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Vanessa Mak

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Cover: *Billy The Kid, 2000,* Steven Lewis

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Globalization, Private Law and New Legal Pluralism

Vanessa Mak*

Abstract

Legal pluralism has gained ground as a framework for lawmaking in transnational private law in times of globalization. Yet, its descriptive and normative underpinnings are underexplored. Why would it offer a better framework than state-centric, positivist views which have served reasonably well in securing private law values such as legal certainty and fairness (incl. the protection of weaker parties)? This paper explores these questions, noting from the outset that an inquiry that moves away from the idea of global legal pluralism towards a more defined institutional context is likely to be more effective in providing mechanisms by which legal pluralism can be 'managed'.

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Globalization, Private Law and New Legal Pluralism

I Introduction

GLOBALIZATION HAS BEEN hailed as the main paradigm of our time by legal scholars, yet its relation to law remains complicated.[1] For one, can we say that globalization is a new phenomenon that law does not know how to grapple with? New, in any case, globalization is not if we look for example at cross-border trading. The golden age of commerce for a number of European trading nations lay much earlier, in the 17th and 18th centuries. The musings of a British captain, as imagined by David Mitchell in his novel *The Thousand Autumns of Jacob de Zoet*, express the sentiment of the time:[2]

> What prophet of commerce in, let us say, the Year 1700 could have foreseen a time when commoners consume tea by the bucket and sugar by the sack? What subject of William and Mary could have predicted the "need" of today's middling multitudes for cotton sheets, coffee and chocolate? Human requisites are prone to fashion; and, as clamoring new needs replace old ones, the face of the world itself changes...

The British in this particular instance had to give way to the Dutch, whom from the 17th century until well into the 19th century were the only nation besides China to maintain trade relations with Japan, operating through a small settlement on the artificial island of Dejima, just off the coast of Nagasaki. Nevertheless, the expansion of trade across the globe was indeed the paradigm of that time, and if we extrapolate the needs of consumers to today's 'middling multitudes', not much seems to have changed in the way that fashions crop up and global trade seeks to respond—apart from that those needs may now relate to iPhones rather than cotton sheets.

The question for legal scholarship is to determine if, when 'the face of the world itself changes', it is also necessary for laws to change. Trade and consumer relationships, on which this paper focuses, would normally be governed, or facilitated, by rules of private

[1] Ralf Michaels, 'Globalization and Law: Law Beyond the State' in: Reza Banakar and Max Travers (eds), *Law and Social Theory* (Hart 2013) 287, 287. Online version available at SSRN: http://ssrn.com/abstract=2240898.
[2] David Mitchell, *The Thousand Autumns of Jacob de Zoet* (Random House 2011) 328.

law, in particular contract law. Depending on whom one asks, contract law as it stands today is, or is not able to respond adequately to the challenges posed by globalization. Two main viewpoints exist. On the one hand, there is the monist 'positivist' perspective of private lawyers who consider contracts valid only if they are governed by the law of a state,[3] the applicable law to be determined in accordance with the rules of private international law. Proponents of this view believe that contracts should be governed by state or state-like rules,[4] mainly because the legitimacy of rules developed through democratic channels is given, but also because national private law systems are substantively valued for their ordered framework of rules, values and practices. At the same time, positivists tend to be reluctant to acknowledge external sources of rules—such as private regulation—as 'law', unless these have received some sort of official recognition, which simultaneously lends legitimacy to the operation of such a formerly 'unofficial' norm into the 'official' legal system.[5] This focus on national laws has remained predominant amongst positivists, even if transactions have become more international and rules of national laws often fall short of providing appropriate solutions.

On the other hand, a 'transnational' perspective has emerged. Finding that the state-centric positivist framework ignores the increasing body of transactions that take place altogether outside the state legislative framework—e.g. on global marketplaces such as eBay, or in commercial networks—transnational law goes beyond questions of validity to search for a framework that encompasses formal and informal rules, at the national and at the international or global level.[6] The aim of such transnational approaches to private law is to provide a new empirical understanding of law beyond the state, describing which sources of norms exist outside state regulation, and a theoretical

[3] Although legal positivism exists in various forms, its main premise is always to determine which social facts lend validity to the existence and content of law in a given society. The most influential theory in our time is HLA Hart, *The Concept of Law* (3rd edn, OUP 2012).

[4] See for the elaboration of the idea of the EU as a (market) state Hans-W Micklitz and Dennis Patterson, 'From the Nation State to the Market: The Evolution of EU Private Law as Regulation of the Economy Beyond the Boundaries of the Union?' in: Bart Van Vooren, Steven Blockmans and Jan Wouters, *The EU's Role in Global Governance. The Legal Dimension* (OUP 2013) chapter 5.

[5] Gralf-Peter Calliess and Peer Zumbansen, *Rough Consensus and Running Code* (Hart 2010).

[6] Peer Zumbansen, 'Defining the Space of Transnational Law: Legal Theory, Global Governance and Legal Pluralism' (2011) Comparative Research in Law & Political Economy, Research Paper No. 21/2011; available at http://digitalcommons.osgoode.yorku.ca/clpe/59.

conceptualization of how these rules relate, or should relate, to state law in a world less marked by positivism.[7] How this conceptualization works out, nevertheless, is an open question. Some use the terminology of 'new legal pluralism',[8] blurring the lines between legal and social norms, whereas others adopt more narrowly defined notions of 'law beyond the state'.[9]

This paper adopts a transnational perspective and seeks to lay the basis of a legal pluralist theory for lawmaking in private law, primarily contract law, in times of globalization. In doing so, it joins a growing literature on legal pluralism in transnational law.[10] Yet, whereas the new pluralist discourse in other areas of law—ie constitutional law, international law and administrative law—has been ongoing for approximately two decades, the private law debate is lagging behind. That seems somewhat surprising, since private law has traditionally always been familiar with pluralist perspectives, in particular in relation to trade relations for which a 'law of merchants' developed that encompassed transnational rules, the *lex mercatoria*.[11] The discourse in that area, nonetheless, has only more recently taken off[12] and will need more time to develop the various viewpoints that may be taken on private law in times of globalization.

The aim of this paper, as part of this inquiry, is to seek to define a more narrow reading of legal pluralism in contract law that can practically be of help in finding ways to manage the divergence of norms between formal and informal lawmaking actors. Part of the difficulty of getting a grip on the current debate seems to be due to the very general

[7] Michaels (n 1) 303 speaks of 'a theoretical conceptualization of law after the breakdown of methodological nationalism', which amounts to the same thing in this context.
[8] Eg Zumbansen (n 6). The term 'new' denotes that this is a new legal pluralism in comparison to the legal pluralist scholarship arising from legal anthropology and sociology in the 1960s, discussed below in part III. Using similar terminology, Neil Walker, *The Intimations of Global Law* (CUP, Cambridge 2015) 114.
[9] Ralf Michaels (n 1), and 'Global Legal Pluralism' (2009) 5 *Annual Review of Law and Social Sciences* 243.
[10] Beside references to transnational legal scholarship throughout this paper, for or a recent overview of the field see the collection of papers in Michael A Helfand (ed), *Negotiating State and Non-State Law. The Challenge of Global and Local Legal Pluralism* (CUP 2015).
[11] See examples cited by Gunther Teubner, 'Global Bukowina: Legal Pluralism in the World Society', in: Gunther Teubner (ed), *Global Law without a State* (Dartmouth 1997), 3; Brian Tamanaha, 'Understanding Legal Pluralism: Past to Present, Local to Global' (2008) 30 *Sydney Law Review* 375, 388.
[12] See the references to the work of Michaels and Zumbansen in the preceding footnotes.

approaches taken in the literature, spanning global and local manifestations of private law—albeit discerning between the role of law in the Westphalian model of western capitalist societies and the contrasting context of the global South—[13] and considering private law relations in general, rather than focusing on specific areas (e.g. contract law, corporate law,[14] labour law, or tort law).[15] Whereas a global pluralist account is helpful for obtaining a better understanding of the role of law in society and its relation to social and economic policies, the discussion of legal pluralism across such a broad spectrum makes it difficult to explore ways of 'managing pluralism'.

This idea, of managing pluralism, holds that even if legal pluralism offers the most appropriate framework for understanding law, it will still need to be coordinated in such a way that conflicts in legal orders are channeled, either into a process in which values may be weighed and conflicts may be resolved, or in a way that upholds core values of a legal system.[16] As to such values, private law systems are relatively consistent in defining which ones they find should be secured through private law mechanisms. Legal certainty is regarded as a core value, expressing good lawmaking but also doing justice to the interests of private parties in consistency and predictability of outcomes.[17] Another value that systems mostly adhere to, albeit it to differing degrees, is the protection of

[13] See eg Peer Zumbansen, 'The Constitutional Itch: Transnational Private Regulatory Governance and the Woes of Legitimacy' in: Michael A Helfand, *Negotiating State and Non-State Law. The Challenge of Global and Local Legal Pluralism* (CUP 2015) 83, 90, stating quite rightly that in the search for a reconceptualization of the role of private law in global governance '[t]he postcolonial challenge in legal and political theory makes more than clear today that a reinvigoration of private law's abilities to "pierce the legal veil" in an attempt to render visible the social and economic inequalities that pervade the realities underneath the floorboard of rules and principles in legal argument can no longer take the troubled regulatory history of the Western welfare state as its obvious starting point and as its all determining frame of reference.'

[14] Although some work engages with case studies; eg Calliess and Zumbansen (n 5) chapters 3 and 4.

[15] The same problem arises for other areas of law. Compare Jennifer Hendry's observation that '[t]he potential and scope of the concept of legal pluralism lend it a malleability that operates as a double-edged sword: on the one hand it is flexible enough to be discussed from many different perspectives, while on the other it appears to lack any real defining contours, other than being premised upon contestability.' Jennifer Hendry, 'Legal Pluralism and Normative Transfer' in: Günter Frankenberg (ed), *Order from Transfer. Comparative Constitutional Design and Legal Culture* (Edward Elgar 2013) 153, 156.

[16] Cf. Paul Schiff Berman, *Global Legal Pluralism. A Jurisprudence of Law Beyond Borders* (CUP 2012) 151, although Schiff Berman himself does not specify values that should be safeguarded.

[17] On good lawmaking, see L.L. Fuller, *The morality of law* (9th edn, Yale University Press 1973) 33 ff. and the analysis by Esther van Schagen for European private law in *The Development of European Private Law in a Mulitlevel Legal Order* (dissertation Tilburg 2013, unpublished) 26-27. See also Martijn Hesselink, 'How Many Systems of Private Law are there in Europe? On Plural Legal Sources, Multiple Identities and the Unity of Law' in Leone Niglia (ed), *Pluralism and European Private Law* (Hart 2013) 199, 231-233.

weaker parties such as consumers, tenants or employees. Although it is a debated question whether private law should be used as a mechanism for pursuing redistributive goals when alternatives are available, e.g. taxation, it is well recognized that private law systems in many instances reflect political, redistributive aims.[18] In the case of the European Union, to which I will refer later on in this paper as a case study, a primary regulatory aim is consumer protection.[19]

A particular challenge for transnational private law is that the mechanisms for managing pluralism tend to be context-specific. The coordination of lawmaking between different lawmakers—such as legislators, courts, and private regulatory bodies—is dependent upon which institutions are actually active as lawmakers in a given society, and on how interactions and (power) relationships play out between them.[20] Coordination of lawmaking may for example be more readily achieved within the EU's institutional context, in which legislators and policy makers at national and EU level coordinate their lawmaking and in which also often note is taken of comparative legal solutions adopted by other Member States, than in legal orders with a lesser degree of regional cooperation between states or other lawmakers. The inquiry in this paper will for that reason, after a discussion of arguments that may be of broader applicability, direct the focus of its argument on coordination of legal pluralism in private law to a particular case study: European contract law. It should nonetheless be noted that the argument considered in that part is of an exploratory nature and that it aims to weigh the possibilities of coordination of lawmakers, but not yet to present a full-fledged theory for managing pluralism in European contract law.[21]

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[18] Eg Anthony Kronman, 'Contract Law and Distributive Justice' (1980) 89 *Yale Law Journal* 472; Ralf Michaels and Nils Jansen, 'Private Law Beyond the State? Europeanization, Privatization, Globalization' (2006) 54 *American Journal of Comparative Law* 843, 848.

[19] Artt 114(3) and 169(2) of the Treaty on the Functioning of the European Union (TFEU).

[20] The importance of institutional context has been highlighted in particular in the work of Neil Komesar, who has shown that the pursuit of policy goals is shaped and determined by institutional processes. See Neil Komesar, *Imperfect Alternatives: Choosing Institutions in Law, Economics and Public Policy* (University of Chicago Press 1997).

[21] I save a further exploration of that question for future research, although I do where relevant in this paper refer to the work of others who engage in questions of pluralism in European contract law – e.g. Micklitz, Hesselink, and Smits. It should also be noted that since the paper is concerned with lawmaking in private law, which results in relatively specific rules, the coordination aimed for is much more rule-oriented than the existing framework for policy-coordination in Europe: the Open Method of Coordination (OMC).

The paper is structured as follows. Objections to the prevailing monist, positivist framework are briefly summarized in Part II. The paper then moves on to the main question: can a theoretical framework based on new legal pluralism do better? Answering this question requires two steps, an analytical and a normative one. Analytically speaking—i.e. asking whether a legal pluralist framework fits the descriptive reality of norm-creation in contract law today—the paper suggests that it is not hard to make a case for legal pluralism as a conceptual framework, and that there is some evidence that legal pluralism has established itself as a valid, albeit still 'alternative' view in the private law discourse. To flesh out this argument, the paper will provide some background on the origins of legal pluralism in 1960s and 1970s scholarship and the reasons for its re-emergence in current legal scholarship (Part III.1). Further, it will discuss the analytical question arises as to whether norms created by non-state actors can be considered 'law' for the purposes of a theory of transnational private regulation (Part III.2).

After exploring legal pluralism as a descriptive framework for global contracting, a normative question remains. Ralf Michaels has raised doubts concerning the usefulness of 'global legal pluralist' approaches. In his view, such theories mesh empirical findings about the existence of law beyond the state with theoretical conceptions of non-state norms as 'law' and ideological positions holding that greater deference must be granted to non-state orders.[22] Although I share his caution to some degree—it is important not to romanticize notions of private law relations as existing purely beyond state law, subject to customary rules only—we should not outright reject using a pluralist framework to develop a better understanding of transnational contracting. In particular, it would seem that a legal pluralist perspective can have advantages for a re-conceptualization of lawmaking in relation to transnational trade and consumer contracts,[23] provided that the institutional context supports it. To explore the merit of this claim, the second part of the question focuses on the normative case for adopting a

[22] Michaels (n 1) 299.
[23] The limited scope of this paper, focusing on trade and consumer contracts, perhaps overcomes some problems that Michaels signals in relation to a broader treatment of pluralism relating also e.g. to Islamic law or corporate governance. See for a more concrete application of a pluralist perspective below, Part IV.

legal pluralist view. Why should we prefer it over the established positivist framework, or over more modest transnational approaches to 'law beyond the state'? Part IV explores this question with reference to theories of cosmopolitan, constitutional and postnational pluralism—fields in which the debate on new legal pluralism is ahead of private law. Part V concludes.

II Positivism in Crisis?

Modern positivist thinking started to emerge around the time that the Westphalian nation-state was established. As political order became tied to a population and a territory, governed by a sovereign on the basis of a social contract,[24] the focus of lawyers became oriented towards the formal requirements for legal validity in this particular context. Positivist views of law require a grounding rule from which the authority of law is derived—according to Hart a social convention which is actually practiced by officials, a *rule of recognition*—[25] and which is almost invariably linked to the state.[26] Norms created 'unofficially', outside the sphere of state influence and without being adopted into the official system, are regarded as non-law—they are social norms only. That is relevant in particular because it means that these norms are not enforceable in state courts, ie they are not considered binding.[27] Methodological nationalism, directing the focus of lawyers to state law as the only valid existing law, was born.

Globalization is said to pose challenges to this framework. But why would legal positivism not be an appropriate lens through which to consider the creation of rules of private law in our times?

The first, and often mentioned reason, is that an increase in self-regulation or private regulation—i.e. the creation of norms by private actors such as companies or private

[24] A state is constituted by four elements: territory, population, government, and the ability to enter into relations with other states. Cf Art 1 of the Montevideo Convention on Rights and Duties of States (signed at Montevideo 26 December 1933; entered into force 26 December 1934).
[25] Hart (n 3).
[26] Cf Michaels (n 1) 302.
[27] See Michaels (n 1) 302, noting further that only decisions on law have the force of precedent, and that questions of law are allocated to judges whereas questions of fact can sometimes be decided by judged.

standard-setting bodies—has diminished the importance of the state as a regulator. That point seems to hold some merit, even if this is by no means the first time in history that private regulation has gained importance. Arguably, private law has traditionally always been familiar with non-state law, in particular in relation to trade relations for which a transnational 'law of merchants' developed—largely made up by private lawmaking activities—the *lex mercatoria*.[28] What makes it a relevant argument today, is that for the first time all the characteristics of globalization seem to be highly present in our society, and are having a direct impact on the increase of cross-border, private law transactions. These four characteristics have been defined as *extensity*, *intensity* and *velocity* of global transactions—referring to the stretching of activities across borders, their interconnectedness, and the speed at which they take place—and the *enmeshment between the global and the local*, reflected in the blurring of lines between domestic and international laws.[29] Not only can an increase of global transactions be observed, it goes accompanied by a growing body of informally developed rules, such as terms and conditions and rules of dispute resolution developed by global market platforms (such as eBay or Airbnb), rules developed by private standard-setting bodies,[30] or corporate codes with a transnational reach.

That by itself is not the only reason why positivism in private law may need to be reconsidered. As Michaels notes, the distinction between law and non-law also 'begins to collapse because the criteria used in legal positivism to define what should count as law are becoming questionable.'[31] If the state is no longer the only source of regulation, it follows that the premise of legal positivism that the validity of rules should be channeled back to an absolute starting point—in most cases related to the state—comes under pressure. At the very least, proponents of the positivist view will be required to

[28] See examples cited by Gunther Teubner, 'Global Bukowina: Legal Pluralism in the World Society' in: Gunther Teubner (ed), *Global Law without a State* (Dartmouth 1997) 3; Brian Tamanaha, 'Understanding Legal Pluralism: Past to Present, Local to Global' (2008) 30 *Sydney Law Review* 375, 388.
[29] Cf David Held, Anthony McGrew, David Goldblatt and Jonathan Perraton, *Global Transformations: Politics, Economics, and Culture* (Stanford 1999) 14-16.
[30] On standardization in services contracts, see Panagiotis Delimatsis, 'Standard-Setting in Services – New Frontiers in Rule-Making and the Role of the EU', TILEC Discussion Paper DP 2015-013. Available at SSRN: http://ssrn.com/abstract=2616618.
[31] Michaels (n 1) 302.

justify why this point is vital for establishing the validity of rules.[32] That may be a daunting task if we take, for instance, Hart's rule of recognition as our starting point. While it may be possible to identify within a nation state which criteria deriving from the rule are regarded by officials as standards that govern their actions,[33] the same exercise seems harder to apply on the transnational plane. Who are the relevant officials in that case, and is it in any event possible to identify a meta-rule for the validity of legal norms if the transnational order itself lacks any kind of discernible system?

A third point concerns non-state law in another sense: the rules espoused by supranational or international lawmaking actors. Their rule-making powers are often regarded as a derivative of the state's lawmaking powers. The state has transferred part of its sovereignty to them, giving them competence to lay down new rules that may legally bind the state and its subjects. Although this interaction between lawmakers at the national and international level may still be couched in positivist language, seeing that the final authority rests with and is derived from the state, that does not mean that no new challenges lie ahead when lawmaking is increasingly taking place at the supranational or international level. Legitimacy can be a concern too, in various ways. First, the validity of laws emanating from a supranational or international lawmaker may be questioned. Did they have competence to promulgate new laws, or not? The answer to that question has in the EU-context proven to be quite fluid, with the EU subtly extending its competences through open-ended legislative provisions or through general principles.[34] Second, the lawmaker can be seen as too distant from the polity to have a proper mandate. In the EU, for example, concerns continue to exist about a 'democratic deficit', meaning that the institutions are insufficiently accessible to citizens and therefore unable to ensure democratic legitimacy.[35]

[32] ibid.
[33] Hart (n 3) 100 ff.
[34] See eg Stephen Weatherill, 'Competence Creep and Competence Control' (2004) 23 *Yearbook of European Law* 1; Sacha Prechal, 'Competence Creep and General Principles of Law' (2010) 3 *Review of European Administrative Law* 5.
[35] For an insightful analysis, see Fritz W Scharpf, 'Legitimacy in the Multilevel European Polity' (2009) 1 *European Political Science Review* 173. Also published as MPIfG Working Paper 09/1, available at: http://www.mpifg.de/pu/workpap/wp09-1.pdf.

Another problem is whether supranational or international lawmakers are positioned in an appropriate place in the political order to make laws that affect the interests of private actors or of states. That is a contextual question. Lawmaking at the supranational or international level is often justified on the basis of economic policy goals—e.g. market integration—yet it may not be the place to deal with social policy particular to individual states.[36]

My aim is not to engage in more detail with all these questions. To make a full inquiry of the merits and non-merits of legal positivism in transnational law would require a philosophical and political theory analysis going far beyond the scope of this paper. What is important, however, is to raise these questions in order to make us reconsider the position of state law in the changing constellation of norm-creation in a globalized world. To say that positivism is in crisis is likely too strong a way to put it—in particular in such a general way. In many cases, the state is still the primary entity to take care of the legal interests of its citizens.[37] Nonetheless, the challenges that globalization of private law transactions pose to the theory at least demand a consideration of alternative frameworks. As set out in the introduction, this paper will consider the merits of a legal pluralist framework for transnational private law, in particular in relation to contracting in the EU. The first step to consider, then, is to what extent legal pluralism is fitting as a descriptive framework for transnational contracting.

III Legal Pluralism as a Descriptive Framework for Transnational Contracting

Neil Walker has contributed the emergence of a 'new legal pluralism' to a double deformalisation in law: first, the focus is no longer exclusively or mainly upon state parties as the subject of (international) law; and second, the context in which choice of

[36] Hans Micklitz's argument that the EU through its legislative actions can only create 'access justice', ie access for all participants to the European market, fits with this understanding. Social policy is still primarily within the realm of the member states. See Hans-W Micklitz, 'Social Justice and Access Justice in Private Law', EUI Working Papers LAW 2011/02, 21-23.

[37] Although even within a state clashes between sub-groups may occur for which a pluralist framework would provide a more helpful context; compare eg Eve Darian-Smith, *Law and Societies in Global Contexts* (CUP 2013).

law questions arise is now as likely to be horizontally (between state laws) as vertically shaped (state law increasingly overlaps with other, substantive jurisdictions).[38] Whereas this characterization focuses primarily on the position of states and state law in international law, this process of deformalisation has similar effects in private law. There too, as discussed in the previous part, the focus is moving from state law to other sources of norms. Also, established hierarchies between state law and other sources of law—whether supranational or international, or non-state law—are becoming less clear.

The term 'new legal pluralism' indicates that what we are talking about is not the legal pluralism that emerged in colonial and post-colonial legal anthropology after the 1960s. But what then are its characteristics and why does it fit the new constellation of sources of lawmaking in transnational contract law? This part explores those questions in more detail, starting with a brief overview of classical conceptions of legal pluralism.

1. Legal Pluralism: Origins and Development

Legal pluralism became popular in the wake of anthropological studies of post-colonial societies in the 1960s.[39] Although its origins go much further back,[40] legal anthropologists in the 1970s and 1980s became interested in the ways in which state laws had taken hold—or not taken hold—in colonial and post-colonial societies. Research on these questions resulted in seminal works on legal pluralism, inter alia by Sally Engle Merry, John Griffiths, and by Sally Falk Moore on 'semi-autonomous fields'.[41]

[38] Walker (n 8) 114.
[39] The literature on legal pluralism has rapidly expanded since the earliest studies and is almost becoming too vast to fully survey. In this part, I will give an overview of some of the main works, many of which are also cited in the footnotes.
[40] Brian Tamanaha, (n 28); Lauren Benton, 'Historical Perspectives on Legal Pluralism' (2011) 3 *Hague Journal on the Rule of Law* 57.
[41] Sally Engle Merry, 'Legal Pluralism' (1988) 22 *Law and Society Review* 869; John Griffiths, 'What is Legal Pluralism?' (1986) 24 *Journal of Legal Pluralism and Unofficial Law* 1; Sally Falk Moore, 'Law and Social Change: the Semi-Autonomous Social Field as an Appropriate Object of Study' (1973) 7 *Law and Society Review* 719.

Central to these works is the realization that most state legal systems, even if they can be perceived as a coherent whole from the outside, in fact host various sets of norms that can overlap but also conflict. Taking the description from legal anthropology, legal pluralism denotes the 'situation in which two or more laws (or legal systems) coexist in (or are obeyed by) one social field (or a population or an individual)'.[42] In the colonial and post-colonial societies that researchers in this field became interested in, the focus was mostly on the existence of norms other than state law, often rules developed by local communities and by Western researchers branded as tribal or customary law, that governed the relationships of legal subjects in those communities. Such rules would operate alongside state law—or perhaps better said: independent from state law—and could also come into conflict with rules of state law, although the perspective mostly tended to be state-centric.[43]

The distinction between state law and other sources of norms is what strongly characterizes these approaches. The suggestion of legal pluralism is that norms created outside the framework of state lawmaking can also be regarded as 'law', or in any event as rules that have a law-like effect on societies or individuals.[44] That perspective opens up space for taking account of non-state norms, such as customs or—of particular importance in modern enterprises or industries—rules developed through self-regulation. It should be noted, however, that whilst legal pluralism as a theoretical perspective gives room to adopting a factual view on what norms govern a particular community or society, it does not prescribe how the validity of norms as 'law' should be assessed or how the interaction between different (state and non-state) norms should be given shape. At the same time, these are questions that have come up in pluralist

[42] Ralf Michaels, 'Why We Have No Theory of European Private Law Pluralism' in: Leone Niglia (ed), *Pluralism and European Private Law* (Hart 2013) 139, 140-141; Griffiths (n 41) 2; and compare Engle Merry (n 41) 870.
[43] William Twining, 'Normative and Legal Pluralism: A Global Perspective' (2010) 20 *Duke Journal of International and Comparative Law* 473, 500.
[44] William Twining, *General Jurisprudence* (CUP 2009) 88-121, 362-375; and compare at 63-64, where Twining advocates an approach in which law regarded from a global perspective is used as an analytical tool to capture the norms created at various levels of regulation.

debates and some grouping of theories is possible, painting with a broad brush, along the lines of 'weak' or 'strong' legal pluralism.[45]

Weak legal pluralism, in early legal literature on pluralism, followed the observations of anthropologists made in their studies of colonial and post-colonial societies. Lawyers studying legal systems in Asia and Africa described patterns that were similar to most colonies, where the colonizing power would introduce its own law as an overarching systems, whilst leaving some room for the customary laws that it found.[46] These descriptions focused on the co-existence or plurality of rules, but in looking at the interaction between them came back to particular legal means such as hierarchically superior rules or conflict of laws mechanisms.[47] Legal pluralism in this sense was therefore a 'juridical' pluralism in which the element of plurality related mainly to the co-existence of legal orders. However, whereas the existence of non-state 'law' was acknowledged, the state was still regarded as superior to other legal orders. Weak legal pluralism, therefore, does not relinquish the hierarchical ordering mechanism of state centralism.

Criticism of the state-centric view pertinent to these early legal works on pluralism gave rise to the development of views of so-called 'strong', or 'radical' legal pluralism.[48] Whereas juridical pluralism adopts a very much internal perspective on law—looking at it through a lawyer's eyes and falling back on legal mechanisms—strong legal pluralism takes an external or sociological view.[49] Scholarship in this field regards legal pluralism as a sociological fact.[50] Its focus is therefore on how norms function in 'reality', such as the effects that norms have in society and the expectations that those who are addressed

[45] Also referred to as 'state law pluralism' and 'deep legal pluralism'; see Gordon R Woodman, 'Ideological Combat and Social Observation. Recent Debate about Legal Pluralism' (1998) 42 *Journal of Legal Pluralism* 21, 34.
[46] Michaels (n 42); MB Hooker, *Legal Pluralism: An Introduction to Colonial and Neo-Colonial Laws* (Clarendon Press 1975).
[47] Michaels (n 42) 142, with sources there cited.
[48] In particular Griffiths (n 41).
[49] Aukje van Hoek, 'Managing Legal Diversity – New Challenges for Private International Law' (2012) 30 *Nederlands Internationaal Privaatrecht* 362.
[50] Cf Griffiths (n 41) 4.

by them have of the content of norms.[51] In relation to legal ordering, this poses new challenges. Strong legal pluralism rejects hierarchy both on normative and empirical grounds. Normatively because it is undesirable to subordinate legal orders to state law—which can be regarded as pejorative, treating non-state law as inferior—[52] and empirically because (state) hierarchy is not a given but the relation between different legal orders is under constant negotiation.[53] What can come in the place of a hierarchical ordering, however, is unclear. Classical legal mechanisms, such as conflict of laws rules, are sometimes rejected, though a renewed interest in their usefulness as a mechanism for managing pluralism is apparent in the work of Schiff Berman and Michaels.[54] It is important to realize that the more open framework presented by strong legal pluralism has been subject to criticism itself, in particular because of the perceived indeterminacy or vagueness that it invokes.[55] Similar criticism has been levied against the idea of inter-legality or hybridity.[56]

2. Strong or Weak Legal Pluralism, and the Relevance of the Question 'But is it Law?'

In what way does a new legal pluralist framework then fit with the sources of law that exist in our current era of globalization? From an ontological perspective it is hard to deny that lawmaking in private law has over the years broadened into a wider amalgam of rules than those laid down by a state legislator. The EU has become an important norm-setter in private law through Directives and Regulations, as well as through soft law instruments like the Draft Common Frame of Reference (DCFR).[57] Apart from rules created in this supranational sphere, both transnational rulemaking (e.g. by UNCITRAL

[51] Van Hoek (n 49) 367.
[52] Twining (n 43) 501-502.
[53] Michaels (n 42) 142.
[54] Schiff Berman (n 16) Part IV; Ralf Michaels (n 9) 256.
[55] See e.g. Woodman (n 45) 40 ff.
[56] Michaels (n 9) 254.
[57] Study Group on a European Civil Code, Research Group on the Existing EC Private Law (Acquis Group), *Draft Common Frame of Reference (DCFR). Principles, Definitions and Model Rules of European Private Law. Full Edition* (Sellier, Munich 2009).

or UNIDROIT)[58] and private regulation by specific industries have added a significant body of non-state rules to the picture. That in itself, however, does not require us to move away from a model in which the state is regarded as the primary lawmaker.

The case for a legal pluralist perspective in transnational private law emerges from the observation that the *hierarchy* between these sources of law is changing, and perhaps even tilting away from the nation-state. That makes that analytically, i.e. in describing what perspective can best capture all relevant sources of law in transnational private law, it seems to be more correct to consider norms on the basis of their *substance or rationale*[59] rather than on the basis of their absorbance into official legal systems. I will say a bit more about each point, and will then set out how they lend support to adopting a strong legal pluralist view as an analytical framework for transnational private law. This part wraps up with a few observations on how such a strong legal pluralist framework can accommodate questions of legitimacy of rulemaking 'beyond the state'—or in other words, how important the question 'But is it Law?' is in this view.

a. Blurring hierarchies between state and non-state norms

The first point that must be observed is that the state, although it still has a central position as a lawmaking entity in transnational private law, is gradually losing ground to other lawmakers. An area in which this is becoming apparent is consumer contract law. A growing part of consumer transactions are conducted in environments regulated by private regulation, and therefore largely outside the reach of formal, state-originated private law. One can think of eBay, or its spin-off company PayPal. Each offers a global platform through which buyers and sellers can connect. Disputes can be resolved through the platform's own dispute resolution mechanisms, and according to the rules

[58] UNCITRAL, the core legal body of the UN system in international trade law, is responsible for the 1980 Vienna Convention on Contracts for the International Sale of Goods (CISG). Under the aegis of UNIDROIT a set of non-binding principles for international commercial contracting was created, the UNIDROIT Principles of International Commercial Contracts (PICC).

[59] Callies and Zumbansen refer to the 'inherent, rational content' of norms. See, with reference to the UNIDROIT Principles of International Commercial Contracts, Calliess and Zumbansen (n 5) 125.

written up by the operators of the platform.[60] Even if, theoretically, a consumer could opt for litigation in a domestic court, the likelihood of that is slim, seeing that the costs at stake in consumer contracts are usually too low to justify that, plus that such a procedure would undoubtedly take much longer to complete than arbitration or other forms of alternative dispute resolution through eBay or PayPal.

Legal scholars who say that for these types of marketplaces or platforms—other examples can be Airbnb or Uber—the state should guarantee the effective enforcement of consumer rights may have a point,[61] seeing that it can be hard to guarantee a minimum level of consumer protection without the involvement of a public regulator like the state.[62] Yet, that does not diminish the observation that there is a trend for more consumer contracts to be concluded in a cross-border context, even if cross-border contracts for now only make up a minor part of the market.[63] Coupling that back to the question what framework would provide the best fit, a transnational, legal pluralist perspective has the advantage over a state-centric view that it includes all relevant sources of norms in its analysis—including non-state law—and therefore can perhaps do more justice to the real interests of consumers in the global marketplace. Importantly, a transnational view does not say that state law has lost its relevance. It merely opens up the debate to a more realistic analysis of consumer contracting in a globalized world, in which many contracts are still concluded within national borders and under state law,[64] but in which an increasing number are concluded across state borders and have special

[60] Calliess and Zumbansen (n 5) 165.
[61] For example Norbert Reich, 'Transnational Consumer Law—Reality or Fiction?' (2009) 27 *Penn State International Law Review* 859, 867-868.
[62] This question forms part of a wider debate on social justice in private law. On the situation in Europe, see eg Hans-W Micklitz, 'Introduction' in Hans-W Micklitz (ed), *The Many Concepts of Social Justice in European Private Law* (Edward Elgar 2011) 3, 34-36. Micklitz proposes the concept of 'access justice', meaning that the EU legislator should ensure that those for whom mandatory rules are written—such as consumers—actually have access to the market so that they can benefit from these rules.
[63] The volume has steadily increased over recent years and has been estimated at 10 to 15 per cent of total e-commerce volume (incl. domestic); see https://www.bcgperspectives.com/content/articles/transportation_travel_tourism_retail_cross_border_ecommerce_makes_world_flatter/.
[64] It should be noted that globalization does not impact only upon cross-border contracting, but that it can also increase the availability of foreign products in markets all over the world. Tilburg University for example has had a Starbucks on campus since last autumn. In these situations, normally the rules of domestic law would apply without problem, since consumer transactions take place completely in the domestic realm. Transactions costs may of course still arise earlier, at the time that the company assesses whether it wants to establish itself in a foreign market.

characteristics to which state law cannot always cater—but to which other (non-state) norms may.

In sum, what examples in transnational contracting show is that many transactions are conducted outside the reach of state law and instead are governed by private regulation. If that is increasingly the case in consumer contracts, it has since much longer been apparent in commercial contracting. Commercial parties are of course under formal, state law already more free to decide upon the terms and conditions of their contracts, seeing that they are not bound by mandatory rules in the same way as businesses are who contract with consumers. In many cases, in particular in cross-border transactions, they moreover prefer to refer disputes to non-state dispute resolution bodies, who are often not bound to decide on the basis of state law. Arbitration is a popular form of dispute resolution, for example through the International Chamber of Commerce (ICC).[65]

The hierarchy of sources of law in private law transactions therefore does not per se put state law at the top. Practice shows that private regulation is of equal or greater importance in some areas of trade and commerce. A framework for lawmaking in private law in times of globalization from this viewpoint character-wise fits with the idea of new legal pluralism. Whether a 'weak' or a 'strong' legal pluralist approach fits best is another question.

b. Weak or strong legal pluralism and the relative importance of norms as 'Law'

Let me say at the outset that the labels 'weak' or 'strong' legal pluralism to my mind do not do justice to the sources of law that we can observe in transnational private law and their interrelation. Weak legal pluralism seems unfitting because it considers the relationship between norms from a purely juridical standpoint. It presumes a hierarchy between sources, usually with the state designated as the primary lawmaker. Even if

[65] The ICC is the most preferred and widely used arbitration institution; see Queen Mary University of London, '2010 International Arbitration Survey: Choices in International Arbitration', available at: http://www.arbitration.qmul.ac.uk/docs/123290.pdf, p 3.

alternative frameworks can be conceived within this view, for example with a supranational lawmaker rather than a state in the role of primary lawmaker, it in any event requires some sort of juridical ordering. As explained in the previous section, that view does not correspond to the realities of contracting in a globalized world. Businesses as well as consumers increasingly conclude contracts, and resolve disputes, through legal mechanisms operating outside the reach of state law.

Strong legal pluralism would at first blush seem to be a better label to place upon this constellation of sources of law. It would include all norms, whether they are created by formal lawmakers—the state, or European or international legislators—or through informal, private regulation. Moreover, questions of legitimacy of norms can be addressed by focusing on the substance of norms rather than on their pedigree. In the words of Calliess and Zumbansen, the governing validity of norms is derived from their 'inherent, rational content' (or *imperio rationis*).[66] The UNIDROIT Principles, for example, are generally accepted by the international trading community on the basis of their substantive suitability for commercial contracting.[67]

Still, this remains a difficult point. An objection often heard in relation to private regulation is that it lacks the legitimacy of rules that have been created through a legislative process in which a democratically chosen body—eg a national or supranational parliament—has been able to assess and possibly amend the rules before they are adopted as law. The question 'But is it law?' reflects the sentiments of most positivist lawyers, who would not put private regulation on par with state legislation in particular for this lack of legitimacy. It continues to be a challenge for lawyers and for legal sociologists with an interest in transnational law to articulate a framework in which norms can be grounded in democratic legitimacy. They may be able to look to the work of political philosophers, who have been engaged in a similar search to combine democratic theory with a programme of deliberation. Their studies seek to identify how one can identify communities of stakeholders beyond the state based on the degree of

[66] Calliess and Zumbansen (n 5) 125.
[67] Cf Ulrich Drobnig, 'Ein Vertragsrecht für Europa' in: Jürgen F Baur, Klaus J Hopt and K Peter Mailänder (eds), *Festschrift für Ersnt Steindorff zum 70. Geburtstag am 13 März 1990* (De Gruyter 1990) 1141, 1151.

'affectedness' of a group or community.[68] The idea is that those who are affected by decisions should also be involved in their development. That principle is still quite vague and further work has tried to make it more concrete by focusing on *institutions* and their ability to give access to essential resources.[69] Translated to private law, that means that a nexus for legitimacy should be created by enabling individuals or communities to take part in lawmaking processes of institutions that affect them.

Here lies a significant challenge. While democratic deficiencies are hard to avoid if we move from a national to a supranational legislator,[70] it is perhaps even harder to see how those affected would have a role in lawmaking by private actors. Here, ultimately, the legitimacy of norms may only follow from them being used and accepted by the community at which they are aimed.[71] On the flipside, should the addressees of the norms not wish to be bound by them, they have the option to challenge them in a state court—which in practice seldom happens. Private regulation therefore may often obtain legitimacy by being adopted, or in practice: not challenged, by those affected by it.

The latter point raises a concern, namely that if norms go unchallenged industry bias might color rules of private regulation in favor of businesses. Self-regulation is said to be an example of 'modern corporatism'.[72] While private regulation may extend also to an entire branch of industry, even in that context bias is hard to rule out, since not every stakeholder may be equally represented. To ensure consumer protection, therefore, some sort of coordination is likely to be needed.

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[68] For an overview of the debate in this field, see Calliess and Zumbansen (n 5) 130 ff, referring in particular to the concept of 'affectedness' developed by David Held which ties any assessment of democracy to the quality by which a group has been affected by a decision. See David Held, 'Democratic Accountability and Political Effectiveness from a Cosmopolitan Perspective' (2004) 39 *Government and Opposition* 364.

[69] Regina Kreide, 'The Ambivalence of Juridification. On Legitimate Governance in the International Context' (2009) 2 *Global Justice: Theory Practice Rhetoric* 18, 28.

[70] Marija Bartl, *Legitimacy and European Private Law* (doctoral thesis, EUI 2012), available at: http://cadmus.eui.eu/bitstream/handle/1814/22455/2012_Bartl.pdf?sequence=2.

[71] Compare Calliess and Zumbansen (n 5) 129, collapsing the distinction between norms that become law at the moment an official authority recognizes them as law, and norms that are recognized as law by the relevant community.

[72] Anthony Ogus, 'Rethinking Self-Regulation' (1995) 15 *Oxford Journal of Legal Studies* 97, 98.

Hence, even if strong legal pluralism can find favor as an analytical lens through which to examine transnational private law, a caveat is in order. A strong legal pluralist view may be appropriate as an analytical description of the status of sources of law in this field, yet it cannot answer questions such as how rules of private law created by different lawmakers can be attuned to one another, or how the interests of weaker parties in private law—such as consumers—should be protected. These are normative questions, and answering them requires further scrutiny of pluralist theories. I will now turn to these issues, noting already that the legal pluralist view that will be proposed on the basis of the following normative inquiry to my mind should not be termed 'strong' but rather 'coordinated' legal pluralism.

IV Legal Pluralism as a Normative Framework for Transnational Contracting

In private law, normative aspects of legal pluralism are relatively unexplored. Theories that could qualify as pluralist often contain normative choices, but these are mostly not explicitly acknowledged, in part because (European) private law has in many cases not directly engaged with the pluralist discourse or sought to rephrase its questions in pluralist terminology.[73] In this part, I consider why a case should be made for legal pluralism in private law, in particular contract law, taking account of insights emerging from theories of pluralism in constitutional law and international public law. Here we reach the core of the submission that was made at the outset of this paper: should a theory of transnational contract law be reconstructed along the lines of legal pluralism because it offers the best framework for transnational lawmaking in this field? And what limitations should be observed in relation to this proposition?

The normative question is dealt with in the following order. The first part (IV.1) assesses which *moral principles* lend support to the idea that a legal pluralist framework should be adopted for transnational contract law. It takes its lead from studies in the field of constitutional and international public law, including human rights law. Jurisprudential

[73] Cf Leone Niglia, 'Prologue: Of Pluralism and European Private Law' in: Leone Niglia (ed), *Pluralism and European Private Law* (Hart 2013) 1.

viewpoints put forward in these fields tend to focus on two principles that, albeit it with modification, may also be regarded as fundamental to a pluralist perspective on contract law. The legal framework should create or maintain a space for deliberation between different communities. It should do that first, by giving voice to *public autonomy*, or in contract law—as will be submitted—private autonomy. Second, the interaction between different communities should be based on *toleration* of other values or viewpoints.

The second part (IV.2) considers how these principles can be translated into more concrete perspectives on transnational lawmaking in contract law. Note will be taken of methodological approaches that are being developed in order to better understand or to 'manage' legal pluralism in transnational private law.

The third and final part (IV.3) considers the boundaries of the theoretical framework. Theorists tend to propose models that expound a coherent view of the chosen subject-matter—ideally, the theory should be able to explain or to resolve all possible situations that may occur. However, reality is hardly ever as straightforward as that. Without seeking to deconstruct the normative argument that was put forward in favor of a legal pluralist approach to transnational contract law—and revert back to a positivist view that, as seen in part I, is likewise unsatisfactory—the aim is to tease out in which contexts norm-creation 'beyond the state' reaches its limits. When is the intervention of a public regulator necessary to guide law-making, and to what extent is a pluralist framework able or unable to accommodate public, often: state, intervention in private law relationships? Bearing in mind that the theory can only be tested in relation to a specific lawmaking context, this part of the paper will focus on European contract law as a case study.

1. Lessons From Cosmopolitan and Postnational Pluralism

Cosmopolitan pluralism and post-national pluralism, as developed by Paul Schiff Berman and by Nico Krisch, are theories that aim to offer frameworks for understanding the transnational pluralist workings of (primarily) public international law, human

rights law, constitutional law and administrative law. Although their theories start from different premises—Schiff Berman's as a means of finding a compromise between sovereigntist and universalist approaches, and Krisch's as a denunciation of monist views of constitutional pluralism—[74] they appear to have much in common in their outlook. Both look at modern transnational law through an—at least partly—strong or radical legal pluralist lens. Moreover, the theories share common ground in their underlying principles and in their proposed ways for 'managing' pluralism.[75] Before looking at these principles the theories will be briefly described, with a few words already on the mechanisms that they envisage for managing pluralism.

a. Schiff Berman's cosmopolitan pluralism

The moniker that Paul Schiff Berman attaches to his normative vision of a global jurisprudence is 'cosmopolitan pluralism'.[76] This notion encapsulates two concepts, that of cosmopolitanism and that of pluralism. With cosmopolitanism, Schiff Berman means to invoke a framework that regards individuals as all being part of multiple communities, both local and global, territorial and epistemic.[77] It is important to note that this definition does not identify one global community, either as a descriptive status quo or as a normative future for post-national law, but rather recognizes the existence of multiple communities. In that sense, Schiff Berman's view may be seen as a variation from other definitions of cosmopolitanism that identify the 'world community' as the relevant community and that seek to move forward towards one global legal order.[78] Those frameworks rely on a global constitutional framework of principles that have

[74] Both positions are explained in more detail below. See pp 15 and 16.
[75] Compare Alexis Galán and Dennis Patterson, 'The Limits of Normative Legal Pluralism: Review of Paul Schiff Berman, *Global Legal Pluralism: A Jurisprudence of Law beyond Borders*' (2013) 11 *International Journal of Constitutional Law* 783, who criticize both authors for not engaging more explicitly with each other's work.
[76] Schiff Berman (n 16) 11 ff.
[77] ibid 11.
[78] See Martijn Hesselink (n 17) 218-219, who finds cosmopolitan theory useful for highlighting the importance of monist perspectives, which in European private law would be translated in a need to ensure legal certainty for private parties. He for now leaves open how this monist ideal can be given practical substance in a composite legal order in which the relationships between national, European and international law are a matter of political deliberation.

ultimate authority.[79] Schiff Berman on the other hand notes explicitly that his cosmopolitan jurisprudence should not be conflated with universalism: it does not 'require a belief in a single global welfare or even a single universal set of governing norms; nor does it necessarily require that global welfare trump state or local welfare.'[80]

Against this backdrop, Schiff Berman develops a pluralist view based in hybridity. His aim is to provide a middle ground between sovereigntist territorialism—a state-centric view—and universalist harmonization—a vision that seeks to erase normative difference altogether. The alternative view that he proposes considers overlapping juridical assertions as 'hybrid legal spaces'.[81] By this he means spaces in which multiple, legal and quasi-legal, actors assert authority. The challenge for legal theorists is to determine how conflicts of norms within these hybrid legal spaces are, and should be dealt with.

Concretely, Schiff Berman's view proposes that ports of entry into decision-making should be created for more, alternative lawmaking communities through procedural mechanisms, institutions and discursive practices.[82] This, what he calls 'juris-generative' approach,[83] or procedural pluralism,[84] is justified on two grounds. First, it should sometimes produce better substantive outcomes. Further, Berman suggests that it is likely to make decision-makers take a restrained view of their own power, which could lead to 'greater tolerance, inclusion, and the development of harmonious processes because even losing parties feel that their voices were heard and taken seriously.'[85] To give shape to this ideal, Schiff Berman opts for a conflict of laws framework as a

[79] Mattias Kumm, 'The Cosmopolitan Turn in Constitutionalism: on the Relationship between Constitutionalism in and beyond the State', in: Jeffrey L Dunoff and Joel P Trachtman (eds), *Ruling the World? Constitutionalism, International Law and Global Governance* (CUP 2009) 258.
[80] Schiff Berman (n 16) 11.
[81] Schiff Berman (n 16) 14.
[82] Schiff Berman (n 16) chapter 6. See also Paul Schiff Berman, 'How legal pluralism is and is not distinct from liberalism: A response to Galán and Patterson' (2013) 11 *International Journal of Constitutional Law* 801.
[83] Schiff Berman (n 82) 801, with reference to Robert Cover, 'Foreword: Nomos and Narrative, The Supreme Court 1982 Term' (1983) 97 *Harvard Law Review* 4, 11–15.
[84] ibid. 803.
[85] Schiff Berman (n 82) 801.

procedural mechanism that aims to instantiate a social space in which conflicting viewpoints can be deliberated.[86]

b. Krisch's postnational pluralism

Krisch developed his theory of post-national pluralism in international law as a response—and denunciation—of the debate in constitutional pluralism. The discourse in this area started out from a 'strong' legal pluralist perspective but has since evolved into more nuanced, 'weak' versions of pluralism. Another typification, following Krisch, would be to discern between 'systemic' and 'institutional' pluralism.[87] In the European context, the first focuses on the EU and the national systems of the Member States as separate orders that run in parallel without subordination or coordination. Both levels, as systemic units, have internally plausible claims to ultimate authority.[88] The institutional view regards both levels as part of a monist international order, in which the EU and domestic constitutional laws have equal positions. Pluralism exists in this view not between systems, but within one (international) system on the basis of a lack of hierarchy or coordination in its institutional structure.[89] A large part of the early literature, which centered on constitutional pluralism, could be characterized as institutional pluralism. Authors like Walker, Maduro, Kumm and Delmas-Marty all sought to instill some sort of institutionalized harmony in order to contain the perceived 'messy' nature of a stronger pluralist perspective.[90]

An alternative to constitutional theories originating from state-centric views is according to Krisch, however, only given by systemic pluralism.[91] Although both

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[86] Schiff Berman (n 16) 327.
[87] Nico Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (OUP 2010) 71.
[88] Compare Neil MacCormick, 'Beyond the Sovereign State' (1993) 56 *Modern Law Review* 1.
[89] A view taken by Neil MacCormick in later work. See MacCormick, 'Risking Constitutional Collision in Europe' (1998) 18 *Oxford Journal of Legal Studies* 517, 527.
[90] Compare Krisch (n 87) 75.
[91] ibid. One may wonder, nonetheless, whether Krisch's concept of systemic legal pluralism fundamentally qualifies as a 'strong' legal pluralist perspective. Interface norms—the norms which in his theory provide an organizing mechanism for deciding what norm ultimately prevails in a given situation—resemble rules of private international law, and would therefore be promulgated by a state or an international organization. These norms would therefore, after all, impose a state-centric hierarchy on sources of law.

perspectives are based on the idea that everyone who is affected by lawmaking action should be included—the idea of political deliberation is echoed here—the systemic pluralist perspective lets go of the idea that different legal orders should be coordinated *within* one overarching system. Rather, it accepts that pluralism can exist *between* different orders. The systemic pluralist perspective emphasizes decentralist management of diversity. The theoretical starting point is that different legal orders can co-exist without subordination or hierarchy. Systemic pluralism therefore at first sight resembles strong, or radical legal pluralism.

Weighing alternative views on pluralism, Krisch identifies perhaps mostly with the work of Teubner and Fischer-Lescano on networks, favouring a conflict-of-laws approach based in systemic pluralism.[92] That similarity is also reflected in the ordering mechanism that he proposes. It is based on what he calls 'interface norms'.[93] Interface norms are defined as the norms that regulate to what extent norms and decisions in one sub-order have effect in another legal order.[94] Or in other words, they are the rules that determine in which instances rules originating outside the legal order can be recognized. In essence, this regime therefore relies on toleration of other legal orders.[95]

c. Principles supporting a normative case for legal pluralism

Although there are differences, Schiff Berman's theory has conceptual links with Nico Krisch's work on pluralism. Krisch likewise eschews universalism in favour of an approach that leaves room for the inclusion of multiple viewpoints, values and preferences in society. Therefore, both propose views that, normatively, promote legal pluralism on the ground that it creates (or maintains) a space for contestation or

[92] Krisch (n 87) 77. And see Andreas Fischer-Lescano and Gunther Teubner, *Regime-Kollisionen: Zur Fragmentierung des globalen Rechts* (Suhrkamp Verlag 2006). Although Krisch presents his view as distinct from the conflicts of laws approach arguably his view falls within that category; compare Galán and Patterson (n 75) 791.
[93] Krisch (n 87) 296.
[94] ibid. 285.
[95] Krisch (n 87) 285-296. Cf. Galán and Patterson (n 75) 797.

deliberation. The justification for that goal is based on a two-pronged argument that can be useful, with modification, for making a normative case for pluralism in private law.

(i) Public autonomy / private autonomy

First, a space for deliberation should be maintained because it enables individuals to realize their public autonomy, ie to be involved in democratic lawmaking processes. Krisch places his argument in the context of political theory, albeit that the precise justification for his view on public autonomy remains somewhat opaque.[96] Briefly restated, he elaborates the point on deliberation by putting forward that pluralism provides adaptability, it creates space for contestation, and it offers a possibility of keeping 'checks and balances' between different levels with competing claims to supremacy.[97] Suggesting that these three elements can apply in the EU but may fall short for maintaining a global pluralist order, he adds that ultimately the normative argument in support of legal pluralism rests on the foundational ideals of political order, in particular on public autonomy.[98] Specifying when those foundational ideals are met, he defers to Habermas: '[i]n a Habermasian interpretation, social practices deserve the attribute 'public autonomy' when they concretize the discursive requirements that allow all to be the authors of the rules to which they are subject.'[99] Krisch emphasizes the need for inclusion through procedural mechanisms and discursive practices. Ultimately, this kind of pluralist conception should provide the best fit for managing the tension between the inclusion of all those affected and the insistence on self-determination by groups with particular commonalities and common goals.[100]

[96] A particular criticism that has been raised is that he groups together, and treats as similar, groups of philosophers with very different views: Waldron (a Lockean liberal), Habermas (a discourse theorist), Rawls (a Kantian liberal), Pettit (a republican), and political pluralists like Laski. See Patrick Capps and Dean Machin, 'The Problem of Global Law' (2011) 74 *Modern Law Review* 794, 803.
[97] Krisch (n 87) 70 and 78 ff.
[98] ibid 99 and 103.
[99] ibid 103.
[100] Krisch (n 87) 100.

Schiff Berman appears more hesitant to pursue an argument based in political philosophy,[101] but also acknowledges that his cosmopolitan pluralist view is at least partially indebted to the proceduralist vision of Habermas.[102] Leaving his political commitment somewhat open—i.e. he concedes a liberal core in his theory of cosmopolitan pluralism but is unwilling to commit to a particular vision of liberalism[103]—Schiff Berman defends his proceduralist approach to pluralism on the basis of four normative arguments.[104] First, pluralists acknowledge the reality that people hold multiple community affiliations rather than—like the universalists or territorial sovereigntist against whom his theory argues—dissolving that multiplicity into either universality or separatism. Second, Schiff Berman argues that pluralism creates a situation in which decision makers are encouraged to take 'a restrained approach to their own potentially jurispathic power', in particular by asking whether deference to other norms might potentially be possible. Third, there is a substantive argument that says that outcomes might be better because there is, in this procedural pluralist view, more opportunity for variations and experimentation. Finally, four, the inclusion of multiple communities may make it more likely that they will at least acquiesce in the ultimate decision, even if they do not agree with the result. From a normative perspective, therefore, a legal pluralist view can be regarded as preferable to alternative approaches—such as sovereigntism or universalism—because it creates spaces within which the voices of individuals or groups can be heard. That enables actors to be at least partially—to the extent that they do not defer to others—in charge of their own autonomy.[105]

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[101] Schiff Berman (n 82) at 803 notes that 'my book is not, and does not attempt to be, a work of political philosophy.'

[102] Schiff Berman (n 16) 18.

[103] Schiff Berman (n 82) 805, where he contrasts his work with that of Will Kymlicka, in particular *Multicultural Citizenship. A Liberal Theory of Minority Rights* (OUP 1995). Whereas Kymlicka seeks a structural representation of minority groups, Schiff Berman only goes as far as saying that the inclusion of multiple groups in society is *preferable*, but not that it is a requirement for legitimacy.

[104] For a 'restatement' based on the theory put forward in his book on *Global Legal Pluralism*, see more recently Paul Schiff Berman, 'Non-State Lawmaking through the Lens of Global Legal Pluralism' in: Michael A Helfand (ed), *Negotiating State and Non-State Law. The Challenge of Global and Local Legal Pluralism* (CUP 2015) 15, 27.

[105] But note that Schiff Berman leaves it open in which circumstances such deference should take place. His view is procedural and therefore focuses on inclusion, recognizing that many normative conflicts remain unsettled. See Schiff Berman (n 16) 15.

The argument that a pluralist perspective enables actors to be in charge of their own autonomy carries weight also in private law, in particular in contract law. Different kinds of autonomy are at stake there: not just public autonomy—the authority of groups to self-legislate through democratic mechanisms—but also private autonomy. The value of private autonomy requires that contract law enables contracting parties to give effect to their will.[106] It is often exemplified by the freedom of contract, which requires that parties are free to decide with whom to contract and on what terms. Against this backdrop, legal pluralism can add a new element to the realization of private autonomy by establishing that parties are free to decide also *under what law* to contract. That is of particular relevance in transnational contracting, where parties deal with counterparties in other jurisdictions. Whereas a monist system may curb the possibilities that parties have in relation to choice of law, a legal pluralist framework allows parties to opt out from systems that they do not like and to opt in to systems that they find more favorable.[107] Normatively, this supports the case for legal pluralism in contract law—even if it should be noted that in reality autonomy in contract law is hardly ever absolute, since mandatory rules often set limits to the freedom of contract.[108]

(ii) Toleration

Second, the interaction between different legal orders or communities is mediated through a principle of *toleration*. Toleration is an element more often encountered in 'strong' pluralist theories, apparently as a counter-argument to the way in which conflicts are resolved in monist (or even in weak pluralist) systems, where the authority

[106] This is the most commonly recognized foundation of autonomy in private law; see e.g. James Gordley, *The Philosophical Origins of Modern Contract Doctrine* (OUP 1991) 161 ff and compare Art II.-1:102 of the Draft Common Frame of Reference (DCFR). Some arguments have been put forward in support of a broader notion of party autonomy in contract law, encompassing not just the freedom of contract but also extending to goals of self-realization and fairness; see e.g. Stephen A Smith, 'In Defence of Substantive Fairness' (1996) 112 *Law Quarterly Review* 138 and further back Ludwig Raiser, 'Vertragsfunktion und Vertragsfreiheit' (1960) part IV, reprinted and online available at: http://www.european-law-school.eu/media/ReaderGrundmann.pdf.

[107] Cf Jan Smits, 'A Radical View of Legal Pluralism' in Leone Niglia (ed), *Pluralism in European Private Law* (Hart 2013) 161.

[108] This is an important reason why theories of European contract law, even if they claim to take a radical legal pluralist view—such as the one espoused by Jan Smits—in reality cannot be deemed 'strong' pluralist approaches.

of the state often decides conflicts. Non state-centric, strong pluralist views instead focus on mechanisms that enable lawmaking actors to engage in norm conflicts in a non-hierarchical way. Such approaches thereby support the inclusion of multiple values and viewpoints for the sake of public autonomy—making toleration a secondary argument in favor of a strong pluralist perspective.

The normative argument seems at first blush persuasive. How a principle of toleration is applied in practice to manage conflicts between different normative orders, and how it relates to public or private autonomy, however, are questions that require further work. At this point, existing theories are only partially able to provide grounds for a pluralist theory for transnational private law, which is in part due to the diverging meanings that are given to ideas of toleration.

According to Krisch toleration means that the value choice made by a community are tolerated, or given deference, by another community even if that choice does not fit the normative commitment of the other community.[109] More concretely, in the context of Krisch's inquiry into international public law, regulatory bodies should tolerate and respect the standards and decisions of other bodies.[110] According to Krisch, this approach will be straightforward within the EU, where the national and European polities and their respective institutions can be characterized as polities that deserve such respect, but harder outside the EU, where 'the candidates are many and their credentials often unclear; moreover, the link between polities and institutions will often be tenuous.'[111] The solution in those cases is that not every alternative view should be deferred to: only those of bodies which instantiate public autonomy, in which the level of toleration is directly proportionate to the way in which it is internally structured so as to give effect to public autonomy. Examples where this might work are, according to Krisch, cases such as the Organization for Economic Co-Operation and Development (OECD) negotiating foreign investment rules mainly targeted at outsiders, the Basel Committee drawing up financial regulation for the rest of the world, or the Financial

[109] Cf Schiff Berman (n 16) 193.
[110] Krisch (n 87) 100-101.
[111] ibid. 101.

Action Task Force (FATF) enforcing money-laundering standards against recalcitrant third parties.[112]

This view, in particular in the field of public international law, seems attractive since it envisages a space for political deliberation in which actors with the greatest commitment to public autonomy prevail in cases of conflict. Yet, there concerns as to how this would work in practice that makes the theory open to vulnerability. First, it is hard to see how the 'win' in each conflict would not go to the most powerful regulatory body, in effect lending support to extant inequalities.[113] Second, if a regulatory body must respect or defer to another normative system, it is hard to uphold that 'toleration' supports public autonomy—at least not the public autonomy of that body. It has been suggested that the only solution to this conundrum is to decide conflicts on the basis of general international legal norms or general principles of justice and legitimacy, such as applied by institutional pluralists like MacCormick, Kumm or Maduro.[114] That would then of course in a 'weak' form of legal pluralism, as discussed above,[115] and moreover demands a consensus on public autonomy at the global level that is unlikely to be established.[116]

Other authors plead for a principle of toleration in another way, resembling mechanisms of private international law, or conflict of laws as it is referred to in the US and in the UK. Schiff Berman opts for a conflict of laws approach that—other than existing regimes of private international law—not only includes state law but also norms created by non-state actors. The aim is to create a space for negotiation between normative systems: '[t]his vision of conflict of laws may help to better negotiate the inevitable divide

[112] ibid. Krisch also notes that private regulation may easily fail to satisfy public autonomy demands. That is a valid point, and it would suggest that in case of conflict, public regulation is likely to trump private regulation. Seeing that many cases governed (in the first instance) by private regulation are never brought before a court or tribunal in which this relationship between sources of law is put to the test, alternative ways of managing pluralism will however need to be considered. See below, part IV.2.
[113] Capps and Machin (n 96) 808.
[114] ibid. 809.
[115] See part III.1.
[116] Neil Walker discusses a number of 'convergent' theories that work towards that kind of consensus, yet they relate primarily to international law and human rights law; see Walker (n 8) 58 ff. In private law, with its variety of lawmaking actors and substantive norms, such consensus seems harder to find the further one gets away from national polities. Compare also Guido Comparato, Guido Comparato, *Nationalism and Private Law in Europe* (Hart 2014) chapter 3.

between self and other by requiring communities both to acknowledge competing community norms and to wrestle explicitly with the question how much to assimilate or give deference to those competing norms.'[117] This view seems attractive in its attempt to create a (hybrid) space for deliberation, yet it has been criticized for remaining vague in relation to its normative underpinnings. For it to constitute a normative view, it has been said, there should be some moral guidance on how legal conflicts between different communities should be resolved. For example, on what ground can jurisprudential practices that are considered 'beyond the pale' (e.g. certain practices of *Shari'ah* law such as stoning) be set aside by other legal communities (e.g. a Western legal system)? Although Schiff Berman indicates that the possibility exists to overcome the deference that would normally be owed to a non-state jurisdiction,[118] he does not specify the basis of that outcome. One would however expect that there was some normative (or moral) basis to reach this conclusion, indicating within which reasonable boundaries solutions can be regarded as acceptable. The recognition of such boundaries would, however, likely restrict contestation of claims and thereby mute real discussion.[119] Schiff Berman's theory may be criticized for remaining vague on this issue.

A similar approach is put forward by Ralf Michaels. Finding that a pluralist perspective—or a view based in interlegality—is the most appropriate framework for law in times of globalization, he suggests that ordering of some sort is still a requirement of most legal systems, and that it should be achieved through the concept of recognition: 'recognition among legal systems ... creates stability (or the illusion of it)'.[120] Legal systems, or if one prefers: legal orders, can in this view create ordering by giving mutual recognition to solutions found in other systems. This is a view very close to conflict-of-laws positions on comity. Recognition by a legal system is not regarded as a constitutive element for the validity of rules developed within another legal system, as might have been the case in traditional studies of legal pluralism, in which customary law needed the recognition of the state in order to be enforceable. Instead, the focus is on

[117] Schiff Berman (n 16) 194.
[118] Schiff Berman (n 16) 225.
[119] Galán and Patterson (n 75) 796-797.
[120] Michaels (n 9) 256.

'recognition as a practice of the recognizing law'.[121] Put differently, the problem is one of perspective. In the eyes of the state, all other legal orders depend on recognition by the state, but in the view of Islam even state law is subject to recognition by *Shari'ah* law.[122] In accordance with strong legal pluralist views, no system takes hierarchy over another in a more absolute manner. Practically, however, it would seem that this approach makes it possible for a state to deny recognition to religious law, since each normative system—in this case the state—decides for itself which rules it regards as law.[123]

While Krisch's view raises questions by seemingly creating a loophole for more powerful actors to impose their norms on weaker regulatory bodies, Schiff Berman's approach may be criticized for remaining vague. Without minimum values or other guiding principles to steer choices in hybrid regulatory spaces, almost any move is possible. Michaels' solution, also based in private international law, seems more straightforward and offers some useful contours for a practical application of a principle of toleration. How it applies in private law—in particular how it can safeguard private law values such as legal certainty and consumer protection—is however also not immediately clear. Michaels has expressed a preference for a private international law approach to European private law, primarily because he finds it better matched with a strong pluralist or inter-legal approach than mechanisms suggested by other scholars in that field,[124] but while that view carries some normative weight by paying heed to public and private autonomy, it is not clear how it can safeguard private law values.[125]

In sum, the theories put forward by Schiff Berman and by Krisch, and on this point also by Michaels, provide useful guidance on the normative reasons that may support a legal pluralist perspective on transnational private law. Yet, they waver when it comes to defending a 'strong' pluralist perspective, either by leaving quite a bit of leeway for the theory to lend support to extant inequalities, by remaining vague on how conflicts can

[121] ibid.
[122] ibid. at 252.
[123] For an application of this approach to a German case on circumcision of boys on religious grounds, see Ralf Michaels, 'What is Non-State Law? A Primer' in: Michael A Helfand, *Negotiating State and Non-State Law. The Challenge of Global and Local Legal Pluralism* (CUP 2015) 41.
[124] eg Jan Smits or Thomas Wilhelmsson. See Michaels (n 42), 142-143, 159.
[125] Further below, part IV.2.

actually be resolved, or on how minimum values of private law can be safeguarded. Nonetheless, that does not automatically lead to the conclusion that it is impossible to normatively defend a strong or radical pluralist theory for transnational private law. If it is accepted that the realization of public and of private autonomy should be a core value, the only question is how the second value, the principle of toleration, can practically lend support to it in a way that does not impose a hierarchy upon lawmaking actors, whilst at the same time safeguarding core values of private law such as legal certainty and consumer protection.

At this point the normative question goes over into a question as to how legal pluralism can be 'managed'. The cosmopolitan and post-national pluralist theories discussed here also provide some good starting points for considering that question in relation to private law. They reveal in some detail which positions may be taken on questions of legal pluralism such as: which community is the addressee or addressor of norms, how do legal orders interact, and who has ultimate authority to decide between conflicting norms? Since we are also dealing with normative choices in this regard—or perhaps rather choices between norms—it seems fitting to discuss them briefly as a follow up to the normative justifications for a legal pluralist perspective discussed just now. As will be seen, private lawyers have already started to engage with such questions under the heading of a new methodology for transnational private law.

2. A Methodology for Transnational Private Law, or 'Managing Pluralism'

Methodologies for 'managing pluralism' seek to determine how legal pluralism actually deals with conflict between legal orders.[126] Can norms co-exist, or who has ultimate authority to decide which norm prevails? Most private lawyers will also want to know:

[126] I use the term 'legal order' here in a loose sense, including communities in which lawmaking occurs regardless of whether they qualify as 'law' under traditional, state-centric perspectives.

how can legal certainty be guaranteed,[127] and how can the interests of weaker actors in society, such as consumers or workers, be protected?

The difficulty with these questions is that they not only venture into almost entirely uncharted territory, but also that the authors who have engaged with these type of questions have defended widely diverging viewpoints. Some of the work that has been done in this area resonates with the approaches taken by Krisch and Schiff Berman for (primarily) public law. In line with mechanisms that can give hands and feet to the idea of 'toleration', these can be qualified as private international law type approaches to managing conflicts. Although they fit well with strong or radical legal pluralist perspectives, one might object that they leave too many points unsettled and cannot guarantee private law's core values. For that reason, it seems necessary to consider alternatives that aspire to go beyond toleration and to actually achieve better coordination, if not harmonization of norms.[128] I will consider both types of approaches.

a. Private international law approaches to 'managing pluralism'

Approaches based in private international law do not need to be discussed extensively here, seeing that the reservations raised against them in public law theories—in particular the obscure normative basis for recognition or non-recognition of foreign norms—[129] apply with equal force in private law. Some situations may still be thought of where private international law approaches could function as a mechanism to manage pluralism in private law, yet only if the right conditions are met.

The first situation that comes to mind is a contract between commercial parties of (more or less) equal size and bargaining power. There is little reason to think that private law should step in to protect either of them against unfair conduct of the other party, as might be the case in contracts where there is an imbalance between the parties (eg in

[127] Stressing the importance of this point for international commerce, Hesselink (n 17) 231-233.
[128] Depending on the degree of coordination aimed for, Neil Walker might categorize such approaches as divergent vs. convergent approaches to global law. Walker (n 8) 55-56.
[129] Above, p 25.

B2C contracts or in commercial contracts where one of the parties is an SME). For these types of cases, private international law rules could indeed provide a useful framework by enabling parties to make a choice of law that is appropriate to their contractual objectives. In a pluralist view, it can even be defended that private international law—other than it does now—should enable parties to opt for non-state law as the applicable law to their contract. Assuming that different normative orders would have no trouble with accepting the parties' choice through their own mechanisms of recognition,[130] this framework would thus enable private parties to freely choose the law or norms that they wish to apply to their contract. That view fits with Jan Smits' theory for legal pluralism in European private law, which is based on individual choice, and which Michaels has deemed a 'liberal pluralism'.[131] Nonetheless, as Hesselink has emphasized, this type of framework can only satisfy contracting parties' need for legal certainty if it is clear what law ultimately governs the contract.[132]

Second, but this is a mostly theoretical proposition, a private international law approach might work in a context in which greater clarity exists as to the minimum values that normative orders seek to uphold. For example, a choice of law mechanism of this kind can work in a B2C context if the consumer always has the right to invoke the rules of his own legal system in case they offer stronger protection than the chosen law. Such a rule exists in Article 6(2) of the Rome I Regulation in the EU.[133] The current framework, however, is imperfect because it does not include non-state law as an autonomous source of law. That results in two problems from a choice perspective. On the one hand, choices for non-state law are likely to be overridden by state law if a dispute is litigated before a court, rendering the parties' choice to a large extent meaningless. On the other hand, with private regulation operating largely outside the reach of state law, it is

[130] In other word, assuming that there are no normative objections as might occur if state law clashes with religious law, or if there are other grounds on which to deny recognition, e.g. because the contract goes against public policy.
[131] Michaels (n 42) 149; and in the same volume Smits (n 107) 161 ff. See also Jan Smits, 'Plurality of Sources in European Private Law, or: How to Live with Legal Diversity?' in Roger Brownsword, Hans-W Micklitz, Leone Niglia and Stephen Weatherill (eds), *The Foundations of European Private Law* (Hart 2011) 323.
[132] Hesselink (n 17) 231.
[133] Regulation (EC) 593/2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L177/6.

unlikely that mandatory rules of consumer protection law will always be enforced in individual cases. These situations therefore demand a stronger form of coordination between state law and non-state law in order to ensure a minimum level of consumer protection.

b. A methodological lens for Transnational Legal Pluralism

It would seem that the safeguarding of private law values such as legal certainty and consumer protection calls for at least some kind of coordination between lawmaking actors. Whereas this is not a new problem for transnational lawmaking, existing solutions have mostly been sought in formal regulation introduced in a top-down manner, e.g. the harmonization of national private laws in the EU through directives and regulations.[134] Not only do such approaches not take into account non-state law, they are also of limited effectiveness since they are mostly of a piecemeal nature and they leave many differences between national laws intact either because they pursue minimum harmonization or because they acquire some local color in the process of implementation. Noting that the continued co-existence of norms in a setting characterized by a plurality of state and non-state law is not perceived as a problem—as said, there are normative arguments in favor of legal pluralism—the question arises whether there are other ways to coordinate lawmaking with an eye to ensuring core values of private law. In the existing literature only one methodological approach stands out—I discuss it here noting that it will likely only be able to serve as a starting point for a more detailed approach tailored to a specific context, such as European private law.

A methodological view on legal pluralism that seeks to identify a mechanism of coordination between global and national, state law and non-state law has been articulated in scholarship is 'transnational legal pluralism' (TLP). It stands out from the global legal pluralism of Schiff Berman or the post-national view of Krisch by being one

[134] Mostly in consumer contract law; see e.g. Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L95/29; Directive 99/44 on certain aspects of the sale of consumer goods and associated guarantees [1999] OJ L171/12; and Directive 2011/83/EU on consumer rights [2011] OJ L304/64.

of the few global legal pluralism approaches that explicitly engages with private law issues. Notably, although aspects of inclusion and deliberation are also present in this context—e.g. it also suggests that processes are needed that include multiple lawmaking levels at different, formal and informal, levels of regulation—they are played out against a background in which other concerns are at stake than in constitutional or international law. In particular, the work of Zumbansen—sometimes in cooperation with Calliess—is important because it emphasizes that lawmaking for private law transactions is embedded in a deeper divide between the 'market' and the 'state'.[135] Choices made in the design of governance strategies therefore always reflect a balancing of efficiency considerations and democratic values.[136] The balancing of these values is representative of most regimes seeking to lay down rules for private law transactions. Policy choices often involve the balancing of business interests—eg in a limited regulatory regime, leaving much scope for profit-seeking business pursuits—with broader social interests such as the protection of human rights or the protection of (economic) interests of consumers.[137] Any governance strategy, therefore, will have to find an appropriate mechanism by which these—in many cases contrasting—values can be balanced.

The work of Zumbansen and Calliess adds a new, but complex perspective to the governance debate. TLP explicitly presents itself as a normative theory, built on a rich, interdisciplinary array of theoretical frameworks and methodologies. Zumbansen and Calliess aim to show that their take on transnational law 'picks up on past and present contestations of the relationship between law and society'—in which context much can be learned from experiences with the regulatory transformation of the nation-state—[138]

[135] Gralf-Peter Calliess and Peer Zumbansen, *Rough Consensus and Running Code* (Hart, Oxford 2010).
[136] This terminology is used by Gillian K Hadfield, 'The Public and the Private in the Provision of Law for Global Services', in: Volkmar Gessner (ed), *Contractual Certainty in International Trade: Empirical Studies and Theoretical Debates on Institutional Support for Global Economic Exchanges* (Hart, Oxford 2009) 239.
[137] That divide can also be observed in European contract law. For a pluralist perspective on constitutional values, see Chantal Mak, 'The One and the Many: Translating Insights from Constitutional Pluralism to European Contract Law Theory' (2013) *European Review of Private Law* 1189.
[138] Calliess and Zumbansen (n 135) 20. 'Regulatory transformation', in this context, appears to see mostly at processes related to the rise (and decline in more recent years) of the welfare state in Western Europe (Germany); compare Peer Zumbansen, *Ordnungsmuster im modernen Wohlfahrtsstaat. Lernerfahrungen zwischen Staat, Gesellschaft und Vertrag* (Nomos, Baden-Baden 2000) and Peer

and 'unfolds these anew in the context of an interdisciplinary assessment of governance models in a global world'.[139] To that end, they explore existing theories on the nature of law and its role in society—new institutional economics, systems theory—in order to provide a background to the evolution of private law in society, but also to identify shortcomings in the ability of those existing theories to provide a framework for lawmaking in times of globalization. Systems theory is criticized for its lack of normativity.[140] New institutional economics, by focusing on the distinction between social norms and formal norms, is said to obscure how the law is in a constant process of negotiating the relation between formal and informal (social) norms.[141] TLP, seeking to overcome such shortcomings, 'is offered as both an explanatory and constructive tool to describe, assess and further develop the different law-making regimes, which can be observed in the transnational arena'.[142] The project therefore explicitly aims to present a normative framework for lawmaking, emphasizing that TLP should be regarded as a 'constructive tool' to this end.

With reference to this wide range of underpinning theories, a description of the contents of a theory of 'transnational legal pluralism' is coated in relatively general terms. Its starting point is that TLP can be construed as a *methodology* for a better understanding of governance processes that fall between 'national' and 'global' governance theories. The term 'transnational' can be used to denote a sphere in between those two perspectives.[143] Transnational law then becomes a 'methodological lens through which we can study the particular transformation of legal institutions in the context of an evolving complex society.'[144] That methodology builds on three elements: actors, norms and processes. By focusing on these factors, it becomes possible to consider norms from

Zumbansen, 'Law After the Welfare State: Formalism, Functionalism and the Ironic Turn of Reflexive Law' (2008) 56 *American Journal of Comparative Law* 769.
[139] Calliess and Zumbansen (n 135) x.
[140] For a detailed analysis, see Zumbansen 2008 (n 138).
[141] Calliess and Zumbansen (n 135) 22.
[142] ibid. 1.
[143] Peer Zumbansen, 'Defining the Space of Transnational Law: Legal Theory, Global Governance and Legal Pluralism' (2011) Comparative Research in Law & Political Economy, Research Paper No. 21/2011; available at http://digitalcommons.osgoode.yorku.ca/clpe/59.
[144] ibid. 5.

a perspective that is neutral on whether norms are part of an official legal system, and also independent from the territorial grounding of law in a particular jurisdiction.[145]

Whilst the suggested framework has some appeal, the connection of TLP with concrete problems of lawmaking in modern private law is not easily made. The case studies undertaken by Zumbansen and Calliess on corporate governance and on consumer contracts go some way towards exploring the practical application of the theory.[146] Nevertheless, the mechanism for 'managing' pluralism suggested by Zumbansen and Calliess is of an experimental nature. Whereas their work lays down a framework for transnational private regulation that provides useful tools for the mapping of lawmaking processes in the transnational sphere—which moreover seems readily transferable to lawmaking in European contract law—it is not immediately obvious how these processes can (or should) be monitored to safeguard values like legal certainty and consumer protection. Its mechanism for 'managing' pluralism is based on the concept of 'rough consensus running code' derived from internet governance.[147] This mechanism, in transnational private regulation, would be kicked off with the introduction of a voluntary regulatory instrument (for example the German Corporate Governance Code of 2002) around which, through adoption by businesses with the possibility to make changes and additions, a governance regime can develop and solidify over time.[148] Although that mechanism in theory allows for the creation of new rules in an interactive process between the state, private actors and civil society, as a governance strategy it provides little guidance on what the outcome is likely to be. As with theories of hybridity or interlegality, it seems that any move is possible. The case study on consumer contracts, for example, reveals that the multitude of fora in which minimum consumer protection standards are discussed and promoted diminishes the likelihood of them being translated into a 'running code'.[149]

[145] ibid. 7.
[146] Calliess and Zumbansen (n 5) chapters 3 (consumer contracts) and 4 (corporate governance).
[147] ibid. 134 ff.
[148] For this example, see Peer Zumbansen, 'Neither "Public" nor "Private", "National" nor "International": Transnational Corporate Governance from a Legal Pluralist Perspective' (2011) 38 *Journal of Law and Society* 50, 67 ff.
[149] Calliess and Zumbansen (n 135) 179-180.

Notwithstanding this critique, the conception of 'transnational legal pluralism' as a methodological lens through which to study processes of societal evolution, and the role of law therein, opens new vistas on how private law norms can be connected between different levels of regulation—formal and informal, local and global. The methodological focus on 'actors, norms and processes' provides a helpful starting point for understanding lawmaking processes in transnational private law and the political, social and economic backgrounds that influence these processes. The broader value of TLP lies in its emphasis on democratic processes, and its questioning of the role of law in the relationship between 'market' and 'state'.

What remains open, however, is the question how legal pluralism can, or should, be managed. The methodology proposed as TLP does not provide normative guidance as to which law has ultimate authority nor to how values like legal certainty or consumer protection can be safeguarded. To be fair, that was not its aim since the theory mainly seeks to provide a lens through which to study different social science approaches to understanding the complexities of transnational private transactions in a global context. But where to go from there?

3. Limitations to the Framework and the Need for 'Coordinated' Legal Pluralism in European Contract Law

Taking stock, it seems that while various arguments lend support to a legal pluralist perspective for transnational private law, the question how the inter-connections between different lawmakers at different levels of regulation—national or international, formal or informal—should be understood or guided is more problematic. The position taken by some pluralists, like Schiff Berman, that we live in a world of conflict and that many of these conflicts are constantly being re-negotiated may be true,[150] but it is also somewhat unsatisfactory in the context of private law relationships. What parties mostly wish to know is how they can draft a contract so that it protects them against litigation.

[150] Schiff Berman (n 16) 15. For private law, see the example of the proposed Common European Sales Law (CESL) discussed below.

In other words: *if* a dispute arises, what will the legal outcome of the case most likely be? Legal certainty is important and one step towards it, in consumer contracts, is to know which mandatory rules will place limitations on the parties' freedom of contract. What level of consumer protection is laid down in the relevant regulation?

The following explores how these values factor into a legal pluralist perspective on private law, placing limits on a framework based in 'strong' or radical legal pluralism. Whilst strong legal pluralism may be the normatively preferable view because of its non-hierarchical view of sources of law, it will be argued that some coordination is needed to ensure that legal certainty and consumer protection are sufficiently safeguarded in each relevant sphere: national, EU and international law; formal and informal law. Seeing that it is nearly impossible to discuss this issue on a global level—in particular because the institutional framework is more diverse and characterized by claims to authority that to varying degrees give voice to public autonomy—[151] the following observations will focus on the question how pluralism can be managed in European contract law.

a. Coordination through legislation: CESL as a case study

Arguably, positive law can in many cases answer the question what law applies—either on the basis of a choice of law by the parties or on the basis of the default rules of private international law—and what the outcome of a potential dispute is likely to be in the light of the rules of contract law of the governing law.[152] In the transnational context, however, the complexity of a transaction may not allow for such a straightforward analysis. An interesting example arose in the European Commission's proposal for a Common European Sales Law (CESL).[153] The proposal has in the meantime been withdrawn, yet the European legislator has indicated an intention to redraft it in light of the needs of the 'digital single market'. With that future proposal in mind the following

[151] Above, p 24.
[152] With some margin of error, since legal advisors may not be able to predict every kind of liability that may arise from a contract, nor the amount of damages that may arise.
[153] Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, COM(2011) 635 final.

takes up the discussion that arose earlier regarding the position of the proposed CESL in relation to other sources of law.[154]

One of the main issues that came up in relation to the CESL is what status it should have in relation to other sources of law—in particular national, EU and international law—for the purposes of private international law. Being envisaged by the European Commission as an 'optional instrument' that contracting parties would be able to choose as a self-standing set of rules governing their contract,[155] the question arose how such a regime could be introduced in accordance with the limitation laid down in Art 3 of the Rome I Regulation, prescribing that only state law can be opted for as the chosen law. Further, a substantive debate arose on the question whether the CESL laid down a regime with a sufficiently high level of consumer protection, and whether consumers might under the rules of private international law be able to invoke the protection of their own national consumer laws in cases where these were more protective. The latter possibility, grounded in Art 6(2) of the Rome I Regulation, would render the idea of the CESL as a self-standing regime meaningless.

The puzzle that arose is a familiar one in the governance discourse in European private law: who should do what at what level of regulation?[156] Should the European legislator be able to introduce the CESL as a self-standing regime, it would erase the fall-back on national law made possible by Art 6(2) of the Rome I Regulation, at least for the part of the 'contract law market' that would start using the CESL for their contracting practices. The prerogative of national legislators to determine the level of consumer protection laid down in their national laws would be curtailed. That could be particularly problematic if the level of consumer protection adopted in the CESL were to be lower than that found in national laws.[157]

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[154] See http://ec.europa.eu/atwork/pdf/cwp_2015_withdrawals_en.pdf (no. 60).
[155] Proposed Regulation (n 153) 11.
[156] Hans-W Micklitz, 'The Visible Hand of European Regulatory Private Law – The Transformation of European Private Law from Autonomy to Functionalism in Competition and Regulation' (2009) 28 *Yearbook of European Law* 3.
[157] It has however been suggested that a higher level of consumer protection in the CESL could have negative consequences for consumers, such as an increase in prices; see eg Horst GM Eidenmüller, Nils Jansen, Eva-Maria Kieninger, Gerhard Wagner and Reinhard Zimmermann, 'The Proposal for a

Several solutions presented themselves as to how the proposed CESL could be introduced in relation to existing laws.[158] First, the CESL could be regarded as a 28th regime for contract law in Europe, beside the 27 (now 28) national legal systems in the EU.[159] Contracting parties would in that scenario be able to choose it as the applicable law to their contract in the same way that they would choose a national regime under Art 3 of the Rome I Regulation. The European Commission did not favor this option, noting that the instrument would not fully work as a self-standing regime since consumers would still be able to invoke provisions of consumer protection of their own national laws under Art 6(2) of the Rome I Regulation in cases where those laws offer stronger protection than the CESL.

A second option would be to regard the CESL as a uniform regime of international law. In that case, the instrument would not be subject to rules of private international law but it would stipulate its own scope and applicability.[160] That option could have found a basis in recital 14 of the Rome I Regulation, albeit that a basis in a recital only is not very strong, the more so considering the uncertain wording of recital 14.[161] Another concern of the European legislator would be that a uniform law, similar to the CISG, could be supplemented or overridden by mandatory rules of national law. Since the scope of the proposed CESL excludes certain issues—such as legal personality, the invalidity of a contract because of a lack of capacity, the transfer of ownership—it becomes necessary to revert to national law for those.[162]

Regulation on a Common European Sales Law: Deficits of the Most Recent Textual Layer of European Contract Law' (2012) 16 *Edinburgh Law Review* 326.

[158] For an overview, see European Parliament, Directorate-General for Internal Policies, Policy Department C: Citizens' Rights and Constitutional Affairs, 'The Functioning of the CESL within the Framework of the Rome I Regulation' (2012), available at: http://www.europarl.europa.eu/document/activities/cont/201211/20121120ATT55984/20121120ATT55984EN.pdf.

[159] If Scotland is counted as a separate legal system, there would even be 29 systems, plus the CESL as a 30th system.

[160] Giesela Rühl has made a plea for this option, calling it a '1st regime'; see Giesela Rühl, 'The Common European Sales Law: 28th Regime, 2nd Regime or 1st Regime?', Maastricht Faculty of Law Working Paper 2012/5. Available at SSRN: http://ssrn.com/abstract=2025879.

[161] European Parliament (n 158) 12.

[162] Nicole Kornet, 'The Common European Sales Law and the CISG. Complicating or Simplifying the Legal Environment?', Maastricht Faculty of Law Working Paper 2012/4. Available at SSRN: http://ssrn.com/abstract=2012310.

The third option, and the one preferred by the European Commission, was to introduce the CESL as part of national laws. In this scenario it would function as a 2nd regime beside the existing rules of national contract law, to be applicable if the parties to a contract chose it.[163] The European Commission has expressed its preference for this option because it can ensure the application of the CESL as a self-standing regime: being part of national law and of equal application throughout the EU it becomes impossible to invoke other national consumer protection rules under Art 6(2) of the Rome I Regulation.

In the light of the perceived need for a coordinated legal pluralism, this third model would appear quite appealing. It can enhance legal certainty for contracting parties since, if they were to opt for the CESL as the applicable law to their contract, the only set of rules they would have to deal with are those of the CESL. Unlike in the existing legal framework or the two other suggested scenarios, a trader would not have to reckon with the (potentially 28) different regimes of consumer protection that he may encounter in the EU member states in which his customers reside. That could make the instrument attractive from a viewpoint of legal certainty—knowing which rules apply and to some extent being able to predict the outcome of potential disputes—and it could also decrease transaction costs since traders would not need to perform a check of various national consumer laws before being able to enter a foreign market.[164]

The question whether this third model would also result in a desirable level of consumer protection is perhaps not as straightforward. On the one hand, the drafters of the CESL could ensure that the instrument adopts a high level of consumer protection—which appeared to be the case in the final version of the proposal before it was withdrawn.[165] In any event, as it is envisaged to become part of national laws, the instrument would have

[163] Proposed Regulation (n 153), explanatory memorandum (pp 4, 6, 8 and 9) and proposed recital 9.
[164] See eg Filomena Chirico, 'The Function of European Contract Law: An Economic Analysis', in Pierre Larouche and Filomena Chirico (eds), *Economic Analysis of the DCFR. The work of the Economic Impact Group within the CoPECL network of excellence* (Sellier, Munich 2010) 9.
[165] European Parliament, Directorate-General for Internal Policies, Policy Department C: Citizens' Rights and Constitutional Affairs, 'Consumer Protection under the Proposal for a Common European Sales Law' (2012), available at: http://www.europarl.europa.eu/RegData/etudes/note/join/2012/462507/IPOL-JURI_NT(2012)462507_EN.pdf.

to give at least the protection prescribed by EU Directives aiming for minimum harmonization, as well as comply with consumer protection rules laid down in Directives aimed at full harmonization.[166] On the other hand, however, the text of the CESL would fix the level of consumer protection across a wide area of European contract law—sales contracts make up roughly 70 to 75 per cent of cross-border transactions in the EU—[167] with little chance of re-setting or re-negotiating that level. Apart from contracting parties' freedom to either opt for the CESL or for another (national) law, there is very little space for deliberation on the chosen level of protection. One wonders if an exclusion of the possibility for consumers to invoke their national laws on the basis of Art 6(2) of the Rome I Regulation, so categorically, is the wisest solution. By enabling recourse to national rules, albeit at the cost of legal certainty, at least a space is preserved in which the conditions for consumer protection that a national context might require are given an outlet. Although such local preferences could in the long term be phased out by national laws' adaptation to the EU framework or to other national laws, that kind of incremental, bottom-up process can often be preferable to the top-down imposition of a regime.[168]

Even if an instrument like the CESL could perform a coordinating function in a legal pluralist framework, this example should make clear that the balancing of various interests remains a delicate process. The enhancement of legal certainty must on occasion give way to local interests regarding consumer protection. Further, the position of the EU legislator in the lawmaking process should not, as might be thought, be above the member states' legislators, but rather besides them, in a context of normative deliberation.

[166] European Parliament (n 158) 14.
[167] Services make up approximately 28 per cent of the export of goods and services in the EU, and 23 per cent of imports. The most recent data from the OECD (July 2014) are available at: http://ec.europa.eu/eurostat/statistics-explained/index.php/International_trade_in_services.
[168] For example because top-down harmonization leaves many differences between national laws in place. Also, harmonization may be resisted on the ground that it cannot sufficiently take account of local economic preferences or of cultural factors; for an analysis in European private law, see Comparato (n 116).

An interesting point to note is that this deliberation is not only—as submitted—desirable from the legal pluralist view in which legal orders co-exist in a non-hierarchical relationship, but that it is also already partly reflected in the legal construction through which the CESL was supposed to be introduced (albeit with the restriction that the EU legislator is the one who decides on the final text). The EU legislator opted for a Regulation in which the text of the CESL was included in an annex. According to the reading of the European Parliament, this construction means that the Regulation (including the text of the annex) would be part of EU secondary law and could therefore be subject to autonomous EU interpretation, monitored by the Court of Justice of the EU.[169] Since the instrument would be introduced as part of national law, it would also have to comply with the levels of consumer protection set by existing EU Directives. In that guise, it could be envisaged that some cross-fertilization between the CESL and national laws might occur. The drafters of the CESL would have to make sure that their text does indeed comply with existing rules. That requires a compatibility check with the texts of existing Directives, but it also invites a comparison with national implementations of those Directives, which on occasion have given local color to the way in which minimum harmonization rules are implemented. For example, the proposed remedies of the CESL might have been the result of such deliberation. Where EU Directive 1999/44/EC laid down a hierarchy of remedies with repair and replacement coming before termination, thereby effectively giving the seller a 'right to cure' a defective performance, the CESL proposed a different solution. Art 106 (in particular sub 1 and 3) would give the buyer a free choice of remedies. A consumer would therefore be free, if purchased goods turn out to be non-conforming, to immediately terminate the contract and ask for his money back. That solution is likely to have been inspired by similar rights in English and Irish law, which allow the buyer to reject the goods and claim his money back.[170]

The process of legislative harmonization therefore may to some extent take place in a space characterized by normative deliberation. Yet, if the focus is on public regulation,

[169] European Parliament (n 158) 15.
[170] Compare the analysis by Hans Schulte-Nölke in a position paper for the European Parliament (n 165) 15.

whether emanating from the state or from a supranational or international organization, the framework leaves little room for engaging with the other important source of regulation in private law transactions: private regulation. As noted earlier, a growing amount of contracting occurs in a transnational sphere governed—for all practical purposes—by private regulation.[171] Examples are eBay and PayPal, platforms that offer a complete system for dispute resolution, governed by their own rules of private regulation. Are there ways to include these regimes in a coordinating mechanism that can pursue legal certainty and consumer protection in a legal pluralist framework?

b. Alternatives for coordination

At this point, coordination becomes more experimental in nature—as was seen already in the discussion of Calliess and Zumbansen's idea of 'rough consensus, running code'. Whereas that mechanism appeared to find some empirical support in the process of adoption of corporate governance rules, the landscape for consumer contract law appeared for now to be too diverse, in the number of actors and the sets of rules developed, to find a basic consensus on which to build a 'running code'.[172] Some alternative mechanisms may be considered, although the way in which they can be (more) actively used to coordinate legal pluralism in European contract law will require further research.

First, it has been observed that standard-setting is increasingly being used as a means of unification of norms in areas of contract law. Practically, this means that standard-setting bodies develop sets of model rules that can be—or should be—incorporated into the specific types of contracts to which they are tailored. Whereas standards have become of regular application in relation to goods, the European Commission has more recently mapped out a strategy for the development of standardization in services contracts.[173] The strategy entails a mandate given to European Standards Organizations

[171] See above, p 12.
[172] Calliess and Zumbansen (n 5) 179-180, and above p 31.
[173] It is based on Art 26(5) of Directive 2006/123/EC on services in the internal market OJ L376/36.

(ESOs) to develop horizontal service standards.[174] If satisfied with the quality of the proposed rules and with the procedural guarantees of the ESO, the European Commission would publish them in the *Official Journal*, thereby giving them quasi-legislative status.[175] This type of norm creation could be regarded as a form of co-regulation, in which a public regulator proposes the need for rules to be worked out on a given topic but leaves it to a private body to determine the substance of these rules.[176] This set up invites deliberation between public and private regulators as to the substance of the norms, possibly also with input from civil society. The fact that the European Commission would monitor the quality of the norms and decide on their publication in the *Official Journal* could count as a form of coordination, in particular with a view to ensuring a high level of consumer protection.

Second, flanking measures could serve as supplements to regulation, with a possibility also for the input from stakeholders. I have discussed their potential in an earlier paper in relation to the reference to 'trade usage' in the interpretation of commercial contracts under the proposed CESL.[177] In the context of trade usage, it would be particularly helpful for traders to have access to instruments of private regulation in foreign markets so that they can estimate with which usages they have to reckon that may potentially supplement terms to their contract.[178] A way of achieving that could be through the development of databases containing e.g. codes of conduct, protocols or otherwise regularly observed rules that are laid down in private regulation.

Finally, an option could be to focus on the coordinating potential of standards in EU law, such as the 'average consumer'. I have also proposed this solution elsewhere, and aim to test the usefulness of such a model in further research. Notably, the term

[174] European Commission, 'Mandate Addressed to CEN, CENELEC and ETSI for the programming and development of horizontal service standards', M/517 EN, 24 January 2013, available at: http://ec.europa.eu/growth/tools-databases/mandates/index.cfm?fuseaction=search.detail&id=525#.
[175] Delimatsis (n 30) 17.
[176] Linda Senden, 'Soft Law, Self-Regulation and Co-Regulation in European Union Law: Where do They Meet?' (2005) 9.1 *Electronic Journal of Comparative Law*, available at http://www.ejcl.org/91/art91-3.PDF.
[177] Vanessa Mak, 'According to Custom..? The Role of "Trade Usage" in the Proposed Common European Sales Law (CESL)' (2014) 10 *European Review of Contract Law* 64.
[178] Private regulation could become part of 'usage and practices' under Art 67(2) of the proposed CESL if it 'would be considered generally applicable by traders in the same situation as the parties'.

'standard' in this case has a different connotation that it does in the term 'standard-setting'. I use it here to refer to norms that are used as benchmarks for determining more concrete rules. The 'average consumer' is an example, as is the 'reasonable man'. Both are used in private law as reference points for determining which expectations deserve legal protection in contract cq tort law.[179] The central idea of the proposed model for transnational private law is that law-making actors can create greater transparency—and through this, certainty—by indicating how the rules they create relate to a central legal standard. This proposed model is for now a thought experiment, and a test of its applicability will require a further analysis. An important question in that light—taking account also of the costs and benefits of regulation—should be which lawmaker, at which level of regulation is best placed to turn standards into specific rules. The EU legislator, for example, might be strategically placed to promulgate a standard for the 'average consumer' if the aim is that it applies in all member states. Yet, if the interest of consumers are diverse throughout the EU, and better safeguarded by differentiating rules to determine the reasonable expectations of an 'average consumer', it would seem better to leave it to the member states to translate the standard into concrete rules. Whatever the outcome is of this legislative deliberation between the EU and its member states, an explicit discussion of rules in relation to a common standard should make it more straightforward for businesses and consumers to establish what rules apply to their situation in a given legal system in Europe. The 'average consumer' standard can in that sense function in a way similar to a signal or trade mark.[180]

These mechanisms for deliberation between legal orders could be starting points for further exploration of how legal pluralism in European contract law can be 'managed'. It should be borne in mind, however, that their effectiveness in relation to private

[179] See Vanessa Mak, 'The "Average Consumer" of EU Law in Domestic and European Litigation', in: Dorota Leczykiewicz and Stephen Weatherill (eds.), *The Involvement of EU Law in Private Law Relationships* (Hart Publishing, Oxford 2013) 333; and also Vanessa Mak, 'Standards of Protection: In Search of the 'Average Consumer' of EU Law in the Proposal for a Consumer Rights Directive' (2011) 19 *European Review of Private Law* 25.

[180] Or in the context of a Common European Sales Law (CESL), similar to the idea of a 'blue button', ie a short cut to signify a particular set of rules with a specific level of consumer protection. In relation to the proposed CESL, it has been suggested that the instrument could actually have a positive signaling effect as a European brand; see Martin Engel and Johanna Stark, 'The CESL as a European Brand – PayPalizing European Contract Law'; available at SSRN: http://ssrn.com/abstract=2246271.

regulatory regimes is likely to depend on different conditions than it is in public regulation. For each of the three suggested mechanisms, their relation to public regulation is more or less fleshed out: standard setting operates under conditions of co-regulation, as do flanking measures; standards such as the 'average consumer' in the envisaged model operate as guidelines for lawmakers and the use of them in public regulation could be monitored by courts.[181] However, as mentioned at various points in this paper, private regulation operates to a large extent outside the reach of state or EU regulation. There is therefore a limitation to what legal intervention can achieve in the regulation of transnational private law transactions. The question which lawmaker at what level of regulation has ultimate authority becomes less important in this context, seeing that many disputes governed by private regulation will be brought before private forums and decided on the basis of the rules laid down in this private regulatory framework rather than other, public regulation that might otherwise apply. In this, for all practical purposes, private sphere, actors and processes determine which norm will prevail based on negotiation—between regulator and stakeholders in a usually pre-determined process—rather than on an ultimate decision by a state or other public body. The adoption and use of standards, model rules or other mechanisms of coordination is therefore voluntary and will depend on the preferences of the relevant private regulator. Coordination, or managing pluralism, in that context could become an aspirational goal rather than a prescriptive agenda. That could mean that in transactions operating under private regulation legal certainty could sometimes be diminished, and more importantly that consumer protection is not always guaranteed unless a consumer takes his case to a public adjudication system.[182]

[181] On the interpretation of the 'average consumer' standard of EU law in relation to national law, the following may provide an example: *Office of Fair Trading v Abbey National plc* [2008] EWHC 875 (Comm); [2009] EWCA Civ 116; [2009] 2 WLR 1286; [2009] UKSC 6; [2009] 3 WLR 1215 (the Bank Charges case) discussed by Simon Whittaker (2011) 74 *Modern Law Review* 106.

[182] The more these private regulatory regimes become 'proceduralized', the more such goals may however be attainable. Cafaggi has observed a development towards more procedural structures in transnational private regulation—setting these forms of regulation apart from rules developed through custom—and proposes a research agenda to obtain a better understanding of their functioning, in particular in relation to public regulation and in terms of their distributive effects. See Fabrizio Cafaggi, 'The Many Features of Transnational Private Rulemaking: Unexplored Relationships between Custom, Jura Mercatorum and Global Private Regulation' (2015) 36 *University of Pennsylvania Journal of International Law* 101.

The greatest challenge remains here: if a legal pluralist framework operates on the basis that lawmakers will deliberate normative values, and that a mechanism for managing pluralism ensures that core values of private law like legal certainty and consumer protection are—at least to the greatest possible degree—being ensured, private regulators somehow have to be drawn into this process. In the three identified mechanisms this could be given shape in a dialectic procedure in which private regulators propose rules, which are then assessed and possibly amended by public regulators, perhaps followed by another round of consultation of the private regulators. Depending on the mechanism—standard-setting, flanking measures or standards as guiding points for lawmaking—the resultant rules could then be introduced in the most appropriate form, which could be as public regulation, as an overview or database of the rules that apply in specific regions, or as model rules that might be adopted by private regulators on a voluntary basis. Further options might exist and they deserve further analysis.

V Concluding remarks

'Variety is the spice of life', one might say. The argument put forward in this paper has sought to establish that a legal pluralist framework for transnational private law is indeed preferable over a monist perspective. Two strands of argumentation lend substance to this view.

First, legal pluralism is in tune with the ways in which private law works today. It is descriptively more accurate than a state-centric view that focuses on the positive laws of states as the ultimate source of law-making, as it takes due account of alternative sources of private law that are of growing importance to transnational contracting: supranational law, international law, and in particular private regulation.

Second, a normative case can be made for a legal pluralist perspective. This aspect of the inquiry has had surprisingly scarce attention until now, even if private law scholars are increasingly interested in legal pluralism as a framework for understanding

transnational law-making. The work of Ralf Michaels has highlighted the enduring importance of state law as a primary source of private law and the need to be careful with adopting a 'global pluralist' framework that might romanticize private law relationships as taking place entirely beyond state law. Taking a nuanced approach that seeks to take account of the co-existence of public and private regulation in transnational private law, this paper has explored arguments that can sustain a pluralist view on law-making in this field. Its key elements are that legal pluralism creates a space for deliberation between law-making actors, giving an outlet to the public autonomy of groups to self-legislate, but also to the private autonomy of contracting parties in their choice of law options. As a secondary argument, mechanisms of toleration are needed to ensure that lawmakers can engage in norm conflicts in a non-hierarchical way, thereby including multiple values and viewpoints for the sake of public and private autonomy.

The paper adds an important caveat to this second element of toleration. Namely, it submits that the mechanisms for 'managing pluralism' need to be specified in a clearer way than they have been in existing pluralist theories in other areas, in particular with an eye to safeguarding core values of private law. In transnational trade and commerce those are: legal certainty and consumer protection. Those values cannot be guaranteed in a pluralist framework if not some form of coordination is introduced. The precise workings of a coordinating mechanism, however, are context-depended as they rely on the institutional framework within which law-making actors operate. For that reason, the paper has focused on a context in which a strong institutional framework is in place—Europe—as an example for law-making in transnational contract law. That is not to say that the reasoning applied there might not be extended to other spaces of transnational private law, but if and how that can be done is a question for further research.

The call for a 'coordinated' legal pluralism might suggest that the framework proposed in this paper is not truly grounded in a strong or radical legal pluralist view, but is rather another example of the preference of European private law for system or order.[183] I do

[183] Michaels (n 42) 158-159; and Hesselink (n 17).

not believe that would do justice to the envisaged framework, however. If we look at the mechanisms of coordination suggested for European private law—legislation, but also standard-setting, flanking measures, and the use of standards as guiding points for law-making—one thing that should set them apart from 'weak' versions of legal pluralism is that they operate in an environment in which there is no clear hierarchy between legal orders, and no clear source of ultimate authority. True, in certain situations state law or EU legislation may be hierarchically superior to other sources of law—for example in cases where the legislator lays down new rules in accordance with the procedures for, and within the scope of its legislative competence. Still, in the law-making processes for transnational private law considered here, the relationship between public regulators—ie state legislators, or the EU legislator—and private regulators instead of hierarchical seems rather a dialectic one. In each mechanism, a space for negotiation between private stakeholders or civil society on the one hand, and public regulators on the other hand is built in. Moreover, adoption of the rules developed in these kind of cooperative processes is, perhaps not in all but certainly in some cases, subject to the voluntary take-up by private actors. The suggested framework therefore, other than weak forms of legal pluralism, does not regard state law as superior over other sources of law, but instead attributes equal quality to the substance of each of them. That could be a starting point for reconsidering the coordination of law-making in transnational private law in times of globalization, with the potential of providing a more fitting framework for the growing number of transactions that go beyond the local, and towards the global level.

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