

[135] *Ibid*, 22, suggests in this sense that the 'mechanisms of repoliticization are still rather external to the *lex mercatoria* itself'.

[136] See D Kennedy, 'The Political Stakes in "Merely Technical" Issues of Contract Law' (2002) 10(1) *European Review of Private Law* 7, suggesting that even apparently technical aspects of contract law—such as issues of liability and breach of contract—conceal political considerations, which Kennedy attempts to outline on the basis of an individualism/altruism continuum.

through which—to borrow Pistor's successful and evocative phrase—the global 'code of capital' is constituted,[137] or perhaps even possible unexpected instruments of contestation and social embedding.[138] In either case, to ease the described tensions, commercial and financial law[139] may need to become more attentive, or 'responsive',[140] to its broadly political, rather than exclusively economic, functions; otherwise, reactions in the form of a nationalisation of the transnational may occur. The point, then, is not the perhaps ephemeral affirmation of the local over the global, of public law over private law, or the judge over the arbitrator, but the recognition of the political *in* the economic.[141]

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137 Pistor (n 23).

138 In this regard, discussing Pistor, *The Code of Capital*, *ibid* (n 23), and Hesselink, 'Reconstituting the Code of Capital' (n 25), A Beckers, 'A Societal Private Law' (2022) 1 *European Law Open* 380, argues against the idea that private law needs radical change and in favour of greater responsiveness of social institutions instead; the point would not be to restrict choice of law but to make it available to more parties, for example by giving wronged individuals the freedom to sue corporations wherever they have assets.

139 With regard to private international law in particular, the point is made most forcefully by Horatia Muir Watt, who notes that while it largely leaves political topics to public international law, 'private international law has contributed very little to the global governance debate, remaining remarkably silent before the increasingly unequal distribution of wealth and authority in the world. By abandoning such matters to its public international counterpart, it leaves largely untended the private causes of crisis and injustice affecting such areas as financial markets'. H Muir-Watt, 'Private International Law Beyond the Schism' (2011) 2(3) *Transnational Legal Theory* 347.

140 In the system-theoretical perspective and discussing privatisation, G Teubner, 'Nach der Privatisierung? Diskurskonflikte im Privatrecht' (1998) 19(1) *Zeitschrift für Rechtssoziologie* 8, proposing to transform private law itself into the constitutional law of private governance regimes.

141 From an economic constitutional perspective and criticising the governance of the EU after the global financial crisis, C Joerges, 'Economic Constitutionalism and "The Political" of "The Economic"' in G Grégoire and X Miny (eds), *The Idea of Economic Constitution in Europe. Genealogy and Overview* (Brill, 2022) 789.