
TRANSNATIONAL LITIGATION: CONCEPTUAL FOUNDATIONS, INSTITUTIONAL FRAMEWORKS, AND PROCEDURAL CHALLENGES IN AN EVOLVING GLOBAL LEGAL ORDER

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ABSTRACT

Although Marti Koskinemi is concerned about the fragmentation of international law, it is now a well-known reality of the current development of international law. ‘Transnational litigation’ is one such novel idea. Although based on ‘Transnational Law,’ this study seeks to provide a far clearer knowledge and summary comprehension of these evolving concepts, and a determination of their overall direction and scope. It attempts to offer a thorough conceptual study of transnational litigation, separating it from conventional international law and litigation with a focus on the problems linked to ‘Transnational litigation’. Emphasizing the role of prominent international instruments in dispute resolution, the paper explores the transnational legal procedure by distinguishing between key ideas such as law vs. litigation, international litigation vs. arbitration, and transnational vs. international law. Placing India within this framework, the study criticizes its antiquated methods and calls for reforms to bring them into line with international norms.

Keywords: Transnational Litigation, International Arbitration, Jurisdiction, Choice of Law, Enforcement of Foreign Judgments

1. Introduction

Evolution of law in the contemporary times makes it much more important for the individuals working in the law discipline to be aware of the minor technicalities of the terms that may be considered as basic as law and litigation. With time the understanding of these terminologies is also widening, which calls for having a clear understating the terms in the developing concept of law that is 'transnational law'. If one is to get an understanding as to the expanse of the transnational law and litigation, it can be made clear from knowledge of the institutions involved in the process. As Carrie Menkel-Meadow, makes a very significant attempt to elaborate on the institutions involved states that,

“Much formal public international law has been enacted following the end of World War II. This modern public international law includes the Charter of the United Nations (UN), many international treaties, the Bretton Woods agreements, and the many modern international and supranational institutions created by these agreements, including the International Court of Justice (ICJ), the World Bank, the International Monetary Fund (IMF), the World Trade Organization (WTO), the International Criminal Court (ICC). Other “transnational” bodies of legal action include regional organs such as the European Council, the European Union, the Organization of American States, Mercosur, NAFTA, ASEAN, ANZUS, and the African Union, which vary in their attempts to regulate, on a regional basis, economic and trade relations, or more “thickly” developed regulations for more social legislation (as the European Union has accomplished in a variety of areas including employment, consumer, and health matters). Separate from economic relations, both international and regional treaties and regulations on a variety of human rights issues have led to new regional, multi-national tribunals and institutions, like the European Court of Human Rights in Strasbourg (separate from the European Court of Justice in Luxembourg) and the Inter-American Court of Human Rights, and have led to new and overlapping jurisdictions for adjudicatory purposes. In traditional legal terms, questions about the relations of these tribunals to each other and

to the courts of nation-states are complex.”¹

All the above-mentioned instruments and institutions from the part of a larger network term that in the contemporary time has been attempted to be undertaken within the umbrella of transnational law. There were serious scholarly attempts made to establish transnational litigation as a distinctive field of practice and study. Samuel P. Baumgartner while supporting his ideas on transnational litigation as “a distinct field,” because until relatively recently, the prevailing views seem to have been that it is not at least not in a functional sense.² Referencing to Professor Burbank who put it over a decade ago, transnational litigation should instead be understood, “as part of a process of cross-fertilization in which, a. doctrine and techniques developed in the context of domestic cases are brought to bear on problems presented in international litigation, and, b. the increasingly international dimensions of litigation in our courts prompt changes in doctrine and techniques, which are then applied in domestic cases.”³ According to Baumgartner, this analytical model accurately reflects the actions of judges and legislators in both the United States and Europe. In reality, though, this method has caused significant problems for both legislators developing transnational procedure policy and litigants looking for justice in transnational cases. Therefore, we should now create an analytical framework for transnational litigation that adequately considers the international interconnectedness of these cases (both factual and legal) and how this interconnectedness impacts the legal process for transnational proceedings. In this view, he put forth the idea that transnational litigation should be treated as a separate area.⁴

2. Overview of Crucial International Instruments

2.1. Brussels Convention

The Brussels Convention, which addresses civil jurisdiction and the enforcement of judgments, was signed in Brussels in 1968 by the European Economic Community members. It was

¹ Carrie Menkel-Meadow, “Why and How to Study “Transnational” Law”, UC Irvine Law Review, Vol. 1, No. 1, 2011, p.102.

² Samuel P. Baumgartner, “Is Transnational Litigation Different?”, University of Pennsylvania Journal of International Law, Vol.25, Issue.4, 2004, p.1.

³ Samuel P. Baumgartner, “Is Transnational Litigation Different?”, University of Pennsylvania Journal of International Law, Vol.25, Issue.4, 2004, p. 4.

⁴ Samuel P. Baumgartner, “Is Transnational Litigation Different?”, University of Pennsylvania Journal of International Law, Vol.25, Issue.4, 2004, p. 62.

released in the Official Journal of the European Communities.^{5 6} The Convention establishes a framework for both the reciprocal enforcement of judgments and the distribution of jurisdiction among contracting states. Except for issues pertaining to dependent territories of Brussels Convention nations⁷, it has mostly been replaced by Council Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters⁸, and then by Regulation (EU) 1215/2012 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast).⁹

The Convention offered a harmonized and codified overview of the rules of jurisdiction—excluding the majority of cases involving non-EU domiciled defendants—far from just addressing the "simplification of formalities." It also included the rules governing the recognition and enforcement of Convention State judgments in civil and commercial matters. The jurisdiction rules were harmonized on the premise that they could be freely recognized throughout the European Community without any inquiry into the jurisdictional foundation on which the judgment was awarded, only if they were collectively accepted by Convention States.¹⁰

2.2. *New York Convention:*

One of the main tools in international arbitration is the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention”). The New York

⁵ “Official Journal of the European Communities,” L 304, Vol. 21, EUR-Lex, Access to European Union law, October 30, 1978, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:L:1978:304:TOC>, (March 22, 2025).

⁶ Glossary, Brussels Convention, Thomson Reuters – Practical Law, [https://uk.practicallaw.thomsonreuters.com/Glossary/UKPracticalLaw/I43e1a9731c9a11e38578f7ccc38dcbee?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/Glossary/UKPracticalLaw/I43e1a9731c9a11e38578f7ccc38dcbee?transitionType=Default&contextData=(sc.Default)&firstPage=true), (March 22, 2025).

⁷ “Glossary - Brussels Convention,” Thomson Reuters – Practical Law, [https://uk.practicallaw.thomsonreuters.com/Glossary/UKPracticalLaw/I43e1a9731c9a11e38578f7ccc38dcbee?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/Glossary/UKPracticalLaw/I43e1a9731c9a11e38578f7ccc38dcbee?transitionType=Default&contextData=(sc.Default)&firstPage=true), (March 22, 2025).

⁸ “Glossary - 2001 Brussels Regulation,” Thomson Reuters – Practical Law, [https://uk.practicallaw.thomsonreuters.com/2-205-5103?originationContext=document&transitionType=DocumentItem&contextData=\(sc.Default\)&ppcid=287f4848f79c4b0c8702d901e46faed0](https://uk.practicallaw.thomsonreuters.com/2-205-5103?originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&ppcid=287f4848f79c4b0c8702d901e46faed0), (March 22, 2025).

⁹ “Recast Brussels Regulation,” Thomson Reuters – Practical Law, [https://uk.practicallaw.thomsonreuters.com/9-588-2365?originationContext=document&transitionType=DocumentItem&contextData=\(sc.Default\)&ppcid=287f4848f79c4b0c8702d901e46faed0](https://uk.practicallaw.thomsonreuters.com/9-588-2365?originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&ppcid=287f4848f79c4b0c8702d901e46faed0), (March 22, 2025).

¹⁰ Alex Mills, “The Brussels Convention 1968: A Code and a Concept,” *Rev. crit. DIP*, Vol.3, No.3, pp. 509, <https://droit.cairn.info/revue-critique-de-droit-international-prive-2018-3-page-509?lang=en>, (March 22, 2025).

Convention covers the referral of a case to arbitration by a court as well as the recognition and enforcement of foreign arbitral awards.¹¹ Based on the location of its signature, the New York Convention is among the most significant and effective international treaties in the field of dispute resolution. In fact, with 161 state parties to the Convention as of December 2019, more than any other treaty in private international law, it is frequently referred to as the most successful international agreement in that field. The New York Convention, which was produced under the United Nations' guidance, was ratified at a diplomatic conference on June 10, 1958. The UNCITRAL's work plan includes promoting the Convention as a key component. The Convention, which is generally regarded as a cornerstone of international arbitration, mandates that the courts in contracting countries enforce an arbitration agreement when they are presented with a case involving a subject covered by that agreement. Additionally, it compels these courts to acknowledge and execute awards rendered in other jurisdictions, with a few restricted exclusions. In plain language, the New York Convention's goal is to facilitate the enforcement of arbitral awards issued in one nation by attaching the award debtor's assets in another.¹²

2.3. UNCITRAL Model Law

UNCITRAL is a global organization that is crucial in creating standardized international trade regulations. The instruments that UNCITRAL employs to formulate harmonized rules primarily take two forms i.e. Convention and Model Laws. Model laws are also referred to by other names, such as "prototype law" and "model law." The Model Laws serve more as a guide for nations to adopt as their internal legislation than as legally binding conventions. These internal laws may be changed to fit the requirements and cultural and social circumstances of each nation without having to reflect every element of the Model Laws.¹³ The Model Law's initial version was implemented in 1985, and its updated version was released in 2006. The revised articles of the Model Law regarding the form of the arbitration agreement and interim measures were prepared after careful consideration and extensive consultation with interested parties and Governments. They will greatly aid in creating a harmonized legal framework for

¹¹ "The New York Convention," <https://www.newyorkconvention.org/>, (April 20, 2025).

¹² Xavier Forneris and Nina Mocheva, "How Countries Can Fully Implement the New York Convention: A Critical Tool for Enforcement of International Arbitration Decisions," The World Bank Group, 2018, <https://documents1.worldbank.org/curated/en/726311577800894244/pdf/How-Countries-can-Fully-Implement-the-New-York-Convention-A-Critical-Tool-for-Enforcement-of-International-Arbitration-Decisions.pdf>, (March 15, 2025).

¹³ "What is UNCITRAL, and why it is important," Thailand Arbitration Center, January 11, 2021, <https://thac.or.th/what-is-uncitral-and-why-it-is-important/>, (March 15, 2025).

the fair and effective resolution of international commercial disputes. It is believed that the modernization of the Model Law's articles is related to the advancement of a consistent interpretation and application of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which was held in New York on June 10, 1958.¹⁴ The convention also is very crucial in the current time in enforcement and acceptance of the arbitral award. It facilitates the enforcement in the recipient country of the foreign arbitration award, regardless of whether the country making the award is the same as the country of arbitration.¹⁵

2.4. ICSID Convention

The Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States was established by the World Bank and went into effect on October 14, 1966. The International Centre for the Settlement of Investment Disputes (ICSID), which has authority over judicial disputes-legal issues arising between a national of another Contracting State and a Contracting State-was established by the Washington Convention on March 18, 1965. ICSID offers arbitration and conciliation services for international investment disputes between individual investors and member nations. ICSID arbitration moves back and forth between international commercial arbitration and interstate arbitration, whereas international commercial arbitration concentrates on resolving disputes between private parties and inter-state arbitration only involves States. More than 140 nations have ratified the Washington Convention.¹⁶

However, the first ICSID award on merits was issued in 1977. In *Adriano Gardella S.p.A. v. Côte d'Ivoire*, the arbitral tribunal established by Pierre Cavin, Jacques Michel Grossen, and Dominique Poncet issued an award on August 29, 1977, in favor of an Italian investor. The award was based on a 1970 agreement that called for ICSID arbitration to settle disputes about the conversion and cultivation of 20,000 hectares of land for a textile factory. According to ICSID statistics, the Centre admitted 22 arbitrations during the first half of 2020. Among the cases registered, 26% of the parties were from Central Asia and Eastern Europe, 23% were from South America, and 15% were from sub-Saharan Africa. In terms of economic sectors,

¹⁴ UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION 1985 WITH AMENDMENTS AS ADOPTED IN 2006, United Nations Publication, Sales No. E.08.V.4, https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955_e_ebook.pdf.

¹⁵ "What is UNCITRAL, and why it is important," Thailand Arbitration Center, January 11, 2021, <https://thac.or.th/what-is-uncitral-and-why-it-is-important/>, (March 15, 2025).

¹⁶ Gautami S. Tondapu, "International Institutions and Dispute Settlement: The Case of ICSID," *Bond Law Review*, Vol.22, Issue.1, 2010, p.2, <https://classic.austlii.edu.au/au/journals/BondLawRw/2010/4.pdf>.

the majority of instances pertain to investments in the Oil, Gas, and Mining Sector, followed by Electric Power and Other Energy. However, there are also cases in the sector of Transportation, Construction, Finance, Information and Communication, Water, Sanitation, and Flood Protection, Agriculture, Fishing, and Forestry, Tourism, and Services and Trade. In conclusion, 11% of the instances were founded on Investment Contracts between the investor and the host State, while 74% were based on BITs.¹⁷

3. Differentiating Crucial Concepts

3.1. Law and Litigation

The understanding of the different crucial terms that come within the expansive umbrella termed as law is needed to have a clearer understanding of what transnational litigation means and contains within its ambit. Law and litigation are not to be confused as the two terms though interrelated, but have a subtle differentiation. The word “law” (lex in Latin, loi in French, legge in Italian, ley in Spanish, lei in Portuguese, nomos in Greek, law or statute in English, wet in Dutch, gesetz in German, prawo or ustawa in Polish, törvény in Hungarian) is surely one of the most commonly used in legal terminology. Written law is used in most European countries. Legislative acts (laws) are the first way it communicates itself. The Declaration of the Rights of Man and the Citizen (August 26, 1789), which is based on Jean-Jacques Rousseau’s Contract Social (The Social Contract), asserts that the law has an undeniable legitimacy, a clear advantage, and is “the expression of the general will.”¹⁸ This represents an entity that is the basic force from which traditionally all the other associated institutions and persons (both legal and natural) derive their identity. This goes without saying about litigation.

The term litigation denotes the official procedure for resolving a legal conflict. When an individual has a legal claim against another party, they usually employ this method to achieve a resolution. The term litigation encapsulates the complete process of dispute resolution. It constitutes a formal legal proceeding aimed at resolving a matter when the involved parties hold opposing views.¹⁹ Legal action is what litigation refers to. It happens when a person

¹⁷ “ICSID Arbitration,” Aceris Law LLC, December 13, 2020, <https://www.acerislaw.com/icsid-arbitration/>, (March 16, 2025).

¹⁸ Francis Delperee, “The Meaning of the Law”, Rada for Europe, p.3, <https://www.undp.org/sites/g/files/zskgke326/files/migration/ua/paper-meaning-of-law-EN.pdf>, (May 3, 2025).

¹⁹ “What Is Litigation?”, Tampa Personal Injury Lawyers, Jack Bernstein, Injury Attorneys, <https://bernsteininjurylaw.com/blog/what-is-litigation/>, (May 3, 2025).

submits documents to initiate formal legal action. This typically implies appearing before a judge in a court controlled by the government's judicial branch. Some disputed administrative processes may also be included. It can be perplexing to comprehend the precise meaning of the word. A few of the instances might be comprehended like; Filing a claim for personal injury compensation following a slip and fall; Claiming compensation after a car accident; Taking legal action to enforce a reasonable accommodation under the Americans with Disabilities Act.²⁰

To cut the long story short and get an understanding of the differentiation about the two terms, it can be considered that Law is something that is on documents or something that is perceived. The activation of these words which are termed as law creates something that is termed as litigation. Litigation can be also considered as an active application of law. Understanding of this differentiation is quite crucial for determining the flow of the discussion ahead in this research as the storm of complexities in contemporary developments of international law would requires the sailor to hold tight to the basis and also unlearn some of the rigid notions of international law in general to make safe through this storm. As the focus of this research paper is to discuss and create a better understanding and narrative about transnational litigation its very much important to create proper differential understanding about International and transnational.

3.2. International litigation and International Arbitration

International litigation is litigation between two or more States, between a State and an international intergovernmental organization, between international intergovernmental organizations, or between a State and some other entity, especially something like a privatized State enterprise or a corporation, particularly a multinational. Litigation and pleading are acts of State.²¹ As explained by Davy Aaron Karkason, what Defines International Litigation is that it is marked by its reliance on the formal legal frameworks established within national court systems, where consent of the parties engaged is not a prerequisite for adjudication. In these disputes, actions are initiated through a lawsuit, compelling the participation of entities under

²⁰ Ibid.

²¹ Shabtai Rosenne, "An Introduction To International Litigation", IBRU Boundary and Security Bulletin Spring 1998, p.57, https://www.durham.ac.uk/media/durham-university/research-/research-centres/ibru-centre-for-borders-research/maps-and-databases/publications-database/boundary-amp-security-bulletins/bsb6-1_rosenne.pdf, (May 3, 2025).

jurisdictions, including vibrant commercial centers such as London, Hong-Kong, Singapore, etc. Key features of the procedure include the right to select arbitrators with sector-specific expertise, such as property or employment law, which provides reassurance that nuanced legal issues will be understood in the context of industry norms. The arbitration process also does away with the conventional pleading system, instead allowing for tailored evidence presentation and a judgment that is final and binding.²⁶ Davy Aaron Karkason puts forth some of the crucial components of the international arbitration procedures that include; mutual consent by both parties to engage in the process; Parties selecting specialized arbitrators, informed by industry-specific expertise; Judgments rendered in arbitration are recognized as final and enforceable; the arbitration process often bypasses the traditional pleading stages of a lawsuit.²⁷

3.3. Discussion about Transnational

3.3.1. Transnational law

A. Is International Law different from transnational law?

We can no longer assert that international law is a system that can be understood as an intentionally developed and vertically enforced set of legal rules when we examine its evolution. International law is evolving into a vast, interpretatively built corpus juris in which numerous actors and institutions (often judicial in nature) play a role in its constitutionality, which is not constrained by a priori parameters. These developments lead us to conclude that international law is progressing away from an overreliance on the state's sovereign actions and is considerably different from the realm of strictly enforceable intergovernmental accords.²⁸ Robert O. Keohane, Andrew Moravcsik, and Anne-Marie Slaughter have proposed a very subtle and fundamental distinction between international and transnational litigation, using the term "interstate" to describe international transactions. They explain in more detail about the distinction between the concepts by stating that "Interstate dispute resolution is consistent with

²⁶ Davy Aaron Karkason, "International Arbitration vs Litigation," Transnational Matters – U.S. & International Lawyers, [https://www.transnationalmatters.com/international-arbitration-vs-litigation/#:~:text=One%20of%20the%20key%20advantages,typically%20follows%20a%20streamlined%20process,\(May%203,%202025\).](https://www.transnationalmatters.com/international-arbitration-vs-litigation/#:~:text=One%20of%20the%20key%20advantages,typically%20follows%20a%20streamlined%20process,(May%203,%202025).)

²⁷ Davy Aaron Karkason, "International Arbitration vs Litigation," Transnational Matters – U.S. & International Lawyers, [https://www.transnationalmatters.com/international-arbitration-vs-litigation/#:~:text=One%20of%20the%20key%20advantages,typically%20follows%20a%20streamlined%20process,\(May%203,%202025\).](https://www.transnationalmatters.com/international-arbitration-vs-litigation/#:~:text=One%20of%20the%20key%20advantages,typically%20follows%20a%20streamlined%20process,(May%203,%202025).)

²⁸ Peer Zumbansen (ed.), THE OXFORD HANDBOOK OF TRANSNATIONAL LAW, 1st ed. 2021, p. 141.

the view that public international law comprises a set of rules and practices governing interstate relationships." In this model, legal dispute resolution occurs between states that are conceptualized as unified entities. Because states are the subjects of international law, they have the authority to grant or deny access to courts or tribunals for dispute resolution. The judges of these tribunals are usually appointed by them. Additionally, states carry out or neglect to carry out the rulings of international tribunals or courts. As a result, states serve as gatekeepers in interstate dispute resolution, both in and out of the international legal system and back to the domestic sphere. In contrast, in transnational dispute resolution, access to courts and tribunals and the later enforcement of their rulings are legally shielded from the desires of specific national governments. As a result, these tribunals are more accessible to civil society individuals and organizations. In the pure ideal type, states are unable to serve as gatekeepers, but they are less able to do so in reality. Regardless of whether it was willingly or unknowingly relinquished, this loss of state control provides a variety of possibilities for judges and their constituencies to influence the agenda.²⁹

B. Transnational law, litigation and process

While contradicting to the criticisms to International law in the formative years of the legal scholarship of the international law, Professor Harold Hongju Koh expresses his ardent understanding the International law and international legal scholars are not powerless in terms of its idea of a law that transcends national boundaries and its acceptance as obligatory by the nation states, and that idea is "Transnational legal Process".³⁰ The understanding of the transnational legal process is crucial in understanding the role of transnational litigation in it. Harold Hongju Koh, further elaborates, "Transnational legal process describes the theory and practice of how public and private actors, nation-states, international organizations, multinational enterprises, non-governmental organizations, and private individuals interact in a variety of public and private, domestic and international fora to make, interpret, enforce, and ultimately, internalize rules of transnational law."³¹ A corollary understanding of the process has also been explained by Gregory Shaffer, James Nedumpara, and Aseema Sinha where they

²⁹ Robert O. Keohane, Andrew Moravcsik, & Anne-Marie Slaughter, "Legalized Dispute Resolution: Interstate and Transnational," *International Organization*, Vol.54, Issue.3, 2000, pp. 457–458, <https://doi.org/10.1162/002081800551299>.

³⁰ Harold Hongju Koh, "The 1994 Roscoe Pound Lecture: Transnational Legal Process," *Nebraska Law Review*, Vol.75, 1996, p.183, <https://digitalcommons.unl.edu/nlr/vol75/iss1/7>.

³¹ Harold Hongju Koh, "The 1994 Roscoe Pound Lecture: Transnational Legal Process," *Nebraska Law Review*, Vol.75, 1996, pp.183 – 184, <https://digitalcommons.unl.edu/nlr/vol75/iss1/7>.

use the terms Transnational Legal Order (TLO), wherein they explain that, TLO perspective differs from a conventional international law viewpoint in that it empirically concentrates on changes in both international institutions and substantive law, like WTO law and in nation states laws, institutions, professions, networks, and norms. This latter category includes those national and local institutions, professions, and practices with which it interacts and which evolve over time.³²

These developments are also a process of evolution of law that cannot be stopped or ignored with the perceived fear to the entity called nation state. Though state has been an ever-present component of governance and politics as has been observed by B. S. Chimni, in the context of India that, “the concept of the state was itself well developed in ancient India; while not present in the early ancient period, the idea of the state evolved over time. The elements that constituted a state, or *rajya*, were identified as *praja* (the citizen body or the populace), *rashtra* (the territory of the state), *rajan* (the king), and *dharma* (laws, both divine and secular).³³ This shows that state has been an important entity in governance and therefore of law since a long time. But it must also be noted that the form in which the state conducted its affairs both domestic and international has always been dynamic and been changing with the changing circumstances of society. Carrie Menkel-Meadow, while discussing the rapid changes in international law and the necessity of instilling these changes in the mindset of future lawyers, states that “modern students of international law need to learn to choose among a range of processes including negotiation, inquiry, fact finding, conciliation, mediation, arbitration, diplomacy, adjudication, and use of force” while studying the application of substantive law. Besides the traditional formal institutions of international law, there are currently many different hybrid and innovative types of courts and organizations that deal with issues involving more than one nation or the consequences of conflicts, whether they occur between states or within states (such as civil wars, genocides, and transitions from dictatorial or other illegitimate governments).³⁴ She emphasizes on a crucial point of differentiation that, “while conventional international law has focused on situations of conflict, modern international processes are also forward looking and seek to build on international cooperation, as much as or more than on older notions of sovereign competition. Disaster aid, environmental crises, and future planning

³² Gregory Shaffer, James Nedumpara, and Aseema Sinha, “State Transformation and the Role of Lawyers: The WTO, India, and Transnational Legal Ordering,” *Law & Society Review*, Vol.49, No.3, 2015, p.4.

³³ B.S. Chimni, “International Law Scholarship in Post-Colonial India: Coping with Dualism,” *Leiden Journal of International Law*, Vol.23, Issue.1, 2010, pp. 29, <https://doi.org/10.1017/S092215650999032X>.

³⁴ Carrie Menkel-Meadow, “Why and How to Study “Transnational” Law”, *UC Irvine Law Review*, Vol. 1, No. 1, 2011, p.117.

have produced an increase in international meetings, negotiations, and cooperative efforts requiring management and governance and providing many more sites of lawmaking.”³⁵ Thus create a better way forward for legal practitioners but at the same time grabbing our attention to the rising multidimensional evolution of law.³⁶

Cross Border data protection rules as an example:

One of the many examples of the situation where it can be said that transnational legal process is quite visible is in the application and implementation of the European Unions General Data Protection Regulation (GDPR).³⁷ Chapter 5 of the regulation provides for the rules as to the ‘Transfers of personal data to third countries or international organizations’.³⁸ The GDPR has established a rigorous standard for data protection and is now the standard for compliance in international data transfers. Businesses must overcome the obstacles of safeguarding sensitive data and guaranteeing compliance with privacy laws in this sector. Businesses must comprehend the obstacles and put successful remedies in place for cross-border data transfers in order to guarantee GDPR compliance.³⁹ The transnational legal process that consists of the law and litigation as well comes into play in such kind of regulations that have cross border application and stand in confrontation with the regulations of other nations as well and creating further compliance barriers for companies involved in the handling of data of EU personnel’s. Because data protection regulations differ from nation to country, companies have a hard time running their compliance operations. Other nations may have different standards, even if the GDPR establishes strict guidelines for data protection in the EU. Businesses must verify that third-party recipients outside the country comply with GDPR requirements and the applicable data protection legislation in their location.⁴⁰ If we take the example of China, on June 30, 2022, the Cyberspace Administration of China (CAC) released the long-awaited Standard Contracts Clauses Rules (SCCR) and the accompanying Standard Contracts Clauses (SCC).

³⁵ Carrie Menkel-Meadow, “Why and How to Study “Transnational” Law”, UC Irvine Law Review, Vol. 1, No. 1, 2011, p.117.

³⁶ Carrie Menkel-Meadow, “Why and How to Study “Transnational” Law”, UC Irvine Law Review, Vol. 1, No. 1, 2011, p.103.

³⁷ General Data Protection Regulation, <https://gdpr-info.eu/>.

³⁸ Chapter 5, Transfers of personal data to third countries or international organizations, <https://gdpr-info.eu/chapter-5/>, (April 18, 2025).

³⁹ Zlatko Delev, “Cross-Border Data Transfers Post-GDPR: Challenges and Solutions,” GDPR local, March 20, 2024, <https://gdprlocal.com/cross-border-data-transfers-post-gdpr/>. (April 18, 2025).

⁴⁰ Zlatko Delev, “Cross-Border Data Transfers Post-GDPR: Challenges and Solutions,” GDPR local, March 20, 2024, <https://gdprlocal.com/cross-border-data-transfers-post-gdpr/>. (April 18, 2025).

Ning Xuanfeng, with other scholars,⁴¹ explained that the rules have some major differences;

Distinctive foundations to set out rights and obligations of contractual parties; the GDPR to cater to various transfer scenarios and the complexity of modern processing chains, uses a 4 modules approach, while the SCCR currently adopts a one-size-fit-all approach to the same issue.⁴²

Companies may enhance the GDPR Standard Contractual Clauses (SCCs) by including additional clauses or safeguards in a larger contract, as long as these additions are not in conflict with the SCCs or infringe on the rights of data subjects. However, such custom "ad hoc contracts" must be authorized in advance by data protection authorities. By allowing organizations to make more practicable commitments that lower the risk of breaches, this strategy gives them more freedom in their data protection responsibilities.⁴³ The SCCR, on the other hand, say nothing about the acceptance of such a flexible approach being applicable to SCCR, neither it specifies the process for obtaining approval for the tailored-made clauses. Rather, it stipulates that all SCCR must register with the provincial CAC office within 10 working days of its effectiveness.⁴⁴

Such scenarios create transnational interaction of business, laws, regulations, government institutions, etc. thus making it also an avenue for transnational litigation. It is an apt example of transnational legal process where there is active involvement of transnational law and also avenues for transnational litigation.

4. Deeper dive into transnational litigation

At the present juncture where we are there is no clear distinctive line between international litigation and transnational litigation. Both the terms are on most occasions used

⁴¹ Ning Xuanfeng, et al., "Comparative Analysis of China SCC and GDPR SCC," King & Wood Mallesons, July 6, 2022, <https://www.kwm.com/cn/en/insights/latest-thinking/comparative-analysis-of-china-scc-and-gdpr-scc.html>, (April 18, 2025).

⁴² Ning Xuanfeng, et al., "Comparative Analysis of China SCC and GDPR SCC," King & Wood Mallesons, July 6, 2022, <https://www.kwm.com/cn/en/insights/latest-thinking/comparative-analysis-of-china-scc-and-gdpr-scc.html>, (April 18, 2025).

⁴³ Ning Xuanfeng, et al., "Comparative Analysis of China SCC and GDPR SCC," King & Wood Mallesons, July 6, 2022, <https://www.kwm.com/cn/en/insights/latest-thinking/comparative-analysis-of-china-scc-and-gdpr-scc.html>, (April 18, 2025).

⁴⁴ Ning Xuanfeng, et al., "Comparative Analysis of China SCC and GDPR SCC," King & Wood Mallesons, July 6, 2022, <https://www.kwm.com/cn/en/insights/latest-thinking/comparative-analysis-of-china-scc-and-gdpr-scc.html>, (April 18, 2025).

interchangeably by the legal scholar, or judges in their judgments. As has been explained by Anggraeni and Partners as, “Transnational litigation, often known as international litigation, refers to legal disputes involving people, events, or transactions connected to several nations. International or transnational litigation differs from domestic litigation in several ways; with the former, some issues, such as personal jurisdiction, service of process, foreign evidence, and judgment execution, are more likely to be relevant.⁴⁵ The term transnational litigation is mentioned separately but also being referred to as international litigation. The proper differentiation of the action of transnational litigation is crucial because of the fact that contribution of scholarly discourse can be considered as a part of transnational law⁴⁶, but transnational litigation exclusively focuses on the action of application of legal principles in the forums. Hence, transnational litigation describes legal disputes that span international boundaries and include participants from various nations. The practitioners working in the field have to deal with conflicts that impact several jurisdictions, requiring a thorough knowledge of both international and domestic legal systems. Transnational litigation includes in its ambit a wide range of situations, such as family law matters, tort claims, and business conflicts. The complexity stems from differences in enforcement methods, cultural norms, and legal systems among jurisdictions.⁴⁷

Putting forth the procedural issues associated with this litigation, the American Society for International Law describes the field of transnational litigation, arbitration, and dispute resolution as covering both the substantive and procedural elements of public and private transnational and international dispute resolution across various institutional contexts, including national courts, ad hoc arbitral tribunals, and permanent international courts and tribunals. It covers subjects like cross-border evidentiary problems, judgment enforcement, law selection, and forum non conveniens. This area of practice also encompasses investment arbitration, conciliation, conflict resolution, and other types of dispute resolution.⁴⁸ Transnational dispute resolution, as opposed to interstate dispute resolution, produces more litigation, jurisprudence that is more independent from national interests, and a further source

⁴⁵ Setyawati Fitrianggraeni, “Brief introduction on transnational litigation: an Indonesia perspective,” Anggraeni and Partners, March 1, 2023, <https://www.lexology.com/library/detail.aspx?g=4264b6b7-6622-4ae3-b4f7-e79eb24f3d47>, (March 12, 2025).

⁴⁶ Art 38 (d), STATUTE OF THE INTERNATIONAL COURT OF JUSTICE.

⁴⁷ “Understanding Transnational Litigation: Key Concepts and Challenges,” International Law Editorial, April 24, 2024, <https://worldjurisprudence.com/transnational-litigation-2/>, (March 12, 2025).

⁴⁸ “Transnational Litigation, Arbitration, and Dispute Resolution,” American Society of International Law, <https://www.asil.org/topics/transnational-litigation-arbitration-dispute-resolution-topics>, (March 12, 2025)

of compliance pressure.⁴⁹ Transnational dispute resolution seems to have an inherently more expansionary character; it provides more opportunities to assert and establish new legal norms, often in unintended ways.⁵⁰

4.1. Is transnational Arbitration different from Transnational Litigation?

It is worth noting that in the traditional sense of term international law, it was divided into two broad sections namely, public international law and private international law. Most of the times from the practice it can be derived the litigation usually us practiced under public international law wherein matters of nation state interest are settled by means of formal institutions. In contrast to it the private international law can be considered on a bit light handed from the perspective of formal procedures, as most of the times the broader interest of the parties involved is to achieve swift decision with limited bureaucracy, as a result of which the Alternative Dispute Resolution (ADR) measures are found to be preferable by the parties involved. However, under transnational litigation the researcher has not seen a pinpoint bifurcation as of transnational litigation and transnational arbitration. The flow of the wind suggests that in the contemporary times the efforts are more on understanding what comes within its ambit rather than being excluded from its umbrella. Florian Grisel, while referring to this evolution as ‘transnationalization’, states that, transnationalization is a process that transcends the divides between public/private, national/international, and legal/nonlegal and international arbitration is a prime example of an effective transnationalization process.⁵¹ Transnational litigation can very well be attributed as a byproduct of this transnationalization. However, when we look at ADR and specifically international arbitration, it can be said to be the most widely used and functional form of dispute resolution that really makes transnational legal practice a very much fact of litigation in the modern times. Looking at the share of international arbitration in the cross-border dispute resolution in the contemporary times, as well as the number of parties and jurisdictions that come within the subject matter of some international arbitration proceedings, it becomes quite helpful and academically sound enough to even consider international arbitration under the ambit of transnational legal practice. However, it still remains questionable as to whether the transnational litigation and arbitration

⁴⁹ Robert O. Keohane, Andrew Moravcsik, and Anne-Marie Slaughter, “Legalized Dispute Resolution: Interstate and Transnational,” *International Organization*, Vol. 54, No. 3, 2000, pp. 458.

⁵⁰ Robert O. Keohane, Andrew Moravcsik, and Anne-Marie Slaughter, “Legalized Dispute Resolution: Interstate and Transnational,” *International Organization*, Vol. 54, No. 3, 2000, pp. 459.

⁵¹ chapter 21, Florian Grisel, *Transnational Arbitration Law*, *Oxford Handbook on Transnational Law*, pp. 469-478.

be considered as same or in a hierarchical structure or supplementary to each other under the umbrella of transnational legal practice.

One interesting case that represents complex interplay of transnational litigation and arbitration is *Cruz City 1 Mauritius Holdings vs Unitech Limited*.⁵² Under his case in July 2012, Cruz City, an entity incorporated in Mauritius, obtained an LCIA arbitral award in its favour worth approximately USD 350 million (including interest) against Unitech, an Indian entity, and its wholly owned subsidiary, Burley Holdings Ltd, incorporated in Mauritius.⁵³ The arbitration involved a contract that Cruz City signed with Unitech and Burley in June 2008, which included clauses regarding a separate Shareholders Agreement under which Cruz City agreed to invest around USD 170 million in the development and management of specific real estate projects in India. Cruz City had the right to exercise a put option under the Shareholders Agreement that required Burley and Arsanovia Ltd., a company indirectly owned by Unitech, to acquire Cruz City's equity investment "at a price yielding a post-tax IRR of 15% of Cruz City's capital contribution."⁵⁴ The disagreement arose when Cruz City decided to put the put option into effect in 2010 due to project delays. A succession of arbitration processes ensued, ending with the Award being granted to Cruz City in its favor.⁵⁵

Cruz City 1 Mauritius Holdings filed the petition for enforcement of a foreign arbitral award. The Award was rendered by an Arbitral Tribunal constituted under the Arbitration Rules of the London Court of International Arbitration pursuant to a request for arbitration filed by Cruz City with the London Court of International Arbitration (LCIA) in respect of disputes arising out of an agreement captioned as Keepwell Agreement. The Keepwell Agreement was entered into between Cruz City, Burley Holdings Ltd. (hereafter 'Burley').⁵⁶ Unitech opposed the enforcement of the Award essentially on three grounds of which the third one is crucial in in

⁵² "Cruz City 1 Mauritius Holdings vs Unitech Limited," Delhi High Court, April 11, 2017, <https://indiankanoon.org/doc/58509699/>, (April 20, 2025).

⁵³ Donny Surtani, "Delhi High Court allows enforcement of arbitral awards despite foreign exchange regulations," Herbert Smith Freehills, 29 June 2017, <https://www.herbertsmithfreehills.com/notes/arbitration/2017-06/delhi-high-court-allows-enforcement-of-arbitral-awards-despite-foreign-exchange-regulations>, (April 20, 2025).

⁵⁴ Para: 3.5, "Cruz City 1 Mauritius Holdings vs Unitech Limited," Delhi High Court, April 11, 2017, <https://indiankanoon.org/doc/58509699/>, (April 20, 2025).

⁵⁵ Donny Surtani, "Delhi High Court allows enforcement of arbitral awards despite foreign exchange regulations," Herbert Smith Freehills, 29 June 2017, <https://www.herbertsmithfreehills.com/notes/arbitration/2017-06/delhi-high-court-allows-enforcement-of-arbitral-awards-despite-foreign-exchange-regulations>, (April 20, 2025).

⁵⁶ Para: 1, "Cruz City 1 Mauritius Holdings vs Unitech Limited," Delhi High Court, April 11, 2017, <https://indiankanoon.org/doc/58509699/>, (April 20, 2025).

this discussion, “that the enforcement of the Award would be contrary to the Public Policy of India as it violates the provisions of the Foreign Exchange Management Act, 1999 (FEMA)”.⁵⁷ The Court determined that the public policy defense's applicability to oppose enforcement was limited after reviewing the pertinent case law, and that it might be likened to violating a specific provision or law. Additionally, it ruled that violating any provision of a statute does not equate to violating the fundamental principles of Indian law. The Delhi High Court additionally stated that Unitech's payments would need RBI approval and be in accordance with FEMA regulations, but that Unitech's arguments against enforcement were not acceptable. The Delhi High Court rejected Unitech's appeal; however, the Reserve Bank of India (RBI) now has the responsibility of granting remittance approvals in accordance with the arbitral award.⁵⁸

The cases like these are the classic example of the situations where arbitration and litigation interact with each other in the same case and also there is also the involvement of the government regulatory agencies to undertake measures to make a foreign arbitral award enforceable. However, in the light of the concerns mentioned by Martti Koskenniemi, towards the fragmentation of internal demonstrating the emergence and operation of structural bias. Through specialization that is to say, through the creation of special regimes of knowledge and expertise in areas such as trade law, human rights law, environmental law, security Law, international criminal law, European law, and so on where the legal practice is being sliced up in the institutional projects that cater for special audience with special interests and special ethos.⁵⁹

The research is acceptance with this observation intends to maintain the simplicity of the standing of the two legal practices i.e. transnational litigation and transnational arbitration. For the purposes of this research the researcher word considers to put transnational litigation and under the umbrella of transnational legal practice. The situation of separation and connectivity between these two concepts can be understood better from Sassen and Florian Grisel observations about transnational law, referring to it as “a normative process that transcends both national and international levels. It is formed by the systems of global law are not centered in state law i.e. they are to be distinguished from both national and international law. In fact,

⁵⁷ Para: 2, “Cruz City 1 Mauritius Holdings vs Unitech Limited,” Delhi High Court, April 11, 2017, <https://indiankanoon.org/doc/58509699/>, (April 20, 2025).

⁵⁸ “The Delhi High Court judgment in Cruz City v. Unitech Limited,” Finsec Law Advisors, April 22, 2017, <https://www.finseclaw.com/article/delhi-high-court-judgment-cruz-city-v-unitech-limited>, (March 13, 2025).

⁵⁹ Martti Koskenniemi, “The Politics of International Law - 20 Years Later”, *The European Journal of International Law* Vol. 20 no. 1, 2009, p. 9.

the dynamics of transnational law can often be located on the fringes, where borders do not always separate social systems with certainty, but rather create gray zones of social overlap and blurred identity. In fact, the construction of transnational arbitration law has taken place in such a gray zone.”⁶⁰

4.2. Core issues associated with transnational litigation

Transnational litigation is more closely associated with private international law than with public international law. This is because private international law serves as the overall legal framework and guiding principles for regulating cross-border civil interactions.⁶¹ Private international law, primarily known as Conflict of Laws, is based on the idea that one set of laws cannot govern human interactions across national boundaries. The impact of global contracts, e-commerce transactions, cross-border marriages, divorces, and insolvency can be seen in more than one jurisdiction. If varied municipal legal systems have contributed to the disputes, jurisdictions' differing approaches to the conflict of laws further complicate the scenario.⁶²

From the readings of the scholarly discourses as well as the observations put forth by practicing lawyers in the field it can be understood that transnational litigation derives its significance from the complex interplay of the laws that transcend national borders, without any specific necessity of the arbitration clauses in place. While transnational arbitration quite specifically needs an arbitration clause or provision of that sort between the parties to use this avenue in a dispute. From the understanding of the legal principles as well as contracts, it can be concluded that transnational arbitration associates itself with mostly with commercial and investment disputes. However, both the practices come majorly within the ambit of private international law. Hence, as far as common issues associated with private international law are concerned, most of them are applicable to transnational litigation and arbitration as well. Various legal and factual issues that arise in transnational litigation, include, managing litigation with global origins and impacts, cross-border discovery, jurisdictional disputes and extraterritoriality issues, forum non conveniens, Foreign Sovereign Immunities Act, corporate separateness,

⁶⁰ Peer Zumbansen (ed.), OXFORD HANDBOOK ON TRANSNATIONAL LAW, 1st ed. 2021, pp. 469-478.

⁶¹ Setyawati Fitrianggraeni, “Brief introduction on transnational litigation: an Indonesia perspective”, Anggraeni and Partners, Lexology, March 1, 2023, <https://www.lexology.com/library/detail.aspx?g=4264b6b7-6622-4ae3-b4f7-e79eb24f3d47>, (March 18, 2025).

⁶² Stellina Jolly and Saloni Khanderia, INDIAN PRIVATE INTERNATIONAL LAW, 1st ed. 2021, p. 3.

foreign judgment defense, enforcement, asset recovery, etc.⁶³

In this research the researcher would focus on two issues Jurisdiction (Choice of forum), Choice of Law and Enforcement of foreign judgments.

4.2.1. Jurisdiction

The Latin words *ius* (right) and *dicere* (to say or pronounce) are the root of the word 'jurisdiction'. It refers to a court's ability to administer (pronounce) justice (right) in a litigant's case and its capacity to hear a case that comes before it and make necessary rulings. In other words, jurisdiction encompasses all of a court's actions, from investigating the facts to applying legal principles, delivering a verdict, and overseeing the implementation of that verdict. The determination of a court's jurisdiction is the primary foundation in private international law, and it is a crucial element from which all other considerations in the resolution of a dispute with a foreign element in a civil or commercial issue emerge.⁶⁴ For many years, the term "jurisdiction" has been defined by judges and legal scholars in relation to a court's "power." According to this idea, a court that did not have jurisdiction merely lacked the authority to bind the parties, and as a result, its subsequent decisions might be viewed as null and having no legal effect by both parties and future judges.⁶⁵

4.2.2. Choice of Forum

Jurisdiction is the determining factor that decides as to whether a particular forum can listen and decide on a case on the basis of the type of dispute (jurisdiction by subject matter), on the basis of parties (Jurisdiction in Personam), and on the basis of property both tangible and intangible (Jurisdiction in rem). Amount of money attached with the dispute also plays a crucial role in determining the forum by means of pecuniary jurisdiction.

To give an example, In *TWC Aviation Capital Limited vs Spicejet Limited*,⁶⁶ The case involves a commercial contract in which SpiceJet leased two planes and four engines from TWC. SpiceJet was unable to meet the renegotiated payment terms set in later revisions to the original

⁶³ "Transnational Litigation," Gibson Dunn, <https://www.gibsondunn.com/practice/transnational-litigation/>, (March 18, 2025).

⁶⁴ Stellina Jolly and Saloni Khandaria, *INDIAN PRIVATE INTERNATIONAL LAW*, 1st ed. 2021, p. 61.

⁶⁵ Ryan C. Williams, "Jurisdiction as Power," *The University of Chicago Law Review*, Vol.89, Issue.7, p. 1719, <https://lawreview.uchicago.edu/print-archive/jurisdiction-power>, (March 19, 2025).

⁶⁶ Delhi High Court, *Twc Aviation Capital Limited vs Spicejet Limited*, 5 April, 2024, <https://indiankanoon.org/doc/192749079/>.

leasing agreements as it dealt with increasing financial difficulties. TWC then declared a default, terminating the leases and requesting the return of the rented goods.⁶⁷ In a suit for declaration filed by TWC Aviation Capital (plaintiff) against SpiceJet, (the defendant), for enforcement of orders passed by the High Court of Justice in England Wales, Court (Business and Property Courts of England Wales King's Bench Division Commercial Court) ('UK Court'), Prathiba M. Singh, J., observed that UK Court was a competent Court in terms of the agreement between the parties, and directed SpiceJet to return aircrafts to TWC along with engines.⁶⁸ The Delhi High Court observed that a foreign order or judgment is only unenforceable if any of the conditions outlined in Section 13 of the Civil Procedure Code, 1908 (CPC) ⁶⁹, are met. Since the UK Court was the competent court according to the parties' agreement, none of these conditions apply in this instance. The Court noted that SpiceJet had actively engaged in the proceedings and found no cause to consider the order as unenforceable in India. ⁷⁰

This shows as to how the parties in such disputes create the issues on the authority of the forum to deal with the case on the basis of jurisdiction. In such situations the observations and interpretations of the judges to the laws forms a better way forward for certainty in precedent setting. The complexities associated with jurisdiction and appropriate forum are quite enormous in transnational litigation and it increases with the number of parties and territories involved. There are also risks of uneven, uncertain and unpredictable progression of jurisprudence in this respect as one of the prime necessities for smoother transnational litigation is certainty of judicial pronouncements in distinct jurisdictions. To facilitate this the 'Hague

⁶⁷ "TWC Aviation Capital Limited vs SpiceJet Limited," March 14, 2024, <https://becivil.co.uk/case-notes/twc-aviation-capital-limited-vs-spicejet-limited--high-court-2024-ewhc-721-comm--case-summary/>, (March 19, 2025).

⁶⁸ Delhi High Court orders SpiceJet to return all aircrafts along with engines to TWC..., SCC Times, published on: May 22, 2024, <https://www.sconline.com/blog/post/2024/05/22/dhc-enforces-uk-court-order-directs-spicejet-to-return-aircrafts-along-with-engines-to-twc-legal-news/>, (March 19, 2025).

⁶⁹ Sec 13: When foreign judgment not conclusive - A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title except-

- (a) where it has not been pronounced by a Court of competent jurisdiction;
- (b) where it has not been given on the merits of the case;
- (c) where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognize the law of [India] in cases in which such law is applicable;
- (d) where the proceedings in which the judgment was obtained are opposed to natural justice;
- (e) where it has been obtained by fraud;
- (f) where it sustains a claim founded on a breach of any law in force in India.

⁷⁰ Delhi High Court orders SpiceJet to return all aircrafts along with engines to TWC..., SCC Times, published on: May 22, 2024, <https://www.sconline.com/blog/post/2024/05/22/dhc-enforces-uk-court-order-directs-spicejet-to-return-aircrafts-along-with-engines-to-twc-legal-news/>, (March 19, 2025).

Convention on Choice of Court Agreements' has been formed, where the preamble of the convention mentions that the States Parties to the Convention, desire to promote international trade and investment through enhanced judicial co-operation, believing that such co-operation can be enhanced by uniform rules on jurisdiction and on recognition and enforcement of foreign judgments in civil or commercial matters, and that such enhanced co-operation requires in particular an international legal regime that provides certainty and ensures the effectiveness of exclusive choice of court agreements between parties to commercial transactions and that governs the recognition and enforcement of judgments resulting from proceedings based on such agreements.⁷¹ Rian Matthews and Dr Max Oehm, exemplify that, the Convention aims to promote the enforcement of exclusive choice of court agreements (CCA) between parties to international transactions; i.e. agreements between two or more parties to submit to a designated national court's jurisdiction, so that their disputes can be resolved by that designated court exclusively.⁷²

4.2.3. Choice of Law

The contractual dealings of every sovereign nation both inside and outside the nation are regulated by different applicable substantive and procedural laws. As a result of the concept of choice of law in international law, which deals with conflicting laws enforced by different judicial systems, sovereign states have opted for unique procedural laws when confronted with it. This dispute is apparent not just in the court's jurisdictional determination, but also in the legislation that the court should apply and the implementation of its ensuing ruling.⁷³

The court with jurisdiction decides which law to use in cases involving foreign parties, foreign transactions, or multiple foreign elements. In a straightforward world, the court would constantly use the law of the forum (lex fori in Latin).⁷⁴ Oyetola Muiyiwa Atoyebi, very subtly explains that, "The choice of law clause in a contract permits the parties to agree that the laws

⁷¹ "Convention on Choice of Court Agreements," Hague Conference on Private International Law (HCCH), June 30, 2005, <https://www.hcch.net/en/instruments/conventions/full-text/?cid=98>.

⁷² Rian Matthews and Dr Max Oehm, "The Hague Convention on Choice of Court Agreements: an unexpected game changer for English schemes of arrangement?," Butterworths Journal of International Banking and Financial Law, 2016, https://restructuring.bakermckenzie.com/wp-content/uploads/sites/23/2017/03/Rian-Matthews_Butterworths_Article2.Matthews.Oehm_3..pdf, (March 20, 2025).

⁷³ Oyetola Muiyiwa Atoyebi, "An Analysis Of The Concept Of Choice Of Law In Private International Law: Its Implication On International Contracts", Lawpavilion, July 13, 2023, https://lawpavilion.com/blog/an-analysis-of-the-concept-of-choice-of-law-in-private-international-law-its-implication-on-international-contracts/#google_vignette, (April 20, 2025).

⁷⁴ Peter Hay and Ulrich M. Drobnig, "Choice of Law", Britannica, <https://www.britannica.com/topic/conflict-of-laws/Choice-of-law>, (March 20, 2025).

of a specific nation will be utilized to interpret the contract, even if the contract will ultimately be executed in a different nation. In addition, this choice of law provision is clear in international contracts, and its main purpose is to prevent ambiguity regarding the law that will govern any disputes that may arise from the relationship established by the contract. A prima facie agreement is also intended to be reached.”⁷⁵

The primary importance of the choice of law agreements/provisions/clauses in the international contracts is to provide clarity about the legal procedural rights and facilities available to the contracting parties by specifying the law applicable to the contract. In the absence of such agreements, the court relies on various theories to determine the governing law. Understanding the available theories, like *Lex Loci Contractus*, which applies the law where the contract was made or *Lex Loci solutionist* theory prioritizes the place where the contract was executed, yet both of these approaches fall short in the contemporary times of electronically executed contracts as well as multi state contracts. One approach that is usually favored is *Teori Lex Fori* that advocates for application of the law of the forum that has the jurisdiction to hear the case, this approach adds an advantage of the ease of dispensation of the rules that the court is familiar with and eliminates the rigour of determination of applicable law. Then according to the Proper Law of Contract theory, the court must select the law that most protects the core of the contract, yet this places a big analytical load on the court, as it leads the court on a voyage of discovery, placing the onus of analysis on the court and further burdening the court with the duty of comparing likely legal options.⁷⁶

To incorporate some amount of certainty, predictability and structuring to this complex issue in the transnational litigation and arbitration, The Hague Conference on Private International Law (the Hague Conference), has developed the first nonbinding, “soft” choice of law instrument: the Principles on Choice of Law in International Commercial Contracts (the Hague Principles).⁷⁷ The Hague Conference has taken the view that states which have not embraced

⁷⁵ Oyetola Muyiwa Atoyebi, “An Analysis Of The Concept Of Choice Of Law In Private International Law: Its Implication On International Contracts”, Lawpavilion, July 13, 2023, https://lawpavilion.com/blog/an-analysis-of-the-concept-of-choice-of-law-in-private-international-law-its-implication-on-international-contracts/#google_vignette, (April 20, 2025).

⁷⁶ Oyetola Muyiwa Atoyebi, “An Analysis Of The Concept Of Choice Of Law In Private International Law: Its Implication On International Contracts”, Lawpavilion, July 13, 2023, https://lawpavilion.com/blog/an-analysis-of-the-concept-of-choice-of-law-in-private-international-law-its-implication-on-international-contracts/#google_vignette, (April 20, 2025).

⁷⁷ Armela Maxhelaku, Xhon Skënderi, “The Hague Principles On Choice Of Law In International Commercial Contracts”, *Global Journal of Politics and Law Research*, Vol. 8, No. 5, 2020, p. 1, <https://www.eajournals.org/wp-content/uploads/The-Hague-Principles-on-Choice-of-Law-in-International-Commercial-Contracts.pdf>.

party autonomy⁷⁸ for choice of law in litigation should take it up. This is reflected in the Hague Principle's core rule that the law that the parties have chosen will govern their contract. The Hague conference has adopted the more contentious stance that states that have embraced the concept of party autonomy should improve and expand it. The Hague Principles support this goal by permitting parties to select the relevant law "tacitly" and to select multiple applicable laws that only apply to certain portions of the contract. Even though these clauses are not novel, their validity has been called into doubt. This is also reflected in the unparalleled provision permitting parties to select non-state rules of law, irrespective of how they resolve their disagreement.⁷⁹ The Hague Principles permit parties to select a "neutral and balanced" "set of rules" that is "generally accepted on an international level" as the governing law for their contract. The United Nations Convention on Contracts for the International Sale of Goods (CISG)⁸⁰ is one set of legal regulations that parties may select. The CISG is an international treaty that offers uniform substantive rules for the creation and execution of contracts for the sale of goods between countries. In the increasingly uncommon situation when the CISG would not apply on its own terms, the Hague Principles permit parties to select the CISG. The UNIDROIT Principles of International Commercial Contracts (PICC)⁸¹ are the second candidate, according to the Hague Principles. The PICC are a non-binding collection of substantive legal guidelines intended to govern the general contractual elements of international commercial contracts.⁸² When we specifically take into consideration transnational arbitration, the UNIDROIT Principles are quite a commendable deal as it tries to provide a fathomable shape to Lex Mercatoria. The UNIDROIT Principles are usually consistent with most national legislations. They accept the parties' choice as top priority, although they provide comprehensive international compromises on the topics they address, which is a wider scope than the particular sales-focused emphasis of the CISG. The rules are subject to modification by the parties. The UNIDROIT Principles, in addition to honoring party

⁷⁸ Sunday A. Fagbemi, "The Doctrine Of Party Autonomy In International Commercial Arbitration: Myth Or Reality?", *Party Autonomy In International Commercial Arbitration*, p. 224, <http://dx.doi.org/10.4314/jsdlp.v6i1.10>.

⁷⁹ Brooke Marshall, "The Hague Choice of Law Principles, CISG, and PICC: A Hard Look at a Choice of Soft Law", *American Journal of Comparative Law*, Vol. 66, No. 1, 2018, pp. 3-6, <http://dx.doi.org/10.1093/ajcl/avy007>.

⁸⁰ UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS, https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09951_e_ebook.pdf.

⁸¹ UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016, <https://www.unidroit.org/wp-content/uploads/2021/06/Unidroit-Principles-2016-English-bl.pdf>.

⁸² Brooke Marshall, "The Hague Choice of Law Principles, CISG, and PICC: A Hard Look at a Choice of Soft Law", *American Journal of Comparative Law*, Vol. 66, No. 1, 2018, pp. 3-6, <http://dx.doi.org/10.1093/ajcl/avy007>.

autonomy, mandate that parties comply with applicable mandatory law, regardless of its origin being national, supranational, or international. The UNIDROIT Principles provide default principles and rules that may be very useful in the context of international arbitration within these parameters. The UNIDROIT Principles may therefore be used in international arbitration either as an addition to treaty or domestic law or as a selection by the parties prior to or during the arbitration. Modern arbitrators should be familiar with them as a standard.⁸³

If the situation of the India in this regard is to be taken into consideration. In India, the rules to identify the applicable law in contractual obligations have not been codified. In such circumstances, the rules to determine the applicable law for disputes arising from a contractual obligation with a foreign element have been developed by judicial dicta. In this respect, the principles of English common law have been instrumental in shaping the principles of Indian private international law. In English common law, the mechanism to identify the applicable law is through the doctrine of the proper law.⁸⁴ Saloni Khanderia, while mentioning the redundant approach of the Indian legal and judicial system to date, she explains, “In India, a common law jurisdiction, there is enough judicial dicta to indicate some opposition to accepting any circumstance that falls short of impossibility as being included in section 56 of the Indian Contract Act 1872. The indiscriminate use of traditional common law principles has been shown to be inadequate for addressing the issues that arise in today's contracts, which are frequently influenced by inflation and other legal or political factors that could negatively affect one party's contracted price of performance. The Indian courts should start using the UNIDROIT method promoted in the Principles on International Commercial Contracts (UPICC). The UPICC, on the other hand, distinguishes between the theories of hardship and force majeure and thus offers distinct remedies to deal with these issues. Using the UPICC as a gap-filler will help Indian judges interpret these concerns in accordance with clearly defined and globally accepted standards, allowing for fair and appropriate relief for the parties when

⁸³ Eckart Brödermann, “The Multiple Roles of the UNIDROIT Principles of International Commercial Contracts in Arbitration,” Kluwer Arbitration Blog, September 13, 2023, <https://arbitrationblog.kluwerarbitration.com/2023/09/13/the-multiple-roles-of-the-unidroit-principles-of-international-commercial-contracts-in-arbitration/#:~:text=The%20UNIDROIT%20Principles%20can%20thus,modern%20arbitrators%20ought%20to%20know.>

⁸⁴ Stellina Jolly and Saloni Khanderia, *INDIAN PRIVATE INTERNATIONAL LAW*, 1st ed. 2021, pp. 196-197.

their contract performance has been impacted by hardship.”⁸⁵

4.2.4. Enforcement of Foreign Judgment

The recognition and enforcement of foreign decisions are conceived as the third pillar of private international law.⁸⁶ In today's world the rise of agreements between individuals, both natural and artificial, have increased international commerce and trade and made many of the traditional principles of international law obsolete. When the party against whom a litigation or arbitration decision is rendered (referred to as the judgment-deb or award-de) has assets in another jurisdiction, the ruling may have an effect outside of its national borders. In such cases, the verdict would be nothing more than a brutum fulmen⁸⁷ if the plaintiff were not given a remedy.⁸⁸

An effective enforcement strategy will typically include three key components: (i) information gathering, (ii) asset preservation, and (iii) asset execution/enforcement. In certain situations, additional measures must be taken to execute against assets owned in the names of affiliated individuals and to reverse the debtor's transfer or disposal of assets. The significance of each of these phases will vary based on the case's circumstances. In numerous cases, formal execution or enforcement against assets will not be required if the information is collected successfully and the assets are preserved effectively. A debtor will frequently make payment if they reach a stage when successful enforcement seems unavoidable. However, in more complicated situations where the debtor no longer owns the assets, the proceedings may involve a network of third parties who are purportedly in possession of assets that the debtor beneficially owns, or who are alleged to have received the debtor's assets outside of commercial conditions. A debtor trying to prevent enforcement will usually employ a mix of technical arguments against the acceptance of a foreign judgment and the manipulation of procedural tools to postpone proceedings. Some debtors will take it a step further by dissipating their assets

⁸⁵ Saloni Khanderia, Commercial Impracticability Under The Indian Law Of Contract: The Unidroit Principles As The Way Forward?, UCL Journal of Law and Jurisprudence , Vol. 7, Issue. 2, p. 1, 10.14324/111.2052-1871.105, (March 21, 2025).

⁸⁶ Stellina Jolly and Saloni Khanderia, INDIAN PRIVATE INTERNATIONAL LAW, 1st ed. 2021, pp. 257.

⁸⁷ ‘A brutum fulmen is a Latin phrase that means "a harmless thunderbolt." It refers to a thunderbolt that strikes without causing any damage or harm. It is like a warning or a scare, but it does not actually hurt anyone or anything. It is a reminder of the power of nature and the unpredictability of life,’
<https://www.lsd.law/define/brutum-fulmen>.

⁸⁸ Stellina Jolly and Saloni Khanderia, INDIAN PRIVATE INTERNATIONAL LAW, 1st ed. 2021, pp. 257.

and claiming that allegedly innocent third parties have prior claims to the debtor's belongings.⁸⁹

It also needs to be taken into consideration that there is a slight distinction between the recognition and enforcement of foreign awards. It is crucial to understand the concepts of recognition, enforcement, and execution in international arbitration because they dictate the post-arbitral ramifications of an arbitration award after it is issued. Their differences, however, are not always easy to identify and may vary depending on the legal system in question. The purpose of recognition in international arbitration is to confirm that an arbitral award is binding and final and has a *res judicata* impact. The recognition of an arbitral award essentially implies that it is regarded as legitimate and capable of having the same impact as a judgment rendered by a domestic court.⁹⁰ Enforcement typically refers to "the procedure of getting a court or authority issue an order directing compliance in accordance with the award." Enforcement "advances beyond acknowledgement." A court that is ready to enforce an award will do so because it recognizes the award as binding on the parties and legitimately made, and thus appropriate for enforcement. Enforcement, as opposed to recognition, is used as a sword applying legal sanctions to compel the party against whom the award was made to carry it out." In other words, enforcement entails forcing the losing party to adhere to the terms of the arbitral award by putting it into practice.⁹¹

A dive into the majorly accepted and feasible regulations in the respect shows that The EU regime represents one of the most developed systems for streamlined cross-border enforcement. One of the most advanced frameworks for expedited cross-border enforcement is the EU regime. Judgment enforcement throughout EU and EFTA nations is required to be simplified by the Lugano Convention⁹² and the Brussels I Regulation⁹³, with a few restricted

⁸⁹ Andrew Bartlett, "Enforcement of Foreign Judgments Laws and Regulations International Enforcement Strategy - An Overview 2025," International Comparative Legal Guides (ICGL), March 14, 2025, <https://iclg.com/practice-areas/enforcement-of-foreign-judgments-laws-and-regulations/02-international-enforcement-strategy-an-overview>, (April 20, 2025).

⁹⁰ "Recognition, Enforcement and Execution in International Arbitration," Aceris Law LLC, August 7, 2024, <https://www.acerislaw.com/recognition-enforcement-and-execution-in-international-arbitration/>, (April 20, 2025).

⁹¹ "Recognition, Enforcement and Execution in International Arbitration," Aceris Law LLC, August 7, 2024, <https://www.acerislaw.com/recognition-enforcement-and-execution-in-international-arbitration/>, (April 20, 2025).

⁹² LUGANO CONVENTION 2007 - CONVENTION ON JURISDICTION AND THE RECOGNITION AND ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS, <http://www.dutchcivillaw.com/lugano2007leg.htm?uri=CONSLEG:1997R2027:20020530:EN:HTML>, (March 21, 2025).

⁹³ THE BRUSSELS I REGULATION, <http://www.europeancivillaw.com/content/brusselsone022.htm>, (March 21, 2025).

deviations. This guarantees resolution and certainty for disputes occurring inside the common market. In contrast, broader international harmonization initiatives have had mixed success but remain incomplete. The Hague Conference's 1971 and 2019 Conventions on foreign judgment recognition have restricted membership at the global level. Enforcement within respective spheres of integration is also supported by regional regimes in the Caribbean, Africa, and Latin America. The Gulf Cooperation Council (GCC) Convention, for instance, promotes recognition among its member states. Yet, many states continue to be overlooked by existing frameworks.⁹⁴

When a return back to the situation in India is done, the progress is still not satisfactory. In India the enforcement of a foreign judgment is the reward of an often protracted and expensive transnational litigation. As Gracious Timothy Dunna puts it, “Unfortunately, the Indian legal stance on the conclusiveness of foreign judgments is antiquated and appears to have a significant impact on international business litigation. This issue lingers in the Indian transnational litigation and arbitration because, section 13(f) of the Code of Civil Procedure, 1908, prohibits the execution of a foreign judgment if it violates “any” provision of Indian law, an exception that is excessively broad and harmful. However, by drawing a parallel with the enforcement of foreign arbitral awards, introducing the “public policy of India” as a substitute for section 13(f) could potentially be developed into a plan that enhances the enforcement of foreign judgments. However, the current plan is still regressive.”⁹⁵

5. Conclusion

The conceptual analysis of transnational litigation shows its distinct position within the broader spectrum of legal practice, setting it apart from traditional international law and litigation. By tracing the evolution of transnational law, this research has clarified that it encompasses a dynamic interplay of public and private international law, involving a diverse array of actors i.e. states, corporations, individuals, and non-governmental organizations, operating across multiple jurisdictions. Unlike international law, which primarily governs state-to-state interactions through formal treaties and institutions, transnational law addresses the

⁹⁴ Djahongir Akhmurodov, “Recognition and enforcement of foreign judgments: International best practices,” *International Journal of Law, Justice and Jurisprudence*, Vol. 4, Issue 1, 2024, p. 2, <https://www.lawjournal.info/article/84/4-1-1-597.pdf>, (March 21, 2025).

⁹⁵ Gracious Timothy Dunna, “Introducing “Public Policy” To Enforcement Of Foreign Judgments: Lessons From The Law Of Arbitration,” *Transnational Dispute Management*, January 26, 2018, p. 1, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3293669, (March 21, 2025).

complexities of cross-border disputes that transcend national boundaries, necessitating a global perspective on issues like jurisdiction, choice of law and enforcement of judgments.

Transnational litigation, as a practical manifestation of transnational law, emerges as a field that navigates the procedural and substantive challenges of disputes involving parties, events or transactions connected to multiple nations. It differs from international litigation, which often relies on state consent and formal court systems, by emphasizing flexibility, informality in process like arbitration, and the inclusion of non-state actors. This research also underscores the scholarly contributions of figures like Linda Silberman and Harold Hongju Koh, who highlight transnational litigation's systemic interdependence and its role in fostering a transnational legal process that internalizes global norms.

One of the focuses was also to get an understanding of India within this conceptual framework, recognizing its potential as a common law jurisdiction to contribute to transnational litigation. However, the persistence of systemic gaps, such as legislative ambiguities and inefficiencies in judicial enforcement poses challenges to aligning India's practices with international norms.