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THE ARBITRATORS' USE OF COMPARATIVE LAW METHODOLOGY: A QUALITATIVE ASSESSMENT OF SELECTED CAS, ICC, AND ICSID AWARDS

Luis Bergolla
Dorothée Goertz

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THE USE OF COMPARATIVE LAW METHODOLOGY IN INTERNATIONAL ARBITRATION

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THE ARBITRATORS' USE OF COMPARATIVE LAW METHODOLOGY: A QUALITATIVE ASSESSMENT OF SELECTED CAS, ICC, AND ICSID AWARDS

Luis Bergolla* and Dorothée Goertz**

Résumé

Cet article utilise des indices empiriques tirés de sentences arbitrales internationales réelles pour déterminer si et dans quelle mesure les arbitres internationaux s'appuient sur la méthodologie du droit comparé (MDC) pour prendre ou expliquer leurs décisions. Nous n'avançons pas de nouvelle théorie ou d'approche de la MDC. À la place, cet article part de la proposition selon laquelle les arbitres ont rarement recours à la MDC et, lorsqu'ils le font, leur utilisation de la MDC apparaît sous forme de dicta et n'est pas déterminante pour le résultat. À l'aide de méthodologies de recherche en analyse de contenu et d'archives, nous avons mené une étude empirique sur un petit échantillon de sentences arbitrales accessibles au public dans des contextes sportifs, commerciaux et d'investissement. À l'aide de ces sentences, nous essayons d'évaluer dans quelle mesure les arbitres se réfèrent - et plus important encore - incorporent la MDC dans le processus décisionnel précédant la sentence. Cet article commence par une analyse de la littérature volumineuse - mais dispersée - sur la MDC dans le but d'identifier les variables les plus importantes de la MDC avancées par les chercheurs dans ce domaine et pertinentes pour notre analyse (les méthodologies fonctionnelle, structurelle, analytique, etc.) et les circonstances dans lesquelles la MDC est utilisée concrètement. Ensuite, pour effectuer notre analyse empirique, nous passons en revue chacune des sentences sélectionnées pour notre échantillon et codons un certain nombre de variables descriptives pertinentes pour notre analyse. Une fois la phase de collecte des données terminée, nous testons l'hypothèse principale de notre article, à savoir que la MDC a un impact limité sur le processus de prise de décision. En ce sens, nous émettons l'hypothèse suivante: (i) les arbitres ont rarement recours à la MDC pour justifier les sentences qu'ils rendent; (ii) dans les cas où les arbitres ont eu recours à la MDC, l'analyse qui en résulte est sans conséquence [n'est pas déterminante] sur l'issue des décisions finales des sentences arbitrales; et (iii) les panels d'arbitres composés majoritairement d'arbitres de droit civil sont tout aussi susceptibles d'utiliser la MDC que les panels composés majoritairement d'arbitres

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de droit commun. Enfin, nous présentons nos conclusions et formulons des recommandations pour de futures évaluations empiriques sur le même sujet.

Mots clés : arbitrage international, méthodologie du droit comparé, recherche empirique, TAS, CCI, CIRDI

Abstract

This paper uses empirical evidence from real-life international arbitration awards to determine whether and to what extent international arbitrators rely on comparative law methodology (CLM) to reach or to explain their decisions. We do not advance a new theory or CLM method. Instead, this paper starts from the proposition that arbitrators rarely resort to CLM, and when they do, their usage of CLM appears in the form of dicta and is not outcome determinative. Using archival and content analysis research methodologies, we conducted an empirical study on a small sample of publicly available arbitration awards from the sports, commercial, and investment arbitration settings. Using these awards, we attempted to assess the extent to which arbitrators reference—and more importantly—incorporate CLM into the decision-making process leading to an award. For practical purposes, this paper reviews some of the extensive—but scattered—literature on CLM in an attempt to identify the most important CLM variables that are relevant to our study (i.e., the functional, structural, analytical methodologies) and the circumstances in which CLM is actually employed. Then, we reviewed each of the actual awards in our sample to code all descriptive variables relevant to our CLM study. After the data collection phase, we proceeded to test our paper's main hypothesis—that CLM has limited influence on the arbitrators' decision-making process. In this sense, we further hypothesized the following: (i) arbitrators rarely employ CLM in justifying the awards they issue; (ii) when arbitrators do resort to CLM, the resulting analysis is immaterial [is not outcome determinative] to the awards' final rulings; and (iii) arbitration panels with a majority of civil law arbitrators are equally likely to employ CLM as panels with a majority of common law arbitrators are. Finally, we have reported herein our findings and offered recommendations for future empirical assessments on the same topic.

Keywords: international arbitration, comparative law methodology, empirical legal research, CAS, ICC, ICSID

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I. INTRODUCTION

Comparative law scholars have come to understand that providing a sound definition of comparative law is a daunting task—one that "may well be impossible to achieve."[1] In fact, such efforts in recent literature on comparative law tend to focus more generally on the different methods (Comparative Law Methodology or CLM) that scholars apply when they compare two bodies of law.[2] Regarding the use of comparative law in international arbitration, we find that the number of studies—let alone the number of empirical studies—specifically focusing on CLM use in international arbitration appears to be extremely small.[3] This is the case despite the consensus that international arbitration is a hotbed for the use of CLM.[4] On one hand, however, the CLM literature primarily discusses the theory behind the specific methods of comparative law, and on the other hand, it says little about how CLM comes to play a role in international arbitration. The literature, notably, does not report under what conditions CLM is used or the effect such use has on the outcome of international arbitration awards. This paper is admittedly not a comparative law piece, and its conclusions do not necessarily represent a contribution to the

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[1] *See* Frederic Gilles Sourgens, *Comparative Law as Rhetoric: An Analysis of the Use of Comparative Law in International Arbitration*, 8 PEPP. DISP. RESOL. L.J. 1, 2 (2007).

[2] *See* JOHN HENRY MERRYMAN ET AL., COMPARATIVE LAW: HISTORICAL DEVELOPMENT OF THE CIVIL LAW TRADITION IN EUROPE, LATIN AMERICA AND EAST ASIA 72–101 (2010); Mark Van Hoecke, *Methodology of Comparative Legal Research*, L. & METHOD 1, 9-21 (2015); Ralf Michaels, *The Functional Method of Comparative Law*, *in* THE OXFORD HANDBOOK OF COMPARATIVE LAW 339–82 (Mathias Reimann & Reinhard Zimmermann eds., 2006).

[3] *See generally* Valentina Vadi, *Critical Comparisons: The Role of Comparative Law in Investment Treaty Arbitration*, 39 DENV. J. INT'L L. & POL'Y 67 (2010) (claiming to be "the first attempt to chart the substantive world of treaty arbitration through the lenses of comparative law."); Sourgens, *supra* note 1; Ole Kristian Fauchald, *The Legal Reasoning of ICSID Tribunals: An Empirical Analysis*, 19 EUR. J. INT'L L. 301 (2008); Emmanuel Gaillard, *The use of Comparative Law in International Commercial Arbitration*, *in* ARBITRATION IN SETTLEMENT OF INTERNATIONAL COMMERCIAL DISPUTES INVOLVING THE FAR EAST AND ARBITRATION IN COMBINED TRANSPORTATION, ICCA CONGRESS SERIES VOL. 4 283-289 (Pieter Sanders ed., 1989).

[4] *See* Valentina Vadi, *Critical Comparisons: The Role of Comparative Law in Investment Treaty Arbitration*, 39 DENV. J. INT'L L. & POL'Y 67 (2010); Sourgens, *supra* note 1; Emmanuel Gaillard, *The Use of Comparative Law in International Commercial Arbitration*, *in* ARBITRATION IN SETTLEMENT OF INTERNATIONAL COMMERCIAL DISPUTES INVOLVING THE FAR EAST AND ARBITRATION IN COMBINED TRANSPORTATION, ICCA CONGRESS SERIES VOL. 4 283-289 (Pieter Sanders ed., 1989).

main literature on CLM. Instead, it summarizes the findings of a brief and basic empirical study on a small sample of arbitration awards from the Court of Arbitration for Sport (CAS), the International Chamber of Commerce (ICC), and the International Centre for the Settlement of Investment Disputes (ICSID) to describe how, and to what extent, international arbitrators incorporate CLM in their decision-making. Accordingly, we have structured the balance of this paper as follows. First, we conducted a brief review of the literature (II) with the purpose of identifying relevant variables for our study and to present our readers with a rough idea of the various forms of CLM. Second, we state our main research question (III) and explain our methodological approach. Next, we report our study's findings on international arbitration awards (IV), and finally, we conclude (V).

II. LITERATURE REVIEW

Our aim here is not to summarize or distill everything previously written theoretically or philosophically about CLM. Instead, we conducted a brief but focused review of the CLM literature with one purpose in mind: to identify the relevant variables to be observed in our sample of international arbitration awards. In other words, we sought to elicit practical and actual examples of CLM from the descriptive literature that could later guide us through the study's coding phase and help us understand when a tribunal was in fact resorting to CLM in determining the merits of a given arbitration case.

Because we are not comparatists, we needed to determine at the outset what it is that scholars in the field recognize as CLM. For a fair segment of the reviewed literature, everything begins with the "functional method"—one that assumes that different legal systems will solve similar social problems similarly, despite possessing varying rules and legal concepts.[5] Some even go as far as to

[5] *See* Mark Van Hoecke, *Methodology of Comparative Legal Research*, L. & METHOD 1-35 (2015).

say that the functional method "serves as shorthand for traditional comparative law."[6]

But what does this functional method entail?

To Zweigert and Kötz, the functional method of comparative law is one that is predicated on the proposition that different legal systems face similar problems that in turn may be resolved in different ways that often lead to similar results.[7] Thus, to Zweigert & Kötz, what is crucial to applying a sound functional methodology is how the comparatist asks the research question, and they suggest:

> "*[I]nstead of asking, 'What formal requirements are there for sales contracts in foreign law?' it is better to ask, 'How does foreign law protect parties from surprise, or from being held to an agreement not seriously intended?' Instead of asking, 'How does foreign law regulate Vorerbschaft and Nacherbschaft?' One should try to find out how the foreign law sets about satisfying the wish of a testator to control his estate long after his death. . .*"[8]

According to Michaels, the functional method is factual—it cares not about the rule but about the result—, "its objects must be understood in light of their functional relation to society," and the institutions it compares are comparable (*tertium comparationis*) to the extent they are functionally similar.[9] To Michaels then, the goal of conducting a functional comparative law analysis is to achieve what he terms, "a better-law comparison," meaning, which one of all these laws or institutions compared "fulfills its function better than the others[?]"[10]

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[6] *See* Ralf Michaels, *The Functional Method of Comparative Law*, *in* THE OXFORD HANDBOOK OF COMPARATIVE LAW 341 (Mathias Reimann & Reinhard Zimmermann eds., 2006).

[7] *See* Konrad Zweigert & Hein Kötz, *Introduction to Comparative Law*, *in* JOHN HENRY MERRYMAN ET AL., COMPARATIVE LAW: HISTORICAL DEVELOPMENT OF THE CIVIL LAW TRADITION IN EUROPE, LATIN AMERICA AND EAST ASIA 72-73 (2010).

[8] *Id*. at 73.

[9] *See* Michaels, *supra* note 6 at 342.

[10] *Id.*

Because any criticism directed toward the adequacy of specific CLM is beyond the scope of this paper, we purposely ignored the segment of the literature that is most critical of the functional method and concentrated on other plausible methodologies of comparative law. Thus, we briefly reviewed the structural, analytical, law-in-context, historical, and common-core methods.[11]

The structural method emerges as an alternative to the functional method. To Van Hoecke, this method is useful to compare aspects of law within different legal families from a broader perspective than is the functional method.[12] Van Hoecke speaks of instances in which it may be reasonable to compare a certain criterion from different legal families when they share "enough structural commonalities."[13] To illustrate this point, Van Hoecke uses the example of three countries that, despite belonging to different "legal families" (Romano-Germanic vs. Anglo-Saxon), can be grouped together when they "share enough structural commonalities" with respect to certain specific criteria. Thus, the structural analysis can yield a counterintuitive conclusion but one that has enormous comparative value: for example, the United Kingdom, the Democratic Republic of Congo, and China all belong to one "land law" family in which the state owns all the land.[14] This interesting comparison would not have been possible if the researcher had confined her inquiry to the Romano-Germanic vs. Anglo-Saxon classification.

The next method—the analytical method—is anchored in dialectic logic. To illustrate this method, Van Hoecke evokes Hohfeld's distinction of "legal opposites" (that is, an individual "cannot at the same time have a right and a non-right on the same object") vs. "legal correlatives" (A's right against B entails B's duty toward A).[15] Interestingly, the results of an analytical study would in turn lead to a more structural type of comparison, thereby combining this

[11] *See* Van Hoecke, *supra* note 5 at 11-21.

[12] *Id.* at 12.

[13] *Id.*

[14] *Id.* at 12-13.

[15] *Id.* at 13-14.

method with the previous one. How this materializes in real life is an interesting empirical question. One attempt to answer it, cited by Van Hoecke, is Arnaud's structural analysis of the French Civil Code of 1973.[16] In that analysis, Arnaud identifies what he calls "jural opposites"—well beyond the official concept of opposites in the Code—to build a comprehensive taxonomy of 32 possible legal relationships arising from the Civil Code.[17]

Thus far we have experienced difficulty in determining what exactly it is that the previous methods of comparative law concern or how they work in the real life. The next method—the law-in-context method—is presented as indissociable from the functional, the analytical, or the structural methods because all three require taking the context in which the law operates into account in order to achieve some meaningful comparison.[18] And to understand how the law operates, the law-in-context method focuses on the empirical observation of the law in a way such that the researcher can explain the law as it is—that is, the law in action.[19] Likewise, the historical method entails a similar analysis to what is present in the law-in-context methodology but uses the historical origins of current laws as a proxy for context. To illustrate this method, Van Hoecke looks at the historical approach to contract interpretation in England, France, and Germany to explain different theories (textual, the subjective will of the parties, and the objectivated will) to corroborate that they were interchangeably dominant in all three countries before reaching the current status. Van Hoecke then concludes that the modern differences among the three regimes are "mainly a matter of historical coincidence."[20] Finally, the common-core method is introduced as a by-product of the functional and structural methods. It is commonly employed in harmonization studies on European law to arrive at the interpretation of legal provisions that is most compatible with the "different national traditions."[21]

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[16] *See* Van Hoecke, *supra* note 5 at 15.

[17] *Id*.

[18] *Id*. at 16.

[19] *Id*. at 17.

[20] *Id*. at 19.

[21] *Id*. at 21.

Let us stop for one second to ask this: Where are we left after this quick overall review of CLM? How will we read the sampled arbitration awards and be able to assess whether and to what extent arbitrators use CLM? Or how will we be able to assess whether CLM affects the outcome of the award in any way? We still do not know.

Accordingly, we look at another segment of literature that discusses how judges and arbitrators may be using comparative law is their decision-making.

In this vein, Vadi examines investment treaty arbitration through the lenses of comparative law and identifies three primary streams of comparative reasoning: (i) reference to previous arbitral awards, (ii) reference to the case law of other international courts and tribunals, and (iii) reference to the jurisprudence of national courts.[22] In keeping with our practical approach to the literature review, we have summarized Vadi's examples of each of the streams of comparative reasoning mentioned earlier in Table 1.

Vadi's examples are useful, and they will certainly inform the way we read the awards. However, these examples stop just shy of describing how is it that an international arbitration tribunal implements CLM beyond the mere reference to previous awards or international or national jurisprudence in its reasoning. We therefore have read the awards in our sample trying to identify bits of evidence of CLM beyond these references to other national or international jurisprudence.

[22] *See* Valentina Vadi, *Critical Comparisons: The Role of Comparative Law in Investment Treaty Arbitration*, 39 DENV. J. INT'L L. & POL'Y 67, 88-98 (2010).

Previous Awards	Other International Jurisprudence	National Jurisprudence
● ICSID tribunal relies on a different ad hoc ICSID tribunal to justify consideration of the issue of moral damages;[23] ● ICSID tribunal pays deference to previous decisions when the parties rely and cite earlier awards;[24] ● ICSID tribunal recognizes a duty to "adopt solutions established in a series of consistent cases."[25]	● ICSID tribunal relies on Iran-U.S. tribunal case "to hold that a state can expropriate immaterial rights;"[26] ● ICSID tribunal entertains the issue of claimant's nationality and references ICJ *Nottebohm* case;[27] ● ICSID tribunal refers to WTO case when applying customary rules of treaty interpretation;"[28] ● Several ICSID and UNCITRAL tribunals have referenced the jurisprudence of the European Court of Human Rights regarding issues of expropriation and remedies;[29] etc.	● In theory, where the national law of a state is the applicable law, the tribunal makes reference to this body of law *ipso jure*—and the comparative law status of this kind of reference remains questionable;"[30] ● In a more concrete example, a tribunal may reference the jurisprudence of national courts, using a functional approach to clarify issues that "emerged as constitutional issue[s] in national law."[31]

Table 1

Sourgens[32] approaches the use of CLM in international arbitration via the lenses of the legal counsels' role and the work undertaken during the

[23] *See* Vadi, *supra* note 22 at 88-89.

[24] *Id*.

[25] *Id*.

[26] *Id.* at 90.

[27] *Id*. at 91.

[28] *Id*. at 92.

[29] *Id.* at 93-95.

[30] *Id*. at 90.

[31] *Id*. at 97.

[32] *See* Sourgens, *supra* note 1.

arbitration process. In his view, "international arbitrations are a teeming Petri dish for the practice of comparative law,"[33] where one of the lawyer's role is to use CLM to translate for the arbitrators the terms of the dispute, given the international context where "all participants are at home in different jurisdictions,"[34] in a manner enabling arbitrators to grasp the circumstances of the case in a broader way than would be possible within the boundaries of their national legal backgrounds—but that remains familiar to them. To achieve this, Sourgens acknowledges that lawyers "will [not] find any help in scientific comparative law on *how* to deploy these materials as part of their case."[35] The method Sourgens highlights is an "attention to the common factual concern behind the different rules of law on points. A careful use of this factual matrix may be the most efficient means [...] to translate the relevant question of law."[36] If this method seems succinct and accurately conveys the arbitration process, it still falls short of offering a practical tool to perform our assessment.

Gaillard points out that "international commercial arbitration revolutionized the field, "transforming comparative law into an eminently practical [...] discipline."[37] Gaillard also engages in an analysis of the different opportunities for using CLM during the various stages of the arbitration process. He emphasizes specifically two situation that can give us potential tools to carry out our assessment: 1) the use of CLM when the applicable law is not set forth in the contract and 2) the use of CLM through the application of general principles of international commercial law, either (i) when parties have expressly chosen them as the applicable law; (ii) when arbitrators find themselves in an arbitral system in which such an application is required (as in ICSID arbitration); or (iii) when arbitrators prefer to have recourse to the general principles whereby "it is difficult to determine the applicable law because the controversy is linked to many different countries and legal

[33] *See* Sourgens, *supra* note 1.

[34] *Id.* at 12.

[35] *Id.* at 4.

[36] *Id.* at 15.

[37] *See* Emmanuel Gaillard, *The use of Comparative Law in International Commercial Arbitration*, *in* ARBITRATION IN SETTLEMENT OF INTERNATIONAL COMMERCIAL DISPUTES INVOLVING THE FAR EAST AND ARBITRATION IN COMBINED TRANSPORTATION, ICCA CONGRESS SERIES VOL. 4, 283 (Pieter Sanders ed., 1989).

systems."[38] Because the content of the principles itself is controversial, the identification of variables representing these principles remains challenging. Nevertheless, in Gaillard's opinion, in this case, "the work of the parties and the arbitrators will clearly be founded in an analysis of comparative law."[39]

We end this review of the literature with a brief reference to Allen and Anderson's take on how common law judges use comparative law.[40] In their view, common law judges resort to comparative law for four reasons. First, judges use comparative law to formulate questions and legal issues.[41] In addition to using domestic legal sources, a judge can discover novel legal issues by paying close attention to legal developments in other countries.[42] In this sense, a simple survey of foreign judgments from other comparable jurisdictions can afford a judge significant "perspective" as to the importance of the case at hand for the domestic law and the context in which it will be decided.[43] Second, judges can survey the law of a handful of jurisdictions to identify several lines of solutions to legal issues (i.e., in a case of disputed recovery of pure economic losses, (i) allow recovery if certain requirements are met; (ii) bar recovery; or (iii) allow recovery where "justice requires it […]").[44] Third, to test the proposed solutions, a judge may cite the example of similar jurisdictions in which the proposed solution to a legal issue has worked perfectly well or could make the case for the desirability of uniform jurisprudence among common law nations.[45] Finally, judges resort to comparative law and reference leading cases from prominent judges to boost their own judgments and make them look "thorough, worldly, and therefore persuasive."[46]

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[38] *See* Gaillard, *supra* note 37 at 288.

[39] *Id.*

[40] *See* Thomas Allen; Bruce Anderson, The Use of Comparative Law by Common Law Judges, 23 ANGLO-AM. L. REV. 435, 459 (1994).

[41] *Id.* at 435–38.

[42] *Id.*

[43] *Id.* at 442.

[44] *Id.* at 444.

[45] *Id.* at 456-57.

[46] *Id.* at 458.

To summarize, the functional method focuses on how a given society resolves a legal problem and much less on the rules used to resolve it. In turn, the structural method focuses on parcels of the law of different legal families where certain commonalities allow for meaningful comparisons (i.e., state ownership of the land in the United Kingdom, Democratic Republic of Congo, and China). Grounded in dialectic logic, the analytical method can be summarized in the following manner: if A has a right to something or someone, then A cannot have a duty to that same thing or person. And underlying each of these methods, as we see it, is the law-in-context method, which requires the researcher examine the empirical evidence to determine the law in action. Finally, the historical and the common-core methods appear as by-products of the law in context and the structural methods. Alternative manifestations of CLM include references to the jurisprudence of other arbitral and international tribunals and of national courts, an analysis of the common factual concerns behind the different rules of law or the use of general principles of international commercial law. Finally, judges may resort to CLM to determine the existence of novel legal issues and to test the possible solutions—not to mention doing so to render their writing more pompous.

In the following section, we state our research questions and the research methodology.

III. RESEARCH QUESTION & METHODOLOGY

This paper attempts to provide an answer to the following research questions: (i) to what extent do arbitrators employ CLM in justifying the awards they issue; (ii) to what extent is the arbitrators' usage of CLM material to the outcome of the arbitral awards; and (iii) whether tribunals with a majority of civil law arbitrators are more or less likely to employ CLM than are panels with a majority of common law arbitrators.

To do this, we opportunistically selected a small sample of international arbitration awards from a larger pool of international arbitration awards that we gathered for our respective dissertations. Then we proceeded to read the

awards qualitatively and coded some of the variables identified in the previous section. As it is often the case in empirical research, we falsified our main hypothesis—that CLM has limited effect on the arbitrators' decision-making process—as a measure to avoid a situation in which we have to confirm our hypothesis for lack of conclusive evidence.[47] Accordingly, we posed the question as a subset of 3 null hypothesis in a way such that if the data disprove our negatively worded hypothesis, then we would reject the null hypothesis or, if otherwise, we would confirm it. In this vein, we have posed the following null hypotheses: (i) Arbitrators rarely employ CLM in justifying the awards they issue; (ii) when arbitrators do resort to CLM, the resulting analysis is immaterial [is not outcome determinative] to the ruling; and (iii) arbitration panels with a majority of civil law arbitrators are as likely to employ CLM as common law arbitrators are.

IV. FINDINGS

In this section, we report our findings from our review of 12 decisions selected from a larger sample of CAS, ICC awards, and ICSID awards.

A. The Court of Arbitration for Sport (CAS)

The CAS is an arbitral institution founded in 1983 by the International Olympic Committee (IOC) that specializes in the resolution of any disputes related or connected to international sports.[48] One of CAS's specificities is that the awards can be made publicly available on the CAS website[49] either if the parties agree to it or if the president of the division so decides (under the

[47] ROBERT LAWLESS ET AL., EMPIRICAL METHODS IN LAW 189-93 (2nd ed. 2016).

[48] *See* Article R27 CAS Code: "Such disputes may involve matters of principle relating to sport or matters of pecuniary or other interests relating to the practice or the development of sport and may include, more generally, any activity or matter related or connected to sport."

[49] https://www.tas-cas.org/en/index.html

ordinary arbitration procedure addressing disputes of commercial nature)[50] or if the parties do not oppose to it (under the appeal arbitration procedure against a disciplinary decision of a sport body).[51] This publicity of CAS awards, which includes the disclosure of the parties' and the arbitrators' names and nationalities, gives us extremely valuable information with which to conduct our empirical analysis.

In the following subsections, we discuss and analyze the most relevant aspects for our inquiry of four recent CAS cases selected from the CAS website between 2015 and 2018.

1. CAS 2015/A/4303

This case addresses the nature and propriety of the behavior of a coach and team manager of an archery team in relation to the spirit of fair-play and non-violence required on the field of play. The Polish team's coach was accused by the World Archery Federation (WAF)'s Board of Justice and Ethics (BJE) to have violated the required fair-play spirit and non violent behavior during a match between the United States and Belarus when he contested a decision of the judge in charge. The BJE recommended the coach's suspension for accreditation for a period of 12 months, which was confirmed by the WAF's Executory Board. During the appeal procedure in front of the CAS, the UK sole arbitrator had to address the preliminary issue of admissibility of witness evidence first provided by the coach in the CAS arbitral proceedings and not in the previous proceedings before the WAF.[52]

In his analysis, the sole arbitrator mentioned that the contesting party did not "make a specific request for that evidence to be excluded from consideration, or make detailed submissions as to why such evidence ought to

[50] *See* Article R43 CAS Code: "Awards shall not be made public unless all parties agree or the Division President so decides."

[51] *See* Article R59 CAS Code: "The award, a summary and/or a press release setting forth the results of the proceedings shall be made public by CAS, unless both parties agree that they should remain confidential."

[52] *See* CAS 2015/A/4303, at 8.

be excluded from consideration."[53] To reach a decision, the arbitrator considered a previous CAS decision (from a Swiss sole arbitrator) to allow the admission of evidence, based on an interpretation of the relevant provisions of the CAS code and on scholarly comments to clarify the latter's interpretation.[54] The UK arbitrator cited the relevant aspects of the CAS decision together with the related reasoning and argumentation, using them to formulate the legal issue at hand and drawing from it his argumentation to decide the matter.[55]

2. CAS 2016/A/4921, 4922

This case takes up the matter of nationalistic judging during a dressage event, where the opponents of a Ukrainian athlete complained about the scores awarded to her by two Ukrainian judges, scores that were allegedly much higher than those of any other involved judges. The Disciplinary Decisions of the *Federation Équestre Internationale* (FEI) found that nationalistic judging had occurred and sanctioned the judges with a three-month suspension for breach of the FEI Codex for Dressage judges. After the decision had been confirmed by the FEI Tribunal, the affected judges appealed the decision to the CAS. The panel of three arbitrators (from Denmark, Slovenia, and the United Kingdom) identified the following issues: (i) due process—violation of the fair trial rule by not granting the appellants their full right to be heard, (ii) was nationalistic judging punishable at the time of the offence? (iii) did the appellants violate the Dressage Judges' Codex? and (iv) what are the appropriate sanctions for such violation?[56]

In terms of the first issue, the arbitrators quoted several previous CAS decisions to illustrate a "well-established CAS jurisprudence" as support for their argumentation that CAS's *de novo* review power can cure previous irregularities; hence, the issue of due process raised was rejected.[57]

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[53] *See* CAS 2015/A/4303 at 9, ¶38.

[54] *Id*. at 9-10, ¶39.

[55] *Id*. at 11-12, ¶40-41.

[56] *See* CAS 2016/A/4921, 4922 at 9,10, 12 & 19.

[57] *Id*. at 10, ¶54-55.

To resolve the second issue, the arbitrators referred to Swiss law, which is the applicable law,[58] and referred to a provision of the European Convention on Human Rights and to a previous CAS case holding that "before a person can be found guilty of a disciplinary offence, the relevant disciplinary code must proscribe the misconduct with which he [or she] is charged ("*nulla pœna sine lege*")[59] to support their holding that nationalistic judging was clearly prohibited in the Codex at the time the offense had been allegedly committed.

For the third issue, the panel refers to previous CAS cases to support its decision that the offense existed and was punishable. The panel borrows from the cases' analyses to decide that the provisions of the Codex are "broadly drawn but not ambiguous" and that the term of the offense must be "construed in the context of the regulation as a whole."[60] The same methodology of leaning on previous CAS decisions to support the panel's argumentation was applied to the search of the evidence to establish the offense.[61]

Finally, to decide on the last issue, the panel used the criteria from "well-established CAS jurisprudence" (with a quotation from a previous CAS decision)[62] to determine that the sanction was appropriate.

3. CAS 2017/A/5133

This case deals with a dispute between a Ukrainian professional soccer player and his former soccer club over the fulfillment of various financial obligations. In this matter, the Football Federation of Ukraine (FFU)'s Dispute

[58] *See* CAS 2016/A/4921, 4922 at 8, ¶50.

[59] *Id*. at 12, ¶62.

[60] *Id*. at 16, ¶70 & 72.

[61] *Id*. at 18, ¶83-84 (citing that: "[i]n order to come to the conclusion that the Appellants violated the Dressage Judges' Codex, the Panel finds that the score deviation and lack of satisfactory explanations need to be supported by other, different and external elements pointing in the same direction, cf. CAS 2016/A/4650.").

[62] *Id.* at 19, ¶95 (holding that: "[a]ccording to well-established CAS jurisprudence, even though the CAS panels retain the full power to review the factual and legal aspects involved in a disciplinary dispute, they must exert self-restraint in reviewing the level of sanctions imposed by the disciplinary body; accordingly, CAS panels should reassess sanctions only if they are evidently and grossly disproportionate to the offence.").

Resolution Chamber (DRC) decided to award the player a certain monetary compensation.[63] The club never appealed the decision. Following a later query from the FFU to the club to fulfill the DRC decision, the latter filed a lawsuit against the player in the Ukrainian courts, claiming that the player was not entitled to any additional payments under the contract. The Ukrainian court issued a default judgment in favor of the club. The club subsequently filed a new petition with the FFU DRC, called "Submission of Reconsideration" of the previous DRC decision on the matter, bringing new arguments and evidence. The DRC issued a decision refusing to take the challenged decision under consideration because the decision had already been adopted and entered into force and no appeal had been made to the CAS within the applicable timeframe.[64]

On appeal of the FFU DRC's decision to the CAS, the Danish sole arbitrator identified two issues: (i) one of jurisdiction: can the second DRC decision be considered as a decision that can be appealed to the CAS pursuant to the provisions of the CAS Code?—and, (ii) one of admissibility: what is legally meant by "the decision appealed against in the CAS code provisions," as the contested decision rejects a request for reconsideration of a previous DRC decision that had come into force previously?

To analyze the first issue, the Danish sole arbitrator posited that the resolution "depends entirely on the meaning and understanding of the term "decision" pursuant to Code Article R47 and the way in which this concept has been interpreted in CAS jurisprudence."[65] As a consequence, the arbitrator refers to several previous CAS decisions, "which provide an illuminating analysis of what is involved in the concept of a "decision," with which the arbitrator respectfully agrees"[66] to come to a conclusion on his jurisdiction on the case.[67]

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[63] *See* CAS 2017/A/5133 at 2, ¶6.

[64] *Id*. at 3, ¶11-13.

[65] *Id*. at 8, ¶42.

[66] *Id*. at 8, ¶43.

[67] *Id*. at 9, ¶45 (citing that: "[i]n the Sole Arbitrator's view and applying the test elaborated in well-established CAS jurisprudence (…) the Sole Arbitrator rules that the challenged decision is a decision within the meaning of Article R57 of the Code and that CAS has jurisdiction…").

In relation to the second issue, the arbitrator "finds necessary to peruse how CAS jurisprudence and Swiss procedural law have regarded appeals that were based upon 'requests for reconsideration' in relation to the time limit for appeal"[68] and literally bases his decision to dismiss the appeal[69] on the analysis of a previous CAS case wherein "the panel was faced with an almost identical situation."[70]

4. CAS 2018/A/5509

This case concerns a matter of determination of an individual offense against an anti-doping rule on the part of a Russian athlete in the framework of the revelation of an extensive secret institutional doping program within the All-Russia Athletics Federation after the Winter Olympic Games in Sochi in 2014.

The athlete in the present proceedings was convicted of anti-doping rule violation by the IOC's Disciplinary Commission (IOC DC) on the basis of her participation in such a scheme, retroactively disqualified from the Two-Woman Bobsleigh competition she had participated in at the Sochi Games and declared ineligible to participate in any future editions of the Games of the Olympiad or the Olympic Winter Games. Upon her appeal to the CAS against the decision, the three-arbitrator panel (two Germans and one Austrian) decided that the main issue was to determine whether the concerned athlete was personally guilty of committing the alleged anti-doping rule violation.

As defined by the arbitrators, the IOC Anti-Doping Rules and the provisions of the Olympic Charter were the relevant rules applicable to the Sochi Games' participants.[71] The panel applied these rules in its search for the definition of the offense and the applicable burden, means and standard of proof. Regarding the latter, the panel referred to CAS jurisprudence for "guidance and meaning of the 'comfortable satisfaction' standard of proof" that

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[68] *See* CAS 2017/A/5133 at 10, ¶54.

[69] *Id*. at 11, ¶57 (holding that: "[t]he Sole Arbitrator fully agrees with the opinion of the panel above.").

[70] *Id*. at 11, ¶56.

[71] *See* CAS 2018/A/5509 at 126, ¶639.

was determined to be the applicable standard for the doping offense[72] and quoted previous CAS decisions to circumvent its interpretation.[73] The same methodology was used in the panel's search for interpretation of the means of proof.[74] Both the provisions of the applicable regulations and the case law helped the panel "identify the (…) principles that must guide its assessment of the allegations and evidence in the present case."[75]

In addition, the reference to a previous CAS case, which related to another Russian athlete involved in the scheme, helped the panel determine, for the purpose of its review, the IOC DC's line of reasoning in determining the doping offense.[76] Indeed, the number of cases was so large (it involved 38 other athletes) that there were no written details mentioned by the IOC DC in the case at hand to support its decision.

Finally, the panel had to determine whether the athlete was guilty of covering up or of complicity in the scheme. To determine the scope of application of this offense, the panel distinguished previous CAS jurisprudence[77] from the present case[78] and decided against the offense of complicity.

As a conclusion to this part, we can first verify that, counter to our hypothesis according to which arbitrators rarely employ CLM in justifying the awards they issue, the CAS arbitrators in the four decisions analyzed use CLM tools—strikingly, all of them primarily in the form of reference to previous CAS awards. This reliance on the findings of previous CAS awards is in line with Vadi's analysis of the methods of comparative law ICSID arbitrators used.[79] Second, in all cases, counter to our primary hypothesis as well, we found that the use of

[72] *See* CAS 2018/A/5509 at 128, ¶655.
[73] *Id*. at 128-129 ¶¶659-662.
[74] *Id*. at 130 ¶¶667.
[75] *Id*. at 130 ¶¶668.
[76] *Id*. at 134, ¶691.
[77] *Id*. at 154-156, ¶¶817-826.
[78] *Id*. at 156, ¶827.
[79] *See supra* Table 1.

CAS precedent was predominantly outcome-determinative regarding the issue at hand, as the findings retained from CAS' case law were clearly referred to and used in the panels' justification of their decisions in the various matters. Finally, our last hypothesis is verified because we found that the CAS arbitration panels with a majority of civil law arbitrators employed CLM the same way as panels with a majority of common law arbitrators did.

B. ICC Arbitration

The International Chamber of Commerce (ICC) is the world's preeminent arbitral institution. Unfortunately, ICC's strict confidentiality regime—which accurately mirrors the fact that confidentiality is a paramount factor of the recourse to international commercial arbitration—significantly limits the number of awards made publicly available. Without researchers having access to the full ICC award database, any study undertaken on the arbitrators' use of CLM in this arbitration setting is necessarily limited.

In this framework, the four awards selected[80] for our empirical analysis gave us a wider range but also a more contrasted view of the use of CLM by ICC arbitrators, as illustrated in the following subsections discussing the cases. For the sake of clarity, the subsections below discuss each time we encountered a hint of CLM use.

1. Partial Award in Case No. 13696[81]

The case addresses a UK licensor and a French licensee who took over the license rights by an agreement with the original licensee. In taking over the license, the new licensee assumed the obligation to pay royalties to the inventor on the sale of specialties based on the product. The licensee contested

[80] In COLLECTION OF ARBITRAL ICC AWARDS 2012-2015 227 (Jean-Jacques Arnaldez, Yves Derains & Dominique Hascher eds., 2019) (hereinafter "ICC Awards").
[81] *Id.* at 227.

the payment of royalties on the grounds that the inventor had not contributed to know-how under the second licensee agreement and, even if he had, the licensee did not use such know-how. In addition, the territory of the patent in question was in dispute because Japan and the US territories had been part of a separate agreement (the first amendment to the license agreement), which had been later revised through a second amendment.[82]

The license agreement was governed by Swiss law and provided for ICC arbitration in Geneva.[83]

The issues the arbitrators identified were twofold: (i) were royalties owed under the license agreement? And (ii) are they also owed in respect to sales in Japan and in the United States?

To decide on the first issue, the arbitrators, "in the absence of a strict definition of 'know-how' under Swiss law,"[84] analyzed the terms of the agreement together with witness and expert statements to determine the parties' intentions and obligations. The arbitrators' decision clearly relied on this factual analysis and was, based on their own wording, already settled before they engaged in an analysis of the legal theories the licensee relied on.[85]

One theory is based on EU competition law whereas the other relies on provisions of Swiss law. Swiss law has been chosen by the parties as the applicable law for the case at hand. The panel's reliance on Swiss law provisions and on related legal experts' opinion to decide on the relevant issue is made ipso jure—as is made the reference to the applicable law's jurisprudence in order to clarify relevant provisions described by Vadi.[86] Hence, it cannot be

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[82] *See* ICC Awards, *supra* note 80 at 229.

[83] *Id.* at 229 & 233-234.

[84] *Id.* at 242.

[85] *Id.* at 245, ¶64 (citing: "[s]ince the Arbitral Tribunal finds that Professor A did contribute to Respondent the know-how which Respondent expected from him, and that Respondent used that know-how for the development of the product, the Arbitral Tribunal could abstain from examining the legal theories relied upon Respondent. However, overabundantly, it will briefly summarize them and express its views as to their merits.").

[86] *See* Vadi, *supra* note 22 at 96-97.

categorized as the use CLM. Neither can be the panel's analysis of EU competition law. Indeed, the latter is considered as mandatory law according to the rules of international arbitration and as a matter of public policy[87] that "would need to be taken into account even if the substantive law chosen by the parties were not a European national law."[88]

On the second issue, it appears that the tribunal used a "generally accepted principle" as expressed by a party's legal expert in his opinion,[89] in order to support its thorough analysis and systematic interpretation of parties' will, through the wording of the agreement and witness statements. We have no further details as to the source of the principle the expert called upon. Nevertheless, this use does not seem to correspond to the use of CLM described by Gaillard when the tribunal "must apply the general principles of international commercial law,"[90] in cases wherein (i) parties have specified it in their contracts, (ii) arbitrators find themselves in an arbitral system in which such an application is required (as in ICSID arbitration), or (iii) it is difficult to determine the applicable law because the controversy is linked to many different countries and legal systems. Here, the applicable law has been chosen, the setting is not an ICSID arbitration setting, and the parties, according to the excerpts' provisions, made no other specification in the contracts. Therefore, it seems even more the case that the principle has been extracted from the applicable law, but it is only an assumption because this is not apparent from the case excerpt.

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[87] *See* NIGEL BLACKABY, CONSTANTINE PARTASIDES ET AL., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION at 3.128 & 3.130 (6th ed., 2015) hereinafter "Redfern and Hunter"; *See also* MARGARET L. MOSES, THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION at 84-86 (2nd ed., 2012).

[88] *See* REDFERN AND HUNTER, SUPRA NOTE 87AT 3.130.

[89] *See* ICC Awards, *supra* note 80 at 256, ¶117 (holding: "It is generally accepted that the wording of the contract is the basis of any interpretation and that the analysis of the text is the primary and predominant means of interpretation.").

[90] *See* Gaillard, *supra* note 37 at 288.

2. Final Award in Case No. 13730[91]

The case deals with a non-exclusive distributorship agreement between a Japanese manufacturer and a Polish distributor for a one-year term that is renewable each year (renewed in practice for 12 years), with each party benefiting from a two-month notice to terminate the contract. The agreement—governed by Japanese law—provided for ICC arbitration in case of dispute.[92]

The manufacturer informed the distributor by letter of the non-renewal of the agreement. The distributor started ICC arbitration seeking compensation for the losses and claiming that the manufacturer "did not provide a compelling reason for the termination of the parties' continuous long-term relationship"[93] as is required under the applicable Japanese law—and more broadly that he violated his general duty to act in accordance with good faith and fair dealing.

The arbitrators had to consequently address the following issues: (i) is a compelling reason needed in the case at hand to terminate the distributorship agreement? (ii) In terminating the contract, did the distributor breach his general duty to act in accordance with good faith and fair dealing?

The three-arbitrator panel used the parties' intent and the applicable Japanese law to analyze the first issue and relied on the opinion of party-appointed legal experts to interpret the relevant provisions of the applicable law. In this framework, the panel entered into a short digression on comparative law[94] before entering into a lengthy analysis of Japanese case law

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[91] *See* ICC Awards, *supra* note 80 at 91.

[92] *Id.*

[93] *Id.* at 92.

[94] *Id*. at 96, ¶11 (finding: "… there is no disagreement (in the experts' opinions) on the hierarchy of norms in Japanese law. The Japanese legal system belongs to the family of civil law systems and has been directly inspired by German law. The primary source of law is therefore legislation (in this case the Civil Code), followed by jurisprudence, the most important source of interpretation of the law. Court decisions, however, are not binding precedents in the English sense of the word. The court's interpretation of a specific provision may, and

in order to determine whether a compelling reason was needed for terminating the agreement at issue (as the experts disagreed). It seems clear from the digression that the tribunal was not familiar with the use of Japanese law and that the arbitrators applied what was for them foreign law. This corresponds to Gaillard's approach of the use of comparative law in the conduct of arbitration whereby the arbitrators compare the applicable law "more or less consciously (…) with the[ir] home legal systems."[95] Nevertheless, the panel applied what had been chosen by the parties as the applicable law, and the analysis of Japanese case law corresponds to the case Vadi expressly refers to, where reference to national case law is made *ipso jure* and does not correspond to the use of CLM.[96]

The panel then referred to EU regulations to determine whether the termination had been made in violation of public policy,[97] (i.e., in violation of the provisions of Council Directive 86/653/EEC of 18 December 1986 relating to self-employed commercial agents and of EU competition law). As mentioned earlier, this cannot be labeled CLM because these provisions are mandatory and a matter of public policy and, as such, the panel must take them into account even if the parties chose the substantive law of a non-member state to govern the contract.[98]

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indeed often does, vary from one court to the other. Finally, doctrinal authorities also play a role in the interpretation of the law but as secondary source.").

[95] *See* Gaillard, *supra* note 37 at 287.

[96] *See* Vadi, *supra* note 22 at 96-97.

[97] *See* ICC Awards, *supra* note 80 at 107, ¶¶46-47.

[98] *See* Redfern and Hunter, *supra* note 88; *see also* MARGARET L. MOSES, THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 84-86 (2nd ed., 2012) (citing: "The ECJ held that a foreign principal, whose commercial agent carries on its activity within the Community, cannot evade [the] provisions [of the Directive Relating to Self-Employed Commercial Agents] by the simple expedient of a choice-of-law clause. Thus, if the agent is in a Member State, the parties cannot contract out of the European Community's commercial agent's directive by choosing the substantive law of a non-member state to govern the contract.").

3. Final Award in Case No. 13756[99]

An agency agreement was concluded between a US agent and a Russian principal. The former brought the latter in contact with a US company, which led to the conclusion of a contract between the principal and the company. The principal refused to pay the related agent's fees. The agent started ICC arbitration in Stockholm, Sweden in accordance with the provisions of the agency agreement, which designated the Hague Convention on the Law Applicable to Agency Agreements (the Convention) as the applicable law, as well as the mandatory provisions of the Russian federation and of the United States of America.[100]

The arbitrators identified the following relevant issues for our analysis: (i) what is the applicable law to the dispute (since the parties only referred to a convention)? and (ii) is the agency agreement valid on a formal point of view?

In relation to the first issue, because the parties had not directly identified "the law of a specific municipal legal system"[101] as substantive law, "arbitration laws and rules provide uniformly that arbitrators will make this determination and generally give them broad discretion to do so."[102] Here, the arbitrators applied the ICC rules and the Convention itself, both chosen by the parties, to determine the applicable substantive law. In doing so, the arbitrators observed the paramount principle of arbitration law according to which arbitration rests on the will of the parties. Nonobservance of the latter principle can lead to the award being set aside on the grounds that the arbitrators have exceeded their power or that "the arbitral procedure was not in accordance with the agreement of the parties."[103] Here, the chosen rules (ICC) gave the

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[99] *See* ICC Awards, *supra* note 80 at 265.

[100] *Id*. at 266.

[101] *Id*. at 273.

[102] *See* MARGARET L. MOSES, THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION, 79 (2nd ed., 2012).

[103] *Id.* at 67.; *see also* Art. V (1) (c-d), The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on 10 June 1958, U.N. Treaty Series (1959), Vol. 330, p. 38, No. 4739.

arbitrators the freedom "to choose the rule of law which he determines to be appropriate"[104] to apply to the merits. Because the parties had specifically chosen the Convention as applicable law to the agreement, whose provisions enabled a determination of the applicable substantive law, in our opinion, in this case, the arbitrators' choice of law did not derive from a CLM exercise.

On the second issue, the arbitrators determined that the Convention did not apply to the formal requirements of the parties' agreement and that the parties did not express their intention that the Convention also be applied in this regard. The arbitrators decided to take "general guidance from the provisions of the private international law rules at the seat of arbitration" to determine the relevant law.[105] Although here the above-mentioned ICC provision applies and provides for a direct method of choosing the appropriate law, it is a choice that arbitrators can make in general, even where, unlike judges, arbitrators "have no particular obligation to a State to use its rules for determining the [applicable] law."[106] It might be that the arbitrators conducted some CLM analysis before deciding to call on this conflict-of-law rule, but it is only an assumption, as this is not readily apparent from the case excerpt.

4. Partial Award in Case No. 13774[107]

The last case selected for our analysis is a matter of contract of sale/purchase between an Egyptian manufacturer and seller and a Spanish buyer for a one-year period. Both parties signed a second contract for the supply of the same product for another six months and a third contract for the

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[104] *See* ICC Awards, *supra* note 80 at 273.

[105] *Id*. at 274 (holding: "According to the provisions of the 1980 Rome Convention on the Law Applicable to Contractual Obligations, which forms part of Swedish international private international law, a contract concluded between persons in different countries is valid as to form if it satisfies the formality requirements of the law which governs it under the Rome Convention, or of the law of one of those different countries – here the Russian Federation and Michigan.").

[106] *See* Moses, *supra* note 102 at 81.

[107] *See* ICC Awards, *supra* note 80 at 287.

sale/purchase of a different product. All contracts provided for ICC arbitration should a dispute arise, but only the last two contracts provided for a seat of arbitration in Cairo.[108]

The Spanish buyer resold the goods to another Spanish company, and the goods were to be delivered directly from the manufacturer. The delivery was delayed, and ultimately none of the buyers paid for the goods. As a consequence, the manufacturer began arbitration against both buyers.

In the partial award, the arbitrator only dealt with the preliminary issues of jurisdiction and place of arbitration. We selected the relevant ones for our analysis as follows: (i) the validity of the arbitration clause; (ii) the jurisdiction of the arbitral tribunal over the second Spanish company, which was a third-party non-signatory to the contracts and (iii) the issue of *forum non conveniens*.

To decide on the first issue, the arbitrators used a "well-settled (principle) in international arbitration"[109]—and referred in this regard to a previous ICC award[110]—to support their argument that under the *Kompetenz-Kompetenz* principle, arbitrators have the power to decide on their own jurisdiction. This principle supported the panel's determination that although the ICC court of arbitration could be satisfied that a *prima facie* valid arbitration agreement existed,[111] it was in the panel's power to decide on its own jurisdiction (i.e., to determine the validity of the arbitration clause). This recourse to a previous ICC award concurs with Vadi's qualification of the use of CLM.[112]

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[108] *See* ICC Awards, *supra* note 80 at 290-291.

[109] *Id*. at 292, ¶6.

[110] *Id.* (citing: *"see e.g., the interim award in the ICC Case no. 4367 [1984], in Collection of ICC Arbitral Awards 1986-1990, 18.").*

[111] *Id.* at 291-292, ¶¶5-6.

[112] *See* Vadi, *supra* note 22 at 96-97.

In relation to the second issue, the arbitrators first referred to a "basic tenet of arbitration law"[113] to highlight the fact that arbitrators' jurisdiction rests on parties' consent. The panel moved on to consider that it had an obligation to analyze some legal doctrine that could allow it to retain jurisdiction over the third-party non-signatory to the arbitration clause.[114] Here, the panel referred to the Dow Chemical ICC case from which "the group of company doctrine" originated and to five theories originated in US courts "out of common law principles of contract and agency law,"[115] to refuse jurisdiction over the third-party non-signatory. The panel then invoked a general principle according to which "a contract cannot confer rights or impose obligations arising under it on any person or agent except the parties to it,"[116] before entering into an analysis of claimant's arguments based on legal theories grounded in Egyptian law to reject once again the panel's jurisdiction to decide on the matter.[117] Finally, the panel raised a last argument, mentioning that "under most jurisdictions, state courts typically set aside arbitral awards or refuse to enforce them when no arbitration clause (and thus no arbitral jurisdiction) exists." Quoting provisions of Egyptian law, Swiss law, and commentaries from a Belgian specialist of international arbitration,[118] the panel engaged in a last CLM analysis on the issue. The analyses of various national law provisions, principles and legal theories made by the arbitral panel on this second issue concur with Gaillard's qualification of the use of CLM "when the applicable law is not set forth in the contract."[119] The panel's last CLM analysis is more in line with the use of CLM as a rhetorical device, as described by Allen

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[113] *See* ICC Awards, *supra* note 80 at 292, ¶8 (holding: "Obviously, it is a basic tenet of arbitration law that an arbitrator is allowed to adjudicate the merits of a dispute only where the parties have agreed, in one way or another, to arbitrate such dispute.").

[114] *See* ICC Awards, *supra* note 80 at 292, ¶10 (holding: "However the arbitral tribunal must discuss whether there is some legal doctrine which could allow it to retain jurisdiction over Second Respondent.").

[115] *Id.* at 293, ¶¶11-12 (citing: "(1) incorporation by reference; (2) assumption; (3) agency; (4) veil piercing/alter ego; and (5) estoppel.").

[116] *Id.* at 294, ¶15.

[117] *Id.* at 294-295, ¶¶16-23.

[118] *Id.* at 295-296 ¶24.

[119] *See* Gaillard, *supra* note 37 at 287.

and Anderson,[120] as it clearly seems to have been made to give a final boost to the panel's decision to reject jurisdiction on the third-party.

To decide on the third issue related to the seat of arbitration in Cairo as "*forum non conveniens,*" the panel referred to the related common law doctrine[121] and used CLM to define it and circumvent its application. Starting from the origins of the doctrine in Scotland and its acceptance by other common law countries,[122] the panel moved on to an analysis of the interpretation of the concept by scholars[123] to an illustration of the doctrine by US and UK case law[124] to determine that the latter could be applied to really "extreme situations."[125] Analyzing that such was not the case, the panel rejected the argument. Here as well, the panel's use of CLM relates to Gaillard's assessment mentioned above, according to which the use of CLM is qualified when the applicable law is not set forth in the contract and "comparative law analysis tends to continue up to the very end of the arbitration."[126]

As a conclusion to our analysis of ICC awards, we find that the use of CLM by ICC arbitrators can be qualified as sporadic. In fact, only one decision out of four made extensive use of CLM, whereas the other three cases did not show any use of CLM. Indeed, in our opinion, the analysis conducted by the arbitrators of the applicable law the parties chose, or the application of mandatory rules cannot be qualified as use of CLM according to the criteria the literature review presented.[127] Nevertheless, the arbitrators' extensive use of CLM in the fourth case is in line with Gaillard's qualification of the use of CLM in cases where the parties did not choose the applicable law. Moreover, this particular instance of CLM usage by the arbitral tribunal was outcome determinative. Finally, we could not verify our third hypothesis in relation to

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[120] *See* Allen and Anderson, *supra* note 40 at 458.

[121] *See* ICC Awards, *supra* note 80 at 299, ¶41.

[122] *Id*. at 299, ¶42.

[123] *Id*. at 300, ¶¶44-45.

[124] *Id*. at 299-300, ¶¶42-43, 46-47.

[125] *Id*. at 300, ¶45.

[126] *See* Gaillard, *supra* note 37 at 287.

[127] *See supra* Table 1.

the dis/similarities of the use of comparative law methodology by arbitrators stemming from the civil law or common law protocol because the ICC only publishes excerpts of awards and because the appointed arbitrators' nationalities remain confidential.

C. ICSID Arbitration

The explosion of bilateral investment treaties or BITs in the latter part of the 20th century and the entry into force of the Washington or ICSID Convention[128] contributed to the creation of a new legal framework that affords disgruntled investors a few additional alternatives and meaningful avenues for obtaining redress.[129] These alternatives include submitting the investment claims to an arbitration that, in essence, is very much like international arbitration. However, ICSID awards are directly enforceable in states that have ratified the Washington Convention, without recourse to national courts. This crucial feature of ICSID arbitration is likely responsible for the sharp increase in investor-state arbitration and one that clearly distinguishes the Washington Convention from the New York Convention.[130] Another important feature of the Washington Convention, and one that makes this study possible, is the fact that neither the conventions nor the ICSID Arbitration Rules impose any confidentiality requirements.[131] ICSID awards are publicly available on the Centre's website,[132] thereby making ICSID arbitration cases much more accessible than, for instance, commercial arbitration cases subject to strict confidentiality clauses.

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[128] The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, produced in Washington, D.C., on 18 March 1965, U.N.T.S. 160 (o. 8359) (1966) (hereinafter the "Washington" or "ICSID" Convention). As of September 1, 2019, the convention was in force in 163 states. For current status, visit https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx

[129] *See* Redfern and Hunter, note 88 *supra* at 444, ¶8.10 (reporting the number of BITs is the world went from 385 to 2,926 in a little less than 25 years according to the United Nations Conference on Trade and Development (UNCTAD)).

[130] *See* GARY BORN, INTERNATIONAL ARBITRATION: CASES AND MATERIALS 39 (2015).

[131] *See* https://icsid.worldbank.org/en/Pages/process/Confidentiality-and-Transparency.aspx#

[132] *See* https://icsid.worldbank.org/en/Pages/cases/searchcases.aspx

In the following subsections we discuss four ICSID cases that adequately illustrate our inquiry.

1. Tenaris v. Venezuela

Several issues in *Tenaris* are useful in regard to our CLM analysis.[133] In the interest of space, we choose to discuss only a portion of the section of the award that is devoted to Venezuela's jurisdictional objections. According to Venezuela, the tribunal lacked jurisdiction because the claimants did not have their *Siège Social/Sede* in Luxembourg and Portugal—the signatory countries of the treaties containing the provisions giving rise to the claims—but rather in Argentina.[134] The Tribunal, notwithstanding Venezuela's objection, concluded that it had jurisdiction *ratione personae* over the two claimants, as it was satisfied that Luxembourg and Portugal were the claimants' effective *Siège Social/Sede*.[135] In reaching this decision, the Tribunal considered the parties' arguments regarding the meaning of the terminology at issue, other BITs, the relevant municipal law, Article 25 of the ICSID convention, and the test of actual or effective management.

The Tribunal began its analysis by referencing Article 31(1) of the Vienna Convention on the Law of Treaties—requiring a good faith interpretation of the terms of a treaty according to their ordinary meaning. In turn, Venezuela's position that the meaning of terms *Siège Social/Sede* ought to be interpreted as "the effective or principal or actual management of the company takes place" clashed with claimants' proposition that both terms referred to the "*registered office*" or "*statutory seat*."[136] In support of their cases, the parties cited extensively international law doctrine, previous ICSID, ICJ, and UNCITRAL

[133] *See Tenaris v. Venezuela*, ICSID Case No. ARB/11/26, Award, 29 January 2016.
[134] *Id.* at 40, 42, ¶¶ 114, 120.
[135] *Id.* at 79, 42, ¶226.
[136] *Id.* at 47, ¶135.

awards.[137] The parties, however, failed to persuade the panel of either precedent-based interpretation of the terminology at issue, and the tribunal concluded that it would follow the "simple wording of the treaty" to arrive at the conclusion that *Siège Social/Sede* means ""effective management" or some sort of actual or genuine corporate activity."[138] Incidentally, in support of this conclusion, the Tribunal interestingly cited to a flurry of international arbitration cases lending support to the well-settled canon of interpretation that "a clause must be so interpreted as to give it a meaning rather than deprive it of meaning."[139]

With regard to the parties' arguments based on other BITs, the Tribunal provided a summary of the parties' positions and then engaged in a cursory comparative exercise between the BITs at issue in *Tenaris* and those additional BITs cited by the parties.[140] The tribunal quickly concluded that the proposed comparative exercise, under Article 31 of the Vienna Convention, was futile and that each treaty at issue needed of be interpreted on its own account.[141]

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[137] The Claimants in *Tenaris*, notably, cited to *Tokios Tokelės v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, 29 April 2004 (for the proposition that "a nationality test of *Siège Social* leads to the same result as one based on state of incorporation"); *The Barcelona Traction, Light & Power Company Limited* (Belgium v. Spain), Second Phase: I.C.J. Reports 1970, Judgment, 5 February 1970 (for the proposition that *Tenaris* was in an analogous position as the claimant in Barcelona Traction—a company with enough ties to Canada (incorporation and registered office located in Canada) as to warrant the Canadian diplomatic protection and despite its many commercial activities outside Canada; and, *Total SA v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Objections to Jurisdiction, August 2006 (pointing to an instance in which the *Total* tribunal used "registered office" as definition of the term *Siège Social*, at issue in *Tenaris*). Venezuela then distinguished each of the foregoing authorities and submitted an extensive compilation of international doctrine along with reference to additional arbitration awards. Most notably, Venezuela relied on the *Alps Finance and Trade AG v. Slovak Republic*, UNCITRAL, Decision on Jurisdiction, 5 March 2011; Respondent's Reply on Bifurcation, ¶15 (for the proposition that that the word "seat" "has a precise meaning under the BIT, namely the principal place of an actual business").

[138] *See Tenaris*, *supra* note 133 at 56-57; ¶¶150-54.

[139] *Id*. at 57, ¶152; FN 115 (citing to *Asian Agricultural Products Ltd. v. Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, 27 June 1990; *Occidental Exploration and Production Company v. Republic of Ecuador*, LCIA Case No. UN3467, Final Award, 1 July 2004; *Salini Construttori S.p.A. e Italstrade S.p.A. v. the Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction, 9 November 2004).

[140] *Id.* at 58-60; ¶¶155-61.

[141] *See Tenaris*, *supra* note 133 at 60, ¶162.

An extremely interesting incident occurred next when the Tribunal discussed the relevance of (relevant) municipal law—Luxembourgish, Portuguese, and Venezuelan law.[142] Although the tribunal recognized that the meaning or the interpretation of the terms *Siège Social/Sede* remained an issue of international law, the tribunal posited it would not be inappropriate to consider relevant municipal law "by way of background to its interpretation."[143] Largely unpersuaded by the parties' experts on foreign law, the Tribunal concluded that nothing in the relevant municipal law warrants reconsideration of the terms *Siège Social* and *Sede* previously made pursuant to Article 31 of the Vienna Convention.[144] Thus, the Tribunal proceeded to apply the test of effective management and concluded that both claimants had their respective seats in Luxembourg and Portugal, thereby confirming the claimants' entitlements to the protections under each treaty and affirming its jurisdiction to hear the claims in this case.[145]

2. Santa Elena v. Costa Rica[146]

As we will see, *Santa Elena* is a famous case related to the controversial valuation of an investment that the government of Costa Rica expropriated in the late 1970s. For brevity's sake, suffice it to say that this is an expropriation case in which the claimant is entitled to compensation, but the quantum is at issue.[147] Thus, it is precisely within the valuation section of the award that one finds the most relevant references to CLM analysis.[148]

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[142] *Id.* at 60, ¶163.

[143] *Id.* at 62, ¶169.

[144] *Id.* at 62-63, ¶171.

[145] *Id.* at 79-80, ¶¶226-27.

[146] *Santa Elena v. Costa Rica*, ICSID Case No. ARB/96/1, Award, 17 February 2000, pp. 169-204 (reprinted in ICSID Rev.—Foreign Invest. L. J.).

[147] *See Santa Elena*, *supra* note 146 at 188, ¶54.

[148] *Id.* at 193.

At the outset, the claimant posited that the compensation due was the property's fair market value based on the property's highest and best use unaffected by the expropriatory and ex-post regulatory actions of the Costa Rican government.[149] The government, in turn, demanded that the valuation was the objective value of the property as of the date of the expropriation decree.[150]

In determining the relevant valuation date, the Tribunal quickly concluded that the relevant date was when the governmental expropriatory measures "deprive the owner of title, possession or access to the benefit and economic use of his property."[151] In support of this point, the Tribunal relies on the *Tippetts* case from the Iran-US Claims Tribunal—holding that a taking may occur "whenever the events demonstrate that the owner was deprived of fundamental rights of ownership"—and the *Mariposa Development Company* case from the US-Panama General Claims Commission—holding that "legislation … may sometimes destroy the marketability of private property, render it valueless and give rise forthwith to an international claim."[152] Even so, the Tribunal said that international law did not provide a precise criterion with which to determine the relevant date for valuation and deemed this question a matter of fact for the tribunal to determine.[153] Accordingly and without further analysis, the tribunal concluded that the date of the expropriation decree is the relevant valuation date because that is when the claimant's ownership was "effectively blighted or sterilized" and when the owner could no longer develop the property according to the plans it had at the time of purchase.[154]

In determining the property's fair market value at the date of the expropriation decree, the tribunal followed a process of approximation commonly used in the context of other arbitrations.[155] Confronted with the

[149] *Id.* at 193, ¶75.

[150] *Id*.

[151] *Id.* at 193, ¶77.

[152] *Id.* at 194, FN 36.

[153] *Id.* at 195, ¶78.

[154] *Id.* at 195, ¶85.

[155] *See Santa Elena*, *supra* note 146 at 198, ¶91 (the Tribunal relies on the Iran-U.S. C.T.R. *AIG v. Iran* case for the proposition that the tribunal can take an approximative approach to determining the value of the property

parties' proposed valuation figures ($1,900,000 for the Respondent and $6,400,000 for the Claimant),[156] the tribunal proceeded, in one of the most controversial valuation cases in ICSID history, to "split the baby" evenly between the parties and fixed the valuation amount at $4,150,000.[157]

3. TECMED v. Mexico[158]

In *TECMED*, the respondent argued that the Tribunal lacked jurisdiction *ratione temporis* because the facts underlying the claims precede the entry into force of the International Investment Agreement between Spain and Mexico (IIA).[159] The parties briefed the Tribunal at length on these issues, but the tribunal quickly declined to decide the question the parties thought most important—whether the IIA could be applied retroactively.[160] Demonstrating caution, the Tribunal referenced the *Tradex* decision in which the arbitrators concluded that the apparent little evidence of the meaning "retroactive application" made it extremely difficult to determine whether the requested retroactive application of the treaty was even permissible in any case.[161] Further, the Tribunal in *TECMED* relied on another ICSID case to further limit the scope of applicable sources of interpretation—thereby closing the door to any meaningful application of CLM—and stated that the Tribunal would look no

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expropriated in light of all relevant circumstances of the case and to yet another Iran-U.S. C.T.R. case—*Phillips Petroleum v. Iran*—for the proposition that a tribunal can make adjustments to valuation proposals by the parties and in so doing, the tribunal "must take into account all relevant circumstances, including equitable considerations.").

[156] *Id.* at 199, ¶93.

[157] *Id.* at 199-200, ¶95.

[158] *TECMED v. Mexico*, Case No. ARB (AF)/00/2, Award 29 May 2013, pp. 1-89.

[159] *Id.* at 15, ¶54.

[160] *Id.* at 16, ¶55.

[161] *Id.* at 16, ¶55, FN 6 (citing to the *Tradex v. Albania*, Decision on Jurisdiction, ICSID Case No. ARB/94/2, 24 December 1996, p. 186).

further than the IIA and the treaty interpretation rules from the Vienna Convention to decide this issue.[162]

After a rather lengthy and detailed discussion of the parties' positions, the Tribunal cites again the same two ICSID cases to reiterate that, according to international law, and barring a specific provision, a treaty is not binding with respect to acts or behavior that stopped existing before the treaty entered into force.[163]

In a sudden change, however, the Tribunal introduced the following reasoning directly from the *Mondev* award:

> "… events or conduct prior to the entry into force of an obligation for the respondent State may be relevant in determining whether the State has subsequently committed a breach of the obligation. But it must still be possible to point to conduct of the State after that date which is itself a breach."[164]

But, as the Tribunal admitted, Article 28 of the Vienna Convention seems to address the question at issue in a way that renders any reference to precedent superfluous. Thus, Article 28 mandates extending the application of the treaty to "an act or fact or situation which took place or arose prior to the entry into force of a treaty continues to occur or exist after the treaty has come into force, it will be caught by the provisions of the treaty."[165] (citations omitted). It is with this background in mind that the Tribunal proceeds to distinguish the acts or omissions in possible violation of the IIA that had occurred pre-entry into force but were "isolated" from those pre-entry-into-force events tied to other acts or omissions in direct violation of the IIA that

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[162] *See TECMED*, *supra* note 158 at 16, ¶55, FN 7 (citing to the *Mondev v. United States*, Award, ICSID Case No. ARB(AF)/99/2, 11 October 2002, at 14, ¶43).

[163] *Id.* at 21, ¶63.

[164] *See Mondev v. United States*, Award, ICSID Case No. ARB(AF)/99/2, 11 October 2002, at p. 23, ¶70 (cited in *TECMED v. Mexico*, Case No. ARB (AF)/00/2, Award 29 May 2013, pp. 22-23, ¶66, FN 35).

[165] *See TECMED*, *supra* note 158 at 23, ¶66.

occurred post-entry into force.[166] The Tribunal then affirmed its jurisdiction as to the latter category only.[167]

Interestingly, following the holding on the issue of "retroactive" application of the IIA, and to end its discussion on jurisdiction, the Tribunal reproduced the following quotation from the *A.A. Megalidis v. Turkey* case:

> *"qu'il est de principe que déjà avec la signature d'un Traité et avant sa mise en vigueur, il existe pour les parties contractantes une obligation de ne rien faire qui puisse nuire au Traité en diminuant la portée de ses clauses.*
>
> *Qu'il est intéressant de faire observer que ce principe –lequel en somme n'est qu'une manifestation de la bonne foi qui est la base de toute loi et de toute convention – a reçu un certain nombre d'applications…"*[168]

4. Pluspetrol v. Perupetro[169]

This is a sizeable ICSID award in which the Tribunal issued a royalty adjustment order against the claimants of approximately $40MM plus interest and arbitration costs payable to the respondent.[170] We reference this award for one reason only. The parties had an arbitration agreement that stipulated that the applicable law to this arbitration was Peruvian law.[171] Aside from about a dozen references to Peruvian law,[172] the Tribunal makes almost no reference in the entire award to the laws or the jurisprudence of a *tertium comparationis*, nor does it cite any previous arbitral decision, ICSID or otherwise. Despite that the three arbitrators are three renowned international arbitrators,[173] and the

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[166] *See TECMED*, *supra* note 158 at 23, ¶¶67-68.

[167] *Id.* at 23, ¶68.

[168] *Id.* at 23, ¶68.

[169] *See Pluspetrol v. Perupetro*, ICSID Case No. ARB/12/28, Award 21 May 2015, at 1-75.

[170] *Id*. at 74, ¶¶218-20.

[171] *Id*. at 4, ¶11.

[172] *Id*. at 24, ¶74; 30, ¶¶91, 93; 40, ¶114; 41, ¶116(c); 51, ¶151; 61-64, ¶¶180-81, 184; 96, ¶196.

[173] The arbitrators in *Pluspetrol* were Eduardo Siqueiros (Mexico), José Emilio Nunes Pinto (Brazil), and Bernardo Cremades (Spain).

law firms that intervened in representation of the parties are also prominent international firms based in the United States,[174] the Tribunal simply resolved the matter put to arbitration pursuant to Peruvian law only.

V. CONCLUSIONS

The limited number of awards in our sample does not allow us to make broad generalizations about arbitrators' usage of CLM. Our findings, however, provide preliminary evidence in support of rejecting our first and second hypotheses—that arbitrators rarely employ CLM or that if they do, such usage is not outcome determinative. Although some information is available as to the arbitrators' nationality and background, we would need to analyze additional awards before we being able to confirm or reject our third hypothesis—that arbitration panels with a majority of civil law arbitrators are as likely to employ CLM as common law arbitrators are. Notably, our data suggest that arbitrators are not rigorous users of CLM in the classic sense; instead, arbitrators' use of CLM is more in line with Vadi and Gaillard's account of the use of comparative law in international arbitration: either they reference other arbitral, international, and national cases, or they indulge in detailed CLM analyses related to the determination of the applicable law when the parties failed to include it in their agreements. Interestingly, our data do not allow us to disagree with Allen and say that arbitrators never resort to CLM for purely rhetoric and ornamental purposes not relevant to the final decision.

This study invites us to continue with this line of research and, in addition to perusing our much larger universe of awards, interview the arbitrators and other stakeholders in an attempt to draw a much more accurate picture of how arbitrators incorporate CLM in their decision-making activity.

[174] Sidley Austin LLP (Washington) represented the respondent, and Weil, Gotshal & Manges LLP (New York) represented the claimants.