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THE USE OF COMPARATIVE LAW METHODOLOGY IN INTERNATIONAL ARBITRATION

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COMPARATIVE LAW IN INTERNATIONAL ARBITRATION

Emmanuel GAILLARD[1]

Résumé

Le droit comparé est utilisé quotidiennement dans l'arbitrage international. Les deux disciplines ont connu des destins similaires et entretiennent des liens étroits. Cet article se propose d'étudier quatre fonctions du droit comparé dans l'arbitrage international : une seconde nature pour les arbitres, une source d'inspiration pour le législateur (à la fois national et transnational), un outil tactique pour les plaideurs et une source autonome de droit. Il s'agira ensuite d'étudier les méthodes du droit comparé dans l'arbitrage international, en analysant tour à tour la preuve du droit comparé et les exigences de la méthode comparatiste.

Mots clés : arbitrage international et droit comparé ; règles transnationales ; principes généraux du droit ; ordre public transnational ; jurisprudence arbitrale

Abstract

Comparative law is routinely used in the practice of international arbitration. These two disciplines have followed similar trajectories and are closely connected. This article identifies four key functions of comparative law in international arbitration: comparative law as second nature for arbitrators, a source of inspiration for lawmakers (both national and transnational), a practical tool for litigants, and a source of law in its own right. The article then explores the methods of comparative law in international arbitration, analyzing in turn evidence of comparative law and the requirements of a cogent comparative law analysis.

Keywords: international arbitration and comparative law; transnational rules; general principles of law; transnational public policy; arbitral case law

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Introduction

Comparative law and international arbitration have long enjoyed a close proximity, and their fates have been very similar. Although both disciplines have existed for long, their modern origins (if one had to identify specific dates or events) are not far apart and can be traced, in the case of comparative law, to the International Congress of Comparative Law that took place in Paris from 31 July to 4 August 1900,[2] and, in the case of international commercial arbitration, to the birth of the International Chamber of Commerce and its Court of Arbitration in the early 1920s. Since then, both disciplines have followed broadly similar historical trajectories, going from relative obscurity to prominence over a relatively short period.

For a long time, comparative law was perceived as a very theoretical field that was primarily concerned with a deeper and "gratuitous" understanding of the law—the legal equivalent, one might think, of "*l'art pour l'art.*"[3] Carbonnier, who sought to promote the study of the sociology of law, viewed comparative law as a "collateral science" (*science collatérale*), along with legal history, as opposed to the "truly legal sciences" (*sciences proprement juridiques*).[4] In a similar vein, international arbitration was not initially taught in universities as an autonomous subject; in the 1970s and in many cases even more recently, few if any hours would be devoted to international arbitration in courses on "international commercial law."

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[2] Congrès international de droit comparé. 1905. *Procès-verbaux des séances et documents*, 1. Paris: LGDJ. Key contributions about comparative law were made by various scholars, including Raymond Saleilles (already an established scholar) and Edouard Lambert (a younger law professor). *See* Jamin, Christophe. 2019. Saleilles' and Lambert's Old Dream Revisited. *The American Journal of Comparative Law* 50: 701-718. For a historical overview of comparative law in France, *see* Fauvarque-Cosson, Bénédicte. 2019. Development of Comparative Law in France. In *The Oxford Handbook of Comparative Law*, ed. Mathias Reimann and Reinhard Zimmermann, 29-53. Oxford: Oxford University Press.

[3] The phrase "*l'art pour l'art*" ("art for art's sake") became current in France following Théophile Gautier's anti-utilitarian conception of art, expressed in his Preface to *Mademoiselle de Maupin* (1835): "There is nothing really beautiful save what is of no possible use."

[4] Carbonnier, Jean. 2004. *Introduction, Les personnes, La famille, l'enfant, le couple*. *Droit civil* 1, 59. Paris: Presses Universitaires de France.

The contrast with the situation today could not be starker. Not only have comparative law and international arbitration in the recent past achieved the status of fully fledged disciplines (when compared to such fields as civil law or criminal law, for instance), but they now occupy key positions in the broader legal landscape. Comparative law is a thriving field of research, with new theoretical questions and approaches constantly being tested.[5] It has attracted the attention of domestic courts and judges, who must increasingly consider issues of a transnational nature in our "ever more interdependent world."[6] Comparative law and foreign law[7] are also valued by some of the best law students, who strive to gain an understanding of multiple legal systems in the course of their studies.[8] Likewise, international arbitration is now taught as a discipline on its own—or even two disciplines, one in international commercial arbitration and the other in investment treaty arbitration. There is indeed a wide range of specialized academic programs devoted to international arbitration in France, England, Switzerland, and various other countries.[9]

[5] *See, e.g.,* Siems, Mathias. 2019. New Directions in Comparative Law. In *The Oxford Handbook of Comparative Law*, ed. Mathias Reimann and Reinhard Zimmermann, 852-874. Oxford: Oxford University Press; Engelbrekt, Antonina, and Joakim Nergelius. 2009. *New Directions in Comparative Law*. Cheltenham: Edward Elgar; Legrand, Pierre, and Roderick Munday, ed. 2003. *Comparative Legal Studies: Traditions and Transitions*. Cambridge: Cambridge University Press.

[6] *See* Breyer, Stephen. 2015. *The Court and the World: American Law and the New Global Realities*, 4. New York: Vintage; Canivet, Guy. 2015. The Use of Comparative Law before the French Private Law Courts. In *Courts and Comparative Law*, ed. Mads Andenas and Duncan Fairgrieve. 472-482. Oxford: Oxford University Press.

[7] The distinction between comparative law and foreign law is somewhat tenuous and need not occupy us in this article. Foreign law concerns the laws and legal systems of another country (as when, speaking from the point of view of the United States, one speaks of the laws of France, China, and India). Comparative law (as its name indicates) involves comparing foreign legal principles and institutions (as such, a comparison of French and English laws on a specific issue would fall in the realm of comparative law). Comparative law necessarily starts with foreign law (*i.e.* the laws of legal systems being compared) and both are often grouped under the same heading (as when one speaks of an academic specialization in "foreign and comparative legal studies").

[8] A clear example of this phenomenon is the dual degree in English and French law which was run jointly between Paris 1 Panthéon-Sorbonne University and King's College London (between 1977 and 2018) and between Paris 1 and Queen Mary University of London (since 2018). On the origins of the program, *see* Tunc, André. 1992. La maîtrise en droits français et anglais. *Revue d'histoire des Facultés de droit et de la science juridique*. 13: 217-221.

[9] To provide a few examples, the University of Geneva offers an LLM in International Dispute Settlement (MIDS); Queen Mary University of London offers one in Comparative and International Dispute Resolution; the University of Paris-Saclay offers a master's degree in Arbitration and International Commerce (MACI); and the

International arbitration has grown exponentially over the past decades and has become a crucial field of research and practice—more so, some might think, than some of its neighboring fields, such as private international law.

In addition to following similar trajectories, comparative law and international arbitration have interacted for a long time, mutually enriching each other along the way. This is reflected in the preoccupations of various scholars. For example, René David, one of the most eminent comparative law scholars of the twentieth century, became interested in international arbitration at an early stage in his career and later devoted multiple studies—as well as one chapter of his autobiography[10]—to international arbitration from a comparative law perspective.[11] Various prominent legal scholars, too, were closely interested in both disciplines. In the United States, for example, Arthur von Mehren made seminal contributions to comparative law[12] as well as international commercial arbitration and private international law.[13] Another leading scholar, Hans Smit, served as director of the Parker School of Foreign and Comparative Law at Columbia Law School from 1980 to 1998 and of the Center for International Arbitration and Litigation Law from 1997 to 2005. He taught and practiced both comparative law and international arbitration.

Given the parallel fate of comparative law and international arbitration, it is easily conceivable to study the myriad ways in which the two disciplines have interpenetrated each other. International arbitration has obviously given comparative law a fertile field of inquiry in which to test new ideas and questions. Some purists might even argue that international arbitration has

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Institut d'Etudes Politiques de Paris (Sciences Po) offers an LLM in Transnational Arbitration and Dispute Settlement.

[10] David, René. 1982. *Les avatars d'un comparatiste*, 244-257. Paris: Economica.

[11] *See, e.g.,* David, René. 1982. *L'arbitrage dans le commerce international*. Paris: Economica; David, René. 1982. *Le droit comparé*. *Droits d'hier, droits de demain*, 337-359. Paris: Economica; David, Réné. 1954. Droit naturel et arbitrage. In *Natural Law and World Law: Essays to Commemorate the 60th Birthday of Kotaro Tanaka*, 19-29. Tokyo: Yuhikaku; David, Réné. 1995. Qu'est-ce que l'arbitrage ? In *Liber Amicorum Algot Bagge*, 58-66. Stockholm: P.A. Norstedt & Soner; David, Réné. 1967. L'avenir de l'arbitrage. In *Liber Amicorum Martin Domke*, ed. Pieter Sanders, 56-64. The Hague: Martinus Nijhoff.

[12] *See, e.g.*, von Mehren, Arthur Taylor. 1957. *The Civil Law System: Cases and Materials for the Comparative Study of Law*. Englewood Cliffs, N.J.: Prentice-Hall.

[13] *See, e.g.*, von Mehren, Arthur and Donald Trautman. 1966. Jurisdiction to Adjudicate: A Suggested Analysis. *Harvard Law Review* 79: 1121-1179.

brought a more practical, if not market-driven, dimension to comparative law, which has stopped pursuing knowledge for its own sake and started providing answers to a wide range of key practical issues.[14]

That said, the topic of the influence of international arbitration on comparative law will not be addressed here. This article is concerned with the opposite phenomenon: how comparative law has contributed to international arbitration. To address this vast topic, the article will first identify and analyze four key functions of comparative law in international arbitration (I) and then explore several questions of comparative law methodology in international arbitration (II).

I. THE FUNCTIONS OF COMPARATIVE LAW IN INTERNATIONAL ARBITRATION

Comparative law has many functions.[15] In the context of international arbitration, comparative law analysis plays four significant roles: first, as second nature for arbitrators (A); second, as a source of inspiration for lawmakers (B); third, as a practical tool for litigants (C); and fourth, as a source of law in its own right (D).

A. A second nature for arbitrators

Experienced arbitrators routinely apply the laws of many countries over the course of their careers and, in that context, develop a sense of the major differences between them. Consider, for instance, an arbitral tribunal composed of three arbitrators, one from the United States, the second one

[14] *See, e.g.*, Gaillard, Emmanuel. 2005. Du bon usage du droit comparé dans l'arbitrage international. *Revue de l'arbitrage* 2: 375-385. For recent studies on the relationship between the two disciplines, see, e.g., Bell, Gary. Forthcoming. Arbitration and Comparative Law. In *Cambridge Companion to International Arbitration*, ed. Chin Leng Lim. Cambridge: Cambridge University Press; and Karton, Joshua. 2020. International Arbitration as Comparative Law in Action. *Journal of Dispute Resolution* 2: 293-326.

[15] For a general overview, *see* Zweigert, Konrad, and Hein Kotz. 1998. The Functions and Aims of Comparative Law. In *Introduction to Comparative Law,* 13-32. Trans. T. Weir. New York: Oxford University Press.

from England, and the third one from France. Even if these three arbitrators must apply the law of yet another country (for example, Switzerland), they will undoubtedly draw comparisons with their own legal system. Whether consciously or not, they will try to understand the similarities and differences between the legal provisions they are asked to apply (in Swiss law) and similar concepts in their own legal systems (in U.S., English or French law). By talking to their co-arbitrators, they will also gain a better understanding of the idiosyncrasies of the legal system in which they each operate. This is true even for the most "domestic" or "territorialist" arbitrators, for whom comparative law will become second nature.[16]

Historically, the Court of Arbitration of the International Chamber of Commerce played a key role in promoting this instinctive use of comparative law. By encouraging the neutral appointment of arbitrators whose nationality differs from those of the parties, the ICC Court forced parties and counsel to consider in the legal matrix of their dispute laws they were not necessarily familiar with. As early as 1927, the ICC introduced in its Rules of Arbitration a provision whereby "[a]s a general rule the Court, unless for good reason shown, shall apply to National Committees of countries other than those of the parties to the dispute" in order to nominate arbitrators.[17] As this practice became more widespread and accepted, arbitrators and lawyers from various countries had to exchange views on the laws of different legal systems, which undoubtedly strengthened their understanding of comparative and foreign law.

However, the arbitrators' willingness to take into account the differences between various legal systems was not universally shared. In the English tradition, for example, the habit has long been to appoint exclusively English arbitrators—often retired judges or barristers—applying English law. This might explain why some English practitioners and scholars, in the international arbitration context at least, are less likely to rely on comparative or foreign law

[16] To provide another example, in a recent case in which the present author was involved as counsel, the arbitral tribunal was composed of three English lawyers, and the applicable law was that of a Gulf State. Counsel was explicitly asked to explain the content of the applicable law by drawing comparisons with English law.

[17] Article 11(1) of the 1927 Arbitration Rules of the ICC. For a recent history of the evolution of the ICC arbitration system, *see* Schinazi, Mikaël. *The Three Ages of International Commercial Arbitration* (forthcoming with Cambridge University Press).

and tend to have a negative reaction against any form of hybridization, as the debates over *lex mercatoria* or transnational principles of law show.[18]

Today, all international arbitrators routinely handle disputes involving a wide range of different legal rules and legal systems. They must think—to some extent at least—like comparatist scholars. This phenomenon is undoubtedly positive, enabling international arbitrators to broaden their horizons. As René David explained in his essay on "comparative law as an element of general legal culture," comparative law can serve to "enrich the minds of jurists, broaden their views, give them a better understanding of the issues they are faced with, make them understand better what the legal order and the evolution of the law are."[19]

In fact, it may even occur that, along the way, international arbitrators rediscover, in David's words, their own legal culture as they encounter and are asked to closely analyze and apply foreign doctrine in the course of disputes. There is indeed a constant back-and-forth between inherited knowledge and new knowledge derived from other legal systems, which may provide a source of questioning of one's own law.[20] Further, as arbitration scholars have noted, there is a distinctive culture of arbitration—or, perhaps more appropriately, an "epistemic community"[21] composed of arbitration practitioners, lawmakers, and members of arbitral institutions—which seems driven by economic considerations[22] and a set of shared normative values.[23] Comparative law is a fundamental part of that culture.

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[18] In fact, prior to the Arbitration Act 1996, "it was assumed that any arbitrator conducting an arbitration in England was bound to apply English law, including the English rules of the conflict of laws, to any dispute before the arbitral tribunal; and that every dispute submitted to arbitration in England had to be determined by reference to some system of national law." *Dicey, Morris & Collins on the Conflict of Laws*. 2012 (updated 2019). ed. Lord Collins and Jonathan Harris. London, Sweet & Maxwell, para. 16-010.

[19] David, René. 1950. Le droit comparé, enseignement de culture générale. *Revue internationale de droit comparé* 2: 683.

[20] On this issue, *see* Ponthoreau, Marie-Claude. 2005. Le droit comparé en question(s). Entre pragmatisme et outil épistémologique. *Revue internationale de droit comparé* 57: 13.

[21] *See* Haas, Peter. 1992. Epistemic Communities and International Policy Coordination. *International Organization* 46: 1-35.

[22] Ginsburg, Tom. 2003. The Culture of Arbitration. *Vanderbilt Journal of Transnational Law* 36: 1335–1345.

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

One potential pitfall, of course, is that knowledge becomes diluted over time. By trying to master only bits and pieces of each and every legal system, it may be the case that some international arbitrators end up lacking expertise in any specific legal system, even their own. International arbitrators should be alert to such a pitfall and bear in mind David's words: "before being able to compare French law and foreign law, jurists must be well aware of each term of the comparison."[24] They should try not to become the jurist who, in the words attributed to Lord Bowen, "knows a little about the law of every country except his own."[25]

B. A source of inspiration for lawmakers

Comparative law is often used as a source of inspiration for lawmakers—including judges in their law-making function—both at the national (1) and transnational levels (2).

1. National lawmakers

In virtually every field of the law, national lawmakers use comparative law to decide whether to adopt a foreign solution to a given legal problem. This is especially true in the international arbitration context in light of the fierce competition between countries vying to attract arbitrations. Lawmakers often turn to more arbitration-friendly regimes as a source of inspiration to improve their own arbitration laws. There are numerous examples of arbitration principles and ideas—and even legal terms of art[26]—that have been adopted after they were first devised and tested in another legal system. Two examples are worthy of note.

The first example is provided by judicial reforms allowing parties, in specific circumstances, to waive any action to set aside the award at the seat of

[24] David, René. 1950. *Traité élémentaire de droit civil comparé*, 10. Paris: LGDJ.

[25] Quoted in Gutteridge, H.C. 1946. *Comparative Law, An Introduction to the Comparative Method of Legal Study and Research*, 23. Cambridge: Cambridge University Press.

[26] For example, the expression "*juge d'appui*" – or "judge acting in support of the arbitration" – was introduced in Article 1505 of the French Code of Civil Procedure following an expression used in Swiss arbitral practice.

the arbitration. This possibility originated in Belgium, where a law dated 27 March 1985 introduced a new Article 1717, paragraph 4 into the Judicial Code, providing that Belgian courts could only hear an action to set an award aside if at least one of the parties to the dispute was "either an individual having Belgian nationality or residence, or a legal entity constituted in Belgium or having a subsidiary or other establishment in Belgium."[27] This provision—described at the time as "revolutionary, but limited,"[28] in that it sought to promote arbitration without court interference, unless one of the parties was a Belgian national or resident—was met with some success.[29]

The Belgian approach may have proved unattractive to some arbitration users who were looking for minimal review of arbitral awards.[30] On this basis, two years later, Swiss lawmakers adopted the same approach but made it optional. Article 192 of the 1987 Swiss Private International Law Statute gave parties the option to exclude recourse against an award "by an express statement in the arbitration agreement or by a subsequent agreement in writing," as long as none of them had its domicile, habitual residence, or a business establishment in Switzerland.[31]

In a remarkable instance of legislative borrowing, the Belgian legislature then followed the Swiss model, which afforded enhanced flexibility to parties by allowing them to decide whether to remove the opportunity to challenge awards. The Belgian law of 19 May 1998 replaced Article 1717, paragraph 4 of the Judicial Code with a provision whereby the parties could, "by an explicit declaration in the arbitration agreement or by a later agreement, exclude any application for the setting aside of an arbitral award", provided none of the

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[27] Article 1717(4) of the Belgian Judicial Code.

[28] Van Houtte, Hans. 1986. La loi belge du 27 mars 1985 sur l'arbitrage international. *Revue de l'arbitrage* 1986: 31. *See also* Paulsson, Jan. 1986. Arbitration Unbound in Belgium. *Arbitration International* 2: 68-73.

[29] This provision may have influenced the choice of Brussels as the seat of arbitration in the Channel Tunnel contract between ten Anglo-French construction contractors and a pool of banks. *See* Gaillard, Emmanuel, and John Savage, ed. 1999. *Fouchard, Gaillard, Goldman on International Commercial Arbitration.* The Hague: Kluwer Law International, para. 1594.

[30] *See* Hanotiau, Bernard, and Guy Block. 1998. La loi du 19 mai 1998 modifiant la législation belge relative à l'arbitrage. *ASA Bulletin* 16: 532.

[31] Article 192 of the 1987 Swiss Private International Law Statute.

parties had its habitual residence or business establishment in Belgium.[32] The approach adopted by Swiss lawmakers also found its way into the 1993 Tunisian Arbitration Code,[33] the 1999 Swedish Arbitration Act,[34] the 1996 Peruvian General Arbitration Act,[35] and the 1999 Panamanian Decree-Law No. 5.[36]

Subsequently, in 2011, France followed suit with yet a new twist, granting parties the right to waive an action to set aside the award without any limitation based on localization (as had been the case in Switzerland or Belgium),[37] while maintaining the French courts' review of the award in case of enforcement in France.[38] This illustrates how lawmakers in various countries drew direct inspiration from what they perceived as more attractive legal provisions in other legal systems.

Another telling example of a principle having spread across legal systems is the negative effect of the competence-competence principle. In its simplest formulation, this principle mandates that courts refrain from engaging into the examination of the arbitrators' jurisdiction before the arbitrators themselves have had an opportunity to do so.[39] The clearest expression of this negative effect—a concept this author coined in 1994[40]—could be found in France even prior to its major arbitral reforms of 1980-1981. In the recent past, this principle

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[32] *See* Hanotiau, Bernard, and Guy Block. 1998. La loi du 19 mai 1998 modifiant la législation belge relative à l'arbitrage, *op. cit*., 528.

[33] Article 78(6) of the 1993 Tunisian Arbitration Code.

[34] Article 51 of the 1999 Swedish Arbitration Act. This provision remained unchanged in the revised Swedish Arbitration Act (2019), which sought to make the arbitration process more efficient, even though the grounds for challenging an arbitral award (article 34) were revised.

[35] Article 126 of the 1996 Peruvian General Arbitration Act.

[36] Article 36 of the 1999 Panamanian Decree-Law No. 5.

[37] Article 1522 of the French Code of Civil Procedure.

[38] *See* Burda, Julien. 2013. La renonciation au recours en annulation dans le nouveau droit français de l'arbitrage. *RTD Com* 4: 653.

[39] Gaillard, Emmanuel, and Yas Banifatemi. 2008. Negative Effect of Competence-Competence: The Rule of Priority in Favour of the Arbitrators. In *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice*, ed. Emmanuel Gaillard and Domenico di Pietro, 259-260. London: Cameron May. For a detailed analysis of this principle, *see* Boucaron-Nardetto, Magali. 2013. *Le principe compétence-compétence en droit de l'arbitrage*. Aix-en-Provence: Presses Universitaires d'Aix-Marseille.

[40] *See* Gaillard, Emmanuel. 1994. Convention d'arbitrage. In *Juris Classeur: Droit International*. Fascicle 586-5, paras. 49–50; *Fouchard, Gaillard, Goldman on International Commercial Arbitration*, *op. cit*., esp. para. 660.

has been adopted in numerous jurisdictions around the world,[41] including Hong Kong (since 1992),[42] Singapore (since 2005),[43] Colombia (since 2007),[44] Mauritius (since 2008),[45] the Philippines (since 2009),[46] Venezuela (since 2010),[47] and Argentina (since 2015).[48] When one considers the effects of comparative law borrowing in the context of international arbitration, it is telling that acceptance of the negative effect of the competence-competence principle has grown so much that it has become one of the most significant proxies for how favorable a given jurisdiction is to arbitration.

2. Transnational lawmakers

In addition to being used by national lawmakers, comparative law is a fundamental source of inspiration for transnational lawmakers who act at the multilateral level to devise new rules or codify existing standards that cut across national boundaries. In the international arbitration context, the United Nations Commission on International Trade Law (UNCITRAL), established by the United

[41] *See* Gaillard, Emmanuel. 2018. Actualité de l'effet négatif de la compétence-compétence. In *Le droit à l'épreuve des siècles et des frontières. Mélanges en l'honneur du Professeur Bertrand Ancel*, 679-707. Paris: LGDJ/IPROLEX.

[42] High Court (Hong Kong), 6 July 1992, *Pacific International Lines (Pte) Ltd and another v. Tsinlien Metals and Minerals Co (HK) Ltd* [1993] HKCU 0559.

[43] High Court (Singapore), 7 September 2005, *Dalian Hualiang Enterprise Group Co Ltd and another v. Louis Dreyfus Asia Pte Ltd* [2005] SGHC 161.

[44] Corte Constitucional (Colombia), 14 March 2007, Sentencia de Unificación No. 174/07.

[45] Section 5(2) of the Mauritian International Arbitration Act 2008 (amended in 2013). For cases in which the Supreme Court of Mauritius referred to section 5(2) in granting a stay in favor of arbitration, *see Mall of Mont Choisy v. Pick N' Pay* [2015] SCJ 10 (Chui Yew Cheong, N. Devat and D. Chan Kan Cheong JJ) and *UBS AG v. The Mauritius Commercial Bank Ltd* [2016] SCJ 43 (S. Peeroo, A. Caunhye, D. Chan Kan Cheong JJ).

[46] Supreme Court of the Philippines, "Special Rules of Court on Alternative Dispute Resolution," 1 September 2009, A.M. No. 07-11-08-SC, especially Rules 2.4 ("Policy implementing competence-competence principle").

[47] Tribunal Supremo de Justicia, Sala Constitucional (Venezuela), 3 November 2010, *Astivenca Astilleros de Venezuela C.A. v. Oceanlink Offshore III AS*.

[48] Article 1656 of the 2015 Argentine Civil and Commercial Code. *See also* Cámara Nacional de Apelaciones en lo Comercial, Sala D (Argentina), 28 October 2009, *Harz Und Derivate v. Akzo Novel Coating S.A*.

Nations General Assembly in 1966,[49] is the primary source for such transnational lawmaking.[50]

In the same way as national lawmakers, transnational lawmakers use comparative law to identify general principles, drawing them from various legal systems. Their reasons for doing so are, however, different. National lawmakers generally turn to comparative law in order to find innovative solutions to a given legal issue, often to create an arbitration-friendly regime. In that sense, comparative law is a true source of inspiration, importing solutions that have met with success in other legal systems. Transnational lawmakers, on the other hand, seek to find generally accepted solutions to a given problem. By devising instruments and model laws that are acceptable worldwide, they try to achieve a consensus among States. In contrast to national lawmakers, transnational lawmakers are not concerned primarily with innovative solutions; their goal, rather, is to identify the mainstream answers to existing problems.[51]

C. A practical tool for litigants

Comparative law is an essential tool for those involved in transnational litigation. Given the international feature of this type of disputes, parties will, as a matter of course, resort to comparative law analysis on such diverse issues as the role of domestic public policy, the operation of mandatory rules of the forum, the power to issue anti-suit injunctions, the scope of provisional and interim relief, methods of obtaining evidence, etc. Parties wishing to identify the best venue in which to bring their claims will often need to contemplate these questions by focusing on the strengths and weaknesses of each relevant legal system.

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[49] "Establishment of the United Nations Commission on International Trade Law," U.N. Resolution 2205 (XXI), December 17, 1966.

[50] For the contribution of transnational lawmakers to the formation of transnational legal orders, *see* Halliday, Terence, and Gregory Shaffer, ed. 2015. Transnational Legal Orders. In *Transnational Legal Orders,* 3-72. Cambridge: Cambridge University Press.

[51] *See* Gaillard, Emmanuel. 2010. *Legal Theory of International Arbitration*, para. 54. Leiden: Martinus Nijhoff.

This is even more so in international arbitration, which is an evolving environment—by contrast to court litigation, a relatively static one. In international arbitration, parties must constantly make strategic decisions, given how broadly party autonomy is at play.[52] Comparative law is, in this context, a practical tool which litigants can use to reach the best possible results.

For example, in the context of the constitution of the arbitral tribunal—which, as any party having been involved in an international arbitration is well aware, involves key strategic decisions—, while it is not always possible to control the appointment process, especially in institutional arbitration, parties generally try to ensure that the arbitrator they nominate is not someone intellectually hostile to the arguments they are likely to put forth in the case. In that sense, parties will often take a more "psychological" approach to comparative law, assessing the potential nominee's legal culture and background to determine whether that might have an impact on key aspects or the outcome of the case: is the potential arbitrator likely to apply the conflict-based method or the direct choice method in determining the law applicable to the dispute? Will the arbitrator be inclined to resort to transnational rules, or will he or she have a preference for a choice of law approach that designates one national legal system? These intellectual inclinations may well depend on each arbitrator's legal culture, and a comparative law assessment of these legal cultures might therefore prove necessary in the process of selecting tribunal members suited to the particular needs of the parties and the dispute.

D. A source of law in its own right

A fourth function of comparative law is to serve as a source of law in its own right, as regards the creation of arbitral case law, broadly defined as the body of arbitral awards that can be referred to by parties in support of their case (1), as well as the recognition of transnational rules (2).

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[52] *See* Gaillard, Emmanuel, and Philippe Pinsolle. 2004. Advocacy in International Commercial Arbitration: France. In *The Art of Advocacy in International Arbitration*, ed. R. Doak Bishop, 133-150. Huntington: Juris Publishing.

1. Through arbitral case law

Without delving into theoretical considerations as to the existence and role of arbitral case law,[53] one needs only open an international arbitration brief—any random brief in arbitration proceedings—to see how often practitioners refer to arbitral "precedents" to help buttress their position. In commercial arbitration, for example, one may consider a dispute relating to a construction project in Turkey, with Turkish law as the applicable law and the issue of whether a workers' strike qualifies as an event of *force majeure* under the contract. The party seeking to invoke *force majeure* will of course rely on the relevant sources in Turkish law, but also refer to other cases—not governed by Turkish law—in which prior tribunals decided that a workers' strike was indeed a circumstance of *force majeure*. Recourse to arbitral precedents has been even more widespread in investment treaty arbitration, in which the push for transparency, justified by the public interest feature underlying these types of disputes, has prompted an almost systematic publication of awards.

The phenomenon, however, is not new. As early as the late 1920s and early 1930s, the ICC started publishing arbitral awards in redacted form to serve as reference for the ICC practice.[54] The publication of awards continued in modern times, serving both parties and arbitrators' reasoning. In 1974, the French *Journal du droit international* launched an annual review of ICC arbitral awards (ICSID awards followed in 1986).[55] In 1976, the *Yearbook Commercial Arbitration* made its appearance as another major source of information concerning international arbitral case law. A number of collections of ICC awards have appeared since 1990.[56] The latest development was the ICC's

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[53] On these issues, *see*, *e.g.*, Gaillard, Emmanuel, and Yas Banifatemi, ed. *Precedent in International Arbitration*. 2008. Huntington: Juris Publishing.

[54] On this topic, *see, e.g.*, Stone Sweet, Alec, and Florian Grisel. 2017. *The Evolution of International Arbitration: Judicialization, Governance, Legitimacy,* 122. Oxford: Oxford University Press.

[55] The review of ICC awards was carried out by Y. Derains, S. Jarvin, J.-J. Arnaldez, and D. Hascher, and the review of ICSID awards, by the present author.

[56] Jarvin, Sigvard, and Yves Derains. 1990. *Collection of ICC Arbitral Awards 1974-1985*. Deventer: Kluwer Law and Taxation Publishers, vol. I; Jarvin, Sigvard, Yves Derains, and Jean-Jacques Arnaldez. 1994. *Collection of ICC Arbitral Awards 1986-1990*. Deventer: Kluwer Law and Taxation Publishers, vol. II; Arnaldez, Jean-Jacques, Yves Derains, and Dominique Hascher. 1997. *Collection of ICC Arbitral Awards 1991-1995*. Deventer: Kluwer Law International, vol. III; Arnaldez, Jean-Jacques, Yves Derains, and Dominique Hascher. 2003. *Collection of ICC*

adoption, in 2018, of a new policy geared towards the publication of all awards made from 1 January 2019 (not before two years after their notification to the parties).[57] Even though this policy allows a certain level of flexibility for the parties, through an opt-out procedure and redaction modalities, the fact remains that it has introduced a significant incentive for publication and the sharing of knowledge and prior solutions that comes with it.[58]

2. Through transnational rules

Comparative law is also a fundamental source of transnational rules and general principles of international commercial law—notions which, from a terminological and conceptual standpoint, should be preferred to that of *lex mercatoria*.[59] As this author has explained elsewhere, transnational rules and general principles should not be viewed as a list,[60] but rather as a method.[61] When applying transnational rules, arbitrators should first look at the parties' intentions and see whether they have given an indication as to how the

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Arbitral Awards 1996-2000. Deventer: Kluwer Law International, vol. IV; Arnaldez, Jean-Jacques, Yves Derains, and Dominique Hascher. 2009. *Collection of ICC Arbitral Awards 2001-2007*. Deventer: Kluwer Law International, vol. V; Arnaldez, Jean-Jacques, Yves Derains, and Dominique Hascher. 2013. *Collection of ICC Arbitral Awards* 2008-2011. Deventer: Kluwer Law International, vol. VI; Arnaldez, Jean-Jacques, Yves Derains, and Dominique Hascher. 2019. *Collection of ICC Arbitral Awards 2012-2015.* Deventer: Kluwer Law International, vol. VII. On this issue generally, *see* Chambre de commerce internationale. 1986. L'apport de la jurisprudence arbitrale. Séminaire des 7 et 8 avril 1986. In *Dossiers de l'Institut du droit et des pratiques des affaires internationales.* Paris: ICC Publishing.

[57] *See* International Chamber of Commerce. 2019. Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration.

[58] *See, e.g.*, Cavalieros, Philippe. 2019. Chroniques. Cour internationale d'arbitrage de la Chambre de commerce internationale. *Journal du droit international (Clunet)* 3: 898-899. *See also* Vadi, Valentina. 2015. *Analogies in International Investment Law and Arbitration,* 19. Cambridge: Cambridge University Press.

[59] Unlike *lex mercatoria*, the notions of transnational rules and general principles of international commercial law do not convey the notion of an opposition between national legal systems and the inadequacy of domestic laws, but underscore the fact that transnational rules are, in fact, based on national laws. On this issue, *see Legal Theory of International Arbitration*, *op. cit.*, paras. 52-53.

[60] Mustill, Michael. 1988. The New *Lex Mercatoria*: The First Twenty-Five Years. *Arbitration International* 4: 86–119.

[61] Gaillard, Emmanuel. 2001. Transnational Law: A Legal System or a Method of Decision Making?. *Arbitration International* 17: 59–72.

applicable rules should be determined. If they have not, arbitrators will then be able to carry out a comparative law analysis.

Arbitrators often identify general principles by looking at various legal systems in which those principles are recognized, as well as any relevant international instruments.[62] In using comparative law, arbitrators will need to establish that national laws converge on a particular point, thereby reflecting an international consensus and, thus, a transnational rule that is capable of being applied. That is not to say, however, that a rule must be present in every legal system and find unanimous support in comparative law; the requirement of unanimity would amount to granting veto power to legal systems incorporating outdated or idiosyncratic rules.[63] Instead, arbitrators will seek to ascertain the existence of a broad consensus among States on the content of a specific rule.

Assessing transnational rules in more detail, there appears to be three categories of transnational rules applied by international arbitrators: transnational choice of law rules, transnational substantive rules, and transnational public policy. Comparative law plays a fundamental role in all three.

a. Transnational choice of law rules

In the absence of a choice of the applicable law by the parties, arbitrators generally enjoy wide freedom to determine the law applicable to the dispute before them. The method through which the applicable law should be determined, however, has been the source of much debate.

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[62] Doing so is, in fact, quite similar to identifying "the general principles of law recognized by civilized nations" pursuant to Article 38(1)(c) of the Statute of the International Court of Justice, as public international law scholars have noted. *See*, e.g., Pellet, Alain. 2000. La *lex mercatoria*, 'tiers ordre juridique' ? Remarques ingénues d'un internationaliste de droit public. In *Souveraineté étatique et marchés internationaux à la fin du 20ème siècle – Mélanges en l'honneur de Philippe Kahn*, 61. Paris: Litec.

[63] On this issue, *see* Gaillard, Emmanuel. 1995. Thirty years of *Lex Mercatoria*: Towards the Selective Application of Transnational Rules. *ICSID Review* 10: 208.

One view was that, when selecting the applicable law, arbitrators should apply the ordinary choice of law rules of the seat of the arbitration.[64] This method is problematic to the extent it equates international arbitrators to local judges and disregards the transnational nature of the source of an international arbitrator's powers.[65] As an ICC Tribunal recognized, "contrary to state courts, an international arbitrator is not bound to respect the choice of law rules of the seat of the arbitration."[66]

An approach followed by various instruments is to allow the arbitral tribunal to identify appropriate choice of law rules. This approach dates back to the 1961 European Convention on International Commercial Arbitration[67] and was subsequently adopted in the UNCITRAL Arbitration Rules of 1976[68] and the 1985 UNCITRAL Model Law on International Commercial Arbitration.[69] Arbitrators following this approach will often adopt one of two methods: the "cumulative" method or the method of general principles of private international law.

The cumulative method involves simultaneously applying the choice of law rules of all systems connected with the dispute. Comparative law plays an essential role in this respect, as the cumulative method involves considering the choice of law rules of each legal system connected with the dispute and demonstrating that they point to the same law.[70] The key advantage of this method is to provide results that are as predictable as possible and, as such, respect the parties' expectations. Nevertheless, this method is of no use when the various choice of law rules under consideration lead to different results.

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[64] *See, e.g.*, Mann, Francis. 1967. Lex Facit Arbitrum. In *International Arbitration: Liber Amicorum for Martin Domke*, ed. Pieter Sanders. The Hague: Martinus Nijhoff. For a more recent exposition of this view, see Mance, Jonathan. 2016. Arbitration: A Law unto Itself?. *Arbitration International* 32: 223–241 (from a speech given in Singapore in 2015).

[65] *See* Gaillard, Emmanuel. *Legal Theory of International Arbitration*, *op. cit.*, paras. 40-41; *Fouchard, Gaillard, Goldman on International Commercial Arbitration*, *op. cit*., para. 1541.

[66] Award rendered in ICC Case No. 6294, *Journal du droit international* (1991), 1050.

[67] *See* Article VII, paragraph 1 of the 1961 European Convention on International Commercial Arbitration.

[68] Article 33 of the UNCITRAL Arbitration Rules (1976).

[69] Article 28(2) of the UNCITRAL Model Law on International Commercial Arbitration (1985).

[70] On this method, *see* Derains, Yves. 1972. L'application cumulative par l'arbitre des systèmes de conflit de lois intéressés au litige (A la lumière de l'expérience de la Cour d'Arbitrage de la Chambre de Commerce Internationale). *Revue de l'arbitrage*: 99-121.

The second method, that of the general principles of private international law, involves finding common principles in the main systems of private international law.[71] Arbitrators using this method will often look for common principles as reflected in arbitral case law or international instruments such as the Rome I Regulation,[72] which draw upon a comparative law analysis and reflect consensus on a given topic.[73]

In addition to these two approaches, arbitrators have the option of choosing the law applicable to the dispute without referring to any choice of law rule—this is referred to as the direct choice or "*voie directe*" method.[74] This method, too, will often lead to the arbitral tribunal relying on a comparative law assessment. Indeed, arbitrators' application of the direct choice method is almost always the result of an unstated and implicit application of transnational choice of law rules based on the assessment of the respective value of different connecting factors (*e.g.*, the place of signature of the contract, the place of performance, or the habitual residence of the parties) and consideration of arbitral precedents, something that is typical of the transnational rules methodology.

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[71] *See, e.g.,* Final Award rendered in ICC Case No. 8672 (1996), *ICC International Court of Arbitration Bulletin* (2001) 12, in which the arbitrator "on the basis of the general concepts of private international law, defines the criteria to determine the law applicable to an agency contract as those of the closest connection with the country in which the characteristic performance of the contract is to take place and also the place where the agent has its main location."

[72] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations.

[73] For a partial codification of transnational choice of law rules applicable to contracts by The Hague Conference on Private International Law, *see* the Principles on Choice of Law in International Commercial Contracts (formally approved by the Hague Conference on 19 March 2015). A commentary of the Principles is forthcoming in 2021: Girsberger, Daniel, Thomas Kadner Graziano, and Jan Neels, ed. *Choice of Law in International Commercial Contracts: Global Perspectives on the Hague Principles*. Oxford University Press.

[74] For a recent example in which the arbitrators applied transnational rules of law – in particular, the 2010 UNIDROIT Principles –, *see* Award rendered in ICC Case, *Uzuc S.A. v. Prakash Steelage Ltd.* (unpublished), Philippe Cavalieros, President; Grigore-Virgil Florescu and Rajan Jodhraj Kochar, arbitrators. On 25 February 2020, the Paris Court of Appeal rejected Prakash Steelage's challenge to the award, which had noted that the award was "largely international" and relied on the direct method for the choice of the "rules of law" applicable to the matter.

b. Transnational substantive rules

Substantive rules of transnational origin will most often be applied by international arbitrators in two situations: where they are to rule upon the existence and validity of the arbitration agreement, and where the parties intended to submit the merits of their dispute to such rules but did not specify the applicable law.

When asked to rule on the existence and validity of the arbitration agreement, arbitrators have the option of applying transnational substantive rules instead of the substantive rules designated through the choice of law method, which may lead to results that are unpredictable or at odds with the parties' legitimate expectations. A well-known example is provided by the *Dalico* case, which concerned a dispute between a Danish party and a Libyan party about a works contract performed in Libya.[75] The parties had provided that Libyan law would govern the contract, but had also referred to a document stipulating that any disputes would be resolved by ICC arbitration in Paris. The arbitrators, and subsequently the French courts upon reviewing the award, took the view that it was not necessary to apply the substantive law of any country to decide whether the arbitration agreement is valid. Instead of having the validity of the arbitration agreement depend upon the idiosyncrasies of Libyan or Danish law, they based their decisions on generally accepted principles of international commerce.

With respect to the merits of the dispute, parties may choose to have their disputes governed by transnational rules by referring, for example, to general principles of law. In such cases, arbitrators are bound to give effect to such a choice, whether or not they consider it to be appropriate. When doing so, arbitrators will need to carry out a comparative law analysis, taking into account various national legal systems, arbitral case law, international conventions, and any relevant codifications such as the UNIDROIT Principles of International Commercial Contracts.

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[75] Cour de cassation (France), *Municipalité de Khoms El Mergeb v. Société Dalico*, 20 December 1993, *Journal du droit international*, 1994, 432, note by Gaillard; *Revue de l'arbitrage*, 1994, 116, note by Gaudemet-Tallon; *Journal du droit international*, 1994, 690, note by Loquin; *Revue critique de droit international privé*, 1994, 663, note by Mayer.

In the absence of agreement between the parties, arbitrators may apply general principles of law drawn from comparative law and international arbitral practice, especially when two or more legal systems are equally closely linked to the dispute. A classic example is the *Norsolor* case, decided in 1979 by an arbitral tribunal[76] having its seat in Vienna.[77] Another example is provided by ICC Case No. 9875, in which the Parties had not specified which law should govern their contractual relationship. The claimant argued that the tribunal should apply the direct choice method leading to the application of French law, whereas the respondent considered that the law of the place where the contract was executed should apply, namely Japanese law. In its partial award, the tribunal considered that "the difficulties to find decisive factors qualifying either Japanese or French law as applicable to the contract reveal the inadequacy of the choice of a domestic legal system to govern a case like this. […] The most appropriate 'rules of law' to be applied to the merits of this case are those of the *lex mercatoria*, that is the rules of law and usages of international trade which have been gradually elaborated by different sources such as the operators of international trade themselves, their associations, the decisions of international arbitral tribunals and some institutions like UNIDROIT and its recently published Principles of International Commercial Contracts."[78] Although one may regret the amalgamation between the notions of transnational rules, *lex mercatoria* and usages of international trade, each covering a different concept, this example shows the significance of comparative law to the outcome of the dispute in the absence of a choice of the applicable law by the parties.

c. Transnational public policy

Comparative law methodology also plays a key role in the assessment and application of "transnational public policy" principles, defined as public policy

[76] Bernardo Cremades, President; Jacques Ghestin and Hans Rudolf Steiner, arbitrators.

[77] Award rendered in ICC Case No. 3131, *Pabalk Ticaret Sirketi v. Norsolor*, 26 October 1979, *Revue de l'arbitrage* (1983), 525. On the subsequent proceedings, *see, e.g.*, Goldman, Berthold. 1983. Une bataille judiciaire autour de la *lex mercatoria*. L'affaire *Norsolor*. *Revue de l'arbitrage* 379–409.

[78] Partial Award rendered in ICC Case No. 9875 (1999), *ICC International Court of Arbitration Bulletin* (2001), 12: 102.

derived from the comparison of the fundamental requirements of domestic laws and public international law.[79]

The issue arises both for arbitrators, who may have to disregard the law chosen by the parties in situations where they find that doing so would contravene the fundamental values of the international community (i), and for judges, who will disregard the law that would normally apply based on a local understanding of international public policy (ii).

i. For arbitrators

Because they do not belong to or derive their adjudicatory powers from any State specifically, international arbitrators must seek to uphold the values that are widely accepted by the international community. Many authors have expressed strong support in favor of the view that arbitrators may seek to apply transnational public policy principles. For example, in 1977, Frédéric Eisemann referred to the arbitrators' discretion to make a decision on the merits "within the sole limits of truly international public policy."[80] At the 1986 Congress of the International Council for Commercial Arbitration (ICCA) in New York, Pierre Lalive cogently explained the concept of transnational public policy and its strong roots in international arbitration.[81] In 1989, the Institute of International Law adopted a Resolution whereby, "[i]n no case shall an arbitrator violate principles of international public policy as to which a broad consensus has emerged in the international community."[82] Authors such as Philippe Kahn,[83]

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[79] *See* Lalive, Pierre. 1987. Transnational (or Truly International) Public Policy and International Arbitration. In *Comparative Arbitration Practice and Public Policy in Arbitration*, ed. Pieter Sanders. ICCA Congress Series 3.

[80] Eisemann, Frédéric. 1977. La *lex fori* de l'arbitrage commercial international. In *Travaux du Comité français de droit international privé,* 198. Paris: Dalloz.

[81] *Comparative Arbitration Practice and Public Policy in Arbitration*, *op. cit*., 310-311. *See* also, Lalive, Pierre. 2009. L'ordre public transnational et l'arbitre international. In *New Instruments of Private International Law. Liber Fausto Pocar*. ed. Gabriella Venturini and Stefania Bariatti, 599. Milan: Giuffrè 2.

[82] Institute of International Law, Session of Santiago de Compostela. 1989. Arbitration Between States, State Enterprises or State Entities, and Foreign Enterprises, Article 2, *Yearbook*, 63: 326.

[83] Kahn, Philippe. 1989. Les principes généraux du droit devant les arbitres du commerce international. *Journal du droit international* 2: 305-327.

Eric Loquin,[84] Jean-Baptiste Racine[85] and Lotfi Chedly[86] have embraced similar views.

In line with this reasoning, there has been a steady emergence of transnational public policy principles in arbitral case law. For example, in its award on jurisdiction in *Framatome v. The Atomic Energy Organization of Iran (AEOI)*, the arbitral tribunal[87] identified "a general principle, which today is universally recognized in relations between States as well as in international relations between private entities (whether the principle be considered a rule of international public policy, an international trade usage, or a principle recognized by public international law, international arbitration law or *lex mercatoria*)," whereby a State "be prohibited from reneging on an arbitration agreement entered into by itself or, previously, by a public entity […]."[88]

Transnational public policy principles have also been identified in cases in which arbitrators were asked to assess evidence of illicit activities, influence peddling or corruption.[89] In such cases, comparative law can be used to show the emergence of a consensus among States to condemn these practices. In investment treaty arbitration, the most well-known example is *World Duty Free Co. Ltd. v. Republic of Kenya*, in which the arbitral tribunal[90] explored the concept of international public policy and carried out an in-depth comparative law analysis. The tribunal concluded that "[i]n light of domestic laws and international conventions relating to corruption, and in light of the decisions

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[84] Loquin, Eric. 1996. Les manifestations de l'illicite. In *L'illicite dans le commerce international*. ed. Philippe Kahn and Catherine Kessedjian, 273. Paris: Litec.

[85] Racine, Jean-Baptiste. 1999. *L'arbitrage commercial international et l'ordre public*, 473. Paris: LGDJ.

[86] Chedly, Lotfi. 2002. *Arbitrage commercial international & ordre public transnational*. Tunis: Centre de Publication Universitaire. *See also*, Chedly, Lofti. 2017. Où va le for arbitral ? In *Où va l'arbitrage international ? De la crise au renouveau*. Journées d'études méditerranéennes en l'honneur du professeur Ali Bencheneb. ed. Filali Osman and Ahmet Cemil Yildirim, 145-162. Paris: LexisNexis.

[87] Pierre Lalive, President; Berthold Goldman and Jacques Robert, arbitrators.

[88] Award on jurisdiction rendered in ICC Case No. 3896 on April 30, 1982, *Framatome v. The Atomic Energy Organization of Iran (AEOI)*, *Journal du droit international*, 1984, 72. On this case, *see* Oppetit, Bruno. 1984. Arbitrage et contrats d'Etat. L'arbitrage *Framatome et autres c/ Atomic Energy Organization of Iran*. *Journal du droit international* 37-57.

[89] *See* Gaillard, Emmanuel. 2019. The Emergence of Transnational Responses to Corruption in International Arbitration, *Arbitration International* 35: 1-19.

[90] H.E. Judge Gilbert Guillaume, President; Hon. Andrew Rogers QC and V.V. Veeder QC, arbitrators.

taken in this matter by courts and arbitral tribunals, this Tribunal is convinced that bribery is contrary to the international public policy of most, if not all, States or, to use another formula, to transnational public policy. Thus, claims based on contracts of corruption or on contracts obtained by corruption cannot be upheld by this Arbitral Tribunal."[91]

A similar reasoning has been applied in international commercial arbitration. Arbitrators have referred to the principle that contracts intended to conceal bribery are invalid; as an arbitral tribunal found, the unlawfulness of one such contract resulted not only from French law but "also from the understanding of international public policy as recognized by most nations."[92] In another case, which concerned a dispute over a commission payable under an agency agreement (the applicable substantive law being Swiss law), the sole arbitrator found that the parties' 5% commission agreement was a fraudulent arrangement, ultimately destined to the respondent. The arbitrator considered that he was "not bound by a specific Swiss notion of public policy," that "the yardstick of public policy against which the Parties' relationship must be measured is clearly an international or universal one", and that "[i]nternational commercial relations must meet certain standards of basic morality in order to be able to claim enforcement of the obligations contracted for."[93] As shown in these cases, arbitrators have relied on comparative law to identify the broad consensus among States on specific issues.

ii. For domestic courts

As in international arbitration, domestic courts are also required to ensure that arbitral awards do not violate international public policy requirements, whether in the context of an action to set aside or in the context of enforcement proceedings, be it under the law of the place of enforcement or pursuant to the

[91] Award in *World Duty Free Co. Ltd. v. Republic of Kenya*, ICSID Case No. ARB/00/7, 4 October 2006, para. 157 and the analysis on paras. 139-157.

[92] Award rendered in ICC Case No. 3913 (1981), *Collection of ICC Arbitral Awards 1974-1985*, 497-498.

[93] Award rendered in ICC Case No. 15300 (2011), *ICC Dispute Resolution Bulletin* (2016) 1: 81-84. On this issue, *see* Gaillard, Emmanuel. 2017. La corruption saisie par les arbitres du commerce international, *Revue de l'arbitrage* 3: 805-838.

1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention).[94]

Although the New York Convention refers to the public policy of the enforcement forum, nothing prevents domestic courts from using comparative law to identify and apply principles that have some claim to universality. In the *Westland* decision, for instance, the Swiss Federal Tribunal took the view that the review of arbitral awards in Switzerland should be based on "transnational or universal public policy including 'fundamental principles of law which are to be complied with irrespective of the connections between the dispute and a given country.'"[95] In subsequent case law, however, Swiss courts have adopted a more domestic approach to international public policy.[96]

In France, in the *Fougerolle* case, the Paris Court of Appeal referred to the existence of a "truly international and universally applicable" public policy.[97] In the *European Gas Turbines* case, the same court referred to the "ethics of international business as understood by the majority of States composing the international community."[98] In yet another case, it defined international public policy as "the body of rules and values whose violation the French legal order cannot tolerate even in situations of international character."[99]

Recent examples of the emergence of such rules and values abound. In the 2017 *Belokon* case, the Paris Court of Appeal set aside an award on grounds that the award would allow the award creditor, Mr. Belokon, to profit from

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[94] New York Convention, Art. V para 2(b). For analysis of this provision, *see* UNCITRAL Secretariat. 2016. *Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)*, ed. Emmanuel Gaillard and George Bermann. Vienna: United Nations Publishing and Library, 237-261.

[95] Swiss Federal Supreme Court, 19 April 1994, *Westland Helicopters Ltd.*, *Arrêts du Tribunal Fédéral* 120 II 155.

[96] *See, e.g.*, Swiss Federal Tribunal, 10 October 2011, Decision 5A_427/2011; Swiss Federal Tribunal, 28 July 2010, Decision 4A_233/2010 (an award contravenes public policy if it violates the Swiss concepts of justice in an "intolerable manner").

[97] Paris Court of Appeal, 25 May 1990, *Fougerolle v. Procofrance*, *Revue critique de droit international privé*, 1990, p. 753.

[98] Paris Court of Appeal, 30 September 1993, *European Gas Turbines SA v. Westman International Ltd*., *Revue de l'arbitrage*, 1994, 359, note by Bureau; *Revue critique de droit international privé*, 1994, 349, note by Heuzé; *Revue trimestrielle de droit commercial*, 1994, 703, note by Loquin; *Yearbook Commercial Arbitration*, 1995, 198.

[99] Paris Court of Appeal, 16 October 1997, *Agence pour la sécurité de la navigation aérienne en Afrique et à Madagascar v. M. N'Doye Issakha*.

money laundering.[100] The Court considered various elements which constituted "serious, precise and converging" indicators of money laundering and set aside the award due to "a manifest, effective and material violation of international public policy."[101] In the 2017 *Democratic Republic of Congo* case, the Paris Court of Appeal found that a violation of public procurement proceedings could constitute a "particularly significant indicia" of a violation of public policy, even though this could not by itself justify setting aside the award.[102]

In all these cases, the French courts considered international instruments as representing the consensus of States when deriving their view of international public policy. The Paris Court of Appeal referred to the UN Convention Against Corruption[103] in both the *Belokon* and *Democratic Republic of Congo* cases. In yet another recent case, *MK Group*, the Paris Court of Appeal referred, somewhat unexpectedly, to a 1962 resolution of the United Nations General Assembly regarding the permanent sovereignty of nations over their natural resources.[104] The Court's decision—reminiscent of the debates over a New International Economic Order in the 1970s—illustrates how domestic courts may seek to identify the "international consensus" of States on a given point in order to bring to light their own view of international public policy.

II. THE METHODS OF COMPARATIVE LAW IN INTERNATIONAL ARBITRATION

[100] Paris Court of Appeal, 21 February 2017, *Valeri Belokon v. The Kyrgyz Republic*. *See also*, Paris Court of Appeal, 28 May 2019, *Société Alstom Transport SA et autres v. société Alexander Brothers Ltd.*, *Revue de l'arbitrage*, 2019, 850, note by Gaillard.

[101] *Ibid*. For an analysis of the case, *see* Gaillard, Emmanuel. The emergence of transnational responses to corruption in international arbitration, *op. cit*., 8-9.

[102] Paris Court of Appeal, 16 May 2017, *République démocratique du Congo v. Société Customs and Tax Consultancy LLC*, *Revue de l'arbitrage*, 2017, 1066.

[103] United Nations Convention Against Corruption (adopted 31 October 2003 and entered into force 14 December 2005).

[104] Paris Court of Appeal, 16 January 2018, *Société MK Group v. S.A.R.L. ONIX*, *Journal du droit international*, 2018, 898, note by Gaillard. The resolution is General Assembly Resolution 1803 (XVII) of 14 December 1962, "Permanent Sovereignty over Natural Resources."

Once it has been decided that a comparative law analysis is useful or necessary, a related question arises as to *how* comparative law should be used. It therefore becomes necessary to study how a comparative law trend can be established (A) and the requirements of a cogent comparative law analysis (B).

A. Evidence of comparative law

Various methods may be used to develop a reasoning based on comparative law in international arbitration. Experts may be called upon to deliver comparative law opinions (1) or parties may wish to rely on pre-existing compilations, in addition to performing a comparative law analysis in their pleadings (2). A related question is whether arbitrators should develop their own legal reasoning through comparative law research and analysis (3).

1. The role of comparative law expert opinions

Parties sometimes convey their intention that the contract be governed by transnational rules, general principles of law or principles common to several legal systems.[105] In such cases, leading arbitrators or scholars, acting as experts, may be called upon to analyze the contents of those rules on the basis of an in-depth comparative law analysis. Such expert assistance may help arbitrators understand unfamiliar aspects of legal traditions or laws being applied; cross-examining such experts may help arbitrators quickly and cogently understand differences and similarities between the parties' positions.

An example of this reliance on comparative law opinions is found in an arbitration conducted under the aegis of the ICC, with London as the seat of the arbitration.[106] In that case, two large North American competitors had signed a pre-bid agreement with a Middle Eastern company which provided that the

[105] *See, e.g.*, Ravillon, Laurence. 2017. Arbitrage international et droit anational applicable au fond du litige. In *Où va l'arbitrage international ? De la crise au renouveau. Journées d'études méditerranéennes en l'honneur du professeur Ali Bencheneb*. ed. Filali Osman and Ahmet Cemil Yildirim, 225-238. Paris: LexisNexis.

[106] The author acted as expert in this arbitration, in which the award was not published.

successful bidder would meet promptly to negotiate in good faith mutually satisfactory supply and service agreements. One of the North American companies won the contract, but its discussions with the Middle Eastern company were unsuccessful and it initiated an ICC arbitration for a declaration that the pre-bid agreement had been validly terminated. Meanwhile, the Middle Eastern company alleged that the negotiations had broken down because the North American company had failed to cooperate and negotiate in good faith as required by the contract. An expert legal opinion was requested on the topic of whether the arbitral tribunal could award punitive damages—as damages exceeding compensatory damages—assuming the Tribunal had jurisdiction to do so. The expertise involved an analysis of transnational public policy and the compatibility of an award of punitive damages with those requirements; the analysis required a comparative law approach based on a review of the relevant international conventions (such as the 1980 Vienna Convention on International Sales of Goods), the legislation enacted in various countries (including England, France, Germany, Australia, Canada, South Africa, and the United States), and international principles (such as those reflected in the UNIDROIT Principles). Based on this analysis, the expert reached the conclusion that an award of damages in excess of compensatory damages was an idiosyncrasy of one law (namely, US law) and that it would contravene transnational public policy, such that the tribunal should refrain from ordering it.

It should be noted that the role attributed to experts in the context of arbitration proceedings is not different from that before domestic courts, especially in jurisdictions that treat foreign law as fact. This is the case both in England, where foreign law must in general be proved by means of an expert witness,[107] and in France, where the issue of the application of foreign law has led to numerous decisions by the Court of cassation (recognizing that experts

[107] *See Dicey, Morris & Collins on the Conflict of Laws*. 2012 [updated 2019], ed. Lord Collins and Jonathan Harris. London, Sweet & Maxwell, para. 9-013; Hartley, Trevor. 1996. Pleading and Proof of Foreign Law: The Major European Systems Compared. *The International and Comparative Law Quarterly* 45: 283.

may be called upon to produce a "*certificat de coutume*," namely a written opinion accompanying the relevant documentation).[108]

2. Pre-existing compilations or codifications

Parties and arbitrators seeking to apply comparative law may also rely on pre-existing compilations or codifications, such as those produced by international institutions or international organizations in order to unify general principles of law. These institutions or international organizations include the ICC and UNCITRAL, both of which have played key roles in this respect.[109]

In addition to the instruments produced by these institutions and international organizations, which may be used alongside national legal rules, other works have codified and harmonized international commercial contracts law. For example, in May 1994, UNIDROIT produced the text of the "Principles of International Commercial Contracts," which represented "a system of rules of contract law which are common to existing national legal systems or best adapted to the special requirements of international commercial transactions."[110] The 119 articles of the UNIDROIT Principles were a remarkable work of comparative law; in fact, it was pointed out that they were "the result of thorough comparative studies carried out by lawyers coming from totally different cultural and legal backgrounds."[111] The Principles have become one of

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[108] *See* Cour de cassation, Etude annuelle 2017. 2018. *Le juge et la mondialisation dans la jurisprudence de la Cour de cassation.* Paris: La Documentation française (esp. chapter 1, "Le juge et la circulation des règles nationales").

[109] *See, e.g.*, with regards to the ICC, Final Award rendered in ICC Case No. 8502 (1996), *ICC International Court of Arbitration Bulletin* (1999) 10: 73, in which the Tribunal found that "the Parties have, to a large extent, agreed to submit their relationship to recognized trade usages such as the INCOTERMS or the Uniform Customs and Practice for Documentary Credits (UCP), published by the ICC. The Arbitral Tribunal considers that by referring to both the INCOTERMS and the UCP 500 the Parties showed their willingness to have their Contract governed by international trade usages and customs."

[110] UNIDROIT Principles of International Commercial Contracts (1994), Preamble, paragraph 4(a). The fourth edition was published in 2016.

[111] *Ibid.*, Comment 2 to Article 1.6. On these principles, *see, e.g.*, International Chamber of Commerce. 1995. The UNIDROIT Principles for International Commercial Contracts - A New *Lex Mercatoria*?. ICC Publication No. 490/1; Berger, Klaus Peter. 1997. The *Lex Mercatoria* Doctrine and the UNIDROIT Principles of International Commercial Contracts. *Law and Policy in International Business* 28: 943-990.

the most successful soft law instruments in the international arbitration context,[112] being used in numerous cases.[113]

The UNIDROIT Principles have been followed by other instruments seeking to codify and harmonize contract law, such as the Principles of European Contract Law (PECL), initially published in 1995 and subsequently revised and expanded.[114] In addition, some compilations have been carried out by academic institutions, such as the TransLex Principles produced by the Center for Transnational Law (CENTRAL) at the University of Cologne, Germany.[115]

This shows that, contrary to an old criticism that there is only a handful of general principles of law, hundreds of them have, in fact, been identified. Those who fear that general principles elaborated by different institutions may contradict each other should be reassured by the fact that the notion of general principles (or transnational rules) builds on a commonality of substance and consensus that, by definition, are designed to discard discrepancies and isolated instances. Comparative law is, in the last instance, the key tool to establish the existence of a trend.

3. The arbitral tribunal's knowledge of comparative law

When the parties to a contract have elected to have their contractual relations governed by general principles of law or transnational rules, an important question is whether arbitrators can use their own knowledge and understanding of comparative law to ascertain the contents of these general

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[112] *See, e.g.*, Oser, David. 2008. *The UNIDROIT Principles of International Commercial Contracts: A Governing Law?.* Leiden: Martinus Nijhoff; Bonell, Michael. 2005. *An International Restatement of Contract Law: the UNIDROIT Principles of International Commercial Contracts*. Leiden: Brill Nijhoff; Ben Hamida, Walid. 2012. Les principes d'UNIDROIT et l'arbitrage transnational: l'expansion des principes d'UNIDROIT aux arbitrages opposant des Etats ou des organisations internationales à des personnes privées. *Journal du droit international* 4: 1213-1242.

[113] *See, e.g.*, Final Award rendered in ICC Case No. 11265 (2003), *ICC International Court of Arbitration Bulletin* (2010) 21 : 68, in which the Tribunal noted that it was "autorisé à se fonder sur les Principes UNIDROIT relatifs aux contrats du commerce international, en tant qu'ils constituent une codification des usages commerciaux et expriment des principes généraux du droit des contrats."

[114] Ole, Lando, and Hugh Beale, ed. 1999. *Principles of European Contract Law, Parts I and II, Prepared by the Commission on European Contract Law*. Kluwer Law International. Parts I and II revised 1998, Part III 2002.

[115] *See* Berger, Klaus Peter. 2019. *TransLex-Principles with Commentary*. Center for Transnational Law Cologne; Berger, Klaus Peter. 2010. *The Creeping Codification of the New Lex Mercatoria.* Wolters Kluwer Law & Business.

principles or whether they should only rely on elements that were directly pleaded by the parties. Much has been written on this issue under the rubric of "*jura novit curia*"—or, as applied to the arbitration context, "*jura novit arbiter*."[116]

Given the broad powers granted to the arbitrators to resolve the dispute before them,[117] they may rely on their own knowledge of foreign or comparative law while at the same time being required, as a matter of due process, to give the parties a full opportunity to be heard on the applicable rules of law with respect to key issues of the case.[118]

B. The requirements of a cogent comparative law analysis

Comparative law methods and reasoning raise a number of important theoretical difficulties: whether the comparative law approach should focus on similarities or differences between legal systems (**1**), and whether the nature of the comparative law method is static or dynamic (**2**).

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[116] *See, e.g*. Ferrari, Franco, and Giuditta Cordero-Moss ed. *Iura Novit Curia in International Arbitration.* Huntington: Juris, 2018; Cordero-Moss, Guiditta. 2016. The Arbitral Tribunal's Power in Respect of the Parties' Pleadings as a Limit to Party Autonomy on *Jura Novit Curia* and Related Issues. In *Limits to Party Autonomy in International Commercial Arbitration*, ed. Franco Ferrari, 289-330. New York: JurisNet; Kaufmann-Kohler, Gabrielle. 2004. "*Iura Novit Arbiter*" – Est-ce bien raisonnable ? Réflexions sur le statut du droit de fond devant l'arbitre international. In *De Lege Ferenda: Réflexions sur le droit desirable en l'honneur du Professeur Alain Hirsch*, ed. Anne Héritier Lachat and Laurent Hirsch, 71-78. Geneva: Slatkine.

[117] *See*, generally, Banifatemi, Yas. *The Powers of the Arbitrators* (forthcoming with Martinus Nijhoff), from a Course delivered at The Hague Academy of International Law as part of the Private International Law session of August 2019.

[118] This principle is illustrated by the French Cour de cassation's decision in the *Malicorp* case, in which the arbitral tribunal based its decision on articles of the Egyptian Civil Code which had not been contemplated or discussed by the parties, with the result that "the tribunal had violated the principle of due process and that the award could be neither recognized nor enforced in France." *See* Cour de cassation (France), First Civil Chamber, 23 June 2010, *Malicorp v. Government of the Arab Republic of Egypt*, *Revue de l'arbitrage*, 2011, 446–448.

1. Identification of trends or praise of difference

When relying on comparative law methods and reasoning to solve a legal problem, should one seek to emphasize similarities or differences?

This debate is, in fact, quite old: in the late nineteenth century, when great national codifications were underway, the goal was primarily to observe similarities rather than differences between legal systems.[119] As Esmein, a nineteenth-century French jurist, explained at the 1900 Paris Congress, legal systems could be placed into various "families," which shared common features.[120] In the twentieth century, the debate refocused on the notion of a "functional method"—or, rather, the "functional methods," as many concepts of functionalism may be identified[121]—which is based on the premise that institutions, no matter how different, are in fact comparable if they perform similar functions in different legal systems.[122] Meanwhile, other scholars emphasized the study of differences in their approach to comparative law. Legrand has forcefully argued in favor of an approach that "calls for the voice of the other […] to be allowed to be heard above the chatter seeking to silence it."[123] Finally, rejecting the strict dichotomy between the approaches that seek to emphasize either the similarities or the differences between legal systems, other scholars have tried to forge a middle path between them.[124]

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[119] *See* Dannemann, Gerhard. 2019. Comparative law: Study of similarities or differences?. In *Oxford Handbook of Comparative Law*, ed. Mathias Reinmann and Reinhard Zimmermann, 392-293. Oxford: Oxford University Press. As Dannemann points out, however, "unification can only occur where there are substantial differences to begin with."

[120] Esmein, Adhémar. 1900. Le droit comparé et l'enseignement du droit. *Nouvelle revue historique de droit français et étranger*. 24: 489-498. Esmein distinguished four such legal families in the Western world (the Latin, Germanic, Anglo-Saxon, and Slavic ones), as well as a fifth legal family (Islamic law).

[121] *See* Michaels, Ralf. 2019. The Functional Method of Comparative Law. In *Oxford Handbook of Comparative Law*, ed. Mathias Reinmann and Reinhard Zimmermann, 345-389. Oxford: Oxford University Press.

[122] The reference text on this issue is Zweigert, Konrad, and Hein Kötz. 1998. Chapter 3, The Method of Comparative Law. *An Introduction to Comparative Law*, 3rd edition (trans. Tony Weir), 33-47. Oxford: Oxford University Press.

[123] Legrand, Pierre. 2003. The Same and the Different. In *Comparative Legal Studies: Traditions and Transitions*, ed. Pierre Legrand and Roderick Munday, 250. Cambridge: Cambridge University Press.

[124] *See* Dannemann, *Comparative law: Study of similarities or differences?*, *op. cit*, at 398-400.

While it is unlikely that arbitrators or parties in international arbitration will have to grapple with such theoretical issues—to the extent their effort is generally geared towards a concrete result—the discussion over whether comparative law should focus on similarities or differences between legal systems does exist in international arbitration. Major international arbitration treatises have adopted fundamentally different approaches on this issue. For example, this author's *Fouchard Gaillard Goldman on International Commercial Arbitration* highlights the trends and similarities between the solutions laid down by the arbitration laws in various countries, whereas Poudret and Besson's *Comparative Law of International Arbitration* underscores that differences "remain more numerous and important than some arbitration practitioners would like to admit."[125] That said, in practice, Poudret and Besson's excellent work—as many other comparative law studies—is often used to highlight trends, not differences, between legal systems, which is a somewhat ironic outcome.[126]

2. The dynamic nature of the comparative law approach

An important difference between a classic conflict-of-laws methodology and a comparative law analysis is that, while the former is static and contemplates the conflict between national laws at a given point in time, the latter is dynamic and takes into account the evolution of national laws. The

[125] Poudret, Jean-François, and Sébastien Besson. 2007. *Comparative Law of International Arbitration*. London: Sweet & Maxwell, vi.

[126] For example, the first edition of Seraglini and Ortscheidt's *Droit de l'arbitrage interne et international* (Domat Montchestien, 2013, para. 710 and footnote 612) quotes Poudret and Besson's *Droit comparé de l'arbitrage international* in support of the proposition that an arbitration agreement can be terminated for good reason (*juste motif*). In fact, Poudret and Besson (at para. 381) show that there is no consensus on the issue: while "the German courts have been receptive to the arguments of a party seeking to terminate the arbitration agreement," this is not necessarily the case in other countries, such as Switzerland. The reference to Poudret and Besson's treatise is omitted in the new (2019) edition of Seraglini and Ortscheidt's work which, oddly however, continues to state that an arbitration agreement can be terminated for good reason, which is a very questionable proposition (Seraglini and Ortscheidt. 2019. *Droit de l'arbitrage interne et international*. Paris: LGDJ, para. 198).

comparative law method thus registers changes that occur in various legal systems over time and tries to identify legal trends.

One may consider, for instance, a situation in which the parties have not determined the law applicable to the dispute. Various legal systems are connected with the dispute, including one that expressly accepts the doctrine of change in circumstances (*imprévision*), while in another one the courts refuse to adapt a contract to meet a change in circumstances owing to a strict application of the principle of *pacta sunt servanda*. Arbitrators using a classic conflict-of-laws methodology will not take into account broader trends and evolutions when determining the applicable law. Nevertheless, arbitrators relying on a comparative law approach will note that, unlike in the past,[127] the doctrine of *imprévision* has become widely accepted at both at the national and transnational levels, in no small part due to the widespread use of long-term contracts. This growing recognition—in such instruments as the UNIDROIT Principles[128] and the Principles of European Contract Law,[129] under certain circumstances—suggests that the doctrine of *imprévision* is now recognized as a general principle of law. This illustrates the dynamic nature of the comparative law methodology and how it may be used by arbitrators to identify the law that will ultimately prevail.

Conclusion

Comparative law is a tool: arbitration practitioners and scholars should not only be aware of the vast opportunities offered by a comparative law analysis, but they may find it deeply rewarding to broaden their legal horizons by

[127] For awards in which arbitrators refused to adapt a contract to meet a change in economic circumstances (especially before the doctrine of *imprévision* was finally introduced into French contract law), *see, e.g.*, Final Award rendered in ICC Case No. 15814 (2010), *Journal du droit international* (2019) 3: 906-907 ("Attempts to expand the doctrine of imprévision to private contracts have been regularly frustrated by the [French] Cour de cassation, which has only been inclined to excuse performance of contractual obligations if it is literally impossible (*force majeure* excuse)"); Final Award rendered in ICC Case No. 8873 (1997), *ICC International Court of Arbitration Bulletin* (1999) 10: 81 (the tribunal refused to apply the UNIDROIT Principles relating to hardship, considering that such principles "ne sont pas encore 'mûrs' pour se transformer en une règle uniforme et autonome capable de s'imposer comme usage").

[128] *See* Article 6.2.2 of the UNIDROIT Principles.

[129] *See* Article 6:111 of the Principles of European Contract Law.

engaging in such analysis. But comparative law is also a function: second nature to arbitrators, a source of inspiration for lawmakers, a tool for litigants, and a source of law in its own right.

Both theory and practice show that, much more than an intellectual pastime, comparative law is an essential feature of, and deeply ingrained in, modern arbitral practice. In many ways, comparative law in international arbitration serves as a common culture among arbitrators. In this sense, it serves a fundamental unification function, against the backdrop of a true international arbitral legal order.