

New Article published in American Journal of Comparative Law

On 11 August 2023, the *American Journal of Comparative Law*, published an article online titled: Jan Kleinheisterkamp, “The Myth of Transnational Public Policy in International Arbitration” The abstract reads as follows:

This Article traces the concept of transnational public policy as developed in the context of international arbitration at the intersection between legal theory and practice. The emergence of such a transnational public policy, it is claimed, would enable arbitrators to safeguard and ultimately to define the public interests that need to be protected in a globalized economy, irrespective of national laws. A historical contextualization of efforts to empower merchants and their practices in Germany and the United States in the nineteenth and early twentieth centuries highlights their reliance on the mythical lex mercatoria that shaped English commercial law. Further contextualization is offered by the postwar invocation of “general principles of law recognized by civilized nations,” to keep at bay the application of supposedly less civilized, parochial legal orders, and by the consequent emergence of the “new” lex mercatoria as conceptualized especially in France. These developments paved the way, on the theory side, for later conceptualizations of self-constitutionalizing law beyond the state, especially by Gunther Teubner, and, on the practice side, for the notion of transnational public policy developed by arbitrators, especially by Emmanuel Gaillard, culminating in jurisprudential claims of an autonomous arbitral legal order with a regulatory dimension. In all these constructions, the recourse to comparative law has been a crucial element. Against this rough intellectual history, the Article offers a critique of today’s construction of transnational public policy by probing into its constitutional dimension and the respective roles of private and public interests. This allows, in particular, to draw on parallels to historic U.S. constitutional debates on the allocation of regulatory powers in federalism.