The Confluence of Transnational Rules and National Directives as the Legal Framework of Transnational Arbitration (updated version)

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SUMMARY

KEYWORDS: TRANSNATIONAL ARBITRATION/INTERNATIONAL COMMERCIAL ARBITRATION/LAW APPLICABLE TO THE ARBITRATION/AUTONOMY OF THE PARTIES IN ARBITRATION/MANDATORY RULES IN ARBITRATION/SOURCES OF ARBITRATION LAW/STATE CONTROL OF ARBITRATION/STATE REGULATION OF ARBITRATION/TRANSNATIONAL LAW OF ARBITRATION/LEGAL FOUNDATION OF TRANSNATIONAL ARBITRATION

INTRODUCTION

I. Transnational arbitration is, in a *broad sense*, every arbitration that gives rise to problems of determination of its legal framework ([1]). By legal framework of arbitration it is understood the set of standards (rules and principles) primarily applicable by an arbitral tribunal. The legal framework of the arbitration comprises the standards applicable to all the issues, either procedural or substantive, of the arbitration process, namely the validity of the arbitration agreement, the constitution, jurisdiction and operation of the arbitral tribunal, the determination of the substantive applicable law and the prerequisites of the arbitral award.

1 - I have in view exclusively the voluntary arbitration, method of jurisdictional dispute resolution in which, based upon the parties will, the decision is entrusted to a third party. To this purpose, a third party is a private person distinct from any of the disputing parties and that does not act on his behalf. For a convergent view, see JARROSSON [1987: 367 et seq., *maxime* 372 e 2001: 19 et seq.], PIERRE LALIVE/GAILLARD [1989: 911 et seq.], and LALIVE/POUDRET/REYMOND [1989: 271].

These standards can be either "substantive" (material) or "conflictual", i.e., they may either directly regulate the arbitration or refer that regulation to another normative body ([2]).

For example, Art. 52(1) and (2) of the Portuguese Arbitration Act (LAV) contains the choice of law rule on the determination of the law applicable to merits in the arbitrations in which interests of the international business are at stake (transnational arbitration in narrow sense – Art. 49(1) LAV). Most of the statutory rules applicable to transnational arbitration, however, are "substantive" (material) rules that directly regulate all the transnational arbitrations that fall under their scope of application.

Arbitration gives rise to problems of determination of its legal framework whenever the *disputed relationship* or the *arbitration itself* has relevant legal connections to more than one country. Thus, the arbitration will be deemed transnational, first of all, where the dispute arises from a transnational relationship, i.e., a relationship that gives rise to a choice of law problem ([3]).Where the relationship is domestic, the arbitration will still be deemed transnational if the procedure has a legal relevant connection with more than one country, mainly when the arbitration is held in another country.

Domestic arbitration is the opposite of transnational arbitration. Domestic arbitration is wholly contained in the interior of a national legal order and, therefore, the legal framework of domestic arbitration is defined entirely by such a national legal order ([4]). Domestic arbitration does not give rise to problems of determination of its legal framework.

Public courts are genetically and organically linked to a country ([5]): they are created by the law of a country and are part of its political organization. The law of this country defines their legal framework and establishes their *lex fori.* The standards that form this framework are applied by professional judges, who are subject to a public law code of rules.

Tribunals of domestic arbitration are not created by the law of the country where they are seated, nor are generally envisaged as State authorities either, but they are wholly contained in the social sphere of that country and, therefore, they are wholly submitted to the law of that country ([6]).

Transnational arbitral tribunals are in a different position: besides not being created by the law of a country nor being part of its political organization, they 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 ([7]).

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2 - For the distinction between substantive rules and choice of law rules see LIMA PINHEIRO [2014 § 2 B], with more references.

3 - On the notion of transnational relationship, see LIMA PINHEIRO [2014: § 1 B].

4 - Without excluding, however, the operation of infranational autonomous sources of law. See also GOLDMAN [1963: 374 et seq.].

5 - In a federal State, the federal courts are linked to the union and the State courts are linked to the respective State of the union.

6 - See also OPPETIT [1998: 84 et seq.].

7 - This is the largely prevailing opinion in the arbitration case law – cf., namely, *ad hoc* in the case *BP* v. *Libya* (1973) [*ILR* 53 (1979) 297], VII/1, and ICC no 1512 [*Clunet* (1974) 904 with approving annotation of DERAINS] – and among the authors – cf. BALLADORE PALLIERI [1935: 302 et seq. and 340]; KLEIN [1955: 205 et seq.]; BATIFFOL [1957: 111, 1973a: 325 et seq. and 1973b: 26]; CURRIE [1963: 785]; FOUCHARD [1965: 366 and 378 et seq.]; GENTINETTA [1973: 74 et seq.]; DEBY-GÉRARD [1973: 199 et seq.]; PIERRE LALIVE [1976: 159 et seq., 1977: 156 and 305 et seq. and 1991: 44]; EISEMANN [1977]; SCHNITZER [1977: 298 et seq.]; JULIAN LEW [1978: 535] apparently

The fact that transnational arbitrations are held in the territory of given countries is not irrelevant but has a limited significance. The place where an arbitration takes place is determined by the parties or, in their omission, by the arbitrator frequently upon considerations of convenience and opportunity. Often the choice falls upon a "neutral" country, which has no connection with the disputed relationship. Furthermore, in some cases an arbitration is conducted in more than one country and, in principle, it is even possible an arbitration by correspondence, by videoconference, or otherwise online, in which the parties or the arbitrators never actually meet in a given place.

By denying that the transnational arbitral tribunals have a *lex fori* which, *a priori*, may define their legal framework, I do not dispute that the countries with a significant relationship with the arbitration hold concurrent jurisdiction to regulate as well as to control the arbitration.

Transnational arbitration is in further contact with standards that are formed in the community of international trade operators and may be faced with claims of applicability of supranational standards (either international or from a regional community).

Therefore, transnational arbitration unavoidably gives rise to *problems of determination of its legal framework*.

II. In the course of transnational arbitration, or in connection therein, it is necessary to determine the law applicable to certain issues, *maxime* to the aspects of the *arbitration agreement* that are not directly regulated and to the *merits of the dispute*.

Either the arbitrators or, in given circumstances, the public courts in the exercise of their functions of assistance and of control of the arbitration or at the stage of enforcement of the arbitral award may be faced with issues related to the formation, validity, effects and interpretation of the arbitration agreement. Many of these issues are regulated directly through substantive rules or principles ([8]). Where, however, this does

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approved in this point by LAGARDE [1981: 220]; VON MEHREN [1982: 222-223 e 226-227]; LOQUIN [1983: 298]; JACQUET [1983: 113]; MAYER [1982: 214 and 1992: 276]; DERAINS [1984: 75]; FERRER CORREIA [1984/1985: 27 et seq. and 1989: 204 et seq.]; FUMAGALLI [1985: 467]; DROBNIG [1987: 98-99 and 106]; BASEDOW [1987: 16]; CHRISTIAN VON BAR/MANKOWSKI [2003: 84] keeping the opinion defended in the previous edition; BUCHER [1987: 214 and 1996: 48 et seq.]; RIGAUX [1988: 310]; LIPSTEIN [1988: 177]; SCHLOSSER [1989: 162 et seq.]; LALIVE/POUDRET/REYMOND [1989: 395 et seq.]; BONELL [1993 n.º 3]; BATIFFOL/LAGARDE [1983: 577-578]; STEIN [1995: 71 et seq. and 122 et seq.]; FOUCHARD/GAILLARD/GOLDMAN [1996: 654]; BENEDETTELLI [1997: 913]; LIMA PINHEIRO [1998: 572 et seq.]; RECHSTEINER [2001: 92]; OPPETIT [1998: 30 e 85]; BERNARDINI [2000: 198], GRIGERA NAÓN [2001: 221 et seq.]; BERGER [2001: 41]; RUBINO-SAMMARTANO [2006: 561 and 1103]; FERNÁNDEZ ROZAS [2002: 46], although defending that the arbitration is always linked to the law of the country where it seats. See further BENTO SOARES/MOURA RAMOS [1986: 386] and BOTELHO DA SILVA [2004: 15 et seq.]. This doctrine was adopted by the Geneva Convention on the International Commercial Arbitration (1961) – Art. 7(1) –, by the UNCITRAL Model Law (Art. 28(2)) and by the Arbitration Rules of CCI (Arts.15 and 17), AAA (Arts. 16 and 28 of the International Arbitration Rules) and LCIA (Arts. 14, 22.3 and 22.4). Also the US Supreme Court, in the judgment rendered in the case *Mitsubishi Motors* (1985) [473 *U.S.* 614], held that "*the international arbitral tribunal owes no prior allegiance to the legal norms of particular states*", and the French Cassation, in the judgment rendered in the case *Putrabali* (2007) [*R. arb.* (2007) 508], held that "la sentence international, qui n'est rattachée à aucun ordre juridique étatique, est une décision de justice internationale dont la régularité este examinée au regard des règles applicables dans le pays où sa reconnaissance et son exécution sont demandées". See also JUENGER [1990: 214] and VON MEHREN/JIMÉNEZ DE ARÉCHAGA [1989a: 107 et seq.]. The contrary view is sustained by some of the supporters of the seat theory (*infra* III. A) – see, namely, MANN [1967: 160].

8 - See LIMA PINHEIRO [2005 §§ 7 and 8, 21-23].

not occur, and unless the arbitration agreement is merely a domestic one, it becomes necessary to choose the applicable law.

In order to decide the dispute that is subject to arbitration, transnational arbitral tribunals have first to choose the law (or the non-normative criteria of decision) applicable.

The problem of the determination of the legal framework of arbitration arises autonomously in a logically previous moment in relation to the choice of the law applicable to the arbitration agreement and to the merits. In fact, the conflict standards (rules and principles) that shall be used in the choice of the applicable law belong to the legal framework of the arbitration. Before choosing the law applicable to these issues, it is necessary to determine the conflict standards that guide that choice.

III. The problem of determination of the legal framework of the arbitration is not the object of a *unitary approach* in many works devoted to the transnational arbitration. Frequently, this problem is let us say diluted in the chapter on the law applicable to the arbitration agreement, the "law governing the procedure" and the law applicable to the merits of the dispute. This approach shall not be approved, due to several reasons.

Firstly, this approach leads to confusion between the moment of the determination of the relevant conflict law and the moment of the choice of the applicable substantive law (which is the result of the operation of that conflict law). It would be otherwise if the arbitrators were not bound by any conflict standards in the choice of the "substantive" (material) applicable law. Nevertheless, this is not my understanding ([9]).

Secondly, according to the main national systems, as well as before the standards developed by the arbitration case law and by rules of arbitration centers, there is no place for a choice of the "law governing the procedure". The national and transnational sources delegate to the parties and, in their omission, to the arbitrators, the shaping of the governing procedural rules within the limits drawn by a few fundamental principles ([10]). To embrace, under such a formula, the whole problem of determination of the legal framework of the arbitration is misleading, because there are rules and principles at stake other than procedural and because, as I will try to demonstrate later (*infra* III A), this problem cannot be solved through the choice of a law based upon a multilateral choice of law rule ([11]).

Lastly, the problem of the determination of the legal framework of the arbitration is common not only to these aspects but also to others (such as, for example, the prerequisites of the arbitral award) and shall be envisaged from a unitary point of view, since the ideas and the criteria put forward to deal with it are, in principle, applicable to all of its aspects.

From the point of view adopted in the present article, the determination of the legal framework of transnational arbitration requires the consideration of certain national directives emanated from the countries that hold jurisdiction to regulate the arbitration. The legal framework of arbitration is formed by legal standards and, therefore, are the normative directives which are at stake here.

This feature of the determination of the arbitration's legal framework displays some parallel with the subject of relevance of judgments rendered by public courts to the transnational arbitral tribunals, namely the binding of the arbitral tribunals by the *res judicata* formed by judgments and by injunctions pursuing the prevention, suspension or cessation of the arbitration process. The present article does not deal with this

9 - See LIMA PINHEIRO [2005 §§ 21 e 25].

10 - See LIMA PINHEIRO [2005 § 24] and Art. 30 LAV.

11 - I.e., a choice of law rule that may refer either to the law of the forum or to a foreign law.

subject, which does not concern the determination of the legal framework of the arbitration. The same shall be said regarding the less frequent case of public administrative acts concerning the arbitration.

IV. The determination of the legal framework of the transnational arbitration is marked by an irreducible relativism. The determination of the legal standards that shall be applied by the arbitral tribunal may be envisaged from the point of view of each one of the national legal orders that have a significant relationship with the arbitration, from the point of view of a Transnational Law of Arbitration (shaped by standards which are formed independently from the action of national and supranational authorities) and, still, from the perspective of the arbitral tribunal itself.

The global comprehension of the issues related to the determination of the legal framework of the arbitration demands a reflection from the different perspectives that correspond to the national legal orders with a significant relationship with the arbitration, to the Arbitration Transnational Law and to the arbitral tribunal ([12]). The attempts to solve the problem in absolute and universally valid terms frequently resemble the attempt to square the circle.

Thus, the present essay is organized around three axes: national regulation of arbitration (I), transnational regulation of arbitration (II) and determination of the legal framework of the arbitration by the arbitrators (III). It shall be stressed that the point of view of the arbitral tribunal is the most important for this essay, since it is from this point of view the most complex and pressing issues on the determination of the legal framework of the arbitration arise. For this reason the III Part, dealing with the determination of the legal framework of the arbitration by the arbitrators, has a conclusive character, converging in it the elements gathered in the two first parts.

The present essay summarizes the points of view advanced in my book "Arbitragem Transnacional – A Determinação do Estatuto da Arbitragem" ([13]).

I. NATIONAL REGULATION OF TRANSNATIONAL ARBITRATION

A) Sources and methods of national regulation of arbitration

In the main national legal orders the arbitration is regulated by supranational, national, infranational and transnational sources.

The *supranational sources* are essentially *international conventions*, which may be of universal or of regional scope.

The main international convention of *universal scope* is the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958). More than 140 countries are parties, including the most influential in the field of arbitration. The

12 - On the spatial scope of application of the LAV, see SANTOS JÚNIOR [2012: 61 et seq.]

The relativism, which postulates the recognition of a plurality of points of view equally relevant, and the pluralism, which demands the participation of a plurality of subjects in the scientific knowledge and in the obtaining of solutions for the social problems are by KAUFMANN [1997: 297 et seq.] raised to basic concepts of the Philosophy of Law in the modern democratic societies. This does not prevent that, by definition, there are a core of values and moral standards of behavior shared by the great majority of the members of a given society which are required by the social intercourse – see also MURPHY/COLEMAN [1990: 94 et seq,] and RAWLS [1993: 15 et seq., 37 et seq. and 141 et seq.]. It must be recognized that the rightness or justice of the prevailing conceptions, based upon ideological standings and political beliefs, may be discussed and is subject to evolution. But the social conscience of the values in a given historical moment, taking into account not only the transitory majorities, but also the acquired heritage of fundamental values and principles, the trend of evolution, may justify suprapositive limits to the laws enacted by the political power – see also MENEZES CORDEIRO [2012: 492 et seq.].

13 - Editora Almedina, Coimbra, 2005.

Convention regulates only the recognition of the arbitration agreement and the recognition and enforcement of foreign arbitral awards.

It shall be emphasized that, according to the best understanding, this Convention obliges the Contracting States to recognize "foreign" arbitral awards even where the arbitration has not been organized under a national legal order and even where the arbitrators have not applied national law to the merits of the dispute ([14]). It is so, unless the award has been set aside or suspended in the country in which, or under the law of which, it was made (Art. 5/e).

Among the conventions of *regional scope* shall be mentioned the European Convention on International Commercial Arbitration (Geneva, 1961), the Inter-American Convention on International Commercial Arbitration (Panama, 1975), the *Acordo sobre Arbitragem Comercial Internacional do Mercosul* (Buenos Aires, 1998) and the twin agreement among the *Mercosul*, Bolivia and Chile (Buenos Aires, 1998) ([15]).

The *European Convention* results from the work carried out by the European Commission for Europe of the United Nations (ECE/UN) and had originally in view to further the arbitration in East-West relations ([16]). As parties to the Convention are admitted the member countries of the ECE/UN as well as the countries admitted to the Commission in an advisory capacity. Presently, 31 countries are parties to the Convention, including Germany, France and Italy. The Convention systematically regulates the arbitration, with exception of the recognition and enforcement of foreign decisions (albeit limiting the grounds for the annulment of the award in a Contracting State which allow the refusal of recognition and enforcement in another Contracting State). A working group of the ECE/UN is studying the possibility of revision of the Convention.

The *Inter-American Convention on International Commercial Arbitration* has been approved in the first Inter-American Specialized Conference of Private International Law, held in Panama, in 1975. The Convention has been ratified by the majority of American countries, including the USA and Brazil, although it has been said that its practical meaning is limited ([17]).

The Inter-American Convention regulates the recognition of the arbitration agreement; delegates to the arbitration parties the regulation of the constitution and operation of the arbitral tribunal, referring, in their omission, to the rules of procedure of the Inter-American Commercial Arbitration Commission (IACAC) ([18]); provides for the legal force of the arbitral award and regulates the recognition and enforcement of the "foreign" awards in terms similar to the New York Convention.

At the level of *national sources* it has been acknowledged that since the nineteen sixties there has been a strong harmonizing tendency, furthered by the international conventions that have just been mentioned and by the Model Law on International Commercial Arbitration adopted by UNCITRAL in 1985 and amended in 2006 ([19]). The United Nations General Assembly, meeting on 11 December 1985, recommended to all

14 - See LIMA PINHEIRO [2005 § 30], with more references.

15 - See ZANETTI [2002: 637 et seq.] and FERNÁNDEZ ARROYO (org.) [2003: 217 et seq.].

16 - See KLEIN [1962: 624].

17 - Cf. SAMTLEBEN [1980: 266 et seq.].

18 - The "rules of procedure" of the IACAC are based, since 1978, in the UNCITRAL Arbitration Rules, adopted by the Resolution no. 31/98, of the United Nations General Assembly (1976) – see MONTOYA ALBERTI [1999: 83 et seq.]. The version of the IACAC Rules presently in force has been adopted in 2000 – see Adriana POLANIA – "Inter-American Commercial Arbitration Commission", *Yb. Comm. Arb.* 27 (2002) 331.

19 - See SANDERS [1995].

the Member States that they have this model in mind in the elaboration or revision of their arbitration statutes. This Model Law inspired, until October 2010, the statutes of 97 States and territories, and, among them, the statutes of Australia, Canada, Germany, Greece, Hong-Kong, Ireland, Japan, Macao, the Russian Federation, Scotland, Spain and some US States ([20]).

We are thus witnessing a *process of globalization* of basic notions, techniques and fundamental principles of transnational arbitration. Already in 1992 BLESSING stressed that while in the fifties an arbitration held in London was substantially different from one held in New York, Tokyo, Paris or Zurich, it was possible to assert that, at the time, the basic parameters have become similar if not, to a large extent, almost identical ([21]). Notwithstanding, the same author pointed out a certain deviation of developing or semi-developing countries in relation to some of these basic parameters ([22]). In the following years, globalization has moved forward, relying upon a change of attitude from many of these countries.

In the main national systems, the most important *national source* is the statutes.

Most of these systems have recent ([23]) or relatively recent ([24]) statutes on voluntary arbitration. A few of these systems, however, have older statutes ([25]).

Although the English and US legal orders, as members of the *Common Law* family, adopt the system of *stare decisis* (binding precedent), thus assigning a specially important role to court decisions as a source of law, it is a fact that statutes are today the main national source of Arbitration Law. This does not prevent the case law of national courts from playing an important role not only in matters that are not governed by the arbitration acts but also within the scope of these acts.

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 the social sphere of a country: infranational sources are contained within this sphere, transnational sources go beyond this sphere.

The custom based upon arbitration case law and the rules of the arbitration centers are the main transnational sources of Arbitration Law ([26]). In fact, the rules created by these processes are recognized as binding standards of conduct in the arbitration circles or within the scope of the arbitration center that has enacted them and are applicable by the arbitral tribunals independently from the point of view taken by a singular national legal order ([27]). Transnational arbitral tribunals even apply primarily standards from transnational source.

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20 - See http://www.uncitral.org.

21 - 81-82 and 88.

22 - 82 et seq.

23 - Namely "English" Arbitration Act of 1996; Brazilian Arbitration Act from 1996; Arts. 1025-1062 German Civil Procedure Code, with the redaction given in 1997; Arts. 806-840 of the Italian Civil Procedure Code, with the redaction given in 2006; Arts. 1442-1527 of the French Civil Procedure Code, with the redaction given in 2011, the Portuguese Arbitration Act of 2011.

24 - Namely Arts. 1, 7 and 176-194 of the Switzerland Federal Act of Private International Law of 1987, with minor modifications of 2005 and 2006.

25 - Namely, in the US, the *Federal Arbitration Act* of 1925, with amendments of 1970 and 1990.

26 - The recognition of these transnational sources is due, in first place, to FOUCHARD [1965: 41 et seq.]. See also FOUCHARD/GAILLARD/GOLDMAN [1996: 169 et seq.].

27 - See, for example, ICC no 8938 (1996) [*Yb. Comm. Arb*. 24 (1999) 174], in which it was clearly held that the provision of the ICC Arbitration Rules at stake is an "independent rule of International Arbitration Law".

These sources operate mainly on an autonomous plane in relation to the national legal orders, embodying a Transnational Law of Arbitration (*infra* II. A). Nonetheless, it shall not be excluded that legal national orders may give relevance to these sources and that, consequently, the rules thereby created may be applied by national courts when dealing with arbitration issues. This is particularly obvious in respect to the rules of arbitration centers: in the decision of many arbitration issues the national courts must take into consideration the rules of the center chosen by the parties.

The rules of arbitration centers are sources of contractual provisions since, through a suitable reference made by the parties, their rules may be incorporated in the arbitration agreement ([28]).

Furthermore, the rules of arbitration centers are sources of law too ([29]). The provisions therein contained are characterized by the generality, inasmuch as their addressees are indeterminable at the time of the adoption of the rules. These addressees are not only the arbitrators but also the parties themselves. These rules are applied by the arbitral tribunal that operates within the scope of the respective center independently from a reference made in the arbitration agreement. Their applicability results automatically from the submission of the dispute to the respective arbitration center. Therefore, they are not a mere model of regulation that only binds through an incorporation in the arbitration agreement or in other agreement concluded between the parties, between the parties and the arbitrators or between the arbitrators and the entity which administrates the arbitration center ([30]).

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.

Among many rules of arbitration mention shall be made of the Arbitration Rules of the *International Chamber of Commerce* (ICC, 2012), the Rules of the *London Court of International Arbitration* (LCIA, 2014), the International Arbitration Rules of the *American Arbitration Association* (AAA, 2014), included in the International Dispute Resolution Procedures, and the Arbitration Rules of the *World Intellectual Property Organization* (WIPO, 2014). A further mention shall be made of the UNCITRAL Arbitration Rules (2010), that are adopted in many *ad hoc* arbitrations ([31]).

B) Forms of national control of arbitration

The national control of arbitration is the necessary counterpart for the concession of jurisdictional effects to the arbitral award ([32]).

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28 - See MAYER [1989: 389] and BERGER [1993: 485 et seq.].

29 - For a convergent view, see MARRELLA [2003: 579 and 722 et seq.]. VON HOFFMANN [1976: 4], BÖCKSTIEGEL [1982: 706], and BERGER [1993: 488-489] hold the contrary opinion.

30 - According to one understanding, the submission to autonomous provisions, namely the acceptation of the articles of association by the new members, would have always a contractual character – see MEYER-CORDING [1971: 75, 97 et seq., and 131 et seq.]. This understanding, however, is challenged by other authors: FLUME [1983: 315 et seq.] sustains that the binding force of the articles of association to the new members derives from the quality of member, not from an autonomous act of "submission". In any case, neither the delimitation of the addressees within the personal scope of the institution nor the possible contractual source of the provisions excludes its characterization as legal rules – cf. MEYER-CORDING [1971: 83 et seq. and 97 et seq.].

31 - The adoption of these rules by agreement of the parties of international contracts has been recommended by a resolution of the United Nations General Assembly adopted on 15 December 1976.

32 - In general, on the national control of arbitration, see DEBY-GÉRARD [1973: 199 et seq.], DASSER [1989: 299 et seq.], GOTTWALD [1987: 59], and PARK [1997: 156 et seq.].

In effect, in the present stage of the organization of the international community, in which there is no international court with jurisdiction to control the transnational arbitration, the national legal orders are only willing to assign jurisdictional effects to a decision rendered by private persons under the condition of being allowed to exercise some control over the arbitration or, at least, over the jurisdictional effects of the award ([33]). This control is mainly designed to assure that the jurisdiction of the arbitrators is based upon a valid arbitration agreement, that a few fundamental principles regarding the procedure are respected and that the decision is compatible with some fundamental standards of the forum legal order.

Before the main systems this control is made mainly at three stages:

- at the stage of court reviewing of the "national" arbitral award;
- at the stage of ordering the enforcement of the "national" arbitral award;
- at the stage of recognition of the "foreign" arbitral award.

The clearly prevailing tendency to abolish the need of a recognition procedure or of homologation of "national" arbitral awards is to a larger extent justified by the policy of promoting the arbitration and avoiding additional costs and delays. This tendency gives rise, however, to two questions.

On the one hand, it could be asked if the criterion adopted for the distinction between "national" and "foreign" awards is functionally appropriate to the difference of treatment arising therefrom ([34]).

On the other hand, arbitral tribunals are not national authorities and, therefore, the awards they render are always decisions external to the national legal order. In light of this, it seems that whenever the arbitral award is invoked before a national court a control of the conformity of the arbitration with some fundamental standards should be possible. The generality of the systems establishes this control in what concerns the enforcement of the arbitral award. It would be conceivable that this control also took place where the *res judicata* effect of the "national" arbitral award is raised incidentally in a suit brought in a national court.

The methods of national control of the arbitration in the main national systems are largely based upon the model established by the New York Convention. According to this Convention, the national control of arbitration is assured by a primary jurisdiction – the jurisdiction from the country in which, or under the law of which, the award was made –, and a secondary jurisdiction – the jurisdiction from the recognition country ([35]).

The primary jurisdiction has the power of reviewing the "national" arbitral award (in principle under the request of one of the parties) and the secondary jurisdiction is in charge of the recognition of the "foreign" arbitral award. The setting aside of the award in the primary jurisdiction deprives the award of effects both in the forum country and in all the countries that do not recognize awards nullified by the primary jurisdiction. The control exercised by the secondary jurisdiction is confined to effects of the award in the legal order of the recognition country.

Nevertheless, the Convention does not exclude that the Contracting States, based upon their domestic law, recognize awards nullified in the country of origin ([36]). Some national courts have taken advantage of this possibility.

According to a more radical proposal, the court reviewing should even be abolished ([37]). The arbitral awards might no longer be set aside in the country of origin and would

33 - See also PETER BEHRENS [1993: 15 et seq.] and BERNARDINI [2000: 7].

34 - On this topic, see LIMA PINHEIRO [2005 §§ 35-36 and §§ 29 et seq.].

35 - See REISMAN [1992: 113-114].

36 - See LIMA PINHEIRO [2005 § 30], with more references.

37 - See FOUCHARD [1997: 351 et seq.] and GIRSBERBER [1999: 255 e 260].

only be subject to national control in the country where their recognition or enforcement was sought ([38]).

In favor of the control of the arbitral award in the country of origin, however, there is a decisive reason: the losing party shall be entitled to see the validity of the award ruled definitively in a sole national jurisdiction ([39]). Otherwise, the party who has obtained a favorable award may attempt to recognize and enforce an award successively in several countries, compelling the other party to comply with a flawed award or to bear the costs of an opposition to the enforcement in all these countries. The legitimate interest of the losing party in a definitive judicial ruling on the validity of the award is reinforced by the risk of incurring serious "social" sanctions for non-compliance which do not depend on the intervention of a court ([40]).

C) Main models of national regulation and control of arbitration

The position taken by a national legal order regarding the regulation and control of arbitration may correspond to four main models: a non-recognition system, a non-intervention system, an assimilation system and a framework system.

The *non-recognition system* is opposed to all the other systems which are founded on the principle of recognition of arbitration as a method of jurisdictional dispute resolution. This system denies the procedural effect of the arbitration agreement and the jurisdictional effects of the arbitral award.

This system was to some extent adopted by the "socialist" countries which did not allow the arbitration or only allowed it in external relations ([41]). Thus, until 1987, in the countries of Eastern Europe, arbitration was only allowed in respect of disputes arising from "private relationships" between legal persons from different countries in matters of international trade or of other international economic, scientific or technological relationships ([42]). These arbitrations were carried out by permanent arbitral tribunals which operated in the frame of the Chambers of External Commerce of these countries ([43]).

The reconversion of these "socialist" countries in market economies has generally been joined by an evolution in the direction of acceptance of the arbitration and of adoption of a framework system ([44]).

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38 - This solution has been enacted in Belgium (Art. 1717 (4) of the *Code judiciaire*), in 1985, regarding the arbitrations between parties without a personal link with Belgium, but partially waived in 1998 – Art. 1717 (4) of the *Code judiciaire* only allows that parties without a personal link with Belgium waive the resort to an annulment action by agreement. This last solution is inspired by Art. 192 of the Switzerland Federal Act of Private International Law – see HORSMANS [1997: 500 et seq.]. See, more recently, Art. 1522 of the French Civil Procedure Code, with the redaction given in 2011.

39 - See VAN DEN BERG [1981: 355-356], PARK [1983: 30-31, 1999: 818-819 and 2001: 599-600], REMIRO BROTÓNS [1984: 236-237], REISMAN [1992: 117], POUDRET [2000: 775 et seq.], GOODE [2000: 262], and POUDRET/BESSON [2002: 904-905 and 963-964].

Since this primary jurisdiction is founded, in first line, in the interest of the parties, it shall be honored, in its determination, the parties will – see also REISMAN [1992: 117]. This points in the direction of the primary jurisdiction being , in principle, the country of the *conventional seat of the arbitration* fixed by the parties or, in their omission, by the arbitrators, even if the proceedings are held in another country – see LIMA PINHEIRO [2005 § 35].

40 - See LIMA PINHEIRO [2005 Introduction I]. Exceptionally, it shall be allowed the recognition of decisions nullified in the country of origin, when the annulment in the country of origin is contrary to the public policy of the recognition country.

41 - Cf. RENÉ DAVID [1987: 113 et seq.].

42 - See SANDERS [1996 no. 61].

43 - See SANDERS [1996 nos. 61 et seq.].

44 - See SANDERS [1996 no. 65].

As *systems of recognition* of the arbitration, the non-intervention system and the assimilation system represent opposite poles in the national regulation and control of arbitration.

A national legal order which adopts the *non-intervention system* declines to define or even outline the legal framework of the arbitration, confining itself to the definition of the conditions under which the arbitration agreement may exclude the judgment of the case by a court and the arbitral award may produce its effects as a jurisdictional act in the domestic sphere.

Close to this non-intervention system are those legal orders that exclude the court reviewing of awards rendered in arbitrations that are conducted within its sphere, as well as, although more loosely, those that allow the waiving of the annulment action by agreement of the parties. I have previously stated the reasons why I do not advocate this solution (*supra* I. B).

In the opposite extreme, a legal order that follows the *assimilation system* puts the legal framework of arbitration and of national courts as far as possible on the same footing. The jurisdiction of the arbitral tribunal still depends on the conclusion of an arbitration agreement, but the national order endeavors to systematically regulate the organization of the tribunal and the arbitration process; and, in principle, the national order directs the arbitral tribunal to determine the law governing the merits of the dispute according to the conflicts law applicable by the national courts.

The traditional attitude in some systems favored a certain assimilation of arbitral tribunals seated in the territory of one country with its courts. An expression of this attitude could be found, for instance, in the understanding that the arbitral tribunals should apply the general conflicts law in force in the legal order of this country. This was the conception that prevailed in the resolution approved by the *International Law Institute* in its sessions of Amsterdam, 1957, and Neuchâtel, 1959 ([45]). It was also, basically, the position of the English law regarding the tribunals seated in English territory, notwithstanding the possibility of choice by the parties of the national law applicable to the arbitration agreement, as well as to the arbitral procedure, based upon the English choice of law rules ([46]). Nonetheless, the evolution operated by the "English" Acts of 1979 and 1996 has clearly led to a framework system.

Among the main motives for resorting to arbitration is the search for a justice that is quick and appropriate to the case. The interest for the arbitration as an alternative method of dispute resolution would be greatly impaired if the arbitral tribunals were subject to the same procedural rules (and in the transnational arbitration, to the same conflicts law) than the national courts ([47]).

Considering that the transnational arbitration is subject to concurrent jurisdictions of regulation and control of a plurality of countries, the national regulation, even if endeavoring to honor the specificity of the arbitration, is a potential source of conflict of national directives and of other difficulties for the operation of the arbitration ([48]).

By respecting a wide sphere of action of the parties and the arbitrators, the countries allow them to formulate the solutions most appropriate to the nature and circumstances of the case and ease the development of transnational rules based upon the arbitration case law and rules of the arbitration centers.

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45 - For a convergent view, see the reports of SAUSER-HALL.

46 - Cf. MANN [1967: 160 et seq., 1968: 363-364 and 1984: 197-198], *Dicey & Morris* [12.ª ed., 574 et seq.] and REDFERN/HUNTER/SMITH [2nd ed., 75 et seq. and 91 et seq.]. See, for a critical view, PIERRE LALIVE [1977: 305 et seq.].

47 - See VON MEHREN [1982: 220 et seq.].

48 - See also the considerations of STEIN [1995: 76 et seq.].

Therefore, the countries shall not seek the systematic regulation of transnational arbitration according to an ideal and technically perfect model; the guiding ideas of their normative action shall rather be the definition of the best possible framework for the autonomy of the parties and the arbitrators, and the respect for the operation of the transnational arbitration rules within certain basic limits that they cannot give up.

We are thus led to a *framework system*, which represents a compromise between the aforementioned extreme positions. According to this system, the legal framework of the arbitration is outlined by the arbitration law in force in the internal order, which delegates to the parties and to the arbitrators the determination of the greater part of the rules that will shape this legal framework.

The main national legal orders have adopted this system. The Geneva Convention from 1961 and UNCITRAL Model Law have given a substantial contribution to the wide acceptance of this framework system.

The framework system honors the specificity and the autonomy of the transnational arbitration, without giving up some fundamental requirements of procedural justice, the establishment of some rules that are normally important for the good operation of the arbitration and of the general criteria on the determination of the law applicable to the merits.

II. TRANSNATIONAL REGULATION OF TRANSNATIONAL ARBITRATION

A) Concept, legal force and sources of the Transnational Law of Arbitration

By *Transnational Law of Arbitration* it is understood the set of standards (rules and principles) applicable by the arbitral tribunal and that are formed independently from the action of national and supranational authorities.

It has been previously mentioned that transnational arbitration, although not immunized before the jurisdiction to prescribe of the countries that have a significant relationship with the arbitration, enjoys a large autonomy in relation to the singular national legal orders. This autonomy allows that its legal framework be in first line defined by transnational law ([49]).

The existence of a Transnational Law of Arbitration was pointed out, already in 1965, by FOUCHARD, who refers to the birth and development of a "law of the practitioners of international commercial arbitration", created by "international community of merchants" ([50]).VON MEHREN advocates also resorting to "anational" procedural rules and autonomous choice of law rules ([51]). The possibility of the formation of autonomous standards is recognized by other authors in what concerns this second aspect ([52]). The aforementioned (*supra* I. A) globalization of basic notions,

49 - See STEIN [1995: 94-95] and LIMA PINHEIRO [1998 § 11 C].

50 - 1965: 41. See also FOUCHARD/GAILLARD/GOLDMAN [1996: 169 et seq.]. Compare DASSER [1989: 70-71] and POUDRET/BESSON [2002: 100].

51 - 1982: 220 et seq.

52 - See GOLDMAN [1963: 366, 380 et seq. and 415 et seq.], HELLWIG [1984: 421], LOUSSOUARN/BREDIN [1969: 43-44], DERAINS [1972: 99 et seq.], VON MEHREN [1982: 224 et seq.], PIERRE LALIVE [1982], and BUCHER [1987: 214 et seq.]. As emphasized by STEIN [1995: 142 et seq.], in what concerns the determination of the applicable law one shall not expect the development of an autonomous conflict system based on fast choice of law rules, since the prevailing tendencies shown in the arbitration case law, in the cases where the parties did not provide on the applicable law, point otherwise; nonetheless, this does not mean the impossibility of development of standards on the determination of the law most appropriated to the case. See further the references made by ISABEL VAZ [1990: 166, footnote 228 and 205-206], and by MARQUES DOS SANTOS [1991: 685 e 689-690].

techniques and fundamental principles of the arbitration favors considerably this development.

The processes generally recognized in the arbitration circles as suitable for the creation of legal standards applicable to the transnational arbitration are *custom* and *regulation by arbitration centers*.

When speaking of custom, I have mainly in mind the *custom based upon arbitration case law*, which results from the integration in the legal conscience of the arbitration circles of solutions developed by a uniform and steady arbitration case law. Transnational Law of Arbitration is a favorable ground for the development of custom based upon arbitration case law, thanks to the self-limitation that characterizes the national and supranational regulation of arbitration, to the arbitral tribunal non-submission to a singular national legal order and to the fact that normally the parties do not define the applicable procedural rules ([53]).

The reasons why the *rules of arbitration centers* shall be deemed sources of law were aforementioned (*supra* I. A).

The transnational arbitral tribunals apply, primarily, standards from transnational sources. Certainly, the binding effect of Transnational Law of Arbitration is limited by the need of taking into consideration some directives emanated from the countries that have a significant relationship with the arbitration or in whose courts the enforcement of the award may be sought. Notwithstanding, as far as possible, arbitrators shall honor the claim for applicability of Transnational Law of Arbitration standards ([54]).

Having in mind this set of sources it becomes clear that the *institutional arbitration* is on quite a different footing from the *ad hoc arbitration* in what concerns the transnational regulation. The institutional arbitration is systematically regulated by the rules of arbitration center and, consequently, is subject to a developed set of transnational rules ([55]), while the autonomous standards that are part of the legal framework of *ad hoc* tribunals are essentially from customary arbitration law, are in limited number and, in most cases, display a high degree of indetermination.

The inventory of the standards of customary law of transnational arbitration is still to be done. It seems unquestionable that in transnational arbitration the arbitrators regard themselves as bound by some rules and principles concerning the validity of the arbitration agreement, the parties freedom to choose the law applicable to the merits of the dispute and the relevance of trade usages ([56]).

Furthermore, some fundamental procedural principles shall be deemed part of Transnational Law of Arbitration, which are common to a large majority of national

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53 - See also SMIT [1997: 110].

54 - For a convergent view, see GOLDMAN [1963: 363 et seq. and 413 and 1964: 189], FOUCHARD [1965: 378 et seq.], LOUSSOUARN/ BREDIN [1969: 43-44], DERAINS [1972: 99 et seq.], VON MEHREN [1982: 224 et seq.], PIERRE LALIVE [1982], BUCHER [1987: 214 et seq.], and STEIN [1995: 84 et seq.]. See still the references made by ISABEL VAZ [1990: 166, footnote 228 e 205 et seq.], MARQUES DOS SANTOS [1991: 685 e 689 et seq.], BERGER [1993: 544 et seq.], SCHWARTZ *in Transnational Rules in International Commercial Arbitration*, *ICC Institute of International Business Law and Practice*, Paris, 1993, 59, and GAILLARD [1995: 15-16].

55 - The point has been already pointed out by FOUCHARD [1965: 303 et seq.].

56 - See LIMA PINHEIRO [2005 §§ 44 et seq.]. The *CENTRAL's Transnational Law Digest & Bibliography (TLDB)* [*in tldb.uni-koeln.de/TLDB.html*], with more references to case law and literature, suggests that already are part of the Arbitration Transnational Law many rules governing the arbitral procedure.

systems, such as the "adversary principle" and the "equality of the parties principle" (due process) ([57]).

The development of the Transnational Law of Arbitration is also desirable from a *legal policy* point of view ([58]).

First of all, the rules of Transnational Law of Arbitration are created in the arbitration *milieu*; this assures their appropriation to the specificity of transnational arbitration.

As international uniform rules, they offer the best possible solution, at the present stage of the organization of the international community, to the regulation problems of transnational arbitration.

The legal force of these rules does not prevent the applicability of mandatory rules of national law, insofar as this legal force does not interfere, in principle, with the duty to take into consideration some national directives (*infra* III. B).

Lastly, the requirement of conformity with general principles of law and fundamental principles accepted in the international community assures that the arbitrators and the parties are not bound by solutions contrary to the internationally prevailing concepts of justice.

B) Legal foundation of transnational arbitration

With the recognition of a Transnational Law of Arbitration autonomous in relation to national legal orders one has still not answered the question about the legal foundation of transnational arbitration, i.e., the source of the jurisdiction of the arbitral tribunal, of the legal effects of procedural acts done by the arbitrators and the parties and of the jurisdictional effects of the arbitral award.

According to the traditional view, which still prevails in Common Law systems and in Germany, every arbitration has its roots in a legal order, which is its *base legal order* [*ordre juridique de base*], to employ an expression that has arisen in the context of the State contracts ([59]). As well as the arbitration of International Law (mainly between States and/or international organizations) is rooted in the international legal order, every domestic or transnational arbitration would be rooted in a national legal order ([60]). The legal framework of every transnational arbitration would be defined by a national legal order – the "law of arbitration" –, which would be the foundation [*Grundnorm*] of the effects of the arbitration agreement and of the arbitral award ([61]).

In this context, a reference may be made to the often-cited metaphor formulated by RAAPE: the "arbitral tribunal is not on a throne over the Earth, does not soar in the air, it shall in any place land, in any place be ´connected to the ground`" ([62]).

This doctrine denies the existence of an autonomous legal order of the international trade in which the transnational arbitration may be founded, and alleges that, albeit the

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57 - Cf. GOLDMAN [*in Colloque de Bâle sur la loi régissant les obligations contractuelles* (cit.), 1983: 193] and PIERRE LALIVE [1986 nos. 47 et seq.].

58 - Compare POUDRET/BESSON [2002: 100] and SMIT [1997: 97].

59 - See LIMA PINHEIRO [1998 § 15 B and 1999].

60 - See, namely, SAUSER-HALL [1952: 531], RAAPE [1961: 557], MANN [1967: 159 et seq.], VON HOFFMANN [1970: 110], MÜNZBERG [1970: 37 and 63-64], NAGEL [1978: 50-51], SMIT [1997: 95 et seq.], SCHWAB/WALTER [2005: 360-361], *Redfern and Hunter on International Arbitration* [2009: 173 et seq., *maxime* 191], SCHLOSSER [1989: 143 and 163 et seq.], SANDERS [1999: 248], SANDROCK [2001: 685], BERNARDINI [2000: 8-9 and 31-32], and GOODE [2000: 256-257].

61 - For this view, see POUDRET/BESSON [2002: 83].

62 - 1961: 557. In the German original, which I have translated freely, "*Das Schiedsgericht thront nicht über der Erde, es schwebt nicht in der Luft, es muß irgendwo landen, irgendwo ´erden*`".

arbitration is grounded in the parties autonomy, this autonomy is not an original legal power, but derived from a delegation or permission of the national legal order.

It is further argued that any transnational arbitration, either domestic or transnational, may occasion the intervention of national courts, either at the stage of court reviewing of the arbitral award or at the stage of its recognition.

Nonetheless, from the fact that arbitration is subject to national jurisdictions to prescribe and to adjudicate does not result necessarily that it is founded in a national legal order.

Three main theories are advocated as an alternative to this traditional view:

- the legal foundation of transnational arbitration is based exclusively on the parties' autonomy;

- transnational arbitration has legal foundation on the whole of national legal orders in which the award may produce effects;

- transnational arbitration is founded on a Transnational Law autonomous in relation to national legal orders.

Let us examine summarily each one of these views.

The theory that founds transnational arbitration exclusively on the parties' autonomy, exercised in the arbitration agreement, is mainly supported in French legal literature, but is echoed in other circles ([63]). This theory presupposes that party autonomy is an original source of legal effects, i.e., that it produces legal effects independently from the operation of rules or principles of law ([64]).

The issue is quite controversial ([65]). In my opinion, party autonomy could only produce legal effects directly, without the mediation of law, if private persons were holders of an "original" or "constitutional" legal power, in the sense of a source of law which is not, itself, regulated by law. It seems to me equivocal to speak of an "autonomous order" in respect of the contractual regulation. A legal order is a normative structure of a society ([66]). A contractual relationship, even if multi-party, cannot be a society in the sociological sense and, correlatively, it is not conceivable a legal order formed exclusively by contractual provisions ([67]).

By denying that contractual parties form a society governed by its own law, it is further denied the chance of envisaging the contract conclusion as the exercise of a "constitutional" power ([68]). Consequently, it is the law that assigns legal effects to the contract ([69]). Since there is still no world society governed by a global legal system, the legal relevance of a contract has to be based upon a national, supranational or transnational law.

In the context of transnational arbitration, I believe that the jurisdiction of the arbitral tribunal and the legal effects of procedural acts and of the arbitral award have to

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63 - See an embryonic form of this view in HOLLEAUX [1956: 179] and CARABIBER [1961: 180], and the development made by VON MEHREN [1982: 215-216], MAYER [1982], and LUZZATTO [1987 nos. 2 and 3].

64 - See MÜNZBERG [1970: 136].

65 - See references in LIMA PINHEIRO [2005 § 43].

66 - Or, in other words, a subsystem of the global social system.

67 - For a convergent view, see CURTI GIALDINO [1972: 796-797].

68 - In any case it would be impossible to derive the legal force of an act from the regulation in itself established.

69 - See arbitral awards in the cases *Aramco* (*ad hoc*, 1958) [*ILR* 27: 117], *Mobil Oil* (Iran-U.S Claims Tribunal, 1987) [*Iran-U.S. Claims Trib. Rep.* 16 (1987) 3], and *Texaco* (*ad hoc*, 1977) [*ILR* 53: 389]. Among the authors see, namely, BATIFFOL [1964] and GIARDINA [1984: 52 et seq.].

be founded in the law. In the expression of FRAGISTAS, transnational arbitration cannot be "suspended in the air" ([70]).

The fact that, as it is generally accepted ([71]), the invalidity of the arbitration does not hinder the jurisdiction of the arbitral tribunal to decide on its jurisdiction, evidences that the jurisdiction of the arbitral tribunal is not founded exclusively on the arbitration agreement ([72]).

The concept of a transnational arbitration exclusively founded on the parties' autonomy is thereby refuted. Nevertheless, the law on which the transnational arbitration may be founded is not necessarily a singular national law.

These considerations lead us to the examination of the theories that found the transnational arbitration on the whole of the national legal orders in which the award may produce effects and on transnational law.

The idea that arbitration is not necessarily subject to the legal order of the country where it seats, has led some authors to look for the legal foundation of the arbitration in the *whole of the legal orders in which is sought the production of legal effects by the arbitral award* ([73]).

It is my understanding that this theory does not provide a satisfactory explanation for the legal relevance of transnational arbitration either.

The jurisdiction of the arbitral tribunal is a legal effect of the arbitration agreement that, according to the previously mentioned, has to be based upon the law. The legal effects of the acts done by the arbitrator and the parties in the arbitration process have also to be derived from the law.

In some cases, however, the legal orders in which the legal effects of the arbitral award will be sought cannot be foreseeable at the time of the constitution of the tribunal and during the arbitration process.

It is equally conceivable that the legal orders that may be foreseeable *fora* of recognition and enforcement disagree among each other on the validity of the arbitration agreement or the arbitrators' powers.

Therefore, often the arbitrators and the parties cannot find guidance in the whole of the legal orders in which the legal effects of the arbitral award are sought.

This theory, then, is either a mere variation of the view previously discussed, in which transnational arbitration is exclusively founded on the autonomy of the parties, albeit the legal effects of the award are controlled by the legal orders of the countries of recognition and/or enforcement, or postulates resorting to a rule or principle whose legal force is autonomous insofar as it does not depend on the concurrence of the legal orders of all of the countries of recognition and/or enforcement.

Transnational arbitration practice suggests precisely that arbitrators and parties rely on a transnational principle that allows the jurisdictional resolution of disputes arising from transnational relationships by private persons, based upon the will of the parties, independently of the position taken, in the particular case, by this or that national legal order.

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70 - 1960: 14. See also RIGAUX [1982: 263].

71 - See LIMA PINHEIRO [2005 § 12], with more references.

72 - See LIMA PINHEIRO [2005 § 9].

73 - This idea was outlined by PAULSSON [1983] who, in a first moment [1981], still follows a line of reasoning close to the aforementioned conception; BUCHER has also appointed in a convergent direction [1989: 91]. The clearest formulation of this conception can be found in FOUCHARD/GAILLARD/GOLDMAN [1996: 654]. See also SERAGLINI [2001: 60 et seq. and 280 et seq.]. This conception has found echo in the arbitration case law – see CCI no. 10623 (2001) [*ASA Bulletin* 21/1 (2003) 82].

We are thereby led to the theory that founds transnational arbitration in *transnational law autonomous* in relation to the national legal orders.

This theory is naturally advocated by the supporters of the *lex mercatoria* doctrine, especially those that assert the existence of an autonomous order of international trade. Already FOUCHARD, in his treaty on International Commercial Arbitration published in 1965 ([74]), admitted this possibility, although pointing out limits to the complete "internationalization" of the arbitration. A few years later, it was the turn of GENTINETTA to essay a construction that founds transnational arbitration in a combination of autonomy of the parties and "general principles of law" ([75]). More recently, this theory has found an improved formulation in authors that hold a view of transnational law dissociated from an autonomous legal order of international trade, namely RIGAUX ([76]) and the later VON MEHREN ([77]).

In my view, transnational arbitration is not, as a whole, inserted in an autonomous legal order of international trade, since this legal order has not yet been formed ([78]).

This assertion, however, does not exclude the possibility of an *institutional insertion of the arbitration in a sectorial autonomous order* ([79]). This possibility deserves serious examination in case of institutional arbitrations that operate in the framework of professional organizations of sectorial and/or regional scope. In this case, the legal force of the arbitration agreement and of the procedural acts done by the arbitrators and by the parties is founded on the respective autonomous order.

In the more common cases, in which the arbitration is not inserted in a sectorial autonomous order, I deem defensible that the Transnational Law of Arbitration may be to a certain extent the legal foundation of transnational arbitration.

The foundation of voluntary arbitration is a concretization of the principle of autonomy of the parties: *the subprinciple of autonomous resolution of disputes* ([80]).

This principle has a different standing at the level of domestic arbitration and at the level of transnational arbitration.

In domestic arbitration, the principle is in force as an element of the national legal order, and is mainly materialized in the legal regime that allows the voluntary arbitration. It is the national legal order that assigns jurisdictional power to the arbitral tribunal.

In transnational arbitration, the principle is in force as an element of Transnational Law of Arbitration. Its legal force is derived from its integration in the legal conscience of the arbitration circles as a constitutional principle of arbitration (custom based upon the arbitration case law) and from the rules of the arbitration centers ([81]).

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74 - 24 et seq.

75 - 1973: 108 et seq. See also EISEMANN [1977: 191 et seq.].

76 - 1987: 142 et seq., 1989: 242-243, and 1993: 1435. In the same line of reasoning see FAZZALARI [1997: 4-5].

77 - 1990: 57-58. See also GAILLARD [2007: 91 et seq.] finding the legal ground of the transnational arbitration in an "arbitral legal order" based upon "transnational rules" inferred by a comparative method from the prevailing trends in the national legal orders; this conception also shares some points of view with the abovementioned doctrine of GENTINETTA.

78 - See LIMA PINHEIRO [1998 § 18 D and 2005 § 41], with more references.

79 - See also BENEDETTELLI [1997: 911].

80 - For a convergent view see HABSCHEID [1959: 114], VON MEHREN [1980 no. 56], and PETER BEHRENS [1993: 14 et seq.].

81 - See also VON MEHREN/JIMÉNEZ DE ARÉCHAGA [1989b no. 13], sustaining that the jurisdiction power does not emanate necessarily from the State and that the constrains and pressings that result from social and economical groups – namely the community of the actors of international trade –, may shape a jurisdictional process even without the support of political power.

National legal orders, or at least those that adopt framework or non-intervention systems (*supra* II. C), recognize transnational arbitration as an autonomous legal institution, based upon the principles of autonomous resolution of disputes and largely self-ruled by the parties and the arbitrators.

The legal order of the recognition country, for instance, cannot presuppose that the arbitrators exercised powers allocated by its domestic rules. By recognizing and/or enforcing awards rendered in transnational arbitrations, even where these were entirely based on autonomous standards, a national legal order is at the same time recognizing the legal force of that transnational law.

Nevertheless, it does not seem that the legal foundation of transnational arbitration lies only on the Transnational Law of Arbitration.

It seems true that the validity and the legal force of the arbitration agreement are founded in the first place on the transnational principle of autonomous resolution of disputes. From the same principle is derived the "obligatory" effect of the arbitral award, which explains why under the New York Convention (Art. 5/1/e) the binding nature of the award does not depend, according to the best understanding, on the legal order of the country of origin ([82]).

The jurisdictional effects of the arbitration agreement and of the arbitrators' rulings, however, are also the result of the position taken by the countries which have a significant relationship with the arbitration. The jurisdictional power of the arbitrators is mainly based upon national recognition: depend on the national legal orders the relevance of the arbitration agreement before the national courts (namely as a procedural defence), the enforcement of procedural decisions, the *res judicata* effect of the arbitral award before national courts and the enforcement of the arbitral award.

In conclusion, *the jurisdiction of the arbitral tribunal has a complex foundation*: the transnational principle of autonomous resolution of disputes, which underlies all the transnational arbitration, and the recognition of one or more of the countries which have a significant relationship with the arbitration ([83]).

III. DETERMINATION OF THE LEGAL FRAMEWORK OF ARBITRATION BY THE ARBITRATORS

A) Traditional views on the determination of the legal framework of arbitration (seat of arbitration and autonomy of the parties)

It has been seen that, according to the traditional view, every transnational arbitration has its foundation on a national legal order (*supra* II. A). It is derived therein that the legal framework of the arbitration would be defined by a national legal order – the *law of the arbitration* – designated by a connecting factor ([84]).

Thus, to follow the traditional view, the arbitral tribunal shall determine the legal framework of the arbitration based upon a choice of law rule which designates the national law governing the arbitration.

This view is shared by the traditional theories on the determination of the legal framework of the arbitration which, however, disagree on the choice of the national legal order that shall define this legal framework.

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82 - See LIMA PINHEIRO [2005 § 30], with more references.

83 - It shall be pointed out a partial convergence with FOUCHARD/GAILLARD/GOLDMAN [1996: 414] when they sustain that the rule jurisdiction-jurisdiction is founded on the law of the whole of countries willing to recognize the decision made by the arbitrators on their own jurisdiction.

84 - See, namely, MANN [1967: 159 et seq.], VON HOFFMANN [1970: 110 et seq.], SCHLOSSER [1989: 163 et seq.], *Redfern and Hunter on International Arbitration* [2009: 173 et seq.], SCHWAB/WALTER [2005: 360-361], and POUDRET/BESSON [2002: 83].

Among the theories on the determination of the legal framework of the arbitration, the most current is the one that postulates the application of the *law of the tribunal's seat*. It was the prevailing view until the end of the fifties ([85]), having been adopted by the aforementioned Resolution of the International Law Institute on the Arbitration in Private International Law (sessions of Amsterdam, 1957, and Neuchâtel, 1959) ([86]).

This view has arisen as the projection in the plane of the determination of the legal framework of the transnational of the *jurisdictional conception* of the arbitration (so in PILLET, NIBOYET and, substantially, in SAUSER-HALL) ([87]). According to this theory, it is by virtue of the law of the arbitration's seat that the arbitrators perform a jurisdictional function and, therefore, transnational arbitration is necessarily subject to this law ([88]).

Among the supporters of the seat theory shall be mentioned MANN ([89]). MANN argues that arbitrators are unavoidably subject to the "jurisdiction to prescribe" of the country where the tribunal functions and that it is the law of the arbitration's seat which decides if and under which conditions the arbitration is permitted. Only the country of the arbitration's seat has such a complete and effective control over the arbitral tribunal. Therefore, the country of the arbitration's seat is the only one which is in position to create the *lex arbitri* ([90]).

The first criticism that is moved against the seat theory concerns its theoretic foundation, which lies in the jurisdictional concept of arbitration. It is based upon an assimilation of the transnational arbitral tribunals to the national courts that the theory under scrutiny deems the arbitration process inserted in the legal order of the country of the tribunal's seat ([91]).

KLEIN and FRAGISTAS correctly pointed out that the arbitrators do not exercise a public function and, consequently, the arbitration process is not necessarily subject to the law of the country where it is carried out ([92]). Albeit the arbitrators are entrusted with a jurisdictional power, this does not mean that they exercise, by delegation, a public function ([93]). By holding its sessions within the territory of a country, the arbitral tribunal does not exercise public powers of this country ([94]). It is beyond doubt that transnational arbitral tribunals are not part of the judicial organization of the country where they seat.

It is often cited, in this context, the award rendered in the case ICC no 2321 (1976), in an arbitration held in Sweden, in which before the allegation, rose by one party, of the interdependency of national courts and arbitral tribunals under Swedish law, the

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85 - See BERNARDINI [2000: 198] and BLESSING [2000 no. 633].

86 - Cf. Arts. 1, 2, 8, 9, 11, and 12.

87 - See GOLDMAN [1963: 367-368] and FOUCHARD [1965: 364 et seq.].

88 - Cf. PILLET [1924: 533 et seq.] and NIBOYET [1950: 135]. See also BARTIN [1930: 608-609], MANN [*in Ann. Inst. dr. int.* 63-I (1989) 170-171], and REISMAN [1992: 1]. On the legal nature of arbitration see LIMA PINHEIRO [2005 § 18].

89 - 1967: 160 et seq. See also SCHNITZER [1958: 884-885], PARK [1983], and GOODE [2000: 250 et seq. and 256 et seq.]; further bibliographic references may be found in SANDROCK [1992 footnotes 5-10].

90 - 1967: 161 and 1985: 219.

91 - See GOLDMAN [1963: 373], FOUCHARD [1965: 364 et seq.], PIERRE LALIVE [1976: 168 et seq.], and BATIFFOL/LAGARDE [1983 no. 724 n. 1].

92 - 1958: 281 et seq. and 1960: 8, respectively.

93 - See LIMA PINHEIRO [2005 § 18].

94 - See also GOLDMAN [1963: 373-374], FOUCHARD [1965: 366 et seq.], SCHLOSSER [1989: 38], and CRAIG/PARK/PAULSSON [2000: 322].

arbitrator stated: "As arbitrator I am myself no representative or organ of any State. My authority as arbitrator rests upon an agreement between the parties to the dispute..." ([95]).

In the second place – and this objection applies especially against the arguments put forward by MANN –, the country where the arbitration process takes place has no exclusive jurisdiction to regulate and control the arbitration; this jurisdiction is concurrent with the jurisdiction of other countries ([96]). In case of conflict of national claims to regulate or control the arbitration, there is no *a priori* reason to give preference to the claim of the country where the arbitration process takes place.

Therefore, no compelling reason, namely of International Law, obliges the arbitrators to apply the law of the arbitration seat ([97]).

A third critical consideration is both of pragmatic nature and of legal policy. Often the place of the arbitration has no significant connection with the disputed relationship, being chosen for reasons of convenience or of opportunity, or even because it is a "neutral" ground (*supra* Introduction II).

In these cases, on the one hand, the country where the arbitration takes place has not, in principle, an interest in the regulation of the disputed relationship, either through its "substantive" law or through its conflicts law. The parties interest in the compliance with the law in force in the place of the arbitration also depends to a large extent on the circumstances of the particular case, namely on the probability of the enforcement of the award being sought in the local country or on the enforcement in another forum being blocked by the annulment in the local country.

On the other hand, as FOUCHARD has emphasized ([98]), it does not make sense to impose on the arbitrators the application of the conflicts law of the arbitration place, where nor the parties or the arbitrators are familiarized with this law and there is not any significant relationship between the country of the arbitration place and the disputed relationship. In principle, the conflicts law of a country is only applicable to the relationships that have significant contacts with this country. In case of the arbitration seat being fixed by the arbitrators in a country that does not have significant contacts with the disputed relationship, the choice of law rule of this country may not have steered the conduct of the parties and, consequently, the resolution of the dispute based upon the law applicable by virtue of that choice of law rule would mean a kind of "legal roulette" ([99]).

Lastly, seat theory may raise insurmountable practical difficulties within its conceptual framework. The arbitration may not have a single material seat, because the proceedings are held in different countries, or may even not have any material seat, because it is conducted entirely through correspondence or modern communication tools, such as the *Internet* ([100]).

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95 - *Yb. Comm. Arb.* (1976) 133.

96 - See LIMA PINHEIRO [2005 § 34].

97 - See also GOLDMAN [1963: 376] and PIERRE LALIVE [1976: 168 et seq.].

98 - 1965: 375.

99 - See also LEW [1978: 253 et seq.].

100 - As pointed out by BATIFFOL/LAGARDE [1983: 578] and VON MEHREN/JIMÉNEZ DE ARÉCHAGA [1989a: 108]. Naturally, if one adopts a purely conventional concept of seat, the parties might, through the choice of the seat, determine the legal framework of the arbitration, even if the arbitration is entirely conducted elsewhere. The seat theory will than come close to the autonomy of the parties theory. In the text, we presuppose that the arbitration seat is not understood in a purely conventional sense.

When understood in this sense, the seat theory is in manifest contradiction with the largely prevailing tendencies in the arbitration case law ([101]), in the rules of the main arbitration centers, in the unification of the Law of Transnational Arbitration and in the national laws that adopt systems of framework or of non-intervention in matter of transnational arbitration ([102]). This is the reason why one may read, in the writings of the most acclaimed authors, that this theory is today "completely surpassed" ([103]).

The Geneva Convention of 1961 has been a milestone in ruling out this theory, by establishing a special choice of law rule for the transnational arbitration which, in lack of a choice by the parties, allows the arbitrators to resort to the choice of law rule that "they deem applicable" (Art. 7/1). This understanding has been reinforced by the UNCITRAL Arbitration Rules (former Art. 33(1), Art. 35(1) after the 2010 revision) and Model Law (Art. 28(1) and (2)).

Notwithstanding, the seat theory is still advocated by a significant number of authors, in a formulation that is more flexible and more adjusted to the framework system prevailing in the main national legal orders. According to this formulation, arbitrators shall apply mandatory rules of the seat country, but the common procedural law and the general conflicts law are not, in principle, mandatory applicable in the arbitration ([104]).

Most of these authors no more justify this theory on the jurisdictional concept of arbitration or in the exclusive jurisdiction of the country where the arbitral tribunal seats. In favor of the application of law in force in the country where the tribunal seats is now argued that it is this country which has the closest connection with the arbitration and that the decision has, for the purpose of recognition and enforcement, the "nationality" of this country ([105]).

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101 - See, in matter of State contracts, the awards in the cases *Aramco* (1958) [*ILR* 27: 117]; *Sapphire* (1963) [*ILR* 35: 136], in part; *Texaco* (1977) [*ILR* 53: 389]; *Liamco* (1977) [*ILR* 62: 140 and *R. arb.* (1980) 132]; and *Aminoil* (1982) [*Clunet* 109 (1982) 869]; among ICC arbitrations, for example, awards rendered in the cases nos.1434 (1975) [*Coll. ICC* (1974-1985, 262], 3043 (1978) [*Clunet* 106 (1979) 1000], 4381 (1986) [*Coll. ICC* (1986-1990) 263] (see, on this award, DERAINS [1994: 269]), and 6294 (1991) [*Coll. ICC* (1991-1995) III 405 an. HASCHER], in which the arbitrator stated clearly that "Un principe incontesté de la doctrine dominante établit que, contrairement au juge étatique, l'arbitre international n'est pas tenu de respecter les règles du droit international privé de son siège".

102 - Cf. LALIVE/POUDRET/REYMOND [1989: 397], SCHWAB/WALTER [2005: 452], and BERNARDINI [2000: 198-199 footnote 39]. LEW [1978: 252] points out that this theory never had widespread acceptance. The issue is disputed in Germany – see MARTINY [1999: 535 et seq.] and JUNKER [2000: 445 et seq.], who favor, in relation to conflicts law, the view expressed in the main text.

103 - Cf. PIERRE LALIVE [1991: 42]; see also BLESSING [2000 no. 633].

104 - May be understood in this sense the comment to the Art. 220 of the *Second Restatement, Conflict of Laws* [c], stating that the arbitration is governed by the local law of the State to which it has its most significant relationship, which is, as a rule, the State where the arbitration hearings were conducted and the award rendered. See also PARK [1983: 22 et seq.], SANDROCK [1992: 789 et seq. and 2001: 675, 677-678 and 680], BERGER [1993: 89 et seq. and 478 et seq.], SANDERS [1996 no. 158 compare 1977 no. 10.2], *Redfern and Hunter on International Arbitration* [2009: 179 et seq. and 234 et seq.], SCHWAB/WALTER [2005: 407], FERNÁNDEZ ROZAS [2002: 23, 46, 51 and 200], POUDRET/BESSON [2002: 85 and 608 et seq.], BLESSING [2000 n.º 625 et seq.], but sustaining that the rules of the national arbitration laws are, in principle, non-mandatory; and BORN [2009: 1248 et seq. and 1310 et seq.].

105 - Among the rules of the main arbitration centers, only the WIPO rules (2002) seem adopt this theory (Arts. 3 and 61/b). A few arbitration rules reserve the application of mandatory rules of the "law applicable to the arbitration" without specifying this law (for example, Art. 1/3 of the UNCITRAL arbitration rules).

In the arbitration case law, even recent, the awards that follow seat theory, understood in this way, to determine the "law applicable to the arbitration", are not rare ([106]).

Even when understood in this way the seat theory is wrong.

From a conceptual point of view, the seat theory is logically flawed. This theory postulates that the arbitrators are subject to the law of the seat in virtue of a choice of law rule that adopts this connecting factor. Since this rule does not belong to the Transnational Law of Arbitration, reality that the supporters of this theory generally deny, its source could only be national and, apparently, it will be the legal order of the seat country. Thus, the conclusion is introduced on the premises: one cannot say that the arbitrators are subject to the legal order of the arbitration seat without presupposing that the arbitrators are bound by a choice of law rule of this order.

Second, it has been emphasized that, from the perspective of the parties and the arbitrators, no national legal order has an exclusive claim of applicability ([107]).

Arbitrators have to pay attention to the directives that are emanated from the countries that have a significant relationship with the arbitration or in which the enforcement of the award may be sought, and not only to the directives of the country where the arbitration takes place. For this purpose, what matters is the scope of application *claimed* by national systems, not the applicability derived from any multilateral choice of law rule ([108]).

Furthermore, as already emphasized, often the dispute does not have a close connection with the country where the arbitral tribunal seats, namely in all the cases in which parties or arbitrators choose a "neutral" country. The mere circumstance of the arbitration being carried out in the territory of a country does not constitute, by itself, a sufficient connection to justify a prevailing interest of this country in the regulation of the arbitration. The interest of the parties in the compliance with the directives emanated from the country where the arbitration is held also depends largely on the circumstances of the case. For these reasons, the arbitrators are not compelled to give preference to the directives coming from the country where the arbitral tribunal seats ([109]).

The *theory of the autonomy of the parties* in the determination of the legal framework of the arbitration has arisen as an expression of the *contractual conception of the arbitration* in the plane of transnational arbitration. This theory has found an early defender in BALLADORE PALLIERI. This author infers from the "contractual character of arbitration" that all the acts that integrate the arbitration shall be regulated by the same law which regulates the arbitration agreement. This law is designated by the choice of law rule applicable to other contracts, namely the law chosen by the parties ([110]).

The autonomy theory is widely accepted in the USA ([111]), prevailed in Germany until the reform of 1997, and is advocated by many authors in other countries ([112]).

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106 - See namely, award in the case *BP* v. *Libya* (1973) [*ILR* 53 (1979) 297], III/2; preliminary decision CCI no. 7929 (1995) [*Yb. Comm. Arb.* 25 (2000) 312]; partial award ICC no 8420 (1996) [*Yb. Comm. Arb.* 25 (2000) 328]; award *Hamburg Friendly Arbitration* de 29/12/1998 [*Yb. Comm. Arb.* 24 (1999) 13]; award no. 1930 *Netherlands Arbitration Institute* (1999) [*Yb. Comm. Arb.* 25 (2000) 13].

107 - *Supra* Introduction I. See further LOQUIN [1983: 299 et seq.], SCHLOSSER [1989: 163 et seq.], and BENEDETTELI [1997: 914 et seq.].

108 - Cf. SCHLOSSER [2002 § 1025 no. 4].

109 - See award ICC no 10623 (2001) [*ASA Bulletin* 21/1 (2003) 82], *maxime* no. 127.

110 - 1935: 340 et seq.

111 - Cf. *Splosna Plovba of Piran* v. *Agrelak Steamship Corp.* (1974) [381 *F.Supp.* 1368] *USDC S.D. New York*; *Remy Amerique* v. *Touzet Distribution* (1993) [816 *F.Supp.* 213] *USDC S.D. New York*; DOMKE/WILNER [1984: 393 et seq. and 1998: 161 et seq.]; VARADY/BARCELÓ III/VON MEHREN

English authors also affirm generally that the parties may choose the law applicable to the arbitration ([113]), however, since they do not distinguish between the perspective of the English legal order – which limits the scope of such a "choice" ([114]) –, and the point of view of the arbitral tribunal, it is far from clear that it is truly a choice of law.

Autonomy theory displays, in relation to the seat theory, the advantage of taking into consideration the interests of the parties, and contains a certain degree of truth. In effect, it is clear that the real will of the parties in respect of compliance with directives of a given country shall be honored, without meaning, however, that the parties may completely exclude the relevance of other countries directives.

Nevertheless, the appeal to the "contractual character of the arbitration" is equivocal, insofar as, in the main systems, arbitration has a mixed nature contractual-jurisdictional, constituting a jurisdictional activity and leading to a decision with jurisdictional legal force ([115]).

As a criterion for the determination by the arbitrators of the legal framework of the arbitration, this theory is not only limited but also not useful.

Limited, because this theory only gives a solution where the parties have chosen the law applicable to the merits of the dispute or (which is rare) the law applicable to the arbitration ([116]).

Not useful, due to the two reasons previously stated regarding the theory seat.

First, the logical argument. The submission of the arbitration to the law chosen by the parties presupposes that the arbitrators are bound by a choice of law rule that adopts the autonomy theory. However, which is the source of this rule? In case it is a choice of law rule in force in the legal order chosen by the parties, its applicability presupposes, in its turn, the submission of the arbitration to the law chosen by the parties. And the circle is closed.

Second, this theory fails when it postulates the exclusive submission of the transnational arbitration to the law of a given country. It has been previously pointed out that there is not for the parties and the arbitrators a singular national legal order that claims exclusive applicability and that the arbitrators have to take into consideration directives potentially emanated from different countries, as well as to the scope of application that national systems claim, instead of any multilateral choice of law rule that designates a given national system.

[2003: 552-553]; and BORN [2009: 1286-1287]. In this sense also points, although summarily, comment *b* to Art. 218 of the *Second Restatement, Conflict of Laws*. See further HIRSCH [1979: 45-46].

The tendency to admit the choice of the law applicable to the arbitration has found some projection in the Supreme Court case law regarding the relations between federal law and state law – see *Volt Information Sciences Inc.* v. *Board of Trustees of Leland Stanford Junior University* (1989) [489 *U.S.* 468] and *Mastrobuono Et Al.* v. *Shearson Lehman Hutton, Inc., Et Al.* (1995) [514 *U.S.* 52] and, on these cases, BORN [2014: 165 and 517-518]. Nonetheless, it is not well established the practical scope of the autonomy theory in the federal law – see BORN [2014: 1534, 1576, and 3005-3006] and MACNEIL/SPEIDEL/STIPANOWICH [1995 § 44.40.1].

112 - See KLEIN [1955: 212 et seq. and 223 et seq., 1958: 266 et seq. and 1967: 93 et seq.], MEZGER [1960: 281 et seq.], FRAGISTAS [1960: 7 et seq.], SANDERS [1977 no. 10.2, compare 1996 no. 158], BATIFFOL/LAGARDE [1983: 578], LUZZATTO *in* TARZIA/LUZZATTO/RICCI [1995 Art. 24 no. 4], Id. [1994: 261], and NYGH [1997: 6-7]. See further MOURA VICENTE [1990: 91 et seq.].

113 - Cf. JONATHAN HILL [1997: 288 et seq.]; *Cheshire, North & Fawcett* [2008: 652], sustaining that the arbitration process, in lack of a choice of the applicable law, is regulated by the law of the place of the arbitration; *Dicey & Morris* [13.ª ed., 2000: 603]; SUTTON/GILL [2003: 71].

114 - Art. 2/1 of the "English" Arbitration Act of 1996. See also *Dicey, Morris and Collins* [2012: nos 16-033 et seq.].

115 - See LIMA PINHEIRO [2005 § 18], with more references.

116 - See GOLDMAN [1963: 378-379] and PIERRE LALIVE [1976: 164 et seq.].

In conclusion, to determine the legal framework of the arbitration arbitrators may have to pay attention to directives emanated from different countries, as well as to supranational directives and to Transnational Law of Arbitration.

B) Arbitrators as addressees of Transnational Law of Arbitration as well as of national and supranational directives

The *binding of the arbitrators by the directives emanated from the countries* that have significant contact with the arbitration shall be understood in the light of the legal foundation of the arbitration and of the submission of the arbitration to the jurisdiction to prescribe of a plurality of countries. On the one hand, transnational arbitration may neither exclude the jurisdiction of (or the exercise of the jurisdiction by) national courts nor lead to an award with full jurisdictional effects without recognition by a national legal order. On the other hand, transnational arbitrations are embraced by the normative and institutional spheres of the countries that have a significant relationship with the arbitration.

Arbitrators must rather take into consideration the *concrete claims of applicability* of the law of the interested countries, than apply any multilateral choice of law rule (such as the ones that adopted the seat theory or the autonomy theory).

The activity of the arbitrators is further embraced by *supranational powers of regulation*, namely the powers exercised by international organizations of universal and regional scope. It derives therefrom that the arbitrators have to pay attention to the directives of these organizations.

Arbitrators shall always comply with the directives emanated from *international organizations of universal scope*. Arbitrators shall also comply with the directives from *regional organizations* (such as the European Union), whenever the disputed relationship is entirely inserted within its social sphere. Thus, the authors have been asserting that Resolutions of the United Nations Security Council that (at least in part) have normative character shall be respected by the arbitrators ([117]). The same shall be said about the application of the European Union Competition Law even if the law applicable to the merits of the dispute is the law of a third country and the parties do not raise the issue ([118]).

Differently, the arbitrator shall have a margin of discretion, or shall I rather say a margin of evaluation, of the directives emanated from regional organizations where the disputed relationship displays at least one significant connection with a third country. This margin of evaluation allows the taking into consideration the legitimate interests of the parties and of the countries at stake ([119]).

The exercise of *national powers of regulation* of the arbitration has been characterized by self-restraint; the main systems confine themselves to *outline the legal framework of the arbitration* and to *delegate to the parties and to the arbitrators* the determination of most of the rules that shall integrate that legal framework.

The chance of contradictory directives emanated from different countries and the fact that transnational arbitration is not legally founded in a single national legal order

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117 - See, for a convergent view, LANDY-OSMAN [1991: 609 e 618], HANS VAN HOUTTE [1997: 168], and GRIGERA NAÓN [2001: 323 footnote 357], referring to an unpublished ICC award.

118 - See, in favor of the *ex officio* application of the EU Competition Law, MELLO [1982: 362-363], AVILLEZ PEREIRA [1994: 331-332], HANOTIAU [1997: 48], DERAINS [1997: 76-77], PHILIP [2002: 530], and DOLMANS/GRIERSON [2003: 44 e 46].

119 - See BLESSING [2000 no.764], LIMA PINHEIRO [2005 § 58], and the ICC award no 6475 (1994) [*ICC International Court of Arbitration Bull.* 6/1 (1995) 52].

confer to the arbitrator a *margin of evaluation* of these directives that is not compatible with an absolute submission to the law of a given country.

Arbitrators are not also, in principle, directly bound by *international conventions of unification* ([120]). Arbitrators are not, in principle, subjects of International Law or, even if one admits a limited international subjectivity of individuals and legal persons of national law ([121]), are not subjects of the obligations created by international conventions of unification in the light of their text, purpose and system of sanctions. Arbitrators shall take into account the unified rules applicable to or in the arbitration on the same footing that rules of domestic source in force in the legal order of the Contracting States.

Supranational directives applicable to the arbitration are also scarce and generally have as object short ranging issues related to the merits of the dispute.

These factors result in transnational arbitral tribunals enjoying a *wide autonomy*. This wide autonomy allows, from the point of view of the parties and of the arbitrators, the legal framework of the arbitration to be in first line defined by *contractual self-regulation* and by the Transnational Law of Arbitration (*supra* II) ([122]).

Arbitrators shall apply this Transnational Law of Arbitration, albeit this duty is limited by the need of taking into consideration some national and supranational directives. Therefrom also results a margin of evaluation of transnational directives.

From the point of view of the parties and of the arbitrators, transnational arbitration may be primarily envisaged as an *autonomous method of dispute resolution*, which, *a posteriori*, is susceptible to a rather limited control by national courts, namely by the court holding jurisdiction to the award review, to the recognition of a "foreign" arbitral award and to the enforcement ([123]).

The legal framework of arbitration results then from the *confluence of sources* which operate in different legal orders and normative planes. The determination of the legal standards primarily applicable by the arbitral tribunal demands, to a large extent, a mediating activity of the arbitrators who, for this purpose, shall inquire about the content of these sources and evaluate the directives thereby contained.

In particular, arbitrators have to determine the *relevant national directives* and to resolve cases of *conflict of directives* emanated from different countries or of national directives with Transnational Law of Arbitration.

When performing these tasks, arbitrators shall not act arbitrarily, but according to suitable criteria, which conform themselves with the legal concepts that are shared in the international community and that allow a fair evaluation of the interests, policies and goals at stake.

The determination of the national directives that the arbitrators shall apply requires a *balancing of these interests, goals and values* ([124]). This balancing is also needed for the resolution of conflicts that may occur between national directives.

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120 - Cf. MAYER [1992: 276 et seq.]; KASSIS [1993: 516 et seq.]; LIMA PINHEIRO [1998 § 11 D and 2005 §§ 51 et seq.]; *Zürcher Komm*/HEINI [2004 Art. 187 nos. 3 and seq.]; and, regarding the unified conflicts law, also MARTINY [1999: 533], JUNKER [2000: 454 et seq.], and KROPHOLLER [2006: 50]. Compare MOURA VICENTE [2002: 401 and 406].

121 - See, namely, DAILLIER/FORTEAU/PELLET [2009: nos 417 et seq.], SEIDL-HOHENVELDERN/STEIN [2000: 177 et seq.], BROWNLIE [2003: 529 et seq.], JORGE MIRANDA [2012: 213 et seq.], and ANDRÉ GONÇALVES PEREIRA/FAUSTO DE QUADROS [1993: 378 et seq.].

122 - See STEIN [1995: 94 et seq.] and LIMA PINHEIRO [1998 § 11 D].

123 - See, for a general view, PIERRE LALIVE [1977: 63 et seq.] and VON MEHREN/JIMÉNEZ DE ARÉCHAGA [1989b no. 13].

124 - The resort to a *Rule of Reason* has also been proposed by SCHNYDER [1995: 303-304], but solely with respect to the applicability of singular mandatory rules by the arbitral tribunal.

Following this line of reasoning, the *method for the determination of the relevant directives* is the balancing of typical and legitimate interests of the parties, of legitimate and reasonable interests of the countries, of goals of the world society in course of formation and of values of transnational public policy. This method is able to lead to the formulation of guiding criteria for the balance of these values, which are characterized by the flexibility and by a high degree of indetermination, in order to allow the taking into account of all the circumstances of the case.

Parties have a *typical interest* in the performance of the arbitration agreement, which shall lead to the resolution of the disputes by the arbitrators. Furthermore, parties are normally interested in a valid award, which will not be set aside and that will be enforceable. This consideration leads us to take into account, in the first place, the directives of the country where the enforcement of the award may be sought, insofar as compliance with them is a condition of enforceability ([125]). Where the enforcement may be prevented by the setting aside of the award in another country, this criterion also justifies the consideration of the directives of this other country ([126]).

Thus, it is widely accepted that the commands of the country where the enforcement of the award may be sought shall be taken into consideration ([127]). Some rules of the arbitration centers also point to a certain extent in this direction (Art. 41 ICC and Art. 32(2) LCIA) ([128]).

The above said does not mean, however, that the arbitrators shall comply with national directives whenever non-compliance may jeopardize the enforceability of the award. Arbitrators have to balance the interest in a valid and enforceable award with other parties' interests and with the interests of countries at stake.

Bearing in mind the high rate of *voluntary performance* of arbitral awards it is easily understandable that parties' interest in the resolution of the dispute by the arbitrators may be to a certain extent independent from the enforceability of the award.

This interest may justify, for example, that the arbitral tribunal does not apply the rule of the country where it seats determining the non-arbitrability of the dispute, where the resolution of the dispute by the arbitrator is compatible with the principles of Transnational Law of Arbitration ([129]), even if that non-application brings the risk of annulment of the award by the courts of the arbitration seat and, therefore, jeopardizes the enforceability of the award in another country.

It is not possible to formulate a more determinate criterion in this respect, a case-by-case evaluation being unavoidable.

Furthermore, frequently it is not foreseeable in which country the enforcement of the award may be sought. Before the chance of enforcement in several countries, the interest in obtaining an enforceable award does not justify, by itself, the compliance with the directives emanated from just one of those countries ([130]).

This has been recognized in some awards rendered in ICC arbitration ([131]).

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125 - See, for a convergent view, PIERRE LALIVE [1967: 650, 1976: 162 and 1991: 51], LALIVE/POUDRET/REYMOND [1989: 396], BUCHER [1989: 95], NYGH [1997: 6], CLAY [2000: 637-639] and BOTELHO DA SILVA [1999 *passim* and 2004: 30], with exclusion of the directives of any other country. Compare POUDRET/BESSON [2002: 648].

126 - See also RAESCHKE-KESSLER/BERGER [1999: 123].

127 - Compare BLESSING [2000 no. 799-800].

128 - On Art. 35 of ICC rules, see analysis done by LIMA PINHEIRO [2005 § 55].

129 - See LIMA PINHEIRO [2005 § 23].

130 - See also GRIGERA NAÓN [2002b: 140-141].

131 - See, namely, CCI no. 6379 (1990) [*Coll. ICC* III 134] and no. 10623 (2001) [*ASA Bulletin* 21/1 (2003) 82-111].

In the arbitration of disputes arising from *State contacts*, between a State and a private person national from another State, there are often strong reasons for the non-application of some mandatory rules either of the "enforcement country" or of the country where the tribunal seats, even if such non-application constitutes a ground for refusal of recognition and enforcement of the award ([132]).

In effect, in the arbitrations started by the private party, the "enforcement country" is, in first line, the Defendant State and this State may eventually raise the immunity of enforcement regarding its assets located in other countries. Therefore, the enforcement of an award rendered against the State party can be, *a priori*, excluded, being then irrelevant, from the enforceability point of view, the application or non-application of such mandatory rules by the arbitral tribunal. In these circumstances, the arbitral tribunal shall be exclusively guided by considerations of justice.

The protection of the parties' interests also justifies the taking into consideration of the parties will in respect to the compliance with directives from a given country. Thus, where the parties express their will regarding the application to the arbitration of rules emanated from a given country, these rules shall be applied as far as they are compatible with the transnational public policy of arbitration and their application does not conflict with directives from another country that shall prevail.

The consideration of national policies postulates that the directives of the countries having a *legitimate and reasonable interest* in the regulation of the arbitration or of a part of it shall be honored.

The *interest is legitimate* where it is founded in an internationally valid jurisdiction ground ([133]), deserves protection in the light of International Law and derives from the pursuance of social policies. The countries with a legitimate interest in regulating the arbitration or a part of it are mainly the country where the arbitration takes place or is conventionally seated, the country where both parties have their seat, habitual residence or relevant place of business and, in what concerns specifically the merits of the dispute, the countries that have a significant relationship with the disputed relationship.

The *reasonableness of the interest* takes into account the value standards prevailing in the international community ([134]). The international community is here understood in a broad sense, which embraces the whole of social relationships, in the sense of world society, although still in a formative stage ([135]).

It is namely reasonable the interest of a country in the application of its *competition law* to practices that occur in its territory or produce effects in its market, provided that it expresses policies in conformity with the value standards prevailing in the international community ([136]). The same may be said about the interest of a country in the compliance with its *exchange rules*, where these pursue goals generally recognized

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132 - See PAULSSON [1981: 376 et seq.] and LIPSTEIN [1988: 192].

133 - See also HANS VAN HOUTTE [1997: 168], BLESSING [2000 no. 807], and GRIGERA NAÓN [2001: 323-324 and 338-339].

134 - For a convergent view, see BLESSING [2000 nos. 808 et seq.] speaking about a criterion of "*application-worthiness*", and GRIGERA NAÓN [2001: 336-337], with resort to the "functional methodologies" developed by North American authors. FOUCHARD/GAILLARD/GOLDMAN [1996: 866 et seq.] also appeal to values widely accepted in the international community, but have essentially in view only the moral values.

135 - On the reasonableness of the States' interest in the applicability of certain mandatory rules, see LIMA PINHEIRO [2012: 141-142].

136 - DROBNIG [1987: 116] asserts the existence of a wide agreement in this respect. See, in particular, judgment of the US Supreme Court in the aforementioned case *Mitsubishi Motors Corporation* v. *Soler Chrysler-Plymouth, Inc.* (1985).

by the international community ([137]). Albeit the point is more controversial ([138]), I believe that the interest in the application of *embargo or boycott statutes* may be legitimate if it is in conformity with the International Law and may be reasonable if it pursues goals generally recognized by the international community.

The issue of the reasonableness of the interest has been frequently raised regarding *anti-corruption statutes*. The fight against corruption is a legitimate goal widely recognized in the international community, but the means employed are not always reasonable ([139]).

Even where a legitimate and reasonable interest underlies the national directive, its relevance to the arbitral tribunal may be excluded by *transnational public policy* ([140]). The arbitral tribunal is not bound by national directives, either in matters of procedure or in relation to the merits of the dispute, that are contrary to transnational public policy ([141]).

In most cases, a directive contrary to transnational public policy is also contrary to the value standards prevailing in the international community, thus excluding the reasonableness of the interest. Therefore, the arbitral tribunal shall not apply rules that establish a "racial" or religious discrimination, even if they are in force at the seat of the arbitration and claim applicability ([142]).

Notwithstanding, there are conceivable cases in which the transnational public policy constitutes an autonomous ground of irrelevance of national directives. This may be the case of some measures of State intervention on contracts concluded by autonomous public entities that are devoted to benefiting theses public entities to the detriment of the foreign party ([143]).

C) Solution of conflicts of national directives

It follows from the above that arbitrators shall, in principle, comply with relevant national directives.

From the absence of international rules of coordination of national systems results the possibility of concurrence of national claims of regulation of the same transnational arbitration or of lack of claim to regulate a transnational arbitration.

National regulation claims of a transnational arbitration may be *compatible among each other*. That is what happens in most cases. In other cases, however, the directives are *contradictory*, i.e., they establish duties and/or permissions of conduct of arbitrators or of parties in the context of the arbitration that are incompatible. The concurrence of claims of regulation leads then to a *directives conflict*.

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137 - This is the case of the exchange rules kept or enacted in conformity with the Agreement for the International Monetary Fund, which are object of special choice of law rule contained in paragraph b of section 2 of Art. VIII of this Agreement. See BERGER [1997: 113 et seq.]. On this rule see LANDO [1984: 398], MOURA RAMOS [1991: 706-707 footnote 702], LIMA PINHEIRO [1998 § 20 H], and BERGER [1997: 118 et seq.].

138 - See RACINE [1999: 341-342].

139 - See, in respect to the case *Hilmarton*, award ICC no 5622 (1988) [*R. arb.* (1993) 327], and judgments of the Court of the Canton of Geneva 17/11/1989 [*R. arb.* (1993) 342], and of the Swiss Federal Court 23/6/1992 [*R. arb.* (1993) 691]; see further judgment *USCA Ninth Circuit*, in the case *Northrop Corporation* v. *Triad International Marketing* (1987) [811 *F.2d* 1265].

140 - Cf. FOUCHARD/GAILLARD/GOLDMAN [1996: 662, 667 and 875-876], SERAGLINI [2001: 322-323 and 417-418], and GRIGERA NAÓN [2001: 323 and 2002a: 614-615].

141 - On transnational public policy, see LIMA PINHEIRO [2005 § 47], with more references.

142 - Cf. FOUCHARD/GAILLARD/GOLDMAN [1996: 876].

143 - See LIMA PINHEIRO [2005: § 57 and 2012: 129 et seq.], with more references.

When faced with *conflicts of national directives* arbitrators shall perform a balancing of interests of the parties, policies and interests of the countries involved and the goals of the world society in formation ([144]).

For this purpose, the arbitral tribunal shall, first of all, inquire into the policies underlying the competing national directives. At the second stage, the arbitral tribunal shall determine the interests that will be satisfied by complying with each of the national directives. After determining these interests, the arbitral tribunal shall analyze its relative weight.

In some cases, it will not be possible to rank the national interests at an abstract level. However, even if it is possible to assign a greater weight to a given interest in detriment to another, the *balance decision* shall always be taken having in mind all the circumstances of the case.

Depending on the circumstances of the case, the balance may lead to the complete sacrifice of the interests in the application of a directive in favor of the interests in the application of another directive, as much as point to a *harmonization of these interests*, which postulates reciprocal adjustments of both directives or the unilateral adjustment of one of them.

In the second case, one shall follow the *proportionality principle* (in broad sense) as applied in cases of conflicts of fundamental rights and of contradiction of principles: the restriction of a directive shall confine itself to the strictly necessary and shall be materially adjusted to the benefit that is obtained with the compliance with the other directive.

D) Coordination of the Transnational Law of Arbitration with national directives

The application of *Transnational Law of the Arbitration* in conformity with national directives does not raise any problem. The arbitral tribunal shall also apply the Transnational Law of Arbitration that goes beyond national directives, since arbitrators have the duty to comply, as far as possible, with transnational standards applicable to the arbitration.

In case of *conflict of Transnational Law of Arbitration with relevant national directives*, it is not possible to rank at an abstract level these sources. One may say that, in principle, Transnational Law of Arbitration shall not be applied against relevant national directives. Nonetheless, it is conceivable that, in exceptional circumstances, it may be justified to apply Transnational Law of the Arbitration against directives, in principle relevant, of one of the countries in contact with the arbitration. This possibility arises where the parties do not have an interest in the compliance with these directives and the interest of the country at stake, although reasonable, is neither common to the other countries involved nor results from an especially significant relationship with the arbitration.

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144 - A convergent suggestion, in respect to the concurrence of overriding rules [*Eingriffsnormen*] of different countries, is already found in SCHNYDER [1995: 307].

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