Part I:
Framework and Research Question

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Chapter 1: Rise of Specialized Commercial Arbitration in Global Markets

A. An historical overview of PLSs

Incentives to comply with law are not always shaped by legal, but also by nonlegal sanctions stemming from private initiatives. Informal discipline, which emerges when the formal coercive apparatus is unable to provide sufficient deterrence in the sense that rational individuals with a reasonably degree of risk aversion are expected to deviate from the law, has been around since ancient times. [24] The oldest surviving accounts can be found in archaic Greece, especially with regard to classical Athens (*I*)[25] and the Roman Republic (*II*).

Likewise, but even more illustrative for the existence of early private self-regulation or a PLS, the special law for the merchant class (*stilus mercatorum*, *jus mercatorum*, *lex mercatoria*), which spread across Europe after the 11th century AD must be mentioned (*III*).[26] During the transition to new manufacturing processes from the 18th century to the 19th century in Europe, more commonly known as the Industrial Revolution, it came to describe a system in which troublemakers could be extrajudicially sanctioned (*IV*).[27]

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24 S. Kube and C. Traxler, "The interaction of legal and social norm enforcement", *Journal of Public Economic Theory* 2010, p. 1.

25 A. Lanni, "*Law and Order in Ancient Athens*", New York: Cambridge University Press 2016, p. 1-27.

26 See, *inter alia*, G. Calliess, "Lex Mercatoria", *Zentra Working Papers in Transnational Studies No. 52 / 201* 2015, p. 1-15; G. Calliess, "Lex mercatoria", *Encyclopedia of Private International Law* 2017, p. 1119-1129; Although *Lex Mercatoria* translates as "law" of merchants, it would be more suitable to refer to it as the "legal system" of merchants. Despite its scholarly value, arguments in favour of this concept will not be discussed. In this research reference will only be made to the law of merchants.

27 K. E. Hendrickson, "*The Encyclopedia of the Industrial Revolution in World History*", Band 3, London: Rowmann & Littlefield 2015, p. 103.

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I. Ancient Greece: "Self-regulation within the Oikos in classical Athens"

In the 4th and 5th centuries BC, Athens was a rather Stateless political community, without a well-functioning court system.[28] Vagueness of statutes prevented *ex ante* a predictable outcome of jury verdicts and ensuing enforcement was not always possible.[29] Nonlegal sanctions (*i.e.* informal discipline) such as a refusal to engage in reciprocal relations, unwillingness to share food or refusal to eat with offenders and the loss of reputation dictated everyday life.[30]

An absence of State interference is perhaps more obvious when looking at the private sphere of the household (*i.e.* Oikos).[31] In classical Athens, the secluded space for private life (or private domain) was seen as the foundation of economic, political and military life. It served as a cornerstone that needed to be protected from any form of state intrusion.[32]

In contrast with its contemporary understanding, albeit not globally agreed upon, it can best be described as an androcentric and patriarchal hierarchical model.[33] The masculine head of the household (*i.e.* the *kyrios* or master) enjoyed complete disciplinary control over his household, who typically lived in the same physical house[34] and operated – in this capacity – entirely apart from the formal legal system.[35] He could privately disci-

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28 P. Cartledge, P. Millett, and S. v. Reden, "*Kosmos: Essays in Order, Conflict and Community in Classical Athens*", Cambridge/New York/Melbourne: Cambridge University Press 1998, p. 1.

29 A. Lanni, "*Law and Order in Ancient Athens*", New York: Cambridge University Press 2016, p. 4.

30 Ibid., p. 20, 25; Interestingly, classical Athens was not a close-knit society, as its citizens regularly traded with foreigners. Hence, according to *Lanni*, the deterrent effect of social sanctioning, in particular, reputational loss is not so convincing.

31 For a brief overview thereof, see C. Ando and J. Rüpke, "*Public and Private in Ancient Mediterranean Law and Religion*", Berlin/Munich/Boston: Walter de Gruyter GmbH 2015, p. 37-41.

32 S. U. Sörling et al., "*Studies presented to Pontus Hellström*", in: B. L. Sjöberg, "The Greek oikos: a space for interaction, revisited and reconsidered", Uppsala: S. U. Sörling et al. 2014, p. 315.

33 See, *inter alia*, U. Terlinden, "*City and Gender: Intercultural Discourse on Gender, Urbanism and Architecture*", Opladen: Leske + Budrich 2003, p. 43.

34 R. Parker, "*Polytheism and Society at Athens*", Oxford: Oxford University Press 2005, p. 9.

35 C. Ando and J. Rüpke, "*Public and Private in Ancient Mediterranean Law and Religion*", Berlin/Munich/Boston: Walter de Gruyter GmbH 2015, p. 40; The Oikos was not a legally defined entity in Athens. See R. Parker, "*Polytheism and Society at Athens*", Oxford: Oxford University Press 2005, p. 9.

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pline (*e.g.* whipping, torture) his slaves for fleeing, stealing, lying and laziness with the exception that killing his slaves was not permitted.[36] Also, he could penalize his wife for non-capital offences.

II. The Roman Empire: "Flexibility & risk allocation with regard to lease contracts in the agriculture sector"

Especially in the last years of the Roman Republic, nonlegal sanctioning was used by politicians when they came to power to blacklist certain families that did not support them.[37] This, however, standing alone is not sufficient to establish that a PLS existed next to State-enforced law.

A much more convincing example relates to the allocation of risk with regard to lease contracts in the agriculture sector. In classical Roman law, a tenant bore all foreseeable risks concerning the price and size of the crops relating to agriculture (*i.e. vitia ex re*). Those persons only had the right to obtain a remission of rent in the event of an unforeseeable natural disaster, the invasion of an army or unusual infestation of the crops by infested birds.[38] In contrast, the landowner was to a great extent non-liable. In that time, such inflexibility was seen as a threat to the continuance of lease contracts, which in turn would hamper the economy of the ancient Roman Empire. Consequently, the Roman legislature allowed the parties who entered into a lease contract to go beyond the requirements laid down in law by, for example, decreasing the rent for a scarcity of crops.[39] Even though it established some basic rights and obligations, private ordering was allowed in order to reach a friendly settlement.[40] This led to the existence of a private initiative that even included informal disciplining in the agriculture sector that existed next to the public legal system. As some may consider such a freedom for the parties to a lease contract not sufficient to

36 A. Lanni, "*Law and Order in Ancient Athens*", New York: Cambridge University Press 2016, p. 34.

37 K. E. Hendrickson, "*The Encyclopedia of the Industrial Revolution in World History*", Band 3, London: Rowmann & Littlefield 2015, p. 103.

38 H. D. Baker and M. Jursa, "*Documentary Sources in Ancient Near Eastern and Greco-Roman Economic History*", Oxford/Philadelphia: Oxbow Books 2014, p. 147.

39 T. A. J. McGinn, "*Obligations in Roman Law: Past, Present, and Future*", Ann Arbor: University of Michigan Press 2012, p. 201.

40 D. P. Kehoe and T. McGinn, "*Ancient Law, Ancient Society*", Ann Arbor: University of Michigan Press 2017, p. 126.

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prove the existence of a PLS, it at least illustrates that already some form of private initiative existed.

III. Medieval Times: "Lex Mercatoria"

To cope with the excessive demands of regulation in the context of an upcoming intensification in trade, a special law for merchants was developed in the Middle Ages.[41] Its aim was to create uniformity for merchants active in transnational trade without the mediation of the legislative powers of States.[42] Mainly through the communication and interchange of merchants as early as the 11th century AD in Italy, especially pertaining to Venice, Genoa and Florence[43], but also spreading to many market places in Europe, *Lex Mercatoria* codified the norms and procedural principles established by and for commerce.[44]

Despite it not being unanimously agreed that early *Lex Mercatoria* qualifies as a PLS, disputes were resolved through private merchant arbitration.[45] For *Goldman*[46] this was sufficient to evidence the presence of a PLS

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41 H. G. Leser, "*Gesammelte Schriften*", Band 1, Tübingen: J.C.B. Mohr (Paul Siebeck) 1968, p. 11.

42 For an in-depth study, see F. Galgano, "*Lex mercatoria: storia del diritto commerciale*", Munich: Il Mulino 1993.

43 P. H. Vishny, "*Guide to International Commerce Law*", New York: McGraw-Hill Inc. 1984, p. 2.

44 G. Saputelli, "The European Union, the Member States, and the Lex Mercatoria", *Notre Dame Journal of International & Comparative Law: Vol. 8: Is. 2, Article 3* 2018, p. 3; R. Michaels, "The True Lex Mercatoria: Law Beyond the State", *Indiana Journal of Global Legal Studies 14* 2007, p. 448; L. A. DiMatteo, "*International Business Law and the Legal Environment: A Transactional Approach*", New York/London: Routledge 2017, p. 127.

45 *Elcin* defined *Lex Mercatoria* as "*the law of adjudication of the disputes arising from international commercial contracts on the basis of a few substantive and procedural principles, under which the reasonable expectations of the parties to a particular contract become the single source of their contractual rights, obligations and risk allocations*". See M. Elcin, "*Lex Mercatoria in International Arbitration Theory and Practice*", Vol. 1, Florence: Mert Elcin 2012, p. 5.

46 B. Goldman, "Frontières du Droit et Lex Mercatoria", *Arch. De Philosophie Du Droit* 1964, p. 177-192; Travaux du Comité français de droit international privé, "*Droit international privé:*", in: B. Goldman (ed), "La lex mercatoria dans les contrats et l'arbitrage internationaux: réalité et perspectives", Paris: Travaux du Comité français de droit international privé 1979, p. 221-270; C. Dominicé, "*Etudes de droit international en l'honneur de Pierre Lalive*", in: B. Goldman (ed),

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that operated autonomously from the State. For others, such as, for example, *Schmitthoff*, the legal basis of *Lex Mercatoria* was anchored to the State system, since it was developed in respect of the State-guaranteed principle of party autonomy.[47] Whichever line of reasoning is followed is immaterial,[48] what matters is that some form of private initiative and informal disciplining also existed in the Middle Ages.[49]

IV. The Industrial Revolution

The cornerstone invention of steam power, the development of intermodal rail transport and the emergence of a factory system resulted in an unprecedented economic growth, which began in mid-18th century in England.[50] In a few years it spread throughout Europe. This period that later came to be known under the name Industrial Revolution continued for the remainder of the 19th century and shifted the economy from manual labour to artificial labour (*i.e.* labour supported by labour-replacing machines).[51]

In this period, many people became financially dependent on the jobs offered in those industries, mainly because of the continually rising de-

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"Nouvelles Riflexions sur la Lex Mercatoria", Basel/Frankfurt am Main: Helbing Lichtenhahn Verlag 1993, p. 241-256.

47 C. M. Schmitthoff, "*The Unification of the Law of International Trade*", London: Sweet & Maxwell 1968; U. Stein, "*Lex mercatoria: Realität und Theorie*", Band 28, Frankfurt am Main: Vittorio Klostermann 1995 p. 188.

48 P. Mazzacano, "The Lex Mercatoria as Autonomous Law", *Comparative Research in Law & Political Economy Research Paper No.* 29 2008, p. 1. "*The lex mercatoria is at once both non-state law and state-based law. It is not created in the state; it is not created exclusively in commerce*."

49 *Lex Mercatoria* is a topic that deserves extensive study, debate and argumentation. The aim of this Paragraph is merely to provide a short overview without going beyond that overview.

50 E. Crooks, "*The Unrelenting Machine: A Legacy of the Industrial Revolution*", Morrisville: Lulu 2012, p. 65.

51 *Marx* recognized two characteristics in relation to this economic change: first, the expropriation of nature. This entails that each individual worker loses any real degree of control over his labour process, since he has to adopt himself to the rhythm of machine production. Second, the expropriation of the product. This entails that the each worker is not the owner of the end-product. See K. Marx, "*Pre-Capitalist Economic Formations*", New York: International Publishers 1965, p. 37, 104 [edited version by E. J. Hobsbawm].

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mand for industrial labour.[52] Given that there was no shortage of labourers, owners exploited their employees[53] by compelling them to perform under horrendous working conditions. Working hours were long, wages were low and working conditions and workers rights were not respected.[54] Wealthy industrialists could act how they wanted to and enforced a system of internal labour discipline. Blacklists were drawn up and shared between owners, which included the names of those workers who were seen as troublemakers.[55] Once on the list, a worker would have difficulties getting hired. Hence, labour activism was to a great extent curtailed.

In terms of its rationale, informal discipline and nonlegal sanctions were seen as necessary to guarantee a system of hierarchical division of work (*i.e.* owner-worker relationship), which was crucial to maintaining a well-functioning economy. [56] Therefore, the State only played a marginal role and allowed great freedom for industrialists (*i.e. laissez-faire* capitalism).[57] By promoting private initiative and by operating in the shadow of the public legal system, the existence of a PLS can be substantiated. Whether or not this is true largely depends on the arguments being used.

B. The theory on present-day PLSs

Throughout history formal legal rules that impose negative sanctions for violations (and positive sanctions for compliance) are only one side of the coin.[58] The other side concerns out-of-court private initiatives that overrule (, arguably, any form of) legal enforcement.

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52 K. S. Madhavan, "*Business & Ethics - An Oxymoron?*", Bangalore: KS Madhavan, p. 40. Workers were needed to satisfy the demand for industrial products in society.

53 *Marx* refers to the distinction between the "industrialist" and "workers" as the "Proletariat" and the "Bourgeoisie". See K. Marx, "*Pre-Capitalist Economic Formations*", New York: International Publishers 1965, p. 30 [edited version by E. J. Hobsbawm].

54 M. Beggs-Humphreys, H. Gregor, and D. Humphreys, "*The Industrial Revolution*", Abingdon: Routledge 1959, p. 27.

55 K. E. Hendrickson, "*The Encyclopedia of the Industrial Revolution in World History*", Band 3, London: Rowmann & Littlefield 2015, p. 103.

56 J. Horn, L. N. Rosenband, and M. R. Smith, "*Reconceptualizing the Industrial Revolution*", Cambridge/London: The MIT Press 2010, p. 157.

57 G-H. Lévesque, "The Concrete Characteristics of Laissez-Faire Capitalism", *Relations industrielles / Industrial Relations, vol. 5, no. 5*, 1950, p. 41-42.

58 B. Bouckaert and G. de Geest, "*Encyclopedia of Law and Economics*", in: S. Panther (ed), "Non-Legal Sanctions", Aldershot: Edward Elgar 2000, p. 1000. According

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Classifying present-day private initiatives as PLS is not straightforward. Certain characteristics confine its ambiguous wording (Paragraph I). Perhaps the most distinctive feature of a present-day PLS, which, in my opinion, substantiates that the membrane between private and public law enforcement is rather rigid, relates to its ability to guarantee self-enforcement. Whereas legal systems have rules to govern the behaviour of citizens, within PLSs reliance is on nonlegal sanctioning.[59] Examples can be found in some present-day industries that are described in Chapter 2 (Paragraph II).

After this typology of sanctions has been described, increased efficiency as the principle argument for rejecting State-enforced law is discussed (Paragraph III).[60] This will be done by comparing the costs of entering into legally enforceable contracts with the costs of becoming a party to unenforceable (*i.e.* extralegal) contracts.[61]

I. Present-day PLSs: General characteristics

1. Self-governance in reputation-based networks vs. governance of members by and through associations

When a State is dysfunctional,[62] unwilling to provide institutions, or is inefficient,[63] private modes of governance can take over the State's role to enforce contracts. Nowadays, such private ordering by self-governance mainly occurs in the following two scenarios. The first scenario takes place when in reputation-based networks behaviour is organized on the basis of

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to *Panther*, legal scholars refer to sanctions as punishments, whereas sociologists refer to it as both punishments and rewards.

59 The terms "social sanctions" and "non-legal sanctions" are synonymous for the purpose of this research.

60 This Paragraph will only discuss the reasons for the existence of PLSs next to formal legal rules. How a PLS is established is only of marginal interest. For a detailed discussion of the (spontaneous) formation of PLSs, see A. Aviram, "The Paradox of Spontaneous Formation of Private Legal Systems", *John M. Olin Law & Economics Working Paper No. 192 (2D Series)* 2003, p. 1-72.

61 L. Bernstein, "Opting out of the Legal System: Extralegal Contractual Relations in the Diamond Industry", *The Journal of Legal Studies, Vol. 21, No. 1* 1992, p. 115.

62 J. McMillan and C. Woodruf, "Private Order under Dysfunctional Public Order", *Michigan Law Review, Vol. 98, No. 8* 2000, p. 2421.

63 A. K. Dixit, "*Lawlessness and Economics: Alternative Modes of Governance*", Princeton: Princeton University 2004, p. 4. Least efficient entails most costly.

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self-governance. This manifests itself when actors all belong to the same homogenous market and State-enforced law is insufficient to guarantee observance (*i.e.* to punish a deviating actor).[64] Exemplary for such private ordering to discipline an actor's opportunistic behaviour relates to stand-up comedy.[65] Persons engaged in comedy performed on a stage cannot adequately protect their intellectual property rights (*e.g.* jokes) against unfair use and duplication by other comedians on the basis of copyright laws.[66] Instead, they rely on social norm-based sanctions. Badmouthing, refusals to work with disobedient stand-up comedians and (a threat of) physical violence are some examples of extralegal sanctions to guarantee observance.[67] Put differently, a career can be hampered by questioning one's reputation.

The second scenario in which private ordering takes places occurs when trade associations step into the role of the State and govern the behaviour of their members on the basis of tailormade privately-designed rules.[68] For the purpose of this research, this category will be of principal interest, even though at times arguments can find support in relation to the first possibility of private ordering.[69]

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64 Homogenous market can best be defined as a marketplace where actors trade a particular type of commodities functionally identical with each unit traded.

65 D. Oliar, "There's No Free Laugh (anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-up Comedy", *Virginia Law Review, Vol. 94, No. 8* 2008.

66 Ibid., p. 1789. There is an absence of copyright lawsuits against stand-up comedians.

67 Ibid., p. 1791; According to *Dixit*, social-norm based sanctions are only effective, when three minimum conditions are met. First, deviating actors must be punished by willing parties. Second, in order to punish deviating actors in time and justly, infringements must be detected on a timely basis and must comply with some standards. Third, actors must have a continuous long-term relationship that exceeds the payoffs of opportunistic behaviour. See A. K. Dixit, "*Lawlessness and Economics: Alternative Modes of Governance*", Princeton: Princeton University 2004, p. 60-61.

68 S. Gomtsian, A. Balvert, B. Hock, and O. Kirman, "Between the Green Pitch and the Red Tape: The Private Legal Order of FIFA", *TILEC Discussion Paper* 2017, p. 8, 12.

69 This is because the second category of private ordering is more likely to transgress the bounds of EU Competition law and US Antitrust law. In other words, it is more suitable to research.

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2. Market of trust

It does not come as a surprise that under multilateral and repeated transactions, members of an association need to be able to "trust" other members. Reputation[70] is often crucial for the selection of business partners, contractual terms, the structure of a transaction, as well as for determining its price.[71] To be regarded as a reliable and acceptable trading partner that obeys the rules and bylaws of the relevant trade association, membership of an association is a crucial indicator.

Failure to comply with privately designed rules stemming from the relevant association can negatively affect the overall faith bestowed on membership. Consequently, it can hamper the trust placed in that association. Preventing short-term opportunistic behaviour by wrongdoers is imperative. In a market of trust, private-order decision-making can be regarded as a form of governance that yields economic efficiency and lowers transaction costs that is preferable to public-order regimes.[72]

3. Naming and shaming through an information exchange

As explained above, members of a trade association are more likely to conduct business with honest and reliable members when they search for potential trading partners. To punish those members that cheat, within a present-day PLS, a trade association often includes an arbitration clause in its bylaws.[73] This empowers such an institution to impose nonlegal sanctions on a disloyal industry actor for non-payment of an arbitral award. The most common extrajudicial measure relates to the dissemination of the names of industry actors that default on standardized contracts in what

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70 *Camerer* with respect to modern game theory explains that "*a player's reputation is crisply defined as the probability that she* […] *will take a certain action*". See C. F. Camerer, "*Behavioral Game Theory: Experiments in Strategic Interaction*", Princeton/Woodstock: Princeton University Press 2003, p. 445.

71 L. Bernstein, "Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions", *Michigan Law Review* 2001, p. 7.

72 E. D. Katz, "Private Order and Public Institutions", *Michigan Law Review, Vol. 98, No. 8* 2000, p. 2482.

73 V. Gessner, "*Contractual Certainty in International Trade: Empirical Studies and Theoretical Debates on Institutional Support for Global Economic Exchanges*", in: W. Konradi (red), "The Role of Lex Mercatoria in Supporting Globalised Transactions", Oxford/Portland: Hart Publishing 2009, p. 67.

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are known as blacklists and circulates them to other members.[74] Once being placed on a blacklist, wrongdoers that did not adhere to an arbitral award will have great difficulty in conducting trade with a non-blacklisted member. Sometimes even with non-members when the list has been made available to the general public.[75] Publishing the name of a recalcitrant party results in a forfeiture of its reputation. This not only ensures compliance with arbitral awards, it also can be seen as a necessary mechanism to safeguard the success of governance beyond the State-nation.[76] Nonetheless, due to institutional changes in culture, geopolitics and technology, the effectiveness of such a coordinated exchange of information may change.[77]

4. Market where a loss of social standing is important

In small, closed and homogenous markets, business and personal relations of members (*i.e.* natural persons) belonging to a trade association are intertwined.[78] Reputation thus is inherent to the social and business understanding that members have among themselves.[79] Non-conformity with an arbitral award stemming from specialized commercial arbitration not only damages the economic position of the trader, but also its social position and sometimes even the trader's family. Honouring one's agreement can, therefore, be seen as a moral obligation. Violating it will result in a loss of respect. When honest dealing is important in a privately organised market, this may be sufficient to deteriorate the standing of that member in the community altogether.[80]

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74 W. Mattli and T. Dietz, "*International Arbitration & Global Governance: Contending Theories and Evidence*", Oxford: Oxford University Press 2014, p. 190.

75 An example is the ICA, which will be discussed in Part 1, Chapter 2, A.

76 W. H. van Boom, I. Giesen, and A. J. Verheij, "*Gedrag en privaatrecht: Over gedragspresumpties en gedragseffecten bij privaatrechtelijke leerstukken*", in: J. van Erp, "Naming en shaming in het contractenrecht? Het reputatie-effect van schadevergoedingen tussen ondernemingen", The Hague: Boom Juridische Uitgevers 2008, p. 166.

77 B. D. Richman, "An Autopsy of Cooperation: Diamond Dealers and the Limits of Trust-based Exchange", *Journal of Legal Analysis, Vol. 9, No. 2* 2017, p. 279.

78 A good example is the DDC, which will be described in Part I, Chapter 2, C.

79 R. C. Post, "The Social Foundations of Defamation Law: Reputation and the Constitution", *California Law Review, Vol. 74, No. 691* 1986, p. 692.

80 K. Binmore, "*Game Theory and the Social Contract: Playing Fair*", Cambridge/London: The MIT Press 1994, p. 112.

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Although good faith, fair dealing, integrity and honesty are important for the formation of contracts and ultimately their impact on economic growth, it is debatable whether a loss of social standing also occurs when the members of a trade association are not natural persons but undertakings. This is because a legal entity does "*not possess […] the capacity for intimate relationships*".[81] Fortunately, a thought-intensive discussion can be put to a halt. Undertakings are represented by natural persons who deal with representatives of other member undertakings. Social shaming in the event of non-conformity with arbitral awards is to a large extent similarly important when only legal persons are involved.

Yet, if a self-policing market is not confined by a homogenous composition of members (*i.e.* close-knit community), but rather by a globally dispersed and changing group of members, loss of social standing in the community is negligible. Wrongdoers, be they natural persons or representatives of undertakings, often do not have any personal relationship with other traders. This truism can be contradicted when parties to a transaction know each other privately. Then, not adhering to an arbitral award can affect both social and business relations.

II. Typology of nonlegal sanctions in present-day PLSs

By failing or refusing to perform an award stemming from specialized commercial arbitration within a present-day PLS, the credibility of the relevant business community is under jeopardy. To prevent this, besides disseminating the names of wrongdoers in a blacklist (Paragraph 1), five others types of nonlegal sanctions are imposed by modern trade associations which operate within present-day PLSs. These are withdrawing membership (Paragraph 2), denying membership for expelled members on the basis of an additional entry barrier (Paragraph 3), refusing to deal with an excluded member (Paragraph 4), entering the premises of wrongdoers without a warrant (Paragraph 5) and limiting adequate access to public courts prior to arbitral proceedings and after an award (Paragraph 6).[82] These

81 E. J. Imwinkelried and R. D. Friedman, "*The New Wigmore: A Treatise on Evidence: Evidentiary Privileges*", Aspen: Aspen Law & Business Publishers 2002, p. 763.

82 Given that the effect of social sanctions declines with the number of violations, it is necessary to guarantee an optimal deterrence. See A. M. Polinsky and S. Shavell, "*Handbook of Law and Economics: Volume 2*", Amsterdam: Elsevier 2007, p. 1604.

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types of nonlegal sanctions are codified in the bylaws and rules of trade associations.

1. Blacklisting

A first type of nonlegal sanctioning concerns the practice of blacklisting or disseminating the names of recalcitrant industry actors. As explained above, the very real fear of being blacklisted often warrants compliance with arbitral awards. Damage of an industry actor's reputation as well as a loss of relation-specific advantages caused by being blacklisted are sufficient to draw this conclusion.[83] Not only is the actor's reputation damaged, it will also harm its future business. Repeated transactions with the same member (*i.e.* repeated deal) or other members; sometimes even nonmembers if a blacklist is made publicly available, are more difficult.

In theory and sometimes in practice, the targeted wrongdoer can respond to the increased risk of loss from future dealings. Concessions (*e.g.* offering a higher price) and/or reforms (*e.g.* terminating the employment contract of an individual who was responsible for not complying with an arbitral award) can offset reputational harm.[84] Whether this is true must be reviewed on a case-to-case basis after carefully examining all available information.[85]

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83 *Charny* considers both types of nonlegal sanctions pertaining to a breach of a commitment. See D. Charny, "Nonlegal Sanctions in Commercial Relationships", *Harvard Law Review* 1993, p. 392-393.

84 Quantifying reputation loss from a breach is not an easy task, as it can be considered unduly speculative and can be skewed towards the future harm done to the blacklisted industry actors without sufficiently taking into account concessions or reforms. Put differently, according to Willis Towers Wadson, "Preserving Your Reputation", *Willis Alert, Issue 17* 2011, p. 3, albeit about the insurance industry, but not less weighty that "*there is no magic potion* […] *that can repair a damaged reputation*." Figure 1 offers only a simplified view of how to calculate blacklisting-related reputational harm.

85 Combining the cost of lost business and the cost of reforms/concessions to avoid reputational harm can be seen as the "aggregate cost" of reputational damage.

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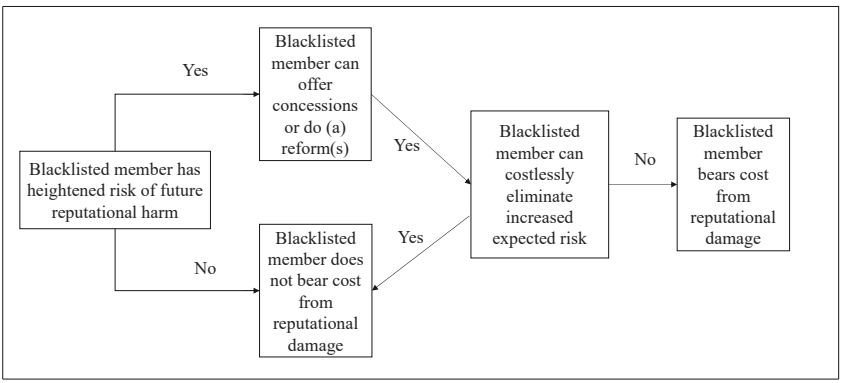
Figure 1: Calculating blacklisting-related reputational harm



2. Withdrawing membership

A second type of nonlegal sanctioning relates to the termination, removal or withdrawal of membership from a relevant trade association. At first glance, threatening defectors with ostracism may seem like an extreme measure in order to enforce cooperation.[86] Yet, members cooperate because they want to avoid such an extreme punishment.[87] Alienation of an excluded member undertaking not only damages a member's commercial reputation, it also takes away relation-specific advantages for no longer belonging to the relevant trade association.

However, this basic assumption that suggests that withdrawing membership is analogous to business harm can occasionally be negated. Three variables can offset the devastating impact of this type of nonlegal sanctioning. First, the likelihood of survival of the member undertaking after having its membership withdrawn (*i.e.* the corporate longevity of the business). When a member is insolvent, over-indebted, close to bankruptcy or bankrupt and survival of a company is inconceivable in the short- and

86 J. Prüfer, "Business Associations and Private Ordering", *TILEC Discussion Paper* 2012, p. 4.

87 First written proof of social ostracism can be traced back to 500 BC, when Athenians determined whether a member of a community, regularly a former political leader, should be exiled from the city for a period of ten years. This was done by casting votes on shards of clay. See K. D. Williams, "Ostracism", *Annual Review of Psychology* 2007, p. 428.

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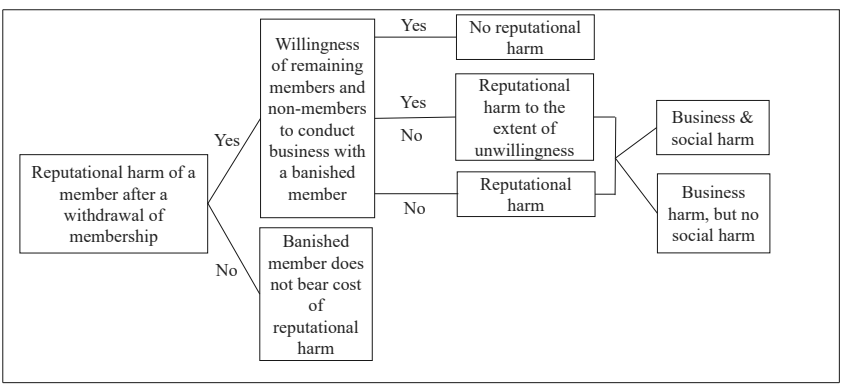
long-term, being banished will not result in reputational harm.[88] Second, the probability that remaining member and non-member undertakings are willing to conduct business with a banished member (*i.e.* the alacrity or readiness of members and non-members). Third, homogeneity and social standing of the members within the association is a factor that affects reputational harm (*i.e.* the degree of reputational harm). In markets where the business and social lives of members are intertwined, being banished can have far-reaching repercussions. It can disrupt social life and business altogether. Similar to calculating the reputational harm of being blacklisted, measuring damage to reputation after membership has been withdrawn, albeit a more far-reaching coercive measure, must be assessed on a case-by-case basis evaluating all available information.[89]

Figure 2: Calculating withdrawal of membership-related reputational harm



88 An insolvent, over-indebted, close to bankruptcy or bankrupt member undertaking can, when all the requirements in national law are fulfilled, continue to operate its business post-liquidation and post-bankruptcy. However, for the purpose of the first variable, it encompasses only the situation that a member company post-ostracism will not continue its business.

89 Figure 2 provides only a simplified overview of how to assess the extent of reputational harm for an excluded member belonging to a trade association.

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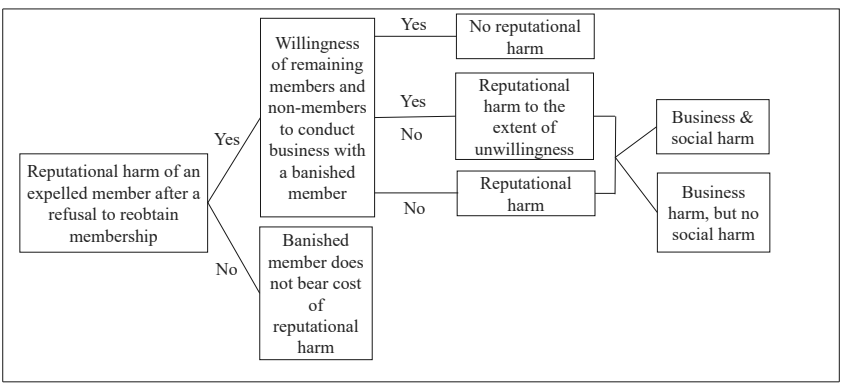
3. Denying membership for expelled members on the basis of an additional entry barrier

A third type of nonlegal sanctioning concerns the situation in which an expelled member is denied being re-admitted to membership of a relevant trade association (which withdrew the membership) on the basis of an additional entry barrier. By denying access to the trade association, the industry actor is forestalled from obtaining access to the services of a trade association. Similar to withdrawing membership, denying membership results in alienating the industry actor, which damages its reputational and takes away relationship-specific advantages. Much will depend on calculating the amount of reputational damage on a case-by-case basis.

Figure 3: Calculating denial to reobtain membership-related reputational harm



4. Refusing to deal with an expelled member

Sometimes within a legal regime driven predominantly by private legal enforcement, blacklisting and withdrawing membership cannot ensure sufficient deterrence to prevent non-compliance with arbitral awards stemming from specialized commercial arbitration. Alongside both nonlegal sanctions, a trade association can instruct its members to not conduct business with a banished former member.[90] In other words, the fourth type of non-

90 Interestingly, in G. Calliess and P. Zumbransen, "*Rough Consensus and Running Code: A Theory of Transnational Private Law*", Oxford/Portland: Hart Publishing 2010, p. 2110, the authors identify three types of non-enforcement mechanisms:

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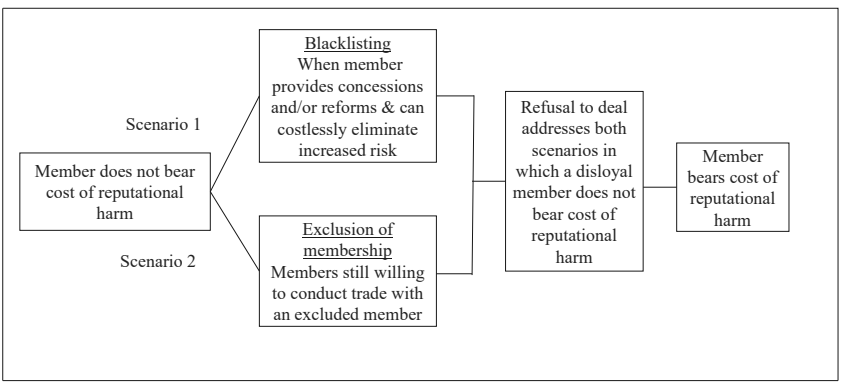
legal sanctioning can be referred to as refusing to deal with an expelled member.

At first glance it may appear like an extreme measure, perhaps even interchangeable with the term boycott. Notwithstanding this fear, it can serve as an important mechanism not to succumb to the situation in which blacklisting and ostracism appear ineffective. It not only increases the effect of deterrence for not complying with an arbitral award, it also - albeit not completely[91] - closes the gap. Mainly by completely damaging a targeted former member's commercial reputation and taking away all remaining relationship-specific advantages.

Figure 4: Addressing scenarios in which blacklisting and a withdrawal of membership do not achieve sufficient deterrence.



first, a reputation mechanism. Second, an exclusion mechanism. Third, private force or coercion. Whereas the last may refer to, in my opinion, a refusal to contract with an excluded member, the first two kinds of non-enforcement refer to blacklisting and withdrawing membership.

91 When a member is insolvent, over-indebted, close to bankruptcy or bankrupt and survival of a company is inconceivable in the short- and long-term, blacklisting, withdrawing membership and refusing to deal with an ostracized member will not result in reputational harm. However, if the company is active in a market where interpersonal relationships are important, nonlegal sanctioning can still harm the social standing of the persons belonging to the company.

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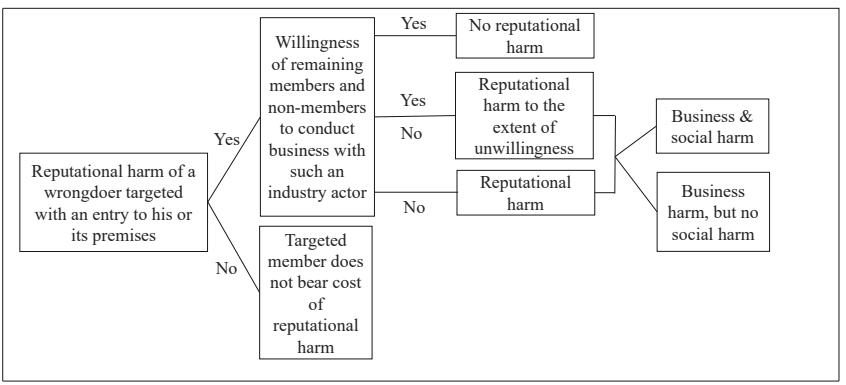
5. Entering the premises of a recalcitrant industry actor

A fifth nonlegal sanction to punish disloyalty by industry actors to satisfy an arbitral award relates to the possibility of a trade association to enter the premises of such an individual or undertaking. Obviously, such a privacy-invasive measure has the potential to harm the industry actor's reputation when other industry actors active in the market become aware of such an activity. Yet, reputational damage is lower when compared to the previously discussed extrajudicial measures.

Figure 5: Calculating entry to the premises of a recalcitrant industry actor-related reputational harm



6. Limiting adequate access to public courts prior to arbitral proceedings and after an award

The sixth and final nonlegal sanctioning measure relates to the limiting adequate access to public courts prior to arbitral proceedings and after an award. While this measure is atypical with regard to the previously discussed extrajudicial measures for the reason that it does not inflict reputational harm on a wrongdoer, it produces negative repercussions for disloyal industry actors. Without the possibility of judicial review at a public court, members are coerced into referring a dispute to specialized commercial arbitration and to forego any other review than that provided by a relevant trade association. This has the risk of hampering the business interests of targeted industry actors.

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C. Present-day PLSs vs. State-enforced contract law

Public law encompasses everyone and does not empower individuals/companies to choose whether they are bound by it or not. Put differently, law can be considered non-excludable.[92] Yet, in some markets where there is acceptance among participants, the operation of State-supplied law can be ousted.[93] Assessing the reasons under which this occurs is not straightforward and may differ in relation to each industry that relies on privately-tailored rules. Nonetheless, some general characteristics can be identified.

I. Inefficiency of the court system

Perhaps the main reason that explains the existence of present-day PLSs as a substitute for failing public institutions concerns the weaknesses of the court system. In some commercial markets protection against opportunistic behaviour of market participants that are members of a trade association is often so inefficient that compliance at low enforcement costs can only be achieved by resolving conflicts through extrajudicial arbitration.

More precisely, three reasons explain the suboptimal cost of *post facto* remedies offered by public courts: First, the pace of litigation. Because of the lengthy nature of many trials, sometimes caused by appeals that can go as far as putting a halt to or unnecessarily slowing down the decision-making process, for example, when they are frivolous and unavailing, the cost of judicial decision-making is high.[94] Attorneys' fees and expenses also bear

92 B. Chaplan, "The Economics of Non-State Legal Systems", *Libertarian Alliance* 1997, p. 13.

93 C. E. Mitchell, "*Contract Law and Contract Practice: Bridging the Gap between Legal Reasoning and Commercial Expectation*", Oxford/Portland: Hart Publishing 2013, p. 30; Under the two-dimensional taxonomy, where there are two types of enforcement strategies, including enforcement through State judicial institutions and private enforcement initiatives that takes place outside the realm of State-supplied law (*i.e.* the formal vs. informal divide), the non-excludability of law is to some extent renounced.

94 J. Dammann and H. Hansmann, "Globalizing Commercial Litigation", *Cornell Law Review, Vol. 94, No. 1* 2008, p. 1. The cost of judicial decision-making varies widely from country to country. "*In some jurisdictions, the courts resolve commercial disputes quickly, fairly, and economically, while in others, they are slow, inefficient, incompetent, biased, or corrupt.*"

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evidence to the high cost of litigation.[95] In contrast, specialized commercial arbitration offers more flexible and speedy proceedings that prevent unnecessary delays.[96]

Second, judges of the court often lack the expertise to deal with disputes that arise from a specific industry under review. Put differently, judges often have difficulty in understanding and weighing the evidence and values of a conflict between market participants that are active in a specific industry.[97] As a result, the outcome of a judgment can be uncertain. This surprise effect can to some extent be offset when the relevant judge in the proceeding has specific industry experience and knowledge. Yet, an in-depth understanding of the *operatus modi* by such an individual is an exception rather than a refutation of the presumption that he lacks expertise and know-how.[98] In private dispute resolution, arbitrators are often selected from among market participants and understand the industry much better. Therefore, enforcement costs are more predictable and, as a rule, lower.

Third, even in the (unlikely) event that the result of legal proceedings is a satisfactory judgment, given that commercial trade is often global with market participants dispersed over different countries or regions, recognition of a foreign judgment ("RFJ") is not always possible and may prove costly. Some countries may be unwilling, whereas others make it almost impossible to recognize and enforce such a judgment.[99] Specialized commercial arbitration within a PLS to a large prevents added costs incurred

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95 E. Sussman and J. Wilkinson, "Benefits Of Arbitration for Commercial Disputes", *Dispute Resolution Magazine* 2012; Administrative fees of arbitration can also be significant and, in theory and practice, can match those of normal courts. See A. Redfern, and M. Hunter, "*Law and Practice of International Commercial Arbitration*", London: Sweet & Maxwell 2004, p. 24.

96 C. N. Candlin, "*Discourse and Practice in International Commercial Arbitration: Issues, Challenges, and Prospects*", London/New York: Routledge 2016, p. 265. While *Candlin* does not talk about specialized commercial arbitration, he talks more generally about the advantages of arbitration in general. Yet, his arguments also have merit with regard to private dispute resolution.

97 Even though a judge can request an expert testimony, he still is responsible for deciding a case on the merits and quantifying the damages that have to be awarded to the claimant. Albeit helpful for the judge, such an expert testimony can increase the duration of the case and, thus, cause considerable delay.

98 Incidental expertise of the judge responsible for a case cannot be expected as a general rule.

99 For example, recognition and enforcement of foreign judgments in China is very limited. If not allowed in arrangements and treaties, the only legal basis for recognizing and enforcing a foreign judgment is when the principle of reciprocity is

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from the RFJ beyond its jurisdiction. This is because arbitral awards stemming from such a private mode of dispute resolution do not need to be recognized and enforced by a foreign court when there is a cross-border dispute. Rather, nonlegal sanctions ensure compliance with arbitral awards.

Aside from cost-related reasons, the other main benefit of private enforcement over judicial proceedings and, thus, bearing testimony to the ineffectiveness of the court systems, concerns the confidentiality of arbitral awards stemming from specialized commercial arbitration.[100] Court's publish judgments that include the names of the parties to proceedings as well as the reasons for the conflict on, *inter alia*, the internet. It is possible that trade secrets and/or intellectual property may become publicly available after proceedings, which is harmful for both parties in a conflict. In contrast, in specialized commercial arbitration, parties have complete confidentiality. Hearings are secret, public records are absent and parties control which information may become publicly available. Trade secrets and intellectual property remain confidential.

II. Increased contractual security / Safeguarding the sanctity of contract

A second reason that clarifies the presence of present-day PLSs relates to the failure of formal law to guarantee optimal contractual security. In

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upheld. See Article 281 of the Mainland CPL. This Article provides that "*After a people's court reviews an application or pleading for the recognition and enforcement of a legally effective judgment or ruling rendered by a foreign court according to the international treaties concludes or acceded to by the PRC or based on the principle of reciprocity, if the court considers that such a judgment or ruling does not contradict the basic principles of the laws of the PRC nor violates the national, social, and public interest of PRC, the court may render a ruling to recognize its force. Where the enforcement is necessary, the court may issue an order to enforce a foreign judgment according to the relevant provisions of this Law, if a legally effective judgment or ruling rendered by a foreign court contradicts the basic principles of the law of the PRC or the national, social, and public interest of PRC, the people's court shall reject the application for recognition and enforcement.";* Yet, mainland courts have only sporadically used this principle to recognize a foreign judgment. See, *inter alia*, J. Huang "*Interregional Recognition and Enforcement of Civil and Commercial Judgments*", Oxford/Portland: Hart Publishing 2014, p. 58-59.

100 M. J. Block, "The Benefits of Alternate Dispute Resolution for International Commercial and Intellectual Property Disputes", *The Digital Journal of Rutgers School of Law, Vol. 44* 2016, p. 7-8. Albeit not specifically relating to specialized commercial arbitration, confidentiality plays a similar role.

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global industries it is crucial that when market participants duly enter into a contract that they honour their obligations. Parties must not be able to escape their contractual obligations, but must keep their bargain (*i.e.* the principle of the sanctity of contract).[101] However, sometimes market participants have an incentive to deviate from or terminate a contract. This is first and foremost to be expected, when entering into a contract with another party brings more benefits (*e.g.* money) than the original contract and the threat of court damages does not offset those benefits.

A hypothetical example would be the market for cotton, in which weather conditions, insect damage, genetics and diseases influence the kilo price.[102] As a result, price fluctuations are not uncommon. When there is a bad cotton harvest, prices will be higher on the ground of scarcity and when there is a good season, prices will be lower due to an (over-)abundance of cotton. By taking into account this general awareness, imagine the scenario where a supplier enters into a futures contract with a distributor (*i.e.* Distributor A), in which the latter agrees to pay € 1,600,000 for 1,000 kilos of cotton that must be collected and paid six months later.[103] While providing a fixed price security for both parties, it is possible that six months later the availability of cotton is so limited owing to a specific disease that the supplier can sell 1,000 kilos of cotton to another distributor (*i.e.* Distributor B) for € 2,200,000 instead. If the expected cost of legal damages would only be € 200,000, the supplier has made a profit of € 400,000.[104]

In other words, in such a scenario public law would be unable to prevent contract deviations and safeguard the principle of the sanctity of contract. To overcome this, nonlegal sanctions made within a PLS would offer

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101 P. Mäntysaari, "*The Law of Corporate Finance: General Principles and EU Law - Volume II: Contracts in General*", Berlin/Heidelberg: Springer 2010, p. 159. Generally, a contract is binding.

102 H. Adanacioglu, "The Futures Market in Agricultural Products and an Evaluation of the Attitude of Farmers: A Case Study of Cotton Producers in Aydin Province in Turkey", *New Medit, No. 2* 2011, 58.

103 J. B. Bittman, "*Trading and Hedging with Agricultural Futures and Options*", Hoboken: John Wiley & Sons 2013, p. 2. A futures contracts is a standardized contract between a buyer and a seller to exchange commodities for an agreed-upon price that is not the result of negotiations and is delivered on a specific delivery date.

104 Obviously, it is also possible that the wholesaler deviates from the contract, when the original futures contract with the supplier is less beneficial for him and expected legal damages are lower than conducting business with another supplier for the specific quantity of cotton.

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a better protection against contract deviation.[105] Blacklisting, withdrawing membership and refusing to deal predominantly harm the reputation of such a disloyal supplier and are better deterrents. Where public law fails, private legal enforcement steps in.

III. Lower transaction costs

A third reason that rationalizes the setting aside of public law by present-day PLSs has to do with decreased transaction costs. According to *Coase*, in a perfect society without any transaction costs, contracting between participants active in a specific market is efficient and will be unaffected by legal rules.[106] Obviously, the presence of such a utopia can immediately be rebutted because we do not live in a perfect society and transaction costs are to be expected. This is particularly true with regard to obtaining legal redress in public courts. Judicial enforcement is more costly than nonlegal sanctioning, as it requires contractual parties to invest in three and sometimes four[107] different types of transaction costs. First, they must find reliable parties to limit the likelihood of disloyalty (*i.e.* contact costs).[108] Second, they must negotiate and draft a contract (*i.e.* contracting costs). Third, after an agreement enters into force they must *ex post* monitor compliance

105 Such a focus to change the strategic environment by inducing market participants to behave in a desired way, so that the resulting equilibrium behaviour is efficient is called "contract theory".

106 For a discussion of the Coase Theorem and its understanding by other authors, see B. Bouckaert and G. de Geest, "*Encyclopedia of Law and Economics, Volume I. The History and Methodology of Law and Economics*", in: S. G. Medema (ed), R. O. Zerbe, "The Coase Theorem", Cheltenham: Edward Elgar 2000, p. 837-838.

107 The fourth and last transaction cost concerns the resolution of a dispute after a breach of contract, which is not always necessary.

108 C. Kirchner and A. Picot, "Transaction Cost Analysis of Structural Changes in the Distribution System: Reflections on Institutional Developments in the Federal Republic of Germany", *Journal of Institutional and Theoretical Economics, Vol. 143* 1987, p. 64; For the interested reader: a categorization of transaction costs was first discussed by *Williamson*. He explained that transaction costs consist of *ex-ante* costs (*i.e.* the costs of negotiating and drafting a contract) and *ex-post* costs (*i.e.* the costs of policing and enforcing the contract after disloyalty). See O. E. Williamson, "*The Economic Institutions of Capitalism*", New York: Macmillan 1985, p. 20; S. Wengler, "*Key Account Management in Business-to-Business Markets: An Assessment of Its Economic Value*", Berlin: Deutscher Universitäts-Verlag 2006, p. 112. Yet, *Williamson* fails to give a clear definition of what can be understood under the term transaction costs.

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with its terms (*i.e.* monitoring costs). Fourth, in the event of a breach of contract disputes must be resolved (*i.e.* resolution costs).

Despite these transaction costs within a PLS also being relevant, they are significantly lower. Because of nonlegal sanctioning market participants can more easily select business partners with a good reputation or standing belonging to the same trade association. Notwithstanding, they still bear the risk of disloyalty in the event they contract with parties that are not members of a trade association. With regard to *ex post* monitoring costs, the transaction costs within the public legal system and within a PLS are comparable. Resolution costs to resolve disputes, on the other hand, are more cost-efficient and expeditious in private commercial arbitration.

IV. Lower distribution costs

Lower prices for end-users in the wake of decreased distribution costs is a last reason to explain the manifestation and appearance of present-day PLSs. On the grounds that PLSs benefit market participants in certain commercial industries by offering a more efficient mechanism to resolve contract disputes, contractual security is higher and transaction costs are lower compared to the situation absent such a system. As a result, the costs incurred to deliver a product to end-users will decrease (*i.e.* distribution costs). Not only will those individuals benefit from lower prices, the market participants will also benefit more. This is because demand will be higher owing to lower prices.[109]

109 B. Atkinson and S. John, "*Studying Economics*", Basingstoke/New York: Palgrave Macmillan 2001, p. 9. This statement is rather a general assumption and can occasionally be rebutted. Under which this is possible will not be discussed, as it will require a long discussion by taking into account a comprehensive economic analysis, supported by algebraic calculations.

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Chapter 2: Examples of Present-day PLSs in which Private-enforcement / Nonlegal Sanctioning Ensures Compliance

A. *Introduction*

In the current legal and political environment in some industries, State-supplied commercial law proves to be an insufficient deterrent. *Morgan* suggests that operational PLSs can be detected in over 50 industries.[110] Globally, but also domestically, private enforcement as a low-cost substitute for commercial laws promulgated by a State legislature can be found in the diamond, cotton, grain, feed, rice, peanut, rubber, hay, tea, burlap, printing and independent film industry. This is done by setting up trade associations in which trade rules (that apply to all members and even non-members when this code of behaviour is chosen to govern a contract) are defined and codified and enforced through specialized commercial tribunals.

As the success of such specialized commercial arbitration largely depends on nonlegal sanctions, this Chapter investigates how compliance with arbitral awards is guaranteed. To answer this question, six cases of successful commercial trade associations are presented: (i) the ICA (Paragraph B); (ii) the DDC (Paragraph C); (iii) GAFTA (Paragraph D); (iv) the FCC (Paragraph E); (v) the LME (Paragraph F); and (vi) FOSFA (Paragraph G). These cases were chosen because of the detailed insight they provide into six different industries. More specifically, three reasons can substantiate such a selection: first, the chosen trade associations operate in markets where nonlegal sanctioning is most obvious. Second, the trade rules provided by these trade associations form the basis of the usual business between industry actors in each relevant commodities industry. Third, the trade associations represent the largest number of members that are active within specific commodities industries as opposed to other trade associations.

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110 J. Morgan, "*Contract Law Minimalism: A Formalist Restatement of Commercial Contract Law*", Cambridge/ New York: Cambridge University Press 2013, p. 208.

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To understand how nonlegal sanctioning in each relevant trade association works, it is insufficient to merely give a brief taxonomy of private enforcement. This Chapter adopts the following structure: first, a detailed overview/characterization of the industry is given for each trade association (Paragraph B-H, I). Second, the types of nonlegal sanctions specific to each trade association in order to enforce arbitral contracts stemming from specialized commercial arbitration are described (Paragraph B-H, II). Third, the rationale of nonlegal sanctioning pertaining to each trade association is explained (Paragraph B-H, III).

B. The International Cotton Association

I. Background

1. History

Because raw cotton could not be grown in the British Isles, it needed to be imported from distant (semi-) tropical suppliers. This process of importation started in the late 18th and early 19th century, in particular in the seaport of Liverpool. [111] During this time, Liverpool became the largest cotton market as well the major port in which merchants sold this type of raw material to spinners.[112]

To safeguard the interests of traders and to regulate the market, bodies that represent the interests of these persons needed to be established. Consequently, the Liverpool Cotton Brokers Association was founded in 1841 despite some form of cooperation having already existed prior to this

111 Historic Society of Lancashire and Cheshire, "*Transactions of the Historic Society of Lancashire and Cheshire*", in: N. Hall (ed) "A 'Quaker Confederation'? The great Liverpool cotton speculation of 1825 reconsidered", Liverpool: Historic Society of Lancashire and Cheshire, Vol. 151 2002, p. 1.

112 Historic Society of Lancashire and Cheshire, "*Transactions of the Historic Society of Lancashire and Cheshire*", in: N. Hall (ed) "The Liverpool Cotton Market: Britain's First Futures Market", Liverpool: Historic Society of Lancashire and Cheshire, Vol. 149, 2000, p. 99; Yet, the manufacture of cotton stagnated in all of the UK as well as in Europe. For example, it took 67 years to double the annual amount of cotton used in clothes to 3.87 million pounds. In the USA, this was the daily amount supplied to spinners. See S. Beckert, "*Empire of Cotton: A Global History*", New York: Vintage Books 2014, p. 40.

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date.[113] The initial success of the association was founded on two main reasons: first, it gave merchants who sought membership access to facilities and, second, it protected them against unfair competition. Unfortunately, despite these benefits, merchants faced three major inconveniences. First, due to the laying of the transatlantic telegraph cable, some brokers dealt directly with traders in the United States.[114] Second, all cotton needed to go through a clearinghouse, which caused delays. Third, merchants who wanted to important cotton needed to pay 1% commission to brokers when they wanted to hedge their trades. These disadvantages resulted in some quarrels between merchants and brokers which in 1881 led to the formation of a rival association, namely the Liverpool Cotton Exchange.[115] One year later, since having two separate associations was rather ineffective, both associations merged into the ICA.[116] Even though the ICA was closed from 1946 to 18 May 1954 and despite its shares being sold in 1963 and again in 1964, it took up residence in its current offices in Liverpool in 1967.

2. Legal form

Ever since February 1963 and under the current Companies Act 2006[117], the ICA is a "private limited company by guarantee" with membership open for individuals and limited companies that are engaged in the cotton

113 S. Alford, J. Barrow, and S. J. D. Nigel Hall, "*Northern History*", in: N. Hall (ed), "The governance of the Liverpool raw cotton market, c. 1840-1914", Abingdon: Taylor & Francis, Vol. 153, Is. 1, 2016, p. 98; Even though the date of establishment of the Liverpool Cotton Brokers Association is vague, it is generally accepted that it was formed in 1841. See T. Ellison, "*The Cotton Trade of Great Britain: including a history of the Liverpool cotton market and of the Liverpool Cotton Brokers' Association*", London: Effingham Wilson 1886, p. 181–182.

114 P. Norman, "*The Risk Controllers: Central Counterparty Clearing in Globalised Financial* Markets", Chichester: John Wiley & Sons 2011, p. 60.

115 W. O. Henderson, "*The Lancashire Cotton Famine 1861 - 65*", New York: Augustus M. Kelley 1969, p. 34.

116 J. A. Todd, "*The cotton world: a survey of the world's cotton supplies and consumption*", London: Sir I. Pitman & Sons 1927, p. 91.

117 Since 2006 the law to incorporate a limited company can be found in Part 2 of the Companies Act 2006 (to access: http://www.legislation.gov.uk/ukpga/2006/46/pdfs/ukpga_20060046_en.pdf).

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trade.[118] This implies that the ICA has legal identity and that its members are protected against legal liability for the association.[119] However, even though full liability is excluded, in the course of liquidation each member is still liable for the nominal amount it has agreed to pay (*i.e.* the guarantee).[120] Other characteristics of the ICA as a "private limited company by guarantee" include the absence of a fixed number of members[121] and for the major reason that payment of the guarantee is postponed on the operation on a not-for-profit basis.[122]

3. Institutional structure

The ICA is divided into three branches: the legislative (*i.e.* the Annual General Meeting), the executive (*i.e.* the Board of Directors), and the judicial (*i.e.* the Arbitration Tribunal). The Annual General Meeting as stipulated in Bylaw 100(6) of the ICA Bylaws and Rules (2018) is a meeting of individual members to elect the ordinary directors belonging to the Board of Directors on a yearly basis (Bylaw 100(5) of the ICA Bylaws and Rules (2018)).[123] Their competence is to manage the ICA on a daily and active basis. In addition, the members choose the associate directors, whose main task is to represent the interests and concerns of all international members belonging to the ICA.[124]

After the Board of Directors is installed, the directors then elect the President as well as the First and the Second Vice President (Bylaw 100(5) of

118 J. Roche, "*The International Cotton Trade*", Cambridge: Woodhead Publishing 1994, p. 17.

119 J. Clarke, "*Managing Better: Becoming a Limited Company*", Dublin: Combat Poverty Agency 1996, p. 2.

120 Part 1, Article 3 (3) of the Companies Act 2006; Limited liability for the members of the ICA is established in Article 5 of the Articles of Association of the International Cotton Association (to access: https://www.ica-ltd.org/wp-content/uploads/2018/10/Articles_Nov2018.pdf).

121 Article 110 of the Articles of Association of the International Cotton Association.

122 J. Clarke, "*Managing Better: Becoming a Limited Company*", Dublin: Combat Poverty Agency 1996, p. 2; J. Law, "*A Dictionary of Law*", Oxford: Oxford University Press 2015, p. 371.

123 Bylaws and Rules of the International Cotton Association Limited of 2018 (to access: https://www.ica-ltd.org/media/layout/documents/rulebooks/2018-11-rulebook-en.pdf).

124 https://www.ica-ltd.org/about-ica/our-board/.

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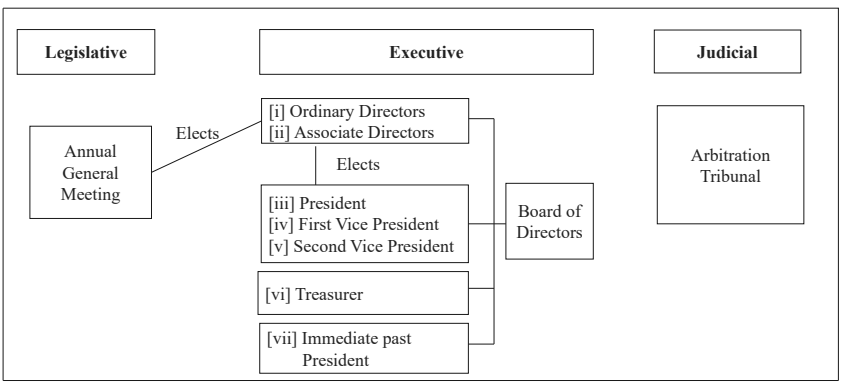
the ICA Bylaws and Rules (2018)) who have the same competences (Bylaw 104) and elect committees and their Chairmen (Bylaw 407 of the ICA Bylaws and Rules (2018)). These committees discuss various topics of importance in the transnational cotton industry. The third layer that completes the organizational governance within the ICA concerns the Arbitration Tribunal and can be found in Sections 3 and 4 of the ICA Bylaws and Rules (2018). This disciplinary procedure is thoroughly discussed in Paragraph 5.

Figure 6: Institutional structure within the ICA



4. Membership

According to the website of the ICA, the association has more than 550 members internationally and perceives itself as the world's leading international trade organisation and arbitration provider in the international cotton trade.[125] As can also be seen on the association's website, members are divided into two classes.[126] The first class comprises private individual members or natural persons.[127] The second class includes member companies that, according to Bylaw 100(21) of the ICA Bylaws and Rules

125 https://www.ica-ltd.org/about-ica/.
126 See also Article 1 of the Articles of Associations of the International Cotton Association.
127 Currently there are 238 private individual members. See https://www.ica-ltd.org/safe-trading/member-search/.

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(2018) fall within one of the following five categories.[128] The first category concerns a "principal firm", which includes firms that are merchants, producers or mills and are registered as such under the Bylaws (Bylaws 100(24) and 405(1) of the ICA Bylaws and Rules (2018)). The second category encompasses an "association member firm", which comprises producers or mills that are also members of an affiliated association related to the cotton industry that declared its support of the Bylaws and principles of the ICA (Bylaw 405(4) and (5) of the ICA Bylaws and Rules (2018)). The third category includes an "affiliate industry firm", which signifies a company or organisation that provides a service to the cotton trade and is registered as such under the Bylaws (Bylaws 100(17) and 405(2) of the ICA Bylaws and Rules (2018)). The fourth category entails an "agent firm" that brings a principal firm into contractual relationships with other parties and is registered as such under the Bylaws (Bylaws 100(18) and 405(3) of the ICA Bylaws and Rules (2018)). The last category is the company related to a principal firm or an affiliate firm (*i.e.* a "related firm") (Bylaw 100(29) of the ICA Bylaws and Rules (2018)).

Following this taxonomy, one can draw the conclusion that membership is open for almost all individual persons and firms that at least have some connection to the cotton industry. Yet, granting membership is not straightforward. Each firm seeking membership needs to comply with Articles 6 to 17 of the Articles of Association of the ICA and Bylaws 400 to 405 of the ICA Bylaws and Rules (2018). Following these rules, a potential member that has a connection with the cotton industry and that falls within the above described definition of membership needs to fulfil three additional requirements prior to being accepted.[129] First, the potential member must be proposed by two members of the ICA (Article 13.1 of the Articles

128 Currently there are 324 member firms. See https://www.ica-ltd.org/safe-trading/member-search/.

129 For historic reference only, at a meeting on 18 February 1841 *Messrs*, *Clare* and *Gill* proposed the following resolution that was accepted unanimously: "*no individual shall be admitted a member of the Association unless he shall have served an apprenticeship as a broker in an office where the cotton brokerage business is carried on, or have been in business at this port for three years at the least as a cotton broker, and unless such individual shall be proposed and seconded in the usual manner after one week's notice having been given, and the meeting generally by a majority thereof approves him as a member.* […] *That in future no individual shall have a right of membership in consequence of his being taken into partnership by any existing member, and that those individuals only who have the management of the cotton department in concerns carrying business as general brokers, are eligible as members, being duly elected, or being already members of the Association*". See T. Ellison, "*The cot-*

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of Association of the ICA) that are both resident in different countries (Article 13.3 of the Articles of Association of the ICA) without being a member within the same firm as the candidate (Article 13.2 of the Articles of Association of the ICA). If a potential member cannot find two members, the President of the ICA may second as a *locum tenens* (Article 13.4 of the Articles of Association of the ICA). An application requesting membership can be rejected when a member has filed objections to the application within a six-day deadline following the application for membership, unless directors overturn the disapproval (Articles 16 and 17 of the Articles of Association of the ICA). Second, the potential member firm must provide information to the directors of the ICA, including the constitution, capital and nature of the firm (Article 15 of the Articles of Association of the ICA). Third, the potential member must pay a registration fee (Bylaw 404(1) of the ICA Bylaws and Rules (2018) and Article 38.1 of the Articles of Association of the ICA).

5. Specialized commercial arbitration

a. A dichotomy of arbitration forms

In addition to maintaining trading rules, the ICA provides a well-organised system of specialized commercial arbitration after a dispute arises. In fact, it provides two forms of arbitration.[130] The first concerns "quality arbitration" for disputes arising from the manual examination of the quality of cotton and/or erroneous quality characteristics that can only be determined by "instrument testing" (Bylaw 300(1) of the ICA Bylaws and Rules (2018)). The second form pertains to "technical arbitration" and addresses all other non-quality disputes when the value of a dispute is above $75,000 (Bylaw 300(1) of the ICA Bylaws and Rules (2018)). In the event a disputes falls below this monetary sum, "small claims technical arbitration" is applicable (Bylaw 316(1) of the ICA Bylaws and Rules (2018)). Both forms of

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ton trade of Great Britain: including a history of the Liverpool cotton market and of the Liverpool Cotton Brokers' Association", London: Effingham Wilson 1886, p. 184. This illustrates that already in the 19th century some extra requirement needed to be met by potential members in order to gain membership of the ICA.

130 https://www.ica-ltd.org/arbitration/.

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arbitration are available to members of the ICA, but also to non-members that contracted under the ICA Bylaws and Rules (2018).[131]

b. Selection of arbitrators

i. Quality arbitration

The arbitration tribunal of the ICA with regard to quality arbitration is normally composed of two arbitrators (Bylaw 331(1) of the ICA Bylaws and Rules (2018)), one selected by the claimant and one by the defendant (Bylaw 332(3) of the ICA Bylaws and Rules (2018)), unless the parties to the conflict unanimously agree that one arbitrator is sufficient to offer redress (Bylaw 332(1) of the ICA Bylaws and Rules (2018)). More specifically, the claimant must propose an arbitrator to the defendant, either by informing the defendant that it wishes to have a sole arbitrator (Bylaw 332(1) of the ICA Bylaws and Rules (2018)) or not (Bylaw 333 of the ICA Bylaws and Rules (2018)).[132] In the event of choosing only one arbitrator, the defendant can within a timeframe of 14 days either accept (by acquiescence) the sole arbitrator or appoint a second arbitrator (Bylaws 332(1) and 334 of the ICA Bylaws and Rules (2018)). The selection of this person must then be accepted (by acquiescence) or rejected within a timeframe of seven days (Bylaws 332(2) and 335(1) of the ICA Bylaws and Rules (2018)). If the claimant does not ask the defendant to nominate a sole arbitrator, the defendant also has 14 days to nominate a second arbitrator and, following such selection, the claimant again has seven days to file reasoned objections (Bylaws 333 and 335(1) of the ICA Bylaws and Rules (2018)). Provided that a party fails to nominate or find a replacement, the President of the

131 In quality arbitration non-members must also apply for arbitration (Bylaw 330(1) of the ICA Bylaws and Rules (2018)). In relation to technical arbitration such requirement seems non-existent. However, it is likely that non-members must also register for arbitration (Bylaw 330(1) of the ICA Bylaws and Rules (2018) by analogy).

132 Choosing an arbitrator must be a well-contemplated choice, as arbitrators can adjudicate based on their political ideology and/or any other bias and may act in self-interest to further their career. See P. Nunnenkamp, "Short Note: Biased Arbitrators and Tribunal Decisions Against Developing Countries: Stylized Facts on Investor-state Dispute Settlement", *Journal of International Development* 2017, p. 851. Whereas *Nunnenkamp* makes these truisms with regard to international investment arbitration, in my opinion, they also apply to specialized commercial arbitration.

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ICA can nominate a substitute arbitrator (Bylaw 335(2) of the ICA Bylaws and Rules (2018)). As a prerequisite, a period of 14 days following a notice of that intention must have elapsed (Bylaw 335(3) of the ICA Bylaws and Rules (2018)). However, either party can appeal this intention to the Board of Directors within seven days of that timeframe (Bylaw 336(4) of the ICA Bylaws and Rules (2018)).

After two arbitrators are confirmed and contingent upon disagreement, both parties have 21 days to appoint a referee to resolve the dispute (Bylaws 331(2) and 336(3) of the ICA Bylaws and Rules (2018) by analogy).[133] Interestingly, to be selected as a referee or an arbitrator, a person must be a member of the ICA (Bylaw 331(3) of the ICA Bylaws and Rules (2018)) who has successfully completed the basic level examination and advanced training that focuses on contract law and the Sales of Good Act 1979, arbitral issues and application of the Arbitration Act 1996 to the cotton market.[134] There is no prohibition on lawyers being selected as an arbitrator. For non-members of the ICA that contract under the Bylaws of the ICA with members of this association, this rule places them at a disadvantage, because they are often more unfamiliar with members that can offer arbitration as opposed to members of the ICA.

In appeal, the case is heard by a Quality Appeal Committee, consisting of two, but not more than four, members who are considered the most qualified (Bylaw 352(4) of the ICA Bylaws and Rules (2018)). These arbitrators are selected by the chairman and deputy chairman of the Quality Appeal Panel.

ii. Technical arbitration

Disputes, when contracting under the Bylaws of the ICA, that are of a non-quality nature are normally heard by an arbitration tribunal consisting of three arbitrators, unless both parties agree that a single arbitrator (*i.e.* qualified arbitrator) is sufficient to resolve the difference of opinions between the claimant and the defendant (Bylaw 303 of the ICA Bylaws and Rules

133 Bylaw 336(3) of the ICA Bylaws and Rules (2018) enables the President of the ICA to revoke an appointment and appoint an alternative arbitrator, when two arbitrators do not appoint a referee within 21 days after being appointed. In analogy to this rule, a referee must be selected within the 21-day timeframe following disagreement.

134 https://www.ica-ltd.org/advanced-level-arbitrator-training/; https://www.ica-ltd.org/basic-level-arbitrator-training/.

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(2018)). In more detail, the claimant has the right to appoint an arbitrator or to propose a sole arbitrator and the defendant must then within a timeframe of 14 days either appoint a second arbitrator or agree to a sole arbitrator (Bylaw 304 (1)). Within seven days after selecting the second arbitrator, the ICA will appoint a third arbitrator who is selected from the members of the ICA Arbitration Strategy Committee (Bylaw 304(2) of the ICA Bylaws and Rules (2018)).[135] In the event that either party has failed to nominate an arbitrator or find a replacement, the ICA will select an arbitrator to fill the vacancy (Bylaw 304(7) of the ICA Bylaws and Rules (2018)). Similarly, as compared to quality arbitration, the arbitrators must be qualified members of the ICA under the standards set by the Board of Directors (Bylaw 304(4) of the ICA Bylaws and Rules (2018)). Also here, lawyers are not barred from acting as an arbitrator. Obviously, this raises a similar burden for non-members of the ICA that contract under the association's Bylaws as compared to quality arbitration, since they are often unfamiliar with the arbitrators. In appeal, the appeal committee is composed of a Chairman, who is selected from the ICA Arbitration Strategy Committee and four other arbitrators (Bylaw 314(4) of the ICA Bylaws and Rules (2018)).

c. Choice of tribunal and jurisdiction of arbitration tribunals

i. Quality arbitration

Quality arbitration is held at the place which the parties to the agreement contracting under the Bylaws of the ICA opted for (Bylaw 33(1) of the ICA Bylaws and Rules (2018)). When such consensus is absent, the arbitration tribunal will be held at the arbitration room of the ICA in Liverpool. Notwithstanding the place of arbitration, any arbitral awards rendered by a tribunal that is in conformity with the applicable procedural rules drafted in the Bylaws of the ICA is stamped and made effective in Liverpool (Bylaw 338(3) of the ICA Bylaws and Rules (2018)). Although a choice of

135 P. Šarčević, "*Essays on International Commercial Arbitration*", London/Dordrecht/Boston: Graham & Trotman/Martinus Nijhoff 1989, p. 69. In technical arbitration the third arbitrator is not a referee. This is because in arbitration with a referee (such as in line with quality arbitration) two arbitrators try to reach a decision and only if they are deadlocked, may the tribunal be supplemented by a third arbitrator. This is different from a tribunal consisting of three arbitrators from the outset.

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tribunal is not mentioned in the Bylaws of the ICA pertaining to instrument testing, the same rule applies regarding quality arbitration.

When ascertaining the jurisdiction of the quality arbitration tribunal to resolve conflicts deriving from agreements formed in connection with the Bylaws of the ICA, English law is applicable (Bylaw 200 of the ICA Bylaws and Rules (2018)). In more detail, the arbitrators (and when relevant the referee) may decide on jurisdiction of a case (Bylaw 340 of the ICA Bylaws and Rules (2018)).[136] The only condition is that there is a valid consensus *ad idem* between two parties to sign an agreement under the terms and conditions of the Bylaws.[137] Jurisdiction may only be denied if either party substantiates evidence that such an agreement does not refer to quality arbitration, but rather technical arbitration (Bylaw 341(1) of the ICA Bylaws and Rules (2018)). Subsequently, unless parties agree otherwise, arbitration will take the latter form.

ii. Technical arbitration

Unfortunately, the ICA does not include any provision that clarifies the place of arbitration with regard to technical arbitration. Yet, it seems apparent that this form of arbitration will be held at the place that both parties that entered into an agreement under the Bylaws of the ICA have agreed to (Bylaw 338(1) of the ICA Bylaws and Rules (2018) by analogy). In the absence of a common intention, technical arbitration is held in the arbitration room of the ICA in Liverpool (Bylaw 338(3) of the ICA Bylaws and Rules (2018) by analogy).

With regard to claiming jurisdiction, any technical arbitration tribunal constituted under the Bylaws of the ICA may claim authority to scrutinize whether an agreement is valid, what matters have been submitted and if the tribunal was correctly established (Bylaw 306 of the ICA Bylaws and Rules (2018)). As a condition, English law must be complied with (Bylaw 200 of the ICA Bylaws and Rules (2018)).

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136 J. D. M. Lew, L. A. Mistelis, and S. M. Kröll, "*Comparative International Commercial Arbitration*", The Hague/London/New York: Kluwer Law International 2003, p. 332. Obviously, by including such a broad competence, recalcitrant parties are prevented from contesting the existence or validity or a choice of governing law, thereby forestalling considerable delays.

137 P. E. Nygh, "*Autonomy in International Contracts*", Oxford: Oxford University Press 1999, p. 92.

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d. Procedure

i. Quality arbitration

Before quality arbitration can be commenced, it must, first, be established whether such a proceeding pertains to quality arbitration based on manual examination of cotton or instrument testing. The basis for ascertaining this is the inclusion of a clause in the agreement between the parties (Bylaw 222(3) of the ICA Bylaws and Rules (2018)). However, in the absence of an explicit insertion, quality arbitration "*will be conducted on the basis of samples and decided by manual examination for grade and staple, unless both parties agree in writing to accept instrument testing*" (Bylaw 339(1) of the ICA Bylaws and Rules (2018)). With regard to manual classification, it can be initiated when (i) an application is made to the ICA and is accepted by this association, unless an application is unnecessary; (ii) the requesting firm/person informs the receiving firm/person of its intention to start arbitration proceedings; and (iii) the requesting firm/person selects an arbitrator/sole arbitrator (Bylaw 329(1) of the ICA Bylaws and Rules (2018)). After fulfilling these formalities, the defendant must complete the tribunal by either accepting (by acquiescence) the sole arbitrator or name a second arbitrator.[138] Notwithstanding the number of arbitrators, the tribunal must then resolve the conflict on the basis of all evidence presented by the parties as well as their interpretation of the law and by taking into account the Bylaws of the ICA. Where a sole arbitrator rules in favour of either party, or two arbitrators reach a decision, or a referee decides in favour of either party after an arbitral deadlock, an arbitral award is rendered which is analogous to a court judgment (Bylaw 350 of the ICA Bylaws and Rules (2018)).[139]

For instrument testing, on the other hand, a conflict is decided solely on the basis of test reports (Bylaw 339(2) of the ICA Bylaws and Rules (2018)).[140] The reports are final, unless the parties: (i) disagree on the place

138 For a complete analysis of how the quality arbitration tribunal is formed, see Part I, Chapter 2, B, I, 5, b, i.

139 V. K. Bhatia, G. Garzone, and C. Degano, "*Arbitration Awards: Generic Features and Textual Realisations*", Newcastle upon Tyne: Cambridge Scholars Publishing 2012, p. 177. The outcome of an arbitration tribunal is an award even if the award is of a non-monetary nature and/or the tribunal decides in favour of or against the claims of the claimant.

140 Instrument testing is final once the steps laid down in Bylaws 224 and 233 of the ICA Bylaws and Rules (2018) are complied with.

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of testing; (ii) have not negotiated to pay a fixed sum nor paid that amount within 14 days after the report has been issued; and/or (iii) disagree on the interpretation of the test report (Bylaw 339(2) of the ICA Bylaws and Rules (2018)). Then, the arbitrators will make an award in accordance with Bylaw 350. Normally, the award publicizes the names of the firms in the dispute, the names of the arbitrators and, when relevant, of the referee, unless both parties opt for anonymous quality arbitration (Bylaw 349 of the ICA Bylaws and Rules (2018)). Importantly, an award rendered in quality arbitration can be appealed before the Quality Appeal Committee.

ii. Technical arbitration

To initiate technical arbitration, the requesting firm/person must (i) send a written request to the ICA (Bylaw 302(1) of the ICA Bylaws and Rules (2018)); (ii) select an arbitrator or sole arbitrator (Bylaw 30 (2) of the ICA Bylaws and Rules (2018)); and (iii) wait for the ICA to send a copy of the written application to the defendant (Bylaw 302(3) of the ICA Bylaws and Rules (2018)). With that said, as an entry requirement, the total value of the dispute must exceed $75,000. If this fixed sum is not reached, small claims technical arbitration is available (Bylaw 316(1) of the ICA Bylaws and Rules (2018)). This entails that arbitration proceedings will be adjudicated by a sole arbitrator appointed by the ICA (Bylaw 316(2) of the ICA Bylaws and Rules (2018)).[141]

In contrast, when the threshold mentioned above is met the defendant must, *inter alia*, agree to the sole arbitrator proposed by the claimant, or name a second arbitrator followed by the selection of a third arbitrator by the ICA to complete the arbitration tribunal.[142] For the tribunal to reach a swift outcome, it is pivotal that the parties provide information regarding procedural and evidential matters expeditiously (Bylaw 307a(4) of the ICA Bylaws and Rules (2018)) and in the English language (Bylaw 307a(7) of the ICA Bylaws and Rules (2018)). When a tribunal reaches a decision, a technical arbitral award will be issued (Bylaw 309(1) of the ICA Bylaws

141 For the complete set of rules pertaining to small claims technical arbitration, see Bylaws 316 to 328 of the ICA Bylaws and Rules (2018). In my opinion, this form of arbitration is interesting, but will bring more unnecessary complexity to understanding the arbitration system of the ICA. Hence, it will not be thoroughly discussed in this Chapter.

142 For a complete analysis of how the quality arbitration tribunal is formed, see Part I, Chapter 2, B, I, 5, b, ii.

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and Rules (2018)). This award can be appealed before an appeal committee (Bylaw 312(1) of the ICA Bylaws and Rules (2018)).

e. The finality of arbitration or the possibility of (some) legal redress in public courts according to the association

i. Quality arbitration

The outcome of quality arbitration is the issuance of an award in writing, which does not state the reasons why the potential dispute was dealt with in such manner (Bylaw 350(2) of the ICA Bylaws and Rules (2018)). An award stemming from this form of arbitration will be treated as having been made in England irrespective of where the proceedings took place, or where the award was sent, delivered, or signed (Bylaw 350(4) of the ICA Bylaws and Rules (2018)). Yet, five conditions have to be complied with: first, the award must be stamped by the ICA on the date of issuance (Bylaw 350(5) and (6) of the ICA Bylaws and Rules (2018)). Second, the parties must be notified post-stamping (Bylaw 350(7) of the ICA Bylaws and Rules (2018)). Third, any outstanding (stamping) fees, costs and expenses must be paid (Bylaw 350(8) of the ICA Bylaws and Rules (2018)). Fourth, each party must receive an original hardcopy version of the award and a PDF copy by email (Bylaw 350(9) of the ICA Bylaws and Rules (2018)). Five, the deadline for lodging an appeal as stated in the arbitral award has expired (Bylaw 352(1) of the ICA Bylaws and Rules (2018)) or involves a dispute over the cost of arbitration (Bylaw 352(3) of the ICA Bylaws and Rules (2018)).[143]

When all the conditions are fulfilled, the quality arbitration award becomes final and has *res judicata effect* (*i.e.* not open to arbitral appeal).[144] By accepting the Bylaws of the ICA, both parties in a dispute waive their right

143 Any appeal is heard by a Quality Appeal Committee consisting of a maximum of four but no less than two members selected by the chairman and deputy chairman of the Quality Appeal Panel (Bylaw 352(4) of the ICA Bylaws and Rules (2018)). The task of this panel is to install the Quality Appeal Committee annually. Importantly, the Quality Appeal Committee must give an opinion and re-assess the quality of the cotton and when relevant instrument testing (Bylaw 353(1) of the ICA Bylaws and Rules (2018)).

144 A. Redfern and M. Hunter, "*Law and Practice of International Commercial Arbitration*", London: Sweet & Maxwell 2004, p. 387. An arbitral award has three aspects of *res judicata*: first, it can put a halt to existing disputes between the par-

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to lodge an appeal to the English High Court under Section 69 of the Arbitration Act 1996 for all questions arising out of fact and law.[145] Yet, an appeal to the English High Court seems possible for other matters (Bylaw 366(5) of the ICA Bylaws and Rules (2018)). Either party can also apply to the courts of England and Wales when the ICA has no further power to do what is required to obtain security for the demand of the claimant during arbitrational proceedings or an appeal (Bylaw 300(5) and (6) of the ICA Bylaws and Rules (2018)). In addition, members may apply to any court once quality arbitration proceedings are refused in the event that (i) the name of either of the parties was mentioned in the association's list of unfilled rewards part 1 at the time that the disputed contract was signed or once the contract predates a placement on this list; or (ii) when a member (or related firm) was suspended by the ICA at the time this party signed the disputed contract (Bylaws 300(7) and 330(1) of the ICA Bylaws and Rules (2018)).

ii. Technical arbitration

An award resulting from technical arbitration becomes effective once the requirements laid down in Bylaw 309 have been fulfilled. These completely mirror those of an award rendered following quality arbitration with the exception that parties must appeal an award within 28 days (Bylaw 309(7) of the ICA Bylaws and Rules (2018)) as opposed to within a deadline for appeal written on the award.

Similarly, technical arbitration awards are also final and cannot be appealed at the English High Court according to Section 69 of the Arbitration Act 1996 on matters of fact and law. When the ICA cannot guarantee

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ties. Second, it has an effect on future disputes between the parties. Third, it can also have consequences for third parties.

145 The Arbitration Act 1996 of 17 June 1996; Mainly three arguments that are in support of setting aside Section 69 of the Arbitration Act 1996 can be given: first, arbitral awards are final and should not be able to be re-examined. Second, international commercial custom of the cotton industry is alien to English law. Third, parties that opt for contracting under the Bylaws of the ICA intend to exclude Section 69 of the Arbitration Act 1996. See N. Andrews, "*Arbitration and Contract Law*", Basel: Springer International Publishing 2016, p. 140; In my opinion, a fourth argument can be added. Parties that opt for specialized commercial arbitration do so out of reasons of privacy, as they do not want detailed and sensitive information becoming known to the public. This cannot be guaranteed by the English High Court.

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security for a claimant's demand during arbitrational proceedings or an appeal, parties in a dispute may also find legal redress at the public courts in England and Wales. Importantly, the grounds of dismal for arbitrational proceedings as laid down in Bylaws 300(7) and 330(1) of the ICA Bylaws and Rules (2018)) do not apply to technical arbitration. Yet, if the ICA fails to copy a request for technical arbitration to the defendant, either party may apply for a remedy at any court (Bylaws 300(7) and 302(3) of the ICA Bylaws and Rules (2018)).

II. Nonlegal sanctioning

To guarantee that awards originating from the well-established two-tier arbitration system for both quality and technical disputes are adhered to, the Bylaws of the ICA provide four different types of nonlegal sanctions.

1. Blacklisting

When an arbitral award is not observed by the other party following a contractual dispute, the directors of the ICA are informed of this refusal (Bylaw 366(1) of the ICA Bylaws and Rules (2018)). On behalf of these persons, the Secretary of the ICA then notifies the non-compliant person or undertaking that its (company) name will be published and passed on to all members and member associations belonging to the International Cooperation between Cotton Associations ("CICCA"). [146] In addition, the Secretary of the ICA will display his/its name on a publicly accessible section of the website of the ICA known as the "ICA List of Unfulfilled Awards: Part 1" (the "default list") (Bylaw 366(2)-(4) of the ICA Bylaws and Rules (2018)).[147] To avoid being blacklisted, the defaulter can within a timeframe of 14 days convince the directors with compelling reasons not to do so (Bylaw 366(2) of the ICA Bylaws and Rules (2018)).

Besides the name of the defaulter being placed on the default list, the Secretary may circulate the name(s) of any other entity (*e.g.* subsidiary) related to the defaulter on a separate not publicly available default list (By-

146 http://www.cicca.info/. The CICCA is an umbrella organization consisting of the most important global trade associations (*e.g.* such as the ICA) involved in the cotton trade.

147 https://www.ica-ltd.org/safe-trading/loua-part-one/.

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law 366(6) of the ICA Bylaws and Rules (2018)). This blacklist is referred to as the "ICA List of Unfulfilled Awards: Part 2".[148] Given that an inclusion has far-reaching consequences, a targeted entity can refute the existence of a link with the defaulter of an arbitral award within a timeframe of 14 days (Bylaw 366(7b) of the ICA Bylaws and Rules (2018)). This company must then provide accurate evidence to convince the Secretary of the opposite (Bylaw 366(9) of the ICA Bylaws and Rules (2018)).

2. Withdrawing membership

When a party fails, neglects or refuses to comply with an award issued by the two-tier arbitration tribunal within 14 days (Article 25.1.4/9 of the Articles of Association of the ICA), the directors must then appoint a disciplinary committee from the approved panel (Article 24 of the Articles of Association of the ICA) whose main task is to impose an equitable penalty for such conduct. Any member will be liable to a formal statement from the ICA that expresses severe disapproval (*i.e.* censure), a fine not exceeding £100,000 and/or a withdrawal of membership (Article 25.1 of the Articles of Association of the ICA).[149] Notice thereof will be sent to all registered members of the ICA and published on the website of this association once the decision of the disciplinary committee is final (Article 31.1 of the Articles of Association of the ICA).

In the event the committee decides to suspend or ostracize a member, all membership privileges will be (pending a suspension) forfeited (Article 31.2 of the Articles of Association of the ICA). This also applies to related companies of the targeted member. However, any disloyal former or suspended member is still liable for arbitration for any extraneous dispute arising from a contract entered into before a suspension or expulsion (Article 31.3 of the Articles of Association of the ICA). Whereas expelled members will have their rights immediately cancelled (Article 31.9 of the Articles of Association of the ICA), membership privileges of suspended members will be denied for the period of abeyance. This entails that suspended

148 The ICA List of Unfulfilled Awards: Part 2 is only available for ICA members and is not made publicly accessible.

149 Even though these sanctions are targeted towards disloyal members of the ICA, it is not unconceivable that defaulting non-members that contracted under the Bylaws of the ICA face being barred from using the arbitral services of the ICA on future occasions. Moreover, they can be denied membership of the ICA in the future. See, for example, Union Internationale Des

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members will not be able to arbitrate on disputes arising out of contracts entered into during the suspension period (Article 31.4 of the Articles of Association of the ICA) and can no longer exercise entitlements such as attending ICA events, representing the ICA, serving as an arbitrator for non-ongoing disputes, participating in elections and proposing or recommending individuals or undertakings for membership of the ICA (Article 31.5 of the Articles of Association of the ICA). Yet, a suspended member is not entitled to voluntarily leave the ICA and must still pay the annual subscription fee (Article 31.6/7 of the Articles of Association of the ICA). However, a suspended member may ask the directors in writing to grant him a temporary restoration of all ICA membership privileges (Article 31.8 of the Articles of Association of the ICA). The directors can reject/accept such request, or can agree subject to limitations or conditions. In addition, the directors can change or rescind that resolution whenever they deem fit. Expelled members, on the other hand, cannot ask for a temporary restoration of membership.

3. Denying membership for expelled members on the basis of an additional entry condition

An expelled wrongdoer will be subject to two additional entry conditions to reobtain membership of the relevant trade association. First, a reapplication for membership is only possible after the lapse of a two-year time period (Article 31.10 of the Articles of Association of the ICA). Second, the Board of Directors must agree to a reinstatement of membership (Article 31.10 of the Articles of Association of the ICA). If a targeted wrongdoer is barred from reobtaining membership on either of these grounds, that wrongdoer is extrajudicially sanctioned.

4. Refusing to deal with expelled members

A member can also suffer censure, a fine not exceeding £100,000 and/or withdrawal of membership once that member enters into a contract with an individual or (related) firm mentioned on the ICA List of Unfulfilled Awards 1 and 2 (Article 25.1.1 of the Articles of Association of the ICA and Bylaw 415(1) of the ICA Bylaws and Rules (2018)), or contracts with a member that has been expelled from the ICA (Article 25.1.2 of the Articles of Association of the ICA). Such refusal to deal can only be circumvented

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when a member advises the directors in writing of an intention to contract with a blacklisted member and provides the directors within seven days after that contracts has been entered into "*with a copy of that contract or contracts showing the date, reference number and estimated date of fulfilment of that contract and the relevant settlement agreement, with any confidential information redacted as required*" (Article 25.2 of the Articles of Association of the ICA and Bylaw 415(2)).[150] In the event a member undertaking wishes to settle an award with a blacklisted member, or has an outstanding contract with such a member, the same proof must be substantiated to the directors within seven days (Bylaw 415(3) and (4) of the ICA Bylaws and Rules (2018)).

III. Rationale for private enforcement/nonlegal sanctioning

For individuals and undertakings active in the cotton trade, upholding a reputation of contractual trustworthiness is crucial for long-term cooperation. This is because a good reputation enhances future deals.[151] Given that deals are made on the telephone, even if worth millions of dollars and are only documented for tax or customs reasons, it is important that cotton is delivered on time, for an agreed amount and quality.[152]

It does not come as a surprise that this freedom can occasionally be exploited by suppliers and distributors of cotton when both parties enter into an agreement to buy or sell a quantity of cotton at a predetermined price and at a specified time in the future (*i.e.* futures contract).[153] This is because the price of cotton crops is extremely volatile (*e.g.* weather conditions, (insect) plagues and war) and can induce either party to deviate from this contract. If both parties negotiated the delivery of a quantity of cotton for an average price per kilo in the future and a few months later there was a scarcity of cotton in the market, the price of cotton will go up. This will induce the supplier to find another distributor to sell his cotton at a higher price per kilo when the expected surplus offsets any possible costs of court

150 Members cannot justify entering into a contract with an expelled former member.

151 J. van Erp, "Reputational Sanctions in Private and Public Regulation", *Erasmus Law Review, Vol. 1, Is. 5* 2009, p. 146.

152 T. Townsend, "*Cotton Trading Manual*", Cambridge: Woodhead Publishing Limited 2005, p. iii.

153 See Part I, Chapter 1, C, II for an example of how the cotton futures market works.

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proceedings. Alternatively, when both parties again agreed a fixed amount of cotton for a price per kilo in the future and a few months later there is an abundance of cotton in the market, the price of cotton will decrease. Obviously, this could trigger the distributor to find another supplier when the expected surplus outweighs the cost of any court proceedings. In other words, equivalent to the syllogism in both scenarios, court proceedings would insufficiently deter wrongdoers and reward deviating from the contract by either the supplier or the distributor.

As a breach of the principle of sanctity of contract can be seen as hazardous for the cotton industry, specialized commercial arbitration offered by the ICA enforced by nonlegal sanctions more efficiently prevents a departure from an agreed arrangement between the supplier and the distributor. Apart from this reason, the necessity of nonlegal sanctions can also be explained by the lack of alternatives. Enforcement of an arbitral award is possible in a public court, but, often, such an enforcement decision needs to be recognized by another State in accordance with the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention").[154] This is because members of the ICA are globally dispersed and parties contracting under a standardized contract prepared by this trade association are usually not in one and the same State. Given that in such scenario two courts would need to recognize the arbitral award, enforceability is too slow in comparison with specialized commercial arbitration. In addition, recognition may also prove uncertain, as some States do not readily enforce arbitral awards even though they are members of the New York Convention (*e.g.* Thailand).

C. The Diamond Dealers Club

I. Background

1. History

The New York DDC was founded and incorporated in 1931 as a voluntary US-based association with bylaws and mandatory rules in order to realize a more amicable interplay between merchants active in the diamond indus-

154 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958.

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try at a central and safe trading place in the midst of the Depression.[155] It modelled itself after Europe's older diamond bourses and consisted of 50 original members and 12 founding incorporators.[156] During the course of World War II the diamond industry in the German-occupied territories came to a stand-still.[157] As the majority of diamond merchants were of Jewish descent, many of them fled to New York. After the war, some returned to the now liberated European countries, whereas a large number of merchants remained in the US.[158]At the end of the 20th century, the DDC consisted of about 1,800 to 2,000 members.[159]

During this time (and arguably also from the outset), the DDC is a brokerage for diamonds and a social club for predominantly Jewish merchants.[160] It respects the Jewish Sabbath and other holy days and even has its own Torah and *Beith Midrash*.[161] Moreover, it offers an infrastructure to govern the diamond trade and provides an elaborate arbitration system to resolve disputes between merchants. Since 1941 the DDC is located in Manhattan's diamond district on 47th Street, New York.[162] Over the last 20 years DDC membership has dropped from 2,000 to 1,200 members. This can be explained by an unwillingness of merchants to be bound to mandatory arbitration and evidence of serious financial mismanagement within the DDC in the period from 2006 to 2009.[163]

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155 B. D. Richman, "The Antitrust of Reputation Mechanisms: Institutional Economics and Concerted Refusals to Deal", *Virginia Law Review, Vol. 95:325* 2009, p. 332; R. S. Shield, "*Diamond Stories: Enduring Change on 47th Street*", London: Cornell University Press 2002, p. 92.

156 B. D. Richman, "*Stateless Commerce: The Diamond Network and the Persistence of Relational Exchange*", Cambridge/London: Harvard University Press 2017, p. 42.

157 R. Kobrin and A. Teller, "*Purchasing Power: The Economics of Modern Jewish History*", Philadelphia: University of Pennsylvania Press 2015, p. 201.

158 Ibid., p. 202. In 1945, 70% of all diamond merchants active in New York were from Antwerp.

159 B. D. Richman, "*Stateless Commerce: The Diamond Network and the Persistence of Relational Exchange*", Cambridge/London: Harvard University Press 2017, p. 42.

160 L. Lambert, "*Spirituality, Inc.: Religion in the American Workplace*", New York/London: New York University Press 2009, p. 73.

161 A *Beit Midrash* is a Jewish "study hall" located in communal buildings.

162 A. Oltuski, "*Precious Objects: A Story of Diamonds, Family, and a Way of Life*", New York: Scribner 2011, p. 76; https://www.nyddc.com/contact-us.html.

163 B. D. Richman et al, "*Journal of Legal Analysis, Vol. 9, Is. 2*", in: B. D. Richman (ed), "An Autopsy of Cooperation: Diamond Dealers and the Limits of Trust-based Exchange", Oxford: Oxford University Press 2017, p. 255-256; https://www.diamondintelligence.com/magazine/magazine.aspx?id=9862.

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2. Legal form

The DDC is a not-for-profit "incorporated company" with membership open for individuals active in the diamond trade.[164] This entails that it is formed pursuant to the laws of the State of New York, is managed by a Board of Directors, has shareholders and is run on a daily basis by officers.[165] The reason for choosing this legal structure is that it shields members from liability of the DDC, even though members are still liable for the annual fees paid. According to the website of the DDC, "*the liability of the DDC and all of its affiliates and employees shall be limited to the membership or user fees paid to the DDC for the current year*".[166] Another benefit for having the DDC incorporated is that this legal form outlives any member.

3. Institutional structure

As the current bylaws and articles of association of the DDC are not publicly available for non-members[167] and whereas this association's website does not clarify its institutional structure, the latter contains some evidence of a corresponding organization compared to the ICA.[168] According to the membership section of the website of the DDC, membership is contingent upon approval by the Board of Directors and, once installed, every member has the right to attend general meetings and to serve on a committee.[169] Moreover, any dispute between members or a member and a

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164 The procedure for incorporation can be found in Article 3 of the Companies Act (to access: http://www.oas.org/juridico/english/mesicic3_jam_companies.pdf).

165 International Business Publications, "*US: Importing into the Unites States Practical Guide*", Washington; International Business Publications 2008, p. 186.

166 https://www.nyddc.com/terms--conditions.html.

167 Due to the unwillingness of the DDC to allow access for non-members to the currently in place (and updated) Bylaws, in the subsequent Paragraphs reference will be made to the Diamond Dealers Club Bylaws from 1999 ("DDC Bylaws (1999)"). This is because this document is the last written information made available to both members and non-members. Even though some discrepancies are to be expected, it is unlikely that the internal rules for DDC members have changed much over time. Thereby it serves as an important reference in this research.

168 After repeated requests, the DDC refuses to give access to its Bylaws and Articles of Association.

169 https://www.nyddc.com/membership.html.

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non-member which is governed by the Bylaws of the DDC will be resolved in arbitral proceedings.[170]

Put differently, the DDC is divided in three branches: the legislative (*i.e.* the annual general meeting), the executive (*i.e.* the Board of Directors[171]) and the judicial (*i.e.* the Arbitration Tribunal).

4. Membership

Only individuals are eligible for membership once they are 21 years old or more and have been employed in the diamond, jewellery or related fields for a minimum of two years.[172] Once these easy to meet requirements are fulfilled, a candidate must submit an application to the executive office, which must then be approved by the Board of Directors.[173] In addition, a candidate must post his picture on the trading floor wall for a period of ten days to give members of the DDC the opportunity to comment on his application (Art. 3 § 8 of the DDC Bylaws (1999)). According to *Richman*, this process of admitting new members is rigorous.[174] Even though membership, in theory, is open for all individuals that satisfy the seemingly easy to meet entry requirements mentioned above, the Board of Directors retains discretionary freedom to deny entry. This makes the process of obtaining membership unpredictable.[175] In addition, according to *Richman*, it appears that membership is subject to the constraints of the physical ca-

170 https://www.nyddc.com/arbitration.html; Section 1b of the Site Terms and Conditions of Use (to access: https://www.nyddc.com/terms--conditions.html).

171 The Board of Directors consists of 16 directors, one president, one vice president, one secretary and one treasurer. See https://www.wfdb.com/diamond-dealers-club; https://www.nyddc.com/officers.html.

172 https://www.nyddc.com/membership.html; Art. 3, § 1 of the DDC Bylaws (1999).

173 Ibid; For the application form, see http://www.nyddc.com/uploads/2/3/7/3/23730718/ddc_membership_application.pdf.

174 Art. 3 of the DDC Bylaws (1999); B. D. Richman, "The Antitrust of Reputation Mechanisms: Institutional Economics and Concerted Refusals to Deal", *Virginia Law Review, Vol. 95:325* 2009, p. 332.

175 It would appear that the Board of Directors could deny membership to an individual for, *inter alia*, immoral conduct (*e.g.* an individual in the past made racist remarks against Jews) and when it is clear that a potential member will be unharmed by social sanctioning for not complying with an arbitral award (*e.g.* if an individual does not belong to the close-knit group).

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pacity of the headquarters of the DDC.[176] In contrast, for immediate relatives of current faithful and loyal DDC members, more lenient entry requirements have to be complied with (Art. 3 § 3a-b of the DDC Bylaws (1999)).[177]

Characteristically, nearly 85% to 90% of all the members belonging to the DDC are Jewish.[178] Given that people belonging to this religion tend to live in tightly knit insular communities,[179] being a member of the DDC is not only necessary for business, but also for maintaining social standing.[180] Club membership signals to other members that an individual is reliable and trustworthy (to conduct trade with).[181] A dealer who is a member of the DDC is also automatically a member of the World Federation of Diamond Bourses ("WFDB").[182] This entails that this member is also allowed to trade on all member bourses belonging to this umbrella federation.[183]

5. Specialized commercial arbitration

a. The single arbitration model

Any dispute between members is resolved through arbitration provided by the DDC. However, when there is a non-member involved in the dispute,

176 Ibid., p. 349.

177 *E.g.* according to Art. 3 § 3a of the DDC Bylaws (1999), any widow of a member is automatically accepted, without needing to pay an admission fee.

178 B. D. Richman, "How Community Institutions Create Economic Advantage: Jewish Diamond Merchants in New York", *Law & Social Inquiry, Vol. 31, Is. 2* 2006, p. 398. From the remaining non-Jewish members, approximately 10% are Indian.

179 R. S. Shield, "*Diamond Stories: Enduring Change on 47th Street*", London: Cornell University Press 2002, p. 12.

180 In the event of death, many members pass down their diamond business within the family. In other words, the influence of the Jewish culture within the DDC remains steady. See B. D. Richman et al, "*Journal of Legal Analysis, Vol. 9, Is. 2*", in: B. D. Richman (ed), "An Autopsy of Cooperation: Diamond Dealers and the Limits of Trust-based Exchange", Oxford: Oxford University Press 2017, p. 251.

181 R. A. Epstein, "*Contract - Freedom and Restraint: Liberty, Property, and the Law*", New York/Abingdon: Routledge 2000, p. 363-364.

182 https://www.wfdb.com/.

183 For a complete list of all trade associations belonging to the WFDB, see https://www.wfdb.com/wfdb-bourses.

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arbitration is only possible when three requirements are fulfilled.[184] First, a member has sold, transferred or delivered goods to such an individual. Second, a member has invited a non-member to be a guest of the DDC (Art. 17 of the DDC Bylaws (1999)). Third, the non-member has agreed or signed an acceptable arbitration clause.[185]

When looking at the single arbitration model of the DDC from the outside, one can draw two conclusions. First, according to *Allen* and *Qian*, DDC arbitration is rather straightforward and rapid, often resulting in an outcome that estimated damages must be divided.[186] Second, notwithstanding the severity of the dispute, due to the DDC's aversion to outsiders and respect for privacy, arbitration hearings are typically secret, unless arbitral awards are not complied with.[187] Only highly publicized cases provide some evidence that a hearing took place, although they only identify the name of the wrongdoer and the amount to be paid.[188]

b. Selection of arbitrators

Prior to a selection of arbitrators, parties are required to resolve a dispute by entering into reconciliation proceedings. When successful, the chairman (who is part of a three-person conciliation panel) may return the mandatory arbitration fee (Art. 12 § 2 and 8 of the DDC Bylaws (1999)). If such voluntary negotiations fail, before arbitration may be initiated and arbitrators can be selected, the Floor Committee of the DDC must reach the

184 https://www.nyddc.com/arbitration.html. Watch the video on this website for an overview of the requirements.

185 Ibid. The arbitration clause can cover either "*the single transaction that the memo, invoice or letterhead refers to*", or "*all transactions where the member is the seller or transferor of the stone*". Importantly, once an arbitration clause covers a transaction, "*any claims about that transaction can be brought to arbitration by both the member and the non-member*".

186 J. J. Heckman, R. L. Nelson, and L. Cabatingan, "*Global Perspectives on the Rule of Law*", in: F. Allen and J. Qian, "Comparing Legal and Alternative Institutions in Finance and Commerce", Abingdon/New York: Routledge 2010, p. 128.

187 B. D. Richman, "Community Enforcement of Informal Contracts: Jewish Diamond Merchants in New York", *The Harvard John M. Olin Discussion Paper, No. 384* 2002, p. 17.

188 B. D. Richman, "*Stateless Commerce: The Diamond Network and the Persistence of Relational Exchange*", Cambridge: Harvard University Press 2017, p. 42-43.

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decision that a material issue of fact exists.[189] If not, and when the panel advises to refer the case to arbitration, DDC arbitration may be commenced.

Three arbitrators (from whom one serves as chairman) are selected by the vice president of the DDC from a group of 40 arbitrators (that includes 16 chairmen), 14 of which are appointed by the Board of Directors and 26 of these who are elected by the members of the DDC every two years.[190] To be part of that group of arbitrators is insurmountable for those members who do not hold the highest esteem within the DDC.[191] Once belonging to the group of 40 arbitrators, any new arbitrator must attend three one-hour seminars at the premises of the DDC in New York City to learn how to comply with the Bylaws of the DDC and Chapter 8 of the Consolidated Laws of the State of New York (*i.e.* Civil Practice Law and Rules).[192] In addition, they are taught how to render standard arbitration awards. There is no explicit prohibition against lawyers qualifying as an arbitrator. Any award rendered by the first-tier arbitration panel may be appealed in second-tier arbitration. The arbitration panel then consists of five arbitrators (Art. 12 § 17 of the Bylaws of the DDC (1999)).

c. Choice of tribunal and jurisdiction of arbitration tribunals

The system of private law-making through the single arbitration model takes place at the premises of the DDC in New York.[193] When the Floor Committee refers a dispute to arbitration, by respecting the secrecy of its proceedings, this form of dispute resolution cannot take place outside the DDC building. This entails that individual DDC members and non-members who are bound by the Bylaws of the DDC cannot choose a different place of arbitration.

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189 L. Bernstein, "Opting out of the Legal System: Extralegal Contractual Relations in the Diamond Industry", *The Journal of Legal Studies, Vol. 21, No. 1* 1992, p. 124.

190 R. S. Shield, "*Diamond Stories: Enduring Change on 47th Street*", Ithaca/London: Cornell University Press 2002, p. 191.

191 B. D. Richman, "*How Community Institutions Create Economic Advantage: Jewish Diamond Merchants in New York*", Law & Social Inquiry, Vol. 31, Is. 2 2006, p. 395.

192 Consolidated Laws of the State of New York of 1909.

193 https://www.nytimes.com/1979/05/06/archives/the-citys-most-exclusive-club.html.

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With regard to the jurisdiction of the arbitration tribunal, in each dispute a three-person arbitration panel must decide a case on their own jurisdiction. As a requirement, a material issue of fact for arbitration to decide must exist and arbitration must be performed in conformity with Section 7501 of the Civil Practice Law and Rules (Art. 12 of the Bylaws of the DDC (1999)).[194] On the substance, arbitrators must base their findings in consideration of trade customs and usages and not on the law for damages and contract of the State of New York.[195] However, they must respect the laws and statutes of this State.[196] Even though *Bernstein* explains that DDC arbitrators do not take past decisions stemming from DDC arbitration into consideration,[197] *Mark & Weidemaier* disagree.[198] According to both authors, despite arbitral awards being secretive and not stating any reasons, the structured system of the DDC might to some extent influence arbitrators.[199]

d. Procedure

As explained above,[200] albeit in less detail, any dispute arising out of a breach of the Bylaws of the DDC between members or a member with a

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194 According to Section 7501 of the Civil Practice Law and Rules, "*A judgment shall be entered upon the confirmation of an award* […] *The judgment-roll consists of the original or a copy of the agreement and each written extension of time within which to make an award; the statement required by section 7508 where the award was by confession; the award; each paper submitted to the court and each order of the court upon an application under sections 7510 and 7511; and a copy of the judgment*".

195 L. Bernstein, "Opting out of the Legal System: Extralegal Contractual Relations in the Diamond Industry", *The Journal of Legal Studies, Vol. 21, No. 1* 1992, p. 126.

196 Section 19 of the Site Terms and Conditions of Use (to access: https://www.nyddc.com/terms--conditions.html).

197 L. Bernstein, "Opting out of the Legal System: Extralegal Contractual Relations in the Diamond Industry", *The Journal of Legal Studies, Vol. 21, No. 1* 1992, p. 126.

198 W. Mark, and C. Weidemaier, "Toward a Theory of Precedent in Arbitration", *William & Mary Law Review, Vol. 51, Is. 5* 2010, p. 1901.

199 In my opinion, for example, if an arbitrator is selected within a three-person arbitration panel to review a dispute between merchants, it is possible that this individual will take into consideration reasons and conclusions from former arbitral disputes, reasons in which he was also an arbitrator. In other words, some precedent is being generated within the DDC arbitration system.

200 See Part I, Chapter 2, C, I, 5, bb.

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non-member should, but necessarily must be, resolved through voluntary pre-arbitration conciliation proceedings. Often resulting in a settlement agreement, it is estimated that around 85 percent of all disputes submitted for arbitration in 2015 were ironed out at such an early stage.[201] The reason for its success is two-fold. First, when successful, parties do not need to pay arbitration fees.[202] Second, after an arbitral award, the names of the parties are published, which can hamper their reputation and social standing.[203]

When conciliation is fruitless, one member can start arbitral proceedings by notifying the Managing Director of the DDC in writing.[204] Consequently, the Vice President of the DDC has the discretionary freedom to officially start arbitration by referring the dispute to the Floor Committee. This official dispute resolution body of the DDC is tasked with finding out whether a material issue of fact exists. This must be based on the evidentiary materials provided by both parties without ordering a hearing.[205] When according to Art. 8 § 7B of the Bylaws of the DDC (1999) a party fails to uphold his commercial obligations with another member and there is no material issue of fact involved, the Floor Committee can penalize this person. Typically, it can impose a final fine of up to $1,000 and/or ostracize such an individual for a period not exceeding 20 days. After reaching a decision, parties can appeal the decision of the Floor Committee by paying the mandatory $ 100 fee. Yet, if there is a material issue of fact, such a possibility is precluded. The Floor Committee then refers the dispute to arbitration within the DDC.

Once the three-person panel is established,[206] arbitrators must, within a period of ten days following a hearing, render an arbitral award in line with Section 7501 of the Civil Practice Law and Rules. This will be done by respecting the principle of majority voting. When an arbitrator with-

201 M. Bussani and A. J. Sebok, "*Comparative Tort Law: Global Perspectives*", Cheltenham/Northampton: Edward Elgar Publishing 2015, p. 18. Absent data, it is unlikely that this amount changed in 2019.

202 R. S. Shield, "*Diamond Stories: Enduring Change on 47th Street*", London: Cornell University Press 2002, p. 190.

203 M. Bussani and A. J. Sebok, "*Comparative Tort Law: Global Perspectives*", Cheltenham/Northampton: Edward Elgar Publishing 2015, p. 18.

204 R. S. Shield, "*Diamond Stories: Enduring Change on 47th Street*", London: Cornell University Press 2002, p. 191.

205 This is similar compared to obtaining a summary judgment in the USA. See S. Subrin, and M. Y. K. Woo, "*Litigating in America: Civil Procedure in Context*", New York: Aspen Publishers 2006, p. 165.

206 To understand how the selection of arbitrators works, see Part 1, Chapter 2, C, I, 5, bb.

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holds his vote and the other two arbitrators within the panel are at an impasse, a new panel is formed.[207] The losing party of an arbitral award will be forced to pay the arbitration fee and any other expenses (Art. 12 § 2 of the Bylaws of the DDC (1999)). Although an arbitral award is final, following receipt of the award by either party, both individuals can within a period of ten days legitimately request an appeal by notifying the Board of Directors of the DDC. Unfortunately, this does not come without difficulties for the requesting party. This is because this individual must provide security (*e.g.* payment) to cover the costs of the dispute and he must deposit an arbitration fee three times the amount paid in first instance (Art. 12 § 15 of the Bylaws of the DDC (1999)).

e. The finality of arbitration or the possibility of (some) legal redress in public courts according to the association?

A party that disagrees with an arbitral award stemming from a DDC arbitrational appeal proceedings can appeal to the New York State courts under New York State law for relief when this individual can substantiate that procedural irregularities have occurred.[208] Examples of previous caselaw relate to an individual who was sympathetic to a Palestinian Liberation Organization[209] and an arbitrator engaged in private communications with the party who won the arbitral proceedings.[210] In other words, improper conduct of a discriminatory and biased arbitrator is grounds for a litigant to challenge an arbitral award at the State court.

When a party from the outset tries to seek relief at a public court for a matter that is covered by DDC arbitration, or litigates at the State court for other matters than irregularities of an award stemming from a DDC arbitrational appeal, such an individual can be fined and ostracized.[211]

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207 R. S. Shield, "*Diamond Stories: Enduring Change on 47th Street*", London: Cornell University Press 2002, p. 192.

208 R. A. Epstein, "*Contract - Freedom and Restraint: Liberty, Property, and the Law*", New York/Abingdon: Routledge 2000, p. 369.

209 Rabinowitz v. Olewski, 473 N.Y.S. 2d 232, 234 (N.Y. App. Div. 1984).

210 Goldfinger v. Lisker, 500 N.E.2d 857, 858 (N.Y. App. Div. 1986).

211 B. D. Richman, "*Stateless Commerce: The Diamond Network and the Persistence of Relational Exchange*", Cambridge: Harvard University Press 2017, p. 42.

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II. Nonlegal sanctioning

To safeguard the enforcement of DDC arbitral awards, the association imposes two types of nonlegal sanctions, which are discussed below. Although at first glance they may appear similar to the methods to guarantee compliance with arbitral awards provided in the ICA Bylaws, caution is required. According to *Richman*, the diamond industry is an unusual industry with certain specific characteristics that can only be found in a small number of other industries.[212]

1. Blacklisting

When an individual fails to pay an outstanding award within ten working days, his picture and a brief explanation of his disloyalty are published on the wall of the DDC's main trading hall (Art. 12 § 25 of the Bylaws of the DDC (1999)).[213] Moreover, his picture is also published on the walls of every major trading association belonging to the WFDB.[214] According to *Epstein*, in an industry where reputation is crucial to guaranteeing future trade, blacklisting has a high risk of putting a disloyal person out of business.[215] News spreads rapidly and makes future members and non-members resistant to conduct trade with a defaulter who (in their eyes) cannot be trusted. In other words, it signals to other members that he is not com-

212 B. D. Richman, "Community Enforcement of Informal Contracts: Jewish Diamond Merchants in New York", *The Harvard John M. Olin Discussion Paper, No. 384* 2002, p. 0 (abstract). According to *Richman*, "*The diamond industry is home to many unusual features: the predominance of an ethnically homogeneous community of merchants* […] *the norm of intergenerational family businesses*"; *Konradi* confirms the idea of *Richman* that the diamond industry is different than most industries. See V. Gesner, "*Contractual Certainty in International Trade: Empirical Studies and Theoretical Debates on Institutional Support for Global Economic Exchanges*", in: W. Konradi (ed.), "The Role of *Lex Mercatoria* in Supporting Globalised Transactions: An Empirical Insight into the Governance Structure of the Timber Industry", Oxford/Portland: Hart Publishing 2009, p. 70.

213 B. D. Richman, "The Antitrust of Reputation Mechanisms: Institutional Economics and Concerted Refusals to Deal", *Virginia Law Review, Vol. 95:325* 2009, p. 333.

214 It is also possible that his picture will be published on the walls of other trade associations active in the diamond trade not belonging to the WFDB.

215 R. A. Epstein, "*Contract - Freedom and Restraint: Liberty, Property, and the Law*", New York/Abingdon: Routledge 2000, p. 393.

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mitted to long-term cooperation.[216] In addition to harming one's business reputation, due to the unique structure of the diamond industry, as many merchants active in the DDC belong to a close-knit social group, having one's picture placed on the wall can even affect an individual's social standing. Social exclusion or isolation from the group of diamond merchants can cause a complete or near-complete loss of contact with those individuals whom he (not always, but often) feels so acquainted with. Therefore, preventing one's picture from ever reaching the wall is crucial.[217]

2. Withdrawing membership

The arbitration board of the DDC is also empowered to suspend or expel a member for failing to pay an arbitral award when such conduct "*reflects adversely upon the integrity of any member of the Organization*" (Art. 7 § 2 of the Bylaws of the DDC (1999)).[218] Such freedom of discretion can be perceived as arbitrary, as it gives the Board the possibility to go after certain defaulters, whereas others are not targeted. Pending a suspension or after an expulsion, wrongdoers are (i) not entitled to enter the DCC's club room, unless given explicit permission; (ii) unable to exercise their DDC membership voting rights[219]; (iii) prevented from maintaining access to the DDC Secure Online Trading Platform; and (iv) are forestalled from gaining access to the DDC arbitration system. Despite such a loss of rights, a (temporarily) ostracized member must fulfil all duties and obligations of a member in good standing relating to his transactions that were concluded in the period he was a member of the DDC.[220]

According to *Richman*, a (temporary) withdrawal of membership can impact the business (or commercial opportunities) of defaulters in two

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216 C. Hawkins, "*Roman Artisans and the Urban Economy*", Cambridge: Cambridge University Press 2016, p. 120.

217 B. D. Richman, "Community Enforcement of Informal Contracts: Jewish Diamond Merchants in New York", *The Harvard John M. Olin Discussion Paper, No. 384* 2002, p. 102.

218 Abraham v. Diamond Dealers, 896 N.Y.S. 2d 848 (N.Y. App. Div. 2010). The only limitation to DDC membership is a suspension or expulsion. Other than that, DDC membership carries no expiration date.

219 Ibid. An immediate automatic suspension of the voting rights of DDC members for not complying with an arbitral award is illegitimate. The DDC must give reasonable notice.

220 Section 1b of the Site Terms and Conditions of Use.

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ways. First, DDC members will most likely not conduct trade with ostracized individuals, as it would hamper their own reputation.[221] Second, any suspension and expulsion from the DDC entails an automatic suspension and expulsion from all 29 affiliated bourses belonging to the WFDB.[222] This would restrict trading for a defaulter on a global scale. It is self-evident that any form of ostracism will also affect the wrongdoer's social status in the diamond merchant society. Perhaps even more than when such a person is only blacklisted.[223]

III. Rationale for private enforcement/nonlegal sanctioning

The diamond industry faces unique difficulties, as diamonds are small in size and have an expensive value that is difficult to ascertain with the naked eye.[224] Disputes are not uncommon and often involve a substantial amount of money. The industry's reputation is fragile due to many difficulties in tracking down blood diamonds and stolen diamonds.[225] As a result, or as *Richman* defines it, in general, every diamond sale is "*an extreme instance of a hazardous transaction*".[226] To solve this issue, as the industry depends on trust and reputation, disputes are better dealt with within a PLS as opposed to a public legal system.

Mainly three arguments support the undesirableness of the latter system: first, whereas diamond disputes involve a lot of money, merchants do not

221 B. D. Richman, "The Antitrust of Reputation Mechanisms: Institutional Economics and Concerted Refusals to Deal", *Virginia Law Review, Vol. 95:325* 2009, p. 334. Collective refusals to deal cannot be found in the Bylaws of the DDC. Yet, the effect of ostracism can be seen as similar.

222 Ibid; Section 1a of the World Federation of Diamond Bourses By-laws and Inner Rules (2016).

223 Whether this is true largely depends on empiric evidence, which is currently not factored in.

224 S. Li, "*Managing International Business in Relation-Based versus Rule-Based Countries*", New York: Business Expert Press, LCC 2009, p. 49; An example of a situation where the value of a diamond cannot be detected with the naked eye involves laser treatment. When a diamond is treated to improve its colour, it often makes the stone less valuable. Unfortunately, such a treatment cannot be detected with the naked eye, but requires a complex laser examination.

225 E. Zirhlioglu, "The Diamond Industry and the Industry's Dispute Resolution Mechanisms", *Arizona Journal of International and Comparative Law* 2013, p. 4.

226 B. D. Richman, "*Stateless Commerce: The Diamond Network and the Persistence of Relational Exchange*", Cambridge: Harvard University Press 2017, p. 77.

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want such an amount frozen pending a court outcome that can last for years.[227] Second, when a court reaches a decision, the outcome will become public. This can hamper the reputation of respectable diamond traders within the industry. Third, neither harmed diamond sellers can be satisfactorily compensated, nor can theft be sufficiently deterred by a court.[228] To overcome this, the DDC arbitration system was introduced, as it can resolve disputes cheaply, quickly and easily by taking into account the peculiarities of diamond trade practices.[229] As members of the DDC are part of a close-knit group that largely works together with one other, and because a bad reputation can hamper future business and social life, this "closure" enables the association to impose nonlegal sanctions that are binding on all members. By doing so, all members are motivated to ensure compliance with arbitral awards and safeguard the overall trust in the diamond industry. In turn, costs involved in finding a respectable buyer or seller are reduced.

D. The Grain and Feed Trade Association

I. Background

1. History

The origins of GAFTA can be traced back to 1878, the year that the London Corn Trade Association ("LCTA") was formed by some corn traders to facilitate the standardization of contract terms[230] for its members and to establish a system of arbitration to resolve disputes.[231] The association was

227 S. Li, "*Managing International Business in Relation-Based versus Rule-Based Countries*", New York: Business Expert Press, LCC 2009, p. 50.

228 B. D. Richman, "*Stateless Commerce: The Diamond Network and the Persistence of Relational Exchange*", Cambridge: Harvard University Press 2017, p. 77.

229 https://www.diamonds.net/News/NewsItem.aspx?ArticleID=49902&ArticleTitle=New+York+Adapting+to+Changing+Diamond+Market.

230 A. B. Bruce, "Bailliére's Encyclopædia of Scientific Agriculture", *Bailliér, Tindall and Cox* 1931, p. 520. An example of a standard term concerned the quality. Every contract of the LCTA contained one or multiple clauses indicating the quality standard of corn; J. Morgan, "*Great Debates in Contract Law*", London: Palgrave 2015, p. 88. Standard terms provided by the LCTA reduced the cost of doing business.

231 A. Lista, "*International Commercial Sales: The Sale of Goods on Shipment Terms*", Abingdon/New York: Routledge 2017, p. 4.

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concerned with grading imported corn and did not develop formal grades for the domestic trade.[232] In most other industries it would serve as the standard model for private ordering.[233]

In 1906, some members who traded in vegetable proteins used as animal feedingstuffs, which were only three years before being introduced to the market, left the LCTA and established the London Cattle Food Trade Association ("LCFTA").[234] Decades later, in 1971, both associations amalgamated and formed GAFTA. This international organization represents 1,800 members in 95 countries consisting of traders, brokers, superintendents, analysts, fumigators[235], arbitrators, individuals, professionals and branches trading in grain, animal feedingstuffs, general produce, pulses[236] and rice.[237] By developing standard contracts and providing a well-respected international dispute resolution system in the form of mediation and arbitration, instead of relying on the public legal system, GAFTA functions within a PLS.[238]

2. Legal form

Similar to the ICA, GAFTA is a non-profit "private limited liability company by guarantee" under the current Companies Act 2006.[239] This alterna-

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232 A. Velkar, "'Deep' integration of 19th century grain markets: coordination and standardisation in a global value chain", *London School of Economics* 2010, p. 24.

233 G. Mallard and J. Sgard, "*Contractual Knowledge: One Hundred Years of Legal Experimentation in Global Markets*", Cambridge: Cambridge University Press 2016, p. 157.

234 https://www.gafta.com/about.

235 Those individuals are tasked with removing harmful insects, bacteria and diseases from something or somewhere by using poisonous gas.

236 Pulses are the edible seeds of peas, beans, or lentils.

237 https://www.gafta.com/Membership.

238 A. Lista, "*International Commercial Sales: The Sale of Goods on Shipment Terms*", Abingdon/New York: Routledge 2017, p. 11. *Lista* explains that the standard contracts developed by GAFTA are more detailed than the Incoterms®. Whereas the Incoterms® are intended to clarify the risks, costs and tasks inherent to the international delivery of goods and transportation, standard contracts of GAFTA cover all aspects of the delivery of goods (*e.g.* quality standards).

239 F. Cafaggi, "*Enforcement of Transnational Regulation: Ensuring Compliance in a Global World*", Cheltenham/Northampton: Edward Elgar Publishing 2012, p. 218; https://www.gafta.com/. Below the webpage, in the contact section, the legal status of GAFTA is explained: "*The Grain and Feed Trade Association, 9 Lincoln's Inn Fields, London, WC2A 3BP Registered in England & Wales with liability*

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tive type of corporation that is specifically used to accommodate not-for-profit trade associations has two benefits: first, it does not require a limit of a maximum number of members. Second, liability is limited to the nominal amount paid by the members.

3. Institutional structure

In line with the openness of GAFTA in terms of providing rules and guidelines concerning membership and arbitration, its institutional structure is well explained.[240] All the affairs of this association relating to the constitution of the association, domestic affairs as well as financing are managed by the Council that is composed of 22 people (Art. 3.1 of the General Rules of GAFTA (2017)).[241] These individuals are elected by the Annual General Meeting which is chaired by a President.[242] Day-to-day business is under the leadership of the Director General.[243] Members have the right to join committees that are tasked with rule-making; examples include the China Trade Committee and the Arbitration Committee.[244]

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limited by guarantee under Company no. 1006456 VAT Registration No. GB 243 8967 24".

240 Although the task of the annual general meeting is not well explained, the Council's tasks are defined in The General Rules and Regulations Applicable to All Members of 2017 (hereinafter referred to as "the General Rules of GAFTA (2017)") (to access: https://www.gafta.com/write/MediaUploads/Membership/General_Rules_and_Regulations_Applicable_to_All_Members_2017.pdf); In addition, the judicial branch of GAFTA known as the two-tier arbitration system is very detailed. Examples include the General Rules and Regulations Applicable to all Member (to access: https://www.gafta.com/write/MediaUploads/Membership/General_Rules_and_Regulations_Applicable_to_All_Members_2017.pdf); Arbitration Rules No. 125 (to access: https://www.gafta.com/write/MediaUploads/Contracts/2018/125_2018.pdf); Gafta Rules - Mediation Rules & Agreement (to access: https://www.gafta.com/write/MediaUploads/Contracts/2014/128_2014.pdf).

241 https://www.gafta.com/Council; For all rules in order to become a member, President, Deputy President, or Vice President of the Council, see Art. 3.2 till 3.12 of the General Rules of GAFTA (2017)).

242 C. Tietje and A. Brouder, "*Handbook of Transnational Economic Governance Regimes*", Leiden/Boston: Martinus Nijhoff Publishers 2009, p. 657.

243 https://www.gafta.com/Staff/75508.

244 C. Tietje and A. Brouder, "*Handbook of Transnational Economic Governance Regimes*", Leiden/Boston: Martinus Nijhoff Publishers 2009, p. 657. Only two members from any single country can join a committee.

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Once again, as can immediately be seen, when comparing this association with the ICA and the DDC, it consists of a legislative (*i.e.* the Annual General Meeting), executive (*i.e.* the Council) and judicial branch (*i.e.* the two-tier Arbitration Tribunal).

4. Membership

Currently, as stated above, GAFTA consists of 1,800 members. To be eligible, potential members must be categorized as a corporate body that is represented by a representative, an unincorporated body that is represented by a representative, or a natural person (Definitions, Art. 1.2 and 1.3 of the General Rules of GAFTA (2017)). Besides this qualification, any potential member must also be active in the grain and feed trade (Art. 1.1 of the General Rules of GAFTA (2017)).

When a potential member considers that it meets the entry requirements, an individual person or the representative of an (un)incorporated company can submit a written application to the Council to request membership (Art. 1.5 and 1.6 of the General Rules of GAFTA (2017)). In the application the applicant must, *inter alia*, explain which category of membership it falls under (Art. 1.7 and 1.12 of the General Rules of GAFTA (2017)).[245] After, the applicant must pay the entry fee determined by the Council as well as the subscription fee that is mandatory for the category of membership the applicant belongs to (Art. 1.8 of the General Rules of GAFTA (2017)).

245 According to Art. 1.12 of the General Rules of GAFTA (2017): "*There shall be the following categories of membership: (A) Trading principals in agricultural commodities and general produce (B) Brokers who do not trade as principals (C) Superintendent and Surveyor Members (D) Individual Qualified Arbitrator and Individual Qualified Mediator Members (E) Individuals engaged or who have been engaged in the trade (other than current category D members) (K) Trading principals in spices and general produce The following categories ((F), (G), (H), (I), (J), (L) and (M)) are Associate Members and do not have voting rights. (F) Laboratories on the Register of Approved Analysts (G) Professional Firms, Agro Supply and Service Companies who provide services to the Trade (H) Branches of Members (whose parent company is in the same country) (I) Qualified Arbitrators and Qualified Mediators employed by a Member of Gafta, acting with their employer's consent (J) Fumigant Operators (L) Students (M) Individuals not engaged in the trade*".

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5. Specialized commercial arbitration

a. Tripartite arbitration

Disputes arising out of contracts in the grain and feedstock trade are resolved by specialized commercial arbitration provided by GAFTA.[246] Even though there is increasing attention to resolving any conflict with mediation, especially since parties can opt for this method of alternative dispute resolution, arbitration is the standard and consensual route.[247] According to *Rubino-Sammartano*, it can be seen as fast-track arbitration.[248]

When looking more closely, three different forms of arbitration can be detected. The most common form refers to the GAFTA Arbitration Rules No. 125. These standard arbitration rules are similar to those of the ICA, and divide arbitration into two types. The first type concerns disputes relating to the quality and condition of goods. The second type concerns arbitration relating to any other dispute resulting from standard contracts. However, unlike the ICA, both types are colloquially referred to as "technical arbitration", since uniform arbitration rules exist. The second form can be found in the GAFTA Simple Disputes Arbitration Rules No. 126 and is applicable to uncomplicated legal issues in which a quick and easy answer can be given in an award that does not fully provide reasons.[249] This form of arbitration is used in order to resolve a minor disagreement. The third and last form concerns the procedure for resolving conflicts stemming from the standard agreement for the carriage of goods between the charterer and the ship-owner (*i.e.* GAFTA Charter Party) as well as other forms of maritime transport. These rules can be found in the GAFTA Arbitration

246 C. Tietje and A. Brouder, "*Handbook of Transnational Economic Governance Regimes*", Leiden/Boston: Martinus Nijhoff Publishers 2009, p. 659. According to *Tietje* & *Brouder*, specialized commercial arbitration provided by GAFTA eclipses domestic court adjudication.

247 Food and Agriculture Organization of the United Nations, "*Proceedings of the FAO Rice Conference 2004: Rice in Global Markets*", Rome: Food and Agriculture Organization of the United Nations 2005, p. 56.

248 M. Rubino-Sammartano, "*International Arbitration: Law and Practice, Third Edition*", New York: JurisNet 2014, p. 1085-1086.

249 Simple Disputes Arbitration Rules No. 126 of 2010 (to access: https://www.gafta.com/write/MediaUploads/Contracts/2010/126.pdf). The scope of application can be found in Art. 8:2 of the Simple Disputes Arbitration Rules No. 126.

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Rules for Charter Parties No. 127.[250] Even though the last two forms of arbitration cannot be underestimated, the focus in this Chapter will be on the GAFTA Arbitration Rules No. 125. This is because parties entering into a standard GAFTA contract automatically agree to arbitrate any potential dispute under these rules.[251]

b. Selection of arbitrators

As a general rule, the arbitration tribunal of GAFTA consists of three arbitrators. The first arbitrator is appointed by the claimant from the list of qualified arbitrators, or by GAFTA on its behalf (Art. 3.2 (a) of the GAFTA Arbitration Rules No. 125). The defendant or respondent must then appoint a second arbitrator from the list of qualified arbitrators, following which GAFTA completes the tribunal by selecting a third arbitrator (Art. 3.2 (b), (c) and (d) of the GAFTA Arbitration Rules No. 125). Optionally, both parties can also agree to refer the dispute to a sole arbitrator who is to be selected by GAFTA (Art. 3.1 of the GAFTA Arbitration Rules No. 125). In appeal, the board of arbitrators consists of three arbitrators when sole arbitration is agreed upon by the parties, or is composed of five arbitrators when an award is rendered by a tribunal of three arbitrators (Art. 11.1 of the GAFTA Arbitration Rules No. 125). In this instance, all arbitrators are selected by GAFTA without any influence of the parties.

Given the complexities of the grain and feed trade and its international magnitude, in order to be eligible to serve as an arbitrator only individuals who are sufficiently qualified may be selected (Art. 3.7 of the GAFTA Arbitration Rules No. 125).[252] Such a person must satisfy the general eligibility and qualification criteria, which are laid down in the Rules and Code of Conduct for Qualified Arbitrators & Qualified Mediators ("Rules for

250 Arbitration Rules No.127 For use with Charter Parties or Other Forms of Maritime Transport of 2014 (to access: https://www.gafta.com/write/MediaUploads/Contracts/2014/127_2014.pdf).

251 I. Polovets, M. Smith, and B. Terry, "GAFTA Arbitration as the Most Appropriate Forum for Disputes Resolution in Grain Trade", *Arizona Journal of International & Comparative Law*
Vol. 30, No. 3 2013, p. 572.

252 C. Tietje and A. Brouder, "*Handbook of Transnational Economic Governance Regimes*", Leiden/Boston: Martinus Nijhoff Publishers 2009, p. 659.

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GAFTA Qualified Arbitrators")[253] (Art. 2 of the Guidelines for GAFTA Appointment of Arbitrators).[254] The entry requirements are two-fold: first, a potential arbitrator must be an individual member or an associate member of GAFTA (Art. 1.1 of the Rules of GAFTA Qualified Arbitrators).[255] Second, he or she must meet the association's criteria and the GAFTA Professional Development (GPD) programme (Art. 1.2 of the Rules of GAFTA Qualified Arbitrators). The programme requires potential arbitrators to attend all mandatory courses about trade foundation, commodities contracts, commodities shipping and commodities dispute resolution and to pass a final exam.[256] Alternatively, such a person can participate in the GAFTA Distance Learning Programme (DLP), which is an online course consisting of six modules and requires a potential arbitrator to pass all of the mandatory written assignments.[257] Upon completion of either course, when a candidate has at least ten years' experience in the grain and feed trade, one last exam must be successfully completed. This is the GAFTA Trade Diploma Examination.[258] Interestingly, members who are lawyers are not barred from participating in this exam and obtain the status of arbitrator upon successful completion. When officially having achieved this status, an individual must participate in ten hours of activities each year to maintain his professional standing.[259]

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253 Rules and Code of Conduct for Qualified Arbitrators & Qualified Mediators (to access: https://www.gafta.com/Rules-and-Code-of-Conduct-for-Qualified-Arbitrators-Qualified-Mediators).

254 Guidelines for GAFTA Appointment of Arbitrators (to access: https://www.gafta.com/Guidelines-for-Gafta-Appointment-of-Arbitrators).

255 In-house lawyers working for GAFTA members can also be eligible to serve as a qualified arbitrator. See https://www.gafta.com/write/MediaUploads/Arbitration/Gafta_Qualified_Arbitrator_Status_2018.pdf.

256 https://www.gafta.com/Gafta-Professional-Development-GPD.

257 https://www.gafta.com/Distance-Learning-Programme. The six modules consist of an "*introduction to contracts, fulfilling contractual obligations, payment and risk, charterparties and international carriage regime, what to do in exceptional circumstances and problems and how to resolve them*".

258 https://www.gafta.com/Trade-Diploma.

259 https://www.gafta.com/Gafta-Qualified-Arbitrators-Annual-Continuing-Professional-Development-GPD-Policy. Examples of activities include giving presentations and attending seminars.

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c. Choice of tribunal and jurisdiction of arbitration tribunals

According to Article 1.3 of the GAFTA Arbitration Rules No. 125, arbitration takes place at the premises of GAFTA in London, unless the parties in a dispute agree otherwise in writing. Then, arbitration can be held anywhere the parties wish. Once the arbitration tribunal has been installed, the sole arbitrator or three arbitrators – jointly - may rule on their own jurisdiction to decide matters, such as whether the tribunal is properly constituted and whether the arbitration agreement and matters relating to it are legitimate (Art. 8.1 of the GAFTA Arbitration Rules No. 125). Arbitrators must take English law into consideration, trade usage as well as all the rules and bylaws of GAFTA.[260]

d. Procedure

When parties conduct business on the basis of one of GAFTA's standard contracts, they are bound by the Bylaws and Rules of the association. When a conflict occurs, there is a growing tendency to, first, use mediation rather than arbitration, especially because disputants will be swayed into reaching a mutually acceptable commercial settlement with the help of a third party, rather than escalating the conflict to an *ad hoc* arbitration tribunal. Other characteristics of this procedure that can be found in the GAFTA Mediation Rules No. 128[261] pertain to its non-binding, confidential, informal and amicable nature without reaching a formal award.[262]

When reconciliation cannot be attained or is not preferred by the parties in a dispute and provided that the parties have traded on the basis of a GAFTA standard contract, which typically incorporates an arbitration clause, the dispute under consideration must be resolved through arbitration in line with GAFTA Arbitration Rules No. 125.[263] To start proceed-

260 Disputes arising out of GAFTA's standardized contracts are governed by English law. See https://www.gafta.com/about.

261 Mediation Rules No. 128 of 2012 (to access: https://www.gafta.com/write/MediaUploads/Contracts/2012/128.pdf).

262 I. Polovets, M. Smith, and B. Terry, "GAFTA Arbitration as the Most Appropriate Forum for Disputes Resolution in Grain Trade", *Arizona Journal of International & Comparative Law Vol. 30, No. 3* 2013, p. 571.

263 For an example of an arbitration clause within a GAFTA standard agreement, see Article 22 (a) of the Contract for the Delivery of Goods Central and Eastern Europe in Bulk or Bags No. 49 of 2018 (to access: https://www.gafta.com/write/

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ings, the claimant must send a notice stating its intention to refer a dispute to arbitration as well as the name of its selected arbitrator to the defendant (Art. 2 of the GAFTA Arbitration Rules No. 125). The defendant must then name a second arbitrator or agree to sole arbitration. When two arbitrators are appointed, GAFTA selects a third arbitrator to complete the arbitration tribunal.[264] After, the claimant must present arguments for its case and pay the costs, fees and expenses of arbitration that GAFTA deems fit within a timeframe of 60 days (Art. 4.1 of the GAFTA Arbitration Rules No. 125). The defendant is then given the opportunity to present counterarguments (Art. 4.2 of the GAFTA Arbitration Rules No. 125). Simultaneously, copies of all evidence must be sent to GAFTA in English (Art. 4.3 and 4.4 of the GAFTA Arbitration Rules No. 125). When the arbitration tribunal deems suitable, in order to prevent unnecessary delays and expenses, it can give both parties more time to present arguments (Art. 4.5 and 4.6 of the GAFTA Arbitration Rules No. 125). Oral hearings are optional and members of a three-person tribunal need not meet in person (Art. 4.8 and 4.9 of the GAFTA Arbitration Rules No. 125).[265]

When a sole arbitrator or the three-person arbitration panel have reached a decision, they render a final and binding award (Art. 6.4 and 9 of the GAFTA Arbitration Rules No. 125). Within a period of 30 days after such an award is made, either party then has the right to appeal the tribunal's decision (Art. 10.1(a) of the GAFTA Arbitration Rules No. 125).[266]

MediaUploads/Contracts/2018/49_2018.pdf). According to this clause: "*Any and all disputes arising out of or under this contract or any claim regarding the interpretation or execution of this contract shall be determined by arbitration in accordance with the GAFTA Arbitration Rules, No 125, in the edition current at the date of this contract; such Rules are incorporated into and form part of this Contract and both parties hereto shall be deemed to be fully cognisant of and to have expressly agreed to the application of such Rules*".

264 For a more detailed discussion of how the arbitration tribunal is formed, see Part I, Chapter 2, D, I, 5, b.

265 Discussing a case via email, telephone, etc. is sufficient between arbitrators in the arbitration tribunal.

266 For an explanation of the appeal procedure and the rendering of an award, see Art. 12 and 15 of the GAFTA Arbitration Rules No. 125.

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e. The finality of arbitration or the possibility of (some) legal redress in public courts according to the association?

Given that GAFTA standard contracts contain an exclusive jurisdiction clause, it appears that the inclusion of exclusive jurisdiction prevents a claimant from seeking ancillary relief outside of the two-tier arbitration system of GAFTA for any dispute that must be dealt with in arbitration.[267] This is understandable as prolonged delays and enforcement problems in foreign jurisdictions of court decisions are to be expected. Despite these arguments in favour of arbitration and the fact that most GAFTA standard contracts contain a clause that instructs both parties to first refer a dispute to GAFTA arbitration before taking any court action (*i.e.* Scott v. Avery clause),[268] arbitral proceedings can be reviewed by English courts, unless the proceedings concern enforcement issues.[269]

II. Nonlegal sanctioning

When a recalcitrant party neglects or deliberately does not comply with an arbitral award decided in GAFTA first instance or second instance arbitration, nonlegal punishment takes the form of blacklisting. Expulsions and refusals to deal are not mentioned in the Bylaws and Rules of GAFTA.

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267 GAFTA arbitration consists of two instances. It contains a first instance tribunal and the possibility to reconsider a case in full in a second instance appeal procedure.

268 For an example of such an arbitration clause within a GAFTA standard agreement, see Article 22 (b) of the Contract for the Delivery of Goods Central and Eastern Europe in Bulk or Bags No. 49 of 2018. According to this clause: "*Neither party hereto, nor any persons claiming under either of them shall bring any action or other legal proceedings against the other in respect of any such dispute, or claim until such dispute or claim shall first have been heard and determined by the arbitrator(s) or a board of appeal, as the case may be, in accordance with the Arbitration Rules and it is expressly agreed and declared that the obtaining of an award from the arbitrator(s) or board of appeal, as the case may be, shall be a condition precedent to the right of either party hereto or of any persons claiming under either of them to bring any action or other legal proceedings against the other of them in respect of any such dispute or claim*".

269 Ibid., see Art. 21.

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1. Blacklisting

The method of ensuring compliance with arbitral awards can be found in Article 24.1 of the GAFTA Arbitration Rules No. 125. This provision empowers the Council of GAFTA to sanction a refusal to deal by posting the name of an individual or undertaking on its notice board, website and/or informing its members in any other way to ensure a similar effect.[270] To be taken off the list or have an individual's or company's good name restored, full payment must be made. Although no express provision is found in the Bylaws that instructs GAFTA to inform a defaulter of its intention to blacklist that defaulter, warnings are typically issued in order to induce compliance.[271]

III. Rationale for private enforcement/nonlegal sanctioning

Similar to the cotton market in which the ICA is an important trade association, the market for grain and feed trade can be classified as a market where derivative financial instruments (such as futures) play a pivotal role.[272] Moving GAFTA commodities from a seller to a buyer is risky primarily due to price swings.[273] To overcome this, despite many developing countries refusing to do so, futures are used to manage risks.[274] This entails that delivery is to be made at a future date and that prices are calculated on the basis of a predetermined method by referring to the exchange mar-

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270 For the GAFTA default list from 2011 to 2018, see https://www.gafta.com/write/MediaUploads/Arbitration/Defaulters/Defaulters_on_Gafta_Awards_of_Arbitration_2011-present.pdf.

271 I. Polovets, M. Smith, and B. Terry, "GAFTA Arbitration as the Most Appropriate Forum for Disputes Resolution in Grain Trade", *Arizona Journal of International & Comparative Law Vol. 30, No. 3* 2013, p. 580; L. Boisson de Chazournes, M. Kohen, and J. E. Viñuales, "*Diplomatic and Judicial Means of Dispute Settlement*", Leiden/Boston: Koninklijke Brill NV 2013, p. 273. Blacklisting facilitates the efforts of creditors and objectifies their claims.

272 C. Tietje and A. Brouder, "*Handbook on Transnational Economic Governance Regimes*", Leiden/Boston: Martinus Nijhoff Publishers 2009, p. 656.

273 M. Atkin, "*The International Grain Trade*", Abington: Woodhead Publishing 1995, p. 113. Although *Atkin* explains that price variations apply to grain trade, the prices of other types of commodities which are traded under GAFTA contracts are also volatile.

274 Ibid., p. 111.

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ket.[275] Obviously, this bears the risk that a seller would be induced to breach the contract in the event he can get a higher price for his commodities compared to the predetermined fixed price. Alternatively, the buyer will be persuaded to breach his contract with the seller if a different supplier can give him a better price. In other words, both scenarios instigate and reward contract deviation when the gains of either person offset any expected legal fees.

Instead of court adjudication, GAFTA arbitration, under the threat of nonlegal sanctioning (here: blacklisting) following non-compliance with an award, is a more effective method to guarantee sanctity of contract and strengthen its credibility. GAFTA's use of nonlegal sanctioning as a governing body to oversee trade and arbitration, without having a direct interest or bias, is essential for proper functioning of the market. A second reason for the introduction of nonlegal sanctions refers to the slow and uncertain enforcement and recognition procedure under the New York Convention. As members of GAFTA are dispersed globally, it is highly conceivable that parties contracting under standardized contracts of this association are not established in one and the same State. Hence, if arbitral awards were to be enforced in a public court, this would require the recognition of that enforcement judgment by a court established in another State. This procedure causes unnecessary delays. In addition, it is possible that the court tasked with the recognition may refuse to do so.

275 R. Duncan, "*Agricultural Futures and Options: A Guide to Using North American and European markets*", Abington: Woodhead Publishing 1992, p. 53-54, 109. Please be aware that farmers active in the grain trade prefer the options market over the market for futures. Options do not contain an obligation to purchase, but a right (or option) to buy a certain amount of commodities at a predetermined price within a fixed time period. As a condition, the seller must make an upfront premium payment, which cannot be reimbursed. Despite this observation, the present Paragraph rationalizes the existence of nonlegal sanctioning found in Article 24.1 of the GAFTA Arbitration Rules No. 125 by referring to the market for futures. This is because, notwithstanding that it provides a rather one-sided and simplistic explanation, futures are used by parties drafting under GAFTA contracts and provide a satisfactory argument to substantiate the existence and effectiveness of nonlegal sanctioning.

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E. The Federation of Cocoa Commerce

I. Background

1. History

To meet the demands of the Western European market,[276] cocoa was imported from South and Middle America from as early as the 17th century.[277] This was risky for many merchants, as storms, corrupt harbour officials, piracy and other dangers could make the quantity of expected cocoa delivery unpredictable. To lower the financial risk of individual journeys, ship-owners started to sell their cargo at auctions or sometimes privately before the commodities arrived.[278] This strategy remained till the beginning of the 19th century, as it was sufficient to accommodate the needs of drinkable chocolate consumers in Western Europe. Decades later, things changed due to increased international trade contingent upon improved vessels and the emergence of large factories that required a steady, high quality and reliable supply of cocoa.[279] In other words, physical arrival of cocoa was almost certain and the risk of a loss of supply was minimal. This enabled merchants to sell cocoa before it even arrived on a fixed day in the future (*i.e.* the emergence of the futures market). As cocoa trade intensified in the subsequent century, also by virtue of the increase in African cocoa supply, merchants who wanted to conduct trade expeditiously favoured trading on standardized contracts. The benefit being that they were easily understood by both parties, without the need of having detailed discussions about the quality of the commodities, risks involved (*e.g. force majeure*) and the settlement of potential disputes.[280] At that time, most standardized contracts stemmed from two trade associations that catered for

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276 M. Castleman, "*The New Healing Herbs: The Classic Guide to Nature's Best Medicines*", Emmaus: Rodale 2001, p. 140. Cocoa was particularly popular in Belgium, Switzerland, Holland and England as a beverage.

277 L. E. Grivetti and H. Shapiro, "*Chocolate: History, Culture, and Heritage*", in: J. H. Momsen and P. Richardson (ed), "Caribbean Cocoa: Planting and Production", Hoboken: John Wiley & Sons 2009, p. 481. In the mid-17th century, cocoa was also grown in the Spanish and French islands.

278 R. Dand, "*The International Cocoa Trade*", New York: Woodhead Publishing 1996, p. 82.

279 Ibid., p. 83.

280 R. Dand, "*The International Cocoa Trade*", Cambridge/Philadelphia/New Delhi: Woodhead Publishing 2011, p. 97.

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the interests of cocoa merchants in Western Europe. The first association is the Cocoa Association of London (CAL) formed in 1928 and the second is the Association Française du Commerce (AFCC), founded in 1935. In 2002 both associations amalgamated to develop a single robust commercial framework for the cocoa market that became known under its current name, the FCC. Its headquarters are located in London.[281]

2. Legal form

Similar to the ICA and GAFTA, the FCC is a not-for profit limited liability company by guarantee.[282] Its goal is to regulate, promote and protect the international cocoa trade and to safeguard the interests of its members. The trade association has neither a fixed number of members, nor any shares or shareholders, but every member can be held liable for his nominal amount paid (Art. 7 and 8 of the FCC Articles of Association (2017)).

3. Institutional structure

The FCC gives members as well as non-members access to its Articles of Association in which its institutional structure is well defined. In detail, this association consists of four bodies that can be subsumed under the following three branches: the legislative (*i.e.* the General Meeting), the executive (*i.e.* the Council and the Board) and the judiciary (*i.e.* the *ad hoc* arbitration tribunal). The General Meeting takes place annually and is tasked with, *inter alia*, organising a poll to allow members to cast a vote to (re-)elect a member for the Council (Art. 32 and 92 of the FCC Articles of Association (2017)).[283] The Council consists of a maximum number of 18 individuals, 14 voting members who are elected in the General Meeting and four non-voting-members who are appointed by the councillors following the installation of the Council (Art. 29 till 34 of the FCC Articles of Association (2017)). The main duty and right of the Council is to appoint the FCC's Board, consisting of the chairman, the vice-chairman and the

281 30 Watling St, London EC4M 9BR, UK.

282 Prelude and Article 6 of the FCC Articles of Association (2017) (to access: https://www.cocoafederation.com/dashboard/documents/download/371).

283 For all rules pertaining to the General Meeting, see Articles 92 to 122 of the FCC Articles of Association (2017).

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treasurer and is tasked with representing the association *ex-officio* (Art. 36 and 58 of the FCC Articles of Association (2017)).[284] In addition, the Council has many other tasks, including drafting or amending standardized contracts, organising arbitration, etc. (Art. 56 and 78a of the FCC Articles of Association (2017)).[285] The fourth body of the association is the arbitration tribunal, which is discussed below.[286]

4. Membership

The FCC, which represents over a 1,000 members in 84 countries[287], divides membership into five categories (Art. 10 to 15 inclusive of the FCC Articles of Association (2017)).[288] The first class is the voting member, which can be any individual, partnership, unincorporated association or any other legal entity or body corporate active in the cocoa trade with (capital) assets exceeding £500,000 (Art. 10 of the FCC Articles of Association (2017)). The second class consists of associate members who are individuals, body corporates or entities that cannot meet the capital requirement mentioned above, but have more than £100,000 and/or satisfy other requirements determined by the Council (Art. 11 of the FCC Articles of Association (2017)). The third category comprises individual non-voting members serving the cocoa trade, without being actively involved (Art. 12 of the FCC Articles of Association (2017)). The last two categories are made up of group members, who are composed of body corporates connected (*e.g.* shareholding) with a voting member/non-voting member (as

284 The Board also comprises of a secretary, although this individual does not have voting powers. See Article 58 of the FCC Articles of Association (2017).

285 The Council is tasked with "*(ii) issuing and amending forms of contracts, charter-parties, bills of lading, policies of insurance and other transactional documentation to be used in the course of the Trade as promoted by the Federation; (iii) settling and amending rules for the accurate sampling, analysis and examination of Cocoa Beans, Cocoa Products and related articles; (iv) arbitrating the settlement of disputes arising out of transactions in or relating to the Trade; (v) petitioning, making representations to or entering into any arrangement with any parliaments, governments, agencies or authorities, supreme, municipal, local or otherwise; (vi) the appointment and removal of the Secretary (and any joint, assistant or deputy secretary); and (vii) organising Members' events and education and training*".

286 For a more detailed discussion of how the arbitration tribunal is formed, see Part I, Chapter 2, E, I, 5.

287 https://www.cocoafederation.com/fcc/members.

288 https://www.cocoafederation.com/membership/categories-of-membership.

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well as constituting a body corporate) active in or serving the cocoa trade (Art. 14 of the FCC Articles of Association (2017)) and honorary members (Art. 15 of the FCC Articles of Association (2017)). To become eligible, besides falling under one of the five categories of membership, a potential member of the FCC must also submit an application and pay a fee, unless he is an honorary member (Art. 18 till 22 of the FCC Articles of Association (2017)).

5. Specialized commercial arbitration

a. A dichotomy of arbitration forms

To promote the trade in cocoa, the FCC has developed a system of arbitration to resolve disputes between market participants trading on the basis of standardized contracts of the association. Despite having uniform arbitration rules, the FCC divides arbitration into two forms: first, quality and, second, other than quality arbitration. Whereas both proceedings have different time limits for submitting evidence in first instance and second instance appeal as well as for hearings in both instances, no further differences exist (Art. 2.11, 2.14, 3.1, 3.8 and 3.12 of the FCC Arbitration and Appeal Rules (2017)).[289] Therefore, this Chapter does not divide arbitration into two proceedings, but discusses both forms as if they were very similar, with some emphasis on the differences mentioned above.

b. Selection of arbitrators

Providing a remedy for the settlement of disputes is paramount for organising and maintaining a system of private ordering by the FCC. Once a conflict arises between two market participants in the wake of a coca sale and/or purchase contract, subject to and conditional upon an acceptance of FCC arbitration in a clause and an application to start arbitration by the claimant, the Secretary of the FCC appoints three qualified arbitrators (Art. 1.2, 1.11, 2.4 (a) of the FCC Arbitration and Appeal Rules (2017)). Only when the parties do not agree on the nomination, or when an arbi-

289 The FCC Arbitration and Appeal Rules of 2017 (to access: https://www.cocoafederation.com/dashboard/documents/freecontent/rules/arbitration-and-appeal/arbitration-appeal-rules/ENG).

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trator dies, becomes ill or incapable, is the composition of the arbitration tribunal final (Art. 2.4 (d), 2.6 and 2.7 of the FCC Arbitration and Appeal Rules (2017)). To reach a decision on a dispute that is referred to them, the tribunal must render an arbitral award on the basis of the majority rule (Art. 2.8 of the FCC Arbitration and Appeal Rules (2017)). In the absence of a majority or unanimity, the chairman of the tribunal has the decisive vote. In appeal, the Secretary of the FCC nominates three arbitrators of the Panel to constitute a Board of Appeal (Art. 3.2 (a) of the FCC Arbitration and Appeal Rules (2017)).

In terms of eligibility, an individual voting and associate member of the FCC (irrespective of his job as a lawyer) is qualified to serve as an arbitrator when he is selected from a panel of experienced cocoa professionals who are approved by the Council.[290] In order to be placed on the list of qualified arbitrators, the procedure to become either a technical or a quality arbitrator must be successfully followed. With regard to the former, the Secretariat of the FCC proposes an individual who has passed all mandatory FCC arbitration training courses for initial review to the Council (Art. 3.1.1 of the Application Procedure to Join the FCC Arbitration and Appeal Panel).[291] If the Council agrees that an individual is suitable to serve as a technical arbitrator, the candidate will be considered officially a technical arbitrator (Art. 3.1.2 and 3.1.3 of the Application Procedure to Join the FCC Arbitration and Appeal Panel).

Albeit partly similar, the procedure to become a quality arbitrator appears to be more specific. Again the Secretary has to propose a candidate to the Council pending initial review (Art. 3.2 of the Application Procedure to Join the FCC Arbitration and Appeal Panel). Yet, to be officially installed, this individual must (i) attend a cocoa bean quality assessment; (ii) substantiate any evidence of his proficiency in quality assessment in accordance with the FCC Contract and Quality Rules (*e.g.* measuring broken beans); and (iii) effectuate a cut test that assesses his generic expertise of bean count and quality (Art. 3.2.3 to 3.2.5 inclusive of the Application Procedure to Join the FCC Arbitration and Appeal Panel).

290 https://www.cocoafederation.com/services/arbitration/arbitration; https://www.cocoafederation.com/dashboard/documents/download/211.

291 The Application Procedure to Join the FCC Arbitration and Appeal Panel of 2017 (to access: https://www.cocoafederation.com/dashboard/documents/download/382).

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c. Choice of tribunal and jurisdiction of arbitration tribunals

Any dispute that is referred to FCC arbitration is governed by the legal jurisdiction of England and Wales (Art. 1.4 of the FCC Arbitration and Appeal Rules (2017)). In addition, the provisions of the Arbitration Act 1996 or any other replacement thereof apply to the proceedings. When an arbitration tribunal is installed, the arbitrators may rule on their own substantive jurisdiction, but only to establish whether there is a valid and properly constituted arbitration agreement and for all matters submitted to arbitration pursuant to an arbitration clause (Art. 4.1 of the FCC Arbitration and Appeal Rules (2017)). English law (*i.e.* the Arbitration Act 1996) must be complied with.[292]

d. Procedure

In the event of a contractual dispute, the claimant starts arbitral proceedings by submitting an application of arbitration to the Secretary of the FCC and notifying the other party within a timeframe of 56 days thereof (Art. 2.1 and 2.2 of the FCC Arbitration and Appeal Rules (2017)). After, a three-person arbitration tribunal is composed in line with the procedural rules found in Articles 2.4 to 2.9 inclusive of the FCC Arbitration and Appeal Rules (2017).[293] To make a good, accurate and complete decision, the parties in the arbitration proceedings must send all copies of evidence submitted to the other party to the tribunal (Art. 2.11 of the FCC Arbitration and Appeal Rules (2017)).[294] Typically, no hearing takes place, unless the

292 Dispute Resolution Service: A Guide to FCC Arbitration of 2015 (to access: https://www.google.de/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=2ahUKEwjjrYja14HhAhWCyqQKHVmID60QFjABegQICRAC&url=https%3A%2F%2Fwww.cocoafederation.com%2Fdashboard%2Fdocuments%2Fdownload%2F211&usg=AOvVaw38QHl1n8pHknBUKlz_6uof).

293 For a more detailed discussion of how the arbitration tribunal is formed, see Part I, Chapter 2, E, I, 5, b.

294 It is important to emphasize that different timetables of submissions of evidence apply with regard to quality and other than quality arbitration. For the former, the claimant must submit his statement to the respondent at the time of his request for arbitration, followed by submission of a defence statement by the latter individual to the claimant no later than within 21 days (Art. 2.11.1 of the FCC Arbitration and Appeal Rules (2017)). With regard to other than quality arbitration, the claimant must send his statement of the case to the respondent within 21 days after his request to start arbitration proceeding (Art. 2.11.2 (i) of

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arbitration tribunal or either party/both parties favour this (Art. 2.14 of the FCC Arbitration and Appeal Rules (2017)). Following contemplation of the dispute by the arbitration tribunal, the tribunal renders a final, conclusive and binding award (Art. 5.1 to 5.3 and 5.7 inclusive of the FCC Arbitration and Appeal Rules (2017)).

If either party disagrees with the findings of the arbitration tribunal in first instance, this individual can request a notice of appeal (Art. 3.2 (a) of the FCC Arbitration and Appeal Rules (2017)). Once the board is installed, except when the appeal concerns a jurisdictional dispute, it must render a final, conclusive and binding award on the basis of all copies of evidence sent to it that have also been sent by one party to the other party and vice versa (Art. 3.8 and 5.9 of the FCC Arbitration and Appeal Rules (2017)).[295]

e. The finality of arbitration or the possibility of (some) legal redress in public courts according to the association?

Judicial power is vested in the FCC two-tier arbitration system. The FCC Arbitration and Appeal Rules (2017) only explain that an award stemming from FCC specialized commercial arbitration is binding and final, without (in wording) excluding the possibility of legal redress at the courts. Whether or not this entails that compensation cannot be found outside the FCC is unclear. Fortunately, these rules contain some articles that specifically refer to the English High Court in conjunction with Section 105 of the Arbitration Act 1996 to revoke the authority of an arbitrator in first and in second instance (Art. 1.11 (h), 2.7 and 3.4 of the FCC Arbitration and Appeal Rules (2017)).

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the FCC Arbitration and Appeal Rules (2017)). After, the respondent must within a period of 21 days submit his defence to the claimant. (Art. 2.11.2 (ii) of the FCC Arbitration and Appeal Rules (2017)). Subsequently, the claimant must within a timeframe of 21 days make a statement of his counter-claim to the respondent (Art. 2.11.2 (iii) of the FCC Arbitration and Appeal Rules (2017)).

295 The same time limits for the submission of evidence apply pertaining to FCC arbitration proceedings in first instance, with the exception that for quality arbitration the appellant must submit evidence to the respondent within 21 days following his request to start arbitral proceedings. See Art. 3.8 of the FCC Arbitration and Appeal Rules (2017).

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II. Nonlegal sanctioning

The FCC provides two methods of punishing non-compliance with awards by disobedient parties following specialized commercial arbitration. As is explained below, a party can be blacklisted and/or excluded from the association.

1. Blacklisting

As stipulated by Article 5.16 of the FCC Arbitration and Appeal Rules (2017), once a party refuses to comply with a final and binding arbitral award stemming from the FCC two-tier arbitration system, the Council is empowered to publish the name of the offender on the website of this association.[296] In addition, the Council has complete freedom to disseminate this information to all members and organisations worldwide, without taking limitations into account.[297]

2. Withdrawing membership

At the absolute discretion of the Council of the FCC, membership can also be suspended or withdrawn in the event that a member does not comply with an arbitral award (Art. 25 of the FCC Articles of Association (2017)). That decision "may" be posted by the Board and, if decided by the Council, "shall" be published on the website of the FCC and/or sent to all members and/or organizations, without having regard to constraints (Art. 26 of the FCC Articles of Association (2017)).

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296 For the FCC's complete default list, see https://www.cocoafederation.com/services/arbitration/defaulters.

297 FCC Dispute Resolution Service: A Guide to FCC Arbitration of 2015, p. 6 (to access: https://www.google.de/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=2ahUKEwjE0eqVpdngAhXDsHEKHSQ_DtQQFjAAegQIBBAC&url=https%3A%2F%2Fwww.cocoafederation.com%2Fdashboard%2Fdocuments%2Fdownload%2F211&usg=AOvVaw38QHl1n8pHknBUKlz_6uof).

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III. Rationale for private enforcement/nonlegal sanctioning

As already partially explained in the historic overview of the formation of the FCC, due to the limited risks and certainty of the arrival of physical cocoa shipments, this commodity can be sold before it even enters the port of destination. Despite this benefit, the price of physical cocoa is highly volatile. To protect the buyer and the seller active in the trade against any risk, the FCC has developed standardized futures contracts. This entails that the buyer and the seller engage in forward sales by determining a fixed price to be paid to the seller at an agreed place and time in the future.[298] This is important, as it protects the buyer and the seller against uncertain future prices. If the price of cocoa goes up, the buyer can still purchase this commodity from the seller at the agreed price. Alternatively, if the price goes down, the buyer must pay the seller the agreed price. [299]

Much like the standardized contracts of the ICA and GAFTA, futures contracts bear the risk that either party can violate its duty to comply with contractual obligations. Disloyalty can be rewarding when the seller can get a higher price for the same quantity of cocoa, in the event this individual is delivering to another buyer rather than complying with the futures contract. Vice versa, the buyer can be triggered to buy cocoa from another merchant in lieu of adhering to the futures contract if the former party can buy cocoa at a decreased price. Either way, the principle of the sanctity of contract can be violated when expected legal fees do not offset the potential gains.

To prevent this, a system of FCC arbitration was introduced to safeguard the notion that once parties enter into a futures contract, they must honour their obligations under that contract. When a party is ordered by an FCC *ad hoc* arbitration tribunal to compensate the other party, there is still a risk that this decision is unenforceable in court. Fortunately, the FCC provides two types of nonlegal sanctions to ensure compliance, namely blacklisting and withdrawing membership. In other words, to ensure the success and effectiveness of futures contracts, nonlegal sanctioning plays a pivotal role.

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298 J. Baffes, D. F. Larson, and P. Varangis, "*Commodities Market Reforms: Lessons of Two Decades*", Washington: The International Bank for Reconstruction 2001, p. 38.

299 P. Robbins, "*Stolen Fruit: The Tropical Commodities Disaster*", London/New York: Zed Books et al 2003, p. 167.

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In addition to this explanation, nonlegal sanctions are necessary in the sense that enforcement of arbitral awards in public courts has proven to cause unnecessary problems. This is mainly because of the fact that parties of the standardized contracts provided by the FCC are often located in two different States. As a result, a public court in the State of registration must issue an enforcement judgment and another State's court must recognize this judgment. This is often not as straightforward as it may appear and causes unnecessary delays and uncertainty.

F. The London Metal Exchange

I. Background

1. History

The historical roots of the LME can be traced back all the way to the formation of the London-based Royal Exchange in 1571.[300] This bourse was the first futures commodities exchange of the world and was the meeting point for traders active in the metal trade.[301] Notwithstanding its historical importance, metal trading was rather underdeveloped in the 16th and 17th centuries. This changed during the course of the Industrial Revolution of the late 18th and the 19th century owing to a considerable increase in the demand for metals, which often required large investments to be made by merchants.[302] Not only had the volume of international trade expanded, but also its structure had changed.[303] To mitigate the high risks involved in importing metals by dint of sharply fluctuating prices, a futures market developed in which metals could be sold at a fixed price (negotiated at the trade date) for delivery at a future place and time.[304]

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300 P. Bernholz and R. Vaubel, "*Explaining Monetary and Financial Innovation: A Historical Analysis*", Heidelberg/New York/Dordrecht/London: Springer International Publishing 2014, p. 267.

301 M. L. Huszar, "*Rohstoffe als Investmentklasse: Eine theoretische und empirische Analyse*", Hamburg: Diplomica Verlag GmbH 2008, p. 4-5.

302 N. Schoon, "*Modern Islamic Banking: Products and Processes in Practice*", Chichester: John Wiley & Sons 2016, p. 117.

303 M. Gorham and N. Singh, "*Electronic Exchanges: The Global Transformation from Pits to Bits*", London a.o.: Elsevier 2009, p. 4.

304 C. Hibbert, B. Weinreb, and J. Keay, "*The London Encyclopaedia (3rd Edition)*", London: Macmillan London Limited 1983, p. 505.

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Against this background and on account of the increasing importance of the trade in non-ferrous metals, the LME was formed in London in 1877.[305] From the outset, this trade association had four functions: first, to provide a single-market place in which non-ferrous metals could be traded. Second, to publish standardized futures contracts. Third, to record the daily prices of non-ferrous metal. Fourth, to offer industry actors contracting under LME standardized rules a possibility to settle their disputes in specialized commercial arbitration.

2. Legal form

Since its formation in 1877 the LME operated as a member-owned mutual society. Although this corporate structure lasted for more than a century, in 1987 the LME exchange was converted into a "company limited by guarantee" under the Companies Act.[306] Once again, in the wake of the growing significance of technology, the members of the LME opted for a change of organization and corporate structure in 2000, resulting in the formation of a new holding company (*i.e.* the LME Holdings Ltd) in 2001.[307] Existing members were given shares in the holding company (or after a refusal, cash payments) to allow future capital raisings.[308] Despite its conversion of a mutual company owned by its members into a "private company limited by shares" (*i.e.* the process of demutualization), the LME is still operated on a not-for-profit basis.

3. Institutional structure

Full-disclosure is given by the LME with regard to its institutional structure. This association is composed of three main bodies, namely the Gener-

305 Non-ferrous metals are metals or alloys that do not contain iron (ferrite) in appreciable amounts.

306 E. Banks, "*Exchange-Traded Derivatives*", Chichester: John Wiley & Sons 2003, p. 105.

307 Ibid., p. 106; Article 1.1 of the London Metal Exchange Rules and Regulations of 2019 (to access: https://www.lme.com/LME-Clear/Rules-and-regulations).

308 Liability of the members of the LME is limited to the amount of their shares. See Article 3 of the LME Articles of Association of 2013 (to access: https://www.lme.com/-/media/Files/LME-Clear/Governance/Approved-LMEC-Articles-of-Association.pdf?la=en-GB).

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al Meeting, the Board and, in the event of a dispute, an *ad hoc* arbitration tribunal. The General Meeting, which is convened by the Board with a notice period of a minimum of 14 days, takes place annually and is tasked with adopting new resolutions such as, *inter alia*, the removal of a director or auditor before the expiration date of his office in line with Section 282 of the Companies Act 2006 (Art. 2 (a), 45 (a), 57 (b) of the LME Articles of Association (2013)). The Board, on the other hand, consists of nine directors who are mandated to promote the success of the association as whole (Art. 6(a) and 22(a) of the LME Articles of Association (2013)). By taking decisions in line with the majority principle, this body which is responsible for representing the members on a day-to-day basis can be seen as the impetus of the association (Art. 9 of the LME Articles of Association (2013)). Although not instructed to resolve conflicts between parties who conducted business on the basis of one of the standardized rules of the LME, it supervises the installation of an *ad hoc* arbitration tribunal. Such a dispute resolution mechanism is formed on the basis of specific rules that are discussed below.[309]

4. Membership

The Board of the LME is empowered to grant membership when a potential candidate falls within one of the seven categories of membership, fulfils the applicable requirements (*e.g.* admission fee) and makes an application on the basis of Part 2, Article 5.1 of the LME Rulebook (2019).[310] Potential category 1 members comprise foreign undertakings or undertakings/managing members of undertakings which are foreign undertakings or body corporates incorporated in the UK[311] that have an exclusive right to trade LME contracts in the telephone market, by open outcry in the

309 For a more detailed discussion of how the arbitration tribunal is formed, see Part I, Chapter 2, F, I, 5.

310 The LME Rulebook of 2019 (to access: https://www.lme.com/-/media/Files/Regulation/Rulebook/Full-Rulebook/Rulebook-as-of-January-2019.pdf?la=en-GB).

311 These requirements for the legal nature of potential candidates apply to categories 1 to 5 of LME membership.

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Ring[312] or on LMEselect (Part 2, Art. 2.2 of the LME Rulebook (2019)).[313] In addition, they are entitled to clear trade in the clearinghouse. A candidate of category 2 membership must fulfil similar conditions, but is not permitted to trade LME contracts by open outcry in the Ring (Part 2, Art. 2.3 of the LME Rulebook (2019)).[314]

More distinctly, potential category 3 candidates must be clearing members that are authorized to trade LME contracts on LMEselect and in the telephone market, without, unlike the first two categories of membership, being allowed to issue client contracts (Part 2, Art. 2.4 of the LME Rulebook (2019)). Category 4 membership requires candidates not to be clearing members, whilst having the competence to trade client contracts on LMEselect and in the telephone market (Part 2, Art. 2.5 of the LME Rulebook (2019)). Categories 5 mandates candidates to be a customer of a category 1 to 4 member of the LME or qualify as a physical market participant wishing to be associated with this association, whereas categories 6 and 7 concern individuals who desire to be near to the LME community and honorary members (Part 2, Art. 2.6 to 2.8 of the LME Rulebook (2019)).

5. Specialized commercial arbitration

a. The single arbitration model

To sustain an orderly market, with the purpose of resolving member-to-member disputes, without having to resort to public court decision-making, the LME provides a well-functioning specialized commercial arbitration system. Different from the ICA, GAFTA and the FCC, but similar to the DDC, this association caters for a single arbitration model, without differentiating between quality and technical dispute resolution.

312 Open outcry in the Ring is the trading of metal in sessions of five minutes on the LME exchange. See https://www.lme.com/en-GB/Trading/Trading-venues/Ring#tabIndex=0.

313 LMEselect is the electronic member of the member trading system that allows anonymous trading by respecting certain tradable hours. See https://www.lme.com/en-GB/Trading/Systems/LMEselect#tabIndex=0.

314 https://www.lme.com/en-GB/Trading/Access-the-market/Membership-categories#tabIndex=0.

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b. Selection of arbitrators

Typically, all disputes arising out of contracts subject to the rules of the LME are referred to two arbitrators (Part 8, Art. 3.1 of the LME Rulebook (2019)). However, both parties can agree to sole arbitration or, at the request of either party and when at least one arbitrator deems this necessary, allow the Secretary of the LME to appoint a third arbitrator (Part 8, Art. 3.5 of the LME Rulebook (2019)). Alternatively, a third arbitrator who will be considered the chairman of the *ad hoc* arbitration tribunal can be appointed when two arbitrators cannot reach a decision and request the Secretary to nominate a third arbitrator (Part 8, Art. 3.6 and 12.2.1 of the LME Rulebook (2019)).

To become eligible to be selected as an LME arbitrator, panellists do not have to be members of the LME or have to be linked to the association, but need to demonstrate a broad knowledge owing to the individual's practical experience in trading metals.[315] What this entails is unclear, as any yardstick to measure the required amount of experience is not provided by the LME or explained in legal doctrine. In spite of this uncertainty, the associations names twenty-three arbitrators that may serve on *ad hoc* arbitration panels.[316] Being a lawyer is not a limitation to serve as an arbitrator.

c. Choice of tribunal and jurisdiction of arbitration tribunals

Any LME arbitration is held in England and Wales (*i.e.* the seat of arbitration) (Part 8, Art. 7.7 of the LME Rulebook (2019)). Whereas hearings are usually held at a venue in both countries, the parties can deviate from this general rule. Documents-only or telecommunication/video-linked arbitration is possible as well as hearings that take place outside both countries (Part 8, Art. 7.1, 7.3 and 7.4 of the LME Rulebook (2019)).

With regard to the jurisdiction of any formed LME arbitration tribunal, the appointed arbitrator or arbitrators of this tribunal must decide on their own jurisdiction in compliance with English law. This entails that the Arbitration Act 1996 must be adhered to or, where the arbitration regulation provides otherwise, the applicable alternative English law defined in that arbitration regulation.

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315 https://www.lme.com/en-GB/About/Regulation/Arbitration#tabIndex=0.
316 https://www.lme.com/About/Regulation/Arbitration/Arbitration-panel.

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d. Procedure

LME arbitration, which is not designed for mediation or conciliation commences when a claimant notifies the respondent of its intention to arbitrate a dispute (Part 8, Art. 2.1 of the LME Rulebook (2019)). Concurrently, the claimant must provide a copy of this notification to the Secretary of the LME as well as a duplicate of the registration fee paid and deposit that indicates the date of payment (Part 8, Art. 2.3 of the LME Rulebook (2019)). After this notification, the arbitration tribunal will be formed, which can be composed of a sole arbitrator, two arbitrators or three arbitrators.[317] Within a timeframe of 21 days following the installation of the tribunal, the claimant must then provide the respondent and the tribunal of all evidence to substantiate its claim (Part 8, Art. 6.2 of the LME Rulebook (2019)). Subsequently, within 21 days the respondent must send the claimant and the tribunal its written defence (Part 8, Art. 6.4 of the LME Rulebook (2019)). Following receipt of the respondent's written defence, the claimant may make a counterclaim within 21 days, which must be forwarded to the respondent and the tribunal (Part 8, Art. 6.5 of the LME Rulebook (2019)). In complete freedom, the respondent may then submit a counterclaim to the claimant and the tribunal within 21 days (Part 8, Art. 6.6 of the LME Rulebook (2019)).

Following an economic, expeditious and just assessment of the dispute, the arbitration tribunal then makes an award in writing (Part 8, Art. 4 and 12.1 of the LME Rulebook (2019)). This decision is final and binding on the parties and may not be appealed within the LME (Art. 12.8 of the LME Rulebook (2019)).

e. The finality of arbitration or the possibility of (some) legal redress in public courts according to the association?

Any LME arbitration tribunal has the exclusive competence to resolve disputes arising out of the completion, validity or existence of this association's standardized rules (Part 8, Art. 10.1 and 11.3 of the LME Rulebook (2019)).

317 For a more detailed discussion of how the arbitration tribunal is formed, see Part I, Chapter 2, F, I, 5, b.

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In addition, unless the parties agree otherwise, contesting an award at any public court is prohibited (Part 8, Art. 12.8 of the LME Rulebook (2019)).

II. Nonlegal sanctioning

Once the time for payment of an arbitral award has elapsed, as is discussed below, the LME can punish a defaulter by entering the defaulter's premises to search for information, publishing the defaulter's name on a default list and suspending or withdrawing the defaulter's membership.[318] Even though the LME does not instruct members to abstain from trading with an expelled member, the LME has far-reaching powers to ensure compliance with any award stemming from this association's arbitration.

1. The power to enter premises

The LME has the authority to enter the premises belonging to the defaulter to seize any records and extracts concerning the defaulter's trading and accounting activities with the aim to determine (i) other unsettled contracts; (ii) the names and addresses of counterparties; (iii) information of warrants and money held (to pay other counterparties); (iv) records of other property; and (iv) all information the LME may deem necessary or expedient to carry out its duties under the Default Regulation (Part 9, Art. 5.1 of the LME Rulebook (2019)).[319] To help prevent this invasion of privacy from further affecting its reputation, since news spreads quickly, any defaulter must cooperate with the power to enter its premises (Part 9, Art. 5.2

318 Only when a category 1 to 4 member is declared a defaulter for not adhering to an award made in LME arbitration, is the Default Regulation as laid down in Part 9 of the LME Rulebook (2019) be applicable. Category 5, 6 or 7 members are not bound by this regulation, unless they entered into an LME contract (Art. 2.1 of the LME Rulebook (2019)). Any defaulter as well as the other party have 14 days to submit a confirmation of payment to the Secretary following the sending of a notice of application (*i.e.* non-payment has occurred) to the Secretary (Part 8, Art. 12.12 and 12.14 of the LME Rulebook (2019)). See also https://www.lme.com/About/Regulation/Arbitration#tabIndex=1).

319 Much like the power of the EU Commission to enter the premises of suspected competition law offenders in line with Article 20 of Regulation 1/2003, the LME has similar competences to inspect.

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and 5.3 of the LME Rulebook (2019)). Counterparties are also invited to provide information about unsettled contracts

2. Blacklisting

Following the LME establishing that a party is considered a defaulter under the Default Regulation, the exchange is obligated to post a notice of this finding in the exchange and inform, where appropriate, other persons and counterparties of unsettled contracts with the defaulter (Part 9, Art. 4.1 of the LME Rulebook (2019)). This notice may also be circulated to other exchanges and clearinghouses approved under Part VII of the Companies Act 1989,[320] the Secretary of State, the Treasury, recognized investment exchanges or regulatory bodies, applicable office holders, and any authority or body associated with the defaulter under the arbitrated contract (Part 9, Art. 10 of the LME Rulebook (2019)).

3. Withdrawing membership

When a disloyal member is considered a defaulter within the meaning of the Default Regulation, the Directors may also immediately suspend or withdraw membership (Part 2, Art. 15.1, 15.2.3 and 15.2.4 of the LME Rulebook (2019)). For a suspension to be considered legitimate, this method must be unavoidable to ensure an orderly market and alternative methods to ensure compliance with statutory obligations must be absent (Part 2, Art. 15.3 of the LME Rulebook (2019)). As such nonlegal sanction can seriously harm members, a targeted individual/company has the right to ask for a reassessment of the facts of the case (*i.e.* lodge an appeal) at the LME Appeal Committee (Part 9, Art. 15.4 of the LME Rulebook (2019)).

With regard to an expulsion, the Directors have complete discretion to effectuate this form of nonlegal sanctioning, without having to comply with any or similar yardstick vis-à-vis a suspension (Part 9, Art. 15.5 of the LME Rulebook (2019)). Although any targeted member may appeal at the LME Appeal Committee, that member's membership is suspended pending the outcome of the appeal. After the committee confirms that the decision of the arbitrator to expel a member is justified, that member's mem-

320 The Companies Act of 1989 (to access: http://www.legislation.gov.uk/ukpga/1989/40/contents).

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bership will be withdrawn. As a result, the defaulter forfeits all privileges of being a member of the LME (e.g. right to entry to the exchange), without being entitled to be reimbursed for subscription or fees already paid (Part 2, Art. 16.1 and 16.2 of the LME Rulebook (2019)).

III. Rationale for private enforcement/nonlegal sanctioning

The LME is a designated futures exchange for aluminium, copper, tin, lead, zinc and silver.[321] To hedge price fluctuations concerning these commodities, the exchange provides standardized rules for its members to exchange an underlying security at an agreed price for future delivery.[322] Under the contract, the buyer is obligated to purchase the underlying asset for the predetermined price and the seller is duty-bound to deliver the contract for this monetary sum.

Although prices are calculated on the basis of the world's demand and supply as well as on the price of the British Pound sterling and the US Dollar, there is a clear risk that both buyers and sellers conducting trade on the basis of futures are induced to deviate from agreed contracts, especially when entering into another contract with a different buyer/seller brings more profit for the seller/buyer and contingent upon the estimation that future legal compensation pertaining to court adjudication is lower than the gains. The LME's setting up its own system of arbitration, and ensuring compliance with its awards by nonlegal sanctions, eliminates this risk of parties deviating from their futures contracts. Access to the LME is important to trade in the metals market, and being blacklisted, expelled as well as having one's premises being searched can hamper a member's reputation. In other words, nonlegal sanctions to guarantee compliance with LME arbitral awards is crucial to safeguarding the system of standardized futures contracts and greatly curtails disloyalty.

Similar to the ICA, FOSFA and the FCC, a second reason for the use of nonlegal sanctions concerns the inadequacy of public court enforcement of arbitral awards as an efficient alternative to nonlegal sanctioning. Given

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321 A. E. Branch, "*International Purchasing and Management*", London: Thomson 2000, p. 63; D. H. Chew, "*Corporate Risk Management*", New York: Columbia University Press 2008, p. 28. Future contracts on copper have already been introduced by the LME in 1883

322 B. A. Goss, "*Futures Markets (Routledge Revivals): Their Establishment and Performance*", in: B. A. Goss (ed.), "The Forward Pricing Function of the London Metal Exchange", London/Sydney: Croom Helm 1986, p. 157.

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that LME members are scattered throughout the world and, therefore, parties contracting under an LME standardized rules are located in different States, if public court enforcement had been chosen, the court in the State of registration would need to issue an enforcement judgment of the arbitral award, which then would need to be recognized by a court in another State. This procedure as laid down in the New York Convention causes unnecessary delays and sometimes even more severe problems, such as an unwillingness of a court to recognize an enforcement judgment. Put differently, nonlegal sanctioning completely removes these risks and provides a much better alternative.

G. The Federation of Oils, Seeds and Fats Association

I. Background

1. History

The use of edible oils, seeds and fats has its origin in the late 19th and early 20th century with the discovery of the process of hydrogenation, which concerns the transformation of inexpensive liquid unsaturated fats into solid fats by adding hydrogen.[323] As a result, as whale and fish oils could now be made edible and to meet the UK's increase in demand, many plants were erected in this country to execute this process.[324] To develop, *inter alia*, a standard for the purchase of linseed, as early as in 1861 the oil crushers founded the non-profit and impartial Incorporated Oil Seeds Association (IOSA).[325] With the purpose of creating a stronger association, the IOSA merged with three other associations in 1971, including the London Oil and Tallow Trades Association (LOTTA) established in 1910, the London Copra Association (LCA) incorporated in 1913, and the Seed, Oil, Cake, and General Produce Association (SOCGPA) founded in 1935. This international association that is tasked with, *inter alia*, issuing standardized rules to regulate the sale and purchase of oils, seeds and fats and to main-

323 A. S. Villegas and A. Sanchez-Taínta, "*The Prevention of Cardiovascular Disease through the Mediterranean Diet*", London/San Diego/Cambridge/Oxford: Elsevier 2018, p. 49.

324 G. Hoffmann, "*The Chemistry and Technology of Edible Oils and Fats and Their High Fat Products*", London/San Diego: Academic Press 1989, p. 201.

325 J. Mark, R. Strange, and J. Burns, "*The Food Industries, Vol. XXVIII*", London: Chapman & Hall 1993, p. 236.

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tain a system of specialized commercial arbitration for the settlement of disputes became known as FOSFA.[326]

2. Legal form

FOSFA is a not-for-profit[327] private company limited by guarantee without share capital.[328] Hence, members are shielded by the "corporate veil" from unlimited liability, even though they are still liable for the amount they have pledged to pay in the event of liquidation of the association.

3. Institutional structure

Comparable to the trade associations already discussed, FOSFA consists of three bodies: the General Meeting, the Council and the *ad hoc* established arbitration tribunals. The General Meeting takes place annually and is tasked with, *inter alia*, despite some vagueness in the FOSFA Rules and Regulations (2018), electing new council members.[329] The Council, on the other hand, which consists of nine directors,[330] has the power to approve new members, publish rules concerning the conduct and procedure of the two-tier arbitration system of FOSFA, to install an appeal board, delegate tasks to specialist/sub committees and ask them to comment on proposals

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326 T. H. Applewhite, "*Proceedings of the World Conference on Lauric Oils: Sources, Processing, and Application*", Champaign: AOCS Press 1994, p. 29.

327 F. Cafaggi, "*Enforcement of Transnational Regulation: Ensuring Compliance in a Global World*", Cheltenham/Northampton: Edward Elgar 2012, p. 218.

328 https://uk.globaldatabase.com/company/federation-of-oils-seeds-and-fats-associations-limited; http://www.datalog.co.uk/browse/detail.php/CompanyNumber/00926329/CompanyName/FEDERATION+OF+OILS+SEEDS+AND+FATS+ASSOCIATIONS+LIMITED.

329 FOSFA Rules and Regulations of 2018 (to access: https://www.fosfa.org/about-us/rules-and-regulations/).

330 See Article 25 of the FOSFA Rules and Regulations (2018). The Council consists of (i) the President; (ii) the Deputy President; (ii)] the Immediate Past President; (iv) the Chairman of the Oilseeds Section Committee; (v) the Vice Chairman of the Oilseeds Section Committee; (vi) the Chairman of the Oils and Fats Section Committee; (vii) Vice Chairman of the Oils and Fats Section Committee; (viii) the Chairman of the Contracts Committee; and (ix) a NOFOTA representative in an ex-officio (non-voting) capacity; For the current officers of the federation, see https://www.fosfa.org/about-us/officers-of-the-federation/.

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(Art. 14 and 34 to 37 of the FOSFA Rules and Regulations (2018)). If there is a conflict between industry actors arising out of one of FOSFA's standardized rules, an *ad hoc* arbitration tribunal may be formed when the claimant requests this.[331]

4. Membership

FOSFA is an international contract-issuing association with over 1,000 members in 84 countries worldwide.[332] Qualifying for membership requires two rules to be complied with. First, an application must be completed, which contains an explanation of which category of FOSFA membership the candidate falls under and whether the candidate is active in the oilseeds and/or oils and fats trade (Art. 4 and 6 of the FOSFA Rules and Regulations (2018)). Second, after acceptance by the Council of the candidate's membership request, payment of the appropriate subscription fee contingent upon the relevant category of membership must be made (Art. 7 of the FOSFA Rules and Regulations (2018)).

With reference to the categories of membership, candidates can fall under the following six groups of members (Art. 4 of the FOSFA Rules and Regulations (2018)). First, normal trading members consisting of companies, sole trader organizations or others conducting trade as principals concerning the commodities of FOSFA. Second, full or associate broker members composed of undertakings, sole traders, organizations or others not acting as principals pertaining to FOSFA contracts that receive commission from the relevant contracting principal(s). Third, full or associate non-trading members, such as organizations, or market participants that do not qualify under any other membership category from time to time. Fourth, FOSFA accredited and recognized analyst members (*i.e.* laboratories or analysts) associated with an undertaking, or organization active in the trade in this association's commodities, without falling under another category of membership. Fifth, FOSFA recognized independent superintendents with the aim of superintending under this association's contracts, without being a member of another category of membership.

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331 For a more detailed discussion of how the arbitration tribunal is formed, see Part I, Chapter 2, G, I, 5.

332 https://www.fosfa.org/membership/categories-of-membership/; A. Lista, "*International Commercial Sales: The Sale of Goods on Shipment Terms*", Abingdon/New York: Informa Law from Routledge 2017, p. 10.

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5. Specialized commercial arbitration

a. Tripartite arbitration

Disputes arising out of GAFTA contracts are typically solved in compliance with the "internal" arbitration proceedings as laid down in the FOSFA Rules of Arbitration and Appeal (2018)).[333] As this document gives specific information about the arbitration procedure, the composition of the arbitration board as well as measures taken in the event of default with an arbitral award, despite it being only available for members and non-members who pay a fee of £15, it is a key reference in the following Paragraphs.[334] In addition to the standard arbitration procedure, FOSFA governs two other types of dispute resolution, which can be found in the FOSFA Rules for Small Claims Single Tier (2018)[335] and the FOSFA Rules for Brokerage Commissions and Interest (2018).[336] In spite of the fact that both procedures merit discussion, these will not be explained here.[337]

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333 FOSFA Rules of Arbitration and Appeal of 2018 (to access: https://www.fosfa.org/document-library/rules-of-arbitration-and-appeal-april-2018/).

334 While FOSFA bans the author's attaching the FOSFA Rules of Arbitration and Appeal (2018) to this research, in the following Paragraphs more quotations are given for the purpose of clarity.

335 https://www.fosfa.org/document-library/rules-for-small-claims-single-tier-april-2018/. This procedure, which can only be chosen when both parties agreed to it in writing is fast-track arbitration proceedings, where a dispute is resolved by a sole arbitrator and where no right of appeal exists (*i.e.* one-tier arbitration system). Unfortunately, it is only available for members and for non-members who pay a fee of £15.

336 https://www.fosfa.org/document-library/rules-for-brokerage-commissions-and-interest-april-2018/. This procedure is applicable in the event of non-payment or late payment of (interest payable on) commission of the brokers in conjunction with FOSFA Contract No. 95. Similar to the other two arbitration proceedings, the FOSFA Rules of Brokerage Commission and Interest (2018) are only accessibly for members and non-members who pay a fee of £15.

337 In my opinion, to discuss these two specialist arbitration proceedings alongside the one laid down in the FOSFA Rules of Arbitration and Appeal (2018) would only increase the complexity of the research, even though they are not common procedure.

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b. Selection of arbitrators

Either party in FOSFA specialized commercial arbitration has the right to appoint one arbitrator, unless both parties agree on sole arbitration (Art. 2(a) of the FOSFA Rules of Arbitration and Appeal (2018)). When two arbitrators are appointed or where FOSFA appoints a second arbitrator in the event the respondent fails to nominate such an individual, the association selects a third arbitrator (Art. 2(b) and (e) of the FOSFA Rules of Arbitration and Appeal (2018)). In appeal, the arbitration panel consists of five arbitrators who are appointed by FOSFA (Art. 8(a) of the FOSFA Rules of Arbitration and Appeal (2018)).

To be eligible for such a selection, "*only Trading, Full Broker and Full Non-Trading Members or their nominated representative/s to the Federation shall have the right to act as arbitrators subject to retirement at age 75, if still active in the trade, or two years after retirement, whichever comes first*" (Art. 2(b) of the FOSFA Rules of Arbitration and Appeal (2018)). In addition, candidate arbitrators need to demonstrate a minimum of ten year's experience in the trade, successful completion of periodic training, and a willingness to abide by the Code of Practice for Arbitrators.[338] Individuals who are wholly or principally engaged in private legal practice are not barred from serving as an arbitrator.[339]

c. Choice of tribunal and jurisdiction of arbitration tribunals

To resolve conflicts between parties arising out of FOSFA contracts or questions of law in connection with FOSFA contracts, arbitration takes place in London (Preamble of the FOSFA Rules of Arbitration and Appeal (2018)). Pursuant to Section 3 of the Arbitration Act 1996, the judicial seat of arbitration is therefore England.

Once an *ad hoc* arbitration board is formed, the arbitrator(s) may rule on their own jurisdiction to establish whether a valid agreement exists (Art. 5 (a) of the FOSFA Rules of Arbitration and Appeal (2018)). However, the

338 https://www.fosfa.org/arbitration/directory-of-fosfa-arbitrators/; FOSFA Code of Practice for Arbitrators of 2018 (to access: https://www.fosfa.org/content/uploads/2018/03/Code-of-Practice-for-Arbitrators-and-Time-Sheet-April-2018.pdf).

339 An express prohibition cannot be found in either the FOSFA Rules of Arbitration and Appeal (2018), or in any other document.

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construction, validity and performance of any contract is governed by English law.[340]

d. Procedure

To start arbitral proceedings, the claimant must, in writing, send this application to the respondent as well as deliver copies to the appointed arbitrator and to FOSFA (Art. 4 (a) (i) of the FOSFA Rules of Arbitration and Appeal (2018)). If the respondent decides to respond to the claimant's submission, the respondent must also send a copy to FOSFA and a copy to the claimant's arbitrator as well as to the arbitrator it has selected, unless the respondent agrees to sole arbitration (Art. 4. (a) (ii) of the FOSFA Rules of Arbitration and Appeal (2018)). At this stage, in line with the rules on formation described above, the *ad hoc* arbitration tribunal must be formed.[341]

After making a well-contemplated decision on the basis of the documents provided by both parties, the tribunal renders an arbitral award (Art. 4 (c) and (d) and 6 (a) of the FOSFA Rules of Arbitration and Appeal (2018)). Notice of the award is given to both parties (Art. 6 (b) of the FOSFA Rules of Arbitration and Appeal (2018)). Upon receipt, the unsuccessful party has 42 days to pay the award, following which it has an opportunity to lodge an appeal under Article 7 of the FOSFA Rules of Arbitration and Appeal (2018). As a condition, an application for appeal must be made "*not later than 12.00 hours London Time on the 28th consecutive day after the day on which the award is sent to the parties*" (Art. 7 (a) of the FOSFA Rules of Arbitration and Appeal (2018)). Upon the composition of the five-person Board of Appeal and the possibility of both parties having the case heard orally and in writing, the Board issues a binding award (Art. 7 (b) of the FOSFA Rules of Arbitration and Appeal (2018)).

340 FOSFA Guide to Arbitrations and Appeals of 2018 (to access: https://www.fosfa.org/content/uploads/2018/03/FOSFA-Guide-to-Arbitrations-and-Appeals-April-2018.pdf).

341 For a more detailed discussion of how the arbitration tribunal is formed, see Part I, Chapter 2, G, I, 5, b.

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e. The finality of arbitration or the possibility of (some) legal redress in public courts according to the association?

An award stemming from specialized commercial arbitration is final and binding (Art. 7 (b) of the FOSFA Rules of Arbitration and Appeal (2018)). Obtaining legal redress at public courts prior to commencing arbitration proceedings and after the rendering of an award is not clarified by FOSFA in any of its rules. The association only explains that a party in whose favour an award has been made has the right to seek enforcement at the English High Court and in other signatory States of the Geneva Convention of 1927 and the New York Convention (FOSFA Guide to Arbitrations and Appeals (2018)).

II. Nonlegal sanctioning

If any party post arbitral proceedings neglects or refuses to carry out or abide by an award of arbitrators or board of appeal, the Council of FOSFA is tasked with putting two types of nonlegal sanctions into effect to punish that party's disloyalty. The first method pertains to blacklisting and the second to withdrawing membership. Both are explained below.

1. Blacklisting

Following non-compliance with an arbitral award, whether stemming from first-tier or second-tier arbitration, the claimant and the respondent must within a period of 28 consecutive days after the date of issuance take up the award (Art. 11(c) of the FOSFA Rules of Arbitration and Appeal (2018)). If this time limit has lapsed, the Council of FOSFA must notify both parties of such disloyalty. When this call is again not heeded, the Council is empowered to post on FOSFA's notice board and/or disseminate this information to its members in any way it considers effective (Art. 11(c) and (d) of the FOSFA Rules of Arbitration and Appeal (2018)).[342] Whether the Council is also empowered to give information concerning defaulters to other associations/exchanges and non-members

342 Dissemination of the names of defaulters is done by means of a circular. The list of companies posted is published on a yearly basis, but remains only accessible for FOSFA members. See https://www.fosfa.org/arbitration/posted-companies/.

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remains unclear. As it stands, the rules of FOSFA do not contain a provision that neither permits nor prohibits this.

2. Withdrawing membership

After a member has been blacklisted by the Council of FOSFA, that member's membership is automatically terminated, if a majority of Directors support withdrawing membership (Art. 18 of the FOSFA Rules and Regulations (2018)). However, at least three-quarters of the Council must be present to take away the membership of an undertaking, organization, sole trader or others. This entails that they lose access to FOSFA as well as, *inter alia*, voting rights in the general meeting. In addition, targeted members are placed at a disadvantage in three other ways. First, they do not have the right to lodge an appeal. Second, they are not awarded a refund of subscription fees already paid. Third, they will not be notified of the reasons for termination.

III. Rationale for private enforcement/nonlegal sanctioning

Unlike the previously discussed UK-based trade associations that provide members with standardized futures contracts in which participants purchase and sell a stipulated quantity of commodities for delivery on a specified future date at a predetermined price (*i.e.* the ICA, GAFTA, the FCC and the LME), FOSFA issues standard rules for the physical transfer of oils, seeds and fats.[343] In other words, this association is a rule-generating system for market participants active in the cash or spot markets in which prices are determined instantly as opposed to on the basis of forward prices.[344] Characteristic for the trade in such markets is that contracting parties do not enter into complete standardized contracts, but incorporate all or some of the relevant trading rules provided by, in this instance, FOS-

343 D. R. Erickson, "*Practical Handbook of Soybean Processing and Utilization*", Urbana: AOCS Press 1995, p. 50.

344 N. N. Chatnani, "*Commodities Markets: Operations, Instruments, and Applications*", New Delhi: Tata McGraw Hill 2010, p. 4.

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FA.[345] As a result of this cherry-picking, each sales agreement may vary in terms of its delivery terms, quality and quantity.

Whereas trading partners conducting trade under the terms of FOSFA are often unfamiliar with one another, especially given the global dimension of the trade in oils, seeds and fats, disputes are not uncommon. Owing to the inefficiency of the public court system as well as a lack of know-how and experience of judges in public courts with regard to these commodities, and to address contractual unfaithfulness, FOSFA has put a two-tier arbitration system in place. By operating in the shadow of the law, even though arbitral awards may be enforced in public courts, a party in whose favour such a decision is made is protected by dint of nonlegal sanctions.[346] Given that blacklisting and withdrawing membership are harmful to the reputation of market participants and even have a foreclosure effect, FOSFA arbitral awards are typically complied with.

A second reason for the use of nonlegal sanctions by FOSFA relates to the enforcement and recognition of judgments pursuant to the New York Convention. This is problematic in the hypothetical situation that two parties contracting under a standardized agreement of this trade association on the cash or spot markets can only seek enforcement in a public court. Given that such parties are often globally dispersed, it would require the enforcement of an arbitral award in one State and the recognition of a different court in another State. For this reason, which results in a slow procedure and owing to an uncertainty whether the latter court will recognize this award, the procedure is considered less efficient. FOSFA arbitration functions properly under the threat of nonlegal sanctions, because it addresses both problems and provides a necessary alternative form of dispute resolution.

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345 A. R. Baldwin, "*World Conference on Emerging Technologies in the Fats and Oils Industry*", in: E.C. Campbell (ed.), "Trade Association Rules - Impact on International Trade", Urbana: American Oil Chemists' Society 1986, p. 24.

346 According to the FOSFA Guide to Arbitrations and Appeals (2018), only if nonlegal sanctions are insufficient to induce a party to pay an award, is enforcement in the public legal system advised.

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Chapter 3: A comparative view of the Present-Day PLSs and their respective enforcement mechanisms

A. *Introduction*

Based on the discussed transnational trade associations active in a wide spectrum of the commodities trade, whether providing standardized futures contracts or trade rules for the cash or spot markets, all have set up an arbitration system and have introduced nonlegal sanctions to punish disloyalty with its awards. By generating rules and resolving industry-specific conflicts, the trade associations as well as their members and – arguably – non-members operate PLSs as substitutes for the public court system.

In my opinion, drawing such a conclusion is not contentious. However, additional emphasis must be given to establish in what way and to what extent the trade associations differ and coincide with regard to (a) legal form; (b) access to membership; (c) structure and composition of an arbitration tribunal; (d) place of arbitration and applicable law; (e) right to appeal to public courts before and after an arbitration award; (f) types of nonlegal sanctions; and (g) rationale for nonlegal sanctioning. As a result, the goal of this Paragraph is to carry out a well-balanced review of these aspects with the purpose of describing the trade associations in more general terms, without – although occasionally required – specifically referring to them. Particular importance is given to the possibility to appeal at public courts, since UK law (*i.e.* the Arbitration Act 1996), which underlays standardized contracts/rules for five out of the six trade associations researched does not in every aspect correspond with the right of appeal rules of these associations before arbitral proceedings and after an award.[347] Also, standardized DDC contracts, which are underlaid by US law and New York State law might not be in harmony with the two laws.

347 These five associations are the ICA, GAFTA, the FCC, the LME and FOSFA.

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B. Legal form

Five of the trade associations researched are UK-based, whereas one is established in New York.[348] With reference to these five trade associations, four of the five are incorporated as a "private limited liability company by guarantee" under the Companies Act 2006.[349] This implies that members are shielded from full liability, with the exception of their nominal amount paid (*e.g.* subscription fee). The sixth trade association is registered as a "private company limited by shares" under the Companies Act 2006, which entails that liability is limited to the shares members hold in the organization.[350] Apart from this (in my opinion, minor) legal distinction, all five trade associations operate on a not-for-profit basis. Similar to a "private limited liability company by guarantee", the New York-based trade association holds members accountable for annual fees paid. Also here, this association, which is registered as an "incorporated company" is not operated with the intention to raise money.

In sum, one can draw the conclusion that rule-generating/dispute-resolving trade associations active in a wide array of commodities trading have two things in common: first, they offer their services on a not-for-profit basis. Second, they limit the liability of their members to the amount paid or the outstanding shares held.

C. Access to membership

All trade associations researched have three entry requirements to obtain membership. First, candidates need to be able to substantiate some sort of connection to/experience in the commodities traded in the relevant industry. Second, candidates must file an application for membership, including an explanation under which membership category they fall.[351] Third, candidates must pay an entry/registration fee.

Apart from these general requirements, two trade associations use additional and more far-reaching requirements that must be complied with.

348 The DDC is located in New York City.
349 The ICA, GAFTA, the FCC and FOSFA are private limited companies by guarantee.
350 The LME is a private limited company by shares.
351 All six trade associations have different forms of membership. For a thorough analysis, see Part I, Chapter 2, B/C/D/E/F/G, I, 4.

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The first association is the ICA, which requires that all candidates be proposed by at least two members of the association. In addition, candidates are obligated to comply with the requirement of dissemination. This entails that they must present the directors with all information concerning the constitution, capital and nature of the company. The second trade association that has introduced more stringent requirements is the DDC. It requires that candidates for membership demonstrate a minimum of two years' experience in the diamond trade and that they successfully convince the Board of Directors. With regard to the latter requirement, every candidate must post his picture on the trading floor wall of the DDC for a period of ten days, during which members of this association can make comments. Despite this influence of members, the Board of Directors retains full freedom of discretion to either grant or deny membership.

D. Structure and composition of the arbitration tribunal

The resolution of disputes is a principal goal of all the trade associations researched. To this extent, all have introduced a specialized system of arbitration which aims to resolve conflicts arising out of standardized contracts/rules made by these associations. Apart from the DDC, which favours mediation over arbitration in the sense that arbitration may only be commenced when reaching an amicable settlement is not possible, the other trade associations prioritize arbitration.

I. First-tier arbitration

To select the arbitrators of an arbitration tribunal, the associations can be divided into two groups. The first group consists of the DDC and the FCC that are solely responsible for appointing the arbitration panel. To this extent, both associations nominate three qualified arbitrators. The second group is composed of the ICA, GAFTA, the LME and FOSFA and allows each party to name an arbitrator, or to agree to sole arbitration. Yet, some differences can be detected concerning the selection of a third person when the latter form of arbitration is not chosen. The ICA pertaining to technical arbitration and GAFTA are tasked with appointing a third arbitrator, whereas the LME can only do so (here: the Secretary) when the claimant and/or the respondent request(s) this and where at least one arbitrator deems this necessary. Another difference relates to quality arbitra-

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tion offered by the ICA, following which the parties can nominate a referee in case of a disagreement, without permitting the selection of a third arbitrator.

II. Second-tier arbitration/internal appeal

Another interesting aspect of the specialized commercial arbitration system provided by the trade associations relates to possibility of internal appeal. Except for the LME, the other five associations maintain a two-tier arbitration system which allows awards rendered in first-tier arbitration to be reviewed/re-assessed by a special appeal committee. Nonetheless, the number of arbitrators who make up these committees varies. FOSFA, the DDC and the ICA concerning technical arbitration require five arbitrators[352], whereas the FCC requires an appeal committee to be composed of three arbitrators. GAFTA takes a middle position in the sense that when an award is rendered by a sole arbitrator, the committee is composed of three arbitrators and whenever an award is rendered by a tribunal consisting of three arbitrators, the appeal committee is composed of five arbitrators. In another way, the ICA pertaining to quality arbitration has a more flexible understanding of the number of arbitrators. An appeal committee must be composed of between two and four arbitrators who are deemed most qualified to arbitrate the relevant dispute.

III. Qualification criteria for candidate arbitrators

In general, candidates need to comply with three requirements to become a qualified arbitrator. First, irrespective of being employed as a legal representative or as a lawyer, candidates must be members of the relevant trade association. An exception is the LME, which also permits non-members to serve as an arbitrator. Second, candidates need to demonstrate some practical experience in the industry. With the exception of GAFTA and FOSFA that require a period of time of ten years to be complied with, the other trade associations remain vague. Although the LME explains that candidate arbitrators need to demonstrate a broad knowledge indicative of their

352 The ICA pertaining to technical arbitration requires that an appeal committee consist of five individuals. Four of whom serve as normal arbitrators and one as chairman.

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practical experience in metals trading, it seems that individuals who want to become an arbitrator in the ICA, the DDC and the FCC will only be selected, in practice, if they can demonstrate some experience in the relevant commodities industry. Third, candidate arbitrators need to successfully complete specific examinations that are laid down in the standards set by the association. Typically, the standards require individuals to display (arguably basic) knowledge of the applicable laws and the functioning of the relevant commodities trade and arbitration.

E. The place of arbitration and applicable law

The place of arbitration is an important concept that pertains to arbitration proceedings. With regard to the LME and the FCC, arbitration is held in England and Wales, unless otherwise agreed by both parties. Whereas the same contractual deviation applies to GAFTA arbitration, which is held at the association's premises in London, FOSFA arbitration can only take place in London. A similar rule, even though the location differs, applies to DDC arbitration, which can only be conducted at the premises of the association in New York City. In contrast, ICA arbitration may take place wherever the parties in a dispute opt for. In the absence of a consensus, arbitration will be held at the arbitration room of the ICA in Liverpool.

Logically, the place of arbitration determines the applicable law that governs the arbitration proceedings. Concerning the five UK-based trade associations, each arbitration panel is entitled to decide a case on their own jurisdiction with regard to the validity, performance and construction of any contract stemming from the relevant trade association. As a condition, English law must be complied with. To this extent, the most important law is the Arbitration Act 1996. With reference to the DDC, any arbitration panel must decide a dispute on its own jurisdiction in conformity with trade usages and customs, without determining the law for damages and contract of the State of New York. Notwithstanding, all other statutes and laws of this State must be adhered to.

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F. *The finality of arbitration or the possibility of (some) legal redress in public courts*

The objective of specialized commercial arbitration is to issue final and binding arbitral awards, thereby limiting the possibility that parties in arbitral proceedings seek legal redress at any public court for matters of fact and law. Be that as it may, the trade associations researched must be divided into three groups. This is because of some differences between them. The first group consists of the LME and the ICA in quality and technical arbitration in the sense that they strictly prohibit parties of a contract to lodge an appeal at a public court to set aside an arbitral award.[353] The second group consists of FOSFA and the FCC that to a large extent remain silent as to whether parties can seek legal redress at public courts.[354] The third and last group is composed of GAFTA and the DDC that are seemingly more open to allowing some form of judicial review. Whereas GAFTA explains that parties can have an arbitration award reviewed at an English court for issues other than enforcement issues, the DDC empowers either party in arbitral proceedings to lodge an appeal at the New York State Courts when procedural irregularities have occurred.[355] Despite these self-claimed rules pertaining to the permissibility of judicial review by public courts offered by the trade associations researched, they may be contrary to the Arbitration Act 1996, which applies to the five UK-based associations and Article 75 of the New York Civil Practice Law and Rules ("CPLR") and the Federal Arbitration Act ("FAA") pertaining to the DDC. This conformity or lack of conformity is explained below. To make a thor-

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353 However, some reservation must be made. The ICA allows parties to seek legal redress at any public court, when they opt this, whereas the LME authorized this, when security of an award cannot be attained in specialized commercial arbitration offered by this association.

354 While this is largely true, both associations allow some form of review by public courts. FOSFA explains that the enforcement of an award can be achieved at the English High Court and in any other signatory State of the Geneva Convention of 1928 and the New York Convention, whereas the FCC empowers parties in arbitral proceedings to ask English courts for revocation of an arbitrator in first- or second-tier arbitration.
However, when a party to DDC arbitral proceedings requests a judicial review for matters of fact and law covered by these proceedings, he may be held liable to pay a fine and can be subject to termination of membership.

355 However, when a party to DDC arbitral proceedings requests a judicial review for matters of fact and law covered by this procedure, he may be held liable to pay a fine and can be subject to termination of membership.

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ough analysis, the possibility to obtain legal redress before arbitral proceedings have commenced as well as after an arbitral award has been rendered merits separate analysis.

I. The English Arbitration Act 1996

1. Judicial review at a public court prior to arbitral proceedings

a. Stay of proceedings pursuant to Section 9 of the Arbitration Act 1996

If two market participants have a conflict concerning a matter which is covered by a standardized contract provided by one of the UK-based trade associations, they are bound by *ad hoc* arbitration. This is because the standardized contracts include exclusive arbitration clauses, which bar both parties access from judicial review in public court. When a party, contrary to such an exclusive jurisdiction clause, initiates court proceedings, the defendant is entitled to stop the judicial proceedings (Section 9(i) of the Arbitration Act 1996).[356] To realize this, the defendant must successfully demonstrate to the court that (i) the counterparty exclusively started the judicial proceedings; (ii) an arbitration agreement exists that covers the dispute; and (iii) the parties are the same as the parties to the agreement.

However, when the court is sufficiently satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed, the court may carry out a substantive review of the case (Section 9(iv) of the Arbitration Act 1996). Unfortunately, convincing the court is not an easy task. The burden of proof, which is shifted from the defendant to the claimant is high. In the case of *Joint Stock Company "Aeroflot Russian Airlines" v. Berezovsky et al* it was decided that only when the court reaches a "clear conclusion" that one of the defences applies, without any shred of

356 For an example, see Ust-Kamenogorsk Hydropower Plant JSC (Appellant) v. AES Ust-Kamenogorsk Hydropower Plant LLP (Respondent), [2011] EWCA Civ 647; This approach is equivalent to the German arbitral estoppel as laid down in § 1032 (i) ZPO. See J. Frohloff, "*Verletzung von Schiedsvereinbarungen: Eine Untersuchung des deutschen Schiedsverfahrensrechts zu den Pflichten der Schiedsparteien und den Rechtsfolgen ihrer Verletzung*", Tübingen: Mohr Siebeck 2017, p. 50; In Lombard North Central plc et al v. GATX Corporation [2012] EWHC 1067 (Comm), para. 21 the court also has the freedom of discretion to put a halt to its proceedings and refer to arbitration.

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evidence to the contrary the court proceedings will continue.[357] This is does not come without its problems for the relevant court, as the defences are open for interpretation. These are explained below.

i. "Null and void" defence

The first defence relates to the situation in which there is no arbitration agreement between the parties, or, but also more exceptionally to the situation in which the parties have not entered into a contract that is connected with the arbitration agreement. With regard to the former situation, three possible methods have been given by UK courts to explain when arbitration is void. First, when the arbitration agreement infringes the right to a fair trial under Article 6 ECHR.[358] Second, as the court in *Albon v. Naza Motor Trading SBD BHD (No 3)* explained, when the arbitration agreement entirely lacks legal effect.[359] In this judgment, Justice *Lightman* referred to the US judgment in *Rhone Mediterranee v. Achille Lauro*, in which the 3rd Circuit Court of Appeals ruled that a "null and void" defence can be employed by the claimant when fundamental policies of the enforcing State are contravened, or in the event of duress, a mistake, fraud or a waiver.[360] Third, albeit unclear whether it specifically concerns the "null and void" defence, or (one of) the other defences, public policy (*e.g.* the exclusion of statutory remedies) is another ground for declaring an arbitration agreement void.[361]

By keeping this in mind, with regard to the UK-based trade associations, it must be determined on a case-by-case basis whether these three scenarios justify a "null and void" defence for the claimant. This is irrespective of whether an arbitration agreement exists at all.[362] One reason is that the

357 Joint Stock Company "Aeroflot Russian Airlines" v. Berezovsky et al [2012] EWHC 1610 (Ch), par. 73.

358 Stretford v. The Football Association Ltd et al (CA) [2007] EWCA Civ 238, para. 38, 67; The UK has a dualistic system and, therefore, Art. 6 ECHR is incorporated in the Human Rights Act 1988.

359 Albon v. Naza Motor Trading Sdn Bhd (No 3) [2007] Lloyd's Rep. L.

360 Rhone Mediterranee v. Achille Lauro [1983] 712 F. 2d 50.

361 Assaubayev et al v. Michael Wilson and Partners Ltd, [2014] EWCA Civ 1491.

362 As it would be redundant to explain the invalidity of the arbitration agreements pertaining to the UK-based trade associations both in this and in the next Paragraph, it would be more suitable to discuss it in the latter Paragraph. To this extent, the requirements to have a valid arbitration agreement under normal circumstances, the special category where an agreement includes an arbitration

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standardized contracts/rules originating from these trade associations merely include an arbitration agreement "by reference". However, this does not necessarily invalidate the arbitration agreement according to Sections 5(3) and 6(2) of the Arbitration Act 1996 if the reference is specific enough to satisfy established UK case law.

ii. "Inoperative" defence

Unlike the "null and void" defence, in which an arbitration agreement has never been entered into from the outset, the "inoperative" defence pertains to validly completed arbitration agreements that have ceased to have legal effect. Examples of these are given by UK courts. An arbitration agreement is inoperative, when (i) the underlying agreement is terminated[363]; (ii) the identities of the parties are unclear; and (iii) the dispute is not covered by the arbitration clause.[364]

Against this backdrop, regarding the UK-based trade associations, it cannot be established in general that this defence is applicable for the claimant to justify public court proceedings. This must be reviewed on a case-by-case basis.

iii. "Incapable of being performed" defence

The "incapable of being performed" defence is enforceable where the claimant is prevented from performing its duties under the disputed contract owing to an external cause. A good example of this defence relates to capacity. When a consumer has entered into an arbitration agreement, the consumer will generally not be subject to arbitration proceedings (Section 89 of the Arbitration Act 1996). This is because any arbitration agreement

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agreement "by reference" as well as the likely reaction of the trade associations in the event its members declare an arbitration agreement invalid for a lack of reference, will be discussed.

363 Downing v. Al Tameer Establishment [2002] EWCA Civ 721. In this case, a repudiatory breach of the underlying contract was a ground for terminating that contract.

364 Fulham Football Club (1987) Ltd v. Richards [2011] EWCA Civ 855. In this case, despite there not being (an implied) arbitration agreement, arbitration could be initiated.

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with a consumer is not enforceable. It is unlikely that this defence can be used by the claimant to legitimize a review by a public court.

b. Application to the court for preliminary ruling on jurisdiction

Either party in arbitral proceedings provided by one of the five UK-based trade associations has a limited right to apply to any court in order to challenge the substantive jurisdiction of this tribunal (Section 32 of the Arbitration Act 1996). As a condition, one of the following two situations must be met. First, both parties apply to the relevant court in writing to consider a preliminary ruling on jurisdiction (Section 32(2)(a) of the Arbitration Act 1996). Second, one party applies to the court with the permission of the tribunal and also sufficiently satisfies the court "*(i) that the determination of the question is likely to produce substantial savings in costs; (ii) that the application was made without delay; and (iii) that there is a good reason why the matter should be decided by the court*" (Section 32(2)(b) of the Arbitration Act 1996).

Importantly, according to the Queen's Bench Division in *Vale do Rio Doce Navegacos SA*, an application to the court for a preliminary ruling on jurisdiction must only be seen as an exception.[365] Contesting the substantive jurisdiction of an arbitration tribunal is usually done by the arbitrators of this tribunal themselves pursuant to Section 30 of the Arbitration Act 1996. Nonetheless, a Section 32 application against the general rule is more appropriate when it would save considerable time and costs[366] if the defendant in arbitration is refusing to clear the substantive jurisdiction and when the tribunal cannot completely solve all questions relating to jurisdiction.[367]

Once all the requirements of Section 32 of the Arbitration Act 1996 are fulfilled and the relevant court has determined the substantive jurisdiction, it issues a declaration.[368] Be that as it may, restricting arbitral proceedings

365 Vale Do Rio Doce Navegacao SA & Anor v Shanghai Bao Steel Ocean Shipping Co Ltd. [2000] EWHC 205 (Comm), para. 45.

366 Azov Shipping co. v. Baltic Shipping co. [1999] 1 Lloyd's Rep. 68, para. 5 and 31; Toyota Tsusho Sugar Trading Ltd v. Prolat S.R.L [2014] EWHC 3649 (Comm), para. 2.

367 Esso Exploration and Production UK Ltd v. Electricity Supply Board [2004] EWHC 787 (Comm).

368 It is not always necessary that all the requirements pursuant to Section 32 of the Arbitration Act 1996 be fulfilled for the relevant court to issue a declaration.

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by making an injunction is not possible according to *Welex AG v Rosa Maritime Ltd.*[369] Whether or not a Section 32 application will be permissible for the claimant of a dispute that arose out of a standardized contract/rules originating from one of the five UK-based trade associations depends on various factors. The defendant may be unwilling to go to the court, the arbitration tribunal might disagree, or the court might be insufficiently satisfied, amongst other factors.

2. Judicial review at a public court after an arbitral award has been rendered

Once an arbitral award, which characteristically awards damages against a party, has been rendered by one of the five UK-based trade associations, public courts have jurisdiction to correct/review/re-assess such an award in certain circumstances. These are discussed below.

a. Insufficient reference made to a broader arbitration agreement within an arbitration clause included in a standardized agreement

Section 5(1) of the Arbitration Act 1996 requires that an arbitration agreement be made in writing. While this is rather ambiguous, Section 5(2) of the Arbitration Act 1996 considers three types of categories that fulfil this criterion. First, written documents that are (un)signed. Second, an exchange of communication in writing (*e.g.* e-mails, faxes or records).[370] Third, agreements that do not themselves embody, but evidence the agreement in writing, including oral agreements that evidence written terms pursuant to Section 5(3) of the Arbitration Act 1996.[371]

Against this background, given that standardized contracts stemming from the UK-based trade associations contain arbitration clauses that refer to a broader arbitration agreement, the first two categories of the "in writ-

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See, for example, Mackley & Co Ltd v Gosport Marina Ltd [2002] EWHC 1315, para. 20, 22, 39. Despite its importance, this case must be seen as an exception.

369 Welex AG v. Rosa Maritime Ltd [2003] EWCA Civ 938.

370 B. Harris, R. Planterose, and J. Tecks, "*The Arbitration Act 1996: A Commentary*", Oxford/Malden/Melbourne: Blackwell Publishing 2007, p. 47.

371 R. Merkin and L. Flannery, "Arbitration Act 1996", Oxon: Informa Law 2014, p. 24. This category functions as a safety net and entails that any shred of evidence can prove the existence of an arbitration agreement.

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ing" requirement are of no interest. This is because the parties that contract under one of the standardized contracts do not specifically concur on the relevant arbitration agreement, but are nevertheless bound by this document. To put it differently, by incorporating an arbitration clause in a standardized contract, which refers to a broader arbitration agreement, the UK trade associations obligate the parties to adhere to the latter agreement.[372] Therefore, in my opinion, such a link between two documents is akin to the third category of the "in writing" requirement laid down in Section 5(1) and (2) of the Arbitration Act 1996.[373] However, as already briefly discussed above,[374] it is questionable whether the arbitration clauses that can be found in the standardized contracts "sufficiently refer" to the relevant arbitration agreements. Section 6(2) of the Arbitration Act 1996, legal doctrine and case law of the UK courts provide some guidance.

i. "Sufficient reference" to arbitration agreements within the standardized agreements provided by the UK-based trade associations

To determine whether market participants that enter into standardized contracts/rules provided by the UK-based trade associations are bound by an external arbitration agreement that is linked to the former document, Section 6(2) of the Arbitration Act 1996 must first be mentioned. This provision stipulates that "*The reference in an agreement to a written form of arbitration clause or to a document containing an arbitration clause constitutes an arbitration agreement if the reference is such as to make that clause part of the agreement*". In other words, this definition explains that both the standardized contract and the arbitration agreement need to be connected. However, it does not explain how much reference is needed.

To address this vagueness, the following question needs to be answered: Is a general reference sufficient, or should the arbitration clause incorporated in the standardized agreement in great detail link both documents? In my opinion, this is not a trivial question because an uncertain link bears the risk that the arbitration agreements are invalid. Fortunately, according

372 See, for example, Article 27 of the GAFTA Contract No. 1 – General Contract for Shipment of Feeding Stuffs in Bags Tale Quale – CIF/CIFFO/C&F/C&FFO Terms of 2018. (to access: https://www.gafta.com/write/MediaUploads/Contracts/2018/1_2018.pdf).

373 Importantly, oral agreements that evidence written terms (Section 5(3) of the Arbitration Act 1996) are outside the scope of this research.

374 See Part I, Chapter 2, H, V, 1, a, i.

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to *Merkin* & *Flannery*, English case law gives guidance to understand the scope of the required intensity of referral needed for incorporation of the arbitration agreement to the standardized contracts.[375] Nonetheless, both authors explain that the English courts have only discussed an incorporation by reference with regard to two distinctive categories: first, in cases where there is only a single contract, but the communication between the parties refers to the standard terms and conditions in which the arbitration agreement is laid down. Second, in the event that one party enters into two contracts with two different parties (*e.g.* A enters into a contract with B, but A also with C), in which one of the contracts contains an arbitration agreement (*e.g.* the contract between A and B) and the other contract does not (*e.g.* the contract between A and C), but the latter contract incorporates the arbitration agreement contained in the former contract "by reference" (*e.g.* the contract between A and C refers to the arbitration agreement contained in the contract between A and B by reference).

Within the bounds of both categories which English case law is focused on, one can draw the conclusion that neither category fits the situation in which an arbitration clause that is included in a standardized contract refers to a broader arbitration agreement. Yet, in my opinion, unlike the second category,[376] the first category bears more similarities. This is because in both situations reference is made to a broader arbitration agreement, even though it is made within a standardized contract as opposed to a communication. As a result, it seems (to a certain extent) justified to use English case law concerning a category one referral, which explains that no explicit, but a general reference is satisfactory "*when the terms are readily available and the question arises in the context of dealings between established players in a well-known market*".[377] If, however, an English court in potential proceedings deems a category two standard more adequate, a stricter standard has to be used.[378] General language will then be insufficient and

375 R. Merkin, L. Flannery, "*Arbitration Act 1996*", Oxon: Informa Law 2014, p. 32-33.

376 The second category is very different as the English Courts focus is on the corporation of charterparties terms and conditions (including arbitration clauses) into the bill of lading. See, for example, Federal Bulk Carriers v C Itoh & Co default [1989] 1 Lloyd's Rep 103.

377 Sea Trade Maritime Corporation v. Hellenic Mutual War Risks Association (Bermuda) Ltd (The "Athena") (No 2), [2007] 1 Lloyd's Rep. 280, para. 65.

378 Ibid, par. 64.

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an "express reference" must be made.[379] In the absence of an express reference, the intention to incorporate the arbitration agreement must be unequivocal.[380]

ii. Examples of arbitration clauses within standardized contracts provided by the UK-based trade associations that refer to a broader arbitration agreement

The UK-based trade associations have drafted hundreds of standardized contracts/rules. Owing to the level of similarity as well as by virtue of time constraints, it would be redundant to assess all those arbitration clauses that refer to broader arbitration agreements. Henceforth, as illustrated in the following table, one standardized agreement which includes an arbitration clause is selected for each of the five UK-based trade associations[381] to scrutinize whether these fulfil the "by reference" yardstick as laid down in English case law appropriate to category one and/or two.

Trade Association	Example of a standardized contract	The relevant arbitration clause that refers to a broader arbitration agreement
The ICA	The ICA International Shipment Contract Form 1 (2004)[382]	Art. 15. All disputes relating to this contract will be resolved through arbitration in accordance with the bylaws of the International Cotton Association Limited. This agreement incorporates the bylaws which set out the Association's arbitration procedure.

379 Aughton Limited (formerly Aughton Group Limited) v. M.F. Kent Services Limited, [1991] 57 BLR 1. This case was about incorporating an arbitration agreement from one subcontract in another subcontract, which is distinctive as opposed to standardized contracts which include arbitration clauses that refer to broader arbitration agreements. Therein, Judge Sir John Megaw explained that only an express reference in contrast with general language can be considered as a suitable reference.

380 Trygg Hansa Insurance Co. Ltd. v. Equitas Ltd, [1998] 2 Lloyd's Rep. 439. Unlike the typical category two cases, this judgment concerns insurances. Notwithstanding, it appears to be of general application to this category.

381 An exception is the LME, as will be explained in the table below.

382 https://www.ica-ltd.org/media/layout/documents/publications/lca_econtract.pdf.

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GAFTA	GAFTA Contract No. 1 – General Contract for Shipment of Feeding Stuffs in Bags Tale Quale CIF/CIFFO/C&F/ C&FFO Terms (2018)[383]	Art. 27 (a). Any and all disputes arising out of or under this contract or any claim regarding the interpretation or execution of this contract shall be determined by arbitration in accordance with the GAFTA Arbitration Rules, No 125, in the edition current at the date of this contract; such Rules are incorporated into and form part of this Contract and both parties hereto shall be deemed to be fully cognisant of and to have expressly agreed to the application of such Rules.
The FCC	The FCC Contract Rules for Cocoa Beans (2017)[384]	Art. 19.2. If the Parties cannot agree upon the terms at which to settle the close out then the dispute shall be referred to arbitration subject to the FCC Arbitration and Appeal Rules. If the Arbitrators decide that a default has occurred they shall declare the contract to be closed out and determine the market price at the date of default.
The LME	The LME does provide standardized contracts, but does not automatically include an arbitration clause. One example is the LMEprecious Contract Specifications.[385] The LME advises parties who wish to make use of the arbitration service in order to resolve any dispute arising out of or in connection with such a contract to incorporate the following model arbitration clause.[386]	Any dispute arising out of or in connection with this agreement, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the Arbitration Regulations of The London Metal Exchange.
FOSFA	FOSFA Contract For European Oilseeds CIF Terms (2015)[387]	Art. 30. Any dispute arising out of this contract, including any question of law arising in connection therewith, shall be referred to arbitration in London (or elsewhere if so agreed) in accordance with the Rules of Arbitration and Appeal of the Federation of Oils, Seeds and Fats Associations Limited, in force at the date of this contract and of which both parties hereto shall be deemed to be cognizant

383 https://www.gafta.com/write/MediaUploads/Contracts/2018/1_2018.pdf.
384 https://www.cocoafederation.com/dashboard/documents/freecontent/rules/cocoa-beans/contract-rules-for-cocoa-beans/ENG.
385 https://www.lme.com/-/media/Files/Metals/Precious-Metals/LMEprecious/LMEprecious-Contract-Specifications.pdf.
386 https://www.lme.com/en-GB/About/Regulation/Arbitration#tabIndex=2.
387 http://www.rheinische-warenboerse.de/upload/Contract_No_26_2822.pdf.

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The arbitration clauses included in the preceding table that contain a reference to broader arbitration agreements vary in terms of explicitness. Some are more general, whereas others are more explicit. While it is a bit confusing to explain in words how the clauses compare, it is more suitable to insert the following table to illustrate the differences.

Trade Association	1. Number of disputes		2. The scope of the dispute				
	All disputes	The dispute	Relating to this contract	Arising out of or under this contract/arising out of or in connection with this agreement	Regarding the interpretation or execution of this contract	Including any question regarding its existence, validity or termination	Including any question of law arising in connection therewith
The ICA	✓		✓				
GAFTA	✓			✓	✓		
The FCC		✓					
The LME	✓			✓		✓	
FOSFA	✓			✓			✓
Trade Association	3. Reference to arbitration rules			4. Agreement's incorporation of the arbitration rules			
	In accordance with the bylaws of a specific arbitration rule	Referred to arbitration in London	In the version current at the date of this contract	This agreement incorporates the bylaws	Both parties hereto shall be deemed to be fully cognisant	Both parties have expressly agreed to the application of such Rules	
The ICA	✓			✓			
GAFTA	✓		✓	✓	✓	✓	
The FCC	✓						
The LME	✓						
FOSFA	✓	✓	✓	✓	✓		

Based on this table, one can draw immediate conclusions. The arbitration clause provided by GAFTA is unmistakeably the most specific, because it contains detailed information about the number of disputes, the scope of the dispute, reference to the arbitration rules as well as to the standardized agreement incorporating the arbitration rules. FOSFA's and the ICA's arbi-

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tration clause have a similar coverage, but are less detailed. However, the FOSFA's arbitration clause is a bit more specific. The model clause provided by the LME that can, but not necessarily must, be included in a standardized agreement if both parties want to make reference to the LME's arbitration rules, does not explain that (i) the standardized agreement incorporates the bylaws; (ii) the parties are cognisant; and (iii) the parties have expressly agreed to be bound by these rules.[388] Reference is made to the arbitration regulations of the LME in general words, but it remains vague where to find these. Along the same lines, the FCC arbitration clause is nebulous. Despite it containing a reference to the FCC Arbitration and Appeal Rules, it does not state, *inter alia*, that the agreement incorporates the arbitration rules. In other words, it is written in a very general manner.

Consistent with the reasoning above, it is not easy to determine whether the arbitration clauses fulfil the "by reference" yardstick developed in English case law. Much will depend on whether English courts require a general reference or a more explicit reference. As this justifies a much broader debate, it almost impossible to give a well-balanced conclusion here. In my opinion, all five arbitration clauses found above have sufficient reference to arbitration where general wording suffices. This is mainly because the arbitration rules are readily available. Yet, it becomes problematic when English courts require a more specific reference. Whereas GAFTA's, FOSFA's and the ICA's arbitration clause are more detailed and, thus, may, but not necessarily will, satisfy the more stringent requirement, the model arbitration clause of the LME and the arbitration clause of the FCC have a clear risk of falling below the required threshold. This is because these clauses include a general reference to the relevant arbitration rules of both trade associations. If indeed an English court draws the conclusion that there is insufficient reference, the broader arbitration agreement will become invalid. This will have the effect that an award stemming from specialized commercial arbitration offered by these trade associations will be null and void.

388 Parties are free to incorporate such a model clause in an LME standardized contract. However, they can also decide to include an arbitration clause with a more detailed reference to the LME's Rules and Regulations, in particular parts 8 and 9.

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iii. The trade association and its members joint reprisal against members who/that seek redress at a public court to invalidate an arbitration agreement for the reason that the arbitration clause within a standardized agreement has "insufficient reference" to the former agreement

While contesting the legality of an arbitration clause is possible at a public court in order to strike down this clause, members of the UK-based trade associations can be faced with a dilemma. Once a member fails to comply with an arbitration award and asks for legal redress at a public court, that member goes against the rules of the relevant association, thereby running the risk that this association will impose nonlegal sanctions. Put differently, when a member seeks the invalidity of an arbitration agreement at a public court based on "insufficient reference" made within the arbitration clause included in the relevant standardized agreement, that member can be fined and sometimes even ostracized.

b. Lack of substantive jurisdiction of an arbitrator or arbitrators

The second method for a public court to *ex post facto* re-assess an arbitration award relates to Section 67 of the Arbitration 1996. This provision enables a party to arbitral proceedings to challenge an award at a public court where that party believes that the arbitrator(s) did not have substantive jurisdiction. However, before this provision can be used, the routes for obtaining relief must be exhausted.[389] This entails that the tribunal must be given the chance to clarify or correct the award within a period of 28 days beginning on the date of the award at a party's request (Sections 52(5) and 70(3) of the Arbitration Act 1996).[390] Put differently, internal arbitral appeal and the related 28-day period must have lapsed.

389 N. Andrews, "*Arbitration and Contract Law: Common Law Perspectives*", Cambridge: Springer 2016, p. 130.

390 The arbitrator has the competence to set a specific date of the award (Section 54(1) of the Arbitration Act 1996); When the arbitrator or arbitrators did not fix this, the date will be that on which the arbitrator or the last arbitrator [in the event of multiple arbitrators] has signed the award (Section 54(2) of the Arbitration Act 1996); According to Section 79(1) of the Arbitration Act 1996, the relevant public court can extend the initial period of 28 days by another 28 days, when it deems fit.

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After this deadline has lapsed and no sufficient corrections and/or clarification is provided by the arbitration tribunal, the challenging party can ask the relevant public court to review the substantive jurisdiction of the arbitrators. However, when neither party has challenged an award on jurisdiction before the main award has been made (Section 73(2) of the Arbitration Act 1996), or when either party has not objected to an assertion of jurisdiction in the arbitral proceeding (Section 73(1) of the Arbitration Act 1996) that party loses the right to apply to any public court. When a party is not debarred and requests the court to challenge (an) arbitrator(s) substantive jurisdiction, this court may on its own initiative allow the challenging party to present its case orally.[391] This can amount to a full re-hearing. When the court reaches a decision, it can either affirm the award (Section 67(3)(a) of the Arbitration Act 1996), vary the award (Section 67(3)(b) of the Arbitration Act 1996), or set aside the award in whole or in part (Section 67(3)(c) of the Arbitration Act 1996).

c. Unfair proceedings

The third method that allows a public court to review an arbitral award can be found in Section 68 of the Arbitration Act 1996. According to this provision, which may be invoked when all internal appeal procedures have been exhausted, a party may challenge an arbitral award on the grounds of "serious irregularities" in the arbitral proceedings, or on a point of law. Examples of this method are narrowly defined and listed in Section 68(2) of the Arbitration Act 1996.[392] To prevent a somewhat exhaustive enumeration of a myriad of factors to illustrate when serious irregularities lead to substantial injustice for an applicant, the following table provides a more lucid summary.[393]

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391 B. Harris, R. Planterose, and J. Tecks, "*The Arbitration Act 1996: A Commentary – fourth edition*", Blackwell Publishing 2007, p. 309.

392 R. Jänig, "*Commercial Law: Selected Essays on the Law of Obligation, Insolvency and Arbitration*", Göttingen: Universitätsverlag Göttingen 2012, p. 125. The examples included in Section 68(2) of the Arbitration Act 1996 are mandatory and may not be ignored by the parties. Put differently, party autonomy is not permissible.

393 Albeit its significance cannot be understated, the following table does not contain a broader analysis of each example. In my opinion, a superficial summary of what falls within the scope of "serious irregularities" is sufficient to under-

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List of conduct that leads to serious irregularities and causes substantial injustice to an applicant	
A.	A failure of the arbitration tribunal to act fairly and impartially, not giving the party a reasonable opportunity to explain his case and not adopting a suitable procedure, which causes unnecessary delays or expenses (Section 33 of the Arbitration Act 1996).
B.	Different from a Section 67 of the Arbitration Act 1996 challenge, when the arbitration tribunal exceeds its powers.
C.	A failure by the arbitration tribunal to carry out the proceedings in line with the procedure agreed by the parties.
D.	An omission of the arbitral tribunal to deal with all the issues that were put to it by the parties.
E.	A sole arbitrator/ multiple arbitrators who exceed its/their powers.
F.	An uncertain or ambiguous effect of the award.
G.	A fraudulent award, or an award contrary to public policy
H.	An award that does not observe the mandatory form.
I.	Irregularities with regard to the conduct of the proceedings, the award admitted by the arbitration tribunal, or the arbitration tribunal itself.

d. Review on the merits

The last possibility to challenge an arbitral award in a public court can be found in Section 69 of the Arbitration Act 1996 and is referred to as a "legal error appeal".[394] This provision opens the possibility for a public court to do a full review on the merits of the dispute decided in, *inter alia*, specialized commercial arbitration.[395] However, according to *Gharavi* & *Liebscher*, this provision is only of limited importance due to four reasons.[396] First, the internal arbitral procedure deadline or proceedings must be finished (Section 70(2) and (3) of the Arbitration Act 1996). Second, parties have contractual freedom to deviate from the rule that a party can request a public court to conduct a review on the merits after an award has been rendered (Section 69(1) of the Arbitration Act 1996). Albeit that an express waiver in the arbitration agreement is sufficient, the situation is a bit more

stand the basics. Overly complicating these grounds for rebuttal purposes is unnecessary.

394 See, for example, E. E. Sutherland, "*Law Making and the Scottish Parliament*", Edinburgh: Edinburgh University Press 2011, p. 314.

395 The Arbitration Act 1996 is unique in the world pertaining to the possibility of a public court to re-consider an arbitral award on the facts and law.

396 H. Gharavi and C. Liebscher, "*The International Effectiveness of the Annulment of an Arbitral Award*", The Hague: Kluwer law International 2002, p. 34.

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complex. It is uncertain whether the arbitration clauses laid down in the standardized agreements/rules stemming from the UK-based trade associations incorporate the broader arbitration agreements. This is crucial, because in the absence of "sufficient reference" there is not a valid waiver of a review on the merits. Notwithstanding this discussion, it is also questionable whether the broader arbitration agreements stemming from some UK-based trade associations exclude a review on the merits by a public court. Whereas the LME and the ICA explicitly prohibit this,[397] FOSFA and the FCC remain silent and GAFTA in its standardized agreements even allows an appeal for matters other than enforcement. As a result of this, it is difficult to ascertain whether parties contracting under the standardized agreement provided by the latter three trade associations have validly excluded a possibility of appeal to a public court for a full review of the merits. Fortunately, this debate does not have to be answered, as it is likely that the trade associations will not accept a party of specialized commercial arbitration to allow such a reconsideration. If such an individual/company disregards this warning, it is possible that member will be fined or ostracized.

Third, a public court can only conduct a review on the merits of the case in relation to arbitral awards subject to English law. With regard to arbitration agreements, this limitation is complied with because all the arbitration agreements attributed to the UK-based trade associations are governed by English law. Fourth, the public court must be convinced "*(a) that the determination of the question will substantially affect the rights of one or more of the parties, (b) that the question is one which the tribunal was asked to determine, (c) that, on the basis of the findings of fact in the award— (i) the decision of the tribunal on the question is obviously wrong, or (ii) the question is one of general public importance and the decision of the tribunal is at least open to serious doubt, and(d) that, despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to deter-*

397 In Sukuman Ltd v. Commonwealth Secretariat [2007] EWCA Civ 243, para. 36 a somewhat comparable clause constituted an express waiver of a review on the merits by a public court. This clause is worded as follows: "*The judgment of the tribunal shall be final and binding on the parties and shall not be subject to appeal. This constitution shall constitute an 'exclusion agreement' within the meaning of the laws of any country requiring arbitration or as those provisions may be amended or replaced*". Whereas the latter sentence cannot be found in the arbitration agreements of the LME and the ICA, in my opinion, one can still draw the conclusion that the first sentence, which is comparable to the clause contained in the arbitration agreements of both associations is sufficient to speak of a waiver.

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mine the question" (Section 69(3) of the Arbitration Act 1996). Whether or not the parties contracting under standard contracts provided by the UK-based trade associations can convince the court depends on a case-by-case basis review. Hence, it is impossible to give a final conclusion.

In sum, despite the risk that market participants contracting under the standard agreements of GAFTA, FOSFA and the FCC can potentially appeal an arbitral award for a full review on the facts at a public court, these trade associations will punish them for doing so. Put differently, nonlegal sanctions will most likely deter such parties from obtaining this type of legal redress.

II. Article 75 of the New York Civil Practice Law and Rules and the US Federal Arbitration Act

1. Judicial review at a public court prior to arbitral proceedings

a. Stay of proceedings pursuant to Article 75, Section 7503 of the New York Civil Practice Law and Rules

When both parties are active within the same State or in different States[398] and one party [the challenging party] seeks legal redress for a dispute that arose under an agreement that is made subject to DDC arbitration at the State Court of New York,[399] then the other party [the defendant] may re-

398 DDC arbitration is covered by the CPLR, the UNCITRAL Model Law, the New York Convention and the FAA. In more detail, the former Act is applicable when the parties of a DDC standardized agreement are both active within the same state, whereas the other laws apply to the situation in which two parties are operating from different states (*i.e.* international arbitration). See T. Lörcher, G. Pendell, and W. Lowery, "CMS Guide to Arbitration, Vol. 1", *CMS Legal Services EEIG* 2012, p. 521; J. H. Carter, J. Fellas, "*International Commercial Arbitration in New York*", New York: Oxford University Press 2010, p. 16. Importantly, the FAA's scope is very broad and covers almost every significant business transaction in the USA.

399 E. Brunet, E. J. Brunet, R. E. Speidel, J. E. Sternlight, S. H. Ware, and S. J. Ware, "*Arbitration Law in America: A Critical Assessment*", New York: Cambridge University Press 2006, p. 124. Even if the FAA were applicable, parties must go to a New York State court rather than a federal court. This is because the FAA does not create federal jurisdiction; Moses H. Cone Mem'l Hosp. v Mercury Constr. Corp., 460 U.S. 1, 24-27 (1983) and Southland Corp. v. Keating, 465 U.S. 1, para. 12 (1984). However, this statement appears to be incorrect. According to

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quest that court to stop the judicial proceeding (*i.e.* stay of proceedings). This is laid down in Article 75, Section 7503 of the CPLR and in the FAA, 9 U.S.C. § 3.[400] However, with regard to the former provision, a request to postpone judicial proceedings indefinitely must be made within 20 days (Article 75, Section 7502(c) of the CPLR).[401] If this time limit has lapsed, the defendant may still request the arbitration tribunal of the DDC to commence arbitral proceedings. Contingent upon the tribunal's full discretion, the arbitrator(s) may then render a decision to continue arbitral proceedings.

Irrespective of the possibility to include a much broader debate about such competence of a State court, an extensive analysis is redundant. The reasons for this are threefold. First, albeit subject to differences, Section 9 of the Arbitration Act 1996, which has been discussed in great detail, contains the same competence for the court. It would be unnecessary to do a full analysis in this Paragraph again. Second, a cursory explanation is sufficient to understand the basic functionality of the "stay of proceedings" competence. Third, defences that function as a safety net for the challenging party to continue judicial proceedings at a State court are more limited.

b. Application to the court for preliminary ruling on jurisdiction

Although Article 75 of the CPLR and the FAA[402] do not contain any provision that enables a party to a standardized agreement of the DCC to challenge the substantive jurisdiction of the arbitral tribunal prior to the com-

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both cases, the FAA creates a body of substantive law that is both applicable in a federal and in a state court; Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. (2006) [J. Thomas, dissenting].Yet, the FAA should not be invoked in state court proceedings.

400 Despite being of interest, the UNCITRAL Arbitration Rules and the New York Convention will not be discussed. This is mainly because a discussion of both would overcomplicate and unnecessarily prolong this Paragraph.

401 The 20-day time limit is treated by the courts as a statute of limitations. See Aetna Life & Casualty Co. v. Slekardis, 34 N.Y.2d 182 (N.Y. App. Div. 1974); Although there the 20-day time period does not need to be upheld where the parties "never agreed to arbitrate", the parties subject to DDC contracts cannot invoke this exception. This is because each standardized contract stemming from this association includes an arbitration clause. See Matarasso v. Continental Casualty Co., 56 N.Y.2d 264 (N.Y. App. Div. 1982).

402 The UNCITRAL Model Law and the New York Convention are not researched.

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mencement and during arbitral proceedings, US courts have ruled on the possibility of interlocutory objections concerning jurisdictional competence by interpreting the FAA. In *Buckeye Check Cashing, Inc. v. Cardegna* the Supreme Court held that "*regardless of whether the challenge is brought in federal or state court, a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator*".[403] Put differently, the arbitration tribunal must rule on its own jurisdiction when the contract and the arbitration clause jointly (*i.e.* the entire agreement), or the underlying contract is invalid. This has been confirmed by, *inter alia*, the 5th District Court in *Brown v. Pacific Life Ins. Co.*[404] and the 9th Circuit Court in *Nagrampa v. MailCoups, Inc*.[405] Obviously, this line of reasoning also entails [by drawing an *argumentum e contrario*] that US courts have the competence to review the substantive jurisdiction of an arbitration tribunal when an arbitration clause is "specifically" invalid, void or terminated.

2. Judicial review at a public court after an arbitral award has been rendered

Ex post facto judicial review of a binding DDC arbitral award by a State court of New York is possible (with some reservations) in accordance with the scenarios explained below. From the outset it is worth mentioning that they are similar to the ones discussed under the Arbitration Act 1996, with two important exceptions. First, the DDC does not provide standardized agreements containing arbitration clauses that refer to a broader arbitration agreement, but allows members to put an arbitration clause in place in their memos, invoices and letterheads.[406] As a result, the question

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403 Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. (2006), para. 8.

404 Brown v. Pacific Life Ins. Co., 462 F.3d 384, 396 (5th Cir. 2006). The Court held that "*Where claims of error, fraud, or unconscionability do not specifically address the arbitration agreement itself, they are properly addressed by the arbitrator, not a federal court*".

405 Nagrampa v. MailCoups, Inc., 469 F.3d 1257 (9th Cir. 2006), para. 43. The court ruled that if "*after examining the crux of the complaint, the district court concludes that the challenge is not to the arbitration provision itself but, rather, to the validity of the entire contract, then the issue of the contract's validity should be considered by an arbitrator in the first instance*".

406 https://www.wfdb.com/media-news-press/news-headlines/370-ddc-announces-new-initiative-to-safeguard-diamond-transactions.

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whether the arbitration agreement is invalid owing to insufficient reference made to a broader arbitration agreement does not play a role. Second, a review on the merits is not possible by a public court under the CPLR, the FAA and the case law of the US courts.[407]

a. Lack of substantive jurisdiction of an arbitrator or arbitrators

Judicial scrutiny by a public court concerning whether the arbitration tribunal had substantive jurisdiction is also available for this court after a binding DDC award is rendered in accordance with the FAA. As a requirement, both parties must be active in different States. If the parties in an arbitral proceeding of this association are active in the same State, the substantive jurisdiction of the arbitration tribunal *ex post facto* cannot be scrutinized by a public court. This is because Article 75 CPLR, Section 7511 only permits an award to be vacated at the request of a party "*who neither participated in the arbitration nor was served with a notice of intention to arbitrate*".

In more detail, with regard to the FAA, public courts have the competence to review the substantive jurisdiction of an arbitration tribunal after an award has been rendered, when (i) a claim was not covered by an arbitration agreement, or (ii) when there is no arbitration agreement from the outset.[408] This follows from the case law of the US courts by interpreting the FAA, 9 U.S.C. § 203, which contains the (rather general) possibility for district courts to claim jurisdiction. Whereas the first requirement is rather clear-cut, especially given that the 2nd District Court in the 2nd Circuit judgment in *Smith/Enron Cogeneration Ltd. P'ship. v. Smith Cogeneration Int'l Inc*. ruled that there is a presumption that the arbitration clause (also in the event of doubt) covers the relevant claim, concluding that an arbitration agreement is invalid requires more emphasis.[409] According to the

407 Also here, the UNCITRAL Model Law and the New York Convention will not be discussed.

408 P. Sherwin, J. D. Roesser, P. L. Miller, and V. Loughery, "Proskauer on International Litigation and Arbitration: Managing, Resolving, and Avoiding Cross-Border Business or Regulatory Disputes", *Proskauer Rose LLP* 2007, chapter 21.

409 Smith/Enron Cogeneration Ltd. P'ship. v. Smith Cogeneration Int'l Inc., 198 F.3d 88 (2d Cir. 1999), para. 49. The 2nd District Court reiterates the 2nd District judgment in Worldcrisa Corp. v. Armstrong, 129 F.3d 71 (2d Cir. 1997), para. 74, in which the court ruled that "*the existence of a broad agreement to arbitrate creates a presumption of arbitrability which is only overcome if it may be said with*

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New York District Court in *Antco Shipping Co., Ltd. v. Sidermar S. p. A.* it requires "*the party resisting enforcement of the agreement [to prove] that the essence of the obligation or remedy is prohibited by a pertinent statute or other declaration of public policy*".[410] To this extent, examples of disputes that are not covered by arbitration relate to criminal offences and insolvency and bankruptcy conflicts.

b. Unfair proceedings

Another possibility for a US public court to review a DDC arbitral award after the award has been delivered to both parties can be invoked by the court when arbitral proceedings were unfair pursuant to Article 75, Section 7511 of the CPLR and the FAA, 9 U.S.C. §§ 10 and 11. Given that both laws contain many examples of situations to reach such a conclusion, the following table structures these grounds that empower a public court to vacate or modify an award.

positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage".

410 Antco Shipping Co., Ltd. v. Sidermar S. p. A., 417 F. Supp. 207 (S.D.N.Y. 1976), para. 215.

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	Article 75, Section 7511 of the CPLR = intrastate arbitration	**The FAA, 9 U.S.C. §§ 10 and 11 = interstate/international arbitration**
Grounds to vacate an award	*(b)(i) corruption, fraud or misconduct in procuring the award; or*	*10(a)(1) Where the award was procured by corruption, fraud, or undue means*
	(ii) partiality of an arbitrator appointed as a neutral, except where the award was by confession; or	*(2) Where there was evident partiality or corruption in the arbitrators, or either of them.*
	(iii) an arbitrator, or agency or person making the award exceeded his power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made; or	*(3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.*
	(iv) failure to follow the procedure of this article, unless the party applying to vacate the award continued with the arbitration with notice of the defect and without objection" the arbitral award can be vacated.	*(4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.*
		(5) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.
Grounds to modify an award	*(c)1. there was a miscalculation of figures or a mistake in the description of any person, thing or property referred to in the award; or*	*11(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.*
	2. the arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted; or	*(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.*
	3. the award is imperfect in a matter of form, not affecting the merits of the controversy.	*(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.*

III. Statement about the conformity of the trade associations and their members' joint limitation to seek legal redress at a public court with the English Arbitration Act 1996, Article 75 of the CPLR and the FAA

All six trade associations researched have in their bylaws and rules limited the possibility to obtain legal redress before and after an arbitral award is rendered. To this extent, the ICA and the LME are the most restrictive. Whereas the ICA allows for judicial review by a public court when consensus between the parties is reached, the LME only allows this judicial review

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to obtain security of an arbitral award. Apart from this, arbitral awards are final and binding and may not be appealed. This prohibition imposed on actors that contract under standardized agreements provided by both associations runs counter to the Arbitration Act 1996. This Act allows a broader basis to seek legal redress at a public court both prior to the commencement of arbitral proceedings (*i.e.* when a defence to negate a stay of proceedings is justifiable and when the arbitration tribunal has no substantive jurisdiction) and after an arbitral award is provided (*i.e.* when there is a lack of substantive jurisdiction of the arbitration tribunal, when proceedings were unfair and –arguably – if the arbitration clause within the standardized agreements insufficiently refers to a broader arbitration agreement and when a full review of the arbitrator's factual and legal determinations is permissible).

For FOSFA and the FCC it is more difficult to ascertain whether their rules contravene the Arbitration Act 1996. This is because these trade associations remain silent about the possibility of parties seeking redress at a public court that are involved in a dispute arising out of a standardized contract stemming from both associations. Nevertheless, they explicitly permit a review by public courts to ensure the enforcement of an award at the English High Court (*i.e.* FOSFA) and to replace an arbitrator in first- or second-tier arbitration at English courts (*i.e.* the FCC). It is unsure whether this entails that all other methods to obtain legal redress at a public court as mentioned in the Arbitration Act 1996 are barred. If yes, the "recourse to a public court" rules of both associations contradict this overarching statutory instrument and, when no these rules are valid, even though they do not explain all the possibilities to go to a public court prior to arbitral proceedings and after the rendering of an arbitral award.

GAFTA's rules "on the recourse to a public court" are clearly in agreement with the Arbitration Act 1996, as they allow parties to obtain judicial recourse by English courts for matters other than enforcement issues. Furthermore, in my opinion, this broad statement seems to even go beyond that law. Along the same lines, but referring to a different trade association, namely the DDC, which is not bound by Arbitration Act 1996, but by Article 75 of the CPLR and the FAA, a somewhat similar conclusion can be drawn. This DDC explicitly allows the possibility for a public court to review an arbitral award stemming from this association's arbitration on the grounds of unfair proceedings. Apart from that, it explains that a review on the merits of a case by a public court after an award has been rendered is punishable with a fine and/or a termination of membership. When meticulously reading both Article 75 of the CPLR and the FAA, this

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seems to be in complete conformity. Yet, both laws also allow for a judicial review prior to and during arbitral proceedings and after an award is rendered concerning the substantive competence of the arbitration tribunal. This possibility is not included in the rules of the DDC. Whether this means that this trade association bars such review is unclear. Much will depend on the reaction of the DDC once a party opts for this legal option.

In sum, there is a clear risk that the six trade associations are not compliant with the relevant applicable laws. Some do this explicitly, others do not portray the full legal possibilities for parties bound by the associations' arbitration tribunals to ask for legal redress at a public court. Even though a party could disregard the "recourse to public courts" prohibition set by trade associations and invoke applicable statutory law, there is a risk that party could be liable to a penalty or even ostracized from the relevant association. This is because that party would be violating the association's rules.

G. *A typology of nonlegal sanctions*

To ensure that a system of specialized commercial arbitration is successful, arbitral awards must be adhered to. Guaranteeing their enforcement by any public court runs counter to this aim. Market participants contracting under a standardized contract provided by the six trade associations researched are internationally dispersed and, as a result, are dependent on whether a public court renders an enforcement judgment and if another country's court recognizes this decision. It does not come as a surprise that this has proven to be a very uncertain, time-consuming and cost-intensive method, because not all courts located in specific States recognize foreign arbitral awards. Put differently, some States are not member to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, whereas others – despite being members – are simply unwilling to consider recognition. To negate such unwanted inefficiency, the trade associations combined (although differences exist) impose the following types of nonlegal sanctions to punish recalcitrant parties for not paying their arbitral awards.

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I. Blacklisting

The most common nonlegal sanction that is used by all six trade associations researched to guarantee compliance with arbitral awards concerns the practice of blacklisting. In general, one can say that this extrajudicial measure enables the publishing/sharing of the names of disobedient non-paying parties with other members. However, two main differences among the trade associations can be detected, as is illustrated in the following table.

Trade Association	**1. The method of publishing and its scope**
ICA	Dissemination of the names of all disloyal members in a publicly available list (*i.e.* the list of unfulfilled awards: part 1) and the names of all related entities in a non-public list (*i.e.* list of unfulfilled awards: part 2).
DDC	Posting of the name and the picture of a recalcitrant party on the wall of the trading hall of the DDC as well as on the wall of the trading hall of any trade association belonging to the WFDB with a caption that details of that party's failure to comply with the arbitration panel's ruling.
GAFTA	Posting the name of a non-compliant individual or undertaking on its notice board, a section on its website which is publicly available and/or informing its members in any other way to ensure a similar effect.
The FCC	Publishing the name of a recalcitrant party on a publicly available section on the website of this association and disseminating this information to all members of the FCC and any other organisation worldwide (without any restriction).
The LME	Publishing the name of a defaulter in the exchange and inform where appropriate other persons and counterparties of unsettled contracts with the defaulter. In addition, information of blacklisting can also be published to other exchanges and clearing houses, the Secretary of State, the Treasury, recognized investment exchanges or regulatory bodies, applicable office holders and any authority of body associated with the default.
FOSFA	Posting the name of a disloyal party on FOSFA's notice board, which is only accessible to members and in any other way it considers effective. It is unclear whether this information may be exchanged to associations/exchanges or non-members.
Trade Association	**2. Responsible institution within the trade association and the obligation to blacklist**
ICA	After being informed of non-compliance, the directors of the ICA "instruct" this association's secretary to blacklist the name of a disloyal party. However, with regard to related companies belonging to a blacklisted party, the secretary "may" blacklist this individual/company.
DDC	The DDC "must" publish the picture, name as well as the reason for blacklisting an individual.
GAFTA	The Council of GAFTA in its full discretion "may" blacklist a disloyal individual/company.
The FCC	The Council of the FCC in its full discretion "may" blacklist a disloyal individual/company.

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The LME	The exchange is obligated to blacklist the name of a defaulter in the exchange as well as disseminate this information to his/this companies other parties and counter parties. For all other possibilities mentioned above, the FCC "may" do so.
FOSFA	The Council of FOSFA, after sending a notification to both parties, "may" blacklist

II. Withdrawing membership

It is largely self-explanatory that the second method of nonlegal sanctioning, namely withdrawing membership, be it temporary or permanent, has more far-reaching consequences than blacklisting. Taking away membership causes a significant loss of credibility in the relevant market, which membership of a trade association signals and a loss of access to the services of this association, including its arbitration facilities. As a result, five out of the six trade associations (with the exclusion of GAFTA) use this measure to punish non-compliance with arbitral awards in order to ensure a smooth running and effective arbitration system. Notwithstanding their use of suspension and termination of membership, three differences can be detected. These are illustrated in the following table.

Trade Association	**1. Responsible institution within the trade association and the obligation to withdraw membership**
ICA	The directors "must" after 14 days of non-compliance with an arbitral award appoint a disciplinary committee from an approved panel, whose task is to impose an equitable penalization (*i.e.* a withdrawal of membership).
DDC	The arbitration board of the DDC "*may*" suspend or expel a member for non-compliance with an arbitral award, when such conduct "reflects adversely upon the integrity of any member of the Organization".
The FCC	The Council of the FCC "may" suspend or terminate the membership of a member, when that individual/company does not adhere to an arbitral award.
The LME	The directors of the LME "may" suspend membership, when this method is unavoidable to ensure an orderly market and alternative methods to ensure compliance with statutory obligations are absent. In addition, the directors "may" also terminate the membership of a member, without having to comply with any condition.
FOSFA	After a member has been blacklisted by the Council of FOSFA, his membership "shall" automatically be terminated, if a majority of directors [and when at least three-quarters of the Council is present] support such a withdrawal
Trade Association	**2. Publication of the withdrawal of membership decision**
ICA	Notice of the disciplinary committee's decision to withdraw membership will be published on the website of the ICA and provided to all registered members of this association.

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DDC	The withdrawal of membership decision will not be published.
The FCC	The withdrawal of membership decision may be posted by the Board and, if decided by the Council of the FCC must be published on the website of this association and send to all members/organisations.
The LME	The withdrawal of membership decision will not be published.
FOSFA	The withdrawal of membership decision will not be published.
Trade Association	**3. Possibility of appeal against a withdrawal of membership**
ICA	Whereas an appeal is not possible against a complete withdrawal of membership, a suspended member can ask the directors in writing to grant a temporary restoration of membership. The directors can accept this, require alterations, or deny such a request at any time they deem fit. Expelled members do not have this right.
DDC	A possibility of appeal against a withdrawal of membership decision is not expounded.
The FCC	A possibility of appeal against a withdrawal of membership decision is not expounded.
The LME	Members can lodge an appeal against a temporary or final withdrawal of membership at the LME Appeal Committee.
FOSFA	Members of FOSFA do not have a right to lodge an appeal against a withdrawal of membership.

III. Denying membership for expelled members on the basis of an additional entry barrier

The third nonlegal sanction concerns denying membership of an expelled member on the basis of an additional entry barrier. This extrajudicial measure, which aims to make withdrawing membership a stronger deterrent and prolongs the reputational harm and inability to access the services of the association, is only used by one of the trade associations researched, namely the ICA. This is illustrated in the following table.

Trade Association	Additional entry barriers for expelled members to regain membership
ICA	Expelled members only have the right to re-apply for membership after a period of two years, following which the directors “may” grant membership.
DDC	A restoration of membership is not expounded.
The FCC	A possibility of appeal against a withdrawal of membership decision or a restoration of membership is not expounded.
The LME	A restoration of membership after a longer period has elapsed is not expounded.
FOSFA	A restoration of membership is not expounded.

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IV. Refusing to deal with an expelled member

Arguably an even more severe measure that a trade association can impose on its members concerns refusing to deal with an expelled member, which entails that members cannot conduct trade with an expelled member. This has the result - in practice - that the expelled member will lose all access to the relevant market in which that member operates. This is because all important market players are often members of such a trade association and trade with them is crucial to remain solvent. Based on the examination on whether the six trade associations researched enforce a refusal to deal prohibition, only the ICA punishes recalcitrant parties that did not adhere to arbitral awards in such a way. This being said, to target a member it is necessary that the member must have been included on the ICA List of Unfiled Awards 1 or 2, or that the member's membership must have been withdrawn. No deviation will be allowed in any case, except when a targeted member asks permission from the directors of the ICA and the directors allow this.

V. Entering the premises of a recalcitrant industry actor

The LME (being the only one of the six trade associations researched) has decided to go one step further. This association permits entry without a warrant to the premises of a defaulting party that did not comply with an arbitral award. This is done in order to determine if there are other unsettled awards, whether this party has money to satisfy the arbitral award, if this party has other property and to find other necessary information to carry out its duties to ensure compliance. Obviously, in a digitalized world news spread rapidly and can have serious negative effects for a targeted member of this trade association. When an officer breaks down a door, or even uses more excessive force to conduct the search, this information can potentially reach all other members and even non-members. In this way, they might be persuaded not to enter into a contract with such a member.

VI. Limiting adequate access to public courts prior to arbitral proceedings and after an award.

The last nonlegal sanction, which – of course – does not fit within this term, but is treated as such throughout this research, pertains to limiting

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adequate access to public courts prior to arbitral proceedings and after an award. As seen above, in Part I, Chapter 3, F, III two trade associations clearly use this practice (*i.e.* the ICA and the LME), whereas two remain silent (*i.e.* FOSFA and the FCC), and two do not (*i.e.* GAFTA and the DDC).

H. Reasons for nonlegal sanctioning

To understand the rationale behind nonlegal sanctioning to facilitate and guarantee compliance with awards rendered by arbitration tribunals formed under the rules of the six trade associations researched, one must divide these organizations into two groups. The first group consists of the ICA, GAFTA, the FCC, the LME and FOSFA in which futures play a significant role. The second group comprises the DDC, which does not provide such futures, but concentrates on safeguarding non-deviation with contracts that underlays an even more high-risk, capital-intensive trade as compared with the first group. Put differently, it is about a market in which trust plays an even more important role.

I. Markets in which futures play a crucial role

The ICA, GAFTA, the FCC, the LME and FOSFA have one thing in common: the commodities that they represent are subject to extreme price fluctuations. To hedge this risk of price volatility, these associations provide standardized contracts/terms for their members (and sometimes even non-members) to exchange a specific quantity of commodities at a predetermined price and specified time in the future. In other words, by providing futures contracts, the buyer is obligated to buy the commodities and the seller is duty-bound to perform the contract for the agreed sum in the future. While good in theory, however, in practice either party is often triggered to deviate from its contractual duties to comply with the award depending on the circumstances. If the buyer and the seller were to negotiate an average price and in the future owing to scarcity of the commodities the former person were to gain more profit by selling to another buyer, when – of course – expected legal fees do not offset this monetary advance, contract deviation cannot be excluded. Similarly, if both persons were to negotiate an average price and in the future there is an abundance of commodities that is to be traded, the buyer may be induced not to fulfil its

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contractual obligations and buy the commodities at a lower price. Once again, the surplus must then outweigh the cost of any court proceedings.

Against this backdrop, it becomes immediately clear that court proceedings are not always sufficient to deter contract deviations by either the buyer or a seller. Awards stemming from specialized commercial arbitration enforced by nonlegal sanctions provide a much better alternative. The threat of being blacklisted, or sometimes even being ostracized or being targeted by a refusal to deal from remaining members of a trade association has even more far-reaching consequences. This is because the reputation of targeted individuals/companies, which is essential for an individual/company to operate in a market in which a specific commodity is traded, is challenged and to some extent even ruined. Other market participants would be less likely to conduct (long-term) trade with such a targeted actor and are to some extent prevented from engaging in future deals.

Notwithstanding the explanation why nonlegal sanctions are necessary to ensure compliance with future contracts, a second reason for the imposition of such sanctions relates to the New York Convention. Given that market participants contracting under standardized (futures) contracts are often located in different States, if an award must be enforced in public court and after a different court in another State has to recognize the former court's enforcement decision under the New York Convention, this bears the risk of two problems. First, this procedure could take too long. Second, the court tasked with recognizing the enforcement decision can decide not to do so. Put differently, public court enforcement can, when two market participants are located in different countries, be seen as a lengthy and uncertain procedure. Nonlegal sanctioning to guarantee compliance with arbitral awards provides a far more effective alternative method, since it puts an end to both risks.

II. A market in which trust plays a crucial role

From all the six trade associations researched, the DDC can be seen as the most peculiar. To substantiate this, three arguments can be given. First, unlike the other five trade associations, this association does not issue standardized (future) contracts/terms for the trade in diamonds, but only provides arbitration and imposes nonlegal sanctions on wrongdoers after a wrongdoer does not comply with an arbitral award. Second, having a good reputation is arguably even more important as compared with the other five trade associations, because diamonds are small, worth a large amount

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of money and can easily be duplicated. In other words, there is a higher risk involved in trading this material and, hence, having a good standing is crucial in order to be seen as a reliable trader. Third, diamond traders who are members of the DDC are part of a close-knit group that have social relationships with one another. In contrast, the members of the other trade associations are often unfamiliar with each another.

By taking this into account, given that the diamond industry must operate as efficiently and swiftly as possible by having as many trustworthy traders as possible, choosing public court adjudication instead of DDC arbitration, or enforcing DDC arbitral awards in court is undesirable. Courts are slow, non-flexible and often ill-equipped to safeguard the reputation of traders active in the diamond industry. Specialized commercial arbitration enforced by nonlegal sanctioning is a better alternative, because compliance with arbitral awards can be achieved more efficiently. The reason for this is that such sanctions specifically target a trader's reputation as well as his social standing.

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Chapter 4: The Limits of Nonlegal Sanctioning

A. *The boundaries of nonlegal sanctioning*

By deviating from the general rule that a dispute is to be adjudicated and enforced in a public court, as was already mentioned before, nonlegal sanctioning through a trade association has a far greater impact for targeted individuals or companies. Being blacklisted, ostracized, and unable to conduct trade with members of a trade association ruins commercial reputations and/or causes social estrangement. Consequently, given the importance of the trade associations, it can lead to a partial or complete loss of access to the relevant commodities market.

In this way, the punishment of foreclosing market entry gives rise to overdeterrence and a complete distortion of the reasoning proper to any legal system, where limitations to market access infringe competition law. Protection of competitors, as one of the major goals that this type of law safeguards, can be infringed. Due to the existence of many competition laws around the world,[411] in my opinion, it is necessary to limit this research to the two largest and most influential systems of competition regulation globally that apply to the situation of the six trade associations researched.[412] The first is US Antitrust Law and the second is EU Competition Law.

I. US Antitrust Law: Sections 1 and 2 of the Sherman Act

The main antitrust law of the USA can be found in Sections 1 and 2 of the Sherman Act.[413] Whereas Section 1 outlaws, *inter alia*, every contract in restraint of trade or commerce among US states or foreign nations, the Section 2 prohibits attempts to monopolize, conspiracies with any other per-

411 It is estimated that more than 100 countries worldwide have some form of competition law in place. See J. Duns, A. Duke, and B. Sweeney, "*Comparative Competition Law*", Cheltenham/Northampton: Edward Elgar Publishing 2015, p. 172.

412 R. Mansell, "*The International Encyclopedia of Digital Communication and Society, 3 Volume Set, Volume 1*", Hoboken: Wiley-Blackwell 2015, p. 79.

413 Sherman Antitrust Act of 1890.

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son(s) and behaviour to monopolize any part of the trade or commerce among US states or foreign nations. On its face, both definitions are very broad and have, in my opinion, a seemingly unlimited scope. Yet, legal commentary and case law of the US judiciary, in the field of antitrust, address and clarify most ambiguities.

II. EU Competition Law: Articles 101 and 102 TFEU

The most relevant provisions of EU Competition Law that could apply to the practice of nonlegal sanctioning are laid down in Articles 101 and 102 TFEU. The Article 101 prohibits anti-competitive agreements, whereas Article102 strikes down any abuse of a dominant position. Even though both provisions are an emulation of Sections 1 and 2 of the Sherman Act, one cannot say that researching EU Competition Law is redundant. This is because of three reasons. First, the provisions in both laws are worded differently. Second, interpretation by enforcement agencies and courts dealing with EU Competition Law and US Antitrust Law differs. Third, the approach of competition law is different in both legal regimes.

B. Prisoner's dilemma type of function analogy

The prisoner's dilemma type of function analogy concerns the situation in which two individuals by acting in their own self-interest do not reach the best outcome because either person is triggered to cheat.[414] An illustration of such a situation was given by *Aviram*.[415] He explains that if two individuals were caught for robbing a bank, without being able to talk to one another prior to a criminal court's decision and both individuals were given two options, namely to betray the other person or not to talk at all, either party will choose the option that minimalizes his risk to go to prison, even though this would go against the common interest. *Aviram* exemplifies this by using the following three options that can, but do not necessarily, result in a prison sentence.[416]

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414 R. P. Malloy, "*Law in a Market Context: An Introduction to Market Concepts in Legal Reasoning*", Cambridge: Cambridge University Press 2004, p. 132.

415 A. Aviram, "The Paradox of Spontaneous Formation of Private Legal Systems", *John M. Olin Law & Economics Working Paper No. 192* 2003, p. 39-41.

416 Ibid., p. 39-40.

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Option	Years in Prison
1. One individual confesses that the other person is guilty, whereas the other person remains silent	Betrayed individual goes to prison for 15 years, whereas the other person is exculpated
2. Both individuals betray one another	Both persons must serve 10 years in prison
3. Both individuals do not betray one another	Both parties must serve 3 years in prison

From a mutual cooperation point of view, the best outcome would be that both remain silent, because then both parties would only go to prison for 6 years. If only one party betrays the other party, this would result in a combined 15 years' prison sentence. The worst case scenario would be when both parties betray one another (*i.e.* mutual default), as then both individuals would go to prison for a combined 20 years. Yet, despite this seeming truism, either individual will most likely (for selfish reasons) want to obtain the best possible outcome for himself. As a result, it is highly conceivable that both persons would betray the other person in order to not go to prison.[417]

Obviously, this illustration cannot be completely transposed to the situation of nonlegal sanctioning by the six trade associations researched. Especially because both situations are not comparable. Be that as it may, an analogy appears permissible. In the absence of nonlegal sanctions to enforce arbitral awards, losing parties have no incentive to comply with such determinations on the merits of a dispute. This is because enforcement in any public court has proven to be problematic, especially when parties in specialized commercial arbitration proceedings (which is not uncommon) are established in different States. Such an award must then be enforced in two States, namely the State of registration and the State of recognition. This often results in serious delays and insecurities. In more detail, the following table lays down the two options that a losing party in arbitration has as well as the results of each decision.

417 For a more extensive discussion of the prisoner's dilemma, see, *inter alia*, J. Cirace, "*Law, Economics, and Game Theory*", London: The Rowman & Littlefield Publishing Group 2018, p. 113-119.

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Option	Result
1. Comply with the arbitration award	Pay the monetary sum stipulated in the award and, hence, contribute to a well-functioning and reliable arbitration system, in which awards are respected.
2. Not comply with the arbitration award	Insecure whether the monetary sum stipulated in the award must be paid in the future, in particular, in the event a second court does not recognize the enforcement decision rendered by the first court. By not complying with an award, the relevant arbitration system may become untrustworthy.

To achieve mutual cooperation, the first option is the best possible outcome. Especially since it secures the success of the arbitration system. However, in line with the above illustration of the prisoner's dilemma type of function, albeit only by analogy, non-compliance with an arbitral award gives a losing party a possible reward after cheating. The losing party then has a chance that the monetary sum stipulated in the arbitral award will not need to be paid. As a result, some market participants will most likely prefer the second option, which in turn can seriously hamper the functionality of the arbitration system. To overcome this problem of opportunistic behaviour and to have measures in place that ensure low enforcement costs, nonlegal sanctioning is the best possible choice. It sufficiently deters or coerces deviating from arbitral awards as efficiently as possible to imagine.[418] Put differently, nonlegal sanctioning is a good method to resolve the prisoner's dilemma of the adverse impact of opportunistic behaviour. Despite such coercive measures having an unmistakeably positive effect for the arbitration systems provided by the six trade associations researched, there is a risk that solving this type of game impedes market access for targeted parties under US Antitrust Law and EU Competition Law.

C. *The actors involved in nonlegal sanctioning*

Before conducting a thorough and extensive research of whether nonlegal sanctions infringe US Antitrust Law and EU Competition Law, it is necessary to identify the actors that take part in such extrajudicial measures and, on the other hand, are the recipients of such coercive measures.

418 A. Aviram, "The Paradox of Spontaneous Formation of Private Legal Systems", *John M. Olin Law & Economics Working Paper No. 192* 2003, p. 41.

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I. Actors that take part in nonlegal sanctioning

Only three actors can be detected that take part in nonlegal sanctioning. The first group of actors concerns the "trade associations", also known as industry trade groups, which are tasked with imposing nonlegal sanctions on disloyal industry actors for not complying with arbitral awards stemming from specialized commercial arbitration. The second group of actors encompasses the members of a trade association which have a role in the execution of nonlegal sanctions following this institution's imposition of nonlegal sanctions. The third and last group of actors comprises individuals/companies other than the members of a trade association which (albeit less obviously) have a role in the execution of nonlegal sanctions following this institution's imposition of nonlegal sanctions.

1. Trade associations

The role of a trade association is to promote the common interests of its members (who/that are almost always competitors in a market) as good as possible.[419] For the reason of achieving this objective, such an institution provides rules for the formation of an arbitration tribunal in the event a contractual dispute between members and occasionally between a member and a non-member occurs. Furthermore, it imposes nonlegal sanctions on wrongdoers for not complying with an arbitral award.

2. Members of a trade association

It is debatable whether an association can be seen as the (sole) instigator of extrajudicial coercive measures. To this extent, it is necessary to answer the following question: Is a trade association responsible for nonlegal sanctioning, or do its members have a role to play in nonlegal sanctioning to punish a disloyal industry actor? Answering this question is not easy, because it is uncertain whether a trade association must only be seen as a vehicle through which members organise themselves. If yes, members would be

419 C. S. Mack, "*The Executive's Handbook of Trade and Business Associations: How They Work-and How to Make them Work Effectively for You*", New York/Westport/Connecticut/London: Quorum Books 1991, p. 14.

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the sole instigators of nonlegal sanctioning by making use of the rules provided by a trade association.

From my point of view, both the association as well as its members are collectively the driving force of nonlegal sanctioning. The association as the actor responsible for imposing extrajudicial measures and the members as the actor in charge of executing such measures. Hence, it is crucial to distinguish between both actors when discussing a potential liability under US Antitrust Law and EU Competition Law due to their respective role in nonlegal sanctioning.

3. Non-members of a trade association

The last actor concerns market participants that do not belong to the relevant trade association, but are involved in a contractual dispute with one of its members. If this institution were to impose a nonlegal sanction on the member, the non-member would also have a role to play in the execution of this extrajudicial measure. This is because this non-member agrees to abide by the standardized rules which refer to a broader arbitration agreement in which nonlegal sanctions are included. With regard to other non-members, they will often refrain from entering into future contracts with an extrajudicially sanctioned industry actor. Even though express consent is lacking, they might tacitly agree to this type of enforcement and have a role to play in its execution.

II. Recipients of nonlegal sanctioning

There are two types of recipients of nonlegal sanctions. First, the disloyal members of a trade association that do not comply with an arbitral award. Second, non-members that enter into a standardized contract which is linked to a broader arbitration agreement in which nonlegal sanctions are included with a member and do not comply with an award stemming from specialized commercial arbitration. Other non-members cannot be disciplined with nonlegal sanctions.

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D. Research Question

Nonlegal sanctioning appears a good method to ensure compliance with arbitral awards stemming from the specialized arbitration systems provided by the six trade associations researched. However, this form of extrajudicial disciplining has a risk of driving out market participants and sometimes of even completely foreclosing market access for such an individual or company. It has long been recognized by some authors that such coercive measures can substantiate a restriction of competition law, namely under Sections 1 and 2 of the Sherman Act and Articles 101 and 102 TFEU.

To date, nonlegal sanctioning imposed by a trade association and executed by its members and non-members has not been considered by the relevant competition enforcement agencies, has never been scrutinized in case law and has not been mentioned in US or EU legislation. Despite this omission, be it justified or not, one cannot draw the conclusion that nonlegal sanctioning is permissible. The compatibility with the antitrust laws of both legal systems must be carefully explained by using a plethora of arguments, legislation, decisional practice and similar cases. Conclusively, the research question is formulated as follows: "*Do the trade associations researched, their members and non-members, for their role in the imposition and execution of nonlegal sanctions, infringe US Antitrust Law and EU Competition Law and, if yes, can they justify these extrajudicial measures?*"

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Chapter 5: Research Design and Research Methods

A. *Case studies*

Before the research question can be answered by delving into US Antitrust Law and EU Competition Law, it was necessary to determine in which PLSs and to what extent nonlegal sanctioning occurs. Although some authors have only mentioned a single PLS in which this type of extrajudicial enforcement occurs, such as *Bernstein* with regard to the ICA,[420] *Musmann* with reference to the Bremen Cotton Exchange,[421] and *Richman* pertaining to the DDC,[422] no legal scholar has conducted full-fledged and extensive research by comparing multiple trade associations which operate within PLSs. In my opinion, by only considering a single PLS in which nonlegal sanctioning occurs, it is neither possible to depict a complete picture of what this method of enforcement entails, nor is it feasible to understand other characteristics, such as (i) the options available for internal and judicial appeal against an award; (ii) the possibility of regaining membership after membership has been withdrawn; and (iii) the rationale of nonlegal sanctioning.[423] These characteristics are important in order to contemplate the illegality and possible justification grounds with regard to the involvement of all three actors in extrajudicial enforcement pursuant to Sections 1 and 2 of the Sherman Act and Articles 101 and 102 TFEU. To provide an as good as possible framework against which to conduct a competition law study, this research has, therefore, discussed six cases (which operate within PLSs) in which extrajudicial enforcement occurs. These cases are the ICA, the DDC, GAFTA, the FCC, the LME and FOSFA.[424]

For some, this selection of cases may still appear inadequate to portray the complete picture of nonlegal sanctioning within a PLS. This is because

420 L. Bernstein, "Opting out of the Legal System: Extralegal Contractual Relations in the Diamond Industry", *The Journal of Legal Studies, Vol. 21, No. 1* 1992.

421 A. C. Musmann, "*Recht und soziale Sanktionen: Eine Untersuchung am Beispiel des grenzüberschreitenden Baumwollhandels*", Baden-Baden: Nomos 2018.

422 B. D. Richman, "The Antitrust of Reputation Mechanisms: Institutional Economics and Concerted Refusals to Deal", *Virginia Law Review, Vol. 95:325* 2009.

423 The fact that such research has not been carried out is not because it is unsuitable for empirical research.

424 These six trade associations are discussed in Part I, Chapters 2 and 3.

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there are many more PLSs in which similar extrajudicial enforcement methods are proscribed. The Bremen Cotton Exchange and BIMCO are the first ones that immediately come to mind.[425] To address this, it is necessary to answer the following question: Why are the six cases suitable to forming the foundation of competition law scrutiny? To answer this question, two arguments in support of the researched cases must be mentioned.[426] These are mentioned below.

I. Unnecessary redundancy exploratory research methodology

Research must not only be accurate and thorough, it should also be as efficient and as economical as possible.[427] Investigating all PLSs in which nonlegal sanctioning occurs is not expedient. It would not only cause unnecessary redundancy, but it would also deviate from the core of this research, namely to explore the compatibility of trade associations, their members and non-members for their role in extrajudicial enforcement with US Antitrust Law and EU Competition Law.

II. Methodological adequacy

The six cases which have been chosen consist of large trade associations that represent global market players operating in different commodities markets. Because nonlegal sanctioning can foreclose market access of competitors that operate in a different State, this not only can trigger the applicability of both laws, it can also infringe their core provisions. Smaller trade associations, such as the Bremen Cotton Exchange, most likely do

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425 The Baltic International Maritime Council (BIMCO) is considered one of the largest international shipping associations that represents ship owners. In line with its policy of restricting public access, only members are granted access to the bylaws and rules of this association. It is, therefore, not possible to understand the arbitration system and the nonlegal sanctions provided by this association. Notwithstanding, various experts active in the maritime industry, who have indicated they wish to remain anonymous, have corroborated the existence of extrajudicial enforcement rules.

426 No author should ever be absolved from the duty to spell out the methodological reasons for the selection of a specific case or cases.

427 J. Barton and R. H. Smith, "*The Handbook for the New Legal Writer*", New York: Wolters Kluwer 2019, p. 345.

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not fall within the ambit of US Antitrust Law or EU Competition Law, because they represent fewer market participants in the relevant commodities market and have a smaller impact on US or EU competition. Hence, they are not suitable for research.

B. Delimitation

This research deals with the potential liability of the trade associations researched, their members and non-members for their participation in nonlegal sanctioning, which takes place within a PLS with US Antitrust Law as well as EU Competition Law. More specifically, the focus is to establish whether the most relevant prohibitions under both laws, which can be found in Sections 1 and 2 of the Sherman Act and Articles 101 and 102 TFEU, are infringed and/or possibly justified. Since these legal norms are very vast, especially given that they are interpreted repeatedly by antitrust enforcement agencies, courts as well as the literature, the research must be limited in some ways so as to be able to answer the overarching central research question.

I. US Antitrust Law

First of all, the analysis of US Antitrust Law does not contain an explanation of whether the Sherman Act is applicable and does not factor in various concepts, such as the existence of a standardization agreement. The anti-competitiveness of nonlegal sanctioning is discussed only against the yardsticks laid down in legislation, case law of US courts and legal doctrine. Rendering a detailed explanation is not the author's main objective, as a succinct discussion of the issue whether the researched trade associations, their members and non-members with regard to nonlegal sanctioning violate US Antitrust Law is sufficient. Reasons for this are threefold.

First, five of the six trade associations researched have a closer connection to EU Competition Law. Only the DDC, as a US-based trade association appears more strongly connected to US Antitrust Law. As a result, a more thorough analysis is required with regard to EU Competition Law rather than US Antirust Law. Irrespective of this, such an observation might be refuted if the Federal Trade Commission ("FTC") were to claim competence to scrutinize the liability of the trade associations researched,

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their members and non-members for their involvement in nonlegal sanctioning under US Antitrust Law. Despite this possibility, because such extraterritorial application would probably upset, *inter alia*, the EU Commission and politicians, it is an unlikely course of events.

Second, my considerable expertise in EU Competition Law justifies a broader analysis with regard to this law rather than US Antitrust Law. Third, whereas *Richman* already in 2009 thoroughly discussed the lawfulness of nonlegal sanctioning against US Antitrust Law,[428] such a detailed discussion about the compatibility of such measures under EU Competition Law has not been carried out to date. Despite *Musmann* in 2018 analyzing the lawfulness of blacklisting and withdrawing membership against Articles 101 and 102 TFEU, her research gives a broad overview only of the main case law and legislation without delving into the specifics.[429] In addition, her focus is – arguably - more on the illegality of nonlegal sanctioning with German Competition Law, namely the Law Against Constraints of Competition (GWB)[430] and the Law Against Unfair Competition (UWG).[431] It is for these reasons that a more thorough and extensive discussion on the lawfulness of nonlegal sanctioning under Articles 101 and 102 TFEU is necessary.

To carry out a concise review of US Antitrust Law, as was already described before, the emphasis should be on two provisions, namely Sections 1 and 2 of the Sherman Act. With regard to Section 1, the research revolves around the question whether (i) the dissemination of the names of recalcitrant industry actors in a blacklist; (ii) withdrawals of membership; (iii) refusals to re-admit expelled members based on an additional entry condition; (iv) refusal to deal with expelled members; (v) entering the premises of a wrongdoer without a warrant; and (vi) limiting adequate access to public courts prior to arbitral proceedings and after an award constitute agreements in restraint of trade. Section 2 of the Sherman Act considers the liability of the trade associations researched and their members for these measures, although the focal is on the denial of access to an essential

428 See B. D. Richman, "The Antitrust of Reputation Mechanisms: Institutional Economics and Concerted Refusals to Deal", *Virginia Law Review, Vol. 95:325* 2009.

429 A. C. Musmann, "*Recht und soziale Sanktionen: Eine Untersuchung am Beispiel des grenzüberschreitenden Baumwollhandels*", Baden-Baden: Nomos 2018.

430 Gesetz gegen Wettbewerbsbeschränkungen of 2017.

431 Gesetz gegen den unlauteren Wettbewerb of 2019.

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facility against the concept of anti-competitive (attempted) monopolization or a conspiracy to monopolize.[432]

II. EU Competition Law

The second limitation of this research is in reference to EU Competition Law. More specifically, it concerns the question whether the trade associations researched, their members and non-members, for their participation in nonlegal sanctioning, infringe Articles 101 and 102 TFEU. With regard to both Articles, corresponding with the delimitation of US Antitrust Law explained above, the focus is to analyze whether (i) the dissemination of the names of recalcitrant industry actors in a blacklist; (ii) withdrawals of membership; (iii) refusal to re-admit expelled members on the basis of an additional entry condition; (iv) refusal to deal with expelled members; (v) entering the premises of a wrongdoer without a warrant; and (vi) limiting adequate access to public courts prior to arbitral proceedings and after an award constitute anti-competitive agreements and/or refusals of access to an essential facility through monopolization.[433] Here, the research is much broader. This is because of two reasons: First, different from the analysis under US Antitrust Law, the scope of application of EU Competition Law is discussed. Second, every relevant decision of the Commission, case law of the CJEU as well as legislation will be taken into consideration. With regard to US Antitrust Law, only the most crucial and relevant decisions are discussed.

III. Type of reasoning

Answering the central research question will be done by deductive legal reasoning by occasionally borrowing concepts found in philosophy and economics. This is necessary to prevent a tunnel vision analysis. Yet, applying economic insights to support legal arguments is to a large extent beyond the scope of this research. Not only would this unnecessarily increase

432 Importantly, the potential single dominance of a member of one of the trade associations researched is not discussed. This is because it is unlikely.

433 Importantly, the potential single firm dominance of a member of one of the trade associations researched is not discussed. This is because it is unlikely.

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the complexity of the research, it would also carry the risk of debunking legal arguments without having the required personal expertise to do so.

C. *Reflection on the research question*

The central research question put forward above will be answered in two steps. First, the illegality of the researched trade associations, their members and – arguably – non-members for their participation in nonlegal sanctioning will be examined under US Antitrust Law. Second, potential anti-competitiveness of all three actors for this practice will be discussed pursuant to EU Competition Law. In more detail, the analysis will be divided into eight Chapters (starting with Chapter 6), each of which contribute to answering this question.

- In Chapter 6, a review of all relevant legislation, case law and literature is conducted to determine whether the trade associations researched, their members and non-members violate Section 1 of the Sherman Act for their participation in nonlegal sanctioning. This is done in six Paragraphs. In the first Paragraph (A), a broad introduction is given. In the second Paragraph (B) examines whether the actors involved in nonlegal sanctioning qualify as a corporation or individual and, hence, fall within the ambit of Section 1 of the Sherman Act. The third Paragraph (C) establishes whether there is a concurrence of wills. The fourth Paragraph (D) scrutinizes whether the practice of blacklisting, withdrawing membership, denying membership for expelled members on the basis of an additional entry condition, refusing to deal with an expelled member, entering the premises of wrongdoers without a warrant, and limiting adequate access to public courts prior to arbitral proceedings and after an award constitute restraints of trade. The fourth Paragraph (E) pursues a rule-of-reason analysis to assess whether each of these measures are permissible. The fifth Paragraph (F) provides the key findings.
- In Chapter 7, a review of relevant legislation, case law and literature is again conducted to determine whether the trade associations researched and their members violate Section 2 of the Sherman Act for their participation in nonlegal sanctioning. This is done in five Paragraphs. A brief overview is given in the first Paragraph (A), followed by a discussion in the second Paragraph (B) of whether the trade associations actually monopolize any part of the trade or commerce among the several States, or with foreign nations. The third Paragraph (C), de-

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bates whether any of these institutions attempt to monopolize any part of the trade or commerce among the several States, or with foreign nations. This includes a balancing exercise between the anti-competitiveness of conduct and their pro-competitive benefits. The fourth Paragraph (D) examines whether the role of the members of the trade associations when executing extrajudicial enforcement is contrary to Section 2 of the Sherman Act. The last Paragraph (E) presents the key findings.

- In Chapter 8, a review is conducted of relevant legislation, case law and literature to establish whether the trade associations researched, their members and non-members satisfy the scope of application of EU Competition Law for their participation in nonlegal sanctioning. This is done in five Paragraphs. The first Paragraph (A) provides a brief overview of the objectives, responsible enforcement agencies and the absence of precedents to determine nonlegal sanctioning as a restriction of Articles 101 and 102 TFEU. A discussion in the second Paragraph (B) highlights the necessity of fulfilling the scope of application of EU Competition Law with regard to both Articles. The third Paragraph (C) examines fulfillment of the legal boundary (or undertaking concept) while the fourth Paragraph (D) discusses compliance with the economic boundaries (or the effect on trade between member states concept). This requires, from the beginning of this Paragraph, describing the threshold as interpreted by the CJEU and the Commission and, subsequently, establishing whether the practice of nonlegal sanctioning by the trade associations researched, their members and non-members meet the economic boundaries. The fifth Paragraph (E) presents the key findings.
- Chapter 9 examines the unlawfulness of the trade associations researched, their members and non-members for their role in nonlegal sanctioning pursuant to Article 101(1) TFEU by reviewing relevant legislation, enforcement practice of the Commission, case law, and the literature. This is done in five Paragraphs. The first Paragraph (A) provides a broad introduction to the subject. The second Paragraph (B) focuses on the concept of collusion or a concurrence of wills. An explanation is given in the third Paragraph (C) as to whether the trade associations researched, their members and non-members because of their participation in nonlegal sanctions breach Article 101(1) TFEU by object or effect. The fourth Paragraph (D) explores whether these actors can justify nonlegal sanctioning under the first arm of Article 101 TFEU in light of the fact that the existence of such a rule of reason ana-

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lysis is debatable. The fifth and last Paragraph (E) summarizes the key findings.

- In Chapter 10, possible justifications for the trade associations researched and their members to escape antitrust liability under Article 101(1) TFEU for their role in nonlegal sanctioning are discussed by analyzing two BERs and Article 101(3) TFEU. The following four Paragraphs examine these issues. The first Paragraph (A) provides a short introduction. The second Paragraph (B) discusses the applicability of two block exemption regulations, namely the Research and Development BER and the Specialization Agreements BER. Both legal documents can debar nonlegal sanctioning from an infringement of Article 101(1) TFEU in a relatively easy and uncomplicated manner. The third Paragraph (C) weighs the participation of the trade associations researched and their members pertaining to nonlegal sanctioning which is contrary to the first arm of Article 101 TFEU against the four exemption conditions laid down in Article 101(3) TFEU. The key findings are provided in the fourth Paragraph (D).
- In Chapter 11, the anti-competitiveness of the trade associations researched for their role in the imposition of nonlegal sanctions are examined against the existence of an abuse of a dominant position pursuant to Article 102 TFEU. This is done by reviewing all legislation, enforcement practice of the Commission, case law and the literature. The review is divided into the following four Paragraphs. The first Paragraph (A) provides a broad introduction to the topic. The second Paragraph (B) examines the existence of a dominant position in the EU markets for regulation and private ordering in which the trade associations operate. The third Paragraph (C) reviews the existence of an abuse of a dominant position in the secondary commodities markets on which their members operate. In Paragraph C, the focus is on the concept of an exclusionary abuse, the essential facility doctrine, the existence of a causal connection between market power of the trade associations on the primary EU markets for regulation and private ordering and an abuse on the second-tier commodities markets on which their members operate and possible justifications. The fourth and last Paragraph (D) summarizes the most important key findings.
- In Chapter 12, the research is summarized in order to understand whether the trade associations researched, their members and nonmembers which have a role in the imposition and execution of nonlegal sanctions within present-day PLSs infringe US Antitrust Law and EU Competition Law and, if yes, if these actors can justify these extraju-

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dicial measures. This is done in the following nine Paragraphs. The first Paragraph (A) discusses the peculiarities of present-day PLSs; the second Paragraph (B) discusses the similarities and differences between the six trade associations, which are the most important actors within present-day PLSs. In the third Paragraph (C), an explanation is provided of the antitrust limits of nonlegal sanctioning, which is a salient feature of these trade associations. The fourth Paragraph (D) examines whether the trade associations researched, their members and non-members for their role in nonlegal sanctioning are in restraint of trade or commerce pursuant to Section 1 of the Sherman Act. The fifth Paragraph (E) discusses whether the trade associations researched and their members for their role in nonlegal sanctioning violate Section 2 of the Sherman Act. In the sixth Paragraph (F), an explanation of the applicability of Articles 101 and 102 TFEU is provided. The seventh Paragraph (G) furthers the discussion on whether the trade associations researched, their members and non-members for their role in nonlegal sanctioning infringe Article 101(1) TFEU. In the eighth Paragraph (H), examines justifications for an infringement of this provision by focusing on two BERs and Article 101(3) TFEU. And the last Paragraph (I) further examines whether the trade associations researched and their members for their role in nonlegal sanctioning violate Article 102 TFEU.

– In Chapter 13, the research question is answered and best practice guidelines are developed for trade associations and their members in order for them to escape liability under US Antitrust Law and EU Competition when the former group of actors impose nonlegal sanctions and the latter group of actors execute such measures. This is done in four Paragraphs. The first Paragraph (A) succinctly answers the central research question. The second Paragraph (B) provides introductory comments to draft best practice guidelines for compliance with US Antitrust Law and EU Competition Law, while the third Paragraph (C) provides best practice guidelines for trade associations. The fourth Paragraph (D) concludes with presenting best practice guidelines for members of trade associations.

D. *Objectives of this research*

This research is the most comprehensive study to date that describes the liability of trade associations, their members and non-members (that func-

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tion within PLSs) with regard to competition law. The reason being that it considers the two most important competition law jurisdictions in the world, namely US Antitrust Law and EU Competition Law. Given that, to date, no study has ever been carried out that analyses extrajudicial enforcement under both laws, answering the main research question will clearly contribute to the general understanding of whether trade associations, their members and non-members involved in this disciplinary method should fear infringing competition law. If the FTC with regard to US Antitrust Law and/or the Commission with regard to EU Competition Law were to reasonably perceive nonlegal sanctioning as an infringement of either law, this could endanger the whole system of specialized commercial arbitration within present-day PLSs. This is because extrajudicial enforcement of arbitral awards would suffer from the threat of invalidity. In turn, judicial enforcement of these awards would remain the only alternative, even though this has proven to be a less efficient option due to issues of unreliability and expected delays. In my opinion, preventing any risk that could impact the functionality (or even the survival) of present-day trade associations which represent industry actors active in the commodities industries should, therefore, be seen as crucial. To do so, the objective of this research is threefold. First, to provide guidance to the trade associations researched, their members and non-members if their participation in nonlegal sanctioning complies with both competition law regimes. Second, to promote transparency for the trade associations researched, their members and non-members concerning a potential US or EU competition law infringement vis-à-vis nonlegal sanctions. Third, to draft or promulgate guidelines for trade associations and their members to ensure that nonlegal sanctioning does not exceed the bounds of US Antitrust Law and EU Competition Law.

I. Guidance for compliance with competition law

Surveying the potential liability of trade associations, their members and non-members for their participation in anti-competitiveness of nonlegal sanctions which are imposed and enforced within PLSs offers much needed clarity on a complex and not widely discussed subject. It is for this reason that guidance for compliance with competition law is provided in Parts II, III and IV of this research. Given that this research is broad and extensive, Chapter 12 summarizes the most important findings, and Chapter 13 provides a succinct conclusion.

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II. Promoting transparency for trade associations, their members and non-members

By discussing the potential non-conformity of the trade associations researched, their members and non-members for their role in nonlegal sanctioning with the competition laws of the US and the EU, all actors involved in this type of extrajudicial enforcement may be warned against the possibility of either the FTC, with regard to US Antitrust Law, and the Commission, with regard to EU Competition Law, might one day hold them accountable for antitrust violations.[434] This contributes to increasing the antitrust liability transparency of these actors with regard to orchestrating nonlegal sanctions.

III. Promulgating best practice guidelines for actors that infringe US Antitrust Law and EU Competition Law

On the basis of this research on the liability of the trade associations researched, their members and non-members under US Antitrust Law and EU Competition Law, as is thoroughly explained in Chapters 6 to 13, the ultimate goal of this research is to formulate best practice guidelines for the actors that infringe US Antirust Law and EU Competition Law and to make recommendations on what to do to avoid, or minimalize, the risk of antitrust liability under both legal regimes for the actors' involvement in nonlegal sanctioning. This research also provides words of warning about taking steps to avoid contravening US Antitrust Law and EU Competition Law.

These best practice guidelines have been drafted with taking the following four intersecting key functions into account. First, the guidelines identify the risks that actors face and provide advice (*i.e.* the identification function). Second, the guidelines include warnings about protecting actors from antitrust liability (*i.e.* the prevention function). Third, the guidelines resolve any difficulty with compliance (*i.e.* the resolution function). Fourth, the guidelines state the most effective measures that ought to be taken to ensure compliance with US Antitrust Law and EU Competition Law (*i.e.* the efficacy function).

434 The concept of transparency is subject to much debate in the literature. This debate will not be discussed here.

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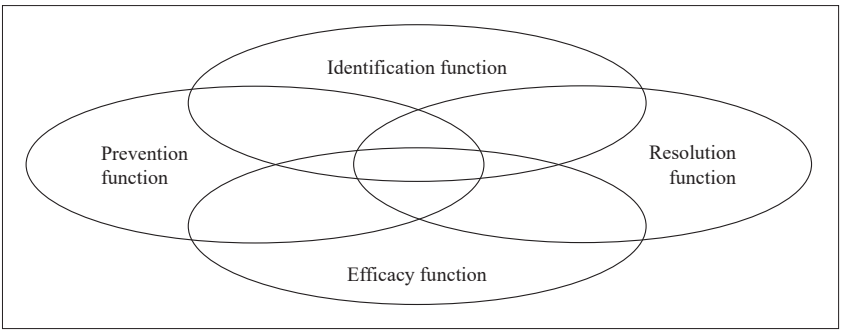
Figure 7: The intersecting functions of establishing best practice guidelines for trade associations and their members



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