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GENERAL PRINCIPLES AND THE SEARCH FOR LEGITIMACY IN INTERNATIONAL ARBITRATION: A COMPARATIVE PERSPECTIVE

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GENERAL PRINCIPLES AND THE SEARCH FOR LEGITIMACY IN INTERNATIONAL ARBITRATION: A COMPARATIVE PERSPECTIVE

Alyssa S. King[1]

Résumé

La comparaison avec l'utilisation des principes généraux en droit français permet d'illuminer la fonction de ce concept dans l'arbitrage international. Dans ces deux contextes, les principes généraux proviennent d'un ordre juridique que ceux-ci mêmes aident à créer et justifier. L'utilisation des principes généraux rend cet ordre plus attirant et sert à justifier le pouvoir de ses représentants. Le problème par rapport à l'arbitrage international est que ceux qui développent ces principes généraux discutent presque exclusivement entre eux. Ces initiés risquent de se convaincre sans réussir à convaincre ceux qui sont à l'extérieur de leur cercle. Ceci pourrait être acceptable si les principes généraux étaient uniquement employés par ces initiés. L'ennui vient du fait que l'arbitrage international doit servir à ceux qui ne font pas partie de cette communauté de juristes, ou également lorsque les partisans d'un ordre juridique arbitral souhaitent que ce dernier soit perçu comme légitime par les États.

Mots clés : principes généraux, arbitrage international, droit comparé

Abstract

Comparison with the use of general principles in the French legal system helps to illuminate the function of this concept in international arbitration. In both contexts, general principles are said to derive from an underlying legal order, which general principles also help to constitute and justify. General principles help jurists argue that the legal order is normatively attractive and that its representatives should be empowered. The problem with this approach with respect to international arbitration is that those developing general principles are in dialogue almost entirely with each other. As a result, they may succeed in convincing only themselves. Doing so might be enough if general principles only applied in cases between the already initiated. The trouble comes when arbitration reaches parties

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beyond these circles or when partisans of an arbitral legal order want it to be perceived as legitimate by states.

Keywords: general principles, international arbitration, comparative law

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I. COMPARATIVE LAW AND GENERAL PRINCIPLES

General principles may decide few arbitrations in practice,[2] but they receive much academic and professional attention.[3] Often, these discussions refer to comparative law. The search for general principles can involve naïve comparison among whatever systems counsel and arbitrators are familiar with, or among those they consider to be good exemplars of the rule of law. Mid-

[2] Mustill, Michael. 1988. 'The New Lex Mercatoria: The First Twenty-five Years,' *Arbitration International* 4:86-116, 111.

[3] Ibid at 116.

century authors might announce that they were comparing the legal systems of "civilised" nations. Modern authors might seek to distance themselves from those colonial overtones while retaining the method. A recently published treatise on general principles in arbitration contends that " [i]n many ways, identifying cross-similarities is the raison d'être of the mainstream comparative discipline."[4] Comparison animated various attempts at codification or restatement[5] of international commercial law.[6] Others, notably Emmanuel Gaillard, argue that tribunals can use comparison to identify trends in the law on a case-by-case basis.[7] Skeptics can use comparison as evidence that the search for general principles is a waste of time.[8] They might cite the difficulty of truly comprehensive comparison or point to the Euro-centric assumptions behind many uses of general principles.

Comparativists might object that their discipline does not exist to solve arbitrators' problems. Carefully designed comparison can make a normative argument for legal change, or a descriptive argument about why the law is the same or different and how it got to be that way. Comparison alone, however, is unlikely to tell arbitrators whether something is a general principle. The debate over the existence of a general principle will not be solved through a methodological debate over how to do comparison, but through referral to some background rule for what ought to count as a general principle.

Although comparison alone cannot tell arbitrators how they ought to choose principles, it has a lot more to say about why arbitrators go looking for general principles in the first place. This article offers one account through

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[4] Kotuby, Charles T., and Luke A. Sobota. 2017. *General Principles of Law and International Due Process: Principles and Norms Applicable in Transnational Disputes*. Oxford: Oxford University Press. 23.

[5] Fortier, Q.L. Yves CC. 2014. 'The New, New Lex Mercatoria, or, Back To The Future' *Arbitration International* 17: 121-128, 125-126.

[6] Lando, Ole. 2001. 'Comparative Law and Lawmaking.' *Tulane Law Review* 75:1015-1032, 1025-27.

[7] Pryles, Michael. 2008. Application of the Lex Mercatoria in International Commercial Arbitration. *UNSW Law Journal* 31:319-329, 321. Gaillard, Emmanuel. 2001. 'Transnational Law: A Legal System or a Method of Decision-Making?' In *The Practice of Transnational Law*, ed. Klaus Peter Berger, 53-66, 56-58. Cambridge, USA: Kluwer Law International.

[8] Mustill, *op. cit.* 2, at 106.

comparison with the use of general principles in French law. Comparison with the use of general principles in France illustrates how general principles help to convince the already-convinced by representing an arbitral legal order that is normatively attractive to its participants. They help to entrench arbitral power because they allow arbitrators to reach results that observers see as good or just. Arbitrators' ability to refer to general principles and to reach such results in turn justifies increasing judicialization, which then needs to be legitimated. One way it might be legitimated is by reference to the existence of an arbitral legal order, which then both provides and is dependent on general principles.

International arbitration faces considerable concern over its legitimacy, lending urgency to questions about whether general principles can provide a firm grounding for arbitral decisions.[9] An intricate, expensive, system of disputing is likely to favor repeat players,[10] a charge that may be laid against both investment and commercial arbitration. Investment arbitration has been blamed for "legislative chill" in which legislatures ignore public demand for change by arguing that reform would violate an investment treaty and subject the country to arbitration, whether it actually would or not.[11] International

[9] See Lynch, Katherine L. 2003. *The Forces of Economic Globalization: Challenges to the Regime of International Commercial Arbitration*, 343 The Hague: Kluwer Law International; Van Harten, Gus and Pavla Křístková. 2018. 'Comments on Judicial Independence and Impartiality in ISDS,' Paper prepared for UNCITRAL Working Group III (arguing that investment arbitration is inconsistent with rule of law values); Brower, Hon. Charles N. and Sadie Blanchard, 2014. What's in a Meme? The Truth about Investor-State Arbitration: Why It Need Not, and Must Not, Be Repossessed by States, *Columbia Journal of Transnational Law*, 52:689-777 (arguing that calls for reform misunderstand the current dispute system). Some authors discussing general principles focus on commercial arbitration. However, the line between investment and commercial arbitration is not always neat. States may be contracting parties in commercial arbitration. Commercial arbitration may also have very significant regulatory implications, for instance in antitrust law. C-126/97, *Eco Swiss China Time Ltd. v. Benetton Int'l NV* [1999] ECR I-3055, at para 93; C-102/81 *Nordsee v. Reederei Mond* [1982] ECR. I-1095, at paras 97-98; Mitsubishi Motors v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985). Interpretive techniques, including use of general principles, may travel between the two spheres. Roberts, Anthea. 2013. 'Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System.' *American Journal of International Law* 107:45-94, 58-60.

[10] Galanter, Marc. 1974. 'Why The" Haves" Come Out Ahead: Speculations on the Limits of Legal Change,' *Law & Society Review* 9: 95-160.

[11] See, for example, Van Harten, Gus and Dayna Nadine Scott. 2016. 'Investment Treaties and the Internal Vetting of Regulatory Proposals: A Case Study from Canada.' *Journal of International Dispute Settlement* 7:92-

commercial arbitration might avoid such problems, as it is chosen by contract. Still, the arbitrator diversity debate points to unease in this context as well. Panels that are too similar to each other, and not similar to the parties, may fail to understand arguments and evidence that are important to the parties and may decide based on reasons that are inadequate from the parties' point of view.[12]

Practitioners have cited both compliance with arbitration and the promotion of arbitration by national legislatures and judiciaries as important measures of whether international commercial and investment arbitration has answered these charges.[13] They also cite the willingness of states to leave the regulation of international business to arbitration, passively accepting the development of general principles of law outside the state.[14] In doing so, they rely on a concept of legitimacy in the sociological sense—the "active belief . . . whether warranted or not, that certain claims to authority deserve respect or obedience for reasons other than self-interest."[15] Sociological legitimacy provides a reason to comply with arbitral awards and to invest in arbitral institutions.

That arbitrators would turn to general principles is not surprising given the heavy influence of French scholarship on the development of international arbitration. French thinkers such as Berthold Goldman, Philippe Fouchard, and Emmanuel Gaillard have been at the forefront of the debate over the existence of a *lex mercatoria* and the application of general principles in international arbitration. The International Chamber of Commerce, one of the oldest and most venerable international arbitration providers, is located in Paris. French

116; Korzun, Vera. 2016. 'The Right to Regulate in Investor-State Arbitration: Slicing and Dicing Regulatory Carve-Outs.' *Vanderbilt Journal of Transnational Law* 50:355-414.

[12] As opposed to being reasons that the parties simply disagree with. For this argument in the context of complaints about the AAA-ICDR arbitrator roster see Joshua Karton, (Dec. 17, 2018) 'Can I Get A…Diverse Tribunal,' Kluwer Arbitration Blog, http://arbitrationblog.kluwerarbitration.com/2018/12/07/can-i-get-a-diverse-tribunal/.

[13] Gaillard, Emmanuel. 2010. *Legal Theory of International Arbitration*, 53, Boston: Martinus Nijhoff Publishers.

[14] Kahn, Phillippe. 1992. 'La "lex mercatoria" : point de vue français après quarante ans de controverses.' *McGill Law Journal*, 34 :413-427, 427.

[15] Fallon, Richard H. Jr. 2005. 'Legitimacy and the Constitution.' *Harvard Law Review* 118: 1789-1853, 1795.

law faculties have trained lawyers and arbitrators who work all over the world. Moreover, boundaries between the worlds of international arbitration and French domestic law have been porous. René Cassin, one of the leading figures in French administrative law, spent part of his career as an arbitrator and referenced general principles in a case administered by the ICC.[16]

At the same time as international arbitration specialists were elaborating general principles applicable to matters such as the interpretation of contracts and the procedural rights of the parties, French jurists have been elaborating a general principles of the laws of the republic in administrative law, and fundamental principles of the laws of the Republic in constitutional law. French public law courts have faced severe challenges to their sociological legitimacy. They have undergone gradual judicialization, a transition through which they took on more recognizably judicial functions and through which procedures became more elaborated and regularized. Problems that did not admit of a legal solution before the growth of these institutions do admit of one today. This evolution has taken place with the support of legal scholars and in a context that has involved input from Parliament as well as competition and cooperation with a variety of other courts at the national and transnational levels.

The problem for arbitration practitioners, however, is that of defining who needs to be convinced that an arbitral legal order is legitimate. If the goal is to promote the use of commercial arbitration by businesses, the arbitral legal order may need only to reflect the views of practitioners and their clients. General principles that find favor with this audience may not be convincing to governments or to the public at large. General principles can shore up practitioners' faith in the legitimacy of what they are doing, but their same self-referential quality (general principles demonstrate the existence and worth of an arbitral legal order; reference to general principles may be justified because there is an arbitral legal order) make them more effective in a dialogue between the already convinced. The structure of international arbitration means that those who choose whether to empower arbitrators are typically among its initiates, but decisions in certain commercial cases and in investment cases

[16] Fouchard, opus cit. 61, at 432.

have a wider impact. This mismatch is likely to leave the stability of any arbitral legal order very much in question.

The next sections of this article concern the definition of general principles and the specifics of the French comparison. Part (II) introduces the problem of identifying general principles in international arbitration. Part (III) uses the French example to discuss the relationship between appeal to general principles and the existence of an arbitral legal order. Part (IV) discusses the relationship between general principles and judicial, or arbitral, power. Finally, Part (V) explores the limits of the comparison.

II. THE PROBLEM OF IDENTIFYING GENERAL PRINCIPLES IN INTERNATIONAL ARBITRATION

General principles enter into an international arbitration in three ways. A contract may directly call for them.[17] They can fill lacunae in the law of the arbitration, whether this law comes from the contract or a national legal system.[18] Finally, Kotuby and Sobota contend that general principles may "*displace* perceived failures in otherwise applicable law."[19] The authors note the utility of general principles in the public law-adjacent context of investment arbitration, in which such principles can be used to judge state action. Used in this way, general principles have considerable bite. However, such a use requires a shared understanding not only of legitimate sources of law, but of legitimate uses of power, both on the part of the parties and on the part of the arbitrators. Tribunals need a reliable way to identify principles in such a way that others will agree that the legal technique, if not the outcome, was legitimate.

Both authors who wish to codify general principles and those who favor a case-by-case approach must contend with the question of how they identify

[17] Kotuby and Sobota, opus cit. 4, at 31.

[18] Ibid.

[19] Ibid at 32 (emphasis original), 40.

general principles, whether in the abstract or when faced with a concrete case.[20] Writing in 1953, Bin Cheng stated that it was "of the nature" of general principles that they were common to all legal systems.[21] Surveying "all legal systems," would seem to be a tall order. However, all might not be all. In a foreword to Cheng's book, Georg Schwarzenberger was clear about how to choose between systems, stating that general principles "reintroduced the standard of civilisation into international law and drew a sharp, and necessary, dividing line between civilised and barbarian nations."[22] A lawyer practicing in a major trade center might well be able to access and read the laws belonging to the circle of the civilized.

Drawing such a distinction is tainted by the colonialism that has gone along with it.[23] Both commercial and investment arbitrators have been subject to critique for perpetuating a North-South divide in which they implicitly and explicitly distinguished between nations they considered civilized and uncivilized and only respected the laws of the former. If arbitrators and their academic supporters are to demonstrate that they have overcome North-South divisions,[24] they cannot simply refer to the small circle of the "civilized" in deriving general principles.

Kotuby and Sobota state that general principles come from a "shared legal corpus," and represent the collective wisdom of the world, or at least of exemplars of major legal families.[25] Kotuby and Sobota write that "[I]n order to be 'general' a principle must be of such a heightened degree of reason that all

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[20] Pryles, Michael. 2008. 'Application of the Lex Mercatoria in International Commercial Arbitration.' *UNSW Law Journal* 31:319-329, 321.

[21] Cheng, Bin. 1953. *General Principles of Law as Applied by International Courts and Tribunals*, 390, Cambridge, UK: Cambridge University Press.

[22] Schwarzenberger, Georg. 1953. Foreward. in ibid at xi.

[23] See Mustill, opus cit. 2, at 92.

[24] Berger, Klaus Peter. 2001. The New Law Merchant and the Global Market Place. In *The Practice of Transnational Law*, ed. Klaus Peter Berger, 1-22, 10-11, 15. Cambridge, USA: Kluwer Law International. Dezalay and Garth's account is significantly more nuanced than Berger appears to give it credit for, as with its recognition of South-South divisions among elites. Dezalay, Yves, and Brayant G. Garth. 1996. *Dealing in Virtue*. Chicago: The University of Chicago Press. 63-74.

[25] Kotuby and Sobota, opus cit. 4, at 21-24.

parties ex ante appreciate its normative value, whatever view they might take after a dispute has arisen."[26]

One way to cut through the thicket of municipal law, without referring to who is "civilized," is to refer to natural law principles, but this method does not seem to be acceptable either.[27] In places, Kotuby and Sobota seem to argue that they can still give the consensus account even if the circle of countries included is widened. In so doing, Kotuby and Sobota assert that the function of comparative law is to identify consensus.[28] However, academic law is not necessarily concerned with the same problems as transnational lawyers. Tribunals and lawyers may be ill-equipped to conduct comparative surveys themselves. The more familiar laws of France, Germany, England and Wales, and the United States (one might specify New York or Delaware), may then get more play by virtue of their accessibility.[29] One way to try to justify this limited view is the "legal families" approach, which focuses on the law spread from a few key centers. Kotuby and Sobota identify legal families primarily based on European law, noting the importance of colonization and of borrowing from Europe in the nineteenth century.[30] They also tell a story of a shared vision of due process that a common law lawyer might term Whig history. This story touches on brief highlights from Roman and canon law, Magna Carta, the French Revolution, and post-World War II Europe.[31]

Kotuby and Sobota would have tribunals take an equally thin approach to sources of law. Kotuby and Sobota affirm that the law that should be compared is the law in books, not in practice. As they describe it:

> *First*, the tribunal drills down vertically into established legal rules to extract the underlying legal principle. *Second*, after that, it moves horizontally among a variety of

[26] Ibid at 19.

[27] Gaillard, Emmanuel. 2010. 'L'ordre Juridique Arbitral : Réalité, Utilité et Spécificité.' 55 *McGill Law Journal* 891-907, 902.

[28] Kotuby and Sobota, opus cit. 4, at 23.

[29] See ibid at 25.

[30] Ibid at 23-24, 59-61.

[31] Ibid at 55-69.

> national legal systems to determine whether that principle is universally recognized. *Third*, before being elevated to the international plane, the principle may undergo further modification 'to suit the particularities of international law.'[32]

This lens privileges whatever law is written down in books in ways that are available to a wide audience. The approach is accessible, but risks seriously distorting the underlying law. A competent comparison between the English and French law on a certain point might require knowing that the courts approach prior decisions differently, how commentary from a court's secretary general should be treated, or that the lower courts have different attitudes towards referrals to the Court of Justice for the European Union. A commentator on Chinese law who paid no attention to the political-legal system or treated the Supreme People's Court's guiding cases as the equivalent of French *grands arrêts* could likewise miss the mark. Federalism, devolution, and regional orders such as the EU mean that comparativists must look up and down as well as sideways. Legal families mapped from one angle, such as a shared history of colonisation, look incoherent when mapped from another.[33]

Somewhat more sensitive to these objections, Gaillard rejects the idea that general principles should represent "unanimous" national law. Before looking to global trends, Gaillard suggests that arbitrators consider what principles might be common to the legal systems of the two parties.[34] In some situations, however, Gaillard would also endorse reference to more global trends. He insists that the identification of principles is "a method, not a list."[35] In identifying general principles, "[t]he idea is to ascertain the prevailing trend within national laws," but not to wait for or expect unanimity.[36] Instead, outlier rules should be rejected in favor of rules "of more general acceptance in the

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[32] Ibid at 18-19 (emphasis original).

[33] Twining, William. 2000. *Globalisation and Legal Theory*. Cambridge, UK.: Cambridge University Press. 178-183.

[34] Gaillard, Emmanuel. 1995. 'Thirty Years of Lex Mercatoria: Towards the Selective Application of Transnational Rules.' *ICSID Review—Foreign Investment Law Journal* 10:208-231, 224.

[35] Ibid.

[36] Gaillard, opus cit. 13, 48.

international community."[37] The trends may be identified through the "the systematic use of comparative law resources."[38] Gaillard explains that this process should be akin to researching various national laws in traditional choice of law analysis—probably more of a thin doctrinal method.[39] He also mentions the possibility of drawing on academic studies, international conventions, and the codified UNIDROIT principles of private commercial contracts.[40]

Some arbitration practitioners assert that comparison between legal systems yields general principles that arbitrators should apply to fill gaps in the contract or the underlying law and even, occasionally to set aside the law of the contract if it would violate such principles. They have not given a clear and coherent account for how such principles can be identified, only that they should not be system-specific, and need not be universal. The process of identifying general principles is not so fraught if one takes the view that only some nations are civilised and that civilised lawyers can identify them. It is also not so fraught if one believes that general principles derive from natural law. If one wants to be a positivist and one recognizes that talk of "civilization" often reflects, at minimum, unexamined bias, then one has a dilemma.[41] Tribunals are not positioned to conduct close comparative studies, and close comparative studies are not necessarily aimed at solving their problems. Moreover, debates over comparative law are not going to provide a rule of recognition. One way out of this dilemma is to say that general principles emanate from an overall legal order that finds its expression in positive law. If arbitrators and counsel are working backward from some existing arbitral legal order, then appealing to general principles may make more sense. The underlying legal order provides a way to choose which comparative trends matter. At the same time, general principles give the legal order content that makes it normatively attractive to its participants.

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[37] Gaillard, opus cit. 27, at 897.

[38] Gaillard, opus cit. 13, at 53.

[39] Gaillard opus cit. 34, at 226.

[40] Ibid at 227.

[41] Opponents of a general principles approach point sum up this dilemma as the lack of a rule of recognition. Berger, opus cit. 24, at 11.

III. THE IMPORTANCE OF A LEGAL ORDER

The promise of an arbitral legal order is that it will contain the unifying background rules, the themes that general principles might then reflect. An arbitral legal order is capable of identifying international trends that amount to general principles of law. That there is a system of general principles (of varying degrees of generality to accommodate rules and exceptions)[42] provides one of the necessary elements for recognizing a legal order. The question of whether an international arbitral legal order exists is hotly contested, it may therefore be useful to compare the dynamics in arbitration with those in what is unquestionably a domestic legal order. French public law provides a template for a dynamic in which general principles both emanate from and constitute the legal order.

A. The French Approach

General principles have an especially storied history in French administrative law, as Kotuby and Sobota recognize,[43] and have been instrumental to the development of constitutional law. Councilor of State and former Secretary General of the Constitutional Council Bruno Genevois describes general principles as playing "a unifying and stabilizing role," contributing to the sociological legitimacy of the French legal system.[44]

General principles in French law emanate from a unitary legal order reflected in the laws of the Republic. Judges can use general principles without "making law" because the general principles emanate from this broader legal order elaborated by Parliament and the constituent power.[45] Genevois identifies three types of general principles in administrative law: general principles of law, general rules of procedure, and "principles that inspire"

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[42] Gaillard, opus cit. 13, at 58.

[43] Kotuby and Sobota, opus cit. 4, at 67.

[44] Genevois, Bruno. 2008. 'Le Conseil d'Etat et les principes.' in *Les principes en droit* ed. by Sylvie Caudal, 325-341, 329. Paris: Economica.

[45] Genevois, opus cit. 44, at 332.

statutory law such as the Code Civil.[46] In constitutional law, the Constitutional Council has referred to the "fundamental principles recognized by the laws of the Republic," and "principles particularly necessary to our times," terms found in the Fourth Republic constitution's preamble, which itself is referenced by the preamble to the current Fifth Republic constitution.[47] It also references a more general concept of "fundamental principles."[48]

A judge is supposed to refer to general principles only when no legislation is directly on point. She is supposed to weave together the various strands represented by conceptually adjacent statutes to find the principle that lies at their root, and then to operationalize this principle to decide the specific case. In a way, general principles ought to be obvious—representing the only result a conscientious jurist could come to in the French Republic. This conception fits best with a teleological approach under which judicial interpretation perfects statutory purpose, and with a concept of a hierarchy of norms.[49] In announcing a general principle, the French judge is not making law in the way common law judges are portrayed as making it—creeping fact pattern by fact pattern into new territory.[50] The French judge is merely following the law one step up the normative hierarchy,[51] to an overarching goal that must be consistent with what the legislature or constitution writer would want. The response to claims the judge is engaging in covert natural law application is the same as the arbitrator's response: general principles emanate from a background legal order.

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[46] Ibid at 326-27.

[47] Ibid at 325-26.

[48] Ibid.

[49] Sauvé, Jean-Marc, vice-president of the Council of State. 2012. La justice administrative au service de l'État de droit: Intervention à l'École nationale d'administration du Liban, Nov. 6, 2012. Conseil d'État. https://www.conseil-etat.fr/actualites/discours-et-interventions/la-justice-administrative-au-service-de-l-etat-de-droit. (« Le juge administratif a toujours veillé à l'application du principe de légalité et au respect de la hiérarchie des normes. »).

[50] On this difference, see Komárek, Jan. 2013. 'Reasoning with Previous Decisions: Beyond the Doctrine of Precedent.' *American Journal of Comparative Law* 61: 149-171.

[51] Whether that step takes the judge to a constitutional level, in interpreting statutes, or to a statutory level in order to strike down regulations, is a matter of some debate. Genevois, opus cit. 44, at 332-33.

B. The Arbitrators' Approach

Appeals to general principles in domestic law presuppose a legal order.[52] In international law, general principles might reflect principles of the international legal order itself, or principles drawn from comparison of domestic orders.[53] In an international context in which tribunals are only constituted to decide the specific case and states have given their blessing to the general idea that there should be enforceable arbitral awards, one might argue that no legal order exists. Even if one focuses on the vertical transfer of norms from domestic orders, which might seem the most distant from what municipal courts are doing,[54] there is still the problem of selecting among domestic orders to borrow from.

French jurists began to refer more frequently to an arbitral legal order in the 1990s, [55] but both Berthold Goldman and Philippe Fouchard raised the question in the 1960s. Goldman and Fouchard argued that general principles of international commercial law were developing, but noted the lack of important elements of a domestic legal order. Goldman argued that certain "general principles" of commercial law existed beyond "national frontiers."[56] He pointed to the "psychology" of arbitrators who saw themselves as applying international norms.[57] Goldman asserted that various elements of *lex mercatoria* represented "general rules of law" subject to "growing, if incomplete, systemization."[58] Still, Goldman did not consider *lex mercatoria* "a complete

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[52] Morvan, Patrick. 2012. What's a Principle? *European Review of Private Law* 20:313-322, 319-20; Couston, Mirielle. 2008. Les principes en droit international In *Les principes en droit* ed. by Sylvie Caudal, 305-319, 309. Paris: Economica.

[53] Morvan, opus cit. 52, 321.

[54] See Ibid at 320.

[55] Gaillard, opus cit.13, at 38.

[56] Goldman, Berthold. 1964. 'Frontières du droit et "lex mercatoria."' *Archives du philosophie du droit* 177-192, 185.

[57] Ibid at 191.

[58] Ibid at 192.

system of law."[59] It was missing a "politically organized collectivity" to give it coercive force.[60]

Philippe Fouchard developed many of these ideas in his treatise on international commercial arbitration. Fouchard observed that parties normally complied with awards without recourse to national courts.[61] For these parties, "international commercial arbitration must be more than a simple expedient" to get around national law, but must "represent an elaborated instrument of international justice."[62] It must have sociological legitimacy, at least among traders, institutions, and arbitrators.[63] Fouchard described the law on which arbitral awards were based as most closely "approaching transnational law," neither reflective of domestic law nor international law if the latter is viewed as the law between states.[64]

Fouchard observed widespread "judicialization," which he viewed as tending to reinforce the autonomy of the law the arbitrators applied.[65] Although Fouchard was clear that arbitral jurisdiction remained grounded in the parties' consent, which he viewed as the defining feature of arbitration, he noted ways in which this consent had become attenuated. [66] His list was nearly identical to the list one could make today: the rise of institutions, which insisted on certain rules of procedure and lists of arbitrators, combined with the use of standardized arbitration clauses that were not subject to much, if any, negotiation.[67] Picking an institution was increasingly close to picking a court.[68]

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[59] Ibid ("la *lex mercatoria* n'est pas une système juridique complet.").

[60] Ibid.

[61] Fouchard, Philippe. 1965. *L'Arbitrage Commercial International* (vol. 2). Paris: Librairie Dalloz. 4.

[62] Ibid.

[63] Ibid at 24-25.

[64] Ibid at 24.

[65] Ibid at 25.

[66] Ibid at 10.

[67] Ibid at 10-11.

[68] See ibid at 5, 11 (discussing arbitrator as "private judge").

Like Goldman, Fouchard stopped short of saying there was a complete normative system of transnational or international commercial law.[69] Reference to "general principles of law" discerned by comparison could not fill every lacuna in international commercial law, necessitating reference to a "complete legal system, thus [to] national laws."[70] The search for general principles in international commercial arbitration could come up empty.

Later French jurists wrote of an "a-national" legal order in international arbitration, and then finally an "arbitral legal order."[71] Emmanuel Gaillard offers a contemporary account of this view. To Gaillard, arbitrators' ability to choose their law and move away from the law of the seat, for instance by referring to general principles, "is emblematic of the representation of international arbitration accepting the existence of an autonomous arbitral legal order."[72] Gaillard cites the 1989 Santiago Resolution by the Institute for International Law, which refers to general principles, as an endorsement of the idea of arbitral autonomy.[73] "This representation corresponds to the international arbitrator's strong perception that they do not administer justice on behalf of any given State, but that they nonetheless play a judicial role for the benefit of the international community."[74] To Gaillard, "the legitimacy of arbitrators performing this function cannot be disputed."[75] This legitimacy is based in states' widespread willingness to enforce arbitral awards.[76] Thus the "arbitrators' perspective" and states' actions corresponded.[77] Arbitrators in this position could "identify rules that are generally endorsed at a given time by the international community."[78]

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[69] Ibid at 25.

[70] Ibid at 25-26.

[71] Gaillard, opus cit. 13, at 37 n.95, 39.

[72] Ibid at 93.

[73] Ibid at 97.

[74] Ibid at 35.

[75] Ibid.

[76] Ibid.

[77] Ibid.

[78] Ibid at 37.

Gaillard contends that general principles have become an interrelated system of rules that follows "legal logic."[79] Recognizing these rules as a legal order entails taking stock of the arbitral legal order's "capacity to answer the fundamental questions of its sources and its relations with other legal orders."[80] Gaillard seeks to distinguish his bottom-up approach from the top-down approach he associates with partisans of natural law and some early accounts of general principles.[81] The reason for wanting to maintain such a distinction is evident—no one has empowered arbitrators to make world law. That is where matters become tricky. The legal order "emanate[s]" from states and is legitimated by their support of it.[82] National judges have also recognized its existence, interacting with the arbitral order as its own, interrelated set of norms.[83]

The treatise writers also seem to have something like an arbitral legal order in mind. Cheng himself describes a post-War order in which both the municipal and the international judge are "intelligent collaborator[s] of the legislature in the application of . . . living law."[84] Cheng points to no less an authority than the Permanent Court of Arbitration advisory committee. In drafting a rule that allowed the court to take account of general principles, Cheng writes, the committee agreed that such a process "brought *latent* rules to light."[85] That arbitrators should have the power to apply the principles to set aside local law is self-evident to Kotuby and Sobota: "The power to apply general principles emanates from the very essence of an international arbitral tribunal's legal authority."[86] The rules, it would seem, are discovered within this order.[87]

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[79] Ibid at 54.

[80] Ibid at 58.

[81] Ibid.

[82] Ibid at 59.

[83] Ibid at 60-66.

[84] Cheng, opus cit. 21, at 17.

[85] Ibid at 19 (emphasis original).

[86] Kotuby and Sobota, opus cit. 4, at 44.

[87] Mustill, opus cit. 2, at 91.

On this account, general principles matter because they support a broader conception of arbitral power grounded in a specific legal order. General principles may serve to make such a legal order normatively desirable. They may also justify increased judicialization. If arbitrators are to speak for a legal order and if their awards therefor have meaning beyond the specific dispute, they need the institutional trappings to go with that status.

IV. GENERAL PRINCIPLES AND JUDICIAL POWER

The histories of both the Council of State and the Constitutional Council suggest that general principles can work to further the concept that the legal order they represent is normatively desirable, which in turn provides a reason to invest more power in its institutions. International arbitration has seen a similar linkage between general principles, a legal order, and a set of arguments that serve to justify and increase arbitral power. General principles both come from and create a legal order. The relationship between general principles and an arbitral legal order gets one rung up a sort of legitimacy spiral.[88] To give the legal order legitimacy in the eyes of its observers and the losing party, one might turn to the typical arguments justifying domestic judicial power. One common argument is that the outcomes of judicial decisions are good in the sense of doing things that they ought to do like protecting rights. Another one is to point to institutional dynamics that constrain judicial decision-making. General principles can help on both counts.

A. In French Public Law

A brief sketch of these institutions' history shows how general principles contributed to institution building, supporting both judicialization and demands for transparency. The Council of State evolved from an arm of the executive to a more impartial observer. Today, administrative judges are judges. If they are criticized as too close to the state, that may be in part due to training and

[88] Thanks to Jacob Weinrib for suggesting this image.

socialization and in part because the state is a super-repeat player, appearing in every case. The Constitutional Council's status has likewise evolved to become more judicial.[89] Besides increased judicial powers, this logic has led to demands for transparency. The articulation of general principles by French courts led to the creation of methods to disseminate decisions and commentary, from the *Grands arrêts de la jurisprudence administrative* to the Constitutional Council's press packets released with its decisions.

As the Council of State got into the business of adjudicating cases, general principles served to justify decisions that administrative judges took. That administrative judges could take such decisions on the basis of general principles also served to justify the existence of administrative judges.[90] The Council of State's close association with the Bonaparte regime led some in the new Third Republic parliament to call for its abolition.[91] The Council's defenders resisted, arguing that the Council could find a different place under democracy, not defending the executive's orders but instead protecting individuals from bureaucrats.[92] After deciding to keep it, the Third Republic Parliament gave the Council powers of "delegated justice," the ability to decide for itself which cases were justiciable. Prior to that time, the executive chose which cases it would hear. These new powers signified a turn from the idea of the Council of State as arm of the executive to the idea of the administrative judge. Decisions made under this new power recognized civil liberties even as they still left plenty of room for the state's authority.[93]

The Council again faced a test at the end of World War II. The institution proved pliant under Vichy, putting up little resistance to the new regime.[94] The Fourth Republic's founders left the Council in place, but made René Cassin, a

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[89] See for example Magnon, Xavier. 2013. 'La révolution continue: le Conseil constitutionnel est une juridiction…au sens de l'article 267 du traite dure le fonctionnement de l'Union européenne.' *Revue française du droit constitutionnel* 96 :917-940.

[90] See ibid at 330.

[91] Weidenfeld, Katia. 2010. *Histoire du droit administrative: Du XIV^e^ siècle à nos jours*, Paris: Economica. 79-80.

[92] Ibid at 92.

[93] Ibid at 94-95, 97.

[94] Ibid at 102.

jurist with unimpeachable wartime credentials, its president.[95] Faced with the task of rehabilitating the Council's reputation, Cassin took a page from the Third Republic, again emphasizing the contribution of administrative justice to protecting individual liberty.[96] In doing so, Cassin promoted the idea of liberty-protective general principles of law.[97] Cassin argued that such principles already existed in French law, but the failure to defend them under authoritarianism meant that the Council needed to "bring to light" these underlying principles as a "rampart" against future judicial acquiescence.[98]

In the post-War era, the Council of State announced that it was guided by "general principles of law applicable even in the absence of [statutory] text."[99] President Tony Bouffandeau, who headed the Council of State's section on administrative litigation, stated that the Council adopted general principles in order to "safeguard the individual rights of citizens."[100] These principles became the basis for the rights protection emphasized by the Council of State and supportive scholars.[101] As they continue to remind their audiences, French administrative judges first took up the call to protect civil liberties and democracy in the post-War era.[102] General principles in administrative law protected civil liberties in an era before the European Court of Human Rights and before the Constitutional Council, created with the Fifth Republic in 1958, arrived on the civil liberties scene in the 1970s.[103] Jean-Marc Sauvé, vice-

[95] Ibid at 107.

[96] Ibid at 114.

[97] Ibid at 107.

[98] Sauvé, opus cit. 49 (citing Cassin, René. 1951. Introduction. *Études et documents du Conseil d'État*, 1951, 11).

[99] Ibid.

[100] Quoted in Brunet, Pierre. 2008. ' À Quoi Sert la "Théorie" des Principes Généraux du Droit.' in Caudal, opus cit. 44, 175-87, 179.

[101] See Sauvé, Jean-Marc, vice-president of the Council of State. 2016. Introduction, Les entretiens du contentieux: Le juge administratif et les droits fondamentaux, Nov. 4, 2016. Conseil d'État. https://www.conseil-etat.fr/actualites/discours-et-interventions/le-juge-administratif-et-les-droits-fondamentaux-premiers-entretiens-du-contentieux#_ftn23. Accessed Aug. 15, 2019.

[102] Strin, Bernard, President of the section du contentieux of the Council of State. 2006. Niveaux de protection des droits fondamentaux, CJEU, Luxemberg, Dec. 5, 2016. Conseil d'État. https://www.conseil-etat.fr/actualites/discours-et-interventions/niveaux-de-protection-des-droits-fondamentaux..

[103] See Ibid.

president of the Council of State, argues that this jurisprudence has been accepted and stable because citizens expect administrative judges to protect civil liberties.[104] Acknowledging general principles allows the Council to fulfill the public's expectations—to achieve sociological legitimacy.[105] It also allows the Council to play a role in reviewing the legality of administrative action that matches that of other European judiciaries.[106] This rights-protective jurisprudence has in turn justified extensions of the administrative judge's mandate, the better to effect judicial protection of rights.[107]

The Constitutional Council, which had several councilors of state among its early members, used general principles in a similar way.[108] In the 1971 *Associations Law* case, the Council first struck down legislation under its abstract review powers.[109] The legislation before the Council would have allowed the government to prevent registration of associations based on the viewpoints of their members and was aimed at preventing the formation of a communist newspaper championed by several outspoken left intellectuals.[110] Council decided that the law violated "fundamental principles recognized by the laws of the Republic."[111] Law professors hailed the decision as beginning a new era of constitutional rights protection.[112] Later decisions elaborated what the Council meant by fundamental principles, most often citing the Declaration

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[104] Sauvé, Jean-Marc, vice-president of the Council of State. 2016. Le juge administratif, protecteur des libertés, Colloquim of the Association Française pour la Recherche en Droit Administratif, University of Auvergne, June 16, 2016. Conseil d'État. https://www.conseil-etat.fr/actualites/discours-et-interventions/le-juge-administratif-protecteur-des-libertes.

[105] Sauvé, opus cit. 49 (The Council "constructs a large part of its legitimacy on the protection of significant liberties from excessive intrusion by administrative authorities.")

[106] Ibid (citing Germany, Italy, Belgium, Sweden, Finland, Poland, and the Netherlands as examples).

[107] Sauvé, opus cit. 104.

[108] Genevois, opus cit. 44, at 351-368, 352.

[109] The Council can judge the constitutionality of legislation that has been passed by Parliament, but not yet signed by the president and it was in this capacity that it decided the matter.

[110] Stone, Alec. 1992. *The Birth of Judicial Politics in France: The Constitutional Council in Comparative Perspective*, 67, Oxford: Oxford University Press.

[111] Cons const, 17 July 1971, *Loi complétant les dispositions des articles 5 et 7 de la loi du 1er juillet 1901 relative au contrat d'association*, (1971), Rec 29, 71-44 DC.

[112] Stone, opus cit. 110, at 69.

of the Rights of Man and the Citizen referenced in the Constitution's preamble.[113] General principles have served as a basis for the Council to check government power, and in so doing assert a greater place for the constitutional judge in French jurisprudence.[114] This role is directly related to the new powers given to the Council to hear concrete cases in a 2010 constitutional amendment. [115] The Council can now respond to priority constitutional questions posed by the administrative and judicial courts on matters of individual rights.

General principles have helped shape the role of France's public law courts, allowing them to achieve their current prominence. These courts turned to general principles because of a shared understanding that judging in the Post-War world entails protecting human rights and restraining government power. Jurists, the public, and other branches of government have approved and reinforced this use of general principles, suggesting that they are a source of sociological legitimacy.

B. The French Template in International Arbitration

General principles might contribute to institution building in international arbitration in a manner similar to the function they perform in France. General principles can allow adjudicators to demonstrate that they are upholding important shared values. The potential for the use of general principles to let adjudicators do good helps to justify increased authority. At the same time, this increased arbitral authority may lead to a desire for a more elaborated institutional setting, for judicialization. [116] Judicialization in turn helps justify wielding general principles, which partisans of increased arbitral authority can

[113] Ibid.

[114] Rousseau, Dominique. 2011. 'Le procès constitutionnel.' *Pouvoirs* 137: 47-55, 47-48.

[115] See Bonnet, Julien. 2013. 'Les contrôles a priori et a posteriori,' Les Nouveaux Cahiers du Conseil constitutionnel 40 :105-115, 115.

[116] See for example, Stone Sweet, Alec and Florian Grisel. 2017. *The Evolution of International Arbitration: Judicialization, Governance, Legitimacy* Oxford: Oxford University Press, 78; Fouchard, opus cit. 6161, at 162.

point to as being a good outcome that in turn justifies giving arbitrators greater power, which in turn needs an institution to contain it.

The arguments are not quite circular, but rather build on each other in a way that tends to ratchet up judicial authority even as they return to the same touch points. This paper does not take a position on whether the legitimacy spiral is desirable. The point is to note its use in response to the need to justify judicial review power in a representative democracy. When writers from representative democracies try to make sense of an arbitral legal order, they bring these familiar tools to the process. These approaches, however, may not be enough to answer to critics who either reject the existence of an arbitral legal order, or who view its existence as pernicious.

1. Content-Based Legitimation

The argument that judicial power is justified because it gets good results is tied to the use of general principles in post-War French public law.[117] So too in international arbitration. Gaillard argues that the arbitrator is a "guarantor of respect for transnational public order."[118] "He sanctions corruption, sets aside rules resting on racial or religious discrimination, and will not refer to [outlier laws] unless they are the laws chosen by the parties."[119] Gaillard also suggests that arbitration has the possibility of restraining the actions of multinational corporations that have the flexibility to avoid sanction by many states.[120] The recently released Hague Rules on Business and Human Rights Arbitration reflect this approach.[121] The rules themselves are focused on procedure, not substance, but the use of arbitration to vindicate human rights could involve

[117] Brunet, opus cit. 100, 182 (la théorie des principes généraux « est une rationalisation de leur pouvoir par les juges conscients de l'exercer. »).

[118] Gaillard, opus cit. 27, at 902.

[119] Ibid.

[120] Ibid at 899.

[121] Simma, Bruno et al. Dec. 2019. The Hague Rules on Business and Human Rights Arbitration. Center for International Legal Cooperation. https://www.cilc.nl/cms/wp-content/uploads/2019/12/The-Hague-Rules-on-Business-and-Human-Rights-Arbitration_CILC-digital-version.pdf. Accessed Dec. 26, 2019.

recourse to related general principles. A tribunal adjudicating rights claims by vulnerable parties might want to draw on such principles to supplement an inadequate or problematic contracts.

The thin approach to comparative method described above is well-suited to a justificatory project the object of which is not to prove that a general principle exists, but to prove that a specific system, which applies such principles, is legitimate. The audience for the argument is one that readily accepts the general principles—the generality and utility of which is largely not in question. What is in question for this audience is the legitimacy of the institution that applies the general principles. Appeal to general principles enhances the legitimacy of extensions of judicial power. The judicial power in question is being extended to achieve an obviously right result on the basis of obviously universal values. In justifying the decision, the adjudicator argues for the existence of these values, appealing to a shared understanding.

2. Judicialization

In the next step in the legitimacy spiral, policymakers may reward "good" substantive law with enhanced institutional powers. Judicialization and the idea of an arbitral legal order are mutually reinforcing. In Fouchard's view, judicialization in arbitration "uniquely reinforces its autonomy,"[122] making the idea of an arbitral legal order capable of operating according to general principles more plausible. At the same time, the existence of awards based on general principles make calls for judicialization more urgent as parties may challenge not only their substance, but the procedures that led to their creation. The identification of investment arbitrators with judges, culminating in the EU's call for an international investment court, provides another instance in which arbitral power has been self-reinforcing in a manner reminiscent of judicial power.

[122] Fouchard, opus cit. 61, at 25.

In order for counsel to know how to use general principles, it helps to see prior awards. Publication is already standard for investment awards. In commercial arbitration, the ICC has historically prioritized publication of awards that refer to general principles.[123] The more general principles are in use, the more publication matters. Publication lets parties and counsel see how arbitrators are using general principles so that they can make arguments that reflect the basis on which the arbitration will be decided.[124] Publication widens the audience for whom arbitrators write, creating a level of accountability to the knowledgeable public that they do not have with private awards. Even without a formal system of common law precedent however, publication also raises the importance of the awards because of their potential to have a long-term impact on how parties argue and arbitrators decide future cases.

International commercial arbitration has remained somewhat insulated from further calls for judicialization because practitioners can point to party choice—leaning on the idea that commercial arbitration is closer to bargaining to fill gaps in a contract than asking a judge to declare the law.[125] The presence of general principles that may be applied above the contract and in future cases complicates this picture, but one can still argue that parties chose the arbitral legal order and its representatives.

Investment arbitration is based in treaty, not contract, and has implications for domestic law, leading to greater scrutiny and claims that the power of arbitrators is illegitimate. An investment court system would give states a greater say in adjudicator selection, an important facet of judicial

[123] Karton, Joshua. 2013. *The Culture of International Arbitration and the Evolution of Contract Law*. Oxford: Oxford University Press. 47.

[124] See Markovits, Daniel. 2006. 'Adversary Advocacy and the Authority of Adjudication.' *Fordham Law Review* 75: 1367-1395 (on the importance of parties and tribunal agreeing on the terms on which a matter will be argued and decided).

[125] Markovits, Daniel. 2010. 'Arbitration's Arbitrage: Social Solidarity at the Nexus of Adjudication and Contract.' *DePaul Law Review* 59:431-488, 477.

legitimacy.[126] Moreover, judges with consistent salaries and appointments do not need to be so entrepreneurial in seeking their next assignments, but will presumably have been vetted for their lack of desire to clash with their home governments. However, judicialization also encourages the idea that there is an arbitral legal order and that its values are being elaborated. If arbitrators are less attuned to the parties in the specific state, they may be more attuned to systemic interests, which may encourage the elaboration of a jurisprudence of general principles beyond the requirements of a specific case.

General principles thus contribute to entrenching arbitral power in two ways. They might get good results in the eyes of their relevant audience, thus leading to support for international commercial and investment arbitration. Their use might also provide a push towards judicialization. Judicialization might create more transparency and control in the use of general principles. It might also serve to justify their further use, precisely because such controls are available.

V. A QUESTION OF AUDIENCE

Using the French system to model the relationship between general principles and legitimacy suggests that general principles can help build institutions and justify a legal order. That leaves the question of who the relevant participants in the legal order are. In articulating a general principle, a French judge is in dialogue with other courts at the national and supranational level, the political branches, and ultimately with the voting public. The judge acts in the name of a specific people. No such stable institutional context exists for international arbitration.

One of the core challenges to the sociological legitimacy of arbitration rests on the premise that there is an arbitral legal order, rather than on the lack

[126] For the relationship between selection processes and popular legitimacy in the context of the US federal judiciary see Eisgruber, Christopher L. 2001. *Constitutional Self-Government*. Cambridge, USA: Harvard University Press. 64-65.

of one. To critics, the existence of an international arbitration community that shares a sufficiently common understanding of the world that can develop "general principles," is the problem. Elite law mainly serves a small slice of elite clients, including multinational corporations and national foreign ministries shopping for outside arbitration counsel. Even if one sets out to be unbiased, experience with and understanding for a client might color one's worldview.

General principles shore up legitimacy only when they are accepted by the relevant audience. They can also take it away. Kotuby and Sobota cite Lord Asquith's award in *Petroleum Development v. Sheikh of Abu Dhabi* approvingly. There, Lord Asquith decided not to apply Abu Dhabi law, which was the law of the contract, because the Sheikh was "in charge of administrating 'discretionary justice' there, such that the application of that law would violate elementary notions of fairness."[127] Although the award had problematic language and its approach was "not free of controversy", Kotuby and Sobota offer it as an example of the "corrective power" of general principles.[128] The award has a different reputation in the Gulf, with some arguing that it slowed down the acceptance of international arbitration in the region.[129]

Abu Dhabi raises the question of what audience arbitrators who cite general principles should write for. Top arbitration practitioners have historically shared a very similar pedigree.[130] Thus, they might be able to convince each other, without being convincing to legal professionals in the parties' home jurisdictions—t o say nothing of business clients, bureaucrats, or the public at large. This position represents a difference with the French law context. Elite law in France is a relatively small world, even if it is larger than it once was. Administrative and constitutional judges often share the same background as members of the legal academy, politicians, and bureaucrats,[131]

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[127] Kotuby and Sobota, opus cit. 4 at 32-33.

[128] Ibid at 33.

[129] Fadlallah, Ibrahim. 2008. 'Arbitration Facing Conflicts of Culture.' *Arbitration International* 25:303-318, 305-306.

[130] Stone Sweet and Grisel, opus cit. 116 at 52, 71.

[131] Lasser, Mitchel de S. O.-L.'E. 2004. *Judicial deliberations: a comparative analysis of judicial transparency and legitimacy*. Oxford: Oxford University Press, 200-201.

a commonality the likely makes it easier to articulate general principles acceptable to legal commentators and Parliament.

As Goldman put it, the "interests" *lex mercatoria* is designed to protect may not continue to give such arbitrator-developed norms sufficient "legitimacy."[132] In international commercial arbitration, inputs come from lawyers engaged in international commerce. They draft the agreements to arbitrate and choose the arbitrators. If general principles mean that arbitration practitioners view the arbitral legal order as legitimate, then they will support it by bringing their clients into it. Arbitrators who get general principles wrong will not be chosen, and those who articulate general principles practitioners can agree on will. If reference to general principles does not serve its intended legitimating function, sophisticated parties can exit, choosing different institutions and arbitrators, or forgo arbitration altogether in new contracts.

A harder problem arises when international commercial arbitration reaches parties outside this circle, as with Uber's attempt to send many of its drivers to ICC arbitration.[133] These parties lack influence over their contracts and may not have access to most arbitration practitioners. General principles reflecting the priorities of global capital are unlikely to speak to their concerns.

Some theorists of an arbitral legal order in commercial arbitration also see state assent as necessary to that order's sociological legitimacy. Goldman wrote of a gap between the willingness of arbitrators in the capitalist world to recognize *lex mercatoria* and even to use general principles as a basis for decision and the failure of Soviet arbitrators to do the same.[134] "This attitude", Goldman wrote, came from a desire not to allow "multinational enterprises" to develop unbridled power in transnational law.[135] In a similar vein, Gaillard

[132] Goldman, opus cit. 56, at 192.

[133] *Heller v. Uber Technologies Inc.*, 2020 SCC 16.

[134] Goldman, Berthold. 1979. 'La lex mercatoria dans les contrats et l'arbitrage internationaux : réalité et perspectives.' *Journal du droit international* 106: 475-505, 504.

[135] Ibid at 505 ("Cette attitude traduit le souci de ces pays de ne pas laisser se développer, dans "l'espace transnational", le pouvoir supposé sans frein des entreprises multinationales.")

writes that states' decision to pass laws favorable to award enforcement and assistance of arbitration are evidence of support for an arbitral legal order.[136] "States" are entities made up of a variety of institutional actors, who may have reasons to be seen to support international arbitration that have very little to do with the content of awards. Still, the argument seems to be that arbitrators should be writing in part for national government executives and legislatures.

States are always present in investment arbitration and the need to gain legitimacy with a wider audience is more pressing. The audience for references to general principles then expands beyond arbitration practitioners and their commercial clients to include states and even voters. It is not evident that the present system is designed to respond to their input in the way that does the sustained input of practitioners and organizations such as ICSID.

Judicialization, in the form of reforms such as an investment court, might create more sustained channels of judicial dialogue. Recent reform efforts that would increase judicialization might thus be understood in part as a response to fears that current doctrine cannot sustain the legitimacy of the arbitral legal order. However, the decision to create something like an investment court is also a decision to build institutions which will have the effect of further entrenching an arbitral legal order without necessarily altering its content.

International arbitrators may do a good job using general principles to convince themselves of their legitimacy without necessarily convincing anyone else. In some instances, they may not have to. To the extent they do want to engage domestic legal communities (such as judges and government lawyers), to say nothing of the public at large, they will need to find ways to widen their own discursive community to take in concerns unfamiliar to elite transnational lawyers.

[136] Gaillard, opus cit. 13, at 53.

VI. CONCLUSION

Comparative law alone cannot tell arbitrators what principles to recognize, but it can tell arbitrators what function general principles serve. Comparative examples from national systems can help explain what makes reasoning from general principles attractive, illuminating the functional role that principles play with reference to how similar ideas have played out in domestic contexts. French public law is an especially useful example. General principles in both contexts are said to emanate from the legal order. The French Council of State and the Constitutional Council have both faced accusations of bias and skepticism about whether the institutions can, or should, function as courts. Reference to general principles helped these institutions establish reputations for protecting individual rights, and these reputations helped to justify maintaining and increasing judicial power. The French example likely had a direct influence on international arbitration because many participants are French-trained. In both contexts, use of general principles can help set off a sort of legitimacy spiral, in which reference to the principles serves to justify extensions of the adjudicator's powers. Here, however, general principles in international arbitration encounter a problem. The audience for a national judiciary's elaboration of general principles is relatively stable. The audience for international arbitrators is not. Principles that are convincing to the relatively small circle of international arbitration practitioners may not convince their clients, let alone the broader public.