

# Private Ordering and Commercial Arbitration: Lasting Lessons from Mentschikoff

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ABSTRACT:

*“Private ordering” is an important concept and commonly-used phrase in legal scholarship. At least three “ordering” activities often performed by governments can be privatized: lawmaking, adjudication, and enforcement of adjudicators’ decisions. Distinguishing among these activities and offering lasting lessons on their privatization—but nowadays not often credited for doing so—is Soia Mentschikoff’s seminal 1961 article, Commercial Arbitration. This short piece reconsiders Mentschikoff’s classic article in light of contemporary scholarship on private ordering and credits Commercial Arbitration with teaching us lasting lessons about commercial arbitration and even about commerce itself. Key to these lessons is Mentschikoff’s empirical study of trade association arbitration and her comparison of such industry-specific arbitration with the more general commercial arbitration exemplified by the American Arbitration Association (AAA). This comparison shows arbitration’s ability—especially in the “core commercial” context of trade associations—to privatize all three of the aforementioned “ordering” activities: lawmaking, adjudication, and enforcement of adjudicators’ decisions. Mentschikoff thus builds impressively from the humble context of routine sales disputes to enduring insights about the role of private ordering in the production, application, and enforcement of law.*

PRIVATE ORDERING AND COMMERCIAL ARBITRATION: LASTING LESSONS  
FROM MENTSCHIKOFF

- I. Private Ordering
  - A. Privatizing Lawmaking, Adjudication, and Enforcement
  - B. Levels of Government Support for Private Ordering

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“Private ordering” is an important concept and commonly-used phrase in legal scholarship.<sup>1</sup> While in this context “private” generally means non-governmental, the type and degree of non-governmental ordering can vary widely.<sup>2</sup> For example, different scholars have used “private ordering” to refer to things as varied as contracts,<sup>3</sup> neighborly customs among California ranchers,<sup>4</sup> credit rating agencies,<sup>5</sup>

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1. A Feb. 14, 2018, search of “private ordering” in Westlaw’s JLR database revealed 6607 results. 5035 of these are dated 2000 or later, while only 1572 are before 2000.

2. See, e.g., Amitai Aviram, *Path Dependence in the Development of Private Ordering*, 2014 MICH. ST. L. REV. 29, 30 (2014) (using “private ordering” and “Private legal systems (PLSs)” interchangeably and noting “PLSs range from informal institutions that bear little resemblance to the public legal system (the law), such as norms of politeness, to ones that are very similar to the law, such as complex commercial arbitration among diamond dealers.”).

3. See, e.g., Jean Braucher, *New Frontiers in Private Ordering—An Introduction*, 49 ARIZ. L. REV. 577, 577 (2007) (“Contract law itself is a mixture of the public and the private, a means by which the state supports private ordering with remedies for breach of some promises.”); Howell E. Jackson, *Regulation in a Multisectoral Financial Services Industry: An Exploration Essay*, 77 WASH. U. L.Q. 319, 341–43 (1999) (“Private ordering is, of course, our presumptive (but not exclusive) regulatory regime in the field of contracts. In the classic two-party contract setting, we generally allow parties to allocate risks as they choose.”).

4. See, e.g., Michael P. Vandenbergh, *Private Environmental Governance*, 99 CORNELL L. REV. 129, 163–67 (2013) (“the private ordering analyzed by Ostrom, Ellickson, and others . . . tends to occur through informal interactions among individuals . . . [such as] the norms that drive the behavior of lobstermen in Maine or farmers and cattle ranchers in Shasta County, California”); Barak D. Richman, *Norms and Law: Putting the Horse Before the Cart*, 62 DUKE L.J. 739, 746 (2012) (citing Robert C. Ellickson, *Order Without Law: How Neighbors Settle Disputes* 3–4 (1991) (“Shasta County Neighbors, it turns out, do not behave as Coase portrays them as behaving in the Farmer-Rancher Parable. Neighbors in fact are strongly inclined to cooperate, but they achieve cooperative outcomes not by bargaining from legally established entitlements, as the parable supposes, but rather by developing and enforcing adaptive norms of neighborliness that trump formal legal entitlements.”)). See also Robert C. Ellickson, *Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County*, 38 STAN. L. REV. 623 (1986) (studying effects of a 1945 statute granting County Board of Supervisors authority to determine when cattle owners were liable for cattle trespass. Through interviewing 28 ranchers in 1982, Ellickson determined that the 1945 change in animal trespass law failed to affect the farmers’ resource allocation towards improving boundary fences because high transaction costs, namely having to learn and enforce legal rules, prevented litigation. Even though cattle trespass was common, cattle owners chose not to rely on law, but instead on “norms of neighborliness” to settle disputes.); *id.* at 678 (“Although the killing of trespassing livestock is a crime in California, six landowners—not noticeably less civilized than the others—unhesitatingly volunteered that they had issued death threats of this sort. These threats are credible in Shasta County, because victims of recurring trespasses, particularly if they have first issued a warning, feel justified in killing or injuring the mischievous animals.”).

5. Anna Gelpern & Erik F. Gerding, *Private and Public Ordering in Safe Asset Markets*, 10 BROOK. J. CORP. FIN. & COM. L. 97, 104 (2015).

Underwriters Laboratories,<sup>6</sup> the Joint Commission on Accreditation of Healthcare Organizations,<sup>7</sup> and the Mafia.<sup>8</sup>

More conceptually, at least three “ordering” activities often performed by governments can be privatized: lawmaking, adjudication, and enforcement of adjudicators’ decisions. Distinguishing among these activities and offering lasting lessons on their privatization—but nowadays not often credited for doing so—is Soia Mentschikoff’s seminal 1961 article, *Commercial Arbitration*.<sup>9</sup> This short piece reconsiders Mentschikoff’s classic article in light of contemporary scholarship on private ordering, and credits *Commercial Arbitration* with teaching us lasting lessons about commercial arbitration and even about commerce itself. Key to these lessons is Mentschikoff’s empirical study of trade association arbitration and her comparison of such industry-specific arbitration, with the more general commercial arbitration exemplified by the American Arbitration Association (AAA). This comparison shows arbitration’s ability—especially in the “core commercial” context of trade associations—to privatize all three of the aforementioned “ordering” activities: lawmaking, adjudication, and enforcement of adjudicators’ decisions. Mentschikoff thus builds impressively from the humble context of routine sales disputes to enduring insights about the role of private ordering in the production, application, and enforcement of law.

## I. PRIVATE ORDERING

### A. *Privatizing Lawmaking, Adjudication, and Enforcement*

Governments make law, and “[a]lmost all theorizing about law begins with government.”<sup>10</sup> A simple civics lesson might describe the roles of the three branches of government as making law (legislature), enforcing law (executive), and

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6. Steven L. Schwarcz, *Private Ordering*, 97 NW. U. L. REV. 319, 321-22 (2002).

7. *Id.* See also *About The Joint Commission*, THE JOINT COMM’N, [https://www.jointcommission.org/about\\_us/about\\_the\\_joint\\_commission\\_main.aspx](https://www.jointcommission.org/about_us/about_the_joint_commission_main.aspx) (last updated Oct. 23, 2018) (commission provides accreditation and certification to health care organizations that meet certain performance standards).

8. John McMillan & Christopher Woodruff, *Private Order Under Dysfunctional Public Order*, 98 MICH. L. REV. 2421, 2457–58 (2000) (“Some private-order organizations use threats of physical violence. The Sicilian and Russian Mafias, for example, offer contract-supporting services, but a lot else besides. Organized crime, according to Curtis Milhaupt and Mark West, ‘is the dark side of private ordering - an entrepreneurial response to inefficiencies in the property rights and enforcement framework supplied by the state.’”) (quoting Curtis J. Milhaupt & Mark D. West, *The Dark Side of Private Ordering: An Institutional and Empirical Analysis of Organized Crime*, 67 U. CHI. L. REV. 41, 43 (2000)); Barak D. Richman, *Firms, Courts, and Reputation Mechanisms: Towards a Positive Theory of Private Ordering*, 104 COLUM. L. REV. 2328, 2335–36 (2004) (describing as a “system[] of private enforcement” “aris[ing] where . . . state-sponsored contract enforcement is unavailable” “members of mafia or other criminal networks whose transactions involve illegal activity”).

9. Soia Mentschikoff, *Commercial Arbitration*, 61 COLUM. L. REV. 846 (1961).

10. See, e.g., Gillian K. Hadfield & Barry R. Weingast, *Privatizing Law: Is Rule of Law an Equilibrium Without Private Ordering?*, SSRN (Oct. 23, 2017), <https://ssrn.com/abstract=3057093> (“Almost all theorizing about law begins with government.” The conventional view is that “law is the subset of norms that are created and enforced by governments. Positive political theory takes the idea that law is the province of government for granted and focuses on the processes and principles by which the substance of law is determined.”).

adjudicating disputes by applying law (judicial).<sup>11</sup> While no branch of government sticks to a single role,<sup>12</sup> the three roles of making, enforcing, and adjudicating law adequately describe the basics of government. This sequence of governmental activity—making, enforcing, adjudicating—is often chronological in criminal prosecutions and other cases brought by government because, in such cases, lawmaking precedes governmental enforcement (arrest, indictment, or suit), which precedes adjudication.<sup>13</sup> In contrast, when the plaintiff is a private party, government’s adjudication usually precedes its enforcement because in civil litigation due process typically entitles the defendant to notice and an opportunity to be heard before any governmental enforcement against that defendant.<sup>14</sup>

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11. See, e.g., *VanSickle v. Shanahan*, 511 P.2d 223, 235 (Kan. 1973) (“Generally speaking, the legislative power is the power to make, amend, or repeal laws; the executive power is the power to enforce the laws, and the judicial power is the power to interpret and apply the laws in actual controversies.”).

12. For example, both executive agencies and common law courts make law and legislative “Article I courts” adjudicate.

13. See, e.g., TENN. CODE ANN. § 40-3-103 (1975) (“All violations of the criminal laws may . . . be prosecuted upon the filing of an information . . . ‘Information’ means a written statement by a district attorney general charging a person with the commission of a criminal offense.”); IND. CODE ANN. § 35-34-1-1 (LexisNexis 1982) (“All prosecutions of crimes shall be brought in the name of the state of Indiana. Any crime may be charged by indictment or information . . . Except as provided . . . all prosecutions of crimes shall be instituted by the filing of an information or indictment by the prosecuting attorney, in a court with jurisdiction over the crime charged.”); *Charging*, U.S. DEPT. OF JUST., <https://www.justice.gov/usao/justice-101/charging> (last visited Feb. 11, 2018) (“After the prosecutor studies the information from investigators and the information he gathers from talking with the individuals involved, he decides whether to present the case to the grand jury. When a person is indicted, he is given formal notice that it is believed that he committed a crime. The indictment contains the basic information that informs the person of the charges against him.”); Kevin M. Stack, *Agency Independence After PCAOB*, 32 CARDOZO L. REV. 2391, 2394 (2011) (“Administrative agencies, it is widely remarked, possess and combine the powers of lawmaking, enforcement, and adjudication. It would be hard to resist (or to improve on) Professor Gary Lawson’s compact statement of how the Federal Trade Commission combines these functions: The Commission promulgates substantive rules of conduct. The Commission then considers whether to authorize investigations into whether the Commission’s rules have been violated. If the Commission authorizes an investigation, the investigation is conducted by the Commission, which reports its findings to the Commission. If the Commission thinks the Commission’s findings warrant an enforcement action, the Commission issues a complaint. The Commission’s complaint that a Commission rule has been violated is then prosecuted by the Commission and adjudicated by the Commission. This Commission adjudication can either take place before the full Commission or before a semi-autonomous administrative law judge. If the Commission chooses to adjudicate before an administrative law judge and the decision is adverse to the Commission, the Commission can appeal to the Commission.”).

14. *Connecticut v. Doehr*, 501 U.S. 1, 8 (1991) (“[D]ispensing with notice and opportunity for a hearing until after the attachment, without a showing of extraordinary circumstances, violates the requirements of due process”); *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017) (quoting *United States v. Raya-Vaca*, 771 F.3d 1195 (9th Cir. 2014) (“The Government may not deprive a person of one of these protected interests without providing ‘notice and an opportunity to respond,’ or, in other words, the opportunity to present reasons not to proceed with the deprivation and have them considered.”); 10 WEST’S LEGAL FORMS, DEBTOR & CREDITOR NON-BANKRUPTCY § 9:2 (4th ed.) (under Supreme Court decisions, “the defendant must receive notice of the request for a prejudgment remedy and an opportunity for a hearing either before seizure of property or (under certain circumstances) promptly thereafter.”); Niki Kuckes, *Civil Due Process, Criminal Due Process*, 25 YALE L. & POL’Y REV. 1, 8 (2006) (“Briefly stated, the essential element of procedural due process, as clearly established in civil settings, is that notice and a hearing must ordinarily precede any governmental deprivation of a liberty or property interest.”); Russell A. Eisenberg & Frances Gecker, *Due Process and Bankruptcy: A Contradiction in Terms?*, 10 BANKR. DEV. J. 47, 54, 60 (1993) (stating that “[t]he cornerstones of procedural due process are ‘notice’ and a ‘hearing.’ . . . As a general rule, individuals are constitutionally

Consequently, this paper on private ordering (not government's prosecutions or suits) discusses lawmaking, adjudication, and enforcement in that sequence.

Lawmaking is routinely privatized by contracts, trusts, wills, and similar documents that enable private parties to choose their legally-enforceable rights and duties.<sup>15</sup> But government courts nevertheless adjudicate and enforce those privately-created duties, so the "private ordering" of contracts, trusts, wills, and the like does not necessarily privatize the activities of adjudicating legal claims or enforcing the adjudicators' decisions.<sup>16</sup>

Adjudication can be privatized through arbitration, which typically privatizes both selection of the adjudicator (an arbitrator hired by the parties rather than a judge hired by government) and the procedures of adjudication (such as the AAA's Commercial Arbitration Rules, rather than the federal or state rules of civil procedure and evidence).<sup>17</sup> However, while arbitration privatizes adjudication, it does not necessarily privatize lawmaking or the enforcement of adjudicators' decisions. That is because the claim in an arbitrated case may arise under law (such as a statute or regulation) made entirely by government,<sup>18</sup> and the arbitrator's decision may be confirmed by a government court and then enforced by a government sheriff or marshal.<sup>19</sup>

Private ordering can even extend to law enforcement, which in this context (as noted above<sup>20</sup>) means remedying breaches of duties found in civil, as opposed to criminal, law. Examples of private law enforcement are many. For instance, breaches of contract are often met with private sanctions like refusing to do additional business with the breaching party or lowering a defaulting debtor's credit score or bond rating with a credit bureau or ratings agency.<sup>21</sup> In those examples,

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entitled to prior notice of a hearing" and "[t]here must be a method whereby one can defend rights or interests that another is trying to take away; this concern is satisfied with the opportunity to be heard.").

15. Brian H. Bix, *The Public and Private Ordering of Marriage*, 2004 U. CHI. LEGAL F. 295, 308 (2004) ("The general argument for making enforceable the private ordering of marriage and marriage-like relationships reflects the general ideals underlying other forms of private ordering (e.g., contracts, trusts, property, and wills): that it better serves both private and public interests to allow parties to order their lives as it suits them.").

16. See Aviram, *supra* note 2 (citing Braucher, *supra* note 3 and Jackson, *supra* note 3).

17. "[T]he distinguishing characteristic of adjudication lies in the fact that it confers on the affected [disputing] party a peculiar form of participation in the decision, that of presenting proofs and reasoned arguments for a decision in his favor." Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 364 (1978); see also 1 IAN R. MACNEIL, RICHARD E. SPEIDEL & THOMAS J. STIPANOWICH, *FEDERAL ARBITRATION LAW: AGREEMENTS, AWARDS, AND REMEDIES UNDER THE FEDERAL ARBITRATION ACT* § 2.6.1, at 2:37 n.1 (1994) ("Arbitration is a form of adjudication because the parties participate in the decisional process by presenting evidence and reasoned arguments to an arbitrator whose final decision should be responsive to the dispute as presented.").

18. See, e.g., Christopher R. Drahozal, *Private Ordering and International Commercial Arbitration*, 113 PENN ST. L. REV. 1031, 1038 (2009) (international "arbitrators ordinarily rely on national law and not the [privately-created customary] *lex mercatoria* in resolving disputes").

19. See STEPHEN J. WARE & ARIANA R. LEVINSON, *PRINCIPLES OF ARBITRATION LAW* § 39 (2017) (discussing confirmation and enforcement of arbitral awards). To the extent government enforces arbitration awards that depart from government-created law, then arbitration might well privatize lawmaking; but law on when courts should enforce or vacate such awards is deeply unsettled. Stephen J. Ware, *Vacating Legally-Erroneous Arbitration Awards*, 6 Y.B. ON ARB. & MEDIATION 56, 106 (2014) (Supreme Court has yet to "resolve the fundamental question whether arbitration awards must apply the law correctly to avoid vacatur").

20. See *supra* notes 13-14 (and accompanying text).

21. See, e.g., Gillian K. Hadfield & Iva Bozovic, *Scaffolding: Using Formal Contracts to Support Informal Relations in Support of Innovation*, 2016 WIS. L. REV. 981, 1000 (2016) (surveying businesses and finding that "contract breach is penalized by the loss of a valuable relationship or reputational harm")

while enforcement of the legal duty may be entirely privatized, a government court may adjudicate the claim for breach of that duty.<sup>22</sup>

### *B. Levels of Government Support for Private Ordering*

All the private ordering discussed above is to some extent supported by government, which enacts laws designed to facilitate: (1) private lawmaking through contracts, trusts, and wills;<sup>23</sup> (2) private adjudication through arbitration;<sup>24</sup> and (3) private law enforcement through credit bureaus and ratings agencies.<sup>25</sup> In contrast, other private ordering is actively opposed by government. For example, government actively opposes criminal enterprises such as the Mafia, and such enterprises engage in private ordering insofar as they: (1) enact rules of “law,” such

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rather than by litigation); Ronald J. Gilson, Charles F. Sabel & Robert E. Scott, *Braiding: The Interaction of Formal and Informal Contracting in Theory, Practice, and Doctrine*, 110 COLUM. L. REV. 1377, 1392 (2010) (“One type of informal enforcement is the threat that one party to an informal contract will respond to its counterparty’s breach by reducing or terminating future dealings.”); David Charny, *Nonlegal Sanctions in Commercial Relationships*, 104 Harv. L. Rev. 373, 394-95 (1990) (“often-cited data that merchants rarely sued when sales contracts were breached suggest that those contracts were primarily enforced through nonlegal sanctions. On this interpretation of the data, the legally enforceable contract formally stated the parties’ obligations, but nonlegal pressures - particularly concern with business reputation - actually induced compliance.”); *id.* at n.70 (“[M]anufacturers often extend credit to consumers even though high litigation costs and judgment-proof defaulters may make it impractical to obtain recovery through legal remedies. The incentive for consumers to repay is largely reputational: consumers want to maintain a good credit rating.”); Schwarcz, *supra* note 6, at 326-27 (describing credit ratings agencies, as “private companies, such as Standard & Poor’s Ratings Services and Moody’s Investors Service,” as a type of private ordering).

22. Braucher, *supra* note 3, at 577 (“Contract law itself is a mixture of the public and the private, a means by which the state supports private ordering with remedies for breach of some promises.”). For instance, a lender might sue and win a quick default judgment against its borrower but then incur only the low cost of reporting the judgment to credit bureaus but not the higher costs of pursuing government’s judgment-enforcement (such as through garnishment or writs to a sheriff).

23. See Jackson, *supra* note 3; Bix, *supra* note 15, at 304 (“Another sense of private ordering involves having the power to order one’s life by being able to enter binding agreements for the future distribution of property (for example, through wills). This form of private ordering requires a government (or social institution or other social force) willing and able to enforce the commitments entered into.”); David V. Snyder, *Private Lawmaking*, 64 OHIO ST. L.J. 371, 373-77 (2003) (“[M]ost privately made law depends ultimately on the power of the state—power the state lends, dependably and in generous measure . . . [and] in various commercial contexts, as a practical matter, the lawmaking function has been partially reallocated from the government.”).

24. Barak Richman lists as a private ordering activity within the “shadow of the law”: “the growing and elaborate world of arbitration.” Richman, *supra* note 4, at 744-45.

25. FAIR CREDIT REPORTING ACT (FCRA), 15 U.S.C. § 1681 (1970); Scott Shorr, *Personal Information Contracts: How to Protect Privacy Without Violating the First Amendment*, 80 CORNELL L. REV. 1756, 1784-89 (1995) (“FCRA permits credit bureaus and their customers to exchange large quantities of detailed consumer information with impunity [and] . . . gives credit bureaus considerable freedom to resort to intrusive collection methods.”).

as, do not snitch to the police;<sup>26</sup> (2) adjudicate alleged violations of these rules;<sup>27</sup> and (3) enforce violations of these rules.<sup>28</sup>

In between private ordering supported by government and private ordering opposed by government is private ordering which receives neither significant government support nor significant government opposition, but rather government neutrality. The classic example of such private ordering is trade association arbitration. It typically privatizes:

- lawmaking, because trade association “arbitrators commonly apply codified industry trade rules rather than publicly created rules,”<sup>29</sup> and these trade rules often differ from the government law that would otherwise apply;<sup>30</sup>

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26. Adam Harris Kurland, *The Prosecution of Michael Vick: Of Dogfighting, Depravity, Dual Sovereignty, and “A Clockwork Orange”*, 21 MARQ. SPORTS. L. REV. 465, 513 n.168 (2011) (quoting LETIZIA PAOLI, *MAFIA BROTHERHOODS: ORGANIZED CRIME, ITALIAN STYLE* 109 (2003)) (“‘omerta’ is described as popular southern Italian code of silence that implies ‘the categorical prohibition of cooperation with state authorities.’”).

27. Gabriel J. Chin & Scott C. Wells, *The “Blue Wall of Silence” as Evidence of Bias and Motive to Lie: A New Approach to Police Perjury*, 59 U. PITT. L. REV. 233, 258 n.95 (1998) (citing *United States v. Gotti*, 171 F.R.D. 19, 52 (E.D.N.Y. 1997) (According to the Mafia’s loyalty oath, “death is assured for the person who is or is suspected of becoming a rat.”)).

28. *Id.* See also Richman, *supra* note 4, at 748 (“the mafia and other criminal networks resort to self-enforcement because their illegal transactions are unenforceable in state-sponsored courts”).

29. Drahozal, *supra* note 18, at 1035–36; see also Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code’s Search for Immanent Business Norms*, 144 U. PA. L. REV. 1765, 1772-73 (1996) (National Grain and Feed Association (“NGFA”) has privatized lawmaking by “adopt[ing] four sets of substantive trade rules that . . . cover the basics of contract formation, performance, repudiation, breach, damages, and excuse” as well as issues related to barge transportation.); Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724 (2001); Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115 (1992) (“[D]iamond industry disputes are resolved not through the courts and not by the application of legal rules announced and enforced by the state. The diamond industry has systematically rejected state-created law. In its place, the sophisticated traders who dominate the industry have developed an elaborate, internal set of rules, complete with distinctive institutions and sanctions, to handle disputes among industry members.”). See Yuliya Chernykh, *The Last Citadel: The Restricted Role of Lawyers in Soft Commodity Arbitration*, TRANSNAT’L DISP. MGMT. (2017), <https://www.transnational-dispute-management.com/article.asp?key=2453> (soft commodities arbitration, such as that administered by the Grain and Feed Trade Association and the Federation of Oils, Seeds and Fats Associations, “shows that non-legal adjudicators with good knowledge of trade usages and customs are preferable to legal adjudicators who are not particularly familiar with them. This preference is confirmed by a number of examples, ranging from direct confirmation from major traders and the impressive proportion of trade that is conducted under the associations’ standard contract forms to such indirect illustrations as the growing numbers of trade association members; the numerous amendments to arbitration rules and other regulations, guidelines and policy which have not excluded the qualification requirements for arbitrators; a constant preference for not listing arbitrators who are actively involved in legal practice, and the lack of other fora competing with bespoke commodity arbitration, etc.”).

30. For instance, Bernstein notes that “industry-drafted trade rules do not, for the most part, include the types of standard-like words, such as ‘reasonable,’ ‘seasonable,’ and ‘without objection in the trade,’ that permeate the [Uniform Commercial] Code. Rather, they contain primarily clear, bright-line rules.” Bernstein, *Private Commercial Law in the Cotton Industry*, *supra* note 29, at 1732-33. “Another notable difference between the trade rules and the Code is the absence of a trade rule equivalent of the Code’s nonwaivable duty of good faith.” *Id.* at 1734; see also Bernstein, *Merchant Law in a Merchant Court*, *supra* note 29, at 1775 (National Grain and Feed Association “trade rules do not contain an explicit equivalent of the Code’s broad duty of good faith.”). In addition, “the types of damage measures available in the private system differ in important ways from the measures used in the public system.” Bernstein, *Private Commercial Law in the Cotton Industry*, *supra* note 29, at 1733.

- adjudication, because in trade association arbitration “the decision maker is a private party, not a state employee,”<sup>31</sup> and
- enforcement, because trade association “arbitration awards are typically enforced through extralegal sanctions, such as publicity or threat of expulsion from the trade association. Only rarely do parties go to court to enforce awards in trade association arbitrations.”<sup>32</sup>

Soia Mentschikoff, as explained below, showed all this with the publication of *Commercial Arbitration* in 1961.<sup>33</sup> Trade association arbitration then apparently faded from the interest of legal scholars until the 1990’s and 2000’s, when Lisa Bernstein published a series of detailed and widely-cited studies of trade association arbitration.<sup>34</sup> Academic interest in “private ordering” more generally seems also to have increased in recent decades.<sup>35</sup>

Some of this recent literature contrasts trade association arbitration with other arbitration to compare different types of private ordering.<sup>36</sup> For instance, Christopher Drahozal persuasively contrasts trade association arbitration—which often privatizes all three of lawmaking, adjudication, and enforcement of law—with international *commercial* arbitration, which privatizes only adjudication because international commercial arbitration tends to apply national law, rather than privately-created rules,<sup>37</sup> and because its awards are often enforced by national courts rather than privately.<sup>38</sup> So, Drahozal writes, international commercial arbitration is not “a purely private legal system,”<sup>39</sup> but rather a “hybrid case” serving primarily as a “procedural substitute for national courts.”<sup>40</sup> Similarly, Barak Richman emphasizes that trade association arbitration, exemplifying “private legal systems rely[ing] on private sanctions and private enforcement,” is very different from other arbitration, which “takes place within the shadow of the law” because its awards are enforced by government.<sup>41</sup>

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31. Drahozal, *supra* note 18, at 1035. See also Bernstein, *Merchant Law in a Merchant Court*, *supra* note 29, at 1772 (NGFA has privatized adjudication because “[a]s a condition of membership in the Association, members must agree to submit all disputes with other members to the Association’s arbitration system.”).

32. Drahozal, *supra* note 18, at 1036. See also Bernstein, *Merchant Law in a Merchant Court*, *supra* note 29, at 1772 (NGFA has privatized enforcement of adjudicator’s decisions because “[a] member who refuses to submit to arbitration or fails to comply with an arbitration award rendered against him may, in addition to having his actions reported in the NGFA newsletter, be suspended or expelled from the Association.”).

33. See *infra* Section II.

34. See Bernstein, *Private Commercial Law in the Cotton Industry*, *supra* note 29. THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 108 (Peter Newman ed., 1998); Lisa Bernstein, *The NGFA Arbitration System at Work* (Mar. 15, 2007), [http://www.ngfa.org/pdfs/NGFA\\_ARBITRATIONSTUDY.pdf](http://www.ngfa.org/pdfs/NGFA_ARBITRATIONSTUDY.pdf); Richman, *supra* note 4, at 741 (“Among the most important strands of scholarship on extralegal enforcement have been inquiries, most famously by Professor Lisa Bernstein, into comprehensive private arbitration systems, or private legal systems.”).

35. See *supra* note 1.

36. Drahozal, *supra* note 18, at 1032–33; Richman, *supra* note 4, at 753–57.

37. Drahozal, *supra* note 18, at 1038–40.

38. *Id.* at 1035–36.

39. *Id.* at 1049.

40. *Id.*

41. Richman, *supra* note 4, at 757; *id.* at 759–60 (“Private legal systems, however, are distinct from typical arbitration precisely because they rest atop private enforcement mechanisms—and, in fact, they tend to prohibit their members from seeking relief from state-sponsored courts, as victors in arbitration are able to do.”).



These contemporary scholars—Bernstein, Drahozal, and Richman—follow and deepen Mentschikoff’s path, as she long ago published a detailed study of trade association arbitration and contrasted such arbitration with other arbitration, thus illuminating different types of private ordering.

## II. MENTSCHIKOFF’S COMMERCIAL ARBITRATION

### A. Mentschikoff’s Data

The previous section summarized some significant contemporary legal scholarship on private ordering. While that literature grows increasingly sophisticated, many of its important lessons appeared in Mentschikoff’s 1961 article *Commercial Arbitration*. The following pages reconsider this classic article and show how very much Mentschikoff taught us.

*Commercial Arbitration* is an empirical article, as it reports the results of Mentschikoff’s survey of trade associations. While *Commercial Arbitration* does not tout this survey, in fact first mentioning it as a passing reference while discussing something else,<sup>42</sup> this survey provides the basis for the article’s many important contributions.

Mentschikoff’s survey of these trade associations “received 547 relevant responses.”<sup>43</sup> At the broadest level, 34% of the associations “indicated that their members made individual arrangements for arbitration,” while 29% “indicated that they used some type of organized machinery, including the American Arbitration Association,” and 26% “reported that their members never arbitrate.”<sup>44</sup> Mentschikoff’s analysis of this data yields *Commercial Arbitration*’s key insight: “These differential responses from trade associations as to the utilization of arbitration was not on a random basis, but indicated instead that there were rational reasons for the existence of these differences.”<sup>45</sup> Mentschikoff’s empirical data on the prevalence of arbitration distinguishes among the types of goods involved; and she classifies parties according to their roles in the production and distribution of goods, with particular emphasis on “merchants,” which she defines as “persons primarily buying for resale.”<sup>46</sup> Mentschikoff made three findings:

(1) Where members of a trade association buy primarily for resale, the rate of institutionalized arbitration machinery is higher than in associations without these types of merchants.<sup>47</sup>

(2) Associations dealing in foreign trade, especially importers, were more likely to use an institutionalized arbitration system.<sup>48</sup>

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42. Mentschikoff, *supra* note 9, at 846. Nine years earlier, Mentschikoff published an article stating an intent to generate empirical data on arbitration. See Soia Mentschikoff, *The Significance of Arbitration—A Preliminary Inquiry*, 17 L. & CONTEMP. PROBS. 698, 699 (1952) (“The University of Chicago Law School is now considering a project which would at least by sample tend to give the answers, but that cannot be completed for at least three years.”).

43. Mentschikoff, *supra* note 9, at 849.

44. *Id.* at 849.

45. *Id.* at 849-50.

46. *Id.* at 850.

47. *Id.*

48. *Id.* at 850-51.

(3) Raw/fungible goods associations are more likely to develop an institutionalized arbitration system than hard/finished goods like cars or appliances.<sup>49</sup>

Mentschikoff further adds that when all three factors—merchants (buy for resale), international trade, and raw goods—are present the rate of institutionalized arbitration approaches 100%.<sup>50</sup> Implications of these findings are discussed in the following sections.

### *B. A Classic Article's Enduring Relevance*

Mentschikoff's survey teaches us lasting lessons about commercial arbitration, and even about commerce itself. Among these lessons are connections between goods and commerce, and thus between goods and *commercial* arbitration. For example, as Christopher Drahozal and I wrote (citing *Commercial Arbitration*), "Going back to Soia Mentschikoff's pioneering research, the commercial arbitration literature has focused on sales of goods as the leading place to find arbitration clauses between businesses."<sup>51</sup> Drahozal and I wrote this while cautioning against reading data collected by Theodore Eisenberg and Geoffrey Miller to suggest that "given their choice, most businesses that negotiate contracts would prefer a judicial dispute resolution system over arbitration."<sup>52</sup> While Eisenberg and Miller saw a "surprisingly low frequency of arbitration clauses" in the contracts they studied,<sup>53</sup> Drahozal and I drew on Mentschikoff's *Commercial Arbitration* to write:

Not only do Eisenberg and Miller focus on types of contracts that are unlikely to include arbitration clauses, they either do not consider, or pay little heed to, the types of contracts that the arbitration literature commonly identifies as likely to include arbitration clauses. As a result, their study likely significantly understates the use of arbitration clauses in contracts between sophisticated parties.

First, going back to Soia Mentschikoff's pioneering research, the commercial arbitration literature has focused on sales of goods as the

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49. Mentschikoff, *supra* note 9, at 851-52.

50. *Id.* at 852 ("To the extent that the factors leading to institutionalized machinery reinforce each other, as, for example, in the case of an association reporting that its members have an import relationship to foreign trade, deal in raws, and consist of merchants, the existence of arbitration machinery rises to approximately 100 per cent.")

51. Christopher R. Drahozal & Stephen J. Ware, *Why Do Businesses Use (or Not Use) Arbitration Clauses?*, 25 OHIO ST. J. DISP. RESOL. 433, 463 (2010).

52. *Id.* at 434 (quoting William J. Woodward Jr., *Saving the Hague Choice of Court Convention*, 29 U. PA. J. INT'L L. 657, 669 (2008)).

53. Drahozal & Ware, *supra* note 51, at 434 (quoting Theodore Eisenberg & Geoffrey Miller, *The Flight from Arbitration: An Empirical Study of Ex Ante Arbitration Clauses in the Contracts of Publicly Held Companies*, 56 DEPAUL L. REV. 335, 335 (2007)). Eisenberg and Miller concluded: "Little evidence was found to support the proposition that these [sophisticated] parties routinely regard arbitration clauses as efficient or otherwise desirable contract terms." Theodore Eisenberg & Geoffrey Miller, *The Flight from Arbitration: An Empirical Study of Ex Ante Arbitration Clauses in the Contracts of Publicly Held Companies*, 56 DEPAUL L. REV. 335, 335 (2007). Instead, they "interpret [their] findings as evidence that sophisticated actors prefer litigation to arbitration, encounter obstacles to negotiating mutually satisfactory contract terms that include arbitration clauses, or some combination of these factors." *Id.* at 336.

leading place to find arbitration clauses between businesses. This focus on goods continues in Lisa Bernstein's widely-cited studies of trade association arbitration. Bernstein documents the prevalence of arbitration in contracts for the sale of goods in industries as diverse as cotton, diamonds, grain, and textiles. Moreover, sale-of-goods disputes rank highly in the caseloads of international arbitration institutions. Yet none of these goods contracts is, as far we can tell, in Eisenberg and Miller's data set.<sup>54</sup>

In short, sale-of-goods disputes have long been the core of "commercial arbitration," and one of *Commercial Arbitration's* strengths is its emphasis on goods, as distinguished from land, services, credit, intellectual property, or information. An important connection between goods and arbitration—cross-border transactions—is discussed next.

### C. Goods, Cross-Border Transactions, and Arbitration

While the word "commercial" is sometimes used to describe any activity with a business or income-producing purpose (as distinguished from a personal, family, household, religious, cultural, social, political, or governmental purpose),<sup>55</sup> transactions in goods differ from other business transactions because goods, as tangible movables, differ from both land—which is tangible, but immovable—and intangibles like services, credit, intellectual property, and information. Such differences cause transactions in goods to raise legal issues not raised by other business transactions.<sup>56</sup> For example, Uniform Commercial Code Article 2—which

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54. Drahozal & Ware, *supra* note 51, at 463-64.

55. For example, the phrase "commercial real estate" is widely used in contrast to "residential real estate." See, e.g., DAVID GELTNERER & NORM G. MILLER, COMMERCIAL REAL ESTATE ANALYSIS AND INVESTMENTS (2d. ed. 2007) ("Mortgagebacked securities (MBS) are publicly traded bondlike products that are based on underlying pools of mortgages, which are real-estate-based debt products. There are both residential MBSs and commercial MBSs."); Joyce Palomar, *The War Between Attorneys and Lay Conveyancers-Empirical Evidence Says "Cease Fire!"*, 31 CONN. L. REV. 423, 491 (1999) ("The preceding regulatory agencies ultimately were unable to distinguish in their databases between complaints filed in residential real estate transactions and those filed in commercial real estate transactions."). Similarly, "commercial speech" is widely used in contrast to "political speech" or "artistic speech." Alan Howard, *The Constitutionality of Deceptive Speech Regulations: Replacing the Commercial Speech Doctrine with a Tort-Based Relational Framework*, 41 CASE W. RES. L. REV. 1093, 1108 (1991) ("[R]ather than regarding commercial speech as simply less valued than political speech, the Relational Framework employs less content-specific factors to distinguish between categories of speech."); Antony Page, *Taking Stock of the First Amendment's Application to Securities Regulation*, 58 S.C. L. REV. 789, 807 n.117 (2007) ("The rationale for the supposed constitutionality of such government restraint turns on notions of the difference between commercial speech and political or artistic speech or on some notions of regulation of professionals in the securities industry.").

56. Fiona Smith & Lorna Woods, *A Distinction Without a Difference: Exploring the Boundary Between Goods and Services in the World Trade Organization and the European Union*, 12 COLUM. J. EUR. L. 1, 3 (2005) ("In many legal systems distinctions are made between 'goods' and 'services' with different regimes applying to each of them. Although in some instances goods and services may be subject to similar rules despite these distinct regimes, in other cases they may be accorded different treatment. Indeed, it may be that, given their inherent characteristics, goods and services should be treated differently."); see also Walter White, *Difference Between Goods and Services: Visual Guide*, INEVITABLE STEPS, <https://inevitablesteps.com/marketing/difference-between-goods-and-services/> (last visited Oct. 23, 2018) (referring to seven major differences between goods and services: intangibility,

governs sales of goods, but generally not sales of land, services, or intangibles—has rules on risk of loss while goods are in possession of a carrier or other bailee,<sup>57</sup> as well as rules on the seller's tender of goods and the buyer's acceptance or rejection of those goods.<sup>58</sup> None of these rules has a particularly close analog in sales of land, services, or intangibles.<sup>59</sup>

Moreover, cross-border transactions in goods grew earlier in history,<sup>60</sup> and (internationally, at least) remain larger than cross-border transactions in services,<sup>61</sup> so the case for uniform law across jurisdictions was stronger earlier with respect to transactions in goods than transactions in land, which cannot move across borders,

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ownership, perishability, evaluation, quality measurement, simultaneous production and consumption, and punctuality).

57. See JAMES J. WHITE & ROBERT S. SUMMERS, *PRINCIPLES OF SALES LAW* 287–316 (1st ed. 2009) (describing U.C.C. sections 2-509 and 2-510 as governing risk of loss).

58. See *id.* at 292 (describing U.C.C. sections 2-503 and 2-504 as governing seller's tender of goods); *id.* at 481-95 (describing U.C.C. sections 2-601, 2-602, 2-612 as governing buyer's rejection of goods); *id.* at 474-81 (describing U.C.C. sections 2-606 and 2-607 as governing buyer's acceptance of goods); *id.* at 496-507 (describing U.C.C. sections 2-607, 2-608 as governing buyer's right to revoke acceptance).

59. See DANIEL KEATING, *SALES: A SYSTEMS APPROACH* (6th ed. 2016) (“In contrast to the sales of goods system, there is a true functional significance to the moment of the ‘closing’ in real estate sales. Following the closing, there is very little chance, absent some fundamental fraud or mistake in the transaction, that the buyer would be able to reject or revoke acceptance of the real estate and rescind the entire contract.”); 10 HAWKLAND UCC SERIES UCITA § 604:1 (NIMMER 2016) (referring to “a fundamental difference between transactions in the area of sales of goods and transactions in reference to information or information services. In the latter type of transaction, there are many situations in which the Article 2 concept of tender, inspection and delivery of a copy are simply irrelevant. Instead, the performance (e.g., grant or rights, completion of services, providing of access) in itself conveys to the transferee all of the value that it contracted for.”). Risk of loss while goods are in possession of a carrier or other bailee can have no close analog in transactions (land, services, intangibles) that have nothing physically moved to possession of a carrier or bailee.

60. See, e.g., Bamber Gascoigne, *History of Trade*, HIST. WORLD, <http://www.historyworld.net/wrldhis/PlainTextHistories.asp?ParagraphID=gy#1923> (last visited Sep. 26, 2017) (during the first to fifth centuries AD, “[t]he caravan routes of the Middle East and the shipping lanes of the Mediterranean . . . provided the world’s oldest trading system, ferrying goods to and fro between civilizations from India to Phoenicia.”); TRENDS IN INTERNATIONAL TRADE, in *WORLD TRADE REPORT* 2013 44, 54 (World Trade Organization, 2013), [https://www.wto.org/english/res\\_e/booksp\\_e/wtr13-2b\\_e.pdf](https://www.wto.org/english/res_e/booksp_e/wtr13-2b_e.pdf). (explaining that from 1918 to 1939, trade “was largely dominated by the exchange of raw materials and agricultural products for manufactured goods . . . since 1945, the main component of trade has been the international exchange of manufactured goods or the components of manufactured goods”). In contrast, cross-border transactions in services are relatively recent. Raymond T. Nimmer, *Services Contracts: The Forgotten Sector of Commercial Law*, 26 *LOY. L.A. L. REV.* 725, 736 (1993) (“Historically, services contracts involved intangible and nonstorable value. If I hire a company to repair my office air conditioning system, the services it provides are rendered on site and cannot be stored for later use. The service provider must be present . . . Many modern services contracts retain this nonstorable and localized character. But prior to the information, communications and transportation explosions of the past several decades, this was the only option for most commercial services.”). See also Prakash Loungani, Saurabh Mishra, Chris Papageorgiou & Ke Wang, *World Trade in Services: Evidence from a New Dataset* 16 (Int’l Monetary Fund, IMF Working Paper WP/17/77, 2017) (“[T]he global economy . . . for so long depended on the stable engines of manufacturing production and exports . . . The industrial revolution built the manufacturing process with the steam engine, division of labor, electricity and mass manufactured production.”); *id.* at 3-4 (“Historically, buyers and sellers needed to be face to face . . . Provision of services - such as restaurant meals, haircuts, and medical checkups - required face-to-face transactions. These did not lend themselves easily to standardization and trade”).

61. WORLD TRADE ORG., *INTERNATIONAL TRADE STATISTICS* 2015 1, 14–15 (2015) (showing that in 2014 world merchandise (goods) exports totaled \$19,002 while world exports of commercial services totaled \$4,782) (“Global services trade, as measured by balance-of payments statistics, represents only about a fifth of total trade in goods and services combined.”); *International Trade Statistics 2015*, WORLD TRADE ORG., [https://www.wto.org/english/res\\_e/statis\\_e/its2015\\_e/its15\\_toc\\_e.htm](https://www.wto.org/english/res_e/statis_e/its2015_e/its15_toc_e.htm) (last visited Feb. 18, 2018).

or service transactions.<sup>62</sup> In fact, uniform law—both within the United States and internationally—advanced earlier and farther with respect to transactions in goods than in land or services. Domestically, uniform law on goods dates back at least to the 1906 Uniform Sales Act<sup>63</sup> and has been carried forward with the Uniform Commercial Code, which governs transactions in goods—including not only sales and leases of goods, but also goods as collateral, and as the subject of documents of title,<sup>64</sup>—while transactions in land and most services remain largely subject to non-uniform state law.<sup>65</sup> Internationally, while the Convention on the International Sale of Goods (governing contracts for the sale of goods) is ratified by eighty-seven nations,<sup>66</sup> no analogous convention governs contracts for the international sale of services.<sup>67</sup>

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62. However, at least one commercial law scholar thought uniformity in the law governing services was worth pursuing as early as a quarter century ago. See Nimmer, *supra* note 60, at 729 (“It is time, actually long past time, to include services contracts in the UCC.”). When original Article 2 was written, most commercial services were provided locally. The world has changed. While many services are provided on a local basis, vast amounts of commercial services are supplied by national companies or by services vendors brought in from remote locations . . . [T]hrough information technology and communications systems, vendors can work from remote locations. If desired, the services output can usually be stored. Restraints in location and storability, like impediments on travel, no longer impede national services networks . . . Services contracts today involve a mix of nationally sourced and local transactions. In this respect, they resemble the mix found in transactions in goods. *Id.* at 736–37.

63. During the latter part of the nineteenth century, the American Bar Association created the National Conference of Commissioners on Uniform State Laws to promote uniformity in law among the states. Richard L. Savage III, *Laying the Ghost of Reliance to Rest in Section 2-313 of the Uniform Commercial Code: An “Endpoints” Analysis*, 28 WAKE FOREST L. REV. 1065, 1068–69 (1993). In 1902, the conference chose Professor Samuel Williston to lead a commercial acts project, eventually known as the Uniform Sales Act. *Id.* at 1069. The Uniform Sales Act was patterned after the British Sale of Goods Act of 1893 and in 1906 was promulgated for the states to adopt. See *id.*

64. U.C.C. Article 2-Sales (AM. LAW INST. & UNIF. LAW COMM’N 1977); U.C.C. Article 2A-Leases (AM. LAW INST. & UNIF. LAW COMM’N 1977); U.C.C. Article 7-Documents of Title (AM. LAW INST. & UNIF. LAW COMM’N 1977); U.C.C. Article 9-Security Interests in Personal Property (AM. LAW INST. & UNIF. LAW COMM’N 1977). Nimmer, *supra* note 60 (UCC’s scope “reflects a goods bias”).

65. CONSTANCE E. BAGLEY, MANAGERS AND THE LEGAL ENVIRONMENT: STRATEGIES FOR THE 21ST CENTURY, 192 (8th ed. 2016) (“The UCC does not govern the rendering of services or the sale of land. Contracts for selling services or land are governed by common law contracts principles. . . .”); Nimmer, *supra* note 60, at 732 (“Services contract law consists of often obscure common-law principles and state-by-state diversity.”); *id.* at 735 (“Consider what default rule governs whether delivery of a slightly damaged product breaches a contract for the sale of a television, and contrast this with the default rule that governs whether a brief delay in completing work breaches a consulting contract . . . For the television, UCC Article 2 provides the reference point, and the general rule will be the same in most states. The answer for the consulting contract lies in common-law rules. One might turn to the Restatement (Second) of Contracts for a general principle, but the Restatement principles have not been adopted in all states; answers for particular states would depend on relevant case law . . . Both bodies of law can be discovered and applied, but codified rules are more readily accessible and tend to be more uniform across jurisdictions.”).

66. Internationally, the Convention on the International Sales of Goods was released in 1980 and has 87 ratifying parties and 18 signatories, while no comparable treaty governs transactions in land or a wide array of services. *United Nations Convention on Contracts for the International Sale of Goods*, UNITED NATIONS TREATY COLLECTION (Apr. 11, 1980), [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=X-10&chapter=10&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=X-10&chapter=10&lang=en) (status of CISG including dates, parties, and signatories); Franco Ferrari, *Specific Topics of the CISG in the Light of Judicial Application and Scholarly Writing*, 15 J.L. & COM. 1, 65 n.432 (1995) (“The rationale behind the exclusion of the international sale of immoveable property from the sphere of application of the CISG is the potential refusal to ratify the CISG by most States which would not have accepted a uniform law derogating their domestic law in a field controlled by public policy considerations.”).

67. See *Multilateral Treaties Deposited With The Secretary-General*, UNITED NATIONS TREATY COLLECTION (Mar. 2, 2017), <https://treaties.un.org/pages/Content.aspx?path=DB/MTDSGStatus/p>

The commonality of uniform law and arbitration is that they both facilitate cross-border transactions, so uniform law and arbitration share a virtue more likely relevant to a transaction in goods than in land or services. One of the advantages of uniform law across jurisdictions is that it reduces disputes about which jurisdiction's law governs.<sup>68</sup> When law is non-uniform, each party to a dispute may argue for its own jurisdiction's law, which is presumably more familiar, and perhaps more favorable, to that party.<sup>69</sup> So uniform law can relieve a party of the costs of complying with the presumably less familiar and favorable law of the opposing party's jurisdiction.

Similarly, a neutral arbitral forum can relieve a party of the costs of litigating in the courts of the opposing party's jurisdiction. In addition to fear of a court's possible bias for its own fellow citizens litigating against foreigners, "the general fear associated with litigating before a foreign court... includes lack of familiarity with the foreign court's system or procedure, pursuing the litigation away from home and the difficulties of enforcement of a foreign judgment."<sup>70</sup> These fears can be avoided with a neutral arbitral forum.<sup>71</sup> So this advantage of arbitration, like the

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ageIntro\_en.xml (listing all multilateral treaties of the UN (including the CISG) none of which concern international contracts in services or land); Maria del Pilar Perales Viscasillas, *UNIDROIT Principles of International Commercial Contracts: Sphere of Application and General Provisions*, 13 ARIZ. J. INT'L & COMP. LAW 381, 385 (1996) (The CISG "is an international treaty which states may incorporate as national law," while the UNIDROIT Principles of International Commercial Contracts for international service contracts are merely "a set of rules without binding character for either individuals or states."). Similarly, treaties regarding tariffs and other trade barriers have progressed farther with respect to goods than services. The General Agreement on Trade in Services "is far less comprehensive and more discretionary than" the General Agreement on Tariffs and Trade, which governs goods. Andreas Lindner, Bill Cave, Lydia Deloumeaux & Joscelyn Magdeleine, *Trade in Goods and Services: Statistical Trends and Measurement Challenges*, 7 ORG. FOR ECON. CO-OPERATION AND DEV. STAT. BRIEF No. 1, 2001, <https://www.oecd.org/trade/its/2539563.pdf>.

68. Steven Walt, *Novelty and the Risks of Uniform Sales Law*, 39 VA. J. INT'L L. 671, 671-72 (1999) ("[U]niform rules [in international commercial law] promote efficiency. Diverse national laws create legal costs of determining and complying with the laws of multiple jurisdictions. Ex post litigation costs of forum shopping and deciding sometimes difficult choice of law issues are also produced. Because uniform law subjects a transnational commercial transaction to a single set of rules, it reduces the legal costs associated with the transaction.").

69. See Gilles Cuniberti, *The International Market for Contracts: The Most Attractive Contract Laws*, 34 NW. J. INT'L L. & BUS. 455, 489 (2014) ("Lawyers are typically trained in the law of one legal system, and thus admitted (and insured) to practice one law. If their client eventually decides to provide for another law to govern her contract, only lawyers admitted to practice that other law will be able to advise her with respect to the particular transaction. In most cases, this will mean that only those lawyers will be able to make profit out of the relevant transaction. The result is that most lawyers have strong incentives to see their client provide for the law in which they are trained."). See also Gilles Cuniberti, *The Laws of Asian International Business Transactions*, 25 WASH. INT'L L.J. 35, 61 (2016) ("Each [party] knows the contract law of his particular jurisdiction but typically does not know the law of other jurisdictions, including the law of the other party's jurisdiction. Parties would, therefore, prefer to submit their contract to their own law not only to avoid the additional costs associated with learning a foreign law, but also because it is psychologically more comfortable to apply familiar law to their business relationships.").

70. Loukas Mistelis, *International Arbitration- Corporate Attitudes and Practices- 12 Perceptions Tested: Myths, Data and Analysis Research Report*, 15 AM. REV. INT'L ARB. 525, 537-39 (2004).

71. See W. Laurence Craig, *Some Trends and Developments in the Laws and Practice of International Commercial Arbitration*, 30 TEX. INT'L L.J. 1, 2-3 (1995) ("In short, while speed, informality, and economy have had some influence on the growth of international commercial arbitration, the essential driving force has been the desire of each party to avoid having its case determined in a foreign judicial forum. Parties seek to avoid these forums for fear that they will be at a disadvantage due to unfamiliarity with the jurisdiction's language and procedures, preferences of the judge, and possibly even national bias.").

advantage of uniform law, is more significant with respect to transactions in goods, which are more likely to be cross-border, than transactions in land or services. Thus, we should not be surprised that Mentschikoff found that the organizations of parties who most often deal in goods—trade associations comprised of merchants and especially those whose business is international—created arbitration systems to resolve disputes among their members. As noted above, Mentschikoff found “institutionalized arbitration” more common among trade associations: (1) comprised of merchants (those buying for resale), (2) associations engaged in foreign trade, and (3) dealing in raw/fungible goods; and she found that when all three factors—merchants (buy for resale), international trade, and raw goods—are present, the rate of institutionalized arbitration approaches 100%.<sup>72</sup>

### III. PRIVATE ORDERING IN *COMMERCIAL ARBITRATION*

Mentschikoff uses her phrase “institutionalized arbitration” to include two types of commercial arbitration: (1) arbitration administered by a trade association, and (2) arbitration administered by the American Arbitration Association (AAA). *Commercial Arbitration*’s detailed study of these two types of arbitration reveals their contrasts and thus illuminates different types of private ordering.

“Self-contained trade group arbitration is,” Mentschikoff concludes, “an extremely important method of settling buyer-seller disputes.”<sup>73</sup> However, she explains, lawyers are generally not involved in trade association arbitration, because merchants play all the necessary roles. Lawyers typically neither represent the parties in trade association arbitration nor serve as arbitrators.<sup>74</sup> Moreover, the parties to trade association arbitration agreements rarely need litigation to enforce such agreements or to confirm or vacate trade association arbitration awards. Mentschikoff notes that merchant parties to trade association arbitration agreements rarely need courts to enforce such arbitration agreements and awards because these merchants are repeat players in the same industry and thus are vulnerable to non-legal pressures—culminating in expulsion from the trade association—if they challenge the arbitration agreement or award.<sup>75</sup>

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72. Mentschikoff, *supra* note 9, at 852.

73. *Id.* at 854.

74. *Id.* at 859 (“In almost all self-contained trade associations and exchanges, on the other hand, lawyer participation in the arbitration proceedings is either forbidden or discouraged, and very few of the arbitrators are lawyers or law-trained.”). This remains true in soft commodities arbitration (SCA) such as that administered by the Grain and Feed Trade Association and the Federation of Oils, Seeds and Fats Associations. See Chernykh, *supra* note 29 (“Limiting the role of lawyers is an important common feature in SCA; lawyers are not usually included in the mandatory arbitral panel and cannot as a rule represent parties in oral hearings without both parties’ express agreement, which in practice is seldom given.”).

75. Mentschikoff, *supra* note 9, at 854 (“In exchange groups, not only is resort to arbitration on the whole compulsory for members, but failure to abide by an award is frequently considered grounds for disciplinary proceedings against the recalcitrant party.”). See also Mentschikoff, *supra* note 42, at 703–04 (“The point to be made in favor of arbitration is that typically such legal testing or appeal is not indulged in by the parties. There are non-legal pressures to accept the process and the award . . . In the labor field . . . [t]he economic sanction of strike or lockout is always present to enforce good faith action under an arbitration clause. In the commercial field . . . [i]t may be that the third attribute of arbitration with all that it connotes for the criteria of decision is enough to swing the balance in favor of arbitration: A judge whom you can choose for yourself”); Charny, *supra* note 21, at 409 (“[I]n a well-organized market with an institutional apparatus for dispute resolution, such as an arbitration system, nonlegal sanctions are used to enforce compliance with the arbitrators’ decisions.”); *id.* at 400 (“A trade

In contrast, Mentschikoff shows, the AAA's general commercial arbitration—often involving parties not in the same trade association—tends to be very different.<sup>76</sup> This general commercial arbitration is much more like litigation, with lawyers usually representing the parties and often serving as arbitrators.<sup>77</sup> Moreover, Mentschikoff emphasizes that central to the AAA's mission is producing arbitration awards courts will confirm rather than vacate.<sup>78</sup> She describes AAA procedures including a clerk whose job is to draft the award and prevent the arbitrators from writing a reasoned opinion, because the AAA believes a very short award—with no reasoning that could tempt a court to find flaws—is less likely to be vacated.<sup>79</sup> Relatedly, because the AAA is more concerned than trade associations about how an arbitration's process will appear to a reviewing court, the AAA is more concerned about arbitration procedure, thus further “lawyer-izing” AAA arbitration compared to trade association arbitration.<sup>80</sup>

While AAA procedures have changed since Mentschikoff's day, short awards remain common in much domestic commercial arbitration, in part because the AAA encourages them.<sup>81</sup> However, while short awards may deter vacatur, they lack the

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association or industry arbitration system may also enforce standards by exacting penalties from members, expelling noncompliant members, or certifying superior products with its ‘seal of approval.’”); Richman, *supra* note 8, at 2339 (Since failure to comply with industry rules and arbitrators' rulings “precludes future business in the industry, losers of arbitration rulings will exhibit compliance only if the benefits from their future dealings within the merchant community will outweigh their immediate loss in arbitration.”); *id.* at 2340 (“A merchant who is found by a private court to have breached a contract but fails to pay receives publicity as a bad actor, leading other merchants to respond to the public ruling by refusing to deal with the transgressor. The literature is replete with instances of such coordinated and collectively orchestrated punishments.”).

76. Mentschikoff, *supra* note 9, at 857–58.

77. *Id.* at 859 (“Lawyers represent one or more of the parties in 80 per cent of the cases, and serve as arbitrators in about 30 per cent. The availability of legal norms or standards for utilization in the disposition of particular arbitrations at the Association is therefore theoretically present.”).

78. *Id.* at 856 (The AAA “from its beginning held itself out as an expert in matters that went to the enforceability of an award and set up its rules and regulations with the primary aim of rendering awards that would not be set aside by the courts.”).

79. *Id.* at 865 (“After the hearings are declared closed, the arbitrators, possibly on the same day, meet to reach a decision. Briefs are sometimes requested, but this is not the usual practice. The tribunal clerk, who has sat through the hearings and who frequently is consulted by the arbitrators as to appropriate procedure, sometimes sits with the arbitrators during deliberations, but more commonly, he is simply available to answer questions. His major task at this point is to draft the award in a legally perfect manner and to prevent the arbitrators from issuing an opinion.”); *id.* at 857 (“The Association puts enormous pressure on its arbitrators not to write opinions but to merely state the award in dollar amounts.”).

80. *Id.* at 858 (“The third difference between self-contained trade association systems and the casual arbitration at the Association lies in the methods by which awards are enforced. The ultimate sanction in many of the self-contained associations and in almost all of the exchanges is a disciplinary proceeding and thus, potential legal problems with respect to procedure are not seriously considered in these groups. The ultimate sanction at the Association is the rendering of judgment on the award by a court of competent jurisdiction, and therefore problems of procedure are always uppermost in the minds of the tribunal clerks, who are charged with the duty of policing the arbitrators sufficiently, so that the award rendered will be legally enforceable.”).

81. See Cynthia A. Murray, *Contractual Expansion of the Scope of Judicial Review of Arbitration Awards Under the Federal Arbitration Act*, 76 ST. JOHN'S L. REV. 633, 637-38 (2002) (“[M]ost awards in domestic commercial arbitration do not specify the factual and/or legal grounds on which they are based”); Alan Scott Rau, *The Culture of American Arbitration and the Lessons of ADR*, 40 TEX. INT'L L.J. 449, 513 (2005) (“[A]n arbitrator's freedom from the need to explain or justify his award is closely linked to his lack of accountability in terms of judicial review: The naked award that is the norm in domestic commercial arbitrations can be explained as much by a desire to insulate decisions from judicial scrutiny as to any desire to avoid the delay or added expense that written opinions would entail.”); EDWARD BRUNET, CHARLES B. CRAVER & ELLEN E. DEASON, *ALTERNATIVE DISPUTE RESOLUTION*:



reasoning of a good precedent that can be relied upon in future cases. This fits Mentschikoff's observation that AAA arbitrators' decisions are rarely used as precedents while, in contrast, trade association arbitrators' decisions often have precedential value.<sup>82</sup> Trade associations, she writes, maintain continuity in their arbitrators and circulate their opinions to members or allow for some form of appeal.<sup>83</sup>

*Commercial Arbitration's* discussion of arbitration awards includes one of Mentschikoff's most cited passages, which is her finding that "[e]ighty percent of the experimental arbitrators thought that they ought to reach their decisions within the context of the principles of substantive rules of law, but almost 90 percent believed that they were free to ignore these rules whenever they thought that more just decisions would be reached by so doing."<sup>84</sup> Mentschikoff's finding that most arbitrators feel free to ignore substantive rules of law highlights the degree to which arbitration can privatize lawmaking, adjudication, and enforcement.

#### IV. CONCLUSION

In sum, Mentschikoff's *Commercial Arbitration* continues to teach us about commercial arbitration in ways that teach us also about commerce and about the private production, application, and enforcement of law. She details a thoroughgoing form of private ordering in trade association arbitration that privatizes all three of:

(1) lawmaking (through arbitrators applying industry trade rules rather than governmental law, and through the precedential effect of arbitrators' reasoned awards);

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THE ADVOCATE'S PERSPECTIVE 626 (5th ed. 2016) ("Written opinions are a rarity, except in labor arbitration, maritime and international arbitration. Indeed, the AAA urges arbitrators to avoid writing opinions as a means to keep the arbitral participants from challenging awards."); Abraham J. Gafni, *Written Opinions in Arbitration Aren't a Given*, LAW.COM (Sept. 22, 2008), <https://www.law.com/almID/1202424702244>. ("[I]n the AAA Commercial Rules and the Uniform Arbitration Act, there is a presumption that a reasoned opinion will not be issued unless the parties so require").

82. Mentschikoff, *supra* note 9, at 857 ("Arbitration at the Association differs substantially from arbitration at the self-contained trade groups. The first and most significant difference between the two systems lies in the use of precedent. The decisions that are rendered by the arbitration committees of self-contained trade associations do have precedential value. This is achieved in two ways: in some associations opinions are written and circulated to the membership; in others awards can be appealed or referred to other committees for the establishment of general standards. Most important, however, in all of these associations there is a continuity in the membership of the deciders, which means that the system of precedent operates automatically, for a question decided in one case on the basis of consideration of competing norms is unlikely to be decided differently in the next case by the same people. However, the casual system of arbitration used by the American Arbitration Association, is designed to discourage the use of precedent. The Association puts enormous pressure on its arbitrators not to write opinions but to merely state the award in dollar amounts. It also tries very hard and very successfully not to have any one person sit as an arbitrator more than once or twice a year.").

83. *Id.* For more on the precedential value of arbitration awards, see W. Mark C. Weidemaier, *Judging-Lite: How Arbitrators Use and Create Precedent*, 90 N.C. L. REV. 1091 (2012).

84. Mentschikoff, *supra* note 9, at 861. A separate question is how often arbitrators in fact ignore or depart from the substantive law a court would have applied had the case been litigated. See Christopher R. Drahozal, *Is Arbitration Lawless?*, 40 LOY. L.A. L. REV. 187, 194 (2006) ("[H]ow often' do arbitrators not follow the law? The empirical evidence on this point--which consists of case analyses, surveys of arbitrators, and reversal rates of arbitration awards and court decisions-- is varied but ultimately inconclusive." (footnote omitted)).

(2) adjudication (through arbitration procedures quite different from courts' rules of procedure and evidence); and

(3) enforcement of the adjudicator's decision (through private sanctions culminating in expulsion from the association).

By contrast, she shows that the general commercial arbitration typical of the AAA often includes only the second of these three forms of privatization. Mentschikoff's comparison of two types of commercial arbitration thus leads us from the mundane context of ordinary sales disputes to fundamental questions about the roles of private parties in the production, application, and enforcement of law. In these important ways, she established both the path followed by significant portions of today's private ordering literature, exemplified by Drahozal and Richman,<sup>85</sup> and the path of in-depth empirical study exemplified by Bernstein.<sup>86</sup> In short, *Commercial Arbitration's* relevance endures.

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85. See Richman, *supra* note 4.

86. See Bernstein, *Merchant Law in a Merchant Court*, *supra* note 29.