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LEGAL AUTHORITIES AND COMPARATIVE LAW IN INTERNATIONAL COMMERCIAL ARBITRATION:

BEST PRACTICES VERSUS EMPIRICALLY DETERMINED ACTUAL PRACTICES

S.I. Strong

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LEGAL AUTHORITIES AND COMPARATIVE LAW IN INTERNATIONAL COMMERCIAL ARBITRATION: BEST PRACTICES VERSUS EMPIRICALLY DETERMINED ACTUAL PRACTICES

S.I. Strong[1]

Résumé

Pendant plusieurs années, le droit comparé a été considéré comme un élément central de l'arbitrage international, en particulier en ce qui concerne les questions de procédure. Non seulement des organisations intergouvernementales comme la Commission des Nations Unies pour le droit commercial international ont soutenu l'idée que les juges et les avocats devraient s'appuyer sur le consensus international pour interpréter des instruments internationaux tels que la Convention des Nations Unies sur la reconnaissance et l'exécution des sentences arbitrales étrangères et la loi type de la CNUDCI sur l'arbitrage commercial international, mais les avocats ont traditionnellement été encouragés à démontrer le bien-fondé de certaines décisions procédurales en présentant aux juges et aux tribunaux arbitraux des données comparatives obtenues grâce à des spécialistes et commentaires doctrinaux.

Bien que l'analyse comparative soit généralement considérée comme une pratique exemplaire dans l'arbitrage commercial international, des questions se posent quant à savoir si et dans quelle mesure elle constitue une pratique réelle. Cet article présente et analyse des informations empiriques concernant l'utilisation des références (« legal authorities ») *et du droit comparé par les juges et les arbitres, en s'appuyant sur les données générées par une récente enquête internationale à grande échelle sur le raisonnement juridique dans les litiges commerciaux. Cet article fournit également une mine d'informations pratiques aux juges, arbitres, avocats et universitaires cherchant à améliorer la manière dont ils conduisent des recherches juridiques comparatives dans l'arbitrage commercial international. Ce faisant, cette analyse facilite la compréhension et le développement de ce domaine de plus en plus important du droit.*

Mots clés : arbitrage commercial international, recherche empirique, raisonnement juridique, recherche juridique, droit commercial, droit procédural, droit international privé, résolution alternative des différends

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Abstract

For years, comparative law has been considered central to international arbitration, particularly with respect to procedural issues. Not only have inter-governmental organizations like the United Nations Commission on International Trade Law supported the view that judges and advocates should rely on international consensus when interpreting international instruments like the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the UNCITRAL Model Law on International Commercial Arbitration, but advocates have traditionally been encouraged to demonstrate the propriety of certain procedural decisions by presenting judges and arbitral tribunals with comparative data culled from specialist reporters and commentary.

Although comparative analysis is generally considered a best practice in international commercial arbitration, questions arise as to whether and to what extent it constitutes an actual practice. This Article presents and analyses empirical information concerning the use of legal authorities and comparative law by judges and arbitrators, relying on data generated by a recent large-scale international survey on legal reasoning in commercial disputes. The Article also provides a wealth of practical information to judges, arbitrators, advocates and scholars seeking to improve the way that they conduct comparative legal research in international commercial arbitration. In so doing, this analysis aids understanding and development of this increasingly important area of law.

Keywords: international commercial arbitration, comparative law, empirical research, legal reasoning, legal research, commercial law, procedural law, private international law, alternative dispute resolution (ADR)

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I. INTRODUCTION

According to renowned comparatist Patrick Glenn, international commercial arbitration is 'a *sui iuris* institution, with its own character and standing, independent of a national legal system',[2] making it eminently suitable for scholarly and comparative study.[3] Indeed, one could go so far as to say that international commercial arbitration has revolutionized the field of comparative law, transforming what was once characterized as a somewhat academic discipline with limited practical application outside of law-unification projects into 'a kind of "living comparison" of laws. . . emerging from the continuous communication between persons educated in different intellectual and legal contexts', to use the words of Jürgen Basedow.[4] Today, international commercial arbitration is seen as a mature and sophisticated field of practice and study generating a variety of innovative interdisciplinary analyses.[5]

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[2] Glenn, H. Patrick. 2001. Comparative law and legal practice: On removing the borders. *Tulane Law Review* 75: 977-1002, p. 998.

[3] Lowenfeld, Andreas. 2014. The two-way mirror: International arbitration as comparative procedure. *Revista Brasileira de Arbitragem* XI: 186-220, pp. 189-99; Paulsson, Jan. 2011. Arbitration in three dimensions. *International and Comparative Law Quarterly* 60: 291-323, p. 312 ('Anyone who wishes to insist that various failed states, simply because their flags fly at the UN, are more entitled to be considered "legal orders" than, say, the institution of arbitral proceedings conducted under the rules of the United Nations Commission on International Trade Law (UNCITRAL) as supported by the New York Convention, is perhaps a prisoner of hollow definitions.'); Rubinstein, Javier H. 2004. International commercial arbitration: Reflections at the crossroads of the common law and civil law traditions. *Chicago Journal of International Law* 5: 303-310, p. 303.

[4] Basedow, Jürgen. 2014. Comparative law and its clients. *American Journal of Comparative Law* 62: 821-857, p. 856.

[5] Brekoulakis, Stavros L. 2013. International arbitration scholarship and the concept of arbitration law. *Fordham International Law Journal* 36: 745-787, pp. 747-48; Park, William W. 2012. *Arbitration of international business disputes: Studies in law and practice*. Oxford: Oxford University Press, pp. 3-27; Schultz, Thomas and

The increasing importance of this area of law has attracted the attention of numerous individuals who have not previously worked in the field.[6] While new voices are always welcome, many judges, arbitrators, advocates and scholars unfortunately appear entirely unaware of the vast array of comparative legal materials currently available to researchers, while other individuals do not appreciate how, why and when matters involving international commercial arbitration require or benefit from comparative legal analysis.[7]

This Article therefore seeks to improve the quality of comparative analysis in international commercial arbitration by providing various insights into best and actual practices in the field. In addition to discussion of key features of comparative legal methodology, the Article also draws on empirical data arising out of a recent large-scale international study of legal reasoning in commercial disputes, focusing in particular on how 465 judges and arbitrators from around the world gauged the relative importance of different types of procedural authority in domestic and international disputes.[8]

A full description of the research methodology is available elsewhere, but the data discussed in this Article involves responses to a question asking survey participants to indicate the relative importance of ten different types of legal authorities to the determination of procedural disputes by using a scale of one to five, where five was considered 'very important' and one was considered 'not

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Niccolò Ridi. 2019. Arbitration literature. In *Oxford handbook of international arbitration,* eds. Thomas Schultz and Federico Ortino. Oxford: Oxford University Press, p. 6.

[6] Strong, S.I. 2012a. Border skirmishes: The intersection between litigation and international commercial arbitration. *Journal of Dispute Resolution* 2012: 1-20, p. 4.

[7] Jolivet, Emmanuel. 2006. Access to information and awards. *Arbitration International* 22: 265-274, p. 266.

[8] The full study, including a detailed discussion of the research methodology, is available elsewhere. Strong, S.I. 2020a. *Legal reasoning across commercial disputes: Comparing judicial and arbitral analyses*. Oxford: Oxford University Press. The full survey contained 37 different questions, and other aspects of the research project involved semi-structured interviews and a qualitative analysis of judicial decisions and arbitral awards, although those features are not discussed in the current Article. Not every respondent answered every question, and the filtering method used to create the Appendix eliminated some answers so as to ensure the quality of the comparisons in question. Therefore, the total number of respondents will not add up 465 in all cases.

important at all'.[9] The Appendix to this Article reports the weighted average of responses relating to each type of authority, followed by the standard deviation in parenthesis, total number of responses relating to that particular type of authority and relative ranking within that cohort.

Responses were filtered to allow comparisons along two different axes. The first comparison considered whether any differences arose between judges and arbitrators,[10] while the second comparison considered whether any differences arose depending on whether the dispute was domestic or international in nature. Respondents were told to focus in all circumstances on commercial disputes.

The data generated by the survey was analysed by considering (1) the relative standing of the various responses to each question within each cohort, (2) the relative standing of the responses to each question between comparative cohorts and (3) the statistical significance of the difference between intensity markings of comparative cohorts with respect to individual responses. The cross-cohort intensity comparisons were reported in a separate column and relied on a t-statistical test, which compares the mean of two independent populations (μ_1 and μ_2) along a single variable to determine whether any difference exists other than that attributable to chance. Statistical significance was deemed to exist in cases with an alpha (*a1*) level of $p<.05$ or

[9] Strong (2020a), fig. 3.6, reproduced in part in the Appendix to this Article. The survey also allowed respondents to identify additional authorities by marking 'other' and providing a written-in response, but that category has been eliminated here for reasons of space.

[10] The inclusion of judges in the study is not problematic because transnational commercial litigation includes arbitration-related matters, such as motions to enforce an arbitration agreement or arbitral award.

lower.[11] The study reports *p* levels of .05 (designated by a single asterisk), .01 (designated by two asterisks) and .001 (designated by three asterisks).[12]

Before beginning, it is necessary to note that this Article focuses on questions of procedural rather than substantive law. Although comparative law can be used to analyse substantive concerns in international arbitration,[13] as is

[11] Statistical significance refers to 'the likelihood, or probability, that a statistic derived from a sample represents some genuine phenomenon in the population'. Urdan, Timothy C. 2005. *Statistics in plain English*. Abingdon-on-Thames, United Kingdom: Routledge, p. 50 (discussing statistical analysis in empirical legal research); see also Epstein, Lee and Gary King. 2002. The rules of inference. *University of Chicago Law Review* 51: 1-133, p. 60; Weidemaier, W. Mark C. 2012. Judging-lite: How arbitrators use and create precedent. *North Carolina Law Review* 90: 1091-1145, p. 1091.

[12] T-statistics were calculated via Medcalc. Medcalc. 2019. The statistical calculator. https://www.medcalc.org/calc/comparison_of_means.php. Accessed 14 Aug 2019. A *p* value of .05 means there is a 5 per cent likelihood (or less) that the difference between the two populations is attributable to chance, while a *p* level of .01 means there is a 1 per cent likelihood that the difference between the two populations is attributable to chance. *P* levels of .001 are even more robust, meaning that there is a .1 per cent likelihood that the difference between the two populations is random. Because Medcalc would not allow calculations where the standard deviation was zero (as it was in a few circumstances due to small sample size), those t-statistics involving a standard deviation of zero were calculated with a standard deviation of .0001.

[13] Strong (2020a), fig. 3.5 (comparing substantive authorities using an empirical analysis identical to that discussed here for procedural authorities); Strong, S.I. 2020b. Legal reasoning in international commercial disputes: Empirically testing the common law-civil law divide. In *Dossier XVII: Legal reasoning in international commercial arbitration*, eds. Mélida Hodgson and Antonio Crivellaro. Paris: ICC Institute of World Business Law, Appx. II (comparing use of legal authorities in substantive disputes across the common law-civil law divide). For example, Frédéric Sourgens has suggested that advocates can use comparative law in three ways in international commercial arbitration:

(1) [they] could use comparative law to explain law foreign to the tribunal in a manner helpful to his case, (2) [they] could use it as a means to close legal gaps in the law applicable to the dispute, and (3) [they] could use it to extract general principles of international law or trade usages.

Sourgens, Frédéric Gilles. 2007. Comparative law as rhetoric: An analysis of the use of comparative law in international arbitration. *Pepperdine Dispute Resolution Law Journal* 8: 1-23, p. 2.

the case in matters involving *lex mercatoria*[14] and conflicts of law,[15] the role that comparative procedural law plays in international arbitration is quite distinctive, with some experts – most notably Leon Trakman – claiming that that the proper comparative paradigm is not between international commercial arbitration and established legal traditions such as the common law or civil law tradition, but between different legal cultures within the world of international arbitration.[16] While this Article does not necessarily adopt Trakman's view, the procedural aspects of international commercial arbitration give rise to a number of unique comparative possibilities, thus supporting the focus of the current analysis.

II. COMPARING LEGAL METHODOLOGY IN INTERNATIONAL COMMERCIAL ARBITRATION: BEST VERSUS ACTUAL PRACTICES

Before researchers can conduct comparative analyses, they must be able to identify and find the relevant legal materials.[17] This task can be somewhat

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[14] Berger, Klaus Peter. 2010. *The creeping codification of the new* lex mercatoria. Alphen aan den Rijn, The Netherlands: Kluwer Law International; Maniruzzaman, Abul F.M. 1999. The *lex mercatori*a and international contracts: A challenge for international commercial arbitration?. *American University International Law Review* 14: 657-734, p. 665; Basedow, Jürgen. 2009. Transjurisdictional codification. *Tulane Law Review* 83: 973-998, p. 997.

[15] Eg, Briggs, Adrian. 2008. *Agreements on jurisdiction and choice of law*. Oxford: Oxford University Press; Borchers, Patrick J. and Joachim Zekoll. 2001. *International conflict of laws for the third millennium: Essays in honor of Friedrich K. Juenger*. Leiden: Brill-Nijhoff; Collier, J.G. 2001. *Conflict of laws*. Cambridge: Cambridge University Press; Grigera Naón, Horacio A. 1992. *Choice of law problems in international commercial Arbitration*. Cambridge: Cambridge University Press; Symeonides, Symeon C. 2014. *Codifying choice of law around the world: An international comparative analysis*. Oxford: Oxford University Press.

[16] Trakman, Leon E. 2006. 'Lega1 traditions' and international commercial arbitration. *American Review of International Arbitration* 17: 1-43, pp. 20-21 (noting different legal cultures in international arbitrations governed by the International Chamber of Commerce (ICC) rules as compared to the American Arbitration Association (AAA) or the Chinese International Economic and Trade Commission (CIETAC)); see also Bachand, Frédéric. 2012. Court intervention in international arbitration: The case for compulsory judicial internationalism. *Journal of Dispute Resolution* 2012: 83-100, pp. 84-85 (noting the debate about a singular arbitral culture).

[17] These issues are discussed by the author in more detail elsewhere. Strong, S.I. 2009a. *Research and practice in international commercial arbitration: Sources and strategies.* Oxford: Oxford University Press; Strong, S.I.

challenging for newcomers to international commercial arbitration, since the field involves a semi-autonomous legal system that not only relies heavily upon both public (state) and private (non-state) sources of authority but that also reflects an intentional blend of common law, civil law and uniquely arbitral norms.[18] Judges, arbitrators, practitioners and scholars can also struggle if they do not understand how each type of authority operates within the system as a whole. This Article therefore seeks to provide those who do not work frequently in international commercial arbitration with a deeper appreciation of the relevance, purpose and use of six types of arbitral authority: international treaties and conventions; national arbitration laws; judicial decisions; arbitral rules and other forms of soft law; arbitral awards and institutional decisions; and scholarly commentary. Each type of authority is discussed in turn.

A. International Treaties and Conventions

1. Relevance, Purpose and Use of Authorities

The first type of authority to consider involves international conventions and treaties. In international commercial arbitration, treaties are most important at the beginning of the process (to assist with actions to compel arbitration)[19] and the end of the process (to assist with actions to enforce a foreign arbitral award),[20] although many parties comply voluntarily with the terms of arbitral agreements and awards, thus eliminating the need to invoke the assistance of national courts in either of these circumstances. Most treaties in this field, including the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), which is the most important of these types of instruments, do not operate directly on the

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2009b. Research in international commercial arbitration: Special skills, special sources. *American Review of International Arbitration* 20: 119-158; see also Poudret, Jean-Francois and Sébastien Besson. 2007. *Comparative law of international arbitration*. London: Thomson/Sweet & Maxwell, ch. 1.4.

[18] Trakman (2006) 11-12, 16.

[19] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. II(3), June 10, 1958, 330 U.N.T.S. 3 (New York Convention).

[20] New York Convention, op. cit. arts. III-V.

arbitral process itself, although advocates and arbitrators should, as a matter of best practice, keep the requirements of any relevant treaties in mind as proceedings ensue so as to avoid jeopardizing the enforceability of the final award.[21] However, one regional treaty applicable in the Americas (the Inter-American Convention on International Commercial Arbitration, known as the Panama Convention) can affect the arbitral process itself through certain default rules of procedure that are incorporated into the terms of the treaty, although it operates in much the same way as the New York Convention in other regards.[22]

Newcomers to the field of international arbitration sometimes confuse treaties applicable to international commercial disputes with instruments (such as the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention or Washington Convention)) that only apply to investor-state (investment) arbitration.[23] However, these latter types of instruments are beyond the scope of the current discussion.

One of the more recent innovations in international dispute resolution involves the development of the United Nations Convention on International Settlement Agreements Resulting from Mediation (Singapore Convention on Mediation).[24] Though mediation (also known as conciliation) differs from

[21] The New York Convention has 159 states parties and operates on a worldwide basis. Other arbitral conventions operate regionally. Organization of American States, Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards (Montevideo Convention), May 14, 1979, 1439 U.N.T.S. 87; Inter-American Convention on International Commercial Arbitration (Panama Convention), Jan. 30, 1975, O.A.S.T.S. No. 42, 14 I.L.M. 336 (1975); European Convention on International Commercial Arbitration, Apr. 21, 1964, 484 U.N.T.S. 364 (European Convention).

[22] Panama Convention, op. cit., arts. 2-3.

[23] Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Mar. 18, 1965, 575 U.N.T.S. 159. Investment arbitration can also arise as a result of a bilateral investment treaty (BIT) or multilateral investment treaty (MIT).

[24] U.N. Comm. on Int'l Trade Law, Report of the U.N. Comm. on Int'l Trade Law, Fifty-first session, U.N. Doc. A/73/17 (2018) at Annex I. The Singapore Convention on Mediation opened for signature on 7 August 2019.

arbitration,[25] the Singapore Convention on Mediation may become relevant to an arbitral dispute if the matter is settled, in whole or in part, prior to final disposition on the merits.[26]

Because arbitral conventions operate on a cross-border basis, judges are meant to interpret and apply these instruments in a consistent and predictable manner. Indeed, Article 31(3)(b) of the Vienna Convention on the Interpretation of Treaties specifically indicates that those seeking to interpret a treaty shall take into account 'any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation'.[27] This task is facilitated by the work of a number of organizations, most notably the United Nations Commission on International Trade Law (UNCITRAL), that have undertaken various initiatives to promote comparative research concerning the New York Convention so as to harmonize application of the treaty.[28]

Recent empirical research into legal reasoning suggests that judges and arbitrators find international treaties very useful to procedural questions associated with international commercial disputes. As indicated in the

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[25] Mediation and conciliation involve the use of a neutral third party who helps parties negotiate an amicable settlement between themselves. Arbitration involves the use of a neutral third party who provides a final, binding decision to resolve the parties' dispute.

[26] Schnabel, Timothy. 2019. The Singapore Convention on Mediation: A framework for the cross-border recognition and enforcement of mediated settlements. *Pepperdine Dispute Resolution Law Journal* 19: 1-60, p. 1.

[27] Strong, S.I. 2012b. *International commercial arbitration: A guide for U.S. judges.* Washington, D.C.: Federal Judicial Center. https://www.fjc.gov/sites/default/files/2012/StrongArbit.pdf. Accessed 14 Aug 2019, p. 93.

[28] UNCITRAL Secretariat. 2016. *Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.* UNCITRAL. http://www.uncitral.org/pdf/english/texts/arbitration/NYconv/2016_Guide_on_the_Convention.pdf, xi-xii (including the *travaux préparatoires*, judicial decisions and a bibliography of materials relating to the New York Convention); see also New York Convention 1958 (2019). UNCITRAL also undertook a large-scale, long-term research project seeking input from various states regarding their interpretation of Article II(2) of the New York Convention. UNCITRAL, Working Grp. II (Arbitration), Compilation of Comments by Governments, Note by the Secretariat, U.N. Doc. A/CN.9/661 (May 6, 2008); UNCITRAL, Working Grp. II (Arbitration), Compilation of Comments by Governments, Note by the Secretariat, U.N. Doc. A/CN.9/661/Add.3 (June 12, 2008).

Appendix, international treaties were considered the second most important type of procedural authority in international commercial disputes, as compared to the eighth most important in domestic disputes. The weighted averages were 3.55 out of 5.00 for international disputes as compared to 1.76 for domestic disputes, a difference that is statistically significant at a high degree of confidence ($p<.001$).

No statistically significant difference arose between judges and arbitrators with respect to the importance of international treaties. The two groups ranked treaties similarly in terms of importance (2.67 out of 5.00 for judges and 2.43 for arbitrators) and placed treaties in similar places within the hierarchy of authority (treaties were tied as the seventh most important procedural authority for judges and were rated as the eighth most important authority for arbitrators).

The study also asked about the importance of the legislative histories of international treaties (*travaux préparatoires*) to the determination of procedural disputes. Again, the data showed a statistically significant difference ($p<.001$) between the relative importance of these materials in international commercial disputes (2.55 out of 5.00) as compared to domestic disputes (1.61). However, these authorities were not generally considered important to the determination of procedural disputes, even in international disputes, with such materials only ranking seventh out of ten. *Travaux préparatoires* were predictably the least important type of legal authority in domestic disputes.

No statistically significant difference arose between judges and arbitrators with respect to the importance of legislative histories for international treaties, with judges rating such materials at 3.00 out of 5.00 and arbitrators rating such materials at 1.89. However, when looking at the importance of *travaux préparatoires* within each cohort, such materials were tied for fourth most important type of authority for judges, although they were ranked as the least most important type of authority for arbitrators.

2. Locating Authorities

As public sources of law, international treaties and conventions are relatively easy to locate, either in hard copy (such as through the United Nations Treaty Series) or through reliable online resources. As a general rule, the best electronic source is the website of the international organization that promulgated the document. Ordinarily it can be somewhat difficult to locate *travaux préparatoires*, but the international arbitral community has conveniently compiled these materials on a freely accessible website.[29]

Although it is important for comparatists to consider the text of any applicable treaty, the analysis cannot stop there. While some countries ('monist' states) allow international law to have direct effect in the national legal system, other jurisdictions ('dualist' states) must enact domestic legislation that implements or enables the recognition of international law in the courts of that country.[30] Studies have shown that implementing legislation can significantly alter the interpretation and application of international treaties in the area of international commercial arbitration.[31] For example, UNCITRAL found that domestic implementation processes could result in only a partial adoption of the instrument in question or could introduce substantive changes, additions or omissions.[32] It is also possible for the terms of the implementing legislation to prevail over the international treaty in cases of conflict.[33] As a result, comparatists must know the correlation between international and domestic law in the jurisdictions they study.

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[29] New York Convention 1958.

[30] Strong, S.I. 2013. Monism and dualism in international commercial arbitration: Overcoming barriers to consistent application of principles of public international law. In *Basic concepts of public international law: Monism & dualism,* ed. Marko Novaković, 547. Belgrade: University of Belgrade, p. 547.

[31] UNCITRAL Secretariat, The Report on the Survey Relating to the Legislative Implementation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), U.N. Doc. A/CN.9/656 (June 5, 2008) (UNCITRAL Survey Report); see also UNCITRAL, Secretariat, The Report on the Survey Relating to the Legislative Implementation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), U.N. Doc. A/CN.9/656/Add.1 (June 5, 2008).

[32] UNCITRAL Survey Report, op. cit. paras. 12, 18.

[33] UNCITRAL Survey Report, op. cit. para 2.

B. National Arbitration Laws

1. Relevance, Purpose and Use of Authorities

The second source of authority to consider involves national laws on arbitration, meaning the national (or sub-national, in certain federal states) arbitration statute in effect in the jurisdiction(s) at issue.[34] National laws on arbitration should not be confused with enabling legislation (although the two may be combined in some jurisdictions),[35] nor should they be confused with the law governing the merits of the dispute. Indeed, the arbitration statute applicable to a particular matter may derive from an entirely different country than the country whose law governs the resolution of the substantive dispute.

National laws on arbitration primarily govern the relationship between the court and the arbitration, and are therefore, like international treaties, particularly relevant at the beginning and end of the arbitral process, when the parties may seek judicial assistance in compelling arbitration or in enforcing or vacating an award.[36] However, national laws on arbitration also describe the ways in which a court can assist an ongoing arbitral process, as in situations where an arbitrator needs to be removed or replaced, and thus may be invoked while an arbitration is progressing.[37] As a result, national laws on arbitration are relevant to a broader range of issues than is the case with international treaties.

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[34] In federalized nations, some questions arise as to whether national or regional law governs international arbitral proceedings. For example, there is some debate in the United States about the extent to which state law provisions supplement the international aspects of the Federal Arbitration Act. Preston v. Ferrer, 128 S. Ct. 978, 981 (2008) (holding 'when parties agree to arbitrate all questions arising under a contract, state laws lodging primary jurisdiction in another forum, whether judicial or administrative, are superseded by the FAA'); Drahozal, Christopher R. 2014. *FAA preemption after* Concepcion. *Berkeley Journal of Employment and Labor Law* 35: 1530174, p. 153. Switzerland handles the matter somewhat differently, explicitly providing that national legislation will apply unless the parties have agreed that it shall not or that cantonal law on arbitration shall apply. Swiss Private International Law of 1987, art. 176.

[35] For example, chapters 2 and 3 of the U.S. Federal Arbitration Act include enabling provisions for the New York and Panama Conventions, respectively, although chapter 1 of the Act can in some instances apply to an international arbitral matter. 9 U.S.C. ss. 1-307; Strong (2012b), pp. 24-28.

[36] Strong (2012b), p. 34.

[37] Strong (2012b), p. 32.

National statutes on arbitration can vary widely in both form and function.[38] While some differences are relatively superficial, others are more significant. For example, the U.S. Federal Arbitration Act allows courts to appoint arbitrators to proceedings anywhere in the world, whereas most arbitration statutes do not.[39] Conversely, the U.S. Federal Arbitration Act does not permit a court to hear an interim challenge to an arbitrator, whereas most other national laws on arbitration do.[40]

The most important arbitration law in any arbitral procedure is the arbitration statute in effect in the country where the arbitration is seated.[41] Some commentators refer to this law as the *lex arbitri.* However, arbitration statutes in other jurisdictions can become relevant if and when an award is taken to another state for enforcement.[42]

The importance of the *lex arbitri* means that practitioners should engage in certain amount of comparative analysis when deciding where to seat an arbitration. This analysis typically takes place during the drafting of the substantive contract, since that contract usually includes the arbitration agreement.[43] However, national laws on arbitration also undergo comparative analysis in more traditional ways, such as through harmonization efforts. The most important of these efforts involves the UNCITRAL Model Law on International Commercial Arbitration (UNCITRAL Model Arbitration Law), which was originally promulgated in 1985 and revised in 2006.[44] The UNCITRAL Model Arbitration Law has been adopted in whole or in part by over 110 countries or

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[38] For example, the structure of the Federal Arbitration Act in the United States does not resemble the English Arbitration Act 1996, although the two statutes operate in relatively a similar manner. 9 U.S.C. §§1-307 (U.S.); Arbitration Act 1996 (England).

[39] Compare 9 U.S.C. s. 206 with UNCITRAL Model Arbitration Law, arts. 1, 8, G.A. Res. 40/72, 40 U.N. G.A.O.R. Supp. (No. 17), U.N. Doc. A/40/17 (June 21, 1985), revised in 2006, G.A. Res. 61/33, U.N. Doc. A/61/33 (Dec. 4, 2006).

[40] Compare 9 U.S.C. ss. 10(a)(2), 208 with UNCITRAL Model Arbitration Law, op. cit. art. 13.

[41] Born, Gary B. 2014. *International commercial arbitration.* Alphen aan den Rijn, The Netherlands: Kluwer Law International, pp. 109-10.

[42] New York Convention, op. cit. art V.

[43] Strong (2012b), p. 31.

[44] UNCITRAL Model Arbitration Law, op. cit.

autonomous regions, and although some variations do exist between different Model Law jurisdictions, UNCITRAL has encouraged and promoted consistent interpretation of this instrument across national boundaries through various initiatives, including the Case Law on UNCITRAL Text (CLOUT) project, which provides free public access to judicial decisions construing various UNCITRAL instruments.[45] Not only does CLOUT provide researchers with an excellent means of comparing the interpretation and application of both the UNCITRAL Model Arbitration Law and the New York Convention, it also helps judges and arbitrators construe the two instruments in a consistent manner, which is an important goal of UNCITRAL.[46]

Empirical research into the importance of different types of procedural authorities in commercial disputes indicates that domestic laws, including regulations, statutes or administrative rules, are central to the process. As reflected in the Appendix, those involved in deciding international procedural disputes believe domestic laws to be the third most important type of authority to consider, which is only one place beneath the rank given to domestic law by those involved in deciding domestic disputes. However, the intensity markings did show a statistically significant difference ($p<.01$) between respondents considering international disputes, who generated a mark of only 3.45 out of 5.00, and respondents considering domestic disputes, who generated a mark of 3.96.

Judges and arbitrators both indicated that domestic statutes were the second most important type of procedural authority out of the ten alternatives. While some variation did arise with respect to intensity markings, with judges giving such materials a mark of 4.25 out of 5.00 and arbitrators giving them 3.77, that difference was not statistically significant.

The Appendix also includes information about the relative importance of legislative histories of domestic regulations, statutes and administrative rules. When considered in terms of hierarchy, respondents who were discussing

[45] Case Law on UNCITRAL Texts (2019).

[46] UNCITRAL Secretariat (2006), para. 51.

international disputes were less likely than their domestic counterparts to rely on these materials, ranking legislative history of domestic law as the eighth most important source of authority as compared to sixth most important for domestic decisionmakers. However, the two cohorts rated the importance of legislative histories very similarly in absolute terms, with respondents discussing international disputes giving this type of authority a mark of 2.53 out of 5.00 and respondents discussing domestic disputes giving a mark of 2.56, a difference that was not statistically significant.

A more marked contrast appeared when comparing judges and arbitrators. Judges evaluating the importance of legislative histories gave them a 4.00 out of 5.00 whereas arbitrators gave such materials only a 2.50, a difference that was statistically significant (p<.001). This discrepancy was also evident when considering the placement of this authority as a hierarchical matter, with judges indicating that legislative histories of domestic laws were the third most important type of legal authority while arbitrators considered such materials to be only the seventh most important.

2. Locating Authorities

Locating national laws on arbitration can be somewhat challenging for comparatists, since some arbitration laws are found within national codes of civil procedure[47] while other arbitration laws are standalone entities.[48] Difficulties can also arise because some countries combine provisions involving both domestic and international arbitration into a single law, while other jurisdictions adopt two separate provisions, one governing domestic

[47] Born (2014), pp. 142-45 (noting France puts its arbitration provisions in its code of civil procedure but Switzerland has its arbitration provisions in its statute on private international law).

[48] Eg, Arbitration Act 1996 (United Kingdom); 9 USC ss. 1-307 (United States).

proceedings and one governing international proceedings.[49] Foreign-language issues can also arise for those who are not multi-lingual.[50]

Some of these difficulties can be overcome by consulting specialty sources. For example, translated versions of arbitration laws from popular arbitral seats are often reproduced in treatises on international arbitration.[51] Researchers can also consult free or subscription electronic databases.[52]

C. Judicial Decisions

1. Relevance, Purpose and Use of Authorities

The largely autonomous nature of international commercial arbitration means that judicial intervention is a relatively rare occurrence.[53] Nevertheless, courts offer various types of assistance to the parties before, during and after

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[49] For example, chapter one of the United States Federal Arbitration Act deals with domestic disputes, while chapters two and three deal with transnational disputes and act as the implementing legislation for the New York Convention and the Panama Convention, respectively. 9 USC ss. 1, 201, 301. Chapter one of the Federal Arbitration Act only applies to matters brought under chapters two and three to the extent that it is not inconsistent with the later provisions. 9 USC ss. 208, 307. Other nations structure their legislation differently. For example, the English Arbitration Act 1996 includes detailed cross-referencing within the Act itself as well as to previous legislation on arbitration, making it somewhat difficult to identify which provisions apply to domestic arbitrations and which apply to international arbitrations. Arbitration Act 1996 §§ 2, 85, 92, 94, 99; Born (2014), p. 142 (noting France has different provisions for domestic and international arbitration).

[50] Conversational fluency in another language is not the same as legal fluency. Strong, S.I., Katia Fach Gómez and Laura Carballo Piñeiro. 2016. *Comparative Law for Spanish-English Speaking Lawyers: Legal Cultures, Legal Terms and Legal Practices / Derecho comparado para abogados anglo- e hispanoparlantes: Culturas jurídicas, términos jurídicos y prácticas jurídicas.* Cheltenham, United Kingdom: Edward Elgar Publishing Ltd.

[51] Eg, Gaillard, Emmanuel and John Savage. 1999. *Fouchard Gaillard Goldman on international commercial arbitration*. Alphen aan den Rijn, The Netherlands: Kluwer Law International, annexes I-III.

[52] Free databases include that offered by the World Legal Information Institute. In addition to general subscription databases such as Westlaw and LexisNexis, researchers can consult the specialized arbitration database published by Kluwer known as kluwerarbitration.com.

[53] Born (2014), p. 3410 (claiming '[i]n practice, the overwhelming majority of international awards are complied with voluntarily'); Mistelis, Loukas. 2006. International arbitration – Corporate attitudes and practices – 12 perceptions tested: Myths, data, and analysis research report. *American Review of Arbitration* 15: 525-591, pp. 584-85 ('Statistically, over 90% of arbitration awards are complied with voluntarily, pursuant to anecdotal evidence from arbitration institutions and arbitration practitioners.').

arbitral proceedings, thereby generating case law that can be consulted by scholars and practitioners as well as by judges and arbitrators.[54]

While many comparatists are comfortable researching judicial decisions in foreign jurisdictions, a certain amount of care must be taken when analysing case law involving international arbitral matters, since courts are only involved with arbitration at an ancillary level and often do not consider what might be characterized as core procedural concerns.[55] Furthermore, to the extent that courts do consider various procedural issues, the decisions often arise out of particular procedural postures (such as a motion to vacate or an action to refuse enforcement of an arbitral award) and are viewed through the lens of national law and policy, which can skew the analysis. Finally, many jurisdictions provide arbitral decisions with a high degree of deference, which has the effect of shielding certain matters from judicial review.[56]

Comparatists can also be surprised by the somewhat atypical approach to judicial precedents in this field. Empirical evidence suggests that conventional wisdom about the role that judicial decisions play in common law and civil law jurisdictions is incorrect when it comes to procedural law involving cross-border commercial disputes, with respondents from civil law and respondents from common law countries both indicating that judicial decisions from the country whose law controls the issue are the most important type of authority in procedural disputes.[57]

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[54] Strong (2012b), pp. 31-32.

[55] Arbitrators are granted a great deal of discretion in arbitral procedure. Born (2014), pp. 98, 2145.

[56] Born (2014), pp. 2180-84.

[57] Strong (2020b); see also Strong (2020a), chs. 3-5 (comparing civil law and common law reasoning in depth). Indeed, commentators have long noted that France, one of the most highly esteemed jurisdictions in the world for international arbitration, relies heavily on its own case law when construing its arbitration law. Gaillard and Savage (1999) para. 151 (stating 'French international arbitration law is thus currently drawn from two sources: a brief, liberal Code of Civil Procedure, and well-established case law that is generally able to overcome the Code's shortcomings . . . and to deal with difficulties of interpretation which may yet arise'); see also Kaufmann-Kohler, Gabrielle. 2007. Arbitral precedent: Dream, necessity or excuse?. *Arbitration International* 23: 357-378, p. 358 (noting civil law countries respect precedent, albeit to a lesser degree than common law countries).

The Appendix includes additional information about how judicial decisions are viewed in commercial disputes. According to that chart, all cohorts discussed in this Article (ie, judges and arbitrators in both domestic and international disputes) rate judicial decisions from the jurisdiction whose law controls the matter as the single most important type of authority in procedural disputes. However, some differences do arise with respect to the intensity of this choice. For example, respondents who are discussing domestic disputes give judicial decisions from the jurisdiction whose law controls the matter a mark of 4.25 out of 5.00, while respondents who are discussing international disputes give those materials a mark of 3.86, a difference that is statically significant ($p<.01$). The difference in intensity ratings is slightly less marked between judges and arbitrators (4.50 and 4.09 out of 5.00, respectively) and is not statistically significant.

When viewed objectively, the heightened importance of judicial decisions in the minds of judge and arbitrators may be somewhat out of proportion with the role that courts play in international commercial arbitration. As noted above, only a small minority of arbitral disputes require judicial intervention and many judicial determinations focus on matters that can be considered ancillary to the core dispute. While no studies have been conducted to determine the reasons behind the preference for judicial decisions, it may be that judges and arbitrators feel most comfortable relying on official (eg, state-sanctioned) legal authorities because courts act as the ultimate arbiter of arbitral procedures.[58] However, it is at least equally possible that judicial and arbitral reliance on judicial decisions is the result of unconscious cognitive distortions like the status quo bias, which leads people to prefer long-established norms over other alternatives.[59] This bias can exist in adjudicators (ie, judges and arbitrators) or in counsel who prioritize judicial

[58] Strong, S.I. 2014. Limits of procedural choice of law. *Brooklyn Journal of International Law* 39: 1027-1121, p. 1085.

[59] Strong, S.I. 2018b. Truth in a post-truth society: How sticky defaults, status quo bias and the sovereign prerogative influence the perceived legitimacy of international arbitration. *University of Illinois Law Review* 2018: 533-578, p. 553. The status quo bias is closely related to preferences for legal defaults, which would include litigation. Strong (2018b), 556.

decisions over other types of legal authority in submissions to courts and arbitral tribunals.

Although respondents did indicate a preference for judicial decisions from the jurisdiction whose law governs the issue, that preference often does not extend to judicial decisions from other jurisdictions, even though the arbitral community recognizes the benefits associated with harmonious interpretation and application of international treaties and model laws.[60] For example, Frédéric Bachand has noted that courts in some jurisdictions, most notably Australia, Bermuda, Canada, Hong Kong, Singapore and the United Kingdom, often adopt a comparative perspective on matters involving international commercial arbitration.[61] However, he also found

> that courts at times are inconsistent in their consideration of the international normative context. Courts in some jurisdictions seem more receptive to considering the international normative context than their foreign counterparts, and one often comes across – in the same jurisdiction – internationally-minded decisions sitting alongside decisions which inexplicably ignore the relevant international normative context.[62]

Empirical research suggests that the level of comparative analysis is even more uneven than Professor Bachand (as he then was) suggested. As the Appendix shows, judicial decisions from jurisdictions other than the jurisdiction whose law controls the matter were not considered an important form of legal authority in international disputes, only achieving an intensity rating of 2.44 out of 5.00 and ranking as the ninth most important type of authority out of ten.

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[60] See s. II. A. 1. Judicial research centres have sought to make national judges more aware of comparative elements embedded within the international arbitral regime. For example, the US Federal Judicial Center (the research and education arm of the US federal judicial) commissioned a judicial guide on international commercial arbitration in order to overcome this type of knowledge gap. Strong (2012b), p. 93. The guide from the Federal Judicial Center was subsequently translated into Chinese and published by the Press of the People's Court of China.

[61] Bachand (2012), pp. 83-84.

[62] Bachand (2012), pp. 83-84.

Interestingly, judicial decisions from other jurisdictions were considered more important in domestic disputes, achieving a rating of 2.72 out of 5.00, a difference that was statistically significant ($p<.05$), and tying for third most important type of authority. The reasons behind this data is unclear, suggesting that further research is necessary. No statistically significant difference appeared between judges and arbitrators in terms of intensity (the intensity marks were 3.00 and 2.59, respectively), and the hierarchical rankings were somewhat similar, with this type of authority tying for fourth among judges and coming in at sixth among arbitrators.

2. Locating Authorities

Comparatists are typically very comfortable locating judicial decisions from around the world through the use of official reporters[63] and general online databases.[64] However, researchers interested in international commercial arbitration can also take advantage of certain specialized reporters and electronic databases that compile judicial decisions on international arbitration not only in their original language but also, in some cases, in translated or abstracted form. English is the *lingua franca* for international commercial arbitration generally, although Latin American arbitration, an important sub-speciality within the field, relies on Spanish and, to a lesser extent, Portuguese.

Perhaps the most comprehensive subscription database of judicial decisions involving international arbitration is published by Kluwer, a commercial provider that has digitized decades' worth of material culled from specialty arbitration reporters like the *ASA Bulletin*, the *Revista de Arbitraje Comercial y de Inversiones*, the *Revue de l'Arbitrage* and the *Yearbook*

[63] An extensive list of the official reporting series of a wide variety of countries can be found in Tables 1 and 2 of *The bluebook: A uniform system of citation*. 2015. New York: Columbia Law.

[64] Some general electronic databases (such as that offered by World Legal Information Institute) are free to the public, although their holdings may not be as extensive as subscription databases. Others – such as Westlaw and LexisNexis – are available by subscription, although their so-called specialized arbitral databases tend not to be extensive or very specialized.

Commercial Arbitration.[65] All of these individual reporters are also available in hard copy, although it is of course easier and faster to conduct a single electronic search rather than consult each of the materials individually.[66]

Electronic research can also be conducted on free specialty databases. The best of these is provided by UNCITRAL through the CLOUT project and includes full-text versions of judicial decisions construing the New York Convention and the UNCITRAL Model Arbitration Law in the original language as well as abstracts of the decisions in the various U.N. languages.[67]

D. Arbitral Rules and Other Forms of Soft Law

1. Relevance, Purpose and Use of Authorities

The previous three subsections discussed public sources of authority: international treaties, national statutes and judicial decisions. However, international commercial arbitration also embraces private forms of legal authority and places them on equal footing with public sources of law, at least in some regards. Perhaps the most important of these private authorities involves the rules of arbitral procedure. While parties in international commercial arbitration do not have to adopt a particular rule set to govern their arbitral proceedings, the vast majority of parties do, and doing so is considered a best practice.[68] Comparative law often plays into the process early on, when parties are deciding which rule set to adopt, since some variations do exist between the different approaches.[69]

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[65] Another specialized source is Arbitration Law Online, although the holdings are not as extensive as that offered by Kluwer.

[66] Strong (2009a), pp. 85-87 (listing additional sources).

[67] UNCITRAL, Case law on UNCITRAL texts. 2019. https://uncitral.un.org/en/case_law. Accessed 14 Aug 2019. One private online database provides some free information (ie, indexing of decisions by topic and by country) but links the actual text of the decisions to Kluwer's subscription database. New York Convention 1958. 2019. www.newyorkconvention1958.org. Accessed 14 Aug 2019.

[68] Born (2014), p. 171.

[69] These analyses typically occur during the drafting of the substantive contract, which typically includes a pre-dispute arbitration agreement. Strong (2012b), p. 31.

Most arbitral rules are promulgated by arbitral institutions and are adopted by the parties through a specific reference in the arbitration agreement. The rules facilitate various administrative matters (such as the naming of arbitrators and the collection of arbitrator fees) and provide the parties with standardized and predictable means of proceeding through the arbitral process. As a result, arbitral rules can be analogized in some ways to judicial rules or codes of civil procedure to the extent that arbitral rules control procedures internal to the arbitration itself, meaning the initiation of the arbitration, selection of the arbitrator(s), taking and presentation of evidence, rendering of the arbitral award and so forth. However, arbitrators have more discretion to decide procedural matters than judges, which means that arbitral rules tend not to be quite as detailed as rules or codes of civil procedure. Because arbitral rules focus on the conduct of the arbitration per se, they can be distinguished from international treaties and national laws, which are typically invoked in judicial proceedings that arise at the beginning and end of the arbitral process.

Most arbitral rule sets are published by private arbitral institutions such as the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA) or the Singapore International Arbitration Centre (SIAC), and result in 'administered' or 'institutional' arbitration.[70] However, one well-known set of procedures – the UNCITRAL Arbitration Rules – are intended for use in non-administered (ad hoc) arbitrations.[71] The content of the different arbitral rules varies slightly between the various institutions, which has generated a number of comparative studies.[72]

Although arbitral rules are the most important type of soft law in international commercial arbitration, the increasing sophistication of the field

[70] In an administered arbitration, the parties pay the arbitral institution to assist with the administrative processes related to the arbitration. Born (2014), pp. 169-70.

[71] UNCITRAL Arbitration Rules, G.A. Res. 31/98, U.N. Doc. A/RES/31/98 (Dec. 15, 1976); see also Born (2014), pp. 170-71. UNCITRAL does not act as an administering entity.

[72] Trakman (2006), pp. 20-21 (noting different legal cultures in international arbitrations governed by different rule sets).

has led to the promulgation of additional soft law instruments. Perhaps the most important of these documents comes from the International Bar Association (IBA), which has issued a variety of items, including the IBA Rules on the Taking of Evidence in International Commercial Arbitration and the IBA Guidelines on Conflicts of Interest in International Commercial Arbitration.[73] While relatively few parties explicitly choose to have these documents apply in a dispute, these instruments tend to describe best practices in the field and are therefore highly persuasive to both judges and arbitrators. Other useful documents include the Chartered Institute of Arbitrators (CIArb) Guidelines for Witness Conferencing in International Arbitration[74] and the ICC Commission Report on Information Technology in International Arbitration.[75]

Empirical research into the importance of different types of procedural authorities in international commercial arbitration asked specifically about the role that soft law, which was defined as non-binding but persuasive guidelines, declarations or codes of conduct, played in judges' and arbitrators' decision-making processes. As noted in the Appendix, these types of materials are considered moderately important in international commercial disputes, ranking fifth out of ten alternatives, but are somewhat less important in domestic disputes, ranking only seventh. In terms of intensity, soft law was given a mark of 3.29 out of 5.00 for international disputes but only 2.52 for domestic disputes, a difference that was statistically significant ($p<.001$).

The Appendix also reported comparisons between judges and arbitrators. Arbitrators were found, somewhat predictably, to rate soft law slightly higher than judges did in the procedural hierarchy, marking it as the fifth most important form of authority as opposed to the sixth most important. However, the two cohorts gave soft law equal marks in terms of intensity (2.75

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[73] International Bar Association. 2019. IBA guides, rules and other free materials. https://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx. Accessed 14 Aug 2019.

[74] Chartered Institute of Arbitrators. 2019. CIArb guidelines on witness conferencing. https://www.ciarb.org/news/ciarb-guidelines-on-witness-conferencing/. Accessed 14 Aug 2019.

[75] International Chamber of Commerce. 2019. Information technology in international arbitration, report of the ICC Commission on Arbitration and ADR. https://iccwbo.org/publication/information-technology-international-arbitration-report-icc-commission-arbitration-adr/. Accessed 14 Aug 2019.

out of 5.00), which was unexpected, given theoretical commentary regarding the role of arbitral rules and soft law in international commercial arbitration.[76] However, the survey question allowed participants to supplement their responses with additional written information in a text box, and a number of individuals indicated that they believed arbitral rules to be of central importance if the parties had adopted those rules, which is consistent with the conventional understanding of the importance of private sources of law in arbitration.[77] The discrepancy in data suggests that some participants may have distinguished between different types of soft law in their responses. As a result, it may be helpful for researchers to develop targeted studies that differentiate between various types of soft law.

2. Locating Authorities

Arbitral rules and procedural guidelines are one of the easiest authorities for comparatists to find. Arbitral organizations and policymaking bodies have sophisticated websites that typically include the most recent as well as archived versions of published documents, so researchers simply need to visit the website of the organization responsible for promulgating the rules in question.

E. Arbitral Awards and Institutional Decisions

1. Relevance, Purpose and Use of Authorities

Another non-public source of authority in international commercial arbitration involves arbitral awards and institutional decisions involving matters other than that which is currently in dispute. Non-specialists often believe that the private and confidential nature of arbitration makes it impossible to obtain these types of materials, but several of the world's leading arbitral institutions have in fact been publishing international awards for decades. While these awards are often available only in denatured (anonymized) or summarized form and have no formal precedential value, conventional wisdom suggests that they

[76] Strong (2009a), p. 22.

[77] Strong (2020a), ch. 3.

nevertheless operate as persuasive forms of authority, particularly with respect to procedural matters.[78]

Full-text versions of international awards can be obtained in those jurisdictions (such as the United States) that provide open access to any documents filed with the courts, which would include an arbitral award filed as part of an enforcement or set aside proceeding. While this approach could generate biased information, since the awards that are made subject to enforcement or annulment proceedings may be somewhat suspect as a procedural matter, it is nevertheless a useful way to obtain access to international awards in their original form.

Although arbitral awards have been available for quite some time, recent years have seen a growing number of arbitral institutions (such as the LCIA and the Stockholm Chamber of Commerce (SCC)) publishing institutional decisions relating to challenges to sitting arbitrators.[79] These materials are different than arbitral awards, since they are rendered by arbitral institutions rather than by arbitral tribunals, as is the case with arbitral awards. Furthermore, challenge decisions do not resolve the merits of the underlying dispute between the parties but instead relate to questions involving the independence, impartiality

[78] This appears to be the case in international commercial arbitration, although the situation in sports and domain name arbitration and investment arbitration may be different. Kaufmann-Kohler (2007), pp. 361-78; Strong (2009a), pp. 26-27. Arbitral awards may be most persuasive to other arbitrators, although there are no technical bars to judicial consideration of arbitral awards as persuasive authority. Sourgens (2007), p. 11 (discussing rhetorical devices in arbitration); Weidemaier (2012), pp. 1141-44 (suggesting judges should respect arbitral awards as at least soft precedent, although they seldom do).

[79] London Court of International Arbitration. 2019. LCIA challenge decision database. https://www.lcia.org/challenge-decision-database.aspx. Accessed 14 Aug 2019; Ipp, Anja, Rodrigo Carè and Valeryia Dubeshka. 2019. SCC practice note: SCC board decisions on challenges to arbitrators 2016-2018. Stockholm Chamber of Commerce. https://sccinstitute.com/media/795278/scc-practice-note_scc-decisions-on-challenges-to-arbitrators-2016-2018.pdf. Accessed 14 Aug 2019. The ICC makes reasons available to individual parties but does not publish challenge decisions. International Chamber of Commerce. 2015. ICC Court to communicate reasons as a new service to users (new service). International Chamber of Commerce. https://iccwbo.org/media-wall/news-speeches/icc-court-to-communicate-reasons-as-a-new-service-to-users/. Accessed 14 Aug 2019. Arbitral rules typically incorporate procedures for challenging or replacing arbitrators, although courts remain available should no other alternative exist.

and neutrality of individual arbitrators. Although challenge decisions are therefore extremely limited in scope, they will nevertheless doubtless prove helpful in illuminating the types of concerns described in soft law instruments like the IBA Guidelines on Conflicts of Interest in International Arbitration.[80]

Commentators have suggested that arbitral awards are seldom if ever relied upon by judges or arbitrators for matters of substantive law, since those issues are more appropriately addressed through public sources of law (ie, treaties, statutes and judicial decisions).[81] However, international arbitral awards can be extremely useful in elaborating on the procedural standards set forth in arbitral rules and identifying the boundaries of arbitral discretion.[82] Arbitral awards can also address questions involving the scope of an arbitration agreement, since those matters can be resolved by arbitral tribunals pursuant to the principle of *competence-competence* (*Kompetenz-Kompetenz*).[83] In many ways, arbitral awards are superior to judicial decisions that may also discuss these and similar concerns, since arbitrators are far more familiar than judges with party expectations in international commercial arbitration and with standards and customs of the field. Arbitrators may also be more inclined than judges to analyse the various issues in accordance with a comparatist-internationalist (rather than nationalist) perspective.[84]

Arbitral awards may also provide useful insights to researchers working outside international arbitration. Because 'arbitrators have an inclination to "transnationalise" the rules they apply',[85] arbitral awards can provide a useful understanding of cross-border procedural norms. Indeed, commentators have already relied on arbitral awards in innovative and interdisciplinary research

[80] International Bar Association (2019).

[81] Strong (2012b) 22.

[82] Strong (2012b) 22. While some procedural matters will be discussed in partial final awards or in procedural orders, procedural and jurisdictional matters are more often discussed as part of the final award on the merits. Strong (2009b) n.95.

[83] Born (2014), pp. 1051-71 (defining *competence-competence* as the ability of an arbitral tribunal to decide its own jurisdiction and noting that judges and arbitrators both address these issues).

[84] Bachand (2012), pp. 83-84.

[85] Kaufmann-Kohler (2007), p. 364.

involving general principles of procedural law,[86] the limits of procedural autonomy[87] and a new concept known as procedural *jus cogens*.[88]

Although reliance on arbitral awards has long been considered a best practice in international arbitration,[89] empirical research suggests that judges and arbitrators do not find such materials important in their work as a matter of actual practice. Indeed, as reflected in the Appendix, arbitral awards involving parties other than those involved in the immediate dispute were considered the least important type of procedural authority in international matters and were the second least important in domestic disputes. However, in terms of intensity marks, arbitral awards were considered more important in international matters, receiving a mark of 2.29 out of 5.00, while only receiving a mark of 1.77 in domestic disputes, a difference that was statistically significant ($p<.001$).

When comparing judges and arbitrators, arbitrators unsurprisingly ranked arbitral awards involving parties other than those involved in the current dispute slightly higher than judges in terms of hierarchy. However, arbitral awards were still not placed very high in the hierarchy of procedural authorities, with arbitrators placing those materials in the ninth position while judges placed them in the tenth (last) position. Intensity markings were equally lacklustre, with arbitrator giving arbitral awards a mark of 1.94 out of 5.00 and judges giving a mark of 1.67, a difference that was not statistically significant.

The tension between best and actual practices raises a number of questions. Because the study did not ask respondents to indicate why they

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[86] Cheng, Bin. 2006. *General principles of law as applied by International Courts and Tribunals*. Cambridge: Cambridge University Press (originally printed by Stevens & Sons Ltd. in 1953), pp. xi-xii; Kotuby Jr., Charles T. and Luke A. Sobota. 2017. *General principles of law and international due process: Principles and norms applicable in transnational disputes*. Oxford: Oxford University Press, p. 2.

[87] Strong (2014), pp. 1086-88.

[88] Strong, S.I. 2018a. General principles of procedural law and procedural *jus cogens*. *Penn State Law Review* 122: 347-409, p. 356.

[89] Strong (2009a), pp. 26-27, 33.

ranked the materials as they did,[90] it is unclear whether survey participants rated arbitral awards relatively low because of concerns about the inherent value of those authorities or because of infrequent references to such materials in the parties' written submissions, a phenomenon that might arise if advocates either did not appreciate the value of arbitral awards or could not find them when researching particular questions of law and practice. More empirical research is needed to determine the cause of the discrepancy.

The survey also sought information about the relative importance of arbitral awards involving the parties to the dispute at issue. These materials would not typically be published in institutional reporters or judicial dockets but would instead be generated as a result of earlier disputes between the parties and therefore be in the possession of the parties themselves. While these materials might be offered simply for persuasive purposes, advocates might seek to rely on these authorities to preclude certain claims or issues.[91]

According to the Appendix, arbitral awards involving the parties to the instant dispute were considered the sixth most important type of procedural authority in international disputes but were tied for third place in domestic disputes. This hierarchical difference belied relatively similar intensity rates, with such authorities receiving a mark of 2.79 out of 5.00 in international disputes and 2.72 in domestic disputes, a difference that was not statistically significant. Arbitrators ranked these types of awards as the fourth most important type of procedural authority, while judges put them in a tie for seventh place. Despite these variations in hierarchy, the two groups rated arbitral awards involving the parties to the current dispute at a relatively similar intensity level, with arbitrators rating such materials at 2.76 out of 5.00 and judges rating such materials at 2.67, a difference that was not statistically significant.

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[90] Judges and arbitrators have been asked to describe their motivation in other types of legal reasoning, although those issues are beyond the current discussion. Strong (2020a), chs. 3-4.

[91] The concept of preclusion in international commercial arbitration is still somewhat nebulous. Born (2014), pp. 3732, 3827.

2. Locating Authorities

Newcomers to international commercial arbitration often find it difficult to locate arbitral awards and institutional decisions, since the best information is not found in standard resource collections. Indeed, some general electronic databases greatly overstate the depth and breadth of holdings in their specialized arbitral libraries.[92] As a result, comparatists should seek to access the type of specialty sources that are commonly relied upon by experienced practitioners in the field.

The most robust free resource for arbitral awards is UNCITRAL's CLOUT database, which relies on information drafted by national reporters from around the world. The most comprehensive subscription service is kluwerarbitration.com, which is associated with international legal publisher Wolters Kluwer and which draws on decades of denatured arbitral awards published by leading arbitral institutions.[93] All of the information on kluwerarbitration.com is also available in hard copy for those who prefer printed materials. A number of arbitral reporting series that are not on kluwerarbitration.com are also available in hard copy.[94]

Institutional decisions on arbitral challenges are not commercially available at this time, but the LCIA website includes an electronic database of institutional decisions on arbitral challenges that is freely accessible[95] and the SCC has published a free practice note summarizing recent challenge decisions.[96] The ICC also provides reasons supporting institutional decisions on arbitrator challenges, although, at this point, those decisions are only made available to the parties themselves.[97]

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[92] While general legal databases like Westlaw and LexisNexis claim to offer materials in international commercial arbitration, they do not have access to the decades' worth of materials found in specialized subscription databases like kluwerarbitration.com.

[93] Arbitration Law Online also provides some arbitral awards, but nowhere near as many as kluwerarbitration.com.

[94] For a list of individual titles, see Strong (2009a), pp. 83-85.

[95] London Court of International Arbitration (2019).

[96] Ipp, Carè and Dubeshka (2019).

[97] International Chamber of Commerce (2015).

F. Scholarly Commentary

1. Relevance, Purpose and Use of Authorities

The final source of procedural authority to consider is scholarly commentary. While comparatists are experts at finding these sorts of materials, they may be unaware of the special role that academic writing plays in international commercial arbitration. For example, the private and confidential nature of arbitration means that the details of arbitral procedure are often cloaked in mystery. Judicial opinions tend not to include a great deal of information about the hearing or about pre-hearing procedures, since those matters are often subject to the discretion of the arbitral tribunal and are given great deference by courts, and published arbitral awards may only be available in denatured or summarized form.[98] In the absence of any direct guidance on arbitral norms, experienced advocates and arbitrators turn to expert commentary to fill in the gaps. This approach is particularly appropriate given that many of the leading commentators have a great deal of practical experience in international arbitration, either as advocates or neutrals, in addition to their scholarly credentials.

Traditionally, civil law lawyers have been somewhat more likely to rely on expert commentary than their common law counterparts, due to the heightened respect given to scholarly works in civil law jurisdictions. Those who come to international commercial arbitration from the common law world might find these sorts of citations odd or inappropriate, particularly if other forms of 'public' authority – such as judicial opinions – are also available. Nevertheless, common law comparatists as well as common law judges, arbitrators and practitioners must learn accept that expert commentary is a legitimate source of authority in international commercial arbitration, even if such works are not used extensively in some national courts.[99] Indeed,

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[98] Fortier, L. Yves. 1999. The occasionally unwarranted assumption of confidentiality. *Arbitration International* 15: 131-139, p. 131; Rogers, Catherine A. 2006. Transparency in international commercial arbitration. *University of Kansas Law Review* 54: 1301-1337, p. 1301.

[99] Whalen-Bridge, Helena. 2008. The reluctant comparativist: Teaching common law reasoning to civil law students and the future of comparative legal skills. *Journal of Legal Education* 58: 364-371, p. 369 ('Once

international commercial arbitration is well-known for blending common law and civil law procedural norms, and this is one of the more civil law-oriented features of the field, a conclusion that has recently been confirmed by empirical research.[100]

Comparatists interested in international commercial arbitration need to be aware that scholarship in this area of law is becoming ever-more sophisticated.[101] Indeed, arbitral commentary has moved beyond the type of contract-based analyses that were once considered the norm and has evolved to include various other types of research, including those of a constitutional and interdisciplinary nature.[102]

Empirical studies suggest that legal decision-makers appreciate the special role that scholarly commentary plays on procedural decision-making. As indicated in the Appendix, scholarly works (meaning articles, books and treatises) were rated as the fourth most important type of authority in the determination of international procedural disputes and the fifth most important type of authority in domestic disputes. In terms of intensity, these types of materials were given a mark of 3.43 out of 5.00 in international disputes but only 2.61 in domestic disputes, a difference that was considered statistically significant ($p<.001$).

Critical differences in terms of hierarchical placements appeared between judges and arbitrators, with judges ranking scholarly works as the ninth most important type of procedural authority and arbitrators ranking such materials as the third most important. However, no statistically significant difference appeared between the two groups in terms of intensity, with judges giving scholarly works a mark of 2.25 out of 5.00 and arbitrators giving a mark of 2.86.

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students receive their first training in the methodology of a particular legal system, they acquire a bias in favor of that system that is difficult to overcome.').

[100] Strong (2020b).

[101] Brekoulakis (2013), pp. 747-48; Schultz and Ridi (2019), p. 6.

[102] Brekoulakis (2013), pp. 747-48; Schultz and Ridi (2019), p. 29.

The study did not seek to identify the reason behind the different approaches,[103] which could stem either from preferences of individual respondents regarding the persuasiveness of the scholarly materials or from the willingness of advocates to present such materials. Notably, the differences do not appear to be attributable to the relative proportions of common law and civil law lawyers in the study.[104]

2. Locating Authorities

Although comparatists are well-versed in locating scholarly authorities, international commercial arbitration has a number of specialist materials that can be difficult for newcomers to find or appreciate.[105] For example, the growing popularity of the field has seen an increase in the number of treatises over the last few years, and it can be challenging for non-specialists to know which texts are considered the most authoritative by those who work frequently in the field.[106]

Recent years have also seen an exponential increase in the number of monographs and specialty journals focusing on international commercial arbitration. While some fields distinguish sharply between works produced by practitioners and those written by academics, international commercial arbitration typically embraces both types of authors, not only because international arbitration provides scholars with an opportunity to study comparative law-in-action,[107] but also because those who are currently practicing as advocates, arbitrators or both are often uniquely qualified to

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[103] See s. 2.5.1.

[104] Strong (2020a), ch. 3; Strong (2020b).

[105] Sourgens (2007), p. 12 (discussing difficulties of comparative research in international arbitration).

[106] Citation count studies suggest the two most popular treatises are *Law and Practice of International Commercial Arbitration* by Alan Redfern and Martin Hunter and *International Commercial Arbitration* by Gary Born. Schultz and Ridi (2019), p. 6; see also Smit, Smit, Hans, Loukas Mistelis and Mary Helen Mourra. 2007. *The Pechota bibliography on arbitration*. Huntington, New York: Juris Legal Information (identifying other treatises); Strong (2009a), pp. 88-108 (same).

[107] Basedow (2014), p. 856.

identify and analyse concerns and practices in a process that is both private and confidential.

Comparatists can face a number of practical challenges when researching scholarship in this field, since many of the most important arbitration journals are not part of standard electronic databases such as Westlaw and LexisNexis. While specialty subscription databases such as kluwerarbitration.com include a number of leading arbitral publications, even they do not include everything.[108] Researchers must therefore be both creative and persistent when seeking out expert commentary in either hard or electronic form.[109]

III. CONCLUSION

Emmanuel Gaillard once wrote that

> [i]nternational commercial arbitration has radically transformed the role of comparative law. Not long ago, comparative law was perceived to be an academic discipline. Its primary function was to provoke reflection on various legal systems and could at its best lead to legislative reform. International commercial arbitration revolutionized the field, transforming comparative law into an eminently practical and often lucrative discipline. Indeed, in many instances important international commercial litigations are won, based on the resolution of issues of comparative law.[110]

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[108] Free electronic research is somewhat limited, although some assistance can be found through free web-based research tools such as the World Legal Information Institute, which allows searches of secondary material by subject matter area or by region, and the Social Science Research Network (SSRN), which compiles materials by subject matter.

[109] Guidance is available. Smit, Mistelis and Mourra (2007) (listing materials); Strong (2009a), pp. 88-108 (same).

[110] Gaillard, Emmanuel. 1989. The use of comparative law in international commercial arbitration. In *ICCA Congress series number 4: Arbitration in settlement of international commercial disputes involving the Far East and arbitration in combined transport*, ed. Pieter Sanders, 283. The Hague: International Council for Commercial Arbitration, p. 281; see also Berger, Klaus Peter. 1998. International arbitral practice and the

As true as this maxim may be, the benefits of comparative law are far from universally appreciated. In some cases, judges, arbitrators, advocates and scholars need to overcome unconscious biases that lead to a preference for materials that are most akin to those used in their home legal system.[111] In other cases, participants in international commercial arbitration must set aside prejudices in favour of public sources of authority and learn to accept the importance of private sources of authority.

Although some problems may arise as a matter of principle, others arise as a practical matter. For example, some of the discrepancies between best and actual practices are likely the result of a lack of knowledge on the part of participants about the use and availability of various specialty sources of law.

As challenging as these issues are, they can be overcome. This Article has therefore sought not only to provide an introduction to comparative research methodology in the area of international commercial arbitration but also to offer a primer on how various resources can and should be used as jurisprudential matter. In so doing, this discussion hopes to advance the understanding of comparative law in international commercial arbitration and thereby ensure that the unique qualities of this field are not lost.[112]

UNIDROIT Principles of International Commercial Contracts. *American Journal of Comparative Law* 46: 129-150, pp. 130-31.

[111] Strong (2018b), p. 539.

[112] Gaillard (1989), p. 283; Lowenfeld (2014), p. 186; Sourgens (2014), p. 1. Those interested in this field can consult a number of related works that are also in the works as this Article goes to press. For example, not only is the current issue of *Ius Comparatum* dedicated to issues involving comparative law and international arbitration, but the 2020 issue of the *Journal of Dispute Resolution* will publish papers from the 2019 Annual Meeting of the American Society of Comparative Law, which focused on comparative law and international dispute resolution.

IV. APPENDIX[113]

Importance of different types of legal authorities when deciding procedural disputes (weighted averages, followed by standard deviation in parenthesis, sample (N) size and ranking within the relative cohort)

Statistical significance is indicated by asterisk, where one asterisk (*) indicates $p<.05$, two asterisks (**) indicate $p<.01$, and three asterisks (***) indicate $p<.001$.

	Judges	Arbitrators	Judges/ arbitrators t-statistic	Domestic disputes	International disputes	Domestic/ international t-statistic
Arbitral awards involving the parties to this dispute	2.67 (1.53) 3 Rank: 7 (tied)	2.76 (1.51) 275 Rank: 4	.10	2.72 (1.54) 230 Rank: 3 (tied)	2.79 (1.47) 101 Rank: 6	.39
Arbitral awards involving parties other than those involved in this dispute	1.67 (1.15) 3 Rank: 10	1.94 (1.11) 276 Rank: 9	.42	1.77 (1.06) 231 Rank: 9	2.29 (1.17) 101 Rank: 10	3.98***
Domestic regulations, statutes or administrative rules	4.25 (.96) 4 Rank: 2	3.77 (1.29) 276 Rank: 2	-.74	3.96 (1.22) 232 Rank: 2	3.45 (1.38) 101 Rank: 3	-3.37***
International treaties	2.67 (1.53) 4 Rank: 7 (tied)	2.43 (1.44) 269 Rank: 8	-.33	1.92 (1.31) 224 Rank: 8	3.55 (1.14) 100 Rank: 2	1o.76***
Judicial decisions from the	4.50 (1.00) 4	4.09 (1.16) 276	-.70	4.25 (1.08) 231	3.86 (1.27) 102	-2.87**

[113] The full chart and methodology are discussed in Strong (2020a), fig. 3.6.

jurisdiction whose law controls the matter	Rank: 1	Rank: 1		Rank: 1	Rank: 1	
Judicial decisions from jurisdictions other than the jurisdiction whose law controls the matter	3.00 (.00) 4 Rank: 4 (tied)	2.59 (1.07) 276 Rank: 6	-.76	2.72 (1.10) 232 Rank: 3 (tied)	2.44 (1.06) 101 Rank: 9	-2.16*
Legislative history of domestic regulations, statutes or administrative rules	4.00 (1.54) 4 Rank: 3	2.50 (1.13) 273 Rank: 7	-2.62**	2.56 (1.18) 229 Rank: 6	2.53 (1.14) 101 Rank: 8	-.22
Legislative history of int'l treaties (travaux préparatoires)	3.00 (2.00) 3 Rank: 4 (tied)	1.89 (1.03) 270 Rank: 10	-1.84	1.61 (.95) 223 Rank: 10	2.55 (1.05) 101 Rank: 7	7.98***
Scholarly works (articles, books, treatises)	2.25 (.96) 4 Rank: 9	2.86 (1.05) 270 Rank: 3	1.15	2.61 (1.02) 228 Rank: 5	3.43 (.93) 100 Rank: 4	6.88***
Soft law (i.e., non-binding but persuasive guidelines, declarations or codes of conduct)	2.75 (.96) 4 Rank: 6	2.75 (1.05) 272 Rank: 5	.00	2.52 (.97) 229 Rank: 7	3.29 (1.07) 101 Rank: 5	6.42***