

Private Ordering of Public Law

Party autonomy is a doctrine in private international law emphasizing the inherent freedom of contracting parties to select the terms of their agreement, including the law governing their engagements. Reflecting the doctrine's intellectual ascendance over the past fifty years, a significant number of cross-border commercial transactions today operate pursuant to contracts specifying a particular national or state law as the exclusive source of law governing the parties.

This Article excavates the subtle but important ways that private entities accrete influence over domestic regulatory law through a growing number of private commercial agreements mandating the application of "foreign law" with little or no connection to the parties. To date, this phenomenon has been widely celebrated as promoting efficiency and jurisdictional competition, but relatively unexamined from a broader regulatory structure or a political legitimacy standpoint. While a growing body of academic literature is exposing the erosion of substantive rights that can be expected in the context of unequal bargaining power between contracting parties, mainstream academics today largely embrace the private entities' ability to bargain for the law governing commercial transactions, so long as the choice was not a byproduct of fraud or lopsided bargaining power.

A closer examination, however, reveals a more complicated picture. When disputes arise out of commercial agreements that implicate domestic regulatory statutes (as they often do), the interests of non-contracting parties are at stake — namely, the general public that stands to benefit when private litigants activate statutes that serve the society in general. This is because public regulatory law is designed not only to provide private remedy, but also intended to help effectuate particular legislative goals. For instance, by over-compensating injured plaintiffs, treble damages provided under the RICO Act and the Sherman Act are designed to discourage *non*-litigants from violating antitrust and anti-racketeering laws. Unlike traditional private law remedies, which is generally understood as the state's minimum effort to ensure that private agreements are respected, treble damages are in place for penal and deterrence purposes. When coupled with the standing doctrine, which keeps out plaintiffs from seeking remedy in courts when the injury is too remote from statutory violations, private commercial agreements may erode domestic regulatory law by systematically precluding potential litigants from activating otherwise applicable domestic statutes. This is particularly unsettling because both Congress and state legislatures rely heavily (to a unique degree) on private litigants to effectuate statutory goals. At minimum, this theoretical defect displays a serious need to re-think how we have understood the rise of private contractual ordering.

To be sure, there is nothing inherently pernicious about borderless private bargaining. Private entities typically specify the law governing contracts in order to enhance predictability as to what law would apply to the wide array of legal claims that can arise in complex commercial transactions. The system of private governance mechanisms that transcend territorially-configured rules, however, does not take place agnostic to the structure of existing regulatory law. To that end, this Article begins a normative discussion centered on remedying the legitimacy deficit associated with private agreements that can systematically undermine the enforcement of public law.