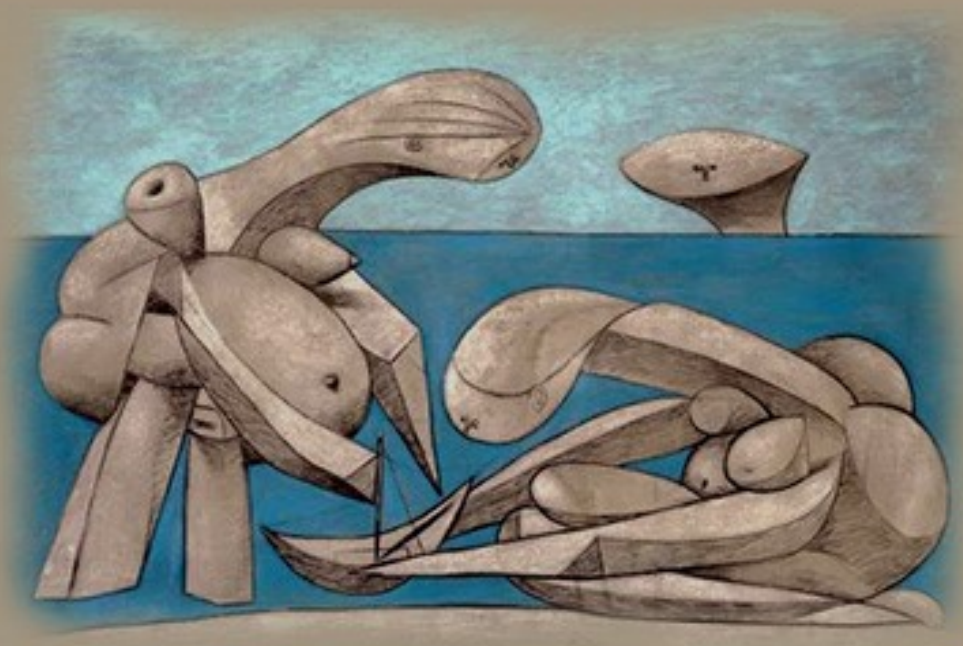
Journal du Droit Transnational



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Vol. 0 – 2023

A GENERAL THEORY OF TRANSNATIONAL PRIVATE LAW

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Abstract

Transnational law is perceived in this sphere as a third sphere of regulation, alongside domestic laws and public international law. In fact, it is argued that transnational has been carved from its two other counterparts by mutual agreement. Even so, transnational private law is wholly predicated on public law-related regulation, without which it is rendered meaningless. The transnational legal sphere is occupied by both state and non-state actors where, however, state actors cannot employ their law-making authority as leverage. States are happy to operate within this sphere as equals to non-state actors and are content to waive privileges otherwise existing under domestic and international law. Although there is some tendency for the transnational legal sphere to become a haven for activities that are unconstitutional, it is hoped that these are exceptional instances.

1 Introduction

The notion of transnational law means different things to different people. It is instructive that it was coined by an international lawyer,[1] yet its greatest manifestation is in the field of cross-border private transactions and dispute resolution. It equally enjoys a significant presence in the domain of international criminal law, but not in human rights, for good reason. In fact, international criminal law scholarship has been split among two rifts, although until the late 1900s this was very much a unified discipline. Transnational criminal law effectively signifies one of the most significant problems of treaty law; namely, the transposition of criminal definitions, penalization, sanctions and enforcement in domestic legal orders.[2] While some international offences are viewed as wholly independent from domestic laws (e.g. crimes against humanity and genocide), most others generally require the mechanisms of states to produce any tangible outcomes. Traditional treaties alone are clearly insufficient and so a new brand of multilateral agreements emerged whereby only the broader contours of the offence are defined and in equal manner the type of penalization, sanctions and enforcement are left to the particular exigencies of each state party in accordance with its legal system. This is predicated on the so-called 'functional equivalence' doctrine. For example, the 1997 OECD Bribery Convention simply provides that States parties must adopt 'effective, proportionate and dissuasive sanctions' against legal persons, recognising that legal persons do not incur criminal liability in all States.[3]

The type of transnational law that works well for non-core international crimes is abhorrent in the domain of international human rights. Functional equivalence[4] is tantamount to

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[1] Philip C. Jessup, 'Transnational Law (Extracts)', in Christian Tietje, Alan Brouder, Kasten Nowrot (eds), *Philip C. Jessup's Transnational Law Revisited—On the Occasion of the 50th Anniversary of its Publication*, (Martin-Luther-Universität, 2006) 45-55. See also M. Reimann, 'From the Law of Nations to Transnational Law: Why We Need a New Basic Course for the International Curriculum' (2004) 22 Penn St Int'l L Rev 397.

[2] N. Boister, 'Transnational Criminal Law?' (2003) 14 *European Journal of International Law* 953, 957–59.

[3] I. Bantekas, *International Criminal Law* (4th ed, Hart, 2010) 9-10.

[4] See generally Jose A Estrella Faria, 'Uniform Law and Functional Equivalence: Diverting Paths or Stops Along the Same Road? Thoughts on a New International Regime for Transport Documents' (2011) 2 Elon L Rev 1.

cultural relativism,[5] whereby states would be free to fit human rights (definitions and enforcement) around their own biased laws and practices and given that most states in the world are undemocratic and generally violate their people's rights, the very idea of human rights would be destroyed.

In the domain of private law, the turn to transnational law a shift from more to less state regulation, chiefly through a process of self-regulation. The key question here is how this is to be achieved. One way is through one or more multilateral treaties. This is an attractive proposition, albeit it suffers from the existence of a world fragmented by reason of politics, finance and industrialization.[6] This in turn gives rise to mistrust among unequal entities and at best can only achieve results among like-minded states. The second way is through a gradual and paced process of harmonization, typically by reference to model laws or other soft law.[7] In both cases, the driving force behind these processes can only be actors that derive a clear benefit from less state regulation and intervention.[8] But let us be clear in that the very idea of self-regulation is in fact an emanation of (some) regulation, as without it self-regulation is anarchical and meaningless. Self-regulation ultimately relies on the enforcement mechanisms of states in the event of bad faith and unresolved conflict.[9] As a result, it is wrong to conceive of this process as private, nor is it correct to assume that in an era of state capitalism private actors are the only drivers of transnational legal processes.[10] States are apt investors, traders, entrepreneurs and have shown a keen willingness to submit disputes with non-states actors to arbitration and alternative dispute mechanisms (ADR). Hence, the self-regulation of otherwise private relationships outside the framework of national laws and legal systems, is only possible through the permissive medium of public law, as well as international law (where appropriate).[11] This further demonstrates the complexity of transnational law and characterizes it not as a system embedded in the absence of law – as is conveniently thought – but rather as a confluence of laws and legal spheres of regulation.

This article will proceed as follows. Section 2 discusses the process whereby the two original spheres gave way to the creation of the sphere of transnational legal regulation. Its various subsections describe the space provided by each of the two original spheres and the competing interests involved in the final carve. Section 2 undertakes an assessment of how transnational private law effectively operates, by direct reference to its end users.

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[5] In human rights it is taken to mean that culture ultimately validates the legitimacy and application of particular rights, thereby rejecting the notion that human rights apply to all without distinction; i.e. that human rights are universal. This conception of culture risks justifying violations of human rights, as is the case with the practice of female genital mutilation. See Jack Donnelly, 'Cultural Relativism and Universal Human Rights', (1984) 6 HRQ 400.

[6] See Karen J Alter, 'From Colonial to Multilateral International Law: A Global Capitalism and Law Investigation' (2021) 19 Int' J Const L 798 (who argues that when capitalism was left to its own devices it bred injustice and inequality. The focus of the article is on Chinese capitalism and hence Alter takes the view that multilateralism led by liberal states is beneficial).

[7] See Ernst von Caemmerer, 'The Problem of the Unification of Private Law in Europe', (1964) 36 U Colo L Rev 307; Marc Ancel, 'From the Unification of Law to its Harmonization', (1976) 51 Tul L Rev 108; Jurgen Basedow, 'Worldwide Harmonisation of Private Law and Regional Economic Integration—General Report', (2003) 8 Unif L Rev 31.

[8] Ilias Bantekas, 'The Contractualisation of Fiscal and Parliamentary Sovereignty: Towards a Private International Finance Architecture?' (2021) 10 Global Constitutionalism 1.

[9] See Julia Black, 'Constitutionalizing Self-Regulation' (1996) 59 MLR 24.

[10] See J Kurlantzik, *State Capitalism: How the Return of Statism is Transforming the World* (OUP 2016); A Cuervo-Cazurra, A Inkpen, A Musacchio, K Ramaswamy, 'Governments as Owners: State Owned Multinational Companies' (2014) 45 Journal of Intl Bus Stud 919.

[11] This type of self-regulation is characterized manifold, as either 'private ordering', lex mercatoria or other. Some question the existence of a lex mercatoria of contracts as distinct from the development of English common law contracts. See Emily Kadens, 'The Myth of the Customary Law Merchant' (2012) 90 Tex L Rev 1153.

2 A Tectonic Shift of Legal Spheres

In this article we perceive transnational law as the manifestation of a tectonic shift of legal spheres.[12] Two legal spheres exist, namely domestic laws and international obligations of states, expressed through the term (public) international law. The sphere of domestic law encompasses statutes, common law and any form of sub-law that is permitted by the aforementioned proto-laws. This includes customary (tribal) law,[13] contracts and party autonomy[14] and others. International law, on the other hand, is a sphere consisting of obligations assumed by states vis-à-vis other states and such obligations are typically found in unilateral acts, treaties, custom, or private agreements governed by at least one domestic law. These two spheres interact and collide, not without their own share of problems, but there is now a distinct body of rules, chiefly of a constitutional nature, that serves to bridge the interaction between the two with the least amount of friction.[15] These rules dictate: a) the relationship between domestic and international law and; b) the transposition of international law into the domestic legal sphere.[16]

Transnational law – albeit not in the sense of its criminal dimension examined in the introduction – but in its "private" dimension is an attempt to create a new regulatory space. However, if the combination of international and domestic law accounts for 100 per cent of all (possible) regulatory space, then the creation of a third sphere of regulation cannot by definition be additional to that of its two predecessors. Rather, it can only be shaped by being grafted from the mold or essence of these two. That is, transnational law as a third sphere of regulation must occupy existing and not new regulatory space. For this to happen, the two existing spheres must carve out space from within, which requires consent from the gatekeepers of these spheres.

There are several arguments about why such consent was granted. The first is a public policy shift towards relative self-regulation in favor unified industries by means of deference to the industry's advanced internal regulation.[17] While the state gives up a small part of its regulatory authority, there is a significant decrease in transaction cost through the elimination of red tape and bureaucracy.[18] In addition, the industry gets to pick up the bill not only for enacting its internal rules but for enforcing them against recalcitrant members. Quite obviously, this is only a temporary and partial conferral of authority since the state (or states) can at any time strip the industry from its power to self-regulate. The only problem here is that the longer an industry is allowed to self-regulate the more intertwined its internal rules become with the legal system from which it derives its authority. By way of illustration, if arbitration was unanimously abolished tomorrow by all states, it would take a good twenty years to rid the millions of contracts globally from their arbitration clauses. The legal uncertainty that would ensue would be colossal and it is unlikely that the participants would venture back to national courts.

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[12] See Herbert Kronke, 'Methodical Freedom and Organisational Constraints in the Development of Transnational Law', (2005) 51 Loy L Rev 287.

[13] See Matthew L.M. Fletcher, 'Toward a Theory of Intertribal and Intratribal Common Law', (2006) 44 Houston L Rev 703; Alan Watson, 'An Approach to Customary Law', (1984) U Ill L Rev 561.

[14] Symeon C Symeonides, 'Party Autonomy in International Contracts and the Multiple Ways of Slicing the Apple', (2014) 39 Brook J Intl L 1123.

[15] See Pierre-Hugue Verdier, Milla Versteeg, 'International Law in Domestic Legal Systems: An Empirical Perspective' (2014) 108 Proc Am Soc Int'l L 376.

[16] Francesco Francioni, 'International Law as a Common Language for National Courts', (2001) 36 Texas Int'l LJ Law 587.

[17] See S Fish, *Is There a Text in the Class? The Authority of Interpretative Communities* (Harvard UP, 1980), who coined the theory of interpretative communities.

[18] Even so, there is a line of thinking suggesting that harmonization incurs higher transaction costs because it leads to the adoption of vaguely drafted rules with a view to reaching a political compromise. See Steven Walt, 'Novelty and the Risks of Uniform Sales Law', (1999) 39 Va J Int'l L 671.

A second argument suggests that states are as eager to populate a new regulatory space free of bureaucracy, as much as private actors. This might at first glance seem disingenuous given that states are effectively giving up their own power to legislative in favor of private rule-making, but it should be remembered that: a) as already mentioned such private rule-making authority is always partial and temporary; b) the transnational sphere ensures speed and confidentiality and; c) it is at the heart of international financial markets where states are free to act as investors and traders.[19] This second argument is predicated on a very practical set of facts. If a state cannot generate income as an attractive trading or investment destination in and by itself, its laws are of little financial value. This is true not only of democratic states desirous of becoming attractive investment destinations, but also of authoritarian regimes eager to sell or trade their national commodities or natural resources.[20] Oil-rich countries such as Azerbaijan have set up trust funds for the sale and investment of their proceeds in financial markets, albeit these are non-transparent, and all contracts thereto are confidential.[21]

A third possible argument is that the growth of international trade and commerce is far too exponential, speedy and advanced as compared to the ability and efficiency of national laws and institutions to regulate it. Lobbying for self-regulation is therefore a natural extension of such divergency in capacity. It is true of course that research and development for new drugs can only be undertaken by pharmaceutical giants and mega-construction is only possible through consortia of large banks and construction multinationals.[22] Their combined expertise has led to the creation of industry rules based on best practices, albeit if left unchecked the likelihood of abuse is rife.[23] This third argument is often rightly conflated with pre-emptive self-regulation by powerful and largely unified industries, with the sole purpose of avoid formal state regulation. It is assumed that states generally consent because they lack the expertise and mechanisms to impose any better solutions of their own.[24]

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[19] For Qatar its investment vehicle is the Qatar Investment Authority (QIA). Although financial data is missing from its website, its estimated assets are 300 billion USD, which ranks it 11th among all sovereign wealth funds according to the Sovereign Wealth Fund Institute. Available at: <https://www.swfinstitute.org/profile/598cdaa60124e9fd2d05bc5a>

[20] This is true even of wealthy, resource-rich states, like Saudi Arabia, which in 2019 put up to a public offering a small amount of shares in Saudi Aramco, with a view to raising liquidity and financing Aramco's future projects. See https://www.cnbc.com/2019/11/09/saudi-aramco-ipo-prospectus-released.html. Saudi Aramco's website provides restricted access to its initial public offering (IPO) documents. In mid-2020, the same country woke up to the post-Covid 19 realization that its excess production in oil was a liability because of the cost of storage and transport during a global slump in consumption.

[21] *BCB Holdings Ltd and Belize Bank Ltd v Attorney-General of Belize*, [2013] CCJ 5 (AJ) is emblematic of this approach. There, a newly elected Belize government repudiated a tax concession granted to a group of companies by means of a settlement deed negotiated by its predecessor because it had not been approved by the Belize legislature, was confidential (hence non-transparent) and was manifestly contrary to the country's tax laws. The Caribbean Court of Justice argued that whether or not the concession violated public policy should be assessed by reference to 'the values, aspirations, mores, institutions and conception of cardinal principles of law of the people of Belize' as well as international public policy. The tax concession could only be considered illegal if it was found to breach 'fundamental principles of justice or the rule of law and represented an unacceptable violation of those principles'. It should be noted that BCB and the Bank of Belize bypassed the CCJ by seeking to enforce the award in New York and ultimately succeeded. *Government of Belize v Belize Social Development Ltd* [formerly BCB], US Ct Appeals judgment (13 May 2016*), cert den* US Supreme Court decision (12 January 2017).

[22] See eg Lisa Bernstein, 'Private Commercial Law in the Cotton Industry: Creating Cooperation through Rules, Norms and Institutions' (2001) 99 Mich L Rev 1724; Lisa Bernstein, 'Opting out of the Legal System: Extralegal Contractual Relations in the Diamond Industry' (1992) 21 JLS 115.

[23] See I Bantekas and Y Haik, 'Nanodrug Clinical Trials: Informed Consent and Risk Management through Blockchain', (2021) 21 *Pittsburgh Journal of Technology Law & Policy* 1.

[24] I Bantekas, 'The International Law of Terrorist Financing', (2003) 97 *American Journal of International Law* 315 (demonstrating how the lending industry mobilized within days of the 9/11 disaster to self-regulate with a view to mitigate or even avoid formal legislation).

A fourth argument is that the absence of regulatory convergence (both in terms of domestic law as well as international law) among states in the sphere of cross-border private law, particularly between superpowers such as the EU, China, Russia and North America has necessitated a neutral sphere where interaction between sophisticated actors is possible.[25] In the absence of predictable and uniform private laws, conflicts of laws rules and business norms, transnational principles, such as the UNIDROIT Principles of International Commercial Contracts,[26] have found fertile ground as well as arbitration and ADR.[27] This is clearly a sleeping giant no one desires to awake.

2.1 The Regulatory Space Conceded by Domestic Law

One of the key points in the previous section was that both the domestic and international legal spheres gave up part of their own regulatory spaces. The question that beckons is which parts and how much? From the point of view of domestic law the liberalization of party autonomy and its extrication from the wrenches of the state was paramount and conferred authority in three general areas of state regulation. Firstly, autonomy meant that parties are free to circumvent the bulk of national private law, save for that portion deemed public policy[28] and mandatory.[29] In this manner the parties' contract becomes a mini law, which the parties can shape in order to circumvent inconvenient parts of domestic laws. Secondly, party autonomy was the driver for the creation of private industry rules that were ultimately validated by their acceptance through contracts.[30] This suggests a contractualisation of the public authority to make laws, even if the legality of such industry rules ultimately rests on the state. Thirdly, the biggest gain in this process was the shift from otherwise compulsory recourse to national courts to international commercial arbitration and ADR. This shift has become so entrenched that some national courts are even enticing parties to litigation through incentives and there has been a growth in international commercial courts as a middle ground between litigation and arbitration.[31] Even though arbitral tribunals are now subject

[25] China lacks bilateral and multilateral agreements for the enforcement of judgments. Reciprocity is a statutory ground under Chinese by which to recognize a judgment of a foreign court and until recently no definition was provided. In practice, de facto reciprocity came into play if a foreign court had recognized a judgment rendered by Chinese courts. In December 2021, the Supreme People's Court of China ("SPC") published the *Minutes of the National Working Seminar of Court on Adjudicating Foreign-related Commercial and Maritime Cases ("SPC Minutes").* According to the SPC Minutes, "*de jure* reciprocity" is the new norm. According to this, Chinese courts may recognize a foreign judgement so long as the law of such foreign jurisdiction allows its court to recognize Chinese judgements. By applying *de jure* reciprocity, for the first time the PRC court recognized judgment rendered by an English court because of the reciprocal recognition of a Chinese judgment in Spliethoff's Bevrachtingskantoor BV v. Bank of China Limited [2015] EWHC 999 (Comm).

[26] The Swiss Federal Supreme Court in Chemical Products case, no 4A_240/2009, Judgment (16 December 2009), held that it was valid for an arbitral tribunal to supplement the parties' chosen law with the UNIDROIT Principles of International Commercial Contracts. See also Ilias Bantekas, 'Transplanting the UNIDROIT Contract Principles in the Qatar Financial Center: A Fresh Paradigm for Wholesale Legal Transplants?' (2021) 26 Unif L Rev 1

[27] See John Linarelli, 'The Economics of Uniform Laws and Uniform Lawmaking', (2002) 48 Wayne L Rev 1387.

[28] In Accentuate Ltd v Asigra Inc, [2009] EWHC 2655 (QB), the English High Court held that the parties could not circumvent the indemnity and compensation provisions of the Directive and any award that was in breach of these mandatory provisions would be refused on grounds of public policy.

[29] There is no clear way of determining mandatory rules, but it must be admitted that in their vast majority they are written and leave no room for party autonomy. See Michael Wojewoda, 'Mandatory Rules in Private International Law: With Special Reference to the Mandatory System under the Rome Convention on the Law Applicable to Contractual Obligations' (2000) 7 Maastricht J Eur & Comp L 183.

[30] See Juana Coetzee, 'CISG and Incoterms: Reviving the Traditions of the Lex Mercatoria', in Andrew Hutchison, Franziska Myburgh (eds), *Research Handbook on International Commercial Contracts* (Edward Elgar 2020) 159.

[31] See Matthew Erie, 'The New Legal Hubs: The Emergent Landscape of International Commercial Dispute Resolution', (2020) 60 Va J Int'l L 225; Ilias Bantekas, 'The Rise of Transnational Commercial Courts: The Astana International Financial Centre Court' (2020) 33 Pace Int'l L Rev 1; Zhengxin Guao and Mann Yip, 'Comparing the International Commercial Courts of China with the Singapore International Commercial Court', (2019) 68 ICLQ 916.

to the same procedural guarantees as national courts,[32] which serves to reinforce their legitimacy, ultimately party autonomy is so extensive that the end users can bypass inconvenient parts of national regulation to achieve their aims. We can call this regulatory planning, which works in more or less the same way as tax planning.

2.1.1 Only the Best National Laws and Institutions Survive (and Thrive)

It has perhaps escaped attention that law can assume similar value as a "commodity".[33] A robust, yet adaptive and flexible legal system, is supported and reinforced by a multitude of institutions, such as courts, ombudsmen, commissions of inquiry and others. The better the law and its institutions the more end users it is likely to attract, whether as a choice of law or choice of forum clause in contracts. As such usage begins to grow, so too does the demand for legal education concerning this legal system. The more lawyers educated in that legal system, the more contracts governed by this law will be generated and more cases will end up in the courts of that state. Ultimately, consultants and law firms educated in and specializing in that legal system will dominate the professional landscape. This argument, as regards the dominant position of English law, is supported by the fact that English law has become the key choice of law in transnational contracts;[34] the volume of transnational disputes before English courts has grown exponentially[35] and; English law has effectively been transplanted, directly[36] or indirectly[37] as the law of several special economic zones in Asia as a result of its perceived sophistication and the uniformity it purportedly produces.[38]

When a legal system achieves such widespread usage by private and state actors across international frontiers and in respect of cross-border transactions, the attendant institutions of that legal system assume significant authority. At that point, the legal system is no longer addressed to its domestic audience, but to a much broader international audience that is relying on it remaining flexible and adaptable. The institutions of English law, for example, are in a constant state of self-inquiry, which encompasses green and white papers, the establishment of specialist commercial chambers and a very active law society that re-evaluates its role in an ever-evolving cross-border legal environment. This is in contrast to other legal systems, even in respect of highly industrialized

[32] Ilias Bantekas, 'Equal Treatment of Parties in International Commercial Arbitration' (2020) 69 ICLQ 991, exploring the boundaries of equal treatment in the context of the right to fair trial.

[33] Horst Eidenmuller, 'The Transnational Law Market, Regulatory Competition, and Transnational Corporations' (2011) 18 Indiana J. Global Legal Studies 707.

[34] Kwai Hang Ng and Brynna Jacobson, 'How Global is the Common Law? A Comparative Study of Asian Common Law Systems (2017) 12 Am J Comp L. 209; Ilias Bantekas, The Globalisation of English Contract Law: Three Salient Illustrations' (2021) 137 LQR 130.

[35] It is instructive, at least from the end-user's perspective, that in 2018–19, 75% of the London Commercial Court's work was international in nature. See Judiciary of England Wales, *Business and Property Courts: The Commercial Court Report 2018–19* (Judicial Office, Royal Courts of Justice, 2019) 10.

[36] See (n 31) for an account of international commercial courts. The most prominent example is the Abu Dhabi Global Markets (ADGM) Application of English Law Regulation of 2015, which effectively serves to transplant select statutes and English common as the law of the ADGM.

[37] See Bantekas (n 26) demonstrating how the largely common law bench of the Qatar Financial Center (QFC) court construes the various QFC statutes by reference to English common law. Equally, while the DIFC founding law (Law No 9 of 2004) is silent on the application of English or common law, Art 8(2)(5) of Law No 3 of 2004 Law on the Application of Civil and Commercial Laws in the DIFC ranks "the laws of England and Wales" fifth in descending order, at the apex of which are DIFC laws. See also Jayanth K. Krishnan and Priya Purohit, 'A Common Law Court in an Uncommon Environment: The DIFC Judiciary and Global Commercial Dispute Resolution', (2015) 26 Am Rev Int'l Arb Arb 497.

[38] See Brian Flanagan, Sinead Ahern, 'Judicial Decision-Making and Transnational Law: A Survey of Common Law Supreme Court Judges' (2011) 60 ICLQ 1 at 18–22, where it is suggested that guidance and uniformity in judicial interpretation is the key reason why common law judges refer to foreign court decisions.

states, that have failed to emulate the English model. Germany and France are on top of this list, with France managing to stay in the race because of its arbitration-friendly environment, further reinforcement by the positioning of the ICC in Paris. Nonetheless, there is no evidence suggesting that parties to cross-border agreements tend to choose French law or its courts in any degree of frequency, other than perhaps Francophone parties with some commercial or business ties to metropolitan France.

2.2 The Regulatory Space Conceded by International Law

From the perspective of international law, the situation is slightly more complex and perhaps also ambiguous. It is tempting to assume that the greatest concession of international law was the promotion of cross-border arbitration through the adoption of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[39] As significant as this instrument is, it merely reflects concessions states made in the sphere of domestic law, in the sense already explained. In fact, international law has made two notable concessions to the sphere of transnational law. The first concerns efforts at legislative harmonization of private laws, whereas the second is twofold: an attempt at partial treaty regulation and purposive silence, which effectively leads to self-regulation.

Uniformity has been defined as 'the varying degree of similar effects on a legal phenomenon across boundaries of different jurisdictions resulting from the application of deliberate efforts to create specific shared rules in some form'.[40] Before we go on to examine the various forms and varieties of uniformity, it is appropriate to ascertain the sources from which it may emanate: a) model or uniform laws; b) principles declared by NGOs, such as the UNIDROIT Principles of International Commercial Contracts;[41] c) standard contract terms, such as those adopted by FIDIC in relation to construction and; d) multilateral treaties, such as the Convention on the International Sale of Goods (CISG) and the New York Convention.

At the apex one finds *textual* or *absolute* uniformity, the aim of which is to 'transplant' the instrument in question verbatim in the legal system of the participating or member states.[42] This type of uniformity is exceptional and difficult to implement in practice. It is demanded in respect of EU Regulations and is envisaged (but by no means demanded) in the case of most treaties (bilateral and multilateral), save where member states are offered the possibility of extensive reservations – which cannot, however, violate the instrument's object and purpose.[43] Whereas in the EU context textual uniformity is viable because of the large cultural, economic and legal convergence,[44] it is doomed to failure in situations where such convergence is absent among a

[39] 330 UNTS 3

[40] Camilla Baasch Andersen, 'Defining Uniformity in Law', (2007) 12 Unif L Rev 5.

[41] See Michael J Bonell, 'Unification of Law by Non-Legislative Means: The UNIDROIT Draft Principles for International Commercial Contracts', (1992) 40 Am J Comp L 617; Robert Ashby Pate, The Future of Harmonization: Soft Law Instruments and the Principled Advance of International Lawmaking, (2010) 13 Touro Int'l Law Rev 142. The UNIDROIT Principles have been identified by several domestic courts and arbitral tribunals, in CISG-related disputes, to constitute general principles under Art 7(2) CISG. See *UNCITRAL Digest of Cases on CISG* (2012), 46.

[42] An extensive literature regarding the textual interpretation of CISG under Art 7 therefore exists. See Larry A DiMatteo, *International Sales Law: A Global Challenge* (Cambridge University Press, 2016) 66ff; Ingeborg Schwenzer (ed), *UN Convention on the International Sale of Goods: Commentary* (Oxford UP, 2016).

[43] See Harry M Flechtner, 'The Several Texts of the CISG in a Decentralised System: Observations on Translations, Reservations and Other Challenges to the Uniformity Principle in Article 7(1)', (1998) 17 J L & Commerce 187.

[44] Even so, in the field of criminal law, the principle of 'mutual recognition' was not based on textual uniformity. Para 8 of the Vienna Action Plan rejected the notion of procedural criminal law harmonisation and unification ideology by proclaiming that the aim of the member states was not to create a common territory where uniform detection and investigation procedures would be applicable to all law enforcement agencies in Europe in the handling of security matters'. Vienna Action Plan of 3 December 1998 on How Best to Implement the Provisions of the Treaty of

group of states, even if ultimately they 'transplant' the text of the agreement verbatim in their domestic laws.[45] Textual uniformity was never envisaged or pursued in respect of the Model Law as this would not only have dissuaded many states from adopting it, but would have been practically impossible in practice as it would have required a wholesale amendment of fundamental areas of law, such as contract and civil procedure. Such strict uniformity is not desirable in the context of the Model Law. Below textual uniformity one encounters *applied* uniformity. The intention here is not to achieve word-by-word textual correspondence across jurisdictions, but rather to develop a uniform understanding and a uniform interpretation of the text/rules in question.[46] In this manner, there is no requirement that texts actually meet or correspond linguistically. Applied uniformity is indeed the hallmark of Article 7(1) of CISG.[47] In the process of achieving applied uniformity there is typically a harmonization of values and norms – this also arises as an outcome from a sustained process of applied uniformity. Another type of uniformity is so-called *functional* uniformity or *functional similarity*. Here, the objective is to create similar rules across jurisdictions, even in the absence of a general cross-border framework of applied uniformity in order to achieve a functional similarity of substantive or procedural trade rules, which ultimately leads to harmonization. Functional uniformity is therefore a short-cut hybrid between applied and textual uniformity. The absence of regulation by a formal source of international law is different to the interpretation one should ascribe to a state's silence on a particular matter.[48] Industrialized and non-industrialized states often find it convenient to avoid or desist from regulating through treaty the conduct of private cross-border entities, such as multinational corporations (MNCs). To be sure, states are eager to regulate the inter-state legal framework encompassing such private conduct, as is the case with the various WTO agreements and bilateral investment treaties (BITs), albeit the contractual dimension of private actors and how they interact with host states is deregulated under international law. This is evident from the fact that home states are reluctant to enforce their laws to MNCs incorporated therein in respect of operations abroad, save in respect of a very finite list of issues,[49] whereas host states in their eagerness to attract foreign investors effectively race to the bottom through lax legislation and onerous contractual terms.[50] The absence of a viable multilateral treaty regulating MNCs,[51] and the parallel conferral of extensive investor

Amsterdam on an Area of Freedom, Security and Justice, [1999] O.J. C19/1. This was achieved through *approximation*, which foresaw as a starting point the gradual adoption of common definitions for a set of core offences bearing a transnational nature. See Anne Weyembergh, Approximation of Criminal Laws, the Constitutional Treaty and the Hague Programme, (2005) 42 CMLR 1567.

[45] See Andrew Watson, *Legal Transplants: An Approach to Comparative Law* (Georgia University Press, 2nd ed, 1993).

[46] Schwenzer (n 42) 6.

[47] There exists an extensive jurisprudence on Art 7(1) CISG and despite the fact that its wording is very close to that of Art 2A of the Model Law – and in fact the latter was inspired by the former – we shall avoid replicating or applying this body of law in order to analyse Art 2A of the Model Law. This approach is justified for several reasons. Firstly, CISG is a treaty (subject to many reservations), whereas the Model Law is not. Secondly, the CISG concerns substantive rules where the focus of the Model Law is largely on rules of civil procedure. This, of course, is not impediment to applying CISG case law *mutatis mutandis* to Art 2A of the Model Law. See *UNCITRAL Digest of Cases on CISG* (2012), 42ff.

[48] See Megan Donaldson, 'The Survival of the Secret Treaty: Publicity, Secrecy and Legality in the International Legal Order' (2017) 111 AJIL 575; Ashley S Deeks, 'A (Qualified) Defense of Secret Agreements (2017) 49 Ariz St LJ 713.

[49] See Modern Slavery Act 2015 (c. 30) (U.K.). Section 54 requires commercial entities with a turnover of £36 million, irrespective of their place of incorporation, but which undertake even a part of their business in the UK, to prepare annual slavery and trafficking audits. This trend is also witnessed in the case law of industrialized states. In Nevsun Res. Ltd. v. Araya, [2020] S.C.J. No. 5 (Can.). the Canadian Supreme Court held that Canadian corporations are liable for the breach of customary and *jus cogens* obligations.

[50] See Ilias Bantekas, 'The Linkages between Business & Human Rights & their Underlying Causes', (2021) 43 Human Rights Quarterly 118.

[51] Ilias Bantekas, 'The Emerging UN Business and Human Rights Treaty and its Codification of International Norms', (2021) 12 George Mason International Law Journal 1.

rights in BITs,[52] suggests a conscious and intentional omission by the international community to regulate MNCs, as well as state regulation of MNCs in accordance with human rights, development and environmental standards. This constitutes a significant concession to the transnational legal sphere by its international law counterpart.

3 The Third Sphere: A Transnational Private Law

Having set out the arguments for the existence of a third sphere of regulation, which has evolved by taking regulatory space from the spheres of both domestic and public international law, let us now assess how it functions. Let us begin this discussion by establishing the outer boundaries of transnational law. At a minimum, the fundamental, peremptory or mandatory tenets and provisions of domestic and international law circumscribe the universe of transnational law and at the same time constitute its *ab initio* underpinnings. These boundaries are welcome for the users of transnational law, as otherwise they would have to grapple with fundamental concepts, such as *pacta sunt servanda*, party autonomy and abuse of process, among others. If transnational law was not predicated on a groundwork of immutable rules, any transactions therein would always depend on the parties' good faith; but no system can function solely on this basis, especially one that is asset intensive.

A typical example of a private transnational process, whether this involves the incorporation of an MNC in a foreign state, or the drafting of a contract between two foreign entities, must necessarily begin with an assessment of maximizing one's benefits. Ideally, this is formulated in the form of a long-term strategy that anticipates possible risks. Breach of contract is a common risk, which is usually mitigated by recourse to international arbitration rather than access to potentially biased national courts. The regulation of the contract, particularly the parties' obligations therein, bears a degree of risk, particularly if one of parties has close ties with the institutions that shape a particular governing law. Consequently, this risk is mitigated by the choice of a neutral and high adaptable law, such as that of England, or soft law such as the UNIDROIT Principles or FIDIC. For investors, further risk mitigation may come about through the benefit of a BIT or a contract with the host state that confers additional investment guarantees to the investor. In all of these strategies the parties are departing from both domestic and international law, while remaining within its broader boundaries and circumference.

Within this framework, all transnational actors have agreed to play by the same rules, which effectively equate states and private parties. In another paper this author has characterized this process as the 'contractualization of international law', which bears both positive and negative connotations. By way of illustration, immunity is no defence to the jurisdiction of arbitral tribunals, nor increasingly to the enforcement of awards against sovereigns.[53] Sovereigns have resorted to

[52] See Kenneth J Vandevelde, 'The Economics of Bilateral Investment Treaties' (2000) 41 Harv Int'l LJ 469, at 499, who argues that BITs 'seriously restrict the ability of host States to regulates foreign investment'. The US Model BIT, eg, prohibits performance obligations beyond what is established by international law, such as employability quotas of nationals of the host state

[53] See Arts 17-19 of the UN Convention on Jurisdictional Immunities of States and their Property. As regards the enforcement of measures of constraint against the property of a losing state, two broad categories are generally recognized, namely pre-judgment and post-judgment (essentially pre and post-award) immunity claims. Pre-judgment measures essentially involve interim measures (injunctions) while arbitral proceedings are pending with a view to securing assets (through freezing or similar orders) or avoiding their dissipation. In practice, the most common measure is the arrest of state ships, which although permissible in several jurisdictions is not allowed under Article 18 of the UN Convention. In France, if a state enters into an arbitration clause which contains an express undertaking to honour a subsequent award, French courts will consider that state to have waived its immunity from execution of the award in France. *Société Creighton Ltd v Ministère des Finances et le Ministère des Affaires Municipales et de l' Agriculture du Gouvernement de l'Etat de Qatar*, [2003] *Rev Arb* 417, French Supreme Cassation Court judgment (6 July 2000); but see

several contractual types that they hope evades parliamentary scrutiny, such as executive agreements,[54] memoranda of understanding,[55] private agreements and even secret agreements, in order to expedite private transactions with transnational private entities. Arbitral tribunals and national courts[56] are generally disinclined to assess the constitutional propriety of such agreements,[57] or indeed the clear unconstitutionality of confidentiality clauses.[58] With such elimination of judicial review, further reinforced by the principle that domestic law cannot trump international legal obligations, states have effectively contractualized their public laws, including their constitutions. The outcome is that states have no more authority than their private counterparts to affect or alter the terms of their agreement. This outcome in untenable in a regulatory framework controlled by one of the parties to a lesser or larger degree.

A key question that arises at the end of this paper, is whether there exist any regulatory overlaps between the sphere of transnational law and the other two spheres, on the one hand, as well as between itself and sub-spheres. The first part of the question is relatively straightforward. Obligations arising under international law supersede over any domestic laws to the contrary. Even so, it is assumed that if two or more states contract through the sphere of transnational law they will not invoke obligations owed to them or their people under international law. A typical example is sovereign financing through private markets on the basis of agreements that violate the borrower's international human rights treaty obligations. Even the handful of borrowers that have complained by propelling human rights defenses, are ultimately forced to settle and abandon their claims.[59] There is in principle no meaningful overlap between transnational law and international foreign investment law. Contracts assumed in the sphere of transnational legal regulation can, if entered into with a state entity, become binding under relevant BITs or as autonomous source of international obligation for host states.

4 Conclusion

This article takes stock of the existing scholarship on the meaning and delineation of transnational law and its place in global regulation. At the same time, however, it puts forward a theoretical model whereby there exist two spheres of regulation, namely domestic laws and international law. Transnational law is depicted in this framework as a breakaway entity from both these spheres with a valid claim for independence of sphere-creation. The state succession and state-creation analogies are apt in this context. There can be no state succession without, at the very least, some

contra, *Joint Stock Corp v Czech Republic*, Austrian Supreme Court judgment (11 July 2012) which dismissed a claim for enforcement (following an arbitral award) against the assets of the Czech Republic on the basis of immunity.

[54] See eg USA-Germany Executive Agreement of 17 July 2000 Concerning the Foundation "Remembrance, Responsibility and the Future, (2000) 39 ILM 1298.

[55] See the classic work of Prosper Weil, 'Towards Relative Normativity in International Law?' (1983) 77 Am J Int'l L 413 (although there Weil warned against the dangers stripping international law and institutions of their normative character); Jutta Brunnée, 'COPing with Consent: Law-Making under Multilateral Environmental Agreements', (2002) 15 Leiden JIL 1.

[56] But exceptionally, in *Eugenia Florescu and Others* v *Casa Jude¸teana˘ de Pensii Sibiu and Others*, Case C-258/14 Judgment of the Court (Grand Chamber) of 13 June 2017, EU:C:2017:448, para 36, that the CJEU came to the conclusion that MoU concluded under EU financial assistance mechanisms and balance-of-payment processes qualified as EU acts under Art 267(1)(b) TFEU, and hence susceptible to interpretation by the Court.

[57] *BCB Holdings Ltd and Belize Bank Ltd v Attorney-General of Belize*, [2013] CCJ 5 (AJ) above (n 21).

[58] The literature is relatively scarce, if non-existent, on confidentiality clauses in contracts between states and between states and non-state entities. No doubt, if we knew of such clauses there must first be a non-disclosure violation by one of the parties. Apart from national defense matters, it is doubtful that national constitutions allow such clauses in state contracts.

[59] See Ilias Bantekas, 'The Right to Unilateral Denunciation of Odious, Illegal & Illegitimate Debt', in Ilias Bantekas, Cephas Lumina (eds), *Sovereign Debt and International Human Rights* (Oxford University Press, 2018), 536-555

degree and volume of international recognition and legality (ie that the new state was created by a referendum, de facto control, lawful exercise of self-determination, or admission to the UN and other intergovernmental organizations). In equal measure, transnational law is impossible without legislative approval and entrenchment in domestic legal systems. In addition, transnational law is doomed to failure without sufficient global uniformity in regulation.

Transnational law is not solely a species of private law; it is not predicated on conflict of laws rules and; its end users are not restricted to private actors. This notwithstanding, it is not exclusively a public law emanation. Transnational regulation is predicated on state approval, yet the form of regulation it gives rise to is tantamount to a sui generis private law. Although this author finds the creation, maintenance and reinforcement of this sphere an important element in cross-border finance and commerce, it should not under any circumstances become a platform or guise for the erosion of civil liberties and socio-economic rights. Consequently, the transnational sphere should be accessible to civil society organizations, as well as parliamentary entities that seek conformity with national constitutions.[60] The benchmark for the success of transnational law will depend on how much its end users entrench it in the rule of law and provide it with a high degree of legitimacy. Legal systems often crumble without such attributes.

[60] See Ilias Bantekas, 'The Contractualisation of Fiscal and Parliamentary Sovereignty: Towards a Private International Finance Architecture?' (2021) 10 Global Constitutionalism 1.