Transnational Arbitration: The Best Way Forward

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Transnational Commercial Arbitration: The Best Way Forward

Introduction

The competence of domestic legal orders, through their legal system, to provide an adequate environment to the development of contractual relationships of certain communities is being more and more questioned. This is particularly the case in transnational commercial and financial contractual relationships, where national law and domestic courts have been unable to provide a proper framework for their growth[1]. In this context, it is without surprise that international arbitration "*has become the principal method of resolving disputes between States, individuals, and corporations in almost every aspect of international trade, commerce and investment*"[2].

The increasing importance of private justice and the need to redefine the concept of law, to better serve different particular communities, brought along with it questions regarding the concept of legal order, the concept of law and the interaction between the different stakeholders (State, private actors, private institutions). Through this process, and according to the needs specified above, some authors[3] sustain that a new concept of law has emerged which is neither public nor private (in other words non statist law) and would not depend for its existence on its enactment by any particular domestic legal order. This law would be transnational.

The emergence of a Transnational Law, which is perceived in the commercial and financial sphere as the *New Lex Mercatoria*, has had a considerable impact on the practice of International Arbitration. Under the influence of this new "law", commercial arbitration is reframing the traditional interplay between legal orders, legal instruments and actors in the arbitration field, in other words, being transnationalised.

[1] For a convergent view see Dalhuisen on *Transnational Comparative Commercial Financial and Trade Law* (Vol I).
[2] Redfern and Hunter on *International Arbitration* 5th edition (1.01).
[3] For a convergent view see Dalhuisen on *Transnational Comparative Commercial Financial and Trade Law* (Vol. I).

Understanding the process of "Transnationalization" of commercial arbitration implies establishing the traditional framework of International Commercial Arbitration (I), reviewing the basic the notions of Transnational Law (II), analyzing the concept of Transnational Arbitration (III) and identifying the Transnational aspects of Commercial Arbitration (IV). In the conclusion of this paper we will bring some ideas relating to the path that arbitration should follow in our "*transnationalized world*".

I. International Commercial Arbitration: Legal Framework

A. International and Commercial Character of Arbitration

"*Arbitration is a form of dispute resolution in which the parties agree to submit their differences to a third party or a tribunal for a binding decision*"[4].

The legal framework of international commercial disputes being understood as having particularities which shall be given special attention, the first question to answer would therefore be: what is "international" and what is "commercial"?

a) International Arbitration

It is interesting to notice right from the start that there is no standard definition of what is "International" in arbitration, "…*each state having its own test for determining whether an arbitration award is domestic or, in the language of the New York Convention foreign"*[5]. Nevertheless, usually, qualification as International of a dispute will refer either to its nature, to the nationality of the parties or to the place of arbitration.

As an example, according to Swiss arbitration law[6], an Arbitration is deemed to be International if, at the moment of the celebration of the agreement to arbitrate, one of the parties was neither habitually resident nor domiciled in Switzerland.

[4] Goode on *Commercial Law* 4th edition (page 1999)
[5] Redfern and Hunter on *International Arbitration* 5th edition (1.28)
[6] Swiss Private International Law Act 1987 Ch 12.

The Model Law[7] defined an International Arbitration as follows[8]:

- An arbitration is international if:

(a) The parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different states; or

(b) One of the following places is situated outside the State in which the parties have their places of business:

(i) The place of arbitration if determined in, or pursuant to, the arbitration agreement;

(ii) Any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject matter of the dispute is most closely connected; or

(c) The parties have agreed that the subject matter of the arbitration agreement relates to more than one country.

b) Commercial Arbitration

As for the definition of the term international, the concept of commerciality brings along with it the same pattern since no common definition exists. For this purpose, international arbitration practice accepts a wide one. This is also the view of the Model Law in which draftsmen stated in a footnote[9]:

"The term commercial should be given a wide interpretation so as to cover matters arising from all relationships of commercial nature, whether contractual or not. Relationships of a

[7] The Model Law is a success story as an instrument for harmonizing legislation. As pointed out by Redfern and Hunter (*on International Arbitration* 5th edition1 .232) it has served as basis for legislation in more than 40 major states.
[8] Model Law, Art 1 (3)
[9] The definition appears as footnote to Art. 1(1).

commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business co-operation; carriage of goods or passengers by air, sea, rail or road".

Internationality and commerciality have been elements of particular relevance in the development of arbitration. Nevertheless, this private justice mechanism could not be understood without having in mind its legal sources.

B. Legal Sources

"(...) besides not being created by the law of a country nor being part of its political organization, (arbitral tribunals) have relevant legal connections to more than one country and, therefore, no country holds exclusive jurisdiction to define their legal framework. Consequently, these tribunals do not have a lex fori as the public courts do and are not governed by a singular national system of Conflict of Laws"[10].

From the above stated, it is quite evident that determining the proper legal framework in cases of disputes in international arbitration might consist in a complex task due to the interplay between domestic and international legal instruments, party autonomy, private institutes rules and procedures. In practice, international arbitration legal framework is determined through the confluence of supranational, national, infranational and transnational sources.

[10] *The Confluence of Transnational Rules and National Directives as the Legal Framework of Transnational Arbitration* by Luís de Lima Pinheiro in estudos de Direito Civil, Direito Comercial e Direito Comercial Internacional, Almedina-2006, page 2.

a) Supranational Sources

The 'pierre angulaire' of international arbitration is the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958. Not being exempt from critics, major trading nations became parties to the above-mentioned convention allowing arbitration to become *"the established method of resolving international trade disputes"*.[11] Other conventions such as the European Convention of 1961[12], the Panama Convention[13] or even BIT's might come into play in Arbitration and therefore need to be considered in the determination of the Arbitration's legal framework, if such is the case.

b) National Sources

It is essentially through the *lex arbitri* that States provide regulation on International Arbitration. Nevertheless, it should be noticed that due to the process of recognition and enforcement of international awards, under the New York Convention, State courts also come into play on this procedure. The possibility of wide interpretation of the terms of the Convention by national courts, especially, in what it relates to the commercial or international nature of a dispute offers the possibility to State courts to have a determinant role in the assessment of the legal framework of an international dispute.

c) Infranational and Transnational Sources

"Infranational and *transnational sources are autonomous sources in relation to the national and supranational authorities, mainly the rules of the arbitration centers and the custom based upon arbitration case law. The distinction between these two sources can be drawn with reference to*

[11] Redfen and Hunter on *International Arbitration* (1.220).
[12] The objective of the european convention of 1961 is the settlement of trade disputes between parties from different States, european or not, through arbitration. It also expressly recognizes the capacity of a state or other public body to enter an arbitration agreement.
[13] The Panama Convention was signed by twelve South American States in January 1975, following the Inter-American Conference on Private International Law in Panama. This convention permits agreements to submit existing or future disputes to arbitration and reciprocal enforcement of arbitral awards between Member states.

the social sphere of a country: infranational sources are contained within this sphere; transnational sources go beyond this sphere."[14]

Private institutes (especially arbitral tribunals), due to practice and evolution based on parties needs, became sources of principles and rules that brought an harmonization effect in international arbitration. From this point of view, the determination of the legal framework of any arbitration will also depend on those common rules and practices. As Luis de Cordeiro correctly pointed out"*The rules of arbitration centers are created by private institutions and are applied by the tribunals that operate within their scope independently of the relevance assigned to them by a singular national legal order. They are, for all these reasons, transnational other infranational sources of Arbitration Law*" [15].

From the exposed above, International commercial arbitration legal framework shall be determined according to:

- International Conventions (namely the New York Convention);

-National Law (essentially the lex arbitri, knowing that an important movement of harmonization has been taking place under the concept of the Model Law).

-Private institutes rules and procedures (ICC rules, Uncitral rules).

C. In Summary

International commercial arbitration has emerged in a legal environment in which predominance was given to Public International Law and Domestic Law. However, the development of transnational economic transactions, the need to regulate issues that might arise from them with a

[14] *The Confluence of Transnational Rules and National Directives as the Legal Framework of Transnational Arbitration* by Luís de Lima Pinheiro (page 7).
[15] *The Confluence of Transnational Rules and National Directives as the Legal Framework of Transnational Arbitration* by Luís de Lima Pinheiro (page 8).

"proper" law, since as we above stated, national law and particularly private international law and its conflict of law system, seem to be quite limited as providing an adequate answer to the international markets needs, have been pushing towards the reshapment of commercial arbitration. The redefinition of the framework of International Commercial Arbitration has been based on the emergence of the concept of transnational law. It is therefore this evolution or "Transnationalisation" of international commercial arbitration that shall be the focus of our analysis.

II. Transnational Law

A. The Notion of Transnational Law

More than half a century has elapsed since Jessup, in his Storrs Lectures given at the Yale school, popularized the term "Transnational Law[16]". Jessup wrote that he "*shall use the term "transnational law" to include all law which regulates actions or events that transcend national frontiers. Both public and private international law are included, as are other rules which do not wholly fit into such standard categories"*[17].

Consensus among scholars and practitioners regarding the concept of Transnational Law has not been reached. As demonstrated by a study carried out by CENTRAL[18] in Munster, Germany, *"in most cases where the parties expressly choose transnational law as the law governing their contract, they do so by referring to "general principles of law", "transnational principles of law", "lax moratoria", "principles of international law", etc"*[19]. On the contrary, it has been understood that the concept of "Transnational Law" blurs the traditional approach Public International Law[20] / Private International Law[21] and that nation States are no longer at the center of the process of law formation.

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[16] Although Jessup was the first to apply the notion of transnationalisation to Law, he did not create the term.
[17] Jessup, 1956, page 2.
[18] The Center of Transnational Law (CENTRAL) at the University of Münster.
[19] *The UNIDROIT Principles and Transnational Law*, Michael Joachim Bonell, Unif. L. Rev. 2000-2, page 204.
[20] Public International Law being traditionally the Law that regulates relations among States.

Craig Scott in "Transnational Law as Proto concept: Three Conceptions[22]", has an interesting point of view. In his perspective, the concept of Transnational Law might be ascertained through three different approaches. The first one would divide existing law into two categories: international and domestic. Consequently, due to the interaction of these two legal orders the need for a particular distinguished transnational law is non-existing. The second approach, although recognizing traditional division between international and domestic law, would nevertheless identify the possibility of the existence of transnational issues that have been dealt with at the domestic and international level, through the emergence of convergent decisions, rules or standards. A third one would refer to the existence of autonomous standard rules, which would be in their essence neither domestic nor international. In this approach, these norms would belong to their own normative sphere and exist alongside with public/private international law, without being any of them.

This third approach leads us to the idea of the emergence of a body of law which doesn't have State as the holder of the monopoly of law creation, therefore implying that other private actors, or institutions, might participate in the process. In this context, transnational law might be understood as being " *law (which) created and developed by the law making forces of a global civil society: (1) It is based on (a) general principles of law, derived from a functional comparative analysis of the "common core" of domestic legal systems, and (b) on the usages and customs of the international business community as expressed in standard contract forms and general business conditions, (2) it is administered and developed by private providers of alternative dispute resolution, and (3) it is enforced predominantly by virtue of social sanctions such as reputation and exclusion. Finally (4) its rules are codified – if at all – in the form of lists of principles, standard contract forms, or codes of conduct proposed by private norm entrepreneurs*[23].

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[21] Private International Law being national law which seeks to regulate private relations that are connected with more than one legal order.

[22] *"Transnational Law" as Proto-Concept: Three Conceptions*, Craig Scott ,York University - Osgoode Hall Law School, *German Law Journal*, Vol. 10, No. 7, page 877, 2009.

[23] Gralf- Peter Calliess Law, *Transnational*, CLPE RESEARCH PAPER SERIES VOL. 06 NO. 08 CLPE Research Paper 35/2010 Vol. 06 No. 8 (2010) page 6.

While this definition will certainly not reach consensus, it covers nevertheless the main ideas of how transnational law might be perceived.

This definition focuses on:

- The importance accorded to the general principles of law as being unanimously respected among the different legal orders;

- The relevance of usages and customs, especially due to its importance in what it relates to financial and commercial matters;

- Codification of certain rules (UNIDROIT principles, INCOTERMS) which act as an harmonization agent;

- Relevance of alternative dispute resolution mechanism (the International Arbitration has become the principal method of resolving disputes between States, individuals, and corporations in almost every aspect of international trade, commerce and investment).

The emergence of the concept of Transnational Law offered the possibility to identify the development of autonomous normative systems in particular fields, especially in those where it has been admitted that State or State law was ill equipped to provide adequate regulations to the needs of particular communities. This has specially been the case in the commercial and financial sphere where it has been affirmed that such an autonomous legal order exists, under the revival of the *New Lex Mercatoria*.

B. The New *Lex Mercatoria*

"*The Lex mercatoria conjures up romantic notions of ancient laws and practices in medieval times as they traded from place to place. In recent decades it has been resurrected as a sort of international commercial law, which may displace national laws in international transactions. As such it has great appeal. The idea of applying national laws in international transactions,*

primarily directed at domestic transactions, to trans-national contracts has always been uncomfortable. The better and more attractive approach is to apply international commercial laws to international commercial transactions"[24].

The question of the emergence of a new body of law, autonomous, developed in a particular community could not develop without being the object of passionate debates. Regarding the *Lex Mercatoria*, those have, mainly, been centered on:

-Whether it constitutes Law;

-Whether it could represent a complete and autonomous legal order;

-Whether its rules could be ascertained in a specific way so as to be applied in practice;

- Could it simply represent usage?

As Gaillard[25] pointed out, the debate regarding the *Lex Mercatoria* has gone through different stages. At first, the debate was centered on the existence of rules other than those formally recognized by an existing legal order, and on the validity of the choice of such other legal rules by parties and arbitrators. Presently, with the acceptance as a valid choice by the parties of substantive laws regulating transnational contracts, others than national laws, the debate has been turned to as whether arbitrators, absent choice of the parties, might choose non-national laws to regulate a contractual relationship.

Another focus of the discussion regarding the *Lex Mercatoria* relates to the difficulty of determining its content. Lord Mustill[26] presented a list of twenty principles[27], which in his view

[24] *Application of the Lex Mercatoria in International Commercial arbitration* by Michael Pryles (2003) 18 International Arbitration Report, page 1.
[25] *Transnational Law: A Legal System or a Method of Decision Making*? 17(1) Arbitration International, p. 54 (2007) by Professor Emmanuel Gaillard
[26] Mustill, *The New Lex* Mercatoria*: The First Twenty Five Years* (1988).
[27] Those principles being:

1. *A general principle that contract should prima facie be enforced according to their terms: pacta sunt servanda. The emphasis given to this maxim in the literature suggests that it is regarded, not so much as one of the rules of the lex mercatoria, but as the fundamental principle of the entire system.*

2. *The first general principle is qualified at least in respect of certain long-term contracts by an exception akin to rebus sic stantibus. The interaction of the principle and the exception has yet to be fully worked out.*

3. *The first general principle may also be subject to the concept of abus de droit, and to a rule that unfair and unconscionable contracts and clauses should not be enforced.*

4. *There may be a doctrine of culpa in contrahendo.*

5. *A contract should be performed in good faith*

6. *A contract obtained by bribes or other dishonest means is void, or at least unenforceable. So too if the contract creates a fictitious transaction designed to achieve an illegal object.*

7. *A State entity cannot be permitted to evade the enforcement of its obligations by denying its own capacity to make a binding agreement to arbitrate, or by asserting that the agreement is unenforceable for want of procedural formalities to which the entity is subject.*

8. *The controlling interest of the group of companies is regarded as contracting on behalf of all members of the group, at least so far as concernes an agreement to arbitrate.*

9. *If unforeseen difficulties intervene in the performance of a contract, the parties should negotiate in good faith to overcome them, even if the contract contains no revision clause.*

10. *'Gold clause' agreements are valid and enforceable. Perhaps in some cases either a clause or a 'hardship' revision clause may be implied.*

11. *One party is entitled to treat itself as discharged from its obligations if the other has commited a breach, but only if the breach is substantial.*

12. *No party can be allowed by its own act to bring a non-performance of a condition precedent to its own obligation.*

13. *A tribunal is not bound by the characterization of the contract ascribed to it by the parties.*

14. *Damages for breach of contract are limited to the foreseeable consequences of the breach.*

15. *A party which has suffered for a breach of contract must take reasonable steps to mitigate its loss.*

16. *Damages for non-delivery are calculated by reference to the market price of the goods and the price at which the buyer has purchased equivalent goods in replacement.*

could represent the concept of the *Lex Mercatoria*. Berger[28], although not diverging form the idea of a list, brought an interesting innovation to its approach introducing the thought that this inventory was not an exhaustive one, so that principles contained therein could provide a solution for more precise situations. Berger's list is derived from many sources. He stated:

"The list unifies the various sources that have fostered the evolution of a transnational commercial legal system into one single, open-end set of rules and principles: The reception of general principles of law, the codification of international trade law by 'formulating agencies' the case law of international arbitral tribunals, the law-making forces of international model contract forms and general conditions of trade, and finally the analisys of comparative legal science. Scientific research in this area of highly practical law is of particular relevance because many authors of case notes, articles and books on transnational commercial law are themselves active in the field of international commercial arbitration.It is therefore not necessary to advocate the acceptance and promotion of the efforts of international practice through legal doctrine.The often heard prejudice that the lex mercatoria-doctrine is purely theoretical is unjustified as long as the list does not only reflect comparative research but also the comprehensive cases load of international arbitral tribunals which, in their function as 'social engineers', play a pivotal role in the evolution of transnational commercial law. It is this comprehensive coverage of all possible sources of the lex mercatoria which provides the necessary legitimacy and authority to the rules and principles contained in the list"[29].

Berger's inventory comprises seventy eight rules or principles and although it is not our intention

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17. *A party must act promptly to enforce its rights, on pain of losing them by waiver. This may be an instance of a more general rule, that each party must act in a diligent and practical manner to safeguard its own interests.*

18. *A debtor may in certain circumstances set off his own cross-claims to extinguish or diminish his liability to the creditor.*

19. *Contracts should be construed according to the principle ut res magis valeat quam pereat.*

20. *Failure by one party to respond to a letter written to it by the other is regarded as evidence of assent to terms*.

[28] Klaus Peter Berger, the Creeping codification of the Lex Mercatoria (Kluwer International Law).
[29] Berger, at pp 210-11

to have them all described here, we should have in mind at least some of the most relevant ones[30].

[30] Just to enumerate some of the most relevant ones:

1. The parties are free to enter into contracts and to determine their contents (principle of party autonomy).

2. the parties must act in accordance with the standard of good fait and fair dealing in international trade.

3. A valid contract is binding upon the parties.It can only be modififed or terminated by consent of the parties or if provided by law (‘*pacta sunt servanda’)*.

4. The parties are bound by any usages to which they have agreed and by any practice which they have established between themselves. Unless agreed otherwise, they are considered to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contract of the type involved in the particular trade concerned.

5. The construction of a contract has to determine the common intention of the parties or, if no such intention can be determined, the meaning that reasonable persons of the same kind as the parties (average diligent businessmen) would give to it in the same circumstances, taking into account, in particular, the nature and purpose of the contract, the conduct of the parties and the meaning commonly given to contract terms and expressions in the trade concerned.

6. Unless otherwise agreed by the parties or contrary to the intrinsic nature of the contract, time limits and other contractual stipulations as to the timely performance of the parties obligations have to be strictly complied with (‘time is of the essence’).

7. A party who breaks off negotiations in bad faith (i.e. when the other party was justified in assuming that a contract would be concluded) is liable for the losses caused to the other party (‘culpa in contrahendo’).

8. A contract that violates boni mores is void (‘fraus omnia corrumpit’).

9. The invalidity of the main contract does not automatically extend to the arbitration clause contain therein (principle of separability).

10. If a party is unjustifiably enriched at the expense of another, that party has to pay a sum of money equal to the value of the enrichment to be determined according to the contractually agreed price or market price, including full compensation for the use (usufruct) of the subject matter of the enrichment (‘nemo sine causa alterius jactura locupletari debet’, ‘conditio indebiti, unjust enrichment’).

11. If non-performance of a party is due to an impediment which is beyond the control of that party and could not have reasonably been foreseen by that party at the time of conclusion of the contract, such as war, civil war, strike, acts of government, accidents, fire, explosions, natural disasters etc., and neither the impediment nor its consequences could have been avoided or overcome (‘acts of God;

'force majeure', 'hohere Gewalt') that party's non performance is excused. If non-performance is temporary, performance of the contract is suspended during that time and that party is not liable for damages to the other party. If the period of non-performance becomes unreasonable and amounts to a fundamental non performance, the other party may claim damages and terminate the contract.

12. No one may derive an advantage from his own unlauful acts ('nullus commodum capere potest de iniuria sua propria').

13. Absent a choice of law by the parties, the contract is governed by the law with which the contract has the closest connection ('center of gravity test';'engster zusammenhang';'liens les plus etroits').

14. If a contract has contacts to more than one jurisdiction and the parties have not agreed on the applicable law, it is in the presumed interest of the parties to apply the law, bioth as to form and to substance, that validates the contract ('favor negoti;, 'lex validitatis', 'rule of validation')

15. If an event of legal, economic, technical,political or financial nature occurs after the conclusion of the contract which could not reasonably been taken into account by the disadvantaged party at the time of the conclusion of the contract and which fundamentally alters the equilibrium of the contractual obligations, thereby rendering the performance of the contract excessively onerous for that party if that party has not, through express stipulation or by the nature of the contract, assumed the risk of that event ('Wegfall der Geschaftsgrundlage; 'clausula rebus sic stantibus', 'hardship', 'frustration of purpose'), that party may claim renegociation of the contract.If the parties fail to reach agreement within reasonable time, either party may apply to a court or arbitral tribunal in order to have the contract adapted to the changed circumstances or terminated at a date and on terms to be determined by the court or arbitral tribunal.

16. If the parties to a contract are required to render their respective performances simultaneously and have not agreed otherwise, each party may withhold performance until tender of performance by the other party ('exceptio non adimpleti contractus').

17. If a party's failure to perform its obligation amounts to a fundamental non-performance, the other party may terminate the contract. Both parties may then claim restitution, in re or in money, of whatever they have supplied to the other party.The exceptio non adimpletus contractus rule applies.

18. No one may transfer more rights than he actually has (nemo plus iure transferre potest quam ipse habet).

19. No one may set himself in contradition to his own previous conduct.('non concedit venire contra factum proprium'; 'l'interdiction de se contredire au detriment d'autrui').

20. A state or state controlled entity may not invoke its sovereignity or internal law to repudiate contractual consent.

21. Each party has a good faith obligation to renegociate the contract if there is a need to adapt the contract to changed circumstances and the continuation of performance can reasonable be expected from the parties.

22. Each party is under a good faith obligation to notify the other party of any problems that occur in the performance of the contract and to cooperate with the other party when such cooperation can reasonably be expected for the performance of that party's obligations.

23. If the contract does not contain a provision fixing the price or a method for determing it, the parties are able to be treated as having agreed to the price generally charged at the time of the conclusion of the contract for such performance in comparable circumstances in the trade concerned, or, if no such price is available, to a reasonable price.

24. Where an agent acts on behalf of a principal within the scope of his authority which has been granted to him expressly or can be implied from the circumstances of the case, for example by a refernce to a contract of comission, that the agent undertakes to bind himself only.

25. A corporate entity acting on behalf of a group of corporate entities binds all entities that belong to the group.

26. The principal is not bound if an agent acts without or outside his authority (falsus procurator) unless he ratifies, expressly or impliedly through his conduct, the acts of the agent. In the latte case, the act produces the same effects as if it has initially been carried out with authority.

27. Where the conduct of the principal causes the third party reasonable and in good faith to believe that the agent has authority to act on behalf of the principal and the agent is acting within the scope of that authority, the principal may not invoke agaisnt the thrid party the lack of authority of the agent (‘agency by estoppel’, ‘ Anscheinsvollmacht’)

28. Facts which the agent knows or ought to have known are attributable to the principal.

29. There is a presumption for the professional competence of the parties to an international commercial contract.The parties may therefore not argue that they were not aware of the significance of the contractual obligations to which they have agreed.

30. Specialised laws prevail over general laws (‘lex specialis derogat legi general’).

31. The burden of proof rests on the claimant viz.On the party who advances a proposition affirmatively (‘actori incumbit probatio’).

32. A written contract may be proved through any means of modern telecommunication (telex, Telefax, btx, EDI etc), if it provides a record of the information contained therein and can be reproduced in writeen form.

33. Damages may not exceed the actual loss and are available only for loss which is proved by the claimant.

34. A party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If it fails to take such measures, the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated.

35. Principle of ‘piercing the corporate viel’in international corporate law in case of clear under-capitalisation and a mingling of corporate and financial spheres, especially in case of total control of the parent company over the business and financial affairs of its subsidiary.

36. In case of corporate de-facto succession liability continues.

A different approach to determine the *Lex Mercatoria*'s content has been presented by Gaillard[31]. In his perspective, even though the list method comprising the general rules of the *Lex Mercatoria* cannot be denied, a more "scientific" method to determine its content would be more adequate. This technique would be based on the "*existence of a number of international treaties which, whether in force or not, reflect a broad consensus, by the incresingly large number of published awards providing as large number of precedents to international arbitrators and by the availability of extensive comparative law resources such as monographs on a large number of specific issues"*[32].

In practice, arbitrators should follow three steps. At first, attention shall be given to parties intent in particular whether they have laid down a method, e.g. limiting the possibility of analysis to particular legal systems. Second, arbitrators shall determine whether allegations made by parties are based on an accepted rule or just rely on a particular aspect of a given legal order.Third, to determine the acceptance of the general principle of law determined according to the principles seth above, unanimity is not required. The comparative analysis of Gaillard, based primarily on the parties intent, reflects the concept of transnational commercial arbitration, which shall find its sources in general principles of law and accepts as one of its most important principles the parties intent (*pacta sunt servanda*).

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37. A state may not nationalise or expropriate foreign private investment except for a purpose which is in the public interest, not discriminatory, carried out under due process of law and against 'appropriate' compensation.

38. Absent an agreement of the parties, if a goig concern is expropriated, the amount of compensation is to be determined immediately before the time at which the taking occurred or the decision to take the asset became publicly known ('full compensation standard').

39. Payment of compensation shall include interest and has to be made 'effectively', i.e. in freely controvertible currency on the basis of the market rate of exchange existing for that currency on the valuation date or in any other currency accepted by the investor, and 'prompt', i.e. without undue delay or, in case of establishing foreign exchange stringencies, by payment in installments within a period which will be as short as possible not exceeding five years from the time of taking.

[31] Gaillard, Emmanuel, *Transnational Law: A Legal System or a Method of Decision Making*? 17(1) Arbitration International, page 54, 2007.
[32] Gaillard, page 63.

A final word must be said regarding a quite innovative perspective as regards the assessment of the *Lex Mercatoria* which has been proposed by Dalhuisen[33] . In his understanding, the determination of the content of the *Lex Mercatoria* is based on the need to assess a configuration which would in any case provide an answer. Such organization exists in the *Lex Mercatoria*, is as complete as any domestic legal order and would have the following sources:

(a) Fundamental legal principle;
(b) Mandatory custom;
(c) Mandatory uniform treaty law (to the extent applicable under its own scope rules);
(d) Mandatory general principle;
(e) Party autonomy;
(f) Directory custom;
(g) Directory uniform treaty law (to the extent applicable under its own scope rules);
(h) General principles largely derived from comparative law, uniform treaty law (even where not directly applicable or not sufficiently ratified), ICC rules and the Like;
(i) Residually, domestic laws found through conflict of law rules.

As to the fundamental legal notions or principles of private or transactional law which come first and form the basis of the whole system, they are:

(a) pacta sunt servanda as the essence of contract law;
(b) the recognition, transferability and substantial protection of ownership to be respected by all as the essence of all property;
(c) the liability for own action, especially:
(i) if wrongful (certainly if the wrong is of major nature) as the essence of tort law;
(ii) If leading to detrimental reliance on such action by others as another fundamental source of contract law;
(iii) if creating the appearance of authority in others as an essential of the law of (indirect) agency; or

[33] Dalhuisen on *Transational Comparative Commercial Financial and Trade* Law, Vol.I.page 287.

(iv) if resulting in owners creating an appearance of ownership in others as an additional fundamental principal in the law of property leading to the protection of the bona fide purchaser (setting aside the more traditional nemo dat principle).

There are other fundamental principles in terms of:

(d) apparent authority and fiduciary duties leading to special protections of counterparties, notably if weaker or in a position of dependence (including principles) against agents, consumers against wholesalers, workers against employers, individuals against the state, smaller investors against brokers). And to duties of disclosure and faith full implementation of one's contractual and other obligations;
(e) unjust enrichment;
(f) respect for acquired or similar rights, traditionally particularly relevant to outlaw retroactive government intervention, but also used to support owners of proprietary rights in assets that move to other countries;
(g) equality of treatment between creditors, shareholders and other classes of interested parties with similar rights unless they have postponed themselves.

Then there are:

(h) fundamental procedural protections in terms of impartiality, proper jurisdiction, proper hearings and the possibility to mount an adequate defense, now often related to the more recent (and also internationalised) standards of human rights and basic protections
(i) fundamental protections against fraud, Sharp practices, excessive powers, cartels, bribery and insider dealings or other forms of manipulation in market-related assets (also in their civil and commercial aspects) and against money laundering;
(j) transaction and payment finality, equally demanded by the transnational public order itself; and finally
(k) there are also increasingly fundamental principles of environmental protections developing.

C. In Summary

From the analisys above exposed, one can understand that the development of a substantive "transnational commercial law" in transborder contractual relations is a hotly debated matter. It is justified by the possibilities that it opens[34], and the questions it brings with[35]. Currently, no generally accepted definition of *Transnational Law* exists nor a common understanding of how to determine its content prevails. Nevertheless, what it cannot be denied is that even though those questions are still unsettled, *Transnational Law* and the new *Lex Mercatoria* found special ground in international commercial arbitration modifying its character and bringing with it a new dimension.

III. Transnational Arbitration

A. Why Transnationalize?

The question of transnational commercial arbitration only arises if, and to the extent that, this "transnationalisation" would be beneficial to the existing "understanding" of international arbitration. Those benefits would have to serve the interests of the different actors in the arbitral process, essentially those of the parties that opted for arbitration but nevertheless coexist with the existing framework, which established the legal basis of Commercial Arbitration.

From this point of view, Transnational Arbitration would represent the evolution of International Commercial Arbitration aiming at better serving the interests of its participants. It shall be noticed that the Transnationalisation of Commercial Arbitration, in our understanding, should be also interpreted as a consequence of the phenomenon that first started with the concept of Transnational Law. It becomes obvious, therefore, that many of the questions that aroused regarding Transnational Law would become problematic in the realm of transnational arbitration.

[34] E. g. could the Lex Mercatoria represent a substantive body of law, separate from any legal municipal law, autonomous from domestic law?
[35] Essentially its content and validity.

To begin with and the most simple of them would therefore be: What is Transnational Arbitration?

B. The Concept

It is not an easy task to properly articulate the concept of Transnational Arbitration. It seems that no clear distinction is made between International Commercial Arbitration on the one side and transnational arbitration on the other. For example, certain centers of research studies[36] or authors[37] present themselves or refer to Transnational Commercial Arbitration and International Commercial Arbitration without any apparent distinction.

As previously affirmed, "*Arbitration is a form of dispute resolution in which the parties agree to submit their differences to a third party or a tribunal for a binding decision*". In this sense, traditionally its legal sources are to be found in international conventions, national legislation and private institution's rules. Therefore, it has originally a transnational legal nature. This transnational original legal nature may be identified through the analysis of the definition of *Transnational Law*. Going back to Jessup's approach," *"transnational law" (shall) include all law which regulates actions or events that transcend national frontiers. Both public and private international laws are included, as are other rules which do not wholly fit into such standard categories.*

Following Jessup's rationale, it is evident that "international commercial arbitration" gathers all the components of transnationality. It finds its legal basis in International Public Law, the New York Convention being the "pierre angulaire" of the all system but also in national law essentially through domestic Lex Arbitri and national court's rulings. However, due to the participation of private actors and the development of its own rules and principles (e.g. separability of the arbitration clause, competence competence, Uncitral Rules on Arbitration, ICC rules) commercial arbitration cannot be defined as existing independently in the legal sphere

[36] ITA (Institute of transnational arbitration)
[37] See above 10.

of Public International Law nor particularly in the legal sphere of domestic Law nor even in the realm of private/party autonomy.

More transnational aspects of commercial arbitration can be identified if we reanalyze the definition provided above of transnational law. As stated:

"*Transnational law might be understood as being " law (which) created and developed by the law making forces of a global civil society: (1) It is based on (a) general principles of law, derived from a functional comparative analysis of the "common core" of domestic legal systems, and (b) on the usages and customs of the international business community as expressed in standard contract forms and general business conditions, (2) it is administered and developed by private providers of alternative dispute resolution, and (3) it is enforced predominantly by virtue of social sanctions such as reputation and exclusion. Finally (4) its rules are codified – if at all – in the form of lists of principles, standard contract forms, or codes of conduct proposed by private norm entrepreneurs*".

Through this conception, it appears that many of the ideas expressed hereby are also present within the theory of a transnationalized arbitration. Those ideas being:

1- Transnational arbitration has been developed according to the needs of a particular society (financial and commercial);

2- It reflects general principles of law, which can derive from the analysis of the "tronc commun" of domestic legal systems;

3- It is enforced essentially through social sanctions such as reputation and exclusion;
4- Its rules and/or codes of conduct are predominantly developed by private institutions (arbitration rules such as Uncitral Arbitration Rules, ICC Rules).

The difficulty in properly assessing transnational arbitration, is increased due to the different understandings of this concept since the term transnational arbitration finds different meanings in

commercial arbitration literature, in some instances authors refer to a-national arbitration, delocalized arbitration or even autonomous arbitration[38].

a) Delocalized Arbitration

Before analyzing the concept of delocalized arbitrations, a word shall be said regarding arbitrations under the ICSID[39]. Even though those arbitrations relate to investment disputes, and the parties involved in the arbitral process are State or State entities on the one side and investors on the other side, the relevance in our analysis relates to the concept of "*truly delocalized or denationalized arbitrations*[40]".

The Washington Convention of 1965 establishes the creation of an arbitral forum for the resolution of disputes between investors and states. Particulars (which under the ICSID accept ion extend to natural persons and legal entities) may submit their disputes to this arbitral forum if[41]:

(i) There is a legal dispute arising directly out of an investment;

(ii) Both contracting states are parties to the ICSID Convention;

(iii) Both the host state and the investor have consented to arbitration.

Following the above, a particular may submit a dispute with a State in the case that both his State of origin and the host State are parties to the Washington Convention, if there is a BIT which "covers" the investment and therefore permits a party to submit a dispute to the arbitral institution and if, there is a dispute related with the investment.

[38] For a convergent view see Julian M.D. Lew QC, Journal of the LCIA, vol.22 n. º2, *Achieving the Dream Autonomous Arbitration.*
[39] International Centre for Settlement of Investment Disputes
[40] Redfern and Hunter in *International Arbitration* 5th edition 1.196
[41] Article 25 of the Washington Convention.

Arbitrations regulated by the Washington Convention find their legal basis on Public International Law (Washington Convention and BIT's) that confers a total degree of autonomy regarding domestic legal orders. This autonomy has two different implications, namely that (i) ICSID awards can only be revised or annulled under ICSID's own internal procedures and (ii) contracting States have the obligation to recognize and enforce ICSID awards as if they were a final judgment of a national court[42].

BIT's do not provide for an applicable law as substantive law in cases of dispute, and those who provide usually refer to international law and domestic law, without an explanation of how they should be combined in practice[43]. In investment arbitration, usually, practice confers a primordial role to principles of International Law without excluding the relevance of domestic law. This interplay between domestic and international law is exemplified through the statement of the arbitral tribunal in *CMS V Argentina*:

"A more pragmatic and less doctrinaire approach has emerged allowing of the application of both domestic law and international law if the specific facts of the dispute so justifies. It is no longer the case of one prevailing over the other and excluding it altogether. Rather, both sources have a role to play".[44]

Remarkably, arbitration under the ICSID has in its legal nature some of the most important components of the idea of a transnational arbitration. The first one would result from the fact that those arbitrations are not "anchored" in any particular domestic system, being therefore totally delocalized and the second one results from the combined approach between international law and domestic law, as regards the substantive law in case of disputes. Through this particular combination, one could see the genesis of a "transnational law" applicable to the BIT's involving both international and domestic law.

[42] Article 54 of the Convention.
[43] For a convergent view see Redfern and Hunter in *International Arbitration* 5th edition (8.47).
[44] CMS Gas transmission company vs. Argentina Republic.

- ***Arbitration for Sports Law***

International arbitration in sports legal system provides another singular example of truly delocalized arbitration. For disputes arising between different actors within the international sports legal system (ISF's, athletes competing at international level, or other actors[45]), arbitration under the CAS is in the vast majority of cases, the dispute resolution mechanism at the disposition of the parties. As McLaren[46] correctly pointed out "[*CAS] provides a forum for the world's athletes and sports federations to resolve disputes through a single, independent and accomplished sports adjudication body that is capable of consistently applying the rules of different sport organizations and the worldwide rules of the [Olympic Movement and the anti-doping movement]"*.

The CAS has its headquarters in Lausanne, Switzerland. Its jurisdiction derives from agreements between the parties to submit their disputes to the jurisdiction of this institution. All arbitrations, regardless of their actual location, have as the place of the seat Switzerland being therefore totally delocalized and having Swiss Law as the *Lex Arbitri*. Accordingly, CAS awards may only be reviewed by Swiss Federal Tribunals. Having as place of the seat Switzerland also implies that for other states, CAS awards are "foreign" under the New York Convention and therefore, those awards may be recognized and enforced in any country that has ratified the Convention.

- ***Delocalised Commercial Arbitrations***

Delocalised commercial arbitrations rely on the idea that commercial arbitrations find their legal basis on the principle of party autonomy and exist without being "anchored" in any particular domestic legal order. This is particularly the case in international arbitration, where the place of the seat (and therefore its *lex arbitri*) has been chosen for its neutrality and that the parties may:

-Choose a procedural law, independent from any domestic legal system;

[45] International Olympic Committee and National Olympic Committees.
[46] McLaren, Richard, H., *The Court of Arbitration for Sport: An Independent Arena for the World's Sports* Disputes" (2000) 35 Val. U. L. Rev. 379 at 381

-Settle on their procedural rules, independent from those of the place of the seat;

-Decide their substantive law (which can be a non-national law).

The legal relation between the place of the seat and the arbitral process, which is taking place in its territory, becomes the more often a matter of convenience since "*most arbitrations are conducted without any reference to the law that governs them*[47]". As a consequence, the only relevant place of control of an international award should be at the place of enforcement, detaching the arbitration from control of the place of the seat. In practice, commercial arbitrations cannot be understood as totally detached from any given legal order since, they rely on domestic legal orders for matters of enforcement and recognition and also in what it relates to support that can be given by the courts at place of the seat[48].

More than a concept of transnational arbitration, delocalized arbitrations can be understood as a feature of commercial arbitration that might be useful in cases of annulment of an award at the place of the seat. A good illustration of this possibility is the Chromalloy[49] award in which an Egyptian court annulled an award made in Cairo in favor of a US corporation and the award was granted recognition and enforcement by the US District Court in Washington, DC. Another example where such a feature might be useful happens when local courts seek to prevent arbitral tribunals from carrying out their duty by issuing anti suit injunctions. This is particularly the case where one of the parties seeks support from a court to delay or stay proceedings (In this case, arbitral tribunals might carry on their mission by delocalizing the arbitration).
Transnational arbitration is also referred, in commercial arbitration literature, as autonomous arbitration [50]. In this perspective, there would exist an autonomous arbitral legal order, independent from any domestic one[51].

[47] Redfern and Hunter inn *International Arbitration*, 5th edition (3.77).
[48] (Interim measures, gathering of evidence).
[49] Chromalloy Aeroservices Inc V Arab Republic of Egypt, 939 FSupp 907 (DCC 1996), (2003) 19 Arab Intl 424, 12 (4) Intl Arb rep B-1.
[50] Fouchard, Gaillard Goldman on *International Commercial Arbitration*, Gaillard and Savage (ed) (1999), 4-57.

b) Autonomous Arbitration

- ***The Lex Sportiva***

The emergence of autonomous private legal orders has not been exclusive to the realm of commercial and financial communities. One of the most proeminent debates around the possibility of the existence of an autonomous legal order has been raised in the domain of "Sports Law" under the designation of *"Lex Sportiva"*. For the analysis presented herein, a summary assessment of the *Lex Sportiva* becomes relevant due to the analogies made between the *Lex Mercatoria* and the former.

The existence of a *Lex Sportiva* as an autonomous legal order remains substance of discussion between scholars[52]. It has even been defended that sports legal system, does not exist as a singular entity but is composed by several distinct "micro" legal systems[53]. This is the present understanding of Thomas Schultz[54], for whom the existence of *leges sportivae* can be ascertained through the existence of legislative, jurisdictional and executionnary competences.

The legislative competence would be demonstrated through the normative activity (e.g. rules, regulations) of the different private institutions (international federations, national sports bodies) within sports communities. The jurisdictional competence would be demonstrated through the submission of the disputes, within the community, to the arbitral dispute resolution mechanisms, which as we saw above, might find in the CAS a *de facto* Supreme Court. The executionnary competence would be inherent to the possibility of the exclusion of an athlete, or even of a national sport association in case of non-compliance or violation of the rules set by the private actors within the community.

As the debate around the existence, or its non-existence, goes on in the scholar field, in practice it seems undeniable that a body of substantive law has emerged in the sports system. Lorenzo

[51]For a convergent view see: (2006) 22 Arbitration International, Julian D.M. Lew QC *Achieving the Dream: Autonomous Arbitration*.
[52] For a convergent view see: A. RIGOZZI, *L'arbitrage international en matière de sport*, Bâle, Helbing & Lichtenhahn, 2005, § 1248:
[53] For a convergent view see Thomas Schultz, *JusLetter* du 20 février 2006.
[54] For a convergent view see Thomas Schultz, *JusLetter* du 20 février 2006.

Casini[55] points out that a *"global sports law" has emerged, which embraces the whole complex of norms produced and implemented by regulatory sporting regimes. It includes not only transnational norms set by the International Olympic Committee (IOC) and by International Federations (IFs) – i.e. "the principles that emerge from the rules and regulations of international sporting federations as a private contractual order" –, but also "hybrid" public-private norms approved by the World Anti-Doping Agency (WADA) and international law (such as the UNESCO Convention against doping in sport). Global sports law is made of norms provided by central sporting institutions (such as IOC, IFs and WADA) and by national sporting bodies (such as National Olympic Committees and National Anti-Doping Organizations).*

This substantive body of law has been increasingly developed through the action of the CAS which behaves as an administrative court, when deciding disputes arising out of Sports institutions decisions, a criminal court, in matters of doping nature, a civil court, in questions of commercial nature and even a constitutional court, when analyzing disputes between institutions at the olympic movement[56].

Due to the activity of the CAS, its influence can be ascertained in the legal fields above enumerated by:

- Developing common legal principles (CAS awards either refer to common legal principles[57] or even create new principles[58] when referring to the so called *principia sportiva*);

- Interpreting sports law and influencing rulemaking (the role of the CAS in the interpretation of Sports Law has become even more structured and important in the last decades through the emergence of a *de facto* rule of precedent[59]);

[55] *"Beyond Dispute: International Judicial Institutions as Law-Makers*" Heidelberg, June 14-15, 2010 *the Making of a Lex sportiva* The Court of Arbitration for Sport "*Der Ernährer*"Lorenzo Casini
[56] The Olympic Movement is constituted of four main elements: the International Olympic Committee, International Sport Federations, national Olympic committees, and Organizing Committees for the Olympic Games. Governments and other public entities cannot be members of the Olympic Movement.
[57] See F. Latty, *La lex sportiva. Recherche sur le droit transnational*, above, p. 320 s.
[58] A complete list of such principles is in F. Latty, *La lex sportiva. Recherche sur le droit transnational.*

- Harmonizing global norms through the appeals procedure (being constituted by two divisions, the Ordinary Arbitration division, who has the task to resolve disputes submitted to ordinary procedure and the Appeals Arbitration Division, who has the task to resolve disputes concerning the decisions of federations, associations or other sports-related bodies, as long as the statutes or regulations of these institutions or a specific agreement provides for, the CAS represents an original system within the realm of arbitration). It shall be noticed that the appeals procedure provided for by the CAS, denotes an opportunity for the latter to review both the facts and the law of the dispute and therefore issue a new decision, which might either replace the challenged decision or annul it and refer the case back to the previous instance[60]. The appeals procedure is available both for international disputes (involving ISF's and national sportbodies or athletes) and for "domestic" disputes as long as an *ad hoc* clause or a specific agreement so determines.

Through this complex system, "*CAS acts like a supreme court playing a significant role in harmonizing global sports law*"[61] both at the transnational level and at the national level.

A final word shall be said regarding the relation between the CAS and national institutions. In the accomplishment of its mission, the CAS may even be called to pronounce itself over public bodies' decisions. This situation has been dealt with in two distinct manners: in Italy, for instance, a specific provision establishes that doping sanctions issued by the national anti-doping tribunal (a public body) can be appealed to the CAS. In other circumstances, the CAS itself has resolved the matter, by simply ignoring the domestic decision[62].

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[59] For a convergent view see *Arbitral Precedent: Dream, Necessity or Excuse?* The 2006 Freshfields Lecture by Gabrielle Kaufmann-Kohler*Arbitration International Vol.23, No. 3 © LCIA, 2007.
[60] R57, *CAS Procedural Rules.*
[61] *"Beyond Dispute: International Judicial Institutions as Law-Makers*" Heidelberg, June 14-15, 2010 THE MAKING OF A *LEX SPORTIVA* The Court of Arbitration for Sport "*Der Ernährer*" Lorenzo Casini page 15.
[62] CAS/A/1149 e CAS/A/1211, *World Anti-Doping Agency (WADA)* v. *Federación Mexicana de Fútbol (FMF) and Mr. José Salvador-Carmona Alvarez*, award of 16 May 2007, citing CAS 96/156, *F.* v. *FINA*, award of 10 November 1997, TAS 98/214, *B.* / *Fédération Internazionale de Judo (FIJ)*, sentence du 17 mars 1999, CAS 2005/A/872, *UCI* v. *Muñoz and Federación Colombiana de Ciclismo*, TAS.

After having reviewed the main principles and ideas of Arbitration within Sports Legal system, through analogy reasoning, analyzing commercial and financial arbitration as an autonomous arbitration, might allow us to bring a shed of light as regards the concept of Transnational Arbitration.

- ***Transnational Arbitration, An Autonomous Legal Order?***

The justification of the existence of an autonomous legal within the commercial and financial legal order is based on the following ideas:

- Commercial's arbitration legal nature is a sui generis one;

- Commercial Arbitration assembles all the characteristics of any legal order;

- The autonomy of this legal order is demonstrated by the fact that an award set aside by a given court can be recognized in another state;

- The arbitral tribunals are not bound by any anti suit injunctions nor even by the "lois de police of a state";

- The applicability of a non-national law, as substantive law of the main contract, also demonstrates its autonomous character;

- The existence of a transnational public legal order that shall be respected in any case.

A few words shall be said regarding the ideas above referred.

Arbitration's legal nature remains an unsettled matter among scholars. Different opinions have been defended but no common ground has been found. Nevertheless, the most important ones

could be understood as being the territorialist thesis, the pluralistic thesis, the autonomous thesis and the contractual thesis.

As for the territoralist or traditional thesis, which has seen, perhaps due to an incorrect understanding of the analysis presented, Mann[63] as one of the most preeminent defendants of such an approach, the concept would consist in the idea that every arbitration is a national arbitration, that is to say, subject to a specific system of law"[64]. It seems nonetheless that this thesis has been abandoned, since its approach was more accurate and adapted to a complete outdated reality. As pointed out by Paulsson[65] "One can understand the territorialist model as a product of attitudes prevailing until the middle of the 20th century. Is simply does not fit the realities of an international society no longer constrained within national units: a world in which moreover national legal systems understand this new flux."

The pluralistic thesis, which finds also in Paulsson[66] one of its most pronounced defenders, is based on the understanding that arbitrations find their legitimacy on a multitude of legal orders that might intervene in the arbitral process. Opponents of the pluralistic thesis, in particular Gaillard, point to the difficult and inconsistency that it would represent to operate in such a vast and unpredictable environment.

It is also Gaillard[67], who is one of the most productive and representative partisans of the autonomous thesis, following which arbitration would find its legitimacy in an autonomous arbitral legal order, separate form any national or domestic legal system. Criticism regarding this approach focuses on its inability to bring any element which was not produced by the pluralistic thesis[68] and in the difficulty of determining the existence of "private" legal orders.

[63] In *Lex Facit Arbitrum*, 1967
[64] Ibid, 159
[65] JAN PAULSSON in Arbitration in three dimensions, ICLQ vol 60, April 2011 pg 296
[66] Ibid, pg 298
[67] For a convergent view see *L'ordre juridique arbitral: Realité, Utilité et specificité* (Conference commemorative John E.C. Brierley) in McGill Law Journal, vol. 55 2010 by Emmanuel Gaillard
[68] For a convergent view see JAN PAULSSON in *Arbitration in three dimensions*, ICLQ vol 60, April 2011 291-323

The "contractual thesis" has been, in particular, defended by Von Mehren[69]. Following this understanding, since arbitration is the result of the expression of the parties intent through contract, its legitimacy is rooted in the autonomy of the parties[70].It shall be noticed that the existence of a principle such as Competence Competence does not leave much room for an extensive analysis of this thesis, the arbitrators having the possibility of determining their competence in case of uncertainty regarding the existence of the arbitral agreement being a severe handicap to the defense of party autonomy has the legitime source of arbitration.

Commercial Arbitration assembles all the characteristics of any legal order [71] . Those characteristics would refer to:

- Its own subjects and institutions (there is an identifiable financial and commercial community which is subject, even though by express consent, to the jurisdiction of arbitral tribunals);

- Completeness (a genuine legal order has the capacity to provide an answer to any legal issue that arises between the parties). While referring to the completeness of the system of arbitral tribunals it is often question of the structure of the *Lex Mercatoria*. As previously noticed, it seems to exist an interrelation between the genesis of the *Lex Mercatoria* and the existence of a separate and autonomous arbitral legal order. Therefore, the methodology developed to identify the rules of Law that would characterize the *Lex Mercatoria* are also applicable to the identification of the rules of the arbitral legal order[72]. As above stated, this methodology could consist in a *functional comparative analysis of the "common core" of domestic legal systems, and on the usages and customs of the international business community as expressed in standard contract forms and general business conditions;*

[69] For a convergent view see VON MEHREN "To What Extent is International Commercial Arbitration Autonomous?" in Etudes Berthold Goldman, 217-227, Paris

[70] This approach has also been defended by Luzzatto, who recognizes the possibility of arbitration finding exclusively its legitimacy in contract as long as there is no interference by state institutions nor contact with its norms (for a convergent view see *Dig.Priv. Comm., Valhi."*Arbitrato commerciale internatzionale"

[71] For a convergent view see *"L'ordre juridique arbitral: Realité, Utilité et specificité*"(Conference commemorative John E.C. Brierley) in McGill Law Journal, vol. 55 2010 by Emmanuel Gaillard

[72] For a convergent view see *L'ordre juridique arbitral: Realité, Utilité et specificité* (Conference commemorative John E.C. Brierley) in McGill Law Journal, vol. 55 2010 by E. Gaillard

-Structured Character. Another specificity of a legal system is its logical interrelation and its hierarchy between the norms that exist in such a system. In this aspect if we would go back to the interrelation between the *Lex Mercatoria* and the idea of an arbitral legal order one can deduct that, as affirmed in the analysis of the *Lex Mercatoria* based on the understanding of Dalhuisen, *"modern Lex Mercatoria is not more incomplete than any domestic law and is thus fully operative as a complete system for those who seek this"*[73].

-The evolving character of the norms of any given legal order is also understood as one of its distinguishing features as opposed to mere "rules of law". Any given genuine legal order is supposed to have the capacity to adapt itself to the evolution of the needs of its community.

The norms developed in the arbitral legal order, be it through case law or due to the action of "private actors" reflect the needs of the parties. The faculty of adapting rules of procedure to any given case, the possibility of the application of substantive rules decided by the parties are only a few examples of this character. Which is more, going back to the idea that the norms of the arbitral legal order derive either from a list or from a method, also represent an example of this character knowing that from the perspective of Berger [74] this list would not be a closed one and could evolve according to the needs identified. In the perspective of Gaillard[75] and Dalhuisen[76], through the methodology approach, those norms would be also updated according to the needs expressed.

It should be noticed that, even though, in arbitration a considerable confidential aspect, which may represent an obstacle to the proliferation and debate of the different solutions provided by arbitrators, is always present, and that arbitrators are not bound by any doctrine of "*precedent"* nor "*stare decisis*[77]", arbitration has developed its own principles (separability of the arbitration

[73] Dalhuisen on *Transational Comparative Commercial Financial and Trade* Law,Vol.I.page 286
[74] See above 27.
[75] See above 30.
[76] See above 32
[77] See above 58.

clause, Competence Competence) according to the needs expressed. From this analysis the evolving character of the norms of an "autonomous arbitral legal order" are undeniable.

- Following a research study[78] 90% of the arbitral awards are spontaneously executed. The main justification of this effective character would consist in the possibility of an exclusion of the community and therefore, the loss of confidence of the other "participants". Accordingly, the issue of its effectiveness becomes irrelevant.

-The autonomy of this legal order is also demonstrated by the fact that an award set aside by a given court can be recognized in another state. As it was previously demonstrated, this is the particularly the case of delocalized commercial arbitrations.

The arbitral tribunals are not bound by any anti suit injunctions nor have a duty *ex officio* to apply mandatory rules of law (to use the french expression les "lois de police"). *"A mandatory rule (loi de police in French) is an imperative provision of law, which must be applied to an international relationship irrespective of the law that governs that relationship"*[79]. The applicability of the mandatory provisions of law derives from their nature, as not being subject to party autonomy. Due to the territoriality principle, these provisions are applicable *per se* to a given subject matter even if the parties of a contractual relationship (i) ignored their existence, and therefore it was not their intent to find their relationship governed by such rules or (ii) expressly derogated the applicability of such provisions.

The question of the applicability of mandatory provisions of law in arbitral tribunals may arise through different circumstances:

i) Do arbitrators have authority to apply mandatory rules of law? (Knowing that arbitrators do not have a Lex Fori)

[78] PriceWaterhouseCoopers et Queen Mary University of London, *«International Arbitration: Corporate Attitudes and Practices 2008* » p. 2, on line: PriceWaterhouseCoopers<http://www.pwc.co.uk/pdf/PwC_International_Arbitration_2008.pdf>.
[79] Pierre Mayer, *'Mandatory Rules of Law in International Arbitration'*, in Arbitration International Volume 2, Number 4 (December 1986), page 275.

ii) Should the arbitrators apply these provisions ex-officio?

iii)Which mandatory rules of law should they apply?

As regards the arbitrators' authority to apply mandatory rules of law, it seems that, presently, the answer would generally be positive. As we shall see further in this analysis, through the expansion of the domain of the "objective arbitrability" disputes involving the applicability of mandatory provisions of law have ceased to be exclusive jurisdiction of domestic courts. Regarding the arbitrators duty to apply mandatory rules of law, it would be more difficult to provide a definitive answer since arbitrators may even not be aware of the existence of such rules and if not invoked directly by the parties, the arbitrator cannot introduce an issue of validity which has not been raised by litigants. Nevertheless, a positive answer shall be admitted if and to the extent that the Lex contractus comprehends the mandatory rule or one of the parties invokes the applicability of the mandatory rule. In the other cases, namely the situation where the mandatory rule is not part of the lex contractus the situations seems to be dealt as follows:

(i) Arbitral tribunals take into account the mandatory provision, without applying it because it is unnecessary to do so[80] or (ii) arbitral tribunals apply exclusively the Lex Contractus[81] or (iii) arbitral tribunals, consider the nature of the mandatory rule and if there "*exists a definite connecting factor between the dispute and the state which promulgated the rule in question, application of the mandatory provision may indeed be appropriate* "[82].

-The applicability of a non-national law, as substantive law, also demonstrates its autonomous character. In International arbitration, it is presently clear that parties enjoy a wide autonomy to submit their contractual relationship to a law or body of rules they deem appropriate, whether this choice consist on a national law or a "non national law" (one could think here about the *Lex*

[80] Pierre Mayer, *'Mandatory Rules of Law in International Arbitration'*, in Arbitration International Volume 2, Number 4 (December 1986) page 281.
[81] Pierre Mayer, *'Mandatory Rules of Law in International Arbitration'*, in Arbitration International Volume 2, Number 4 (December 1986) Page 283.
[82] Pierre Mayer, '*Mandatory Rules of Law in International Arbitration'*, in Arbitration International Volume 2, cit., page 285.

Mercatoria). However, in cases where parties have failed to do so, arbitrators have the obligation to decide on their behalf what law or body of rules should be applied. This decision is therefore a matter of extreme importance for the parties and for the tribunal.

Due to the fact that arbitral tribunals do not have a lex fori, traditional approach based on ascertaining the applicable law through conflict of laws can be problematic. Also, since each state has its own conflict of laws, and knowing that they may differ from one state to another, submitting the determination of the applicable law to a contract, in cases where states would have different conflicts of laws, could result in different laws applying subject only to the difference of the place of the seat. In international arbitration this does not seem an adequate solution. As Redfern and Hunter pointed out *"This has led to the formulation of a doctrine that has found support both in the rules of arbitral institutions and in the practice of international arbitration, namely that, an international arbitral tribunal is not bound to follow the conflict of law rules of the country in which it has its seat"*[83].

Accordingly, Model Law *Article 28* provides the following:

(1) The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. Any designation of the law or legal system of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules.

(2) Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules that it considers applicable.

In this case, the reference to the application of the "Law determined by the conflict of law rules which it considers applicable" seems to exclude the possibility to select any non national body of rules even though arbitral tribunal still have the possibility to decide the "conflict of laws rules" it considers applicable.

[83] Redfern and Hunter on *International Arbitration* (5th edition.3.217).

The same rationale seems to have been adopted in English Arbitration Act 1996, which provides that:

46 (1) the arbitral tribunal shall decide the dispute:

(a) In accordance with the law chosen by the parties as applicable to the substance of the dispute, or

(b) If the parties so agree, in accordance with such other considerations as are agreed by them or determined by the tribunal.

(2) For this purpose the choice of the laws of a country shall be understood to refer to the substantive laws of that country and not its conflict of laws rules.

(3) If or to the extent that there is no such choice or agreement, the tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.

It seems clear that English Arbitration Act followed Model Law's approach in conferring on the one side a wide discretion to the parties in the choice of "non national laws", but limiting the arbitrator's choice to a particular Law (which could a priori exclude any non national law).

As opposed to the understanding of the provisions above, ICC Rules seem to adopt a different approach. Article 17 provides that:
1) The parties shall be free to agree upon the rules of law to be applied by the Arbitral Tribunal to the merits of the dispute. In the absence of any such agreement, the Arbitral Tribunal shall apply the rules of law which it determines to be appropriate.

2) In all cases the Arbitral Tribunal shall take account of the provisions of the contract and the relevant trade usages.

It seems is that the intention of the ICC Rules is to go a step further of what is provided by the Model Law, in explicitly allowing arbitrators to apply "*the Rules of Law which it determines to be appropriate*". Moreover, number 2 of the relevant article also expressly enunciates the possibility of taking into account *"the relevant trade usages"*. This is also the approach followed by French lex arbitri[84] which allows, as regards the merits of the dispute, the arbitral tribunal to settle the dispute by applying the "rules of law" that the parties have chosen or, absent such choice, that the tribunal deems suitable. Tribunal shall also take into account trade usages.

Although some model rules or national lex arbitri seem to "tussle" with the idea of allowing arbitrators to decide a dispute, in case parties did not provide a "lex contractus", at their own initiative based on "non-national laws", for others this does not seem problematic nor unreasonable. Moreover, it seems that by acting in such a way, these legislations demonstrate an increased transnationalisation of international commercial arbitration.

If for purposes of determining applicable law to the subject matter dispute, international arbitration framework and practice seems to be settled, the question is quite different in what it relates to the determination of the law applicable to the arbitration agreement, where the parties have failed to do so. Also it would be interesting to analyze, if and to what extent, could the arbitration agreement be subject to "non national law" either by the initiative of the parties or, where the parties have failed to do so, through the initiative of the arbitrators.

The issue of determining the applicable Law to the arbitration agreement is a consequence of the principle of separability of the arbitration clause. As already discussed, in international commercial arbitration, the arbitration agreement is a separate agreement of the main contract. Therefore, the choice of law clause of the main agreement does not apply to the arbitration agreement, except if the parties expressly agree so. Given that the arbitral tribunal has no *Lex fori*, it cannot rely on pre-established conflict of law rules to determine the applicable law. Since the law applicable to the arbitration agreement, in principle, would not be extended to the main contract and since the arbitrators have no lex fori, what solutions would be available to them?

[84] Art.1511 NCPC

A reasonable assumption would consist in relying in the law of the place of seat. Nevertheless as Berger pointed out "(…) *only very few of these arbitration laws contain specific conflict rules for the determination of the law applicable to the arbitration agreement by the arbitral tribunal. Those conflict rules that deal with this issue are concerned with the determination of the applicable law by the courts in setting aside and enforcement proceedings*[85]*"*. Which is more, since arbitral tribunals have no Lex fori there is no obligation for the arbitral tribunals to determine the applicable law to the arbitration agreement based on conflict of law rules of the place of the seat.

However, as Berger[86] also defends, "(…) *It is fair to say that today, the conflict rule contained in Art. V (1) (a) New York Convention, Art. VI (a) and (b) European Convention, in Arts. 34(2) (a) (i) and 36(1) (a) (i) UNCITRAL Model Law, Sect. 1059(2) 1.a) and 1060(2) German Arbitration Act, Art. 1073 Dutch Arbitration Act, and Sect. 48 Swedish Arbitration Act has developed into a truly transnational conflict rule for the determination of the law governing the substantive validity of the arbitration agreement. This rule has been applied in numerous international arbitral awards, is favored by international arbitral doctrine and has been accepted by domestic courts"*.

Following this rule, and due to the territoriality principle, and also derived from the fact that arbitrators, who would not follow this approach, might end up finding their awards being set aside or annulled by courts either at place of the seat or at the place of the enforcement, in cases where the parties did not expressly mentioned the law applicable to the arbitration agreement, applicability of the law of the seat prevail. A remarkable exception shall be mentioned regarding this conclusion. For French courts, the existence and scope of the arbitration agreement depends only on the parties' discernible common intention. Consequently, under French lex arbitri arbitrators are not bound, for the determination of the law applicable to the arbitration agreement,

[85] Klaus Peter Berger *Re-examining the Arbitration Agreement: Applicable Law – Consensus or Confusion?* From Albert Jan van den Berg (ed), International Arbitration 2006: Back to Basics? ICCA Congress Series 2006 Montreal 13 (Kluwer Law International 2007) page 4.
[86] Berger, page 11.

to any national legal order. This principle has been affirmed by the Cour de Cassation decision "*Dalico*"[87]:

"By virtue of a substantive rule of international arbitration, the arbitration agreement is legally independent of the main contract containing or referring to it, and the existence and effectiveness of the arbitration agreement are to be assessed, subject to the mandatory rules of French law and international public policy, on the basis of the parties' common intention, there being no need to refer to any national law".

It shall be noticed that many authors have criticized this approach. As an example, for Berger this attitude would consist in *an "unnecessary exaggeration of transnationalism"*[88]*,* as regards its implications, in particular the abandonment of a traditional determination of the applicable law through conflict of laws rules, and the possibility of extrapolating the parties will. It shall nonetheless be noticed that, in our opinion, there is no legal obstacle to this approach. The conflict rule derived from the New York Convention[89], which we can also find in the Model Law[90], establishes that:

An arbitral award may be set aside by the court only if: The said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the State (where the award was made). This provision does not establish that the award shall be made according to a particular national law to be recognized has valid by the law of the seat, nor that arbitrators shall decide, if the parties did not provide for a specific law of the arbitration agreement, on any national given law.

The French example provides us with a gateway to the transnationalization of the arbitration agreement that, in our view shall not be neglected. Also, It shall not be forgotten that international arbitration is becoming more and more independent from domestic legal systems

[87] Municipalité de Khoms El Mergeb c/Ste Dalico, Cass.Civ. 1ere, 20 December 1993, Rev arb, 1994, 116.
[88] Berger, page 7.
[89] Art. V (1)(a).
[90] Arts. 34(2)(a)(i) and 36(1)(a)(i).

and that the relation between the place of the seat and the arbitral process is becoming more and more a question of convenience, rather than a question of legal determination.

C. In Summary

A few conclusions can be drawn up from the reasonings above. In first place, the concept of transnational arbitration can be understood as the detachment of the arbitral process from any particular domestic legal order. This is demonstrated by the growing autonomy of commercial arbitration as regards municipal laws and state intervention but also through the emergence of a genuine body of substantive law, namely the *Lex Mercatoria*.

In second place, when compared with arbitration for investment or sport disputes, commercial arbitration seems to be acquiring more and more the features and characteristics of those dispute mechanisms. Therefore, by analogy and if the transnational character of those dispute resolution mechanisms would be acceptable in their realm, as autonomous, commercial arbitration might also be understood as a transnational concept.

Understanding commercial arbitration, as a transnational concept, shall also be analyzed within the reformulation of the legal process, happening at the global level. The State is not anymore at the center of the legal process, they are part of a "globalweb" which for some authors could imply the development of a genuine process of "Legal pluralism[91]". Based on the new framing of the legal process, in our perception, it would be unwise to identify and compare the emergence of new legal orders (e.g. the Lex Sportiva, the Lex Mercatoria) on legal philosophical concepts which were developed under a complete outdated legal reality. The understanding of the legal process in our era shall be opened to new legal theories which could reflect and explain, from a different perspective, the emergence of such new legal orders[92].

[91] For a convergent view see CLPE Research Paper 01/2010 Vol. 06 No. 01 (2010), Peer Zumbansen *Transnational Legal Pluralism*.

[92] For an interesting analysis see Teubner, Gunther, *"„Global Bukowina": Legal Pluralism in the World Society"*, in Gunther Teubner (ed.) Global Law Without a State (Bookfield, Vermont: Dartmouth Publishing, 1997).

Having analyzed so far, essentially from a legal-philosophical point of view, the existence of commercial arbitration as part of a conceptual autonomous legal order, our intention is to demonstrate that, in practice, the development and establishment of this different understanding of the arbitral practice is a process which has already began. This process of transnationalisation of comercial arbitration can be identified through the ever growing scope of arbitration, under the concept of "Arbitrability", the emergence of transnational principles of commercial arbitration and the harmonization of those transnational principles. Some authors went even further and identified in this process the genesis of a Transnational Law of Arbitration[93].

IV. The Transnationalization of Commercial Arbitration

A. The Expanding Scope of Transnational Arbitration.

A remarkable explanation for the emergence of the *Lex Sportiva,* as an autonomous legal order, lies in the relative low intervention of the State within the normative process. State courts have, historically, always been reluctant to intervene in sports disputes. The main reasons seem to be their lack of expertise, the fact that disputes regarding sports bodies' decisions are often related to "field-of play-decisions", and not rules of law, and also the genuine transnational nature of international sports law (based on contract).

Obviously, in the commercial and financial sphere, the arguments for the autonomy above referred could not explain its transnational character. Nevertheless, a different phenomenon is taking place by which jurisdiction of arbitral tribunal is being expanded [94] towards some "traditionally" national state courts domain, under the concept of *"Arbitrability"*.

[93] For a convergent view see Luis de Lima Pinheiro in Arbitragem Transnacional "*A determinação do estatuto da arbitragem"* Edições Almedina 2005.

[94] The expansion above referred in the domain of commercial, financial arbitration is taking place with the consentment of national authorities (national courts) which, in our perspective shall be commented as follows:

- There is an explicit authorization of national courts as regards arbitral tribunals to exercise their jurisdiction in certain matters which previously where the exclusive competence of national courts, thereby a certain degree of confidence is being accorded to those tribunals;

- ***Objective Arbitrability***

General understanding is that arbitrability relates only to the subject matter arbitrability, the "objective arbitrability". Consequently, the objective arbitrability is determined according to national laws, in particular by such laws that cannot be derogated by party autonomy, in other words the mandatory rules of law (to use the french expression " *Les Lois de Police*").
If the question of arbitrability arises at the enforcement or recognition stage, national courts shall pronounce themselves on the issue. Accordingly, the New York Convention[95] establishes that:

iv) Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

v) The subject matter of the difference is not capable of settlement by arbitration under the law of that country.

The same rationale can be found in the Model Law[96] which provides that:

Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only: If the court finds that the subject matter of the dispute is not capable of settlement by arbitration under the law of this State.

The Model Law, as the New York Convention, both explicitly refer that the determination of the concept of Arbitrability depends only on national court's interpretation. The arbitrability issue resolves the conflict between party autonomy and public order. As a result, the concept of arbitrability is a national one and relates to the question of which subject matter might be referred to arbitration by the parties (rights that are at the free disposition of the parties and

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- As opposed to the attitude of private institutions in Sports law ,which by their own initiative ignore the domestic decisions, in the commercial and financial sphere the national authorities expressly allow arbitral tribunals to exercise their jurisdiction over the subject matter.

[95] Article V (2).
[96] Article 36 (1)(b)(i).

subject to the principle of party autonomy) and which cannot, and are therefore subject to the exclusive competence of national courts. "*Modern arbitration laws contain substantive rules of private law that govern the subject matter arbitrability of claims that are in dispute in arbitrations which have their seat in that jurisdiction* [97] *(e.g. Art.177 Swiss statute on Private International Law, Sect 1(1) Swedish Arbitration Act).*

The determination of objective arbitrability, due to its intrinsic connection with public order, arises mainly in disputes related with bribery and corruption, patents, trademarks and copyrights, insolvency, fraud, natural ressources, competition laws and antitrust. As regards the matters above, what is interesting to notice is the acknowledgement and, in some circumstances it wouldn't be too farfetched to say, encouragement of national courts towards the arbitrability of disputes related to the subject matters so referred. The Mitsubishi[98] case represents a perfect illustration of the trend towards the expansion of subject matter arbitrability, in the competition and antitrust field.

In the case above referred, the Japanese automobile manufacturer (Mitsubishi) had granted to Soler the exclusive rights to distribute its vehicles in Puerto Rico, an Island under United States sovereignty. The parties' agreement proscribed Soler from reselling outside Puerto Rico, particularly in the continental United States. Soler, finding himself unable to sell all the units for which it had contracted, wanted to circumvent this prohibition. Mitsubishi responded by seeking arbitration under the rules of the Japanese Arbitration association before three Japanese arbitrators sitting in Tokyo.Soler upheld that the clause forbidding resale outside Puerto rico violated the Sherman Act, and filed an action in US federal court requesting a ruling that the dispute was not arbitrable, and that the US federal courts alone were competent to decide disputes involving issues of anti-trust. The Us First Circuit Court of Appeals, upholding in this respect the US District court for the District of Puerto Rico, held that the arbitrators should not take place. In its view, arbitrators, who are usually recruited from the business community, should not be allowed to resolve disputes that may have an impact on the public interest, especially with respect to vital interests such as those embodied in the antitrust laws.

[97] Berger, page 3.
[98] Mitsubishi Motors Corp v Soler Chrysler Plymouth Inc, 473 Us 105 S ct 3346 (1985).

The Supreme Court reversed this decision by a five to three majority declaring first of all that it was convinced that the parties and the institution they had selected to organize the arbitration would choose competent, conscientious, and impartial arbitrators and second that due to the fact that the allegation of a violation of the Sherman Act would be raised before them, the arbitrators should rule on it. Even if they owe, as the Supreme Court noted, no prior allegiance to the legal norms of particular States, they at least have the duty to carry out the mission with which the parties have entrusted them. The dispute was thus referred to arbitration. This decision by the US Supreme Court represents a considerable turning point in what it relates to question of arbitrability. As stated by Berger[99] "*The significance of this problem is substantially reduced due to the worldwide trend in favor of arbitrability which has begun with the Mitsubishi decision of the US Supreme Court"*.

In Europe, the expansion of the objective arbitrability in favor of arbitral tribunals took place at the EU level, mainly through the influence of the European Court of Justice. In particular the decision *Eco Swiss China Time Ltd vs. Benetton International NV*[100] where the ECJ ruled, in the context of a challenge to an award that gave effect to a license agreement that was alleged to violate Article 81 of the EU Treaty that:

"A national court to which application is made for annulment of an arbitration award must grant that application if it considers that the award in question is in fact contrary to Article 81 EC, where its domestic rules of procedure require it to grant an application for annulment founded on failure to observe national rules of public policy".

Another field that has assisted to the expansion of Arbitral tribunal's jurisdiction was in securities transactions, particularly in the United States. In 1953 the US Supreme Court decided that disputes under the securities act were not arbitrable[101]. Nevertheless, in 1974[102] the court decided however, that those disputes were arbitrable in international commercial arbitration, by

[99] Berger, page 3
[100] Case C- 126/79 (1999) XXIV Ybk Comm Arb 629.
[101] Wilko V Swan 346 US 427 (1953).
[102] Scherko v alberto-cuvler (417 Us 506 (1974).

affirming that "*a parochial refusal by the courts of one country to enforce an international arbitration agreement would damage the fabric of international commerce and trade and imperil the willingness and ability of businessmen to enter into international commercial agreements*" further decisions confirmed this position by the US court.

The expanding scope of arbitrability might be understood as the expression of the autonomous character of arbitration towards domestic legal orders, even if, as we saw, in many cases this expansion is being assisted and conducted by national courts. Along with the expansion of the objective notion of arbitrability, its subjective understanding [103] implied in international arbitration practice the emergence of a transnational general principle which, in our understanding, is another characteristic of the transnational nature of commercial arbitration.

B. The Emergence of Transnational Principles of Commercial Arbitration.

- ***Subjective Arbitrability***

As opposed to the Objective Arbitrability, which is determined by national law or state courts, the Subjective Arbitrability is submitted to a different analysis in commercial arbitration. The justification of this different approach, lies in the fact that a party's capacity to enter into a contract is generally determined according to the conflict of law rules that shall be applicable by a given jurisdiction. Therefore, different jurisdictions would provide different connecting factors to determine the party's capacity to arbitrate.

In International commercial arbitration differences between party's nationality, place of business, domicile or residence, or place of incorporation are rarely relevant[104], "*the general conflict rule for the determination of the law governing the substantive validity of the arbitration agreement*[105]" shall not apply to the issue of whether a party was authorized to enter into an

[103] Subjective Arbitrability which relates to party's capacity to enter into arbitration agreements and to represent other parties.
[104] For a convergent view see Berger, page 19.
[105] Berger, page 19

arbitration agreement.[106]" As Berger [107] referred, "*Indeed, this approach reflects a general conflict rule which is accepted both in international commercial arbitration and in general conflicts doctrine".*

The development of transnational principles of law, which are accepted as general principles of international arbitration practice, confirm this re-interpretation of the subjective arbitrability. Article 177(2) Swiss Private International Law Statute provides us a perfect illustration in determining that: "If a party to the arbitration agreement is a state or an enterprise or organization controlled by it, it cannot rely on its own law in order to contest its capacity to be a party to an arbitration or the arbitrability of a dispute covered by the arbitration agreement. It shall be noticed that as regards the application of the provision of law above stated, in what it relates to State Party's capacity to enter into arbitration agreements article 177(2) Swiss Private International Law would supersede any general rule regarding parties' capacity to enter into an arbitration agreement. This approach is not a particularity of the Swiss legislation.

As above demonstrated, the transnational character of international arbitration can also be found in general principles which arise from arbitration practice and are presently recognized in main modern arbitration laws. This is the case of the principles of separability of the arbitration clause and Competence Competence. Due to their inherent function, which is to "(…) *prevent premature judicial intervention from obstructing the arbitration process*[108]" they contribute to insulate arbitral process from state intervention.

- ***The Doctrine of Separability of the Arbitration Clause***

In international commercial arbitration, the arbitral clause is a separate contract from the main contract in which it is embodied. Therefore it survives nullity and termination of the main contract and still allows for the arbitral tribunal, to pronounce itself and to accomplish its mission.

[106] Sect (48) Swedish Arbitration Act:
[107]Berger, page 19.
[108] The Jurisdiction of the Arbitral tribunal: A Transnational analysis of the negative effect of competence O SUSLER MqJBL (2009) Vol 6 page 119.

Accordingly, Model Law in its article 16 (1) stipulates that:

For that purpose, an arbitration clause that forms part of a contract shall be treated as an agreement independent of the other terms within the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

The same rationale can be found in French Decree N.2011-48 portant réforme de l'arbitrage of 13 January 2011[109]. As a matter of fact, the doctrine of separability of the arbitration clause in France has been admitted since 1963[110]. The English Arbitration Act of 1996 also recognizes this doctrine[111]. Even though the terminology employed by the different legislations may differ, French Decree refers to an i*ndependence* from any " ineficacité" while Model Law stipulates that this independence covers cases where the main contract might be "null and void" and English Arbitration Act extends the scope of separability to main contracts that are invalid, have not come into existence or have become ineffective, having therefore a different scope as regards the separability doctrine, they all recognize this principle of international commercial arbitration.

- ***Principle Of Competence Competence***

"Competence Competence is defined as *the conferral of inherent power on the tribunal to determine whether it has jurisdiction to hear the dispute and subsequently on the existence of the main contract".*[112]

Competence Competence is the corollary of the principle of separability of the arbitration clause from the main contract. Through the operation of these two principles arbitral tribunals determine their jurisdiction regarding a given subject matter before, except in certain given circumstances, any state court intervention. As with the doctrine of separability of the arbitration clause, modern arbitration laws contain provisions which allow arbitral tribunals to rule on their

[109] Arts. 1520 and 1525.
[110] Civ.1re, May 7, 1963, RCDIP 1963 page 615.
[111] Art. 16(1).
[112] Jean François Poudret et al. C*omparative Law of International Arbitration* 2nd ed, 2007.

own jurisdiction and therefore "*rule that an arbitration agreement is invalid and to issue an award that it lacks jurisdiction without contradicting itself*"[113].

French *Decree N.2011-48 portant réforme de l'arbitrage of 13 January 2011(Art*. 1448) contains such a provision. Also, Model Law Articles 8(1), 8(2), 16(1) and 16(3) in particular are relevant to *competence-competence.* Article 7(b) of Swiss Federal Statute on Private International Law also deals with such a principle.

Competence Competence in international arbitration is also relevant due to its "double effect". The positive effect which is to allow arbitral tribunals to rule on their own jurisdiction but also a "negative effect" which determines the conditions that must be met for courts to rule on the jurisdiction of an arbitral tribunal. Following the understanding above, article 7(b) of Switzerland's Federal Statute on Private International Law provides that:

"If the parties have concluded an arbitration agreement with respect to an arbitrable dispute, the Swiss court before which the action is brought shall decline its jurisdiction unless:

b. The court finds that the arbitration agreement is null and void, inoperative or incapable of being performed".

In the French approach, Article 1458 NCPC provides that: If a dispute pending before an arbitral tribunal on the basis of an arbitration agreement is brought before a State court, it shall declare itself incompetent. If the dispute is not yet before an arbitral tribunal, the State court shall also declare itself incompetent, unless the arbitration agreement is manifestly null and void. In neither case may the State court declare itself incompetent at its own motion.

It is not difficult to see a considerable difference in the provisions above considered, the French provision requiring for a much higher threshold for the courts to intervene. This is the

[113] The Jurisdiction of the Arbitral tribunal: *A Transnational analysis of the negative effect of competence* O SUSLER MqJBL (2009) Vol 6 page 126

understanding of the French Cour de Cassation which stated [114] that the manifest nullity of the arbitration agreement could be '*the only barrier to the principle that establishes priority of arbitral competence to rule on the existence, the validity and the scope of the arbitration agreement*".

A quite different approach has been adopted by English 1996 Arbitration act[115] which provides that: in matters governed by this Part the court should not intervene except as provided by this Part' and Section 9(4) provides that 'On an application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed.

The examples above demonstrate that modern arbitration laws reflect the principle of competence competence and it is only by variation of terminology that its effects may diverge. Competence Competence stands for another transnational principle of commercial arbitration.

A reasonable deduction from the analysis herein contained, lead us to conclude that the transnational character of international arbitration derives also from general principles that are being developed and confer a wider autonomy to arbitral tribunals. Those principles relate not only to the arbitral process in itself, by "insulating" it from premature court intervention, but also from the development of more general rules of law which depart from traditional approaches (in particular traditional conflicts rules).

The transnational character of commercial arbitration can also be found in the increased harmonization of domestic legislation. This process can be identified in the emergence of principles such as separability of the arbitration clause and competence competence, but also, which is quite remarkable, at the procedural level.

[114] *American Bureau of Shipping (ABS) vs. Copropriété Maritime Jules Verne, (*2001) Cour de Cassation Chambres Civiles.
[115] Section 1(c).

C. The Transnationalization of Commercial Arbitration at the Procedural Level

In commercial arbitration, the determination of the relevant procedural law governing the arbitration can be ascertained through two distinct approaches. The first one would allow the procedural law to be determined according to the party's intention. It would be justified by the strong autonomy, which is given to the parties as a characteristic of the arbitral process. The choice of law governing the arbitration would therefore encompass the applicable procedural law without regards to the place of arbitration (the subjective approach).

A different alternative (the objective approach) would result from a more jurisdictional or territorial approach. In this case, the choice of the seat or place of arbitration, due to the territoriality principle, would determine the procedural law applicable to the arbitration. This is the approach adopted by the Model Law[116] and some of the most influent arbitration laws[117]. Chapter 12 of the Swiss Private International Law Act of 1987 applies "if the seat of the arbitration is in Switzerland." Wording of similar effect can be found in the English[118], and Swedish Acts [119] for example.

Even though it seems that the "objective" or territorial approach prevails, as regards determination of the procedural law, in reality modern arbitration laws essentially limit themselves to require that principles of "due process" are respected by parties and arbitral tribunals. As Gabrielle Kaufmann-Kohler points out *" The term "due process" refers to a number of notions with varying names under different national laws, including natural justice, procedural fairness, the right or opportunity to be heard, the so-called principe de la contradiction and equal treatment*[120]. This attitude is followed by the French *Decree N.2011-48 portant réforme de l'arbitrage of 13 January 2011*[121].

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[116] Article 1(2).
[117] For a convergent view see Arbitragem Transnacional, *a determinação do estatuto da arbitragem,* by Luis de Lima Pinheiro page. 223 and s.
[118] Arbitration Act, 1996, §§ 2(1), 3 (Eng.).
[119] Swedish Arbitration Act, 1999, art. 46.
[120] Globalization of Arbitral Procedure Gabrielle Kaufmann-Kohler, Vanderbilt Journal of transnational Law (vol 36:1313, page 1321)
[121] Art. 1509.

Remarkably, it is from the wide autonomy given to the parties and to the framing of the procedure applicable to the arbitration, which also derives from national arbitrations laws that the transnationalisation of the procedure in commercial arbitration arises. Fouchard[122], already in 1965 pointed out to the emergence and development of a Law of international commercial arbitration that was created by the international community. In the same perspective, Von Mehren[123] refers to procedural "anational" rules and autonomous conflict rules.

The transnationalisation of the procedural rules in commercial arbitration is essentially the consequence of two converging factors: the rules of private arbitral institutions and the harmonization of the lex arbitri.

For *Luis de Lima Pinheiro[124],* the rules developed by those private arbitral institutions, find their legal nature in the transnational sphere [125]being therefore transnational in their essence. Which is more, they develop autonomously from any state intervention and are only limited due to the necessary interaction with domestic legal orders. Accordingly, some of the rules developed by such institutions have become standards of transnational arbitration so that arbitrators have a duty to comply with them.

Also, the harmonization of domestic lex arbitri has a transnationalisation function. As above explained, modern lex arbitri essentially limit their intervention in the arbitral process, as regards procedural rules, by requiring that some, fundamental principles, are respected by any arbitral process. Through this operation, those fundamental principles "due process" are incorporated in the transnational arbitration since failing to comply with them, would offer the possibility to challenge such award.

[122] 1965:41.
[123] 1982:220 .
[124] Arbitragem Transnacional*, a determinação do estatuto da arbitragem*, by Luis de Lima Pinheiro page 445.
[125] One of the arguments of authors who defend the *Lex Mercatoria* as an autonomous legal order or identify an arbitral legal order is based on the existence of a transnational sphere which would transcend domestic legal orders. This transnational sphere results from the transnational activity of commercial operators and domestic legal orders attitude towards such activity, in particular its non intervention. Commercial operators would therefore be given wide autonomy to regulate their activities in this transnational sphere.

D. In Summary

Arbitration is undoubtedly "*the principal method of resolving disputes between States, individuals, and corporations in almost every aspect of international trade, commerce and investment*"[126]. This fact justifies that presently, the scope of arbitrable matters is being expanded towards some more traditionally reserved State court's Jurisdiction. On the other hand, the development of Arbitration implies two separate but intrinsically connected phenomenon's:

-The convergence of techniques and rules of arbitrators and private institutions[127];

-The emergence of transnational principles of Arbitration.

[126] See above 2.
[127] For a convergent view see Graving, Richard J. "The International Commercial Arbitration Institutions: How Good A Job Are They Doing?" American University International Law Review. 4, no. 2 (1989): 319-376.

Conclusion

Transnational arbitration is just not only the best way forward, in commercial arbitration, but it is the only way forward. This idea encompasses different perspectives. As regards its legal sources, arbitration is genuinely transnational. Nevertheless, the "transnationalisation" of commercial arbitration reflects two distinct realities which represent current trends and the evolution of commercial arbitration. The first one being, the development of transnational principles and rules (e.g. principle of competence competence but also procedural rules that have been developed by Arbitral Institutions) and the second one, the convergence of modern arbitration laws (this is particularly the case regarding procedural rules, as above demonstrated) .

The concept of transnational arbitration also leads us to question the role of the "Pierre angulaire" of arbitration, the New York Convention, and particularly the fact that such instrument, might be outdated nowadays since it was drafted in a state centered social, legal and economic environment. In our opinion, the revision of such a document, in a transnational perspective might reveal itself as being appropriate.

A particular attention shall be given to the discussion of the existence of an arbitral legal order. To the extent that such a legal order might exist, and in our understanding this legal order would exist under the concept of the *New Lex Mercatoria,* it shall not be assumed that this legal order would be autonomous as regards domestic legal orders. Domestic legal orders, in commercial arbitration, still have an important role to play even if such a role shall be more of a supportive nature than an interventionist nature. An interesting example of such a perspective has been given by French Institutions attitude and their supporting position in the recognition of transnational arbitration.

Finally, it is also our opinion that the "creation" of a "supreme court" for arbitral disputes, as it exists in Sports Legal System, could represent an interesting approach in arbitration. As we saw, such an instrument could bring coherence and structure to the body of rules and norms which are

being developed in the commercial sphere and therefore its role in the development of the New Lex Mercatoria, as a legal order, could turn out to reveal itself as crucial.

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ABREVIATIONS

BIT- Bilateral Investment Treaty

CAS- Court of Arbitration for Sport

CENTRAL - Center for Transnational Law

CLPE - Comparative Research in Law & Political Economy

European Convention of 1961- European Convention on International Commercial Arbitration of 1961 Done at Geneva, April 21, 1961 United Nations, Treaty Series, vol. 484, p. 364 No. 7041

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IBA - International Bar Association

ICC - International Chamber of Commerce

ICSID - International Center for Settlement of Investment Disputes

ITA - Institute of transnational Arbitration

IOC - International Olympic Committee

ISF - International Sports Federations

INCOTERMS - International Commercial Terms

NCPC - Nouveau Code de Procedure Civile

Panama Convention- Inter-American Convention on international commercial arbitration, 1975

UNCITRAL - United Nations Commission on International Trade Law

UNIDROIT - International Institute for the Unification of Private Law

Model Law - UNCITRAL Model Law

UNESCO - United Nations Educational, Scientific and Cultural Organization

New York Convention - United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958.

Washington Convention of 1969 - Convention On The Settlement Of Investment Disputes Between States And Nationals Of Other States

WADA - World Anti Doping Agency