

### Judicial Services for Global Commerce – Made in Germany?

By Graf-Peter Calliess & Hermann B. Hoffmann \*

#### A. A Global Market for Judicial Services

International business disputes rarely go to court,<sup>1</sup> but sometimes they do. By virtue of the internationally accepted principle of party autonomy, business partners involved in cross-border transactions are entitled to select their forum of choice for any dispute which may arise from their commercial relationship. Party autonomy entails the right to opt out of the nation state's court systems. In fact, arbitration clauses often refer disputes to a non-state institution for commercial arbitration such as the International Court of Arbitration of the ICC in Paris.<sup>2</sup> In a choice of court agreement, however, parties may also choose between the different forums for dispute resolution provided by the nation states. In the era of economic globalization when the demand for cross-border dispute resolution services is growing, the provision of legal services for international commerce becomes big business. As a result, national business lawyers develop a natural interest in channeling international disputes to their domestic courts. A very effective way to broaden their market share is to submit as many contracts as possible to their own national law. Once a choice of law clause, English law for example, is agreed on, a corresponding choice of court agreement comes quasi naturally, since the courts of other nations have a lack of experience in applying foreign law. Thus, when international business transactions are negotiated, the

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<sup>1</sup> See e.g. Ian F. G. Baxter, *International Conflict of Laws and International Business*, 34 *Internat'l & Comp. L. Q.*, 538 (1985), Klaus Peter Berger, et al., *The Central Enquiry on the Use of Transnational Law in International Contract Law and Arbitration*, in: *THE PRACTICE OF TRANSNATIONAL LAW 91* (Berger, Klaus Peter Ed., 2001), URSULA STEIN, *LEX MERCATORIA* 13 (1995); Hannes Hesse, *Schiedsgerichtsbarkeit in der Investitionsgüterindustrie - eine empirische Untersuchung*, in: *RECHT DER INTERNATIONALEN WIRTSCHAFT UND STREITERLEDIGUNG IM 21. JAHRHUNDERT 277* (BERGER, KLAUS PETER et al. eds., 2001), Rolf Schmidt-Diemitz, *Internationale Schiedsgerichtsbarkeit - eine empirische Untersuchung*, *DER BETRIEB* (DB), 369 (1999), GRAF-PETER CALLIESS, *GRENZÜBERSCHREITENDE VERBRAUCHERVERTRÄGE* 246 (2006).

<sup>2</sup> See <http://www.iccwbo.org/court/arbitration/id4398/index.html>, last accessed 23 February 2009.

involved lawyers engage in what is appropriately described as a 'fight for the applicable law'.<sup>3</sup>

### **B. Rule, Britannia! Britannia rule(s) international commerce?**

The existence of a 'global market for judicial services'<sup>4</sup> received attention only recently, when the above described competition of jurisdictions was taken from the secrecy of contract negotiation to the public. The law society of England and Wales embarked on an hitherto unprecedented form of aggressive marketing when publishing a brochure entitled 'The Jurisdiction of Choice'<sup>5</sup> in 2007, which listed the supposed advantages of the Common Law and the English commercial courts over Continental legal systems. As inherent to the advertisement industry, the brochure offers a very self-reliant impression of English law and the English court system. English law is described as 'transparent and predictable', giving '...guidance on almost every issue. Parties (especially commercial parties) can predict, with greater certainty than in many civil law systems, whether a proposed course of action is likely to be lawful or unlawful'.<sup>6</sup> Furthermore, English judges are described as having 'a worldwide reputation for quality' and their judgments 'are respected internationally',<sup>7</sup> just to give some examples. The message of the groundbreaking English marketing brochure reminds us of a poem by James Thomson,<sup>8</sup> which in its original version was formulated in the form of an appeal: 'Rule, Britannia! Britannia rule the waves.' When, on 1 August 1740, the poem was first presented to the German Prince Frederick (of Hanover), who became Prince of Wales, it was not a celebration of the existing state of naval affairs, but an exhortation for the future. The change to the self-content formulation 'Britannia *rules* the waves' occurred later on in the Victorian era, a time when the British actually did rule the waves and no longer needed to be exhorted to rule them. It remains

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<sup>3</sup> Volker Triebel, *Der Kampf ums anwendbare Recht*, ANWALTSBLATT (ANWB.), 305 (2008), see also Theodore Eisenberg & Geoffrey P. Miller, *The Market for Contracts* (2007), available at: <http://ssrn.com/paper=938557>, last accessed 23 February 2009.

<sup>4</sup> Jens C. Dammann & Henry Hansmann, *A Global Market for Judicial Services* (2007), available at: <http://ssrn.com/paper=976115>, Jens Dammann & Henry Hansmann, *Globalizing Commercial Litigation*, 94 CORNELL L. REV., 1 (2008); there is also a global market for legal services which is described e.g. by Carole Silver, *Winners and losers in the globalization of legal services: situating market for foreign lawyers*, 45 VIRGINIA J. INTERNAT'L L., 897 (2005), Carole Silver, *Regulatory mismatch in the international market for legal services*, 23 Nw. J. Internat'l L. & Bus., 487 (2003).

<sup>5</sup> [http://www.lawsociety.org.uk/documents/downloads/jurisdiction\\_of\\_choice\\_brochure.pdf](http://www.lawsociety.org.uk/documents/downloads/jurisdiction_of_choice_brochure.pdf), last accessed 23 February 2009.

<sup>6</sup> P. 8 of the described British brochure.

<sup>7</sup> P. 9.

<sup>8</sup> The text is available at: <http://www.poemhunter.com/poem/rule-britannia/>.

to be seen in the future, if Britain actually will rule international commerce as implied by the marketing brochure. For the time being it seems to be an exhortation for the future.

### C. Law – Made in Germany

At least Volker Triebel, a German lawyer and English Barrister, in a recent comparative survey of the brochure remains skeptical. He finds many of the advertising messages in the booklet are a kind of misleading advertisement or are even wrong.<sup>9</sup> In an open letter to the German Minister of Justice, Brigitte Zypries, he called upon German lawyers to take up the English challenge and to embark on a joint endeavor to market the advantages of German law. His appeal was successful: under participation of all legal professional groups the brochure “Law – Made in Germany”<sup>10</sup> was published in November 2008. In the bilingual – and no less self-promoting than the English – description of German law, the authors promote their conviction that only ‘Codification provides legal certainty’.<sup>11</sup> The international audience is informed that ‘Germany is justifiably proud of its courts. For many years now, international studies and empirical data have been attesting to Germany’s efficient court system committed to the principle of due course of the law. This system has set world-wide standards’.<sup>12</sup> The slogan of the German brochure refers to history as well: The label ‘Made in Germany’ was originally introduced in Britain by the Merchandise Marks Act 1887, to mark foreign produce more obviously, as Britain considered foreign produce to be inferior to domestic produce, and tried to get buyers to adhere to the concept of ‘buying British’. Already in 1894, however, the German Reichstag’s commission reported that after suffering slight losses, German manufacturers soon found the label to be of good use since they could distinguish themselves better from the British manufacturers. The term ‘Made in Germany’ was soon associated with product reliability, quality and even perfection. It is questionable, however, if German law will be equally successful in international commerce as e.g. the German car manufacturer Audi was with his advertising slogan ‘*Vorsprung durch Technik*’, which was published in England in the German language.

The German and British booklets were made to promote the advantages of the existing legal systems. Behind the roar of guns of marketing brochures, however, what is decisive in the competition for international business disputes is the effectiveness of the judicial services offered. The increasing pace of international commerce creates a pressure for legal reforms to adopt the domestic court systems to the needs of a globalized business

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<sup>9</sup> Volker Triebel, *Der Kampf ums anwendbare Recht*, ANWB, 305 (2008).

<sup>10</sup> <http://www.lawmadeingermany.de/>

<sup>11</sup> P. 6 of the described German brochure.

<sup>12</sup> P. 19 of the brochure.

world. In this context it is not sufficient to just promote the status quo of a nation's court system. Furthermore, it is not only the United Kingdom and Germany who are involved in the competition for business disputes, as international arbitration institutions play a dominant role in this market as well as other nations as e.g. the courts of New York, which successfully installed an up to date commercial division in 1995.<sup>13</sup> Our thesis is that there is a need for creative reforms of the domestic legal systems in order to strengthen the role of state provided judicial services in creating legal certainty for global commerce.

#### D. The Transnationalization of Commercial Law

Under the 'umbrella' of the Collaborative Research Center 'Transformations of the State'<sup>14</sup> at the University of Bremen, the authors are involved in an interdisciplinary research project on 'new forms of legal certainty in globalized exchange processes'.<sup>15</sup> Despite of all efforts to harmonize private law and to facilitate judicial cooperation,<sup>16</sup> the state and its legal system still appear largely unable to effectively regulate global commerce.<sup>17</sup> Depending on the specifics of the involved jurisdictions, cross-border transactions face varying degrees of legal uncertainty. In sum, international trade operates under circumstances which are appropriately described under the eye-catching term of "lawlessness".<sup>18</sup> At the same time, a plethora of private governance mechanisms are available to international commerce. Occasionally, such private legal services are bundled into effective private governance regimes or private legal systems, substituting national regulatory structures.<sup>19</sup> Empirical research, conducted as part of the above mentioned

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<sup>13</sup> Robert L Haig, *Can New York's New Commercial Division Resolve Business Disputes As Well As Anyone?*, 13 *TOURO L. REV.*, 191 (1996), Theodore Eisenberg & Geoffrey P. Miller, *The Flight to New York: An Empirical Study of Choice of Law and Choice of Forum Clauses in Publicly-Held Companies' Contracts* (2008), available at: <http://ssrn.com/paper=1114808> and for the work of the commercial division in general see: <http://www.nycourts.gov/courts/comdiv/PDFs/ComDiv-Jan06.pdf>, last accessed 23 February 2009.

<sup>14</sup> <http://www.sfb597.uni-bremen.de>

<sup>15</sup> <http://www.staat.uni-bremen.de/pages/forProjektBeschreibung.php?SPRACHE=en&ID=4>

<sup>16</sup> For the failed Hague Convention on Choice of Court agreements see e.g. Graf-Peter Calliess, *Value-added Norms, Local Litigation, and Global Enforcement: Why the Brussels-Philosophy failed in The Hague*, 5 *GERMAN L. J.* 1489 (2004), Giesela Rühl, *Das Haager Übereinkommen über die Vereinbarung gerichtlicher Zuständigkeiten: Rückschritt oder Fortschritt?*, *PRAXIS DES INTERNATIONALEN PRIVAT- UND VERFAHRENSRECHTS (IPRAX)*, 410 (2005).

<sup>17</sup> Graf-Peter Calliess, *The Making of Transnational Contract Law*, 14 *INDIANA J. GLOB. LEG. STUD.*, 469 (2007).

<sup>18</sup> See further, AVINASH K. DIXIT, *LAWLESSNESS AND ECONOMICS: ALTERNATIVE MODES OF GOVERNANCE* (2004); see also Hans-Jörg Schmidt-Trenz & Dieter Schmidtchen, *Private International Trade in the Shadow of the Territoriality of Law: Why Does It Work?*, 58 *SOUTHERN ECONOMIC JOURNAL*, 329 (1991).

<sup>19</sup> See e.g. Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 *J. Leg. Stud.* 138 (1992) and recently Andreas Maurer & Anna Beckers, *Lex Maritima*, in: *SOZIOLOGISCHE*

research project during the past four years, has revealed an increasing transnationalization as a basic pattern in the governance of cross-border transactions.<sup>20</sup> Triggered by the globalization of commerce, economic governance, understood as the provision of "good order and workable arrangements"<sup>21</sup> for business dealings, is fundamentally transformed: as governance mechanisms become increasingly decoupled from state legal systems they are at the same time internationalized and privatized. Our studies on off-shoring in the software industry, the international timber trade, and the role of international law firms<sup>22</sup> have shown that business actors in cross-border situations increasingly tend to rely on transaction-type or branch specific governance regimes, recombined from different public and private mechanisms of control, when it comes to the enforcement of their mutual obligations. Instead of exclusively or at least predominantly relying on the state legal system, these regimes build on "relational contracting"<sup>23</sup>, "social sanctions"<sup>24</sup>, alternative dispute resolution, and other kinds of private governance, while public institutions such as contract law, courts, or legal sanctions are of rather peripheral importance.

Foreign trade has always been a strong field for self-regulation and – as a consequence – for private courts.<sup>25</sup> However, while foreign trade was rather an exception in the old days, it nowadays is in some branches the main field of business, especially in so called export nations like Germany. While the dominance of international arbitration courts was formally acceptable from a constitutional state perspective, the situation is different today. Where the state does not offer sufficient governance for global commerce, state courts lose expertise in the field of commercial disputes. When trials vanish from the

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JURISPRUDENZ – FESTSCHRIFT FÜR GUNTHER TEUBNER ZUM 65. GEBURTSTAG, 645 (Graf-Peter Calliess, Andreas Fischer-Lescano, Dan Wielsch & Peer Zumbansen eds., 2009).

<sup>20</sup> See Graf-Peter Calliess et. al., *Transformations of Commercial Law*, in TRANSFORMING THE GOLDEN AGE NATION STATE, 83 (Achim Hurrelmann, Stephan Leibfried et. al. eds., 2007).

<sup>21</sup> Oliver E. Williamson, *The Economics of Governance*, 95 AMERICAN ECONOMIC REVIEW, 1 (2005).

<sup>22</sup> John Flood, *Lawyers as Sanctifiers: The Role of Elite Law Firms in International Business Transactions*, 14 Indiana J. Glob. Leg. Stud., 35 (2007), FABIAN SOSA, VERTRAG UND GESCHÄFTSBEZIEHUNG IM GRENZÜBERSCHREITENDEN WIRTSCHAFTSVERKEHR, (2007)

<sup>23</sup> This concept was basically described by Ian Macneil, *The Many Futures of Contracts*, 47 S. Cal. L. Rev., 692 (1974), Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AMERICAN SOCIOLOGICAL REVIEW, 55 (1963).

<sup>24</sup> David Charny, *Nonlegal Sanctions in Commercial Relationships*, 104 Harv. L. Rev., 373 (1990).

<sup>25</sup> See e.g. HANS GROSSMANN-DOERTH, DAS RECHT DES ÜBERSEEKAUFS, BAND I, (1930), Hans Großmann-Doerth, *Der Jurist und das autonome Recht des Welthandels*, JURISTISCHE WOCHENSCHRIFT (JW), 3447 (1929), ERNST RABEL, DAS RECHT DES WARENKAUFS BAND 1, (1936).

courtrooms,<sup>26</sup> there is a lack of judge-made law in the sector of commercial cases and, hence, legal certainty suffers.

In fact, business disputes seem to vanish from German courts.<sup>27</sup> While international arbitration courts register an increasing caseload,<sup>28</sup> decreasing numbers of cases are filed with German commercial courts.<sup>29</sup> This development may well be characterized as a self-made problem. Since German commercial courts were first installed in 1877,<sup>30</sup> there was no substantial reform which adopted the structure of the court system to the requirements of modern commerce. Thus, the German court system is still focused on the age of domestic commerce.

To give some examples of the German situation, the commercial courts are instituted at the district courts (*Landgericht*), staffed with one professional judge and two merchants as lay-judges selected by the local chamber of commerce. While the basic idea of integrating expert knowledge into commercial courts still prevails, the concrete institutionalization seems to be misaligned with today's globalized commerce. Whereas Section 184 of the *Gerichtsverfassungsgesetz* (Act on the Constitution of Courts) provides that German is the only official language in courts, the fact that English is the *lingua franca* of international business is still neglected. In addition, the various stages of appeal – not only provided by German law – bear the danger of endless disputes which often end up at the European Court of Justice, a fact which was adequately criticized by the phrase '*justice delayed, is justice denied*'.<sup>31</sup> These two aspects reflect only some of the reasons why international commerce prefers arbitration over state courts when selecting a forum for the resolution

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<sup>26</sup> Margo Schlanger, *What We Know and What We Should Know about American Trial Trends* (2006), available at: <http://ssrn.com/abstract=917960>, Carolien Klein Haarhuis & Bert Niemeijer, *Vanishing or Increasing Trials in the Netherlands?*, 2006 JOURNAL OF DISPUTE RESOLUTION, 71 (2006), Nathan L. Hecht, *The Vanishing Civil Jury Trial: Trends in Texas Courts and an Uncertain Future*, 47 S. TX. L. REV., 163 (2005), Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J.EMP. LEG. STUD., 459 (2004), Gillian K. Hadfield, *Where have all the trials gone? Settlements, non-trial adjudications and statistical artifacts in the changing disposition of federal civil cases* (2004), available at: <http://ssrn.com/abstract=574144>, last accessed 23 February 2009.

<sup>27</sup> Paul Hobeck, *Flucht aus der deutschen Gerichtsbarkeit bei wirtschaftsrechtlichen Streitigkeiten - warum?*, DEUTSCHE RICHTERZEITUNG (DRIZ), 177 (2005).

<sup>28</sup> See e.g. Stefan Voigt, *Are International Merchants Stupid? – Their Choice of Law Sheds Doubt on the Legal Origin Theory*, 5 J. Emp. Leg. Stud. 1 (2008).

<sup>29</sup> From 1992 – 2005 the number of cases decreased by 18,5 %, see Graf-Peter Calliess & Hermann Hoffmann, *Effektive Justizdienstleistungen für den globalen Handel*, ZEITSCHRIFT FÜR RECHTSPOLITIK (ZRP), 1 (2009).

<sup>30</sup> A detailed description of the history of the German chambers of commerce (*Kammern für Handelsachen*) gives HANS KARL SOMMERMEYER, *DIE KAMMER FÜR HANDELSACHEN*, (1966).

<sup>31</sup> Christian Joerges, *The Bright and the Dark Side of the Consumer's Access to Justice in the EU* (2001), available at <http://www.bepress.com/cgi/viewcontent.cgi?article=1026&context=gj>, last accessed 23 February 2009.

of disputes. There are many other issues where institutional reform of state courts could learn from the experience of international commercial arbitration.<sup>32</sup> We suggest using these experiences as a toolbox for a creative reform of the German court system in order to adapt it to the needs of modern commerce.<sup>33</sup>

#### E. Panel discussion on 'Forum Germany the global competition of jurisdictions'

Current proposals for the promotion of the German legal system to the international market for legal solutions were discussed in a panel discussion with the German Minister of Justice Brigitte Zypries, the former judge of the *Bundesverfassungsgericht* (Federal Constitutional Court) Wolfgang Hoffmann-Riem, Graf-Peter Calliess and practitioners in Berlin on 12 February 2009. The title of the discussion was intended to stress that not only arbitration institutions but as well courts of different nation states are involved in a competition for the resolution of international commercial disputes. In the United States for example, such competition for disputes was triggered when some states like New York created special chambers for business disputes, the so called commercial divisions.<sup>34</sup>

Such competition among different nations' state courts can be observed in Europe as well, where Article 23 of the Brussels I regulation<sup>35</sup> provides European-wide recognition and enforcement of judgments resulting from a choice of court agreement. But should state courts be interested in increasing their caseload? Some years ago, many scholars complained about the overloaded court system and argued private partners of the courts should be strengthened as a relief.<sup>36</sup> 'Why should we offer our court system for cases from

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<sup>32</sup> See Gerhard Lüke, *Unorthodoxe Gedanken zur Verkürzung der Prozeßdauer und Entlastung der Zivilgerichte*, in: Festschrift Baumgärtel, 349 (Hanns Prütting ed., 1990). Arbitration courts are a stimulation for an improvement of state courts, see e.g. Ulrich Vultejus, *Nachdenken über neue Justizstrukturen - Anfragen eines Juristen an die Rechtssoziologie*, in: *ARMER RECHTSSTAAT*, 119 (Hubert Rottleuthner ed., 2000), Wolfgang Hoffmann-Riem, *Richterliche Unabhängigkeit in Zeiten struktureller Veränderungen der Justiz*, in: *WEGE GELEBTER VERFASSUNG IN RECHT UND POLITIK*, 497 (Rainer Pitschas ed., 2007).

<sup>33</sup> See Graf-Peter Calliess & Hermann Hoffmann, *Effektive Justizdienstleistungen für den globalen Handel*, ZRP, 1 (2009), Graf-Peter Calliess & Hermann Hoffmann, *Justizstandort Deutschland im globalen Wettbewerb*, ANWB, 52 (2009).

<sup>34</sup> Kimberly A. Ward, *Getting Down to Business - Pennsylvania Must Create a Business Court, Or Face The Consequences*, 18 J. L. & Comm., 415 (1999), Mitchell L. Bach & Lee Applebaum, *A History of the Creation and Jurisdiction of Business Courts in the last Decade*, 60 BUSINESS LAWYER, 147 (2004). And for the argued need of specialized courts for business disputes, see Rochelle C. Dreyfuss, *Forums of the Future: The Role Of Specialized Courts in Resolving Business Disputes*, 61 Brooklyn L. Rev., 1 (1995).

<sup>35</sup> Council regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

<sup>36</sup> See e.g. Bruce Benson, *To Arbitrate or To Litigate: That Is the Question*, 8 Eur. J. L. & Econ., 91 (1999), Bruce Benson, *Economic Freedom and the Evolution of Law*, 18 CATO JOURNAL, 209 (1998), BRUCE BENSON, *THE ENTERPRISE*

abroad?<sup>37</sup> was the much debated question. A competition for international cases seemed far out of sight. This attitude changed only recently, when states realized that the provision of legal services to international commerce became an economically relevant sector.<sup>38</sup> It is not only the state courts which are able to make profit with judicial services adapted to the needs of international trade, but as well a huge legal and auxiliary services industry which may flourish.<sup>39</sup> Judicial services, thus, can be turned into an 'export good'.

#### F. Summary

This article has shown that there is a competition among nations' state courts, expressed through the publication of marketing brochures for a jurisdiction. The goal behind those booklets is to try to get more commercial cases to state courts or to arbitration courts. Those cases are of high legal and financial importance for a legal system: business disputes are of economic importance. From a legal perspective, this competition is enabled by the principle of freedom of choice respectively party autonomy in international private law. It is catalyzed, however, by the mobility of the international business world. When firms trade around the globe, they can choose the forum which fits to their requirements. In this sense, a competition as 'discovery procedure' is triggered among arbitral courts and state courts from different nation states.

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OF LAW - JUSTICE WITHOUT THE STATE, (1990); for Germany see the description of the discussion by WOLFGANG HOFFMANN-RIEM, MODERNISIERUNG VON RECHT UND JUSTIZ : EINE HERAUSFORDERUNG DES GEWÄHRLEISTUNGSSTAATES, (2001).

<sup>37</sup> An overview on this debate is given by GERHARD WAGNER, PROZESVERTRÄGE, 358 (1998).

<sup>38</sup> See for this point also Maarten J. Kroeze, *The Dutch Companies and Business Court as a Specialized Court* (2006), available at: <http://ssrn.com/abstract=976277>, last accessed 23 February 2009.

<sup>39</sup> See also Jens Dammann & Henry Hansmann, *A Global Market for Judicial Services* (2007), available at: <http://ssrn.com/paper=976115>, last accessed 23 February 2009.