Self-regulation in Private Law in Japan and Germany

Edited by

Harald Baum / Moritz Bälz / Marc Dernauer

Carl Heymanns Verlag 2018

ZEITSCHRIFT FÜR JAPANISCHES RECHT
JOURNAL OF JAPANESE LAW

SONDERHEFT 10 / SPECIAL ISSUE 10 (2018)

Verlag / Publisher: Carl Heymanns Verlag – a brand of Wolters Kluwer Germany, Luxemburger Straße 449, D-50939 Köln, phone: +49 221-943 73-7000; Internet: www.heymanns.com; Customer Service: phone: +49 2631-801-2222, e-mail: info-wkd@wolterskluwer.de

Bezugspreis: Das Sonderheft kann über den Verlag zum Preis von 69,– € zzgl. Versandkosten bezogen werden. Mitglieder der Deutsch-Japanischen Juristenvereinigung e.V. können das Sonderheft zum Vorzugspreis von 59,– € zzgl. Versandkosten beziehen.

Subscription price: The special issue can be purchased from the publishers for € 69 plus postage. Members of the German-Japanese Association of Jurists may buy the special issue for the preferential price of € 59 plus postage.

Anzeigenverkauf / Advertisement Sales: Janosch Kleibrink, Phone: +49 221-943 73-7797, e-mail: janosch.kleibrink@wolterskluwer.com

Anzeigendisposition / Advertisement Disposition: Wolters Kluwer Germany, Advertisements, Karin Odening, Luxemburger Str. 449, D-50939 Köln, phone: +49 221-943 73-7760, e-mail: anzeigen@wolterskluwer.com. Price list No. 11, 1 January 2018.

Druckerei / Printed by: rewi Druckhaus, Reiner Winters GmbH, Wissen

ISBN 978-3-452-29116-5

www.ZJapanR.de

Preface

The year 2016 marked the 20th anniversary of the founding of the *Journal of Japanese Law.* The Journal is jointly published by the Max Planck Institute for Comparative and International Private Law (MPI) and the German-Japanese Association of Jurists (DJJV) and aims to serve the needs of legal practitioners and scholars interested in Japanese law. Its goal is to make all areas of the Japanese legal system accessible in a comprehensive and methodologically structured manner. At present the Journal is the world's only western language publication which offers a regular and timely documentation and analysis of the myriad lines of development in Japanese law.

From November 4–5 November 2016, the MPI in cooperation with the DJJV, organized the conference "Self-regulation in Private Law in Japan and Germany" to celebrate the Journal's anniversary at its premises. The contributions to that conference are presented here in an updated and edited version. Self-regulation in private law, in Japan often called soft law, is of growing relevance for the modern societies in both Japan and Germany. Some forms of self-regulation have stood the test of time, such as commercial customs or general contract terms. But there are also new types in the form of what is called "state induced" or "regulated" self-regulation. These are increasingly emerging as governments delegate some of their traditional tasks to private institutions.

In this volume, leading private and commercial law scholars from Japan and Germany present an up-to-date and comprehensive analysis of the highly complex and diversified phenomenon of self-regulation from a theoretical as well as a practical perspective. The book is the first comparative study of Japanese and German law in this surprisingly under-researched area of regulation.

The editors gratefully acknowledge the generous financial support for the conference from the German *Fritz Thyssen Foundation* which was foundational for the project. The editors would like to extend special thanks to *Janina Jentz* as well as to *Anna Katharina Suzuki-Klasen, Michael Friedman,* and *Jocasta Godlieb* for their skillful and diligent editorial support which made this book possible.

Harald Baum	*Moritz Bälz*	*Marc Dernauer*
Hamburg	Frankfurt/Main	Tōkyō

March 2018

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I. Phenomenology of Self-Regulation

Terminology, Development, and Institutional Framework of Self-regulation in Japan

Marc Dernauer[*]

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I. INTRODUCTION

Despite the fact that self-regulation is only rarely discussed in the media and only in part thoroughly analyzed by legal scholars,[1] it is a widespread and important ordering phenomenon in today's Japanese society. Moreover, as two basic forms of decentralized social regulation and monitoring, self-regulation and the similar concept of self-administration have a long and parallel tradition in Japan, going back to the 13th century.

II. DEFINITION

1. General Concept

In Japan, there is no legal or generally accepted definition of "self-regulation" – in Japanese it is called "*jishu kisei* (自主規制)" – but the prevalent

* Prof. Dr. Marc Dernauer, LL.M. (Tōhoku University), Associate Professor of Civil Law, Faculty of Law, Chūō University, Tōkyō.

1 H. HARADA, *Jishu kisei no kōhō-gaku-teki kenkyū* [Public-law Research on Self-regulation], Vol. 1 of Kyūshū University's legal publication series *"Kyūshū Daigaku hōgaku sōsho"* (Tōkyō 2007) 2–3, 16 –17.

concept can be described as a "discretionary ordering by private entities in response to an outside impact and in conformity with public interests".[2]

"Ordering", in Japanese, "*kisei* (規制)", refers to regulation *and* monitoring on the basis of defined rules. This primarily refers to measures that restrict the actions of individuals or entities, but depending on the context it may also include guidance instruments such as the awarding of benefits of various forms.[3] In many examples of self-regulation, both kinds of instruments of ordering can be found. The ordering can pertain to fully legally binding rules or to rules of less or no binding force, including any type of "soft law" as well as informal arrangements and cooperations. Therefore, the ordering can involve both formal and informal means.[4]

"Discretionary" can mean "voluntarily" or "genuine", but it also includes examples of self-regulation where the state participates in, induces or orders self-regulation as well as instances where it entirely or partly leaves to the entity the choice of *how* to carry out self-regulation in view of a particular objective and certain defined specifications.

An "outside impact" is interpreted very broadly. It can refer to legal requirements, administrative demands, legal or administrative incentives, and other external social and economic factors that have an influence on the entity.

Problems are caused mainly by the remaining elements "private entities" and "conformity with public interests".

2. Self-regulation and Self-administration

Whereas self-regulation usually refers only to regulations adopted by private law entities, self-administration refers to regulation and monitoring carried out by public law entities for the performance of public tasks. It is recognized, however, that there are some self-regulatory private entities and

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2 HARADA, *supra* note 1, 14, 239 (in Japanese: "*Aru shiteki hō-shutai ni taishite gaibu kara inpakuto ga ataerareta koto o keiki ni, tōgai hō-shutai no nin´i ni yori, kōteki rieki no jitsugen ni tekigōteki na kōdō ga torareru yō ni naru koto* ある私的法主体に対して外部からインパクトが与えられたことを契機に、当該法主体の任意により、公的利益の実現に適合的な行動がとられるようになること"). Harada, a public law scholar, used this definition in his comprehensive work on self-regulation, which is often cited by other authors. Some other authors, however, refrain from consenting to or offering a precise definition. They suggest that the phenomenon is too complex and manifold. They instead confine themselves to categorizing the various forms of appearances of self-regulation, describing its functions and pointing to the various legal problems involved; see for example J. NAGAO, *Jishu kisei to hō* [Self-regulation and the Law] (Tōkyō 1993) 1, 2, 3–6, 16–20, 21 et seq. in his comprehensive work on self-regulation in the field of private law.

3 HARADA, *supra* note 1, 8–10.

4 NAGAO, *supra* note 2, 4–5.

self-administrative public law entities which are in their nature very similar to each other.

For example, on the one hand there are the bar associations in Japan (the Japan Federation of Bar Associations (JFBA, *Nihon Bengoshi Rengō-kai,* 日本弁護士連合会) as well as the many local bar associations) which are public law entities with (mainly) public tasks. Sections 31 and 45 Attorneys Law[5] stipulate that the JFBA and its local associations are legal entities that have the duty to guide and monitor attorneys-at-law and attorney's corporations (hereinafter referred to only as "attorneys") for the purpose of improving the performance of their duties and maintaining the dignity of attorneys in view of their mission and occupation. For this purpose, the JFBA and the local bar associations also have the competence to take disciplinary measures and impose disciplinary sanctions on attorneys (Sections 56 et seq. Attorneys Law). Relevant duties of the attorneys in this regard are not only stipulated in the Attorneys Law itself but are also provided in by-laws of the Bar Associations, and they are in particular laid down in the "Basic Rules on the Duties of Practicing Attorneys",[6] adopted by the JFBA on 10 November 2004, which define both a code of ethics and a code of conduct for attorneys. Furthermore, people qualified to work as attorneys in Japan are legally required to register as a member with a local bar association before practicing law. The autonomy and the competences conferred to the JFBA and the local bar associations by the Attorneys Law is commonly understood as "self-administration" or "self-governance" (*jichi,* 自治) rather than self-regulation. The JFBA itself holds the view that:

> "The JFBA and the local bar associations have a high degree of self-governance […] Self-governance is essential for preserving the independence of the legal profession […] For this reason, the JFBA and bar associations differ from other professional associations in that they are not governed by a regulatory agency and from a financial perspective are operated entirely from dues and other revenues collected from members."[7]

On the other hand, there are the Japanese Institute of Certified Public Accountants (JICPA, *Nihon Kōnin Kaikeishi Kyōkai,* 日本公認会計士協会); the Japan Patent Attorneys Association (JPAA, *Nihon Benrishi-kai,* 日本弁理士会); the Japan Federation of Certified Public Tax Accountants' Associations (JFCPTAA, *Nihon Zeirishi-kai Rengō-kai,* 日本税理士会連合会) and its local associations; the Japan Federation of *Shihō Shoshis*' (Judicial Scriveners) Associations (*Nihon Shihō Shoshi-kai Rengō-kai,* 日本司法書士会

5 *Bengoshi-hō,* 弁護士法, Law No. 205/1949.

6 *Bengoshi shokumu kihon kitei,* 弁護士職務基本規定; available at *https://www.nichibenren.or.jp/en/about/us/regulations.html.*

7 JAPAN FEDERATION OF BAR ASSOCIATIONS, Brochure (publication date unknown) 10, available at *https://www.nichibenren.or.jp/en/about/us/brochure.html.*

連合会) and its local organizations; the Japan Federation of Administrative Procedures Legal Specialists (Administrative Scriveners) Associations (*Nihon Gyōsei Shoshi-kai Rengō-kai,* 日本行政書士会連合会) and its local associations; and other professional organizations (most of them "quasi-lawyers'" professional associations). All these organizations are special private law entities (*tokubetsu minkan hōjin,* 特別民間法人) with functions very similar to those of the bar associations. They also have, in particular, the duty to guide and monitor their compulsory members in order to ensure, for the sake of public interests, a professional performance of their duties and an adherence to the ethical standards of the profession. They can also adopt by-laws for the purpose of "self-regulation".

With the difference that the JFBA and the local bar associations have the competence to punish their members (also severely) on their own initiative in case of any misconduct, whereas the members of all other associations are primarily disciplined by specific government agencies based on statutes,[8] the mentioned types of professional organizations are in fact quite similar, as self-regulation and self-administration are not easy to distinguish from each other. Based on the law applicable to the respective professional association and the adopted by-laws, all these organizations also have at least some mild means of sanctioning their members in cases of misconduct. Moreover, the bar associations, in particular the JFBA, and the Japanese Institute of Certified Public Accountants are sometimes both qualified as organizations whose nature is comparable to non-profit public law cooperatives serving the public good (*kōkyō kumi'ai,* 公共組合).[9]

3. Conformity with Public Interests?

Many experts endorse the view that the only forms that should be recognized as examples of self-regulation are those where the regulating purpose and its implementation are in conformity with public interests.

This criterion, however, neglects several items, in particular that (1) "illegal" self-regulation may in fact exist, (2) it sometimes may not be easy to tell whether a certain regulating activity is legal or illegal, and (3) legal self-regulation may after a while become illegal self-regulation, or vice versa, because of legislative actions or decisions rendered by courts or administrative bodies, such as the Japan Fair Trade Commission (JFTC).

In fact, as opposed to examples of self-regulation that qualify as being desirable and trade-enhancing in nature (sometimes referred to as "adminis-

8 K. ISHIDA, Ethical Standards of Japanese Lawyers: Translation of the Ethics Codes for Six Categories of Legal Service Providers, Pacific Rim Law & Policy Journal 14/2 (April 2005) 383, 385.

9 HARADA, *supra* note 1, 3.

trative self-regulation"), some forms of self-regulation in Japan are eyed with particular suspicion, especially by economists, political scientists and foreign politicians. That is to say, they are viewed as forms of self-regulation that fall into the category of "protective self-regulation", which aims at shielding industry from competition by creating defensive boundaries to trade.[10] The boundaries between administrative and protective self-regulation are also often found to be blurred.[11]

Therefore, generally neglecting those forms of self-regulation that are illegal at a certain point in time, be it by accident or fault, does not seem to be wise when discussing the whole phenomenon of self-regulation. In the context of some academic disciplines and in the framework of particular inquiries, such as when analyzing an economic system or anti-monopoly law and policy, lawfulness should certainly not be a valid criterion for identifying and evaluating cases of self-regulation.

4. Self-regulation in "Private Law"

Although the academic symposium in whose context this paper was drafted addressed mainly the phenomenon of self-regulation in "private law", from the Japanese perspective at least, it is often not easy to distinguish between the categories of "private law" and "public law". There are many examples of self-regulation where these two broad legal categories overlap.

For example, there are cases where model standard terms of business for specific branches were designed by a joint commission of delegates from industry associations, consumer organizations, ministry officials, academics and others. Although these model standard terms were generally prepared as samples for use in private business transactions, the government administration was heavily involved in their specification (through representatives of ministries) and one certainly cannot deny a public interest in the use of fair standard business terms by entrepreneurs in relations with their customers, in particular consumers.

As a further example, one can consider the regulating and monitoring activities of professional organizations – either under public law or under private law – activities which, for instance, the Japanese bar associations

10 U. SCHAEDE, Industry Rules: The Replacement of Government Rules by Self-Regulation, Philipps-University Marburg Center for Japanese Studies' Occasional Papers No. 25 (2001) 8 et seq. Protective self-regulation of various kinds is regarded by some authors as also being a particular feature of "cooperative capitalism" (see U. SCHAEDE, Cooperative Capitalism: Self-regulation, Trade Associations and the Antimonopoly Law in Japan (Oxford et al. 2000)), which is often criticized as an impediment to fair and free international trade.

11 SCHAEDE, *supra* note 10, 2001, 9.

and the tax accountants' associations perform. Irrespective of the character of the organization as a public law or private law entity, it is the case that such activities involve public tasks and public interests although they also mostly extend to fostering private business activities of their members and regulating or influencing contractual relations.

Moreover, some rules in respect of business conditions and the activities of financial products' dealers are set by financial market operators (e.g. the Tokyo Stock Exchange, Inc., *Kabushiki Kaisha Tōkyō Shōken Torihiki-jo,* 株式会社東京証券取引所) or by the Japan Association of Securities Dealers (JSDA, *Nihon Shōkengyō Kyōkai,* 日本証券業協会), which were adopted on the basis of the Financial Instruments and Exchange Act (FIEA)[12] and in part approved by the competent supervisory authority.[13] On the one hand, the activities of these entities involve public tasks and interests such as ensuring the sound development of the national economy, the proper functioning of financial markets, and the protection of customers, but on the other hand they also reflect a private interest in fostering business activities in the field of financial services. Some of these rules also regulate private contractual relations, such as the formation and content of financial service contracts and purchase contracts pertaining to financial products.

The Japanese public discussion on self-regulation also does not pay much attention to differentiating between self-regulation under "private law" and self-regulation under "public law". With the exception of some particular fields, such as capital market law, self-regulation is primarily discussed by administrative law scholars from the perspective of public law,[14] with these individuals generally tending to treat the cases of self-regulation as a "public law" issue.

The same applies for the differentiation asking whether the rules set through self-regulation are of a "public law" or "private law" nature. For instance, Japanese courts that have to judge compensation claims brought by consumers/investors against dealers of financial products because of a financial loss suffered as a result of the purchase of a financial product will in some cases also cite a relevant violation of rules set by the Tōkyō Stock Exchange or the Japan Association of Securities Dealers as one reason for finding liability of the dealer under tort law or contract law, without sufficiently discussing the nature of the specific rule.[15] As long as the respective

12 *Kin'yū shōhin torihiki-hō,* 金融商品取引法, Law No. 25/1948.

13 The supervisory agency for financial markets and market participants in Japan is at present the Financial Services Agency (FSA, *Kin'yū-chō,* 金融庁), which was founded in 2000.

14 One exception in this regard is Jisuke Nagao, who undertook a comprehensive analysis primarily from the viewpoint of private law (see *supra* note 2).

rule is covered by the statutory authorization in the Financial Instruments and Exchange Act mentioned above, there is not so much a question of whether the rule has legally binding force, which however is certainly a pertinent question in other cases of self-regulation. The question here is, rather, whether the rule is of a "civil law" or "public law" nature. In civil law, it is the prevailing view that a violation of a public law provision normally has no effect in civil law.[16] This is in particular the general concept applied by the Japanese courts.[17] When evaluating the civil law effect of a violation of rules set by self-regulation, there is a similar problem, as the nature of the rules can be quite different.[18] Since the Financial Instruments and Exchange Act is – with only a few exceptional provisions – public law, can it therefore be that the rules set by the Tōkyō Stock Exchange or the Japan Association of Securities Dealers are binding "private law" as concerns third persons? Should the case law be given a different interpretation? Such theoretical problems might not yet have been sufficiently explored, since – as stated above – the Japanese courts indeed sometimes take a violation of self-regulatory rules into consideration without exploring their nature in detail.

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15 A. M. PARDECK, *Shōken torihiki kan'yū no hōki-sei: "kaiji gimu" "setsumei gimu" o koete* [Regulating the Solicitation of Securities Transactions: Beyond Disclosure and the Duty to Explain] (Tōkyō 2001) 110 et seq. A similar state of affairs can be found in the case law on the civil law liability of dealers of commodity futures contracts with respect to the violation of statutes set by the commodity futures exchange market operators and rules set by the association of commodity futures dealers; see M. DERNAUER, Verbraucherschutz und Vertragsfreiheit im japanischen Recht (Tübingen 2006) 195–196, 219–228. Nagao takes the view that despite the fact that the strength of the binding effect of self-regulation may be quite different depending on the specific form of self-regulation, the violation of a rule set by self-regulation could generally be taken as a basis for arguing for liability under tort law (*supra* note 2, 17). In respect of cases dealing with the question of the tort liability of a commodity futures dealer, Nagao also confirms that while the rules set by the commodity futures exchange market operators and the rules set by the association of dealers of commodity futures are of various nature (*supra* note 2, 60–61, 67 et seq.), the Japanese courts often take a violation of rules into account (*supra* note 2, 68–69, 82). On the other hand, Nagao acknowledges that the conception of the courts differs and that some courts do not take such violations into account at all (*supra* note 2, 71 et seq.). He himself is of the opinion that a violation of such rules could be taken into account as a "violation of a duty of care" in a civil law sense and that it thus could be at least one contributing factor toward the tort liability of the respective dealer (*supra* note 2, 82).

16 PARDECK, *supra* note 15, 110.

17 For details see DERNAUER, *supra* note 15, 176 et seq.

18 NAGAO, *supra* note 2, 16.

5. *Self-regulation as an Ambiguous Form of Rule-making*

As a result, "self-regulation" in Japan today is a very broad, very important, and – at the same time – quite ambiguous subject, one which is still not sufficiently explored in regard to its legal nature and legal effects.

III. HISTORICAL DEVELOPMENT

1. *Self-regulation in Pre-modern Japan (Before 1868)*

Although a precise dating is difficult, the first forms of self-regulation of guilds (*za,* 座) of merchants can be traced back at least to the Kamakura period (1192 to 1333).[19]

The country at that time was ruled mainly by a military government (*bakufu,* 幕府) having its headquarters in East Japan, in Kamakura, but the many domains – that is fiefdoms and provinces – were semi self-governed. Likewise, estates in the domains and the villages in the domains – as the direct producers of rice and the other agricultural goods on which the society was based – were to a high-degree self-governed. This basic structure, which historians call a *hōken* (封建) *kind of government*[20] existed for centuries and on into modern times. A *hōken* government is basically characterized by a central government that invests someone or multiple persons and his/their heirs with ruling in the provincial domains (a position which they keep on the condition of good behavior) and who themselves internally organize the domain in a similar manner.[21]

In those times, the shipping of tax, rent and goods required carriers, and transport was cumbersome and fraught with risk. Specialized merchants took on those tasks particularly in regard to long-distance transactions, and they also engaged in money lending.[22] Merchants partly united in guilds that had various functions, such as dealing with the authorities, negotiating privileges against tax payment, and ensuring that the same price (preferably all that the market would bear) was paid by customers for a specified quality and amount of goods and services.[23] Some guilds began to operate in greater areas, some even on a nation-wide scale.[24] The lords, their vassals, the temples and the government were very willing to leave organizing trade, transport and related

19 C. STEENSTRUP, A History of Law in Japan until 1868 (Leiden et. al. 1996) 91–92, 100.
20 STEENSTRUP, *supra* note 19, 72–73.
21 STEENSTRUP, *supra* note 19, 72.
22 STEENSTRUP, *supra* note 19, 91.
23 STEENSTRUP, *supra* note 19, 91.
24 STEENSTRUP, *supra* note 19, 91.

tasks to the guilds, since in the class society of Japan at that time, which lasted for hundreds of years into modern times, trading and money lending were generally considered to be unworthy activities; nevertheless, they of course demanded payment for granting such rights and privileges.

The guilds organized and regulated themselves primarily in the interest of their members and tried to monopolize trade in the markets, villages and towns while fighting off other guilds and single merchants. The guilds elected their own leaders and executive committees and laid-down their competences, in- and outside the guild, in guild by-laws.[25]

In spite of sporadic bursts of legislation against them, the guilds survived for centuries because of their economic usefulness. Thereby, they also served a legal necessity, namely the regulation of relationships between the producers (domains and estates as wells as artisans) and the traders. Those relationships were left mostly unregulated by the central military government in Kamakura (which later resettled under a different dynasty in Edo – now present-day Tōkyō), by the court in Kyōto and by the provincial lords in their domains as regulation by the latter was mainly agriculturally focused and preoccupied with affairs of the warrior class and the nobility.[26] As a result, one can say that self-regulation and self-administration were both already common phenomena in 13th-century Japan.

Four centuries later, in the Edo period (1603 to 1868), Japan was rapidly developing into a unified market. Super-wholesalers (*toiya,* 問屋), active in broader areas or on a national level, united in special guilds (*nakama,* 仲間) that organized the trade for their members with trade-facilitating effects such as ensuring quality standards, but also with trade-restrictive effects achieved through discrimination against outsiders and price-fixing.[27] The primary function of these guilds was to intermediate between the *toiya* on the one side and, on the other side, the central government in Edo, the provincial lords in their domains (now called *han,* 藩) and their *samurai* and *hatamoto* vassals, individuals who themselves had neither experience nor interest in trade and other business activities such as banking. Through these guilds, the rulers also taxed the individual merchants. Moreover, these guilds had to pay a fee themselves to the local rulers and/or the central government in order to be allowed to operate.[28] Sometimes, those *nakama*-guilds were granted a monopoly in certain business areas and were then called *kabu-nakama* (株仲間).[29] At some points in time, the central govern-

25 STEENSTRUP, *supra* note 19, 92.
26 STEENSTRUP, *supra* note 19, 92.
27 STEENSTRUP, *supra* note 19, 121–122, 148–149.
28 STEENSTRUP, *supra* note 19, 121–122, 148–149.
29 STEENSTRUP, *supra* note 19, 148.

ment legislated against abuses of the *nakama*-guilds, in particular trade-restrictive measures. The government set maximum prices for certain goods and services, confiscated the assets of offending merchants and sometimes even abolished exploitative *nakama*-guilds, but only with limited success.[30]

In some instances, single merchants developed into nation-wide active, family-owned and family-regulated enterprises,[31] operating in a variety of business areas. One example is the Mitsui merchant house, originally founded by Takatoshi Mitsui at the end of the 17th century. More than 200 years later, this trading house developed into the Mitsui *zaibatsu,* which was dissolved after World War II; nevertheless, its surviving components continue to form the current Mitsui *keiretsu,* an important, largely informal group of companies. The Mitsui merchant house regulated itself based on a house law (first codified in 1722 with later supplements and amendments, particularly in 1900).[32]

2. Developments in the Meiji, Taishō, Shōwa, and Heisei Periods

The *toiya*-wholesalers and *nakama*-guilds disappeared after the Meiji Restoration in 1868, that is, at the beginning of Japan's modern era. In the Meiji period (1868 to 1912) and the Taishō period (1912 to 1926), modern-type stock companies took over and basically free competition flourished.[33] Business associations played a less important role for several decades. However, close contacts between politicians, bureaucrats and economic leaders – especially from the big Japanese merchant houses (e.g. the Mitsui merchant house, see above), which later came to be known as the "*zaibatsu* (財閥)", developed and offered a forum for informal cooperation and coordination with the common goal of quickly developing the Japanese economy.[34] This has even been described by some scholars as a characteristic pattern of the Japanese economic and political system that is still clearly visible in postwar Japan. According to that view, Japan could be characterized as a network state in the sense that government power is intertwined with that of the private sector.[35] With the beginning of the Meiji period, the

30 STEENSTRUP, *supra* note 19, 122, 149.

31 STEENSTRUP, *supra* note 19, 138.

32 Japan: An Illustrated Encyclopedia (Tōkyō 1993) 982 under the entry "Mitsui".

33 STEENSTRUP, *supra* note 19, 149; HARADA, *supra* note 1, 71.

34 CH. JOHNSON, MITI and the Japanese Miracle. The Growth of Industrial Policy, 1925–1975 (Stanford 1982), Tuttle edition (1986) 85 et seq.; D.B. SMITH, Japan since 1945. The Rise of an Economic Superpower (London et al. 1995) 19–21.

35 D. I. OKIMOTO, Japan, the Societal State, in: Okimoto/Rohlen (eds.), Inside the Japanese System. Readings on Contemporary Society and Political Economy (Stanford 1988) 211, 214–215.

government commenced to identify, nourish and protect certain key industries for the economic development of the country, and it cooperated closely with the leaders of the relevant industry sectors (in particular of the *zaibatsu*) for the achievement of this goal. As a result, particularly those pampered industries flourished.[36]

At the beginning of the Shōwa period (1926 to 1989), in the 1930s and in particular after the 1931 Manchurian incident, the economy became increasingly controlled by the government administration.[37] The control became stricter especially after the beginning of the Second Sino-Japanese War and World War II in the Pacific.[38] In addition to legislative measures and central economic planning,[39] management and control of the Japanese economy by the government was exercised also through and with the support of newly established business or industry associations (which, however, often were based on already existing industry associations) with compulsory membership for companies in most industry sectors (so-called "control associations" (*tōsei-kai,* 統制会)).[40] One example is the "Control-Association for Electric Machines (*Denki Kikai Tōsei-kai,* 電気機械統制会)", established in 1942, which developed into the present day "Japan Electronics and Information Technology Industries Association (JEITA, *Denshi Jōhō Gijutsu Sangyō Kyōkai,* 電子情報技術産業協会)".[41]

After the war, the former wartime cooperation between industry and the government administration evolved to a certain extent into a less formal but nevertheless close relationship, partially intermediated by the successor industry associations, for the purpose of rebuilding the Japanese economy.[42] There were also some new enterprise groups of particular market power

36 T. ITO, The Japanese Economy (Cambridge, London 1992) 20, 31–33; R. MINAMI, The Economic Development of Japan. A Quantitative Study (2nd ed., London et al. 1994) 25-26, 113–116, 120–121; SMITH, *supra* note 34, 6–10, 11–12.

37 T. NAKAMURA, The Japanese War Economy as a Planned Economy, in: Pauer (ed.), Japan's War Economy (London, New York 1999) 9, 11 et seq.

38 HARADA, *supra* note 1, 75–79; NAKAMURA, *supra* note 37, 13, 14–15.

39 For an overview: Y. KAWAGUCHI, *Nihon kindai hōsei-shi* [A History of Modern Japanese Law] (Tōkyō 1998) 393–402; NAKAMURA, *supra* note 37, 11–21.

40 HARADA, *supra* note 1, 75–80; NAKAMURA, *supra* note 37, 17–18; S. OTTO, National Policy Companies and their Role in Japan's Wartime Economy, in: Pauer, *supra* note 37, 124, who discusses as a further control instrument the founding of national policy companies (*kokusaku gaisha,* 国策会社) and who, furthermore, mentions at page 124 the numerous cartels in many industry sectors which were also used by the government to guide and control the economy.

41 HARADA, *supra* note 1, 94.

42 MINAMI, *supra* note 36, 121–124; G.C. ALLEN, The Japanese Economy (London 1981) 31 et seq.; B. BALASSA, Japan's Trade Policies, in: The Japanese Economy Part 1, Volume III (London 1998) 126, 149–152.

(*keiretsu,* 系列)[43] which partly developed from the former *zaibatsu* and with whom the government administration could deal directly. On the whole, this cooperation and coordination of the economy in some sectors seems to have been – although disputed[44] – quite successful and to have helped Japan's economy to regain and even surpass pre-war economic strength within a short number of years. By the end of the 1960s, Japan had surpassed West Germany to become the second largest market economy in the world.[45] There were of course additional factors that contributed to the rapid rebuilding of the Japanese economy after the war, which cannot be discussed here in detail.[46] The government administration, in particular the Japanese Ministry of International Trade and Industry (MITI, *Tsūshō Sangyō-shō,* 通商産業省),[47] exercised its influence to shape industry in particular by means of informal administrative guidance (*gyōsei shidō,* 行政指導),[48] often also through intermediation and self-regulation of the industry associations,[49] but it also had some legal supervisory competences which could be used if need be (the so-called "carrot and stick mechanism"[50]). Informal cooperation between the government administration and

43 ITO, *supra* note 36, 180 et seq.

44 ITO, *supra* note 36, 201–204.

45 Japan: An Illustrated Encyclopedia, *supra* note 32, 308, at the entry "economic history".

46 For an overview of the structural, political and economic conditions and policies see ITO, *supra* note 36, 52–67; U. SCHAEDE, Change and Continuity in Japanese Regulation, ZJapanR/J.Japan.L. 1 (1996) 21, 21–23. More detailed: T. NAKAMURA, The Postwar Japanese Economy. Its Development and Structure (2nd ed., Tōkyō 1995) 33–143.

47 The MITI is the predecessor organization of the present Ministry of Economy, Trade and Industry (METI, *Keizai Sangyō-shō,* 経済産業省).

48 JOHNSON, *supra* note 34, 242 et seq.; F.K. UPHAM, Law and Social Change in Postwar Japan (Cambridge, London 1987) 166–204; ITO, *supra* note 36, 196, 198–200; NAKAMURA, *supra* note 46, 88–95; ALLEN, *supra* note 42, 41 et seq.; D.I. OKIMOTO, The Costs of Japanese Industrial Policy in: Okimoto/Rohlen, *supra* note 35, 222, 223–224; Y. MURAKAMI, The Japanese Model of Political Economy, in: Yamamura/Yasuba (eds.), The Political Economy of Japan. Volume 1: The Domestic Transformation (Stanford 1987) 33, 47–56; M. UEKUSA, Industrial Organization: The 1970s to the Present, in: Yamamura/Yasuba *(ibid.)* 469, 475–476; SMITH, *supra* note 34, 90–93, 107–109, 166–167; BALASSA, *supra* note 42, 141; S. TSURU, The Mainsprings of Japanese Growth: A Turning Point?, The Atlantic Papers No. 3 (Paris 1976) 33–38.

49 HARADA, *supra* note 1, 83–87, 249 (general development), 94–98 (example of the semiconductor and computer industry); SCHAEDE, *supra* note 10, 2001, 5–6.

50 SCHAEDE, *supra* note 46, 23; H. BAUM/M. BÄLZ, § 1 Rechtsentwicklung, Rechtsmentalität, Rechtsumsetzung, in: Baum/Bälz (eds.), Handbuch Japanisches Handels- und Wirtschaftsrecht (Cologne 2011) 1, 24.

industry (and also politicy-making) that was undertaken with the aim of developing the Japanese economy was further fostered by guidance and consultation provided by "old boy's networks". These groups of retired bureaucrats were employed by private companies for the purpose of maintaining a good and mutually-beneficiting relationship with the authorities (also referred to as *amakudari,* 天下り, literally "descending from heaven").[51] Later, in many sectors, the coordination and self-regulation under the guidance of Japanese ministries extended also to purposes such as protecting consumers, establishing fair business practices, shaping labor relations, and protecting the environment, i.e. purposes that do not primarily involve the growth of the economy or the generation of enterprise profits.

On the whole, prominent elements of this policy include: informal communication in tandem with informal and formal coordination between industry and the government administration, often intermediated by industry associations and committees (*shingi-kai,* 審議会)[52] featuring representatives from the supervising ministries, industry (including industry associations) and other parties; various forms of financial and non-financial support from the ministries for the industry sectors considered to be of particular importance for economic development; a weak anti-trust monitoring;[53] and a partial protection of the Japanese market through customs and non-tariff barriers to trade.[54] This period generally lasted until the beginning of the 1990s (with some adjustments in the 1980s[55]) and has been classified in various ways: as a model of a strong state-guided high-growth system with a close cooperative relationship between the state bureaucracy and the private business world,[56] as a developmental state model,[57] as "Japan Incorpo-

51 Cf. U. SCHAEDE, The "Old Boy" Network and Government-Business Relationships in Japan, Journal of Japanese Studies, Vol. 21 No. 2 (1995) 293–317.

52 For the importance of committees (or deliberation councils) for the coordination between industry and the government administration see e.g. SCHAEDE, *supra* note 46, 24.

53 ITO, *supra* note 36, 204–206; F. WALDENBERGER, The Changing Role of Competition Policy in Japan, in: Metzger-Court/Pascha (eds.), Japan's Socio-Economic Evolution. Continuity and Change (Kent 1996) 191, 199–210; SCHAEDE, *supra* note 10, 2001, 14–15; K. YAMAMURA, Procartel Policy: The Advantages, in: Okimoto/Rohlen, *supra* note 35, 220–221. For the specific nexus between guidance and competition policy see L. LESZCZYŃSKI, Economic Guidance and the Antimonopoly Law: Traditions versus Legal Changes, in: Metzger-Court/Pascha *(ibid.)* 221–243.

54 BALASSA, *supra* note 42, 134–154;

55 SCHAEDE, *supra* note 46, 22–25.

56 JOHNSON, *supra* note 34, 309 et seq.

57 JOHNSON, *supra* note 34, 17, 305 et seq.

rated"[58] or – more simply – as a period of very active industrial policy.[59] Even in consideration of the adjustments in the 1980s, in particular the many measures of deregulation, Japan is still characterized as an economic system of "consultative capitalism".[60]

Growing trade frictions in the 1980s, in particular with the U.S.,[61] a growing self-confidence of some industry sectors in their developed economic strength,[62] a general upswing in the support for the concept of a deregulated and lean state, the beginning of a long-lasting economic and financial crisis, which has been by some also identified as a failure of the hitherto policy model,[63] and – finally – a call for a stronger democratization of the Japanese society brought about many political, legal and economic reforms in the 1990s and 2000s.

As a result, the formal and informal strong influence of the government administration on the policy of the industries was reduced, but not eliminated. Additionally, the phenomenon of *amakudari* may have on the whole decreased – in view of continuous criticism during the past decades; nonetheless, it seems to be still a pattern of continuity.[64] Moreover, a strong cooperation and coordination among the industry sectors themselves still exists, in particular intermediated by business associations and often implemented by means of self-regulation.[65] Since institutionalized mechanisms of the past have only been adjusted but not totally replaced, the Japanese economic system can still be qualified as a form of "consultative capitalism" or "cooperative capitalism".[66]

Today, in many industry sectors, self-regulation continues to be an important and necessary tool for the implementation of many policy goals, be they genuine goals of the sector itself or imposed ones. Considering the

58 SMITH, *supra* note 34, 107.

59 SCHAEDE, *supra* note 10, 2001, 11.

60 SCHAEDE, *supra* note 46, 26–27, 28.

61 ITO, *supra* note 36, 365–384

62 SCHAEDE, *supra* note 46, 23–24.

63 BAUM/BÄLZ, *supra* note 50, 27–29; SCHAEDE, *supra* note 10, 2001, 2–3.

64 A. VAN RIXTEL, The Change and Continuity of *Amakudari* in the Private Banking Industry, in: Metzger-Court/Pascha, *supra* note 53, 244, 261; C.P. JONES, Bridging Corruption and Legitimacy: Amakudari, Japan Times of 12 April 2015; C. P. JONES, The Influence of Amakudari on the Japanese Legal System, ZJapanR/J.Japan.L. 40 (2015) 1–57; HARADA, *supra* note 1, 246.

65 HARADA, *supra* note 1, 87 et seq. Some argue that governmental influence by formal regulation and informal administrative guidance has been to a great extent replaced by self-regulation of the industry itself (SCHAEDE, *supra* note 10, 2001, 8, 12 et seq., 16–18), thereby maintaining a strong cooperative economic system, cf. SCHAEDE, *supra* note 10, 2000.

66 SCHAEDE, *supra* note 10, 2000.

hitherto style of the Japanese legislation in industrial policy and the administrative guidance by the supervisory authorities, the industry perceives self-regulation as a reasonable and effective way to implement certain common policy goals rather than as a means of escaping administrative control. Even if a specific form of self-regulation involves guidance by the supervising ministry, this is not considered as causing grave problems. The Japanese companies and industry associations have long learnt to deal with the authorities on formal and informal terms in order to achieve their goals.

IV. Framework of Self-regulation in Japan

1. Diversity of Self-regulation

In Japan, there are not only many examples of self-regulation visible, but also a great diversity of its forms. Self-regulation is present in many areas of public law and private law, for example in: finance, investment and capital market law; banking law; consumer law; media law;[67] data protection law;[68] environmental law;[69] labor law; social security law;[70] construction and construction planning law;[71] and the legal framework of many liberal professions or industry associations.

In addition, there are certainly also many forms of illegal and anticompetitive cooperation among industry competitors, which may also involve industry associations, but this is a matter of cartel and competition law that cannot be further explored here.

a) Finance, Investment, and Capital Market Law

In finance, investment and capital market law, we find a variety of self-regulation undertaken by the Japanese stock exchanges and the Japan Association of Securities Dealers. Covered aspects include: auditing standards for initial and further public offerings of company shares and other financial instruments, the governance of financial markets participants for the prevention of illegal acts,[72] and the monitoring of sales transactions in order

67 Harada, *supra* note 1, 36–38.
68 Harada, *supra* note 1, 38–39.
69 Harada, *supra* note 1, 39–42.
70 Harada, *supra* note 1, 44–48.
71 Harada, *supra* note 1, 48–51.
72 For an example of self-regulation in the field of commodity futures transactions by the association of commodity futures dealers and by commodity futures exchange market operators, see Nagao, *supra* note 2, 61–82. For an example of self-

to detect insider trading and cases of unnatural price formation in securities and other financial products.[73] The competence for such self-regulation is based on provisions of the Financial Products and Exchange Act (FIEA), and the measures require approval by the competent supervising authority, at present the Financial Services Agency (FSA, *Kinyū-chō,* 金融庁). One particular example is Japan's Corporate Governance Code set by the Tokyo Stock Exchange, which has been in force since 1 June 2015.[74] In addition, all financial product dealers have to prepare and set public policy objectives for the solicitation of customers based on the Financial Products Sales Act[75] (Sections 9 and 10).

b) Accounting Law

In the area of accounting law that borders not only financial and capital market law but also company and tax law, a standard for accounting was set and continues to be further developed by the Committee for Enterprise Accounting (*Kigyō Kijun Shingi-kai,* 企業基準審議会), established by the supervisory agency in financial law, the Financial Services Agency (FSA). Members of the committee include in particular delegates from the Japanese Institute of Certified Public Accountants (JICPA, *Nihon Kōnin Kaikeishi Kyōkai,* 日本公認会計士協会) in addition to bureaucrats from the FSA.[76]

In contrast to the aforementioned cases of self-regulation in the field of finance and capital market law, there is no duty or competence provided by law for the setting of an accounting standard; however, a Cabinet Order based on the Financial Instruments and Exchange Act provides that an accounting standard set by that committee is to be regarded as "fair and rea-

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regulation in the field of securities transactions by the Japan Association of Securities Dealers (JSDA), see PARDECK, *supra* note 15, 104–111.

73 HARADA, *supra* note 1, 30–31. See also the present forms of self-regulation mentioned by the Japan Exchange Group, Inc., which operates the Tōkyō Stock Exchange, Inc. and the Ōsaka Exchange, Inc., the two largest exchange markets in Japan, on its homepage (*http://www.jpx.co.jp/regulation/index.html;* last visited on 15 May 2017).

74 For the relevant documents and explanations see the homepage of the Japan Exchange Group, Inc. at *http://www.jpx.co.jp/english/equities/listing/cg/.* For details about the Japan Corporate Governance Code see, for instance, the numerous articles in the special edition (on the setting of the corporate governance code) of the law review Jurisuto (ジュリスト) 2015, No. 9 (September). See also N. NAKAMURA/Y. KURAHASHI, *Kōporēto gabanasu kōdo no yomikata, kangaekata* [How to Read and Appraise the Corporate Governance Code] (Tōkyō 2015).

75 *Kin'yū shōhin no hanbai-tō ni kansuru hōritsu,* 金融商品の販売等に関する法律, Law No. 101/2000.

76 HARADA, *supra* note 1, 32–33.

sonable". A common feature here again is that the authorities participate in the standard-setting process.

Moreover, the JICPA is also the self-regulating association for monitoring all public accountants in Japan, as already mentioned, and is itself supervised by the FSA.

c) Banking Law

In banking law, based on the Bank Act,[77] banks have to install a compliance regime which involves regular duties of reporting to the FSA.[78]

d) Consumer Law

In the area of consumer law, there are the following forms of self-regulation that are particularly noticeable.

(1) In cooperation between the industry associations of numerous sectors and the relevant supervising ministry, model standard terms of business for various kinds of contracts have been prepared and published.[79] In most cases a special committee established by the supervising ministry served as the venue for the deliberation and setting of the model standard terms of business. As regards the setting of model standard terms, there is neither a legal basis for these activities nor a legal competence for the participation of the ministries. Rather, the ministries here exercise informal administrative guidance. However, in many sectors, establishing a business requires the permission of the supervising ministry and the preparation of (fair and complete) standard terms of business. The ministries in these cases usually take into consideration whether and to which degree the respective entrepreneur follows the model standard terms of business.
(2) Various industry associations offer ADR-proceedings. The maintenance of some ADR bodies is required by law (e.g. the ADR body of the Door-to-door Selling Association (*Nihon Hōmon Hanbai Kyōkai,* 日本訪問販売協会), Section 29 SCTA);[80] some were initially established based on

77 *Ginkō-hō,* 銀行法, Law No. 59/1981.
78 HARADA, *supra* note 1, 29.
79 HARADA, *supra* note 1, 34; NAGAO, *supra* note 2, 83–112; DERNAUER, *supra* note 15, 418–420.
80 Law on Special Commercial Transactions (*Tokutei shō-torihiki ni kansuru hōritsu,* 特定商取引に関する法律), Law No. 57/1976.

informal requests by the supervising ministries[81] (e.g. the various product liability ADR centers[82] administered by industry associations).

(3) The Consumer Product Safety Association (CPSA, *Seihin Anzen Kyōkai,* 製品安全協会) awards the "SG (safety guaranteed)" certification (*SG māku,* SGマーク) for consumer goods if these comply with the SG safety standard set by the Association and approved by the Ministry of Economy, Trade and Industry (METI, *Keizai Sangyō-shō,* 経済産業省).[83]

(4) There are many other product standards, such as the SG certification, that are either set by law or self-regulation, where compliance with the respective standards can, under certain conditions, be certified by private entities instead of supervising authorities. As a result, the manufacturer or the distributer of the respective product may advertise it by using a certification mark (*ninshō, shōmei māku,* 認証・証明マーク). Therefore, the accredited certification bodies granting the respective certifications are often the users of the certifications themselves, a specific business association of the users or third-party entities that were established by the business associations in the respective sector. Here, Japan follows a worldwide trend in product certification and monitoring, visible particularly also in the EU.[84]

(5) Private self-certification in some areas even extends to industry facilities. One recent controversially discussed example is the self-monitoring regime in respect of nuclear reactors, introduced by law in 2003,[85] which came under enormous criticism after the 2011 Tōhoku earthquake.

e) Labor Law

In labor law, employers can enter into collective agreements with labor unions, based on the Labor Union Act,[86] which supersede individual agreements in labor contracts. Moreover, employers with more than ten employees also have to stipulate general work regulations (*shūgyō kisoku,*

81 HARADA, *supra* note 1, 35.

82 L. NOTTAGE/Y. WADA, Japan's New Product Liability ADR Centers: Bureaucratic, Industry, or Consumer Informalism?, ZJapanR/J.Japan.L. 6 (1998) 40, 51–56.

83 HARADA, *supra* note 1, 35–36.

84 Cf. for example: H.C. RÖHL/Y. SCHREIBER, Konformitätsbewertung in Deutschland [Survey on Conformity Assessment in Germany and other countries for the German Federal Ministry for Economic Affairs and Technology, in particular in the EU] (April 2006) 31 et seq.; HARADA, *supra* note 1, 191–193.

85 HARADA, *supra* note 1, 30.

86 *Rōdō kumi'ai-hō,* 労働組合法, Law No. 174/1949.

就業規則) for all employees, based on the Labor Standard Act,[87] which, if reasonable, also supersede individual contractual terms in labor contracts.[88]

f) Retirement Homes

Private retirement and nursing homes are much less regulated by law than similar public facilities. They are however subject to self-regulation by the Japan Association for Private Retirement and Nursing Homes (*Zenkoku Yūryō Rōjin Hōmu Kyōkai,* 全国有料老人ホーム協会), supplemented by informal administrative guidance by the competent prefectural administration and the Ministry of Health, Labor, and Welfare (*Kōsei Rōdō-shō,* 厚生労働省).[89] This pertains to the service conditions as well as the contracts with residents. The Association, for instance, offers ADR proceedings for residents of member facilities. They also prepare model standard terms of business for contracts with residents. In addition, upon request for membership the Association checks compliance with the guidelines of the Ministry of Health, Labor, and Welfare for the establishment of such private facilities (Guidelines). The Association, however, has no specific legal competence for monitoring the operation and management of the facility thereafter or for non-compliance with the law, the Guidelines or the rules set by the Association. If in fact the Association becomes aware of a member facility's non-compliance with laws or with the rules of the Association, it can only intervene on the basis of self-established rules. An expulsion from the Association, however, has no effect on the facility's ability to continue its operation.

g) Others

It must be mentioned that there are many more similar cases of self-regulation than those mentioned above. Moreover, in almost all industry and liberal professions sectors there are member associations that operate based on self-established rules, in part based on a specific law entrusting them with specific self-regulatory tasks, in part without any legal basis.

2. Categories of Self-regulation

As can be inferred from the aforementioned examples, the forms of self-regulation can be very different. They vary in particular with regard to whether or not the self-regulation was implemented based on a legal provi-

87 *Rōdō kijun-hō,* 労働基準法, Law No. 49/1949.

88 HARADA, *supra* note 1, 42; S. NISHITANI/H.P. MARUTSCHKE, *Arbeitsrecht, Sozialversicherung, Geschäftstätigkeit von Ausländern in Japan,* in: Baum/Bälz, *supra* note 50, 418, 421–425.

89 HARADA, *supra* note 1, 46–48.

sion (sometimes even as a duty), the degree and mode of involvement of the Japanese authorities (usually ministries), and the mode of involvement of industry associations. In most cases of self-regulation, the involvement of a particular industry association and a particular ministry is pivotal. Corresponding with these elements, also the nature of the rules established by self-regulation and the opportunities and procedures for their enforcement can be very different. The forms of self-regulation in Japan can be broadly divided into the following categories.

a) Genuine Self-regulation

There are cases of genuine (*dantai jiritsuteki,* 団体自立的) self-regulation in Japan. Significant for such cases is that self-regulation was established neither on the basis of a law nor by inducement and participation of the government administration. Pre-formulated standard terms of business used by entrepreneurs are one typical example. At present, there is neither a civil law provision determining the requirements for the incorporation of business terms into a contract nor one for evaluating a specific clause in respect of its reasonableness, save for more general civil law and consumer law instruments.[90] In some sectors, however, the supervising ministry has the legal competence to check the reasonableness of the terms of business used by entrepreneurs. Moreover, the industry association(s) in the respective sector may establish model standard terms of business and have some informal or formal guidance opportunities towards its members based on self-established rules of the association. Sometimes, there are also ministries involved in the establishment of committees for the preparation of model standard terms of business for a specific business sector and a specific type of contract.[91]

Another example is the setting of uniform technical standards for specific new products, in particular in the area of electric and electronic devices, such as standards for electric and electronic components, mobile communication devices, and audio, video and digital recording technologies (DVDs, CDs etc.), these often being developed and set by private entities. In the area of electric and electronic devices, the setting of technical standards in Japan is often guided by the earlier-mentioned Japan Electronics and Information Technology Industries Association (JEITA),[92] the most relevant

90 Legal provisions regulating the incorporation of standard business terms into a particular contract (as applicable contract clauses) and their specific validity, however, will become part of the Japanese Civil Code in a few years, after the entry into force of Law No. 44 of 2 June 2017 reforming the law of obligations, which has to be effected, at the latest, by 2 June 2020 (by government ordinance).

91 For references see *supra* note 79.

92 HARADA, *supra* note 1, 109–115.

industry association in this industry sector. In addition, there are also *ad hoc* standards created by a single company or by a consortium of companies, or technical standards developed by a private standard-setting organization established by companies in the same technical area. These *de facto* standards can become *de jure* standards, on the national level as part of the Japan Industrial Standards (JIS) and on the international level as part of the International Electrotechnical Commission (IEC) standards.[93] Depending on the *de facto* standard, the implementation of the standard is either technically necessary for product makers or informally safeguarded by the internal rules of the standard setting organization itself. Anti-competitive agreements among companies could be also assigned to this category.

In addition, all member associations in the various industry and liberal professions sectors that operate based on self-established rules without any specific legal basis, and all cooperation agreements among and between groups of legal entities, in particular between companies, could be regarded as belonging to this category of self-regulation.

If compliance with the rules established under genuine forms of self-regulation is in fact not necessary, as in the case of some technical standards, the binding effect of those rules is mostly rather weak. If the product market, however, requires the implementation of the standard, for instance if the respective device is a part of another device whose specifications are determined by the standard, there is a *factually* binding effect. If an industry association is involved, it is often important how much internal formal and informal influence the association has on its members; in other cases, it depends on whether the market participants are willing to sanction any non-compliance with the rules through their reactions.

b) Self-regulation Informally Guided by the Government Administration

Although informal inducement and guidance by ministries through administrative guidance *(gyōsei shidō),* ministerial decrees (*tsūtatsu,* 通達), financial support and other measures is one particular feature of many types of self-regulation in Japan, cases of ministerial guidance and support completely without any legal basis have become rare.

As examples, one could point to the mentioned setting of model standard business terms guided mainly by the MITI/METI as well as also to the coordinated research, development and marketing project in the electronic industry for semiconductor related technologies from the 1960s on, which was also guided by the MITI and intermediated by predecessors of the JEITA and related organizations. Although informal guidance by ministries

93 HARADA, *supra* note 1, 114.

and similar entities has only limited legal effect itself, it works where the respective ministry can claim special expertise or where it can exercise influence by legal decisions on other issues as coercive means. Rules established solely on the basis of informal involvement of the authorities are usually considered as having no legally binding effect.

The adoption of Japan's Corporate Governance Code in 2015[94] may also be assigned to this category. The Code was introduced by the Tōkyō Stock Exchange and prepared by a committee of experts (the "Council of Experts"); it is applicable for all companies listed at this stock exchange. In the preamble under item 11, the Council explains:

"Moreover, unlike laws and regulations the Code is not legally binding. The approach it adopts for implementation is "comply or explain" (either comply with a principle or, if not, explain the reasons why not to do so). In other words, the Code assumes that if a company finds specific principles (General Principles, Principles and Supplementary Principles) inappropriate to comply with in view of their individual circumstances, they need not be complied with, provided that the company explains fully the reasons why it does not comply."

c) Legally Induced Self-regulation or Regulated Self-Regulation

The cases of self-regulation induced by or based on a legal provision (legally induced (*yūdō,* 誘導) or regulated self-regulation respectively) are particularly numerous and diverse. Here in particular, the degree of formal and informal participation of the government administration varies.

Most of the above-mentioned examples presented to demonstrate the diversity of self-regulation in Japan belong to this category, e.g. the self-regulation of the Japanese stock exchanges and the Association of Securities Dealers, the setting of accounting standards, which are also influenced by international standards of the same kind, and the setting of the SG safety standards.

Self-regulation belonging to this category is safeguarded either by possible legal actions – either within the self-regulated framework or outside, that is by way of a possible intervention of the authorities – or by initiating court proceedings.

As a special type of this category one can consider those cases where the compliance with a specific standard can be certified and monitored by user companies themselves, by a business association of users or by an accredited third-party organization established by users of the standard.

Many of the rules established by self-regulation of this type have a legally binding nature. However, the degree of their effectiveness varies substantially.

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94 Available at *http://www.jpx.co.jp/english/equities/listing/cg/tvdivq0000008jdy-att/20150513.pdf.*

V. Typical Features of Self-regulation in Japan

One can summarize the following common features of self-regulation in Japan: Most cases of self-regulation in the field of private law in Japan involve a prominent involvement of business associations in the relevant area.[95] Many important cases of self-regulation are induced by or based on legal provisions. In most cases of self-regulation, the Japanese government administration – usually the supervising ministry – guides the self-regulation by formal or/and informal means.[96] The structure of the cooperation and coordination between and among the government administration (mostly ministries), the business associations and the individual entities is often opaque and complicated. Through this type of self-regulation, the interests of the government administration, industry interests, and – more recently – also the interests of involved and affected third parties are being taken into account and balanced.[97] The degree of effective implementation varies greatly, depending on the specific form of self-regulation.

VI. Conclusion

In Japan, self-regulation is a broad and ambiguous topic. Nevertheless, self-regulation – in various functions – has a long tradition and is widely used at various levels of society, not only in industrial or economic contexts, and also in various forms.

In comparison to Germany, the functions and basic categories of self-regulation do not seem to differ so much. Moreover, growing international cooperation in some areas contributes to the development of parallel and similar forms of self-regulation worldwide.

Notable for Japan, however, are the degree and forms of participation of the supervising ministries in the respective sectors – in particular the informal guidance instruments. Moreover, most cases of self-regulation are based on law.

Self-regulation in Japan is generally considered as an effective means of ordering, drawing upon the special expertise of the government administration as well as the respective industry, and as a means to also incorporate particular third-party interests, where necessary. It is not so much regarded as a means for avoiding formal legal regulation. Industry has long since adapted to cooperation and coordination with the supervising ministries on the basis of a regulated self-regulation scheme.

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95 Harada, *supra* note 1, 117.

96 Harada, *supra* note 1, 117–118.

97 Harada, *supra* note 1, 118.

Terminology, Development, and Institutional Framework of Self-regulation in Germany

Petra Buck-Heeb[*]

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I. Introduction

When I was asked to talk about the terminology, development and institutional framework of self-regulation in Germany, I was convinced that this would be a simple task. When I began writing down my thoughts, I realized that it turned out to be somehow complicated, which was astonishing. Two reasons can be identified for these difficulties. First, the given task means an introduction to the German system and at the same time drawing conclusions from the examination of many special sectors in which self-regulation takes place.

Secondly, self-regulation still lacks significant systematization in Germany. Together with Andreas Dieckmann, I published the German book "Selbstregulierung im Privatrecht" ("Self-regulation in Private Law") in

* Prof. Dr. Petra Buck-Heeb, Professor of Civil Law and European and International Business Law, Faculty of Law, Gottfried Wilhelm Leibniz University in Hannover.

2010. In this book we took first steps aiming to systematize self-regulatory elements in the various sectors where self-regulation can be found. But since then, we – and here I mean the collective "we" – have had hardly any general research on this subject in German literature. Instead, we can find a large amount of literature on self-regulation in specific sectors.

As the following chapters deal with general aspects of self-regulation, it seems helpful to mention some examples. Therefore, this lecture should start with some current examples of self-regulation. It had been my intention to give you some brief insight into the success of self-regulation in Germany. But what did I find? The contrary.

Three current examples: There was a voluntary self-commitment of the German Central Credit Committee *(Zentraler Kreditausschuss)*[1] under which every citizen in Germany was to get a payment account.[2] The Committee asked its members to implement this commitment. Few did it, most did not. What was the result? From 19 June 2016 onwards we have Section 31 of the "payment accounts act" *(Zahlungskontengesetz)*.[3] Accordingly, all consumers in Germany now have the right to a payment account with basic features irrespective of their credit status. In this context, banks and many authors speak of coercive contracting. Without going further into this point, we can conclude that there is now regulation instead of self-regulation.

In the German Corporate Governance Code, which was drafted by the "Government Commission German Corporate Governance Code", there has been a rule (chapter 5.4.1. of the Code) since 2010 that there is to be more diversity in the supervisory board of German listed stock corporations. Above all, more women should be members of the supervisory board.[4] Some tried to follow the rule, some didn't. In addition to this, in March 2011 there was a self-commitment of the industry to follow the rule of diversity management.[5] But the number of women in supervisory boards did not increase significantly. The legislator registered that the voluntary

1 Now called "Die Deutsche Kreditwirtschaft" ("The German Banking Industry Committee").

2 It was called a "current account for everybody" – "Girokonto für Jedermann".

3 Federal Law Gazette (Bundesgesetzblatt, BGBl.) of 11 April 2016, 720; this act implements the European Payment Accounts Directive (Directive 2014/92/EU of 23 July 2014, OJ L 257/214) into German law.

4 S. JUNG, Eine Frauenquote für die EU, Betriebs-Berater (BB) 2013, 387, 388; J. BASEDOW, Komplexität der Wirtschaft, Allokation des Wissens und privates Privatrecht, in: Calliess (ed.), Transnationales Recht (Tübingen 2014) 141, 150 ff.

5 See "Charta der Vielfalt", under *www.charta-der-vielfalt.de/fileadmin/user_upload/beispieldateien/Downloads/Faktenblatt_CdV_2016-4.pdf*

rules failed to succeed[6] and inserted Section 96 para. 2 into the German Stock Corporation Act. Pursuant to this, listed companies now must have at least 30% of the seats on the supervisory board, corresponding to at least six seats, staffed by women. The fulfilment of this minimum staffing requirement is ensured by a harsh sanction.

In the same way, the non-binding rule in the German Corporate Governance Code about the remuneration of members of the management board[7] proved to be without effect (chapter 4.2.2. ff. of the Code). Therefore, the German legislature changed Section 87 para. 1 of the German Stock Corporation Act.[8] As a binding legal rule, the supervisory board must ensure, first, that the aggregate remuneration bears a reasonable relationship to the duties and performance of the members of the management board as well as the conditions of the company and, second, that it does not exceed standard remuneration without any particular reason. So, the result was that we have obtained a regulation instead of self-regulation.

The resulting confusion is increased by a statement in academic literature referring to the Capital Market Law. There it was concluded: "Für privates Recht ist kein nennenswerter Raum mehr" (meaning: "There isn't any significant scope for privately made law").[9] The reason for this seemed to be especially the global financial crisis of 2008. This, so it is said, marked the beginning of a new era.[10] Thus, my idea to enrich this lecture with examples of successful self-regulation did not seem to work.

Ultimately, some examples of self-regulation could be found: in the field of the internet or in accounting principles. When I looked at these more closely, I realized that all of these are transnational rules, which means that they are not genuine or exclusive German self-regulation. They go beyond our borders. Therefore, they are also called "private law beyond the

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6 See "Entwurf eines Gesetzes für die gleichberechtigte Teilhabe von Frauen und Männern an Führungspositionen in der Privatwirtschaft und im öffentlichen Dienst", BT-Drucks. 18/3784 of 20 January 2015, under A., 1 and 40.

7 H. FLEISCHER, Aufsichtsratsverantwortlichkeit für die Vorstandsvergütung und Unabhängigkeit der Vergütungsberater, Betriebs-Berater (BB) 2010, 67 ff.

8 "Gesetz zur Angemessenheit der Vorstandsvergütung (VorstAG)" of 31 July 2009, Federal Law Gazette (Bundesgesetzblatt) BGBl. No. I, 2479 ff.

9 R. VEIL, Autonomie privaten Rechts und dessen Einbindung in die staatliche Rechtsordnung, in: Bumke/Röthel (eds.), Privates Recht (2012) 269, 272.

10 See J. KÖNDGEN, Transnationale Regel- und Standardbildung auf Finanzmärkten – vor und nach der Krise, in: Calliess (ed.), Transnationales Recht (Tübingen 2014) 277 ff.; S. T. OMAROVA, Rethinking the Future of Self-Regulation in the Financial Industry, Brooklyn Journal of International Law (Brook. J. Int'l L.), Vol. 35:3 (2010) 697, 706; critically also W. WEISS, Selbstregulierung der Wirtschaft – noch sinnvoll nach der Finanzkrise?, Der Staat 2015, 555 ff.

state".[11] So, in a narrow sense, it's not "self-regulation in Germany".[12] In most cases the regulating body is not situated in Germany. We will come back to this point later.

This is the somehow disturbing starting point for our reflections on the terminology, development and institutional framework of self-regulation. And at the same time this result leads to another point which we cannot deepen here but which we will have to deal with at many points of our symposium: The question of the importance of self-regulation nowadays.

II. Terminology of Self-regulation

1. Various Definitions

So, I will turn to the topic "terminology of self-regulation". At first sight, at least defining this term seemed to be easy. But it also turned out to be difficult. The reason was that there has not been sufficient systematization of self-regulation in Germany up to now.

This is already apparent when we look at the numerous special terms that are used in Germany for the phenomenon of "self-regulation". Accordingly, one speaks of co-regulation, delegated regulation, controlled self-regulation, regulated self-regulation, state-initiated self-regulation, audited self-regulation,[13] embedded self-regulation,[14] autonomous self-regulation, genuine self-regulation etc.[15] What do these terms mean?

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11 R. Michaels, The true lex mercatoria: Private law beyond the state, Indiana Journal of Global Legal Studies (IJGLS) 14 (2007) 447 ff.

12 See P. Zumbansen, The constitutional itch: Transnational private regulatory governance and the woes of legitimacy, in: Helfand (ed.), Negotiating state and non-state law (Cambridge 2015) 96, 108 f.; critically referring to a public or private character P. Zumbansen, Neither "public" nor "private", "national" nor "international": Transnational corporate governance from a legal pluralist perspective, Journal of Law and Society, Vol. 38, No. 1, March 2011, 50 ff., under *digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1949&content=scholarly_works;* see also F. Möslein, Dispositive Regeln im transnationalen Privatrechtsverkehr, in: Calliess (ed.), Transnationales Recht (Tübingen 2014) 155, 156 ff.

13 W. Schulz/T. Held, Regulierte Selbstregulierung als Form modernen Regierens, Endbericht Mai 2002, Arbeitspapiere des Hans-Bredow-Instituts Nr. 10, A-4 f., who explain that the term is used especially in the USA, under *https://www.hans-bredow-institut.de/webfm_send/53.*

14 Omarova, *supra* note 10, 697, 701.

15 Cf. C. Wenzel/S. Gadringer/J. Trappel, Media Policy and Regulation in Times of Crisis, in: Simpson/Puppis/van den Bulck (eds.), European Media Policy for the Twenty-First Century (New York 2016) 106.

There is a definition in scholarship according to which the term "self-regulation" means that "the actors are urged to solve problems among themselves, before turning to the state regulator".[16] But this covers only a portion of the self-regulatory measures. The same is true for another definition, according to which self-regulation is "the possibility for economic operators, the social partners, non-governmental organizations or associations to adopt amongst themselves and for themselves common guidelines at European level (particularly codes of practice or sectoral agreements)".[17] This definition found in EU papers is also unsatisfactory, as it is too narrow and only describes one part of the possible self-regulating acts.

Even brief research makes clear that in the various fields in which "self-regulation" can be found, the term is used quite differently. Thus, in academic literature one cannot find a standardized definition of the term "self-regulation". All existing definitions refer only to special sectors. That does not seem to be a good starting point for dealing with the terminology of "self-regulation". And it leads to the question: Is it impossible to define this term generally for all fields? Is the reality of self-regulation different from sector to sector and possibly even from circumstance to circumstance?[18]

In scholarship we can find a thesis that goes even further. It is assumed that the definition of self-regulation can in fact change in one area when there is an alteration of the topic that is to be self-regulated.[19] Has self-regulation a different meaning depending on the sector in which it is used? How can we discuss legal issues if we do not have at least a general definition of self-regulation for all sectors in Germany? This would make it impossible to speak about self-regulation in general, as we are doing here. And moreover: Is it nevertheless possible to compare our system with others when we do not have a system?

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16 Cf. H. J. KLEINSTEUBER, The Internet between Regulation and Governance, in: Möller/Amouroux (eds.), The Media Freedom Internet Cookbook (Vienna 2004) 61, under *www.osce.org/fom/13844?download=true.*

17 No. 22 of the Interinstitutional agreement on better law-making (2003/C321/01), OJ. C 321, 1, 3 of 31 December 2003; but no longer mentioned in the EU agenda "Better regulation for better results", COM (2015) 215 final of 19 May 2015 or in the European Commission's paper "Better Regulation: Delivering better results for a stronger Union", COM (2016) 615 final of 14 September 2016. This definition can also be found in the European Economic and Social Committee's "The Current State of Co-Regulation and Self-Regulation in the Single Market" (2005), under *www.eesc.europa.eu/resources/docs/2018_cahier_en_smo_def.pdf,* 11; Communication from the Commission to the Council and the European Parliament concerning a New Legal Framework for Payments in the Internal Market, 2 December 2003, COM (2003) 718 final, 15, fn. 26.

18 E. P. MONROE/S. G. VERHULST, Self-Regulation and the Internet (The Hague 2005) 3.

19 MONROE/VERHULST, *supra* note 18, 3.

2. *The Terms "Self" and "Regulation"*

The two parts of the term, "self" and "regulation", already show the difficulties we have to cope with. "Self" means first of all "made by non-governmental parties" or "made by private parties". Such a broad definition of "private" includes all non-state actors.[20] "Private parties" in this context means any natural and legal persons that are not the "state".[21] Others use a more narrow definition and use the term "private" only as regards "institutions" such as industry associations, interest groups and supervisory authorities.[22]

Also, when we add "not by the state", we encounter a problem because there are some forms of self-regulation where the state indeed does not make the rules but instead regulates and supervises the rule-making. Therefore, in academic literature it is concluded that there is a wide range of possible definitions for the "self".[23] So, it is seen as important to distinguish between individual self-regulation – where regulation of the entity takes place independent of others – and self-regulation by a group. In most cases self-regulation does not govern the actions of individual actors but "represents collective constraints that bind a group of actors".[24]

On the other hand, the term "regulation" is a problem in itself. There are so many understandings of "regulation" that we cannot deepen the discussion in the present context. The term "regulation" is broad and therefore "leaves room for different explanatory approaches".[25]

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20 T. POGUNTKE, in: Graz/Nölke (eds.), Transnational Private Governance and its Limits (London 2008) xvii; see also P. BUCK-HEEB/A. DIECKMANN, Selbstregulierung im Privatrecht (Tübingen 2010) 19 f.

21 T. M. J. MÖLLERS/B. FEKONJA, Private Rechtsetzung im Schatten des Gesetzes, Zeitschrift für Unternehmens- und Gesellschaftsrecht (ZGR) 2012, 777, 779 referring to S. AUGSBERG, Rechtsetzung zwischen Staat und Gesellschaft. Möglichkeiten differenzierter Steuerung des Kapitalmarktes (Berlin 2003) 34.

22 SCHULZ/HELD, *supra* note 13, A-3 fn. 11.

23 M. E. PRICE/S. G. VERHULST, Self-Regulation and the Internet (The Hague 2005) 10.

24 PRICE/VERHULST, *supra* note 23, 10.

25 C. BUMKE, Regulierung am Beispiel der Kapitalmärkte, in: Hopt/Veil/Kämmerer (eds.), Kapitalmarktgesetzgebung im Europäischen Binnenmarkt (Tübingen 2008) 107, 108; E. SCHMIDT-ASSMANN, Verwaltungsrecht in der Informationsgesellschaft (Baden-Baden 2000) 405, 425; G. F. SCHUPPERT, Governance und Rechtsetzung (Baden-Baden 2011) 253 ff.; C. WAHLERS, Private Selbstregulierung am Beispiel des Kapitalmarktrechts (Göttingen 2011) 34 f.; T. ZÜLL, Regulierung im politischen Gemeinwesen (Tübingen 2014) 6 ff.; M. FECHNER/T. TIPTON, Securities Regulation in Germany and the U.S. (2016), Comparative Corporate Governance and Financial Regulation. Paper 5, 1, (under *http://scholarship.law.upenn.edu/fisch_2016/5);* BUCK-HEEB/DIECKMANN, *supra* note 20, 17 ff.

3. *Self-regulation as Privately Made Law?*

Let us try to access the terminology of "self-regulation" by another means. In the literature it is often described as privately made law.[26] German scholars define this as "law made on the basis of powers delegated by the state". Similarly, some talk about the "privatization of law".[27] And in most cases this means the privatization of public law, meant as an inclusion of private rules into the German legal system.[28] This has the disadvantage that it means in our context that the state has in the first place the right to regulate and can transfer this power to private parties – so it's a public view of rule-making.[29]

In Germany the term "privatization" is translated not only with the word "Privatisierung"; some also call it "Entstaatlichung",[30] which is broader than our topic.[31] This latter term means that regulation by the state is withdrawn. Concretely, it means that fields in which governmental regulation took place are now going to be regulated by private actors. Often, in German literature this is seen as a result of the globalization.[32] But it also can be discovered in other areas (and here that means national areas).

The question that is being discussed in Germany is whether self-regulation really means "law" as "Recht". Mostly, in Germany "Recht" means "Gesetz". And this can only be made by the state as a legislator. The

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26 R. MICHAELS/N. JANSEN (eds.), Private Law Beyond The State? Europeanization, Globalization, Privatization, The American Journal of Comparative Law (AJCL) 54 (2006) 850.

27 See J. KÖNDGEN, Privatisierung des Rechts – Private Governance zwischen Deregulierung und Rekonstitutionalisierung, Archiv für civilistische Praxis (AcP) 206 (2006) 477 ff.

28 H. SCHEPEL, The Constitution of Private Governance (Oxford and Portland, Oregon 2005) 32; C. BUMKE/A. RÖTHEL, Auf der Suche nach einem Recht des Privaten Rechts, in: Bumke/Röthel (eds.), Privates Recht (2012) 1, 3.

29 See BUCK-HEEB/DIECKMANN, *supra* note 20, 24 f.

30 See the conference transcript of the "Gesellschaft für Rechtsvergleichung" (German Society of Comparative Law), J. SCHWARZE (ed.), Globalisierung und Entstaatlichung des Rechts (Tübingen 2008), and R. ZIMMERMANN (ed.), Nichtstaatliches Privatrecht. Geltung und Genese (Tübingen 2008); compare also W. BERNHARDT, Sechs Jahre Deutscher Corporate Governance Kodex – Eine Erfolgsgeschichte?, Betriebs-Berater (BB) 2008, 1686 (referring to the German Corporate Governance Code); see also A. RÖTHEL, Entstaatlichung des Rechts. Ein Einführung, in: Deutsche Sektion der Internationalen Juristen-Kommission e.V. (ed.), Entstaatlichung des Rechts (Wien 2014) 17 ff.; J. A. KÄMMERER, Privatisierung (Tübingen 2001) 54 f.; BUCK-HEEB/DIECKMANN, *supra* note 20, 21.

31 See KÄMMERER, *supra* note 30, 16 ff.; see also BUCK-HEEB/DIECKMANN, *supra* note 20, 25.

32 See SCHWARZE, *supra* note 30.

state has a monopoly on the legitimate use of force ("staatliches Gewaltmonopol"). So, in principle only the state can enforce effective rules.[33] Even the German Federal Supreme Court ("Bundesgerichtshof") has observed that being authorized to make rules comprises also the authority to impose and enforce sanctions.[34] So, "Recht" is according to prevailing opinion only law made by the state.[35] And this means that "private law" ("privates Recht") cannot exist. Private parties can only adopt unbinding rules,[36] i.e. a private ordering.

4. Definition by Categories

The best way to handle the term "self-regulation" seems to be to distinguish between various categories of self-regulation. In the German discussion we can find different approaches to categorization. In almost all self-regulatory research we can identify a differentiation that comes from public law.[37] There is a distinction between voluntary, genuine self-regulation as opposed to state-induced self-regulation as co-regulation or regulated self-regulation. This point will be looked at in more depth later.

5. Differentiation from Other Terms

In the last chapter we talked about self-regulation, privatization and the German word "Entstaatlichung". First of all, we have to realize that self-regulation is not identical to the term "de-regulation".[38] We also have to differentiate the term "self-regulation" from "self-control", "self-administration", "self-government" and "soft law".

The term "self-control" is narrower than the term self-regulation. It means in the first place the supervision and enforcement of rules.[39] The

33 Also G. BACHMANN, Private Ordnung. Grundlagen ziviler Regelsetzung (Tübingen 2006) 1, who focuses above all on the reliable enforcement of state norms in order to qualify only these as "law".

34 BGH, 28 November 1994, II ZR 11/94, BGHZ 128, 93, 98.

35 SPRAU, in: Palandt (ed.), BGB (77th ed., Munich 2018) Einl. Rn. 24; T. M. J. MÖLLERS, Standards als sekundäre Rechtsquelle – Ein Beitrag zur Bindungswirkung von Standards, in: Möllers (ed.), Geltung und Faktizität von Standards (Baden-Baden 2009) 143, 149; see also T. M. J. MÖLLERS, Internationalisierung von Standards (Baden-Baden 2011); BACHMANN, *supra* note 33, 1, 21, 51.

36 BACHMANN, *supra* note 33, 22; see also S. KADELBACH/K. GÜNTHER (eds.), Recht ohne Staat? Zur Normativität nichtstaatlicher Rechtsetzung (Frankfurt/Main 2011).

37 See BUCK-HEEB/DIECKMANN, *supra* note 20, 15.

38 OMAROVA, *supra* note 10, 697, 698.

39 BUCK-HEEB/DIECKMANN, *supra* note 20, 23.

term "self-administration" means a form of administration and therefore is also too narrow to cover all aspects of self-regulation.[40]

There also exists the terms of "self-government" and "private governance".[41] Governance comprises in a wide sense all forms of collective regulation of social topics.[42] So there is a certain similarity with "regulated self-regulation".[43] But the latter term refers to the performance of public tasks, whereas "governance" is neutral.[44] And governmental rule-making also

40 BUCK-HEEB/DIECKMANN, *supra* note 20, 23; see also G. F. SCHUPPERT, Selbstverwaltung und Selbstregulierung aus rechtshistorischer und governancetheoretischer Perspektive (Self-administration and Self-regulation from a Legal Historical and Governance Theoretical Perspective), Max Planck Insitute for European Legal History Research Paper Series N. 2015-01, under *http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2559077,* from 26 March 2016; G. LEHMBRUCH, From State of Authority to Network State: The German State in Developmental Perspective, in: Muramatsu/Naschold (eds.), State and Administration in Japan and Germany: A Comparative Perspective on Continuity and Change (Berlin/New York 1997) 39, 54 ff.; WAHLERS, *supra* note 25, 38 f.; G. F. SCHUPPERT, Governance-Perspektiven für Demokratie und Selbstverwaltung, in: Cancik (ed.), Demokratie und Selbstverwaltung – Selbstverwaltung in der Demokratie (Göttingen 2015) 53, 62 f.

41 See i.e. F. CAFAGGI/A. RENDA, Public and Private Regulation, Mapping the Labyrinth, CEPS Working Document No. 370 October 2012, 1 ff. *(https://www.ceps.eu/system/files/WD370%20Renda%20Public%20and%20Private%20Regulation.pdf).*

42 R. MAYNTZ, Governance Theory als fortentwickelte Steuerungstheorie?, in: Schuppert (ed.), Governance-Forschung. Vergewisserung über Stand und Entwicklungslinien (2nd ed., Baden-Baden 2006) 11, 15; W. HOFFMANN-RIEM, Governance im Gewährleistungsstaat, in: Schuppert (ed.), Governance-Forschung. Vergewisserung über Stand und Entwicklungslinien, (2nd ed., Baden-Baden 2006) 195 ff.; see also SCHUPPERT, *supra* note 25, 101 f.; SCHEPEL, *supra* note 28, 28 ff. referring to the European Standardization Committee CEN and the DIN (German Institute for Standardization, "Deutsches Institut für Normung") for product standards, especially 19 ff., also on the development from government to governance; KÖNDGEN, *supra* note 27, 477, 511; a critical view S. GRUNDMANN/H.-W. MICKLITZ/M. RENNER, Privatrechtstheorie – eine Einführung, in: Grundmann/Micklitz/Renner (eds.), Privatrechtstheorie, Vol. I (Tübingen 2015) 1, 33 f.

43 M. SECKELMANN, Regulierte Selbstregulierung – Gewährleistungsstaat – kooperativer Staat – Governance: Aktuelle Bilder des Zusammenwirkens von öffentlichen und privaten Akteuren als Analysekategorien für historische Kooperationsformen, in: Collin/Bender/Ruppert/Seckelmann/Stolleis (eds.), Regulierte Selbstregulierung in der westlichen Welt des späten 19. und frühen 20. Jahrhunderts (Frankfurt/Main 2014) 27 ff.

44 P. COLLIN/S. RUDISCHHAUSER, Regulierte Selbstregulierung. Historische Analysen hybrider Regelungsstrukturen, Trivium 21 (2016) recital 10, also referring to G. F. SCHUPPERT, Selbstverwaltung und Selbstregulierung aus rechtshistorischer und governancetheoretischer Perspektive (Self-administration and Self-regulation from a Legal Historical and Governance Theoretical Perspective), Max Planck Insitute

includes the assistance of private parties.[45] This can be different when the term "private governance" is used in the context of transnational law.[46] In that context it means the necessity of private rules "as a means of compensating for the inability of nation states to provide effective regulation".[47]

In part, the various forms of self-regulation are described as "soft law"[48] or as "soft regulation".[49] In Germany the term "soft law" is understood much broader than it is used in this paper,[50] and it is very imprecise and

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for European Legal History Research Paper Series N. 2015-01, 25 f., under: *http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2559077;* G. F. SCHUPPERT, Governance-Perspektiven für Demokratie und Selbstverwaltung, in: Cancik (ed.), Demokratie und Selbstverwaltung – Selbstverwaltung in der Demokratie (Göttingen 2015) 53, 64 f.

45 BUCK-HEEB/DIECKMANN, *supra* note 20, 23.

46 J. C. GRAZ/A. NÖLKE, Introduction: beyond the fragmented debate on transnational private governance, in: Graz/Nölke (eds.), Transnational Private Governance and its Limits (London 2008) 1 ff.

47 POGUNTKE, *supra* note 20, xvii.

48 European Economic and Social Committee, "The Current State of Co-Regulation and Self-Regulation in the Single Market" (2005), under *www.eesc.europa.eu/resources/docs/2018_cahier_en_smo_def.pdf,* 10; referring to the German Corporate Governance Code see M. LUTTER, Das Europäische Unternehmensrecht im 21. Jahrhundert, Zeitschrift für Unternehmens- und Gesellschaftsrecht (ZGR) 2000, 1, 18; M. LUTTER, Vergleichende Corporate Governance – Die deutsche Sicht, Zeitschrift für Unternehmens- und Gesellschaftsrecht (ZGR) 2001, 224, 225; A. VON WERDER, Der deutsche Corporate Governance Kodex – Grundlagen und Einzelbestimmungen, Der Betrieb (DB) 2002, 801; M. KÖRNER, Comply or disclose: Erklärung nach § 161 AktG und Außenhaftung des Vorstands, Neue Zeitschrift für Gesellschaftsrecht (NZG) 2004, 1148, 1150; M. KORT, Corporate Governance-Fragen der Größe und Zusammensetzung des Aufsichtsrats bei AG, GmbH und SE, Die Aktiengesellschaft (AG) 2008, 137, 138; M. LINNERZ, Anfechtbarkeit eines auf Entlastung des Aufsichtsrats gerichteten Hauptversammlungsbeschlusses wegen fehlenden Berichts zu Interessenkonflikten, Betriebs-Berater (BB) 2008, 581, 582; critically P. ULMER, Der Deutsche Corporate Governance Kodex – ein neues Regelungsinstrument für börsennotierte Aktiengesellschaften, Zeitschrift für das gesamte Handels- und Wirtschaftsrecht (ZHR) 166 (2002) 150, 161; P. ULMER, Aktienrecht im Wandel, Archiv für die civilistische Praxis (AcP) 202 (2002) 143, 169.

49 T. TALAULICAR, Normierungseffekte der Co-Regulierung von Standards guter Corporate Governance/Normative effects of co-regulatory regimes of corporate governance, in: Jahrbuch für die Ordnung von Wirtschaft und Gesellschaft (ORDO), Vol. 62 (Stuttgart 2011) 269, 275 with further references concerning the German Corporate Governance Code.

50 Organization for Economic Co-operation and Development (OECD), Better Regulation in Europe: Germany (2010) 91, under: *http://www.oecd-ilibrary.org/governance/better-regulation-in-europe-germany-2010_9789264085886-en.*

controversial.[51] This is especially true in the context of self-regulation because it relates to the legislative nature ("Normcharakter") of self-regulation and the question of whether it can be seen as "law". Thus it doesn't help further.

6. *Special Aspects*

There are two aspects that we haven't considered enough up to now in our discussion of the terminology. One is more general, this being the influence of transnational rules. The other aspect is the European context, especially the correlation between German and European rule-making.

a) German and Transnational Rules

In Germany, self-regulation takes place not only with the generation of national German rules but also with the acceptance of transnational rules by private parties. Here, first of all, we also have the generally recognized problem that the term "transnational law" has become common, although we do not have "law" in a formal German sense.[52] In those sectors in which transnational law is made by private parties, the state cannot enact legislation.[53]

Accordingly, transnational law is left to cope with global issues, as for example the Internet.[54] As an additional example, one can point to the International Financial Reporting Standards (IFRS), which were drafted by the International Accounting Standards Board (IASB), based in London.[55] The decentralized nature of the topics means that it is impossible to obtain

51 Critically AUGSBERG, *supra* note 21, 36.

52 See SCHUPPERT, *supra* note 25, 361 ff., who talks of "transnational regulation".

53 Cf. G. P. CALLIES/A. MAURER, Transnationales Recht – eine Einleitung, in: Callies (ed.), Transnationales Recht. Stand und Perspektiven (Tübingen 2014) 1, 11 ff.; G.-P. CALLIESS/P. ZUMBANSEN, Rough Consensus and Running Code: A Theory of Transnational Private Law (London 2012); L. VIELLECHNER, Was heißt Transnationalität im Recht?, in: Calliess (ed.), Transnationales Recht, (Tübingen 2014) 57 ff.; M. RENNER, Transnationales Recht, in: Grundmann/Micklitz/Renner (eds.), Privatrechtstheorie, Vol. II (Tübingen 2015) 1871 ff.; P. ZUMBANSEN, The constitutional itch: Transnational private regulatory governance and the woes of legitimacy, in: Helfand (ed.), Negotiating state and non-state law (Cambridge 2015) 96 ff.

54 KLEINSTEUBER, *supra* note 16, 61 ff.; C. T. MARSDEN, Co- and Self-Regulation in European Media and Internet Sectors: the Results of Oxford University's Study *www.selfregulation.info,* in: Möller/Amouroux (eds.), The Media Freedom Internet Cookbook (Vienna 2004) 76 ff., under *www.osce.org/fom/13844?download=true.*

55 See for example F. KIRCHHOF, Außerstaatliche Normsetzung am Beispiel von IFRS-Perspektiven und rechtliche Probleme, in: Hopt/Veil/Kämmerer (eds.), Kapitalmarktgesetzgebung im Europäischen Binnenmarkt (Tübingen 2008) 167 ff.

a solution for effective regulation at the national level.[56] This development is a challenge for the traditional private law system in Germany[57] because it is the beginning of an interaction between different national legal traditions.

b) German Self-regulation and European Rules

Another aspect we have to face when talking about self-regulation in Germany is that we have to include the topic of "self-regulation in the European Union". At present, there is very little research dealing with self-regulation in private law in Germany. However, there is even less as regards the EU.[58] The impact of self-regulation or co-regulation in Europe has still not been examined. In 2005 the European Economic and Social Committee stated that these "alternative methods of regulation have recently developed at European level".[59]

Also, there are up to now only rudimentary approaches for a discussion of the influence of European rule-making on national rule-making by self-regulation.[60] To date no one has analyzed the existing definitions in the various fields.[61] So, at the moment we do not know much about how the Europeanization of rule-making has influenced self-regulation. We know that there are EU-Principles for Better Self- and Co-Regulation.[62] This is the basis for some German approaches, for example in the field of data protection.[63]

There exist some topics where the German government proposed the use of "regulated self-regulation" and the Council of the European Union rejected the idea. In the field of internet regulation, for example, Germany

56 See MARSDEN, *supra* note 54, 76, 86.

57 See CALLIESS/ZUMBANSEN, *supra* note 53, 76 ff.

58 See instead, for example, European Economic and Social Committee, "The Current State of Co-Regulation and Self-Regulation in the Single Market" (2005) under *www.eesc.europa.eu/resources/docs/2018_cahier_en_smo_def.pdf.*

59 European Economic and Social Committee, *supra* note 58, 5.

60 BUCK-HEEB/DIECKMANN, *supra* note 20, 310; see also R. EISING, Interest Groups and Social Movements, in: Graziano/Vink (eds.), Europeanization: New Research Agendas (2008), Chapter 13, 167 ff.

61 See for example F. BIGNAMI, The Non-Americanization of European Regulatory Styles: Data Privacy Regulation in France, Germany, Italy, and Britain, in: Center for European Studies Working Paper Series #174 (2010) 20 ff., under *https://ces.fas.harvard.edu/uploads/files/publications/CES_174.pdf.*

62 *https://ec.europa.eu/digital-single-market/sites/digital-agenda/files/CoP%20-%20Principles%20for%20better%20self-%20and%20co-regulation.pdf.*

63 See Selbstregulierung Informationswirtschaft e.V., "Chancen und Voraussetzungen effektiver Selbst- und Ko-Regulierung zur Förderung des Verbraucherschutzes und des Datenschutzes in der digitalen Welt", Position Paper of May 2014, 5.

"proposed giving companies strong incentives to create and adhere to rules and technology that would safeguard users' privacy. The German Government considered this a good approach toward managing the necessary transition for matching outdated privacy legislation and modern communication technology. Under the proposed plan, companies would develop and implement fair and transparent data processing methods, ask customers for consent before gathering data and explain to them how data would be used."[64] A majority of the Council rejected the proposal: "The presidency instead said the Council would follow the regulatory approach and provide a framework companies would need to follow. The presidency also said the private sector could participate in [the] development of such regulations."[65]

The influence of the Europeanization on policy- or law-making is also only partially described.[66] Up to now only a few studies exist on the role of private rule-making as an element of European private law-making.[67]

The reality is that European legislation overruled German and transnational attempts at implementing so-called corporate social responsibility into the corporate governance regimes of companies through the formulation of standards[68] or codes. Since 2014 we have the European directive as regards disclosure of non-financial and diversity information by certain large undertakings and groups (Corporate Social Responsibility-Directive, CSR).[69] In this context, 2013 saw the installation of the "Community of

64 See eco (Association of the Internet Industry) under *https://international.eco.de/2013/news/privacy-in-the-eu-german-plan-for-regulated-self-regulation-rejected.html.*

65 See *https://international.eco.de/2013/news/privacy-in-the-eu-german-plan-for-regulated-self-regulation-rejected.html.*

66 BIGNAMI, *supra* note 61, 21 ff.

67 See for instance F. CAFAGGI (ed.), Reframing self-regulation in European private law (Dordrecht, London 2006); F. CAFAGGI, Private Regulation in European Private Law, EUI Working Paper RSCAS (Robert Schuman Centre For Advanced Studies) 2009/31, 1 ff. (under *cadmus.eui.eu/bitstream/handle/1814/12054/RSCAS_2009_31%5brev%5d.pdf?sequence=3&isAllowed=y.*

68 F. J. SÄCKER, Corporate Social Responsibility und das Lauterkeitsrecht: Braucht es ein "Europäisches Unternehmerleitbild"?, in: Hilty/Henning-Bodewig (eds.), Corporate Social Responsibility: Verbindliche Standards des Wettbewerbsrechts? (Berlin, Heidelberg 2014) 261, 269 f. ("corporate social responsibility as first step to future law"); in a transnational context see M. KALTENBORN/J. NORPOTH, Globale Standards für soziale Unternehmensverantwortung, Recht der internationalen Wirtschaft (RIW) 2014, 402 ff.

69 Directive 2014/95/EU of 22 October 2014, OJ L 330, 1.

Practice for Better self- and co-regulation".[70] In 2016, first attempts were made at implementing the directive into national (German) law.[71]

And finally, the question arises whether it is possible to implement an European directive by means of self-regulation instead of governmental rules, e.g. implementing the 2014 directive[72] giving a right of access to payment accounts through self-regulating rules. This idea is rejected in recital 8 of the directive, where European lawmakers conclude:

"Transparency and comparability of fees were considered at Union level in a self-regulatory initiative, initiated by the banking industry. However, no final agreement was reached on that initiative. As regards switching, the common principles established in 2008 by the European Banking Industry Committee provide a model mechanism for switching between payment accounts offered by banks located in the same Member State. However, given their non-binding nature, those common principles have been applied in an inconsistent manner throughout the Union and with ineffective results."[73]

III. Development of Self-regulation

1. General Aspects

Talking about the development of self-regulation means asking whether there is an increase in the number of self-regulatory rules. Or is self-regulation nowadays – especially after the financial crisis of 2008 – on its way back? Did the state increasingly intervene in fields where self-regulation was seen as the best way of regulating? Can we identify areas where self-regulation has proved to be ineffective in Germany? Or can we discover fields where we are witnessing a renaissance of self-regulation?

Even a brief introduction to the "history" of German self-regulation would be a broader task than we can undertake in this context. For this reason, we must limit ourselves to rough lines of development. First of all, we can note that there is still a lack of research in this field that has only begun to be filled in the last years.[74] A further point should also be men-

70 See *https://ec.europa.eu/digital-single-market/genealogy-cop.*

71 On the draft law of 2016 see BT-Drucks. 18/9982 of 17 October 2016 "zur Stärkung der nichtfinanziellen Berichterstattung der Unternehmen in ihren Lage- und Konzernlageberichten" (meaning: on strengthening the non-financial reporting of companies in their management and group management reports).

72 Directive 2014/92/EU of 23 July 2014 on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features, OJ L 257 of 28 August 2014, 214 ff.

73 OJ L 257, 28 August 2014, 214, 216.

74 Cf. Buck-Heeb/Dieckmann, *supra* note 20, 7; also Michaels/Jansen, *supra* note 26, 843, 890; N. Jansen/R. Michaels, Private Law and the State: Compara-

tioned here: The distinction between private and public law plays a major role in Germany. This has historical reasons. Thus we have some uncertainty about what private law means within the legal tradition of Germany.

In German literature, we can find two contradictory statements. First, it is said that self-regulation has a long tradition in Germany.[75] Second, it is said that it is a quite modern creation.[76] Both are true. The different statements have to do with the distinction that I have indicated above: the distinction between genuine self-regulation and state-induced or regulated self-regulation.

The first self-regulatory rules can be found already in the 11th century, at a time when a state in the modern sense had not yet existed. But – and this is an important point – one didn't call it "self-regulation". The development of "regulated self-regulation" began only in the 19th century, when the German national state arose.[77] Technical rules in particular have been elaborated for more than a hundred years. To date we can count over 20,000 rules.[78]

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tive Perceptions and Historical Observations, in: The Rabel Journal of Comparative and International Private Law (RabelsZ) 71 (2007) 345, 358 ff.; P. COLLIN, Einleitung: "Gesellschaftliche Selbstregulierung" und "Regulierte Selbstregulierung" – ertragreiche Analysekategorien für eine (rechts-)historische Perspektive?, in: Collin/Bender/Ruppert/Seckelmann/Stolleis (eds.), Selbstregulierung im 19. Jahrhundert – zwischen Autonomie und staatlichen Steuerungsansprüchen (Frankfurt/Main 2011); see also P. COLLIN/G. BENDER/S. RUPPERT/M. SECKELMANN/M. STOLLEIS, Regulierte Selbstregulierung im frühen Interventions- und Sozialstaat (Frankfurt/Main 2012); P. COLLIN/G. BENDER/S. RUPPERT/M. SECKELMANN/M. STOLLEIS, Regulierte Selbstregulierung in der westlichen Welt des späten 19. und frühen 20. Jahrhunderts (Frankfurt/Main 2014); COLLIN/RUDISCHHAUSER, *supra* note 44; P. COLLIN (ed.), Justice without the State within the State. Judicial Self-Regulation in the Past and Present (Frankfurt/Main 2016).

75 See for example Organization for Economic Co-operation and Development (OECD), Reviews of Regulatory Reform: Germany (2004) 60, under: *http://www.oecd-ilibrary.org/governance/oecd-reviews-of-regulatory-reform-germany-2004_9789264107861-en.*

76 COLLIN/RUDISCHHAUSER, *supra* note 44, recital 6; see also the title of the study of W. SCHULZ and T. HELD, Regulated Self-Regulation as a Form of Modern Government (Hamburg 2004).

77 Compare T. KEISER, Selbstregulierung im entstehenden Nationalstaat: Autogoverno und Corpi intermedi in Italien, in: Collin/Bender/Ruppert/Seckelmann/Stolleis (eds.), Selbstregulierung im 19. Jahrhundert. Zwischen Autonomie und staatlichen Steuerungsansprüchen (Frankfurt/Main 2011).

78 F. MICHAEL, in: Ehlers/Fehling/Pünder (eds.), Besonderes Verwaltungsrecht, Vol. 1 (3rd ed., Heidelberg 2012), § 16 Rn. 23; see also the development of the "self-created rules of the economy" ("selbstgeschaffenes Recht der Wirtschaft"), P. C. LEYENS, Selbstbindungen an untergesetzliche Verhaltensregeln: Gesetz, Vertrag,

The OECD review of regulatory reform in Germany of 2004 emphasizes:

"Self-regulation is part of the German tradition. Many activities are already subject to regulatory frameworks which have been developed and are managed by representatives of the sector, albeit under the umbrella of a comprehensive and efficient competition law and authority."[79]

Self-regulation has been consciously perceived only since the second half of the 20th century, because from this period the image of the "strong" state no longer describes reality. Since that time, the state has increasingly used private actors to regulate certain fields or enforce rules in those fields. On the one hand, the state is leaving regulation to private parties because the state does not have the necessary expertise (i.e. technical rules) or because the common good ("Gemeinwohl") is not affected (i.e. sporting competitions). On the other hand, the state is assigning tasks to private actors that inherently fall upon the state or are ones for which the state, while perceiving a need for regulation by law, nevertheless renounces this needs and instead uses economic and social mechanisms to regulate a field. The state only takes action when the parties concerned cannot cope with the regulatory task themselves. This can be the case, for example, if some of the persons concerned are disadvantaged (i.e. where there is an abuse of power by the economically or socially stronger). This can also be the case if third parties who are not directly related to the field to be regulated have become affected ("Gewährleistungsverwaltung").[80]

2. Autonomous Self-regulation, Especially Transnational Rules

This form of self-regulation looks back over a long tradition in Germany. Even in the eleventh century it was well developed in early long-distance networks, whether it was in the Mediterranean region as *lex mercatoria* or in the Hanseatic League, which covered the North and Baltic Seas.[81] This form of self-regulation can be characterized by the total privacy of regula-

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Verband, Publizität und Aufsichtsrecht, Archiv für die civilistische Praxis (AcP) 215 (2015) 611, 616 f.

79 OECD, *supra* note 75, 60.

80 See W. HOFFMANN-RIEM, Das Recht des Gewährleistungsstaates, in: Schuppert (ed.), Der Gewährleistungsstaat – ein Leitbild auf dem Prüfstand (Baden-Baden 2005) 87 ff.; W. HOFFMANN-RIEM, Innovation und Recht – Recht und Innovation (Tübingen 2016) 374; A. VOSSKUHLE, Beteiligung Privater an öffentlichen Aufgaben und staatliche Verantwortung, Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer (VVDStRL) 62 (2003) 266 ff.

81 M. LATZER/N. JUST/F. SAURWEIN/P. SLOMINSKI, Selbst- und Ko-Regulierung im Mediamatiksektor. Alternative Regulierungsformen zwischen Staat und Markt (Wiesbaden 2002) 9; see also CALLIESS/MAURER, *supra* note 53, 1, 8 ff.

tion without involvement of the state. Here, the reason for private rule-making is not that the state has withdrawn from these fields but that state-regulation is not an option because of the transnationality of the field that is to be regulated.[82] Thus there is no alternative between state and private regulation. This can be found mostly in private law.[83]

We also have new areas of self-regulation, as for example the rules in sports. Sports rules, which are defined by sports federations, are intended to ensure abstract-general rules according to which competitions and the like can take place.[84]

3. Regulated Self-regulation/Co-regulation

A second development we can see is in the field of regulated self-regulation. In Germany, this form of self-regulation was for a long period not as popular as, for example, it was in Great Britain. Nevertheless, starting in the 19th century there were some initial developments that – from today's point of view – can be called "regulated self-regulation".

This has to do with two general developments in Germany. The first one is the possibility of organizing interests beyond status-based social structures ("ständische Gesellschaft"). Being corporately organized was no longer dictated and instead became voluntarily possible. Thus we find many new or renewed organizations, as for example industry associations, chambers and employer associations. At the same time, legislation intervened in more and more sectors of economic life, and it undertook increasingly socio-political functions. The increase in governmental regulation led to new challenges. In many fields the challenges could be only met by social self-organization.[85] Especially two areas are covered by the development of this form of self-regulation: economics and social policy.[86]

This form of self-regulation gained great importance in the 1970s. This has to do with the emerging criticism of existing regulation.[87] There was a demand for the state's withdrawal in rulemaking, with constant stress

82 See G.-P. CALLIESS (ed.), Transnationales Recht. Stand und Perspektiven (Tübingen 2014); L. VIELLECHNER, Transnationalisierung des Rechts (Weilerswist 2013); N. C. IPSEN, Private Normenordnungen als Transnationales Recht? (Berlin 2009); H. ADEN, Transnationales Recht als Thema fragmentierter Rechtswissenschaft(en), Rechtswissenschaft (RW) 2010, 212 ff.; M. RENNER, Zwingendes transnationales Recht (Baden-Baden 2011).

83 COLLIN/RUDISCHHAUSER, *supra* note 44, recital 7.

84 BUCK-HEEB/DIECKMANN, *supra* note 20, 67 ff.

85 COLLIN/RUDISCHHAUSER, *supra* note 44, recital 12 f.

86 COLLIN/RUDISCHHAUSER, *supra* note 44, recital 19.

87 BUCK-HEEB/DIECKMANN, *supra* note 20, 19.

placed on the danger of over-regulation, inflexible regulation etc. Thus the term "regulated self-regulation" is quite a new one in Germany. There was a public law debate about a reform of administrative law. The central question here was whether and how a social self-organization ("gesellschaftliche Selbstorganisation") should take place to fulfill public tasks. Therefore it was discussed how such a non-governmental pursuit of interests ("Interessenverfolgung") could be systematically understood. The term "regulated self-regulation" seemed to describe the notion best.[88] Under this term the various administrative sectors are analyzed.[89]

Although this discussion took place, in 2004 the OECD still identified a considerable backlog of self-regulation in Germany. Therefore it was concluded that Germany

> "should further promote and support systematic consideration of self-regulation and regulatory alternatives for new regulatory proposals. Considerations about the use of self-regulation and soft-law alternatives should be matched with the same scrutiny, transparency and accessibility that applies for traditional regulation".[90]

The reason for this deficiency was seen in the failure of having "not yet developed more specific guidelines or criteria for when self-regulation should be preferred to other tools".[91]

IV. Framework of Self-regulation

1. Diversity of Self-regulation

In Germany, self-regulation – whatever this term means – can be found in all social and economic areas. So we will not deepen this here. It can be

88 H.-H. Trute, Verwaltung und Verwaltungsrecht zwischen gesellschaftlicher Selbstregulierung und staatlicher Steuerung", Deutsches Verwaltungsblatt (DVBl) 1996, 950 ff.; M. Schmidt-Preuss, Verwaltung und Verwaltungsrecht zwischen gesellschaftlicher Selbstregulierung und staatlicher Steuerung, Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer (VVDStRL) 56, 160 ff.; E. Schmidt-Assmann, Regulierte Selbstregulierung als Element verwaltungsrechtlicher Systembildung, in: Regulierte Selbstregulierung als Steuerungskonzept des Gewährleistungsstaates, Die Verwaltung, supplement 4 (2001) 253 ff.

89 For example D. Bosch, Die "Regulierte Selbstregulierung" im Jugendmedienschutz-Staatsvertrag (Frankfurt/Main 2007); S. Frenzel, Stromhandel und staatliche Ordnungspolitik (Berlin 2007); T. Stefaniak, Der Wettbewerb in der Energiewirtschaft zwischen staatlicher Regulierung und selbstregulativer Verantwortung (Baden-Baden 2008); A. C. Thoma, Regulierte Selbstregulierung im Ordnungsverwaltungsrecht (Berlin 2008).

90 OECD, *supra* note 50, 89.

91 OECD, *supra* note 50, 90.

found in commercial law, in sports, in technical areas, in the area of accounting etc.[92]

2. Categories of Self-regulation

Because of the difficulties in defining the term "self-regulation", we can at least try to build categories of self-regulation. In scholarly literature there have been certain attempts to form categories. It seems difficult to draw distinctions between voluntary and non-voluntary self-regulation. Here, the question is what we mean by "voluntary". Accordingly, some genuine self-regulated rules without a direct influence of the state nevertheless have to fall under the category "non-voluntary" when there is the threat that the state will regulate if there is not sufficient self-regulation.

The most widely used distinction is the one which comes from public law scholars and which was already mentioned above. It is either a four-model system or a three- (or alternatively two-) model system. The distinction is based on the consideration that self-regulation encompasses a wide range. On the one hand there is private ordering without resort to legal rules, and on the other hand there are various forms of state-enforced systems of delegated rules.

a) The Four-model System

In this context we can find a differentiation into four self-regulation possibilities dependent on the influence of the state.[93] Here, the degree of interference by the state varies. First of all we have voluntary self-regulation, which means that the state doesn't play an active and not even a passive role. Second, there is the possibility of coerced self-regulation ("erzwungene Selbstregulierung"), where a private party is urged to make rules. The goal is to discourage the government from legislating. So, here the government threatens to implement a formal regulatory procedure if the results of self-regulation have proven unsatisfactory. Some refer to this form as forced self-regulation.

Third, we have a stronger influence of the state in the form of approved self-regulation ("genehmigte Selbstregulierung"). Here the rules made by private parties have to be consented to by the state. And last but not least

92 See BUCK-HEEB/DIECKMANN, *supra* note 20.

93 G. F. SCHUPPERT, Governance im Spiegelbild der Wissenschaftsdisziplinen, in: Schuppert (ed.), Governance-Forschung. Vergewisserung über Stand und Entwicklungslinien (2nd ed., Baden-Baden 2006) 371, 402; MONROE/VERHULST, *supra* note 18, 11 ff.; E. P. MONROE, In Search of the Self, in: Marsden (ed.), Regulating the Global Information Society (London 2000) 57, 64 ff.

we have mandated self-regulation ("angeordnete Selbstregulierung"), where the government instructs a private party or institution to make rules taking into account the framework set by the state.

b) The Two- or Three-model System

A more general differentiation, deriving from German administrative law ("Verwaltungsrecht"),[94] is the one between totally autonomous self-regulation and self-regulation taking place under the influence of the state. As to the latter, some differentiate between co-regulation and regulated self-regulation (a three-model system). Others see co-regulation as a form of regulated self-regulation (a two-model system).[95]

aa) Co-regulation

Co-regulation (or delegated regulation)[96] is used in a wide variety of circumstances. German scholars mostly define co-regulation in their special area of expertise. Therefore, there is no uniform meaning; instead the specific meaning of co-regulation has to be seen "in the national, sectoral and temporal context in which it is used".[97] Moreover, in addition to there being no single definition in Germany, there is no prospect of identifying a uniform definition in Europe or internationally.

Some differentiate between co-regulation and regulated self-regulation.[98] While regulated self-regulation is defined as an activity of private parties, which is supervised and partially instructed by the state, co-regulation means an equal cooperation of private parties and the state. Co-regulation means in this sense a dialogue between private parties and the state. And last but not least, the term "co-regulation" gives a sense of the joint responsibilities of market actors and the state.[99] In fact, co-regulation is seen as an

94 See W. HOFFMANN-RIEM/E. SCHMIDT-ASSMANN/A. VOSSKUHLE (eds.), Grundlagen des Verwaltungsrechts, Vol. 1 (2nd ed., Munich 2012); see also LEYENS, *supra* note 78, 611, 619; W. HOFFMANN-RIEM, Auffangordnungen, in: Hoffmann-Riem/Schmidt-Aßmann (eds.), Öffentliches Recht und Privatrecht als wechselseitige Auffangordnungen (Baden-Baden 1996) 300 ff.; BUCK-HEEB/DIECKMANN, *supra* note 20, 33 ff.

95 MARSDEN, *supra* note 54, 76, 86, referring to W. HOFFMANN-RIEM, Regulating Media: The Licensing and Supervision of Broadcasting in Six Countries (New York 1996).

96 In Germany these two terms are used as synonyms.

97 MARSDEN, *supra* note 54, 76, 86.

98 See for example SCHUPPERT, *supra* note 25, 300 ff.

99 MARSDEN, *supra* note 54, 76, 86.

alternative to the "command and control regulation" which is widely used in Germany.

Co-regulation means that a group of actors make rules for their sector in cooperation with or on behalf of the state. But in another context, we can find in academic literature a dissenting opinion. Here, the thesis is that since "co-regulation presumes the direct involvement of public actors in the regulatory process, especially with regard to enforcement, such regulatory mechanism is primarily considered or understood to take a "top-down" approach and to complement legislation rather than be an alternative to legal ordinances."[100]

In the EU, co-regulation is defined in an interinstitutional agreement titled "Better Lawmaking", which was concluded on 16 December 2003 between the Parliament, the Council and the Commission. Here it is described as

"the mechanism whereby a Community legislative act entrusts the attainment of the objectives defined by the legislative authority to parties which are recognised in the field (such as economic operators, the social partners, non-governmental organizations, or associations). This mechanism may be used on the basis of criteria defined in the legislative act so as to enable the legislation to be adapted to the problems and sectors concerned, to reduce the legislative burden by concentrating on essential aspects and to draw on the experience of the parties concerned".[101]

Others define co-regulation as a process where the state and the private regulators co-operate in joint institutions.[102] Some see also public-private partnerships as a form of co-regulation.[103]

The OECD speaks of co-regulation in Germany when

"experts contribute to the development of technical standards (e.g. for measurement procedures, noise control, etc.). Such standards are defined, among others, by the standards committees of the German Institute for Standardization (Deutsches Institut für Normung e.V.) or professional associations, such as the Association of Engineers (Verein Deutscher Ingenieure, VDI), or medical expert organizations. Some of these institutions and organizations receive financial support from a federal Ministry."[104]

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100 T. TROPINA, Public-Private Collaboration: Cybercrime, Cybersecurity and National Security, in: Tropina/Callanan (eds.), Self- and Co-regulation in Cybercrime, Cybersecurity and National Security (Cham et. al 2015) 16.

101 See No. 18 of the Interinstitutional agreement on better law-making (2003/C321/01), OJ C 321 of 31 December 2003; also see European Economic and Social Committee "The Current State of Co-Regulation and Self-Regulation in the Single Market" (2005), under *www.eesc.europa.eu/resources/docs/2018_cahier_en_smo_def.pdf,* 11.

102 KLEINSTEUBER, *supra* note 16, 61 ff.

103 TROPINA, *supra* note 100, 17.

104 OECD, *supra* note 50, 103 f.

We can also find co-regulation, for example, in the field of the protection of young people from harmful media ("Jugendmedienschutz").[105]

Important for the discussion of the development of self-regulation is the following point: Depending on the concrete definition of co-regulation, the examples given in academic literature vary (see below under c)).

bb) Regulated Self-regulation

Regulated self-regulation in Germany is at times also called "controlled self-regulation" or self-regulation induced by the state. The term "regulated self-regulation" goes back to the judge of the Federal Constitutional Court Wolfgang Hoffmann-Riem in 1995.[106] He and other German scholars describe the concept of administrative regulated self-regulation with the German term "Gewährleistungsverwaltung". This refers to "measures that secure functionality of a certain field of business by activating and sharing action-guiding criteria".[107]

Here the government actively uses private sectors to achieve public policy objectives. Thus, regulated self-regulation is seen as a form of modern government. In this context self-regulation changes the role of the state.[108]

The German concept of regulated self-regulation is called "a form of delegation of rule-making to self-regulation bodies".[109] Hence, the state only plays a role when basic constitutional rights are to be upheld. Therefore some conclude that where self-regulation is structured by the state but the state is not involved, it should be called "regulated self-regulation".[110] In this context it is in the end a manner of outsourcing legislation.[111]

Private rule-making initiated by the government can be called "rule-making in the shadow of the law", taking into account the term which is

105 W. SCHULZ, Neue Ordnung durch neues Medienrecht? Modelle der Co-Regulierung im Medienbereich, in: Jarren/Donges (eds.), Ordnung durch Medienpolitik (Konstanz 2007) 217, 224.

106 W. HOFFMANN-RIEM, Multimedia-Politik vor neuen Herausforderungen, Rundfunk und Fernsehen (RuF) 1995, 125 ff.

107 BUMKE, *supra* note 25, 107, 108; SCHMIDT-ASSMANN, *supra* note 25, 405, 425; FECHNER/TIPTON, *supra* note 25, Paper 5, 1.

108 MICHAELS/JANSEN, *supra* note 26, 843.

109 SCHULZ/HELD, *supra* note 76.

110 See for example KLEINSTEUBER, *supra* note 16, 61 ff., referring to W. Hoffmann-Riem.

111 W. WIEGAND/J. WICHTERMANN, Der Einfluss des Privatrechts auf das öffentliche Bankrecht, in: Wiegand (ed.), Berner Bankrechtstag 1999, BBT Vol. 6 (Bern 1999) 119, 134 f.

used in the American sociology of law.[112] Some call it regulation under the "shadow of the state".[113] This last term shows that there is a control by a superior, i.e. that there is a directive function of the state. In other words: The state provides a "safety net" in case self-regulation fails.[114]

cc) Genuine Self-regulation

The second (or third) type of self-regulation is genuine self-regulation. This manner of self-regulation without any influence of the state is also called autonomous self-regulation, "pure" self-regulation,[115] voluntary self-regulation,[116] or even "social self-regulation" ("gesellschaftliche Selbstregulierung").[117] Some call it "private self-regulation" in contrast to "regulated" self-regulation.[118]

Autonomous self-regulation means self-regulation as rule-production by private parties in the absence of legal instruction. This means that the regu-

112 Cf. KÖNDGEN, *supra* note 27, 477, 495 ff.; SCHUPPERT, *supra* note 25, 227 ff.; see the reference to the American sociology of law, especially R. H. MNOOKIN/L. KORNHAUSER, Bargaining in the Shadow of the Law: The Case of Divorce, 88 Yale Law Journal 950, 968 (1978/79) 496; see also MÖLLERS/FEKONJA, *supra* note 21, 777, 779 fn. 9; S. GRUNDMANN, Schatten des Rechts und soziale Einbettung, in: Grundmann/Micklitz/Renner (eds.), Privatrechtstheorie, Vol. II, (Tübingen 2011) 1998 ff.

113 KLEINSTEUBER, *supra* note 16, 61 and 69.

114 KLEINSTEUBER, *supra* note 16, 61 and 69; M. M. LEITAO MARQUES/L. BETTENCOURT NUNES, Deepening the freedom of services through pro-competitive regulation: the case of the EU Services Directive, in: Drexl/Bagnoli (eds.), State-Initiated Restraints of Competition (Cheltenhem 2015) 103, 107.

115 G. MÜLLER/F. UHLMANN, Elemente einer Rechtssetzungslehre (3rd ed., Zürich 2013) 38.

116 L. MADER, Regulierung, Deregulierung, Selbstregulierung: Anmerkungen aus legistischer Sicht, in: Zeitschrift für Schweizerisches Recht (ZSR) 2004 II, 3, 43 (together with B. Rütsche).

117 P. COLLIN, Einleitung: "Gesellschaftliche Selbstregulierung" und "Regulierte Selbstregulierung" – ertragreiche Analysekategorien für eine (rechts-)historische Perspektive?, in: Collin/Bender/Ruppert/Seckelmann/Stolleis (eds.), Selbstregulierung im 19. Jahrhundert – zwischen Autonomie und staatlichen Steuerungsansprüchen (Frankfurt/Main 2011); SCHMIDT-PREUSS, *supra* note 88, 160, 162 ff.; U. DI FABIO, Verwaltung und Verwaltungsrecht zwischen gesellschaftlicher Selbstregulierung und staatlicher Steuerung, Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer (VVDStRL) 56 (1997), 235, 237 ff.; W. HOFFMANN-RIEM, Verfahrensprivatisierung als Modernisierung, Deutsches Verwaltungsblatt (DVBl.) 1996, 225, 228 ff.; W. HOFFMANN-RIEM, Innovation und Recht – Recht und Innovation (Tübingen 2016) 374 meaning not genuine but regulated self-regulation; see also KÖNDGEN, *supra* note 27, 477, 509.

118 COLLIN/RUDISCHHAUSER, *supra* note 44, recital 7.

lation is undertaken by private actors. It is established independently from the adoption of legal orders. Some call it a "bottom-up" approach.[119]

It is uncertain just what could be an example of genuine self-regulation. Thus, some identify German general contract terms ("Allgemeine Geschäftsbedingungen") as such a form of genuine self-regulation. General contract terms are a long-proven means of private ordering. Whether they can be called an instrument of self-regulation is not yet quite clear. Additionally, the self-regulation of the press in Germany is often taken as an example.[120] And surely transnational rules are an example of genuine self-regulation.

c) Conclusion

Could I now present you with a systematized description of self-regulatory acts in Germany? The answer seems to be yes, but, frankly said, the answer is no. As we have been able to see, there is no uniform definition of co-, regulated or genuine self-regulation.

The problem with the differentiations which I presented above is, that there exist in some fields different opinions as to whether a certain self-regulatory act falls in the one or the other category. As an example of this, we can take the German Corporate Governance Code. Some see it as an example of co-regulation.[121] Others see it as a form of regulated self-regulation.[122] Another opinion sees it as voluntary self-regulation; for though there is a comply-or-explain-rule in the German Stock Corporation Act, the Code is nevertheless non-binding[123] and therefore has no means of formally enforcing its rules, enforcement instead referring only to the comply-or-explain principle.[124] This uncertainty can also be seen in other papers to be presented at this conference.[125]

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119 Cf. TROPINA, *supra* note 100, 16 f.

120 SCHULZ/HELD, *supra* note 13, A-3 with further references.

121 Cf. TALAULICAR, *supra* note 49, 269 ff., especially 274 ff.; see also M. M. HAFEEZ, Corporate Governance and Institutional Investment (Boca Raton, Florida/USA 2015) 61; on whether the German Corporate Governance Code can be seen as an act of self-regulation see BUCK-HEEB/DIECKMANN, *supra* note 20, 99 f.

122 M. GRÜNBERGER, Geschlechtergerechtigkeit im Wettbewerb der Regulierungsmodelle, Rechtswissenschaft (RW) 2012, 1 ff.; S. LEUTHEUSSER-SCHNARRENBERGER, Recht mitgestalten. Bemerkungen zur liberalen Rechtspolitik anlässlich des 69. Deutschen Juristentages, Recht und Politik (RuP) 2012, 129 ff.

123 See the open formulation in the preamble of the German Corporate Governance Code (latest version dated 5 May 2015), where it is stated: "[…] the Code contributes to more flexibility and more self-regulation in the German corporate constitution".

124 LEYENS, *supra* note 78, 611 ff.

If we look closer, there is also a problem with the public law categories in the field of transnational law. Here, for example, it is discussed, whether the lex mercatoria is really autonomous or not.[126] Some even see the *lex mercatoria* as a "useful illusion"[127] or a "normative hypocrite" ("normative Hochstapelei"[128]). In the same way the existence of a lex sportiva is questioned by some scholars.[129]

Difficulties arise also in integrating so-called forced self-regulation into the system.[130] Although some see in this a separate category, the question remains whether there is seen an influence of the state or not. Genuine self-regulation must be rejected because governmental regulation is to be avoided. But it is also not a form of state-induced self-regulation.

At the same time, some even deny the self-regulatory character of certain models. For example, some assume that only heteronomous, state-induced self-regulation is "self-regulation", whereas genuine self-regulation belongs to the field of contractual freedom.[131]

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125 In the same way both MÖSLEIN and BINDER refer to the German Corporate Governance Code as an example, although in one paper the topic is genuine, and in the other it is state-induced self-regulation.

126 BUCK-HEEB/DIECKMANN, *supra* note 20, 156; see also P. ZUMBANSEN, Transnational Private Regulatory Governance: Ambiguities of Public Authority and Private Power, Vol. 76, No. 2 (2013) 117 ff., see under *scholarship.law.duke.edu/cgi/viewcontent.cgi?article=4364&context=lcp.*

127 SCHUPPERT, *supra* note 25, 379 ff.; ähnlich auch G. F. SCHUPPERT, Governance-Perspektiven für Demokratie und Selbstverwaltung, in: Cancik (ed.), Demokratie und Selbstverwaltung – Selbstverwaltung in der Demokratie (Göttingen 2015) 53 referring to A. ENGERT, Private Normsetzungsmacht: Die Standardisierung von Regelungen im Markt als Form der Fremdbestimmung, Rechtswissenschaft (RW) 2014, 301 ff.

128 G. F. SCHUPPERT, Governance-Perspektiven für Demokratie und Selbstverwaltung, in: Cancik (ed.), Demokratie und Selbstverwaltung – Selbstverwaltung in der Demokratie (Göttingen 2015) 53, 58 (in the end left open); but clearly in this direction K. SCHMIDT, Lex mercatoria: Allheilmittel? Rätsel? Chimäre?, in: Murakami/Marutschke/Riesenhuber (eds.), Globalisierung und Recht. Beiträge Japans und Deutschlands zu einer internationalen Rechtsordnung im 21. Jahrhundert (Berlin 2007) 153 ff.; compare also IPSEN, *supra* note 82.

129 See the notes in BUCK-HEEB/DIECKMANN, *supra* note 20, 84; see also K. D. WOLF, The non-existence of private self-regulation in the transnational sphere and its implications for the responsibility to procure legitimacy: the case of the lex sportiva, in: Global Constitutionalism, Vol. 3, Issue 3 (2014) 275 ff.

130 See BASEDOW, *supra* note 4, 141, 144.

131 C. CALLIESS, Inhalt, Dogmatik und Grenzen der Selbstregulierung im Medienrecht, Archiv für Presserecht (AfP) 2002, 465, 466; see also J. KÜHLING, Sektorspezifische Regulierung in den Netzwirtschaften (Munich 2004) 27.

This result leads to the fundamental question of whether we have to abandon the categories that have been used for years, the categories that are also the background of the lectures at our symposium. We have to question whether the categorization which was offered by administrative law scholars was an unsuccessful attempt.

3. New Categories?

This leads to the next question: If we abandon this categorization, how will it be possible to systematize self-regulatory acts?[132] Can we find a private approach? Or would it be better to leave aside the discussion on a "private" or "public" approach because it is a "political" question not influencing the content? The advantage of this would be that the discussion could be widened to the international level, where the difference between "public" and "private" rules mostly doesn't exist in the same way. If we give up the "public"-"private"-approach, we will have to look for another way to categorize the different forms of self-regulation.

Therefore, we need to decide whether it is preferable to make a distinction between the different stages in which self-regulation takes place. Here we could distinguish between the stages of the creation, application and enforcement of self-regulated rules. Especially the way in which self-regulated rules are enforced is crucial to their success, i.e. as to the rules being accepted and respected. Also, the creation of rules has to cope with a lot of challenges. For example, individual parties can try to design the rules in such a way that they are one-sidedly beneficial to them.[133] Self-regulation can also be used as a means of restricting competition against a market participant seeking market entry.

It is also possible to distinguish between external and internal effects of self-regulatory rules. Thus an external effect occurs when the rules are used (also by courts) for the concretization of private law. Such an effect can be seen with special technical rules or with sports rules, e.g., the FIS rules for skiing. On the other hand it is solely an internal effect when the rules apply only to the members and don't have an external effect.

Another possibility is to categorize self-regulatory acts by distinguishing between the various self-regulatory bodies and organizations (see below 4.) Self-regulation also can be categorized according to the tool that is used (see below 5.). All of the details cannot be dealt with here, so we will focus on these last two points.

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132 For the typificaton of law see BASEDOW, *supra* note 4, 141, 146.

133 R. BAHAR/L. THÉVENOZ, Conflicts of Interest: Disclosure, Incentives, and the Market, in: Bahar/Thévenoz (eds.), Conflicts of Interest. Corporate Governance Financial Markets, (Alphen aan den Rijn 2007) 1, 17 ff.

4. Self-regulatory Bodies as a Categorization

There exist many different rule-makers or standard-setters in the various areas of self-regulation.[134] Thus various types of standard-setters can be identified.[135] We can recognize self-regulatory rules made by companies in relation to contract partners (i.e. with general contract terms), we have rules created by a registered association ("eingetragener Verein") for its members (i.e. in sports), and there are rules made by an institute for standardization (i.e. DIN) or by a committee (IFRS). In this context, some see the rule-making bodies as "lawmaking clubs".[136]

An older self-regulatory body is the FSK (Freiwillige Selbstkontrolle der Filmwirtschaft GmbH, The German Film Industry's Organization for Voluntary Self-regulation/Film Classification Board), which enforces the legally regulated protection of youth and minors by designating age restrictions for films, videos and digital image carriers which will be publicly screened to children and young people, or made available to them.[137]

There are also chambers making rules in the sense of a self-regulation: chambers of handicraft and guilds, chambers of lawyers (federal and for individual court districts), chambers of doctors, chambers of pharmacists etc.[138] In these cases regulatory powers have been delegated to self-regulatory bodies. The OECD notes that the effectiveness of this type of regulation is not always clear and can engender restraints on competition.[139] In a transnational context we can name the International Chamber of Commerce (ICC). Here we find no delegation because of the transnational character of this chamber.

An example of self-regulation by private associations *(Vereine)* would be the Accounting Standards Committee of Germany (ASCG, "Deutsches Rechnungslegungs-Standards Committee e.V.", DRSC), which was established as a national standardization organization. Pursuant to Section 342 of the German Commercial Code (HGB), it has been recognized as a private accounting committee by the Federal Ministry of Justice.

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134 SCHUPPERT, *supra* note 25, 217 ff.

135 See SCHUPPERT, *supra* note 25, 221 ff.; T. M. J. MÖLLERS (ed.), Standardisierung durch Markt und Recht (Baden-Baden 2008); T. M. J. MÖLLERS, Standards als sekundäre Rechtsquelle – Ein Beitrag zur Bindungswirkung von Standards, in: Möllers (ed.), Geltung und Faktizität von Standards (Baden-Baden 2009) 143 ff; see also T. M. J. MÖLLERS, Internationalisierung von Standards (Baden-Baden 2011); in the field of transnational self-regulation see KÖNDGEN, *supra* note 10, 277, 289 ff.; LEYENS, *supra* note 78, 611, 620 f.

136 SCHUPPERT, *supra* note 25, 404.

137 *https://www.spio-fsk.de/?seitid=1299&tid=1299*.

138 OECD, *supra* note 75, 75.

139 OECD, *supra* note 75, 75.

Self-regulation can also involve private organizations, like for example the German Federal Bar (Bundesrechtsanwaltskammer), founded in 1878. It is the umbrella organization for the professional self-regulation of German lawyers. The regional bar associations monitor lawyers' exercise of professional rights and compliance with professional duties in their capacity as self-regulatory institutions. In the same way we have, for example, the Chamber of Public Accountants *(Wirtschaftsprüferkammer)* as well as many other chambers. They are corporations under public law, but this is not private law.

5. Self-regulatory Tools as a Categorization

In the OECD-report from 2010 on Germany, a range of alternative approaches to state regulation is enumerated. Mention is made of voluntary agreements, standardization, conformity assessment and self-regulation in sectors such as corporate governance, financial markets and professional services such as accounting.[140] One can add self-binding rules[141] in the form of commitments, declarations, charters, standards, codes of conduct and contractual agreements. In 2005, 60% of all professional associations in Europe stated that they were involved in self-regulation, and half of the remaining 40% expected to be involved in the future.[142] We can differentiate between the various contractual elements of the self-regulatory acts as long as private law and not public law is the focus. An important point is the binding effect.[143] As time is limited, I can focus on only a few points at present.

a) Codes

Codes of practice or good conduct are common tools of self-regulation. These can be a special form of a self-commitment. The Fairness Code, for example, is a self-commitment of the German Derivatives Association (*Deutscher Derivate Verband,* DDV). It is a "voluntary undertaking by issuers to observe standards with respect to the structuring, issuing, marketing and trading of structured products".[144] Often the codes are merely gen-

140 OECD, *supra* note 50, 81 and 104.

141 LEYENS, *supra* note 78, 611 ff.

142 European Economic and Social Committee (EESC) "The Current State of Co-Regulation and Self-Regulation in the Single Market" (2005) 5, under *www.eesc.europa.eu/resources/docs/2018_cahier_en_smo_def.pdf;* see also EESC The Current State of Self-Regulation and Co-Regulation", 31.3.2008; M. MATAIJA, Private Regulation and the Internal Market (Oxford 2016) 14 ff.

143 LEYENS, *supra* note 78, 611, 636 ff.

144 See the homepage of the DDV, *www.derivateverband.de/DEU/Politik/Selbstregulierung*.

eral declarations of principles.[145] Some equate the term "code" with the term "gentlemen's agreement".[146] This does not seem convincing since the latter are not regularly fixed in writing. There are different sanctions for breaches of the code in question.

In Germany, the experience with codes is varied. The Takeover Code of 1995, for example, did not prove successful. The Code was said to have some functional shortcomings. It mainly failed because it was not accepted by a sufficient number of listed companies.[147] Consequently, since 1 January 2002 Germany has a Takeover Law (WpÜG).

Some see the German Corporate Governance Code as being more successful than the Takeover Code, although the recommendations and suggestions of the Code are voluntary. But through the declaration of conformity pursuant to Section 161 of the German Stock Corporation Act, the Code has a legal basis.[148] According to this "the board of directors and the supervisory board of listed companies have to declare annually that they have complied with the recommendations of the Code Commission, or have to declare which recommendations will not be considered". The declaration statement is mandatory and non-compliance has to be explained. In German literature it is criticized that the principle of comply-or-explain has increasingly eroded and a juridification ("Verrechtlichung") of the code is taking place.[149] But, although the German Corporate Governance Code is accepted by the majority of the German business community and although there is a sort of supervision through the comply-or-explain-mechanism,[150] it often doesn't lead to the desired effects – as I already mentioned in my introduction.[151]

145 PRICE/VERHULST, *supra* note 23, 7.

146 WAHLERS, *supra* note 25, 94.

147 BUCK-HEEB/DIECKMANN, *supra* note 20, 99; AUGSBERG, *supra* note 21, 280.

148 See P. C. LEYENS, Comply or Explain im Europäischen Privatrecht: Erfahrungen im Europäischen Gesellschaftsrecht und Entwicklungschancen des Regelungsansatzes, Zeitschrift für europäisches Privatrecht (ZEuP) 2016, 388 ff.

149 Arbeitskreis Externe und Interne Überwachung der Unternehmung (AKEIÜ) der Schmalenbach-Gesellschaft für Betriebswirtschaft e.V. (a working group for external and internal supervision of companies), Der Betrieb (DB) 2016, 395 ff.; see also M. R. THEISEN, Aufstieg und Fall der Idee vom Deutschen Corporate Governance Kodex, Der Betrieb (DB) 2014, 2057 ff.; R. POFALLA, Gute Unternehmensführung in Deutschland, im Spannungsfeld zwischen Selbstregulierung und gesetzgeberischem Auftrag, Die Wirtschaftsprüfung (WPg) 2013, Sonderheft, 2 f.

150 LEYENS, *supra* note 150, 388 ff.

151 See under I.

b) Other Self-commitments

Self-commitments of companies indeed may be binding for the individual company. But in most cases the rules are very general so that the addressees normally don't acquire a legal right. In this context, the problem is not, as above, acceptance by parties or enforcement; rather, the problem is the way how self-regulatory rules are created. In consequence, the rules hardly lead to any real commitment as long as they are formulated in a very general fashion.

c) Standards and Technical Rules

Technical rules are, for example, implemented by the German Institute for Standardization (*Deutsches Institut für Normung e.V.,* DIN), by the Association of German Engineers (*Verein Deutscher Ingenieure,* VDI) and by the German Technical and Scientific Association for Gas and Water (*Deutscher Verein des Gas- und Wasserfaches e.V.,* DVGW). Even for the members there is no obligation to comply with the technical standards. In private law these rules serve to make some legal terms ("unbestimmte Rechtsbegriffe") and general clauses more specific and thus assume the function of concretizing the law.[152] The standardizations[153] themselves are not law, but the rules are incorporated into the law. They constitute binding references for the field on technical issues. In this context, also courts use them in reaching their decisions.

V. Concluding Remarks

The present talk discussed only the terminology, the development and the framework of self-regulation. We have not been able to address other cross-cutting issues, as for example the pros and cons of self-regulation; the legitimation of self-regulatory rules;[154] the enforcement of self-regulatory rules and their binding force; the conditions which are relevant for successful self-regulation; and, especially, the effectiveness of self-regulation. We also didn't deal with the requirements for a successful and/or adequately legitimated self-regulatory body or with the formation of a regulatory choice theory.[155]

152 Buck-Heeb/Dieckmann, *supra* note 20, 159 ff.

153 See also W. Hoffmann-Riem, *supra* note 117, 420 ff.

154 See Bachmann, *supra* note 33, 159 ff.; Bumke/Röthel, *supra* note 28, 1, 13 ff.; G. Bachmann, Legitimation privaten Rechts, in: Bumke/Röthel (eds.), Privates Recht (Tübingen 2012) 207 ff.; S. Magen, Zur Legitimation privaten Rechts, in: Bumke/Röthel (eds.), Privates Recht (Tübingen 2012) 229 ff.

155 Schulz/Held, *supra* note 13, A-5.

Similarly, we also didn't talk about special private law-effects, e.g. the possibility of binding third parties to self-regulatory rules. And we didn't answer the question whether, after the financial crisis, we need at least in certain sectors a shift in the "conception of the principal goals, scope, and function of self-regulation".[156] It remains open whether we can talk about an increase of self-regulation in the transnational context and a decrease of so-called genuine self-regulation (without transnational rules).

The goal of this lecture was to give a short introduction into general aspects of self-regulation. With this effort many questions have arisen and we can summarize that in Germany we are still at the early stages of systemizing self-regulation.[157] This paper has attempted to show the problems we have to cope with.

Let me end with a provocative thesis: The lack of sufficient systematization has to do with the insufficient categories we have used up to now. Therefore we should think about abandoning the distinctions developed by public law scholars. We should concentrate on a private law approach. Then a sufficient systematization might be possible and experiences in one area may help to govern other areas. Perhaps we can learn in this context from the Japanese approach toward self-regulation.

156 See OMAROVA, *supra* note 10, 697; see also TALAULICAR, *supra* note 49, 269, 270.

157 First steps in BUCK-HEEB/DIECKMANN, *supra* note 20; see also BACHMANN, *supra* note 33; T. M. J. MÖLLERS, *supra* note 135; T. M. J. MÖLLERS, Standards als sekundäre Rechtsquelle – Ein Beitrag zur Bindungswirkung von Standards, in: Möllers (ed.), Geltung und Faktizität von Standards (Baden-Baden 2009) 143 ff.; see also T. M. J. MÖLLERS, Internationalisierung von Standards (Baden-Baden 2011); MÖLLERS/FEKONJA, *supra* note 21, 777 ff.; LEYENS, *supra* note 78, 611 ff.

II. Types of Self-Regulation

Genuine Self-regulation in Japanese Capital Markets: The Stewardship Code

In Comparison to the Corporate Governance Code

Hiroyuki Kansaku[*]

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VI. Improvement of the Stewardship Code
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  2. Proposal for Revised Stewardship Code
VII. Concluding Remarks

* Prof. Hiroyuki Kansaku, Professor of Law, The University of Tōkyō, Graduate Schools for Law and Politics.

I. INTRODUCTION

Japan's Stewardship Code (SSC) represents the fundamental principles of good practice for institutional investors in fulfilling their stewardship responsibilities. The SSC was created in 2014 and influenced by the Stewardship Code in the United Kingdom.[1] On the other hand, the Tōkyō Stock Exchange (TSE) incorporated Japan's Corporate Governance Code (CGC) into its Securities Listing Regulations in 2015.[2] The CGC aims to achieve effective and transparent corporate governance of listed companies. These two codes are expected to work as the two wheels of a cart, so that the sustainable growth of listed companies is promoted by both sides: Japanese institutional investors and listed companies.[3]

As forms of self-regulation in the capital market, the SSC and the CGC have characteristics in common. First, both codes are non-legally-binding norms. Second, they are non-autonomous, artificial soft laws. Third, both adopt a so-called "principles-based" approach and a "comply or explain" rule. Finally, the council of experts established by the Financial Services Agency of Japan drafted them both. The private and public sectors cooperated to create both of these codes.

Nevertheless, the codes also have their own characters, especially concerning binding effects and enforcement mechanisms. The SSC can be characterized as genuinely self-binding, and there is neither a contract nor an organization that oversees and enforces it apart from the CGC. This means that the binding effect of the SSC is very weak, and enforcing it would be difficult.

The binding effect of the CGC, however, is stronger, because a listed company agrees with the TSE to abide by the securities listing regulations in its

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1 NIHON-HAN SUCHUWĀDOSHIPPU KŌDO NI KANSURU YŪSHIKI-SHA KENTŌ-KAI [The Council of Experts Concerning the Japanese Version of the Stewardship Code], *Sekinin aru kikan tōshi-ka no sho-gensoku* [Principles for Responsible Institutional Investors (Japan's Stewardship Code)] (26 February 2014). English translation available at *http://www.fsa.go.jp/en/refer/councils/stewardship/20140407/01.pdf.*

2 TŌKYŌ STOCK EXCHANGE, INC., *Yūka shōken jōjō kitei* [Securities Listing Regulations], *betten* [Attachment], Corporate Governance Code, English translation available at *http://www.jpx.co.jp/english/rules-participants/rules/regulations/tvdivq0000001vyt-att/securities_listing_regulations_(r901-r1606)_20161104.pdf.*

3 KŌPORĒTO GABANANSU NO SAKUTEI NI KANSURU YŪSHIKI-SHA KAIGI [The Council of Experts Concerning the Corporate Governance Code], *Kōporēto gabanansu kōdo gen'an – Kaisha no jizoku-teki na seichō to chū-chōkitekina kigyō kachi no kōjō no tame ni –* [Japan's Corporate Governance Code [Final Proposal] – Seeking Sustainable Corporate Growth and Increased Corporate Value over the Mid- to Long-Term] (5 March 2015), Background, paragraph 8, pp. 3–4. English translation available at *http://www.fsa.go.jp/en/refer/councils/corporategovernance/20150306-1/01.pdf.*

listing agreement and the CGC is incorporated into the TSE's securities listing regulations. Furthermore, the TSE is a self-regulatory organization according to the Japanese Financial Instruments and Exchange Act (FIEA).[4] A financial instruments exchange is permitted to establish and enforce its self-regulation by the FIEA. The CGC is thus connected with the state, because the self-regulations of the TSE are, ultimately, state-supervised.[5]

In this paper I will focus on Japan's SSC, which was created in 2014 as a genuine approach to self-regulation in the capital markets, and compare it with the CGC, which was incorporated into the listing regulations of the TSE in 2015.

II. Japan's Stewardship Code

1. Outline of the Stewardship Code

Japan's SSC defines "stewardship responsibilities" as the responsibilities of institutional investors to enhance the mid- to long-term investment return for their clients and ultimate beneficiaries by improving and fostering the investee companies' corporate values and sustainable growth through constructive engagement or purposeful dialogue based on in-depth knowledge of the companies and their business environments.[6] There is no definition of the term "institutional investors" in the SSC. Not only asset owners and investment managers, as institutional in a narrow sense, but also other players in the equity investment chain, which extends from ultimate beneficiaries to investee companies, could be covered, including proxy advisors or consulting firms that give advice or make recommendations for exercising voting rights or engagement.[7]

The SSC outlines seven principles of good practice for institutional investors.

Principle 1: Institutional investors should have a clear policy regarding how they fulfill their stewardship responsibilities,[8] and publicly disclose it.

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4 Articles 84 and 85 of *Kin'yū shōhin torihiki-hō* [Financial Instruments and Exchange Act], Law No. 25/1948.

5 Article 80, paragraph 1 and Articles 149, 153-3 and 153-4 FIEA.

6 SSC, *supra* note 1, "Stewardship responsibilities" and the role of the Code, p. 1.

7 SSC, *supra* note 1, Aims of the Code, paragraphs 7 and 8, p. 3.

8 Stewardship responsibilities refers to the responsibilities of institutional investors to enhance the medium- to long-term investment return for their clients and beneficiaries by improving and fostering the investee companies' corporate value and sustainable growth through constructive engagement, or purposeful dialogue, based on in-depth knowledge of the companies and their business environment. SSC, *supra* note 1, Aims of the Code, paragraph 4, p. 2.

Principle 2: Institutional investors should have a clear policy regarding how they manage conflicts of interest when fulfilling their stewardship responsibilities and publicly disclose it.

Principle 3: Institutional investors should monitor investee companies, so that they can appropriately fulfill their stewardship responsibilities with an orientation towards the companies' sustainable growth.

Principle 4: Institutional investors should seek to arrive at an understanding in common with investee companies and work to solve problems through constructive engagement with them.

Principle 5: Institutional investors should have a clear policy on voting. The policy on voting should not be comprised only of a mechanical checklist; it should be designed to contribute to the sustainable growth of the investee companies (5-1). Institutional investors should disclose their voting activities (5-2).

Principle 6: Institutional investors should, in principle, report periodically to their clients and beneficiaries on how they are fulfilling their stewardship responsibilities, including their voting responsibilities.

Principle 7: To contribute positively to the sustainable growth of investee companies, institutional investors should have in-depth knowledge of the investee companies and their business environment, and skills and resources needed to appropriately engage with the companies to make proper judgments in fulfilling their stewardship activities.

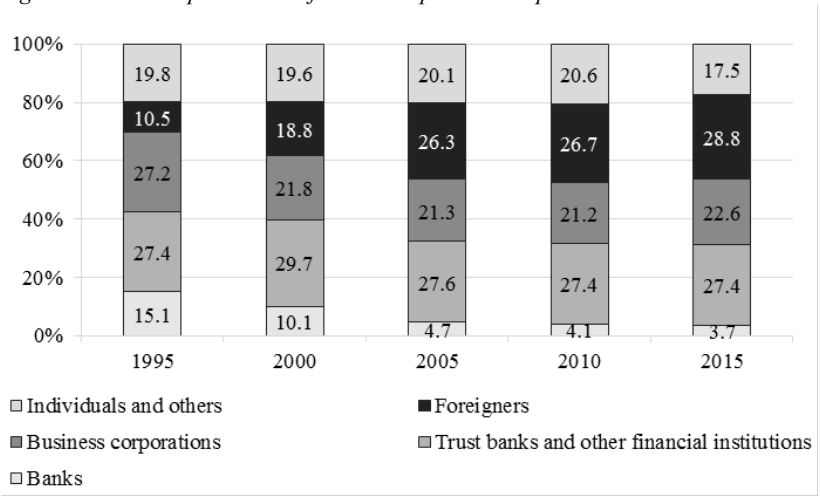
2. *Background of the SSC*

Figure 1 indicates the transformation of the ownership structure of listed companies in Japan since 1995.[9] As of March 2015, the ratio of stocks held by foreign investors was 28.8 per cent, with 27.4 per cent held by financial institutions, 22.6 per cent by industrial companies, and 17.5 per cent by individuals and others. Most of the foreign investors are financial institutions. The percentage of shareholding by commercial and regional banks accounted for only 3.7 per cent. Nevertheless, the percentage of stocks held by financial institutions has been increasing, and is currently at 59.1 per cent. This means that the ownership of stocks in listed companies has become highly concentrated in financial institutions, and collective action on the part of financial institutions has become more feasible. In Japan, shareholding by financial institutions has contributed to the stability of ownership structures and thus the stability of these firms' management. One reason for this is an investment

9 NIHON TORIHIKI-JO GURŪPU [Japan Exchange Group], *Kabushiki bunpu jōkyō chōsa* [Research of ownership structure of listed companies in Japan], available at *http://www.jpx.co.jp/markets/statistics-equities/examination/01.html.*

strategy known as passive or index management, which large financial institutions usually adopt. Once a portfolio is structured, a fund manager has less incentive to monitor the individual companies in it. A second reason is the problem of conflicts of interest. The interests of the ultimate investors are not necessarily aligned with the interests of the financial institutions, which have another business connection with investee companies, such as loans transactions or insurance policies, or mutual shareholding relationships.

Figure 1: Ownership structure of listed companies in Japan



3. *Statistics on the SSC*

As of 27 December 2016, 214 institutional investors had signed up to Japan's SSC.[10] The number of institutional investor signatories has been gradually increasing (Figure 2). A breakdown of these companies is provided in Figure 3: 151 investment companies and investment advisors, seven trust banks, eighteen life insurance companies, four non-life insurance companies, twenty-six pension funds, seven proxy advisors and other firms. More than half (57 per cent) of the signatories are domestic companies, while 43 per cent are foreign.[11]

10 The Financial Services of Agency of Japan (FSA) publishes the list of institutional investors who have notified it of their intention to accept the SSC on its website. It is available at *http://www.fsa.go.jp/en/refer/councils/stewardship/20160315.html*.

11 KIN'YŪ-CHŌ [Financial Services Agency], *Suchuwādoshippu kōdo o meguru jōkyō to forō appu kaigi iken-sho ni tsuite* [Status of the Stewardship Code and Opinion Statement of the Follow-up Council (31 January 2017), slide 5. English translation available at *http://www.fsa.go.jp/en/refer/councils/stewardship/material/20170131_3.pdf*.

Figure 2: Number of signatory institutional investors

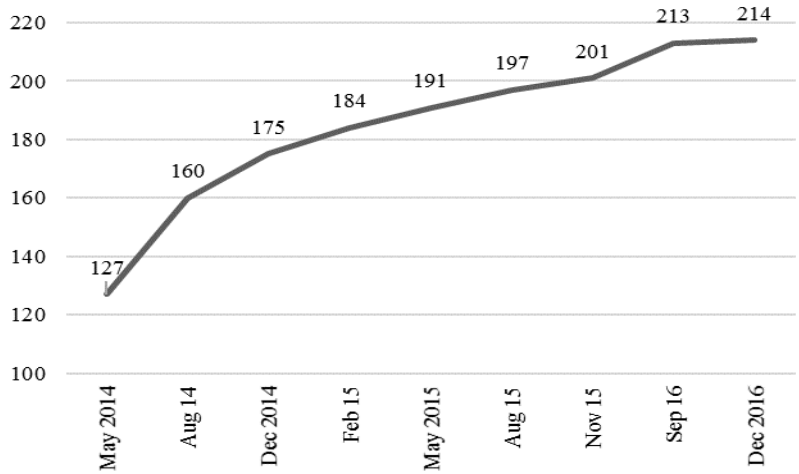
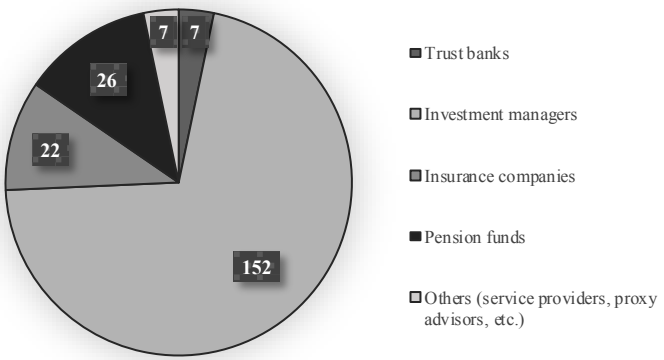


Figure 3: Attribution of signatory institutional investors (as of 27 December 2016)

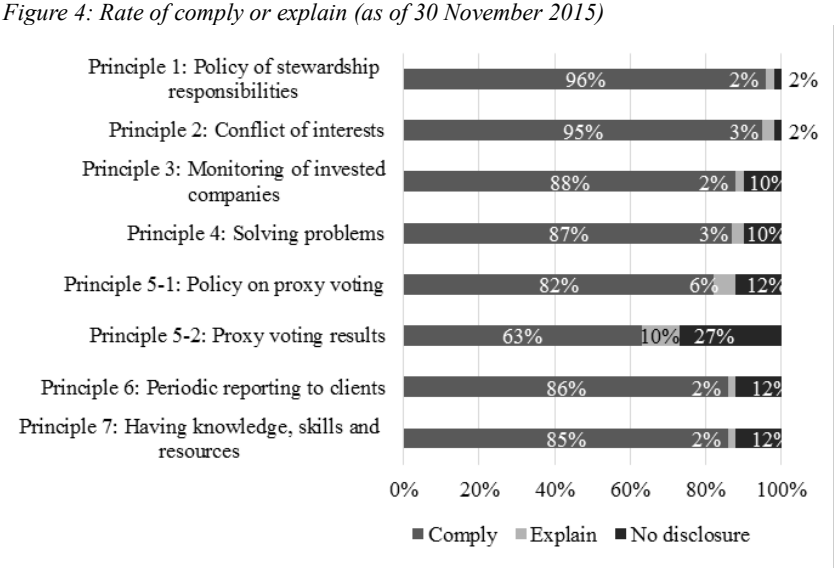


As of 30 November 2015, principles 3, 4, 5-1, 6, and 7 were being complied with by approximately 85 per cent of all signatory institutions, while principles 1 and 2 were being complied with by more than 95 per cent.[12]

12 KIN'YŪ-CHŌ, SŌMU KIKAKU-KYOKU KIGYŌ KAIJI-KA [Corporate Accounting and Disclosure Division, Planning and Coordination Bureau, Financial Services Agency of Japan], *Suchuwādoshippu kōdo uke'ire kikan no torikumi hōshin oyobi katsudō naiyō no kōhyō jōkyō* [Disclosure status of policies/activity contents of institutions that have accepted the Stewardship Code] (18 February 2016), slide 4. English trans-

Principle 5-2, which requires the disclosure of voting results, was being complied with by only 63 per cent of all institutions. Only 10 per cent of signatory institutional investors explained the reason why they were not complying with Principle 5-2, while 27 per cent did not disclose anything in terms of voting results (Figure 4).

Figure 4: Rate of comply or explain (as of 30 November 2015)



One year later, at the end of December 2016, more than 94 per cent of all signatory institutional investors were abiding by principles 1 to 7 of the SSC – with the exception of Principle 5-2 (Figure 5). Principle 5-2 was being complied with by only about 61 per cent of all institutions.[13]

Dialogues between institutional investors and the management officials of investee companies tend to focus on issues such as corporate strategy, corporate governance structures, corporate performance and long-term growth, shareholder return policy and risk factors, the CEO's leadership, and so on (Figure 6).[14]

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lation available at *http://www.fsa.go.jp/en/refer/councils/follow-up/material/20160218-2.pdf*.

13 FSA, Status of the Stewardship Code and Opinion Statement of the Follow-up Council, *supra* note 11, slide 6.

14 NIHON TŌSHI KOMON-GYŌ KYŌKAI [Japan Investment Advisers Association (JIAA)], *Nihon-han suchuwādoshippu kōdo e no taiō-tō ni kansuru ankēto (dai ni-kai) no kekka ni tsuite* [2nd survey report on the JIAA member companies to the questionnaire for Japan's Stewardship Code] 14 and *Nihon-han suchuwādoshippu kōdo e no*

Figure 5: Rate of comply or explain (as of 31 December 2016)

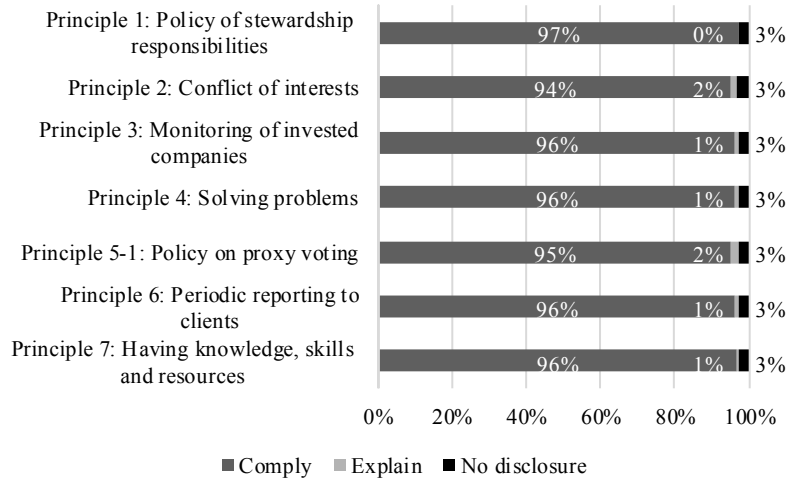
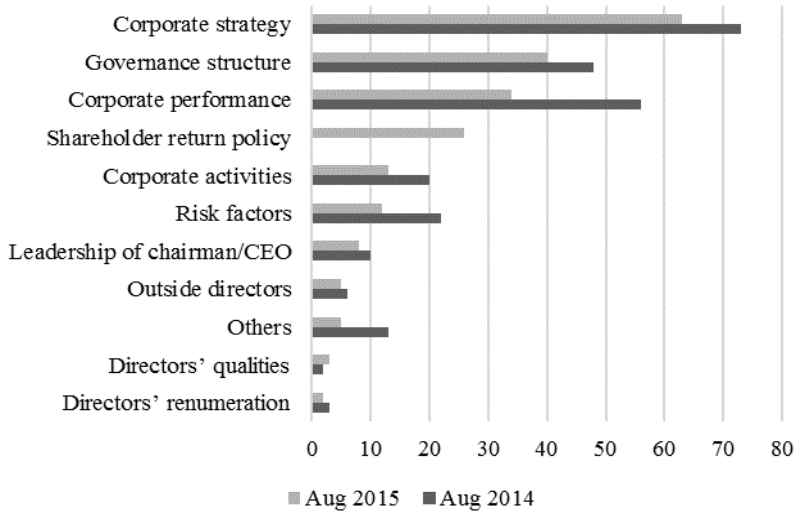


Figure 6: Matters discussed as part of shareholder engagement



taiō-tō ni kansuru ankēto (dai san-kai) no kekka ni tsuite [3rd survey report on the JIAA member companies to the questionnaire for Japan's Stewardship Code] 24–25.

III. JAPAN'S CORPORATE GOVERNANCE CODE

1. Outline

Japan's CGC defines "corporate governance" as a structure for transparent, fair, timely, and decisive decision-making by listed companies, with due attention paid to the needs and perspectives of shareholders and customers, employees, and local communities.[15]

The CGC consists of seventy-three principles – namely, five general principles, thirty main principles, and thirty-eight supplementary principles.[16] The general principles state the most abstract norms, while the supplementary principles represent the most concrete and explicit norms. Self-regulated matters are broken down into five sections. The first calls for securing the rights and equal treatment of shareholders. The second deals with cooperation with stakeholders such as creditors, employees, the local community, and so on. The third deals with appropriate information disclosure and transparency in terms of corporate governance. The fourth focuses on the responsibilities of boards of directors. The fifth section addresses constructive dialogue between management and shareholders.

The fifth section is closely connected with the SSC, and states that the management should have constructive dialogue with shareholders in order to contribute to sustainable growth and the increase of corporate value. Concretely speaking, boards of directors are required to approve and disclose policies concerning the measures and organizational structures aimed at promoting constructive dialogue with shareholders (Principle 5.1). The management is also required to establish and disclose its business strategy and business plan (Principle 5.2).

2. Statistics

The TSE operates in five sections: the First Section, the Second Section, Mothers, JASDAQ, and the TOKYO PRO Market. The First and Second Sections are the main markets of the TSE, especially the former, which is the largest and most liquid capital market in Japan. All seventy-three principles of the CGC apply to the listed companies in the First and Second Sections. The Mothers section is a trading market for companies with growth potential that aim to be reassigned to the First Section in the near

15 Japan's Corporate Governance Code [Final Proposal], *supra* note 3, p. 1.

16 M. YUFU et al., *Kōporēto gabanansu kōdo gen'an no kaisetsu, No. 1~4* [Outline of the Final Proposal of the Corporate Governance Code], Junkan Shōji Hōmu No. 2062 (2015) 47, No. 2063 (2015) 51, No. 2064 (2015) 35, No. 2065 (2015) 46; H. KANDA, *Kōporēto gabanansu kōdo ni tsuite* [Regarding the Corporate Governance Code], Gekkan Kansayaku No. 642 (2015) 4.

future. The JASDAQ was formerly an over-the-counter market operated by the Japan Securities Dealers Association that has been a stock exchange since 2004. Its listing requirements are more lax than those of the main markets. TOKYO PRO Market is a specified financial instruments exchange market *(tokutei torihiki-jo kin'yū shōhin shijō)* based on the Japanese FIEA where stock buying by general investors, excluding professional investors,[17] is prohibited.[18]

Only five of the general principles apply to the listed companies in the Mothers and JASDAQ sections. As of 8 May 2017, the total number of listed companies on the TSE excluding TOKYO PRO Market stood at 3,540 (Table 1).[19]

Table 1: Scope of "comply or explain" in the TSE's five sections

Market division	*Number of companies*	*Scope of "comply or explain"*
TSE 1st Section	2,017	All 73 principles (a) 5 general principles (b) 30 principles (c) 38 supplementary principles
TSE 2nd Section	531	
Mothers	238	Only 5 general principles
JASDAQ	754	
TOTAL	3,540	

Figures 7 and 8 provide an analysis of the corporate governance reports in the First and Second Sections of the TSE as of 31 December 2015 and 31

17 Professional investors who can purchase stocks in TOKYO PRO Market consist of specified investors *(tokutei tōshi-ka)* and deemed specified investors *(minashi tokutei tōshi-ka)* that meet certain requirements and become specified investors by filing with their securities companies. According to the FIEA, qualified institutional investors (financial institutions, etc.), the national government, the Bank of Japan, listed companies, and stock companies with capital of 500 million yen and more are appointed as specified investors. As of 8 May 2017 only 17 companies were listed in the TOKYO PRO Market.

18 Article 2, paragraph 32, and Article 117-2 of the FIEA. The TSE entrusts investigation of compliance with the criteria for listing or delisting and with listing eligibility requirements to an approved J-Adviser that meets certain qualifications under Article 85, paragraph 4 of the FIEA.

19 NIHON TORIHIKI-JO GROUP [Japan Exchange Group], *Jōjō kaisha-sū oyobi jōjō kabushiki-sū* [The number of listed companies and listed shares], available at *http://www.jpx.co.jp/listing/co/*.

December 2016 according to research by the TSE. As of 31 December 2015, the number of listed companies in the First and Second Sections which publicly disclosed corporate governance reports was 1,858. A total of 11.6 per cent, or 216 companies, declared full compliance with all seventy-three principles of the CGC, and 88.4 per cent, or 1,642 companies, explained their non-compliance with some of the principles. A total of 66.4 per cent, or 1,233 companies, complied with more than 90 per cent of all the principles, while 22.0 per cent (409 companies) complied with less than 90 per cent. We can note that the proportion of complying firms was much larger in the First Section than in the Second (Figure 7, Table 2).[20]

Figure 7: Rate of compliance with the CGC (as of 31 December 2015)

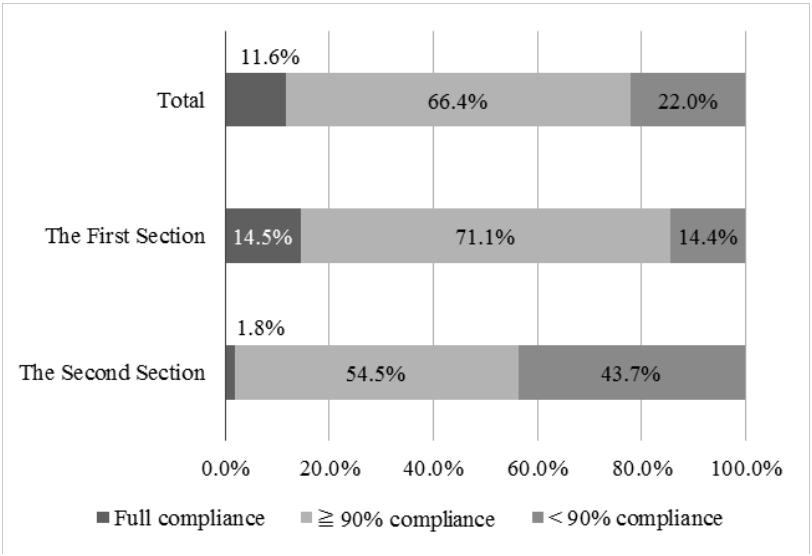


Table 2: Number of companies complying with the CGC

	Full compliance	≥ 90% compliance	< 90% compliance
Total	216	1,233	409
The First Section	209	1,025	242
The Second Section	7	208	167

20 TŌKYŌ STOCK EXCHANGE, INC., *Kōporēto gabanansu kōdo e no taiō jōkyō* (2015-nen 12-gatsumatsu) [How Listed Companies Have Addressed Japan's Corporate Governance Code (Status as of the end of December 2015)], available at *http://www.jpx.co.jp/news/1020/nlsgeu000001ei88-att/20160120-1.pdf.*

As of 31 December 2016, the number of listed companies in the First and Second Sections which publicly disclosed corporate governance reports was 2,530. A total of 19.9 per cent, or 504 companies, declared full compliance with all seventy-three principles of the CGC, and 80.1 per cent, or 2,026 companies, explained their non-compliance with some of the principles. A total of 64.8 per cent, or 1,639 companies, complied with more than 90 per cent of all the principles, while 15.3 per cent (387 companies) complied with less than 90 per cent. We can note here, too, that the proportion of complying firms was much larger in the First Section than in the Second (Figures 8, Table 3).[21]

Figure 8: Rate of compliance with the CGC (as of 31 December 2016)

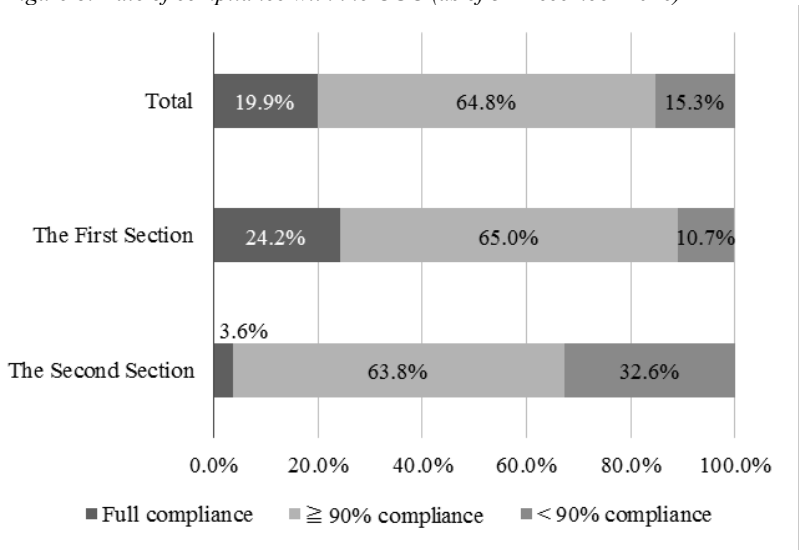


Table 3: Number of companies complying with the CGC

	Full compliance	≥ 90% compliance	< 90% compliance
Total	504	1639	387
The First Section	485	1302	215
The Second Section	19	337	172

21 TŌKYŌ STOCK EXCHANGE, INC., *Kōporēto gabanansu kōdo e no taiō jōkyō* (2016-nen 12-gatsumatsu) [How Listed Companies Have Addressed Japan's Corporate Governance Code (Status as of the end of December 2016)], available at *http://www.jpx.co.jp/news/1020/nlsgeu0000027kxe-att/nlsgeu0000027kzz.pdf.*

IV. The Stewardship Code in Comparison to the Corporate Governance Code

1. Who Initiated and Created it?

The Abe administration initiated the Japanese SSC as part of its economic growth strategy, the so-called "third arrow" of its economic policy.[22] The stock prices of listed Japanese companies had long been stagnant after the economic bubble of the 1990s burst, and the median return on equity (ROE) of listed companies in Japan was evidently low in international comparison (Figure 9).[23] The reason for this is not apparent, but the weak control exerted on the part of shareholders, among others, over financial institutions may have been responsible to some extent. Nevertheless, there was little incentive for institutional investors to introduce the unified SSC because the business models are entirely different among various institutional investors, which include investment advisors, trust banks, life- and non-life insurance companies, pension funds, proxy agencies, and so on. The Council of Experts Concerning the Japanese Version of the SSC was therefore established within the FSA of Japan as part of the government initiative.[24]

As for the CGC, the Council of Experts Concerning the Corporate Governance Code, which was established by the FSA, drafted the code,[25] and

22 In June 2013 the Abe cabinet approved the Japan Revitalization Strategy [*Nihon saikō senryaku 2013*], which defined the growth strategy, or "the third arrow", of the economic policy. The Strategy proposed considering and compiling principles (Japanese version of the SSC) for institutional investors to fulfil their fiduciary responsibilities, such as promoting the mid- to long-term growth of companies through dialogue. *Nihon saikō senryaku 2013* [Japan Revitalization Strategy – JAPAN is BACK], English translation available at *http://www.kantei.go.jp/jp/singi/keizaisaisei/pdf/en_saikou_jpn_hon.pdf*.

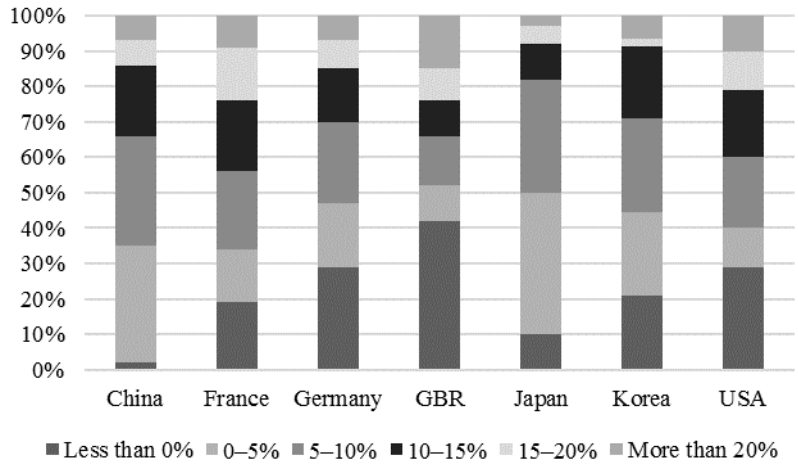
23 International Comparison of ROE in: Ito Review of Competitiveness and Incentives for Sustainable Growth – Building Favorable Relationships between Companies and Investors – Final Report (August 2014), available at *http://www.meti.go.jp/english/press/2014/pdf/0806_04b.pdf*.

24 SSC, *supra* note 1, Background, paragraphs 1–3, p. 1–2. Concerning the SSC, M. Kasahara, *Sekinin aru kikan tōshi-ka no sho-gensoku – nihon-han suchuwādoshippu kōdo no gaiyō* [Outline of the Principles for Responsible Institutional Investors – Japan's Stewardship Code], Junkan Shōji Hōmu No. 2029 (2014) 59–71; H. Kansaku, *Nihon-han suchuwādoshippu kōdo no gaiyō to shihon shijō* [Outline of Japan's Stewardship Code and Capital Markets], in: Kansaku/Shihon Shijō Kenkyū-kai (eds.), *Kigyō hōsei no shōrai tenbō – Shihon shijō seido no kaikaku e no teigen (2015 nendo-han)* [Perspective of Business Law System in Future – Proposals for Capital Markets Reform (2015 edition)] (Tōkyō 2015) 103–138.

25 CGC [Final Proposal], *supra* note 3, Background, paragraph 4, p. 2.

the TSE then introduced it as a part of its self-regulation.[26] The FSA thus served as a venue for creating the SSC and for discussing the contents of the CGC in cooperation with various stakeholders and experts.[27]

Figure 9: International comparison of ROE (2000 to 2010)



2. *Degree of Binding Effect and Enforcement Mechanism*

There is no organization or body charged with enforcing Japan's SSC. This means the code is difficult to effectively enforce.[28] Nevertheless, when an institutional investor is a fiduciary to clients or investors, it is occasionally obligated to conduct stewardship activities, such as having its engagement

26 See *supra* note 2.

27 The Council of Experts Concerning the Corporate Governance Code consisted of 13 members – three from listed companies, three from academic or research institutes, two from asset management companies, one each from a business revitalization company and a business law firm, the senior advisor of the Japan Audit & Supervisory Board Members Association, the chairman and president of the Japanese Institute of Certified Public Accountants, and the representative of a non-profit organization that aims to promote corporate governance in Japan.

28 H. KANSAKU, *Nihon-han suchuwādoshippu kōdo no kihan-sei ni tsuite* [Concerning the Strength of the Norm of Japan's Stewardship Code, in: Kuronuma/Fujita (eds.), *Egashira Kenjirō sensei koki kinen, kigyō-hō no shinro* [Festschrift for Professor Kenjiro Egashira's 70th birthday, Direction of the Enterprise Law] (Tōkyō 2017) 1018–1019.

policy and disclosing the results of its exercise of voting rights to its beneficiaries, under both civil and regulatory law. If an institutional investor is a trust bank or investment advisor, it is subject to the duties of care and of loyalty to its clients under trust law and civil law. The regulatory law also obligates trust banks and investment advisors to the duties of care and of loyalty. Therefore, some of a body's stewardship responsibilities could also be legally binding. On the other hand, stewardship responsibilities cannot be applied as a legal norm for some types of financial institutions, such as insurance companies and proxy advisors.

The CGC can be more effectively enforced than the SSC because listed companies are required to respect the intent and sprit of the CGC and make efforts to enhance their corporate governance according to the listing regulations of the TSE.[29] When a listed company does not comply with a principle of the Code, it must explain its reasons for such non-compliance in the corporate governance report. Furthermore, it must explain the reasons for compliance with specific principles,[30] since the TSE requires all listed companies to do so for some of the principles. When a listed company violates this duty, the TSE has four alternatives as sanctions. First, it can order the submission of an improvement report.[31] Second, it can make a public announcement.[32] Third, it can impose a listing agreement violation penalty.[33] Fourth, it can delist the firm, the strictest of all sanctions.[34]

3. Legitimacy

The SSC was created by the Council of Experts at the FSA, which consists of a total of fourteen members – seven from institutional investors, three from academic or research institutes, two from consulting companies, and one each from a proxy advisor and a listed company. Nevertheless, the representation of stakeholders on the council was very limited. Although the materials and minutes of the council were publicly disclosed on the FSA's website and public opinion procedures were carried out, these democratic processes do not seem to have sufficed to create a binding artificial norm. However, an institu-

29 TŌKYŌ STOCK EXCHANGE, INC., Securities Listing Regulations, Article 445-3.
30 TŌKYŌ STOCK EXCHANGE, Securities Listing Regulations, Article 436-3.
31 TŌKYŌ STOCK EXCHANGE, Securities Listing Regulations, Article 502, paragraph 1, item 2.
32 TŌKYŌ STOCK EXCHANGE, Securities Listing Regulations, Article 508, paragraph 1, item 2.
33 TŌKYŌ STOCK EXCHANGE, Securities Listing Regulations, Article 509, paragraph 1, item 2.
34 TŌKYŌ STOCK EXCHANGE, Securities Listing Regulations, Article 601, paragraph 1, item 12.

tional investor is entirely free to agree to and sign the SSC, unlike the CGC, which all listed companies have to abide by according to the TSE's listing agreement. Therefore, the SSC's lack or deficiency of legitimacy is not as serious as a similar failing in the CGC would be. This is because the CGC has an effective enforcement mechanism and all listed companies are automatically and comprehensively bound by it based on the listing agreement with the TSE. Furthermore, the CGC is not a simple contract because it is also a part of the listing regulations of a self-regulatory organization authorized by the state pursuant to the FIEA. The CGC is characterized as a soft law which is more closely connected with the state than the SSC is.[35]

V. Criticisms of the Stewardship Code

1. Does Shareholder Engagement Really Contribute to the Enhancement of Corporate Governance and the Maximization of Shareholder Value?

Fundamental doubt has been cast about whether stewardship responsibility contributes to the enhancement of corporate governance and the maximization of shareholder value. In Japan, corporate governance is expected to be enhanced by the involvement and engagement of shareholders – among others, institutional investors – via both the legal and soft-law systems.[36] This should allow capital market participants to implement a shareholder-oriented management approach.[37] The percentage of shareholding by institutional investors has been increasing in Japan (Figure 1). These institutional investors, such as pension funds and investment trusts, normally create investment portfolios in order to diversify their investment risk, as diversified portfolios can be insulated from the effects of firm-specific risks. Therefore, diversified shareholders must expect firms to take more risks. On the other hand, the managers of a company are an undiversified group, in contrast to institutional investors, because they have human capi-

35 S.L. Schwarcz, Private Ordering, 97 (2002) Northwestern University Law Review. 319, 324–329; T. Fujita, *Kihan no shiteki keisei to kokka-hō no yakuwari* [Private Ordering and the Role of National Law], Sofutorō Kenkyū (2006) No. 6, 2–7.

36 H. Kansaku, The Role of Shareholders in Public Companies, in: Fleischer/Kanda/Kim/Mülbert (eds.), German and Asian Perspectives on Company Law (Tübingen 2016) 263–268.

37 Also in Europe, see Proposal for a Directive of the European Parliament and of the Council amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement and Directive 2013/34/EU as regards certain elements of the corporate governance statement, COM(2014) 213 final, pp. 2 and 4; Action Plan: European company law and corporate governance – a modern legal framework for more engaged shareholders and sustainable companies, COM(2012) 740 final, p. 8.

tal tied up in their firms.[38] From the perspective of modern portfolio theory, the notion that corporate governance mechanisms consequently encourage managers to take risks through the exercise of shareholders' rights and engagement with management may be justified.

Empirical research data tells us that there is evidence that ownership by domestic and foreign institutional investors such as pension funds increases governance effects. On the other hand, the ownership ratio of banks and insurance companies has a significantly negative impact on all performance indices. The research suggests that the enhancement of investee companies' performance by foreign institutional investors and domestic pension and mutual funds results from pressure based on these investors' exits and voices, while domestic banks and insurance companies are bound by their business relationships – such as loan contracts, insurance contracts and *keiretsu* relationships.[39]

Thus, corporate governance in Japan is expected to move from a traditional Japanese corporate governance model or stakeholder model in the direction of a shareholder-oriented model that aims at corporate value maximization.

2. *Not in Accordance with the Passive Investment Policy of Most Institutional Investors*

Most institutional investors in Japan, especially in recent years, have adopted a so-called passive investment policy which includes an index investment strategy based on the modern portfolio theory. Nevertheless, such passive institutional investors have followed the "Wall Street rule" of selling stocks when they disapprove of their firms' management – though they seldom challenge it openly. An investment policy according to the modern portfolio theory under which institutional investors consider the market as a whole may invite a decreased incentive to closely monitor individual corporations in the portfolio.[40] In short, the appropriate engagement may not be in accordance with the passive investment policy.

The costs of individual engagement would outweigh the benefits of a passive investment strategy if fund managers were to engage with the manage-

38 J. ARMOUR/J. N. GORDON, Systemic Harms and Shareholder Value, Journal of Legal Analysis 6 (2014) 35, 36, 50–53.

39 H. MIYAJIMA/T. TODA, Ownership Structure and Corporate Governance: Has an Increase in Institutional Investors' Ownership Improved Business Performance?, Policy Research Institute, Ministry of Finance, Japan, Public Policy Review, Vol. 11 No. 3 (2015) 361, 365.

40 M. BECHT/J. FRANKS/C. MAYER/S. ROSSI, Returns to Shareholder Activism: Evidence from a Clinical Study of the Hermes UK Focus Fund, in: Bratton/McCahery (eds.), Institutional Investor Activism (Oxford 2015) 224.

ment of all investee companies.[41] However, fund managers establish investment policies through formalized business contracts with their clients, including asset owners, according to their business model. Therefore, it is difficult for fund managers to act differently according to investors' attributes and characteristics, especially when they adopt a passive investment strategy.

3. Weak Binding Effect and Enforcement

As mentioned above, the binding effects and enforcement mechanisms of the SSC are weak, because no organization or body is charged with overseeing and enforcing the code and because it is difficult for general investors or the ultimate beneficiaries to oversee and enforce it.[42]

4. Focus on the Mid- to Long-term Investment Return

The Japanese SSC focuses on mid- to long-term investment returns.[43] One critique of this focus argues that the premise is contrary to the efficient market hypothesis. If the hypothesis is correct, it would not make sense to distinguish short- from mid- to long-term investment returns, since the current market prices reflect all available information. This approach suggests that a focus on the mid- to long-term investment return would tend to weaken pressure on the management of an investee company, even when the current financial results are not good. This might lead to weakened corporate governance, which is contrary to the original intention of the code.

5. Conflict with the Traditional Concept of Shareholder Value Maximization

According to the prevailing opinion in Japan, the managers of a joint-stock company are subject to the duty of maximizing shareholder value. Nevertheless, shareholder engagement could conflict with the duty of institutional investors' management as a joint-stock company when the costs of such individual engagement outweigh the benefits and shareholder value is thus impaired.[44]

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41 T. EGUCHI, *Engējimento no jidai ni okeru kikan tōshi-ka no yakuwari* [The Role of Financial Institutions in the Era of Engagement], Junkan Shōji Hōmu No. 2109 (2016) 27.

42 KANSAKU, *supra* note 28, 1018–1019.

43 SSC, *supra* note 1, Aims of the Code, paragraph 5, p. 2.

44 W. TANAKA, *Kōporēto gabanansu no kanten kara mita nihon-han suchuwādoshippu kōdo* [Japan's Stewardship Code from the Viewpoint of Corporate Governance], Shintaku Fōramu (2014) No. 1, 38.

6. Box-ticking for Stewardship Activities and Boilerplate Explanations

There is some doubt about whether the stewardship activities and explanations and the public disclosure of the stewardship activities' results according to the SSC would be meaningful for the capital market and the ultimate beneficiaries. This is because the stewardship activities tend to become box-ticking under the binding force of the SSC and public disclosure of the stewardship activities tends to take the form of boilerplate explanations.[45]

Furthermore, the explanation of stewardship activities could harm sound and constructive dialogue between the management of investee companies and institutional investors. It is suggested that such fruitful and constructive dialogues between them are not normally evident externally, unlike the conspicuous engagement activities such as voting against corporate proposals and the exercise of shareholders' proposal rights.[46] The disclosure and explanation of all stewardship activities would harm the establishment of a relationship of mutual trust between institutional investors and the management of investee companies.

VI. IMPROVEMENT OF THE STEWARDSHIP CODE

1. The Council of Experts Concerning the Follow-up of Japan's Stewardship Code and Japan's Corporate Governance Code

The Council of Experts Concerning the Follow-up of Japan's Stewardship Code and Japan's Corporate Governance Code was established at the FSA of Japan in 2015.[47] Regarding the SSC, the Council focused on four points, in response to the above-mentioned criticisms and in consideration of the implementation and practice of the SSC.

The first aim is to enhance the quality of shareholders' engagement. For example, the establishment of an independent committee of institutional investors is proposed to oversee conflicts of interest with investee compa-

45 H. NODA, *Kōporēto gabanansu ni okeru kisei shuhō no kōsatsu* [A Study on Regulatory Measures in the Field of Corporate Governance], Junkan Shōji Hōmu (2016) No. 2109, 18–19.

46 EGUCHI, *supra* note 41, 24.

47 SUCHUWĀDOSHIPPU KŌDO OYOBI KŌPORĒTO GABANANSU KŌDO NO FORŌ APPU KAIGI [The Council of Experts Concerning the Follow-up of Japan's Stewardship Code and Japan's Corporate Governance Code], *Kikan tōshi-ka ni yoru jikkō-teki na suchuwādoshippu katsudō no arikata – kigyō no jizoku-teki na seichō ni muketa kensetsu-teki na taiwa no jūjitsu no tame ni* – (30 November 2016) [Effective Stewardship Activities of Institutional Investors – To Enhance Constructive Dialogue toward Sustainable Corporate Growth]. English translation available at *http://www.fsa.go.jp/en/refer/councils/follow-up/statements_3.pdf*.

nies through other service or business connections. The professionalization of the shareholders' engagement and prudent use of proxy advisors are also recommended.[48]

The second aim is to enhance disclosure through the provision of voting results for each investee company for each agenda and proposal. The current SSC requires institutional investors to disclose their voting records only by aggregating them by major categories of proposals. The Council recommended that both asset managers and asset owners be required to disclose not aggregation-level but company-level voting results to the public – not merely to asset owners – based, at a minimum, on a "comply or explain" approach in order to secure the interests of the ultimate beneficiaries and to enhance transparency.[49]

The third aim is to strengthen the monitoring and overseeing of asset managers by asset owners. One of the most important problems of the SSC is its weakness in terms of enforcement, since there is no organization or body in Japan charged with overseeing and enforcing it.[50] Therefore, the Council expects asset owners to play this role and proposes that asset managers conduct self-evaluations of their implementation of the SSC and disclose the results to the public. Such self-evaluations by asset managers are intended to help asset owners select and evaluate asset managers.[51]

The fourth aim is to improve the shareholders' engagement with passive asset managers, although this would not be in accordance with passive investment policy.[52]

2. Proposal for Revised Stewardship Code

The Council of Experts Concerning the Japanese Version of the Stewardship Code reconvened on 31 January 2017 in order to revise the Code. The Council drafted a revised version and publicly disclosed it on 28 March 2017.[53]

In response to the first proposal of the Follow-up Council, paragraph 2-3 was added to the Guidance of the draft and stated that asset managers should establish governance structures, such as an independent board of directors or third-party committees for decision-making or oversight of

48 Effective Stewardship Activities of Institutional Investors, *supra* note 48, 2–3.

49 Effective Stewardship Activities of Institutional Investors, *supra* note 48, 3–4.

50 See IV.2.

51 Effective Stewardship Activities of Institutional Investors, *supra* note 48, 5.

52 See V.2.

53 The Council of Experts on the Stewardship Code, Principles for Responsible Institutional Investors "Japan's Stewardship Code"—To promote sustainable growth of companies through investment and dialogue—(Draft) (28 March 2017), English translation available at *http://www.fsa.go.jp/en/news/pub/03.pdf*.

voting, in order to secure the interests of clients and beneficiaries and prevent conflicts of interest.[54]

As for the second issue, the draft requires institutional investors to disclose voting records for each investee company on an individual agenda item basis.[55] Furthermore, the draft recommends that at the time voting records are disclosed, it would also be beneficial to explicitly explain the reasons why they voted for or against an agenda item in order to enhance transparency for institutional investors.

The draft also adopted the third recommendation of the Follow-up Council. According to the amendment of paragraph 7-4 in the Guidance of the draft, asset managers should regularly conduct self-evaluations with respect to the status of the implementation of each principle, including guidance, and disclose the results regarding the continued improvement of their governance structures, conflict of interest management, and stewardship activities, etc. The results of such self-evaluations should be used by asset owners to monitor whether their asset managers are conducting stewardship activities in line with the asset owners' policies.[56]

As for the fourth point, the draft requires institutional investors who adopt a passive investment policy to actively take charge of engagement and voting with a view to the medium- to long-term perspective, since passive management provides limited options to sell investee companies' shares and to promote a medium- to long-term increase in corporate value.[57]

VII. Concluding Remarks

The SSC is formally and genuinely self-binding. It was introduced as a part of the Abe administration's economic growth strategy, together with the CGC. Therefore, the SSC is in the shadow of the government.

One of the characteristics of the SSC is its weak binding effect and enforcement mechanism, because there is no organization or body charged

54 Paragraph 2-3 in the Guidance of the draft of the revised Japan's Stewardship Code. Furthermore, the following sentences will be added in paragraph 7-2 of the draft. "The management of institutional investors should have appropriate capability and experience to effectively fulfill their stewardship responsibilities, and should be constituted independently and without bias, in particular from their affiliated financial groups. The management of institutional investors should also recognize that they themselves have important roles and responsibilities to carry out stewardship activities such as enhancing dialogue, structure their organizations and develop human resources, and take action on these issues."

55 Paragraph 5-3 in Guidance of the draft of revised Japan's Stewardship Code.

56 Paragraph 1-5 in Guidance of the draft of revised Japan's Stewardship Code.

57 Paragraph 4-2 in Guidance of the draft of revised Japan's Stewardship Code.

with enforcing it. Nevertheless, institutional investors are obligated to exercise voting rights and to occasionally engage with investee companies under the dictates of both civil and regulatory law – for example, when they are trust banks or investment advisors. In some cases, the stewardship responsibility can be a legally binding norm. In contrast, insurance companies or proxy advisors are not deemed fiduciaries in Japan. If we look at the entire equity investment chain, it is necessary to close this loophole in order to ensure the trustworthiness of the entire chain for the ultimate beneficiaries. The concept of the SSC could play a role in this respect.

Asset owners in particular are expected to enforce the SSC by nominating and overseeing asset managers.[58] The Government Pension Investment Fund of Japan (GPIF) is the largest public pension fund in the world, with total assets under management equalling 129 trillion yen, or approximately 1 trillion euros. The GPIF doesn't make investment management decisions by itself, nor does it directly exercise voting rights, so as not to give rise to concerns that it could have a direct influence over the management of listed companies. The GPIF signed the Code and discloses its policy for performing stewardship activities.[59] According to the policy, the GPIF will ask external asset managers to submit their guidelines for the exercising of voting rights and to report on their status. It will also hold meetings with the managers about the results. The GPIF will consider the way in which an asset manager exercises his or her voting rights as part of the annual evaluation process. Such practices on the part of asset owners are expected to change asset managers' practice of seeking only short-term gains and to enhance the mid- to long-term investment return for the clients and ultimate beneficiaries by improving and fostering the investee companies' corporate values and sustainable growth.

58 Paragraphs 1-3 to 1-5 of the draft of revised Japan's Stewardship Code.

59 GOVERNMENT PENSION INVESTMENT FUND, JAPAN, Acceptance of the Japan's Stewardship Code, 30 May 2014, available at *http://www.gpif.go.jp/en/fund/pdf/e_ukeirehyoumei.pdf.*

Genuine Self-regulation in Germany

Drawing the Line

Florian Möslein[*]

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In times of globalization and privatization, private law is subject to fundamental changes since legal relations between private individuals are increasingly cross-border in nature and occur on the basis of changed patterns of statehood. For this reason, there is a growing recognition that private law scholarship should not only focus on the existing rules of substantive law, but also support regulators in the selection and design of appropriate legal instruments.[1] More precisely, legal scholarship must examine the material content of specific legal provisions, as well as analyze the full range of regulatory instruments and strategies, along with comparing them with regard to their regulatory intensity and impact. Legal scholarship must provide for regulatory instruments that are appropriate for solving real-life problems.[2] The discipline of private law is supposed to contribute to the "art of regulation" (again).[3]

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* Prof. Dr. Florian Möslein, LL.M. (London), Professor of Civil Law, German and European Business Law, Philipps-Universität Marburg.

1 For general information on peculiar characteristics of current legal scholarship, see C. ENGEL/W. SCHÖN (eds.), Das Proprium der Rechtswissenschaft (Tübingen 2007); M. JESTAEDT/O. LEPSIUS (eds.), Rechtswissenschaftstheorie (Tübingen 2008).

2 H. FLEISCHER, Die Zukunft der gesellschafts- und kapitalmarktrechtlichen Forschung, Zeitschrift für Unternehmens- und Gesellschaftsrecht (ZGR) 2007, 500,

Research on private law rule-making, then, is increasingly becoming established as a legal subdiscipline in its own right.[4] Accordingly, an extensive series of recently published German monographs aims to measure the effectiveness of specific regulatory instruments, techniques and strategies in different areas of private and commercial law.[5] With a focus on different modes of regulation, the specific research questions are cross-sectoral in

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502 et seq.; cf. *id.,* Gesetz und Vertrag als alternative Problemlösungsmodelle im Gesellschaftsrecht, Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht (ZHR) 168 (2004) 673.

3 With reference to the traditional notion (much too narrow today) of "Gesetzgebungskunst" (art of legislation), and from a historical perspective, see S. EMMENEGGER, Gesetzgebungskunst: Gute Gesetzgebung als Gegenstand einer legislativen Methodenbewegung in der Rechtswissenschaft um 1900 – Zur Geschichte der Gesetzgebungslehre (Tübingen 2006), in particular, 154–183 (on the determination of suitable legislative means).

4 F. MÖSLEIN (ed.), Regelsetzung im Privatrecht (Tübingen 2018, forthcoming). In a similar vein, with respect to contract law, see G. BACHMANN, Optionsmodelle im Privatrecht, Juristenzeitung (JZ) 2008, 11, 19 et seq.; H. EIDENMÜLLER, Der homo oeconomicus und das Schuldrecht – Herausforderungen durch Behavioral Law and Economics, Juristenzeitung (JZ) 2005, 216; H. UNBERATH/J. CZIUPKA, Dispositives Recht welchen Inhalts? – Antworten der ökonomischen Analyse des Rechts, Archiv für die civilistische Praxis (AcP) 209 (2009) 37, 39. With respect to company law, see J.-H. BINDER, "Prozeduralisierung" und Corporate Governance – Innerbetriebliche Entscheidungsvorbereitung und Prozessüberwachung als Gegenstände gesellschaftsrechtlicher Regulierung – Entwicklungslinien und Perspektiven, Zeitschrift für Unternehmens- und Gesellschaftsrecht (ZGR) 2007, 745 et seq.; H. EIDENMÜLLER, Forschungsperspektiven im Unternehmensrecht, Juristenzeitung (JZ) 2007, 487, 490 et seq.; FLEISCHER, *supra* note 2, 686–704.

5 For instance, see S. BECHTOLD, Die Grenzen zwingenden Vertragsrechts – Ein rechtsökonomischer Beitrag zu einer Rechtsetzungslehre des Privatrechts (Tübingen 2010); J.-H. BINDER, Regulierungsinstrumente und Regulierungsstrategien im Kapitalgesellschaftsrecht (Tübingen 2012); J. CZIUPKA, Dispositives Vertragsrecht – Funktionsweise und Qualitätsmerkmale gesetzlicher Regelungsmuster (Tübingen 2010); M. FORNASIER, Freier Markt und zwingendes Vertragsrecht (Berlin 2013); T. HABERER, Zwingendes Kapitalgesellschaftsrecht – Rechtfertigung und Grenzen (Wien 2009); A. HELLGARDT, Regulierung und Privatrecht (Tübingen 2016); L. KÄHLER, Begriff und Rechtfertigung abdingbaren Rechts (Tübingen 2012); F. MÖSLEIN, Dispositives Recht – Zwecke, Strukturen und Methoden (Tübingen 2010); R. PODSZUN, Wirtschaftsordnung durch Zivilgerichte (Tübingen 2014); M. RENNER, Zwingendes transnationales Recht – Zur Struktur der Wirtschaftsverfassung jenseits des Staates (Baden-Baden 2010). From a similarly comparative perspective, see N. KORNET, Contract Interpretation and Gap Filling: Comparative and Theoretical Perspectives (Antwerpen 2006); V. LASSERRE-KIESOW, La Technique Legislative (Paris 2002); see also J. BLACK, Rules and Regulators (Oxford 1997) 246–250 ("Towards a Theory of Rule Making").

nature, which is (at a minimum) relevant for all private law. Moreover, by taking complex forms of non-state regulation into account as well, this research approach extends far beyond classical legal theory, as well as beyond the traditional *Gesetzgebungslehre* (theory of legislation), to become a subdiscipline of public law.[6]

Against this background, the present volume on self-regulation in private law could not be more timely or topical. For the first time, this specific rule-making phenomenon is approached from a cross-sectoral and comparative perspective, taking both Germany and Japan into account. At the same time, it builds on a long and illustrious tradition of Japanese-German exchanges in legal scholarship, as well as honorably marking the 20th anniversary of the founding of the Journal of Japanese Law. On a personal note, my own contribution builds on the particularly fruitful experience of two previous German-Japanese conferences attended as a younger scholar more than a decade ago. I feel especially honored and pleased to contribute to the present volume, given that three times proverbially makes a tradition. In fact, both of these earlier contributions happened to concern questions of private law rule-making as well.[7]

I. Introduction: Is Genuine Self-regulation a Twofold Oxymoron?

The specific topic that I have currently been assigned is genuine self-regulation in Germany. Due to globalization and privatization, self-regulation has become so important and omnipresent that our times have already been qualified as an "era of self-regulation".[8] Concurrently, self-regulation is an established mode of rule-making and has ancient origins, for example, with respect to the liberal professions.[9] Its long tradition and

6 G. F. Schuppert, Governance und Rechtsetzung – Grundfragen einer modernen Regelungswissenschaft (Baden-Baden 2011).

7 F. Möslein, Rechtsangleichung durch Richterrecht – Eine Darstellung am Beispiel der Geschäftsleiterpflichten, in: Riesenhuber/Takayama (eds.), Rechtsangleichung: Grundlagen, Methoden und Inhalte (Berlin 2006) 279; *id.,* Inhaltskontrolle und Inhaltsregeln im Schuldvertragsrecht, in: Riesenhuber/Nishitani (eds.), Wandlungen oder Erosion der Privatautonomie – Deutsch-Japanische Perspektiven des Vertragsrechts (Berlin 2007) 233.

8 C. Estlund, Rebuilding the Law of the Workplace in an Era of Self-Regulation, Columbia Law Review 105 (2005) 319.

9 For an extensive (including historical) account, see J. Taupitz, Die Standesordnungen der freien Berufe (Berlin 1991); for a more general historical perspective, see P. Collin et al. (eds.), Selbstregulierung im 19. Jahrhundert – zwischen Autonomie und staatlichen Steuerungsansprüchen (Frankfurt/Main 2011).

widespread use, when taken together, make self-regulation an incredibly broad field for legal scholarship and one that has already made many valuable contributions in the realms of private and (even more so) public law.[10]

Yet, the contours of the term as such, and the definition of genuine self-regulation in particular, are far from being razor-sharp; indeed, they remain largely blurred. I will therefore focus on crucial issues of delimitation by first reflecting on the term itself (in this introduction) and then by trying to develop distinctive criteria (see Section II), which I will subsequently apply to different examples (see Section III). In the end, these examples will be used to illustrate why it is important to draw such a distinctive line in the first place.

1. Self-regulation: An Oxymoron?

At first sight, the term self-regulation seems self-explanatory. Self-regulatory rules are "by definition developed by those directly involved in the industry or professions".[11] Some of the advantages commonly attributed to self-regulation are that this regulatory form is relatively flexible, quick and cheap to achieve, that it accurately reflects the issues and needs of specific sectors, and that it creates a sense of a common bond, which in turn increases the likelihood of compliance. On the other hand, there are the various dangers of self-interest coming before public interest, anti-competitive effects and entry barriers, risks of non-enforcement, and also concerns about the lack of democratic legitimacy.[12]

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10 For instance, see S. AUGSBERG, Rechtsetzung zwischen Staat und Gesellschaft: Möglichkeiten differenzierte Steuerung des Kapitalmarktes (Berlin 2003); W. BERG et al. (eds.), Regulierte Selbstregulierung als Steuerungskonzept des Gewährleistungsstaats – Ergebnisse des Symposiums aus Anlass des 60. Geburtstages von Wolfgang Hoffmann-Riem (Berlin 2001); T. HOEREN, Selbstregulierung im Banken- und Versicherungsrecht (Karlsruhe 1995); G. MAKOWSKI, Kartellrechtliche Grenzen der Selbstregulierung (Baden-Baden 2007); K.-D. SABROWSKY, Selbstregulierung im Wirtschafts- und Unternehmensrecht (Bonn 1978); H. STOCKHAUS, Regulierte Selbstregulierung im europäischen Chemikalienrecht (Tübingen 2015); Z. TALIDOU, Regulierte Selbstregulierung im Bereich des Datenschutzes (Frankfurt/Main 2005); A. C. THOMA, Regulierte Selbstregulierung im Ordnungsverwaltungsrecht (Berlin 2008); K. TONNER, Regulierung und Selbstregulierung im Verbraucherrecht (Hamburg 1994). From a specifically private law perspective, see P. BUCK-HEEB/A. DIECKMANN, Selbstregulierung im Privatrecht (Tübingen 2010).

11 C. HARLOW/R. RAWLINGS, Law and Administration (Cambridge 2009), p. 325, referring to BETTER REGULATION TASK FORCE, Self-regulation Interim Report (London 1999).

12 For more extensive information on both the advantages and disadvantages of self-regulation, see, for instance, A. OGUS, Rethinking Self-regulation, Oxford Journal of Legal Studies 15 (1999) 97; R. VAN DEN BERGH, Towards Efficient Self-

In contemplating the term self-regulation itself, however, an inherent tension gradually becomes obvious:

> "The term self-regulation is an oxymoron. If all persons affected agree to a set of rules, the problem calling for regulatory intervention disappears. Self-regulation means something different. At least some actors have subdued to group pressure, or the entire group has given in to outside pressure, usually to a threat of the exercise of sovereign powers."[13]

Indeed, if the word fragment "regulation" is understood as any alteration of socially harmful behavior, and the word fragment "self-" is understood as a requirement of consent of all affected parties, the combination of both word fragments is a contradiction in itself. Any change against the will of the involved parties would effectively exclude such consensual agreement. We can only make sense of that combination if such consent is not entirely autonomous but somehow influenced by outside powers, either by the other party or from outside. To analyze this heteronomous influence requires us to unpack the concept of consent.

2. Genuine Self-regulation: Not Even in the Desert?

Against this background, the attribute "genuine" does not make our understanding any easier. According to a leading English-language dictionary, "genuine" means "actual, real, or true – not false or fake".[14] The structure of the present volume illustrates, however, that the true contrast is not between genuine and false or fake self-regulation, but between genuine self-regulation and self-regulation "induced by the state".[15] In fact, in order to overcome the deficiencies of self-regulation, which have just been mentioned, the approaches to self-regulation vary widely and involve different degrees of state involvement. Not every form of self-regulation is genuine self-regulation; instead, self-regulation itself can be regulated to varying degrees. Conversely, German administrative lawyers accordingly employ yet another form of wording, namely, regulated self-regulation, or *"Regulierte Selbstregulierung",* to cite the title of a *Festheft* (commemorative publication) about the well-known legal scholar and former judge of the German Federal Constitu-

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Regulation in Markets for Professional Services, in: Ehlermann/Atanasiu (eds.), European Competition Law Annual 2004: The Relationship Between Competition Law and the (Liberal) Professions (Oxford 2006) 155, 157 et seq.

13 C. ENGEL, The Role of Law in the Governance of the Internet, International Review of Law, Computers & Technology 20 (2006) 201, 202.

14 See the respective entry in the Merriam-Webster Dictionary, available at: *https://www.merriam-webster.com/dictionary/genuine.*

15 Cf. the contributions made in this volume by S. KOZUKA (p. 109) and J.-H. BINDER (p. 127).

tional Court, Wolfgang Hoffmann-Riem.[16] Since its publication, that term has become very common and is used in many different respects.[17]

This contrast between "genuine self-regulation" and "regulated self-regulation" or "self-regulation induced by the state" seems to imply that the former occurs in the absence of any outside influence, in some sort of legal and regulatory vacuum, where private parties self-regulate without being subject to any outside influence by the state regulator: in other words, entirely autonomous self-regulation. In fact, some authors distinguish accordingly between heteronomous and autonomous self-regulation, defining the latter as "regulation that takes place without any state interference" ("Regulierung, die ohne staatliche Einflussnahme erfolgt").[18]

But, can we imagine this kind of entirely autonomous self-regulation? In a different setting, this question was discussed over 90 years ago by Gerhart Husserl, one of the sons of the famous philosopher Edmund Husserl. The junior Husserl analyzed contracting as the most fundamental form of self-regulation, while indulging in the following thought experiment.[19] Imagine that, by coincidence, two people of different origins, different nationalities and different languages meet in the desert. One of them is thirsty but has only dried fruits, while the other one is hungry but has nothing to eat except a coconut. While it might seem beneficial for them to exchange the dried fruits and the coconut, they will probably not conclude such an exchange contract. The reason for the absence of contracting here is that they are both afraid that, immediately after the exchange, the opposing party will steal back what he has just given away. This example shows that even the simplest form of self-regulation, an exchange contract, will only reliably function with at least some form of state intervention, even if it simply involves the safeguarding of the execution of contracts.[20] As a consequence, as self-

16 BERG et al. (eds.), *supra* note 10.

17 In addition to the monographs by STOCKHAUS, see TALIDOU and THOMA, *supra* note 10; see also T. ATTENDORN, Regulierte Selbstregulierung: Gibt es das in der telekommunikationsrechtlichen Zugangsregulierung?, Die öffentliche Verwaltung 2008, 715; K.-H. LADEUR, Regulierte Selbstregulierung im Jugendmedienschutzrecht, Zeitschrift für Urheber- und Medienrecht 2002, 859; T. WEICHERT, Regulierte Selbstregulierung – Plädoyer für eine etwas andere Datenaufsicht, Recht der Datenverarbeitung 2005, 1.

18 P. BUCK-HEEB/A. DIECKMANN, *supra* note 10, 45.

19 G. HUSSERL, Rechtskraft und Rechtsgeltung: eine rechtsdogmatische Untersuchung (Berlin 1925) 39; cf. G. MANSSEN, Privatrechtsgestaltung durch Hoheitsakt (Tübingen 1994) 141. See also F. V. HIPPEL, Das Problem der rechtsgeschäftlichen Privatautonomie (Tübingen 1936, 91–105 ("im Naturstande").

20 For more details, see F. MÖSLEIN, Privatrechtliche Regelsetzung, Governance und Verhaltensökonomik, Austrian Law Journal 1 (2014) 135, 138 et seq.

regulation will never entirely occur without the state, it will never be purely autonomous or "genuine".

While some public law scholars question whether autonomous self-regulation, that is, the exercise of private autonomy, qualifies as self-regulation at all[21] (and while some private law scholars contrariwise question whether heteronomous self-regulation forms part of self-regulation in the proper meaning of the term),[22] our argument here is different: Self-regulation is never purely autonomous because private autonomy cannot be exercised in the absolute absence of the state. This idea that any form of self-regulation requires at least some state-made legal infrastructure can also be traced to the jurisprudence of the German Constitutional Court. In the famous *Bürgschaftsurteil,* a decision on the provision of a security, the court observed that safeguarding private autonomy requires enforceability and therefore constitutes a duty on the part of the legislature to provide regulatory tools and mechanisms that are legally binding and that establish enforceable legal positions in the event of disputes.[23] The contrary view, which argues that the legal order could restrict itself to simply tolerating private arrangements,[24] has consequently been rejected by Claus-Wilhelm Canaris as completely pointless and inconsistent with the constitutional right to the freedom of action (Art. 2, para. 1, German Basic Law).[25] While the state is necessarily involved to a greater extent, what may vary is the degree and the manner of state interference. Comparative contract law indeed shows significant differences, namely, in the comparison between common and civil law jurisdictions.[26]

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21 C. CALLIESS, Inhalt, Dogmatik und Grenzen der Selbstregulierung im Medienrecht, Zeitschrift für Medien- und Kommunikationsrecht (AfP) 2002, 465, 466; J. KÜHLING, Sektorspezifische Regulierung in den Netzwirtschaften (Munich 2004) 27.

22 P. BUCK-HEEB/A. DIECKMANN, *supra* note 10, 45.

23 BVerfGE 89, 214, 231 ("Nach ihrem Regelungsgegenstand ist die Privatautonomie notwendigerweise auf staatliche Durchsetzung angewiesen. Ihre Gewährleistung denkt die justitielle Realisierung gleichsam mit und begründet daher die Pflicht des Gesetzgebers, rechtsgeschäftliche Gestaltungsmittel zur Verfügung zu stellen, die als rechtsverbindlich zu behandeln sind und auch im Streitfall durchsetzbare Rechtspositionen begründen").

24 G. STRUCK, Vertragsfreiheit – ein Grundrecht, Demokratie und Recht (DuR)1988, 39.

25 C.-W. CANARIS, Verfassungs- und europarechtliche Aspekte der Vertragsfreiheit in der Privatrechtsgesellschaft, in: Badura/Scholz (eds.), Festschrift for Peter Lerche (Munich 1993) 873, 889 (note 59: "völlig sinnlos und mit Art. 2 I GG zweifelsfrei unvereinbar").

26 M. PARGENDLER, The Role of the State in Contract Law: The Common-Civil Law Divide, New York University School of Law Working Paper No. 17-01, available at *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2848886.*

II. Defining the Line

If self-regulation therefore never occurs entirely "without the state",[27] the distinction between genuine self-regulation and self-regulation induced by the state becomes difficult and diffuse. Yet the variety of different forms of self-regulation is obvious; likewise, the variances of state involvement.[28] Even more, it is crucial to form and differentiate two kinds of subcategory with regard to the application of the respective rules: The interpretation of rules follows different patterns, depending on whether they are induced by the state or not. As will be shown more extensively at a later stage,[29] such a distinction is not only reasonable for the sake of legal systematization but is also necessary in order to apply and interpret self-regulated rules.

But, how can one make this distinction? How can one draw the line between genuine self-regulation and self-regulation induced by the state? What is the decisive criterion? What we already know is that the mere involvement of the state does not play a role because the state is always involved in some form or another when it comes to private rule-making. What we therefore arguably need to consider is not the involvement but the initiative: On whose initiative does self-regulation take place? Is it the initiative of private parties or is it the initiative of state authorities?

Let me propose the identification of three different dimensions of this initiative criterion: namely, the procedure of rule-making, the substance of rules and their enforceability. I will briefly explain each of these three dimensions (see Subsections 1-3 below) before extensively illustrating them with various examples (see Section III). The challenge is to find the respective "tipping points",[30] i.e., the point where self-regulation rapidly and dramatically changes its character, such that it falls under the alternative

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27 For a similar form of wording, see G. Teubner, Global Law without a State (Dartmouth 1997); cf. N. Jansen/R. Michaels (eds.), Beyond the State: Rethinking Private Law (Tübingen 2008).

28 For a recent account of this variety (and its different dimensions), see G. F. Schuppert, The World of Rules. Eine etwas andere Vermessung der Welt (Frankfurt/Main, forthcoming), working paper available at: *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2747385*.

29 See, *infra,* Section III, Subsection 3.

30 The idea of such tipping points has been extensively explored in other social sciences, namely, economics and sociology; see T. Schelling, A Process of Residential Segregation: Neighborhood Tipping, in: Pascal (ed.), Racial Discrimination in Economic Life (Lexington 1972) 157; M. Granovetter, Threshold Models of Collective Behavior, American Journal of Sociology 83 (1978) 1420. Cf. the best-seller from M. Gladwell, The Tipping Point: How Little Things Can Make a Big Difference (London 2014): "The tipping point is that magic moment when an idea, trend, or social behaviour crosses a threshold, tips, and spreads like wildfire."

respective subcategory. We need to define more precise criteria that produce the categorical difference between genuine self-regulation and self-regulation induced by the state.

1. Mechanisms, but No Mandate

Beginning with procedural aspects, in any event, the state creates the necessary infrastructure for rule-making: To cite the German Constitutional Court again, the state provides regulatory tools and mechanisms, which are legally binding and establish legal positions that are enforceable in the event of disputes.[31] Several fundamental questions need to be answered in order to define the respective legal positions. Which statements are legally binding? What formalities does self-regulation require? Who is competent to regulate? All these questions concern the legal infrastructure of self-regulation. In fact, private law in general is widely regarded as representing this infrastructure.[32] Its provision by the state does not therefore necessarily speak against genuine self-regulation but is a necessary precondition for self-regulation of any kind.

But, where is the tipping point? What level and what intensity of respective specifications transform genuine self-regulation into self-regulation induced by the state? A preliminary proposition is that this line is crossed once the state not only provides mechanisms but also mandates self-regulation.[33] In fact, any such delegated rule-making lacks the necessary de-

31 See reference, *supra* note 23. For more detail on private law implications, see H. HANAU, Der Grundsatz der Verhältnismäßigkeit als Schranke privater Gestaltungsmacht (Tübingen 2004) 27–29, which claims that enforceability of private arrangements requires a respective order by the state (Erforderlichkeit eines "staatliche[n] Geltungsbefehl[s] für private Abreden").

32 Above all, see C. WINDBICHLER, Neue Vertriebsformen und ihr Einfluss auf das Kaufrecht, Archiv für die civilistische Praxis (AcP) 198 (1998) 261, 271; cf. G. BACHMANN, Privatrecht als Organisationsrecht – Grundlinien einer Theorie privater Regelsetzung, Jahrbuch Junger Zivilrechtswissenschaftler 2003, 1, 20 et seq.; J. DREXL, Zwingendes Recht als Strukturprinzip des Europäischen Verbrauchervertragsrechts?, in: Coester et al. (eds.), Festschrift für Hans Jürgen Sonnenberger (Munich 2004) 771, 783; S. GRUNDMANN, Regulating Breach of Contract, European Review of Contract Law 3 (2007) 121, 122; *id.*/F. MÖSLEIN, Vertragsrecht als Infrastruktur für Innovation, Zeitschrift für die gesamte Privatrechtswissenschaft (ZfPW) 2015, 435; K. RIESENHUBER/F. MÖSLEIN, Contract Governance – Skizze einer Forschungsperspektive, in: Riesenhuber (ed.), Perspektiven des Europäischen Schuldvertragsrechts (Berlin 2008) 1, 22. With respect to company law, see H. FLEISCHER, Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht (ZHR) 168 (2004) 673, 675–678 and 707 ("Infrastrukturverantwortung des Gesetzgebers").

33 For a fundamentally different approach, cf. P. BUCK-HEEB/A. DIECKMANN, *supra* note 10, 45, referring to state responsibility ("staatliche Veranwortlichkeit"), i.e., to

gree of private autonomy for it to qualify as genuine self-regulation since it evolves at the behest of the state, not of private parties. Of course, the "increasingly dynamic and synergistic interaction between public and private […] rule-making systems"[34] tends to make it difficult to distinguish between mandates and mechanisms. The examples given subsequently (see Section III) will serve as test cases as to whether this distinction is nonetheless workable in practice.

2. Limitations, but No Instructions

In addition to procedural differentiation, a second dimension concerns the substance of self-regulated rules. In this respect, the state can and does define limitations. For instance, the general clause of § 138 of the German *Bürgerliches Gesetzbuch* (BGB), i.e., the Civil Code, prohibits extremely unjust or immoral agreements. A more specific example is § 276, paragraph 3, of the German BGB, which disallows the advance exclusion of liability for willful acts.[35] Such provisions excluding certain (more or less specifically defined) substantive content in private arrangements are commonplace in private law. In particular, they serve to protect the common interest or interests of third parties.[36] As a consequence, such limitations are indeed indispensable for the efficient functioning of self-regulation, given that self-regulation involves the specific risk of self-interest being put before public interest.[37]

Once again, if substantive limitations are ubiquitous, where is the tipping point? In this substantive respect, the preliminary proposition is that, as long as the state only limits the content of self-regulation, the latter is still within the realm of genuine self-regulation. The line is crossed, however, once the state affirmatively determines what content self-regulation should comprise. In turn, there are various instances where it is difficult to distin-

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the question about whether the state itself has a duty to regulate. What remains unclear, however, concerns the specific requirements with respect to the sources and intensity of such a duty. In fact, there are only a few instances where legislation is (constitutionally) mandatory; see J. ISENSEE, Der Bundesstaat. Bestand und Entwicklung, in: Badura/Dreier (eds.), Festschrift 50 Jahre Bundesverfassungsgericht (Tübingen 2001) 719, 739 et seq. ("Soweit der Bund die Gesetzgebung in bestimmten Materien hat, hat er die Befugnis, aber nicht die Verpflichtung, Gesetze zu erlassen").

34 J. LISTER, Corporate Social Responsibility and the State (Vancouver/Toronto 2011) 29 (illustrating the "Co-Regulatory Policy Mix" with respect to environmental law).

35 Various incidental restrictions of that liability remain possible, however; see L. KÄHLER, Mittelbare und unmittelbare Einschränkungen der Vorsatzhaftung, Juristenzeitung (JZ) 2007, 18.

36 For more extensive information, see MÖSLEIN, *supra* note 5, 164–175.

37 Cf. the above references in note 12.

guish between limitations and instructions. Default rules are a prime example: While private parties may, by definition, deviate from them, such rules also serve as focal points, such that deviating from them could prove to be difficult, either for practical reasons or due to legal provisos.[38] But, "taken as such, default rules do not intrude on autonomy, even if they influence people without persuading them".[39] In spite of the applicability of default rules, which may or may not have an influence on its substantive content, self-regulation may still qualify as genuine.

3. Enforcement, but Not Public

The third and final dimension concerns the enforcement of self-regulated rules. Husserl's desert example, as well as the reasoning of the Constitutional Court, demonstrates that safeguarding private autonomy, as in self-regulation, requires some degree of enforceability. Of course, self-regulation can also be of a non-binding nature.[40] To note that codes of conduct, for instance, are not legally binding, "is not to say that they do not influence international economic relations, nor does it mean that they produce no legal effects whatsoever".[41] The enforcement mechanisms largely differ; they can also involve non-legal, i.e., social or economic sanctions.[42] Moreover, seemingly "voluntary" corporate codes may well be enforced by private law means.[43] When distinguishing between the two categories of self-regulation, the specific type of enforcement is relevant. In this respect, the preliminary proposition is that private enforcement (in a very large sense) characterizes genuine self-regulation, whereas self-regulation induced by the state is typically also enforced by the state, i.e., publicly enforced.

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38 Such legal and factual barriers are extensively dealt with by MÖSLEIN, *supra* note 5, 186–334.

39 C. SUNSTEIN, Autonomy by Default, The American Journal of Bioethics 16 (2016) 1. In a similar vein, see F. MÖSLEIN, "Governance by Default" – Innovation und Koordination durch dispositives Recht, in: Grundmann et al. (eds.), Festschrift für Klaus J. Hopt, (Berlin 2010) 2861.

40 See P. BUCK-HEEB/A. DIECKMANN, *supra* note 10, 42 (distinguishing between binding and non-binding self-regulation).

41 S. ZAMORA, Economic Relations and Development, in: Joyner (ed.), The United Nations and International Law (Cambridge 1997) 232, 261.

42 Cf., for instance, A. OGUS/E. CARBONARA, Self-regulation, in: Parisi (ed.), Production of Legal Rules, (2nd ed., Cheltenham 2011) 228–229 et seq.

43 A. BECKERS, Enforcing Corporate Social Responsibility Codes (Oxford/Portland 2015).

III. Walking the Line: Three Examples

While these three dimensions provide an image of the divide between genuine self-regulation and self-regulation induced by the state, they need to be applied to and tested with different examples. According to the cross-sectoral nature of rule-making theory, we examine rules in three entirely different contexts of private law: contract law, where we will examine standard terms (see Subsection 1 below); corporate law, where the focus is on corporate governance codes (see Subsection 2 below); and various standards from a European law perspective (see Subsection 3 below).

1. Standard Terms in Contract Law

Standard terms are often known as the "fine print" and form a part of many contracts, even though the opposing party is often not even aware of those terms. US legal scholars pointedly refer to them as "boilerplate".[44] To read a set of standard terms is indeed not very stimulating, instead requiring a level of time and effort that most consumers are not ready to invest.[45]

In Germany, the regulation of standard contract terms has a long tradition and history.[46] This history started as early as 1906, when the Reichsgericht first scrutinized the substance of standard contract terms, which, at the time, was based on BGB § 138 and was undertaken only where the terms were employed by monopolists.[47] In the 1920s, the Reichsgericht broadened the scope of this jurisprudence to situations of superior economic power, while the Bundesgerichtshof later applied it to a wide range of situations involving materially unbalanced terms, basing it on either § 242 or § 315 BGB.[48] In 1958, Ludwig Raiser described that case law as a particularly glorious chapter *(Ruhmesblatt)* in German jurisprudence.[49] The legislature then intervened in 1976 with a law on standard contract terms.[50] A major adjustment of that law was triggered by European harmonization, since the Directive on Unfair

44 O. Ben-Shahar (ed.), Boilerplate: The Foundation of Market Contracts (Cambridge 2007).

45 For an empirical study, see Y. Bakos/F. Marotta-Wurgler/D. R. Trossen, Does Anyone Read the Fine Print? Consumer Attention to Standard Form Contracts, Journal of Legal Studies 43 (2014) 1.

46 For a more extensive survey, see J. Basedow, in: Säcker et al. (eds.), Münchener Kommentar zum Bürgerlichen Gesetzbuch (7th ed., Munich 2016) Preliminary Note, § 305 et seq., para. 8.

47 Judgment of the Reichsgericht of 6 January 1906, RGZ 62, 264 (266).

48 See, on the one hand, the Judgment of the Reichsgericht of 26 October 1921, RGZ 103, 82, 83; and, on the other hand, for instance, the Judgment of the Bundesgerichtshof of 29 October 1962, BGHZ 38, 183, 186.

49 L. Raiser, Vertragsfreiheit heute, Juristenzeitung (JZ) 1958, 1, 7.

Terms of 1993 urged the German legislature to adjust the focus in order to primarily take consumer contracts into account.[51] With the reform of the Law of Obligations of 2002, the provisions were finally incorporated into the German BGB itself (now in BGB § 305 et seq.).[52]

While this history of the regulation of standard terms is well known, it may seem surprising to conceptualize standard terms themselves as (self-) regulation. Formally, at least, they simply form a part of contractual arrangements. But, it is worth recalling the comment made above in relation to self-regulation as an oxymoron, specifically: That we need to unpack the concept of consensus.[53] Standard terms are indeed a prime example of the ambivalence of that concept: Since the other party is typically not well aware of those terms, the claim that those terms are consensus-driven is not very persuasive. As a consequence, standard contract terms have, for a long time, been discussed as a form of regulation, namely by the ordoliberal Hans Großmann-Doerth. The title of his Freiburg inaugural lecture in 1933 referred to the self-produced law of the business community *(Das selbstgeschaffene Recht der Wirtschaft),* where he discussed standard terms as a form of law.[54] After all, standard terms often go far beyond bilateral contracts and "regulate" a wide range of situations, for instance, when they are elaborated by trade associations and applied sector-wide in the banking and insurance industry.[55] Let us therefore apply the three-dimensional grid to standard terms.

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50 Gesetz zur Regelung des Rechts der Allgmeinen Geschäftsbedingungen (AGB-Gesetz) of 9 December 1976, Bundesgesetzblatt I, p. 3317. On the legislative history, again see BASEDOW, *supra* note 46, paras. 10–13.

51 Council Directive 93/13/EEC of 5 April 1993, on unfair terms in consumer contracts, OJ L 95 of 21 April 1993, p. 29. For a brief overview and further references, see F. MÖSLEIN, Kontrolle vorformulierter Vertragsklauseln, in: Schmidt-Kessel (ed.), Ein einheitliches europäisches Kaufrecht? (Munich 2012) 255, 259 et seq.

52 For more extensive information on this legislative step, see M. WOLF/T. PFEIFFER, Der richtige Standort des AGB-Rechts innerhalb des BGB, Zeitschrift für Rechtspolitik 2001, 303; R. KOCH, Auswirkungen der Schuldrechtsreform auf die Gestaltung Allgemeiner Geschäftsbedingungen, Wertpapier-Mitteilungen (WM) 2002, 2173 and 2217; U. SCHUMACHER, Materielle Neuregelungen im Recht der Allgemeinen Geschäftsbedingungen, Monatsschrift für Deutsches Recht 2002, 973.

53 *Supra* note 13.

54 H. GROSSMANN-DOERTH, Selbstgeschaffenes Recht der Wirtschaft und staatliches Recht (Freiburg 1933), reprinted and discussed in U. BLAUROCK/N. GOLDSCHMIDT/A. HOLLERBACH (eds.), Das selbstgeschaffene Recht der Wirtschaft – Zum Gedenken an Hans Großmann-Doerth (Tübingen 2005). In a similar vein, see H. GROSSMANN-DOERTH, Das autonome Recht des Welthandels, Juristische Woche (JW) 1929, 3447.

55 On parallels and differences in detail, cf. MÖSLEIN, *supra* note 5, 459 et seq.

a) Mechanisms of Bilateral Consensus

With respect to the procedure of rule-making, the mechanism here is the same as for contractual agreements in general, that is: bilateral consent. With respect to consumers, however, German law contains a specific rule in § 305 paragraph 2, of the BGB. It lays down the so-called *Einbeziehungskontrolle* (meaning a review of the incorporation of standard terms), which requires the user of the terms, when entering into a contract, (1) to explicitly refer the other party to the standard terms and (2) to give the other party, in an acceptable manner, the opportunity to take notice of these terms. Last but not least, the provision also requires the agreement of the other party to the application of the standard terms.[56]

This last requirement clearly shows that bilateral consent is required. As a consequence, standard terms clearly fall into the realm of genuine self-regulation, even if such an agreement does not need to be explicit; indeed, it can even be "silent" if based on conclusive conduct.[57] We have to be satisfied, then, with a very formal sort of consent because the counterpart will often not be consciously aware of the substance of those standard terms. To illustrate how blurred the line between autonomous self-determination and heteronomous external determination can be, some speak pointedly of zones of diluted autonomy *(Zonen verdünnter Freiheit)*.[58] At least the legal rules in question give the counterpart a chance to gain access to these standard terms and to take notice of them.

In any event, the use of standard terms is not mandated by the state. Take, for example, a commercial website: While there are information duties mandating the disclosure of various facts, for instance, with respect to prices,[59] there is no duty to use standard terms. However, if you use stand-

56 The provision was originally very much debated, cf. H. E. BRANDNER, Wege und Zielvorstellungen auf dem Gebiet der Allgemeinen Geschäftsbedingungen, Juristenzeitung (JZ) 1973, 613–614 et seq.; H. KÖTZ, Welche gesetzgeberischen Maßnahmen empfehlen sich zum Schutze des Endverbrauchers gegenüber Allgemeinen Geschäftsbedingungen und Formularverträgen?, in: Verhandlungen für den 50. Deutschen Juristentag (Munich 1974) A 59–A 61; E. ULMER, Welche gesetzgeberischen Maßnahmen empfehlen sich zum Schutze des Endverbrauchers gegenüber Allgemeinen Geschäftsbedingungen und Formularverträgen?, in: Verhandlungen für den 50. Deutschen Juristentag (Munich 1974) H 28–H 30. Moreover, such a review is not provided for in the European Directive; cf. MÖSLEIN, *supra* note 51, 274, with further references.

57 In this sense, see the legislative materials, Bundestags-Drucksache 7/3919, 18.

58 L. RAISER, Vertragsfunktion und Vertragsfreiheit, in: v. Caemmerer et al. (eds.), Festschrift Hundert Jahre Deutsches Rechtsleben (Berlin 1960) 101, 126.

59 Art. 246a, § 1 para. 1, no. 4 Einführungsgesetz zum Bürgerlichen Gesetzbuche (EGBGB).

ard terms, you need to disclose them: not only by virtue of § 305 paragraph 2, of the BGB, but also according to the more specific rules on distance selling.[60] Despite these information duties, the use of standard terms, as such, is voluntary and, in that respect, this clearly falls into the realm of genuine self-regulation.

b) Substantive Limitations of Different Intensities

With respect to the substance of standard contract terms, German and European law prescribe limitations in sets of rules which, to different degrees, take differentiated approaches. At the European level, the Directive on Unfair Contract Terms confines itself to the abstract general clause in Article 3 paragraph 1, which provides that standard contract terms "shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer". Both preconditions, that is, the term of "significant imbalance", as well as the requirement of good faith, are obviously in need of concretization. Even though the directive at least includes in its annex a non-exhaustive list of terms which may be regarded as unfair, the courts have had difficulties in defining the substantive limitations of standard contract terms and even deciding upon the competence, at the European or national level, to concretize that general clause.[61]

In comparison, the rules in German law take a much more differentiated approach. Whereas BGB § 309 contains a "black list" of clauses, which are prohibited per se without any possibility of evaluation, BGB § 308 provides for another list of prohibited clauses; this second list is "gray", however, since the wording of its prohibitions allows for case-specific evaluations.[62] Last but not least, BGB § 307 prescribes a more general test of reasonableness for general clauses. Roughly following the wording of the directive, it states that "provisions in standard business terms are ineffective if, contrary

60 Art. 246a, § 1 para. 1, no. 7 EGBGB; for more details, in particular on specific problems of mobile orderings, cf. R. JANAL, Die AGB-Einbeziehung im "M-Commerce", Neue Juristische Wochenschrift (NJW) 2016, 3201.

61 For more details, see, for instance, A. RÖTHEL/F. MÖSLEIN, Concretisation of General Clauses, in: Riesenhuber (ed.), European Legal Methodology (Cambridge/Antwerp/Portland 2017) 261, 271–275.

62 Cf. with the directive: M. STÜRNER, Der Grundsatz der Verhältnismäßigkeit im Schuldvertragsrecht (Tübingen 2010) 113–117. More recent reform proposals at the European level, namely, the draft Proposal for a Regulation on a Common European Sales Law (Arts. 83–85) and the 2008 draft for the Directive on Consumer Rights (Arts. 32–35), contained much more differentiated sets of rules, similar to German law; see, respectively, MÖSLEIN, *supra* note 51, 265 et seq.; A. MITTWOCH, Vollharmonisierung und Europäisches Privatrecht (Berlin 2013) 246.

to the requirement of good faith, they unreasonably disadvantage the other party to the contract with the user"; the second paragraph of the same provision then specifies that such unreasonable advantage will be assumed if a clause (1) is not compatible with essential principles of the statutory provision from which it deviates, or if it (2) limits essential rights or duties inherent in the nature of the contract to such an extent that attainment of the purpose of the contract is jeopardized.

Beyond doubt, this much differentiated set of provisions limits the freedom of contract, be it by absolute limits or by much more nuanced relative limits.[63] Some of these limitations are very case-sensitive, to be finally decided upon by the courts rather than by the legislators who take a rather general approach. Notwithstanding their partly abstract and partly more precise character, however, these legal provisions only define the limitations of standard terms' substance. In any event, they do not affirmatively instruct the rule-making parties to include any particular kind of substance. In other words, the content of standard clauses is not prescribed by any third party. In particular, it is not mandated by the state.

Yet, there are some more specific counterexamples in German law too, namely, with respect to public services. For instance, the standard terms for postal services and transport and railway services are prescribed by statutory instruments, such that any specific deviation from these prescriptions typically requires administrative authorization.[64] As opposed to standard contract terms in general, these exceptional terms are beyond the tipping point, meaning they qualify as self-regulation induced by the state. In general, however, we can qualify standard terms as genuine self-regulation, including with respect to their substance.

c) Individual and Collective Enforcement

With respect to enforcement, the mechanisms are, in principle, the same as for contractual agreements in general, i.e., standard terms can be enforced by private litigation. The same individual enforcement framework also applies to the question about whether standard terms are valid or not. In other words, the question about whether such terms comply with the aforementioned procedural and substantive rules will regularly be decided in court proceedings between the two private parties, i.e., the consumer and the supplier who have concluded the contract.[65]

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63 In a general sense with regard to these different forms of limitations, see MÖSLEIN, *supra* note 5, 187–216.

64 Cf. the provisions in the Postdienstleistungsverordnung (namely, § 1 para. 2), the Personenbeförderungsgesetz (namely § 58 para. 1 no. 3), and the Eisenbahn-Verkehrsordnung (namely, § 5 para. 1); for more details, see MÖSLEIN, *supra* note 5, 206 et seq.

In addition, the law provides for collective mechanisms of enforcement: unfair contract terms can also be challenged in court by consumer or business organizations. For this purpose, the German legislature enacted a specific law, the so-called *Unterlassungsklagegesetz*.[66] In § 3 of this law, it defines the organizations that are competent to bring actions.[67] It is important to note that this provision enumerates private organizations, not public authorities. Against the backdrop of our three-dimensional grid, this is a clear indicator that we can qualify standard terms as genuine self-regulation, including with respect to enforcement.

European law, however, takes a somewhat different approach (as do other national laws within the EU). Article 7, paragraph 2, of the Unfair Terms Directive provides that the means of enforcement are to include provisions on collective enforcement. According to this provision, however, the decision as to whether contractual terms are unfair does not necessarily need to be litigated before the courts, but could also be taken by "competent administrative bodies".[68] Whenever national legislators opt for this kind of enforcement, it is at least partly driven by public authorities.[69] In such cases, the qualification of standard terms as genuine self-regulation is much less obvious. Under German law, however, standard terms are indeed genuine self-regulation in all three of the respects as outlined above.

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65 For more details, see F. WILMAN, Private Enforcement of EU Law before National Courts (Cheltenham/Northampton 2015) 161–171; on the enforcement of consumer rights in individual proceedings in general, see M. FRIES, Verbraucherrechtsdurchsetzung (Tübingen 2016) 108–169.

66 For an overview see, for instance, E. SCHAUMBURG, Die neue Verbandsklage, Der Betrieb (DB)2002, 732; W.-D. WALKER, Die Verbandsklage nach dem Unterlassungsklagengesetz (UKlaG), in: Dauner-Lieb et al. (eds.), Das Neue Schuldrecht (Heidelberg 2002) 206.

67 The definition raises various much-debated issues, cf., for instance, the Judgment of the Bundesgerichtshof of 25 September 2002, BGHZ 152, 121; see also W. LÖWE, Flickschusterei bei den gesetzlichen Änderungen der AGB-Verbandsklagebefugnis, Zeitschrift für Wirtschaftsrecht (ZIP) 2003, 12.

68 T. WILHELMSSON, Public Interest Litigation on Unfair Terms, in: Micklitz/Reich (eds.), Public Interest Litigation before European Courts (Baden-Baden 1996) 385, 389–392.

69 See, for instance, on the transposition in the UK empowering the Office of Fair Trading to pursue collective proceedings in relation to unfair terms: J. DEVENNEY/T. PFEIFFER, Control of Standard Terms and Collective Proceedings, in: Dannemann/Vogenauer (eds.), The Common European Sales Law in Context (Oxford 2013) 687, 698 et seq.; C. WILLETT, From Reindeers to Confident Consumers: UK Consumer Bodies and the Unfair Term Directive, in: Micklitz/Reich (eds.), Public Interest Litigation before European Courts (Baden-Baden 1996) 403.

2. *Codes in Corporate Law*

In the realm of corporate law, one could possibly discuss a whole range of different instruments of self-regulation, such as corporate charters, bylaws or shareholder agreements.[70] As opposed to exchange contracts, they are all of a multilateral nature. Some even require (or used to require, from a legal-historical perspective)[71] an approval by public authorities, with their substance is partially prescribed, at least when corporate law is mandatory, as is the case for a German stock corporation *(Aktiengesellschaft)* pursuant to the much debated provision in § 23 paragraph 5, of the German *Aktiengesetz*.[72]

My focus, however, will be on corporate governance codes, a particularly modern regulatory instrument with very recent origins. The history of these codes does not even straddle two decades, prompted as they were by various scandals in the UK, particularly related to the manufacturer Polly Peck and the media proprietor Robert Maxwell.[73] These scandals led to the appointment of the Committee on the Financial Aspects of Corporate Governance, led by Sir Adrian Cadbury.[74] This committee produced the Cadbury Report,

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70 See also D. KERSHAW, Corporate Law and Self-Regulation, in: Gordon/Ringe (eds.), Oxford Handbook on Corporate Law and Governance (Oxford 2017), with a focus on the (UK) takeover code.

71 On the so-called octroi system, requiring such public approval, see, for instance, K. LEHMANN, Die geschichtliche Entwicklung des Aktienrechts bis zum Code de Commerce (Berlin 1895) 82–88; more generally, see F. MÖSLEIN, Grenzen unternehmerischer Leitungsmacht im marktoffenen Verband (Berlin 2007) 11–16.

72 For recent contributions on this debate, see in particular W. BAYER, Empfehlen sich besondere Regelungen für börsennotierte und für geschlossene Gesellschaften, Gutachten E, in: Verhandlungen des 67. Deutschen Juristentag, Vol. I (Munich 2008), in particular, 27 et seq.; see also M. HABERSACK, Staatliche und halbstaatliche Eingriffe in die Unternehmensführung, Gutachten E, in: Verhandlungen des 69. Deutschen Juristentag, Vol. I (Munich 2012) 26 et seq. From an Austrian perspective, see S. KALSS/M. SCHAUER, Die Reform des Österreichischen Kapitalgesellschaftsrechts, Gutachten für den 16. Österreichischen Juristentag (Vienna 2006) 54 et seq. From a comparative perspective, this mandatory approach is exceptional; cf. H. FLEISCHER, Der Einfluß der Societas Europaea auf die Dogmatik des deutschen Gesellschaftsrechts, Archiv für die civilistische Praxis (AcP) 204 (2004) 502, 517; K. J. HOPT, Gestaltungsfreiheit im Gesellschaftsrecht in Europa – Generalbericht, in: Lutter/Wiedemann (eds.), Gestaltungsfreiheit im Gesellschaftsrecht (Berlin 1998) 123; G. SPINDLER, Deregulierung des Aktienrechts?, Die Aktiengesellschaft (AG) 1998, 53.

73 For more details, see T. CLARKE, Cycles of Crisis and Regulation, Corporate Governance – An International Review 12 (2004) 153, 156; cf. P. STILES/B. TAYLOR, Maxwell – The Failure of Corporate Governance, Corporate Governance – An International Review 1 (1993) 34.

74 See B. CHEFFINS, The History of Corporate Governance, in: Wright et al. (eds.), The Oxford Handbook of Corporate Governance (Oxford 2013) 46, 57.

which called for contemporary best practice to be embraced by listed companies. This recommendation led not only to the UK Combined Code,[75] but also, on a supranational basis, to the OECD Principles of Corporate Governance. Originally developed in 1999, these principles were updated in 2004 and 2015 and are now also endorsed by the G20.[76] In Germany, the Corporate Governance Code was introduced in 2002 and has subsequently been updated several times, with its current version stemming from 2015.[77]

This historical summary already shows that, within a short time span, corporate governance codes are at the core of widespread practice. A study commissioned by the European Commission counted 35 different codes in Europe alone.[78] What is even more interesting for our present purposes is the regulatory variety of these codes, with different procedures of elaboration, different substantive approaches and different modes of enforcement. Several studies distinguish the different regulatory modes of such codes, ranging from pure (i.e., genuine) self-regulation to pure regulation, including various degrees of statutory and non-statutory support in between.[79]

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75 For a survey on related developments, see P. DAVIES, Board Structure in the United Kingdom and Germany: Convergence or Continuing Divergence, International and Comparative Corporate Law Journal (ICCLJ) 2 (2000) 435 et seq.; cf. *id.,* Enron and Corporate Law Reforms in the UK and the European Community, in: Hopt et al. (eds.), Corporate Governance in Context (Oxford 2005) 163.

76 OECD (ed.), G20/OECD Principles of Corporate Governance (Paris 2015); cf. S. WONG, The 'New' G20/OECD Principles of Corporate Governance, Hawkamah Journal 2 (2015) 20. For more details, but on earlier versions, see P. HOMMELHOFF, Die OECD-Principles on Corporate Governance – ihre Chancen und Risiken aus dem Blickwinkel der deutschen corporate governance-Bewegung, Zeitschrift für Unternehmens- und Gesellschaftsrecht (ZGR) 2001, 238; U. SCHNEIDER, Die Revision der OECD Principles of Corporate Governance 2004, Die Aktiengesellschaft (AG) 2004, 429.

77 Available at *http://www.dcgk.de/de/kodex.html;* for detailed accounts, see T. H. KREMER/G. BACHMANN/M. LUTTER/A. V. WERDER (eds.), Deutscher Corporate Governance Kodex – Kommentar (6th ed., Munich 2016); H.-U. WILSING (ed.), DCGK – Deutscher Corporate Governance Kodex (Munich 2012); L. FUHRMANN/M. LINNERZ/A. POHLMANN (eds.), Deutscher Corporate Governance Kodex (Frankfurt/Main 2015).

78 WEIL/GOTSHAL/MANGES LLP (eds.), Comparative Study of Corporate Governance Codes Relevant to the European Union and Its Member States – Final Report (Brussels 2002), available for download at *http://ec.europa.eu/internal_market/company/docs/corpgov/corp-gov-codes-rpt-part1_en.pdf;* an index with links to all codes is available at *http://www.ecgi.org/codes* (both last visited on 16 February 2017).

79 A. GALLE, 'Comply or Explain' in Belgium, Germany, Italy, the Netherlands and the UK: Insufficient explanations and an empirical analysis, Corporate Ownership & Control 12 (2014) 862; A. PIETRANCOSTA, Enforcement of Corporate Govern-

This regulatory variety makes these codes an excellent research subject with a view to analyzing the boundaries of genuine self-regulation. We revert again to the three-dimensional grid in order to examine the example of the German Corporate Governance Code.

a) Mechanisms of Rule-making and Compliance

With regard to the procedure of rule-making, the German Corporate Governance Code is elaborated – on a continuing basis – by a commission which was established by the German Federal Minister of Justice in September 2001, the so-called Regierungskommission Deutscher Corporate Governance Kodex.[80] It consists of board representatives of German listed companies, institutional and retail investors, academics, auditors and a trade union federation.[81] In fact, all members are private actors. Moreover, the commission itself can recommend new members, but they are ultimately appointed by the Federal Ministry of Justice and for Consumer Protection.[82]

In short, the rule-making procedure is initiated by the state, rather than by private actors. In this respect, the code is clearly outside the realm of pure self-regulation (perhaps even outside the realm of self-regulation in general).[83] Of course, the commission develops the standards not only through internal discussion, but in dialogue with economists, politicians and the general public. This does not change the fact, however, that the procedure of rule-making is initially induced by the state. Moreover, the

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ance Codes – A Legal Perspective, in: Grundmann et al. (eds.), Festschrift für Klaus J. Hopt, (Berlin 2010) 1109; H. H. VOOGSGEERD, Corporate Governance Codes: markt- of rechtsarrangement? (Deventer 2006); E. WYMEERSCH, The Enforcement of Corporate Governance Codes, Journal of Corporate Law Studies 6 (2006) 113.

80 See, for instance, W. BAYER, Grundsatzfragen der Regulierung der aktienrechtlichen Corporate Governance, Neue Zeitschrift für Gesellschaftsrecht (NZG) 2013, 1, 4; W. SEIDEL, Der Deutsche Corporate Governance Kodex – eine private oder doch eine staatliche Regelung?, Zeitschrift für Wirtschaftsrecht (ZIP) 2004, 285, 287 et seq.; cf. M. WOLF, Corporate Governance – Der Import angelsächsischer 'Self-Regulation' im Widerstreit zum deutschen Parlamentsvorbehalt, Zeitschrift für Rechtspolitik 2002, 59.

81 For the list of its current members, see *http://www.dcgk.de/de/kommission/mitglieder.html.*

82 Cf. its rules of procedure: Geschäftsordnung der Regierungskommission Deutscher Corporate Governance Kodex, Sub. 1.2, available at *http://www.dcgk.de//files/dcgk/usercontent/de/download/geschaeftsordnung/2014-04-14_Geschaeftsordnung_RegKom.pdf.*

83 In fact, some qualify the code as state-made law, others as "private rule-making in the shadow of law". See, on the one hand, *supra* note 80; on the other hand, T. MÖLLERS/B. FEKONIA, Private Rechtsetzung im Schatten des Gesetzes, Zeitschrift für Unternehmens- und Gesellschaftsrecht (ZGR) 2012, 777, 803 et seq.

provisions of the code become valid on publication in the official section of the Federal Gazette: they are published as if they were laws.[84]

b) Limitations and the Shadow of the Legislature

With respect to their substance, different sets of rules can be distinguished within the Corporate Governance Code.[85] Some provisions simply describe the law, since they replicate provisions of German corporate law that refer to the management and supervision of listed companies. One may wonder whether this is a pointless exercise, but the idea here is that replicating these provisions in the Corporate Governance Code makes them easier to access, particularly by foreign investors.[86] Other provisions do not replicate the law; rather, they aim to represent internationally and nationally acknowledged governance standards.[87] They substantiate corporate law standards, which are often rather abstract and general, while providing more specific guidance. Based on the regulatory intensity of the rules, one can again distinguish between recommendations and mere suggestions, but it is only with respect to enforcement that this second distinction gains in significance (see, infra, Subsection C).

In general, we can, at any rate, observe that some provisions of the code simply replicate codified law and therefore strictly follow formal instructions of the state, whereas others are produced with a wider margin of discretion, reflecting private market practices. Yet, if we take a broader look at the politics of the Corporate Governance Code,[88] there are numerous examples of a more subtle, informal influence of the legislature. At various times, the legislature either made clear that legal provisions would be enacted if rules were not incorporated into the code, or indeed enacted legal provisions after it had become clear that the respective code recommendations were not sufficiently followed. As a consequence, even in the second, seemingly genuine, self-regulated set of rules, the "shadow of the legisla-

84 See Geschäftsordnung, *supra* note 82, sub. 3.4.

85 See, for instance, P. ULMER, Der Deutsche Corporate Governance Kodex – ein neues Regulierungsinstrument für börsennotierte Aktiengesellschaften, Zeitschrift für das gesamte Handels- und Wirtschaftsrecht (ZHR) 166 (2002) 150, 153.

86 On the importance of corporate governance reports for investors, cf. S. WEBER / P. VELTE, Die Bedeutung von Corporate Governance Reports aus Investorensicht, Deutsches Steuerrecht 2011, 1141.

87 See, for instance, C. SEIBT, Deutscher Corporate Governance Kodex: Antworten auf Zweifelsfragen der Praxis, Die Aktiengesellschaft (AG) 2003, 465, 470.

88 More generally and from a transnational perspective on this topic, see H. OVERBEEK / B.V. APELDOORN / A. NÖLKE (eds.), The Transnational Politics of Corporate Governance Regulation (London / New York 2007).

ture"[89] plays an important role, albeit in a subtle and informal manner. Cooling-off periods between management and supervisory boards, disclosure of remuneration and the gender quota are prominent examples of that shadow's reach.[90] Due to the informal character of this legislative impact, it is difficult to assess the German Corporate Governance Code in this substantive respect. In any event, we can note that, with regard to its substance, the code is definitely not purely genuine self-regulation but seems to exceed the tipping point.

c) Enforcement by Reputation, Voidability and (Perhaps) Liability

With respect to enforcement, the most prominent mechanism originates from the comply-or-explain rule, which is laid down in § 161 of the German Stock Corporations Act (*Aktiengesetz,* AktG).[91] The provision obliges listed companies to make a declaration of conformity: Deviations from the code's recommendations, but not from its suggestions, have to be explained and disclosed in the annual declaration of conformity.[92] While recommendations and suggestions are neither mandatory nor even enforceable in a strictly legal sense, the comply-or-explain principle aims at establishing some kind of social enforcement mechanism, which works by reputation. The idea here is that companies which comply with the code enjoy a better reputation with investors and that this reputation will ultimately translate into higher stock market performance and into better economic success.[93]

In addition to this reputational mechanism, however, two different legal forms of enforcement have been established or are at least discussed. On

89 See also M. MOORE, Corporate Governance in the Shadow of the State (Oxford 2013), cf. reference in note 83 above.

90 On the varied regulation of these issues in Germany, cf. M. ROTH, Ehemalige Geschäftsleiter im Aufsichts- und Verwaltungsrat, Zeitschrift für das gesamte Handels- und Wirtschaftsrecht (ZHR) 1178 (2014) 638; S. AUGSBERG, Vom Kodex zur Kodifizierung – Anmerkungen zum Gesetz über die Offenlegung der Vorstandsvergütungen, Zeitschrift für Gesetzgebung 2005, 315; M.-PH. WELLER/N. BENZ, Frauenförderung als Leitungsaufgabe, Die Aktiengesellschaft (AG) 2015, 467, 469.

91 See M. LUTTER, Die Erklärung zum Corporate Governance Kodex gemäß § 161 AktG, Zeitschrift für das gesamte Handels- und Wirtschaftsrecht (ZHR) 166 (2002) 523, 525 et seq.; cf. M. SCHÜPPEN, To Comply or Not to Comply – That's the Question!, Zeitschrift für Wirtschaftsrecht (ZIP) 2002, 1269; and, more generally, P. LEYENS, Comply or Explain im Europäischen Privatrecht: Erfahrungen im Europäischen Gesellschaftsrecht und Entwicklungschancen des Regelungsansatzes, Zeitschrift für Europäisches Privatrecht (ZEuP) 2016, 388.

92 Cf. LUTTER, *supra* note 91, 530 et seq.

93 The effectiveness of this mechanism depends, however, on a broad range of circumstances; see, for instance, O. EHRHARD/E. NOWAK, Die Durchsetzung von Corpo-

the one hand, decisions by a general meeting which were based on incorrect declarations of conformity have been considered to be voidable by the German Federal Court of Justice.[94] Whether the management can be held liable for such inaccurate declarations is, on the other hand, a more hotly debated issue and has not yet been decided by the highest civil court.[95] In any event, both mechanisms are again forms of private, not public, enforcement. Incorrect declarations may also give rise to some criminal or administrative sanctions, but only under very specific circumstances.[96] In general, we can sum up by stating that the enforcement of the Corporate Governance Code is predominantly private, and even only partially of a legal nature. In this context of enforcement, the code is therefore closest to genuine self-regulation. If all three dimensions are taken together, however, the Corporate Governance Code cannot persuasively be qualified as genuine self-regulation, but it is at least a borderline case.

3. (Harmonized) Standards in European Law

In the third and final place, let us briefly turn to standards and analyze them from the perspective of European law. There are indeed innumerable examples of standards in many different fields, ranging from technical to profes-

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rate-Governance-Regeln, Die Aktiengesellschaft (AG) 2002, 336. On the interplay between rules and companies' reputation, see L. KLÖHN/K. SCHMOLKE, Unternehmensreputation (Corporate Reputation), Neue Zeitschrift für Gesellschaftsrecht (NZG) 2015, 689.

94 See, in particular, the Judgment of the Bundesgerichtshof of 21 September 2009, BGHZ 182, 272; for more details, see P. MÜLBERT/A. WILHELM, Grundfragen des deutschen Corporate Governance Kodex und der Entsprechenserklärung nach § 161 AktG, Zeitschrift für das gesamte Handels- und Wirtschaftsrecht (ZHR) 176 (2012) 286, 291 et seq.

95 Even though the court ascertained an infringement of the law, the question was expressively left open in the Judgment of the Bundesgerichtshof of 16 February 2009, BGHZ 180, 9, para. 19 ("ohne dass der Senat generell zu den Folgen eines Verstoßes gegen § 161 AktG Stellung nehmen müsste"); see also G. BACHMANN, Die Erklärung zur Unternehmensführung (Corporate Governance Statement), Zeitschrift für Wirtschaftsrecht (ZIP) 2010, 1517, 1526; *id.,* Der Deutsche Corporate Governance Kodex – Rechtswirkungen und Haftungsrisiken, Wertpapier-Mitteilungen 2002, 2137–2138 et seq.; MÜLBERT/WILHELM, *supra* note 94, 299 et seq. T. TRÖGER, Aktionärsklage bei nicht-publizierter Kodexabweichung, Zeitschrift für das gesamte Handels- und Wirtschaftsrecht (ZHR) 175 (2011) 746, 767 et seq.

96 For more details, see P. LEYENS/F. SCHMIDT, Corporate Governance durch Aktien-, Bankaufsichts- und Versicherungsaufsichtsrecht, Die Aktiengesellschaft (AG) 2013, 533; H.-C. KESSLER, Strafrechtliche Aspekte von Corporate Governance (Berlin 2012).

sional standards, for instance, for lawyers.[97] This "world of standards" is remarkably diverse, including from a regulatory perspective: There are all different sorts of standard setters, limited in substance to various degrees and by different modes of enforcement. [98] In this section, however, we will not focus on the elaboration and application of these standards themselves, but rather change the perspective in order to see how they are scrutinized. We will focus on their standard of review as prescribed by European law. This perspective will provide insights not only into how to draw the line between genuine self-regulation and self-regulation induced by the state, but, more significantly, on why it is important and indeed crucial to draw that line. In fact, recent jurisprudence of the European Court of Justice (ECJ) gives important guidance in this respect.

a) Associations of Undertakings vs. Mechanisms of Delegation

With respect to their procedural setting, these judgments concern self-regulation of two different sorts. On the one hand, they relate to standards of national professional bodies, either acting autonomously or with the approval of a national public authority, for example regulations by the bar on the exercise of the legal profession,[99] or compulsory tariffs for fees of bar members as approved by the national ministry of justice.[100] On the other hand, the ECJ deals with "harmonized" standards, and more precisely with standards that are again set by private bodies, but based on some kind of European mandate.[101]

In fact, this latter approach is very common under the so-called New Approach strategy, adopted back in 1985.[102] Under this strategy, private

97 For more details, see, for instance, B. VAN LEEUWEN, European Standardisation of Services and Its Impact on European Law (London 2017); H. SCHEPEL, The Constitution of Private Governance (Oxford/Portland 2005) 101 et seq.; see also P. DELIMATSIS, The Law, Economics and Politics of International Standardisation (Cambridge 2015).

98 For an extensive overview, see N. BRUNSSON/B. JACOBSON, A World of Standards (Oxford 2002); see also T. MÖLLERS, Geltung und Faktizität von Standards (Baden-Baden 2009).

99 ECJ case C-309/99 *Wouters,* ECR 2002, I-01577 (ECLI:EU:C:2002:98).

100 ECJ case C-35/99 *Arduino,* ECR 2002-I-01529 (ECLI:EU:C:2002:97).

101 ECJ case C-613/14 *James Elliott,* not yet published (ECLI:EU:C:2016:821); cf. ECJ case C-171/11 *Fra.Bo,* ECLI:EU:C:2012:453 (a case where the national legislature considered the products certified by the private body to be compliant with national law).

102 For more details, see, for instance, J. PELKMANS, The New Approach to Technical Harmonization and Standardization, Journal of Common Market Studies 25 (1987) 249; C. JOERGES, The New Approach to Technical Harmonization and the Interests of Consumers, in: Bieber et al. (eds.), 1992: One European Market? (Baden-Baden 1988) 157;

bodies termed European Standard Bodies exercise rule-making powers: On the basis of a mandate from the European Commission, they draw up and adopt harmonized technical standards, which set out guidelines on how to comply with key requirements laid down by European directives. The Commission subsequently publishes the reference to the respective harmonized standard in the Official Journal. As a consequence, this standard acquires a presumption of conformity, such that compliance with the standard triggers a presumption of compliance with the directive itself.[103]

b) Limitations in EU Primary Law: Fundamental Freedoms vs. Rules on Competition

In terms of substance, such standards, even if not harmonized, raise two questions about European law, namely, (1) whether the competition rules of the Treaty on the Functioning of the European Union apply or, alternatively (2) whether its rules on the fundamental freedoms apply. This set of questions is crucially relevant to our topic because the former set of rules is aimed at private actors, whereas the latter set of rules is aimed at Member States. As a consequence, these questions correspond to the dividing line between different forms of self-regulation, while the classification of the ECJ effectively responds to the distinction between genuine self-regulation and self-regulation induced by the state. For instance, rules of private professional bodies are scrutinized under competition rules, but only as long as their validity does not depend on the approval of a public body.[104] Conversely, fundamental freedoms apply to private standards, provided they are backed by the legislature, for instance, by references in EU directives.[105]

c) Enforcement and Uniform Interpretation

The recent *Elliott* judgment of the ECJ[106] raised a third question, which concerns the enforceability, or at least the application and interpretation, of

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K. SCHREIBER, The New Approach to Technical Harmonization and Standards, in: Hurwitz/Lequesne (eds.), The State of the European Community (Harlow 1991) 97.

103 Cf. SCHEPEL, *supra* note 97, 235.

104 For more details, see H. SCHWEITZER, Standardisierung als Mittel zur Förderung und Beschränkung des Handels und des Wettbewerbs, Europäische Zeitschrift für Wirtschaftsrecht (ZIP) 2012, 765; cf. H. LÖRCHER, Anwaltliches Berufsrecht und europäisches Wettbewerbsrecht, Neue Juristische Wochenschrift (NJW) 2002, 1092.

105 For more extensive information, see A. CRESPO VAN DE KOOJI, The Private Effect of the Free Movement of Goods, Legal Issues of Economic Integration 40 (2013) 363; cf. R. VAN GESTEL/H.-W. MICKLITZ, European Integration through Standardization, Common Market Law Review 50 (2013) 145.

106 *Supra* note 101.

private standards. The question was about whether such standards require uniform interpretation across Europe and whether the ECJ is competent under Article 267 of the Treaty on the Functioning of the European Union to decide on that interpretation. In turn, the answer depends on whether the standard qualifies as a provision of European law, and more precisely whether it ranks among acts "which, while indeed adopted by bodies which cannot be described as 'institutions, bodies, offices or agencies of the Union', are by their nature measures implementing or applying an act of EU law".[107] Again, the ECJ made clear that this may well be the case, even though the standard is private, but only if it is induced by a European institution: "While the development of such a harmonised standard is indeed entrusted to an organisation governed by private law, it is nevertheless a necessary implementation measure which is strictly governed by the essential requirements defined by that directive, initiated, managed and monitored by the Commission, and its legal effects are subject to prior publication by the Commission of its references in the 'C' series of the Official Journal of the European Union."[108] In other words, the ECJ precisely draws the line between genuine self-regulation and self-regulation induced by the state (i.e., the EU), while providing specific criteria that, with respect to procedure, substance and enforceability, come very close to the set that we have described and discussed throughout this paper.

IV. Conclusion

To conclude very briefly, this contribution has dealt with the difficulties of drawing the line between genuine self-regulation and self-regulation induced by the state. It has proposed a three-dimensional grid of criteria, referring to the procedure, the substance and the enforcement of self-regulation, and it has applied these criteria to standard terms, as well as to the German Corporate Governance Code. Whereas the former turns out to be genuine self-regulation under this grid, the latter proves to be more ambivalent in character. A brief look at the standards in European law has revealed the legal importance of drawing this line, which is crucial for both the application of competition rules or fundamental freedoms, and also for the uniform interpretation of its provisions by the ECJ.

107 ECJ case C-613/14 *James Elliott,* para. 34.

108 See again ECJ case C-613/14 *James Elliott,* para. 43.

Self-regulation Induced by the State in Japan

Souichirou Kozuka[*]

I. Introduction: the Varieties of State Engagement in Self-regulation
II. Self-regulation Foreseen by the State in a Statute
  1. Referral to Accounting Standards
  2. Self-commitment by Retailors of Financial Products
III. Self-regulation Endorsed by the State as Regards the Interpretation of a Statute
  1. The Determination of Gross Negligence in Allocating Risk Associated with the Use of Forged or Stolen Bank Cards
  2. The Exemption of Internet Providers from Liability
IV. Self-regulation Encouraged by the State to Complement Statutory Regulation
V. Self-regulation Coordinated by the State in the Absence of a Statutory Basis
  1. Voluntary Undertakings on Consumer-oriented Management
  2. Technical Standards for DVDs Recording Television Programmes
VI. Conclusions

I. Introduction: the Varieties of State Engagement in Self-regulation

This paper aims at giving an overview of what self-regulation induced by the state *(die staatlich gesteuerte Selbstregulierung)* looks like in Japan. It does not aspire to produce an exhaustive list of such self-regulation. Nor is it a theoretical analysis in the strict sense: it is more of a descriptive nature. Legal issues are noted where relevant, but in-depth analysis is left for further study. Given that the study of the self-regulation has only recently started to attract the attention of legal academics,[1] a cursory sketch of existing self-regulations may be useful as such.

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* Prof. Dr. Souichirou Kozuka, Professor of Law, Faculty of Law, Gakushūin University, Tōkyō.

1 P. Buck-Heeb/A. Dieckmann, Selbstregulierung im Privatrecht (Tübingen 2010) is a comprehensive study of self-regulation that is a standard reference work. The concepts of "genuine self-regulation" and "self-regulation induced by the state" derive from this book (at pp. 33–41). The author of this present paper once advanced an analytical framework in a paper titled "Soft Law, Private Authority and Social Norms: When and how the non-state law replaces the private law of the State?"

It is anticipated that self-regulation induced by the state is not uniform in all respects. First, there is of course variety in the subjects of regulation. It will be meaningful to identify those subject matters for which self-regulation induced by the state is commonly found and those for which such self-regulation is exceptional. Though, as mentioned, this paper does not exhaustively cover the subject-matters of self-regulation, the examination might still offer initial insight into this point.

Variety is also found with regards to how the state is engaged in self-regulation. As opposed to genuine self-regulation *(echte Selbstregulierung),* self-regulation induced by the state, by definition, assumes the engagement of the state. However, "engagement" is a broad concept that encompasses a large variety in extent and formality. At one extreme, the state foresees self-regulation with an explicit provision in a statute or a rule of another type. In this case, self-regulation is incorporated in the statutory framework.[2] As less formal engagement, the state endorses self-regulation that entails the interpretation or implementation of the relevant statutory provision. If such self-regulation has been envisaged already in the process of introducing the formal regulation, it forms part of the package aiming to achieve a compromise among the stakeholders. In still another case, the state encourages self-regulation alongside the statutory framework. The state's aim is to make use of self-regulation in serving a policy goal as a scheme complementary to the regulation through statutes. Finally, the state may coordinate self-regulation in the absence of, or instead of, statutory regulation. Depending on the subject, it may be found more convenient to achieve some public policy goals through self-regulation and not through statutory regulation. Or it is not the subject but the context of the regulation, regarding timing for instance, that calls for informal regulation through self-regulation.

Besides the varieties in the modality of the state's engagement, variety is also found in the state's motivation or intention in inducing self-regulation. In this respect, the relationship with the goal of statutory regulation becomes the issue, leaving us to ask whether the intention behind the self-regulation induced by the state is to achieve the same goal as that of the statute, to enhance the latter, or to introduce another policy goal.

The following sections are structured according to the variety of state-induced self-regulation in the second respect identified above, namely the manner of the state's engagement in self-regulation. An examination of the other two aspects, the subject of self-regulation and the motivation of the

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(mimeo) that was presented at the 25th World Congress of IVR, a work referring to the sociological theory of Talcott Parsons.

2 BUCK-HEEB/DIECKMANN, *supra* note 1, at p. 37, also distinguishes between self-regulation prescribed by statute and that without such statutory delegation.

state, is conducted simultaneously through the review of the various instances of self-regulation and will be summarised in the last chapter.

II. Self-regulation Foreseen by the State in a Statute

1. Referral to Accounting Standards

One of the best known statutory rules that foresees self-regulation is that on the principles of corporate accounting. Introduced in 1974 as Article 32 (2) of the then Commercial Code, the rule is now embodied in Articles 431 (for joint stock companies) and 614 (for other types of companies) of the Companies Act as well as in Article 19 (1) of the Commercial Code (for individual merchants). The legislation provides that accounting "should comply" *(shitagau mono to suru)* with accounting practices generally recognised as fair and adequate. Furthermore, an equivalent provision has existed for non-profit corporations since 2006.[3]

The original purpose of the provision back in 1974 was to reconcile the Commercial Code's regulations on corporate accounting with actual accounting practices. Until recently, the Commercial Code, pursuant to the German law tradition, included several provisions on the evaluation of assets in the section on corporate accounting. The Ministry of Justice, as the agency in charge of corporate law, took the view that these provisions were the sole legal rules governing corporate accounting and denied the relevance of accounting standards in any legal sense. Accounting standards, on the other hand, had served as reference point for audits by certified public accountants under the then Securities and Exchanges Act (now Financial Products and Exchanges Act) since 1949. The latter Act was modelled after the American regulation of the capital market and gave rise to the overlap of audit by statutory auditors and audit by public certified accountants for listed companies. In this sense, the issue was how to accommodate the Anglo-American system transplanted after the Second World War with the traditional civil law system.

Finding a solution for the conflict became urgent when the reform of the audit system was put on the legislative agenda.[4] Being faced by a series of window dressing scandals in the 1960s, it was proposed that audit by public certified accountants, which had been in practice for two decades under the Securities and Exchanges Act, be introduced into corporate law (codified in the Commercial Code at that time). In order for this proposal to be realised,

3 Art. 119, Act on General Incorporated Associations and General Incorporated Foundations (Law No. 48 of 2006).

4 For details on the corporate law reform of 1974, see M. D. H. Smith, The 1974 Revision of the Commercial Code and Related Legislation, Law in Japan 7 (1974) 113.

corporate law needed to accommodate accounting standards. However, accepting accounting standards as such was considered inappropriate as a legal rule because of the non-normative nature of accounting standards. As a result, the term of accounting "practices" was chosen instead of accounting "standards"; additionally, the term was qualified by the requirement that the practices be "generally accepted as fair and appropriate." With all these qualifications, the provision basically adopts a self-regulation of corporate accounting through application of industry accounting standards.

While the text of the provision has remained the same since then, a significant reform of the law on corporate accounting was made when the Companies Act was enacted in 2005. Since the early 2000s, the internationalisation of accounting had advanced and the International Accounting Standards Board (IASB) was formed. To be represented on the board, an expert must be nominated by a non-governmental standard-setting body. The Corporate Accounting Council of the Ministry of Finance, which had developed the Corporate Accounting Principles and other accounting standards in Japan, did not qualify under this requirement. In order to address this issue, in 2001 a non-profit body titled the Accounting Standards Board of Japan was established, which has since that time published accounting standards. In response to such a privatisation of the development of accounting standards, the Companies Act no longer includes specific regulations on corporate accounting. Demand for compliance with the "accounting practices generally accepted as fair and appropriate" has now become the sole provision regulating corporate accounting in the Companies Act. The move to self-regulation has thus become complete.

2. Self-commitment by Retailors of Financial Products

When the government incorporates self-regulation by means of a statute, it is not always delegating to private actors the self-regulatory creation of rules. Rather, sometimes a statute invites private parties to make a self-commitment.

Such a mechanism is found in the Act on Sales of Financial Products, enacted in 2000.[5] Inspired by developments in UK regulation that resulted in the Financial Services and Market Act of 2000, the Act aims to provide a comprehensive consumer protection framework for the trade of financial products. The Act on Sales of Financial Products provides for the general

5 Law No. 101 of 2000. See C. SCHULTE, Das Gesetz über den Verkauf von Finanzprodukten, ZJapanR/J.Japan.L. 19 (2005) 123. For the broader context of consumer law developments surrounding this law, see T. MATSUMOTO, Privatization of Consumer Law: Current Developments and Features of Consumer Law at the Turn of the Century, Hitotsubashi Journal of Law and Politics 30 (2002) 1.

duty of financial products retailors to ensure the adequacy of their manner of marketing financial products.[6] It requires each financial products retailor to promulgate its marketing policy and publish it (with some exceptions).[7] The marketing policy must include the policy on suitability for the customer as well as the policy on the manner and hours of marketing. The latter requirement implicitly demands the restraint of unsolicited marketing.[8] A failure to promulgate or publish the marketing policy is subject to administrative penalty (of 500.000 JPY or less). The marketing policy required under this Act may be seen as a manner of self-regulation (though not through an organisation but by individual retailors).

Importantly, the requirement of the marketing policy is not the only regulation under the Act on Sales of Financial Products, and it is not even the primary regulation. The operative provision of the Act imposes on retailors of financial products the duty to provide explanations on "important points" to the customer in advance of concluding sales. "Important points", defined in an elaborate manner, are basically any risks that could result in the customer incurring losses (i.e. obtain a return smaller than the invested amount) and factors that could cause a risk to materialise.[9] The retailor is also prohibited from offering an assertive judgment about what is in fact uncertain as well as from making a statement that erroneously leads the customer to be convinced of the certainty of something that is in fact uncertain.[10] A retailor in breach of these obligations is liable for compensation of the damages.[11]

Even in the absence of these rules on statutory tort, the courts have developed case law on the "duty to explain in advance of conclusion of a contract," which is a case law doctrine similar to, but not exactly the same as, *culpa in contrahendo*.[12] The doctrine awards damages as remedies to parties that are unduly exposed to transactional risks as a result of their not receiving sufficient information in advance.[13] According to the Supreme Court, it is a kind of tort liability.[14]

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6 Art. 7 of the Act on Sales of Financial Products.

7 Art. 8 of the Act on Sales of Financial Products.

8 N. OKADA / Y. TAKAHASHI, *Chikujō kaisetsu kin'yu shōhin hanbai-hō* [Commentary on Financial Instruments Sales Law], (Tōkyō 2001) 137.

9 Art. 3 of the Act on Sales of Financial Products.

10 Art. 4 of the Act on Sales of Financial Products.

11 Art. 5 of the Act on Sales of Financial Products.

12 K. YAMAMOTO, Vertragsrecht, in: Baum / Bälz (eds.), Handbuch Japanisches Handels- und Wirtschaftsrecht (Cologne 2011) 461, Rn. 32–53. Briefly in English, see M. C. CHINO et al, Contract and Tort, in: McAlinn (ed.), Japanese Business Law (Austin et al. 2007) 173, at 177–178; H. ODA, Japanese Law (3rd ed., Oxford 2009) 154.

13 See, for example, Supreme Court, 28 October 1996, Kin'yu Hōmu Jijō No. 1469, p. 49 (variable life insurance).

The case law and the statutory obligations under the Act on Sales of Financial Products provide customers with a minimum level of protection. Yet in view of its existence, the self-regulation flowing from the promulgation of a marketing policy constitutes an additional layer of protection for customers. The extent of that additional layer is left to each retailor: the mechanism of self-commitment anticipates that market discipline will operate effectively so as to favour those who commit to greater protection. The legislature may have considered that mandatory obligations imposed through statutory regulation tends to be less rigorous on account of lobbying by industry members. Consequently, the legislature may have believed that self-regulation would lead to better protection of customers in the long run.

III. Self-regulation Endorsed by the State as Regards the Interpretation of a Statute

1. The Determination of Gross Negligence in Allocating Risk Associated with the Use of Forged or Stolen Bank Cards

Some self-regulation lacks an explicit basis in a statute but was foreseen by the legislature when a related statute was enacted. The agreement among banks on the meaning of "gross negligence" under the Act on Forged and Stolen Bank Cards (hereinafter "Bank Cards Act")[15] is an example of that kind of self-regulation.

The Bank Cards Act was enacted in 2005 in the wake of public concern arising from many reports about stolen bank cards and stolen personal identification numbers (PINs). Before the Bank Cards Act, the Civil Code applied when a bank card was stolen or forged and the wrongdoer successfully withdrew cash from an automatic teller machine (ATMs). Art. 478 of the Civil Code releases the bank from the duty to repay the account holder if the bank was not negligent in disbursing money to an unauthorised holder of the stolen card.[16] Needless to say, the release of the bank meant that the risk of such a criminal incident was placed on the cardholder whose deposits had been withdrawn from the bank. The Supreme Court held that negligence is established in the case of a withdrawal from an ATM when the

14 Supreme Court 22 April 2011, Minshū 65, No. 3, p. 1405.

15 Law No. 94 of 2005.

16 Art. 478 of the Civil Code: "Any performance made vis-a-vis a holder of quasi-possession of the claim shall remain effective to the extent the person who performed such obligation acted without knowledge, and was free from any negligence." For the meaning of this article, see Oda, *supra* note 12, 148–149; Yamamoto, *supra* note 12, marg. no. 161.

system lacks a sufficient level of security.[17] While this case law warns the banks to employ a sufficient level of security for an automated system, consumers were frustrated by the fact that the risk from a criminal act could fall upon them even if they were in no way at fault.

The Bank Cards Act has modified the rules in the Civil Code and has shifted part of the risk to banks. To be more precise, the Act distinguishes a case where a forged card is used at an ATM from a case where the bank card is stolen and used at an ATM. In the case of a forged card, the Bank Cards Act excludes application of the Civil Code.[18] Instead, it provides that the bank is released from the duty to repay the account holder only if the bank is not negligent *and* the account holder is not grossly negligent or if the forged card is used intentionally with the consent of the account holder.[19] In the case of a stolen card, the Civil Code still applies, but the Bank Cards Act provides that a victimised account holder is entitled to have wrongly withdrawn bank deposits refunded under certain conditions (i.e. procedural requirements such as advising the bank of the theft in a timely manner). Refund is made in full when the account holder has acted without negligence and at three quarters of the lost amount when the account holder has been negligent, but not grossly negligent.

It is obvious that, in both cases, the outcome depends on whether there is a finding that the account holder acted with gross negligence. The Bank Cards Act itself does not provide any guidance on this issue. However, in October 2005, two months after the enactment of the Act and four months in advance of its entry into force, the Japan Bankers' Association published an agreement as to when a account holder has acted negligently and when he or she has acted in a grossly negligent manner.[20] According to the agreement, the account holder is found to be grossly negligent in the following cases:

– when the account holder discloses his or her PIN to another person;
– when the account holder writes down his or her PIN on the bank card;
– when the account holder hands his or her bank card to another person; or
– in a situation equivalent to any of these.

The agreement further provides that the account holder is found to be negligent (but not grossly negligent) in the following cases:

17 Supreme Court 8 Apr. 2003, Minshū Vol. 57, No. 4, p. 337.
18 Art. 3 of the Bank Cards Act.
19 Art. 4 of the Bank Cards Act.
20 The Japan Bankers' Association, *Gizō, tōnan cash card ni kansuru yokin-sha hogo no mōshiawase* [Agreement on the Protection of Account holders with regards to Forged and Stolen Bank Cards], dated 6 October 2005, *https://www.zenginkyo.or.jp/fileadmin/res/news/news171006_2.pdf* (in Japanese).

– when the account holder, despite repeated suggestions by the bank, fails to change a PIN that can easily be guessed (such as one comprising his or her birthday) and carries together with the bank card a document from which the PIN can be guessed (such as a driver's license);
– when the account holder puts down his or her PIN on a note and carries it together with the bank card;
– when the account holder, despite repeated suggestions by the bank, fails to change a PIN that can easily be guessed (such as his or her birthday) or when the account holder uses the same PIN for another purpose (such as for a facility locker) and creates a situation under which the bank card can easily be stolen (such as displaying it in a conspicuous manner); or
– in a situation equivalent to any of these.

It might appear that the banks spontaneously discussed how the new Bank Cards Act will be applied to individual cases and that the government had no role to play in the production of this agreement. In fact, however, the legislative history shows that the agreement had from the beginning been incorporated in the package responding to the call for new legislation. Although the Bank Cards Act was drafted as a Diet member's Bill on the political initiative of the Liberal Democratic Party, the Financial Services Agency, which is in charge of supervising banks, coordinated a council-like Study Group to consider legislative options. The Interim Report of the Study Group published in March 2005 suggests that risks from the unauthorised use of a bank card should be borne by the bank, except when the account holder is grossly negligent.[21] The same Report mentions that if such a solution is enacted into law, the finding of (gross) negligence would be based on the facts of individual case, which could result in a divergence of outcomes depending on how accommodating the relevant bank might be. The Report further suggests that some "guidelines" be required to prevent such divergence from taking place. The agreement on negligence and gross negligence by the Japan Bankers' Association is apparently a response to this suggestion in the Study Group's Interim Report. It is, in this sense, self-regulation endorsed by the state.

Functionally, the agreement works as a self-commitment by the banks not to raise the negligence or gross negligence of the account holder as a defence in a dispute unless one of the listed situations is found to exist. The agreement is not, of course, binding on the court, but the court has no chance to find the account holder (grossly) negligent if the bank does not

21 The Interim Report of the Study Group on the Forged Bank Card Problem, dated 31 March 2005, *http://www.fsa.go.jp/news/newsj/16/ginkou/f-20050331-3.pdf* (in Japanese).

raise the issue in the first place. Furthermore, the court may find the agreement to be self-regulation binding on the banks and give it a normative effect. One court in fact did so and referred to the agreement in holding that a account holder who had continued to use her birthday as her PIN was not grossly negligent if the bank merely distributed flyers advising customers (account holders) not to use their birthday as a PIN but did not directly advise the account holder to change her PIN; the court found the actions taken by the bank to be insufficient to establish "(repeated) suggestions by the bank" under the agreement.[22]

2. The Exemption of Internet Providers from Liability

The self-regulatory power to interpret statutes sometimes involves an institutional mechanism and not a simple agreement among industry members. An example is found with regard to the liability of internet providers.

As is well known, internet providers can face conflicting demands and run the risk of being sued for uploaded contents regardless of the action they take. On the one hand, someone whose rights have allegedly been infringed may claim that the internet provider must remove (or restrict access to) the infringing content and should be liable for damages if it fails to do so. However, once the internet provider does remove the claimed content, the individual that uploaded it may complain and seek to hold the provider liable for unduly removing the content. Such a difficulty often arises with regards to allegations of copyright and trademark infringement as well as to claims of defamation.

Against this background, the United States amended the Copyright Act so as to introduce the system of "notice and takedown" for alleged copyright infringement cases. Under the relevant provisions of the Digital Millennium Copyright Act (DMCA), the provider is, on the one hand, not liable if it removes or restricts access to content upon notice of a claim by the owner of the copyright under certain conditions.[23] On the other hand, the provider owes no liability for removing content for which infringement is claimed if it (i) promptly notifies the uploader of the content (the "subscriber" to the provider's service), (ii) promptly notifies the copyright holder in the event the subscriber submits a counter notification objecting to the removal of the content, and (iii) replaces the removed content unless the owner of the copyright raises suit against the uploader.[24] The Japanese providers lobbied for a

22 Ōsaka District Court, 17 April 2008, Hanrei Jihō 2006 (2008) 87.
23 17 USC § 512 (c).
24 17 USC § 512 (g).

similar system be introduced in Japan, and the government responded by enacting the Act to Limit Liability of Internet Providers in 2001.[25]

However, the Japanese Act was not exactly the same as the DMCA in the US. Unlike the DMCA, the Act to Limit Liability of Internet Providers failed to provide a "safe harbour" for internet providers. As regards liability for failing to remove content, it provides that an internet provider will not be liable to a person whose rights were allegedly infringed unless it knew or had good reason to become aware that the content infringed that person's right.[26] Thus, the application (or, more precisely, non-application) of the exemption depends on the ascertainment of a "good reason," a determination which will likely depend on the facts of each individual case. Similarly, as regards liability for deleting content, the Act provides that an internet provider will not be liable if it had a good reason to believe that the content infringed another person's rights or if the person who uploaded the content does not object within seven days of the notice of request to remove the content.[27] Despite the apparent similarity to the "notice and take down" system, this provision is silent about what the outcome shall be if the uploader of the content *does* object within seven days. As a result, the exemption is similarly dependent on the finding of a "good reason." Unsurprisingly, internet providers were not entirely satisfied with the Act.

Accordingly, the Ministry of Internal Affairs and Communications (MIC) commenced the second round of consultations to promulgate Guidelines for the Act's implementation. The Guidelines adopted as a result provide for procedures by which a party suffering an alleged infringement can request the internet provider to remove the infringing content. There are three Guidelines, namely those on Defamation and Privacy, on Copyright Infringement and on Trademark Infringement.[28] The procedures under the latter two provide that the Reliability Certification Entity (REC) is to examine the request and certify the infringement if the alleged copyright or trademark is confirmed. As of 2017, there are twelve RECs for copyright and one REC for trademark. There is no equivalent mechanism under the Guidelines on Defamation.

Certification by the REC releases the internet provider from the risk of erroneously judging the disputed right. As long as the internet provider

25 Law No. 137 of 2001. See S. KOZUKA, The Role of Japan in World-Wide Copyright Protection, in: Gotzen (ed.), The Future of Intellectual Property in the Global Market of the Information Society (Brussels 2003) 23, at 32.

26 Art. 3 (1) of the Act to Limit the Liability of Internet Providers.

27 Art. 3 (2) of the Act to Limit the Liability of Internet Providers.

28 The Guidelines are available on the website of the Telecom Services Association. The Japanese versions are at *http://www.telesa.or.jp/consortium/provider* and the English versions are at *http://www.telesa.or.jp/consortium/provider/pconsortiumproviderindex_e-html.*

relies on the certification by the REC and removes the content, it can expect that the court, in the event the uploader of the removed content brings suit, will find a "good reason" to believe that the removed content infringes the copyright or trademark. Alternatively, if the REC declines to certify an infringement and the internet provider relies on this finding, the latter may expect that the court will find the absence of any "good reason" to become aware of the infringement. Furthermore, if in an individual case the court finds the opposite, the internet provider may still seek recourse from the REC for causing it to take an erroneous action, suing the latter as a result.

Where the statute includes a general clause such as "good reason", its interpretation is left to the court, which means that the relevant party (in this case the internet provider) incurs the risk of unpredictability. Still, the certification procedure under the Guidelines serves as a form of self-regulation which is agreed upon by internet providers and holders of copyright and trademark and which shifts potential liability to the latter. In this manner, internet providers in Japan have achieved the (functional) equivalent of what their counterparts in the US enjoy per statutory exemption under the "notice and take down" procedure of the Copyrights Act.

IV. Self-regulation Encouraged by the State to Complement Statutory Regulation

When the statutory regulation is framed only by a general term, the self-regulation can go beyond a simple interpretation of the statute and constitute an elaborated regulation on the basis of the statutory framework. The government may benefit from such self-regulation if it has a reason to avoid elaborating the statute itself. This is state-induced self-regulation to complement statutory regulation.

This type of self-regulation has developed significantly subsequent to smartphones having rapidly become popular among the public. When people are happy with smartphones, it is usually the apps that they find useful. Most of these apps collect and utilise personal information while providing services. In some cases, an independent module for this purpose is incorporated in the app and makes use of the collected information in a manner never imagined by the user of the app. These facts raise concerns among users about their privacy.

Under Japanese law, the right to privacy is a fundamental human right protected by the Constitution. Although there is no explicit reference, it is considered as part of the right to pursue personal happiness in Art. 13 of the Constitution. When one raises a privacy claim against another person, rather than against the state, the Constitution does not apply directly, and tort law liability under the Civil Code comes into play. It is established case law

that infringing someone's privacy wrongfully gives rise to tort liability, and the victim is entitled to damages.[29]

The protection of personal data ("data protection" in the European sense) is provided in the Act on Personal Data Protection.[30] The "personal data" protected by the Act is the data that identifies an individual (or enables identification by an easy matching with another set of data) and data including personal identifiers.[31] The information collected through the use of a smartphone may or may not be the personal data thus defined. While, for example, the device's ID is probably personal data (because it is easy to match with the holder's name, address etc.), the browsing history of websites is usually not personal data in itself. The Act on Personal Data Protection is enforced by the Personal Information Protection Commission, which publishes Guidelines for this purpose. However, given the special nature of the telecommunications service, the MIC has published Guidelines on Personal Data Protection in the Sector of Telecommunications Services. These Guidelines are implementation Guidelines and not self-regulation.

Furthermore, the telecommunications service involves the secrecy of communications, which is another fundamental human right protected by the Constitution. It is explicitly mentioned in Art. 21 (2) of the Constitution, together with the prohibition of censorship, and is provided in the Law on Telecommunications Business as one of its basic rules.[32] Some of the services offered by smartphones are telecommunications services (such as conversation over the telephone or e-mail texts) but others are not (such as positioning on the map app). A user usually subscribes to a service of the telecommunications service provider to start using a smartphone, but many of the apps are offered by companies that are not telecommunications service providers and that are not directly regulated by the MIC.

Given the general nature of the law on privacy (Constitution and general tort law) and the fragmentary regulations on personal data protection and

29 See generally, D. ROSEN, Private Lives and Public Eyes: Privacy in the United States and Japan, Florida Journal of International Law 6 (1990) 141; M. WEST, Secrets, Sex, and Spectacle (Chicago 2006) 63–68; M. HORIBE, Privacy Culture and Data Protection Laws in Japan, presentation at the 39th International Conference of Data Protection and Privacy Commissioners (Hong Kong 28 September 2017), available at *https://www.privacyconference2017.org/eng/files/ppt/masao_horibe.pdf*.

30 Law No. 57 of 2003. On the enactment of its original version, see C. LAWSON, Japan's New Privacy Act in Context, UNSW Law Journal 29 (2) (2006) 88. On the most recent amendments to it, see U. KIRCHHOFF/T. SCHIEBE, The Reform of the Japanese Act on Protection of Personal Information. From the Practitioner's Perspective, ZJapanR/J.Japan.L. 44 (2017) 199.

31 Art. 2 (1) of the Act on Personal Data Protection.

32 Art. 4 of the Law on Telecommunications Business (Law No. 86 of 1984).

telecommunications services, it is not easy to introduce formal rules to address the concerns of smartphone users about the collection and use of personal information. Therefore, the MIC has chosen to develop self-regulation to elaborate on and complement the statutory framework. Following the tradition of using a Council *(shingikai)* before introducing a regulation, the "Study Group on ICT Services in view of users' perspectives" was formed and published its first Report in 2012. The Report was titled "Smartphone Privacy Initiatives" and introduced the "Guidelines for handling smartphone users' information."[33] As basic principles, the Guidelines demand that the following six requirements be complied with when personal information of smartphone users is collected and utilised:

1. Ensuring transparency (i.e. notice to the user about the collection and use);
2. Offering an opportunity for the user's involvement in the process (i.e. notice, consent and/or opt-out);
3. Making sure that the collection method is proper;
4. Taking appropriate security measures;
5. Providing a contact point for complaints and inquiries; and
6. Adopting "privacy by design".

The Guidelines then request providers of apps, personal information collecting modules and smartphone advertisements to promulgate and publish a privacy policy reflecting the six basic principles. The privacy policy is to include (1) the name of the entity collecting personal information, (2) the information to be collected, (3) the method of collection (automatic or through the user's action), (4) the purpose of collecting the personal information, (5) the manner of giving notice, acquiring consent and having the user involved in the process, (6) whether or not the collected information is offered to a third party, as well as whether or not the personal information collecting module is incorporated, (7) the contact point, and (8) the procedure for amending the privacy policy. In the absence of a statutory basis to regulate app providers, the Guidelines have adopted self-commitment through publication of the privacy policy.

In order to enforce the self-regulation, the MIC further coordinated follow-up meetings, which concluded by publishing the "Smartphone Privacy Initiatives II" in 2013.[34] This Report elaborated on the idea already sug-

33 "The Smartphone Privacy Initiatives", dated August 2012, available at *http://www.soumu.go.jp/main_content/000171225.pdf* (in Japanese). The summary in English is available at *http://www.soumu.go.jp/main_content/000371721.pdf.*

34 "Smartphone Privacy Initiatives II", dated September 2013, available at *http://www.soumu.go.jp/main_content/000236366.pdf* (in Japanese). The summary in English is available at *http://www.soumu.go.jp/main_content/000371722.pdf.*

gested in the first Report that a third party verify whether, and to what extent, the app providers have promulgated and implemented the required privacy policy. The Report does not endorse the idea of nominating a single entity to exclusively carry out verification. Rather, verification may be carried out by various entities competitively as long as the common criteria for verification is developed and shared. Based on this report, the MIC has since 2014 published the outcomes of verification in the annual "Smartphone Privacy Outlook".[35] The findings were then reflected in the 2017 revision of the Guidelines, the "Smartphone Privacy Initiatives III".[36]

V. Self-regulation Coordinated by the State in the Absence of a Statutory Basis

1. Voluntary Undertakings on Consumer-oriented Management

Though it might sound oxymoronic, the state may coordinate self-regulation even where there is no statutory basis. A recent example of this kind of state-induced self-regulation in Japan is the facilitation of consumer-oriented management.

The concept of "consumer-oriented management" appeared in the Basic Consumer Plan adopted by the Cabinet in March 2015.[37] The Basic Consumer Plan vaguely refers to it as "business activities emphasising the consumers' interests", and the Plan expects the government to facilitate such consumer-oriented management.

In order to discuss how to implement this policy, the Consumer Affairs Agency called for a study group on the facilitation of consumer-oriented management, which in turn published a Report in April 2016.[38] The Report describes the concept as meaning that:

– The business entity puts itself in the shoes of consumers in general (as opposed to those of the actual customer) and accepts the protection of con-

35 "Smartphone Privacy Outlook" (2014) at h*ttp://www.soumu.go.jp/main_content/000371719.pdf;* "Smartphone Privacy Outlook II" (2015) at *www.soumu.go.jp/main_content/000371720.pdf;* "Smartphone Privacy Outlook III" (2016) at *http://www.soumu.go.jp/main_content/000416561.pdf;* "Smartphone Privacy Outlook IV" (2017) at *http://www.soumu.go.jp/main_content/000496537.pdf* (all in Japanese).

36 "Smartphone Privacy Initiatives III", dated July 2017, available at *http://www.soumu.go.jp/main_content/000495608.pdf* (in Japanese). The summary in English is available at *http://www.soumu.go.jp/main_content/000371722.pdf.*

37 "The Basic Consumer Plan", dated 24 March 2015, available at *http://www.caa.go.jp/adjustments/pdf/150324adjustments_1.pdf.*

38 The Report of the Study Group on Consumer-Oriented Management, *http://www.caa.go.jp/information/pdf/160406_houkokusho.pdf.*

sumers' rights and the enhancement of consumers' interests as central to their management;
– The business entity, further, carries responsibility for creating a sound market and gains trust from consumers by promoting consumer safety and fairness of transactions, by providing necessary information to consumers, by paying due consideration to the knowledge and experience of the consumer, and by establishing an internal system to respond to complaints; and
– The business entity, in the middle to long term, operates its business with its social responsibility in mind, aiming to build a sustainable and preferable society.

The concept apparently has connotations for corporate governance, as it refers to how business entities are managed. The Report requires that (1) the top management commit to consumer-oriented management, (2) corporate governance be established for this purpose, (3) each employee take consumer interests seriously and (4) the section on operations and the sections on quality, consumers and compliance liaise with each other.

These requirements are rather surprising given that the recent corporate governance debate in Japan has centred on how to make management take shareholder interests seriously.[39] The emphasis on consumer interests as "central to the management" might seem to be a reversion to the traditional stakeholder-interests model. However, reviewed more carefully, perhaps these requirements have been raised because of such recent developments in corporate governance. It is exactly because the statutory framework of corporate law now focuses on shareholder interests and the demands of the capital market that the interests of the consumer – who is also an important stakeholder – need to be explicitly addressed. In this sense, this self-regulation operates in the absence of a statutory basis.

As a concrete policy measure, the government collaborates with industry organisations and consumer groups to establish a "platform" for consumer-oriented management. The platform will encourage each business entity to make "voluntary declarations on consumer orientation" (whose template is appended to the Report of the Study Group). The voluntary declarations, together with specific undertakings made by each company pursuant to the declarations, are to be published on the website of the platform. It has also been suggested that companies which have made an outstanding effort be commended on the platform.

39 See G. GOTO/M. MATSUNAKA/S. KOZUKA, Japan's Gradual Reception of Independent Directors, in: Puchniak/Baum/Nottage (eds.), Independent Directors in Asia (Cambridge 2017) 135.

2. Technical Standards for DVDs Recording Television Programmes

Technical standards are usually genuine self-regulation which involve no inducement by the state. Still, in some cases the technical standard affects a party's legal rights, in which case the state has a reason to step in. Recording devices have repeatedly given rise to this problem, as their use is closely related to copyright issues.[40]

Under current digital technology, the reproduction of copyrighted content is controlled by codes known as the digital rights management (DRM) system. In Japan, the technical standards for DRM in the telecommunications and broadcasting sectors are adopted by the standard-setting organisation for these sectors, titled the Association of Radio Industries and Businesses (ARIB). The members of ARIB include manufacturers, telecom service companies and broadcasting entities.

In 2004, digitalised satellite broadcast introduced the DRM system known as "copy once." The user could record a television programme on his or her personal recording device (hard disk of a DVD recorder) but could not produce a copy from the recorded data. If the user copied the data to another recording device (a DVD disk), the original copy (the data recorded on the hard disk) disappeared. The system was based on the technical standards adopted by ARIB for digitalised satellite broadcasting, and its aim was to protect copyrighted content included in the satellite television programme. Consumers, however, often complained that the "copy once" standard was inconvenient.

In fact, it was not only a matter of inconvenience but a matter of legal rights. The Copyright Act provides that reproduction for personal use is not prevented by copyright.[41] When technologies such as photocopying machines and cassette tape recorders developed and enabled general consumers to make a private copy of copyrighted works, the Copyright Act introduced the levy system inspired by the German copyright law. The type of machines subject to levies is designated by the Cabinet Order.[42] The "copy once" standard prevented consumers from making copies of satellite television programmes even for the personal use, which however is legally authorised under the Copyright Act. The fact that DVD recording machines

40 This issue is discussed in greater details in S. KOZUKA, Copyright law as a new industrial policy?, in: Otmazgin/Ben-Ari (eds.), Popular Culture and the State in East and Southeast Asia (London 2012) 106.

41 Art. 30 (1) of the Copyright Act. On this issue, see P. GANEA/C. HEATH, Economic Rights and Limitations, in: Ganea/Heath/Saito (eds.), Japanese Copyright Law (The Hague 2005) 58–60.

42 Art. 30 (2) of the Copyright Act.

and disks were subject to levies under the Cabinet Order was perceived as "adding insult to injury" or "imposing duplicate burdens on the consumer."

Subsequently it was decided that terrestrial broadcasting switch from an analog to a digital system by 2011. This meant that terrestrial broadcasting could also be subject to the DRM system. Given that the great majority of the public in Japan enjoy television programmes on terrestrial broadcasting, any inconvenience due to the technical standard was considered a matter not to be neglected. The MIC, through a series of Council meetings as always, coordinated a consensus among broadcasting entities, manufacturers, copyright holders and consumers on the new DRM system, named "Dubbing 10." The new system allows ten copies of the same data, but still restricting the second generation of a copy (copy from a copy). The consumer can now record a television programme on the hard disk of a DVD recorder and produce nine copies on DVD disks. If the consumer makes a tenth copy on a disk, the original data on the hard disk will disappear. A person who receives a DVD disk with copied data on it cannot copy that data to another disk.

Copyright holders (including performers who hold neighbouring rights) accepted this as a compromise but expected that they would be rewarded by the expansion of compensation through levies. However, this was opposed severely by manufacturers, who have the task of collecting levies from the consumers,[43] as well as by consumers to a lesser extent. Because the issue involved the copyright law regime, the Cultural Affairs Agency attempted to coordinate the matter through the Copyright Subdivision of the Council for Cultural Affairs, but only in vain.

Theoretically, the issue lay in the conflict of views about how to protect copyright in the face of vast developments in digital technology. The levy system assumes that private copying cannot be captured and compensates the copyright holder through a lump-sum payment from consumers, while the DRM system is based on the premise that each and every instance of private copying can be captured and controlled by current technology. Unless this issue is addressed, any coordination on the copyright law side is destined to fail. But the debate on this issue is so fundamental that there is no prospect of reaching a quick consensus. In the meantime, slight improvements in technical standards are serving as a substitute for a fundamental reform of copyright law.

Because the technical standards for the DRM system affect parties' rights under the copyright law, and because their adoption is a substitute for

43 According to the Copyright Act, the duty to pay the levy is on the purchaser of the designated recording machine (Art. 30 (2)), but the manufacturer is to cooperate by collecting the due amount from the purchaser and delivering the collected amount to the collecting organisations (Art. 104-5).

copyright law reform, the involvement of copyright holders and consumers in the process was required. However, ARIB, as the standard setting organisation, does not represent these stakeholders. For this reason, the government stepped in to coordinate the matter, which changed the nature of the technical standards from genuine to state-induced self-regulation.

VI. CONCLUSIONS

Though not at all exhaustive, the overview in this paper has shown that state-induced self-regulation abounds in Japan. There is probably more state-induced self-regulation than true self-regulation. This is not surprising, as the concept of "state-induced" covers a large variety of engagement by the state whereas "true" self-regulation, by definition, refers only to cases where there is no involvement of the state at all.

In terms of the subject-matter, state-induced self-regulation is, among other areas, resorted to in the fields of technology-related law (internet provider's liability, smartphone privacy, technical standards for DVDs) and consumer law (sales of financial products, consumer-oriented management). These spheres of economic activity experience rapid changes in the prevailing factual setting, the result being an underlying context which statutory regulation alone can hardly keep pace with. Thus it may be useful to rely on the expertise – and collaboration – of the relevant industry actors. On the other hand, more traditional areas, such as (general) contract law or real property law, seem to rely less on self-regulation induced by the state.

Finally, there is also variety in the state's motivation for inducing self-regulation. In some cases, as in the law of corporate accounting, the motivation is to defer to the expertise that the private sector possesses. In others, the state appears to find "co-regulation" to be the most effective; here the typical example stands as smartphone privacy initiatives. Still another type of motivation is that the state expects the industry to engage in a "race to the top" by voluntarily undertaking a heavier burden than is mandatory under the statute. Self-commitment is a good measure to make such competition take place, this being intended, for example, under the Act on the Sales of Financial Products and with the platform for consumer-oriented management.

All these varieties deserve further and more analytical examination. It is, however, beyond the scope of this paper, not least because such an analysis requires more examples.

Self-Regulation Induced by the State in Germany

Jens-Hinrich Binder[*]

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I. Introduction

"Self-regulation induced by the state", the topic allocated to this contribution within the overall concept of the symposium, clearly represents a somewhat puzzling blend of two concepts that, at first sight, seem to be hardly reconcilable. To be sure, the term "regulation", as such, comes with a wide variety of meanings in both German[1] and Anglo-American[2] academic terminology, but

* Prof. Dr. Jens-Hinrich Binder, LL.M. (London), Professor of Private Law, Commercial, Company and Securities Law, Eberhard-Karls-University, Tübingen.

1 See, for a survey of the uses of the term in the areas of administrative, private and economic law, e.g., J.-H. Binder, Regulierungsinstrumente und Regulierungsstrategien im Kapitalgesellschaftsrecht (Tübingen 2012) 36–39. See also, surveying a narrower range of sources, P. Buck-Heeb/A. Dieckmann, Selbstregulierung im Privatrecht (Tübingen 2010) 17–19.

2 E.g., B. M. Mitnick, The Political Economy of Regulation (New York 1980) 6 ("Regulation is the policing according to a rule, of a subject's choice of activity, by an entity not directly party to or involved in that activity"); R. Baldwin/M. Cave, Understanding Regulation (Oxford 1999) 2 ("a specific set of commands […] to be applied by a body devoted to this purpose", "deliberate state influence", and "all forms of social control or influence" as alternative meanings); R. A. Posner, Theo-

the state (legislators or administrative agencies) interfering in private activities in order to accomplish a specific objective or set of objectives is a key characteristic recognised by them all. "Self-regulation", then, refers to the ordering of certain relationships and/or interests of private actors by rules and principles – and, possibly, also enforcement mechanisms – agreed upon by these actors themselves.[3] Against this backdrop, the concept of "self-regulation induced by the state" (or, to use a more established terminology, "enforced self-regulation"[4] or, with a slightly different meaning, "co-regulation"[5]) seems to be squaring the circle: Genuine self-regulation, driven exclusively by the regulatees' own desire to establish and submit to a certain order, can and not infrequently will occur where the state either willingly or accidentally refrains from taking legislative or administrative steps to impose and enforce such an order, and where it is in the regulatees' best interest to step in. In cases of self-regulation induced by the state, by contrast, the state itself actually *does* regulate – but it chooses to do so under self-imposed restraints: Not just by deliberately leaving part of the regulatory task to the regulatees, but also, perhaps even more importantly, by making arrangements to ensure that the regulatees actually do engage in self-regulatory activities in the first place. In other words: The state, in the case of state-induced self-regulation, delegates control over the substantive design of regulation, but it retains the initiative to regulate and, to a varying degree, also the control over fundamental policy decisions that inform and govern the substantive design.[6]

In this light, state-induced self-regulation bears some functional similarities with the concept of delegated legislation exercised by administrative bodies within a framework defined by statutory law. As will be explored in more detail below, both concepts share at least some common motives: In a

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ries of Economic Regulation, Bell Journal of Economics and Management Science 5 (1974) 355 ("pattern of government intervention in the market").

3 See, surveying the German literature, e.g., A.C. THOMA, Regulierte Selbstregulierung im Ordnungsverwaltungsrecht (Berlin 2008) 32–34; from a private law perspective, see BUCK-HEEB/DIECKMANN, *supra* note 1, 13–17; and see also, using a different terminology, BINDER, *supra* note 1, 252–261. For a representative view in the English academic literature, see, e.g., BALDWIN/CAVE, *supra* note 2, 39–41, 63–65, 125–126, for a definition, see *ibid.,* 125: "Self-regulation can be seen as taking place when a group of firms or individuals exerts control over its own membership and their behaviour."

4 BALDWIN/CAVE, *supra* note 2, 39–41 and 133–136; I. AYRES/J. BRAITHWAITE, Responsive Regulation (Oxford 1992) 101–132.

5 Cf. AYRES/BRAITHWAITE, *supra* note 4, 101: "Coregulation, *as distinct from* enforced self-regulation, is usually taken to mean industry-association self-regulation with some oversight and/or ratification by government" (emphasis added).

6 See, e.g., BALDWIN/CAVE, *supra* note 2, 39–41 and 133–136; AYRES/BRAITHWAITE, *supra* note 4, 101–132.

way, the use of both state-induced self-regulation and delegated legislation reflects, explicitly or implicitly, the insight that direct regulation by the state may be deemed insufficient in view of either (a) a lack of understanding of the real-world relationships and activities to be regulated on the part of the relevant legislative body, or (b) the inability of a formal legislative process to keep up with a rapidly changing social, technical or economic environment, or (c) the inability to attain a satisfactory level of compliance with legislative requirements, or, (d) the desire to reduce the costs of public regulation and enforcement, or finally, (e) all four aspects simultaneously or in varying combinations. State-induced self-regulation, as discussed in the previous chapter, thus seeks to activate not just the regulatees' expertise but also their self-interest in order to generate solutions that are not just mutually beneficial but also more advanced in technical terms than direct regulation by the state could ever hope to be. In particular, state-induced regulation may help to overcome the fundamental problem of timely access to accurate information on the relevant real-world phenomena, which is the precondition for effective regulation.[7] At the same time, it seeks to avoid or at least minimise negative externalities – which might otherwise arise precisely because the regulatees can be expected to maximise their own welfare in the regulatory process – by defining a more or less specific framework of policy objectives and restrictions for the design features.

As a result, state-induced self-regulation is bound to lack a number of the perceived advantages of genuine self-regulation: First, state-induced self-regulation is *not,* or not primarily, triggered by the genuine desire of private actors to establish, and submit to, an order that reflects their own interests and policy choices. Secondly, it is *not* free to define its scope of application. Thirdly, and perhaps more importantly, it is *not* free in the policy choices that dictate both the procedural framework for decision-making and technical solutions adopted. Almost by definition, state-induced self-regulation thus lacks some of the key ingredients that foster the legitimacy of genuine self-regulation from the regulatees' perspective. This is by no means trivial, as it is generally agreed that it is the legitimacy of genuine self-regulation that leads to the rather high level of acceptance usually identified as one of the clear functional advantages in comparison to direct state regulation.[8]

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7 See generally, e.g., AYRES/BRAITHWAITE, *supra* note 4, 110–116; BALDWIN/CAVE, *supra* note 2, 40–41, 134; see also BINDER, *supra* note 1, 274–277; A. OGUS, Regulation: Legal Form and Economic Theory (Portland 2004), 107; THOMA, *supra* note 3, 66–69; cf. also, discussing the advantages of self-regulation generally, BUCK-HEEB/DIECKMANN, *supra* note 1, 220–228.

8 BINDER, *supra* note 1, 276; on high levels of acceptance as a perceived advantage of self-regulation generally, see BUCK-HEEB/DIECKMANN, *supra* note 1, 223.

Against this backdrop, this paper seeks to explore the relevance of the concept of "state-induced self-regulation" in German private law, which, it should be noted from the start, can hardly be underestimated. In many fields, the relevance of state-induced self-regulation far exceeds the relevance of what has been referred to as "genuine" self-regulation, discussed in other contributions to the symposium. In order to prepare the ground, it will be appropriate, in section II below, to sketch a more specific map of the use of state-induced self-regulation in German law – or at least present an inevitably superficial and subjective selection of phenomena that may or may not prove illustrative of other examples as well. While this will help to outline the application of the concept within the German legal system, it will, of course, not be sufficient if we look for a truly comprehensive explanation of the phenomenon. For an in-depth analysis of the causes of state-induced self-regulation, it obviously would be necessary to take into account also the history of the relevant phenomena, which cannot be accomplished within the constraints of the present paper, however. But even the rather rough sketch that follows may well facilitate a better understanding of the fundamental policy questions pertaining in particular to "state-induced self-regulation": What are the perceived benefits, especially compared to both direct regulation by the state and autonomous self-regulation? What are the relevant substantive and procedural requirements that must be met in order to achieve the desired results, taking into account also the factual circumstances in which the regulatory processes are set to take place? And finally, how does state-induced self-regulation relate to the statutory legal framework applicable to the relevant economic activity? These questions will be taken up again and addressed in section III, below, following the sketch of selected fields of state-induced self-regulation and on the basis of a closer inspection of one specific example from the area of company law and corporate governance.

II. The Landscape: A Rough Map of State-induced Self-regulation in Germany

1. Overview

"State-induced self-regulation" is certainly not a new phenomenon – and, as this symposium amply illustrates, is by no means confined to Germany. Similar arrangements have also been observed in a wide range of other jurisdictions both within and outside Europe, as, for example, a collected volume edited by a number of German legal scholars has demonstrated as recently as 2014.[9] Within Germany, the interpretation of the concept in academic writings has long been dominated more or less exclusively by a

public law perspective. "Regulated self-regulation", from this perspective, was (and continues to be) seen as a regulatory strategy that could be deliberately activated by the state in order to replace direct forms of regulation, that is, legislation and/or measures by administrative bodies – as a form of regulation particularly well-suited for a modern liberal economy, whose complexity exceeds the regulatory capacity of the state itself. A number of contributions stand out as drivers for this view.[10] Among these, a collected volume, published in 2001, played a particularly formative role for the ensuing academic discussion[11] before a number of doctoral dissertations then began to explore the relevant issues for specific areas of economic activities. To name but a few milestones: One of the first of these studies, Steffen Augsberg's "Rechtsetzung zwischen Staat und Gesellschaft",[12] went some way to develop both the functional characteristics and potential applications in the field of securities regulation. On a related topic, Johannes Junker's "Gewährleistungsaufsicht über Wertpapierdienstleistungsunternehmen",[13] examined the application of the concept in the regulation of securities firms. A later monograph, "Regulierte Selbstregulierung im Ordnungsverwaltungsrecht", by Anselm Christian Thoma then covered a more comprehensive range of areas where "regulated self-regulation" was employed.[14] The private law perspective has followed suit, however, starting with Gregor Bachmann's seminal Habilitation thesis on "Private Ordnung",[15] a number of chapters in Petra Buck-Heeb's and Andreas Dieckmann's "Selbstregulierung im Privatrecht",[16] and an analysis of relevant arrangements in the field of corporate law.[17]

Specifically in the context of private law, areas of application have been, inter alia, media law,[18] product safety regulation,[19] and corporate and secu-

9 P. COLLIN et al. (eds.), Regulierte Selbstregulierung in der westlichen Welt des späten 19. und frühen 20. Jahrhunderts (Frankfurt/Main 2014).

10 Note that the following survey should be read as a list of representative writings rather than an exhaustive list.

11 W. BERG et al. (eds.), Regulierte Selbstregulierung als Steuerungskonzept des Gewährleistungsstaates – Ergebnisse des Symposiums aus Anlass des 60. Geburtstages von Wolfgang Hoffmann-Riem (Berlin 2001).

12 S. AUGSBERG, Rechtsetzung zwischen Staat und Gesellschaft – Möglichkeiten differenzierter Steuerung des Kapitalmarktes (Berlin 2003).

13 J. JUNKER, Gewährleistungsaufsicht über Wertpapierdienstleistungsunternehmen (Berlin 2003).

14 THOMA, *supra* note 3 (analysing media law, product safety regulation, environmental law and the enforcement of accounting standards).

15 G. BACHMANN, Private Ordnung. Grundlagen ziviler Regelsetzung (Tübingen 2003).

16 BUCK-HEEB/DIECKMANN, *supra* note 1.

17 BINDER, *supra* note 1, 261–263.

18 For an in-depth introduction and analysis, see, THOMA, *supra* note 3, 83–172.

rities law, with new forms of "regulated self-regulation" implemented, in particular, in the areas of accounting and financial reporting[20] as well as corporate governance standards for public companies.[21] Obviously, the classification of most of these different fields as "private law" is far from uncontroversial, which may give rise to doctrinal concerns particularly within the German legal tradition, where the conceptual distinction between the realms of public and private law has been upheld particularly vigorously. Generally, the obliteration of the traditional borders between the two fields will come as much less a surprise to an international academic audience, especially in a world increasingly dominated by the influence of the Common Law tradition, where the distinction between the two areas traditionally has played a much lesser role. All the same, it is also the case in Germany that in any of these areas *public* law elements can be said to interact with elements of *private* law, especially when it comes to the enforcement of standards developed within self-regulatory arrangements. It is thus particularly at the enforcement level that the different applications of "self-regulation induced by the state" demonstrate the need for a comprehensive, functional understanding of law-making and law enforcement, where elements of public and private law can be activated, at least to some extent, as interchangeable, functionally related instruments – and where they should be understood as such.[22]

On closer inspection, the different phenomena mentioned above fall broadly into one of two categories: In the first one, the state has incorporated pre-existing self-regulatory arrangements into a new regulatory approach, which may or may not involve the imposition of changes to residu-

19 See, e.g., THOMA, *supra* note 3, 172–226.

20 See THOMA, *supra* note 3, 261–298; see also BUCK-HEEB/DIECKMANN, *supra* note 1, 122–145. For a discussion of self-regulatory arrangements, including arrangements induced by the state, in the area of securities law, see AUGSBERG, *supra* note 12 and CH. WAHLERS, Private Selbstregulierung am Beispiel des Kapitalmarktrechts (Göttingen 2011). See also BINDER, *supra* note 1, 262–263 and TH. SCHÜLKE, IDW-Standards und Unternehmensrecht. Zur Geltung und Wirkung privat gesetzter Regeln (Berlin 2014) (discussing the relevance of accounting standards promulgated by the German Institut der Wirtschaftsprüfer, a professional organisation in the accounting industry).

21 E.g., BINDER, *supra* note 1, 258–260, 270–271; BUCK-HEEB/DIECKMANN, *supra* note 1, 90–103; M. WEISS, Hybride Regulierungsinstrumente (Tübingen 2011).

22 Cf., discussing the need for a comprehensive understanding of norm enforcement mechanisms that includes elements of both public enforcement (e.g., by supervisory authorities) and private law (e.g., through the use of liability rules), BINDER, *supra* note 1, 205–210. See also, discussing the need for a comprehensive, intra-disciplinary analytical framework in the area of product safety regulation, H. T. WEISS, Die rechtliche Gewährleistung der Produktsicherheit (Baden-Baden 2008) 40, 519–604.

al decision-making procedures and/or the substantive content (*infra* 2.). The second category, by contrast, is more straightforward. In this category, self-regulatory arrangements have only been established in response to the introduction of new legislation, which requires the regulatees to implement such arrangements (*infra* 3.).[23] While the first category certainly qualifies as "regulated self-regulation", in that direct *public* regulation is imposed on the relevant self-regulatory arrangements, it is perhaps disputable whether the relevant phenomena would also qualify as "state-induced self-regulation" within the meaning employed in the present symposium. There are, however, essentially three reasons why they should nonetheless be considered – at least as part of a first approach to the relevant issues: *First,* depending on the degree of state influence, the differences between the two concepts are gradual rather than fundamental. *Secondly,* the functional characteristics are likely to be similar. And *thirdly,* from an analytical perspective, the process of incorporation of autonomous self-regulation into a state-controlled regime may prove particularly interesting in this context, as such a transformation is likely to change the relevant actors' incentive structure, with possible implications both in terms of substantive content and compliance.

2. *Category 1: State-induced Self-regulation Where Existing Self-regulatory Arrangements Have Been in Place Prior to Relevant Legislation*

a) *Product Safety Regulations*

As a first example of state legislation introduced *ex post* in order to regulate pre-existing forms of self-regulatory arrangements, the area of product safety regulation is particularly illustrative. In this area, safety certificates (indicating, for example, the contents of a particular product or adherence to certain qualitative requirements) have played an increasing role in the protection of consumers and consequently have been recognised as useful tools for the development, and promotion, of high standards of product safety in both national and European legislation. Within Germany, such certificates have been developed with regard to general requirements (applicable to a wide range of different products) as well as sector-specific

23 Note that this distinction is not identical to the conceptual distinction between "co-regulation" and "enforced self-regulation" as developed in Anglo-American regulatory theory (as to which see, *supra,* text and notes. 4 and 5. For example, BALDWIN/CAVE, *supra* note 2, 39, define self-regulation as "'enforced', where it is subject to a form of governmental structuring *or* oversight" (emphasis added): If the government merely oversees the relevant arrangements, they would fall into the first of the two categories defined above, whereas a self-regulatory process *structured* by the government would fall into the second.

standards (applicable to certain types of products), even prior to the incorporation of the concept in mandatory legislation.[24] For more than two decades now, the certification of products both as a condition for market access and as an additional source of information for consumers has taken place in a complex interplay between (a) the European Commission, (b) national authorities, (c) independent private bodies engaging in the development of, and the monitoring of compliance with, relevant standards, and (d) the manufacturers subject to that regime. While details are outside the scope of the present contribution,[25] one aspect is of a particular interest: With the incorporation of self-regulatory arrangements into a regime of state regulation and enforcement, the certification of products has transformed from a more or less autonomous system of self-regulation, where the development and promotion of relevant standards was driven purely by industry interests, into a regime where the state retains a tight control of both the substantive contents of privately developed standards and their enforcement. Within this framework, each manufacturer has a wide range of incentives to comply with the relevant standards (which include, first and foremost, the marketability of the relevant products for which certification is mandatory but also sanctions under private and criminal law) and to submit to scrutiny by a private law body.[26]

b) Labour Relations

A second, rather special example of regulatory incorporation of pre-existing self-regulatory arrangements can be found in labour relations, where collective bargaining between employers and trade unions was formally recognised by 1949 legislation[27] setting out requirements for the content of collective agreements on wages and working conditions, including provisions

24 THOMA, *supra* note 3, 177–178. And see, for a comprehensive analysis of the relevant self-regulatory standards, H. T. WEISS, *supra* note 22, 412–414.

25 For an in-depth account of the (complex, sector-specific) legal frameworks encountered at the national and the European levels, see, e.g., THOMA, *supra* note 3, 178–226, 447–453; H.T. WEISS, *supra* note 22, 81–124 (outdated on the facts, but still valid in principle). Today, the key legal basis at the national level is the Product Safety Act *(Produktsicherungsgesetz)* of 8 November 2011 (BGBl. 2011 I 2178) (as amended). The relevant European law instrument is Regulation (EC) No 765/2008 of the European Parliament and of the Council of 9 July 2008, setting out the requirements for accreditation and market surveillance relating to the marketing of products, OJ L 218 of 13 August 2008, 30.

26 THOMA, *supra* note 3, 215–218; see also H. T. WEISS, *supra* note 22, 412–420.

27 Tarifvertragsgesetz [Law on Collective Labour Agreements] of 9 April 1949, Gesetzblatt der Verwaltung des Vereinigten Wirtschaftsgebietes 1949, 55/68; newly enacted on 25 August 1969, Bundesgesetzblatt 1969, I, 1323 (as amended).

on the implications of such agreements for covered labour contracts, as well as some procedural arrangements for the negotiating process. Obviously, both trade unions as well as employers and employers' organisations – i.e., the parties to such arrangements – existed prior to the enactment of the 1949 law, and the same is true for collective agreements as such. However, it was only with the introduction of the legal regime, complemented with the recognition of collective bargaining as a legal concept protected under the *Grundgesetz* (the German Constitution of 1949), that collective agreements received their status as a highly influential tool for the regulation of labour relationships – a concept that continues to be characteristic of labour relations in this country to the present date.[28] From a doctrinal perspective and within the context of the present symposium, collective bargaining presents a particularly interesting example of regulated self-regulation in that the precise nature of collective agreements has been, and continues to be, the subject of intensive controversy. Some authors and earlier judgments of the Federal Labour Court (the highest court of appeals for labour issues) have interpreted such arrangements as essentially a form of delegated legislation, given that the relevance for third parties not directly involved in the negotiations is based on state legislation, not the individual will of these parties.[29] According to a more modern interpretation, however, which has now been accepted also by the courts, collective agreements should rather be interpreted as representing a special, collective form of contractual agreements, whose validity is based on the relevant parties' decision to submit to their terms and conditions.[30] Against this backdrop, collective bargaining in German legal doctrine is particularly illustrative of the hybrid nature of "regulated self-regulation" and clearly also of the difficulties in defining its position between public regulation and private ordering of social relationships.

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28 See generally, e.g., BUCK-HEEB/DIECKMANN, *supra* note 1, 198–203.

29 E.g., Bundesarbeitsgericht [Federal Labour Court], 15 January 1955 – 1 AZR 305/54, reported in BAGE (Amtliche Sammlung der Entscheidungen des Bundesarbeitsgerichts) 1, 258, at 264; *id.,* 23 March 1957 – 1 AZR 329/56, reported in BAGE 4, 240, 251; see, for a review of the history of the doctrine and the key sources, M. LÖWISCH/V. RIEBLE, Grundlagen, in: *id.* (eds.), Tarifvertragsgesetz (4th ed., Munich 2017) para. 30.

30 E.g., Federal Labour Court, 25 February 1998 – 7 AZR 641/96, reported in BAGE 88, 118, at 123; 21 July 2004 – 7 AZR 589/03, reported in Zeitschrift für Tarifrecht 2005, 255, para. 20; *id.,* 7 June 2006 – 4 AZR 317/05, reported in Neue Zeitschrift für Arbeitsrecht (NZA) 2007, 343, para. 30; for an in-depth discussion, see, e.g., LÖWISCH/RIEBLE, *supra* note 29, paras. 31–39.

3. *Category 2: State-induced Self-regulation in the Absence of Prior Self-regulatory Arrangements*

A prominent example of self-regulatory arrangements established on the initiative and under the control of the state can be found in media regulation, where the protection of minors and the protection of personal data have been addressed through a complex framework of state legislation, public enforcement agencies, and self-regulatory bodies established and formally recognised under the applicable statutory provisions. In this setting, self-regulatory bodies play an important role in the critical assessment of media contents and in the enforcement of substantive legal requirements.[31] Other examples can be found in the area of corporate governance: As early as 1998, a private law-standard-setting organisation – *Deutsches Rechnungslegungs-Standardisierungs-Committee* (DSRC) – was established and formally recognised by law in order to contribute to the development of accounting standards for listed groups.[32] In order to improve the enforcement of accounting standards and in reaction to prominent accounting scandals in the USA and in Europe, legislation was enacted in 2004 to establish a two-tier enforcement system for the regulation of corporate financial information of listed companies, whereby a private enforcement body – *Deutsche Prüfstelle für Rechnungslegung e.V.* – was established in order to scrutinise accounting documents in cooperation with the relevant firm before formal enforcement measures are taken by the financial markets supervisory authority.[33] In both cases, the initiative clearly originated in state legislation.

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31 See, further, THOMA, *supra* note 3, 82–172. For a comparative analysis of the relevance of self-regulatory arrangements within the context of private law positions in the field, see also L. WALLENHORST, Medienpersönlichkeitsrecht und Selbstkontrolle der Presse (Berlin 2007) (comparing German and English law).

32 For the legal basis, see § 342 German Commercial Code, Handelsgesetzbuch, HGB, as amended by Article 2 Gesetz zur Kontrolle und Transparenz im Unternehmensbereich of 27 April 1998 (BGBl. 1998 I 786). See, for further discussion, BUCKHEEB/DIECKMANN, *supra* note 1, 125–128; W. EBKE/B. PAAL, in: K. Schmidt (ed.), Münchener Kommentar zum Handelsgesetzbuch (3rd ed., Munich 2013) § 342, paras. 1–19; SCHÜLKE, *supra* note 20, 88–107.

33 For the legal basis, see §§ 342b–342e HGB, as amended by Bilanzkontrollgesetz of 15 December 2004 (BGBl. 2004 I 3408). And see, for further discussion, e.g., BUCKHEEB/DIECKMANN, *supra* note 1, 132–135; B. PAAL, in: K. Schmidt (ed.), Münchener Kommentar zum Handelsgesetzbuch (3rd ed., Munich 2013) Vorbemerkungen zu §§ 342b bis 342e, paras. 1–8; THOMA, *supra* n. 3, 261–298 and 462–464.

4. *A Comparison: State-induced Self-regulation and the Functional Characteristics of Self-regulatory Arrangements*

While the technical details cannot be explored any further within the present context, the brief outline of specific examples of state-induced self-regulatory arrangements in Germany nonetheless highlights a number of common features and, arguably, provides helpful insight into the underlying policy objectives. A key characteristic common to all the different examples just touched upon is, obviously, the rather technical nature of the relevant social and/or economic activities and relationships – the term "technical" in this context being used as a catchphrase for activities and relationships that are characterised by problems of a nature that is not easily accessible to outsiders, in view of a specific expertise required to develop the necessary understanding and/or in view of the remoteness of the relevant community of actors. In such areas, the relevance of state-induced self-regulation as a solution to the problem of timely and accurate information (that would otherwise create impediments to effective *legislative* solutions) becomes particularly obvious.[34] This certainly holds true for areas like product safety regulation, where the definition of problem-adequate standards requires a degree of sophisticated scientific knowledge and insight into the regulated activities that would be extremely difficult to build and keep updated at the legislative level. Similarly, the enforcement of corporate accounting standards clearly should benefit from the practical experience and insights of actors employed in the private enforcement body. On closer inspection, similar considerations also apply in the area of labour relations, where collective agreements ideally should facilitate tailored solutions that reflect the parties' individual circumstances much more directly, and adequately, than could ever be achieved in the formal legislative process, where the relevant information is, by definition, available only in an intermediated form. At first sight, the area of media regulation constitutes an exception in this regard, for what would be more accessible to external scrutiny than standards of media coverage? Even if other objectives for legislative self-restraint and delegation to self-regulatory arrangements may be said to play a more important role in this field, however, this example does not qualify as a total outlier with respect to the information problem: Judging which media content should be permissible and which should not evidently requires an assessment of the relevant qualitative standard which, in the absence of self-regulatory arrangements, could only be developed ex post by courts adjudicating individual cases under inevitably rather general principles of law. For example, the protection of minors

34 On which, see *supra,* text accompanying note 7. See also, discussing the function of regulated self-regulation as a means to compensate for structural information deficits on the part of the state, THOMA, *supra* n. 3, 66–67.

from excessively brutal content or from the explicit exhibition of sexual activities in media coverage can, of course, be defined as a legal obligation for media companies. Likewise, statutory provisions aiming at the protection of personal information (e.g., in the form of defamation laws or laws against the publication of details of one's private life) are not just conceivable but do, in fact, exist. Yet if, in the absence of self-regulatory arrangements in the form established by German media law, the development of more granular common standards inevitably had to rely on the judiciary, the protection would probably be much less effective than in the present scenario, where standards are being developed proactively and in a consensus between market participants and stakeholders. Notably, it would not exclusively be based on extreme cases that ultimately reach the courts *ex post, i.e.,* after violations of rights have occurred. In other words, it is also in this area that the integration of self-regulatory elements helps to activate the private knowledge of individual actors and, thereby, to calibrate the relevant standards to real-world circumstances and practices.[35]

In addition to reflecting how information problems faced by legislators fuel the trend towards state-induced self-regulation, the cited examples also indicate that state-induced self-regulation can claim to be more flexible in procedural terms than state legislation itself. The legislative process, for both constitutional and political reasons, is formalistic, usually time-consuming, dependent on political cycles, and possibly fraught with compromises that may reflect issues entirely unrelated to the relevant problems as such. Against this backdrop, the delegation of regulatory powers to private bodies may not just help to focus the debate on those issues that really need to be addressed; rather, as relevant information is readily available it also facilitates an ongoing adaption to changed circumstances, to the extent that the process is sufficiently flexible so as to allow swift reactions.[36] Finally, in each of the examples described above, the integration of private actors in the regulatory process may also come with advantages in the form of enhanced compliance, to the extent that the involvement of regulatees and stakeholders may increase acceptance of the substantive content and, ideally at least, reduce the need for formal enforcement measures.[37]

These advantages are, of course, contingent on a rather complex set of specific conditions, some of which will be addressed in the subsequent case study. Two aspects are particularly noteworthy in this regard: *First,* the

35 Cf. WALLENHORST, *supra* note 31, 500–502 (discussing the advantages of self-regulatory arrangements in the resolution of complaints against media coverage generally). But see THOMA, *supra* n. 3, 432–434 (denying that this rationale plays a role).

36 Cf. BUCK-HEEB/DIECKMANN, *supra* note 1, 220–222.

37 See *supra,* note 8 and accompanying text.

structure and composition of the relevant self-regulatory bodies obviously play a key role. In order for the regulatory process to really facilitate adequate solutions on the basis of relevant real-world information, state-induced self-regulation needs to include all relevant sources of information, which may also require the inclusion of stakeholders other than the regulatees themselves, in particular where the regulated activities will give rise to third-party implications.[38] *Secondly,* and related to the foregoing, the procedural framework for reaching decisions within the self-regulatory body is also of essence. Even where the relevant decision-making bodies do reflect a sufficiently representative range of relevant stakeholders, flawed decision-making processes may lead to flawed results that are biased by self-interest or reflective of an inability to agree on anything but the lowest common denominator.[39] Obviously, addressing these problems through the technical integration of self-regulation into the legislative framework and into enforcement measures is a core issue for the effective implementation of state-induced self-regulation. That task is not made easier by the fact that the self-interest of the regulated parties is probably the key driver in their willingness to get involved in the first place: Just as genuine self-regulation rests on the parties' own interest in creating a reliable order for their own affairs, integrating the regulatees in state-induced regulatory arrangements will hardly be successful unless their own interests are protected to some extent. This highlights a possible trade-off between the acceptance of self-regulatory arrangements, which will depend on the level of respect for the regulatees' own interests, on the one hand, and the protection of third party stakeholders on the other hand.[40]

III. A Case Study: The German Corporate Governance Code

1. The Code Within the Statutory Framework

For present purposes, the German Corporate Governance Code (*Deutscher Corporate Governance Kodex,* DCGK) presents a particularly interesting case for a number of reasons – not least because its legal nature, which has been the subject of some controversy, remains far from settled. As will be discussed in a moment, many authors would classify the Code as a product of autonomous rule-making by industry and stakeholder representatives – and thus, not as an emanation of "state-induced self-regulation" at all. According

38 Cf. (discussing the need to ensure balanced representation of interests in the decision-making process) Buck-Heeb/Dieckmann, *supra* note 1, 278–283.

39 Cf. (discussing the decision-making procedure) Buck-Heeb/Dieckmann, *supra* note 1, 283–289.

40 See also Baldwin/Cave, *supra* note 2, 136.

to others, the state's influence on both the decision-making process and the substantive content is far too strong as to support this view. Needless to say, this controversy comes with substantial implications for the evaluation of the Code in general and for its legitimacy and effectiveness in particular.

The Code is promulgated and updated on a regular basis by a commission of academics, representatives of listed companies, and representatives of shareholders' associations and trade unions.[41] The commission was first established in 2001 on the recommendation of an independent panel of experts appointed and convened by the federal government. Then as today, the purpose[42] was to complement the (to a large extent mandatory)[43] provisions of the German Stock Corporation Act (*Aktiengesetz,* AktG) with a document that promotes concepts and standards of good corporate governance, taking into account the characteristics of German company law as well as international trends and standards. From the beginning, the Code – first published in 2002 – was also conceived as a tool to familiarise investors in general and, in particular, foreign (institutional) investors as to the key elements of corporate governance in Germany and, thereby, to promote foreign direct investment in German equity markets.[44] Against this backdrop, the Code, which is published by the Federal Ministry of Justice in the Official Journal of the Federal Republic pursuant to § 161 AktG, combines a summary of the relevant statutory framework with recommendations to follow specific standards, and it makes additional suggestions promoting good practice in certain areas.[45]

2. Evaluation

In principle, the Code clearly seems to be fully in line with a global trend towards self-regulation in matters of corporate governance, and this is re-

41 See, for the present composition of the Commission, *http://www.dcgk.de/de/kommission/mitglieder.html.*

42 Cf. the explanatory notes to the bill introducing § 161 AktG, Bundestags-Drucksache 14/8769, p. 21.

43 Pursuant to § 23(5) AktG, the articles of association can deviate from the Act's provisions only where this is expressly allowed.

44 See generally, e.g., AUGSBERG, *supra* note 12, 294–300; BUCK-HEEB/DIECKMANN, *supra* note 1, 97–98; SCHÜLKE, *supra* note 20, 108–112; M. WEISS, *supra* note 21, 63–72; see also BINDER, *supra* note 1, 258–260. And see the contribution made in this volume by F. MÖSLEIN, p. 83.

45 See *http://www.dcgk.de/de/kodex.html.* A number of commentaries on the Code exist, see, e.g., T.H. KREMER et al. (eds.), Deutscher Corporate Governance Kodex – Kommentar (6th ed., Munich 2016); H.-U. WILSING (ed.), DCGK – Deutscher Corporate Governance Kodex (Munich 2012); L. FUHRMANN et al. (eds.), Deutscher Corporate Governance Kodex (Frankfurt/Main 2015).

flected by the fact that both the very concept and the structure are derived from corporate governance codes in the Anglo-Saxon world.[46] On closer inspection, however, unlike the relevant counterparts in foreign jurisdictions, it is indisputably an instrument of state-induced self-regulation rather than a product of genuine self-regulation[47] – and it is, for that matter, even characterised by a rather high degree of state influence on both procedural and substantive matters. Conceptually, the Code certainly satisfies a number of key conditions for an effective application of the concept: As mentioned before, the drafting commission is sufficiently diverse as to reflect not just the views of industry representatives but also the perspective of a wider group of stakeholders, including both investors and the workforce. Over the years, the commission's deliberations have also become more transparent, with consultation procedures and conferences held prior to amendments to the Code's recommendations and suggestions.

At the same time, however, the drafting commission, formally known as a "Regierungskommission" (literally: a government commission), is clearly a body appointed by the state, with its composition being effectively determined by the Federal Ministry of Justice. And, rather than relying on voluntary acceptance by the industry, compliance with the Code is fostered by a rather strong mechanism set out as part of the mandatory legal framework for listed companies: Pursuant to § 161 AktG, the executive and the supervisory boards have to publish, on an annual basis, a declaration of compliance (or, indeed, non-compliance) with the Code's recommendations – and where they have decided not to comply, they also have to publish an explanation for their non-compliance. In this sense, the comply-and-explain approach is a good example of indirect enforcement of standards, with market pressure (in particular, stock exchange prices reflecting investors' interest in the maintenance of good corporate governance standards) ex-

46 See, e.g., K.J. HOPT, Die internationalen und europarechtlichen Rahmenbedingungen der Corporate Governance, in: Hommelhoff et al. (eds.), Handbuch Corporate Governance (2nd ed., Stuttgart 2009) 39, 41–44.

47 See, for a similar assessment, e.g. M. WEISS, *supra* note 21, 100–103; see also MÖSLEIN, *supra* note 44. For an even stronger, albeit not convincing view (DCGK as state regulation), see P. HOHL, Private Standardsetzung im Gesellschafts- und Bilanzrecht (Berlin 2007) 48–50. This is not the majority position, however, see e.g., reaching the opposite conclusion, BUCK-HEEB/DIECKMANN, *supra* note 1, 100; U. SEIBERT, Transparenz- und Publizitätsgesetz, Zeitschrift für Wirtschaftsrecht (ZIP) 2001, 2192; C.H. SEIBT, Deutscher Corporate Governance Kodex und Entsprechenserklärung (§ 161 AktG-E), Die Aktiengesellschaft (AG) 2002, 249, 250; P. ULMER, Der Deutsche Corporate Governance Kodex – ein neues Regulierungsinstrument für börsennotierte Aktiengesellschaften, Zeitschrift für das gesamte Handels- und Wirtschaftsrecht (ZHR) 66 (2002) 150, 158–164.

pected to nudge management into high levels of compliance with the Code. In addition, incorrect compliance reporting may also expose the relevant company, in certain circumstances, to challenges against decisions of the shareholders' meeting, thereby jeopardising the swift execution of such decisions – which increases incentives to accept, and follow, the Code's approach yet further.[48]

At first sight, this seems to have worked out as expected. The level of compliance with the Code's recommendations has been high to date, and practitioners have observed a rather strong tendency towards convergence of, and standardisation in, corporate governance arrangements, in particular with an increased professionalisation of supervisory boards in listed companies in recent years.[49] On closer inspection, however, the results appear to be, at best, mixed. Empirical studies on the connection between stock prices and compliance levels are inconclusive, casting doubt on the effectiveness of the chosen enforcement mechanism.[50] To be sure, the Code certainly does reflect the general objective of activating private interests and private knowledge, and thus a key policy objective of state-induced self-regulation generally. Whether the legal environment is in fact sufficiently conducive for the attainment of this objective is an open question, however. Comparing German stock corporation law to the legal frameworks in other jurisdictions – and, in particular, to US law – one cannot escape the conclusion that the general statutory environment leaves comparatively little scope for experimental approaches toward the development of governance standards and practices by the industry itself, given the highly prescriptive and to a large extent mandatory character of the German law on stock corporations.[51] Moreover, even in areas not covered by detailed mandatory provisions, the readiness of the state to actually allow an open-ended development of relevant standards in the form of Code recommendations has been, at best, half-hearted. Although the government has, to date, refrained from exercising direct substantive influence on the Code, there has been a clear tendency to transform existing recommendations into mandatory legislation, thereby transferring the relevant issue back into the scope of direct regulation, especially in areas perceived to be of particular

48 See, e.g., J. KOCH, in: Hüffer/Koch, Aktiengesetz. Kommentar (12th ed., Munich 2016), § 161 para. 3; P. LEYENS, in: Hopt/Wiedemann (eds.), Großkommentar zum Aktiengesetz (4th ed., Berlin 2012), § 161 paras. 48–49. And see, discussing the implications for the Code's effectiveness as a regulatory tool, BINDER, *supra* note 1, 271–272; SCHÜLKE, *supra* note 20, 112–126.

49 For an empirical study, see A. VON WERDER et al., Größere Kodexskepsis im General Standard?, Die Aktiengesellschaft (AG) 2011, 491, 493.

50 Cf., surveying the available empirical evidence, BINDER, *supra* note 1, 276.

51 See, *supra* text and note 43.

social or political importance. Notable examples include the remuneration of directors and board diversity, where the Code's recommendations evidently were perceived to be too weak by legislators and were then replaced by mandatory provisions in the Stock Corporation Act.[52]

Such developments, in a democratic society, are certainly not illegitimate per se. They can, and perhaps should, be expected where specific policy objectives are identified as too important to be left to private experiments. Against this backdrop, however, it should not come as a surprise that the Code has in recent years met with increasing criticism from industry representatives, legal practitioners and academics.[53] One of the key concerns expressed in this context is that the high level of compliance could actually be interpreted as a result of enforcement pressure rather than positive acceptance of the Code's recommendations, reflecting growing doubts as to its substantive quality – and, indeed, its legitimacy – among regulatees and their advisers. If that is true, adherence to the Code's recommendations could no longer be interpreted as reflecting real improvements in corporate governance arrangements; in fact, the Code could even be criticised as being an actual impediment to such improvements.

While the underlying technical problems cannot be examined in detail within the present paper,[54] the Code thus highlights not just the potential for state-induced self-regulation in terms of both substantive content and potential enforcement mechanisms, but also possible deficiencies in the concept. To be sure, the Code and its statutory environment (in particular, § 161 AktG demonstrate quite impressively that both *formal* state influence (in the form of enabling legislation, but also through disclosure rules and comply-and-explain requirements) and *informal* influence (on the selection of the relevant decision-makers and in on-going political pressure placed

52 E.g., W. BAYER, Grundsatzfragen der Regulierung der aktienrechtlichen Corporate Governance, Neue Zeitschrift für Gesellschaftsrecht (NZG) 2013, 1, 5 f.; KOCH, *supra* note 48, para. 5a; G. SPINDLER, Zur Zukunft der Corporate Governance Kommission und des § 161 AktG, Neue Zeitschrift für Gesellschaftsrecht (NZG) 2011, 1007.

53 See, summarising the discussion, KOCH, *supra* note 48, para. 5a. And see, for particularly critical (though not representative) assessments, SPINDLER, Neue Zeitschrift für Gesellschaftsrecht 2011, 1007; W. TIMM, Corporate Governance Kodex und Finanzkrise, Zeitschrift für Wirtschaftsrecht (ZIP) 2010, 2125, 2128.

54 For more in-depth analyses, see, e.g., BAYER, Neue Zeitschrift für Gesellschaftsrecht (NZG) 2013, 1; G. BACHMANN, Überlegungen zur Reform der Kodex-Regulierung, in: Krieger et al. (eds.), Festschrift für Michael Hoffmann-Becking zum 70. Geburtstag (Munich 2013) 75; K. J. HOPT, Der Deutsche Corporate Governance Kodex: Grundlagen und Praxisfragen, in: Krieger, *ibid.;* P. O. MÜLBERT / A. WILHELM, Grundfragen des Deutschen Corporate Governance Kodex und der Entsprechenserklärung nach § 161 AktG, Zeitschrift für das gesamte Handels- und Wirtschaftsrecht (ZHR) 176 (2012) 286.

upon them) can collaborate highly effectively in order not just to kick-start self-regulatory arrangements, but also to shape their substantive outcomes. In this regard, the Code clearly presents not only a highly successful example of state-induced self-regulation in general but also an illustrative example of how the content and the enforcement of self-regulatory arrangements can be structured by statute. As mentioned before, however, there probably exists a trade-off between, on the one hand, the need to exercise some regulatory influence on self-regulatory arrangements in order to protect public policy and, on the other hand, the need to preserve the necessary procedural and substantive freedom for those private actors that are engaging in the relevant self-regulatory processes. It is only where these are kept sufficiently free so as to accommodate their legitimate self-interest that state-induced self-regulation can be expected to yield the anticipated benefits. The German Corporate Governance Code is a highly illustrative example in this regard – a case where, arguably at least, the state's influence has reached an intensity that may simply be too high for these benefits to be achieved.

IV. Conclusions

Germany is clearly a jurisdiction where the concept of state-induced self-regulation has been embraced in a number of different contexts. The various emanations of the principle examined above highlight the potential benefits but also the risks inherent to the very concept. State-induced self-regulation clearly can help to activate the self-interest of the regulatees for the attainment of more problem-adequate regulatory solutions than could be achieved through direct regulation, in particular because relevant solutions can be expected to be more adequately suited to the underlying real-world problems and because the participation of the regulatees in the formulation of the solutions could increase acceptance and foster compliance. The risk of externalities – self-regulating actors ignoring, or acting against, the interests of relevant third-party stakeholders – can effectively be addressed through appropriate procedural and/or substantive precautions. However, as the above case study suggests, state control over procedures and substance also entails the risk that the state can overdo its influence in this regard – with possible repercussions not just in terms of the quality of regulatory responses, but also in terms of the readiness of regulatees to participate and ultimately submit to the relevant standards. As mentioned before, the very concept, prima facie, seems to amount to squaring the circle – an attempt to reconcile what cannot be reconciled. The examples examined here would indicate that squaring the circle can indeed be possible; but they also show that the pros and cons have to be assessed as carefully as the trade-off between state influence and expected benefits has to be calibrated.

III. Theory und Practice of Self-Regulation

Self-regulations and Constitutional Law in Japan as Seen from the Perspective of Legal Pluralism

Yuki Asano[*]

I. Introduction
II. The Gist of the Case
III. The Judgment of the Supreme Court
IV. Three Different Stories About this Case
  1. Opponents of the Judgment
  2. From the Viewpoint of the Private Relationship
  3. From the Viewpoint of the Church Group's Involvement
V. The Case from the Legal Pluralism Perspective
VI. Conclusion

I. Introduction

For years, I have been interested in legal pluralism and have been investigating the ways in which non-state laws coexist with state laws from that perspective.[1] My interest in legal pluralism is based on the question of whether traditional state law can properly cover newly emerged spheres of human activity, which tend to extend beyond national borders in accordance with the development of globalization, and on the presumed possibility that self-regulation in these spheres can complement state laws or can function as non-state "laws" instead of state laws. I usually focus on these self-regulations in the global context, looking, for example, at international NGOs' rules on self-organization; at the laws regarding the Internet, such as those sustained by ICANN; at the lex sportive, as found in rules institutionalized by the IOC or the world soccer associations; at the lex mercatoria, which is often connected with international arbitration; at the various kinds of standardization or certification systems related to global environmental law and governance; and so on. While these are comparatively recent examples of non-state rules or regulations, there are also more traditional transnational laws such as Islamic law and Jewish law.

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* Prof. Yuki Asano, Professor of Law, Dōshisha University Law School, Kyōto.

1 Y. Asano, From the Theory of Private Law to Legal Pluralism: On the Reconstruction of Private Law in the Age of Globalization, Japanese Yearbook of international Law 57 (2015) 163–178; TLI Think! Paper 18/2016. Available at SSRN: *https://ssrn.com/abstract=2767862.*

However, the idea of legal pluralism focusing on various functional areas such as Internet communication, market transactions, religious activity and so on, which are possibly regulated more effectively and more properly by self-regulation or through private governance than by the state,[2] can be applied to domestic cases relating to these functional areas.[3] Also, most of the historical origins of legal pluralism are rooted in the study of plurality of law in domestic contexts, such as the coexistence of the colonial law and the native law in a colonized country.

Thus, in this article, as a Japanese researcher who has studied legal pluralism, I would like to consider a domestic case of self-regulation in Japan, *Japan v. Nakaya,*[4] from that point of view and would like to look at the lessons learned from it.

There are four reasons why I take up this case. First, this case referred to a religious issue, which is one of the traditional topics of legal pluralism. Second, it is a famous Supreme Court case concerning the relationship between Japanese constitutional law and self-regulation, and also a case that raised strongly divided opinion among the courts as well as in the academic sphere.[5] Third, as evident from the second reason, this case looks very different according to the perspective one takes. Fourth, the case seems to reflect characteristics of Japanese culture, especially to the eyes of foreign people, and it thus makes sense to choose it as a topic for communication on legal as well as cultural matter between Japan and Germany.

In following sections, I introduce the gist of this slightly complicated case (section 2), analyse the Supreme Court's judgment (section 3), explicate three different views on the case (section 4), and add some considerations from the perspective of legal pluralism (section 5), before providing a brief conclusion.

II. The Gist of the Case

In 1973, Yasuko Nakaya, widow of Takafumi, a deceased member of the Ground Self-Defense Force (hereinafter SDF) who had died of injuries in a traffic accident while on active duty, sued to have his Shinto enshrinement,

2 P. Zumbansen, Transnational Legal Pluralism, Transnational Legal Theory 1 (2014) 147, 151.

3 On the connection between the functionalism emphasized in legal pluralism and the domestic welfare state government, see *ibid.,* 144, 173.

4 *Japan v. Nakaya* (*Ji'ei-kan gōshi hanketsu,* The Serviceman Enshrinement Case) Supreme Court, 1 June 1988, Minshū 42, 277.

5 In contrast to the negative decision by the Supreme Court toward Mrs. Nakaya, many media outlets and legal scholars saw her as a victim or a heroine. See Y. Obuki, *Kenpō no kiso riron to kaishaku* [Foundational Theory and Interpretation of Constitutional Law] (Tōkyō 2007) 546.

which had taken place at the request of the Yamaguchi chapter of the Self-Defense Forces Friendship Association (hereinafter, SDF Friends or the Friends, a private association composed of SDF ex-servicemen and their families) rescinded.

In 1972, the Friends had petitioned the Yamaguchi Shinto Gokoku Shrine, a shrine for war dead, for the "joint enshrinement" *(gōshi)* of the spirit of Mrs. Nakaya's deceased spouse, along with the souls of twenty-six other deceased servicemen. The SDF Regional Liaison Office, a state agency, cooperated with and supported the Friends in making this petition. The petition was carried out according to the self-regulation of the Friends – that is, the "rules of practice for worship of servicemen deceased on duty at Yamaguchi Shinto Gokoku Shrine"[6] – and the organization and the purpose of establishment of the Friends were prescribed by the articles of association and other detailed rules.[7]

Mrs. Nakaya, a Christian since 1958, opposed the enshrinement, arguing that the Friends, as an auxiliary of the SDF, a state agency, was bound by the constitutional norm of separation of religion and the state. She demanded the retraction of the original petition for joint enshrinement, and asked for one million Yen from the Friends and the Government of Japan as compensation for violating her personal religious rights under the constitution.

The district court rejected Nakaya's demand that the petition for enshrinement be rescinded, but awarded her damages to be paid by the Friends and the state. The Friends and the government brought an appeal to the High Court against the adverse portion of the district court's judgment (*kōso*), as did Mrs. Nakaya in a supplementary appeal. The Hiroshima High Court affirmed the first instance judgment for the most part. The government then brought an appeal to the Supreme Court *(jōkoku)*.

III. The Judgment of the Supreme Court

The Supreme Court vacated the first instance judgment and dismissed the case. Its reasoning can be constructed as follows:

First, the Supreme Court denied the fact of substantial involvement of SDF as a state agency in the course of the petition made by the Friends of the Yamaguchi Gokoku Shrine. It said the joint enshrinement was basically achieved through the efforts of the Friends only, which was acting on the request of the families of deceased SDF members and negotiating with the shrine under its own name. The SDF Regional Liaison Office only gave the Friends the reports of examples of other Gokoku shrines that had already enshrined servicemen

6 Supreme Court, 1 June 1988, Minshū 42, 358.
7 Supreme Court, 1 June 1988, Minshū 42, 378.

who had died on duty in addition to the previous war dead, as well as contacting Mrs. Nakaya and other family members. Thus, it was said that this case was not necessarily one between the state and an individual, but rather between a private association and an individual, as well as between Mrs. Nakaya and Yamaguchi Gokoku Shrine (also a private legal person), which actually enshrined Takafumi based on the petition made by the Friends.[8]

Provided that the SDF's involvement was limited, the next issue to be considered by the court was whether this involvement violated Article 20, paragraph 3 of the Japanese Constitution (*Nihon-koku Kenpō* of 1946), which prescribes the separation of religion and the state.[9] The court suggested its case law showed that religious activity under said article should not be construed to include any acts related to religion, as this would lead to impractical and unreasonable conclusions concerning deep and widespread connections between religion and social custom. Thus, the article should be interpreted to prohibit only those acts whose purpose has religious meaning and whose effect is to promote, aid or support specified religions, or to suppress or interfere with other religions.[10] The actual actions of the SDF Regional Liaison Office staff had an indirect relationship with religion. Their purpose and intention were assumed to be to raise the social status and morale of SDF members, not to encourage their religious attitudes to take a specific direction. These actions would not be considered by the general public as having the effect of the state drawing attention to a particular religion or suppressing or interfering with another religion.

Provided there was no violation of the Constitution by the SDF, the court finally investigated whether Mrs. Nakaya's legal interest of freedom of religion had been infringed by the Friends. Despite the original judgment that the joint enshrinement infringed upon Mrs. Nakaya's legal interest in a

8 Yamaguchi Gokoku Shrine had denied Nakaya's request to rescind the enshrinement before the litigation. For the shrine, it was not acceptable for an enshrinement to be nullified because it would mean blasphemy against the once-enshrined entity.

9 Article 20 reads:

"1. Freedom of religion is guaranteed to all. No religious organization shall receive any privileges from the State, nor exercise any political authority.

2. No person shall be compelled to take part in any religious acts, celebration, rite or practice.

3. The State and its organs shall refrain from religious education or any other religious activity."

10 This is called the "purpose-effect test", established first by the *Tsu jichin-sai hanketsu* (Tsu Ground God Ceremony Case), Supreme Court, 13 July 1977, Minshū 31, 533. For an analysis of cases applying this "purpose -effect test" and recent pertinent developments, see F. RAVITCH, The Shinto Cases: Religion, Culture, or Both – The Japanese Supreme Court and Establishiment of Religion Jurisprudence, Brigham Young University Law Review (2013) 505.

peaceful religious atmosphere and her religious rights as a person, the Supreme Court suggested that an argument for constitutional rights, when applied to cases between private parties and not those between the state and an individual, has to take into account both parties' equal freedom – in this case, both Mrs. Nakaya's religious rights and the Friends and other family members' religious rights. Based on the religious plurality characteristic of Japanese society, a claim to one's religious rights should entail tolerance for other people's religious activity, even when this activity does not accord with one's religious beliefs, unless the individual in question is compelled to take part in a religious ceremony held by others or their own religious activity is suppressed by those others.

In this case, Mrs. Nakaya was not compelled to participate in the ceremony held at Yamaguchi Gokoku Shrine. The Friends simply sent a mail which read: "Offerings for the Sacred Eternal Prayer in memory of Shinto Deity Takafumi Nakaya are solemnly accepted. Hereafter, a memorial service will continue to be held on 12 January forever." The offerings were actually paid for by the Friends, using money donated by other Friends members. Mrs. Nakaya kept Takafumi's remains in a charnel at her church and prayed for him annually at a memorial ceremony held by the church, without any disturbance from others. Based on these facts and reasoning, the court concluded that her legal interest in religious freedom had not been infringed.

This was the majority opinion of the court. There were four supplementary opinions and three different opinions with the same conclusion and one dissenting opinion.

IV. Three Different Stories About this Case

Shrines in Japan were established for the worship of the mainstream gods and goddesses, such as Amaterasu, who is said to be an ancestor of the Japanese royal family, as well as many local gods and goddesses who were originally the opponents of the mainstream ones. Historically, many Japanese people have become accustomed to the idea of the enshrinement and deification of losers of political battles or persons who have lost their lives to tragedy, in order to console their souls and avoid later misfortune.[11]

Because the tradition is based on polytheism and other related elements of Japanese culture, it is not surprising that this idea of enshrinement seems strange or nonsensical to many people whose religions originated from monotheism or who belong to non-Japanese cultures. As for Takafumi, however, he

11 Japan's long-standing tradition of enshrinement of such people who might become vengeful spirits is explained, for example, in M. Saiichi, *Chūshin-gura to ha nani ka* [What is *Chūshin-gura*] (Tōkyō 1984).

was said to have no specific religious belief, Christianity included, and it is not irrational to assume from the fact that he belonged to the SDF that he did not strongly deny or hate Shintoism and its related idea of protecting the nation.[12]

Even given this common understanding, as I mentioned earlier, the case looks very different depending on which viewpoint one takes. Let me explicate three ways of viewing and understanding this case.

1. Opponents of the Judgment

From the viewpoint of the opponents, this case demonstrates one of the typical problems in traditional Japanese state ideology. The Supreme Court's finding that the SDF's cooperation with and support of the Friends was trivial is contrary to the facts. In line with the intention of the Defense Ministry, the SDF had long been campaigning for the enshrinement of servicemen who had died on duty at certain Gokoku shrines across Japan in order to raise the morale of servicemen, who are said to guard the state.[13] In the course of this campaign, they also promoted the idea of death for the state as death with honour.[14] This idea is a remnant of Japanese authoritarianism and militarism passed on from the generations who lived before the war. In this case, the SDF actually checked and reported on existing examples in various Gokoku shrines of the enshrinement of servicemen who had died while on duty and wrote a draft of the "rules of practice for worship of servicemen who have died on duty at Yamaguchi Gokoku Shrine" as well as the prospectus for donations for worship on behalf of the Friends. Almost all the individuals who contacted Mrs. Nakaya in person were SDF staff members working for the Friends' office, which was located in the same building of the SDF Regional Liaison Office. Thus, this case provides a typical example of authoritarian ideology being supported by a part of the state and a part of Japanese society and successfully suppressing the freedom of an individual.

This view may be supported by the sceptical feeling that a part of the Japanese population holds towards Shintoism based on negative historical experiences prior to the end of WW II.[15]

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12 On this point, see the claim made by the State as the defendant in Supreme Court, 1 June 1988, Minshū 42, 371–372, and the adverse claim made by Mrs. Nakaya (*ibid.,* 349)

13 Supreme Court, 1 June 1988, Minshū 42, 301.

14 See N. ASHIBE, *Ji'ei-kan gōshi to seikyō bunri gensoku,* [Joint Enshrinement of a Serviceman and Principle of Separation between State and Religion], Hōgaku Kyōshitsu 95 (1988) 12–13.

15 *Masaji Chiba* points out that while it is possible to see *jichin-sai* as a non-religious custom, based on the legal theory of the separation between state and religion (*supra* note 10), it is not proper as a political choice considering the history of Japan, which used Shintoism to support the national ideology during the wars. See M. CHIBA, *Asia-hō no tagenteki kōzō* [The Plural Structure of Asian Law] (Tōkyō 1998) 302–303.

2. From the Viewpoint of the Private Relationship

The second way of viewing the case is from the perspective of the private relationship involved within the conflict. From this viewpoint, despite any commitment the SDF was said to have made, the SDF itself had no strong intention to enshrine Mrs. Nakaya's deceased spouse against her will. The story only started with the fact that some families of deceased SDF members expressed their personal desire to have the deceased jointly enshrined at the Gokoku Shrine. Upon hearing this, the Friends and the SDF cooperated to realize the families' desire. In fact, after recognizing that Mrs. Nakaya did not wish to have Takafumi enshrined because of her religious faith, SDF staff tried to cancel the application for his enshrinement. However, knowing this, Takafumi's father asked that it not be cancelled. Later, the father sent the Friends a letter signed by the family members, including Takafumi's sister and brother, himself and even Mrs. Nakaya's father. It stated that they were all very happy and wished for Takafumi to be enshrined. The SDF and the Friends were embarrassed and asked Mrs. Nakaya to consult with the father.[16] Entangled in conflict within the family in such a way, Mrs. Nakaya felt that the SDF's attitude was irresponsible and insincere. She thought that her will should take priority. The SDF felt caught in a dilemma. This impasse seemed to provide the background for the court to talk about the necessity of tolerance between private parties.

3. From the Viewpoint of the Church Group's Involvement

The third view focuses on the Christian association to which Mrs. Nakaya belonged. In 1958, she was baptized at the Yamaguchi Shin'ai Church of the United Christian Church, which was led by the priest Kenji Hayashi. He had organized study sessions opposing a series of legislative measures aimed at establishing government funding for the Yasukuni Shrine, which was established to enshrine the souls of loyalists who had died in the Meiji Restoration and went on to include imperial subjects who had died in WW II. He suggested that one of the members of the study group collect signatures for a petition to protest the state funding for Yasukuni.[17]

When the SDF and the Friends began to contact her about her deceased husband's enshrinement, she consulted with Priest Hayashi about the correct way to worship. Previously, Mrs. Nakaya had attended the Buddhist funeral ceremony for Takafumi held by the SDF and the Buddhist memorial service held by his father. She also bought a Buddhist altar for her home so that she could worship him.[18] But she hesitated to have him enshrined at the Gokoku

16 Supreme Court, 1 June 1988, Minshū 42, 391.

17 N. FIELD, In the Realm of a Dying Emperor (New York 1991) 124–125.

Shrine. Hayashi strongly supported her denial of the enshrinement and accompanied her to meet SDF staff members to protest against it.[19] The Friends claimed that while they were only trying to console the souls of deceased SDF members, Priest Hayashi politicized the case, promoting Mrs. Nakaya's discomfort to make her situation part of his campaign against Yasukuni Shrine, which didn't have any direct relation to the local Gokoku Shrine.

V. The Case from the Legal Pluralism Perspective

From the viewpoint of legal pluralism, this case can basically be explained as one in which the court admitted room for the autonomy of a private association's – the Friends' – self-regulation. It is also the case that the Supreme Court demonstrated the limits of the direct application of a constitutional right to solve conflicts within a family or between private associations. The theories used to justify the constitutional limit and the application of an association's self-regulation were "the indirect or restricted effect of constitutional law when applied to a case between private parties" in general and the idea of tolerance between different religious beliefs specific to the case.

From a legal-pluralist viewpoint, which does not expect state laws to take priority in all cases and tries to accept different values existing in a society, this reasoning can mostly be appreciated. However, there do seem to be some problems.

First, it must be pointed out that nobody can really deny the fact of a strong relationship between the Friends and the SDF, whatever the constitutional consequences of that relationship. Even if one denies the relationship between them as the Supreme Court did with its formalistic way of understanding the fact, one can never deny social or ideological continuity between them.[20] Legal pluralism often supports powerful self-regulations substantially backed by the state or state laws, contrary to its idea of promoting plural values or interests within a society expressed by norms other than state laws. This sort of danger of legal pluralism explains why many scholars see this case as an example of the indifference and insensitivity to an individual's religious freedom in the Japanese state court.

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18 Supreme Court, 1 June 1988, Minshū 42, 377–378.

19 Supreme Court, 1 June 1988, Minshū 42, 354.

20 On the formalistic interpretation the Supreme Court used and its relationship with the Japanese style of *"Institutsgarantie"* theory relating to the "separation between state and religion", see K. Sato, *Nihon-koku kenpō-ron* [A Theory of Japanese Constitutional Law] (Tōkyō 2011) 236–237. On the opposition to the Court's use of the *"Institutsgarantie"* theory to avoid the direct judicial review of violations of an individual's rights in this case, see T. Inoue, *Hō to iu kuwadate* [Law as Project] (Tōkyō 2003) 174–176.

Second, in terms of the conflict within the family, the other family members seemed to show no respect for Mrs. Nakaya's wish to avoid the enshrinement. Takafumi's father and other family members went over her head to the SDF to deny her wish without contacting her. There also seemed to be no respect for her wish on the part of SDF staff, who were reported to have said at the beginning of the petition procedure that she must be glad about the enshrinement of her spouse as a Japanese national. Additionally, after the litigation, Mrs. Nakaya was reported to have received numerous harassing telephone calls and threatening letters, saying things such as "You are possessed by a devil" or "Go to a Christian country!"[21] The Supreme Court's preaching of tolerance toward Mrs. Nakaya was not so effective given such intolerance in Japanese society towards a person belonging to a minority group, as she did.[22] We should be careful of the oft-cited collectivism in Japanese society when considering the actual results of legal pluralism. It may sometimes lead to the result that only the stronger party can enjoy its norms, while the interests of the weaker party are sacrificed.

As mentioned above, I expect positive possibilities to emerge from legal pluralism, according to which people may enjoy and coordinate their activities in line with their own reasonable order, irrespective of whether this is state law or non-state law. In pursuing this, we need to avoid the danger of hidden collusion between certain types of self-regulation and state law, which may lead to the hidden imposition of state ideology by the state under the guise of private, voluntary action. We also need to be sensitive to the danger of collectivism when considering whether to support legal pluralism.[23]

Thus, what conditions are necessary for the self-regulation in this case to function in a more proper way? In other words, what conditions would have had to be fulfilled for this self-regulation to function as a "law" providing reasonable guidance regarding the activities of the people involved in this case. Here, we can utilize lessons from legal pluralism.

Three issues can be pointed out. First, one of the biggest problems in this case was that the relationship between the state and the private association, the Friends, was too close. As a result, the state entangled itself in the serious conflict within the family through the activity of the Friends. With a more autonomous position as a private, mutual aid association which did not advocate for Shintoism in the name of the state, the Friends' self-regu-

21 FIELD, *supra* note 17, 133–136.

22 See N. SASAGAWA, *Shūkyō-jō no jinkaku-ken no rekishi-teki igi* [Historical Meaning of Personal Right on Religion], Hōritsu Jihō Vol. 60 No. 10 (1988) 60–61.

23 On the complicated relationship between liberalism and legal pluralism, and the cases where liberalism based on individualism is incompatible with legal pluralism, see R. MICHAELS, On Liberalism and Legal Pluralism, in: Maduro/Tuori/Sankari (eds.), Transnational Law: Rethinking European Law and Legal Thinking (Cambridge 2014) 125–130.

lation for offering condolences to deceased people could have been more reasonable and justifiable.[24]

Second, even if the relationship between the SDF and the Friends had been slight enough to be ignored, the Friends' self-regulation was deficient in that it only anticipated agreement from and within the families of the deceased, thereby neglecting the possibility of disagreement from individual family members. It required more comprehensive rules for cases where there were disagreements – for example, a rule giving priority to the surviving spouse's wishes or a rule preventing the unauthorized use of a person's name as a donor.

However, such imperfections of self-regulation cannot be perfectly avoided in many cases. Thus, for a self-regulation to function as a law, as reasonable guidance for people's conduct, some device or institution to find and amend deficiencies on demand is necessary. This is the third point. Here, the importance of the procedural setting has to be emphasized.[25] Information disclosure systems, such as the disclosure system for directors' remuneration used in the Japanese corporate governance code, can work in some cases. But one of the most advocated methods is the institutionalization of some dispute resolution system. With the term "dispute resolution", I don't mean the court-like system only. The process can be a more informal or more primitive one intended to hear the voices of the parties involved. In this enshrinement case, there were no rules regarding a process for hearing grievances.

VI. Conclusion

In conclusion, for a self-regulation to become a "law" directing people's conduct outside the state law, it needs (1) enough autonomy from the state organization, (2) enough comprehensiveness of the rules to be applied to possible cases, and (3) some institutionalized process for hearing claims (grievances). To the extent that these requirements are fulfilled, a self-regulation can be a "law" to be applied beyond parties to contracts or people who obey the rules of any association on a fully voluntary basis. This seems to be a suggestion we can obtain from the perspective of legal pluralism in our domestic case.

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24 Berman suggests that when a non-state legal practice is internal, the practice should be given more leeway than when the state is part of the relevant affiliation, thereby taking account of the community affiliation analysis, which reflects a pluralist vision of conflict law. P. Berman, The Evolution of Global Pluralism, in: Cotterrell/Del Mar (eds.), Authority in Transnational Legal Theory (Cheltenham, UK/Northampton, MA, USA 2016) 162–163.

25 In the area of legal-normative regimes outside of the nation state, the shift from legitimacy based on state constitutional order to legitimacy based on process and procedure has to be emphasized. See P. Paiement, Paradox and Legitimacy in Transnational Legal Pluralism, Transnational Legal Theory 4 (2013) 198, 203, 213.

Self-commitments and the Binding Force of Self-regulation with Respect to Third Parties in Germany

Patrick C. Leyens[*]

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I. INTRODUCTION[1]

Self-commitments to non-statutory rules or standards of good conduct serve to generate trust. Generating trust can be indispensable for business where legislation does not yet exist, when compliance with the legal minimum does not satisfy customers, or where maintaining such a minimum will not suffice to organize exchange within an industry. Arguably, self-commitments as a form of self-regulation are often made in the shadow of the law, i.e. to avoid legal intervention into an industry that has come into the focus

* Prof. Dr. Patrick C. Leyens, LL.M. (London), is Professor (hon.) of Law & Economics at the Erasmus University Rotterdam, Erasmus School of Law, Netherlands, and Guest Professor at the Humboldt University of Berlin, School of Law, Berlin, Germany.

1 The following article is based on P. C. LEYENS, Selbstbindungen an untergesetzliche Verhaltensregeln: Gesetz, Vertrag, Verband, Publizität und Aufsichtsrecht, Archiv für die civilistische Praxis (AcP) 215 (2015) 611–654.

of the legislature.[2] Ideally, self-regulation leads to a better allocation and use of rule-making resources. Private rule-making and standard setting can serve to fill gaps where legislators lack the relevant knowledge.[3] Moreover, self-commitments to such rules and standards can trigger innovation by helping the market to distinguish between offers and, hence, by increasing competition within one industry.

Uncertainty about the legal consequences can lead to unfavourable risk aversion and hamper the positive effects of self-regulation. Whilst it is agreed that self-commitments are an important component of self-regulation, it is widely unexplored how and to what extent they influence legal duties. When one party commits herself towards the other party, legal doctrine will normally provide the relevant categories for determining the consequences of non-compliance. The position is much less clear when self-commitments are used to secure a third party's trust. The term 'third' is used here to describe constellations where a person is either not a party to the agreement to which the self-commitment is tied or where such agreement does not exist from the outset.

The main purpose of this article is to show that a typology of binding mechanisms helps to narrow this uncertainty. The article is written from a German legal perspective and includes selected comparative remarks. Described phenomena mainly relate to self-commitments made by business professionals. In section II, a brief look at the theory and practice of self-commitments will explain where the discussion stands and which challenges need to be addressed. Section III presents the typology of binding mechanisms, these including norms, contracts, charters, and disclosure. Section IV looks at the consequences of non-compliance with a self-commitment in respect of third parties. Section V concludes with a summary of the main findings regarding the binding effects of self-commitments towards third parties.

II. Self-Commitments in Theory and Practice

Self-commitments to non-legal standards have most probably always been used by professional suppliers of goods or services. Their practical rele-

2 The term was coined by R. H. Mnookin/L. Kornhauser, Bargaining in the Shadow of the Law: The Case of Divorce, Yale Law Journal 88 (1979) 950, 968. It was taken up, for instance, by T.M.J. Möllers/B. Fekonja, Private Rechtsetzung im Schatten des Gesetzes: Ein Beitrag zur Bindungswirkung privaten Rechts am Beispiel des Deutschen Corporate Governance Kodex und der Deutschen Rechnungslegungs Standards, 2012, 777, 779.

3 J. Basedow, Komplexität der Wirtschaft, Allokation des Wissens und privates Privatrecht, in: Callies (ed.), Transnationales Recht: Stand und Perspektiven (Tübingen 2014) 141, 142.

vance is rarely questioned. Especially technical standards are often perceived as a binding legal source by producers as well as by their customers. The logic is simple: Producers will often not be able to sell a product that does not conform to the relevant industry standards. Similarly, service providers depend on their clients' trust in proper execution, and corporations need to convince investors of sound corporate governance or socially responsible behaviour. Where this simple logic applies and where compliance is safeguarded through mutual trust and reputation, legal scrutiny is of small importance. From a legal perspective, the pivotal question concerns the consequences of non-compliance in cases when such mechanisms fail.

1. Legal Approaches

The approaches to self-commitments in German legal theory look back on an array of schools of thought. *Max Weber* introduced the distinction between the legal order and the societal order.[4] Within his bifocal taxonomy, self-commitments without legislative backing would be subject to moral suasion and outside the law. Leading scholars of the 19th century like *Otto von Gierke* and *Andreas von Thur* had already laid the foundations for classifying private sets of rules or standards either as norms or contracts.[5] Setting norms requires a degree of group empowerment whilst, for a contractual obligation, a sufficient consensus between the parties is needed. Self-commitments reveal elements of both categories: They often refer to a set of rules or standards set by someone else, e.g. by an industry association. At the same time they are made to induce or facilitate contractual consensus.

Consensus as a binding mechanism requires indicia of seriousness, be that consideration in common law or causa in civil law.[6] Two developments in the German legal discourse of the 20th century outline the difficult task of determining the requirements of consensus: The first concerns the attempt to create extra-legal binding mechanisms. At the time, the requirements for consensus by a matching of offer and acceptance under the German Civil Code were arguably interpreted too narrowly. This led to the idea of a de facto contract *(faktischer Vertrag),* i.e. attaching binding force to (mere) social behaviour.[7] Classic examples relate to unpaid train journeys or the use of electricity without a service agreement. The legal construct of

4 M. WEBER, Wirtschaft und Gesellschaft: Grundriß der verstehenden Soziologie (5th ed., Tübingen 1972) 187.

5 O. VON GIERKE, Deutsches Privatrecht, Vol. 1: Allgemeiner Teil und Personenrecht (Leipzig 1895) 120, 142 ff.; A. VON TUHR, Der Allgemeine Teil des Deutschen Bürgerlichen Rechts, Vol. 1: Allgemeine Lehren und Bedeutung (Leipzig 1910) 503.

6 K. ZWEIGERT/H. KÖTZ, An Introduction to Comparative Law (3rd ed., Oxford 1998) 388.

a de facto contract, concluded absent consensus, found support in German courts as well as from leading scholars like *Karl Larenz*.[8] Before the turn of the century, however, the idea had to give way to the stricter, albeit more generously interpreted concept of tacit consensus. Following up on these developments, a mere social consensus on non-statutory rules or standards does not provide a basis for legal consequences.

The second area of intense discussion relates to the alleged normative nature of standard terms ('small print'), which came into focus in the course of industrialization and an increasing number of mass transactions. In his inaugural lecture at the University of Freiburg in 1933 *Hans Grossmann-Doerth* explained the increasing presence of non-negotiated contracts as an attempt of business to create its own legal order *("Selbstgeschaffenes Recht der Wirtschaft")*.[9] Later *Friedrich Kessler* coined the term 'contracts of adhesion' and reinforced the view that judicial review of standard terms is needed to correct failures of contracting that are due to unequal negotiation power.[10] Market power as a reason for contracting failures has been challenged in interdisciplinary literature.[11] It is true though that the ability of one party to dictate the terms of a transaction challenges the assumption that contractual consensus serves as a warranty for complete promises in the sense of *Walter Schmidt-Rimpler*.[12]

The most visible outcome is the consumer protection movement, today an area of genuine European Union legislation. This movement, however, did not lead to a new understanding of the legal nature of standard terms nor to other attempts of business to draw up its own law. It rather brought forth a specific set of rules regarding judicial review of the inclusion of

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7 G. HAUPT, Über faktische Vertragsverhältnisse (Leipzig 1941) 9, 16, 21 distinguishing between legal relationships arising from social contacts (culpa in contrahendo), from affiliating with other persons (de facto corporate charters or de facto labour contracts), and from social obligations (e.g. a train journey). According to his view, in all the mentioned examples a legal obligation is created without a matching of offer and acceptance (*ibid.* 27).

8 K. LARENZ, Allgemeiner Teil des deutschen bürgerlichen Rechts (6th ed., Munich 1983) § 28 II. He gave up the idea of the de facto contract only in the following edition of 1989.

9 H. GROSSMANN-DOERTH, Selbstgeschaffenes Recht der Wirtschaft und Staatliches Recht (Freiburg 1933).

10 F. KESSLER, Contracts of Adhesion – Some Thoughts about Freedom of Contract, Columbia Law Review 43 (1943) 662.

11 P. C. LEYENS/H.-B. SCHÄFER, Inhaltskontrolle allgemeiner Geschäftsbedingungen. Rechtsökonomische Überlegungen zu einer einheitlichen Konzeption von BGB und DCFR, Archiv für die civilistische Praxis (AcP) 210 (2010) 771, 779, 782.

12 W. SCHMIDT-RIMPLER, Grundfragen einer Erneuerung des Vertragsrechts, Archiv für die civilistische Praxis (AcP) 147 (1941) 130, 149.

standard terms into a contract as well as specific fairness tests regarding the contents of such terms.

The struggle to build up a thorough understanding of the binding mechanisms that form the so-called 'private legal order', including self-regulation and self-commitments, continues until today in the civil law as well as in the public law discussion.[13] Leading works like the monographs by *Johannes Köndgen, Gregor Bachmann,* and the one jointly written by *Petra Buck-Heeb* and *Andreas Dieckmann* argue, of course with qualifications, that legal effects are subject to the legitimacy of the set of private rules.[14] Legitimacy has many facets. The possible criteria for narrowing what amounts to legitimacy include lateral consent, group utility, and involvement in the standard-setting process. These criteria are well-fitted to assess the legal relationship between rule-maker and rule-taker in a context of subordination. For example, a lack of involvement in the process of setting the rule or standard can justify more far-reaching judicial review. Self-commitments, however, do not necessarily involve elements of subordination. They might also serve co-ordination at arm's length.

This short survey has shown that privately set specifications of behaviour, without legislative backing, do not assume normative force simply by the fact that they are used by many. Another outcome is that contractual obligations that might derive from such specifications can be (and often should be) subject to more intense court review than freely negotiated terms. The open question concerns the legal significance towards third parties who are ultimately affected by non-compliance with a self-commitment.

2. Interdisciplinary Assessments

In interdisciplinary literature, the binding effects of self-commitments are often explained by network gains.[15] Since the article published by *Lisa*

13 S. AUGSBERG, Rechtsetzung zwischen Staat und Gesellschaft: Möglichkeiten differenzierter Steuerung des Kapitalmarktes (Berlin 2003); C. BUMKE/A. RÖTHEL (eds.), Privates Recht (Tübingen 2012); T.J.M. MÖLLERS (ed.), Internationalisierung von Standards (Baden-Baden 2011); T.J.M. MÖLLERS (ed.), Geltung und Faktizität von Standards (Baden-Baden 2009); F. KIRCHHOF, Private Rechtsetzung (Berlin 1987) 138 ff.

14 J. KÖNDGEN, Selbstbindung ohne Vertrag (Tübingen 1981) 97 ff., 233; G. BACHMANN, Private Ordnung: Grundlagen ziviler Regelsetzung (Tübingen 2006) 206; P. BUCK-HEEB/A. DIECKMANN, Selbstregulierung im Privatrecht (Tübingen 2010) 276.

15 For a recent account see A. ENGERT, Private Normsetzungsmacht: Die Standardisierung von Regelungen im Markt als Form der Fremdbestimmung, Rechtswissenschaft (RW) 2014, 301, 309 ff.

Bernstein in 1992, the perhaps best-known example is the New York Diamond Dealers Association.[16] The New York Diamond Dealers created a more or less comprehensive private legal order, including mechanisms for dispute resolution tailored to their business needs. Another well-researched example is the City of London and its 'Square Mile' which, at least historically, has comprised all industries relevant for pursuing a corporate or financial transaction. Within this geographically confined area, 'The London City Code of Takeovers and Mergers' of 1968 gained high acceptance levels amongst corporate actors and also their advisors.[17]

The explaining force of network effects is generally accepted for so-called micro-societies. The examples mentioned so far concern geographically concentrated groups which come close to what one might call a micro-society. The pitfall of explanations that rest on network effects seems to be the definition of what a network is and what its benefits are. The parties (also third parties) might generally benefit from enhanced trust. While this explains collective benefits it does not necessarily explain the individual decision to adopt standards of good conduct.

The explaining force is less strong outside micro-societies, e.g. as in the more regionally organized market of finance and ancillary financial services found in Germany.[18] Still, we see self-commitments. The general levels of acceptance for the self-regulatory Code on Takeovers published by the Stock Exchange Expert Commission in 1995,[19] however, were considerably lower than those for its British counterpart.[20] Other attempts like the Guidelines on Insider Trading of the 1970s failed to attract a sufficient number of subscriptions.[21] At least in hindsight, the low levels of acceptance are not surprising in either area. They can be explained by indi-

16 L. BERNSTEIN, Opting out of the Legal System: Extralegal Contractual Relations in the Diamond Industry, Journal of Legal Studies 21 (1992) 115.

17 B. R. CHEFFINS, Company Law (Oxford 1997) 364 ff.; H. BAUM, Funktionale Elemente und Komplementaritäten des britischen Übernahmerechts, Recht der Internationalen Wirtschaft (RIW) 2003, 421.

18 For a comparative account see K. J. HOPT, Self-Regulation in Banking and Finance – Practice and Theory in Germany, in: La Déontologie bancaire et financière/The Ethical Standards in Banking & Finance (Bruxelles 1998) 53.

19 Übernahmekodex der Börsensachverständigenkommission beim Bundesministerium der Finanzen. The last revised version of 14 July 1995 is printed with short comments by K. J. HOPT, in: Baumbach/Hopt (founder/ed.), Handelsgesetzbuch (30th ed., Munich 2000) Übernahmekodex (18).

20 T. HOEREN, Selbstregulierung im Banken- und Versicherungsrecht (Karlsruhe 1995) 199; K. J. HOPT, Europäisches Übernahmerecht (Tübingen 2013) 21, 26; G. ROSSKOPF, Selbstregulierung von Übernahmeangeboten in Großbritannien: Der City Code on Takeovers and Mergers und die dreizehnte gesellschaftsrechtliche EG-Richtlinie (Baden-Baden 2000) 86.

vidual incentives that, at the time, were constrained neither by sanctions for neglecting reciprocity within a micro-society nor by sanctions of a fully developed capital market. Regarding takeovers, positional conflicts of interest of the managers of possible target companies will have played a role. Regarding insider dealing, the expectation of profits from successful deals could explain the unwillingness to subscribe.

It seems that the reasons for compliance with non-statutory rules and standards rests in an individual calculus rather than in a collective bargaining mechanism. Where compliance is de facto compulsory for doing business within the relevant business community, the role of self-commitments is strong. The opposite is true where business relations can be built up without self-commitments.

3. Regulatory Embedding

The relevance of self-commitments to non-statutory rules or standards has gained considerable momentum from the fact that they are increasingly embedded into statutory reporting duties through the regulatory technique of 'comply or explain'.[22] Since 2002, companies listed in Germany have been obliged to annually state their compliance with the recommendations of the German Corporate Governance Code.[23] The code is administered by a commission that largely acts outside governmental or parliamentary control. In a next step, European Union law fostered disclosure through the amendment of the Accounting Directive in 2006, whereby listed companies are obliged not only to disclose their compliance but also to give reasons for possible non-compliance with a national corporate governance code.[24]

The German Supreme Court in Civil Matters addressed the legal effects of the annual compliance statement in two 2009 decisions.[25] The court held that shareholders may void their ratification of management activities *(Ent-*

21 Insiderhandels-Richtlinien. The last revised version of June 1988 is printed with short comments by K. J. HOPT, in: Baumbach/Hopt (founder/ed.), Handelsgesetzbuch (29th ed., Munich 1995) Insiderhandels-RL (16).

22 P. C. LEYENS, Comply or Explain im Europäischen Privatrecht: Erfahrungen im Europäischen Gesellschaftsrecht und Entwicklungschancen des Regelungsansatzes, Zeitschrift für Europäisches Privatrecht (ZEuP) 2016, 388, 390, 417.

23 For details see P. C. LEYENS, in: Hopt/Wiedemann (eds.), Großkommentar zum Aktiengesetz (4th ed., Berlin 2012) § 161 paras. 8, 73.

24 Directive 2006/46/EC of the European Parliament and of the Council of 14 June 2006 amending Council Directives 78/660/EEC on the annual accounts (and other directives), Official Journal L 224, 16 August 2006, 1 (title abbreviated by the author).

25 BGH, judgment of 16 February 2009 – II ZR 185/07 *(Kirch/Deutsche Bank),* BGHZ 180, 9 para. 18; BGH, judgment of 21 September 2009 – 2085 II ZR 174/08 *(Umschreibungsstopp),* BGHZ 182, 272 para. 16.

lastung) if necessary corrections of a false or incomplete annual statement of compliance with the non-statutory corporate governance code were not made prior to their assembly at the general meeting.[26]

In a 2014 recommendation the European Commission envisages a further tightening of 'comply or explain' by requiring companies not only to explain their non-compliance but also to state how alternative measures will accord to the general goals of the applicable national corporate governance code.[27] This advance could sooner or later be expanded to other areas where comply or explain is used. For example, from 2017 on the European Union Directive on Corporate Social Responsibility obliges not only listed but also large companies, e.g. companies with more than 500 employees, to annually disclose their policies in regard to, inter alia, environmental, social, and employee matters.[28] The compliance statement may be formulated along the lines of principles or standards issued by international organizations, e.g. the United Nations Global Compact. If a company does not pursue policies in relation to one or more of the relevant matters, it must provide a clear and reasoned explanation for not doing so. The reformed European Union Shareholder Rights Directive 2017 will expand the scope of legally embedded self-commitments by using the regulatory technique of comply or explain also for institutional investors, asset managers, and proxy advisors.[29]

No doubt, statutory reporting requirements and their fostering will change the incentives of corporate actors, professional investors and their advisors. Empirical assessments might not be unanimous, but it can hardly be argued that professional actors will ignore reputational capital and public standing when choosing their mode of behaviour. It should be noted that none of the legislative advances has seriously investigated the binding effects of self-commitments in general and the liabilities for non-compliance in respect of third parties in particular.

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26 S. MUTTER, Überlegungen zur Justiziabilität von Entsprechenserklärungen nach § 161 AktG, Zeitschrift für Unternehmens- und Gesellschaftsrecht (ZGR) 2009, 788, 794; LEYENS, *supra* note 23, paras. 468, 484 for further discussion.

27 Commission Recommendation of 9 April 2014 on the quality of corporate governance reporting ('comply or explain'), Official Journal L 109, 12 April 2014, 43, para. 8(e).

28 Art. 19a Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups, Official Journal L 330, 15 November 2014, 1.

29 Arts. 3g (institutional investors), 3i (asset managers) 3j (proxy advisors) Directive (EU) 2017/828 of the European Parliament and of the Council of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement, Official Journal L 132, 20 May 2017, 1.

III. Binding Force of Self-commitments

It is widely agreed that a self-commitment can have a certain binding effect. The legal basis, scope, and consequences are less clear. Particularly in light of the increased use of 'comply or explain' in European Union legislation, it seems advisable to chart self-commitments more precisely within the legal landscape. Positioning seems advisable, especially with a view to the increased use of 'comply or explain' in European Union legislation. The following typology can help to organize the debate and narrow uncertainties regarding, for example, subsequent changes in private rules or standards and possibilities to escape future obligations. In essence, it will be suggested to group the binding effects along the lines of norms, contracts, charters, and disclosure.

1. Norms

Non-statutory rules or standards do not qualify as laws (§ 2 Introductory Law to the German Civil Code). Accordingly, they rarely give rise to normative effect but rather restate duties that are implicit in the relevant activity. The skiing rules that are published by the Fédération Internationale de Ski (FIS) might serve as an example. One could argue that the act of skiing qualifies as a *tacit* self-commitment to generally accepted rules, although, of course, not all skiers will have ever read the relevant catalogue of duties. Courts have used the duties set out by the FIS to resolve tort law cases.[30] The test applied, however, asked whether the rules were generally accepted in the sense of customary law.

Drawing the line between customary law and mere custom can be difficult. Customs only inform the interpretation of duties existing under a contract. This is of particular relevance in commercial law (§ 346 German Commercial Code). Customs do not, by themselves, create new duties. German courts have been reluctant to categorize accepted commercial practice as customary law. Points of discussion have concerned the *lex mercatoria* as such, generally agreed sets of rules on terms used in international contracts (INCOTERMS), and uniform customs and practice governing documentary credits (UCP).[31] It seems, however, that judges are well aware

30 BGH, judgment of 11 January 1972 – VI ZR 187/70, BGHZ 58, 40, 42 ff., Juris para. 14. For details see Buck-Heeb/Dieckmann, *supra* note 14, 87.

31 J. Basedow, Die Incoterms und der Container oder wie man kodifizierte Usancen reformiert, The Rabel Journal of Comparative and International Private Law (RabelsZ) 43 (1979) 116, 125 distinguishing between core provisions (customary law) and ancillary provisions (customs). More recently on stock exchange usages A. Fleckner, Die Börsengeschäftsbedingungen, Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht (ZHR) 180 (2016) 458, 506.

of the practical needs in commerce. For example, established trade terms like 'free on board' (FOB) have informed the interpretation of carriage contracts.[32] Where arbitration is common in the relevant industry, courts have assumed a tacit arbitration agreement.[33]

In sum, the first binding mechanism of 'norms' does not appear to be an area where self-commitments play a genuine role. Within this category self-commitments are rather of a declaratory nature, either because they merely declare compliance with obligations already existing under (customary) law or because they inform the interpretation of duties that are created by contract.

2. Contracts

The next type of a binding mechanism is termed a 'contract'. In practice, offerors of a product or service often agree to include a non-statutory standard in the performance description. The standard then becomes part of the bargain and determines proper performance as any other description does. The legal basis of the binding effect, including possible contractual rights of a third party, is then the contract itself. Accordingly, the self-commitment merely serves to incorporate a set of duties that otherwise could have been included in the agreement by means of copy and paste.

It follows that general rules of contractual interpretation inform the scope of the binding effect (§§ 133, 157 German Civil Code). Interpretation must be based on the promise as given at the time of contract conclusion. Generally, changes in the relevant non-statutory rule or standard do not alter the promise in the future. Unless changes are agreed to by the party who subscribed to the standard, the scope of the obligation stays where it is upon contract conclusion (static duty).

Not surprisingly, courts have faced the task of deciding cases of omitted reference to a generally accepted standard as well as cases that concerned changes in the relevant standard subsequent to contract conclusion. The relevant legal questions are intertwined: To start with, an omitted reference to the relevant standard can be cured by applying general principles of gap-filling. Concepts of judicial gap-filling differ between jurisdictions. The smallest common denominator is that a court may not rewrite the contract. The German concept of gap-filling is tied to contractual interpretation, with an emphasis on good faith (§ 242 German Civil Code).

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32 No. 9 Incoterms 2010. For details see A. MAURER, Lex Maritima: Grundzüge eines transnationalen Seehandelsrechts (Tübingen 2012) 48.

33 BGH, judgment of 3 December 1992 – III ZR 30/91, Neue Juristische Wochenschrift (NJW) 1993, 1798; OLG München, judgment of 3 July 1996 – 7 U 2162/96, Wertpapier-Mitteilungen (WM) 1996, 2335, 2336. For details see BUCK-HEEB/DIECKMANN, *supra* note 14, 155.

This link implies that a court might use a non-statutory rule or standard only when there are sufficient indicia of a will to include that standard (implicit term). A common use of a certain professional standard within the relevant industry might, but does not necessarily pass this legal test. The historic debate about the classification of non-statutory rules or standards as either contracts or norms appears to be reflected in scholarly attempts to give greater weight to objective methods of interpretation. Scholars like *Werner Flume* and *Otto Sandrock* proposed to include duties into the agreement if those duties are characteristic of a transaction of the type in question.[34] These proposals have been criticized for neglecting the subjective will of the parties, and it seems they are today generally disfavoured.[35]

The prevailing rejection of placing exclusive weight on objective circumstances when interpreting a contract is convincing, especially concerning self-commitments to non-statutory rules or standards: For example, the parties might have voluntarily opted for the legally minimum duties with a view to saving costs, i.e. they might have excluded the applicability of commonly used standards.[36] It follows that deviations from the market price – if there is one – can carry some persuasive power for determining whether the parties, in their agreement, envisaged extra duties or whether they wished to restrict their duties to the legal minimum. Only if there are sufficient indicia of a subjective will does it seem justified to hold the offeror to extra duties derived from the non-statutory set of behaviours.

Still, the problem of a subsequent change in the standard might arise. Non-statutory codes of conduct are mostly administered by professional bodies or, more generally, by commissions that represent the interests of offerors or offerees or, ideally, both sides. Commissions normally review the contents of the codes of conduct they administer from time to time. It follows that there might be a change between the time of contract conclusion and performance. In fact, this constellation will often present a challenge in determining the duties in long-term contracts. It can also be of relevance when, for example, a service provider declares herself to be a member of an association of professionals. The binding mechanism in the latter cases is a 'charter', which will be treated in the next section.

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34 W. FLUME, Allgemeiner Teil des bürgerlichen Rechts, Vol. 2: Das Rechtsgeschäft (Berlin 1965) 322 ff., 327; O. SANDROCK, Zur ergänzenden Vertragsauslegung im materiellen und internationalen Schuldvertragsrecht (Cologne 1966) 87 ff.

35 R. BORK, Allgemeiner Teil des Bürgerlichen Gesetzbuchs (4th ed., Tübingen 2016) para. 537; M. WOLF/J. NEUNER, Allgemeiner Teil des deutschen Bürgerlichen Rechts (11th ed., Munich 2016) § 35 Rn. 59.

36 W. SCHÖN, Der Zweck der Aktiengesellschaft – geprägt durch europäisches Gesellschaftsrecht? (editorial), Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht (ZHR) 180 (2016) 279, 286 on corporate social responsibility.

Regarding the binding mechanism of a 'contract', a court holding from 1998 that is based on the following facts serves as illustration:[37] The producer agreed to comply with a certain technical standard. A change in the relevant standard had already been publicly announced when the agreement was made. Before the time of performance the requirements under that standard changed. Resolving the dispute according to general principles of interpretation, the court had to take the view of a recipient of the offer (objective component) in the shoes of the individual addressee (subjective component). The outcome of this assessment can either be a promise that incorporates the standard in its wording at the time of contract conclusion or one that incorporates the wording at the time of performance. The case was decided in favour of the latter interpretation; hence the court assumed a duty to apply the standard in its current version (dynamic duty). It is unclear to what extent this holding can be generalized. Had the forthcoming change of the standard not been known at the time of contract conclusion, the opposite finding might have been more expectable.[38]

In sum, self-commitments of the type 'contract' are firmly tied to the terms of the given promise. Gap-filling according to principles of contractual interpretation does not allow courts to insert non-statutory duties unless there is sufficient evidence that the parties would have done so had they thought of the matter at the time of contract conclusion. A contractual promise generates a static duty that, absent mutual consent ex ante or ex post, does not by itself change over time. Future changes in a non-statutory rule or standard accordingly determine the performance description only where the parties so wished at the time of making their agreement. These findings demonstrate the considerable scope of 'contract' as a binding mechanism, but at the same time they reveal the limits of the binding effects that result.

3. Charters

Self-commitments to a 'charter', e.g. of an industry association, can lead to farther reaching effects than a contract, precisely in regard to a change in the duty set subsequent to the time of making the agreement. Professional service providers tend to make their clients aware of any membership in reputable business associations. By doing so they send an extra signal of trust to existing or prospective clients. Extra trust signals are needed espe-

37 BGH, judgment of 14 May 1998 – VII ZR 184/97, BGHZ 139, 16, 19, Juris para. 16.

38 J. KÖNDGEN, Privatisierung des Rechts – Private Governance zwischen Deregulierung und Rekonstitutionalisierung, Archiv für die civilistische Praxis (AcP) 206 (2006) 477, 484, however, argues for a normative effect from accepted technical standards.

cially when the object of performance has characteristics of a credence good, i.e. when the suitability of the good cannot be determined ex ante and when ex post experience will come too late. Financial advice in regard to private pensions is a prominent example because negative outcomes resulting from following the advice can usually no longer be corrected when they become observable.

There are many possible modes of letting clients know of a membership in a reputable association prescribing adherence to high standards of conduct. One might think of oral declarations, letterhead insignias, printed certifications on the office wall, website announcements, or the like. It is a characteristic feature of the binding mechanism of 'charters' that the duties as a member of an association inform the client at the time of contract conclusion. As opposed to the mechanism of 'contracts' discussed above, non-statutory charter provisions are not embodied in the promise in a way that equals a simple copy and paste. As opposed to the mechanism of 'disclosure', which will be discussed in the next section, the trust signal must necessarily be sent to the client before or at the time of contract conclusion to unfold legal effects.

To give an example: In the past, many believed that credit rating agencies were essentially free in determining the methods of their assessment.[39] Binding regulation was widely absent in the European Union before the Regulation on Credit Rating Agencies of 2009.[40] But what if an agency signed the rating contract as a member of the German Association for Financial Analysis and Asset Management (DVFA)? The standards of the DVFA reach or reached beyond statutory obligations for solicited ratings in that they, inter alia, require rating agencies to undertake a plausibility check of the data basis provided by the rated corporation and impose an obligation to gather information from inside the corporation rather than relying exclusively on market data.[41] The duty to produce the rating stems from a contract but, at the same time, the scope of that duty is widened by the non-statutory charter provisions of an association of professionals. The membership in an association creates a continuing obligation. It obliges adherence to the *currently* applicable rules and standards.

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39 U. G. SCHROETER, Ratings – Bonitätsbeurteilungen durch Dritte im System des Finanzmarkt-, Gesellschafts- und Vertragsrechts (Tübingen 2014) 745.

40 Regulation (EC) No. 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies, Official Journal L 302, 17 November 2009, 1.

41 DVFA-Rating Standards und DVFA-Validierungsstandards, DVFA-Finanzschriften 4/2006, No. 1.1.4.3. Compare to Regulation 1060/2009, *supra* note 40, Art. 8 para. 2.

The binding mechanism of 'charter' unfolds genuine effects in two ways: Firstly, including membership in an industry association into the contractual promise obliges adherence to not only the current standard but also its updates over time (dynamic duty). Secondly, the possibilities of one-sided changes play a greater role than under the contract-type binding mechanism. This second matter is most important with a view to the possibilities of escaping the effects of non-statutory rules or standards based on membership and a corporative charter. Under German constitutional law no one can be bound to perpetual membership (Art. 9 German Constitution). Future termination of membership hence must be permissible. This can lead to a clash between the customer's expectations – which would be justified under a contract-type binding mechanism – and the provider's constitutional freedom to terminate membership in an association.

Courts will need to find a way to balance contractual expectations and constitutional rights in a manner that satisfies both positions without neglecting one of them completely *(praktische Konkordanz)*.[42] In the aforementioned example this could lead to the following solution: If the rating agency wishes to terminate its membership in the DVFA, it is free to do so but it must notify its customers. Upon such notification a customer should have the right to terminate the contract. Legal support for this conclusion can be found in several provisions under general civil law that grant special termination rights in long-term legal relationships (§ 626 para. 1 and, more generally, §§ 314 para. 1, 324 German Civil Code).

4. Disclosure

A number of self-commitments to non-statutory rules or standards are made to the public and can be treated here under a binding mechanism called 'disclosure'. No doubt, a statement of compliance with non-legal standards included in a listing prospectus which is directed to anonymous investors can evoke reliance and, if the information is false or misleading, it can lead to liability. Today, liability for false or misleading primary market information, especially prospectus liability, is mainly a subject of specialized legislation.[43] The legal treatment is far less clear in regard to continuing disclosure, i.e. information provided with a view to enable exchange in secondary markets.

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42 On the scope and limits of these expectations and rights see J. A. KÄMMERER, Privatisierung: Typologie – Determinanten – Rechtspraxis – Folgen (Tübingen 2001) 463; W. ZÖLLNER, Regelungsspielräume im Schuldvertragsrecht, Archiv für die civilistische Praxis (AcP) 196 (1996) 1, 11.

43 See § 21 German Statute on Security Prospectus (Wertpapierprospektgesetz, WpPG).

The increasingly used technique of 'comply or explain' can serve as an example illustrating one of the pressing questions regarding the legal treatment of self-commitments for enhancing continuing disclosure: Assume, a corporation publicly explains that it complies with best practice recommendations set out by a national Corporate Governance Code. An investor buys a share of that corporation. The issuer corporation then publishes a statement that it will abstain from compliance with the code in the future, i.e. it revokes its statement of future compliance.

Revisiting the binding mechanisms we have seen so far, we can exclude 'norms' (best practice recommendations do not have normative effect in a technical sense), 'contract' (regularly, there is no contract with the issuer but with the holder of the share who sells it to the acquirer) and 'charter' (non-compliance with codes of conduct is permitted if correctly explained to the investor public). 'Disclosure', accordingly, is of a category of its own.

The distinctions made regarding earlier-discussed binding mechanisms are important in at least in two respects: Firstly, absent a legal obligation or contractual agreement, any public disclosure of an intention to follow best practice *in the future* can be binding only until it is recalled (revocable commitment).[44] In other words, the binding effects of disclosure expire when the disclosed facts or intentions are retracted from the public information repository.

Secondly, the requirements of disclosure about *past* behaviour are subject to the standards applicable to the relevant context. In regard to statements that address shareholders and the investor public, a true and fair view must be given. It is only if the statement does not adhere to these reporting principles that there will be a basis for civil sanctions.[45] As already mentioned, the German Federal Supreme Court in Civil Matters endorsed this understanding in two 2009 decisions by holding that a shareholder resolution regarding the ratification of management activities can be voided in the event of false or incomplete disclosures.[46]

To sum up, public disclosure of compliance with non-statutory codes of conduct is a form of revocable self-commitment. Revocation is possible in the future. As long as such a revocation is made properly, any binding effect that might have existed previously ceases to exist.

One might argue that the examination of possible binding effects presented here could be further expanded. For example, one could investigate self-commitments that are addressed to supervisory authorities as required

44 G. SPINDLER, in: Schmidt/Lutter (eds.), Aktiengesetz (3rd ed., Cologne 2015) § 161 paras. 9, 16.

45 LEYENS, *supra* note 23, para. 297, 307.

46 See previously provided references *supra* note 26.

in some regulated industries like banking and insurance.[47] Where such self-commitments are published, they might be grouped in the category 'disclosure'. When the self-commitment is not published it will, however, hardly serve to back-up the third party civil claims that are discussed in the following section.

IV. Third Party Effects of Self-commitments

The preceding sections have shown that the binding force of self-commitments differs depending on how the commitment is introduced into a legal relationship. Determining the effects towards third parties adds another layer to the discussion. Third parties do not participate in setting the terms of the agreement that might cause a binding effect. Their position is rather comparable to the victim of a tort. As we will see in the following section, the disjunction between contracts and torts is of less relevance than it might seem at first sight.

1. Professional Liability

Self-commitments play a pivotal role for market participants who depend on signalling good conduct as a means of attracting customers. The examples used mainly relate to professions that make self-commitments to underline the quality of their products or services. In many of the cases the signal is ultimately directed to a third party: Expert opinions are contracted by sellers with a view to attracting buyers, disclosure of compliance with corporate governance codes serves to attract shareholders, and promising a high standard of credit assessment increases the possibilities of selling a rating to a corporate client.

Under German law third parties might benefit from a contractual agreement when they are foreseeably affected by the consequences of that agreement *(Vertrag mit Schutzwirkung zugunsten Dritter)*. The most important advantages of contractual liabilities are that an entitled third party can claim compensation for negligent misstatements and that the burden of proof in regards to fault is shifted to the defendant (§ 280 German Civil Code). Common law courts are said to be rather reluctant about accepting contractual duties that are owed towards third parties. English courts, however, have accepted duties of banks towards third parties since the famous 1963 decision in *Hedley-Byrne vs. Heller*.[48] In the *Caparo* Case of 1990,[49] it

47 For details see LEYENS, *supra* note 1, 634.

48 *Hedley Byrne & Co Ltd. v. Heller & Partners Ltd* (1963) 2 All England Law Reports 575.

49 *Caparo Industries v. Dickman* (1990) 1 All England Law Reports 568.

was acknowledged – similar to a 1978 decision of the German Supreme Court in Civil Matters concerning a provider of financial news *(Börsendienst)*[50] – that those who provide information to the public can limit the scope of possible reliance by attaching qualifications to their statements. The most obvious technique concerns liability exclusions, which will be discussed below.[51]

The reason why courts are reluctant towards accepting liability for negligence towards third parties is that it will, in most cases, lead to a compensation of pure economic loss. The German Civil Code, at least generally, reflects the insight that compensation of negligently caused pure economic loss is not advisable because it merely shifts resources from one party to another. The insight of economic theory, however, loses power when a loss of confidence in the market and its intermediaries might go hand in hand with a suboptimal use of resources and hence produce losses in societal welfare.[52]

Regarding professional liability, crisis often induces at least a furtherance of legal concepts, if not paradigm shifts. The recent financial crisis and the role of credit rating agencies is one example. Already in 2013, the European Union included third party liability for negligent misstatements in its new Art. 35a in the Regulation on Credit Rating Agencies.[53] And the Australian Supreme Court held in its Bathurst judgment of 2015[54] that a rating agency can be liable towards investors for negligent misrepresentation.[55]

Court decisions on professional liability towards third parties in Germany seem to have always oscillated between contract and tort. Depending on

50 BGH, judgment of 8 February 1978 – VIII ZR 20/77 *(Börsendienst),* BGHZ 70, 356, Juris para. 13.

51 *Infra* section 3.

52 W. BISHOP, Economic Loss in Tort, 2 Oxford Journal of Legal Studies 1, 28 f. (1982) on the example of a deficient legal opinion: "[…] the action *does induce real social cost and not merely a transfer.* […] In fact failure to award damages in such cases normally would induce *inefficiency because of its effects on the market for information*" (italicized by the author).

53 Regulation (EU) No. 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No. 648/2012, Official Journal L 176, 27 June 2013, 1.

54 *ABN AMRO Bank v Bathurst Regional Council* (2014) Federal Court of Australia Full Court (collection of judgments) 65, 6 June 2014, paras. 1608, 1611.

55 The judgment is discussed by H. EDWARDS, Liability for the rating and sale of structured credit products: Australian cases and their (much) wider implications, 7 Law and Financial Markets Review 88 (2013); H. EDWARDS, CRA 3 and the liability of rating agencies: inconsistent messages from the regulation on credit rating agencies in Europe, Law and Financial Markets Review 7 (2013) 186. For an account from the German perspective see S. SEIBOLD, Die Haftung von Ratingagentu-

the facts of the case, courts either accept a third party right under a contract or they lower the requirements of the test for intentional behaviour under tort law (§ 826 German Civil Code).[56] If we consider the ongoing discussions in Germany and elsewhere from a certain distance, we get the impression that pragmatism rules. The distinction between contractual and tortious duties towards third parties has long given way to a general standard of professional liabilities towards third parties *(Haftungsstandard)*.[57] This general standard applies to the determination of liabilities and occasionally generates contractual *or* tortious responsibilities, depending *inter alia* on the statutory recognition of the profession and the embedding of its activities into statutory contexts. The scope of the relevant duties can be informed, at least to a certain extent, by self-commitments.

2. *Scope of Duties*

To determine the scope of duties and to interpret general provisions on fault like negligence (§ 276 German Civil Code) or intentional harm causation (§ 826 German Civil Code), courts look at common practice and at what is commonly expected from a producer or service provider. By committing to non-statutory rules or standards the agent makes a self-selection and classes herself into a sub-group of professionals, in most cases into the group that follows the industry-wide highest demands. The German scholars *Erich Schanze* and *Johannes Köndgen* use the term 'inclusion' to describe the persuasive force of existing practices in determining legal effects.[58]

Applying this line of argument to the third party effects of a self-commitment to non-statutory rules or standards is in line with the conventional approach regarding the determination of duties applicable to the relevant sub-group of a particular industry: If a rule or standard of behav-

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ren nach deutschem, französischem, englischem und europäischem Recht (Tübingen 2016) 103.

56 BGH, judgment of 2 April 1998 – III ZR 245/96, BGHZ 138, 257, Juris para. 9 (contractual liability of statutory auditor for false report); BGH, judgment of 19 November 2013 – VI ZR 336/12, Wertpapier-Mitteilungen (WM) 2014, 17, Juris para. 11 (tortious liability of statutory auditor for inducing investments by reference to his forthcoming auditor report).

57 K. J. HOPT, Nichtvertragliche Haftung außerhalb von Schadens- und Bereicherungsrecht: Zur Theorie und Dogmatik des Berufsrechts und der Berufshaftung, Archiv für die civilistische Praxis (AcP) 183 (1983) 608, 657. For analysis and discussion see H. HIRTE, Berufshaftung (Munich 1996) 386, 412.

58 E. SCHANZE, International Standards – Functions and Links to Law, in: Nobel (ed.), International Standards and the Law (Bern 2005) 83, 84, 90; KÖNDGEN, *supra* note 38, 518.

iour is generally accepted, or if it is accepted by the benchmark group, the standard will have persuasive force.

At closer look, however, this is a consequence not of the rule or standard itself but rather of the voluntary statement regarding the performance in conformity with a set of duties applicable to a certain group. That is to say, it is the result of a self-commitment by the defendant.

3. Liability Limitations

Tortious liability for economic loss generally requires intent and cannot be limited ex ante. By contrast, an agent is free to exclude contractual liabilities towards the principal for negligence. If the liability exclusion is individually negotiated, it will be effective in respect of third party claims as the terms of the underlying contract also determine the rights of third parties (§ 334 German Civil Code). Limiting liability is essential when the number of potentially injured persons cannot be determined ex ante. Certain limitations appear well justified, last not least, because insurance cover for unlimited losses cannot be contracted at a reasonable cost.

With a view to upholding protection of third parties, courts have assumed a tacit waiver of defences that stem from the main contract.[59] This has been criticized heavily, especially by *Claus-Wilhelm Canaris,* for constellations in which the interests of the principal and the third party are opposed.[60] And in fact, these interests are often opposed. For example, a seller will mandate an expert opinion on the value of the good to be sold in order to increase the price, whilst the buyer will naturally have an interest in keeping the price low. Against this background it appears more convincing to many to grant liability only if the injurer induced special reliance (§ 311 para. 3 German Civil Code).[61] This inducement requirement is not easily met. Where it is met, the injured has a genuine claim that is not subject to liability limitations set out in a possible contract with a principal.

Liability exclusions are often included in a set of standard terms that are not negotiated between the parties. Under German law, even in business to business contracts standard terms are void when they conflict with the essential purpose of the contract (§ 307 German Civil Code).

A recently much debated example again concerns credit ratings.[62] It is clear that a rating will be sold to an issuer only if that issuer can make use of the assessment to send a trust signal to third party investors or lenders.

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59 BGH, judgment of 17 January 1985 – VII ZR 63/84, BGHZ 93, 271, 275.

60 C.-W. CANARIS, Die Reichweite der Expertenhaftung gegenüber Dritten, Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht (ZHR) 163 (1999) 206, 213.

61 For details see B. BÜTTNER, Umfang und Grenzen der Dritthaftung von Experten (Tübingen 2006) 136.

Some authors convincingly argue that a liability exclusion achieved by means of standard terms should not be given effect as it would contradict the essential purpose of the rating agreement. However, the important distinction we need to make in regard to self-commitments is the following: The additional duties will rarely, if ever, qualify as essential terms of the contract.

To avoid a complete failure of third party protection, tortious liability appears to be the only option. This is one of the reasons why the requirements for pleading intentional harm causation have often been lowered in cases of professional liability.[63]

4. Burden of Proof

The above findings on the possible effects of self-commitments to non-statutory rules or standards do not lead far in court unless a breach of duty can be proven. For physical products a simple comparison with the quality requirements under the relevant rule or standard might do. In regard to services the task is more difficult. A completed expert opinion, like a credit rating, does not manifest from the outside whether it was produced in line with high standards or whether it has been issued in disregard of best practice. It hence appears that the burden of proof will often be a peremptory gate shutting out any possible legal effects for self-commitments in cases where compliance is non-observable from the outside.

German courts have shifted the burden to the defendant only under exceptional circumstances, for example, when financial products are sold in overheated markets. In those cases it appears justified to assume that advice on price-relevant information formed the basis of the purchase decision *(Anlagestimmung)*.[64] Absent such exceptional circumstances, shifting the burden would go too far. This is all the more true for non-statutory rules or standards as in most cases they have not yet been transformed into statutory law since non-compliance does not carry a particular danger of causing losses to others.

The result is unsatisfactory for the following reason: Self-commitments are used to overcome uncertainties which would otherwise preclude or

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62 E. VETTER, Rechtsprobleme des externen Ratings, Wertpapier-Mitteilungen (WM) 2004, 1701, 1710. For further discussion see U. BLAUROCK, Verantwortlichkeit von Ratingagenturen – Steuerung durch Privat- oder Aufsichtsrecht?, Zeitschrift für Unternehmens- und Gesellschaftsrecht (ZGR) 2007, 603, 627 f. *(protestatio facto contraria)*.

63 *Supra* section IV.1 (p. 172).

64 BGH, judgment of 13 December 2011 – XI ZR 51/10 (IKB), BGHZ 192, 90 paras. 61, 63 on the state of the discussion.

reduce possibilities to conduct business. Producers, issuers of financial instruments, and professional information intermediaries are free to signal to the public their compliance with non-statutory rules or standards. If they do, they must be ready to prove their compliance. The perhaps most convincing option is to treat the self-commitment as an obligation to demonstrate compliance with the relevant decision-making standard. In terms of civil procedure this does not lead to a shift of the burden of proof but to a shift of the pleading burden from the claimant to the defendant.

On the one hand, one might think that reversing the pleading burden could open the floodgates to innumerable third party claims. This fear is not necessarily justified because the injured will still have to provide a plausible argument as to why non-compliance with the non-statutory duties could have caused a loss. Plausible loss causation is by no means given, especially not in regard to a lack of compliance with non-statutory rules or standards. Under German law the plaintiff has to shoulder the costs of a claim that is not sufficiently substantiated. Under these conditions, the danger of opening the floodgates correspondingly appears to be rather low.

On the other hand, a shift of the pleading burden might already create incentives for defendants to carefully consider whether they should make a self-commitment that generates trust in the public if in fact they actually do not plan to follow the relevant non-statutory rules or standards.

It has been argued that obliging a defendant to provide facts that relieve her from otherwise assumed liability amounts to a breach with general principles of civil and criminal procedure *(nemo tenetur).*[65] Yet this argument does not hold. It has long been accepted in general producer liability that adequate production processes must be proven in the courtroom.[66] The principle of *nemo tenetur* might be compelling for non-voluntary obligations, but its strict application does not seem to be adequate for self-committed duties. It might be helpful to summarize the above findings: Voluntarily self-commitments follow an individual calculus. The commitments are made to send trust signals. Requiring a party to demonstrate that this trust was deserved is nothing more than holding one to the given word.

Around 200 years ago *Sir William Blackstone,* the great commentator of English common law, used the metaphor of a shingle.[67] Professionals who place a shingle above their office door to attract customers must be ready to

65 BUCK-HEEB/DIECKMANN, *supra* note 14, 61 try to find a balanced approach.

66 G. WAGNER, in: Habersack (ed.), Münchener Kommentar zum Bürgerlichen Gesetzbuch (7th ed., Munich 2017) § 823 para. 858.

67 W. BLACKSTONE, Blackstone's commentaries, Vol. 3 (Philadelphia 1803) 164. See also K. J. HOPT, Der Kapitalanlegerschutz im Recht der Banken (Munich 1975) 353; KÖNDGEN, *supra* note 14,, 37, 42.

fulfil the expectations that are commonly evoked in those who take notice of the shingle. This thought fits the present discussion well: Self-commitments to non-statutory rules or standards should be given effect in courtrooms. Plaintiffs will often fail to make their claim due to a lack of information on the necessary elements of compliance. This problem can be overcome if courts oblige the defendant to provide plausible information on the steps taken to safeguard compliance. The burden of proof would remain untouched. This means that plaintiffs might still have to provide evidence that the defendant, in fact, did not follow the compliance process laid out by her.

Based on the approach to self-commitments that is advocated here, those who claim that they adhere to high standards but in fact do not make sufficient compliance efforts will have difficulties in avoiding the finding of a duty breach. The liability test, of course, encompasses further elements. Proving causality between non-compliance and loss will often be the most difficult hurdle.

V. Conclusions

1. Self-commitments to non-statutory rules or standards serve an enabling function for businesses in that they signal trust especially where performance quality is unobservable. As a component of self-regulation they contribute to improving the allocation of regulatory resources in areas where legislators lack relevant knowledge and in instances when statutory duties do not suffice to fulfil the needs of market participants.

2. A fostered discussion of the binding effects is advisable, since self-commitments are increasingly embedded in the law through use of the regulatory technique of 'comply or explain'. Within the European Union, the duty to state compliance with a non-statutory set of best practice and to explain possible deviations has been expanded from the area of corporate governance into corporate social responsibility, and it also attaches to professional market participants like institutional investors, asset managers, and proxy advisors.

3. The legal effects of self-commitments can be grouped according to a typology of mechanisms, these including norms, contracts, charter provisions and public disclosures: Self-commitments do not create normative effects, but they might restate applicable law or customary law (restatement). They can be a component of a contractual agreement, but that does not lead to an evolving set of duties unless agreed at the time of making the agreement (static duty). Conversely, a self-commitment to a charter of a business association provisions obliges adherence to the current state of best practice as set out by the charter until membership is withdrawn (dynamic duty). Disclosure of future compliance to a set of non-statutory rules

or standards is binding until publication of a statement of future non-compliance (revocable commitment).

4. Third party effects must be determined according to the aforementioned binding mechanisms: Professional liability can be of a contractual or a tortious nature. Self-commitments to non-statutory sets of duties can be used to determine the scope of professional liabilities. Liability exclusions that are included in a contract to which the self-commitment is tied will often preclude rights of third parties, but they might be subject to judicial review if securing a third party's trust is the essential purpose of the contract. For self-commitments to be viable, courts should not shift the burden of proof to the defendant. Instead, the defendant should be obliged to provide plausible information on the steps she has taken to comply with the self-commitment. This is nothing more than holding one to the given word.

Legitimacy and Limits of Self-regulation in Japan

Takahito Kato[*]

I. Introduction
II. The Japanese Stock Exchange's Contribution to Increasing the Number of Outside and Independent Directors in Japanese Listed Companies
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I. INTRODUCTION

In Japan, the legitimacy and limits of self-regulation are not necessarily themes that have been heavily studied, at least not among private law scholars.[1] Of course, the legitimacy and limits of self-regulation are connected with other problems relating to self-regulation. What I mean to say is that it is rare in Japan to research the legitimacy and limits of self-regulation as one issue. The reason for this is not clear, but self-regulation as a regulatory measure of course exists in Japan, and when the government studies the necessity of a new regulatory scheme, it often considers whether the regulatory purpose could be achieved through self-regulation.

The legitimacy and limits of self-regulation are relevant to the way in which the government approaches self-regulation. For example, I assume that the government has a problem to resolve and has to decide how to resolve it. In that case, self-regulation is one of the alternatives. It is also possible that some self-regulation already exists. In this case, the government has to decide whether to keep the self-regulation; to take steps to

* Prof. Takahito Kato, Professor of Law, The University of Tōkyō, Faculty of Law.

1 In the area of public law, self-regulation is regarded as a topic of study, unlike the case in private law. H. HARADA, *Jishu kisei no kōhō-gakuteki kenkyū* [Self-regulation from the perspective of public law] (Tōkyō 2007).

make the self-regulation more effective; or to substitute a public regulation, in the form of new legislation or administrative orders, for the self-regulation. To make this decision, it might be useful for the government to recognize the legitimacy and limits of self-regulation.

Therefore, I think we should look into the legitimacy and limits of self-regulation more proactively in Japan. In this article, I would like to introduce three individual matters that I see as relating to the legitimacy and limits of self-regulation in Japan. I will use these to analyze why self-regulation is selected to deal with a problem and under which conditions self-regulation functions well. I attempt to tackle the legitimacy and limits of self-regulation using a functional approach. I will now briefly explain these three matters.

The first matter is the role of the Japanese stock exchange in the introduction of outside and independent directors by Japanese listed companies.[2] In Japan it seems that the stock exchange regulation was selected to increase the number of outside and independent directors in listed companies. Analyzing why the stock exchange regulation, and not legislative actions, was selected is meaningful in considering the legitimacy and limits of self-regulation.[3]

The second matter relates to the process of how a self-regulation is created. One of the benefits of self-regulation compared with other regulatory measures is that we can expect the regulated parties to voluntarily follow such self-regulation because such parties are involved in the necessary consensus-building process preceding such self-regulation. By involving the regulated parties in the creation of self-regulation, we can avoid such self-regulation becoming unreasonable and unrealistic.[4] Also, from an emotional standpoint, we can expect people to be more likely to follow a rule that they have created themselves rather than a rule that is forced upon them by law or government. These logics may apply when the regulated parties, which are also the parties involved in the creation of the self-regulation, have characteristics in common. On the other hand, when the characteristics of the regulated parties are diverse, the said benefit of self-

2 It is not clear whether the stock exchange's implementation of a corporate-governance-related regulation covering listed companies can be straightforwardly classified as self-regulation. In Japan, it seems that the corporate governance rules for listed companies set forth by the stock exchange are regarded as one type of self-regulation. T. KATO, *Shōken torihiki-jo to jōjō kigyō no kanri* [Management of Listed Companies by Securities Exchange], in: Kuronuma/Fujita (eds.), *Kigyō-hō no riron, Gekan* [Theory of Enterprise Law, last volume] (Tōkyō 2011) 685–686.

3 I analyzed the same matter from a different perspective. T. KATO, *Kōporēto gabanansu o meguru rūru no konvājensu* [The Convergence in Corporate Governance Rules], in: Soft Law Journal 18 (2011) 66–72.

4 KATO, *supra* note 2, 689–690.

regulation vis-à-vis other regulatory measures will be lost. The reason is simple: more compromises will be made among the parties to reach a consensus on such self-regulation. In such a situation, creating self-regulation will entail significant costs, and the contents of such self-regulation are likely to become ineffective. In the past, I attended the Tōkyō Stock Exchange's (TSE) review process for its corporate-disclosure-related self-regulation. Such corporate disclosure regulation might have a stronger characteristic of self-regulation than the regulation regarding outside and independent directors mentioned above, because the stock exchange has more discretion in such a matter than in the corporate-governance-related one. But when there are over 3,500 listed companies to regulate, it is doubtful that common characteristics exist among all such companies, something which is necessary for the self-regulation to be effective. I would therefore like to analyse this matter based on my experience of being involved in the TSE's self-regulation review process.[5]

The third issue relates to the limits of self-regulatory organizations. Various self-regulatory organizations exist in Japan. For example, there is the Japan Securities Dealers Association (JSDA), a self-regulatory organization consisting of securities companies, which in many cases appear to have common interests in matters which may require self-regulation. As I noted in the discussion of the second issue, I view the nature of the regulated parties as relevant to the limits of self-regulation. In self-regulatory organizations, the members are subject to self-regulation, and they generally have interests in common. Also, there is a merit to self-regulation via self-regulatory organizations, which is that enforcement in response to violations is carried out at the level of the self-regulatory organization. Without strong self-regulatory organizations, self-regulation will be enforced only by reputation. On the other hand, there is a possibility that self-regulation will not be effective even in situations where the members have common characteristics. Such ineffectiveness is due to the limited scope of persons subject to such self-regulation, depending on the kind of self-regulatory organization. This is because a self-regulatory organization can directly regulate only its members.

For example, in Japan, discussion is ongoing about whether to regulate selective disclosure. Certain scandals have led the government to begin an amendment process regarding securities regulation.[6] For example, an ana-

5 In October 2009, the TSE established a working group for disclosure under the Advisory Group on Improvements to TSE Listing System to study the disclosure system. I participated in the activities of this working group from 2009 through 2010.

6 The Financial System Council within the Japan Financial Services Agency proposed the introduction of a new rule banning selective disclosure after studying the

lyst in a securities company used non-public information received from an issuing company to solicit securities transactions. The JSDA introduced a self-regulation prohibiting analysts from approaching issuing companies for the purpose of receiving non-public information.[7] This regulation might not be enough to resolve the problems, however, since it does not cover issuing companies engaging in selective disclosure. The selective disclosure issue arises between listed companies that disclose company information and securities companies that request the disclosure of such information, and therefore the issue will not be solved simply by regulating only listed companies or only security brokerage firms. I would therefore like to discuss the most recent events in Japan regarding this issue.

II. The Japanese Stock Exchange's Contribution to Increasing the Number of Outside and Independent Directors in Japanese Listed Companies

1. Did the Japanese Government Influence TSE Regulation, and How?

From a global perspective, Japan was for years well-known for the fact that its listed companies did not elect outside and independent directors.[8] Listed companies in Japan are not mandated to elect outside directors as long as they adopt a form of governance system called "Corporation with an Audit & Supervisory Board".[9]

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same in two subcommittees. See THE "WORKING GROUP ON CORPORATE DISCLOSURE" OF THE FINANCIAL SYSTEM COUNCIL, Report – Ensuring fair and timely disclosure of information to investors (18 April 2016), available at *http://www.fsa.go.jp/en/refer/councils/singie_kinyu/20160719-1/01.pdf;* THE "TASK FORCE ON FAIR DISCLOSURE RULE" OF THE "WORKING GROUP ON FINANCIAL MARKETS" OF THE FINANCIAL SYSTEM COUNCIL, Report – Ensuring fair and timely disclosure of information to investors (7 December 2016), available at *http://www.fsa.go.jp/en/refer/councils/singie_kinyu/20170303-1/01.pdf.* The Japan Financial Services Agency submitted the amendment proposal to the Diet on 3 March 2017 which was adopted on 5 May 2017.

7 JSDA, Guidelines concerning Association Member Analysts' Interviews, etc. with Issuers and Communication of Information (20 September 2016), available at *http://www.jsda.or.jp/en_old/rules/E29-1.pdf.*

8 G. GOTO, The Outline for the Companies Act Reform in Japan and Its Implications, ZJapanR / J.Japan.L. 35 (2013) 18–19.

9 In a "Corporation with an Audit & Supervisory Board", a member of such a board supervises management together with the board of directors. But there are limits to the supervisory role vis-à-vis management by such a member of the "Audit & Supervisory Board", because the latter does not possess the right to vote on the management's election, even though they have a right to attend the board of directors' meetings. "Audit & Supervisory Board" is *"kansa-yaku-kai"* in Japanese, and is

Today, most listed companies in Japan have one or more outside and independent directors on their board of directors.[10] I may be jumping to conclusions, but it seems that the number of outside and independent directors being elected by listed companies has increased in tandem with the repeated self-regulatory changes made by the TSE to encourage these companies to elect such directors. However, such self-regulation by the TSE was not its own initiative, but rather a measure to achieve harmonization of interests through law or governmental measures. In other words, the government used the TSE to achieve the regulatory purpose based on the public consensus-building process. Externally, however, the TSE appears to have played a large role in having Japanese listed companies elect outside and independent directors.

2. *The Recent Transformation of the TSE Regulation Relating to Outside and Independent Directors*

The TSE first amended its regulation to require listed companies to have one or more independent executive members – meaning outside directors or auditors who do not have a conflict of interest with general shareholders – and to disclose this in their corporate governance report in December 2009.[11] Since this requirement was stated as part of "Matters to be Observed", listed companies violating this requirement were subject to enforcement.[12] Listed companies were, however, allowed to report their outside auditor as the required independent executive. In the TSE regulations,

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composed of *"kansa-yaku"*. While *"kansa-yaku"* is often translated as "statutory auditor", recently the association of *kansa-yaku,* which might be viewed as a self-regulatory organization, has strongly recommended that *"kansa-yaku-kai"* be translated as "Audit & Supervisory Board". THE JAPAN CORPORATE AUDITORS ASSOCIATION, New Recommended English Translation for *"Kansayaku"* and *"Kansayaku-kai"* (4 September 2012), available at *http://www.kansa.or.jp/news/ns121023-1.pdf.*

10 TSE, Appointment of Independent Directors by TSE-Listed Companies [Final Figures] (27 July 2016), available at *http://www.jpx.co.jp/english/listing/others/ind-executive/tvdivq0000001j9j-att/b5b4pj00000171dc.pdf.* The ratio of such outside and independent directors on the board of directors is not large from a global perspective, so the role of such directors in the supervision of management may be still limited. However, in this article, I would like to focus on the role of the Japanese stock exchange in increasing the number of outside and independent directors in Japanese listed companies, and not the role of such directors themselves.

11 TSE, Listing System Improvements based on the Listing System Improvement Action Plan 2009 (Matters for prompt implementation) (29 October 2009), available at *http://www.jpx.co.jp/english/equities/improvements/general/tvdivq0000004iib-att/summary.pdf.*

12 TSE, Securities Listing Regulations, Rule 436-2 (as of 30 December 2016).

"auditor" means a member of the "Audit & Supervisory Board". Therefore, this amendment was limited as a measure to have listed companies elect outside and independent directors. Notwithstanding these limitations, the number of listed companies electing outside and independent directors has increased since this amendment.[13]

Later, in May 2012, the TSE introduced a new rule under "Matters Desired to be Observed" regarding independent executives, which stated, "Listed companies shall make efforts to designate independent executives, in consideration of the meaning of such independent executives having right to vote in the Board of Directors."[14] The TSE later amended this rule in 5 February 2014 to say "An issuer of listed domestic stocks must make efforts to secure at least one independent director/auditor as a member of its board of directors."[15] Because these rules are part of "Matters Desired to be Observed", no enforcement will take place when listed companies violate such rules.[16] However, it is my view that here the TSE has made one step further to encourage listed companies to elect outside and independent directors.

From 1 June 2015, companies listed on the TSE were obliged to comply with "Japan's Corporate Governance Code" or explain why they did not comply.[17] Many rules regarding outside and independent directors exist in the Corporate Governance Code, which means the listed companies are required to "comply or explain" in this regard.[18]

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13 TSE, TSE-Listed Companies White Paper on Corporate Governance 2013 (February 2013) 23–24, available at *http://www.jpx.co.jp/equities/listing/cg/tvdivq0000008jb0-att/b7gje6000003ukm8.pdf*.

14 TSE, Securities Listing Regulation, Rule 445-4 (as of 10 May 2012).

15 TSE, Securities Listing Regulation, Rule 445-4 (as of 10 February 2014).

16 Those TSE regulations are components of the "Code of Corporate Conduct" in the Securities Listing Regulation of the TSE. "If the TSE deems that a listed company violates a provision regarding the matters to be observed, the TSE may recommend said listed company to take appropriate measures or make a public announcement, etc. to that effect", see *http://www.jpx.co.jp/english/equities/listing/code-of-conduct/index.html*.

17 TSE, Securities Listing Regulation, Rule 436-3 (as of 1 June 2015); TSE, Japan's Corporate Governance Code – Seeking Sustainable Corporate Growth and Increased Corporate Value over the Mid- to Long-Term (1 June 2015), available at *http://www.jpx.co.jp/english/equities/listing/cg/tvdivq0000008jdy-att/20150513.pdf*.

18 For example, "Principle 4.8: Effective Use of Independent Directors" reads as follows: "Independent directors should fulfill their roles and responsibilities with the aim of contributing to sustainable growth of companies and increasing corporate value over the mid- to long-term. Companies should therefore appoint at least two independent directors that sufficiently have such qualities. Irrespective of the above, if a company in its own judgement believes it needs to appoint at least one-third of directors as independent directors based on a broad consideration of factors such as the in-

3. The TSE's Independence from Legislative and Administrative Bodies

As mentioned above, it is clear that the TSE repeatedly introduced changes to its rules to encourage listed companies to elect outside and independent directors. But these changes may be viewed as the TSE merely responding to requests from legislative or administrative bodies, and not acting on its own initiative.

For example, the changes the TSE introduced in December 2009 seem to be based on the following proposal from the Financial System Council's Study Group within the Japan Financial Services Agency:

"Naturally, the best form of corporate governance will differ depending on the organization, size, line of business and other aspects of each individual company; but in spite of the difficulties in applying the same rule to all companies, if the above line of thinking is adopted one can say that there is room for improvement, since there is a considerable gap between this and the reality that 55% of companies listed on the TSE have not appointed any outside director.

The stock exchanges should present a model of corporate governance in line with the above thinking, which is regarded as suitable for the majority of listed companies for securing the confidence of shareholders, investors and others. Based on this, stock exchanges should adopt measures that would require companies to sufficiently disclose the details of their respective governance systems and the reasons for selecting a particular system. Furthermore, with respect to the details of statutory disclosure relating to the status of corporate governance, revisions should also be made if necessary, in conjunction with the matters described in the rest of this chapter."[19]

The changes made on 5 February 2014 were also closely linked to law-making activities related to Japanese company law, which began in 2010. As part of these law-making activities, the question of whether to mandate Japanese listed companies to elect outside and independent directors was discussed. The law-making activities related to Japanese company law often start with the minister of justice referring the matter to the Legislative Council of the Ministry of Justice. In this case, the Company Law Subcommittee was in charge of the actual review. Its role was to create a draft outline of the Company Law amendment. Within the subcommittee, wheth-

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dustry, company size, business characteristics, organizational structure and circumstances surrounding the company, it should disclose a roadmap for doing so."

19 THE FINANCIAL SYSTEM COUNCIL'S STUDY GROUP ON THE INTERNATIONALIZATION OF JAPANESE FINANCIAL AND CAPITAL MARKETS, Report by the Financial System Council's Study Group on the Internationalization of Japanese Financial and Capital Markets: Toward Stronger Corporate Governance of Publicly Listed Companies (17 June 2009), available at *http://www.fsa.go.jp/en/news/2009/20090618-1/01.pdf*. One scholar attending the study group and discussing the changes made by the TSE has noted that such changes were merely a realization of the consensus reached in the study group's discussion. KATO, *supra* note 3, 79 note 52.

er to mandate the election of outside and independent directors was discussed intensively, but the subcommittee could not propose such an obligation. Instead, they decided to impose a rule that listed companies that have not elected outside and independent directors must explain their reasons for not doing so. When the Legislative Council of the Ministry of Justice approved the subcommittee's proposal, the council requested that the securities exchange alter its regulations to impose the obligation on the listed companies to elect at least one outside director.[20]

Regarding the amendments relating to Japan's Corporate Governance Code, the formulation of the same was the Japanese Government's policy, while the content of the code was determined by the Council of Experts Concerning the Corporate Governance Code. The TSE assumed the role of secretary of the council together with the Japan Financial Services Agency.[21]

4. Why the TSE Needed Public Assistance to Change its Regulation Regarding Outside and Independent Directors in Listed Companies

As demonstrated above, the transformation of the TSE regulations regarding outside and independent directors in listed companies resulted from public consensus-building procedures undertaken by legislative or administrative bodies. Based on this fact, I would like to comment on the following two points regarding the legitimacy and limits of self-regulation.

First, if these public consensus-building procedures did not exist, the TSE might not have been able to change the situation regarding outside and independent directors. Since the regulations regarding outside and independent directors relate to the core composition of the board of directors, the stock exchange must have had a strong interest in designing such a system. The TSE appears to have wanted listed companies to have one or more outside and independent directors for a long time. In Japan, there is the TSE and other stock exchanges, but the TSE surpasses the other stock exchanges in terms of the number of listed companies and transaction volume. For companies that plan to list their shares for the first time, the TSE is the only feasible option unless there are special reasons to choose otherwise. Therefore, the TSE is in the position to act to increase the numbers of outside and independent directors in TSE-listed companies in accordance with the interests of investors rather than those of listed companies. How-

20 GOTO, *supra* note 8, 21–22.

21 THE COUNCIL OF EXPERTS CONCERNING THE CORPORATE GOVERNANCE CODE, Japan's Corporate Governance Code [Final Proposal] – Seeking Sustainable Corporate Growth and Increased Corporate Value over the Mid- to Long-Term (5 March 2015), available at *http://www.fsa.go.jp/en/refer/councils/corporategovernance/20150306-1/01.pdf.*

ever, regarding the composition of the board of directors, even a strong stock exchange such as the TSE could not initiate a big change without the help of public consensus-building procedures.[22]

Similar issues may arise regarding other self-regulations – namely, there may be situations where self-regulations cannot be introduced without public consensus-building procedures. The combination of public consensus-building procedures and self-regulation, however, may lessen the benefits of self-regulation. One of the benefits of self-regulation is that by having the regulated parties participate in the private consensus-building process, the content of the regulation may become more flexible and the regulated parties will have an incentive to comply with the regulation because they have been given the right to participate in the creation process.[23] The regulated parties may also be invited to participate in a public consensus-building process, but it seems that the differences between such public and private processes are extensive.

Second, it seems questionable whether the Japanese government may legitimately choose to utilize the regulations of the stock exchange to encourage listed companies to elect independent and outside directors. As noted above, public consensus-building procedures have been held mainly by councils governed by the Japan Financial Services Agency. These consen-

22 In other articles, I have analyzed why the TSE needed assistance from public organizations such as the Japan Financial Services Agency to increase the number of outside and independent directors. KATO, *supra* note 2, 697–711; KATO, *supra* note 3, 66–72.

First, let us consider the interests of stock exchanges in listed companies' election of outside and independent directors. There may be differences between countries regarding what roles are expected of outside and independent directors, but many countries seem to expect that outside and independent directors will supervise company management in the place of shareholders, who cannot supervise management due to collective action problems. In other words, outside and independent directors are expected to confront company management as representatives of investors. Investors can then comfortably purchase shares in listed companies since such representation exists within the company's governance structure. Japanese listed companies have recognized that electing outside and independent directors requires material changes to their company governance structures, which have mainly consisted of insiders. Therefore, the interests of listed companies, especially management, and investors may have conflicted with regard to the election of outside and independent directors.

In a situation where such interests collide, it is difficult for stock exchanges to support either the company management or the investors, because the income structure of the stock exchange is dependent on the number and transaction volume of listed companies. It is therefore necessary for stock exchanges to obtain support from both listed companies' management and investors to receive steady income.

23 KATO, *supra* note 3, 66–67.

sus-building procedures are, however, not the same as those required in legislative processes.[24] There are at least two ways to introduce regulations regarding the composition of listed companies' boards of directors. One is to amend the Japanese Company Act, [25] and the other is to amend the regulations of the stock exchange. The former requires a legislative process, but the latter does not. In the latter case, the amendment process is much more modest than in the former case: The stock exchange simply requests the Japan Financial Services Agency's approval of an amendment, and the Financial Services Agency approves the amendment.

Let us assume that the Japanese government decided to resolve a certain issue via self-regulation. It could make this kind of decision without a legislative process by specifically giving the self-regulation authority for this purpose. If such a decision by government was made to circumvent the legislative process, it would appear that the resulting self-regulation has a serious legitimacy problem.

III. Diversity in the Characteristics of Listed Companies

Since the composition of the board of directors is closely connected to the management structure of a listed company, the company management, investors, stock exchanges and other third parties have strong and diverse interests in it. Therefore, it may have been difficult for the stock exchange to create a regulation relating to the composition of the board of directors without public consensus-building procedures. On the other hand, since issues regarding the disclosure of listed companies relate to the listed companies and investors only, the stock exchange may be able to initiate self-regulation on these issues more easily than on those of board of directors.

As a matter of fact, the TSE has adopted the following self-regulations regarding the disclosure of listed companies. First of all, there is the timely disclosure rule *(tekiji kaiji seido)*.[26] Under this rule, listed companies must immediately disclose material non-public information, as enumerated in the TSE regulation, if such a case arises.

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24 In the legislative procedures, the consensus-building process seems mainly to involve interested groups. GOTO, *supra* note 8, 16. I believe that a similar process has been undertaken in the councils regarding outside and independent directors, but it might not be a key priority. What is more important for those councils might be consensus building among corporate governance professionals, similarly to the case within the High-Level Group of Company Law Experts in the EU.

25 *Kaisha-hō,* Law No. 86/2005.

26 TSE, Securities Listing Regulation, Rule 402 (as of 4 November 2016).

Second, there is the earnings reports rule *(kessan tanshin)*.[27] Under this rule, listed companies must immediately disclose their quarterly account settlement once it is completed.

The Financial Instruments and Exchange Act,[28] which is an important component of the Japanese securities regulations, contains mandatory disclosure rules similar to the timely disclosure and earnings reports rules. Simply speaking, the stock exchange disclosure rules require listed companies to disclose more information sooner than the mandatory ones.

I was involved in the review of the earnings reports rule.[29] During the review process, I realized that the diversity of listed companies' understandings regarding the importance of disclosure may sometimes prevent the stock exchange from creating self-regulation concerning disclosure.

First, companies whose shares are widely owned by institutional investors, or companies that frequently utilize equity financing, are aware of the importance of corporate disclosure. It is clear that disclosure is the key to establishing a good relationship with institutional investors. If there is any issue with disclosure, the cost of equity financing will rise. Such listed companies have an incentive to disclose, without the regulations of the stock exchange, because of this awareness. Therefore, the stock exchange's regulations on disclosure are meaningful only in the sense that they would make those companies which don't recognize the importance of disclosure do so adequately.

When the stock exchange is developing a new regulation, it will usually create a working group that includes representatives from listed companies.[30] Some working group members are usually chosen from blue chip companies, which are aware of the importance of disclosure and are already adequately disclosing their information. It seems that blue chip companies would not object to the stock exchange changing the regulation and imposing more stringent disclosure obligations, since they are already engaging in adequate disclosure and such stringent obligations would not burden them. The purpose of the regulatory change is to have other companies adequately disclose their information. They, however, do sometimes object to such change, because it would prevent their voluntary and flexible disclosure practices. For them, increased disclosure obligations via stock exchange regulations would only mean more costs.

Therefore, for the stock exchange to create an effective disclosure regulation, it must be able to limit the scope of application; however, this is not

27 TSE, Securities Listing Regulation, Rule 404 (as of 4 November 2016).

28 *Kin'yū shohin torihiki-hō,* Law No. 25/1948.

29 See *supra* note 5 and accompanying texts.

30 *Id.*

easy. The TSE has three markets – Main Market, Mothers and JASDAQ – and the Main Market is divided into two departments.[31] If the companies within each market have a common understanding of the importance of disclosure, it may be effective to have different regulations for each market. However, it is unclear whether such a common understanding exists.

IV. The Limitations of Self-regulation via Self-regulatory Organizations

There can be self-regulation without a self-regulatory organization, but the existence of a self-regulatory organization aids the effectiveness of self-regulation in various ways, including but not limited to its introduction, review and enforcement. However, the limitation of the members of a self-regulatory organization will limit the scope of the self-regulation.

Let us look at an example regarding the disclosure of material non-public information. Japanese securities regulation includes the timely disclosure rules in the TSE's regulation but did not have a rule banning selective disclosure and promoting fair disclosure in the Financial Instruments and Exchange Act until 2017. From 2015 to 2016, some selective disclosure scandals took place.[32] In those cases, the sell-side analysts in the securities companies received material non-public information from the listing companies, and the securities companies offered securities transactions to their customers using that information.

Those offers were illegal.[33] The JSDA therefore took steps to deal with the scandals and amended its analyst rule.[34] Briefly speaking, the new rule forbids analysts from asking listed companies for material non-public information. The JSDA's action might be a rational way of dealing with the scandals, but its self-regulation is not enough to achieve fair disclosure. Selective disclosure happens not only because analysts ask listed companies for material non-public information, but also because the listed companies use that information to maintain good relationships with the analysts. A regulation to

31 TSE, Securities Listing Regulation, Rule 101-103 (as of 4 November 2016).

32 Securities and Exchange Surveillance Commission, Recommendation for Administrative Action based on Findings of the Inspection of Deutsche Securities Inc. (8 December 2015), available at *http://www.fsa.go.jp/sesc/english/news/reco/20151208-1.htm;* Securities and Exchange Surveillance Commission, Recommendation for Administrative Action based on Findings of the Inspection of Credit Suisse Securities (Japan) Limited (15 April 2016), available at *http://www.fsa.go.jp/sesc/english/news/reco/20160415-1.htm.*

33 Art. 117 para. 1 no. 14, Cabinet Office Ordinance on Financial Instruments Business, based on Art. 38, no. 8, Financial Instruments and Exchange Act.

34 See *supra* note 7 and accompanying texts.

achieve fair disclosure has to be broad enough to regulate not only the analysts but also the listed companies. The JSDA's self-regulation is too narrow in terms of the targets for achieving fair disclosure.

A good way to resolve this narrowness of its targets might be for the JSDA to cooperate with the TSE, which could regulate the listed companies. Generally speaking, such cooperation might be more difficult than one might expect. The cooperation of two or more self-regulatory organizations might make the consensus-building procedures required to decide on the content of the self-regulation more challenging. Without some official process, an effective self-regulation likely cannot be established. On the other hand, and as mentioned above, the necessity of public consensus-building procedures may lessen the benefits of self-regulation.[35]

In terms of responsibility for enforcement, some agreement might be necessary. If multiple self-regulatory organizations are in charge of a certain self-regulation, the enforcement level may be excessive or too limited. Since violations of the self-regulation by members of one self-regulatory organization would impair the reputation of this organization relative to the others, the organization may engage in excessive enforcement. On the other hand, if multiple self-regulatory organizations are in charge of enforcement, certain organizations may free-ride on the enforcement of others because enforcement would entail costs. Self-regulation by multiple organizations may seem attractive, but it requires particular considerations to design a system that would work effectively.

V. CONCLUDING REMARKS

Legitimacy and limits of self-regulation represents a very important research topic. Self-regulation is deeply rooted in the Japanese regulatory structure. When the government tries to introduce a new regulation, the legitimacy and limits of self-regulation should be considered more seriously. In some cases, public regulation might prevent a new self-regulation from being established. In other cases, an effective self-regulation cannot be established without public assistance. Such public assistance is not necessarily an evil. However, we should be slightly more concerned about the reasons why the government facilitates self-regulation. It is my guess that there might be some cases where the government uses self-regulation to bypass legislative action, without any legitimate reason.

Tackling the legitimacy and limits of self-regulation means seeking the conditions under which an effective self-regulation can be established and well managed. Generally speaking, if the number of regulated parties is

35 See *supra* note 23 and accompanying texts.

small and they have common interests, self-regulation will work well. On the other hand, if the number of regulated parties is large and they do not have interests in common, it is difficult for self-regulation to be effective. In the latter case, a self-regulatory organization has to play an important role in the creation, review and enforcement of the self-regulation. On that topic, I think a historical and comparative analysis could be fruitful. Self-regulation has a long history, and each country has its own, distinctive self-regulation tradition.

Legitimacy and Limits of Self-regulation in Germany

Andreas Dieckmann[*]

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I. INTRODUCTION

Self-regulation is not a new phenomenon in the "realm" of private law. Rules self-created by private individuals and private communities existed long before there was any state in the modern sense at all.[1] Yet these privately made rules were not understood as self-regu-lation. That changed only when the modern state arose. Since then private norms have been

* Dr. Andreas Dieckmann, Faculty of Law, Gottfried Wilhelm Leibniz University in Hannover.

1 Cf. N. JANSEN/R. MICHAELS, Private Law and the State: Comparative Perceptions and Historical Observations, The Rabel Journal of Comparative and International Private Law (RabelsZ) 71 (2007) 358–392; F. KIRCHHOF, Private Rechtsetzung (Berlin 1987) 508; K. VIEWEG, Normsetzung und -anwendung deutscher und internationaler Verbände: Eine rechtstatsächliche und rechtliche Untersuchung unter besonderer Berücksichtigung der Sportverbände (Berlin 1990) 144–145.

conceived as a counter-draft to the law of the state; this is because "law" and "state" are in a "traditional" view the same, and, therefore, per this "state-centred" view, rules self-created by private individuals or associations seem to conflict with the state's law-making monopoly.[2]

For this reason, self-regulation is often viewed from a public-law perspective. However, such an attitude does not really fit into private law, which regards itself as the place where citizens "freed" from the state (lat. *privare* = to free) regulate their affairs on their own. And because this article is about the legitimacy and limits of self-regulation in *private law,* the concept of self-regulation encompasses in this context only the rules or norms in which private rule-makers, as individuals or as associations, do not exercise power transferred by the state.

Nevertheless, the following remarks on genuine self-regulation can, in principle, be applied to state-regulated self-regulation, too, provided that the binding nature of this self-created law is based on contract or statute (in the sense of institutional or organizational rules), and thus on the private autonomy of its addressees. If, on the other hand, the binding nature of the privately formulated rules relies on the order of the state, it is the state itself that, as in other cases, must answer the question of legitimacy and not the private rule-makers. Then the question of legitimacy, however, is no longer one of private law but of public law.

The right to regulate one's own affairs in a legally binding way in private law is called "private autonomy". Because contracts and statutes are instruments of this private autono-my, the view here is directed towards them as the two basic forms of genuine self-regulation in private law. But privately made rules are binding not only under contract or statute, but also under the concept of "rough consensus and running code",[3] which works like a kind of customary law.

Because the state intervenes in the life of its citizens without their consent or against their will, the question of legitimacy is, in the first instance, concerned only with legislation. Apparently, this is about state dominion and thus about power. But power and dominion can be exercised not only by the state, but also by private individuals and associations. Therefore, not only state but also private power can threaten the freedom of the citizens,

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2 Cf. G. BACHMANN, Private Ordnung (Tübingen 2006) 21, 51; S. MEDER, Ius non scriptum: Traditionen privater Rechtsetzung (2nd ed., Tübingen 2009) 2–4. According to S. MAGEN, Zur Legitimation privaten Rechts, in: Bumke/Röthel (eds.), Privates Recht (Tübingen 2012) 229, the state has a monopoly not to create but only to confirm rules as law.

3 G.-P CALLIESS/P. ZUMBANSEN, Rough Consensus and Running Code: A Theory of Transnational Private Law (Oxford, Portland 2010).

such that both must be legitimized. The private rules based on this private power must be justified. A private rule is legitimate if there are "good reasons" to demand observance from its addressees.[4] That is why the question of legitimacy always arises where a rule is binding on its addressees.[5] Also, a private rule is binding on its addressees only when the state, to which the monopoly of enforcement is attributed, either implements the private rule actively or chooses not to proceed against a private enforcement of the private rule.[6]

II. The Contract – the Basic Concept of Self-regulation in Private Law

But how can private dominion be legitimized in private law? The basic form by which private parties regulate their own affairs among themselves is the contract.[7] And even the contract establishes dominion.[8] It creates a power in one of the contracting partners over the other. Power is the opportunity to implement one's will, if necessary, also against the reluctance of a counterpart.[9] As soon as the contract is binding, the creditor can demand from the debtor the fulfilment of the obligation, even if the debtor no longer wants it. The creditor may enforce his claim against the will or without the consent of the debtor with the help of the state.[10] The contract becomes a norm, because now it no longer depends on the will of the debtor as the addressee of the contractual rule. This private power is legitimate in the case of a contract since the debtor has also originally agreed to the contract. He has voluntarily submitted to his creditor; he has tied himself to him. In this way, he has made use of his private autonomy, i.e. he has exercised his liberty to regulate his own affairs independently within the legal order.

His self-commitment is a self-renunciation of freedom, e.g. the buyer must pay the agreed purchase price to the seller as his creditor. But, at the same time, his self-commitment is the realization of freedom.[11] For on the

4 G. Bachmann, Legitimation privaten Rechts, in: Bumke/Röthel (eds.), Privates Recht (Tübingen 2012) 223.

5 Magen, *supra* note 2, 232.

6 Bachmann, *supra* note 4, 213.

7 Cf. Bachmann, *supra* note 4, 220.

8 Cf. J.-U. Franck, Machtquellen: Grundlagen privater Machtpositionen, in: Möslein (ed.), Private Macht (Tübingen 2016) 540–542.

9 G. Bachmann, Die Legitimation privater Macht, in: Möslein (ed.), Private Macht (Tübingen 2016) 609.

10 So also Franck, *supra* note 8, 541; Bachmann, *supra* note 9, 620.

11 Cf. I. Kant, Die Metaphysik der Sitten (Königsberg 1797) A 1–14, in: Weischedel (ed.), Immanuel Kant. Die Metaphysik der Sitten, Werkausgabe VIII (Frankfurt/

one hand it is his freedom to commit himself to pay a sum of money to the creditor; on the other hand – in a way as a "return" for his voluntary self-commitment and his self-renunciation of his freedom – he receives the purchase-item promised by the seller. This also applies to the seller, so that there is a proper balance of interests between the contracting parties. Behind this is the idea that someone renounces a part of his freedom solely because he receives in return a portion of – and the control over – the freedom of another. This can be summarized under the concept of self-interest. This expression, too, is abbreviated in this context. The contract mechanism is not aimed solely at the realization of individual freedom, but also at the level of general justice which is to be produced at least in the relationship between the contracting parties. This justice is a formal one in the sense that mutual giving and taking (lat. *do ut des*) as a procedure leads to a proper balance of interests between the contracting parties.[12] In this respect, private law pursues a procedural approach. The acceptance, which is stated in the conclusion of the contract, ensures a justified and therefore legitimate liability.[13]

III. General Terms and Conditions – a Combination of Contract and Norm

1. The Failure of the Contract Mechanism: Justice is no Longer Established by Procedure

This procedural approach presupposes, however, that the potential contracting parties are equally empowered. For only then is the individual agreement voluntary and based on private autonomy. The fact that this condition is often not fulfilled in self-regulation is demonstrated by the appearance of general terms and conditions. General terms and conditions are contractual conditions which are only binding if both the "user", meaning the party to the contract who has pre-formulated the terms and conditions of the contract, and the other party has agreed to the terms and conditions. Since the user has pre-formulated these standard terms, the terms of the contract are no longer negotiated as usual. The other party has only the choice of accepting the standard terms or rejecting the contract *(take it or leave it)*.

The user formulates general terms and conditions only so as to deviate favourably from dispositive legal regulations (cf. § 307 para. 2 no. 1 Ger-

Main 1977) 508–516; G. W. F. Hegel, Grundlinien der Philosophie des Rechts oder Naturrecht und Staatswissenschaft im Grundrisse, in: Moldenhauer (ed.), Georg Wilhelm Friedrich Hegel. Werke, Vol. 7 (Frankfurt/Main 1970) 297–298.

12 P. Buck-Heeb/A. Dieckmann, Selbstregulierung im Privatrecht (Tübingen 2010) 261.

13 Bachmann, *supra* note 9, 607.

man Civil Code, *Bürgerliches Gesetzbuch,* BGB). Thus, a proper balancing of interests can no longer come to be through the contract mechanism. Rather, the user exploits the freedom of contract to his advantage and thereby exercises control over his potential contractual partner. It comes to a kind of heteronomy. A party can theoretically choose his contractual partner through a review of the offered standard terms, but he usually rejects this approach because the effort and costs of such a comparison of the general terms and conditions are disproportionate to the resulting benefits.[14] Through this power imbalance, the standard terms assume a norm character, especially since the user has pre-formulated them for many contracts. Hence, the addressees of the standard terms are accordingly undefined so that the terms of the contract have an abstract-general nature.

General terms and conditions are, therefore, a combination of autonomy and heterono-my, and in this way something between contract and norm.[15] A norm is distinguished by the fact that a rule-maker who is different from the addressee of the rule unilaterally imposes a certain behaviour on the addressee without regard for his will, and in this way he makes him the subject of the created rule.[16] For this reason, the *Bundesgerichtshof* (hereinafter: BGH)[17] designates standard terms as a "ready-made legal system" and classifies them in this way as norms,[18] while at the same time emphasizing the "contractual nature of the conditions".[19]

Even if the other contractual party has agreed to the general terms and conditions so that the standard terms have been formally agreed to as contract terms, this alone is not enough to ensure that they are legally binding as an act of self-commitment for this contractual partner of the user. The presumption that the contract mechanism has led to a proper compensation of interests between the contracting parties is no longer applicable, so that a binding application of the standard terms is not legitimate exclusively on account of the

14 BUCK-HEEB/DIECKMANN, *supra* note 12, 50–51

15 BUCK-HEEB/DIECKMANN, *supra* note 12, 54. J. KÖNDGEN, Privatisierung des Rechts: *Private Governance* zwischen Deregulierung und Rekonstitutionalisierung, Archiv für die civilistische Praxis (AcP) 206 (2006) 480; see also D. V. SNYDER, Private Lawmaking, Ohio State Law Journal 64 (2003) 403–420.

16 MEDER, *supra* note 2, 92.

17 The *Bundesgerichtshof* is the German Federal Court of Justice, the highest German appellate court in civil and criminal cases.

18 BGH, 3 November 1994 – I ZR 100/92, BGHZ (Official collection of decisions of the BGH in civil cases) 127 (1995) 281; BGH, 4 May 1995 – I ZR 90/93, BGHZ 129 (1996) 326; BGH, 4 May 1995 – I ZR 70/93, BGHZ 129 (1996) 349.

19 BGH, 1 March 1982 – VIII ZR 63/81, Neue Juristische Wochenschrift (NJW) 1982, 1389.

real individual consent of the rule addressee. The limit of legitimate self-regulation is reached here because the desired justice is not realized.

2. The Consequence: Material Justice Established by State Control

If justice is nevertheless achieved, it is no longer a result of the contract mechanism as a procedural approach. Instead, state law intervenes by first trying to strengthen the individual agreement as legitimation. The standard terms are pre-formulated and done so unilaterally. Because of this, the user must specifically refer the other contractual party to the standard terms and give him the chance to take note of the contents of the terms and conditions (cf. § 305 para. 2 no. 2 BGB). It is only then, if at all, that the other contractual party's agreement can be the expression of a free and self-determined decision in favour of the general terms and conditions.

The procedural approach, however, does not attain full effectiveness (in achieving justice), and in this respect the other contractual party does not regain its freedom completely. There is still a private domination of the user. The binding nature of the standard terms is, furthermore, an act of heteronomy of the user over the other party to the contract, so that the general terms and conditions retain their norm character. For this reason, the content of standard terms is subject to judicial review. The standard of review is given by legislation and the dispositive legal regulations from which the user deviates with his general terms and conditions. Material fairness between the contractual partners is no longer produced on a purely formal basis; it is instead being achieved primarily on a substantive basis.

3. The Legitimacy of Self-created Law in General and Especially of Standard Terms

The legitimacy of standard terms as privately created law is based on a combination of agreement and common welfare,[20] whereby the concept of common welfare stands firstly only for material justice in the relationship of the contractual partners. However, the general terms and conditions are intended for many contracts and thus for addressees who are still undefined, so that these potential contractual partners are also to be included in the reconciliation of interests and thus into the judicial review of the contents. For this reason, standard terms are not interpreted subjectively, as is otherwise usually done with contractual conditions (§§ 133, 157 BGB), but objectively.[21] This also reveals the norm character of general terms and conditions and thus the heteronomy which they express.

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20 BACHMANN, *supra* note 2, 206–208.

21 BUCK-HEEB/DIECKMANN, *supra* note 12, 53.

The reason why a body of rules must be legitimate is the conviction that a rule addressee should only be subject to a fair set of rules.[22] Both contractual partners must consider their negotiated contract to be fair. What is fair for them is what they determine themselves. To ensure that the state does not have to lay down its own standards and value propositions, the state first draws on a procedural approach to generate fairness between the contracting parties. Anyone who submits to a rule – voluntarily agrees to it – will do so only if it is advantageous for him; that is to say, only if it is a fair rule for him will he accept it. In that case the state no longer has to decide what is good and fair for the two contracting parties. The private rule-makers know best what is good and fair for them. Here self-regulation is autonomous. That is the advantage of a procedural approach in relation to a material one.

If the actual consent is no longer voluntary, an illegitimate domination of one party over the other can occur. In place of real approval, or rather flanking its side, we have the idea of common welfare. Even where the weaker rule addressee has not actually and voluntarily agreed to the rules, the body of rules is justified if the addressee could have done so. A rule is fair when it realizes the common welfare. Common welfare is what is beneficial to everyone, so that all individuals would voluntarily agree to the set of rules based on a kind of self-interest. At a minimum, they should do it because it is reasonable for all and in this respect for each of them. In contrast to the view of Gregor Bachmann, here the concept of common welfare is not to be understood in a utilitarian sense.[23] The goal of common welfare is not maximum utility, but justice for all. And therefore, in the words of Stefan Magen, the legitimacy of dominion is assessed not according to its utility but according to its perceived moral quality as a "good" and "fair" dominion.[24]

So that the individual does not seek his own advantage at the expense of others and so that the set of rules is justified for all, one can have recourse to the idea that John Rawls draws up in his theory of justice.[25] The rule-makers, who are at the same time the rule addressees, are under a "veil of igno-

22 MAGEN, *supra* note 2, 232, 244.

23 BACHMANN, *supra* note 2, 16 with note 59, 170, 174–177, 203.

24 MAGEN, *supra* note 2, 232, 244; J. HAIDT/J. GRAHAM, When Morality Opposes Justice: Conservatives Have Moral Intuitions that Liberals may not Recognize, Social Justice Research 20 (2007) 104–105; see also T. R. TYLER, Psychological Perspectives on Legitimacy and Legitimation, Annual Review of Psychology 57 (2006) 393–394; IDEM, A Psychological Perspective on the Legitimacy of Institutions and Authorities, in: Jost/Major (eds.), The Psychology of Legitimacy: Emerging Perspectives on Ideology, Justice, and Intergroup Relations (Cambridge 2001) 430.

25 J. RAWLS, A Theory of Justice (Oxford 1972).

rance".[26] Above all, they do not know about their strengths and weaknesses; all are fictitiously powerless.[27] Because an disadvantageous rule can strike anyone, everyone will agree only to the rule which is not "unfair" to anyone, and thus also not to him.[28] Here, too, there is an attempt to produce justice for those affected by the body of rules by means of a procedural approach.[29] Even though people are certainly characterized by a sense of justice and fairness, views differ in the individual case as to what is good and fair.[30] Therefore, Rawls tries to avoid this problem through his theory of justice, and he thus tries to avoid the questions of what is to be understood under the concept of justice and who can – and is – allowed to define it.

4. The Example of Sports Rules as a Kind of Standard Terms

Where sports associations are organizing competitions, they can bind the athletes to sports rules by contract. Because sports associations are monopolists and, in this sense, socially powerful associations, an athlete who wants to participate in a competition must submit to these sports rules, which are for him a kind of general terms and conditions.[31] The actual consent of the individual sportsman is no longer an exclusive expression of his voluntary self-commitment but, at the very least, a form of heteronomy, an exercise of private power which requires justification. Because in this respect sports rules have a norm character, their substantive content is subject to judicial review. But should a state judge really decide on the meaning of the offside rule in a soccer match? The judge often lacks the necessary knowledge. Sports law is also a law requiring expert knowledge.

In addition, it is often not the social welfare that the state should promote and protect, but rather the "group welfare" of those who are involved in sports.[32] Even in the case of heteronomy regarding the sportsmen, the sports association as the rule-maker has a margin of appreciation as to what is an appropriate regulation for the sporting competition. In this sense sports is autonomous. But, as soon as it is no longer a question of sports

26 RAWLS, *supra* note 25, 136–142.

27 RAWLS, *supra* note 25, 137: "The persons in the original position" even "have no information as to which generation they belong", so that "they must choose principles the consequences of which they are prepared to live with whatever generation they turn out to belong to". Therefore, the common welfare is determined not only by the present members, but also by the future members of the community.

28 Cf. BACHMANN, *supra* note 4, 223.

29 RAWLS, *supra* note 25, 136.

30 BACHMANN, *supra* note 4, 219.

31 BUCK-HEEB/DIECKMANN, *supra* note 12, 72–73.

32 See, with the regard to the difference between common and group welfare, BACHMANN, *supra* note 2, 206.

itself, the submission of the athletes to the competition rules imposed on them is no longer justified by the fairness of the athletic competition. The sports rules become illegitimate and judicial review of their contents is reopened.

IV. Statutes as an Expression of Private Power based on the Example of Sports Associations

1. Statutes – or: the Domination of the Association Over its Members

A sports association that organizes a competition can bind the participants to the sports rules not only by contract but also by its statutes. However, this requires the athletes to be members of the sports association. The statutes become binding as privately created law only if the rule addressee has joined the association and has submitted to the statutes. Because he has voluntarily accepted the statute, its binding nature is legitimate. As in the case of the contract, the binding nature of statutes is based on private autonomy and thus the freedom of the rule addressee. Here as well, the individual member did not negotiate the terms and conditions of the statutes but merely agreed to them. This is like general terms and conditions. The statutes are also a "ready-made legal order"; they have a norm character, and in this respect they are a form of heteronomy. However, this private power is legitimate if the regular addressee has voluntarily consented to them. This changes only when he is dependent on joining the association, for social or professional reasons, especially as a professional sportsman.[33] The statutes of such a socially powerful association are then subject to a judicial review of their contents.

The statutes may be amended, even after the rule addressee has joined the association and thereby submitted to the statutes. In contrast to the general terms and conditions, this does not necessarily require that every member agrees to this because it is not the contract principle that is applied here (cf. § 311 para. 1 BGB) but mostly the principle of majority rule (cf. § 33 para. 1 BGB). Therefore, not all members must agree to the amendment of the statute. This has the consequence that the majority rules over the minority. Hence, at first sight the approval given upon joining the association is no longer sufficient to legitimize the binding nature of the amended statutes. However, the necessary consent can be seen in the fact that the member remains in the association despite the amendment of the statute. However, this presupposes that the member has a right of withdrawal at any

33 Cf. A. Röthel, Lex mercatoria, lex sportiva, lex technica: Private Rechtsetzung jenseits des Nationalstaates?, Juristen Zeitung (JZ) 2007, 757–758.

time (cf. § 39 para. 1 BGB) to avoid the binding nature of the amended statutes and that the member does not depend on his membership in the association. Only then can remaining in the association be regarded as voluntary consent and thus as an act of self-commitment. Otherwise, the binding nature of the amended statute constitutes a dominion of the majority over those members who have not consented to the amendment of the statutes.

2. Autonomy for the Sport?

If joining the association or the fact that the member remains in the association despite the statutes' amendment is no longer an expression of voluntary consent, only the "group welfare" can be considered as a legitimation for the statutes. The association imposes a rule on an individual member without his consent or against his will. But this is legitimate if the member should have agreed anyway, because the norm is well and fair for all members and therefore also for him. For a fair sporting competition to take place, all athletes must be bound by uniform sports rules.[34] The sports association may, therefore, only define "group welfare" for the realm of sport. The sports association is allowed to determine how an appropriate balance of interests between the participating athletes is to be provided. Therefore, the rule formulated by the sports association must be typical for sports and – consistent with the standard for ensuring a fair sporting match – there must be good reasons to demand adherence to this rule from each athlete. The member may be affected by the rule only in his role as a sportsman *(status sportivus)* and not as a private individual, i.e. as a citizen of the state.[35] Otherwise, the sports association exceeds its "self-administration right" and it leaves the "autonomy of sport".

While a sports rule can be sports-typical only to a certain degree, it can still be justified by the association's autonomy.[36] Its legitimacy then depends on the point at which the sports rule leaves the realm of sports. The more a sports rule is typical for sports, the more likely it is legitimized by the autonomy of sport and it is therefore freed of a review by state courts.[37] The fact that a doped sportsman can no longer participate in the competition is cer-

34 Court of Justice of the European Union, 18 June 2006 – C 519/04 P, *Meca-Medina and Majcen/Commission,* Zeitschrift für Sport und Recht (SpuRt) 2006, 197.

35 T. SUMMERER, 2nd Part. Sport, Vereine, Verbände und Kapitalgesellschaften, in: Fritzweiler/Pfister/Summerer (eds.), Praxishandbuch Sportrecht (3rd ed., Munich 2014) 130–131.

36 K. VIEWEG/A. RÖTHEL, Verbandsautonomie und Grundfreiheiten, Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht (ZHR) 166 (2002) 32–33.

37 B. PFISTER, Sportregeln vor staatlichen Gerichten, Zeitschrift für Sport und Recht (SpuRt) 1998, 226.

tainly necessary to ensure a fair sporting match.[38] Even if a professional athlete is affected not only in his role as a sportsman but also in his role as a private individual, the main emphasis is still in the sphere of sport.

A subsequent doping suspension can also be typical of sports and therefore legitimate if it is necessary to ensure fairness and equal opportunities in sport.[39] However, the longer the period of suspension, the more the emphasis shifts to the fact that the sportsman is now increasingly affected in his role as a private person (*status extra-sportivus* and *status oeconomicus*).[40] At this point, the sports association's "group welfare" is no longer sufficient for justifying the doping suspension. This makes it clear that sport and society cannot always be clearly defined, and thus it is not always easy to determine when sport remains autonomous and when state control is necessary to help the athlete in his role as a private individual, i.e. as a citizen of the state.

3. Legitimacy of Self-created Law Through Democratic Rules?

Although a rule formulated by a sports association is typical of sports, there is still a heteronomy over the sportsman as an addressee of the sports rule because he is dependent on the affiliation to the sports association. Therefore, his joining the association and his remaining there is insufficient to conclude that the binding nature of the sports rules is based on an act of pure self-commitment. Because of that, judicial review of the rules under the standard of "group welfare" is called for. However, because a state judge does not have the necessary expertise and because there is a desire to ensure the freedom of private law-makers to regulate their own affairs independently of the state (to the extent possible), this manner of material approach is less preferable than a procedural approach. Part of such a preferred procedural approach is allowing the rule addressees to participate at the rule-making level; another aspect is adherence to the majority principle discussed above. Then the norm can be democratically legitimized and seen as an act of self-commitment.

It is argued that by joining the association, the rule addressee has not only subjected himself to the statutes but also to the majority principle anchored there, so that a subsequent majority decision contrary to his will is still justified by his original agreement. Here, too, the procedural approach

38 K. VIEWEG/R. SIEKMANN, Legal Comparison and the Harmonization of Doping Rules: Pilot Study for the European Commission (Berlin 2007) 221–224, 227–229; J. ADOLPHSEN, Internationale Dopingstrafen (Tübingen 2003) 26.

39 Court of Justice of the European Union, 18 June 2006 – C 519/04 P, *Meca-Medina and Majcen/Commission, supra* note 34, 197.

40 SUMMERER, *supra* note 35, 130–131.

is based on the consent of the rule addressee. His freedom, however he uses it, is then the standard which the state regards as a space of freedom, and to which it also belongs, to subordinate himself to a majority.[41] Participation in decision-making increases at least the chance that the interests of all members, including those who have been prevailed over by the majority, have been incorporated into the established rule.[42] However, because this is not necessarily the case, a judicial review of the content takes place even in the case of a majority decision where it is alleged that the majority has, with the aim of giving itself an advantage, tried to harm either the association as such or the subordinate members (cf. § 243 para. 2 German Stock Corporation Law, *Aktiengesetz,* AktG).[43]

4. Conclusion

In the case of a socially powerful association, consent to the statutes and to the majority principle established in them is not really voluntary. Therefore, consent must be supplemented by the common welfare, and because of this a judicial review of the contents must always be undertaken. The expressed decision of the majority should, at least more or less, be beneficial for all. This is, at least, true if the legal consequences of the majority decision impact all members equally, that is, if the majority principle is combined with the principle of equal treatment.[44] In this way, the common welfare is realized by the majority principle. For this reason, together with the possibility of participation in the decision-making process, the majority principle is sufficient to legitimize the rule democratically. Thus, the principle of procedural justice legitimates the dominion of the association over its members, this being what is referred to as "association power" *(Vereinsgewalt).*[45] Here, too, the aim of protecting individuals from exploitation serves to limit the association power, with the result that judicial review of the contents takes place as soon as minority rights are violated by a majority decision.[46] This is the case, in particular, when the common welfare can no longer justify demanding the minority's compliance with a rule imposed on it. For no one would voluntarily submit to such a rule out of reason; nor should one do so where the rule violates the ethical legal minimum that is accepted in the legal community (cf. §§ 138, 242, 826 BGB).

41 MAGEN, *supra* note 2, 238.
42 Cf. KÖNDGEN, *supra* note 15, 522.
43 Cf. BACHMANN, *supra* note 2, 207.
44 Cf. BACHMANN, *supra* note 4, 223.
45 MAGEN, *supra* note 2, 232, 244–245.
46 BACHMANN, *supra* note 2, 207.

V. The Concept of "Rough Consensus and Running Code" – a Kind of Customary Law

1. The Recourse of Statutory Law to Rules Formulated by Private Associations

Hence, a privately formulated rule can, through contract or statute, assume a binding nature for the rule addressees in private law. The binding nature of this soft law is based on the individual consent of the rule addressees and is, insofar as it lacks complete voluntariness, supplemented by the common welfare. A private rule that is not binding and therefore based on voluntary compliance does not raise a question of legitimacy since there is always a lack of dominion and thus no private power of one over another. However, even where a rule formulated by a private individual or an association has not become binding for the rule addressee under contract or statute, it may be binding for another reason.

Specifically, in many places, the law of the state moves from blanket norms and vague legal concepts to privately created rules. For example, anyone who fails to exercise customary care acts negligently and is liable (§ 276 para. 2 BGB).[47] But, state law does not define what "customary care" means. Instead "customary care" is determined by what is universally accepted in the relevant group as a measure of care, and in this way the private rules of conduct bind state law. These private rules of conduct must be accepted by the group to which they apply. There must be a common consensus on the binding nature of these private rules in the in-group, at least more or less. This broad agreement can be described as a "rough consensus", which is confirmed and updated in practice by its repeated application, and thus it becomes a "running code".[48] The parallel to customary law, or in the same sense to common law, is obvious. The essence of customary law is that the members of a legal community are constantly exercising a specific behaviour and are convinced that they must behave in this way, because it is perceived as a binding, objective law.[49] This, however, is not self-regulation, which is the subject of this article. Self-regulation is defined here as those norms deliberately created by private individuals or association, and that is the difference from the rules which are developed spontaneously "from the bottom up" in society, here in an in-group.

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47 For KÖNDGEN, *supra* note 15, 520, such a legal norm is an "inclusion norm" *(Inklusionsnorm)*.

48 G.-P CALLIESS/P. ZUMBANSEN, *supra* note 3.

49 H. HONSELL, in: Staudinger, BGB (Berlin 2013), Einleitung zum BGB margin-no. 234; K. F. RÖHL/H. C. RÖHL, Allgemeine Rechtslehre (3rd ed., Cologne, Munich 2008) § 70: customary law as "private" law-making.

Private regulators first formulate non-binding norms, for example technical standards or sports rules such as what is known as the FIS-rules, in which the International Ski Federation (in French: the *Fédération Internationale de Ski,* abbreviated FIS) prescribes requirements for all skiers and snowboarders as they exercise their sport, even as a recrea-tional sport. Although these rules are binding neither by contract nor by a statute, the rule addressees voluntarily accept the rules simply by repeatedly applying and reaffirming them.[50] Therefore the legitimacy of these private standards is based on the principle of "rough consensus and running code". They have become, as it were, a sort of common law.

The private rules become binding through the fact that the rule addressees rely on the knowledge of the private rule makers, called formulating agencies, and therefore immedi-ately accept and follow the privately formulated rules. Thus, this soft law is a form of dominion, and because of this the rules have norm character. The private rule-makers exert power over the addressees of the rule. This heteronomy requires legitimation. In contrast to normal customary law, the rules do not arise out of society "from the bottom up". Rule-makers and addressees of the rule are not more or less equal, and the private individuals are not identically empowered and free of control ("bottom-up model"); instead it is a sort of norm setting "from the top down" ("top-down model").[51]

2. Procedural Requirements for "Good" and "Fair" Self-regulation

For the addressees of a rule to be able to rely on (i) the knowledge of the professional private rule-makers and (ii) the fact that the private rules express an appropriate balance of the interests of all those affected by the private rules, also here a procedural approach is preferable to judicial review in order to offset the legitimacy deficit. For this reason, private rule-makers should be independent, the procedure in which the rules are formulated should be transparent and documented, and the rules should be public.[52] In addition, the possibility of participation in this process must be granted to all who are affected by the private rules, so that their interests can be incorporated into the process of rule-making.[53] Therefore, the private committees that formulate the norms

50 Cf. G. WAGNER, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch (6th ed., Munich 2013) § 823 para. 572; P. W. HEERMANN/S. GÖTZE, Modifizierte Anwendung der FIS-Regeln infolge technischer und räumlicher Neuerungen im Wintersport, Neue Juristische Wochenschrift (NJW) 2003, 3253.

51 Cf. MEDER, *supra* note 2, 9.

52 Cf. BUCK-HEEB/DIECKMANN, *supra* note 12, 277–289; KÖNDGEN, *supra* note 15, 523.

53 KÖNDGEN, *supra* note 15, 522.

should be filled with representatives of all groups which might be influenced by the self-created law.[54] If public interest is also effected by the private norms, the state, as the guardian of the public welfare of all its citizens, has to ensure that all third-party interests are taken into account in the case of the private rule-making. Here private or genuine self-regulation becomes a kind of regulated self-regulation. Provided these procedural conditions are fulfilled, there is at least the presumption that the private rules represent an appropriate balancing of the interests of all rule addressees, and therefore they are legitimately accepted and obeyed by them.

If the private rule-makers have followed these procedural minimum requirements, the formulated rules are presumed to be "fair" and therefore generally accepted and adhered to by the rule addressees, although the private rules are intrinsically non-binding and have merely an advisory character.[55] However, this presumption can be rebutted. An addressee who is burdened by the norm can therefore refute this presumption in court, so that a judicial review of the contents reappears. Because the private rules are already binding if accepted and adhered to by most of the addressees, this legitimate dominion of the majority over the minority finds its limit when an individual addressee is disproportionately affected by the private rule. Here, too, the protection from exploitation applies.

VI. Concluding Remarks

Even if the term "self-regulation" refers to autonomy and thus to self-determination, private power can nevertheless exist and thus there may be a dominion of one over others. Self-regulation, too, can threaten the freedom of the individual and thus threaten social justice in its entirety. As power always needs justification, the question of legitimacy also arises in the case of self-created private rules and not merely in the case of state law. To protect freedom and justice, state law first pursues a procedural approach and abstains from its own material evaluations, recognizing a rule as binding only if the rule addressee voluntarily consented to it as an act of self-commitment.

As an expression of private autonomy, the contract is the model for a principle of material justice generated solely by procedural justice. Behind this is the idea that everyone knows best what is good and fair for him. Because the individual as the norm addressee becomes at the same time the norm creator, he subjects himself only to his own law and not to the dominion of another. This assumes, however, that all parties are equally empowered. Not one of them is master or servant. Because, in the words of Ernst-Joachim Mestmäck-

54 Cf. Buck-Heeb/Dieckmann, *supra* note 12, 278–283.

55 BGH, 14 June 2007 – VII ZR 45/06, BGHZ 172 (2008) 355 (technical norms).

er, it is "the great achievement of private law, that in the play of the forces which arise out of society, no masters and servants are recognized."[56]

If actual and individual consent alone is no longer sufficient to justify a private norm as an expression of dominion, the consent given must be flanked by the aspect of common welfare. Thus, in order for private rules to be legitimate in this case, the real agreement, which must be present always – at least as a "residual" of self-determination – must be supplemented by the common welfare.[57] For what is good and fair for all can and must be agreed to out of reason by everyone. The state is the guardian of the common welfare. It determines what is good and fair for all. This, however, leads to a conflict with the freedom of private law-makers who express their specific valuations in their own realms, especially in sports or technology, and not necessarily those of the public. Accordingly, a procedural approach is again preferable to a judicial review of substantive terms, as this better protects, as far as possible, the autonomy of citizens in private law from well-intentioned interventions by the state.

Here, too, a procedural approach establishes material justice, or at least an opportunity to promote material justice. It legitimates the private norms created in this way as "good" and "fair" and thus ensures that the rule addressees accept them as binding. This procedural approach includes, above all, the majority principle, since the decision of the majority – more or less – ideally expresses what is beneficial and what is therefore more appropriate for all. However, because there is still the risk that the majority rule over the minority will be exploited to the former's advantage and result in an abuse of its private power, even the democratic majority principle finds its limit in protection against exploitation, such that the injury of indispensable minority rights can be asserted at any time before the state courts. Hence, the interventions by the state in the legal relations of its citizens should be restricted in private law to what is necessary to secure and promote the freedom of its citizens as individuals and as communities.[58] Self-regulation as private rule-making is typical in private law, at least it should be, and in this respect self-regulation is just an expression of the principle of subsidiarity in private law.[59]

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56 E.-J. MESTMÄCKER, Private Macht: Grundsatzfragen in Recht, Wirtschaft und Gesellschaft, in: Möslein (ed.), Private Macht (Tübingen 2016) 44, recalling Hegel's depiction of the master and the servant.

57 BUCK-HEEB/DIECKMANN, *supra* note 12, 257; BACHMANN, *supra* note 2, 206.

58 Cf. H. EIDENMÜLLER, Effizienz als Rechtsprinzip: Möglichkeiten und Grenzen der ökonomischen Analyse des Rechts (4th ed., Tübingen 2015) 374–385; W. ENDERLEIN, Rechtspaternalismus und Vertragsrecht (Munich 1996) 52–67.

59 Cf. S. MEDER, Doppelte Körper im Recht: Traditionen des Pluralismus zwischen staatlicher Einheit und transnationaler Vielheit (Tübingen 2015) 293–297, 298–301.

IV. Self-Regulation in Transnational Perspective

Lex Mercatoria and Self-Regulation in Transnational Perspective

Yuko Nishitani[*]

I. Introduction
II. Self-Regulation in Cross-Border Transactions
  1. Notion of Lex Mercatoria
  2. Self-Regulatory Regimes
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V. Conclusion

I. Introduction

In today's globalized world, cross-border activities of individuals, corporations and other actors are increasing and expanding remarkably, giving rise to various cross-border legal relationships. The legislative power that used to be concentrated on sovereign states has gradually eroded. Various norms are developing at supranational, international or regional levels. While sovereign states certainly remain the most important stakeholders in fulfilling the function of law-making, regulation and adjudication, states are continuously diminishing their autonomy and becoming interconnected and interdependent, as the examples of the European Union (EU) and the World Trade Organization (WTO) show.[1]

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* Prof. Dr. Yuko Nishitani, Professor of International Business Law and Private International Law at Kyōto University Graduate School of Law.

1 See, *inter alia,* R. MICHAELS, Transnationalizing Comparative Law, Maastricht Journal of European and Comparative Law 23 (2016) 352; Y. NISHITANI, *Global na chitsujo keisei no tame no kadai: kokusai-hō to kokusai shihō no kyōdō o mezashite* [Contemporary challenges for global ordering: Bridging between public and private international law], Ronkyū Jurisuto 23 (2017) 43; *idem, Global-ka to kokusai shihō: Kokusai kazoku-hō no shiten kara* [Private international law in the era of globalization: from a viewpoint of private international family law], Hōritsu Jihō 1103 (2016) 70.

At the same time, various non-state private actors – such as multinational enterprises, business organizations or entities, associations, NGOs, religious communities, international organizations or other bodies – are increasingly generating autonomous or customary norms as non-state law (or anational law) through their cross-border activities. These norms often fulfill the function of "self-regulation" of private actors, independently of sovereign states. With an increasing number of non-state norms, their validity, efficacy and self-regulatory function, as well as their relationship with state law is being questioned. Some authors even claim the existence of an autonomous transnational legal order that is separate from any national legal system.[2] With a gradual erosion of state sovereignty, the divide between public and private starts blurring. In various sectors, public law and private law increasingly blend or overlap to cooperate to fulfill a regulatory function. This requires us to reconsider the relationship between law and the state or the society, and between the state and global markets.[3]

It is, of course, a difficult and challenging task to establish a sophisticated legal theory for such a complex new phenomenon. As a preliminary attempt to tackle these issues, the underlying paper envisages an analysis of the functioning and nature of *"lex mercatoria"* as a non-state law for cross-border transactions from a viewpoint of self-regulation. This study focuses on self-regulation as self-regulation represents the efficacy of non-state law constituted by organizations or entities other than the states. Against this background, this paper first examines the notion of *lex mercatoria* as autonomous non-state law and the various modalities of self-regulation (II.). Second, this study analyzes the legal nature of *lex mercatoria,* particularly its legal validity and efficacy (III.). Third, aspects of dispute resolution are investigated as a method of implementing *lex mercatoria* to govern cross-

2 H. MUIR WATT, Private International Law beyond the Schism, Transnational Legal Theory 2-3 (2011) 390 ff.

3 P. ZUMBANSEN, Defining the Space of Transnational Law: Legal Theory, Global Governance and Legal Pluralism, in: Handl/Zekoll/Zumbansen (eds.), Beyond Territoriality. Transnational Legal Authority in an Age of Globalization (Leiden/Bosten 2012) 70, 81 ff.; see also Y. ASANO, *Hō-riron ni okeru global hō-tagenshugi no ichiduke* [The place of global legal pluralism in legal theory], in: Asano et al. (eds.), *Global-ka to kōhō shihō kankei no saihen* [Globalization and the restructuring of the relationship between public law and private law] (Tōkyō 2015) 110 ff.; *idem, Shihō riron kara hō-tagenshugi he: Hō no global-ka ni okeru kōhō shihō no kubun no saihensei* [From private law theory to legal pluralism: Restructuring the divide between public law and private law in globalization of law] (*Shihō riron*), *ibid.,* 305 ff.; T. FUJITANI, *Global-ka to kōhō shihō no saihen: Global-ka no moto deno-hō to tōchi no aratana kankei* [Globalization and the restructuring of public law and private law: New relationship between law and regulation in the face of globalization], *ibid.*, 333 ff.

border transactions in arbitration and litigation (IV.). Some final remarks will conclude this paper (V.).

II. Self-Regulation in Cross-Border Transactions

1. Notion of Lex Mercatoria

The notion of *lex mercatoria* has been used and defined differently by various authors. The divergent contour and scope of *lex mercatoria* reflects the divergent position of these authors, as well as the evolution and expansion of non-state norms in cross-border transactions.[4]

The origin of *lex mercatoria* is often ascribed to the uniform customary merchant law that developed around the Mediterranean in the Middle Ages in Europe.[5] Yet, even the proponents of the ancient *lex mercatoria* have so far failed to provide sufficient accounts for their claim. Such historical facts are difficult to prove or disprove,[6] considering that trade was carried out only by a small group of privileged merchants and the available sources are mostly limited to procedural rules and documents of mercantile courts.[7] The debate on ancient merchant law should rather be understood as an additional historical argument brought about by contemporary authors[8] to justify the revival of non-codified law.[9]

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4 U. Stein, Lex Mercatoria. Realität und Theorie (Frankfurt/Main 1995) 1 ff., 13 ff.

5 N. Jansen, Legal Pluralism in Europe: National Laws, European Legislation, and Non-legislative Codifications, in: Niglia (ed.), Pluralism and European Private Law (Oxford et al. 2013) 109 ff.

6 R. Michaels, Legal Medievalism in Lex Mercatoria Scholarship, Texas Law Review 90 (2012) 261 ff. Proponents of the ancient *lex mercatoria* are, for example, L. E. Trakman, The Medieval Law Merchant (1983), in: Bernstein/Parisi (eds.), Customary Law and Economics (Cheltenham et al. 2014) 75 ff. On the other hand, opponents denying the ancient *lex mercatoria* are, for example, A. Cordes, Auf der Suche nach der Rechtswirklichkeit der mittelalterlichen Lex mercatoria, Zeitschrift der Savigny-Stiftung für Rechtsgeschichte 118 (2001) 172 ff.; K. O. Scherner, Lex mercatoria – Realität, Geschichtsbild oder Vision?, *ibid.*, 148 ff.; E. Kadens, The Empirical and Theoretical Underpinnings of the Law Merchant: Order within Law, Variety within Custom: The Character of the Medieval Merchant Law, Chicago Journal of International Law 5 (2004) 39 ff.; *idem,* The Myth of the Customary Law Merchant, Texas Law Review 90 (2012) 153 ff. For an overall state of discussion, see G.-P. Calliess, Lex mercatoria, ZenTra Working Papers in Transnational Studies 52 (2015) 3 ff. (available at *https://www.ssrn.com/en/*).

7 See G. de Malynes, Consuetudo, vel lex mercatoria or the ancient law-merchant (London 1622, reprinted in 1997); W. Beawes, Lex mercatoria: or a complete code of commercial law (6th ed., London 1813).

8 See, e.g., K.-P. Berger, The Creeping Codification of the New Lex Mercatoria (2nd ed., Alphen aan den Rijn 2010).

In Europe of the 19th century, subsequently to the era of *ius commune,* legislative power was concentrated in the modern nation states.[10] Yet, as early as the turn of the 20th century, the state's exclusive authority of law-making was starting to be questioned by *Eugen Ehrlich* in his "free legal theory" (1903)[11] and by *Santi Romano* in the theory of legal orders (1918).[12] A Japanese author, *Masaichiro Ishizaki,* investigated in 1928 the silk trade run by silk associations in New York and Lyon. He observed that these closed communities dispensed with state law, as their transactions were governed by trade usage and standard contractual terms, financed without an official banking system, and subject to autonomous dispute resolution by arbitration.[13] Furthermore, *Ernst Rabel* and *Edouard Lambert,* as proponents of comparative and uniform law, put forth work referring to non-state norms as a method of private law unification.[14] *Großmann-Doerth* also observed that cross-border sales contracts were governed by general terms and conditions prepared by merchants, which constituted an autonomous normative order in his eyes.[15]

From the beginning of the 1960s, the academic discussion on *lex mercatoria* flourished in France, the UK and some other countries. It was the time where unification of commercial law by treaties encountered difficulties due to the West-East divide as an antagonistic "capitalism vs. communism," and the North-South divide as an antagonistic "developed countries vs.

9 MICHAELS, *supra* note 6, 262 ff.

10 A. PADOA SCHIOPPA, Storia del diritto in Europa. Dal medioevo all'età contemporanea (Bologna 2007) 456 ff.

11 E. EHRLICH, Freie Rechtsfindung und Freie Rechtswissenschaft (Leipzig 1903; reprint 1973) 34 ff.

12 S. ROMANO, L'ordre juridique (Paris 2012) (traduction française de la 2e édition de *l'Ordinamento giuridico. Studi sul concetto, le fonti e i caratteri del diritto* (Pisa 1918)) 77 ff.

13 M. ISHIZAKI, Le droit corporative international de la vente des soies: Les contrats-types américaines et la codification lyonnaise dans leurs rapports avec les usages des autres places*,* Vol. 1-3 (Paris 1928); see F. OSMAN, La contribution de Masaichiro Ishizaki à la doctrine de la *Lex Mercatoria,* in: Jaluzot (ed.), Droit japonais, droit français. Quel dialogue? (Geneva 2014) 79 ff.

14 E. RABEL, Observations sur l'utilité d'une unification du droit de la vente au point de vue des besoins du commerce international, in: Leser (ed.), Ernst Rabel Gesammelte Aufsätze, Vol. 3 (Tübingen 1967) 477 ff. (first published in 1935); *idem,* L'unification du droit de la vente internationale, ses rapports avec les formulaires ou contrats-types des divers commerces, *ibid.,* 646 ff. (first published in 1938); E. LAMBERT, Introduction: La fonction du droit civil comparé, Vol. 1 (Paris 1903) 109 ff.

15 H. GROSSMANN-DOERTH, Das Recht des Überseekaufs, Vol. 1 (Mannheim et al. 1930) 42 ff.; see also *idem,* Selbstgeschaffenes Recht der Wirtschaft und staatliches Recht (Freiburg 1933) 26.

developing countries".[16] Against this background, *lex mercatoria* as an autonomous non-state law appeared a feasible alternative.[17]

In 1961, *Goldman* asserted the existence of *lex mercatoria* as "customary law" in cross-border commercial transactions. He considered *lex mercatoria* as a law of the *tertium genus,* independent of domestic law and international law.[18] Thus, for *Goldman, lex mercatoria* primarily concerned (i) general principles of law, such as *"pacta sunt servanda"* and good faith, and (ii) commercial customs, trade usage, standard contractual terms and other customary norms. On the other hand, *Schmitthoff* called autonomous commercial norms the new merchant law.[19] Thus, he included also "international legislation" into the category of *lex mercatoria,* in addition to the (i) general principles of law and (ii) customary norms. For *Schmitthoff,* the category of international legislation encompassed (iii) uniform commercial rules adopted by formulating agencies,[20] such as the Uniform Rules for Documentary Credits (UCP)[21] and the INCOTERMS,[22] and (iv) uniform law conventions, such as the 1924/68 Hague-Visby-Rules on bill of lading.[23]

Since the 1990s, uniform commercial rules are no longer limited to sectorial norms without systematics. Rather, they also include comprehensive

16 See R. DAVID, The International Unification of Private Law, in: International Encyclopedia of Comparative Law (1972) 5-41 ff.; J. KROPHOLLER, Einheitsrecht (Tübingen 1975) 78 ff., 225 ff., 344 f.; Y. NISHITANI, *Hō-tōitsu no tenkai to hi-kokka-hō no igi* [Evolution of uniform law and the impact of non-state law], Minshōhō Zasshi 153-5 (2017) 667 ff.

17 CALLIESS, *supra* note 6, 9.

18 For Goldman, *lex mercatoria* was "droit coutumier du commerce international": B. GOLDMAN, The New Law Merchant, Journal of Business Law 1961, pp. 12 ff.; *idem,* Frontière du droit et «lex mercatoria», Archives de philosohie du droit 9 (1964) 187 ff.

19 C. SCHMITTHOFF, International Business Law: A New Law Merchant ("Law Merchant"), in: Cheng (ed.), Selected Essays on International Trade Law (Dordrecht 1988) 20 ff.; *idem,* The Law of International Trade, Its Growth, Formulation and Operation ("International Trade"), *Ibid.* 165 ff.

20 For formulating agencies, see*, inter alia,* International Institute for the Unification of Private Law (UNIDROIT) *(http://www.unidroit.org/);* United Nations Commission on International Trade Law (UNCITRAL) *(https://www.uncitral.org/);* International Chamber of Commerce (ICC) *(http://www.iccwbo.org/).*

21 Uniform Customs and Practice for Documentary Credits (the latest version is UCP600 adopted in 2007).

22 Rules for the Use of Domestic and International Trade Terms (the latest version is INCOTERMS 2010).

23 International Convention for the unification of certain rules of law relating to bills of lading, Brussels, 25 August 1924 ("Hague Rules"); Protocol to amend the International Convention for the unification of certain rules of law relating to bills of

private codification, such as the 1994 UNIDROIT Principles (UPICC)[24] followed by the 1995 Principles of European Contract Law (PECL).[25] At the same time, uniform law conventions have been increasing in various areas. The most successful one is certainly the 1980 Vienna Sales Convention (CISG),[26] which has so far gained 89 Contracting States including Japan.[27] While the majority of authors only regard customary, unwritten norms as *lex mercatoria,*[28] others adopt a broader notion of *lex mercatoria* that encompasses also the UPICC and the CISG.[29]

Today, following expanding international investment agreements (IIAs) and arbitration in state-investor disputes,[30] the sources of *lex mercatoria* also extend to public international law. Further, in international financial regulation, soft law instruments like Basel III (2010/17)[31] and the IOSCO Principles[32] play an important role.[33] Some religious laws should be includ-

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lading signed at Brussels on 25 August 1924, Brussels, 23 February 1968 ("Visby Rules"); SDR Protocol, Brussels 21 December 1979.

24 UNIDROIT Principles on International Commercial Contracts (UPICC) (the latest version is 2016), available at *http://www.unidroit.org/.*

25 O. LANDO/H. BEALE (eds.), Principles of European Contract Law, Parts I & II (2000); O. LANDO/E. CLIVE/A. PRÜM/R. ZIMMERMANN (eds.), Principles of European Contract Law, Part III (2003); see also the 2009 Draft Common Frame of Reference (DCFR) at von Bar/Clive/Schulte-Nölke et al. (eds.), Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR) (Munich 2009), available at *https://www.law.kuleuven.be/personal/mstorme/2009_02_DCFR_OutlineEdition.pdf.*

26 United Nations Convention on Contracts for the International Sale of Goods (CISG), Vienna, 11 April 1980.

27 See *http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html.*

28 STEIN, *supra* note 4, 184 ff.; see also 2005 Commission Proposal for the Rome I Regulation (see *infra*).

29 See, e.g., J. H. DALHUISEN, Dalhuisen on Transnational Comparative, Commercial, Financial and Trade Law, Vol. 1 (6th ed., Oxford et al. 2013) 349 ff.; A. TAKAKUWA, *Kokusai shō-torihiki-hō* [International Business Law] (3rd ed., Tōkyō 2010) 70; H. KANSAKU, *Global na shihon shijō ni okeru soft law to nihon-hō heno eikyō* [Soft law in the global market and its influence on Japanese law], in: Dogauchi (ed.), *Gendai-hō no dōtai* [Dynamics of contemporary law], Vol. 4: *Kokusai shakai no hendō to hō* [Dynamics in international society and law] (Tōkyō 2015) 67; T. MORISHITA, *Lex mercatoria to kokusai kin-yū* [Lex mercatoria and international financing], *ibid.*, 98 ff.

30 A. KOTERA (ed.), *Kokusai tōshi kyōtei: Chūsai ni yoru hōteki hogo* [International investment agreements: legal protection by arbitration] (Tōkyō 2010) 2 ff.

31 Basel Committee on Banking Supervision.

32 Objectives and Principles of Securities Regulation of the IOSCO (International Organization of Securities Commissions) *(https://www.iosco.org/library/pubdocs/pdf/IOSCOPD561.pdf).*

33 KANSAKU, *supra* note 29, 75 ff.

ed in *lex mercatoria* as well. Jewish law particularly serves as self-regulatory norms for transactions in Jewish communities,[34] and Islamic law as autonomous norms of financing with the prohibition of interests in the Middle East and Malaysia.[35] Ultimately, one author even includes any kind of "knowledge practices" – institutions, actors, doctrines, ideas and material documents – as a feature of global private law.[36]

These various components of *lex mercatoria* represent the contemporary phenomena that non-state norms accrue and compound multiple layers along with state law. With a view to subsuming plurality of legal norms and analyzing self-regulatory functions of non-state law, the underlying study follows a broader notion of *lex mercatoria.* Thus, the reference to *lex mercatoria* includes the entire range of non-state norms addressing cross-border transactions between private parties, including private codification like the UPICC and the PECL, as well as uniform law treaties like the CISG.[37]

2. Self-Regulatory Regimes

With the expansion of non-state norms, self-regulatory regimes are emerging in certain sectors. Early on, non-state law in maritime transport of goods has developed to serve for self-regulation *(lex maritima).* The 1877 York-Antwerp Rules on general average adopted by the CMI[38] have, in particular, often been employed and revised. Also, standard terms called the "Gencon C/P" on voyage charters produced by the BIMCO in 1922[39] have usually been relied on as self-regulatory norms.[40]

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34 A. LEVINE (ed.), The Oxford Handbook of Judaism and Economics (Oxford 2011) 372 ff., 507 ff.

35 See, *inter alia,* Y. MOROZUMI, *Islam-hō ni okeru shin-yō to 'risoku' kinshi* (Tōkyō 2011) 49 ff.; ISLAM KINYŪ KENTŌ-KAI (ed.), *Islam kinyū: Shikumi to dōkō* [Islamic financing: structure and tendencies] (Tōkyō 2008) 22 ff.; E. YOSHIDA, *Islam kinyū nyūmon* [Introduction to Islamic financing] (Tōkyō 2007) 16 ff.

36 A. RILES, The Anti-Network. Private Global Governance, Legal Knowledge, and the Legitimacy of the State, in: Jansen / Michaels (eds.), Beyond the State. Rethinking Private Law (Tübingen 2008) 185.

37 Also KANSAKU, *supra* note 29, 67.

38 They had first been adopted as 1864 York Rules (the latest version is the "York-Antwerp Rules 2016"). For a thorough analysis of law-making activities of the CMI (Comité Maritime International), see T. FUJITA, *Kokusai shō-torihiki ni okeru kihan keisei: Bankoku kaihō-kai o rei toshite* [Law-making in cross-border business transactions: taking the CMI as an example], Soft Law Kenkyū 12 (2008) 107 ff.

39 "Uniform General Charter" of the BIMCO (Baltic and International Maritime Conference) (the latest version is Gencon C/P 1994).

40 G.-P. CALLIESS / H. HOFFMANN / J. M. MERTENS, The Transnationaliation of Commercial Law, ZenTra Working Papers in Transnational Studies No. 04/2012, p. 9.

Notably, state-induced self-regulation may be requested when autonomous regulation does not suffice, as in the case of the 1924 Hague Rules on bill of lading.[41] The International Law Association (ILA) had adopted the corresponding norms to restrict the carrier's exemption clauses as a non-binding instrument in 1921. These model provisions were expected to be voluntarily incorporated into bills of lading by carriers. However, because there were no sanctions other than *de facto* pressure by banks or insurers, carriers would not adopt these rules, and thus incur liability for fear of losing out in the competition against other carriers.[42] Thus, the 1921 Hague Rules had to be transformed into the 1924 Convention as a legally binding instrument, with a view to formalizing regulation by the state.[43] Arguably, some forms of self-regulation in certain sectors do not work without the involvement of the state.

On the other hand, for international swaps and derivative transactions, an autonomous community of interests has been established by the International Swaps and Derivatives Association (ISDA).[44] The ISDA is a private body with highly professional knowledge, engaged in commercial activities, detached from any domestic market regulation or state law. International swap dealings are usually governed by the ISDA Master Agreement. This has usually prevented the intervention of state bankruptcy law, as collateral arrangements are requested and the payment is refused in case of insolvency.[45] The ISDA has yielded an autonomous system and even influenced negotiations and the adoption of conventions on securities held with an intermediary at the Hague Conference on Private International Law (HCCH)[46] and UNIDROIT.[47] Within the system of the ISDA, collateral is *de facto* governed by New York law or English law pursuant to the parties' choice of law.[48] In this sector, the state can hardly exercise regulation by solely applying securities law extraterritorially.[49]

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41 See *supra* note 23.

42 S. D. COLE, The Hague Rules 1921 Explained (London 1922).

43 M. A. CLARKE, Aspects of the Hague Rules. A Comparative Study in English and French Law (The Hague 1976) 3 ff.

44 International Swaps and Derivatives Association (ISDA).

45 RILES, *supra* note 36, 186 ff.

46 Hague Conference on Private International Law (HCCH).

47 Hague Convention on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary, 5 July 2006; UNIDROIT Convention on Substantive Rules for Intermediated Securities, Geneva, 9 October 2009; see RILES, *supra* note 36, 193 (note 33 ff.).

48 RILES, *supra* note 36, 204 f.

49 N. MATSUO, *Kinyū shōhin torihiki-hō* [Law on securities transactions] (4th ed., Tōkyō 2016) 84 ff.; KANSAKU, *supra* note 29, 77 ff.

For Internet domain names, the ICANN[50] has adopted a specific dispute resolution policy (UDRP) and UDRP-Rules.[51] The UDPR-Rules are being implemented in a complex network of governance,[52] constituting *lex digitalis* as non-state law. Although the UDPR-Rules are based on contracts, the system is not entirely voluntary, as there is no alternative for a domain name.[53] As *Kozuka* rightly contends, the ICANN creates *de facto* an exclusive right for the use of a domain name, like intellectual property with *erga omnes* effects.[54]

In the sports sector, the so-called *lex sportiva* is gradually emerging.[55] For the purpose of dispute resolution, the Court of Arbitration for Sport (CAS)[56] offers a unique venue and yields jurisprudence on disputes over the methods of selecting or disciplining athletes and authorizing their commercial activities by the IOC[57] and other sport associations or entities. For particular sectors like football, the Fédération Internationale de Football Association (FIFA)[58] has strict control over the national associations and players. The autonomous, self-regulatory norms adopted by FIFA are referred to in resolving various legal questions.

The Commercial Court of St. Gallen in Switzerland rendered a notable judgment on 12 November 2004.[59] In this case, the plaintiff Swiss company entered into contract with the defendant Greek company on the transfer of a football player. There was an exclusive choice of court clause in favor of the Commercial Court of St. Gallen in Switzerland. As the law governing the contract, the parties selected the FIFA Rules and Swiss law. Four years later, dispute arose as to the payment of transfer fee. While the limitation period was 10

50 Internet Corporation for Assigned Names and Numbers (ICANN) *(https://www.icann.org/)*.

51 Uniform Domain Name Dispute Resolution Policy (UDRP) *(https://www.icann.org/)*.

52 E. M. WEITZENBOECK, Hybrid net: the regulatory framework of ICANN and the DNS, International Journal of Law and Information Technology 22-1 (2014) 49 ff.

53 G. SPINDLER, Private Rechtssetzung in IT-Märkten, in: Zimmermann (ed.), Globalisierung und Entstaatlichung des Rechts, Vol. 2 (Tübingen 2008) 23.

54 S. KOZUKA, *Keisei shutai no gawa kara mita soft law: soft law o keisei suru 'dantai'* [Soft law observed from a viewpoint of its constituents: 'entities' creating soft law], in: T. Fujita (ed.), *Soft law no kiso riron* [Funtamental theories of soft law] (Tōkyō 2008) 107 ff.

55 A. RÖTHEL, Lex mercatoria, lex sportiva, lex technical – Private Rechtssetzung jenseits des Nationalstaates?, Juristenzeitung (JZ) 2007, 755.

56 Court of Arbitration for Sport (CAS) *(http://www.tas-cas.org/)*.

57 International Olympic Committee (IOC) *(https://www.olympic.org/the-ioc)*.

58 Fédération Internationale de Football Association (FIFA) *(http://www.fifa.com/)*.

59 Handelsgericht St. Gallen (Switzerland), 12 November 2004 *(http://www.unilex.info/case.cfm?id=1123)*.

years pursuant to Swiss law (Art. 127 OR), the FIFA Rules restricted it to two years. The question was, therefore, whether the FIFA Rules prevailed over the limitation period under Swiss law and time-bared the underlying claim.

The Commercial Court of St. Gallen affirmed this question and dismissed the claim by applying the FIFA Rules as the law governing the contract, allegedly following the majority of Swiss authors that allow the choice of non-state law (Art. 166 (1) IPRG).[60] Thus, the FIFA Rules were given priority to the Swiss law on the limitation period, although as a matter of substantive law this provision cannot be derogated from by the parties' agreement (Art. 129 OR). This decision was ultimately overruled by the Swiss Federal Supreme Court on 20 December 2005, which held that the FIFA Rules were only incorporated into the contract (*materiellrechtliche Verweisung*) and could not go beyond the Swiss mandatory rules.[61] Nevertheless, the decision of the Commercial Court of St. Gallen remains a remarkable example of state acknowledgement of *lex mercatoria* as prevailing over state law, thus respecting the self-regulation of an autonomous entity.

3. Reasoning

As has been discussed, *lex mercatoria* may play an important role for self-regulation in various sectors. Needless to say, employing *lex mercatoria* has various advantages, such as flexibility, efficiency, reflecting sector-specific expertise and fulfilling a model function. As the reverse side of the coin, we observe the limitations of state law. State law is primarily geared toward domestic cases and does not necessarily fit cross-border transactions. The legislature can hardly keep up with rapid economic, social or technical developments.[62] Nor can the legislature always act expeditiously to take necessary measures. Particularly in the areas of international swap transactions or Internet domain names, the state has neither effective tools for regulation nor expertise for sophisticated law-making. The self-regulatory schemes by *lex mercatoria* in cross-border transactions may respond better to the need of businesses and global markets, and form a valid substitute for unsuitable and inefficient state law.[63]

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60 For the academic opinion that allows the choice of non-state law as a body of rules, K. SIEHR, Das Internationale Privatrecht der Schweiz (Zürich 2002) 232; M. AMSTUTZ/N. P. VOGT/M. WANG, Art. 116 IPRG, in: Honsell/Vogt/Schnyder (eds.), Kommentar zum schweizerischen Privatrecht: Internationales Privatrecht (Basel 1996) para. 21.

61 Bundesgericht (Switzerland), 20 December 2005 *(http://www.unilex.info/case.cfm?id=1124)*.

62 See J.-H. BINDER, Regulierungsinstrumente und Regulierungsstrategien im Kapitalgesellschaftsrecht (Tübingen 2012) 284 ff.

63 KOZUKA, *supra* note 54, 106 ff.

However, *lex mercatoria* as non-state law has also certain flaws, as it is not provided with democratic legitimacy. Nor does it necessarily cater to fair, appropriate, balanced, transparent, ascertainable or comprehensive norms. *Lex mercatoria* may also be made advantageous for some stakeholders in particular sectors. Thus, granting third-party effects to *lex mercatoria* may cause externalitie and require careful assessment.[64] These aspects should be considered when discussing the legal validity and eligibility of *lex mercatoria* to govern the contract.

III. Legal Validity of *Lex Mercatoria*

1. Lex Mercatoria and Legal Sources

Can we then consider *lex mercatoria* as "law"? How can we recognize the legal validity of non-state norms and emancipate "law" from the "state"?[65]

The "pure theory of law" advocated by *Kelsen*[66] or the "concept of law" expounded by *Hart*[67] in principle attributed a legal validity limited to norms deriving from the legitimate legislative authority of sovereign states. Since legally valid norms ought to emanate from the "fundamental norm" *(Grundnorm)* or be legally recognized by state law, customary or other norms that emerge in society or within a community do not primarily qualify as law. While a comparable positivist position is still supported by the majority of authors today,[68] other authors emphasize the legal validity of non-state norms to capture all legal phenomena beyond the state. Such a fundamental question in legal philosophy cannot be answered right away. The analysis below at least attempts to give some reflections.

a) Customary Law

Goldman and other authors assert the legal nature of *lex mercatoria* by qualifying it as customary law.[69] In fact, if certain norms embody commer-

64 But in some cases, behaviors according to internal custom of an entity can be acknowledged and respected by the court (UCC § 4-103 (c)). T. Fujita/T. Matsumura, *Jiritsu-teki chitsujo no keizai-gaku* [The economics of an independent order], in: Fujita (ed.), *Soft law no kiso riron* [Fundamental theories of soft law] (Tōkyō 2008) 35 ff.

65 S. Tanaka, *Gendai hōri-gaku* [Contemporary legal theory] (Tōkyō 2011) 89 ff.

66 H. Kelsen, Reine Rechtslehre (Wien 1960) 196 ff.

67 H. L. A. Hart, The Concept of Law (3rd ed., Oxford 2012), cited from the Japanese translation by Yasuo Hasebe (Tōkyō 2014) 60 ff.

68 See N. Jansen/R. Michales, Private Law and the State. Comparative Perceptions and Historical Observations, in: Jansen/Michaels (eds.), Beyond the State. Rethinking Private Law (Tübingen 2008) 16 ff.

cial customs or trade usage and become *opinio juris,* they generally qualify as customary law within the realm of state law.[70] *Goldman,* however, failed to give empirical evidence that *lex mercatoria* has indeed become customary law at the global level. Nor did he demonstrate the legitimacy of *lex mercatoria* as law.[71]

Notably, some Japanese authors contend that even commercial customs other than *opinio juris* constitute legal sources within the state law system since the 2005 amendment of Article 1 (2) of the Japanese Commercial Code.[72] It is different from § 346 of the German HGB, which solely refers to commercial customs to interpret and assess the effects of the parties' acts, without qualifying commercial customs as adjudicatory norms.[73]

Nevertheless, we ought to be reminded that contemporary *lex mercatoria* largely consists of "private lawmaking".[74] The UCP, the INCOTERMS or the UPICC are not commercial customs or trade usage.[75] Interestingly enough, the Tokyo District Court decided on 29 May 1987 that referring to the UCP has become a commercial custom in letter of credit transactions in Japan. Thus, the plaintiff company was held to be bound by the UCP, although the

69 GOLDMAN, Lex mercatoria, *supra* note 18, 183; also H. TAKI, *Kokusai chūsai to kokusai torihiki-hō* [International arbitration and international business law] (Tōkyō 1999) 108 ff.

70 Art. 3 of the Act on the General Rules on the Application of Laws ("AGRAL"), Law No. 78 of 21 June 2006; Art. 1 (2) Commercial Code.

71 G. TEUBNER, 'Global Bukowina': Legal Pluralism in the World Society, in: Teubner (ed.), Global Law Without a State (Aldershot 1997) 9.

72 Notably, after Art. 1 (2) Japanese Commercial Code altered the wording from "shō-kanshū-hō" ("commercial customary law") to "shō-kanshū" ("commercial customs"), academic opinions are divided. Some authors advocate that customary norms can be legally valid without *"opinio juris",* see S. OCHIAI/C. OTSUKA/T. YAMASHITA, *Shōhō* [Commercial law], Vol. 1: *Sōsoku & shōkōi* [General part & commercial acts] (5th ed., Tōkyō 2013) 24; M. TANABE, *Shōhō sōsoku & shōkōi-hō* [General part of commercial law & commercial acts] (3rd ed., Tōkyō 2011) 33ff. Other authors require "*opinio juris*" to ascribe legal validity to customary norms, see M. KONDO, *Shōhō sōsoku & shōkōi-hō* [General part of commercial law & law of commercial acts] (6th ed., Tōkyō 2013) 11; T. FUJITA, *Kihan no shiteki keisei to kokka ni yoru enforcement: shōkan-shū & torihiki kankō o sozai to shite* [Private lawmaking and implementation by the state: with the example of commercial customs & trade usage], Soft Law Kenkyū 6 (2006) 8 ff.).

73 BAUMBACH/HOPT, Handelsgesetzbuch (37th ed., Munich 2016) § 346 HGB, para. 1 ff.

74 P. LAGARDE, Approche critique de la *lex mercatoria,* in: Mélanges Berthold Goldman (1982) 139 ff.; TEUBNER, *supra* note 71, 9, 17.

75 A. TAKAKUWA, *Kokusai torihiki ni okeru shihō no tōitsu to kokusai shihō* [Private law unification and private international law in cross-border business transactions] (Tōkyō 2005) 101; FUJITA, *supra* note 38, 114.

managing director was not informed of the UCP.[76] In this decision, the judge actually said that not the *content* of the UCP, but only the *practice of referring to* the UCP had become a commercial custom. The UCP was first adopted in 1933 to unify rules on letter of credit transactions across the Atlantic, when export from the U.S. to Europe was expanding. Since then, the UCP has been revised six times by experts in financial sectors from all over the world, who gathered at the International Chamber of Commerce (ICC) to develop expedient rules and give guidance to letter of credit transactions. The UCP ought to be primarily understood as an "autonomous" non-state law, rather than a commercial custom or trade usage.[77] Consequently, the legal validity of *lex mercatoria* cannot logically be maintained simply by relying on its nature as customary law or commercial customs.

b) Corporatism

As mentioned above, *Ishizaki* observed that silk associations in Lyon and New York established autonomous norms for their transactions without the involvement of official state law.[78] Based on his study, *Ishizaki* ascribed legal validity to norms created by a self-regulating community or entity other than the state. His view largely coincided with the legal "corporatism" advocated by *Santi Romano,* who considered that various entities beyond or within the state – such as the international community, church, enterprise, school and family – constituted autonomous legal systems.[79] It is true that certain non-state norms may well function *de facto* as binding rules within an autonomous, independent collectivity. Yet, such a corporative law can only emerge in a close-knit community of merchants, where people know each other and have mutual trust. These settings would generally not correspond to the reality of contemporary cross-border mass transactions in global markets. Hence, the legal validity of *lex mercatoria* cannot be justified by definition based on the legal corporatism.[80]

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76 Tōkyō District Court, 29 May 1987, Kinyū Shōji Hanrei 781, 38 = Kinyū Hōmu Jijō 1186, 84.

77 Y. NISHITANI, *Kokusai shiharai to soft law: shin-yōjō tōitsu kisoku no igi to hōteki seishitsu* [International payment and soft law: The meaning and legal nature of 'Uniform Customs and Practice for Documentary Credits'], in: Kotera/Dogauchi (eds.), *Kokusai shakai to soft law* [International Community and Soft Law] (Tōkyō 2008) 215 ff.; for further detail on the UCP, see BAUMBACH/HOPT, *supra* note 73, BankGesch (7), K/1 ff.

78 ISHIZAKI, *supra* note 13, Vol. 2, pp. 350 ff.

79 ROMANO, *supra* note 12, 77 ff.

80 TEUBNER, *supra* note 71, 18.

c) Self-Validating Legal System

Schmitthoff used to put forth that *lex mercatoria* constitutes an autonomous body of law. Insofar as *lex mercatoria* governs the contract, there is no *"contrat sans lois"* in his view. However, *Schmitthoff* sought the ultimate legitimacy of *lex mercatoria* in state law,[81] which was an obvious contradiction.

Instead, *Teubner* asserted the validity of *"contrat sans lois"* by relying on the network theory. *Teubner* contended that states and non-state actors constitute their own normative regimes in parallel. In his view, global contracts do not presuppose a pre-existing legal system, as they are self-validating and self-legitimizing. Contracting is held as an autopoietic legal source on equal footing as state law. For *Teubner,* legal validity is provided by private actors as quasi-legislative institutions through arbitration as quasi-courts. It is a system of "private adjudication, private legislation and private contracting".[82]

This construct of "reflexive mechanism"[83] reminds us of the *Messageries maritimes* decision of the Court of Appeal of Paris dated 24 April 1940.[84] This French decision notably declared the gold clause as valid despite the prohibitive measures of Canada, on the ground that the parties can exclude any state law for international contracts. This argument drew upon ex-Article 1134 (now Art. 1103) of the French Civil Code, which stipulates that "contracts which are lawfully formed have the binding force of legislation for those who have made them".[85] However, the reflexive mechanism cannot duly expound why the parties have the absolute authority to exclude all mandatory rules of the state by simply concluding an international contract. Nor can the reflexive mechanism draw external criteria to define the validity of objective law. Without normative value prescriptions, public policy and public interest would be undermined in the international community.

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81 SCHMITTHOFF, Law Merchant, *supra* note 19, 34 ff.; *idem,* International Trade, *supra* note 19, 148 ff., 165 ff.

82 TEUBNER, *supra* note 71, 18; also G. TEUBNER/A. FISCHER-LESCANO, Wandel der Rolle des Rechts in Zeiten der Globalisierung: Fragmentierung, Konstitutionalisierung und Vernetzung globaler Rechtsregimes, in: Murakami/Marutschke/Riesenhuber (eds.), Globalisierung und Recht. Beiträge Japans und Deutschlands zu einer internationalen Rechtsordnung im 21. Jahrhundert (Berlin 2007) 15 ff.; A. FISCHER-LESCANO/G. TEUBNER, Regime-Kollisionen: Zur Fragmentierung des globalen Rechts ("Regime") (Frankfurt/Main 2006) 57 ff.; see D. YOKOMIZO, *Funsō shori ni okeru shiteki jichi* [Party autonomy in dispute resolution], Kokusai Shihō Nenpō 15 (2013) 118.

83 For this expression, see STEIN, *supra* note 4, 164 ff.

84 Cour d'appel de Paris, 24 avril 1940 [Messageries maritimes], Receuil Dalloz Sirey 1942.2.29, note *Niboyet.*

85 This provision stipulates as follows: "Les contrats légalement formés tiennent lieu de loi à ceux qui les ont faits." For an English translation, see *http://www.textes.justice.gouv.fr/art_pix/THE-LAW-OF-CONTRACT-2-5-16.pdf.*

Ultimately, the French Supreme Court decided on 21 June 1950[86] that the underlying contract be localized in a state legal system. At the same time, the court granted the validity of the gold clause by having resort to French public policy.[87]

d) Sociological and Anthropological Concepts of Law

Some recent authors like *Asano* advocate legal pluralism, justifying the legal validity of non-state norms by the character of private law. Pursuant to this opinion, norms created by private actors are legally valid, as these norms regulate activities of private parties in a neutral way without involving moral or political values. Civil society is separated from the political sphere.[88] Other authors, *Suehiro* and *Tanaka,* also held certain non-state norms – such as collective bargaining agreements, labor guidelines and general terms of contracts – as legally valid.[89] Social norms that uniformly bind a certain group of people entering into the relationship are held to qualify as law.[90] This idea recognizes legal validity on the basis of the sociological findings that certain norms prescribe and regulate people's behavior.[91]

Similarly from a viewpoint of legal anthropology, *Chiba* and other authors put forth legal pluralism based on the binary code of state law and non-state law, or "official law" and "unofficial law".[92] These authors attrib-

86 The French *Cour de cassation* dismissed the appeal, but with a different reasoning. The justices contended that international contracts are always subject to a certain state law. Cour de cassation, 21 juin 1950 [Messageries maritimes], Revue critique de droit international privé 1950, 609, note *Batiffol;* Receuil Dalloz Sirey 1952.1.1, note *Niboyet.*

87 Y. NISHITANI, *Lex Mercatoria to jishu kisei* [Lex Mercatoria and self-regulation], Hōgaku Ronsō 180-5/6 (2017) 353 ff.; *idem, supra* note 16, Minshōhō Zasshi 153-6 (2017) 101 ff.

88 ASANO, *Shihō riron, supra* note 3, 306 ff.; *idem,* Self-regulations and Constitutional Law in Japan as Seen from the Perspective of Legal Pluralism, in this book, *supra* Chapter 3.

89 I. SUEHIRO, *Hōritsu shakai-gaku* [Legal sociology], in: Rokumoto/Yoshida (eds.), *Suehiro Izutaro to nihon no hō-shakai-gaku* [Izutaro Suehiro and legal sociology in Japan] (Tōkyō 2007) 87 ff.; TANAKA, *supra* note 65, 82.

90 TANAKA, *supra* note 65, 82. *Tanaka* does not consider sanction or commandment as necessary factor of the nature of law, along the lines of "living law" by *Eugen Ehrlich.*

91 See J. GRIFFITHS, What is Legal Pluralism?, Journal of Legal Pluralism 24 (1986) 38 f.; S. E. MERRY, Legal Pluralism, Law & Society Review 22-5 (1988) 889 ff.

92 M. CHIBA, *Hō-bunka no frontier* [Frontiers of legal culture] (Tōkyō 1991) 174 ff.; *idem, Hō-bunka heno yume* [Ideals of legal culture] (Tōkyō 2015) 17 ff.; T. TSUNODA et al. (eds.), *Hō-bunka-ron no tenkai: hō-shutai no dynamics (Chiba*

ute legal validity to indigenous norms grounded in customs, tradition or religions in non-Western countries including former colonies, as well as to contemporary autonomous norms within a business entity, religious community, ethnic minority or other collectivities.[93] Following these ideas, global private governance regimes set up by the ISDA for swap transactions or by the ICANN for domain names may well qualify as "law" by virtue of their uniform binding effects.

Nevertheless, these sociological or anthropological constructs only serve to describe the facts that soft law *is* being abided by in a certain community. This does not yet explain *why* normative validity or legitimacy is provided by the simple fact that certain norms are abided by in society.[94] Nor does it define the nature of law grounded on objective criteria. In fact, if legal validity is attributed solely by the function of prescribing people's behavior, even social norms lacking in efficiency and transparency can be regarded as "law", independently of their normative values. This may well readily justify self-regulation by private actors and even jeopardize individual rights by granting third-party effects.

It is notable that the UPICC provides for mandatory rules, such as "good faith and fair dealing" (Art. 1.7 UPICC), unlike the CISG and other non-binding instruments. However, the UPICC deduces the mandatory rules (Art. 1.4 UPICC) and the effects of breaching mandatory rules (Art. 3.3.1 UPICC) from the state law governing the contract, which is designated by private international law. Consequently, even the UPICC seeks its ultimate authority in state law and can hardly be considered as a self-sufficient normative system.[95]

e) Recognition

Instead of the reflexive mechanism or the sociological or anthropological accounts of legal pluralism, *Michaels* asserts a mutual recognition of legal systems. In his view, as the state has so far exclusively determined "what constitutes state law", private bodies or religious communities also define auton-

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Masaji sensei tsuitō) [Developments of legal culture: dynamics of legal subjects: Liber memorialis Masaji Chiba] (Tōkyō 2015) 5 ff.

93 See also B. Z. TAMANAHA, A Framework for Pluralistic Socio-Legal Arenas, in: Foblets et al. (eds.), Cultural Diversity and the Law: State Responses from Around the World (Brussels 2010) 381 ff.; P. SHAH, Legal Pluralism in Conflict. Coping with Cultural Diversity in Law (London 2005) 2 ff.

94 R. MICHAELS, Was ist nichtstaatliches Recht? Eine Einführung ("Nichtstaatliches Recht"), in: Calliess (ed.), Transnationales Recht (Tübingen 2014) 49 ff.; *idem,* The Re-statement of Non-State Law: The State, Choice of Law, and the Challenge from Global Legal Pluralism, Wayne Law Review 51 (2005) 1221 ff.

95 NISHITANI, *supra* note 87, 357.

omously "what is law". Each legal system ought to determine as the first step whether it considers itself as "law", and if yes, as the second step whether it also recognizes other legal systems as "law". Reciprocal recognition is required for non-state norms to qualify as "law". Thus, non-state norms are furnished with legal validity, insofar as they are perceived as autonomous legal norms by states or other private actors on ground of tertiary rules.[96]

The construct of the mutual recognition of legal systems presupposes the relativity and relationality of state and non-state legal systems. It cannot deduce objective, self-sufficient criteria for defining legal validity. Nor can it create hierarchical orders between the normative systems or justify shared values in the international community. This position would unduly give a carte blanche to each legal system in providing its own rules and deciding on whether to recognize other legal systems. In view of global governance, it would rather be desirable that certain normative preconditions for public interest and common goods be respected universally.

2. Lex Mercatoria as the Governing Law in Private International Law

Arguably, various attempts to prove the legal validity of non-state law including *lex mercatoria* have not yielded a fruitful result yet. The question of what is "law" depends on the legal theory, the author's position and the *zeitgeist.* The answer often depends on the time and place. The idea of uniting "law" and "authority" in the doctrine of natural law[97] or the doctrine of *Volksgeist* of the historical school of law[98] was grounded on a particular position at a certain moment in the history. They can hardly serve as the basis of the contemporary *lex mercatoria,* after the modern state law system was founded in the respective nation state.[99]

In considering how *lex mercatoria* ought to be applied and put into force, we should turn to the function of private international law. The conventional method of private international law goes back to *Savigny.* His doctrine relies on the construct that one territorial state law is chosen out of several conflicting territorial state laws to regulate a cross-border legal

96 MICHAELS, Nichtstaatliches Recht*, supra* note 94, 52 ff.; *idem,* What is Non-State Law? A Primer, in: Helfand (ed.), Negotiating State and Non-State Law. The Challenge of Global and Local Legal Pluralism (Cambridge 2015) 55 ff.; *idem,* Law and Recognition – Towards a Relational Concept of Law, in: N. ROUGHAN/A. HALPIN (eds.), In Pursuit of Pluralist Jurisprudence (Cambridge 2017) 107 ff.

97 PADOA SCHIOPPA, *supra* note 10, 329 ff.; F. WIEACKER (translated into Japanese by Rokuya Suzuki), *Kinsei shihō-shi: tokuni doitsu ni okeru hatten wo koryo shite* [Modern private law history: in view of the developments in Germany] (Tōkyō 1961) 267 ff.

98 PADOA SCHIOPPA, *supra* note 10, 502 ff.; WIEACKER, *supra* note 97, 469 ff.

99 MICHAELS, Nichtstaatliches Recht*, supra* note 94, 47 ff.

relationship. The applicable law is determined by searching for the state with which the relevant legal relationship has the closest connection, i.e., the "seat" *(Sitz).*[100] As a metaphor, a global contract can be imagined as a balloon flying in the air, and private international law seeks to capture it to localize and anchor it in the territory of a certain state. According to the conventional view, potentially applicable laws are limited to state laws emanating from the authority of sovereign states. Judges representing the state judicial authority are held to apply solely state law. Not only positivists like *Christian von Bar* and *Lagarde,*[101] but also *Mayer,*[102] who advocates the theory of legal orders, takes a comparable view by relying on state law.

However, this presupposition does not necessarily apply to arbitration as a mechanism of private dispute resolution based on the parties' agreement. Also, for litigation before state courts, the eligibility of non-state law to govern the contract can theoretically be granted independently of the legal validity of *lex mercatoria*. This is a policy decision of private international law, which can be taken independently of whether *lex mercatoria* is regarded as legitimate "law" in legal theory.[103] Even norms without legal validity can qualify as the applicable law when authorized as such by private international law. There is no preemptive argument against including *lex mercatoria* into the "law" governing the contract.[104] How should we then treat *lex mercatoria* in dispute resolution?

100 F. C. VON SAVIGNY, System des heutigen römischen Rechts*,* Vol. 8 (Berlin 1849) 2 ff.

101 C. VON BAR/P. MANKOWSKI, Internationales Privatrecht*,* Vol. 1 (2nd ed., Munich 2003) § 2 para. 75; LAGARDE, *supra* note 74, 125.

102 See P. MAYER, Le phénomène de la coordination des ordres juridiques étatiques en droit privé, Recueil des cours 327 (2007) 9 ff.; also D. YOKOMIZO, *Teishoku-hō no taishō tonaru 'hō' ni kansuru jakkan no kōsatsu: joron teki kentō* [Some reflections on the concept of 'law' as the object of conflict of laws], Tsukuba Law Journal 6 (2009) 19 ff.

103 R. MICHAELS, Preamble I, in: Vogenauer (ed.), Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC) (2nd ed., Oxford 2015) para. 50.

104 Y. TAMEIKE, *Kokusai shihō kōgi* [Lecture on private international law] (3rd ed., Tōkyō 2005) 367; for the current state of discussion, see Y. NISHITANI, Party Autonomy in Contemporary Private International Law – The Hague Principles on Choice of Law and East Asia, Japanese Yearbook of International Law 59 (2016) 312 ff.

IV. Dispute Resolution and *Lex Mercatoria*

1. Arbitration

a) General Remarks

Certain sectors with sophisticated self-regulation, such as ICANN and CAS, frequently have particular settings for dispute resolution. Otherwise, the framework of international commercial arbitration is often used for an autonomous dispute resolution in cross-border transactions. Arbitration in a narrow sense is a method of dispute resolution conducted by arbitrators as third parties, on the ground of the parties' agreement to arbitrate and be bound by the award rendered by the arbitrators. It is a kind of private judiciary.[105]

Particularly in Asia, international commercial arbitration is rapidly gaining importance along with its economic growth. Compared with litigation, advantages of arbitration lie in its simplicity, expeditiousness, expertise, confidentiality and flexibility.[106] Moreover, the cross-border effectiveness of arbitral awards is ensured by the 1958 New York Convention,[107] which has gained 157 Contracting States so far,[108] whereas the recognition and enforcement of Japanese judgments are generally prevented in China,[109]

105 K. Yamamoto/A. Yamada, *ADR & chūsai-hō* [Alternative dispute resolution & arbitration law] (2nd ed., Tōkyō 2015) 290 ff.

106 Yamamoto/Yamada, *supra* note 105, 291.

107 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958. Notably, the recognition and enforcement of foreign arbitral awards can also be effected pursuant to Art. 45 and 46 Japanese Arbitration Act and bilateral treaties, such as Art. 8 (4) of the 1974 China-Japan Trade Agreement. See Osaka District Court, 25 March 2011, Hanrei Jihō 2122, 106; Tōkyō District Court, 19 June 1995, Hanrei Timuzu 919, 252; Yokohama District Court, 25 August 1999, Hanrei Jihō 1707, 146. For further detail, see A. Takakuwa, *Kokusai shōji chūsai-hō no kenkyū* [Studies on international commercial arbitration law] (Tōkyō 2000) 163 ff.

108 See *http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html.*

109 The People's Republic of China ("China") requires reciprocity for the recognition and enforcement of foreign judgments (see Arts. 281 and 282 of the Chinese Civil Procedure Code) except for divorce judgments. While the case law used to require international treaties to guarantee reciprocity (33 bilateral treaties serve this purpose), the position has softened to grant reciprocity if the foreign state has already recognized and enforced a Chinese judgment. This has happened so far with Germany, Singapore and the U.S. Due to lack of reciprocity so far, however, there is no mutual recognition and enforcement of foreign judgments between Japan and China or the Republic of Korea and China. The People's Supreme Court denied reciprocity with Japan in its answer of 26 June 1994 in the *"Gomi Akira"* case (1994 Question in civil matters No. 72), which was followed by the Intermediate People's Court of Dalian City in its decision of 5 November 1994. In response, Japanese courts also denied reciprocity with China

Indonesia, Thailand, Vietnam and India.[110] Nor does the judicial system of newly developing countries always guarantee transparency and certainty. Thus, Japanese companies often refer to arbitration abroad for their cross-border transactions in Asia.[111]

The most important venues for arbitration in Asia are China, Hong Kong and Singapore. According to the statistics from 2016,[112] the total number of new cases at CIETAC (China) was 2,183, out of which 485 were cross-border cases.[113] It is less than 1,050 at the AAA/ICDR (U.S.)[114] and 966 at the ICA (ICC arbitration),[115] but outnumbers 303 at the LCIA (U.K.).[116] Also the HKIAC (Hong Kong) received 460 new cases, out of which 262 were cross-border cases,[117] and the SIAC (Singapore) 343 new cases, of which 80% were international cases.[118] The 2015 survey of White & Case

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(Art. 118 No. 4 of the Japanese Civil Procedure Code) and refused their recognition and enforcement. Osaka High Court, 9 April 2003, Hanrei Jihō 1841, 111; Tōkyō High Court, 25 November 2015 (see the lower court decision of Tōkyō District Court, 20 March 2015, 2015WLJPCA03208001).

For further detail, see Y. GUO, Country Report: The People's Republic of China, in: Chong (ed.), Recognition and Enforcement of Foreign Judgments in Asia (Singapore 2017) 56 ff.; Q. HE, The Recognition and Enforcement of Foreign Judgments between the United States and China: A Study of *Sanlian v Robinson,* Tsinghua China Law Review 6 (2013) 32 f.; W. ZHANG, Recognition and Enforcement of Foreign Judgments in China: A Call for Special Attention to Both the 'Due Service Requirement' and the 'Principle of Reciprocity', Chinese Journal of International Law 12 (2013) 152 ff.; *idem,* Recognition of Foreign Judgments in China: The Essentials and Strategies, Yearbook of Private International Law 15 (2013/14) 329 ff.; *idem,* Sino–Foreign Recognition and Enforcement of Judgments: A Promising 'Follow-Suit' Model?, Chinese Journal of International Law 16 (2017) 515 ff.

110 T. AWATA (ed.), *Asia kokusai shōji chūsai no jitsumu* [Practice of international commercial arbitration in Asia] (Tōkyō 2014) 64 ff.

111 The number of cases, in which Japan is chosen as the situs of arbitration, is very small. Even at the Japan Commercial Arbitration Association (JCAA) that is representative for cross-border cases, the total number of arbitration cases was limited to 16 (2016), 21 (2015), 14 (2014), 26 (2013), 15 (2012) and 22 (2011) (see *https://www.jcaa.or.jp/jcaa/docs/h28_1.pdf*). For its background, see YAMAMOTO/YAMADA, *supra* note 105, 297 ff.

112 For comprehensive statistics, see *https://globalarbitrationnews.com/international-arbitration-statistics-2016-busy-times-for-arbitral-institutions/.*

113 China International Economic and Trade Arbitration Commission *(http://www.cietac.org/?l=en).*

114 American Arbitration Association/International Centre for Dispute Resolution *(https://www.icdr.org/).*

115 ICC International Court of Arbitration *(http://www.iccwbo.org/).*

116 London Court of International Arbitration *(http://www.lcia.org/).*

117 Hong Kong International Arbitration Centre *(http://hkiac.org/).*

118 Singapore International Arbitration Centre *(http://www.siac.org.sg/).*

on international arbitration[119] indicates that the most frequently chosen seats – outside the U.S. and China – were London (45% of the cases surveyed) and Paris (37%), whereas Hong Kong (22%) and Singapore (19%) were rapidly catching up. The HKIAC and SIAC are gaining popularity due to their legislation in favor of arbitration,[120] as well as the improvement of hearing facilities and local arbitral institutions and the availability of highly qualified arbitrators.[121]

Arbitration is a private adjudicatory mechanism. This justifies the arbitral tribunal rendering an award based on the law chosen by the parties, or even *ex aequo et bono* once entitled by the parties. Thus, in determining the law governing the merits of the dispute, extensive party autonomy has been granted in Article 28 (1) of the 1985 UNCITRAL Model Law ("Model Law"),[122] which also allows the choice of non-state law ("rules of law").[123] The Model Law has been adopted in 78 States (109 jurisdictions),[124] including Germany and Japan. Article 36 (1) of the Japanese Arbitration Act follows the provision of Article 28 (1) Model Law.[125] Also the arbitration rules of the ICC[126] and other arbitral institutions grand a broad scope of choice of law, including the selection of non-state law.[127] Consequently, the eligibility

119 White & Case and Queen Mary University of London, *2015 International Arbitration Survey: Improvements and Innovations in International Arbitration* (see *http://www.arbitration.qmul.ac.uk/docs/164761.pdf*).

120 For Singapore, see 2001 Arbitration Act, Chap. 10 (amended in 2002); 1994 International Arbitration Act, Chap. 143A (amended in 2002); for Hong Kong, see 2011 Arbitration Ordinance, Chap. 609 (amended in 2014); see J. CHOONG/R. WEERAMANTRY (eds.), The Hong Kong Arbitration Ordinance. Commentary and Annotations (2nd ed., Hong Kong 2015) para. 4.00 ff.; A. LO, International Arbitration in Hong Kong, in: Balthasar (ed.), International Commercial Arbitration (Munich et al. 2016) § 11, para. 70 ff.

121 See also G. CUNIBERTI, The Laws of Asian International Business Transactions, Pacific Rim Law & Policy Journal 25 (2016) 35 ff.

122 Art. 28 (1) of the UNCITRAL Model Law on International Commercial Arbitration of 21 June 1985 (with amendments adopted on 7 July 2006) (see *http://www.uncitral.org/*).

123 N. BLACKABY/C. PARTASIDES et al. (eds.), Redfern and Hunter on International Arbitration (6th ed., Oxford et al. 2015) para. 3.99.

124 See *http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html.*

125 M. KONDO et al. (eds.), Arbitration Law of Japan (Tōkyō 2004) 193 ff.

126 Art. 21 (1) of the 2017 ICC Rules of Arbitration (see *https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/*)

127 See I. RADIC, Feasibility Study on the Choice of Law in International Contracts – Special Focus on International Arbitration (Preliminary Document No. 22 C of March 2007 for the attention of the Council of April 2007 on General Affairs and Policy of the HCCH), available at *http://www.hcch.net/*); L. GAMA JR./G. SAUMIER,

of *lex mercatoria* as the law applicable to cross-border contracts is an established principle as regards international arbitration.[128]

However, whether the parties actually choose non-state law is a different question. According to the "UNI-Lex" database,[129] there were only 21 cases where the UPICC was applied upon explicit choice of the parties, whereas in 76 cases the arbitrators applied or indirectly referred to the UPICC in the absence of choice of law. Even the UPICC as a well-known, established and widely recognized instrument is seldom chosen in arbitration.[130] In commercial arbitration in Asia, cases choosing *lex mercatoria* are rare. Chinese law is usually chosen when the seat is China, and English law when the seat is Hong Kong or Singapore. In disputes between a U.S. company and an Asian company, New York law is chosen with a preferred seat in the U.S.[131] Despite the eligibility of non-state law in arbitration, the parties hesitate to deviate from the usual practice based on state law.

However, in certain sectors that have a developed form of self-regulation, such as in international swap transactions, the parties may well behave differently, selecting non-state law. Actually, in the case of the ICANN and CAS that have an established dispute resolution mechanism, *lex mercatoria* mostly serves as the norms of adjudication.[132]

b) Relation to the State

Among recent authors, the opinion that an autonomous legal order of arbitration is emerging independently of the conventional state legal order is gaining support.[133] Yet, although arbitration constitutes a private adjudicatory mecha-

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Non-State Law in the (Proposed) Hague Principles on Choice of Law in International Contracts, El derecho internacional privado en los procesos de integración regional (San José 2011) 45 ff.; NISHITANI, *supra* note 104, 316 f.

128 See BLACKABY/PARTASIDES et al., *supra* note 123, para. 3.97 ff.; S. BALTHASAR (ed.), International Commercial Arbitration (Munich et al. 2016) § 1, para. 65.

129 *http://www.unilex.info/*.

130 See CALLIESS, *supra* note 6, 11; F. DASSER, Mouse or Monster? Some Facts and Figures on the *lex mercatoria,* in: Zimmermann (ed.), Globalisierung und Entstaatlichung des Rechts, Vol. 2 (Tübingen 2008) 139 ff.; R. MICHAELS, The UNIDROIT Principles as Global Background Law, Uniform Law Review 19 (2014) 643 ff.

131 CUNIBERTI, *supra* note 121, 35 ff.

132 Among the total number of 1,236 cases handled by the CAS, 644 cases concern football where usually the FIFA Rules are applied (see *http://jurisprudence.tascas.org/Shared%20Documents/Forms/PerSport.aspx*).

133 E. GAILLARD, Ascpects philosophiques du droit de l'arbitrage international (Leiden/Boston 2008 [livre de poche]) 83 ff.; M. WELLER, Mandatory Elements of the Choice-of-Law Process in International Arbitration: Some Reflections on Teubnerian and Kelsenian Legal Theory, in: Gottschalk/Michaels/Rühl/von Hein (eds.), Conflict of Laws in a Globalized World (Cambridge et al. 2007) 256 ff.

nism, it is not an entirely stand-alone, self-sufficient legal institution. Rather, the state provides assistance *ex ante,* where necessary, and also controls *ex post.* The state court can, in particular, be asked to appoint arbitrators,[134] determine the authority of the arbitral tribunal,[135] order evidence submission[136] or interim measures.[137] Furthermore, arbitral awards that have serious defects can exceptionally be set aside by the court of the seat under strict conditions.[138] Once an arbitral award is rendered, enforcement as a coercive measure can only be effected by the state.[139] Thus, the system of arbitration is grounded on cooperation and coordination with the state legal system.

Although the self-regulation by *lex mercatoria* has various advantages, an absolute autonomy of the parties would allow circumvention of any mandatory rules and undermine the regulatory authority of the state.[140] Even in cross-border transactions, public interest ought to be recognized, where necessary.[141] It is generally acknowledged that arbitral tribunals have, just like the judiciary of the state, the authority and duty to exclude an inappropriate governing law in light of public policy and to apply or give effect to overriding mandatory rules for the sake of public interest and social, political or economic order. The U.S. Supreme Court and the European Court of Justice have confirmed the applicability of anti-trust law by arbitral tribunals,[142] which seems to be followed in practice.[143] As a result, the state law cooperates and coordinates with the legal order of arbitration, while upholding the regulatory authority inherent in the state.

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134 Art. 9 Model Law; Art. 17 (5)(6) Japanese Arbitration Act.

135 Art. 11 (4)(5) Model Law; Art. 23 (5) Japanese Arbitration Act.

136 Art. 16 (3) Model Law; Art. 35 Japanese Arbitration Act.

137 Art. 27 Model Law; Art. 15 Japanese Arbitration Act.

138 Art. 44 Japanese Arbitration Act; for a conflict of interests case, see Japanese Supreme Court, 12 December 2017, Saiban-sho Jihō 1690, 6.

139 Art. 45 and 46 Japanese Arbitration Act.

140 G.-P. CALLIESS/M. RENNER, Between Law and Social Norms: The Evolution of Global Governance, Ratio Juris 22-2 (2009) 272 ff.

141 Traditional conflict of laws method of public policy to exclude the application of an inappropriate law, or the unilateral application of or reference to overriding mandatory rules or *lois de police* ought to be guaranteed. For an excellent analysis of the interaction between party autonomy and regulation, see S. FRANCQ, Party Autonomy and Regulation – Public Interests in Private International Law, Japanese Yearbook of International Law 59 (2016) 251 ff.

142 U.S. Supreme Court, 2 July 1985, 473 U.S. 614 [*Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*]; see also U.S. Court of Appeal (9th Cir), 30 April 1999, 175 f. 3d 716 [*Simula, Inc. v. Autoliv, Inc.*]; CJEU, 1 June 1999, Case C-126/97 *[Eco Swiss Ltd. v Benetton International NV]*.

2. *Litigation*

a) *Choice of Non-State Law*

Unlike in arbitration, the state has generally not yet accepted the choice of non-state law in litigation, even though academics are becomingmore responsive to it.[144] The majority of Japanese authors deny the choice of non-state law, on the grounds that mandatory rules should not be circumvented, the function of private international law is limited to resolving conflicts of state laws, or the wording of Article 7 AGRAL that allows choice of law solely designates territorial state law.[145]

Also in other countries, the right to choose non-state law has generally not yet been granted.[146] In enacting the Rome I Regulation,[147] the European Commission proposed in 2005 that the parties be entitled to also choose

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143 CALLIESS/HOFFMANN/MERTENS, *supra* note 40, 11. It is, however, still disputed whether the seat of arbitration, the expected place of enforcing the arbitral award or any other place ought to provide the criteria for public policy or overriding mandatory rules.

144 For Japanese authors, see T. MORISHITA, *Kokusai shō-torihiki ni okeru hi-kokka-hō no kinō to tekiyō* [Functioning and application of non-state law in cross-border commercial transactions], Kokusai-hō Gaikō Zasshi 107-1 (2008) 35 ff.; S. NAKANO, *Hi-kokka-hō no junkyo-hō tekikaku-sei: kokusai shihō-teki sokumen kara mita lex mercatoria* [The eligibility of non-state law: *Lex mercatoria* from a viewpoint of private international law], CDAMS Discussion Paper (2004) 6 ff., available at *http://www.lib.kobe-u.ac.jp/repository/80100028.pdf;* N. TAKASUGI, *Kokusai shihō ni okeru shin-yōjō tōitsu kisoku no toriatsukai* [The treatment of the uniform customs and practice for documentary credits in private international law], Tezukayama Hōgaku 5 (2001) 111 ff.; *idem, Kokusai kaihatsu keiyaku to kokusai shihō: anteika jōkō no yūkō-sei to hi-kokka-hō no junkyo-hō tekikaku-sei* [Cross-border development contracts and private international law: stabilization clause and the applicability of non-state law], Ōsaka Daigaku Hōgaku 52 (3/4) (2002) 1022 f.; M. YAMATE, *Lex mercatoria ni tsuite no ichi-kōsatsu: sono seisei to tenkai oyobi tekiyō process* [A reflection on *lex mercatoria:* Its emergence and developments as well as the application process], Hōgaku Zasshi 33 (3) (1987) 539 ff.; *idem, Lex mercatoria ni tsuite: kokusai torihiki keiyaku kisei-kihan no dokuji-sei to sono hōteki seishitsu* [*Lex mercatoria:* The independency of legal norms governing international commercial contracts and their legal nature], Tōhoku Gakuin Daigaku Ronshū 34 (1989) 131 ff.; for further reference, see NISHITANI, *supra* note 104, 336 ff.

145 See, *inter alia,* Y. NAKANISHI, *Article 7* [Art. 7 AGRAL], in: Sakurada/Dogauchi (eds.), *Chūshaku kokusai shihō* [Commentary on private international law], Vol. 1 (Tōkyō 2011) 188 ff.; M. DOGAUCHI, *Kokusai keiyaku jitsumu no tame no yobō hōgaku: junkyo-hō, saiban kankatsu, chūsai jōkō* [Preventive jurisprudence for international contractual practice: Applicable law, adjudicatory jurisdiction and arbitration clause] (Tōkyō 2012) 38, 88 ff.; TAKAKUWA, *supra* note 29, 70 ff.; J. YOKOYAMA, *Kokusai shihō* [Private international law] (Tōkyō 2012) 164.

"the principles and rules of the substantive law of contract recognized internationally or in the Community", which included the UPICC and PECL in addition to the envisaged optional instrument of the EU.[148] Yet, because this proposal was ultimately discarded due to the objection of the Council, European authors see generally no more room for the choice of non-state law under Rome I.[149] Also case law in various countries, including that of England,[150] have generally denied the eligibility of non-state law.

Nevertheless, it ought to be considered that party autonomy is a particular conflicts rule to subjectively designate the applicable law by relying on the parties' intent. Once the legislature takes a policy decision to qualify non-state law as eligible applicable law, there is no preemptive argument against it.[151] The admissibility of a choice of non-state law in arbitration can logically be extended without much ado to litigation.

The choice of *lex mercatoria* also makes sense as regards commercial contracts that are largely determined by the autonomy of the parties in substantive law. The choice of non-state law used to be criticized for authorizing "private legislation" or creating *"contrats sans loi",* as it would allow the parties to circumvent any mandatory rules to govern their contract.[152] In international contracts, however, there is no predetermined single applicable law indicating their centre of gravity, so a *fraus legis* cannot be an is-

146 See R. MICHAELS, Preamble I: Purpose of the PICC, in: Vogenauer/Kleinheisterkamp (eds.), Commentary on the UNIDROIT Principles of International Commercial Contracts (Oxford 2009) para. 49 ff.

147 Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), *O.J.* 2008, L 177/6.

148 Art. 3 (2) of the European Commission Proposal (Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I), 15.12.2005, COM (2005) 650 final, 2005/0261 (COD)).

149 *Cf.* Recital 13 Rome I; see A. V. DICEY/J. H. C. MORRIS/L. COLLINS, Conflict of Laws, Vol. 2, (15th ed., London 2012) para. 32-039 ff., 049 ff.; R. PLENDER/M. WILDERSPIN, The European Private International Law é of Obligations (4th ed., London 2015) para. 6-011 ff.; P. MAYER/V. HEUZÉ, Droit international privé (11th ed., Paris 2014) para. 740 ff.; D. BUREAU/H. MUIR WATT, Droit international privé (3rd ed., Paris 2014) para. 896; Nomos-Kommentar/LEIBLE, Rom-Verordnungen, Vol. 6 (Baden-Baden 2014) Art. 3 Rome I, para. 34; C. REITHMANN/D. MARTINY, Internationales Vertragsrecht (7th ed., Cologne 2010) para. 98 ff.

150 *Beximco Pharmaceuticals Ltd v Shamil Bank of Bahrain EC* [2004] 4 All ER 1072 (Islamic law); *Halpern v Halpern* [2006] 3 All ER 1139 (Jewish law). However, for arbitration, the choice of Islamic law has been approved. See *Musawi v R.E. International (UK) Ltd* et al. [2007] EWHC 2981 (Ch).

151 TAMEIKE, *supra* note 104, 367.

152 MAYER/HEUZÉ, *supra* note 149, para. 740.

sue.[153] Even under the current private international law system, the parties can select any state law, without questioning its completeness, modernity or legitimacy, and exclude *de facto* a number of mandatory rules by choosing more than one law *("dépeçage").* The choice of *lex mercatoria* does not create a legal vacuum, as non-state law itself substitutes state law and is provided with legally binding force by the mandate of private international law.[154] Thus, the parties' intent no longer merely qualifies as a factor connecting the legal relationship with the governing legal system, but the foundation for non-state norms to become "applicable".

Furthermore, the choice of *lex mercatoria* provides practical advantages. It serves to accommodate the parties' needs and expectations in cross-border transactions by providing neutral, suitable and predictable norms in the relevant sectors,[155] which will ultimately reduce the transaction cost.[156] Unlike in the 1960s where the discussion on *lex mercatoria* flourished by *Goldman* and *Schmitthoff,* the UPICC or the PECL have existed since the 1990s, and constitute a complete set of reasonable contractual rules adapted for private ordering. The eligibility of pluralistic non-state norms may well enhance normative competition through interactions of private actors, possibly resulting in an integration or convergence of concurring norms over the longer term.[157] Arguably, accepting the choice of *lex mercatoria* is an

153 Cf. R. MICHAELS, Die Struktur der kollisionsrechtlichen Durchsetzung einfach zwingender Normen, in: Liber Amicorum Claus Schurig zum 70. Geburtstag (Munich 2012) 191 ff.

154 L. G. RADICATI DI BROZOLO, Non-National Rules and Conflicts of Laws: Reflections in Light of the UNIDROIT and Hague Principles, Rivista di diritto internazionale private e processuale 48 (2012) 858; G. SAUMIER, Designating the UNIDROIT Principles in International Dispute Resolution, Uniform Law Review 17 (2012) 542 f.

155 O. LANDO, The Draft Hague Principles on the Choice of Law in International Contracts and Rome I, in: Mélanges en l'honneur de Hans van Loon (Cambridge et al. 2013) 306; B. FAUVARQUE-COSSON, Un nouvel instrument du droit souple international. Le 'projet de Principes de la Haye sur le choix de la loi applicable en matière de contrats internationaux', Dalloz 2013, p. 2187.

156 P. ZUMBANSEN, Lex mercatoria: Zum Geltungsanspruch transnationalen Rechts, The Rabel Journal of Comparative and International Private Law (RabelsZ) 67 (2003) 673; J. BASEDOW, *Lex Mercatoria* and the Private International Law of Contracts in Economic Perspective, in: Basedow/Kono (eds.), An Economic Analysis of Private International Law (Tübingen 2006) 60 ff.

157 See G. RÜHL, The Choice of Law Framework for Efficient Regulatory Competition in Contract Law, in: Eidenmüller (ed.), Regulatory Competition in Contract Law and Dispute Resolution (Munich et al. 2013) 291 ff. However, *Vogenauer* indicates that such regulatory competition is not occurring in the field of contract law. S. VOGENAUER, Regulatory Competition through Choice of Contract Law and Choice of Forum in Europe: Theory and Evidence, European Review of Private Law 21 (2013) 13 ff.

appropriate method to deal with global legal pluralism and prescribe cross-border commercial transactions.[158]

In fact, the 1994 Mexico Convention, which is in force in Mexico and Venezuela, is often understood as allowing the designation of non-state law *per se,*[159] so is the 2001 statute of the State of Oregon in the U.S.[160] Some court decisions in Tunisia and Columbia,[161] as well as in Switzerland,[162]

158 See, *inter alia,* J. BASEDOW, The Law of Open Societies: Private Ordering and Public Regulation of International Relations: General Course on Private International Law, Recueil des cours 360 (2013) 200 ff.; *idem,* The Law of Open Societies: Private Ordering and Public Regulation in the Conflict of Laws (Leiden 2015) paras. 254 ff.; K. BOELE-WOELKI, Party Autonomy in Litigation and Arbitration in View of the Hague Principles on Choice of Law in International Commercial Contracts, Recueil des cours 379 (2016) 68; NISHITANI, *supra* note 104, 339 ff.

159 Inter-American Convention on the Law Applicable to International Contracts, signed at Mexico, D.F., Mexico, on 17 March 1994. The authors who assert the choice of non-state law rely on Art. 9 (2) and Art. 10 of the Mexico Convention. F. K. JUENGER, The Inter-American Convention on the Law Applicable to International Contracts: Some Highlights and Comparisons, American Journal of Comparative Law 42 (1994) 391 ff.; *idem.*, Contract Choice of Law in the Americas, American Journal of Comparative Law 45 (1997) 204 ff.; *idem,* The lex mercatoria and private international law, Uniform Law Review 5 (2000) 182 ff.; D. P. FERNÁNDEZ ARROYO, Derecho internacional privado interamericano: Evolución y perspectivas (Buenos Aires 2003) 60 ff.; L. GAMA Jr., Contratos internacionais à luz dos Princípios do UNIDROIT 2004: soft law, arbitragem e jurisdição (Rio de Janeiro et al. 2006) 431 ff.; J. A. MORENO RODRÍGUEZ, Los contratos y La Haya: ¿ancla al pasado o puente al futuro?, in: Basedow et al. (eds.), ¿Cómo se codifica hoy el derecho commercial internacional? (Asunción/Paraguay 2010) 321 ff. Notably, however, there are also authors who deny the eligibility of non-state law on the ground of Art. 17 of the Mexico Convention. N. DE ARAUJO, Contratos internacionais. Autonomia da vontage: Mercosul e convenções internationais (3rd ed., Rio de Janeiro et al. 2004) 192 ff.; A. BOGGIANO, Curso de derecho internacional privado. Derecho de las relaciones privadas internacionales (4th ed., Buenos Aires 2003) 698 ff.

160 Oregon Revised Statutes 81.120 (2001), Comments 3 to Section 7 (reprinted in: James A.R. Nafziger, Oregon's Conflicts Law Applicable to Contracts, Willamette Law Review 38 (2002) 421); S. C. SYMEONIDES, Codifying Choice of Law for Contracts: The Oregon Experience, The Rabel Journal of Comparative and International Private Law (RabelsZ) 67 (2003) 737 ff.; MICHAELS, *supra* note 103, para. 70; *idem,* Non-State Law in the Hague Principles on Choice of Law in International Commercial Contracts ("Non-State Law"), in: Purnhagen/Rott (eds.), Varieties of European Economic Law and Regulation: Liber Amicorum for Hans Micklitz (Heidelberg et al. 2014) 45 ff.

161 For the choice of the UCP 400 in Tunisia, see Court d'appel de Tunis, 9 April 2001 (décision nº 48119), Journal du droit international 2005, p. 1067, note *Sami Bostanji;* for the eligibility of non-state law in general in Columbia, see Corte Suprema de Justicia, 21 February 2012 (nº 11001-3103-040-2006-00537-01, available at *http://www.unilex.info/case.cfm?id=1709*).

have granted the choice of non-state law. In 2015, the HCCH adopted the "Hague Principles on Choice of Law in International Commercial Contracts" (HP)[163] as the first non-binding instrument and granted the right to choose non-state law (Art. 3 HP). While Article 3 HP restricts the eligible non-state law to the "rules of law that are generally accepted on an international, supranational or regional level as a neutral and balanced set of rules" like the CISG or UPICC,[164] the 2015 statute of Paraguay that incorporated the HP removed these requirements and granted the eligibility of any non-state law for the sake of legal certainty and predictability.[165] Currently, the Australian Parliament is contemplating implementing the HP.[166] The outcome is being awaited with great interest and curiosity.

b) Coordination with Arbitration

As a result of these developments, the possibility of choice of *lex mercatoria* established in arbitration has been gradually extended to litigation. This will also avoid non-state law holding an elusive position depending on the dispute resolution mechanism. This accords with the recent tendency in international commercial arbitration, which generally provides for adversarial proceedings to guarantee the parties' right to be heard and renders an award not *ex aequo et bono* but on a legal basis, coming closer to litigation.[167]

Notably, some jurisdictions have started providing new dispute resolution mechanisms that transcend the conventional threshold between litigation and arbitration. In addition to particular commercial courts that exist in Switzerland and other countries,[168] the Singapore International Commercial

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162 See *supra* note 59.

163 Available at *http://www.hcch.net/index_en.php?act=conventions.text&cid=135;* for a detailed analysis, see NISHITANI, *supra* note 104, 309 ff. (with further references).

164 Commentary to the Hague Principles on Choice of Law in International Commercial Contracts, para. 3.4 ff.; for a thorough criticism of this provision, see MICHAELS, Non-State Law*, supra* note 160, 56 ff.

165 Paraguay Ley nº 5393-2015 sobre derecho aplicable a los contratos internacionales, *Gaceta Oficial* nº 13, 20 January 2015.

166 Australia's Accession to the Convention on Choice of Court Agreements (The Hague, 30 June 2005), [2016] ATNIF 23, National Interests Analysis [2016] ATNIA 7 with attachment on consultation.

167 Y. TANIGUCHI/I. SUZUKI, *Kokusai shōji chūsai no hō to jitsumu* [Law and practice of international commercial arbitration] (Tōkyō 2016) 19 ff.

168 Commercial Court of Zurich has two professional judges and three representatives of the trade and industry as "commercial judges". DASSER, *supra* note 130, 132. A similar system is being contemplated in Germany (Bundestag Document No. 17/2163). CALLIESS/HOFFMAN/MERTENS, *supra* note 40, 14.

Court (SICC)[169] is a remarkable court system specialized in cross-border commercial transactions. The SICC has even appointed, beside a number of Singaporian judges, also foreign judges from Japan, Hong Kong, England, Australia and France to make its judiciary internationally balanced and attractive to business communities in the world.

Furthermore, the United Arab Emirates (UAE) established the Dubai International Financial Centre (DIFC) Courts in 2004 and the DIFC-LCIA Arbitration Centre in 2008.[170] The DIFC Courts are authorized to convert DIFC-LCIA arbitral awards into DIFC judgments to facilitate their enforcement within the UAE. What is more, in 2015 the UAE introduced a mechanism that allows DIFC Courts to convert their judgments into an arbitral award upon the parties' agreement,[171] with a view to ensuring its enforcement abroad pursuant to the 1958 New York Convention. Once provided with appropriate settings to efficiently enforce judgments, state courts may well play a comparably important role as arbitral tribunals in cross-border transactions.

The phenomenon that the arbitration and state judiciary cross over and cooperate represents the relativization of state sovereignty and the constitution of private legal order in the era of globalization. This may well be a plausible ground to extend the eligibility of *lex mercatoria* also to state courts.

V. Conclusion

As this paper expounded, *lex mercatoria* as autonomous, self-regulatory norms created by non-state actors may well cooperate with or complement state law.[172] With the increasing importance of non-state norms, some authors even talk about the emergence of autonomous transnational legal order outside the realm of the state.[173] As in the case of the ICANN and the CAS, there are a growing number of sectors that are better administered by non-state actors through self-regulation than by the state, owing to their expertise, efficiency and acceptance within the relevant sector. In such close-knit closed communities, dispute resolution may well better function

169 Singapore International Commercial Court (SICC), available at *http://www.sicc.gov.sg/*.

170 The DIFC Courts were established by the Law No. 12 of 2004 of the United Arab Emirates (UAE) (see *http://difccourts.ae/*). Furthermore, the DIFC-LCIA Arbitration Centre was established in 2008 as a joint-venture between the DIFC and the London Court of International Arbitration (LCIA) (see *http://www.difc-lcia.org/*).

171 See DIFC Courts Practice Direction No. 2 of 2015 ("Referral of Judgment Payment Disputes to Arbitration"), available at *http://difccourts.ae/*.

172 Kansaku, *supra* note 29, 71 ff.

173 Muir Watt, *supra* note 2, 390 ff.

through their internal informal settings rather than outside mechanisms of arbitration or litigation.[174]

However, the existence of such high profile *lex mercatoria* seems to be limited to certain sectors. Even today, the usual conduct of transactions or prevalent business models may still be very much influenced by local practice and customs. In automobile production in Japan, for example, *Toyota* is locally established and has small companies in the local area depending on and producing parts for *Toyota* as the giant enterprise, even though the final products are sold in global markets. *Nissan,* on the other hand, is integrated in the global supply chain, so its commercial transactions are geared toward international clients.[175] Arguably, the emergence of uniform transnational commercial law is sectorial. It very much depends on the size of the community and the homogeneity of the participating members.[176]

It cannot yet be predicted whether the denationalization and juxtaposition of various non-state norms will lead to legal fragmentation without a fixed hierarchy of norms or focal point, as *Teubner* observes.[177] It is, however, safe to assume that private international law can play a role to resolve conflicts of norms between state law and non-state law, or among various non-state norms in pluralistic communities.[178] At the same time, even

174 See the U.S. case studies on the diamond and cotton industry at L. BERNSTEIN, Opting out of the Legal System: Extralegal Contractual Relations in the Diamond Industry, Journal of Legal Studies 21 (1992) 115 ff.; *idem,* Private Commercial law in the Cotton Industry: Value Creation through Rules, Norms, and Institutions, Michigan Law Review 99 (2001) 1724 ff.; also as to the dispute resolution mechanism for farmers in Shasta County, see R. ELLICKSON, Order Without Law: How Neighbors Settle Disputes (1991).

175 As Feldman presents (E. A. FELDMAN, The Tuna Court: Law and Norms in the World's Premier Fish Market, California Law Review 94 (2006) 313 ff.), the Tuna Court at the *Tsukiji* Wholesale Market in Tōkyō is a semi-official adjudicatory setting under the auspices of the Tōkyō Metropolitan Government. Tuna traders with troubles in transactions at the famous *Tsukiji* Market can refer to the Tuna Court located within the marketplace, where a decision is rendered immediately by experts. The dispute resolution functions well. Tōkyō Metropolitan Wholesale Market Sanitation Inspection Station, Inspection Division at the Tsukiji Market *(http://www.fukushihoken.metro.tokyo.jp/itiba/kensajo/sum10.html).*

176 FUJITA/MATSUMURA, *supra* note 64, 14 ff.

177 TEUBNER, *supra* note 71, 15; FISCHER-LESCANO/TEUBNER, Regime, *supra* note 82, 57 ff.

178 P. SCHIFF BERMAN, Global Legal Pluralism: A Jurisprudence of Law beyond Borders (Cambridge et al. 2012) pp. 41 ff.; MUIR WATT, *supra* note 2, 390 ff.; D. YOKOMIZO, *Global-ka jidai no teishoku-hō* [Conflict of laws in the era of globalization], in: Asano et al. (eds.), *Global-ka to kōhō/shihō kankei no saihen* [Globalisation and the restructuring of the relationship between public law and private law] (Tōkyō 2015) 111 ff.

though an exclusive governance of sovereign states cannot be expected, the authority and regulatory functions of the states ought to be secured through coordination and cooperation with non-state actors in light of global justice.[179] This would require rethinking methods of global governance to safeguard fundamental values and public interest, as the slogan says "from government to governance".[180]

179 See the contributions at: *Kokkyō o koeru seigi – sono genri to seido* [Justice beyond state borders – Its principles and institutions], *Hō-tetsugaku nenpō* [The Annals of Legal Philosophy] 2012, pp. 1 ff.

180 ZUMBANSEN, *supra* note 3, 81 ff.

The Hague Principles on Choice of Law

Their Addressees and Impact

Jürgen Basedow[*]

I. Introduction
II. The Soft-Law Movement and the Hague Principles
III. The Addressees of the Hague Principles
IV. The Principles and Private Parties
V. The Hague Principles in Arbitration
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3. The Main Contract
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I. INTRODUCTION

The Hague Principles on choice of law in international commercial contracts (henceforth: the Principles or HP)[1] confirm the principle of party autonomy which is recognized in many, but not in all jurisdictions.[2] They provide for rules on the formation of a choice-of-law agreement, on its scope and effects, and on its limitations. They follow rather closely the model of the 1980 Rome Convention on the law applicable to contractual obligations[3] and its successor, the Rome I Regulation of the European Union.[4] However, they diverge from that model on some points. Notable dif-

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* Prof. Dr. Dr. h.c. mult. Jürgen Basedow, LL.M. (Harvard Univ.); Director, Max Planck Institute for Comparative and International Private Law and Professor of Law, University of Hamburg; *Membre associé* of the *Institut de droit international.* – This article was first published in the Uniform Law Review, Volume 22, Issue 2, 1 June 2017, pp. 304–315. The editors of this volume thank Oxford University Press and the editors of the Uniform Law Review for their kind permission to publish a reprint of the article in these conference proceedings.

1 The Hague Principles and the Commentary are reproduced in print in both English and French, in: Uniform Law Review 20 (2015) 365–489.

2 In particular, some countries in the Middle East and in Latin America are still opposed to party autonomy, see J. BASEDOW, The Law of Open Societies (The Hague 2015) paras. 187–191.

ferences include: allowing for the choice of non-state law,[5] enunciating the principle of severability,[6] declaring a choice of law by formless consent to be valid,[7] providing for special rules on battles of forms[8] and on compliance with overriding mandatory provisions in arbitration,[9] and, finally, merging overriding mandatory provisions and public policy into a single provision.[10] These deviating rules have been addressed in other papers published in volume 22 of the Uniform Law Review in greater detail.

In March 2015 the Principles were adopted by the Hague Conference on Private International Law in a fairly uncommon procedure. The Council on General Affairs and Policy "noted with satisfaction" that the Principles on Choice of Law in International Commercial Contracts had been approved in accordance with a procedure established by the Council itself in 2014. It provided that unless a Member raised an objection within 60 days following receipt of the finalized text, the instrument would be considered as approved.[11]

This unusual procedure mirrors the non-binding nature of the Principles, which are consistent with a broad soft-law movement in the more recent history of international law-making, *infra* II. The non-binding nature of the instrument raises questions as to its effectiveness. What will be its impact on international transactions? Who will take notice of the Principles? The latter question relates to the various actors to whom such a text is addressed, to their reactions, and to whether the content of the Principles is in line with their non-binding nature. After a survey of the various addressees, *infra* III., the following paper will take a closer look at that context with regard to private parties who might avail themselves of the Principles, *infra* IV., and with regard to the role of the Principles in arbitration, *infra* V.

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3 Convention on the Law Applicable to Contractual Obligations, opened for signature in Rome on 19 June 1980, OJ 1980 L 266/1.

4 Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June of 2008 on the law applicable to contractual obligations, OJ 2008 L 177/6.

5 See Art. 3 HP.

6 Art. 7 HP.

7 Art. 5 HP.

8 See Art. 6 para. 1 lit. b HP.

9 Art. 11 para. 5 HP.

10 See Art. 11 paras. 1 and 3 HP.

11 Council on General Affairs and Policy of the Conference (24–26 March 2015), Conclusions & Recommendations adopted by the Council, para. 3, and General Affairs and Policy, prel. doc. No. 1, October 2014, Conclusions & Recommendations of the Council on General Affairs and Policy of the Conference (8–10 April 2014), para. 2; both documents are available on the website of the Hague Conference: *www.hcch.net* → governance → Council on General Affairs and Policy → archive (2000–2015).

II. The Soft-Law Movement and the Hague Principles

Private cross-border relations are governed by a large number of norms which have a great impact but, strictly speaking, are non-binding. Most of them are of a private origin and have acquired their significance through consensual adoption of usages established between the parties or by trade custom. A well-known example is the set of *Incoterms* drafted by the International Chamber of Commerce, which gave rise, together with other instruments, to a broad discussion about the so-called *lex mercatoria*. We also find manifold combinations of private and public rule-making.[12]

The Hague Principles are of a different nature. They do not flow from private initiative but originate in an intergovernmental organization. They belong to what has since the 1970s been called "soft law".[13] The development of soft law has been fostered by a number of factors: decolonization and the extraordinary growth in the number of independent states rendering the approval of binding instruments difficult or impossible in the post-World War II period; the structure of the United Nations with a General Assembly allowing for a broad representation of the international community but lacking the power to enact binding legal rules; the establishment of ever more international organizations dealing with a large variety of issues below the level of international legislation; and the growing need to promote certain practices in international relations despite the absence of binding rules.

Some of these factors are mirrored by the development of private international law. Over the 120 years of existence of the Hague Conference on Private International Law, it has emerged that many non-European countries, while interested in issues of jurisdiction and judicial cooperation, take little notice of issues relating to the applicable law.[14] Given the lack of interest, a binding convention on choice-of-law issues does not show promise of great success, although its substance may not be that controversial and courts are confronted with the issue of the applicable law in all juris-

12 For a survey of the variety of forms see J. Basedow, The State's Private Law and the Economy – Commercial Law as an Amalgam of Public and Private Rule-Making, American Journal of Comparative Law (Am. J. Comp. L.) 56 (2008) 703–721.

13 According to D. Thürer, Soft Law, in: Wolfrum (ed.), Max Planck Encyclopedia of Public International Law (Oxford, Electronic Resource, 2009) para. 5, it was *Lord McNair* who coined the term soft law to describe instruments with extra-legal binding effect.

14 J. Basedow, Was wird aus der Haager Konferenz für Internationales Privatrecht?, in: Rauscher/Mansel (eds.), Festschrift für Werner Lorenz zum 80. Geburtstag (Munich 2001) 463–482; see in particular the list of ratifications at 475, specifying the number of European and non-European countries that have ratified the various Hague Conventions.

dictions from time to time. A non-binding instrument may be more effective in shaping the views of lawyers in many countries; it may also be influential as a precursor of municipal legislation.[15]

The Hague Principles are embedded in a broad soft-law movement affecting business and commercial relations. As early as the 1970s the OECD and UNCTAD adopted non-binding rules on competitive practices, which later served as models for legislation in many countries in the world after 1990.[16] In 1980, Unidroit constituted a working group for the purpose of preparing what later became the Principles of International Commercial Contracts.[17] More recently, in a different context, the so-called *Ruggie* Principles, which are the "Guiding Principles on Business and Human Rights", were endorsed by the Human Rights Council of the United Nations.[18] Alongside these examples are other instruments in other fields of law. They all convey the impression that below the level of binding law, a new layer of norms is emerging that, although of academic note, has not attracted much attention from legal scholars at large so far.[19]

It is not possible, in this context, to explore in depth the various aspects of this new body of law emerging from the various lists of principles. The following remarks will concentrate on one aspect: the perception and impact of the Hague Principles. The effect of non-binding instruments is very much dependent on how they are perceived by their addressees, i.e. the various actors who may make decisions on issues covered by the Hague Principles.

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15 THÜRER, *supra* note 13, paras. 28 and 30, referring to this function of soft law in general.

16 ORGANIZATION OF ECONOMIC COOPERATION AND DEVELOPMENT (OECD), Declaration on international investment and multinational enterprises of 21 June 1976, as amended in: Horn (ed.), Legal problems of codes of conduct for multinational enterprises (Deventer 1980) 451–461; UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT (UNCTAD), Set of multilaterally agreed equitable principles of rules for the control of restrictive business practices, UN Document TD/RBP/Conf./10 of 2 May 1980.

17 UNIDROIT, Unidroit Principles of International Commercial Contracts 2010, Rome, Unidroit 2010, XXII with regards to the history of these Principles.

18 Guiding Principles on Business and Human Rights, implementing the United Nations "Protect, Respect and Remedy" Framework (New York/Geneva/United Nations 2011), see also Document A/HRC/17/31.

19 The character of the Hague Principles as *droit savant* is stressed by B. FAUVARQUE-COSSON/P. DEUMIER, Un nouveau instrument de droit souple international – Le projet des Principes de La Haye sur le choix de la loi applicable en matière de contrats internationaux, Recueil Dalloz 2013, 2185–2190, 2187; for a broader treatment of non-state law see N. JANSEN/R. MICHAELS (eds.), Beyond the State – Rethinking Private Law (Tübingen 2008); G.-P. CALLIESS (ed.), Transnationales Recht (Tübingen 2014).

III. The Addressees of the Hague Principles

The impact of the Principles on cross-border transactions will result from the reactions of a number of actors addressed. These actors are: contracting parties in the business community, academics as the gate-keepers of legal information, state courts, arbitrators and related organizations, and legislatures at the national or international level.

Since the Principles, contrary to other Hague instruments, only deal with the selection of the applicable law by *private parties* and do not make provision for the absence of such choice, the most relevant addressees are these parties and their counsel. Unless they agree on the applicable law – which, if at all, usually occurs *ex ante,* i.e. at the early stages of a transaction – the Principles will largely be devoid of practical significance. We shall therefore take a closer look at the prospects for the successful implementation of the Principles by private actors, *infra* IV.

How will private actors know that the Principles exist? The working group of the Hague Conference that authored the instrument was constituted by a majority of *academics* and only few practitioners; apparently no in-house counsel of any big company was a member or observer.[20] Thus, there is a long road to be travelled from the forum that drafted the Principles to those who might decide on their actual use one day. The dissemination of legal information required to overcome that distance is primarily a task for academics. It will be up to them to spread knowledge about the Principles in legal education, in seminars for practitioners, and by means of scholarly publications. Given the flood of information lawyers already have to accommodate, this will be a difficult task. Its effects can be expected only in the long term.

Courts have to face issues of the law governing international transactions from an *ex-post* perspective. In many jurisdictions they have to apply the binding conflict rules of the forum state. To the extent that these conflict rules already cover issues arising in a pending case, there is no room for the application of the Principles. For example, under the Rome I Regulation, the formal validity of a contract including a choice-of-law clause is subject to a rather detailed conflict rule providing for alternative connections. While those connections favour formal validity, they exclude recourse to a substantive rule such as Art. 5 HP, which states that a choice of law is valid by mere consent of the parties.[21] Conversely, in jurisdictions

20 See the website of the Hague Conference: *www.hcch.net* → Instruments → Conventions, Protocols and Principles → Principles on Choice of Law in International Commercial Contracts → Preparatory Work → 2013: Members of the Working Group.

21 For a detailed analysis see T. Pfeiffer, Die Haager Prinzipien des internationalen Vertragsrechts – Ausgewählte Aspekte aus der Sicht der Rom I-VO, in: Mankowski/

such as China, where explicit regulation of the formal validity of a choice-of-law clause is lacking, no such barrier exists.[22] Since one function of the Principles is "to interpret, supplement and develop rules of private international law",[23] a Chinese judge might feel encouraged to refer to Art. 5 HP in order to allow formless choice-of-law agreements. In other words, the less detailed the national conflict rules are, the more room there is for the application of the Principles by courts.

Arbitrators are a further group of addressees of the Principles. Since a *lex fori* is lacking in international arbitration, they are not bound by a set of specific conflict rules, unless the parties have imposed such an obligation on them. While this may open the door for the application of the Principles, there are other restrictions and complications which deserve a closer analysis later on, see *infra* V.

The greatest impact that may be expected for the Principles is where *legislatures* set out to codify choice-of-law rules for international contracts, taking the Principles as a blueprint. The relevant texts are a bit ambivalent on this point. On the one hand the Preamble specifically points out that the Principles "may be used as a model for national, regional, supranational or international instruments."[24] On the other hand the official Commentary makes clear that the Principles are not "a model law that States are encouraged to enact."[25] The apparent contradiction may be the result of inattentive drafting. The Principles have the style of a codification of the continental European type and are without any doubt suited to serve as a model law; Paraguay has in fact copied them almost verbatim into a municipal statute on the law applicable to international contracts.[26] The assertion of the

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Wurmnest (eds.), Festschrift für Ulrich Magnus (Munich 2014) 501–513, 506 et seq., pointing out the differences but also the far-reaching similarity of results to be achieved under Arts. 3 para. 5 and 11 Rome I and Art. 5 HP; see also S. SYMEONIDES, The Hague Principles on Choice of Law for International Contracts: Some Preliminary Comments, American Journal of Comparative Law (Am. J. Comp. L.) 61 (2013) 873–899, 891.

22 Cf. Q HE, Recent Developments of New Chinese Private International Law with Regard to Contracts, in: Basedow/Pissler (eds.), Private International Law in Mainland China, Taiwan and Europe (Tübingen 2014) 157–179, 165.

23 See para. 3 of the Preamble of the HP.

24 See para. 2 of the Preamble of the HP.

25 See the Commentary, *supra* note 1, para. I.8.

26 Ley No. 5393 sobre el derecho aplicable a los contratos internacionales, Gaceta Oficial de la República del Paraguay No. 13 del 20 de enero de 2015, 2; an English translation is published in: J. BASEDOW/F. FERRARI/P. DE MIGUEL ASENSIO/G. RÜHL (eds.), Encyclopedia of Private International Law (EPIL), Vol. IV (Cheltenham 2017), see the materials under Paraguay. The statute is not confined to the choice of the applicable law but also deals with the law applicable in the absence of such choice.

Commentary that they are not a model law is perhaps meant to prevent the misunderstanding that they exclusively address legislatures and not the judiciary and other actors.

IV. The Principles and Private Parties

How can private parties avail themselves of the Principles? Where other soft law instruments such as the Unidroit Principles[27] are at issue, the answer appears easy: the parties can incorporate the Unidroit Principles into their contract by agreement. Incorporation by agreement is possible within the freedom of contract often granted by the applicable law.[28]

That solution is excluded for the Hague Principles since, at the time of conclusion of the contract when the choice of law is made, there is not yet an applicable law to determine the boundaries of freedom of contract; it is the very purpose of the Hague Principles to allow the parties to determine that applicable law by their choice. If the foundational assertion of Art. 2 para. 1 HP that "a contract is governed by the law chosen by the parties" were to serve as a basis for such choice, this would come down to the recognition of a vicious circle. Art. 2 para. 1 HP is meaningless in a legal sense, at least from a strictly positivistic perspective of private international law. To the extent that national conflict rules such as those of Uruguay or Iran disallow a choice,[29] the Hague Principles remain ineffective.[30] In a similar vein, the explicit admission of the choice of non-state law in Art. 3 HP cannot set aside the prohibition of such a choice in Art. 3 Rome I or in the Regulation's pertinent recitals and legislative history.[31]

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27 See *supra* at note 17.

28 Cf. R. Michaels, in: Vogenauer (ed.), Commentary on the Unidroit Principles of International Commercial Contracts (PICC) (2nd ed., Oxford 2015) Preamble I, paras. 34 seq.

29 For Uruguay see Arts. 2399 and 2403 of the Civil Code and D. Hargain/G. Mihali, Uruguay, in: Esplugues Mota/Hargain/Palao Moreno (eds.), Derecho de los contratos internacionales en Latinoamérica, Portugal y España (Madrid et al. 2008) 765–788, 773; for Iran see Art. 968 of the Civil Code and N. Yassari, Das internationale Vertragsrecht des Iran, Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 2009, 451–456, 454; at p. 455 the author refers to the 1997 law on international arbitration that allows for unrestricted party autonomy with regard to arbitration.

30 Very clear on this point Fauvarque-Cosson/Deumier, *supra* note 19, 2189–2190; see also the broad discussion reaching the same result in A. Schwartze, Weltweit einheitliche Standards für die Wahl des Vertragsstatuts, in: Kaal/Schmidt/Schwartze (eds.), Festschrift zu Ehren von Christian Kirchner (Tübingen 2014) 315–332, 321–323.

Art. 2 para. 1 HP is nevertheless an important statement; it is a *political commitment* made by the Hague Conference having relevance for its own future work, and it is a *political appeal* to the states of the world to allow party autonomy. In this sense it gives support to the human-rights based approach to party autonomy that has been elaborated elsewhere.[32] Both approaches coincide in the great weight they afford to the goal of certainty and predictability in international commercial relations.[33]

While the admission of party autonomy as such in a non-binding instrument cannot set aside the restrictions laid down in statutory conflict rules, the Principles contain many other provisions that clarify the contours of choice of law. These relate to the formation of the choice-of-law agreement, the scope of the chosen law, and other effects of the choice. Many details are not regulated by the binding conflict rules of the various jurisdictions. The example of the form of the choice-of-law agreement under Chinese law was given above.[34] There are many more examples: *Marta Pertegás* and *Brooke Marshall* have compared some of the Hague Principles with recent conflicts legislation in Korea, Japan and China; the resulting checklist is a good illustration of the numerous issues arising under national conflict rules that could receive clear solutions under the influence of the Principles.[35] If we look into older legislation such as the Civil Code of Egypt, the under-regulation is even more conspicuous; we do not find more than a single rule on the admission of choice of law, all details being left to legal scholarship and case law.[36]

Enhancing legal certainty is in the interest of the parties where their international contract may be somehow affected by the fragmentary regula-

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31 See recitals 12 and 13 of the Rome I Regulation; the Commission Proposal of 15 December 2005, COM(2005) 650 contained a rule allowing for the choice of non-state law, see Art. 3 para. 2, but it was not accepted by the Council and did not finally make it into the Rome I Regulation; the divergence between Art. 3 Rome I and Art. 3 HP is pointed out by D. GIRSBERGER, Die Haager Prinzipien über die Rechtswahl in internationalen kommerziellen Verträgen, Schweizerische Zeitschrift für internationales und europäisches Recht 2014, 545–552, 550.

32 See BASEDOW, *supra* note 2, paras. 239 et seq.

33 See the Commentary, *supra* note 1, para. I.3 and the reference to Art. 28 of the Universal Declaration of Human Rights of 1948, in: BASEDOW, *supra* note 2, para. 252.

34 See text at note 22, above.

35 M. PERTEGÁS/B. A. MARSHALL, Intra-regional reform in East Asia and the New Hague Principles on Choice of Law in International Commercial Contracts, Korea Private International Law Journal 20 (2014) 391–428, 394.

36 See Art. 19, 2nd sentence of the Preliminary Chapter of the Civil Code, English translation in EPIL, *supra* note 26, Vol. IV, Egypt; for an account of the Egyptian law see H. JUNG, Ägyptisches Internationales Vertragsrecht (Tübingen 1999) 7 et seq.

tion of choice of law in countries such as Egypt. As pointed out above, binding law will usually not be opposed to gaps being filled by the Hague Principles, and the parties will welcome an instrument that deals with details which rarely become the subject of negotiations. But there is of course the risk that courts or arbitrators will fill the gaps of national conflict rules with other rules and in an inconsistent way. To foreclose or minimize such a risk, the parties should refer to the Hague Principles in an appropriate contract clause that could be drafted along the following lines:

"The present contract is subject to the law of […]; to the extent that it is not inconsistent with binding conflict rules, this choice is to be construed in accordance with the Hague Principles on Choice of Law in International Commercial Contracts."

The Hague Conference could promote the Principles by recommending such a standard clause. This would be a step towards the use of the Principles in commercial practice. Business associations at both international and national levels would be encouraged to recommend the use of the standard clause and would thereby promote the Principles to the business community at large. A company inclined to accept the Principles could propose the standard clause to its contracting partners, relying on the reputation and the neutral standing of the Hague Conference. In the event of litigation, the incorporation of the standard clause into the contract would alert judges and arbitrators to the Principles. All in all, such a clause would be an element in the slow process of disseminating information about the Principles.

V. The Hague Principles in Arbitration

1. Arbitration and State Law

International commercial arbitration is characterized by a certain independence from state law. The degree of that independence differs from country to country. But it can be taken for granted everywhere that state courts do not and cannot intervene as long as both parties comply with the arbitration agreement and with the resulting award; in that case the arbitration may be considered as an equivalent to a successful out-of-court settlement.

But even if one of the parties, contrary to the arbitration agreement, starts litigation in a state court, or if the losing party applies for the annulment of the award or objects to its enforcement, the review by a state court will usually be confined to a limited number of grounds relating to procedural fairness, to the arbitrability of the subject matter, and to aspects of public policy.[37] As a matter of principle, the law applied by the arbitrators

37 See Art. V of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, opened for signature in New York on 10 June 1958, UNTS 330, 38; see

to the subject matter of the dispute is outside the scope of review. This opens the door for the Hague Principles.

In commercial arbitration three types of agreements have to be distinguished: the main agreement that gives rise to the dispute; the arbitration agreement that excludes the jurisdiction of state courts and is foundational for the authority of the arbitrators to decide the case; and an agreement relating to the procedure to be followed. While the latter agreement is outside the scope of the Principles,[38] the two former agreements raise choice-of-law issues and may be subject to a selection of the applicable law by the parties. What role can be assigned to the Hague Principles in those conflicts analyses?

2. The Arbitration Agreement

Following the Rome I Regulation, the Hague Principles exclude arbitration agreements from their scope of application.[39] The reason given in the official Commentary is the fact that arbitration agreements, in some jurisdictions, are considered procedural in nature and are therefore governed by the *lex fori* or the *lex arbitri*.[40] While this is true, it reflects the perspective of a state court and not the viewpoint of an arbitration panel which has to assess the validity and scope of the underlying arbitration agreement prior to any proceedings in a state court.

In general, arbitrators neither know whether a state court will review their action at a later stage, nor can they predict which jurisdiction will carry out that review. Thus, they are not aware of the law that may become relevant as the *lex fori* at a later stage; nor do they know whether a state court that may be approached one day will consider the validity of the arbitration agreement as a procedural issue to be assessed under the *lex arbitri.* Nevertheless, their authority depends on a valid arbitration agreement, and they will have to establish the law that determines its validity and scope. If that law results from the parties' choice, why should that choice not be construed in accordance with the Hague Principles? The alternative is the complete absence of any applicable conflict rule. The application of the Principles could provide helpful assistance, in particular in mixed arbitration panels composed of arbitrators from different jurisdictions.

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also Arts. 34 and 36 of the UNCITRAL Model Law on International Commercial Arbitration 1985 with Amendments as Adopted in 2006, Vienna 2008.

38 M. KOPPENOL-LAFORCE, Arbiters en rechtskeuze: het handvat van de Draft Hague Principles on choice of law, in: Erasmus School of Law, Piet Sanders – Een honderdjarige vernieuwer (The Hague 2012) 293–298, 295.

39 Art. 1 para. 3 lit. b HP and Art. 1 para. 2 lit. e Rome I Regulation.

40 Commentary, *supra* note 1, para. I.26.

Take the example of a seller established in the EU and a buyer in a third country who have entered into a sales contract containing an arbitration clause that subjects "all disputes arising from the legal relationship between the parties to arbitration at X (city) in accordance with the law of Y (state)". It turns out that the sales price, fixed by the seller in accordance with a price cartel, was excessive; consequently the buyer brings a claim for damages. The arbitrators have to decide whether the claim falls within the scope of the arbitration agreement. This interpretive question will probably be answered in the affirmative by laws of non-EU countries. But the answer will most likely be negative under the laws of any EU Member State in accord with a recent ruling of the European Court of Justice. In *Hydrogen Peroxide* the Court held that a choice-of-forum clause, in order to exclude an otherwise competent jurisdiction, must explicitly refer to claims arising from the breach of competition law.[41] The same requirement of specificity arguably applies to arbitration clauses.[42] Thus, the outcome of the case will depend on the law applicable to the interpretation of the arbitration clause. The Hague Principles, were they applicable, would refer questions of interpretation to the law of Y chosen by the parties.[43] Since their application is excluded, considerable uncertainty will prevail for the arbitrators.

The example shows that it would have been preferable not to exclude arbitration agreements from the scope of the Principles and instead trust that arbitrators would wisely exercise the discretion they have anyway in applying the Hague Principles.[44] To extend this analysis to a more general level, it appears doubtful whether a list of precisely drafted exclusions as figuring in Art. 1 (3) HP is compatible with the nature of a non-binding instrument. Such lists are a familiar occurrence and are necessary in binding international conventions. But in a non-binding instrument the same technique excludes what has not been previously included by compulsory rules.

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41 CJEU, 21 May 2015, case C- 352/13 *(Cartel Damage Claims (CDC) Hydrogen Peroxide SA v. Akzo Nobel NV and others),* ECLI:EU:C:2015:335, paras. 68–71.

42 In this sense C. HARLER/J. WEINZIERL, The ECJ's CDC-Judgment on Jurisdiction in Cartel Damages Cases: Repercussions for International Arbitration, Europäisches Wirtschafts- und Steuerrecht (EWS) 2015, 121–123 (122); in a similar vein C. STEINLE/S. WILSKE/M. ECKARDT, Kartellschadensersatz und Schiedsklauseln – Luxemburg Locuta, Causa Finita?, German Arbitration Journal (SchiedsVZ) 2015, 165–169, 168 et seq.

43 Art. 9 para. 1 lit. a HP.

44 See para. 4 of the Preamble of the Principles and D. MARTINY, Die Haager *Principles on Choice of Law in International Commercial Contracts,* The Rabel Journal of Comparative and International Private Law (RabelsZ) 79 (2015) 625–652, 632, who correctly points out that the Principles by necessity have to grant this discretion to both courts and arbitrators.

3. The Main Contract

All articles of the Hague Principles apply to the designation of the law applicable to the main contract by both courts and arbitrators, and a distinction is made in only two provisions: (i) with regard to the choice of non-state law and (ii) as concerns the application of overriding mandatory provisions and public policy.[45] A further, not explicit but inherent distinction results from the fact that an arbitration panel has no *lex fori* that may block or supplement the parties' agreement. Instead, arbitration rules often allow the arbitral tribunal to designate the applicable law in the absence of a choice by the parties;[46] this reduces the significance of the Principles as a guideline for arbitrators.

Art. 3 HP allows for the choice of "rules of law that are generally accepted on an international, supranational or regional level as a neutral and balanced set of rules, unless the law of the forum provides otherwise". The limitation in the final part of the provision exclusively relates to state courts; it does not apply to arbitration where the parties – in the absence of a "forum" – are deemed free to choose non-state law provided that it has the named attributes.[47]

These attributes are not required in Art. 28 of the UNCITRAL Model Law on International Commercial Arbitration,[48] the provision which is cited in the Commentary as the model for Art. 3 HP.[49] While the additional requirements appear reasonable in substance,[50] they are difficult to encapsulate in clear language.[51] Moreover, the divergent wording raises the ques-

45 Cf. Arts. 3 and 11 para. 5 HP; see also the Commentary, *supra* note 1, para. P.6.

46 See e.g. Art. 35 para. 1 of the UNCITRAL Arbitration Rules (as revised in 2010), New York 2011; Art. 21 para. 1 2nd sentence of the Arbitration Rules of the International Chamber of Commerce of 2012, *www.iccwbo.org*.

47 This is clearly spelled out in the Commentary, *supra* note 1, para. P.6; MARTINY, *supra* note 44, 639 voices some doubts, however.

48 See *supra* note 37.

49 See the Commentary, *supra* note 1, para. 3.1.

50 The criteria set forth in Art. 3 HP – completeness and neutrality – were enunciated in the discussion preceding the adoption of the Rome I Regulation, see MAX PLANCK INSTITUTE FOR FOREIGN PRIVATE AND PRIVATE INTERNATIONAL LAW, Comments on the European Commission's Green Paper on the Conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernization, The Rabel Journal of Comparative and International Private Law (RabelsZ) 68 (2004) 1–118, 32–33.

51 See the harsh criticism expressed by A. DICKINSON, A Principled Approach to Choice of Law in Contract?, Butterworths Journal of International Banking and Financial Law (JIBFL) 28 (2013) 151–153, 152: "[…] this provision should not have seen the light of the day: almost every word drips with uncertainty." This criticism is further elaborated by R. MICHAELS, Non-State Law in the Hague Principles in In-

tion whether rules of law agreed upon by the parties in their contract as the applicable law may be subject, by the arbitral tribunal, to scrutiny under the criteria set forth in Art. 3 HP. Put in other words, could the arbitrators declare a set of rules forming part of the contract as too fragmentary or too one-sided to be treated as the applicable law under Art. 3 HP if the same set of rules can be expected to be regarded as the applicable law in court proceedings under the national provision implementing Art. 28 of the UNCITRAL Model Law?

The debate of the drafters on the additional properties of the "rules of law"[52] apparently did not take this divergence into consideration. It rather turned on the right of the parties to select non-state law as the applicable law, seemingly looking at this question from the *ex-post* perspective of a state court. But since that court will likely apply the national provision implementing Art. 28 UNCITRAL Model Law, the role of Art. 3 HP is a bit opaque. Perhaps the drafters simply wanted to reinforce the general tendency toward non-state law that already emerges from Art. 28. If that were the case, they should have copied Art. 28 verbatim. Perhaps Art. 3 HP is rather meant to clarify the concept of "rules of law" used in Art. 28. If that were the case, it should have been made clear at least in the Commentary, which would however raise some doubts as to its legitimacy. Whatever the correct understanding of Art. 3 HP may be, the preceding discussion points to an unclear overlap of non-binding provisions drafted by different international organizations.

Under Art. 11 (5) HP, an arbitral tribunal is not prevented from applying or taking into account public policy or the overriding mandatory provisions of a law other than the *lex causae* in cases where "the arbitral tribunal is required or entitled to do so". What at first sight looks a bit tautological appears to be a useful statement after all. Arbitrators often find themselves in a dilemma between a narrow perception of their terms of reference and the need to give effect to certain imperative norms of other laws in the interest of the effectiveness of their award.[53] Where they do not take notice

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ternational Commercial Contracts, in: Purnhagen/Rott (eds.), Varieties of European Economic Law and Regulation – Liber amicorum for Hans Micklitz, (Heidelberg 2014) 43–69, 56 et seq., 61: "The additional requirements […] have made a problematic rule far worse."

52 On that debate see FAUVARQUE-COSSON/DEUMIER, *supra* note 19, 2188 pointing to the disagreement between the working group and the special intergovernmental commission; SYMEONIDES, *supra* note 21, American Journal of Comparative Law (Am. J. Comp. L.) 61 (2013) 893–994; MARTINY, *supra* note 44, The Rabel Journal of Comparative and International Private Law (RabelsZ) 79 (2015) 637–638.

53 See e.g. PERTEGÁS/MARSHALL, *supra* note 35, 416–417.

of those imperative norms, the award may later be annulled or turn out to be unenforceable.[54]

Art. 11 para. 5 HP makes clear that the arbitration tribunal is empowered – not compelled[55] – to apply or take into consideration those imperative norms, and that a state court seized of the annulment or enforcement of the resulting award cannot quash or refuse to enforce it on the ground that the tribunal is acting *ultra vires*. The proviso that the tribunal is *entitled* to give effect to the imperative norms will be fulfilled where the applicable arbitration rules aim at an enforceable award[56] or at the final resolution of the dispute.[57] Since these are the very objectives of arbitration, the proviso comes down to a negative condition: the tribunal is empowered to give effect to imperative norms unless that is excluded in its terms of reference.

VI. Conclusion

The Hague Principles stand as a novel approach to international contract law. As a non-binding instrument, its impact on international business transactions depends on the echo it finds with several groups of addressees: private parties, academics, courts, arbitral tribunals, and legislatures. The drafters appear not to have always been fully aware of the specific perspectives of these groups. Some of the provisions too closely follow the model of binding texts. The most promising addressees for the future proliferation of the Principles are, first, legislatures and courts in countries that have no or no detailed rules on choice of law in contracts and, second, international commercial arbitrators in general. The Hague Conference should keep working on the dissemination of knowledge about the Principles in business practice.

54 See CJEU 1 June 1999, case C-126/97 *(Eco Swiss China Time Ltd. v. Benetton International N.V.),* ECLI:EU:C:1999:269: EU competition law to be enforced against an award rendered under a different law.

55 The discretion of arbitrators is highlighted by M. Pertegás/B. A. Marshall, Party Autonomy and its Limits: Convergence through the New Hague Principles on Choice of Law in International Commercial Contracts, Brooklyn Journal of International Law 39 (2014) 975–1003, 1001.

56 See Art. 41 of the Arbitration Rules of the International Chamber of Commerce of 2012, *supra* note 46.

57 See Art. 17 of the UNCITRAL Arbitration Rules, *supra* note 46.

V. Comparative Resume

Self-Regulation in Private Law in Japan and Germany

A Comparative Perspective

Moritz Bälz[*]*/Michael Pfeifer*[**]

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I. Introduction

This concluding contribution aims at adding some remarks from a comparative perspective to the rich contributions in this volume. Comparative research in the rising research field of self-regulation in private law is in its early stages. This symposium is arguably the first time that a Japanese-German group of scholars has jointly engaged in such comparison. Given the breadth and complexity of the topic, it goes without saying that we cannot aim at an exhaustive assessment of this volume's contributions, let alone a comprehensive comparative evaluation of the phenomenon of self-regulation in private law in Japan and Germany. Rather, we undertake to highlight some key commonalities and differences of self-regulation between the private law in both legal systems. We hope this will facilitate exploiting the valuable results of this symposium for future research.

To do so, we shall start with some remarks on terminology and categorizations (II.). In a second step, we attempt to roughly sketch self-regulation both

* Prof. Dr. Moritz Bälz, LL.M. (Harvard), Professor of Japanese Law and its Cultural Foundations, Goethe University Frankfurt.
** Michael Pfeifer, Attorney-at-Law, Hoffmann Eitle, München.

as a social phenomenon and as a topic of academic discourse in both jurisdictions (III.). A third part is devoted to the question of legitimacy, an aspect featuring prominently especially in the German discourse on self-regulation (IV.). Finally, selecting just one example for closer observation, we shall look into self-regulation's role in corporate governance, a topic which has been discussed with particular intensity both in Japan and Germany in recent years (V.). We sum up our findings in a brief conclusion (VI.).

II. Terminology and Categorizations

1. No Fixed Definition

Both Japanese law and German law have yet to provide a fixed definition of self-regulation (*jishu kisei* and *Selbstregulierung*, respectively).[1] In the intensifying discourse ongoing in both jurisdictions, a large variety of definitions, often inspired by public law, are offered to capture the diverse phenomenon. Conceptualizing self-regulation even in a very basic sense as "the ordering of certain relationships and/or interests of private actors by rules and principles – and, possibly, also enforcement mechanisms – agreed upon by these actors"[2] is subject to the qualification that normally not all addressees of self-regulation will be involved in the rule-making process, nor will they always have consented to such rules entirely of their own will.[3] Among the quite numerous terms used to describe the phenomenon of self-regulation, in Japan "soft law" *(sofuto rō)* is found particularly frequently.[4] This can be attributed in part to a major research project undertaken at the University of Tokyo in the years 2003 to 2013 under the same name.[5] While German scholars tend to be more critical of that term,[6] the

1 M. Dernauer, Terminology, Development, and Institutional Frame of Self-regulation in Japan, *in this volume,* p. 3; P. Buck-Heeb, Terminology, Development, and Institutional Frame of Self-regulation in Germany, *in this volume,* p. 27, pp. 30 ff.

2 See J.-H. Binder, Self-Regulation Induced by the State in Germany, *in this volume,* p. 127, p. 128.

3 F. Möslein, Genuine Self-Regulation in Germany. Drawing the Line, *in this volume,* p. 83,pp. 86 f.

4 See, e.g., H. Kansaku, Genuine Self-regulation in Japanese Capital Markets: The Stewardship Code. In Comparison with the Corporate Governance Code, *in this volume,* p. 61, 76; Dernauer, *in this volume,* p. 4; for details on the following see M. Pfeifer, Selbstregulierung und Soft Law im japanischen Gesellschaftsrecht (forthcoming), *sub* B.I.2.

5 See M. Iwamura, Reflections on the Past 10 Years of the Soft Law Project (2013), retracable under *http://www.gcoe.j.u-tokyo.ac.jp/en/greetings_E.pdf*.

distinction mainly seems to be a matter of perspective. "Self-regulation" emphasizes the actor in the regulation process, whereas "soft law" refers to the legislative nature[7] and "extra-legal binding effect"[8] of the resulting rules.

2. *Categorization Based on State Involvement: "Genuine Self-regulation" Versus "State-induced Self-regulation"*

Similarly, there is an absence of consensus as regards an adequate categorization of the numerous and diverse forms of self-regulation found in Japan and Germany.[9] Most common are approaches, again derived from public law,[10] which draw distinctions based on different degrees of state involvement in the establishment of the regulation. Along these lines, the most basic categorization, which has also served to structure the contributions of this symposium, distinguishes between "genuine self-regulation" and "state-induced self-regulation":

"Genuine self-regulation",[11] refers to self-regulation without state involvement.[12] Examples include the self-regulation of certain professional

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6 Representatively, BUCK-HEEB, *in this volume,* pp. 36 f.: "very imprecise and controversial".

7 *Ibid.*

8 J. BASEDOW, The Hague Principles on Choice of Law – Their Addressees and Impact, *in this volume,* p. 245, p. 247, referring to *Lord McNair*'s original coinage of the term in note 13; see also DERNAUER, *in this volume,* p. 4; A. DIECKMANN, Legitimacy and Limits of Self-Regulation in Germany, *in this volume,* p. 195, pp. 207 f.

9 For Germany: BUCK-HEEB, *in this volume,* pp. 30, 44 ff.

10 Not satisfied with the existing public law-inspired categorizations and with the aim of widening the German discussion to the international level, where the bifurcation between public law and private law is less marked, *Buck-Heeb* contemplates in this volume developing an alternative, genuinely private law categorization focusing on the nature of the self-regulatory body or the tools used for such purpose. BUCK-HEEB, *in this volume,* p. 27. Given that the Japanese legal system shares the conceptual distinction established in German law between public law and private law, even if in Japan the lines may at times be more blurred (see DERNAUER, *in this volume,* pp. 7 ff.), this line of thinking is not further explored here.

11 At times, though not consistently, "autonomous self-regulation and "voluntary self-regulation" are used synonymously. *Buck-Heeb* is rightly critical of the term "voluntary" in this context, as self-regulation even absent direct state influence may well be non-voluntary given the threat that the state might regulate if self-regulation proves insufficient from the perspective of policy-makers (BUCK-HEEB, *in this volume,* p. 45). One should add, however, that similar arguments could, of course, also be made for "genuine" self-regulation.

12 It should be noted that some authors when using "genuine" refer to the compliance with such rules rather than to the establishment of self-regulation. This is why *Kansaku* considers the Japanese Stewardship Code an example of "genuine" (in the

organizations, which as with the self-regulation of guilds have existed for centuries.[13] Standard business terms, as well, are often assigned into this category,[14] at least to the extent they are not prescribed by statute or subject to ministerial approval.[15] Genuine self-regulation is particularly important in transnational law, for example in international trade,[16] but also in international sports.[17] This can be considered a logical result of the states' limited reach to enact or induce regulation across borders. Some point out that even genuine self-regulation will never occur entirely without the state, as private autonomy is conditioned on the possibility of its being enforced by the state.[18] Whether one shares this view arguably depends on whether we can imagine a self-validating legal system beyond the state.[19]

"State-induced self-regulation", by contrast, is widely used to capture examples of self-regulation characterized by more direct state involvement. Obviously, this lumps quite disparate cases together, and some of the authors of this volume therefore prefer more sophisticated categorizations. For Japan, where the state at least in the past quite frequently has induced self-regulation even absent a statutory basis through informal means such as administrative guidance *(gyōsei shidō), Dernauer* proposes to differentiate further between "self-regulation informally guided by the state" and "legally induced self-regulation".[20] *Kozuka*, in order to capture his intri-

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sense of genuinely self-binding) self-regulation, but at the same time as "non-autonomous"; see KANSAKU, *in this volume,* p. 62 f.

13 For the Japanese guilds *(za):* DERNAUER, *in this volume,* p. 10; for Germany: BUCK-HEEB, *in this volume,* p. 42, referring to the example of the Hanseatic League.

14 For Japan: DERNAUER, *in this volume,* p. 22; for Germany: DIECKMANN, *in this volume,* pp. 198 ff.; MÖSLEIN, *in this volume,* pp. 94 ff.; P.C. LEYENS, Self-commitments and the Binding Force of Self-regulation with Respect to Third Parties in Germany, *in this volume,* p. 157, pp. 162 f. More cautious with regard to whether standard business terms should be considered a form of self-regulation: BUCK-HEEB, *in this volume,* p. 50.

15 For Japan: DERNAUER, *in this volume,* p. 22; for Germany: MÖSLEIN, in this volume, p. 98. Overall, in Japan the state often seems to play a more prominent role in establishing model standard business terms than in Germany, even absent a statutory basis for such state interference. See DERNAUER, *in this volume,* pp. 7 and 22 f.

16 Y. NISHITANI, *Lex Mercatoria* and Self-Regulation in Transnational Perspective, *in this volume,* p. 213, pp. 214 f.

17 DIECKMANN, *in this volume,* pp. 202 ff.; BUCK-HEEB, *in this volume,* p. 43.

18 MÖSLEIN, *in this volume,* p. 89 citing the German Federal Constitutional Court *(Bundesverfassungsgericht)* in note 23, which has stressed that private autonomy is conditioned on the possibility of enforcing its results and the state providing the means for such enforcement.

19 See NISHITANI, *in this volume,* pp. 226 f., on *Teubner*'s theory on a global private law order independent of national law ("Global Bukowina").

20 DERNAUER, *in this volume,* pp. 23 ff.

guing examples, goes so far as using four categories of state-induced self-regulation depending on whether the state foresees self-regulation by statute, merely endorses it as regards statutory interpretation, encourages it to complement statutory regulation, or coordinates it absent a statutory basis.[21]

The (sub-)categories advanced for Germany differ slightly. This may be due to the constitutional framework for self-regulation being arguably narrower in Germany or to a longer existing discourse on "regulated self-regulation" in German public law, the latter being understood as an activity of private parties that is supervised and partially instructed by the state. Such setting has to be seen against the backdrop of the welfare state's transformation from a provider of goods and services to a provider of subsistence, the so-called *Gewährleistungsstaat*.[22] Some distinguish "co-regulation" standing as an entangled and interwoven cooperation of private and state actors on equal footing, as a category of its own.[23] Notably, co-regulation features certain similarities to the implementation of private party interests in some cooperative frameworks found in Japan.[24] *Binder*, in this volume, differentiates between cases where the state incorporates pre-existing self-regulatory arrangements into legislation, as for example in the case of product safety regulation in Germany, and those cases where self-regulatory arrangements are established only as a response to inducing legislation, for which he offers German media regulation as a prominent example.[25] If we restrict ourselves in the following discussion to the basic categories of genuine versus state-induced self-regulation, this is by no means meant to refute any of the aforementioned more sophisticated categorizations.

Delineating the border between genuine and state-induced self-regulation remains a challenging task. This is evidenced by the fact that in both jurisdictions there is no consensus on how to categorize even prominent examples such as the Japanese and the German corporate governance codes.[26] According to *Binder* genuine self-regulation occurs where the state willingly or accidentally refrains from taking legislative or administrative action and the regulatees themselves step in out of their own desire to es-

21 S. KOZUKA, Self-regulation Induced by the State in Japan, *in this volume,* p. 109, pp. 110 f.

22 See BUCK-HEEB, *in this volume,* p. 48.

23 See BUCK-HEEB, *in this volume,* pp. 46 ff., and the differing usage of the term by BINDER, *in this volume,* p. 128.

24 See DERNAUER, *in this volume,* p. 25 with further references; H.-G. DEDERER, Korporative Staatsgewalt: Integration privat organisierter Interessen in die Ausübung von Staatsfunktionen (Tübingen 2004) critically discusses a similar development of state "corporatism" against the background of German constitutional law.

25 BINDER, *in this volume,* pp. 132 ff.

26 See *infra* V.

tablish and submit to a certain order; by contrast, in the case of state-induced self-regulation the state does in fact regulate, though under self-imposed restraints; further, it retains both the initiative to regulate and, to a certain degree, also control over fundamental policy decisions.[27] *Möslein* similarly stresses that it is the initiative of the state, rather than just any particular form of involvement, which makes the difference. He proposes drawing the line using a three-dimensional grid of typological criteria, namely procedure, substance, and enforcement of self-regulation;[28] interestingly, he emphasizes that this delimitation is not only of systematic value, but that it may matter as well for enforcement at least under European competition law.[29]

Given Japan's strong tradition of cooperation and coordination of state and private actors, often taking on rather opaque forms,[30] distinguishing genuine from state-induced self-regulation in the Japanese context is arguably even more difficult. Where Japanese literature differentiates between self-regulation (or *soft law*) from "below" and from "above", it focuses mainly on the state's ability to monitor and influence the development of self-regulation within a (statutory) regulatory framework as well as its execution.[31] As *Dernauer* notes, public entanglement may, in theory, give rise to questions regarding the enforceability of self-regulatory regimes in civil law disputes.[32] At least in the realm of stock exchanges and securities law, however, private law (i.e., the Tokyo Stock Exchange (TSE)'s contracts with securities dealers and listed companies as well as tort law)

27 BINDER, *in this volume,* p. 128.

28 MÖSLEIN, *in this volume,* pp. 90 ff.

29 MÖSLEIN, *in this volume,* pp. 105 ff.

30 DERNAUER, *in this volume,* pp. 25 f.; on the blurred lines between state and social actors in Japan in a civil society context see H. HOLBIG/M. BÄLZ, Strengthening the nation and protecting the weak: Shifting modes of state-society relations in Japan and China, in: Amelung/Bälz/Holbig/Schumann/Storz (eds.), Protecting the Weak in East Asia: Framing, Mobilisation and Institutionalisation (forthcoming, Abington 2018).

31 S. MAEDA, *Shōken torihi-jo ni okeru jishu kisei – Amerika oyobi Igirisu ni okeru jishu kisei no keitai to sono hatten* [Self-regulation of securities exchanges – Form and development of self-regulation in America and England], in: Tatsuta/Kanzaki (eds.)*, Shōken torihiki-hō taikei – Kawamoto Ichirō sensei kanreki kinen* [System of securities trade law – On the occasion of Prof. Ichirō Kawamoto's 60th birthday], (Tōkyō 1986) 91, 95 ff., specifically in respect to capital-market regulation; a similar differentiation is used in the *soft law* discourse, see H. KANDA, *Shijō torihiki to sofuto rō* [Soft Law and Commerce], Soft Law Journal 22 (2013) 29, 31: spontaneous order between private parties as opposed to complementary soft law created by a self-regulation organization.

32 DERNAUER, *in this volume,* pp. 8 ff.

seems to govern the rules of liability.[33] But this does not mean that the Financial Services Agency as the premier supervising authority would not hold a firm hand on the stock exchange's self-regulation as provided for in Japan on a statutory basis.[34] Given the increasing role of private law within the regulatory framework, reflecting a shift from traditional *ex-ante* regulation towards *ex-post* monitoring,[35] we may see more such cases of doubt in the future.

III. Self-regulation as a Social Phenomenon and Self-regulation as a Topic of Discourse

The aforementioned issues of terminology and categorization hint already to certain differences that can be observed when comparing self-regulation in Japan and Germany respectively. Some of these differences, as well as important parallels, shall be highlighted in the following section. We first look into self-regulation as a social phenomenon in both societies before comparing the respective discourse on the topic.

1. Self-regulation as a Social Phenomenon in Japan and Germany

Nowadays, self-regulation constitutes a highly important phenomenon in the economic and social life of both Japan and Germany with applications in numerous and diverse fields. The contributions in this volume offer numerous illustrative examples of this. As regards the role played by self-regulation in German national law, more skeptical voices can be heard as well; after all many examples seem to demonstrate a tendency that self-regulation, in the form of codes of conduct, is sooner or later replaced by

33 See the detailed analysis of the *Mizuho Case* and the regulatory framework by H. Baum/A. M. Fleckner/M. Sumida, Haftung für Pflichtverletzungen von Börsen: Deutschland und Japan im Vergleich, The Rabel Journal of Comparative and International Private Law (RabelsZ) 82 (2018) (forthcoming), from a comparative perspective. When a mistake of a Mizuho employee using the Tokyo Stock Exchange's electronic trading system led to significant losses, the Tokyo High Court held the TSE liable under tort rules for not implementing sufficient safeguards (Judgment of 24 July 2013, Kinyū Shōji Hanrei 1422 (2013) 20 ff. = M. Sumida, ZJapanR/J.Japan.L. 38 (2014) 235 ff., in partial German translation).

34 X. Wen, *Torihiki-jo no kōporēto ganbanansu kisei to kinshō-hō* [The Exchange's Rules on Corporate Governance and the FIEA], in: Iwahara (ed.), *Kaisha, Kinyū, Hō* [Company, Finance, Law], Vol. 1 of 2, Tōkyō (2013) 375, 395: "semi-governmental public interest nature" (*jun-seifu teki na kōeki seishitsu*); see Pfeifer, *supra* note 4, *sub* D.II.1. for details.

35 H. Baum/H. Kanda, Financial Markets Regulation in Japan, ZJapanR/J.Japan.L. 44 (2017) 65, 70 f.

regulation because the former does not yield the expected results.[36] It is true that in certain fields such as capital markets the German state tends to leave less and less room for self-regulation.[37] Nevertheless, there seems to exist a broad consensus that self-regulation, at least state-induced self-regulation in its various forms, today is highly relevant in Japanese as well as in German private law.[38]

The history of self-regulation – even if not termed as such – reaches back for centuries both in Japan and Germany.[39] The example of professional guilds has already been mentioned. Prior to the rise of the modern nation state in the 19th century, self-regulation meant genuine self-regulation. After all, state-induced self-regulation requires inducement by a state, which in the modern sense existed only since the late 19th century.[40]

The areas where self-regulation is widely used in in Japan and Germany show remarkable parallels. Self-regulation with regard to technical and accounting standards, corporate governance, and professional organizations, for example, feature prominently in both legal systems. This observation may be explained by the factors which drive self-regulation. Besides globalization, which arguably is the main driver of self-regulation on the transnational level given the limited ability of nation states to respond to the increased interconnectedness of the world,[41] the need for knowledge of technically complex fields and the necessity of flexibility to respond to rapid change are important factors which can make self-regulation an attractive option. Self-regulation allows exploitation of the regulatees' expertise in the field in question and facilitates a quicker adjustment of rules to new challenges posed by technological change.[42] Given that both Japan and Germany are facing globalization, an increasing technical complexity and accelerating

36 BUCK-HEEB, *in this volume,* pp. 28 ff. and 55.

37 BUCK-HEEB, *in this volume,* p. 29.

38 For Japan: DERNAUER, *in this volume,* pp. 3 and 10; T. KATO, Legitimacy and Limits of Self-regulation in Japan, *in this volume,* p. 181, p. 193: "deeply rooted in the Japanese regulatory structure"; KOZUKA, *in this volume,* p. 126. For Germany: BINDER, *in this volume,* p. 130.

39 For an historical overview on Japan see DERNAUER, *in this volume,* pp. 10 ff. For Germany: see BUCK-HEEB, *in this volume,* pp. 40 f.; DIECKMANN, *in this volume,* p. 195.

40 For Germany: BUCK-HEEB, *in this volume,* pp. 43 f.

41 NISHITANI, *in this volume,* p. 222; see also Y. ASANO, Self-regulations and Constitutional Law in Japan as Seen from the Perspective of Legal Pluralism, *in this volume,* p. 147.

42 BINDER, *in this volume,* pp. 137 ff.; KOZUKA, *in this volume,* p. 126; MÖSLEIN, *in this volume,* p. 86.

technological change similarly, it is not surprising that we can observe attempts to react by employing self-regulation in both legal systems.

At the risk of generalizing a bit too much, we are inclined to say that state-induced self-regulation may be even more deeply rooted in the regulatory structure of Japan, with its traditionally strong bureaucracy and its cooperative relationship with the business world,[43] than in the German case. Japanese ministries and agencies frequently use self-regulation as a means to implement their policies. One strategy applied for this purpose is to initiate an expert commission *(shingi-kai)* or informal study group *(kenkyū-kai)*. These bodies often produce guidelines or recommendations which, while legally non-binding, establish standards in line with the ministry's policies.[44] Some observers also find that Japanese industries seem overall quite willing to accept state-induced self-regulation as an effective means of policy implementation and not merely as a way to avoid administrative control.[45] What, for obvious reasons, cannot be observed in Japan is self-regulation triggered by European Union law, which has increasingly become relevant for self-regulation in German private law.[46] Prominent examples here include not only consumer law but also corporate governance.[47]

A different and far more difficult question is to what extent self-regulation can be called successful in the private laws of both countries. Part of the problem is that it is far from clear what "success" should mean in this context. Where self-regulation is not accepted by a substantial number of regulatees, as in Germany in the cases of the 1970 Insider Trading Guidelines and the 1995 Takeover Code,[48] from the point of view of regulation aiming at influencing behavior, self-regulation must be called a failure. Conversely, a high compliance rate as such cannot always be equated with success. Even leaving the quality of the rules and possible competition-restricting effects of self-regulatory arrangements aside,[49] where self-regulation deliberately leaves room for deviations in unusual cases, as where it applies a comply-or-explain mechanism like the corporate governance codes in both Japan and Germany, one might argue that 100% compliance constitutes failure rather than success. Nevertheless, as shown by the

43 See DERNAUER, *in this volume,* pp. 15 ff. with further references.

44 See the examples provided by KOZUKA, *in this volume,* pp. 116, 121 and 122 f.; KATO, *in this volume,* p. 187 for distinct fields of regulation.

45 DERNAUER, *in this volume,* pp. 17 and 26.

46 In general BUCK-HEEB *supra* note 1, 47 ff.; more specifically in respect to standards MÖSLEIN, *in this volume,* pp. 106 f; BINDER, *in this volume,* pp. 133 f.

47 LEYENS, *in this volume,* pp. 163 ff.

48 LEYENS, *in this volume,* pp. 162 f.; BUCK-HEEB, *in this volume,* p. 55.

49 DERNAUER, *in this volume,* p. 7; BUCK-HEEB, *in this volume,* p. 52; MÖSLEIN, *in this volume,* pp. 106 f.

example of the Japanese Corporate Governance Code requiring that listed companies have independent directors on the board, at least in some cases success will be measured predominantly based on compliance rates rather than on an increase in efficiency.[50]

Allowing for deviations from a rule may rest on the idea that *"no size fits all"*,[51] but that does not mean that self-regulation would come without expectations on the side of the state. Self-regulation regularly takes place against the backdrop of possible state regulation and in this sense "in the shadow of the legislator".[52] It is often stressed for Germany that the state tends to step in too readily wherever self-regulation does not yield the desired results. Women on supervisory boards, executive compensation, and the consumer's right to a payment account are just three prominent examples from the recent German experience where self-regulation was succeeded by state regulation rather soon.[53] This pattern is problematic as it threatens to discredit self-regulation as such. At least based on the contributions for this symposium, one is left with the impression that this tendency is not quite as strong in Japan. One hypothesis might be that in Japan, given its traditionally strong ministries with their various formal and informal ways of steering state-induced self-regulation according to their policy preferences, the state might less often need to avail itself of state regulation to achieve its policy goals. Phrased differently, state-induced self-regulation requires that the state motivate the regulatees to engage, as they are not acting of their own will.[54] Taking into account the influence of Japanese ministries on various industries and in turn the influence of certain industry organizations on their members, compliance with state-induced self-

50 See *infra* V.

51 T. FUJITA, Corporate Governance and the Rule of Soft Law, UT Soft Law Review 5 (2013) 9 ff.

52 LEYENS, *in this volume,* p. 157; MÖSLEIN, *in this volume,* pp. 103 ff.; BUCK-HEEB, in this volume, p. 49 with further references. For Japan see KANSAKU, *in this volume,* p. 81: Stewardship Code in the shadow of the government. For the Japanese soft law discourse and focusing on enforcement see T. FUJITA, *Hādo rō no kage no moto de no shiteki chitsujo keisei* [Private ordering in the shadow of the hard law], in: Nakayama/Fujita (eds.), *Sofuto rō no kiso riron* – Theory of Soft Law (Tōkyō 2008) 227 ff.

53 BUCK-HEEB, *in this volume,* p. 28 f; BINDER, *in this volume,* pp. 142 f. Of course, this is not a unique feature of German law. *Nishitani* points to a remarkable example from transnational law in this respect, namely the 1924 Hague Rules on bills of lading, which were concluded as a binding international convention after earlier self-regulatory attempts had not found sufficient adherents (NISHITANI, *in this volume,* p. 220).

54 See BINDER, *in this volume,* pp. 139, 144, who however stresses that such motivation should be accomplished by sufficiently reflecting the regulatees' interests.

regulation might be more easily accomplished in Japan than in Germany. Obviously, this hypothesis needs to be tested by further research. It also seems fair to say that the Japanese business community has developed a certain expertise in shaping the outcome of state regulation.[55]

2. *Self-regulation as a Topic of Discourse in Japan and Germany*

While some forms of self-regulation have existed for centuries in substance, if not by name,[56] only with the rise of the modern state did self-regulation become conceived as such.[57] While certain aspects of self-regulation such as the impact of standard business terms on contractual freedom had already been subject to analysis well back in the past,[58] the systematic scholarly discourse on this social phenomenon, not to mention many of the pertinent terms (including "self-regulation" itself), is comparatively new.[59] The prominence self-regulation has rapidly been gaining in legal discussions over approximately the past twenty years mirrors fundamental changes – e.g., the (partial) withdrawal of the state from certain fields in the course of deregulation, technological change and globalization – that have for their part fostered self-regulation in the same time period, particularly in the form of state-induced self-regulation.

The national discussions in Japan and Germany are in part influenced by, and thus connected with, an ongoing transnational discourse. The broad soft law movement[60] and the international trend to employ codes of conduct, *inter alia* to improve corporate governance are just two prominent examples of transnational discourse having impacted also Japan and Germany. Regulatory tools such as comply-or-explain have become legal transplants (if one is willing to use this term) in both legal systems. Japanese and German scholars intensively discuss theories which are intertwined with self-regulation like legal pluralism[61] and transnational law.[62]

The discourse on self-regulation in both countries, furthermore, has in common that the discussion originated and is still heavily influenced by

55 K. EGASHIRA, *Kaisha hōsei no shōrai tenbō* [Future outlook on corporate law], in: Uemura (ed.), *Kigyō hōsei no genjō to kadai* [Present Condition and Problems of Company Law], Tōkyō (2009) 115, 128. *Egashira*, notably, contrasts this with the limited success of Japanese business associations in regulating their own members.

56 BUCK-HEEB, *in this volume,* pp. 40 f., see also *supra* III.1.

57 DIECKMANN, *in this volume,* p. 195 with references.

58 See LEYENS, *in this volume,* pp. 159 ff., and MÖSLEIN, *in this volume,* p. 1888 with references.

59 BUCK-HEEB, *in this volume,* p. 42; KOZUKA, *in this volume,* p. 109.

60 BASEDOW, *in this volume,* pp. 247 ff.

61 ASANO, *in this volume,* pp. 147 ff. and 154 ff.

62 NISHITANI, *in this volume,* pp. 213 ff.

public law discourse. This applies not only to Germany[63] but also to Japan.[64] It seems plausible that with regard to rules and actors, the dividing line between public law and private law in Japanese law is at times hard to draw.[65] Yet, this does not mean that among scholars and thus also in discourse the division is not similarly marked as in Germany.

A difference, for obvious reasons, derives from Germany being a member of the European Union. For German scholars this makes it necessary to analyze the impact of European rule-making on self-regulation in Germany as well as in the other Member States. Still, even in Japan, European developments are studied closely (as exemplified by the adoption of the Corporate Governance Code and the Stewardship Code following originally English models). While the European Union constitutes a significant force behind the expansion of self-regulation and soft law in the Member States,[66] its instruments thus also shape the Japanese regulatory landscape.[67]

The prominence of the term soft law *(sofuto rō)* in the Japanese discourse is one of the striking differences between the academic debates encountered in both countries. Many German commentators rather avoid the term.[68] "Soft law" emphasizes the effects of rules which are not legally binding in the sense that they are not enforced by the state. If it is true that in principle only the state, owing to its monopoly on the legitimate use of force, can enforce effective rules,[69] privately made law will necessarily be "soft", unless it is backed by the state. This does not mean that these rules are necessarily less effective. From a more economic perspective, the effect of "hard" law on certain behavioral patterns in a group, i.e., social norms, may be perceived as providing for nothing but an indirect effect on the underlying private ordering process. Following such understanding, the effect of soft and hard law becomes one of degree and style rather than character.[70] The examples given by *Asano* and *Nishitani* in this volume illustrate this coexistence of (national) law and, sometimes conflicting,

63 BINDER, *in this volume,* pp. 130 f. with further references.

64 DERNAUER, *in this volume,* p. 4 and note 2; KATO, *in this volume,* p. 181.

65 DERNAUER, *in this volume,* pp. 7 ff.

66 BUCK-HEEB, *in this volume,* p. 37 ff.; see examples in respect to industry and safety standards given by MÖSLEIN, *in this volume,* pp. 106 f., and in respect of corporate governance regulation by LEYENS, *in this volume,* pp. 163 f.

67 See H. KANDA, *Sōkatsu ni kaete* [Instead of a summary], Junkan Shōji Hōmu 2103 (2016) 24, 25 who explains the shift in the orientation of the corporate governance debate towards EU inspired soft law instruments with the common aim to create wealth.

68 See *supra* II.1.

69 BUCK-HEEB, *in this volume,* pp. 34 f.

70 FUJITA, *supra* note 52, 243 f.; see PFEIFER, *supra* note 4, *sub* B.II.1.

rules of other origin. Neither the preferences of supporters of the Japanese Self Defense Forces in respect of the enshrinement of one of their deceased fellow soldiers[71] nor the global *lex mercatoria*[72] are enforced by the state, yet both shape and affect relationships with third parties. Of course, both in Japan and Germany there are quite a few cases where the courts indirectly have granted legal effect to privately made rules.[73] A prominent voice in the Japanese discussion, however, has highlighted that enforcement of social norms, such as trade customs, is not always beneficiary but has to be balanced against potential trade-offs, taking into account the effect on the underlying private ordering, the courts' limited knowledge and the effect on third parties.[74]

IV. The Issue of Legitimacy

The legitimacy of self-regulation seems a significantly more salient question in the German discourse than in the Japanese.[75] This difference may again be connected to the prominent role of Japanese ministries and agencies and their strength in inducing self-regulation. To the extent self-regulation is viewed from the regulatees' perspective as a reasonable and effective way to implement certain common policy goals rather than as a means of escaping administrative control,[76] the question of legitimacy indeed does not seem that important. Another explanation would be that German constitutional law probably shows greater deference to restraints on state regulation, which in order to be effective must not be circumvented by state-induced self-regulation.

There are at least two fundamentally different ways to look at the question of legitimacy, presented in this volume by *Dieckmann* and *Kato* (which is not to claim that the approaches they describe are representative of their respective legal systems): For the first approach personal freedom is the starting point, which may only be restricted if such restraint can be justified.[77] Where, it is argued, total voluntariness is not guaranteed, "good reason" is required. This is where public interest and the need for judicial

71 Asano, *in this volume,* p. 156, who criticizes the close relationship between the "Friends" of the SDF and the state.

72 Nishitani, *in this volume,* pp. 223 ff.

73 For examples see Buck-Heeb, *in this volume,* p. 56; Kozuka, *in this volume,* pp. 116 f.; Möslein, *in this volume,* pp. 104 f.

74 Fujita, *supra* note 52, 238 f.

75 For the scarcity of Japanese literature on this point see Kato, *in this volume,* p. 181.

76 See *supra* at note 45.

77 Dieckmann, *in this volume,* pp. 196 f.

control can come into play.[78] Such a view adopts the highly influential but not undisputed claim of *Bachmann*, which considers legitimacy in self-regulation mainly as a safeguard against exploitation *(Ausbeutungsverbot)* based on two elements, acceptance and welfare.[79] From this perspective, gains in prosperity may make up for a missing individual approval of a norm. *Dieckmann* advances several factors that provide guidance on the aspects that safeguard the creations of rules that are both "good" and "fair", namely the independence of rule-makers and at least the possibility for those affected by the outcome of the self-regulation to participate, this meaning transparency, documentation, openness for public comment etc.[80] Here, the example of the Stewardship Code and the rather limited public attention during the creation of the Code noted by *Kansaku*[81] sheds light on the limits of procedural safeguards and their ability to guarantee adequate public consensus-building.

The second approach asks to what extent it is legitimate for the state to avail itself of self-regulation instead of state regulation. Was it, for example, legitimate to implement the policy of increasing the number of independent directors in Japan through a Corporate Governance Code, which is locked into the TSE Listing Regulations, instead of enacting corresponding legislation?[82] Here, "good reason" is required to bypass the procedures normally to be complied with when acting through state regulation.[83] The latter approach, consequently, is concerned with state-induced self-regulation, whereas the former especially targets genuine self-regulation (in the case of state-induced self-regulation, the question of legitimacy will often have to be answered by the state).[84] The state regulator's own lack of expertise in highly technical fields, the need for speedy and flexible solutions in a quickly changing environment, and the desire to allow for regulatory competition may account for only some of these reasons.[85] Viewed from the outside, procedures for determining self-regulatory rules in the state-induced frame-

78 DIECKMANN, *in this volume,* pp. 201, 205

79 G. BACHMANN, Private Ordnung (Tübingen 2006) 194 f.; DIECKMANN, *in this volume,* p. 201; one major critique of this argument lies in its minimal concern with democratic legitimacy, see for example S. MAGEN, Zur Legitimation privaten Rechts, in: Bumke/Röthel (eds.), Privates Recht (Tübingen 2012) 229, 244 f.

80 DIECKMANN, *in this volume,* pp. 205 f.; P. BUCK-HEEB/A. DIECKMANN, Selbstregulierung im Privatrecht (Tübingen 2010) 277 ff.

81 KANSAKU, *in this volume,* pp. 75 f.

82 KATO, *in this volume,* p. 185.

83 KATO, *in this volume,* pp. 189 f.; see also ASANO, *in this volume,* p. 155, who sees the risk of a "hidden collusion between certain types of self-regulation and state law".

84 DIECKMANN, *in this volume,* p. 196.

85 BINDER, *in this volume,* p. 129; KOZUKA, *in this volume,* p. 126.

work do not seem to differ all too much from the established Japanese legislative practice, especially the significant role of expert commissions *(shingi-kai)* in the preparation of major legal reforms. It requires an insider's eye to note that the actors in these types of commissions indeed differ and that participation of all affected parties in the preparation of self-regulatory rules may be guaranteed to a lesser extent.[86] It is at least questionable (if not highly problematic) to what extent such a consensual element may be replaced by authority that primarily claims its legitimacy based on expertise.[87]

Both approaches have in common that the question of legitimacy is all the more crucial the more self-regulation has a binding effect and *vice versa*. As *Leyens* notes on an abstract level and as *Kansaku* exemplifies with respect to the Japanese Stewardship Code, genuine self-commitment poses a lesser problem for legitimacy.[88] However, even in this context, legitimacy may have a decisive effect on the acceptance of self-regulation among the regulatees and thus foster its self-binding nature.[89] In this sense, the "success" of self-regulation is closely linked to its ability to achieve acceptance among the addressees and to create wealth surpluses which are at the same time at least not detrimental to concerned third parties. Self-regulation does not guarantee an efficient solution to complex problems, but rather involves tradeoffs.[90]

V. Corporate Governance in Particular

Given the prominent attention the German Corporate Governance Code has received in German literature, it is no wonder that several articles in this volume have taken it up as a key example for their analysis. Despite its claim of constituting "self-organization of the industry" and despite being in the second decade since its making, the correct categorization of the

86 KATO, *in this volume,* p. 189 and in note 24; see, however, the critique of the eminent corporate law scholar *Egashira* in respect of the appointment of like-minded participants to expert commissions preparing legislation in Japan (K. EGASHIRA, *Kaisha-hō kaisei ni yotte Nihon no kaisha ha karawanai* [Japan's companies will not change by reform of company law], Hōritsu Jihō 86/12 (2014) 59 Fn. 1) and more generally BINDER, *in this volume,* pp. 129, 143 f.

87 BACHMANN, *supra* note 79; 176 f.; BINDER, *in this volume,* pp. 138 f., and DIECKMANN, *in this volume,* pp. 205 f.; both also highlight the importance of procedural justice ("fair and good") and involvement of the addressees, as does KATO, *in this volume,* p. 182.

88 LEYENS, *in this volume,* p. 161; KANSAKU, *in this volume,* pp. 76.

89 BINDER, *in this volume,* p. 129; KATO, *in this volume,* p. 182; for an application of this idea to the recent Japanese Corporate Governance reform see PFEIFER, *supra* note 4, *sub* E.V.3.

90 BINDER, *in this volume,* pp. 139, 144; this is also mentioned by KATO, *in this volume,* p. 183, with a slightly differing reasoning.

German Corporate Governance Code remains difficult, as illustrated by the differing opinions of *Möslein* ("borderline case" between genuine and state-induced self-regulation)[91] and *Binder* ("indisputably an instrument of state-induced self-regulation").[92] The discussion on the occasion of this symposium is timely, given that the TSE incorporated its own Corporate Governance Code into its Listing Regulations only in May 2015.[93] This is not to say that the TSE's self-regulation had not already earlier played an important role in addressing several issues not governed by statutory law in order to provide investors with an attractive environment.[94] In respect of corporate governance, there may be even more room for such self-regulatory means in Japan compared to Germany, where rules on stock companies are mostly mandatory.[95]

As in Germany, we see a high grade of state involvement in the initiative behind the Japanese Corporate Governance Code, which was created by an expert commission administered by the Financial Services Agency as a supervising authority.[96] Much of the attention the Japanese Corporate Governance Code has received so far is related to the increased number of independent directors on the boards of Japan's listed companies.[97] *Kato* argues in this volume that the TSE was used by the administration to foster acceptance of such an objective,[98] but – sandwiched between investors and companies – it lacked the ability to trigger such change alone absent a public consensus-building procedure.[99] The Code is not the only regulatory instrument in this regard, it is instead supplementing the regulation provided for by the Companies Act and the TSE's Listing Regulations. Viewed

91 MÖSLEIN, *in this volume,* p. 105.

92 BINDER, *in this volume,* p. 141 with further references.

93 KANSAKU, *in this volume,* pp. 69 ff. Note that the (few) remaining other Japanese stock exchanges in Nagoya, Fukuoka and Sapporo have also implemented Japan's Corporate Governance Code as part of their Listing Regulations. As regards the TSE's different markets, only the five main principles apply to all listed companies.

94 See KATO, *in this volume,* pp. 185 ff.; specifically on independent directors and PFEIFER, *supra* note 4, *sub* D.II.2.

95 MÖSLEIN, *in this volume,* p. 100.

96 KANSAKU, *in this volume,* pp. 73 f; DERNAUER, *in this volume,* p. 24.

97 Besides KATO, *in this volume,* pp. 184 ff., see G. GOTO/M. MATSUNAKA/S. KOZUKA, Japan's Gradual Reception of Independent Directors: An Empirical and Political-Economic Analysis, in: Puchniak/Baum/Nottage (eds.), Independent Directors in Asia (Cambridge 2017) 135, 144 ff.; T. SPIEGEL, Independent Directors in Japan (Tübingen 2017), and M. PFEIFER, *supra* note 4, *sub* E.IV, from a more regulatory perspective.

98 KATO, *in this volume,* p. 185; similarly DERNAUER, *in this volume,* p. 24, who speaks of informal guidance by the administration.

99 KATO, *in this volume,* p. 189.

from the outside, the quick and steady increase in companies which have appointed at least two independent directors may well be called a success story. Only time will tell whether we are seeing here a compliance based on acceptance of the Code's reasoning or the rather familiar pattern of compliance in the "shadow of the law", the latter having been the basis of much criticism under German law.[100]

To a certain extent, the intense debate on independent directors overshadows that the Japanese Corporate Governance Code is a far more ambitious project and addresses a wide variety of additional points.[101] The Code employs the comply-or-explain mechanism familiar from Sec. 161 of the German Stock Companies Act[102] and thus allows for a deviation where addressees consider a certain principle not fit for the specific circumstances.[103] Implemented into Rule 436-3 of the TSE Listing Regulations (in the part "Matters to Be Observed" of what the TSE terms a Code of Conduct), this mechanism is at least in theory subject to a rigid enforcement regime which allows for severe sanctions up to the delisting of the company at issue.[104] Representatives of the TSE stress that the principles provide no room for window dressing and demand full compliance with the spirit of the norm rather than its wording,[105] but they have signaled that they will initiate procedures against a company only in cases where a company "objectively and obviously" does not comply with a principle of the Code and refuses to provide an explanation or provides an explanation which is "obviously false."[106] By contrast, German case law has developed a far more indirect, but nevertheless effective way to enable judicial review in allowing for a challenge of shareholders' resolutions which are based on incorrect compliance statements.[107] Since doubts about the legitimacy of the German Corporate Governance Code were in part caused by the impression

100 See *supra* at note 53.

101 See KANSAKU, *in this volume,* p. 69, and PFEIFER, *supra* note 4, *sub* E.III.4, for a more comprehensive overview.

102 See LEYENS, *in this volume,* p. 163; MÖSLEIN, *in this volume,* p. 104; BINDER, *in this volume,* pp. 141 f.

103 KANSAKU, *in this volume,* p. 75; DERNAUER, *in this volume,* p. 24.

104 KANSAKU, *in this volume,* p. 75.

105 M. YŪFU et al., *"Kōporēto Gabanansu Kōdo Gen'an" no kaisetsu (I)* [Commentary to the "Corporate Governance Code [Final Proposal]" (I)], Junkan Shōji Hōmu 2062 (2015) 47, 50.

106 T. SATŌ, *Kōporēto Gabanansu Kōdo no sakutei ni tomonau jōjō seido no seibi no gaiyō* [Overview on the rules for listed companies accompanying the forumlation of the Corporate Governance Code], Junkan Shōji Hōmu 2065 (2015) 57, 58 f.

107 MÖSLEIN, *in this volume,* pp. 104 f.; LEYENS, *in this volume,* p. 163 with further references.

that high compliance rates might be owed to enforcement pressure rather than positive acceptance of the Code's recommendations,[108] the TSE's self-restraint approach may have its benefits.

Nevertheless, as in Germany compliance rates regarding the Japanese Corporate Governance Code are high.[109] To some extent this can be explained by deliberate utilization of the principle-based approach, which affords companies wide discretion in interpreting the principle at issue.[110] Where expectations of compliance with "best practices" are high, it is no wonder that compliance in word rather than spirit has been identified as an inherent problem of the comply-or-explain approach.[111] One may approach formal compliance from an angle of acceptance and legitimacy[112] – or even hold the party subscribing to a comply-or-explain regime liable vis-à-vis third parties if its self-commitment does not prove true.[113]

In respect of fostering the engagement of institutional investors, Japan has taken the lead.[114] It implemented its Stewardship Code, originally a transplant from the United Kingdom, already in 2014 and even before discussions on a complementary Corporate Governance Code had started. The Japanese experience can thus be more than helpful for the German discussion. Here, the revised EU Directive on Shareholder Rights requires Member States, by June 2019, to implement instruments that address institutional shareholders, asset managers and proxy advisors and among others requires them to develop and publicly disclose an engagement policy and proxy voting results on a comply-or-explain basis.[115] The topic in Germany seems to garner far less attention than in Japan (and probably also less than it deserves). It is not exaggerated to say that this new instrument is not awaited with the highest

108 BINDER, *in this volume,* p. 143.

109 KANSAKU, *in this volume,* pp. 69 ff. For Germany: BINDER, *in this volume,* p. 142.

110 See the Mn. 10 of the Appendix to Japanese Corporate Governance Code as published by the TSE: "This principles-based approach has already been adopted in Japan's Stewardship Code. The significance of this approach is found in having parties confirm and share the aim and spirit of the principles and review their activities against the aim and spirit, not against the literal wording of the principles, even where the principles may look abstract and broad on the surface. For this reason, the terminology used in the Code is not strictly defined as is the case with laws and regulations […]."

111 For the Stewardship Code KANSAKU, *in this volume,* p. 79; in respect to the Japanese Corporate Governance Code see the concerns raised by The Council of Experts Concerning the Follow-up of Japans Stewardship Code and Japan's Corporate Governance Code, Corporate Boards Seeking Sustainable Corporate Growth and Increased Corporate Value over the Mid- to Long-Term (18 February 2016), retraceable under: *https://www.fsa.go.jp/en/refer/councils/follow-up/statements_2.pdf.*

112 BINDER, *in this volume,* pp. 143 f.

113 LEYENS, *in this volume,* pp. 171, 176 ff.

114 See KANSAKU, *in this volume,* pp. 61 ff.

expectations by German corporate law scholars.[116] *Kansaku's* report shows that it is the same concerns in respect of the Stewardship Code's efficiency which are debated in Japan. Therefore, the aforementioned commitment of asset owners to the principle of stewardship as well as its implications for the entire investment chain deserves attention.[117] Nevertheless, if one uses the regulators' metaphor of the Stewardship Code and Corporate Governance Code interacting as "two wheels of a cart"[118] designed to foster a "constructive dialogue" *(kensetsu-teki na taiwa)* it seems questionable whether the two wheels are indeed of the same size.[119]

VI. Conclusion

Comparative research on self-regulation in private law is in its early stages. The first attempt to engage in such a comparison as undertaken by the group of Japanese-German scholars contributing to this volume testifies not only to the rising importance but also to the variety and complexity of the topic. Although it is true that both legal systems still lack fixed definitions for even basic terms and that fundamental categorizations remain in flux – a good example being the distinction between genuine self-regulation and state-induced self-regulation that is used to structure the present volume – there can be no doubt that self-regulation in Japan and Germany has in recent years become a highly relevant social phenomenon as well as the object of a lively scholarly debate.

Given that Japan and Germany are similarly confronted with globalization, increasing technical complexity and accelerating technological change and given that certain advantages have been attributed to self-regulation as an answer to such regulatory challenges, it is not all too surprising that the

115 Art. 1 of Directive (EU) 2017/828 of the European Parliament and of the Council of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement, see Leyens, *in this volume,* p. 164.

116 See, e.g., H. Fleischer, Zukunftsfragen der Corporate Governance in Deutschland und Europa: Aufsichtsräte, institutionelle Investoren, Proxy Advisors und Whistleblowers, Zeitschrift für Unternehmens- und Gesellschaftsrecht (ZGR) 2011, 155, 164 ff.; D. Zetsche, Langfristigkeit im Aktienrecht? – Der Vorschlag der Europäischen Kommission zur Reform der Aktionärsrechterichtlinie, Neue Zeitschrift für Gesellschaftsrecht (NZG) 2014, 1121, 1124 f.

117 Kansaku, *in this volume,* pp. 76 ff.

118 Kansaku, *in this volume,* p. 62.

119 T. Kato*, Suchuwādoshippu Kōdo no rironteki kōsatsu: Kikan tōshi-ka no insentibu kōzō no kanten kara,* [Theoretical thoughts on the Stewardship Code: From the insentive structure of institutional investors], Jurisuto 1515 (2018) 16, 20; Pfeifer, *supra* note 4, *sub* E.IV.6.

fields where self-regulation features prominently in the private laws of both countries show a large overlap. Under which circumstances self-regulation should be called successful, however, is a question far more difficult to answer. It should not be reduced exclusively to a high compliance rate.

From a comparative perspective, state-induced self-regulation seems particularly deeply rooted in the regulatory structure of Japan. This is because of Japan's tradition of a strong bureaucracy and the latter's close and sometimes opaque cooperative relationships with many industries. Japanese ministries and agencies arguably have a particularly rich array of formal and informal tools, including the establishment of expert commissions and study groups, to induce self-regulation. Japanese regulatees, in turn, seem to accept state-induced self-regulation relatively broadly as an effective implementation of state policy, and they do not, by contrast, appear merely to be seeking to avoid state regulation. This seems to explain at least in part why issues of legitimacy feature less prominently in the Japanese discourse on self-regulation than in the corresponding German discussion. Furthermore, from the state's perspective, it may therefore less frequently be necessary to step in and enact state regulation because self-regulation has not yielded the desired results. With regard to the German case, by contrast, it is often criticized that by replacing self-regulation rather quickly with state regulation wherever the former has not achieved its regulatory aims, the state threatens to discredit the tool of self-regulation as such.

As regards specific private-law fields in which self-regulation features prominently both in Japan and Germany, the recent establishment of the Japanese Corporate Governance Code and the Japanese Stewardship Code make comparison from the German perspective particularly topical. But even beyond these prominent examples, the volume at hand convincingly demonstrates the potential of a Japanese-German comparison of self-regulation in private law. The symposium from which the contributions in this volume are derived was convened to celebrate the 20th anniversary of ZJapanR/J.Japan.L, the only non-Japanese journal exclusively devoted to tracking important developments in Japanese law from a comparative perspective. We believe the results of this symposium assembled in this volume and briefly reflected upon here perfectly illustrate how rewarding an undertaking this can be.

Contributors

Yuki Asano
Professor of Law, Dōshisha University Law School, Kyōto.

Moritz Bälz
Dr. iur., LL.M. (Harvard University), Professor of Law, Goethe University Frankfurt.

Jürgen Basedow
Dr. iur., Dr. h.c. mult., LL.M. (Harvard University), Director em., Max Planck Institute for Comparative and International Private Law; Professor of Law, University of Hamburg; Membre associé of the Institut de droit international.

Jens-Hinrich Binder
Dr. iur., LL.M. (London), Professor of Law, Eberhard-Karls-University, Tübingen.

Petra Buck-Heeb
Dr. iur., Professor of Law, Gottfried Wilhelm Leibniz University, Hannover.

Marc Dernauer
Dr. iur., LL.M. (Tōhoku University), Associate Professor of Law, Chūō University, Faculty of Law, Tōkyō.

Andreas Dieckmann
Dr. iur., Gottfried Wilhelm Leibniz University, Faculty of Law, Hannover.

Hiroyuki Kansaku
Dr. iur., Professor of Law, The University of Tōkyō, Graduate Schools for Law and Politics.

Takahito Kato
Professor of Law, The University of Tōkyō, Faculty of Law.

Souichirou Kozuka
Dr. iur., Professor of Law, Gakushūin University, Faculty of Law, Tōkyō.

Patrick C. Leyens
Dr. iur., LL.M. (London), Professor (hon.) of Law & Economics, Erasmus University Rotterdam, Erasmus School of Law; Guest Professor, Humboldt University of Berlin, School of Law.

Florian Möslein
Dr. iur., LL.M. (London), Professor of Law, Philipps-University, Marburg.

Yuko Nishitani
Dr. iur., Professor of Law, Kyōto University, Graduate School of Law.

Michael Pfeifer
Attorney-at-Law, Hoffmann Eitle, Munich.