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Summary

Roles and Role Perceptions in Transnational Private Law
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1. The private lawyer's role is inseparably connected with the paradigms and doctrines of private law. This is so because the role played by private lawyers constitutes a large part of their understanding of the discipline. At the same time, the shared understanding of the discipline has necessary consequences for the roles played by lawyers in it.

2. Roles and role perceptions in private law are contingent upon space and time. The most important factor affecting private lawyers today is the growing detachment of private law from the state, through globalization, Europeanization, and privatization of law.

3. International commercial arbitration creates a transnational epistemic community. Within this community, the same individuals perform different functional roles: party representatives, arbitrators, scholars, advertisers.

4. The international arbitrator is cosmopolitan; his or her national origin is considered largely irrelevant and is marginalized. This cosmopolitan role is both a consequence of and a prerequisite for the autonomy of international commercial arbitration.

5. The states' courts, by contrast, are only slowly becoming transnationalized. They favor convergence but shy away from unilateral regulation where such convergence does not exist or cannot be brought about.

6. The arbitrator's role has evolved in the 20th century, from that of a legal notable whose authority rests in experience and wisdom, to that of a professional and entrepreneur. However, both types, as well as intermediate types, still exist.

7. In arbitration, the scholar's role is regularly inseparable from that of a stakeholder. Most scholarship is produced by practitioners; university professors who write on arbitration frequently also practice. Arbitration scholarship is used as advertisement for its practitioner author's name and for international arbitration in general. The resulting scholarship is therefore of mixed quality; it tends to present arbitration in a favorable light.

8. Whereas domestic law rests in and finds its legitimacy in the state, such a foundation is lacking for international arbitration. Instead of an alternative theory, scholars and practitioners frequently resort to faith and visions instead of rationality.

9. Two theories of international arbitration compete: a private theory of the arbitrator as a service provider whose only obligations are to the parties, and a public understanding of the arbitrator as a quasi-judge with obligations towards the world at large. Attempts to combine both theories usually fail in their attempt to transcend the public/private tension inherent in both theories. A new theory will be necessary.

10. Other than legal practice, which is already transnationalized, private law scholarship is still in a process towards such transnationalization. The process largely leads to a role perception detached from both the state and politics.

11. Effectively, legal practice takes part in the creation of law beyond the state, in particular in so-called formulating agencies. Officially, however, such a lawmaking role is regularly rejected.

12. Private codifications like the Lando and UNIDROIT Principles are justified with a view to the needs of practice. Their authors, however, view themselves as disinterested scholars, neither as practitioners nor as lawmakers. This is true even for the authors of the European Common Frame of Reference. The ensuing unclear relation between restatement and prestatement of law is not a peculiarity of transnational private law, it is commensurate with the experience from state codifications.

13. Private codifications, other than state laws, need to be recognized by their users in order to claim any validity. As a consequence, private codifiers frequently act as advertisers for their products.

14. In transnational private law, ultimate foundations are often sought with reference to faith and vision, not rationality.

15. The private codifier legitimizes herself as a service provider vis-à-vis lawmakers and parties; she rejects a governance role. Her code is supposed to gain its validity from reason rather than state power, a doubtful juxtaposition. The reference to private autonomy is meant to substitute for other legitimacy, based on substantive quality or democratic process.

16. Private codifiers regularly defer to the state for questions of public interests. The consequence is a division of responsibilities.