

# THE DIAMOND INDUSTRY AND THE INDUSTRY'S DISPUTE RESOLUTION MECHANISMS

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## I. INTRODUCTION

According to researchers, up to 3.3 billion years ago and almost 500 miles below the earth's surface, carbon started its journey in evolving under extreme pressure and heat, which resulted in the most valued commodity on earth, the Diamond.<sup>1</sup> Although the diamond plays a big role in the proposals of marriage in today's world, this tradition does not go back more than a few decades.<sup>2</sup> Even though in 1377, Emperor Maximilian gave the first reported diamond engagement ring to Mary of Burgundy,<sup>3</sup> diamonds were beyond the public's reach until the discovery of diamonds near Hopetown, south of Kimberley in South Africa, which gave birth to the modern diamond industry.<sup>4</sup>

In this article, I will examine the diamond industry's features with special regard to the dispute resolution mechanism of diamond dealers.

After this introduction, in Part II, the background history will be examined. Special attention will be given to the diamond industry and diamond dealers, along with the reason for Jewish predominance in the industry. In Part III, *sui generis* issues of the diamond industry will be reviewed. The unique difficulties of the diamond transactions will be analyzed to understand the reason why diamond dealers needed a special set of rules to solve their disputes. The differences between private and public legal systems will also be analyzed. In Part IV, key reasons for enforcing the contracts in the diamond industry will be shown. The role of reputation and trust in the industry will also be reviewed. In Part V, the process of dispute settlement among diamond dealers will be explained. The special rules of diamond dealers' clubs and the World Federation

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<sup>1</sup> Ned Rozell, *The Great Diamond Rush in Canada's Arctic*, ALASKA SCIENCE FORUM (Jan. 10, 2002), <http://www2.gi.alaska.edu/ScienceForum/ASF15/1576.html>.

<sup>2</sup> Margaret F. Brinig, *Rings and Promises*, 6 J.L. ECON. & ORG. 203, 203 (1990).

<sup>3</sup> *Id.*

<sup>4</sup> Francesca Carnevali, *Golden Opportunities: Jewelry Making in Birmingham between Mass Production and Specialty*, 4 ENTERPRISE & SOC'Y 272, 287-88 (2003); see also *History of Diamonds*, ALLABOUTDIAMONDS.ORG, <http://www.allaboutdiamonds.org/diamond-history.html> (last visited Oct. 19, 2013).

of Diamond Bourses will also be reviewed. Part VI will be the conclusion of this article.

## II. BACKGROUND

### A. History

The first diamond was recorded in India in approximately 2000 B.C.<sup>5</sup> These stones were acquired through alluvial digs, which were then recovered in rivers.<sup>6</sup> After several millennia, in 1720 A.D., diamonds from alluvial deposits were recovered in Brazil.<sup>7</sup> By the mid-eighteenth century, Brazil had replaced India as the world's leading diamond producer.<sup>8</sup> Although diamonds continue to be mined in both India and Brazil, the history of modern diamond mining began in South Africa.<sup>9</sup>

In 1867, the son of a Dutch farmer in South Africa found a 21.25 carat<sup>10</sup> diamond close to his home.<sup>11</sup> The first discovery was followed by the discovery of an 83.5 carat diamond, which was placed on exhibit in Cape Town.<sup>12</sup> "The stone was eventually shipped to London where it was cut, polished, and purchased by the Earl of Dudley for £30,000."<sup>13</sup> The European and American press picked up British newspapers' reports regarding the transaction,<sup>14</sup> and "the publicity triggered the South African diamond rush."<sup>15</sup>

### B. The Diamond Industry and a Diamond's Route

Approximately ten million people are involved in the diamond industry—both directly and indirectly—across a wide variety of roles, from mining to

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<sup>5</sup> Stephen E. Haggerty, *A Diamond Trilogy: Superplumes, Supercontinents, and Supernovae*, 285 *SCIENCE* 851 (1999).

<sup>6</sup> Peter L. Webster & Chris G. Baldwin, *Selling the Crown Jewels: Diamond Royalties and Marketing Agreements in Canada*, 50 *ROCKY MTN. MIN. L. INST.* 13-1, § 13.03 (2004).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> Carat is a measurement term used in reference to the weight of a gemstone; one carat is the equivalent of 200 milligrams, or in other terms 0.00705 ounces.

<sup>11</sup> Webster & Baldwin, *supra* note 6, § 13.03.

<sup>12</sup> STEFAN KANFER, *THE LAST EMPIRE: DE BEERS, DIAMONDS, AND THE WORLD* 26 (2005).

<sup>13</sup> Webster & Baldwin, *supra* note 6, § 13.03.

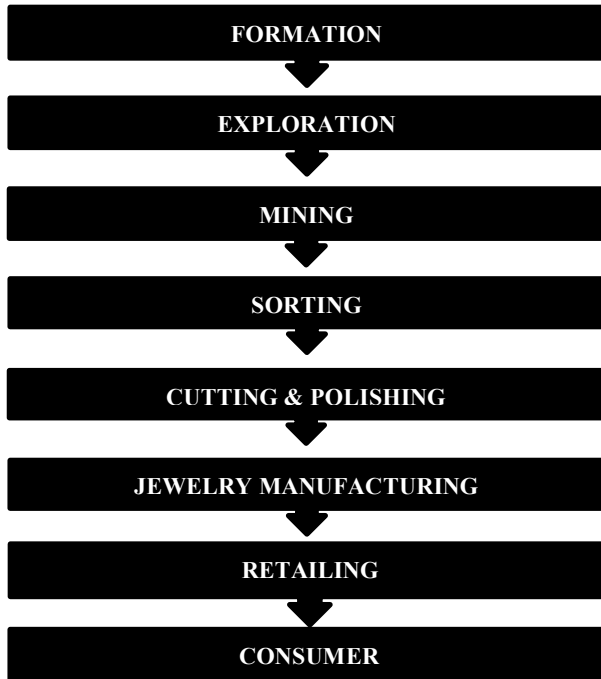
<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

retail.<sup>16</sup> The industry includes specialists,<sup>17</sup> business people,<sup>18</sup> diamond workers,<sup>19</sup> government officials,<sup>20</sup> and unfortunately, illicit people such as smugglers, illegal traders, and underground bankers.<sup>21</sup>

Today the industry is often perceived as a diamond pipeline.<sup>22</sup> The diamond pipeline, which is the process that brings diamonds to consumers, is illustrated in the chart below:

**Chart 1: Diamond Pipeline**



<sup>16</sup> *Diamond Industry Fact Sheet*, WORLD DIAMOND COUNCIL, [http://www.worlddiamondcouncil.org/download/resources/documents/Fact%20Sheet%20\(The%20Diamond%20Industry\).pdf](http://www.worlddiamondcouncil.org/download/resources/documents/Fact%20Sheet%20(The%20Diamond%20Industry).pdf) (last visited Sept. 17, 2013).

<sup>17</sup> Examples of specialists are geologists, geophysicists, and chemists.

<sup>18</sup> Examples of business people include mine owners, bankers, investors, dealers, and brokers.

<sup>19</sup> Examples of diamond workers include diggers, cleavers, cutters, and butters.

<sup>20</sup> Examples of government officials include security, customs, and police.

<sup>21</sup> DINA SIEGEL, *THE MAZZEL RITUAL: CULTURE, CUSTOMS AND CRIME IN THE DIAMOND TRADE* 15 (2009).

<sup>22</sup> *Id.*

As shown in the chart, a diamond's route from formation to consumer consists of various stages. In the U.S. \$72 billion diamond jewelry industry,<sup>23</sup> the diamond may be said to have begun its route as long as 3.3 billion years ago, the age at which some diamonds have been dated.<sup>24</sup> In the second step, the diamond prospectors "often search for Kimberlite (the host rock for diamonds) by testing the ground for changes in magnetic fields."<sup>25</sup> Diamonds are mostly found in Africa (approximately 65 percent), but can also be found in Australia, Canada, and Russia.<sup>26</sup> After the mining is complete, sorting experts sort and value the diamonds into different categories.<sup>27</sup> The best quality diamonds will be distributed to the gem market, and the remainder will be used for industrial purposes, such as cutting.<sup>28</sup> Approximately 65 percent of these rough diamonds go to the Diamond Trading Center (DTC), formerly known as Central Selling Organization (CSO), in London.

The DTC "distributes its supply of rough diamonds through four brokers who sell presorted boxes of diamonds to 125 specific merchants, known as 'sightholders,' during individual 'sights,' or viewing sessions, in London."<sup>29</sup> Subsequently, "[s]ight-holders then sell these rough diamonds to a network of individual dealers, and approximately 80 percent of these initial sales occur in Antwerp's four diamond bourses."<sup>30</sup> The "gem quality diamonds are usually distributed to one of the main diamond cutting and trading centers in Antwerp, Mumbai, Tel Aviv, New York, China, Thailand or Johannesburg."<sup>31</sup> Once they arrive at the diamond centers, experts cut and polish the rough diamonds.<sup>32</sup> The resulting diamonds are sold to diamond wholesalers or jewelry manufacturers in one of the twenty-four registered diamond bourses around the world.<sup>33</sup> Wholesalers or manufacturers buy small proportions of these unset, polished diamonds and then sell them to designers, manufacturers, or retailers.<sup>34</sup> In the final stage of the diamond pipeline, retailers will sell the diamond jewelry to the consumer.<sup>35</sup>

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<sup>23</sup> *Diamond Industry Fact Sheet*, *supra* note 16.

<sup>24</sup> Rozell, *supra* note 1.

<sup>25</sup> *Diamond Industry Fact Sheet*, *supra* note 16 (quoting another source).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> Barak D. Richman, *How Community Institutions Create Economic Advantage: Jewish Diamond Merchants in New York*, 31 *LAW & SOC. INQUIRY* 383, 390 (2006) [hereinafter Richman, *Community Institutions*] (quoting another source).

<sup>30</sup> *Id.*

<sup>31</sup> *Diamond Industry Fact Sheet*, *supra* note 16.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

### **C. Diamond Dealers and the Reason for Jewish Predominance**

Since the 11<sup>th</sup> century, Jewish merchants have played an important role in the diamond industry.<sup>36</sup> Jewish communities were home to diamond traders and cutters throughout the Middle Ages, when India was the world's leading source of raw diamonds.<sup>37</sup> According to some sources, the reason for the Jews' dominance and expertise in diamond cutting and polishing was because the cutting and polishing of diamonds was one of the few jobs they were permitted to do during the medieval guilds, along with money lending, which also dealt with diamonds.<sup>38</sup>

Beginning in the late 15<sup>th</sup> century, after the Sephardic Jews escaped from the Inquisition in Spain and Portugal, they built the world's largest diamond market in Holland and gained a virtual monopoly for several centuries.<sup>39</sup> The Jewish community in Hamburg monopolized the diamond trade to the courts of Europe during the 17<sup>th</sup> and 18<sup>th</sup> century.<sup>40</sup> When 18<sup>th</sup> century England's trade with India made London a significant diamond trade center, a majority of the East India Company's diamond importers were Jewish.<sup>41</sup>

Although not as monopoly-like, Jewish predominance continued in the 21<sup>st</sup> century, and Jewish merchants still remain disproportionately represented in the world's diamond centers of Antwerp, Tel Aviv, and New York.<sup>42</sup> Today, the Jewish presence in these diamond centers is mostly related to diamond cutting and diamond brokering.<sup>43</sup> Twenty-four thousand of all of Amsterdam's 30,000 cutters in the 1900s were Jewish, and in Antwerp, three-fourths of all brokers and one-third of all cutters were Jewish.<sup>44</sup> In New York's diamond industry, the Jewish presence is most profound at the ground level, since the industry's brokers and cutters are disproportionately comprised of ultra-Orthodox Jews, adherents to an

<sup>36</sup> Richman, *Community Institutions*, *supra* note 29, at 385.

<sup>37</sup> *Id.*

<sup>38</sup> EDWARD JAY EPSTEIN, *THE RISE AND FALL OF DIAMONDS: THE SHATTERING OF A BRILLIANT ILLUSION* 77 (1982).

<sup>39</sup> Barak D. Richman, *Ethnic Networks, Extralegal Certainty, and Globalization: Peering into the Diamond Industry*, in *CONTRACTUAL CERTAINTY IN INTERNATIONAL TRADE: EMPIRICAL STUDIES AND THEORETICAL DEBATES ON INSTITUTIONAL SUPPORT FOR GLOBAL ECONOMIC EXCHANGES* 31, 35 (Volkmar Gessner ed., 2009) [hereinafter Richman, *Ethnic Networks*].

<sup>40</sup> Richman, *Community Institutions*, *supra* note 29, at 385.

<sup>41</sup> Barak D. Richman, *Community Enforcement of Informal Contracts: Jewish Diamond Merchants in New York* 6 (Harv. Law Sch., John M. Olin Ctr. for Law, Econ. & Bus., Discussion Paper No. 384, 2002) [hereinafter Richman, *Community Enforcement*] (citing SOLOMON GRAYZEL, *A HISTORY OF THE JEWS* 426-27 (1968); SALO BARON ET AL., *ECONOMIC HISTORY OF THE JEWS* 158-61 (1975); Abe Michael Shainberg, *Jews and the Diamond Trade*, in *THE JEWISH DIRECTORY AND ALMANAC* 301-11 (Ivan Tilleme ed., 1982)).

<sup>42</sup> Richman, *Community Institutions*, *supra* note 29, at 386.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

insular and highly ritualistic version of Jewish practice.”<sup>45</sup> A visit to Manhattan’s 47<sup>th</sup> Street and the New York Diamond Dealers Club (DDC) will clearly reveal the Orthodox Jewish influence in the New York diamond world by showing merchants who are speaking Yiddish, have same-style beards, and dress in black suits, overcoats, and black hats or caftans.<sup>46</sup>

There are several theories in the academia regarding the reason for Jewish predominance in the diamond sector. One theory invokes history. As explained above, the diamond business was one of the few permitted jobs for Jews during the medieval guilds, along with money lending, which also dealt with diamonds.<sup>47</sup> They were banned from owning land, expelled from merchant guilds, and excluded from most handicrafts, which led them to become suppliers of finished goods and extenders of credit.<sup>48</sup> Jewish communities’ history of expulsions and forced emigrations also led them to professions with easily portable inventories.<sup>49</sup> Jews were similarly marginalized in many Middle-Eastern and North African countries, and thus Jewish merchants in those areas also searched for professions that required small-fixed investments.<sup>50</sup> Because the diamond trade matched those conditions, it became attractive to Jewish merchants.<sup>51</sup> However, while these observations explain why Jewish merchants were drawn to the diamond industry and why Jews distanced themselves from occupations that involved non-portable fixed assets, they do not explain Jewish success over non-Jewish competitors. Early predominance suggests not only that the diamond industry was a last resort, but also that Jewish merchants enjoyed a comparative advantage.

Another theory relies on path dependence and argues that during a seminal period, Jewish merchants may have seized industry leadership through advantages by chance or historical accident. This past leadership put them in a favorable position to subsequent challengers.<sup>52</sup> This theory indicates that entry barriers that severely restrict outsiders from challenging industry leadership led to Jewish predominance.<sup>53</sup>

One other theory relies on a theory of human capital and suggests that Jewish families developed know-how, which empowered Jewish merchants to

<sup>45</sup> *Id.*; see also Michael K. Silber, *The Emergence of Ultra-Orthodoxy: The Invention of a Tradition*, in *THE USES OF TRADITION: JEWISH CONTINUITY IN THE MODERN ERA* 23-84 (Jack Wertheimer ed., 1992); SAMUEL HEILMAN, *DEFENDERS OF THE FAITH: INSIDE ULTRA-ORTHODOX JEWRY* (1992).

<sup>46</sup> Richman, *Community Institutions*, *supra* note 29, at 386.

<sup>47</sup> EPSTEIN, *supra* note 38, at 77.

<sup>48</sup> Richman, *Community Institutions*, *supra* note 29, at 386; see also ISRAEL ABRAHAMS, *JEWISH LIFE IN THE MIDDLE AGES* (1932); CECIL ROTH, *THE JEWISH CONTRIBUTION TO CIVILIZATION* (1940).

<sup>49</sup> Richman, *Community Institutions*, *supra* note 29, at 386; see also MARCUS ARKIN, *ASPECTS OF JEWISH ECONOMIC HISTORY* (1975); EPSTEIN, *supra* note 38, at 77.

<sup>50</sup> Richman, *Community Institutions*, *supra* note 29, at 386.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 387.

<sup>53</sup> *Id.*

become experts in the diamond trade.<sup>54</sup> A different theory explains Jewish predominance by ethnic cartel.<sup>55</sup> Ethnic cartel means that “merchants in an insular community pledge to charge competitive prices only to its own community members and to sell goods only at oligopoly prices to non-members and as a result, outsiders are at a disadvantage in entering a supply chain and competing against insiders.”<sup>56</sup>

Another theory explaining Jewish predominance argues that today’s Jewish merchants owe their success in the diamond trade to a comparative advantage that enables them to organize diamond transactions more efficiently than potential rivals. Barak D. Richman says:

The primary comparative advantage Jewish merchants enjoy is the ability to credibly commit to pay for the diamonds they purchase on credit. Jewish merchants owe this advantage to complementarities between the demands governing diamond transactions and the traditional structure of Jewish communities. In short, Jewish community institutions can enforce executory contracts that are beyond the reach of public courts and thus beyond non-community members as well.<sup>57</sup>

Although some of the theories have more supporters than others, none of the theories can be considered 100 percent accurate. All the points mentioned in the theories somehow contributed to Jewish predominance in the diamond industry throughout history. However, an important point to remember is that there is a Jewish predominance, which highly contributes to the unique settlement system in the diamond industry, as we will see in the upcoming pages.

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<sup>54</sup> *Id.*; see also GARY S. BECKER, HUMAN CAPITAL: A THEORETICAL AND EMPIRICAL ANALYSIS, WITH SPECIAL REFERENCE TO EDUCATION (3d ed. 1994).

<sup>55</sup> Richman, *Community Institutions*, *supra* note 29, at 388; see also Anne Krueger, *The Economics of Discrimination*, 71 J. POL. ECON. 481 (1963).

<sup>56</sup> Richman, *Community Institutions*, *supra* note 29, at 388.

<sup>57</sup> *Id.* at 389; see also Yoram Barzel, *Some Fallacies in the Interpretation of Information Costs*, 20 J.L. & ECON. 291 (1977); Roy W. Kenney & Benjamin Klein, *The Economics of Block Booking*, 26 J.L. & ECON. 497 (1983); Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115 (1992) [hereinafter Bernstein, *Opting Out of the Legal System*]; Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code’s Search for Immanent Business Norms*, 144 U. PA. L. REV. 1765 (1996); Richman, *Ethnic Networks*, *supra* note 39.

### III. SUI GENERIS ISSUES OF THE DIAMOND INDUSTRY

#### A. The Unique Difficulties of the Diamond Transactions

All industries have difficulties, and diamonds are no exception. High insurance costs, a high rate of theft during almost all phases of the diamond pipeline, relatively limited sources, high rent costs, and finding skilled workers are some of the many problems the industry faces.<sup>58</sup> Additionally, blood diamonds' negative effect on the industry's reputation and difficulty in tracking these diamonds are also problematic issues for the industry. The focus in this research will concentrate on the transactional problems of the industry, but knowing the above mentioned problems will also help us visualize the problems of the overall industry.

The diamond sale is dubbed as "an extreme instance of a hazardous transaction" according to some scholars.<sup>59</sup> To expand their inventory, merchants have to purchase the diamonds on a consignee basis; similarly, brokers market the diamonds that they possess, but do not own.<sup>60</sup> Credit's role in diamond transactions is so central that the diamond market has been called "an implicit capital market."<sup>61</sup>

Due to the importance of credit sales, the industry depends on the reliable enforcement of executory contracts.<sup>62</sup> The ease of placing stolen diamonds in the black market, and the courts' failure to prevent flight, amounts to a failure to enforce the executory contract, forcing diamond merchants to rely on trust-based exchange.<sup>63</sup>

Despite the state courts' unreliability, mutual trust among merchants assures dealers that by maintaining a well-established reputation,<sup>64</sup> they will preserve the opportunity to engage in future transactions.<sup>65</sup> On the other hand, portability of diamonds, conceivability, and high value increase the risk of theft and leads the industry to develop forceful private mechanisms to induce credit payment and deter theft.<sup>66</sup> Thus, those who are permitted to participate in the

<sup>58</sup> RUTH W. MESSINGER, ADAM FRIEDMAN & JUDY GOLDBERG, OFFICE OF THE MANHATTAN BOROUGH PRESIDENT, DIAMOND AND JEWELRY INDUSTRIES STUDY 65-70 (1992).

<sup>59</sup> Barak D. Richman, *Firms, Courts, and Reputation Mechanisms: Towards a Positive Theory of Private Ordering*, 104 COLUM. L. REV. 2328, 2352 (2004) [hereinafter Richman, *Firms, Courts, and Reputation Mechanisms*].

<sup>60</sup> *Id.*

<sup>61</sup> Bernstein, *Opting Out of the Legal System*, *supra* note 57, at 131; Richman, *Community Enforcement*, *supra* note 41, at 14.

<sup>62</sup> Richman, *Community Institutions*, *supra* note 29, at 392.

<sup>63</sup> *Id.*

<sup>64</sup> *See infra* Part III.B.

<sup>65</sup> Roger Starr, *The Real Treasure of 47th Street*, N.Y. TIMES, Mar. 26, 1984, <http://www.nytimes.com/1984/03/26/opinion/the-editorial-notebook-the-real-treasure-of-47th-street.html>.

<sup>66</sup> Richman, *Firms, Courts, and Reputation Mechanisms*, *supra* note 59, at 2352.



industry are subject to a solid reputation mechanism in which wrongdoers and their descendants are proscribed from future transactions and denied participation in community activities. The fear of these countermeasures is sufficient to induce contractual compliance and transactional security.<sup>67</sup>

In diamond sales, adding value to the good is highly dependent on “collecting market information,” “exposure to market pressures,” and “the capacity for spontaneous adaptation.”<sup>68</sup> The 4Cs of the diamond<sup>69</sup> also determine the price of the diamond. A same sized, same colored, same clarity diamond’s price can change tremendously based solely on the labor quality of its cut.<sup>70</sup> The various cutting types,<sup>71</sup> polishing techniques,<sup>72</sup> jewelry settings,<sup>73</sup> and subjective judgments infuse substantial variation and uncertainty into how end consumers will value the finished product, which makes finding an optimal buyer for a specific stone an enterprise that is very profitable.<sup>74</sup> Influencing factors on prices include, but are not limited to, the country where it is bought, store brand association, and certification. In order to examine the product, a prospective buyer needs to see the product that he may be interested in. To match the right product and right buyer, sellers and brokers must have market information of buyer demand and “pair their idiosyncratic needs with the distinct qualities of available stones.”<sup>75</sup> The New York Diamond Dealers Club can be a good example of a matching zone. As examined above, the diamond industry is home to many middlemen who add value and earn substantial profits by matching right stones with right buyers.<sup>76</sup> During these transactions, a diamond can double its value in a day.<sup>77</sup> These transactions “involve hard negotiations over price, payment method and schedule, and credit security.”<sup>78</sup>

Since we have seen the difficulties in both the industry and in the transactions, I now turn to the comparison of private versus public legal systems. By doing so, I believe that the need for private dispute settlement mechanism will be clarified.

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<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> Carat, Cut, Clarity, and Color.

<sup>70</sup> *Cut Grade*, HRD ANTWERP, <http://www.hrdantwerp.be/media/25358/Cut%20Grade%20parameter%20from%20Feb%202013.pdf> (last updated Feb. 2013).

<sup>71</sup> MESSINGER, *supra* note 58, at 44–45.

<sup>72</sup> *Id.* at 45–46.

<sup>73</sup> *Id.* at 29–30.

<sup>74</sup> Richman, *Firms, Courts, and Reputation Mechanisms*, *supra* note 59, at 2352.

<sup>75</sup> *Id.*

<sup>76</sup> Richman, *Community Institutions*, *supra* note 29, at 391.

<sup>77</sup> Lauren Weber, *The Diamond Game, Shedding Its Mystery*, N.Y. TIMES, Apr. 7, 2001, <http://www.nytimes.com/2001/04/08/business/the-diamond-game-shedding-its-mystery.html?pagewanted=all&src=pm>.

<sup>78</sup> Richman, *Community Institutions*, *supra* note 29, at 391.

## **B. Public Versus Private Ordering**

First, public ordering applies to all disputes; it applies a general body of contract law, and it requires all losing parties to comply with its legal rulings.<sup>79</sup> On the other hand, private ordering requires voluntary cooperation by participating merchants<sup>80</sup> and applies a body of customized law and procedures to merchants who voluntarily obey such rules, and it also provides effective transactional security.<sup>81</sup> As it will be reviewed more in depth in the forthcoming pages, failure to comply with the arbitral findings may bring the dealer's future transactions to a complete end. Thus, as Richman indicates:

[A]rbitration rulings in private ordering systems serve more as mechanisms to signal the quality of a merchant's reputation than as genuine instruments to enforce contractual obligations. A merchant who is found by a private court to have breached a contract but fails to pay receives publicity as a bad actor, leading other merchants to respond to the public ruling by refusing to deal with the transgressor . . . . In sum, public ordering employs the coercive power of the state, to which all actors are subject, and relies on standard contract law and litigation rules. In contrast, private ordering relies on reputation mechanisms, which can induce only members of a merchant community to comply, and exhibits separately created law and selected judges.<sup>82</sup>

These legal structures result in different qualities of performance and involve their respective costs of enforcement, efficacy of enforcement, and availability of entry.<sup>83</sup>

In terms of costs of enforcement, three points should be mentioned regarding the private ordering system. First, the decision maker is a private party, which is most likely an insider of the industry, instead of a judge with presumably little—if any—information about the industry.<sup>84</sup> The second point is visible in choice of rules resolving disputes, which means that the arbitrators mostly apply industrial rules and/or norms rather than common public rules.<sup>85</sup> Thirdly, arbitration awards are typically enforced through non-legal sanctions, such as publicity, mobilization of shame, or threat of expulsion from the trade

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<sup>79</sup> Richman, *Firms, Courts, and Reputation Mechanisms*, *supra* note 59, at 2338-39.

<sup>80</sup> Bernstein, *Opting Out of the Legal System*, *supra* note 57, at 135.

<sup>81</sup> Richman, *Firms, Courts, and Reputation Mechanisms*, *supra* note 59, at 2339.

<sup>82</sup> *Id.* at 2340.

<sup>83</sup> *Id.*

<sup>84</sup> Lisa Bernstein, *Private Commercial Law*, in 3 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 108 (Peter Newman ed., 1998).

<sup>85</sup> *Id.*

association.<sup>86</sup> These three advantages of the private order lead to faster, more accurate, and more predictable legal outcomes.<sup>87</sup>

In terms of efficacy of enforcement, because the diamonds are portable, concealable, and universally valuable, as mentioned before, courts become incapable of punishing a diamond dealer who refuses to pay the seller and instead flees with the diamonds to an unknown country. Since brokering diamonds does not require a big amount of complementary investments, a fleeing diamond dealer's leftover assets may not be adequate to compensate the plaintiff.<sup>88</sup> Also, because public law and state courts have substantial delays and most of the time requires significant amounts of time to resolve disputes, it would not be very useful for a dealer, especially when the amount is small.<sup>89</sup>

Additionally, when contracts involve complex issues, such as a dispute arising from clarity of the stone, and when the parties do not have a lot of time to settle the disputes, the public system may not be feasible.<sup>90</sup> Lisa Bernstein states:

By providing for the appointment of industry-expert arbitrators, who can make many factual determinations more accurately and less expensively than a judge or jury can, the [industry]<sup>91</sup> rules greatly expand the “contractible” aspects of an exchange. The use of stream-lined procedures together with the appointment of expert adjudicators transforms considerations that in the public legal system would have been only observable to the parties—that is, knowable by the parties but not worthwhile for them (from an *ex ante* perspective) to prove to a tribunal in the event of a dispute—into considerations that are also verifiable—that is, worthwhile to prove to a tribunal in the event of a dispute—thereby encouraging transactors to enter into more complete contracts.<sup>92</sup>

On the other hand, private legal systems relying on reputation mechanisms have provided instruments that overcome the inadequacies of the public courts.<sup>93</sup> When a dealer's future business depends on his reputation, the threat will be bigger, and thus the dealer's rate of compliance will increase.<sup>94</sup> Also, the non-economic sanctions of reputation mechanisms, such as community

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<sup>86</sup> *Id.* at 109–10.

<sup>87</sup> Richman, *Firms, Courts, and Reputation Mechanisms*, *supra* note 59, at 2342.

<sup>88</sup> *Id.* at 2343.

<sup>89</sup> *Id.*

<sup>90</sup> Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724, 1740–46 (2001) [hereinafter Bernstein, *Private Commercial Law in the Cotton Industry*].

<sup>91</sup> The word “industry” is not used in the original text.

<sup>92</sup> Bernstein, *Private Commercial Law in the Private Commercial Law in the Cotton Industry*, *supra* note 90, at 1741.

<sup>93</sup> Richman, *Firms, Courts, and Reputation Mechanisms*, *supra* note 59, at 2344.

<sup>94</sup> *Id.*

honor, religious beliefs, and future community participation will force dealers to comply with the rules.<sup>95</sup>

In terms of availability of entry, it is clear that reputation mechanisms can only affect those who care about maintaining a good reputation.<sup>96</sup> Thus, it will not be a mistake to say that the influence of private law is somewhat limited to long-term players who intend to be in the industry for long periods.<sup>97</sup> Although the situation is similar in other industries, such as the cotton industry,<sup>98</sup> the diamond industry's dependence on and valuation of reputation is much stricter.<sup>99</sup> For instance, a merchant who has missed a single payment will have to overcome significant obstacles before gaining reentrance into the diamond community.<sup>100</sup>

In sum, private ordering systems benefit from an assortment of administrative efficiencies compared to the public courts, such as "savings in arriving at and implementing accurate adjudications," and securing contracts "where public courts would be toothless;" but on the other hand, they deal with "restricting entry" and "inviting collusion."<sup>101</sup>

After examining the differences between private and public ordering, it is clear why the diamond dealers choose private ordering. However, there is one more thing that is worth mentioning: secrecy. Although secrecy will be examined in more detail while examining the contracts in the industry, it should be noted that the reason for diamond dealers' choice of private law cannot be separated from their traditions' integral secrecy.<sup>102</sup>

Another reason to choose private ordering is related to religious customs of Jewish people. Lisa Bernstein explains the effect of religious traditions as:

[U]nder Jewish law, a Jew is forbidden to voluntarily go into the courts of non-Jews to resolve commercial disputes with another Jew. Should he do so, he is to be ridiculed and shamed. Jewish law also provides rules governing the making of oral contracts and lays down rules for conducting commercial arbitration.<sup>103</sup>

Menachem Elon also describes the prohibition by stating:

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<sup>95</sup> *Id.*

<sup>96</sup> Marc Galanter, *Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law*, 19 J. LEGAL PLURALISM 1, 26 (1981).

<sup>97</sup> Richman, *Firms, Courts, and Reputation Mechanisms*, *supra* note 59, at 2346.

<sup>98</sup> For further information regarding cotton industry, see Bernstein, *Private Commercial Law in the Cotton Industry*, *supra* note 90.

<sup>99</sup> Richman, *Firms, Courts, and Reputation Mechanisms*, *supra* note 59, at 2346.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 2347–48.

<sup>102</sup> Daniel Feldman, *Conflict Diamonds, International Trade Regulation, and the Nature of Law*, 24 U. PA. J. INT'L ECON. L. 835, 842 (2003).

<sup>103</sup> Bernstein, *Opting Out of the Legal System*, *supra* note 57, at 141.

A striking expression of the religious and national character of Jewish law is to be found in the prohibition on litigation in the gentile courts . . . to which the Halakhic scholars and communal leaders attached the utmost importance . . . any person transgressing the prohibition was deemed to have relied and blasphemed and rebelled against the Torah.<sup>104</sup>

Assuming that none of the advantages of private ordering are related to a dispute, would the dealers choose public ordering? Although there is no absolute answer to this question, when we think about the value of secrecy in the industry,<sup>105</sup> traditions of the dealers,<sup>106</sup> religious customs of Jewish people,<sup>107</sup> and the close-knit group philosophy of “what happens in group, stays in group,” these factors would probably lead the dealers to private orderings, even when there is no advantage of private orderings compared to public orderings.

#### IV. CONTRACTS IN THE DIAMOND INDUSTRY

##### A. Reasons for Choosing Non-Legal Contracts in the Diamond Industry

Diamond dealers mostly prefer extralegal contracts when dealing with diamonds.<sup>108</sup> What is meant by saying that “enforcing the contracts in the diamond industry” should thus be understood as enforcement of the non-legal contracts in the industry. Although sometimes the contracts in the industry are common legal contracts, the interest of the article is related to the atypical sides of the industry, thus this article will not examine the legal contracts. Even though legal contracts are typical types of trade, their usage in the diamond trade usually only happens when a bank or insurance company is involved in the transaction.<sup>109</sup> An important reason for this is the wide use of extralegal contracts in the industry.

One possible explanation is that the transaction costs of negotiating and drafting legally enforceable agreements is higher than that for non-legal agreements.<sup>110</sup> Although the sole reason is not the expense of legally enforceable agreements, compared to the handshaking and saying *mazel und brocha*, which means “luck and blessing,”<sup>111</sup> monetary advantages should not be seen as

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<sup>104</sup> MENACHEM ELON, *THE PRINCIPLES OF JEWISH LAW* No. 6, at 20–21 (1975).

<sup>105</sup> ALICIA OLTUSKI, *PRECIOUS OBJECTS: A STORY OF DIAMONDS, FAMILY, AND A WAY OF LIFE* 32, 47 (2011).

<sup>106</sup> *Id.*

<sup>107</sup> LAKE LAMBERT III, *SPIRITUALITY, INC.: RELIGION IN THE AMERICAN WORKPLACE* 72 (2009).

<sup>108</sup> Bernstein, *Opting Out of the Legal System*, *supra* note 57, at 133.

<sup>109</sup> *Id.* at 154–55.

<sup>110</sup> *Id.* at 132.

<sup>111</sup> TOM ZOELLNER, *THE HEARTLESS STONE: A JOURNEY THROUGH THE WORLD OF DIAMONDS, DECEIT, AND DESIRE* 253–54 (2006); OLTUSKI, *supra* note 105, at 36.

irrelevant to the choice. There are, of course, contrary opinions against the monetary advantage hypothesis, which usually indicates that “[b]ecause the ability of the promisee to enforce an extralegal contract depends on the posting of a reputation bond by the promisor, each of the parties must bear the ‘information cost’ of determining whether the other party is trustworthy before negotiation over the terms of the agreement even begins”;<sup>112</sup> however, because the common agreement type is extralegal contracting in the diamond industry, and because the diamond bourses rapidly transmit the reputation information to its members to reduce the cost substantially, the information cost is relatively lower than in most other industries.<sup>113</sup>

Another explanation for the widespread usage of extralegal contracts is related to remedies in case of breach. In a typical diamond transaction, litigation costs would be relatively high compared to the recoverable amount, and the promisee would be undercompensated most of the time if the dispute settled under standard damage remedies.<sup>114</sup> Also, in other industries, it is becoming a new fashion to have an implicit, extralegal term that “captures the value of the promisor’s reputation”;<sup>115</sup> the reason to have this in case of a breach is because the loss is usually higher than the remedy granted by the court.<sup>116</sup>

Another reason that makes extralegal contracts preferable is the traditions in the industry. Secrecy has been one of the fundamental elements of that tradition. A Jewish author, Alicia Oltuski, explains the situation as:

The precautions Jews had to take during centuries of global persecution also set the foundation for many of today’s diamond customs. My own father’s secrecy comes from a long tradition of tight-lipped diamond dealers. For centuries, there was no choice but to be discrete. During the Inquisition and the pogroms, Jews kept their diamonds hidden in order to assure holding on to them. The diamond business was virtually a paperless world because written contracts were too dangerous. A man’s promise was safer than his signature, and trust is still the most vital component of the trade.<sup>117</sup>

The possible reasons for choosing non-legal contracts in the industry are not limited to the ones mentioned above, nor is there a single reason for preferring extralegal contracts. The reasons for the industry’s choice of extralegal contracts vary, but they seem to be shaped by a lot of factors developed over a long period of time. It seems that monetary advantages of extralegal contracts, traditional aspects of the (almost) homogenous ethnical background of merchants, and the

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<sup>112</sup> Bernstein, *Opting Out of the Legal System*, *supra* note 57, at 132.

<sup>113</sup> *Id.* at 133.

<sup>114</sup> *Id.* at 134.

<sup>115</sup> *Id.* at 138.

<sup>116</sup> *Id.*

<sup>117</sup> OLTUSKI, *supra* note 105, at 73.

impotence of contract law remedies in the diamond business have influenced the outcome.

### **B. Enforcing Extralegal Contracts in the Industry**

Another vital point about the extralegal contracts in the industry is the enforcement of the contracts. Although the reasons for choosing the non-legal contracts are important issues with regard to understanding the logic of the dealers, the enforcement issue is a more concrete subject.

Although there may be several reasons for enforcing extralegal contracts in other industries, in the diamond industry, enforcement is deeply rooted in the reputation mechanism of the industry. “Sustaining reputation-based exchange relies on mechanisms that inform all parties of the reputations, or past behavior, of potential business partners.”<sup>118</sup> The reputation exchange mechanism is well established in the diamond industry through the help of the World Federation of Diamond Bourses and 29 diamond dealers’ clubs established all around the world from Antwerp to Bangkok, Italy to Moscow, and Istanbul to New York. These bourses serve the important role of “disseminating reputation information” and “enabling trust-based exchange” even between strangers.<sup>119</sup>

These bourses issue governing rules of diamond trade and resolve the disputes through their own mandatory arbitration system.<sup>120</sup> The arbitration panels’ rulings do not shelter written justifications or create case law, and all arbitration rulings are final.<sup>121</sup> Because they do not have case law, *stare decisis* cannot be established. Thus, the outcomes are not easy to predict. Also, since secrecy in the industry is highly valued, Themis’s blindfold becomes even thicker in the industry. However, there are no strong arguments regarding the ongoing secrecy technique’s disadvantages on the dispute resolution system’s standard of review mechanism.

The effect of the bourses’ arbitration board is limited to cooperating disputants because of its lack of power to force any individual to pay an arbitration award.<sup>122</sup> Dealers obey the bourses’ arbitration board only to protect their chance to engage in future diamond transactions by conserving their good reputations.<sup>123</sup> Consequently, the bourses’ dispute resolution system’s functionality rests on its power of broadcasting dealers’ reputations and foreclosing future transactions to disobedient disputants.<sup>124</sup> This is very similar to the private judges’ power in the medieval Champagne Fairs, whose power did not come from the power to enforce agreements, but from the ability to deploy

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<sup>118</sup> Richman, *Community Institutions*, *supra* note 29, at 395.

<sup>119</sup> *See id.*

<sup>120</sup> *See id.*

<sup>121</sup> *See id.*

<sup>122</sup> *See id.* at 396.

<sup>123</sup> *See* Richman, *Community Institutions*, *supra* note 29, at 396.

<sup>124</sup> *See id.*

information and support a reputation mechanism.<sup>125</sup> The diamond bourses accomplish this role by assisting the progress of information exchange and publicizing dealers' reputations.<sup>126</sup> Bernstein highlights the importance of bourses' information exchange duty by saying that "[t]he bourse is an information exchange as much as it is a commodities exchange."<sup>127</sup> Although bourses have several information exchange techniques, the most striking method is publicizing the pictures and information of disobedient disputants.<sup>128</sup> Thus, we can say that the international law's powerful tool, mobilization of shame, is also one of the beloved tools of diamond dealers.

Another reason for having relatively fewer difficulties in enforcement of the extralegal contracts is that the merchants have strong ties between themselves. Most merchants have either family connections or they are members of the same religious communities. This makes it difficult to easily breach a contract because money is not the only thing at stake.

In sum, the key reasons for enforcement of extralegal contracts in the diamond industry are trust, reputation, family connections, and/or being members of the same communities, leading them to fear losing more than money.

## V. DISPUTE SETTLEMENT IN THE DIAMOND INDUSTRY

Disputes are almost unavoidable in any industry, and the billion-dollar diamond industry is no exception to this generalization.<sup>129</sup> Until now, this article examined the distinct features of the diamond industry to explain why the industry's disputes are resolved in unorthodox manners. It has been mentioned that the industry is not welcoming to the public law, and the reasons for this have been explained. Instead of public laws and regulations, the diamond industry has created an idiosyncratic set of dispute settlement rules.

These dispute settlement rules are included in the bourses' by-laws or inner rules. Although some bourses publicize these rules on their websites, some of them keep their bylaws as tightly closed as Pandora's Box.<sup>130</sup> Another

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<sup>125</sup> See Paul R. Milgrom, Douglass C. North & Barry R. Weingast, *The Role of Institutions in the Revival of Trade: The Law Merchant, Private Judges, and the Champagne Fairs*, 2 *ECON. & POL.* 1 (1990).

<sup>126</sup> See Richman, *Community Institutions*, *supra* note 29, at 397.

<sup>127</sup> Bernstein, *Opting Out of the Legal System*, *supra* note 57, at 121; see also *Arbitration*, N.Y. DIAMOND DEALERS CLUB, <http://www.nyddc.com/arbitration.aspx> (last visited Sept. 17, 2013) [hereinafter NYDDC, *Arbitration*].

<sup>128</sup> See Richman, *Community Institutions*, *supra* note 29, at 397.

<sup>129</sup> Bernstein, *Opting Out of the Legal System*, *supra* note 57, at 115.

<sup>130</sup> Some of the bourses which have publicly distributed their bylaws are: the Israel Precious Stones and Diamonds Exchange Ltd, Istanbul Gold Exchange, the Diamond Chamber of Russia, the Diamond Dealers Club of South Africa, and World Federation of Diamond Bourses; on the other hand, contrary to their "transparent club" claims, New York Diamond Dealers Club neither publicize its bylaws, nor give access to the bylaws even for research purposes.



difference between bourses is, while some bourses have a few rules regarding the dispute settlement procedures,<sup>131</sup> other have very detailed and specific rules.<sup>132</sup>

Instead of examining a specific bourse's dispute resolution mechanism, this article will examine the dispute resolution mechanisms of the entire industry without giving special attention to any singular bourse. However, due to access constraints of some bourses' bylaws and/or other dispute resolution rules, the World Federation of Diamond Bourses (WFDB),<sup>133</sup> the Israel Precious Stones and Diamonds Exchange Ltd (IPSE),<sup>134</sup> the Istanbul Gold Exchange (IGE),<sup>135</sup> the Diamond Chamber of Russia (DCR),<sup>136</sup> the Diamond Dealers Club of South Africa (DDCSA),<sup>137</sup> and the New York Diamond Dealers Club (NYDDC)<sup>138</sup> regulations will be my primary sources.

The bourses'<sup>139</sup> procedural rules mostly indicate the industry's preference for the voluntary resolution of disputes.<sup>140</sup> Most of the regulations give control of the dispute settlement process, prior to arbitration, to parties to resolve their disputes voluntarily. In NYDDC regulations, pre-arbitration conciliation is

<sup>131</sup> The Israel Precious Stones and Diamond Exchange Ltd, and Istanbul Gold Exchange are good examples of framework regulations.

<sup>132</sup> World Federation of Diamond Bourses and the Diamond Chamber of Russia have very detailed regulations regarding dispute settlement.

<sup>133</sup> See World Fed'n of Diamond Bourses, *By-Laws and Inner Rules*, available at <http://www.wfdb.com/PDFs/Statutes/By-Laws%20and%20Inner%20Rules%20-%20Final%20October%202012.pdf> (last visited Sept. 17, 2013) [hereinafter WFDB, *Inner Rules*].

<sup>134</sup> See The Israel Precious Stones and Diamonds Exchanges, *Memorandum of Association*, available at [http://www.ipsde-il.com/eng/bursa\\_regulations.asp](http://www.ipsde-il.com/eng/bursa_regulations.asp) (last visited Sept. 17, 2013) [hereinafter IPSE, *Memorandum of Association*].

<sup>135</sup> See İstanbul Altın Borsası [Istanbul Gold Exchange], *İstanbul Altın Borsası Elmas ve Kıymetli Taş Piyasası Yönetmeliği* [*Istanbul Gold Exchange Diamond and Precious Stone Market Regulations*] (Mar. 15, 2011), <http://www.iab.gov.tr/docs/mevzuat/yon06.pdf> [hereinafter IGE, *Regulations*]. All rules are written in Turkish, and as such, the translations belong to the author.

<sup>136</sup> See Diamond Chamber of Russ., *Arbitration Regulations on Settlement of Economic Disputes at the Diamond Chamber of Russia*, available at <http://www.diamond-chamber.ru/eng1/ArbCourtIntRules1.htm> (last visited Sept. 17, 2013) [hereinafter DCR, *Dispute Regulations*].

<sup>137</sup> See Diamond Dealers Club of S. Afr., *Constitution and Rules of the Diamond Dealers Club of South Africa*, available at [http://www.diamonddealers.co.za/ddcsa\\_constitution.html](http://www.diamonddealers.co.za/ddcsa_constitution.html) (last visited Sept. 17, 2013) [hereinafter DDCSA, *Constitution*].

<sup>138</sup> Although I have direct access to the World Federation of Diamond Bourses, the Israel Precious Stones and Diamonds Exchange Ltd, the Istanbul Gold Exchange, the Diamond Chamber of Russia, and the Diamond Dealers Club of South Africa regulations, this research will benefit from Lisa Bernstein's findings while examining NYDDC specific terms. See Bernstein, *Opting Out of the Legal System*, *supra* note 57.

<sup>139</sup> Unless otherwise stated, the term "bourses" will include WFDB, NYDCC, IGE, IPSE, DCR, and DDCSA, due to the information constraints regarding other bourses, explained previously.

<sup>140</sup> See Bernstein, *Opting Out of the Legal System*, *supra* note 57, at 124.

mandatory.<sup>141</sup> Indeed, the NYDDC Trading Guide states, “Arbitration is a last resort for members who cannot reconcile their differences. Frivolous complaints should not be filed and could lead to fines.”<sup>142</sup> Although not as severe as NYDDC regulations, similar provisions are also referred to in other bourses’ regulations/articles.<sup>143</sup> Bourses seem to have unanimity with regard to settling disputes via more peaceful methods, such as mediation or negotiation. However, their bylaws do not have a prospectus regarding other alternative dispute resolution methods.

The second point about arbitration in the industry relates to the secrecy of the proceedings. Although other bourses do not have special regulations regarding the secrecy issue in their bylaws, which of course is not meant to ignore the fundamental confidentiality custom of arbitration, the NYDDC discusses this subject. According to the NYDDC, the arbitrators are not required to make findings regarding the facts, nor do they produce any written decisions regarding their reasoning.<sup>144</sup> However, as previously mentioned, should the awards not be complied with, then the disobedient disputant will be publicized on the club wall.

Prior to referring a dispute to arbitration, bourse officers<sup>145</sup> decide whether a material issue of fact exists.<sup>146</sup> There are no specific bars in any of the bourses’ regulations against the appeal of these decisions; however, the question of who will decide the appeal seems to be left in abeyance except in the NYDDC, which discusses the appeals process for these pre-arbitration decisions. Indeed, its bylaws even show the basic fee.<sup>147</sup> According to the NYDDC, the appellate panel’s finding regarding the pre-arbitration decisions is final. However, in the WFDB the situation is completely different. In the WFDB, “[t]he commencement

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<sup>141</sup> *Id.*

<sup>142</sup> *DDC Trading Guide*, N.Y. DIAMOND DEALERS CLUB, <http://www.nyddc.com/ddc-trading-guide.aspx> (last visited Sept. 17, 2013) [hereinafter NYDDC, *Trading Guide*].

<sup>143</sup> See Diamond Chamber of Russ., *Internal Regulations of the Diamond Chamber of Russia* arts. 51–52, available at <http://www.diamond-chamber.ru/eng1/IntRegDC1.htm> (last visited Sept. 17, 2013), which is empowered by Article 1.4 of DCR, *Dispute Regulations*, *supra* note 136. See also *id.* art. 4.4 (allowing parties to settle disputes at any stage of the arbitration) (“*At any stage of Arbitration proceedings Umpires shall take all their opportunities in order to settle a dispute through the amicable settlement.*” (emphasis added)); DDCSA, *Constitution*, *supra* note 137, art. 2.2.9 (indicating that the defendant has the right to mediate his case prior to arbitration); WFDB, *Inner Rules*, *supra* note 133, art. 4, § D (“*The President may, at any stage, offer the relevant parties to a dispute, to attempt conciliation or mediation of any such dispute, to be conducted by him or by another suitable bourse member.*” (emphasis added)).

<sup>144</sup> Bernstein, *Opting Out of the Legal System*, *supra* note 57, at 124.

<sup>145</sup> Although in Russia, South Africa, and Turkey, there is no special committee to decide, and the arbitration related organ decides the fact, the NYDDC “Floor Committee,” which is different from the “Board of Arbitrators,” are competent to decide it.

<sup>146</sup> Bernstein, *Opting Out of the Legal System*, *supra* note 57, at 124.

<sup>147</sup> *Id.* at 125.

of the arbitration takes effect when a member of a bourse files a claim in writing against a member of another bourse to his own bourse”<sup>148</sup>

Although not verbatim, all of the bourses share similar terms regarding the field of arbitration. Any member can file a complaint against any other member, regarding any diamond related dispute, whether contractual or not. Related provisions are as follows:

NYDDC says every member “having any claim or controversy arising out of or relating in any way to the diamond, precious stone or jewelry business” against any other “member or group of members, must file his complaint in writing” with the DDC.<sup>149</sup>

IGE says, “Dispute means whether directly or indirectly originated from any contractual, transactional or operational dispute between members.”<sup>150</sup>

The DCR states, “Arbitration Regulations on settlement of economic disputes at the Diamond Chamber of Russia (the Regulations) shall be the fundamental document determining the order of consideration or way of settling economic disputes between Members of the Diamond Chamber and/or other participants of transactions made at the Diamond Chamber and the order of arbitration proceedings.”<sup>151</sup>

With regard to the arbitration proceedings, there are not enough written regulations in most of the bourses’ bylaws. The broadest written regulations regarding the arbitration proceedings are found in the DCR, which is almost the only bourse that regulates the proceedings step-by-step. There is no written material to review other bourses’ arbitration proceedings, nor enough material to conclude whether the bourses’ proceedings are similar or completely different. However, instead of skipping the proceedings process, we will focus on DCR’s regulations with regard to the proceedings process.

It is stated in DCR Article 6.1 that arbitration proceedings should be conducted in accordance with the regulations of the DCR, unless the parties agree otherwise.<sup>152</sup> If an issue arises, which is neither coordinated by the parties nor determined by them, the way to handle the procedure should be determined by the arbitration committee.<sup>153</sup>

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<sup>148</sup> WFDB, *Inner Rules*, *supra* note 133, art. 4, § B.

<sup>149</sup> NYDDC, *Arbitration*, *supra* note 127.

<sup>150</sup> IGE, *Regulations*, *supra* note 135, art. 26.

<sup>151</sup> DCR, *Dispute Regulations*, *supra* note 136, art. 1.2.

<sup>152</sup> *Id.* art. 6.1.

<sup>153</sup> *Id.*

Although in DCR Article 6.2 it is stated that the arbitration should be located in Moscow, unless stated otherwise by the parties,<sup>154</sup> since there are no similar rules in the other bourses' bylaws, it would not be right to assume that the situs should be the capital city. For instance, if the arbitration were held by the NYDDC, the situs would most likely be New York City, instead of Albany. Similarly, in Turkey, since most transactions are made in Istanbul, the situs of arbitration will be Istanbul most of the time, instead of the capital, Ankara. Thus, this rule seems to be unique to Russia, instead of a common regulation.

It is stated in DCR Article 6.3 that unless parties agree otherwise, the working language should be Russian, and the party who needs to provide a document in another language should also provide its official translation.<sup>155</sup> As mentioned previously, other bourses do not provide similar lengthy regulations as the DCR does. However, it seems reasonable to assume that a similar practice is applicable also in other countries. For instance, an Italian document would most likely need to be translated to Hebrew in Israel, or Turkish in Turkey.

It is provided in all of the bourses' regulations, either implicitly or explicitly, that the arrangements for hearing the dispute should be made in the shortest possible time by the committee.<sup>156</sup> As previously mentioned, time is very valuable in the diamond transactions, and the speed of the arbitration process is vital to most, if not all dealers.

The statement of claim issue is covered by almost all of the bourses' bylaws, either as broad as the DCR, or with a few words. Although not verbatim in all of the bylaws, they mostly state that the claimant should list his demands in the statement of claim,<sup>157</sup> which shall be sent to the committee in writing.<sup>158</sup> The committee then sends the copies and enclosed documents to the respondent. According to DCR bylaws, the statement of claim should include:

Date of the statement of claim; name and address of organizations, parties to the Arbitration proceedings; justification of Arbitration competence; demands of the claimant; reasons for the above-mentioned demands; arguments proving the above-mentioned reasons for the claim; amount claimed; full name of the sole arbitrator or arbitrators, chosen by the claimant and respondent on the basis of mutual agreement or a request to have Members or a sole arbitrator appointed by the Chairman of Arbitration; list of enclosed documents and materials.<sup>159</sup>

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<sup>154</sup> If parties agree to another place, then parties should pay all additional expenses. *Id.* art. 6.2.

<sup>155</sup> *Id.* art. 6.3.

<sup>156</sup> DCR, *Dispute Regulations*, *supra* note 136, art. 6.4.; WFDB, *Inner Rules*, *supra* note 133, art. 4, § F3(l).

<sup>157</sup> IGE, *Regulations*, *supra* note 135, art. 27.1.

<sup>158</sup> DCR, *Dispute Regulations*, *supra* note 136, art. 6.5.

<sup>159</sup> *Id.*

The date of the statement of claim shall be the day of delivery to the arbitration committee.<sup>160</sup> Although there is not an explicit rule in other bourses' bylaws, this regulation is most likely the common practice in the bourses.

According to DCR Article 6.6: "The respondent shall be entitled to present the claimant and Arbitration his opinion on the claim stating all his objections against the claim."<sup>161</sup> According to the IGE, in the bill of claims, the respondent will give answers to the accusations and will state his counter-claims, if he has any.<sup>162</sup> The bill of claims should be sent to the complainant and the committee in a given time period.<sup>163</sup>

According to the DCR, each party should prove the circumstances referred to as justification for claims and objections, and the committee is entitled to ask the disputants for additional evidence if needed.<sup>164</sup> There is, however, no written regulatory rule in other bourses' bylaws regarding this matter. On the other hand, since the bylaws do not ban arbitrators from requesting additional evidence, it can be interpreted as if the arbitrators of other bourses can act similarly.

Article 6.10 of the DCR, which relates to participation of the parties in the sitting of arbitration, reads as follows:

The parties shall send a message containing information about time and place of a sitting of Arbitration. The above-mentioned message shall be sent and handed over to in the order provided for submission of claims. If there is no agreement of the contrary, copies of all the documents or materials and other information presented to Arbitration by one of the parties shall be sent to the other party by Arbitration. Expert's reports, Arbitration bases decisions on, shall be delivered to the parties by Arbitration.

Party may ask for hearing of a dispute *durante absentia* of this party. On mutual agreement of the parties the dispute may be settled without oral hearing on the basis of written materials. Subject to the lack of materials presented to Arbitration the latter may appoint an oral hearing.

Contumacy of the party, properly informed about the time and place of the sitting, shall not obstruct the hearing of a dispute

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<sup>160</sup> *Id.*

<sup>161</sup> *Id.* art. 6.6.

<sup>162</sup> IGE, *Regulations*, *supra* note 135, art. 28.5.

<sup>163</sup> Until the opening of sitting, according to DCR, *Dispute Regulations*, *supra* note 136, art. 6.6.

<sup>164</sup> *Id.* art. 6.9.

unless the absent party prior to the completion of the sitting demands to postpone it for a reasonable excuse.

Verification of evidence shall be held in the way determined by the Members of Arbitration. Umpires shall hold verification of evidence by moral certainty based on the overall, complete and objective examination of all the evidence.

As required, on demand of the parties hearing of a dispute may be postponed or suspended based on the following decision thereof.<sup>165</sup>

Paragraph one of DCR Article 6.10 is the common statement, which can be found in other bourses' bylaws, although not verbatim.

On the other hand, the statement in paragraph two is not similarly covered by the other bourses. The IGE and DDCSA are completely silent on the subject. The IPSDE also has no direct regulatory rule in its bylaws; however, IPSDE Article 66, section (h) states that "the board of directors shall prescribe judicial procedures in regulations, and the procedures regarding the submission of statements of claim, statements of defense, the submission of evidence, as well as the fees and duties that must be paid when filing any claim."<sup>166</sup> According to Article 66.h, it can be interpreted that the board of directors will decide the issue. Since there is no explicit bar, the board of directors can decide to hear a dispute in the absence of a party. The WFDB also allows hearings in absence of a party, if the party did not ask for postponement of the hearing.<sup>167</sup> Although there is not adequate information regarding the NYDDC's regulations on the issue, the only point that can be stated is that the NYDDC allows hearings in the absence of a party.<sup>168</sup> However, some of the club members are strongly against this practice.<sup>169</sup>

Although DCR Article 6.11<sup>170</sup> explains the consequences of a parties' failure to submit documents and other materials,<sup>171</sup> other bourses' bylaws do not

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<sup>165</sup> *Id.* art 6.10.

<sup>166</sup> IPSDE, *Memorandum of Association*, *supra* note 134, art. 66, § h.

<sup>167</sup> "If a litigant is called to appear before the International Arbitration Panel and does not do so, without having applied for a postponement, then the said Panel may continue with the hearings in his absence, and adopt a final decision in the arbitration, which will be binding on all parties." WFDB, *Inner Rules*, *supra* note 133, art. 17.

<sup>168</sup> Chaim Even-Zohar, *Memo: Arbitration Justice in Absentia*, INTERNATIONAL DIAMOND EXCHANGE (Apr. 10, 2008), [http://www.idexonline.com/portal\\_FullEditorial.asp?id=30032](http://www.idexonline.com/portal_FullEditorial.asp?id=30032).

<sup>169</sup> *Id.*

<sup>170</sup> DCR, *Dispute Regulations*, *supra* note 136, art. 6.11, provides:

Consequences of the failure to submit documents and other materials by the parties. Contumacy.

Failure to submit documents and other materials or contumacy of the parties or their representatives to the sitting of Arbitration, subject to

emphasize the results of such a failure. Article 6.12 regulates scheduling and conducting an examination. DCR Article 6.12 states:

If there is no agreement of the contrary, Arbitration may schedule an examination for clarification of the accrued questions that require a specific knowledge, and demand any of the parties to present all the documents or material necessary for the examination. If there is no agreement of the contrary, Arbitration may appoint one or more experts.

If there is no agreement of the contrary, Arbitration shall put up a candidate for position of an expert and determine questions requiring clarification in the course of the examination while taking into consideration opinions of the parties.

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their proper informing about the time and place of sitting of Arbitration, shall not obstruct the hearing of a dispute in Arbitration and decision-making on the subject, if the excuse of failure to submit the documents and other materials or contumacy of the parties to the sitting of Arbitration is unreasonable.

Respondent's failure to submit objections against the claim shall not be considered as acknowledgement of the claimant's demands.

If one of the parties, a Member of the Diamond Chamber, in spite of the appropriate treaty within the framework of the agreement refuses to submit the dispute to Arbitration for any reason, the Chairman of Arbitration shall notify the party of improper behavior and send copies of the notification to the other party and the Council of the Diamond Chamber. If the named party to a conflict, nevertheless, still refuses to take part in the process, the Chairman of Arbitration in accordance with established procedure appoints Members of Arbitration to hear the case essentially. The Members of Arbitration realize proceedings of Arbitration and make an award, which they declare to the parties to the conflict and in case of need to the Council of the Diamond Chamber to take adequate disciplinary measures.

If the party to a conflict is a person, who is not a Member of the Diamond Chamber but who has become a party to the transaction in the capacity of a visitor of the Diamond Chamber in accordance with the Internal Regulations and the person, in spite of the appropriate treaty within the framework of the agreement refuses to submit the dispute to Arbitration, no matter for what reason, this fact shall be taken into consideration in the course of decision-making in case of his joining the Diamond Chamber and his admission to the Diamond Chamber in the capacity of a visitor. The Chairman of Arbitration shall inform the Council of the Diamond Chamber of the foresaid.

If there is no agreement of the contrary, Arbitration shall allocate expenses incurred in the course of the examination in accordance with the Regulations.

The expert's conclusion shall be made in writing.

If there is no agreement of the contrary, subject to the request of a party or that of Arbitration, the expert having made a conclusion shall take part in a sitting of Arbitration, where the parties and Umpires shall be given an opportunity to pose questions to the expert with the regard for the examination and attained results.<sup>172</sup>

Other bourses do not ban expert involvement in the arbitration. Furthermore, some bourses' bylaws explicitly allow expert involvement;<sup>173</sup> however, none of them have as many broad regulatory rulings as the DCR.

The DCR also states that the Secretary of Arbitration shall keep minutes of arbitration proceedings,<sup>174</sup> although most of the other bourses are silent on that matter.

According to all the bourses' regulations, arbitration fees depend on the circumstances of the case, such as the amount in dispute, length of proceedings, complexity of the case, whether expert opinion is needed, and whether any translation cost occurred. Under most instances, the arbitration fee is paid in advance by the claimant; however, the fee may then be split by the parties or the defendant may be held responsible.<sup>175</sup>

Although the IPSDE, DCR, and DDCSA are silent about appealing the arbitral awards, the IGE<sup>176</sup> and WFDB<sup>177</sup> explicitly bar appealing the awards. To the contrary, the NYDDC allows its members to appeal the awards "within ten days of the parties' receipt of the judgment."<sup>178</sup> In fact, the NYDDC bylaws appear to have broad regulations regarding the appeal process. According to NYDDC bylaws, "[t]he appellant must pay a fee three times the original arbitration fee"<sup>179</sup> and "deposit cash or sufficient security to cover the amount of

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<sup>172</sup> *Id.* art. 6.12.

<sup>173</sup> IGE, *Regulations*, *supra* note 135, art. 28.4.

<sup>174</sup> DCR, *Dispute Regulations*, *supra* note 136, art. 6.13.

<sup>175</sup> Articles regarding the fees are: IGE, *Regulations*, *supra* note 135, art. 30; DCR, *Dispute Regulations*, *supra* note 136, art. 10; Bernstein, *Opting Out of the Legal System*, *supra* note 57, at 125 (citing N.Y. Diamond Dealers Club, *Arbitration Bylaws*, art. 12, § 2); IPSDE, *Memorandum of Association*, *supra* note 134, art. 66, § h.

<sup>176</sup> IGE, *Regulations*, *supra* note 135, art. 30 (stating that decisions rendered by the arbitrators about any disputes are final).

<sup>177</sup> WFDB, *Inner Rules*, *supra* note 133, art. 4, § F4 ("All decisions reached by the International Arbitration Panel shall be final and no appeal will be permitted on a decision reached by the International Arbitration Board.").

<sup>178</sup> Bernstein, *Opting Out of the Legal System*, *supra* note 57, at 125.

<sup>179</sup> *Id.*



the judgment.”<sup>180</sup> The NYDDC also sets out the rules regarding the composition of the appeals board and states that the board is “under no obligation to specify any findings of fact which are reversed or modified, nor set forth any new findings of fact.”<sup>181</sup>

Regardless of any rules of any bylaws, parties can appeal the arbitral awards to the courts when the required circumstances are met. However, while the courts are very willing to enforce the arbitral awards, a party’s chance of appealing any award with success is very low. Also, as we reviewed above, dealers’ approaches to the courts are not very welcoming and a dealer who goes to court may face reputational disadvantages. Thus, although it is a party’s constitutional right in most jurisdictions to go to court, appealing an award in the diamond industry may have more disadvantages than advantages; therefore, an appeal is considered an uncommon last resort.

Even though the bourses’ arbitration systems serve to benefit club members, in some bourses non-members who have a dispute with members can request a hearing too. For instance, while a non-member can request a hearing in the NYDDC and DDCSA, the IGE bans this probability explicitly in Article 26. There are several reasons for a non-member to request arbitrating the dispute in a bourse. The reason may rise from general advantages of arbitration over litigation, such as cheap costs and faster results. Another reason might be that if the non-member is aware that his chance of losing is higher in litigation, but he is unable to successfully settle with the other party, “then having a neutral third party assess a penalty should enable him to minimize the reputation cost of his breach since arbitration awards are kept secret if the judgment is paid promptly.”<sup>182</sup>

Additionally, although some bourses explicitly mention, while others only imply, it is true for all the bourses that the arbitrators resolve the disputes mainly by taking trade customs into account. They mostly refer to their bylaws, and add that if there is nothing in the bylaws, they advise the arbitrators to look for similar disputes, and if there is nothing there, then they advise the arbitrators to use the general rules of law.<sup>183</sup> Also, in most instances, the bourses’ bylaws refer to WFDB Article 4, which deals with compliance.

It is a common rule “that arbitrators have jurisdiction to determine their own jurisdiction – known as the ‘Kompetenz-Kompetenz doctrine’– which is among the most important, and contentious, rules of international arbitration.”<sup>184</sup> The bourses also value the Kompetenz-Kompetenz doctrine, which is included in the European Convention on International Commercial Arbitration of 1961 Dome at Geneva Article V(3):

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<sup>180</sup> *Id.* (quoting N.Y. Diamond Dealers Club, *Arbitration Bylaws*, art. 12, § 15).

<sup>181</sup> *Id.* (quoting N.Y. Diamond Dealers Club, *Arbitration Bylaws*, art. 12, § 17).

<sup>182</sup> *Id.* at 126.

<sup>183</sup> For instance DCR, *Dispute Regulations*, *supra* note 136, art. 1.7.

<sup>184</sup> PHILIPPE FOUCHARD, EMMANUEL GAILLARD & BERTHOLD GOLDMAN, FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 395 (Emmanuel Gaillard & John Savage eds., 1999).

Subject to any subsequent judicial control provided for under the *lex fori*, the arbitrator whose jurisdiction is called in question shall be entitled to proceed with the arbitration, to rule on his own jurisdiction and to decide upon the existence or the validity of the arbitration agreement or of the contract of which the agreement forms part.

Although some bourses, such as the IGE, have not explicitly mentioned the Kompetenz-Kompetenz doctrine, none of them have any article prohibiting its use. The DCR and NYDDC relatively broadly regulate the Kompetenz-Kompetenz doctrine in their bylaws. The NYDDC, for instance, states that “the club has the right to refuse to arbitrate a claim when it does not arise out of the diamond business,”<sup>185</sup> or

- (1) involves complicated statutory rights;
- (2) is ‘forum nonconveniens’ in that it is burdensome or inconvenient to handle the claim in the club;
- (3) involves non-members;
- (4) has been conciliated, mediated, arbitrated or litigated outside the club and/or the parties have sought remedies elsewhere;
- (5) is not in the ordinary course of commercial dealings.<sup>186</sup>

DCR rules have similar, but more compendious regulations in its bylaws.<sup>187</sup> The NYDDC clearly states: “No member may go to any outside court system for resolution of complaints with another member unless the Club’s ARBITRATION system expressly grants that permission.”<sup>188</sup> Similarly, DDCSA Article 6.7.2.3 states:

A member of the Club who institutes legal proceedings against any other member of the Club concerning a dispute which should have properly been referred to the Club for arbitration and which legal proceedings have not been authorized as contemplated by Clause 6.7.2.2. above shall himself be guilty of a breach of this Constitution and shall be liable to disciplinary action. Such member against whom such legal proceedings have been instituted shall have and retain all his rights to have the dispute dealt with as contemplated by this Constitution.<sup>189</sup>

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<sup>185</sup> Bernstein, *Opting Out of the Legal System*, *supra* note 57, at 126.

<sup>186</sup> *Id.* at 126–27 (quoting N.Y. Diamond Dealers Club, *Arbitration Bylaws*, art. 12,

§ 1b).

<sup>187</sup> DCR, *Dispute Regulations*, *supra* note 136, art. 2.

<sup>188</sup> NYDDC, *Trading Guide*, *supra* note 142.

<sup>189</sup> DDCSA, *Constitution*, *supra* note 137, art. 6.7.2.3.

However, these statements should not be interpreted as if the member whose arbitration request is denied due to competence cannot proceed to legal proceedings. Although it is not clearly stated in the bylaws, the scholars agree that if the bourses deny hearing a case, the parties are not banned from seeking remedies outside the club.<sup>190</sup>

Arbitrators decide the cases on the basis of various factors, such as trade customs,<sup>191</sup> common sense,<sup>192</sup> bourses' bylaws, and the influence of the country's law.<sup>193</sup> Additionally, due to the wide Jewish influence, Jewish law may also be a factor. On the other hand, it would not be wise to decide an award that goes against public policy due to the non-enforceability factor.<sup>194</sup> Similar circumstances also apply for the calculation of damages. Because there are no general rules regarding damages, arbitrators valuing the stone (or other dispute subject material), consider the circumstances and use their business experience.<sup>195</sup> Moreover, according to Lisa Bernstein, many dealers feel that the arbitrators have redistributive instincts; they cite the unpredictability of the decisions as well as the arbitrators' tendency to "split the difference" as an important motivation to settle their disputes on their own,<sup>196</sup> which is why most of the arbitration complaints are settled by the parties instead of going to judgment.<sup>197</sup>

Occasionally, a person who breaches a contract or engages in unethical conduct can be ordered to pay punitive damages.<sup>198</sup> Unlike the courts' relatively predictable awards, arbitration awards carry uncertain components, such as a fine to charity in addition to compensating the other party's damages.<sup>199</sup> Lisa Bernstein explains this with an anecdote:

In one case, a dealer falsely accused another dealer of stealing a stone. The accuser subsequently remembered where he had put the stone and apologized to the other dealer. As the incident had become widely known throughout the club, however, the wrongly accused dealer brought an arbitration action against the owner of the stone for impugning his good name. The board

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<sup>190</sup> Bernstein, *Opting Out of the Legal System*, *supra* note 57, at 127.

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> DCR, *Dispute Regulations*, *supra* note 136, art. 1.

<sup>194</sup> New York Convention art. V/2/b from June 10, 1958 reads: "Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that the recognition or enforcement of the award would be contrary to the public policy of that country." Thus, the arbitrators would probably not decide an award against that country's public policy.

<sup>195</sup> Bernstein, *Opting Out of the Legal System*, *supra* note 57, at 127.

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

ordered the man to make a full public apology and a fifty thousand dollar donation to a Jewish charity.<sup>200</sup>

Another different aspect of bourses' arbitration proceedings is that in some bourses, representation is banned. While the IPSDE's ban is strict,<sup>201</sup> the DDCSA's ban is conditional.<sup>202</sup> To the contrary, the IGE explicitly<sup>203</sup> and DCR implicitly<sup>204</sup> allows representatives. It is unclear whether the ban of representation is due to procedural or substantive reasons, or whether this ban has any special reason, such as due to secrecy, monetary effects, or timeliness. Even though in most jurisdictions, if not all, the right of representation is of such value that it is protected by the constitution, there is not enough material to evaluate the policy reasons behind such an approach.

Bourses' arbitration panels usually consist of three members.<sup>205</sup> Although the IPSDE and DDCSA are silent on the matter of rendering decisions by a unanimity or majority, the IGE and DCR explicitly state that the decisions need a majority vote. However, if there is no unanimity, a dissenting arbitrator has to explain his reasons for dissenting.<sup>206</sup> These arbitrators have a kind of

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<sup>200</sup> Bernstein, *Opting Out of the Legal System*, *supra* note 57, at 127.

<sup>201</sup> "The members of the Company hereby waive their right to be represented during any proceeding and hearing before the Judicial Committee in respect of any claim that might be filed by them or against them, by any representatives, including representatives who are attorneys . . . ." IPSDE, *Memorandum of Association*, *supra* note 134, art. 66, § j.

<sup>202</sup> DDCSA, *Constitution*, *supra* note 137, art. 6.7.2.10:

No legal representation at an Arbitration Hearing shall be allowed to any party unless:

- a) [H]e shall have applied timeously for the right to have such representation; and
- b) [T]he Arbitration Sub-Committee considers in its sole and absolute discretion that the nature or complexity of the matter in dispute warrants such representation, in which event all parties shall be entitled to such representation.

<sup>203</sup> "[P]arties can have representatives." IGE, *Regulations*, *supra* note 135, art. 28, § 8.

<sup>204</sup> "If there is no agreement of the contrary, the Arbitration proceedings shall be executed in a closed sitting of Arbitration with participation of the parties or their representatives." DCR, *Dispute Regulations*, *supra* note 136, art. 4.5.

<sup>205</sup> "Any claim or counter-claim or a related claim, originating from the dispute under the provisions of this article between individual members of the affiliated Bourses shall be brought before three arbitrators . . . ." WFDB, *Inner Rules*, *supra* note 133, art. 4, § F2. See also IGE, *Regulations*, *supra* note 135, art. 28, § 3, which mandates three members. "[T]ribunal presided over by an odd number of members, being not less than three . . . ." IPSDE, *Memorandum of Association*, *supra* note 134, art. 66, § e. (emphasis added).

<sup>206</sup> IGE, *Regulations*, *supra* note 135, art. 29, § 1; DCR, *Dispute Regulations*, *supra* note 136, art. 7.2.

immunity, which bans holding them responsible, “in any matter, for any of [their] acts in [their] official capacity or be subject to any legal suits whatsoever for any decision rendered.”<sup>207</sup>

In most bourses, arbitration awards are automatically final and binding;<sup>208</sup> however, in the DCR, in order for the award to be final, parties should have an arbitration agreement providing that the award will be final.<sup>209</sup> Failure to comply may result in suspension from the bourse.<sup>210</sup>

Although binding arbitration awards can be confirmed in a court, and have the same force and effect as a court award, parties usually do not seek confirmation of an arbitral award, primarily due to the fact that the secrecy of arbitration will be disturbed during the court proceedings.<sup>211</sup> Furthermore, some bourses’ bylaws state that “if a member refuses to pay a judgment and the party who prevailed finds it necessary to obtain a court enforcement order, the losing party (is required) to pay an additional 15 percent of the awards to cover his opponent’s legal expenses.”<sup>212</sup> Also, it should be remembered that the disputant who does not comply with the award will be publicized on the club wall, and will thus sustain reputational damages. In addition, if the losing party fails to pay, he might be barred from entering any of the diamond dealers’ clubs affiliated with the WFDB.<sup>213</sup> Other than the aforementioned enforcement tools, similar factors under the enforcement of extralegal contracts also influence the enforcement of arbitral awards.

## VI. CONCLUSION

This article described the history of the diamond, including the diamond’s journey from the beginning of the big bang to our homes, the diamond industry, and the reasons for Jewish predominance in the industry. By providing this course, I believe that the reader can comprehend the idiosyncrasy of the diamond industry’s contracts and the enforcement mechanisms in this context.

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<sup>207</sup> WFDB, *Inner Rules*, *supra* note 133, art. 4, § G; IGE, *Regulations*, *supra* note 135, art. 29, § 3.

<sup>208</sup> DDCSA, *Constitution*, *supra* note 137, art. 6.7.3.8; *see also* IGE, *Regulations*, *supra* note 135, art. 29, § 3.

<sup>209</sup> “If the Arbitration agreement does not provide for the Arbitration award to be final, the Arbitration award may be contested by one of the parties submitting an application to contest the Arbitration award to the competent court within three months after the date of receipt of the Arbitration award by the party submitting an application.” DCR, *Dispute Regulations*, *supra* note 136, art. 8.

<sup>210</sup> WFDB, *Inner Rules*, *supra* note 133, art. 4, § 1a.

<sup>211</sup> Bernstein, *Opting Out of the Legal System*, *supra* note 57, at 129.

<sup>212</sup> *Id.* at 129–30.

<sup>213</sup> “Furthermore, the winning party may seek to have the losing party suspended from the DDC which, if approved by the Club’s Board of Directors, would lead to that person being barred from all of the Club’s affiliated with the World Federation of Diamond Bourses.” NYDDC, *Arbitration*, *supra* note 127.

Next, the article focused on the unique difficulties of the industry, compared the private and public ordering systems, and examined the industry's reasons for choosing extralegal contracts and the ways of enforcing these contracts. Although the industry's specific mechanisms work well, and the dealers do not come across dispute settlement proceedings often,<sup>214</sup> the dispute settlement procedures of bourses were nonetheless described.

While reviewing arbitration in the industry, instead of examining a single bourse, several bourses' bylaws were compared; similarities and differences between different countries' industry rules were shown. Even though there are slight differences between the bourses, their approach's fundamental points are very similar. Bourses have built a well-functioning dispute settlement system, which can solve the issues quicker, cheaper and better than courts, and which has stronger enforcement mechanisms than regular arbitration awards.

Additionally, players in the industry are without a doubt the most effective factor for the industry's successful dispute prevention and dispute resolution methods. The participants of the industry slowly, but steadily formed their own rules. While doing so, they also benefited from sharing a similar culture. As a result of their similar culture and belief system, they were forming rules, which they are already familiar with. The result can be called the *Law of a Diamond Merchant* or *Lex de adamas Mercatoria*.

In the end, the diamond industry needed *sui generis* regulations due to their idiosyncratic structure, which is shaped in centuries, if not millennia. They cleverly used reputation and trust mechanisms, and their social ties, and thus became not only a successful industry, but also a living proof of collaborative works' success. It seems like the industry knows how to win in the prisoners' dilemma.



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<sup>214</sup> Lisa Bernstein states that there are approximately 150 disputes a year in NYDDC that are submitted to arbitration. Compared to the large quantities of transactions each day, 150 disputes a year seems nearly phenomenal. Bernstein, *Opting Out of the Legal System*, *supra* note 57, at 124.