



THE TRANSNATIONAL LAW OF ARBITRATION VERSUS NATIONAL LAW: FROM COLLISION TO SOLUTION, IN CONTEXT

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RESUMO

Este relatório tem como objetivo estudar a interação entre sociologia e direito internacional privado, adotando como ponto de partida a nova proposta da Gunther Teubner e Peter Korth para resolver a “colisão” entre direito transnacional e direito nacional. Com base na análise desta proposta e nos temas fundamentais inerentes, examinaremos o direito transnacional da arbitragem, seu escopo e autonomia, e a colisão entre as “padrões internacionais de arbitragem” e as regras do direito nacional relacionadas com as medidas cautelares na arbitragem. As nossas observações conclusivas concentrar-se-ão nas contribuições que a sociologia traz para as questões levantadas em relação tanto ao direito transnacional da arbitragem quanto ao conflitos de direito, como nossas futuras áreas de investigação.

PALAVRAS-CHAVE

Direito de conflitos; direito transnacional; arbitragem internacional; padrões internacionais da arbitragem; medidas cautelares arbitrais.

ABSTRACT

This paper aims to study the interaction between sociology and private international law, adopting the new proposal by Gunther Teubner and Peter Korth to solve the “collision” of transnational law and state law as a starting point. Based on the analysis of this proposal and the fundamental topics inherent to it, we will examine transnational arbitration law, its scope and autonomy, and the collision between “international arbitration standards” and rules of national law related to interim protection in arbitration. Our conclusive remarks will focus on the contributions that sociology brings to the issues raised in relation both to transnational arbitration law and to conflicts of law, as our future areas of research.

KEYWORDS

Conflict of laws; transnational law; international arbitration; international arbitration standards; arbitral interim measures

1. Introduction

The purpose of this paper is to study the approach employed by Gunther Teubner and Peter Korth in relation to transnational law, more specifically their proposal for a solution in the event of a collision between transnational law and state law¹.

These authors analyse in depth the fragmentation of world society and the inherent collision of laws that go beyond state-based conflicts, specifically those that involve transnational law and indigenous law. By rejecting traditional conflicts-of-law rules, in view of their circumscribed functionality, these scholars propose that in the face of these new conflicts, it becomes possible to search for sociological directions to find more appropriate results.

The solutions proposed by Teubner and Korth merit reflexion, both within the realm of legal pluralism and private international law. Although they assume an optimistic outlook, these solutions may lead to uncertain results, raising the issue of acceptance by jurists. To further reflect on the proposed solutions, we will study transnational arbitration law, its scope and autonomy, and discuss the application of the proposed solution to the collision of this transnational law and national law. We will use the example of the law applicable to interim measures to raise awareness regarding these issues, considering the current trend towards

¹ Gunther Teubner and Peter Korth, "Two Kinds of Legal Pluralism: Collision of Laws in the Double Fragmentation of World Society", in Margaret Young (ed.), *Regime Interaction in International Law: Facing Fragmentation*, Cambridge, Cambridge University Press, 2012, pp. 23-54. The version cited herein is one translated by Anna Furness revised by Anne Emert, and made available online at https://www.jura.uni-frankfurt.de/42853939/zweiartendesrechtspluralismuseng_pk_okt08.pdf, hence the pages will be quoted 1-24 (last accessed on 7 February 2021).

application of international standards to the conditions to grant these measures, as opposed to national law.

Considering the above, we will analyse the problems and solutions proposed by Teubner and Korth (Chapter **Erro! A origem da referência não foi encontrada.**), and then make some remarks regarding the relevance of their proposals in the field of transnational arbitration law (Chapter **Erro! A origem da referência não foi encontrada.**).

2. The problems and solutions behind “Two kinds of Legal Pluralism: Collision of Laws in the Double Fragmentation of World Society” by Teubner and Korth

Teubner and Korth base their article on two factual cases. The first case mentioned is that of *Global SantaFe*. The chronology of the facts is as follows.

In September 2001 Global Marine Inc and Santa Fe Intl. Corp announced a merger. In the same month, a Korean citizen named Jongsun Park, registered the domain name “globalsantafe.com” in the Korea-based domain name registrar Hangang². In October 2001, the newly constituted Global Santa Fe (“GSF”) requested a Virginia court to compel Hangang and the Virginia-based domain name registry VeriSign (.com), to transfer the domain name “globalsantafe.com” to VeriSign, alleging violation of GSF trademark rights, under the Anti-cybersquatting Consumer Protection Act (“ACPA”). In April 2002, the Virginia

² Teubner and Korth, “Two Kinds...”, cit., p. 1.

Court granted GSF's request³. However, in the same month, Park filed for an injunction in Seoul, South Korea, to prohibit Hangang from transferring the domain name. This request was also granted⁴. In February 2003, upon GSF's request, the Virginia court directed VeriSign to cancel the domain name until it was transferred to GSF. This court considered it had jurisdiction and that "international comity" did not require deference to the Korean injunction, since the Virginia court had been the first court to assert jurisdiction over the intellectual property at stake⁵⁻⁶.

In essence, this case was one of *cybersquatting*. This term refers to the unauthorized registration and use of internet domain names that are identical or similar to trademarks, service marks, company names, or personal names. GSF accused Park of doing exactly that⁷.

The second case brought forth by Teubner and Korth was that of the *Neem Tree*. In sum, the Neem Tree is a worshiped tree in India, considered holy. Extracts from leaves of this tree treat fungus and bacteria in burn tissue, prevent viral infections, and is used against

³ Teubner and Korth, "Two Kinds...", cit., p. 1.

⁴ Teubner and Korth, "Two Kinds...", cit., p. 1.

⁵ 250 F. Supp. 2d 610 (E.D. Va. 2003).

⁶ This was done in reference to the Princess Lida doctrine. The Princess Lida doctrine is also known as the doctrine of prior exclusive jurisdiction. If a lawsuit is *in rem* or *quasi in rem*, which means that a court must have possession of or some control over the property in order to grant the relief sought, then the first court to exercise jurisdiction over the case gets jurisdiction to the exclusion of all other courts. Cf. Princess Lida of Thurn and Taxis et al. v. Thompson et al., 305 U.S. 456, 59 S.Ct. 275, 83 L.Ed. 285 (1939).

⁷ The Virginia court agreed. The second decision mentioned considered that Park's registration of the domain name after, and in response to, the GSF merger announcement, along with no indication of any prior use of the GSF mark by Park, legitimate or otherwise, led to the conclusion the registration of the domain name, within one day of the merger announcement, was a violation of GSF's trademark rights.

smallpox, chicken pox, hepatitis B and herpes. Moreover, this tree is extensively used in ayurvedic medicine⁸⁻⁹.

An American company, WR Grace & Co, acquired a series of patents in the USA and Europe in connection with the production of a stabilizing solution to fight fungi made from the Neem Tree¹⁰. Activists of NGOs filed oppositions against these patent applications, and obtained successful relief in Europe, based on the “novelty of invention standard” provided for in the European Patent Convention¹¹. They argued that these patent registration applications were an attempt by transnational companies to obtain exclusive rights related to “natural” knowledge and exploit this natural product, amounting to *biopiracy*¹².

What is new in these cases is that they address *new situations of collision of legal norms*. In the GSF case, at issue are the autonomous laws of the internet. More specifically, those laws determined by the Internet Corporation for Assigned Names and Numbers (ICANN) that deal with the assignment of domain names. These are rules set up by a private not-for-profit company from California, which have a global reach and are exclusively oriented

⁸ Teubner and Korth, “Two Kinds...”, cit., pp. 1-2.

⁹ A medical system from India that has been used for thousands of years. The goal is to cleanse the body and to restore balance to the body, mind, and spirit. It uses diet, herbal medicines, exercise, meditation, breathing, physical therapy, and other methods. See for reference, “Ayurvedic medicine”, Nacional Cancer Institute, Dictionaries. Available at <https://www.cancer.gov/publications/dictionaries/cancer-terms/def/ayurvedic-medicine> (last accessed on 7 February 2021).

¹⁰ Teubner and Korth, “Two Kinds...”, cit., p. 2. See also Vandana Shiva, “The Neem Tree - A case history of biopiracy third world network”, Third World, Network, 2013. Available at <http://www.twn.my/title/pir-ch.htm> (last accessed on 7 February 2021).

¹¹ Article 52 (1) and article 54 (1) and (2) of the European Patent Convention.

¹² Teubner and Korth, “Two Kinds...”, cit., p. 2.

towards the particular interests of the internet¹³. On the other hand, there are several national laws that want to apply to this situation, including the laws of South Korea and the USA, which are limited to a territory, emerge from a political legislative process and are aimed at promoting the public interest¹⁴. In the Neem Tree case, we witness the clash between modern laws on patents, essential in a modern “knowledge economy” and the right of indigenous people to protect their ancient medicinal culture and to use their traditional knowledge freely¹⁵.

Teubner and Korth argued that new conflict-of-laws rules are required, because the situations described depart from the traditional understanding that only national legal orders can be in conflict with each other, assuming that the norms in conflict are legal norms and not mere social norms, and public and private international law are not suited to deal with these new types of norm collisions¹⁶.

We will now examine how these scholars analysed the double fragmentation arising from these two types of collision and the new conflict-of-law rules proposed (Sections **Erro! A origem da referência não foi encontrada**.a. and 2.b.). Finally, we will produce a summary of the suggested solutions (Section 2.c.) and make some preliminary contextualizing and critical remarks (Section 2.d.).

¹³ The Rules for Uniform Domain Name Dispute Resolution Policy are available online at: <https://www.icann.org/resources/pages/policy-2012-02-25-en> (last accessed on 7 February 2021). An applicant may file a dispute if their domain name is being used by a third-party in bad faith, see Article 4(a)(iii).

¹⁴ Teubner and Korth, “Two Kinds...”, cit., p. 3.

¹⁵ Teubner and Korth, “Two Kinds...”, cit., p. 3.

¹⁶ Teubner and Korth, “Two Kinds...”, cit., p. 3.

a. Global Santa Fe and cybersquatting

As pertains to the GSF case, we will address the fragmentation of world society into autonomous global functional systems, in post-modern society (Section 2.a.i.), describe Teubner and Korth's understanding of conflict of legal norms, as opposed to social norms (Section 2.a.ii.) and describe the authors' proposal for a new conflicts-of-law rule based on substantive methods (Section 2.a.iii.).

i. Post-modern sectorial differentiation of legal orders and overlap

Teubner and Korth argued that, in the case of GSF, the functional differentiation of modern society caused the collision between different social functional systems and the legal norms coupled to them¹⁷.

The authors pointed out the *fragmentation of world society into autonomous global functional systems*¹⁸. Their assumption was that law was a *global unitary social system*, beyond national laws. This unitary global law would reproduce itself through legal acts

¹⁷ Teubner and Korth, "Two Kinds...", cit., p. 4.

¹⁸ Teubner and Korth, "Two Kinds...", cit., p. 4-

guided by distinct programs, but always oriented by the binary code of legal/illegal¹⁹. This unity was process-based, deriving from the modes of connection between legal operations, which transfer binding legality between even highly heterogeneous legal orders. This was in contrast with national law, where courts ensured normative consistency²⁰.

Consequently, the unity mentioned was not understood as a normative unity, since it was expected that there be contradictions in legal norms, but rather an operative unity achieved at a global level, or in other words “*operative interlegality*”²¹. A dynamic variety of normative operations, where coexisting autonomous norm systems with different origins touch, connect and inspire one another, without uniting to become one²².

The authors then described interlegality in post-modernity. This was a world of juxtaposition, where different (closed) legal systems claimed to apply to the same social situations. This led to the collision of local customary laws and legal acts of parliament, as well as a “new confusigness in the legal in-between-worlds of global society”, all coexisting, with contradictory case decisions and rules, governing the same social field and without a recognition rule²³.

The authors then explain how the internal differentiation of law evolved over time. Before, it was made with reference to national boundaries, based on the political logic of nation

¹⁹ Teubner and Korth, “Two Kinds...”, cit., pp. 4-5.

²⁰ Teubner and Korth, “Two Kinds...”, cit., p. 5. Here, the authors cite Niklas Luhmann and his systems theory.

²¹ Teubner and Korth, “Two Kinds...”, cit., p. 5.

²² Teubner and Korth, “Two Kinds...”, cit., p. 5.

²³ Teubner and Korth, “Two Kinds...”, cit., p. 5.

states, which had territorial jurisdiction (and public international law followed)²⁴. In the 20th century, there was an expansion of international organizations and politically initiated regulatory regimes, establishing themselves as autonomous legal orders, giving rise to a sectorial fragmentation²⁵. Now, this sectorial fragmentation occurs with transnational law regimes. In the GSF case, this regime referred to the internet rules that had a global reach and were exclusively oriented towards particular interests of the sector²⁶.

This shift in differentiation had several consequences. *First*, the fragmentation of society, i.e. political regulation of social spheres that led to issue specific arenas that juridified themselves²⁷. *Second*, these new issue-specific global regimes ended up not entailing integration, harmonization nor convergence, rather, internal differentiation of law²⁸. *Third*, they did not produce unity, but instead fragmentation, based on international agreements, but also on non-state legal regimes (“law without the state”), which gave rise to the *multi-dimensionality of global legal pluralism*²⁹. In sum, there was an *overlap between territorial-segmental and “thematic-function” differentiation in legal orders*.

²⁴ Teubner and Korth, “Two Kinds...”, cit., p. 6.

²⁵ Teubner and Korth, “Two Kinds...”, cit., p. 6. See also António Hespanha, O direito democrático numa era pós-estatal. A questão pública das fontes de direito, Lisboa, António Manuel Hespanha, 2018, pp. 54-55, 65-71.

²⁶ Teubner and Korth, “Two Kinds...”, cit., p. 3.

²⁷ Teubner and Korth, “Two Kinds...”, cit., p. 6.

²⁸ Teubner and Korth, “Two Kinds...”, cit., p. 6.

²⁹ Teubner and Korth, “Two Kinds...”, cit., p. 7.

As such, transnational communities were seen as autonomous fragments of society with their own legal orders. Examples of transnational regimes are *lex digitalis*, *lex mercatoria*, *lex sportive*, and *lex constructionis*³⁰.

ii. Conflicts of legal norms

When speaking of collision, it is assumed that equally valid legal norms are at issue, otherwise there would be no conflict. This raises the issue of understanding whether these new sectorial rules are legal norms or rather mere social norms.

Social norms, as mention Teubner and Korth, amount to mere expectations of behaviour. Specifically, they are “expectations of behaviour which emerge from processes of spontaneous interactions”; these would only gain legal significance when legal norms, even if implicitly, were to incorporate them into the system of law, for example by making reference to them³¹. In the conflict between legal norms and social norms, legal norms would prevail³².

Teubner and Korth posited that the criterion by which the law decides whether a norm possesses legal quality – a decision, in their view, important to ensure the law’s societal function to decide conflicts – is not the connection between a nation state or an international institution and the norm, but the establishment of processes of secondary rulemaking³³.

³⁰ Teubner and Korth, “Two Kinds...”, cit., p. 7.

³¹ Teubner and Korth, “Two Kinds...”, cit., pp. 3, 8.

³² Teubner and Korth, “Two Kinds...”, cit., p. 8.

³³ Teubner and Korth, “Two Kinds...”, cit., p. 9.

This is line with the adopted views expressed above. Transnational communities are viewed as autonomous fragments of society, that satisfy their needs by resorting to transnational law, which is “created and developed by the law creating powers of *global civil society*, it is based on *general principles of law and their concretisation in social practice*, its application, interpretation and development are – at least primarily – the responsibility of *private dispute resolution providers*, and it is codified – if at all – in general catalogues of principles and rules, standardised contract forms or codes of conducts which are set up by *private rule-making bodies*.”³⁴

As such, they consider that the ICANN policies at stake in the GSF case, transnational private law of *lex digitalis*, can be considered legal norms, and in collision with the other national laws relevant to this cybersquatting case. Their sources are secondary rules governing the private autonomous acts of internet users and coexist with other rules of dispute resolution providers accredited by ICANN³⁵.

iii. New proposal for a conflicts-of-law rule

Considering the collision of legal rules before them, Teubner and Korth quickly concluded that the *traditional conflicts-of-law rules were inept* for this situation. This is so because conflict-of-laws rules of public or private international law have a territorial character, they have been constructed to deal with collisions of national legal orders, by subsuming the

³⁴ Teubner and Korth, “Two Kinds...”, cit., p. 9.

³⁵ Teubner and Korth, “Two Kinds...”, cit., pp. 9-10.

rules of whichever forum state is addressed, and thus never envisioned a conflict involving transnational laws of non-state origin³⁶.

Seeking a solution, these authors first *considered the option of applying by analogy the private international law rules of referral*³⁷. However, this would have to be understood as referring not to the law of the national territory with the closest link – which is not possible considering that transnational law was not differentiated based on national boundaries – but rather to the law of the competing national and functional legal orders where the “location of the legal relationship” was based, a-territorially understood³⁸. This solution adopted a “primary coverage” criterion, where the applicable law would be that of where the legal relationship was based, or in other words, which social sector (made of substantive rules) had the strongest interests in being applied to this situation³⁹. The main advantages would be the reduction of conflicting decisions by courts and possibility to consider case-adequate aspects⁴⁰.

In the GSF case, this referral would point unequivocally to the applicability of the ICANN policies for domain names, due to the “inescapable transnationality of the world wide web”⁴¹.

³⁶ Teubner and Korth, “Two Kinds...”, cit., p. 10.

³⁷ Teubner and Korth, “Two Kinds...”, cit., p. 10.

³⁸ Teubner and Korth, “Two Kinds...”, cit., p. 8, 10.

³⁹ Teubner and Korth, “Two Kinds...”, cit., p. 10. The authors mentioned the studies of Trachtman and Brainerd Curie and the latter’s “governmental interest analysis”. See more in António Marques dos Santos, *Direito Internacional Privado, Introdução – Vol. I*, Lisboa, AAFDL, 2001, pp. 169-184

⁴⁰ Teubner and Korth, “Two Kinds...”, cit., p. 11.

⁴¹ Teubner and Korth, “Two Kinds...”, cit., p. 11. Pursuant to the ICANN policies, the principle of priority would apply first, and thus Park would prevail; however GSF could demonstrate (1) the domain name Park registered was identical or confusingly similar to its company trademark, (2) Park did not have a right or legitimate interest in respect of the domain name and (3) Park had registered and used the domain name in bad faith.

However, the authors also quickly acknowledged that the aforementioned method did not grasp the particularities and complexity of this collision. The referral was designed with the premise that national legal orders were comprehensive and cohesive systems, whereas, transnational law reflected solely the rationality standard of a specific social sector and was “self-contained”⁴².

As a second option, the scholars then considered developing a new collision rule, still *applying the referral technique, but adding certain measures to compensate the transnational regime’s “tunnel vision”*. The proposal was to incorporate contextualizing elements allowing for competing interests to be considered, such as a public policy clause (fundamental principles of a normative order that the application of transnational regimes cannot go against), and *comitas* towards other global regimes and their eigen-rationality, in legal norm-making⁴³.

Still, Teubner and Korth concluded that applying the referral technique by analogy did not take into account the equal claim transnational law posed next to national law, since private international law rules only considered the latter⁴⁴.

These scholars thus concluded that the *substantive law approach* of private international law was the most appropriate. The adjudicator would *create a new rule of substantive law that integrates elements of the competing legal orders*, instead of favouring one legal order

⁴² Teubner and Korth, “Two Kinds...”, cit., p. 11.

⁴³ Teubner and Korth, “Two Kinds...”, cit., p. 12.

⁴⁴ Teubner and Korth, “Two Kinds...”, cit., p. 12.

over the other, reaching a synthesis⁴⁵. This was a method cited by von Mehren, used in private international law of the USA for inter-local collision law⁴⁶.

In the GSF case, this would amount to the creation and application of a legal norm combining elements of US law, Korean law and the ICANN policies, which would not be in favour of the cybersquatter⁴⁷.

b. Neem Tree and biopiracy

In regard to the Neem Tree case, we will briefly examine the clash of regional cultures and social organisational principles, another dimension of fragmentation (Section 2.b.i.) and address the authors new proposal for choice of law in this biopiracy case (Section 2.b.ii.).

i. Neem Tree and biopiracy

Teubner and Korth identified a double fragmentation of world society and its law. First, there were *colliding rationalities in modern society*, where traditional knowledge was subjected to diverging demands from *functional regimes worldwide*. In essence, economic, scientific, medical, cultural and religious principles were in conflict about the use of this

⁴⁵ Teubner and Korth, "Two Kinds...", cit., p. 12.

⁴⁶ Teubner and Korth, "Two Kinds...", cit., p. 12. See also Arthur Taylor von Mehren, "Choice of Law and the Problem of Justice", Law and Contemporary Problems, Duke University School of Law, Issue 41, no. 2, 1977, pp. 27-43, pp. 38 et seq; and A. Marques dos Santos, Direito Internacional Privado, cit., pp. 193-194.

⁴⁷ Teubner and Korth, "Two Kinds...", cit., p. 13.

traditional knowledge⁴⁸. Second, there was also a level of fragmentation related to *regional cultures in global society*. Differences between social organisational principles clashed between the formal law of modern society – global culture principles run by modern institutions, specialized by function and “self-contained”⁴⁹–, and the socially embedded legal systems of indigenous societies – regional cultural principles run by diffuse structures in stratified societies, totally integrated⁵⁰.

In this clash, the former teared traditional knowledge out of its context, detaching it from its vital connection, and transformed it⁵¹. This is evident in the way in which globalized science treated traditional knowledge, because the scientifically legitimate claim that knowledge should be public necessarily destroyed structures of communal ownership of knowledge in regional cultures, including the religion, culture and habitat that gave rise and maintained this traditional knowledge in the first place⁵².

ii. New proposal for a conflicts-of-law rule

The authors posited that traditional conflict rules were inept to treat this conflict of norms, because they were developed for the collision of “Western and Non-Western Law”⁵³.

⁴⁸ Teubner and Korth, “Two Kinds...”, cit., pp. 13-14.

⁴⁹ Teubner and Korth, “Two Kinds...”, cit., p. 14.

⁵⁰ Teubner and Korth, “Two Kinds...”, cit., p. 3.

⁵¹ Teubner and Korth, “Two Kinds...”, cit., p. 14, arguing that “The multi-directional traditional institutions are undermined by the uni-directionality of modern hyperstructures”.

⁵² Teubner and Korth, “Two Kinds...”, cit., p. 15.

⁵³ Teubner and Korth, “Two Kinds...”, cit., pp. 3, 15.

Therefore, they proposed that new collision rules be developed in the context of a modified theory of basic rights models, taking into account the “social embeddedness of the legal norms” in regional cultures, to ensure compatibility with the integrity of traditional knowledge⁵⁴.

Niklas Luhmann’s sociological theory of basic rights was mobilized to frame this proposal. Luhmann has shown that counter-movements have counteracted the self-destructive aspects of functional differentiation and coerced social systems into self-restriction⁵⁵. The example of basic rights, beyond the legal perspective, as “social counter-institutions” that exist inside the systems and restrict their expansion from within, ensures the autonomy of social spheres against tendencies to usurp them. When these expansionist tendencies arise – be it in politics, economics, science, technology or others – and threaten the autonomy of other areas of society, conflict would arise, and conflict-attained positions would be institutionalised in politics⁵⁶.

This effect describes the collision of social spheres, and in the Neem Tree case of constitutive principles of society⁵⁷. Strengthening the autonomy of spheres of action is a reactive mechanism that would work in both the vertical (conventional effect) and horizontal dimension of human rights (third-party effect on other expansive subsystems). Biopiracy would be a good example of expansionist tendencies in other subsystems, considering that

⁵⁴ Teubner and Korth, “Two Kinds...”, cit., p. 15.

⁵⁵ Teubner and Korth, “Two Kinds...”, cit., p. 15.

⁵⁶ Teubner and Korth, “Two Kinds...”, cit., pp. 15-16.

⁵⁷ Teubner and Korth, “Two Kinds...”, cit., p. 16. These are structurally different than the conflict rules in private or public international law, as in this case there is a collision of national legal orders.

the key actors in this field were not states but private entities such as universities, museums and corporations⁵⁸.

The authors argued that it was necessary to think of new rules that would protect the particularities of regional cultures and prevent the expansion of modernity (“global society’s hyperstructures”) and ensure compatibility with the integrity of traditional knowledge⁵⁹. These rules would have to be hybrid to ensure sensitivity to regional-cultural specificities – recognizing existing cultural practices⁶⁰ – and operativity of modern law, through the use of modern law language⁶¹. Direct recourse to customary law was not possible, and thus the traditional referral method of private international law was insufficient. As such, the new collision rules must simultaneously develop new norms of referral (recourse to the extrinsic) and create substantive law rules of self-restraint (restriction of the intrinsic)⁶².

⁵⁸ Teubner and Korth, “Two Kinds...”, cit., p. 16.

⁵⁹ Teubner and Korth, “Two Kinds...”, cit., p. 15.

⁶⁰ The authors apply in this approach the United Nations Human Rights Framework, articles 19 and 27 of the International Covenant on Civil Political Rights.

⁶¹ The authors considered whether to use collision rules to reconstruct interests of indigenous cultures within modern law, and whether protecting traditional knowledge would be facilitated by using modern law that refers to “customary law”. In this sense they concluded that this would have to “reconstruct extrinsic factors using intrinsic concepts, in order to erect internal barriers in the appropriate positions”. These are always “reconstructions”, because indigenous law does not actually exist as formal law. Modern law collates chosen elements of usages/customs of regional cultures, in what the authors say is a misreading or a misunderstanding – possibly a creative misunderstanding. It is only creative, however, where it succeeds to trace and transform existing foreign cultural material into modern law, without any addition. This can be also a productive misunderstanding: modern law creates the fiction that there is a legal production mechanism of indigenous law (consider certain communications as legal acts), that is capable of counteracting the modern expansionist tendencies, by implementing prohibitions and legal sanctions. See Teubner and Korth, “Two Kinds...”, cit., pp. 17-18.

⁶² Teubner and Korth, “Two Kinds...”, cit., p. 19.

This would allow the basic rights' protection to include the entire process of knowledge production, and consequently its social embedding⁶³. In addition, the protection of basic rights should include procedural autonomy, that is, the possibility for indigenous cultures to develop independently and in conflict with modernity, but also to participate in the decisions related to access to traditional knowledge⁶⁴. Therefore, the authors concluded that the “model of the institutionalised and proceduralised protection of basic rights” was the most adequate⁶⁵.

c. Summary of the proposed solutions

In sum, Teubner and Korth argued that in the collision of a legal norm and a social norm, the legal norm prevails⁶⁶. They contended that the two cases before them were *collisions of genuine legal norms*: in the case of cybersquatting, national law and transnational private law collided, and in the case of biopiracy, national and international industrial property law collided with indigenous law of protection of knowledge⁶⁷.

The three colliding legal orders were different in terms of scope (global, national and local), but most importantly in *social embedding*⁶⁸.

⁶³ Teubner and Korth, “Two Kinds...”, cit., p. 19.

⁶⁴ Teubner and Korth, “Two Kinds...”, cit., p. 20.

⁶⁵ Teubner and Korth, “Two Kinds...”, cit., pp. 20-21.

⁶⁶ Teubner and Korth, “Two Kinds...”, cit., p. 23.

⁶⁷ Teubner and Korth, “Two Kinds...”, cit., p. 23.

⁶⁸ Teubner and Korth, “Two Kinds...”, cit., p. 23.

Transnational law's social embedding was weak, considering it is a set of highly specialized legal norms that reflect the rationality of a single social sector, and thus are "self-contained". It produced its own autonomous law, based on function, and was disconnected from society's endeavours to achieve common welfare⁶⁹. National law was also not socially embedded as it became autonomous by formal procedures; however, the norms contained therein were forced to interact (no matter how specialized) and therefore suffered permanent mutual restriction (unlike transnational law)⁷⁰. Indigenous law had a strong social embeddedness, because the organization principle of society is one of hierarchical differentiation (and not functional, as in transnational law) and therefore their legal norms were genetically and structurally interwoven with religious, political, economic and traditional knowledge-based systems of interaction⁷¹.

In the collision with transnational law, the referral techniques of private international law were considered inadequate, and a substantive law approach was suggested, allowing the consideration of all the colliding legal orders. This amounted to a form of hybrid law: "the new substantive law rule absorbs extrinsic elements into its law while at the same time leaving the autonomy of the extrinsic intact"⁷².

In the collision with indigenous law, the model of the institutionalised and proceduralised protection of basic rights was followed, in order to achieve self-restriction of modern law⁷³.

⁶⁹ Teubner and Korth, "Two Kinds...", cit., p. 23.

⁷⁰ Teubner and Korth, "Two Kinds...", cit., p. 23.

⁷¹ Teubner and Korth, "Two Kinds...", cit., p. 23.

⁷² Teubner and Korth, "Two Kinds...", cit., p. 24.

⁷³ Teubner and Korth, "Two Kinds...", cit., p. 24.

d. Preliminary critical remarks

These proposals arise three initial remarks within the realm of legal pluralism and private international law.

First, an observation related to legal pluralism, and the recognition and limits of pluralism, in relation to non-state law.

Legal pluralism is multiple and diverse and has a long history⁷⁴. Recognizing that law manifests itself in a plural way includes not only acknowledging the non-state law with a neoliberal ideology that arises from business globalization, but also other non-state manifestations of legal and political pluralism, with a different origin and nature, including amongst communities and cultures that value other forms of self-regulation⁷⁵. This would include both transnational law, as well indigenous law, in a view also shared by Teubner and Korth⁷⁶. What these authors also recognized is that since the late 20th century, states have been losing power and legal functions, leading to a new paradigm of post-state law⁷⁷.

⁷⁴ See for reference, Brian Z. Tamanaha, “Understanding Legal Pluralism: Past to Present, Local to Global”, Sydney, Sydney Law Review, vol. 30, 2008, pp. 375-411, pp. 377-390, for a historical analysis of legal pluralism in the Medieval period, during and after colonisation and, more recently, the late 20th century legal pluralism. This author also highlights that legal pluralism also began to be addressed by academia in the 1970s – see p. 390.

⁷⁵ A. Hespanha, O direito..., cit., p. 58. See also sections 2.1 and 2.2 above.

⁷⁶ B. Z. Tamanaha, “Understanding Legal Pluralism...”, pp. 397-398, categorizing indigenous law as a customary normative system, and *lex mercatoria* as an economic/capitalist normative system.

⁷⁷ B. Z. Tamanaha, “Understanding Legal Pluralism...”, p. 386. Although it is recognized that rarely will state law be completely irrelevant – see p. 411.

In other words, this change broke the old frame of law, that is, the stable relationship between legislation and adjudication on an exclusively national scale⁷⁸.

Transnational law presents some legitimacy issues from this standpoint, which can be described as an inherent lack of formalized procedure (present in representative democracies) and the consequent inequality based on sectorial consensus (which ignores the global relevance and effects of sectorial regulation). These can be contrasted, as did Teubner and Korth, with the legislative procedures attached to state-law, as a manifestation of the will of the people, protecting general interests, that can correct biases and distribute social power more evenly⁷⁹. However, state courts have increasingly transmitted a sense of detachment and artificiality, which lead to the impression that they are less legitimate for those reasons. In this instance, alternative dispute resolution mechanisms chosen by the parties will be thought of as more appropriate to reach a fair resolution, with the least intervention possible of state mandatory rules, only to ensure that parties keep their side of the bargain and that general interests are safeguarded⁸⁰.

An issue of recognition arises in this discussion. Hespanha proposes that to make compatible the reality of law today and to maintain a model of democratic legitimation (that is required for political and efficacy reasons), then a shift must occur, where the community will reserve for itself, through the mediation of different institutions and processes – where

⁷⁸ Gunther Teubner, “Breaking Frames: Economic Globalisation and the Emergence of *lex mercatoria*”, in *European Journal of Social Theory*, SAGE Publications, Vol. 5, Issue 2, 2002, pp. 199-217, section IV.

⁷⁹ A. Hespanha, *O direito...*, cit., pp. 56-62.

⁸⁰ A. Hespanha, *O direito...*, cit., p. 60; see also B. Z. Tamanaha, “Understanding Legal Pluralism...”, pp. 387, 406.

the state will no longer be the exclusive or default representative –, the right to say what the law is⁸¹. As a consequence, not all the norms observed in the community will be law, only those effectively recognized as “legal” by the community at large – this will allow a general application of that norm in and by the community⁸². Not only this, but the consensus must be observable, that is, be susceptible of being described, discussed and attested by all, and not only by a few⁸³.

One can argue that transnational law, through its processes of secondary rulemaking, described by Teubner and Korth, meets this criterion⁸⁴.

A discussion of the role and legitimacy of lawyers as speakers of the law ensues in this setting, analysed in the context of a broader consensus (from the people) or restricted consensus (from the legal specialists)⁸⁵. This would also be relevant in the case of conflict of laws, where legal adjudicators would have to assess which potentially applicable law in conflict raised a wider consensus in any given situation, that is reflected and thus

⁸¹ A. Hespanha, *O direito...*, cit., pp. 71-73.

⁸² A. Hespanha, *O direito...*, cit., p. 74. Taking the same position, see B. Z. Tamanaha, “Understanding Legal Pluralism...”, p. 396.

⁸³ A. Hespanha, *O direito...*, cit., pp. 88-89.

⁸⁴ See Section **Erro! A origem da referência não foi encontrada.** above. This ties into the notion of “law” in legal pluralism, which is contentious. Teubner and Korth propose a criterion, already mentioned, in contrast with the notions of other academics, such as Malinowsky (focusing on normative order within a social group, irrespective of legal institutions), Weber and Hoebel (defending that law is the public institutionalised enforcement of norms), Hart (addressing primary and secondary rules), and more recently Griffiths (social fields with the capacity to produce and enforce rules) and Galanter (patterns of social ordering found in various institutional settings) – see B. Z. Tamanaha, “Understanding Legal Pluralism...”, pp. 391-393, explaining in detail these authors’ proposals.

⁸⁵ A. Hespanha, *O direito...*, cit., pp. 77-80.

sustainable⁸⁶. It is argued that in this context, the norms with origin in bodies democratically legitimated and working under the auspices of democratic principles should be given special weight, in detriment of other norms with unclear, problematic or obscure “validity”⁸⁷.

If and how this “weight” should be given is a discussion to be developed in the context of private international law, which, as Teubner and Korth have highlighted, has not been historically designed to accommodate collisions with non-state law⁸⁸.

Second, a comment on the optimism inherent to the solutions proposed, in the context of private international law.

Private international law has as object the regulation of private international legal relations, that is, relations where more than one law is potentially applicable, having as reference the legal order where the adjudicator belongs⁸⁹. In other words, private international law provides the rules to decide which law will apply in a situation that touches several legal orders. This assumes the application of law in certain physical spaces only, the territories of the states corresponding to the legal orders these are part of⁹⁰, as the term often used to describe these legal relations is “plurilocalized”⁹¹.

⁸⁶ A. Hespanha, O direito..., cit., p. 80.

⁸⁷ A. Hespanha, O direito..., cit., p. 91

⁸⁸ See section 2.a.iii. above.

⁸⁹ A. Marques dos Santos, Direito Internacional Privado, cit., pp. 7, 9; João Baptista Machado, Lições de Direito Internacional Privado, 5th reprint, Coimbra, Almedina, 2015, pp. 12-13.

⁹⁰ Manuel Almeida Ribeiro, Introdução ao Direito Internacional Privado, reprint, Coimbra, Almedina, 2010, p. 7.

⁹¹ A. Marques dos Santos, Direito Internacional Privado, cit., p. 9; J. Baptista Machado, Lições..., cit., pp. 9-10.

The global movement of persons and capital has multiplied the legal relations established in contact with more than one jurisdiction, which emphasized the relevance of these norms to ensure their continuity, the predictability of their effects, the respect for the legitimate expectations of those concerned, and justice and legal certainty⁹². This justice, as seen in traditional legal literature, based on the model of Savigny⁹³, was of a formal nature. This was so because the element of connection chosen to determine the applicable law to a certain situation would be based on the formal and abstract closeness of the potentially applicable laws in consideration to the relationship at issue, irrespective of their content⁹⁴. This would achieve international harmony, as the same relationship would receive the same solution irrespective of the forum in which it was assessed⁹⁵.

However, more modern trends have focused on substantive justice in the regulation of private international legal relations. In the US, scholars have advocated that the material solutions provided in the legal orders in conflict be considered prior to the selection taking place, counter to adopting the blind, mechanical and insensitive model of formal justice⁹⁶, the result of which was often “neither entirely satisfying nor fully convincing”⁹⁷. This is where

⁹² A. Marques dos Santos, *Direito Internacional Privado*, cit., pp. 10-12.

⁹³ See in more detail, A. Marques dos Santos, *Direito Internacional Privado*, cit., pp. 114-121.

⁹⁴ A. Marques dos Santos, *Direito Internacional Privado*, cit., p. 48. Giving the example of the element of connection regarding the personal law of physical persons being, in Portugal, that of the nationality, and in Brazil, that of the domicile; differences motivated also due to pragmatic reasons and political motives. See also, J. Baptista Machado, *Lições...*, cit., p. 46.

⁹⁵ A. Marques dos Santos, *Direito Internacional Privado*, cit., p. 118; J. Baptista Machado, *Lições...*, cit., p. 39.

⁹⁶ A. Marques dos Santos, *Direito Internacional Privado*, cit., p. 50, pp. 162-163, explaining David F. Cavers criticisms and proposal.

⁹⁷ A. von Mehren, “Choice of Law...”, cit., p. 27.

von Mehren's suggestion fits in, which Teubner and Korth imported to solve the conflict between state law and transnational law.

More specifically, von Mehren proposed the “compromise of clashing policies”⁹⁸. In other words, the creation of special substantive rules to regulate multistate problems that achieved a compromise of the viewpoints of all potentially applicable laws, considered equally, as well as part of their underlying policies⁹⁹. For these purposes, a functional or instrumental analysis of the law of each community was to be carried out¹⁰⁰. In the end, these new special substantive rules would be apt and uniform, thus avoiding forum shopping¹⁰¹. This author's thesis pointed out that in cases where a unitary source was not posited, compromise could be seen as principle of justice, and this attempt for harmony would then be considered just¹⁰².

This seems to meet Teubner and Korth's concerns as well, considering the novel characteristics of transnational law and the vocation of private international law to address competing and overlapping “global legal pluralism”¹⁰³. Moreover, it assesses all colliding legal orders equally, acknowledging an equal claim to apply, which ignores concerns regarding an alleged degree of validity, raised above. This is, putting it shortly, an optimistic proposal.

⁹⁸ A. von Mehren, “Choice of Law...”, cit., p. 36.

⁹⁹ A. Marques dos Santos, *Direito Internacional Privado*, cit., p. 193.

¹⁰⁰ A. von Mehren, “Choice of Law...”, cit., p. 31.

¹⁰¹ A. Marques dos Santos, *Direito Internacional Privado*, cit., p. 193.

¹⁰² A. von Mehren, “Choice of Law...”, cit., p. 39.

¹⁰³ See Section **Erro! A origem da referência não foi encontrada.** above. See also B. Z. Tamanaha, “Understanding Legal Pluralism...”, p. 389.

Third, a remark related to potential issues or obstacles for jurists regarding the proposed solution.

One potential issue would be the legitimacy of the rule-maker, that is the entity applying (*rectius* creating) the law, be it a judge or an arbitrator. In internal situations, the creation of rules is typically within the legislative power, in countries that apply the principle of separation of powers¹⁰⁴. In transnational situations, even if not positioned in the same way as internally, a wide and reflected consensus would still be required in order to see law as legitimate, and thus, legally valid. Teubner and Korth propose in this instance that secondary rulemaking, including the interpretation and development of law by arbitrators and codification of principles and rules by private bodies, bridge this gap, regardless of the fact that these rules arise from social sectorial differentiation.

Another obstacle would be the inherent legal uncertainty adjacent to creating a new substantive rule of law that would be the combination of the colliding legal orders. This has led commentators to qualify this construction as “solomonic”¹⁰⁵. The risk of arbitrariness, of valuing one interest, policy or solution over the other without convincing justification, but also of unenforceability of this solution are emphasized as disadvantages¹⁰⁶. In sum, despite its flexibility, the benefits associated with general and abstract laws that provide a criterion for the choice of law would be omitted in this regard¹⁰⁷.

¹⁰⁴ An issue that von Mehren acknowledges himself – see “Choice of Law...”, cit., p. 39.

¹⁰⁵ A. Marques dos Santos, *Direito Internacional Privado*, cit., p. 193.

¹⁰⁶ A. Marques dos Santos, *Direito Internacional Privado*, cit., pp. 193-194.

¹⁰⁷ M. Almeida Ribeiro, *Introdução...*, cit., p. 17

Additionally, and as von Mehren also recognizes, this “hybrid law” would not be attained, and thus the method would not be possible, when the competing legal orders have differences in values and purposes that are fundamental¹⁰⁸.

In sum, the discussion regarding the issues above, of wide and reflected consensus in the context of legal pluralism and formal and material justice in the context of private international law, seem to permeate the issue of collision of state law and transnational law at large, in a constant dialogue focused on legitimacy. This, as we will see, can also be projected to the research of other areas of law, including that of international arbitration.

3. Relevance of Teubner and Korth’s proposal in transnational arbitration law

We propose to examine with more detail the transnational law of arbitration. This field of law has emerged because arbitration, the forum for disputes related to transnational law, is composed of both national law regulation and autonomous rules and principles deriving from arbitral practice and institutional rules¹⁰⁹.

¹⁰⁸ A. von Mehren, “Choice of Law...”, cit., p. 40. This author provides two examples, such as views on monogamous and polygamous marriage, as well as liability of a driver of a car before guests in cases of accidents.

¹⁰⁹ Luís Lima Pinheiro, *Arbitragem Transnacional. A Determinação do Estatuto da Arbitragem*, Coimbra, Almedina, 2005, pp. 198, 440-448.

In this study, we will address a potential case of collision of international standards and national law. The purpose of this exercise is to analyse if the proposed solutions allow jurists to find new answers for this legal problem.

Thus, we will examine transnational law of arbitration and the coming up of “international standards” in this field (Section 3.a.), the collision of these “international standards” and state law in arbitral interim measures of protection, from a legal standpoint (Section 3.b.), finally providing final remarks regarding the application of the Teubner and Korth rule to this issue (Section 3.c.).

a. Transnational arbitration law and “international standards”

Arbitration is based on party autonomy. Parties to an international commercial contract may wish to submit their current or future disputes to neutral third-party adjudicators, i.e. arbitrators, that will decide the dispute in a private and binding manner, through an enforceable arbitral award¹¹⁰.

In regard to transnational arbitration law, and of relevance to the present analysis, we will briefly describe its scope and autonomy (Section 3.a.i.), and its relation with choice of law, broadly (Section 3.a.ii.), to then introduce the notion of “international arbitration standards” (3.a.iii.).

¹¹⁰ George A. Bermann, International Arbitration and Private International Law, The Pocket Books of The Hague Academy of International Law, Vol. 30, Brill Nijhoff, 2017, pp. 19-20.

i. Scope and autonomy of transnational arbitration law

Transnational law of arbitration can be defined as the *rules and principles primarily applicable by an arbitral tribunal*, that are formed irrespectively of the action of state organs. These rules and principles can be of substantive nature, or conflictual nature, that is, when they refer to the regulation entailed in other normative bodies¹¹¹.

The *autonomy* of transnational law of arbitration refers to its autonomy in relation to the national laws of states, individually considered, although it is not totally immune from the national laws connected to any given arbitration (e.g. that of the place of enforcement)¹¹².

The transnational law of arbitration was said to have been born from the practitioners of international commercial arbitration, a community of international merchants¹¹³. Although included in its scope, it must not be confused with *lex mercatoria*¹¹⁴, which is the set of norms, of substantive character, that includes usages, practices and customs of international commerce¹¹⁵. A great discussion in the 1980s and 1990s revolved around *lex*

¹¹¹ L. Lima Pinheiro, Arbitragem Transnacional..., cit., p. 441.

¹¹² L. Lima Pinheiro, Arbitragem Transnacional..., cit., p. 441; Emmanuel Gaillard, Legal Theory in International Arbitration, Leiden-Boston, Nijhoff, 2010, p. 47.

¹¹³ L. Lima Pinheiro, Arbitragem Transnacional..., cit., p. 441; B. Z. Tamanaha, "Understanding Legal Pluralism...", p. 398.

¹¹⁴ L. Lima Pinheiro, Arbitragem Transnacional..., cit., p. 443.

¹¹⁵ A. Marques dos Santos, Direito Internacional Privado, cit., p. 34.

mercatoria, and whether it consisted in a legal order¹¹⁶. This discussion focused on the law applicable to the merits of a dispute and to the arbitral procedure and led states to amend or clarify their arbitration laws to address these issues. Broadly speaking, modern arbitration laws then proceeded to allow parties to choose and arbitrators to apply rules of law, rather than laws (that is, national laws) and to craft the procedure as they considered adequate, albeit based on the fundamental principles of equality of the parties and due process of law¹¹⁷.

In terms of *sources*, the rules and principles of transnational arbitration law can be found in custom, understood as customary arbitral case law, and institutional arbitration rules¹¹⁸. In addition, it is argued that arbitral tribunals will apply, primarily, rules and principles of transnational origin. The only requirement that these rules and principles of transnational origin must obey is that they conform to general principles of law and fundamental values largely recognized by the international community¹¹⁹.

Examples of the former are rules and principles related to the validity of the arbitration agreement, the parties' freedom to choose the law applicable to the merits of the dispute,

¹¹⁶ E. Gaillard, *Legal Theory...*, cit., p. 37; G. Teubner, "Breaking Frames..."; cit., section IV. See also – Dário Mouta Vicente, *Da Arbitragem Comercial Internacional*, Coimbra, Coimbra Editora, April 1990, pp. 199-200, arguing that *lex mercatoria* is not a legal order, and thus reference to it by the parties can only be considered a substantive reference, that is, of contractual nature.

¹¹⁷ E. Gaillard, *Legal Theory...*, cit., p. 38.

¹¹⁸ L. Lima Pinheiro, *Arbitragem Transnacional...*, cit., p. 444.

¹¹⁹ L. Lima Pinheiro, *Arbitragem Transnacional...*, cit., p. 445. Some authors add that a systemic use of comparative law resources is also employed here, to "establish whether the rule that a party claims to be applicable is generally accepted by States or, to the contrary, is isolated or outdated" – see E. Gaillard, *Legal Theory...*, cit., p. 53.

and the relevance of commercial usages, but also equality of the parties and the right to be heard¹²⁰.

Considering their genesis, these rules are seen as more adequate, and while presenting an international uniformity, they do not prevent the applicability of mandatory rules of national law. Furthermore, these are in line with an international general conception of justice¹²¹.

The source of arbitration's *juridicity* is argued to have different origins, a national legal order, party autonomy, the several legal orders where the arbitration award will be effective, or autonomous transnational law itself¹²². A more current trend asserts that the jurisdictional powers of arbitrators are based on the transnational principle of autonomous resolution of disputes and the respective recognition by states¹²³.

From a *sociological standpoint*, Teubner has called for a legal recognition of transnational law as positive law¹²⁴. Arbitration derives its legitimacy from *lex mercatoria*, as the *fora* where disputes related to this body of rules are to be resolved, while at the same time contributing to its perpetuation and development, through the decisions issued by arbitrators¹²⁵. This can be seen as a means of defending and expanding this normative

¹²⁰ L. Lima Pinheiro, Arbitragem Transnacional..., cit., p. 446.

¹²¹ L. Lima Pinheiro, Arbitragem Transnacional..., cit., p. 447.

¹²² L. Lima Pinheiro, Arbitragem Transnacional..., cit., pp. 448-465.

¹²³ Be it the convergence of all states, see E. Gaillard, Legal Theory..., cit., pp. 46, 48, or the states with a relevant connection with the arbitration - L. Lima Pinheiro, Arbitragem Transnacional..., cit., p. 466.

¹²⁴ G. Teubner, "Breaking Frames...", cit., sections IV and V. See also section 2.1.2 above.

¹²⁵ A. Marques dos Santos, Direito Internacional Privado, cit., p. 34; see also section 2.1.2 above.

system, against other normative systems that are in conflict¹²⁶. In sum, international commercial arbitration is seen as a non-hierarchical, self-regulated and transnational phenomenon¹²⁷.

Additionally, international arbitration has also been characterized as a “field”¹²⁸, in the sense that was conceptualized by Bourdieu¹²⁹, where several social actors, including suppliers, consumers, and regulatory agents, interacting more frequently with each other, than with other social agents, and sharing a “common meaning system”, although living in a polarized field¹³⁰.

ii. Transnational arbitration and choice of law

As explained above¹³¹, *private international law* is the body of law that is called upon when a claim or a dispute involves an element foreign to the system to which the court dealing with it belongs. This body is composed of laws that deal with issues of international jurisdiction, transnational provisional relief, choice of law and international recognition and

¹²⁶ B. Z. Tamanaha, “Understanding Legal Pluralism...”, p. 401.

¹²⁷ E. Gaillard, *Legal Theory...*, cit., pp. 45-51.

¹²⁸ Emmanuel Gaillard, “Sociology of international arbitration”, in *Arbitration International*, Oxford University Press, 2015, Vol. 31, pp. 1–17.

¹²⁹ Gaillard also mentions other authors that have studied sociology or arbitration, including - Yves Dezalay and Bryant G. Garth, *Dealing in Virtue. International Commercial Arbitration and The Construction of a Transnational Legal Order*, Chicago, Chicago Series in Law and Society, 1996, with a foreword by Pierre Bourdieu.

¹³⁰ E. Gaillard, “Sociology ...”, cit., p. 3.

¹³¹ See Section **Erro! A origem da referência não foi encontrada.**

enforcement¹³². The same function will be relevant in international arbitration, even if conducted out of court¹³³. Some authors view transnational arbitration law is a subcategory of private international law¹³⁴.

When it comes to the intersection between arbitration and choice of law, there are three topics that typically come to mind: the arbitration agreement, the arbitration procedure, and the merits of the dispute¹³⁵. As was mentioned, the freedom of the parties to conform their arbitral procedure and to choose the law applicable to the merits have already been widely discussed. These points are now considered established principles of transnational arbitration law and have been recognized both in international legal instruments, as well as national laws¹³⁶.

However, there are other issues that can come up in arbitration, and that will require a determination on the applicable law. These can include the capacity of the parties to enter into an arbitration agreement, the objective and subjective arbitrability of disputes, the recognition and enforcement of the award, among other procedural issues¹³⁷, including those related to interim measures, we add.

¹³² G. Bermann, *International Arbitration...*, cit., pp. 18-19.

¹³³ G. Bermann, *International Arbitration...*, cit., pp. 20-22.

¹³⁴ G. Bermann, *International Arbitration...*, cit., p. 59.

¹³⁵ Gary B. Born, *International Commercial Arbitration*, 3rd ed., The Hague, Kluwer Law International, 2020, section §19.01.

¹³⁶ L. Lima Pinheiro, *Arbitragem Transnacional...*, cit., pp. 467-469.

¹³⁷ Blackaby Nigel, Constantine Partasides, et al., *Redfern and Hunter on International Arbitration*, 6th ed., Kluwer Law International, Oxford University Press, 2015, p. 157

If the parties choose a law to apply to any issue of their dispute, arbitrators will typically interpret and apply that choice-of-law clause, unless mandatory rules indicate otherwise. If the parties do not provide for the applicable law for a certain issue of their dispute, which often is the case considering the panoply of potential issues raised therein, then the arbitrators will have to make a determination regarding the applicable law¹³⁸.

In this moment, arbitrators may either choose the applicable law pursuant to a choice of law methodology or directly apply a substantive rule¹³⁹. The latter method could only be considered an alternative if a universal substantive law existed. This is considered both “utopic”¹⁴⁰ and inapt to replace conflict of law norms, because these universal norms would still exist within a specific time and space, and therefore, while there exist various substantive-legal systems of laws, rules regarding conflict of laws in space will always be necessary¹⁴¹.

iii. “International arbitration standards”

International standards are principles and rules consistently applied by arbitral tribunals in international arbitrations seated all around the globe. They arise from situations where similar issues are considered and arbitrators draw upon common principles of law in

¹³⁸ G. Born, *International Commercial ...*, cit., section §19.01.

¹³⁹ G. Born, *International Commercial...*, cit., section §19.01; A. Marques dos Santos, *Direito Internacional Privado*, cit., p. 16.

¹⁴⁰ A. Marques dos Santos, *Direito Internacional Privado*, cit., p. 43.

¹⁴¹ A. Marques dos Santos, *Direito Internacional Privado*, cit., p. 43; J. Baptista Machado, *Lições...* cit., p. 15.

developed states to solve them¹⁴². These international arbitration standards apply to matters of transnational arbitration law, meaning the regulation of the arbitration procedure.

To some extent, these international standards have been codified. Take the example of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) (“New York Convention”)¹⁴³.

The legal framework of international arbitration is said to be constituted by this convention. This is a multilateral treaty dealing with common legislative standards for the recognition of arbitration agreements and court recognition and enforcement of foreign and non-domestic arbitral awards, and although it was prepared by the United Nations prior to the establishment of the United Nations Commission on International Trade Law (“UNCITRAL” or “Commission”) in 1969, the promotion of the New York Convention is an integral part of UNCITRAL’s work¹⁴⁴.

This treaty was designed for the purpose of facilitating the effective recognition and enforcement of foreign arbitration agreements and arbitration awards. The overarching idea was to establish a uniform, international set of standards facilitating enforcement, and avoid that the application of parochial rules would render ineffective or obstruct the arbitral

¹⁴² G. Born, *International Commercial ...*, cit., section §17.02[G][2].

¹⁴³ G. Born, *International Commercial ...*, cit., section §11.0.1[A].

¹⁴⁴ See “Foreign Arbitral Awards”, Conventions, Arbitration, UNCITRAL. Available at https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards (last accessed 7 February 2021).

process, by imposing local standards on foreign-seated arbitrations that disregard the essential characteristics of international arbitration¹⁴⁵.

Thus, it is said the New York Convention *adopts uniform international standards* such as those recognizing the presumptive validity of such awards, final and binding for the parties, and limit the grounds for denying their recognition¹⁴⁶, but also in relation to the validity of the arbitration agreement and the limited grounds available to oppose recognition¹⁴⁷. Not only that, but scholars also argue that this convention, often when failing to provide a specific choice of law rule, *provides for the application of uniform international standards*, on issues such as the standards of procedural fairness (here emphasizing the inadequacy of other sources, including the law of the place of enforcement)¹⁴⁸ and standards of arbitrator independence¹⁴⁹.

In relation to *procedural fairness*, “an equal, adequate opportunity to present one’s case, by counsel of one’s choice, to an impartial tribunal which applies regular, rational and neutral adjudicatory procedures” has been the common set of minimum international procedural

¹⁴⁵ G. Born, *International Commercial ...*, cit., section §26.05[C][3][c][ii].

¹⁴⁶ G. Born, *International Commercial ...*, cit., section §26.03[B]; § 26.05[C][7][e][vii].

¹⁴⁷ G. Born, *International Commercial ...*, cit., section §26.05[C][1][e][i][5]. This author argues that only when such agreements are invalid under generally applicable, internationally neutral contract law defences that do not impose discriminatory burdens or requirements on the formation or validity of agreements to arbitrate, should the recognition of their validity be denied.

¹⁴⁸ G. Born, *International Commercial ...*, cit., section §26.05[C][3][a] and 26.05[C][3][c][ii]. Under Article V(1)(b), an award may be denied recognition if “[t]he party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case.”

¹⁴⁹ G. Born, *International Commercial ...*, cit., section §26.05[C][6][a].

guarantees that warrant general consensus, despite different legal systems having different approaches in this regard¹⁵⁰.

In relation to the *standards of arbitrator independence*, these have deserved unprecedented attention because in arbitration, differently from national litigation, the parties appoint the arbitrators that will solve their dispute, who work regularly in a cohesive community. In this regard the 2014 IBA Guidelines on Conflicts of Interest in International Arbitration, a set of guidelines was prepared and issued addressing this topic¹⁵¹.

This and other “procedural” issues in international arbitral proceedings are also said to be generally governed by international standards¹⁵². The example of evidence-taking and standards for disclosure is telling, and also here codified non-binding guidelines have been prepared. Examples of these are the 2010 IBA Rules on the Taking of Evidence in International Arbitration, prepared to ensure efficiency and bridge the gap between civil law and common law practices¹⁵³, and the 2018 Prague Rules¹⁵⁴.

These guidelines are what is called “soft law”, that is, non-binding directives and recommendations with great persuasive power in relation to the agents or operators of

¹⁵⁰ G. Born, *International Commercial ...*, cit., section §26.05[C][3][c][ii].

¹⁵¹ Document available at <https://www.ibanet.org/Document/Default.aspx?DocumentUid=e2fe5e72-eb14-4bba-b10d-d33dafee8918> (last accessed 7 February 2021). A version in Portuguese, commented, is included in *Dário Moura Vicente (coord.), Lei da Arbitragem Voluntária Anotada*, 4th ed., Associação Portuguesa de Arbitragem, Almedina, 2019. See also G. Bermann, *International Arbitration...*, cit., pp. 68-69.

¹⁵² G. Born, *International Commercial ...*, cit., section § 17.02[G][2].

¹⁵³ Document available at <https://www.ibanet.org/Document/Default.aspx?DocumentUid=68336C49-4106-46BF-A1C6-A8F0880444DC> (last accessed 7 February 2021). See also G. Bermann, *International Arbitration...*, cit., pp. 69-70.

¹⁵⁴ Document available at https://pragerules.com/prague_rules/ (last accessed 7 February 2021).

international commercial law¹⁵⁵. The purpose of these procedural guidelines and recommendations has been to provide options for the parties to choose foreseeable standards allowing parties to mitigate some of the unpredictability that comes with arbitration's lack of specific regulation¹⁵⁶.

The more they are adopted by parties, the more awards will interpret and apply them, the more these will become and be seen as “best practices”, and eventually, on some matters, customary practice that can be incorporated and recognized as international standards¹⁵⁷. In some way, they serve as criteria of legitimation of practices and behaviours of a given profession¹⁵⁸. Criticism is not absent from these proposals, who have been accused of “judicialization” or “ossification” of arbitration, with the effect of actually harming arbitration's biggest advantage, that of flexibility¹⁵⁹.

b. Collision of “international standards” and state law in arbitral interim measures

¹⁵⁵ A. Marques dos Santos, *Direito Internacional Privado*, cit., p. 41.

¹⁵⁶ See B. Nigel, C. Partasides, et al., *Redfern and Hunter...*, cit., pp. 227-228, “One of the recognised advantages of international arbitration is the flexibility that results from the paucity of rules (and the corresponding preponderance of discretion) that enables arbitrators to tailor proceedings precisely to the characters, cultures, and claims that feature in any particular arbitration. Thus, every international arbitration—at least in theory—is a microcosm of potential procedural reform. That potentiality is undoubtedly a quality of the arbitral process—but that quality has a price: procedural unpredictability. And it is a price that many in the expanding constituency of arbitration users are increasingly unwilling to pay.”

¹⁵⁷ G. Bermann, *International Arbitration...*, cit., pp. 70-71.

¹⁵⁸ A. Marques dos Santos, *Direito Internacional Privado*, cit., p. 41.

¹⁵⁹ G. Bermann, *International Arbitration...*, cit., pp. 70-71.

The topic of interim measures raises many issues in relation to choice of law and international standards. We will address first the notion and function of interim measures, along with their relation with choice of law (Section 3.b.i.), describe the rules of law that may apply in relation to the prerequisites for granting these arbitral interim measures (Section 3.b.ii.) and discuss the applicability of “international standards” to this issue (Section 3.b.iii.).

i. Arbitral interim measures and choice of law

Interim measures are broadly characterized as a form of temporary and urgent relief¹⁶⁰, with the aim of safeguarding the rights of parties to a dispute pending its final resolution¹⁶¹. These summary and provisional mechanisms are considered a tool to facilitate the effectiveness of judicial protection¹⁶², and are seen as a neutralizing antidote against the harm inflicted by delayed court decisions, which will necessarily require some amount of time to issue a fair verdict¹⁶³.

¹⁶⁰ Hilary Heilbron, “Interim Measures in International Commercial Arbitration - Useful Weapon or Tactical Missile: By What Standards Should Arbitral Tribunals Fire the Shots?”, in Albert Jan van den Berg (ed.), *Legitimacy: Myths, Realities, Challenges*, ICCA Congress Series, the Hague, Kluwer Law International, 2015, Vol. 18, pp. 241-259, p. 242.

¹⁶¹ Ali Yesilirmak, *Provisional Measures in International Commercial Arbitration*, the Hague, Kluwer International Law, 2005, p. 5; Armindo Ribeiro Mendes, “As Medidas Cautelares e o Processo Arbitral”, in *Revista Internacional de Arbitragem e Conciliação*, Ano II, Associação Portuguesa de Arbitragem, Almedina, 2009, pp. 57-114, p. 95. See also the definition in Art. 17(2) of UNCITRAL Model Law.

¹⁶² Opinion of Mr. Advocate General Tesauro on Case C-213/89, *R. v. Secretary of State for Transport, ex parte: Factortame Ltd*, I - 2450, 17 May 1990, para. 18. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61989CC0213> (last accessed on 7 February 2021).

¹⁶³ António Abrantes Galdes, *Temas da Reforma do Processo Civil*, Vol. III, Coimbra, Almedina, 1998, p. 41; Miguel Teixeira de Sousa, *Estudos sobre o Novo Processo Civil*, 2nd ed., Lisboa, Lex, 1997, pp. 49-50; José

Based on the above, it is clear that interim measures are instrumental and dependent of the main actions initiated by the respective right holders. This means that interim measures will not autonomously and definitively solve a conflict of interests, rather effectively prevent serious breach of irreparable rights and anticipate certain effects of final court decisions in order to prevent harm arising from the mentioned delay¹⁶⁴.

This applies also to international commercial arbitration. Parties to international arbitration may also resort to courts or to arbitrators, depending on the relevant *lex arbitri*, to request interim measures.

The issues of applicable law in regard to arbitral interim relief are vast. There are several issues in interim measures that can be regulated and addressed autonomously: the power of the arbitral tribunal to order interim measures, the prerequisites that have to be met for the tribunal to order the measure, the types of measures that the arbitral tribunal is entitled to order and the procedure of ordering interim measures¹⁶⁵.

The many issues listed here confirm that interim relief is neither substantive (which would lead to the application of the *lex causae* - law governing the parties' underlying contract or relationship) nor purely procedural (which would be regulated by the parties' arbitration

Miguel Júdice, "As Providências Cautelares e a Arbitragem: Em que Estamos?", 2011, pp. 1-2. Available at: https://www.josemigueljudice-arbitration.com/xms/files/03_ARTIGOS_CONFERENCIAS_JMJ/01_Artigos_JMJ/As_Providencias_Cautelares_e_a_Arbitragem_Em_que_estamos.pdf (last accessed on 7 February 2021).

¹⁶⁴ A. Abrantes Galdes, *Temas...*, cit., p. 35; Rui Pinto, "As providências cautelares na arbitragem: noção geral e papel. Algumas notas", I Pós-graduação Avançada Direito da arbitragem, 19 January 2016, pp. 13-14.

¹⁶⁵ Christopher Boog, "The laws governing measures in international arbitration", in Franco Ferrari and Stefan Kroll (eds.), *Conflict of Laws in International Arbitration*, Munich, sellier european law publishers, 2011, pp. 409-457, p. 411.

agreement, *lex arbitri* – the law applicable to the arbitration procedure, typically the law of the seat of the arbitration, or the institutional rules adopted by the parties)¹⁶⁶. In any case, arbitrators in this instance will have to consider the relevant laws connected with the dispute and choose one to apply to each issue, should it arise.

ii. The (rules of) law applicable to the prerequisites to grant arbitral interim measures

We will focus on the prerequisites to grant interim measures. Many laws can apply to this issue: the *lex arbitri*, the national civil procedure rules, institutional rules, the *lex causae*, and international standards¹⁶⁷.

Regarding the *lex arbitri*, opinions split. Some authors argue that if it provides for rules and it is considered to apply to the issue of the prerequisites, there should be no doubt of its binding nature¹⁶⁸. Differently, others argue that most national laws are silent on this issue, and by failing to provide for these standards, they indicate that they are not fit for that

¹⁶⁶ Mariana França Gouveia and Iñaki Carrera, “Choice of Law in Interim Measures issued by Emergency Arbitrators”, in PLMJ Arbitration Review, Lisbon, no. 3, 2018, pp. 25-34, p. 28.

¹⁶⁷ M. França Gouveia and I. Carrera, “Choice...”, cit., p. 30.

¹⁶⁸ M. França Gouveia and I. Carrera, “Choice...”, cit., p. 30, citing Interim Award (1996), ICC case 8786, ICC International Court of Arbitration Bulletin, Paris, Vol. 11, No. 1, 2020, p. 81, where this was the preferred method. In favour of the application of the *lex arbitri*, see also John Beechey & Gareth Kenny, “How to control the impact of time running between the occurrence of the damage and its full compensation: Complementary and alternative remedies in interim relief proceedings”, in Filip De Ly and Laurent Levy (eds.), Interest, Auxiliary and Alternative Remedies in International Arbitration, Dossiers of the ICC Institute of World Business Law, Paris, Volume 5, 2008, pp. 91-125, p. 109.

purpose; moreover, there is no logical connection between interim measures and the law of the seat¹⁶⁹.

As to *national civil procedure rules*, although having been employed in practice¹⁷⁰, their applicability is largely rejected: reasons are the unsuitability of these rules in relation to the arbitral procedure, which naturally arises from the difference between the arbitrators' powers compared to those of state courts¹⁷¹.

Institutional rules seem to provide little guidance on this issue¹⁷².

The *lex causae*, despite having been applied in practice¹⁷³, also is a point of contention. Its application would derive from the assumption that the parties' choice of law for the merits also established their intentions regarding provisional measures, an assumption some authors accept¹⁷⁴, and others question, raising a flag in situations where different substantive laws will apply to different claims, and interim measures are requested based

¹⁶⁹ G. Born, *International Commercial ...*, cit., section § 17.02[G][2].

¹⁷⁰ See for example *Interim Award (1996)* in ICC Case no. 7544, ICC International Court of Arbitration Bulletin, Paris, Vol. 11, No. 1, 2008, p. 56, where these rules were considered when the arbitral tribunal was determining which standards to apply.

¹⁷¹ M. França Gouveia and I. Carrera, "Choice...", cit., p. 31; G. Born, *International Commercial ...*, cit., section §17.02[G][2].

¹⁷² M. França Gouveia and I. Carrera, "Choice...", cit., p. 31; G. Born, *International Commercial ...*, cit., section §17.02[G][3][a]. See Art. 26(3) of the UNCITRAL Arbitration Rules.

¹⁷³ See *Interim Award (1998)*, ICC Case 8879, ICC International Court of Arbitration Bulletin, Paris, Vol. 11, No. 1, 2000, p. 84.

¹⁷⁴ Jean-François Poudret and Sébastien Besson, *Droit comparé de l'arbitrage international*, Zurich-Bâle-Genève, Bruylant, L.G.D.J., Schulthess, 2002, pp. 565-566.

on those claims¹⁷⁵. Moreover, this would imply characterizing this issue as one belonging to the merits, and not to the procedure, which is also criticized¹⁷⁶.

Finally, “*international standards*” appear as an alternative, or even the most appropriate solution. Several authors have defended that international standards should apply to the prerequisites of arbitral interim measures, instead of a specific national law¹⁷⁷. They consider that this issue is unrelated to the seat and to the underlying contract¹⁷⁸, since both categories of national laws typically do not provide for these prerequisites¹⁷⁹, and therefore international sources should provide the appropriate standards¹⁸⁰. Several arbitral tribunals have applied international standards to this issue already¹⁸¹.

¹⁷⁵ G. Born, *International Commercial ...*, cit., section § 17.02[G][2].

¹⁷⁶ M. França Gouveia and I. Carrera, “Choice...”, cit., p. 31.

¹⁷⁷ C. Boog, “The laws governing...”, cit., p. 425 (see also references contained therein); G. Born, *International Commercial ...*, cit., section § 17.02[G][2]; Julian D. M. Lew, “Commentary on Interim and Conservatory Measures in ICC Arbitration Cases”, *ICC International Court of Arbitration Bulletin*, Paris, Vol. 11, No. 1, 2000, pp. 23-30, pp. 26-28; Fernández González de Cossío, “Interim Measures in Arbitration: Towards a Better Injury Standard”, in Albert Jan Van den Berg (ed.), *Legitimacy: Myths, Realities, Challenges*, ICCA Congress Series, Vol. 18, 2015, pp. 260-277.

¹⁷⁸ See also references contained in C. Boog, “The laws governing...”; cit., pp. 424-425.

¹⁷⁹ Except for countries that have adopted the UNCITRAL Model Law amendments of 2006.

¹⁸⁰ G. Born, *International Commercial ...*, cit., section § 17.02[G][2]. See also Pierre Karrer, “Interim Measures Issued by Arbitral Tribunals and the Courts – Less theory, Please”, in Albert Jan van den Berg (ed.), *International Arbitration and National Courts: The Never Ending Story*, ICCA Congress Series no. 10, 2001, pp. 97-110, p. 104, who bases these standards on a “comparative law approach”.

¹⁸¹ Final Award (1994), ICC Case 7895, *ICC International Court of Arbitration Bulletin*, Paris, Vol. 11, No. 1, 2000, p. 64; Final Award (1994), ICC Case 7210, *ICC International Court of Arbitration Bulletin*, Paris, Vol. 11, No. 1, 2000, p. 49; Partial Award (1995), Case 8113, *ICC International Court of Arbitration Bulletin*, Paris, Vol. 11, No. 1, 2000, p. 65; Interim Award (1997), ICC Case 8894, *ICC International Court of Arbitration Bulletin*, Paris, Vol. 11, No. 1, 2000, p. 94.

The application of these standards would lead to a better outcome because these standards are more appropriate, as they accord to the more flexible and business oriented nature of arbitration, when compared to courts, and encourage uniform results, providing for legal certainty and predictability to the arbitral process, in the end fostering the parties' trust in international arbitration¹⁸². Some authors add that this method would also reduce the importance of choice-of-law questions in international arbitration, an important objective of arbitral proceedings¹⁸³.

iii. “International standards” of prerequisites to grant arbitral interim measures

There is no “official” repository of these standards. In any case, we can examine two main proposals made by scholars regarding the source of these standards, codification and arbitral decisions.

First, the *standards set out in the UNCITRAL Model Law on International Commercial Arbitration* (1985, with amendments as adopted in 2006) (“Model Law”). Let us briefly provide some context of this legal text and institution.

The Model Law has modern features to meet the specific needs of international arbitration and was designed to assist States in reforming their arbitration laws and was

¹⁸² M. França Gouveia and I. Carrera, “Choice...”, cit., p. 33; C. Boog, “The laws governing...”, cit., p. 428.

¹⁸³ G. Born, *International Commercial ...*, cit., section § 17.02[G][2].

prepared by UNCITRAL in a first version in 1985, and a revised version in 2006¹⁸⁴. UNCITRAL has a mandate to further the progressive harmonization and unification of the law of international trade.

In fact, UNCITRAL has progressively codified legal rules relevant to international arbitration over the years, in the forms of recommendations, model laws, rules, conventions, among other instruments¹⁸⁵. So far, UNCITRAL has achieved several milestones in the field of international arbitration, having in its record the Model Law – adopted in 84 States¹⁸⁶ – and UNCITRAL Arbitration Rules, but also the Convention on Transparency in Treaty-based Investor-State Arbitration (New York, 2014) and the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (April 2014).

These instruments will later have to be adopted or translated to national legislation by states; therefore, as they exist, they can be classified as a form of “soft law”¹⁸⁷.

In its Article 17, the Model Law defines interim measures as temporary measures issued prior to the issuance of the award that settles the dispute, with various purposes, including to maintain or restore the *status quo* pending determination of the dispute, prevent current or imminent harm or prejudice to the arbitral process, preserve assets out of which a

¹⁸⁴ See “Commercial Arbitration”, Model Law, Arbitration, UNCITRAL, undated. Available at: https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration (last accessed 7 February 2021).

¹⁸⁵ “A Guide to UNCITRAL. Basic facts about the United Nations Commission on International Trade Law”, United Nations Commission on International Commercial Law, Vienna, January 2013. Available at: <https://www.uncitral.org/pdf/english/texts/general/12-57491-Guide-to-UNCITRAL-e.pdf> (last accessed 7 February 2021)..

¹⁸⁶ See “Commercial Arbitration”, Model Law, Arbitration, UNCITRAL, undated. Available at: https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration (last accessed 7 February 2021).

¹⁸⁷ A. Marques dos Santos, *Direito Internacional Privado*, cit., p. 42.

subsequent award may be satisfied or preserve evidence that may be relevant and material to the dispute.

Article 17-A of the Model Law sets out the conditions for granting interim measures. First, harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted. Second, there must be a reasonable possibility that the requesting party will succeed on the merits of the claim.

The recognition of these codified standards is not unanimous. On the one hand, the existence of this list is seen as being “in tension” with international standards, because formalizing these in a normative text (of the law of the seat) is unnecessary and unwise. This is because this formalization threatens, and even prevents, the development of improved and more nuanced international standards tailored to the circumstances of each arbitration case¹⁸⁸. On the other hand, it is also raised that these, in principle, aim to reflect a position widely supported in the UNCITRAL member states, and thus should be considered and adopted in national legislation¹⁸⁹.

Second, the other proposal regarding the content of international standards focuses on the formation of these standards through practice, that is, they will be construed over time

¹⁸⁸ G. Born, *International Commercial ...*, cit., section § 17.02[G][2].

¹⁸⁹ Settlement of commercial disputes Interim measures of protection Proposal by the International Chamber of Commerce (3 February 2004), UN Doc. A/CN.9/WG.II/WP.129, p. 2. Available at: <https://undocs.org/en/A/CN.9/WG.II/WP.129> (last accessed 7 February 2021). In this document it is stated that the Model Law “is designed to reflect a worldwide consensus on the principles and important issues of international arbitration practice that is acceptable to States of all regions.”; C. Boog, “The laws governing...”, cit., p. 429.

in *arbitration awards* where similar issues are considered and arbitrators will draw upon common principles of law in developed states to solve them¹⁹⁰. This allows for consistency and reliability, but also makes space for constant amendment¹⁹¹. Scholars who have studied these decisions propose that the following criteria has been established: *fumus bonus iuris*, urgency and irreparable or substantial harm¹⁹². The requirement of proportionality can also be considered¹⁹³. Other decisions have added other requirements¹⁹⁴.

A proposal has been made that the mandatory provisions of law (here most relevantly the law of the seat), if they exist, be considered by the arbitrator, followed by the parties' agreement on these requisites (including by referral to institutional rules with guidelines in this regard), failing which international standards of international arbitration should apply¹⁹⁵. In effect, this proposal is a suggested transnational choice of law rule for the prerequisites of interim measures, in the field of international arbitration. Differently, authors that consider that international standards are the most adequate to regulate this issue, would in effect be proposing a *voie directe* mechanism, for arbitrators to carry out.

¹⁹⁰ G. Born, *International Commercial ...*, cit., section § 17.02[G][2].

¹⁹¹ M. França Gouveia and I. Carrera, "Choice...", cit., p. 32.

¹⁹² M. França Gouveia and I. Carrera, "Choice...", cit., p. 32, citing Partial Award (1995), Case 8113, ICC International Court of Arbitration Bulletin, Paris, Vol. 11, No. 1, 2000, p. 65; Interim Award (1997), ICC Case 8894, ICC International Court of Arbitration Bulletin, Paris, Vol. 11, No. 1, 2000, p. 94; inter alia.

¹⁹³ M. França Gouveia and I. Carrera, "Choice...", cit., p. 32, citing, inter alia, Mohammed Munshi v. Mongolia, Award on Emergency Measures, Arbitration SCC EA 2018/007, §§ 41 et seq.. Available at: <https://www.italaw.com/cases/6656> (last accessed 7 February 2021).

¹⁹⁴ See in detail, M. França Gouveia and I. Carrera, "Choice...", cit., p. 32.

¹⁹⁵ C. Boog, "The laws governing...", cit., pp. 427-428; similarly, see G. Born, *International Commercial...*, cit., section § 17.02[G][3][a].

c. Relevance of Teubner and Korth's proposal in transnational arbitration law: final critical remarks

We have described above the position of Teubner and Korth in relation to transnational law, as a true legal order recognized through secondary rule-making processes, and their solution to the problem of the collision of *lex digitalis* and national laws, trending towards a substantive law approach whereby the adjudicator will make their own rule, integrating all the policies contained in the conflicting laws. We then examined transnational arbitration law, another sectorial differentiated legal system, and studied its scope, autonomy and content, focusing on international standards applicable to the issue of the prerequisites to grant interim measures.

This specific issue encompasses, in our view, a problem similar to that addressed by Teubner and Korth, as there will be circumstances where a potential collision between national law and international standards will delve on the issue of granting interim measures, an issue that is highly debated in the field, and not consensual in many aspects. As was explained, there is an extensive debate, from a legal standpoint, regarding the law applicable to this specific practical matter.

Having made our generic remarks on Teubner and Korth's proposal above, regarding their proposition in light of legal pluralism and private international law¹⁹⁶, we will now raise and discuss the two main issues that this contextual approach raises in relation to our

¹⁹⁶ See Section 2.d. above.

practical matter of arbitral interim measures, and how these authors' thesis can help us develop our research in these areas. These are, from one standpoint, the issue of rulemaking in transnational arbitration, and from another, the substantive law approach suggested for cases of collision.

First, as regards rulemaking in transnational arbitration law, we note that these authors focused partly on the *codification by private bodies*¹⁹⁷.

We have mentioned *UNCITRAL* already. Commentators have highlighted this Commission's capacity to invite to the same working groups different social actors, with their own extremely distinct interests, and to generate norms that are able to accommodate these different positions¹⁹⁸.

Tellingly, *UNCITRAL* is able to mediate conversations that allow the integration of states with different legal traditions (including those from Common law and Civil law families), as well as other social actors with other interests, who are also present in the working groups as observers, such as arbitral institutions, NGOs, arbitration clubs, professional organizations and academics. Working groups deliberate traditionally based on consensus¹⁹⁹, which means that voices of these social actors will only be relevant (and thus

¹⁹⁷ See Section 2.a.ii. above.

¹⁹⁸ E. Gaillard, "Sociology...", cit., p. 16.

¹⁹⁹ "A Guide to *UNCITRAL*", cit., p. 6.

they will only be able to export their values) to the extent that a compromise is achieved. The production of relevant legal instruments can take years²⁰⁰.

In some way, this codification process can be understood as a global legislative process, totally public and open to scrutiny, as Hespanha would require²⁰¹, although sectorial based. In addition, the full participation of all states, and to what degree their participation is representative can be questioned.

Indeed, there are authors that state that the working core lawmakers at UNCITRAL represent a very small subset of developed state and non-state actors, which interferes with this Commission's legitimacy and efficacy, since the former will prevent widespread adoption of the instruments resulting from its work²⁰². This is a critic not exclusive of arbitration, new globalized forms of political organization, deemed more rational because less detached from local interests have said to be overvalued, considering the risks of disfigurement and subordination of weaker communities and deficit of regulation in globalization²⁰³. However, the same authors recognize that, considering that legitimacy rests on perception, it may be that entities are satisfied with the existence of an opportunity to be

²⁰⁰ UNCITRAL instruments are first discussed in working groups, that draft an instrument, this instrument will after that be approved by the Commission, which also sets the agenda of UNCITRAL, and finally the UN General Assembly will ratify the Commissions decisions. See "A Guide to UNCITRAL", cit..

²⁰¹ See Section **Erro! A origem da referência não foi encontrada.** above.

²⁰² Susan Block-Lieb, Terence C. Halliday, and Josh Pacewicz, "Who Governs? Delegations in Global Trade Lawmaking", in Regulation & Governance, Fordham University School of Law, 7, 2013, pp. 279-298, p. 280. Available at: http://ir.lawnet.fordham.edu/faculty_scholarship/614 (last accessed on 7 February 2021).

²⁰³ A. Hespanha, O direito..., cit., p. 71.

heard, and as long as the end-result instrument allows them sufficient flexibility to adapt to local circumstances²⁰⁴. This obviously impacts the discussion of international standards.

Arbitration institutions, such as the ICC International Court of Arbitration, with a global reach and a historically relevant role, are also relevant in the making of international conventions such as the New York Convention, a pillar of international arbitration²⁰⁵. Other institutions are established by region, commercial sector, or type of dispute²⁰⁶, and their rules will also inform what international standards will be in international arbitration.

In addition, the role of professional associations, such as the International Bar Association (IBA), which besides conducting conferences and other programs, will also issue guidelines with a view to reform²⁰⁷, as already mentioned. They grow as protagonists in the development of transnational arbitral law.

This *rise of non-state actors* is telling and can lead to other relevant observation. It seems that this social functional fragmentation, from Teubner and Korth's perspective, leads to the erosion of law of the seat²⁰⁸. The increasing number and density of repositories of

²⁰⁴ S. Block-Lieb et al., "Who Governs?...", cit., pp. 294-295.

²⁰⁵ See in detail Florian Grisel, "Treaty-Making between Public Authority and Private Interests: The Genealogy of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards", in *European Journal of International Law*, Oxford University Press, Vol. 28, No. 1, 2017, pp. 73-87.

²⁰⁶ G. Bermann, *International Arbitration...*, cit., p. 61,

²⁰⁷ G. Bermann, *International Arbitration...*, cit., p. 66.

²⁰⁸ G. Born, *International Commercial ...*, cit., section §11.01[B][2], "As discussed below, the practical importance of the law of the seat has eroded over past decades, because of a convergence in the terms of national arbitration statutes in different developed jurisdictions, and because of the imposition and application of international standards under the New York Convention. Despite these developments, the law and courts of the arbitral seat continue to play a unique, and sometimes critical, role in the international arbitral process

international standards, but also the recognition that these should have precedence in constituting what transnational arbitration law is points to this trend. However, mandatory rules of the seat, when existing, are to be respected, as they are a condition imposed by states to accept and recognize arbitration in their courts.

Associated with this matter, is the contented point of *whether codification is desired at all*, at the expense of the flexibility inherent to arbitration being totally forsaken. This tension between flexibility and predictability, between practice and formalized norm is present in the issue of interim measures, as was addressed²⁰⁹. Supporters of a less rigid approach would prefer to allow arbitrators, in their *decision-making*, to define for each case the rule that would serve the parties best, based on other previous arbitral decisions. In this sense, “every international arbitration—at least in theory—is a microcosm of potential procedural reform”²¹⁰.

In this regard, we note that Teubner suggests that the origin of this category of *lex mercatoria* will have both external and internal conditions: the former is the law searching for precedents and falsifying sediments of social communication (it begins in the middle); the latter a virtuous circle in contractual arbitration, between contract and arbitration, where an internal relation (contracts) is transformed into an external one (unofficial law), controlled

under the Convention and national arbitration legislation. In one authority’s words, “[t]he importance of the place of arbitration cannot be overestimated.”

²⁰⁹ See Section **Erro! A origem da referência não foi encontrada..**

²¹⁰ B. Nigel, C. Partasides, et al., Redfern and Hunter..., cit., pp. 227-228.

and disciplined by arbitral bodies (official law)²¹¹. Although the recognition by the arbitrator of the rule is not constitutive for the operational existence of transnational law²¹².

Second, and turning to the collision of laws part of this analysis, we also add some final remarks.

In the potential collision of national law and transnational arbitration standards the substantive law approach suggested, although an optimistic, remains a legally questioned solution. Legal concerns of lack of predictability, arbitrariness and unenforceability are present, as seen already²¹³, despite the material justice solution presented by von Mehren and Teubner and Korth. On top of this, the issue of a wider and reflected consensus lacking in any transnational law determination, as a self-contained system based on specific sectorial rationality, goes right to the core of whether arbitral decisions to this extent can ever be recognized as “legal” by the community at large.

This determination will be that of the parties initially, but also that of state courts, if annulment or recognition and enforcement of the award is sought at the national level, a perspective one cannot ignore in arbitration. State courts will also carry out their choice of law analysis, in relation to the same issue addressed by the arbitrators, and they may or may not apply the same choice of law methods as arbitrators did, or interpret the same norms in a similar way, even in the context of the same dispute²¹⁴. In this regard, it can be

²¹¹ G. Teubner, “Breaking Frames...”, cit., section VI.

²¹² G. Teubner, “Breaking Frames...”, cit., section II, and V.

²¹³ See Section **Erro! A origem da referência não foi encontrada.** above.

²¹⁴ G. Bermann, International Arbitration..., cit., p. 72.

said that “the possibility of exercising private international differently and, to the extent those differences are outcome-determinative, much depends on who, in any given issue, has the final word.”²¹⁵

On the one hand, by paying deference to arbitral decisions and enforcing them, albeit with a limited control, state courts are permitting the coexistence of a non-state legal system that was constituted to avoid the state legal system, allowing conflict to be suppressed in a certain way²¹⁶. On the other hand, their control of the choices made by the arbitrators, following this recognition principle, will have to be limited, and from a legal standpoint, might not extend to the arbitrators’ choice of law analysis.

A second remark pertains to the situations where, instead of having interests of the state and of transnational agents in collision, reflected in the mentioned conflict of laws, this conflict does not exist or can be said to be mitigated.

The phenomenon of “glocalization” can be observed, where “global” legal models are appropriated at the local level, which although entails an inherent risk of distortion of these original models, might be necessary in order to for them to be locally accepted²¹⁷.

In many states, a strategy of incorporation or recognition of arbitration has taken place, seen in relation to the recognition of arbitral decisions or imposition of arbitration for certain disputes²¹⁸. This can take place due to a variety of reasons, including the acceptance that

²¹⁵ G. Bermann, *International Arbitration...*, cit., p. 72.

²¹⁶ B. Z. Tamanaha, “Understanding Legal Pluralism...”, p. 405.

²¹⁷ A. Hespanha, *O direito...* cit., p. 86.

²¹⁸ B. Z. Tamanaha, “Understanding Legal Pluralism...”, p. 404. Other reactions could be the state legal system assuming a posture of neutrality, identity, or competition (ranging from permissive to prohibitive).

this mechanism provides a useful function, the belief that these norms are valid and legitimate, the embracing of political benefits, or the recognition that these norms are too powerful for the state legal system to replace²¹⁹.

This dynamic can be transplanted to our discussion. The Portuguese Arbitration Law is said to be modelled after the UNCITRAL Model Law²²⁰ and thus accepting its solutions, in our case, even the prerequisites provided for arbitrators to grant interim measures. In those cases where states have adopted the Model Law, a synthesis of the rules contained therein and international standards may achieve and meet the parties' expectations, considering that these rules can be said to codify those same standards, although this is not without debate, as we have seen. On this instance, no conflict would exist as the underlying policies would be in unison.

4. Conclusion

The cases explored by Teubner and Korth are situations where collision of regimes represents conflicts between social systems. These authors proposed to re-root conflicts

²¹⁹ B. Z. Tamanaha, "Understanding Legal Pluralism...", p. 404.

²²⁰ On the influence of the Model Law regarding the Portuguese arbitration law (Law no. 63/2011, of 14 December), António Sampaio Caramelo, "A reforma da lei da arbitragem voluntária" in *Revista Internacional de Arbitragem e Conciliação*, Associação Portuguesa de Arbitragem, Almedina, Ano II, 2009, pp. 7-56, p. 7. For a historical analysis of arbitration in Portuguese legislation, see Armindo Ribeiro Mendes, "A Arbitragem na Jurisprudência do Tribunal Constitucional", *Revista Internacional de Arbitragem e Conciliação*, Associação Portuguesa de Arbitragem, Almedina, Ano VII, 2014, pp. 123-160; pp. 123-126.

based on sociological directions, rejecting a model too formal and inept for post-modernity, and searched for rules dealing with new and different conflicts more adequately.

Based on the reflections above, we highlight two issues that, in our view, benefit from a sociological perspective in the study of transnational arbitration law, and those relate primarily to transnational law norm-making and level of formality desired by codifications of private bodies, and the applicability of international standards and the issues they raise in terms of predictability, but also perhaps the increasing permeability of state arbitration law to international arbitration law, with some limits. The example of the prerequisites to grant interim measures is telling and brings out these questions as well.

All the sub-issues addressed herein – and others that could be densified additionally – could benefit from further research and analysis. Our goal is to pursue the study of private international law and arbitration, and benefit from this research and analysis.

Overall, this is but the surface of the study of legal sociology contributing to private international law in general, and to transnational arbitration law in specific, in an effort to understand current phenomena and promote access to justice. In the words of von Mehren, “today, to the extent that contemporary economic and social life spills across the boundaries of nation states, the problem of justice remains, as we shall see, most perplexing.”²²¹.

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²²¹ A. von Mehren, “Choice of Law...”, cit., p. 29.

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