

IUS COMPARATUM

LE RECOURS À LA MÉTHODOLOGIE
DU DROIT COMPARÉ EN ARBITRAGE INTERNATIONAL

THE USE OF COMPARATIVE LAW METHODOLOGY IN
INTERNATIONAL ARBITRATION



VOLUME 1 – 2020

aidc-iacl.org

Ius Comparatum rassemble chaque année des publications académiques sur diverses questions juridiques ayant fait l'objet d'une analyse de droit comparé.

Toutes les publications sont disponibles sur le site Web de l'Académie et sont publiées avec l'ambition de faire avancer la recherche en droit comparé.

La qualité de la publication est garantie par une sélection en interne suite à un appel à contributions pour le thème choisi chaque année. Le contenu est la responsabilité des auteur(e)s. Les articles peuvent être téléchargés par des particuliers, pour leur propre usage, sous réserve des règles ordinaires du droit d'auteur.

Tous les droits sont réservés.

Aucune partie de cette publication ne peut être reproduite sous quelque forme que ce soit sans l'autorisation des auteur(e)s.

Directeur de publication (Volume 1)
Dr. Alexandre Senegacnik

Académie internationale de droit comparé

Ius Comparatum gathers each year academic publications on diverse legal issues analyzed from a comparative law perspective.

All publications are available on the Academy's website and are released in the interest of advancing comparative law scholarship.

The quality of the publication is guaranteed by an internal review following a Call for Papers for each year's selected topic. The content is the responsibility of authors. Papers may be downloaded by individuals, for their own use, subject to the ordinary copyright rules.

All rights reserved.

No part of this publication may be reproduced in any form without permission of the author(s).

Editor (Volume 1)
Dr. Alexandre Senegacnik

International Academy of Comparative Law

VOLUME 1

<i>Avant-propos – Foreword</i> Alexandre Senegacnik	IV

Citation/Cite as: Alexandre Senegacnik 'Avant-propos - Foreword' *Ius Comparatum* 1(2020) IV-IX [International Academy of Comparative Law: aidc-iacl.org]

<i>Pourquoi ce sujet ? – Why this topic?</i> Diego P Fernández Arroyo	X

Citation/Cite as: Diego P Fernández Arroyo 'Pourquoi ce sujet ? – Why this topic?' *Ius Comparatum* 1(2020) X-XV [International Academy of Comparative Law: aidc-iacl.org]

<i>Comparative Law in International Arbitration</i> Emmanuel Gaillard	1

Citation/Cite as: Emmanuel Gaillard 'Comparative Law in International Arbitration' *Ius Comparatum* 1(2020) 1-35 [International Academy of Comparative Law: aidc-iacl.org]

<i>Le droit comparé, un pont entre le droit et le commerce international</i> Sebastián Partida	36

Citation/Cite as: Sebastián Partida 'Le droit comparé, un pont entre le droit et le commerce international' *Ius Comparatum* 1(2020) 36-64 [International Academy of Comparative Law: aidc-iacl.org]

<i>Lex sportiva : ex ius comparatum ad independentiam?</i> Charles-Maurice Mazuy	65

Citation/Cite as: Charles-Maurice Mazuy, 'Lex sportiva: ex ius comparatum ad independentiam?' *Ius Comparatum* 1(2020) 65-91 [International Academy of Comparative Law: aidc-iacl.org]

<i>Legal Authorities and Comparative Law in International Commercial Arbitration: Best Practices versus Empirically Determined Actual Practices</i>	92
Stacie I. Strong	

Citation/Cite as: S.I. Strong, 'Legal Authorities and Comparative Law in International Commercial Arbitration: Best Practices versus Empirically Determined Actual Practices' *Ius Comparatum* 1(2020) 92-129 [International Academy of Comparative Law: aidc-iacl.org]

<i>Applied Comparative Law—Five Steps to Success</i>	130
Johannes Landbrecht	

Citation/Cite as: Johannes Landbrecht, 'Applied Comparative Law – Five Steps to Success' *Ius Comparatum* 1(2020) 130-163 [International Academy of Comparative Law: aidc-iacl.org]

<i>The Use of the Comparative Method in International Arbitration Scholarship</i>	164
Morad El Kadmiri	

Citation/Cite as: Morad El Kadmiri, 'The Use of the Comparative Method in International Arbitration Scholarship' *Ius Comparatum* 1(2020) 164-210 [International Academy of Comparative Law: aidc-iacl.org]

<i>A New (Quasi-)Codified Lex Mercatoria Based on Soft Law Regulatory Competition and the Use of Comparative Law Methodology in International Commercial Arbitration</i>	211
Marco Torsello	

Citation/Cite as: Marco Torsello, 'A New (Quasi-)Codified Lex Mercatoria Based on Soft Law Regulatory Competition and the Use of Comparative Law Methodology in International Commercial Arbitration' *Ius Comparatum* 1(2020) 211-253 [International Academy of Comparative Law: aidc-iacl.org]

<i>Chinese Context and Complexities – Comparative Law and Private International Law facing new Normativities in International Commercial Arbitration</i>	254
Ulla Liukkunen	

Citation/Cite as: Ulla Liukkunen, 'Chinese Context and Complexities – Comparative Law and Private International Law facing new Normativities in International Commercial Arbitration' *Ius Comparatum* 1(2020) 254-287 [International Academy of Comparative Law: aidc-iacl.org]

- General Principles and the Search for Legitimacy in International Arbitration:
A Comparative Perspective* 288
Alyssa S. King

Citation/Cite as: Alyssa S. King, '*General Principles and the Search for Legitimacy in International Arbitration: A Comparative Perspective*' *Ius Comparatum* 1(2020) 288-318 [International Academy of Comparative Law: aidc-iacl.org]

- The Limits of the Comparative Public Law Methodology in International
Investment Law: an Australian Case Study* 319
Alexander Ferguson

Citation/Cite as: Alexander Ferguson, '*The Limits of the Comparative Public Law Methodology in International Investment Law: an Australian Case Study*' *Ius Comparatum* 1(2020) pp. 319-359 [International Academy of Comparative Law: aidc-iacl.org]

- The Arbitrators' Use of Comparative Law Methodology:
A Qualitative Assessment of Selected CAS, ICC, and ICSID Awards* 360
Luis Bergolla and Dorothee Goertz

Citation/Cite as: Luis Bergolla and Dorothee Goertz, '*The Arbitrators' Use of Comparative Law Methodology: A Qualitative Assessment of Selected CAS, ICC, and ICSID Awards*' *Ius Comparatum* 1(2020) 360-398 [International Academy of Comparative Law: aidc-iacl.org]

AVANT-PROPOS — FOREWORD

Alexandre Senegacnik*

« Tout d'abord sur un plan purement pratique : il est bon de montrer que le droit comparé n'est pas l'affaire de rêveurs, et que le commerce international, bien au contraire, a besoin de comparatistes ».

René David¹

"First of all, from a purely practical perspective: it is good to show that comparative law is not the business of dreamers, and that, quite to the contrary, international commerce needs comparatists".

René David¹

Le recours à la méthodologie du droit comparé dans l'arbitrage international — le choix de ce sujet pour le premier volume de la nouvelle publication en libre accès de l'Académie internationale de droit comparé s'est imposé avec évidence. Un choix évident, mais pas nécessairement pour les raisons qui pourront venir en premier lieu à l'esprit. En guise d'introduction de ce volume, le professeur Diego P. Fernández Arroyo expose les multiples raisons qui font de l'arbitrage un domaine qui intéresse évidemment les comparatistes. L'arbitrage international, tous types confondus², offre un terreau fertile pour des comparaisons. Nul doute que l'appel de René David il y a maintenant plus de soixante ans a été entendu : le droit comparé n'est certainement pas l'affaire des rêveurs/rêveuses, si tant est qu'il l'ait réellement été. Force est de constater qu'il existe un véritable réflexe de la comparaison tant dans la pratique que dans la doctrine.

The use of comparative law methodology in international arbitration—the choice of this topic for the first volume of the new open access publication of the International Academy of Comparative Law seemed evident.

An evident choice, but not necessarily for the reasons which might first come to mind.

In the introduction of this volume, Professor Diego P. Fernández Arroyo recalls the many reasons which explain why arbitration is evidently a domain of particular interest for the comparatists. International arbitration, all types considered, offers a fertile ground for comparisons. There is no doubt that René David's call more than sixty years ago, has now been heard: comparative law is obviously not the business of dreamers, assuming that it ever really was.

One will easily accept that there exists now a true comparative reflex in both practice and scholarship.

L'extraordinaire succès pratique de l'arbitrage international et la compétition parfois féroce qui existe entre les différents acteurs peuvent en partie expliquer ce besoin de (se) comparer. Mais l'attrait principal de l'arbitrage international pour le comparatiste réside sans doute ailleurs ; plus particulièrement dans la singulière réunion d'un ensemble divers de règles mais aussi d'acteurs — étatiques ou non étatiques, à l'échelon national, international et transnational. C'est la délicate articulation entre ces derniers qui peut alors assurer la résolution efficace des différends. Chaque tribunal arbitral éclaire de manière singulière les questions et concepts de droit auxquels il fait face — kaléidoscope, il peut proposer à chaque fois de nouvelles réponses et approches.

Il importe de préciser que le premier volume de *Ius Comparatum* n'a pas pour premier objectif d'offrir des recherches sur ce qu'il semble opportun d'appeler le « droit comparé de l'arbitrage ».

Chaque étape de la procédure arbitrale gagne assurément à être éclairée par une analyse comparative des diverses approches législatives et jurisprudentielles (judiciaires mais aussi arbitrales) pertinentes en la matière. L'Académie ne manque d'ailleurs certainement pas de participer à cet effort de recherche avec ses Congrès².

The extraordinary practical success of international arbitration and the sometimes fierce competition which exists between the different actors can explain this need to compare (oneself).

But the main interest of international arbitration for the comparativist probably lies elsewhere; more particularly in the singular reunion of a diverse set of rules but also actors—state and non-state, at the national, international and transnational levels. It is the subtle articulation between these which can ultimately ensure the efficient resolution of disputes. Each arbitral tribunal sheds a unique light on the legal questions and concepts it faces— like a kaleidoscope, it can each time propose new answers and approaches.

It is important to clarify that the first volume of *Ius Comparatum* does not primarily aim to propose new insights on what one may call the "comparative law of arbitration".

Certainly, each stage of the arbitration procedure benefits from a comparative analysis of the diverse and relevant approaches in legislations and Case Law (judicial but also arbitral). The Academy certainly does not fail to engage in this research effort through its Congresses.²

Il s'agit néanmoins avant tout dans ce volume de s'intéresser au **recours à la méthodologie du droit comparé par l'arbitre international**. C'est ainsi l'utilité du droit comparé dans le *quotidien* de l'arbitrage international qui est ainsi en premier lieu questionnée dans les pages qui suivent. Comment, selon quelle méthodologie et à quel moment l'arbitre recourt-il au droit comparé afin d'accomplir sa mission ? Quelle est la place réelle et souhaitable pour le droit comparé dans la mission de l'arbitre ? Voici quelques questions que le présent volume propose de discuter.

Le présent volume rassemble les contributions d'une conférence organisée le 8 octobre 2019 à Paris. Cette dernière a indéniablement été un succès à bien des égards. L'Académie peut en effet se féliciter d'avoir organisé, avec le soutien de l'École de droit de Sciences Po, une conférence sur un sujet qui mérite sans doute une plus grande attention. La participation record à cette conférence semble confirmer cette intuition. Le Bureau et le Secrétariat de l'Académie remercient tout particulièrement le professeur Emmanuel Gaillard pour sa leçon inaugurale qui éclaire sous un nouveau jour ce singulier tandem que forment le droit comparé et l'arbitrage international. Il ne fait nul doute qu'il était impossible de trouver une meilleure entrée en la matière.

The primary aim is however in this volume to focus on **the use by international arbitrators of comparative law methodology**. It is thus the usefulness of comparative law in the *daily* life of arbitration which is ultimately questioned in the following pages. How, according to what methodology and when does the arbitrator use comparative law to accomplish her mission? What is the real and recommended place for comparative law in the mission of the arbitrator? Here are some questions that this volume proposes to discuss.

This volume brings together the contributions of a conference organized on October 8, 2019 in Paris. The latter was undeniably a success in many ways. The Academy can pride itself on having organized with the support of Sciences Po Law School, a conference on a topic which undoubtedly deserves greater attention. The record attendance at the conference appears to support this intuition. The Executive Committee and the Secretariat of the Academy particularly thank Professor Emmanuel Gaillard for his inaugural lesson which sheds new light on this singular tandem of comparative law and international arbitration. There is no doubt that it would have been impossible to find a better *entrée en la matière*.

Le Professeur Gaillard réussit le tour de force de discuter une majorité — si ce n'est l'intégralité — des questions soulevées par le sujet de la conférence.

L'Académie peut aussi certainement se féliciter d'avoir permis à des chercheurs et chercheuses en provenance de plusieurs continents de venir exposer et discuter leurs travaux pour le premier volume de *Ius Comparatum*. Le Bureau et le Secrétariat se félicitent tout particulièrement du dialogue initié entre ses différentes générations de chercheurs.

Enfin, le Bureau et le Secrétariat tiennent tout particulièrement à remercier les Professeurs Sylvain Bollée et Pierre Tercier d'avoir accepté un exercice théâtral largement inédit pour conclure notre conférence.

Il s'agissait de mettre en scène une discussion entre deux arbitres fictifs sur le recours à la méthodologie du droit comparé. Il ne faut pas se méprendre sur ce point sur l'utilité de cette saynète. Loin d'être improvisée, elle n'avait de léger que le ton, car elle offrait une autre manière de discuter les questions essentielles du sujet même de la conférence.

Il était évidemment impensable d'inclure dans le présent volume une simple retranscription de cet échange théâtral.

Professor Gaillard succeeds to discuss most—if not all—the questions raised by the topic of the conference.

The Academy can also certainly pride itself on allowing researchers from several continents to present and discuss their work for the first volume of *Ius Comparatum*. The Executive Committee and the Secretariat particularly welcome the dialogue initiated between these different generations of researchers.

Finally, the Executive Committee and the Secretariat particularly wish to thank Professors Sylvain Bollée and Pierre Tercier who accepted a largely unprecedented theatrical exercise to conclude our conference.

The idea was to stage a discussion about the use of the comparative law methodology between two fictional arbitrators.

One should certainly not question the usefulness of this little play. Far from being improvised, it was only light in tone as it offered a different way to discuss the essential questions of the very topic of the conference.

It was for evident reasons not possible to include in this volume a mere transcript of this theatrical exchange.

Le lecteur ou la lectrice n'ayant pas eu la chance d'y assister se consolera néanmoins avec, en guise de conclusion, une petite illustration qui rappelle l'un des nombreux points de désaccord entre, d'un côté, l'illustre arbitre Bronson, *c.-à-d.* celui qui n'accorda décidément aucune place au droit comparé, et de l'autre l'arbitre Wayne, qui au contraire défend l'idée que le recours au droit comparé est bien un exercice inhérent à la mission de l'arbitre.

Le parti pris de ce premier volume de *Ius Comparatum* a été de proposer une perspective de recherche originale dans un format inédit pour l'Académie. C'est un grand plaisir de pouvoir enfin partager avec vous ce premier volume. Je remercie très chaleureusement les auteurs, le Bureau de l'Académie et en particulier le Secrétaire général pour sa confiance tout au long de l'élaboration et de la réalisation de ce projet.

* Secrétaire général adjoint de l'Académie internationale de droit comparé / Deputy Secretary-General of the International Academy of Comparative Law.
Contact: [as\[at\]aidc-iacl.org](mailto:as[at]aidc-iacl.org)

¹ 'Arbitrage et droit comparé' 1959 RIDC 11(1).

² Les différentes contributions dans ce volume traitent à la fois de l'arbitrage international commercial, d'investissement et sportif. The different contributions in this volume deal with international commercial, investment and sports arbitration.

Nevertheless, the reader, who has not had the chance to participate in it, will have to console herself with a little concluding illustration which evokes one of the many points of disagreement between, on the one side, the infamous Arbitrator Bronson, *i.e.* the one who refuses to give any room to comparative law, and on the other side, Arbitrator Wayne, who to the opposite defends the very idea that the use of comparative law is indeed an inherent exercise in the arbitrator's mission.

The aim of this first volume of *Ius Comparatum* was to offer an original research perspective in an unusual format for the Academy. It is a great pleasure to finally be able to share this first volume with you. I warmly thank the authors, the Executive Committee of the Academy and in particular the Secretary General for his trust throughout the development and implementation of this project.

³ V. par exemple / see for instance. George A. Bermann (Dir. de publication/Editor), *Recognition and Enforcement of Foreign Arbitral Awards: the Interpretation and Application of the New York Convention by National Courts*, Springer, *Ius Comparatum - Global Studies in Comparative Law*, 2017, ISBN 978-3-319-50915-0.

SOMEWHERE IN PARIS
ON OCTOBER 8TH 2019



OF COURSE COMPARATIVE LAW IS PART OF THE ARBITRATOR'S MISSION. CONSIDER AN ARBITRATION WITH AUSTRALIAN AND SOUTH KOREAN PARTIES SELECTING SWISS LAW TO SETTLE THEIR DISPUTE. SURELY ONE CANNOT EXPECT AN ARBITRATOR TO APPLY SWISS LAW AS IT IS APPLIED TO SWISS PEOPLE?!

WHAT IS KOREAN SWISS LAW? PARTIES SELECTING SWISS LAW SHOULD GET SWISS LAW. WHEN SOUTH KOREANS VISIT SWITZERLAND THEY DON'T WANT AD HOC KOREAN SWISS CHOCOLATE! JUST SWISS CHOCOLATE!

POURQUOI CE SUJET ? — WHY THIS TOPIC?

Diego P. Fernández Arroyo*

Peu d'acteurs juridiques sont aussi exposés au droit comparé que les arbitres transnationaux.

Même lorsque la loi applicable au fond a préalablement été identifiée par les parties, et même lorsqu'elle coïncide avec la loi du siège de l'arbitrage, le scénario le plus courant est celui d'au moins cinq contextes juridiques réunis autour de l'affaire : ceux (à minima deux) des parties et ceux des trois arbitres. En conséquence, la loi choisie, aussi claire qu'elle puisse paraître à première vue, sera probablement considérée à travers différents prismes.

Par ailleurs, les équipes d'avocats représentant les parties sont souvent également composées de différentes nationalités, ce qui peut également avoir un impact sur le contenu juridique des conclusions soumises aux arbitres. Il va sans dire qu'il convient d'éviter l'association irréfléchie et hâtive entre la nationalité et le contexte juridique, la réalité étant évidemment bien plus complexe. Les arbitres transnationaux, ainsi que les conseils et les responsables des institutions d'arbitrage, ont souvent des parcours juridiques riches et pluriels. Beaucoup d'entre eux ont été éduqués ou ont été exposés à différents systèmes juridiques. Les réactions comparatives sont donc logiques¹.

Few legal actors are as exposed to comparative law as transnational arbitrators.

Even when the applicable law to the merits has been well identified beforehand by the parties, and even it coincides with the law of the seat of the arbitration, the most common scenario is that of at least five legal backgrounds gathered around the case: those (at least two) of the parties and those of the three arbitrators. As a consequence, the selected law, no matter how clear it may appear a first glance, will probably be viewed through different prisms.

Furthermore, the teams of counsel representing the parties are often also multinational, which may further have an impact on the legal content of the submissions received by the arbitrators. Needless to say, one should avoid the hasty and thoughtless association between nationality and legal background, the reality being obviously more complex. Transnational arbitrators, as well as counsel and the staff of arbitral institutions, have often rich, plural legal backgrounds. Many of them have been educated in or have been exposed to different legal systems. Comparative reactions are thus logical.¹

Tout cela signifie qu'en ce qui concerne le sujet le plus fréquemment évoqué — c'est-à-dire la détermination de la loi applicable — chaque fois que la prise de décision arbitrale transnationale est en jeu, les termes « comparaison », « comparatif » et les autres termes similaires semblent inévitables. Peut-être que l'accent ainsi mis sur les questions de droit applicable est lié à l'influence que la doctrine de droit international privé — prise dans sa version plus « conflictuelle » (classique) — a eu sur les fondements de l'arbitrage moderne.

Cependant, ces questions ne sont qu'un des multiples visages des relations entretenues par le droit comparé avec l'arbitrage. De nos jours, l'activité des arbitres rencontre une myriade de situations nécessitant l'exercice des muscles comparatifs des arbitres. Prenons, par exemple, tout aspect procédural de l'arbitrage transnational. Il est indéniable que la procédure d'arbitrage connaît un processus de normalisation universelle rampante. Indépendamment des règles applicables ou du siège, les principaux éléments procéduraux de tout arbitrage ont tendance à être similaires. Les arbitres transnationaux sont familiers avec ces derniers, où qu'ils siègent. Néanmoins, l'approche de chaque arbitre sur des questions telles que la demande de production de documents, l'obtention d'un témoignage oral ou la répartition des coûts dépend encore considérablement de sa culture juridique. Le récent débat opposant les règles de l'IBA aux règles de

Prague est une manifestation de cette réalité.

All this means that as far as the most frequently invoked topic is concerned—*i.e.* ascertaining the applicable law—whenever transnational arbitration decision-making is at stake, the words “comparison”, “comparative” and the like seem unavoidable. Perhaps the stress on applicable law issues may be linked to the influence that private international law scholarship—taken in its more “conflictual” (classical) version—has had on the foundation of modern arbitration.

However, such issues are just one of the multiple faces of the relationship which comparative law entertains with arbitration. Nowadays arbitrators' activity encounters a myriad of situations that require the exercise of arbitrators' comparative muscles.

Take, for instance, any procedural aspect of transnational arbitration. It is undeniable that arbitration proceedings experience a process of creeping universal standardization. Irrespective of the applicable rules or the seat, the main procedural elements of any arbitration tend to be similar. Transnational arbitrators are used to them, wherever they seat. Nevertheless, the approach of each single arbitrator to issues such as the request of document production, the taking of oral testimony, or the allocation of costs still considerably depends on her legal culture. The recent debate confronting IBA Rules versus Prague Rules is a manifestation of this reality.

Malgré leurs différences, la manière dont les questions de droit applicable et les questions de procédure sont actuellement présentées dans des cas réels met en lumière un autre aspect de la notion contemporaine de droit comparé.

L'association traditionnelle entre droit comparé et systèmes juridiques nationaux — qui peine à se maintenir dans de nombreux domaines — est particulièrement contestée dans l'arbitrage transnational.

En réalité, bien que le droit étatique soit traditionnellement considéré comme la cible essentielle de l'analyse du droit comparé dans ce domaine ainsi que dans d'autres domaines juridiques, l'importance croissante du droit non étatique révèle l'obsolescence de ce présupposé classique.

Je prends le terme « non étatique » dans son acception la plus large, c'est-à-dire en ce qu'il regroupe non seulement les règles privées substantielles ou procédurales de toute nature, mais également les normes élaborées à l'échelon international.

Des expressions telles que « règles de droit », les « procédures transnationales » ou l'« ordre public transnational » indiquent à quel point l'utilisation incontournable de la méthodologie du droit comparé par les arbitres n'est pas — et ne peut pas être — limitée au droit des États.

Bien sûr, rien de ce qui précède n'est nouveau. Dans *l'avant-propos* de ce livre, Alexandre Senegacnik cite René David, écrivant il y a près de soixante ans sur le sujet.

Notwithstanding their differences, the way in which both, applicable law issues and procedural matters, are currently presented in real cases sheds light on another aspect of the contemporary notion of comparative law.

The traditional association between comparative law and national legal systems—which hardly resists in many fields—is particularly challenged in transnational arbitration.

In fact, although state law has been traditionally understood as the essential target of comparative-law analysis in this field as well as in other legal fields, the growing significance of non-state law reveals the obsolescence of this common assumption.

I am taking the concept of “non-state” in its broader meaning, that is to say, as referred not only to private substantial or procedural rules of all kinds but also to the norms elaborated at an international level.

Expressions such as “rules of law”, “transnational procedure” or “transnational public policy” indicate to what extent the inescapable use of the comparative law methodology by arbitrators is not—and cannot be—limited to state law.

Of course, nothing of the foregoing is new. In the *Foreword* of this book, Alexandre Senegacnik quotes René David, writing sixty years ago on this topic.

Plus proche de notre époque, mais certainement pas hier, Pierre Lalive — dont les contributions exceptionnelles en tant qu'universitaire au droit international privé (y compris l'arbitrage) sont largement connues et qui est unanimement considéré comme l'un des plus grands avocats et arbitres de tous les temps — a donné son propre témoignage sur notre sujet : « Si je devais résumer, en quelques mots, la leçon la plus importante que j'ai apprise au cours de plusieurs décennies d'expérience pratique en tant que conseil ou arbitre, mon choix tomberait sans hésitation sur l'extrême importance de ce que l'on appelle la dimension « culturelle » ainsi que l'une de ses principales conséquences: *c.-à-d.* la nécessité d'une 'approche comparative' et d'une vision réellement internationale »².

Ce qui est relativement nouveau, et rend encore plus urgent le besoin évoqué par Lalive, est le rôle central de l'arbitrage et de sa progressive *transnationalisation*. Comme il est bien connu, selon la matière concrète en jeu, l'arbitrage est devenu la juridiction compétente prédominante ou *de facto* exclusive pour le règlement des différends transnationaux. Cette centralité provoque non seulement un fort impact sur le discours de légitimité, mais a aussi des conséquences pratiques importantes³.

En outre, d'un point de vue éducatif, l'arbitrage est également devenu une partie inévitable du droit international, tant privé que public.

Closer to our time but certainly not yesterday, Pierre Lalive—whose outstanding contributions as an academic in private international law (including arbitration) are broadly known and who is unanimously considered as one of the greatest counsel and arbitrators ever—gave his own life testimony on our subject: “If I had to sum up, in a few words, the most significant lesson I learned in several decades of practical experience as counsel or arbitrator, my choice would unhesitatingly fall on the extreme importance of the so-called ‘cultural dimension’, together with one of its main consequences: *i.e.* the necessity of a ‘comparative approach’ and of a really international outlook.”²

What is relatively new and makes the need evoked by Lalive even more urgent, is the central role of arbitration and its progressive *transnationalisation*. As it is well known, depending on the concrete involved matter, arbitration has become the prevalent or *de facto* exclusive jurisdiction for the settlement of transnational disputes. This centrality is provoking not only a strong impact on the legitimacy discourse but also has important practical consequences.³

Furthermore, from an educational perspective, arbitration has also become an unavoidable part of international law, both private and public.

Ce n'est pas un hasard si cette nouvelle trilogie de droit international, d'arbitrage et de droit comparé est présente dans toutes les contributions de ce volume.

En résumé, aucun autre sujet n'a été plus approprié pour lancer la publication *Ius Comparatum* que l'arbitrage. On pourrait même dire que c'était le sujet évident.

J'espère que le contenu de ce premier numéro sera aussi instructif qu'utile pour tous ses lecteurs.

It is not by chance that this new trilogy of international law, arbitration and comparative law is present in all the contributions of this volume.

Summing up, no other topic was more appropriated to start the *Ius Comparatum* publication than arbitration. One might even say that it was the obvious topic.

I hope that the content of this first issue will be as instructive as useful for all its readers.

* Secrétaire général de l'Académie internationale de droit comparé – Secretary-General of the International Academy of Comparative Law.
Contact: [diego.fernandezarroyo\[at\]sciencespo.fr](mailto:diego.fernandezarroyo[at]sciencespo.fr)

¹ D'autres facteurs contribuent à l'urgence de réactions comparatives. Par exemple, de nombreux arbitrages en matière d'investissement sont menés en deux langues, ce qui implique un effort considérable dans la recherche d'une terminologie équivalente. Other factors contribute to the emergence of comparative reactions. For instance, many investment arbitrations are conducted in two languages, which implies a considerable effort in the search of equivalent terminology.

² Pierre Lalive, Cultural differences and international arbitration, 9 *Euromoney* (1995) 13-15. [Free Translation into French].

³ Diego P. Fernández Arroyo, "Nothing is for Free: The Prices to Pay for Arbitralizing Legal Disputes" in L. Cadet, B. Hess & M. Requejo Isidro (eds.), *Privatizing Dispute Resolution*, Baden-Baden, Nomos (2019) 615-646.

COMPARATIVE LAW IN INTERNATIONAL ARBITRATION

Emmanuel GAILLARD¹

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 a 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

¹ Visiting Professor, Yale Law School and Harvard Law School; Global Head of Disputes and International Arbitration, Shearman & Sterling. Email: EGaillard@Shearman.com. The author wishes to thank Mikaël Schinazi, an associate in the firm's International Arbitration Group, for his assistance in preparing this contribution.

TABLE OF CONTENTS

I.	THE FUNCTIONS OF COMPARATIVE LAW IN INTERNATIONAL ARBITRATION..	6
A.	A second nature for arbitrators.....	7
B.	A source of inspiration for lawmakers.....	9
1.	National lawmakers	9
2.	Transnational lawmakers	12
C.	A practical tool for litigants.....	13
D.	A source of law in its own right	14
1.	Through arbitral case law.....	15
2.	Through transnational rules.....	16
a.	Transnational choice of law rules	18
b.	Transnational substantive rules.....	20
c.	Transnational public policy	22
i.	For arbitrators.....	22
ii.	For domestic courts	25
II.	THE METHODS OF COMPARATIVE LAW IN INTERNATIONAL ARBITRATION..	27
A.	Evidence of comparative law.....	27
1.	The role of comparative law expert opinions	27
2.	Pre-existing compilations or codifications	29
3.	The arbitral tribunal's knowledge of comparative law	31
B.	The requirements of a cogent comparative law analysis	31
1.	Identification of trends or praise of difference	32

2. The dynamic nature of the comparative law approach 33

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,

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.

few if any hours would be devoted to international arbitration in courses on “international commercial law.”

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 law⁷ 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

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.

arbitration in France, England, Switzerland, and various other countries.⁹ 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 autobiography¹⁰—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 law¹² 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.

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 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, René. 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, René. 1995. *Qu'est-ce que l'arbitrage ?* In *Liber Amicorum Algot Bagge*, 58-66. Stockholm: P.A. Norstedt & Soner; David, René. 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.

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 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).

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.

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 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.

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).

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 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

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.

“epistemic community”²¹ composed of arbitration practitioners, lawmakers, and members of arbitral institutions—which seems driven by economic considerations²² and a set of shared normative values.²³ Comparative law is a fundamental part of that culture.

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

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.

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.

their own arbitration laws. There are numerous examples of arbitration principles and ideas—and even legal terms of art²⁶—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 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

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.

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.

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 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

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*

effect—a concept this author coined in 1994⁴⁰—could be found in France even prior to its major arbitral reforms of 1980-1981. In the recent past, this principle 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

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.

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.*

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 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

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.

these questions by focusing on the strengths and weaknesses of each relevant legal system.

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

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.

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).

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

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.

awards have appeared since 1990.⁵⁶ The latest development was the ICC's 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

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 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.

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 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.

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.

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.

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.

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 Arbitration⁶⁷ and was subsequently adopted in the UNCITRAL Arbitration Rules of 1976⁶⁸ 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

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).

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.

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

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.

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.

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.

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

⁷⁵ Cour de cassation (France), *Municipalité de Khoms El Mergueb 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.

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.

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 tribunal⁷⁶ 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

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.

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 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

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.

principles of international public policy as to which a broad consensus has emerged in the international community.”⁸² Authors such as Philippe Kahn,⁸³ Eric Loquin,⁸⁴ Jean-Baptiste Racine⁸⁵ and Lotfi Chedly⁸⁶ 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 tribunal⁸⁷ 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*

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.

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, Lotfi. 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.

Co. Ltd. v. Republic of Kenya, in which the arbitral tribunal⁹⁰ 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 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.

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

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.

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 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

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.

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 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 Corruption¹⁰³ 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

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*.

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.”

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

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-

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.

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 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

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

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 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

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.

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.

different cultural and legal backgrounds.”¹¹¹ The Principles have become one of 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.

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.

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.

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 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

¹¹⁶ See, e.g. Ferrari, Franco, and Giuditta Cordero-Moss ed. *Jura 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. “*Jura 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 désirable 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.

similarities or differences between legal systems (1), and whether the nature of the comparative law method is static or dynamic (2).

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 identified¹²¹—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

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.

to emphasize either the similarities or the differences between legal systems, other scholars have tried to forge a middle path between them.¹²⁴

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

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

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).

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 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 Principles¹²⁸ 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.

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.

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 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.

LE DROIT COMPARÉ, UN PONT ENTRE LE DROIT ET LE COMMERCE INTERNATIONAL

Sebastián Partida¹

Résumé

Loin d'être une méthode nouvelle, le droit comparé a encore du mal à trouver sa place dans la vie quotidienne des juristes. Une matière semble cependant échapper à ce constat : il s'agit de l'arbitrage commercial international. Ce domaine, par sa nature transnationale, impose en effet depuis longtemps la comparaison comme mode de réflexion. Néanmoins, les juristes français et européens restent parfois frileux, pour ne pas dire hermétiques, face à la comparaison de leur droit avec des droits que l'on pourrait qualifier d'exotiques. Pourtant, l'accroissement du nombre de parties issues de pays désignés hier comme « émergents » dans les arbitrages internationaux, fait que la prise en compte nombreux droits asiatiques ou latino-américains est aujourd'hui devenue cruciale dans l'étude comparative. En ce qu'elle impose de prendre en compte ces nouveaux droits et les réalités économiques contemporaines, la méthode comparative, dès lors qu'elle est appliquée à l'arbitrage international, constitue ainsi un véritable pont entre le droit et le commerce international.

Mots clés : Arbitrage international – Droit comparé – Méthodologie – Pays émergents – Droit chinois – Droit indien – Droit brésilien - Harmonisation – Arbitrage accéléré – Med-Arb

Abstract

Far from being a new method, comparative law is still struggling to find its place in lawyers' daily work. A field of law that seems to differentiate itself from this observation is international commercial arbitration. Arbitration, by its transnational nature, has for a long time imposed the comparative method as a mode of reflection. Nevertheless, French and European lawyers remain sometimes hesitant, almost hermetic, when comparing their own law with foreign laws that could be qualified as exotic. Still, the increase in the number of parties from countries designated not so long ago as "emerging" in international arbitration, has necessarily made the study of many Asian or Latin American arbitration laws crucial. By requiring to take into account these new national laws as well as the contemporary economic realities, comparative law applied to the international arbitration appears to be a bridge between law and international trade.

Keywords: International Arbitration – Comparative Law – Methodology – Emerging Markets – Chinese Law – Indian Law – Brazilian Law - Harmonization – Expedited Arbitration – Med-Arb/Arb-Med

¹ Docteur en droit de l'Université Panthéon-Assas Paris 2 – Chef de groupe juridique chez Bouygues Construction – Membre du Centre de recherche sur la justice et le règlement des conflits (CRJ).

TABLE DES MATIÈRES

I.	LE RENOUVEAU DE LA MÉTHODE DU DROIT COMPARÉ PAR LA PRISE EN COMPTE DES DROITS DES NOUVELLES PUISSANCES DU COMMERCE INTERNATIONAL.....	42
A.	L'impérieuse nécessité de sortir de l'ethnocentrisme.....	43
B.	Les illustrations de ce nouveau paradigme	46
II.	LA METHODE DU DROIT COMPARE : UN OUTIL DE PREMIER CHOIX POUR OBSERVER LES MUTATIONS DE L'ECONOMIE ET DU DROIT	55
A.	La remise en cause du modèle dominant et des instruments d'harmonisation.....	56
B.	Une transmission des modèles renouvelée	62

INTRODUCTION

Une méthode mal-aimée – Souvent reléguée au rang de sous-branche du droit, à mi-chemin entre l'histoire, la sociologie et la simple étude d'un droit étranger, la méthode du droit comparé² peine encore à s'imposer. Malgré les efforts incommensurables de la doctrine depuis Montesquieu, Savigny, Lambert et Saleilles jusqu'aux auteurs les plus modernes, force est de constater, qu'en dépit de leur nombre croissant, les comparatistes ont toujours du mal à convaincre dans les milieux académiques. Pour s'en rendre compte, il

* Cet article a été soumis pour publication en août 2019 mais a fait l'objet d'une mise à jour en octobre 2020. Par ailleurs, de nombreux thèmes abordés ici font l'objet de développements plus poussés in S. Partida, La convention d'arbitrage dans les nouvelles puissances économiques (Chine, Inde, Brésil, Mexique), préface Ch. Jarrosson, avant-propos E. Gaillard, Bruylant, Coll. Arbitrage, 2020.

² L'objet n'étant pas ici de trancher la question de savoir si le droit comparé est une discipline à part entière ou s'il s'agit simplement d'une méthode pouvant être utilisées dans l'ensemble des branches du droit, nous utiliserons dans les développements suivants de manière indifférente les expressions « droit comparé », « comparaison » ou « méthode du droit comparé ».

suffit de regarder la petitesse des développements consacrés à la comparaison (lorsqu'ils existent) dans la plupart des manuels ou dans les cours magistraux dispensés à l'université. Ceci est particulièrement vrai en France, dont la culture juridique s'est exportée aux quatre coins du monde, mais aussi dans la plupart des pays qui jouissent d'un héritage juridique important³. Il existe cependant un domaine dans lequel ce constat pour le moins pessimiste doit être largement nuancé, pour ne pas dire balayé : il s'agit de l'arbitrage commercial international⁴.

Droit comparé et arbitrage – L'arbitrage commercial international est en effet depuis longtemps considéré comme étant indissociable du droit comparé. Lors du Congrès ICCA de Tokyo en 1988, Emmanuel Gaillard déclarait ainsi : « *International commercial arbitration has radically transformed the role of 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* »⁵. Le recours à la méthodologie du droit comparé est, il est vrai, d'une grande aide tant pour les rédacteurs de contrats internationaux que pour leurs conseils, et cela que ce soit au moment des négociations contractuelles ou au cours de la résolution d'un litige. La comparaison est utilisée pour choisir la loi applicable au contrat et à sa clause compromissoire, pour choisir le siège de l'arbitrage ou encore pour déterminer les règles de procédure les plus adaptées⁶. Du côté des

³ A l'inverse, les juristes issus de pays qui ont développé un système juridique principalement emprunté à celui d'un autre pays, que ce soit pour des raisons historiques (colonisation) ou pour des raisons de tailles (Monaco, Liechtenstein, etc.), ont plus naturellement recours à la méthode comparatiste.

⁴ On retrouve un recours similaire à la comparaison juridique dans de nombreux autres domaines directement concernés par la mondialisation ; comme par exemple le droit des transports, le droit maritime, les ventes internationales de marchandises, la propriété intellectuelle, etc.

⁵ E. Gaillard, *The Use of Comparative Law in International Commercial Arbitration*; P. Sanders (éd.), ICCA Congress Series n° 4, 9th : 1988 : Tokyo, Kluwer, 1989, p. 283.

⁶ Pour diverses études empiriques sur la manière dont ces différents choix sont opérés v. les différents sondages Queen Mary/ White & Case – v. également : Y.- W. Li, *Dispute Resolution Clauses in International Contracts: An Empirical Study* ; *Cornell International Law Journal* 2006, vol. 39, n° 3, p. 789 – S. R. Bond, *How to Draft an Arbitration Clause (Revisited)*, *Bull. CCI* 1990, p. 14, réédité in Christopher R. Drahozal & R. W. Naimark, *Towards*

arbitres, la méthode comparative permet de combler les lacunes laissées par les parties, notamment lorsqu'elles ont omis de choisir une loi applicable au fond, ou encore de créer du droit positif lorsqu'ils ont été chargés de trancher le litige conformément aux « principes généraux du droit du commerce international » ou en amiable composition⁷. Les juges nationaux peuvent, quant à eux, y avoir recours pour renforcer la légitimité de leurs décisions⁸. Enfin, le recours à la méthodologie du droit comparé permet aux législateurs et aux institutions d'arbitrage, qui se livrent à une véritable concurrence normative, d'assurer la compétitivité de leurs lois⁹ et de leurs règlements¹⁰.

L'arbitrage, un objet d'étude précieux pour le comparatiste – Le recours à la méthodologie du droit comparé, qui consiste non pas en une utilisation purement pragmatique de la comparaison – à l'instar de ce qui peut résulter des nombreux *benchmarks* auxquels se livrent régulièrement les praticiens – mais plutôt en une analyse doctrinale visant à comprendre l'origine et le bien-fondé des règles régissant une matière, permet aussi de découvrir l'esprit qui les anime et d'en suggérer une amélioration. Cela résulte en grande partie de la meilleure connaissance qu'elle nous apporte de nos propres institutions. Par conséquent, le comparatiste dispose d'une place de choix pour comprendre son système juridique et pour observer les mutations du droit à un niveau

a Science of International Arbitration: Collected Empirical Research 69-70 (2005) – S. R. Bond, How to Draft an Arbitration Clause; *Journal of International Arbitration* 1989-2, p. 65.

⁷ E. Gaillard, Du bon usage du droit comparé dans l'arbitrage international ; *Rev. arb.* 2005, p. 375, spéc. p. 378.

⁸ *Ibid.*, p. 377 – Sur le recours au droit comparé par les magistrats v. également : M. Andenas & D. Fairgrieve (éd.), *Courts and Comparative Law*, Oxford, 2015 – S. Bouabdallah, La comparaison des droits, in P. Deumier (sous la dir.), *Le raisonnement juridique, Méthodes du droit*, Dalloz, 2013, p. 202 et s.

⁹ En France, rappelons par ex. que le législateur s'était inspiré de solutions issues du droit comparé pour introduire les concepts de renonciation à se prévaloir des irrégularités ou encore la faculté pour les parties de renoncer au recours en annulation dans le décret du 13 janv. 2011 – v. Ch. Jarrosson & J. Pellerin, *Le droit français de l'arbitrage après le décret du 13 janvier 2011* ; *Rev. arb.* 2011, p. 5, spéc. n° 36 et n° 104.

¹⁰ Les années 2010 ont donné lieu à une véritable surenchère de la comparaison entre les différentes institutions d'arbitrage. Bon nombre d'entre elles sont ainsi allées jusqu'à modifier plusieurs fois de suite leurs règlements en quelques années afin d'introduire notamment les procédures accélérées, l'arbitrage d'urgence ou encore des règles sur la transparence.

mondial. D'une part, parce que l'immersion que suppose l'étude d'un droit étranger, lui permet de découvrir des notions et des institutions différentes de celles auxquelles il est habitué. D'autre part, parce la comparaison peut lui faire prendre conscience du positionnement de sa propre loi dans la course à l'attractivité juridique à laquelle se livrent les différents législateurs. L'arbitrage international, en ce qu'il suppose la mise en jeu des intérêts du commerce international et surtout en raison du caractère transnational des règles qui l'irriguent aujourd'hui, se présente ainsi comme le médium idéal pour relier le droit aux évolutions du commerce international.

L'arbitrage au cœur du commerce international – Le lien très étroit qui unit le droit comparé et l'arbitrage constitue en effet surtout l'expression du fait que l'arbitrage international est avant tout une nécessité pour les opérateurs du commerce international. Depuis l'Antiquité, les commerçants ont toujours eu besoin de mettre en place différents instruments leur permettant d'échanger par-delà les frontières. Cela inclut notamment une langue véhiculaire (*lingua franca*), une devise, un système de normes, d'usages et de conventions. L'établissement de ces institutions et d'un véritable corpus juridique a ainsi toujours permis l'expansion du commerce et a parfois jeté les bases d'une transformation politique future. La construction européenne, avec l'établissement d'une monnaie unique et la constitution d'un véritable ordre juridique européen, peut ainsi parfaitement illustrer la nécessité de créer un cadre transnational visant à favoriser les échanges de biens et services.

L'arbitrage commercial international, en ce qu'il constitue un for neutre et spécialisé permettant aux opérateurs de régler efficacement leurs différends, procède ainsi d'un processus d'intégration comparable. En effet, la mise en place depuis les années 1950 de nombreux instruments portant sur les modalités de mise en œuvre de ce mode de règlement des litiges, dont les plus illustres sont la Convention de New York, le Règlement et la Loi-type CNUDCI, a progressivement conduit à la construction d'une justice autonome, détachée

des juridictions nationales, avec ses propres règles et sa propre jurisprudence¹¹. Un auteur écrivait ainsi: « *arbitration is the expression of peaceful forces toward international integration triggered by trade* »¹².

La comparaison comme témoignage d'une époque – Une analyse chronologique des différents ouvrages portant sur l'arbitrage international démontre d'ailleurs à quel point l'utilisation du droit comparé, en ce qu'elle impose un renouvellement systématique des paradigmes, reflète à chaque fois son époque. Le monde bipolaire de la Guerre froide décrit par Philippe Fouchard¹³ et René David¹⁴ - dans lequel était opposés les droits occidentaux (« Monde libre ») avec ceux de l'URSS et des démocraties populaires – a en effet peu de chose à voir avec celui de l'hégémonie transatlantique des années 1990-2000 dépeint notamment par Alan Redfern et Martin Hunter¹⁵, ou par Jean-François Poudret et Sébastien Besson¹⁶. Un tel renouvellement des paradigmes impose par conséquent de renouveler si ce n'est de la méthode de la macro comparaison (dont la systématisation peut parfois s'avérer compliquée), au moins les objets, les droits, sur lesquels doit porter l'étude comparative.

Les transformations récentes du commerce international – Un des grands bouleversements à l'œuvre depuis la crise financière de 2008, qui relève tant de la macroéconomie que de la géopolitique, et dont les effets se sont fait sentir tout au long de la décennie écoulée, consiste en l'apparition fulgurante de nouveaux acteurs économiques. Ces derniers, issus de pays que l'on

¹¹ A. Mourre, *Soft law as a condition for the development of trust in international arbitration*; *RBA* 2016, n° 51, p. 82, spéc. p. 87.

¹² A. Casella, *Arbitration in International Trade*; *NBER Working Paper* #4136, 1992, p. 1.

¹³ Ph. Fouchard, *L'arbitrage commercial international*, Préface de B. Goldman, Dalloz, 1965 – Dans un esprit de continuité v. également E. Loquin, *L'amiable composition en droit comparé et international - Contribution à l'étude du non-droit dans l'arbitrage commercial*, Préface Ph. Fouchard, Librairies Techniques, Paris, 1980.

¹⁴ R. David, *L'arbitrage dans le commerce international*, Economica, 1982.

¹⁵ A. Redfern & M. Hunter, *Law and Practice of International Commercial Arbitration*, 4^e éd., Sweet & Maxwell, 2005.

¹⁶ J.-F. Poudret & S. Besson, *Droit comparé de l'arbitrage*, Schulthess / L.G.D.J. / Bruylant, 2002.

qualifiait encore hier d'« émergents », ou « en voie de développement », tels la Chine, l'Inde, le Brésil, Singapour, la Corée du Sud, ou encore le Mexique, influent désormais de manière substantielle sur la pratique du droit de l'arbitrage international. Partant, il est intéressant de voir dans quelle mesure l'apparition d'un grand nombre de justiciables venant d'horizons juridiques très différents a un impact sur la méthodologie du droit comparé et si, en conséquence, les juristes français et européens doivent être invités à reconsidérer leur vision du monde.

Face à une approche comparative encore trop souvent basée sur la dichotomie droits de Common Law / droit continentaux, la méthodologie du droit comparé doit aujourd'hui être renouvelée. Pour ce faire, il est fondamental de prendre davantage en compte les droits des nouvelles puissances du commerce international (I). A défaut, il serait très compliqué pour le comparatiste de saisir l'intégralité des mutations juridiques contemporaines, ce qui ferait perdre une grande partie de son intérêt à la méthode du droit comparé (II).

I. LE RENOUVEAU DE LA MÉTHODE DU DROIT COMPARÉ PAR LA PRISE EN COMPTE DES DROITS DES NOUVELLES PUISSANCES DU COMMERCE INTERNATIONAL

La méthode employée par de nombreux juristes français et européens, qui consiste à comparer leur droit national uniquement à celui de leurs plus proches voisins tend à verser dans un certain ethnocentrisme qui mérite d'être abandonné (A). Différentes illustrations montrent en effet que la non-prise en compte de droits plus éloignés peut empêcher le comparatiste de saisir la totalité de phénomènes juridiques touchant à l'arbitrage international (B).

A. L'impérieuse nécessité de sortir de l'ethnocentrisme

Un « eurocentrisme » dépassé – Nous l'avons vu, à l'inverse de nombreuses disciplines, le recours au droit comparé s'impose depuis longtemps dans l'arbitrage international ; non pas seulement dans la pratique des arbitres ou des conseils mais aussi et surtout en doctrine. La comparaison des droits est en effet évidente dans la plupart des ouvrages relatifs à cette matière, et en particulier dans les traités qui font figure de référence. Pensons par exemple à celui des professeurs Fouchard, Gaillard et Goldman¹⁷, à celui de MM. Lew, Mistelis et Kröll¹⁸ ou encore à celui de Gary Born¹⁹. Néanmoins, dans de nombreux ouvrages plus récents, les auteurs francophones, et particulièrement français, restent encore souvent quelque peu frileux face à la comparaison de leur droit aux autres droits de l'arbitrage. Hormis quelques exceptions notables, en particulier certaines thèses de doctorat (rarement publiées) qui comparent notre droit à un autre droit étranger, le recours au droit comparé demeure en effet trop secondaire, voire anecdotique, et borné aux droits les plus proches (suisse, belge, italien, allemand, etc.). Ce phénomène, qui concerne tous les domaines du droit est régulièrement dénoncé²⁰. Il peut s'expliquer d'abord par une certaine proximité naturelle, qui est tant géographique que linguistique. Mais aussi par un mode spécifique de la comparaison qui prévaut depuis le milieu du XX^e siècle, et que certains ont qualifié de « comparaison des ressemblances »²¹. Cette méthode, qui prend le contre-pied de l'ancienne « comparaison des différences » qui prévalait autrefois au moment de l'affirmation des nations, consiste en effet à démontrer

¹⁷ P. Fouchard, E. Gaillard, B. Goldman, *Traité de l'arbitrage commercial international*, Litec, 1996.

¹⁸ J. D. M. Lew, L. A. Mistelis, S. M. Kröll, *Comparative International Commercial Arbitration*, Kluwer International Law, 2003.

¹⁹ G. B. Born, *International Commercial Arbitration*, Kluwer International Law, 3^e éd., 2020.

²⁰ v. not. O. Moréteau, *Le juriste français, entre ethnocentrisme et mondialisation*, Dalloz, 2014 – H. Muir Watt, *La fonction subversive du droit comparé* ; *RIDC* 2000, p. 503.

²¹ v. P. G. Monateri, *Éléments de comparaison des études comparatives* ; in P. Legrand (sous la dir.), *Comparer les droits, résolument*, Puf, 2009, p. 69, spéc. p. 93.

combien les droits - en particulier européens - sont proches les uns des autres. Cela présentait, il est vrai, l'avantage de s'intégrer facilement à un processus d'harmonisation ; ce qui a pu présenter une certaine utilité tout au long de la construction européenne.

Toutefois, la restriction de la comparaison des droits de l'arbitrage à la *summa divisio* Common Law / droit continental, en particulier depuis la dislocation de l'URSS, s'explique avant tout par le fait que les opérateurs du commerce international ayant recours à ce mode de règlement des litiges étaient, jusqu'à une période récente, dans la majorité des cas issus de pays occidentaux. Restreindre la comparaison aux droits de l'arbitrage européens et nord-américains dans les années 2000, comme le faisaient Jean-François Poudret et Sébastien Besson dans leur célèbre ouvrage, était ainsi pertinent dans la mesure où les droits visés représentaient ceux des pays qui comptaient le plus, à l'époque, dans les échanges internationaux. Toutefois, se limiter à la comparaison des droits occidentaux ou à la dichotomie Common Law / droit continental relève aujourd'hui d'un certain ethnocentrisme, pour ne pas dire « eurocentrisme », qui doit être abandonné. Soulignons, en outre, que les divergences entre le droit continental et la Common Law demeurent finalement assez artificielles²². L'étude de la plupart des droits latino-américains démontre d'ailleurs assez bien qu'une synthèse des deux familles de droit existe déjà, sans que cela ne pose trop de difficulté.

La prise en compte nécessaire de nouveaux droits – Le but premier poursuivi par le juriste qui adopte une démarche comparatiste est la découverte d'un ou de plusieurs droits étrangers qui ne sont *a priori* pas les

²² Si l'opposition entre systèmes romano-germaniques et systèmes de Common Law remonte au XV^e siècle (v. M. Langer, *In the Beginning was Fortescue : On the Intellectual Origins of the Adversarial and Inquisitorial Systems and Common and Civil Law in Comparative Criminal Procedure* » ; in B. A. Acherman, K. Ambos, H. Sikirić (ed.), *Visions of Justice. Liber Amicorum Mirjan Damaška*, Duncker & Humblot, 2016, p. 273), dès les années 1960 l'idée d'un « droit occidental » commence cependant à se faire jour sous la plume de René David. Aujourd'hui, cette opposition semble s'être surtout déplacée sur le terrain de l'efficacité. Pour une analyse complète v. A. Gambaro, R. Sacco, L. Vogel, *Le droit de l'Occident et d'ailleurs*, L.G.D.J., 2011, p. 45 et s.

siens. Il existe cependant des exceptions. Il est ainsi toujours assez surprenant de découvrir que dans de nombreux pays africains où le Code civil français n'a quasiment pas été modifié depuis leur accession à l'indépendance, la jurisprudence locale continue souvent de se référer à la jurisprudence de la Cour de cassation française²³. Néanmoins, hormis ces cas, le recours à la méthode du droit comparé permet avant tout au juriste de découvrir d'autres institutions, d'autres manières de raisonner, de penser et, de façon plus large, d'autres formes de justice. On comprend dès lors que la comparaison d'un droit uniquement avec des droits voisins mène de manière inéluctable à un certain enfermement. Ceci est d'autant plus renforcé par les nombreux processus d'harmonisation au niveau régional qui ont été mis en œuvre au cours des dernières décennies et qui ont généralement conduit à un effacement plus ou moins prononcé aux références culturelles locales ainsi qu'à un appauvrissement certain (quoique parfois difficile à percevoir) de la créativité juridique. Si des auteurs comme René David ou Philippe Fouchard, se proposaient déjà dans les années 1960 de comparer la quasi-totalité des droits de la planète, leurs classifications en familles de droit sont néanmoins difficilement transposables dans le monde actuel. Une méthode du droit comparé renouvelée doit ainsi permettre, au juriste français ou européen, de mettre en perspective son propre droit non plus seulement avec les droits qui ressemblent au sien mais aussi avec les droits de pays qui, bien qu'éloignés géographiquement et culturellement, comptent aujourd'hui de manière significative dans le commerce international.

Un nouveau paradigme – De très nombreux pays qualifiés hier d'« émergents » sont en effet devenus de grands acteurs des échanges mondiaux et le poids de leur économie devrait même encore s'amplifier dans

²³ On retrouve ce phénomène, dans une ampleur encore plus grande, dans les anciennes colonies britanniques, où le système de Common Law renforce la référence permanente à la jurisprudence anglaise.

les années à venir²⁴. Cela a pour conséquence que le nombre de parties à des arbitrages internationaux issues de ces pays (dont les populations représentent plus de la moitié de la population mondiale) ne cesse de croître. Les dernières statistiques de la CCI montrent, par exemple, qu'en 2019 le nombre de parties brésiliennes (147) a dépassé le nombre de parties françaises recensées (126) ; le nombre de parties chinoises (105) était quant à lui supérieur au nombre de parties allemandes (97) ou britanniques (78)²⁵. Plusieurs auteurs ont d'ailleurs relevé qu'il y avait désormais bien plus d'arbitrages administrés en Asie que dans les places traditionnelles comme Genève, Paris ou Londres²⁶ et les institutions qualifiées autrefois de « régionales », comme le SIAC ou la CIETAC sont aujourd'hui en pleine expansion. Ces dernières ouvrent désormais des bureaux à l'étranger, comme le faisaient avant elles les institutions européennes. Pensons, par exemple, à l'ouverture par la CIETAC de bureaux à Vienne et à Vancouver en 2018. La prise en compte de ce nouveau paradigme, et par conséquent l'étude de droits encore trop peu étudiés par le comparatiste français ou européen, donne ainsi l'occasion d'élargir un peu l'horizon. Cela permet, en outre, de démontrer que l'"occidentalisation" du droit qui primait au cours des deux derniers siècles n'est plus la norme et qu'à présent les influences peuvent être réciproques. Deux exemples permettent d'illustrer ce propos.

B. Les illustrations de ce nouveau paradigme

La propagation de l'arbitrage accéléré – Le premier exemple de ce nouveau paradigme concerne l'adoption par un nombre croissant d'institutions

²⁴ Selon une étude de PwC, en 2050, 6 des 10 pays les plus riches de la planète seront des pays qualifiés aujourd'hui d'« émergents » ; les PIB de la Chine et de l'Inde dépassant largement celui des Etats-Unis ; v. The World in 2050 - The Long View How will the global economic order change by 2050?, fév. 2017.

²⁵ International Chamber of Commerce, ICC Dispute Resolution 2019 Statistics, 2020, p. 21.

²⁶ v. par ex.: A. Reyes & W. Gu (dir.), The Developing World of Arbitration: A Comparative Study of Arbitration Reform in the Asia Pacific, Hart Publishing, 2018, p. 1.

de règles d'arbitrage accéléré. En effet, face à la judiciarisation de l'arbitrage et à la complexification des litiges, un besoin de simplification et d'accélération des procédures arbitrales est de plus en plus exprimé par les justiciables. Le but n'est pas seulement d'entraîner une baisse des coûts de l'arbitrage. Il s'agit surtout d'améliorer son efficacité, en particulier pour les litiges juridiquement peu complexes ou dont les enjeux financiers sont relativement modestes. Si quelques rares lois comme la loi brésilienne²⁷, la loi française²⁸ ou encore la loi indienne²⁹, peuvent fixer une durée maximum pour les procédures arbitrales (principalement en matière interne), la réponse la plus adaptée apportée à ces attentes a cependant été l'instauration de procédures accélérées, également appelées « *fast-track arbitration* », « *expedited arbitration* » ou encore « *accelerated arbitration* ».

Malgré certaines nuances³⁰, l'objectif général dans ces procédures est la réduction des délais ordinaires afin d'accélérer toutes ou certaines des phases de l'arbitrage et d'obtenir une décision sur le fond dans un délai plus court³¹. Elles permettent ainsi de réduire les coûts - qui sont généralement directement proportionnels à la durée et à l'ampleur des services des conseils et des arbitres³² - et d'obliger les parties à sélectionner et à concentrer leurs moyens,

²⁷ Loi brésilienne d'arbitrage 2015, art. 23.

²⁸ CPC, art. 1463.

²⁹ Arbitration & Conciliation Act 2019, sect. 29A.

³⁰ Des auteurs ont proposé de distinguer ces trois types d'arbitrage accéléré : « *fast-track arbitration* » faisant référence à une procédure dans laquelle les parties désignent un type particulier de litige parmi les contentieux qui peuvent les opposer, pour lequel le délai de l'arbitrage est non-prorogeable ; « *expedited arbitration* » faisant référence à une procédure qui suit les dispositions spécifiques d'arbitrage accéléré d'un règlement institutionnel ; et enfin « *accelerated arbitration* » désignerait le cas où, malgré une clause d'arbitrage non spécifique, une fois l'arbitrage commencé les parties décideraient en raison de l'urgence de raccourcir les délais normalement applicables ; v. B. David, O. Lagacé & M. Volkovitch, *When Doctrines Meet-Fast-Track Arbitration and the ICC Experience*, Kluwer Law International 1993, Vol. 10, p. 69 – Notons néanmoins que ces trois expressions restent très souvent utilisées de manière interchangeable.

³¹ En cela, elle doit être distinguée de la procédure qui permet de nommer un arbitre d'urgence, qui va uniquement prononcer des mesures provisoires et conservatoires mais sans se prononcer sur le fond.

³² Selon certains auteurs, cet avantage doit cependant être relativisé dans la mesure où pour respecter des délais plus brefs, les différents acteurs de la procédure peuvent être amenés à déployer des efforts plus

ce qui rend le processus arbitral plus efficace. Ces procédures, qui connaissent un véritable succès en pratique³³, s'avèrent particulièrement nécessaires dans les litiges qui interviennent dans des relations commerciales de longue durée ou lorsqu'il y a un intérêt spécifique à limiter la période d'incertitude qui caractérise tout différend. Cela est notamment le cas en matière de construction, de fusions-acquisitions ou encore dans les litiges en matière de propriété intellectuelle³⁴. Il n'est d'ailleurs pas surprenant que l'une des premières institutions à avoir adopté des règles spécifiques d'arbitrage accéléré soit l'OMPI en 1994. La même année, la CIETAC a également adopté sa « procédure simplifiée »³⁵ et le SCC son « Règlement pour l'arbitrage accéléré ». Depuis, la majorité des institutions d'arbitrage ont adopté des dispositions similaires, que celles-ci soient directement intégrées dans le Règlement³⁶ ou qu'elles forment un corps de règles à part³⁷.

L'adoption en 2017 d'une procédure accélérée par la CCI - dernière grande institution avec la LCIA qui ne disposait pas d'un ensemble de règles dédiées - s'avère cependant particulièrement intéressante, en ce qu'elle a

intenses et des ressources additionnelles. Dans ce sens: I. Welser & C. Klausegger, *Fast Track Arbitration: Just Fast or Something Different?*; *Austrian Arbitration Yearbook* 2009, p. 273.

³³ A titre d'exemple, les procédures accélérées représentaient 69,56% des affaires administrées par la CIETAC en 2016 ; v. *Annual Report on International Commercial Arbitration in China* (2016), p. 20 – De même, en 2017 sur 200 nouvelles affaires devant la SCC 72 (soit 36%) étaient des procédures accélérées ; v. A. Havedal Ipp, *Expedited Arbitration at the SCC: One Year with the 2017 Rules* ; *Kluwer Arbitration Blog*, 2 avr. 2018 – De son côté, entre 2010 et 2017, le SIAC a administré 236 arbitrages accélérés sur 1905 affaires (soit 12%) ; v. SIAC *Annual report* 2017, p. 11 et 13.

³⁴ A. Carlevaris, *L'accélération des procédures arbitrales*, in S. Azzali, S. Besson et al. (dir.), *L'arbitre international et l'urgence*, Francarbi, Bruylant, 2014, p. 162.

³⁵ R. CIETAC 1995, art. 64 et s. – Pour sa version française v. *Rev. arb.* 1995, p. 545 et s.

³⁶ v. par ex. R. CCI, art. 30 et Appendice VI – R. CIETAC, art. 56 et s. – R. BAC, art. 53 et s. – R. SHIAC, art. 52 et s. – R. HKIAC, art. 41 – R. MCIA, art. 12 – R. SIAC, art. 5 – R. KCAB, art. 43 et s. – R. CANACO, art. 36 – R. SCAI, art. 42 – R. ICDR, art. E-1 et s.

³⁷ Tel est le cas notamment des règlements d'arbitrage accéléré de l'OMPI, du SCC, de l'AIAC, du CIESP/FIESP ou de l'ARBITAC. Notons que certaines institutions proposent des règlements spécifiques à l'arbitrage accéléré mais qu'en cas de silence, ces derniers sont complétés par le Règlement général ; v. par ex. R. CANACO ABC, art. 3.

révélé une concurrence accrue des institutions asiatiques vis-à-vis de leurs homologues européennes. Le Président de la Cour d'arbitrage de la CCI, nous avait ainsi confié que même si des règles d'arbitrage accéléré étaient depuis longtemps réclamées par les utilisateurs³⁸, c'était le fait qu'elles soient particulièrement appréciées en Asie³⁹ et surtout la montée en puissance du SIAC en Inde pour le règlement des petits et moyens litiges (aux dépens de son institution) qui avait décidé la CCI à introduire la nouvelle procédure accélérée.

Cette appétence des parties indiennes pour l'arbitrage accéléré s'explique essentiellement par les profondes défaillances qui caractérisent leur système juridique national : hostilité judiciaire à l'égard de la justice arbitrale, absence de grande institution locale, prévalence de l'arbitrage *ad hoc*, prohibition des cabinets d'avocats étrangers, etc. Si des réformes ont été entreprises depuis quelques années, il en résulte encore bien souvent des délais interminables et des coûts prohibitifs. Ainsi, lors des débats relatifs à la réforme de 2015 de l'Arbitration & Conciliation Act, l'*Attorney General* avait sévèrement qualifié le droit indien de l'arbitrage : « *I find, with my experience over the last several years, that the Arbitration and Conciliation Act, 1996 is a complete failure. Firstly, arbitration itself has become a joke in this country. Arbitration proceedings are unduly prolonged since mostly retired judges are appointed as arbitrators and they view arbitration just like a case in court. The procedure is as elaborate as that of court. It is normal to have 50-100 sittings in arbitration, whether by a single member or a multi-member arbitration* »⁴⁰. Les

³⁸ Sur ce point v. A. Carlevaris, *ibid.*, p. 166 qui explique que l'absence de dispositions spécifiques n'a jamais empêché le déroulement de procédures accélérées, qu'un groupe de travail avait d'ailleurs été constitué au début des années 2000 pour proposer une nouvelle procédure mais qu'il avait été très compliqué de parvenir à un consensus notamment sur la définition de la notion de « petit litige ».

³⁹ En 2016, sur 2181 affaires administrées par la CIETAC 1517 (soit 69,56%) étaient des arbitrages accélérés; v. CIETAC Annual Report on International Commercial Arbitration in China (2016), p. 20 – De même, pour la seule année 2017, le SIAC a reçu pas moins de 107 requêtes d'arbitrage accéléré ; v. SIAC Annual Report 2017, p. 11 – Rappelons également qu'en 2015 le législateur indien a, de manière originale, introduit une nouvelle procédure d'arbitrage accéléré à la section 29B de l'Arbitration & Conciliation Act.

⁴⁰ M. Chhibber, Law panel, AG differ on arbitration Act, govt set to revisit its clauses; *The Indian Express*, 18 mai 2015, disponible sur <http://indianexpress.com/>.

illustrations de cette inefficacité sont en effet légion dans ce pays⁴¹ et la durée des procédures dépasse souvent l'entendement. Dans une affaire *Arriba India c/ Ispat Industrie*, une partie avait par exemple demandé la destitution d'un tribunal arbitral parce qu'en quatre ans et demi, les arbitres n'avaient procédé qu'à l'audition d'un seul témoin et avaient, de surcroît, demandé une augmentation de leurs honoraires (en particulier le paiement des frais d'audiences qui n'avaient pas eu lieu) en raison de l'attitude des parties⁴². Un autre exemple peut être donné avec l'affaire *Panacea Biotec*, dans laquelle, après que les parties aient versé en avance 76 000 US\$ d'honoraires à un tribunal arbitral, les arbitres étaient restés inactifs pendant plusieurs années⁴³. Un juge indien confiait même avoir vu des arbitres mettre jusqu'à huit ans pour rendre leur sentence⁴⁴. Le record revient cependant à l'affaire *Singh Builders Syndicate*, dans laquelle la procédure arbitrale a duré plus d'une décennie, dont sept années rien que pour la nomination de l'arbitre unique⁴⁵ !

Il est ainsi intéressant de relever le lien direct entre les défaillances du système juridique indien, le comportement suscité chez les parties indiennes, la réforme de 2017 du Règlement CCI, et l'effet boule de neige qui en a résulté. Le fait que d'autres institutions européennes, comme par exemple l'Association française d'arbitrage (AFA) en 2018, décident d'introduire de nouvelles procédures accélérées dans leur règlement, montre ainsi que l'influence n'est plus à sens unique. Ce ne sont plus les institutions dites « traditionnelles » ou occidentales qui imposent de manière unilatérale leur modèle. Désormais, les

⁴¹ v. les nombreux exemples cités in B. Srinivasan, Appeal Against the Order of the Chief Justice Under Section 11 of the Arbitration and Conciliation Act, 1996: An Empirical Analysis. Author; *Indian Journal of Arbitration Law* 2012, p. 21.

⁴² High Court of Delhi, 4 juil. 2011, *Arriba India Private Ltd. c/ M/S Ispat Industries Ltd.*, O.P.M. 358/2010.

⁴³ High Court of Delhi, 25 fév. 2014, *Union of India c/ M/S Serum Institute of India and ors.*, O.M.P. 1296/2013.

⁴⁴ A. Bhan, Commercial Arbitration: Need to Change the Mindset; *ICA Quarterly*, Vol. XLII, No. 3 & 4, oct. - déc. 2007 & janv. - mars 2008, p. 2, spéc. p. 3 : « *I have seen certain awards not being given for six years, seven years, eight years...* ».

⁴⁵ CSI, 26 fév. 2009, *Union Of India c/ M/S. Singh Builders Syndicate*, Civil appeal N° 3632 of 2007.

institutions qualifiées hier de « régionales », et surtout leurs utilisateurs, peuvent également imposer leurs innovations et leur pratique.

La combinaison de l'arbitrage avec d'autres modes alternatifs – Un second exemple pouvant illustrer l'influence à double sens qui peut s'exercer désormais entre les différentes places d'arbitrage, qu'elles se situent en Europe ou en Asie, est la combinaison de l'arbitrage avec d'autres modes amiables de règlement des différends. Tout comme pour l'arbitrage accéléré, le fondement d'une telle combinaison réside avant tout dans des considérations commerciales (besoins de rapidité et d'économies), perceptibles sans aucune référence au droit comparé. Toutefois, la préférence par un nombre croissant de parties, souvent issues d'Asie du Sud et de l'Est (Chine, Inde, Singapour, Indonésie, Corée du Sud, etc.), de voir leurs litiges *réglés* par un conciliateur ou par un médiateur plutôt que *tranchés* par un juge ou un arbitre, et le recours usuel à la « Med-arb » ou à l'« Arb-Med » qui peut en résulter, n'est pas sans incidence sur la pratique internationale.

En effet, depuis l'adoption de la Loi-type CNUDCI sur la conciliation commerciale internationale de 2002⁴⁶, de nombreux pays ont adopté des textes dont l'objet est d'imposer le recours à la médiation ou à la conciliation préalablement ou de manière concomitante à toute procédure juridictionnelle ; que celle-ci soit arbitrale ou non⁴⁷. Citons par exemple la directive européenne 2008/52/EC du 21 mai 2008, la Section 89 du *Code of Civil Procedure 1908* indien modifiée en 2011⁴⁸, ou encore, en France, le décret du 11 mars 2015 qui impose le recours à un mode de résolution amiable pour tous les litiges en matière civile et commerciale⁴⁹ et surtout la loi « Justice du XXI^e siècle » de

⁴⁶ Devenue la « Loi-type de la CNUDCI sur la médiation commerciale internationale et les accords de règlement internationaux issus de la médiation » en 2018.

⁴⁷ L'objectif pour les Etats est notamment de faire des économies dans l'administration de la justice.

⁴⁸ CPC indien 1908, sect. 89 – Signalons également que le Commercial Courts Act 2015 comporte, depuis sa révision de 2018, une section 12 A qui impose une médiation préalable avant la saisine d'une *Commercial Court*.

⁴⁹ Décret n° 2015-282, art. 18 et 19 modifiant les articles 56 et 58 du CPC – Rappelons aussi que l'article 21 du CPC, qui impose au juge la mission de concilier les parties, est applicable par extension à l'arbitre.

2016, dont l'un des objectifs principaux a été de favoriser les modes alternatifs. Cette tendance se retrouve également en Amérique latine, en particulier depuis la mise en place de l'ALENA et du MERCOSUR⁵⁰. Au Brésil, tant la loi d'arbitrage réformée en 2015⁵¹ que la loi sur la médiation du 26 juin 2015⁵² ou encore le nouveau Code de procédure civile de 2016, favorisent ainsi l'utilisation des modes alternatifs préalablement, voire postérieurement, à l'arbitrage⁵³. De même, au Mexique, une réforme constitutionnelle de 2008 a érigé le recours aux modes alternatifs en droit fondamental⁵⁴ et la proximité avec les Etats-Unis, où l'arbitrage n'est traditionnellement choisi qu'après épuisement d'un ou plusieurs autres modes de résolution des litiges, fait que de nombreuses parties mexicaines y ont spontanément recours.

C'est néanmoins surtout en Asie, où la recherche d'une solution amiable est culturellement favorisée⁵⁵ et où la distinction entre l'arbitre et le médiateur peut parfois être brouillée⁵⁶, que la combinaison de l'arbitrage à un autre mode

⁵⁰ M. Gomm Ferreira Dos Santos, *The Role of Mediation in Arbitration: The Use and the Challenges of Multi-tiered Clauses in International Agreements*; *RBA* 2013, p. 7 – E. Palmer & E. Lopez, *The Use of Multi-tiered Dispute Resolution Clauses in Latin America: Questions of Enforceability*; *Am. Rev. Int'l Arb.* 2003, p. 285.

⁵¹ Loi brésilienne d'arbitrage, art. 7§2.

⁵² Loi n° 13.140/2015 du 26 juin 2015, art. 23.

⁵³ CPC Brés., art. 359.

⁵⁴ Constitution fédérale mexicaine, art. 17 §4 – v. également Cour suprême mexicaine (SCJN), 13 sept. 2012, *Amparo en revisión* 278/2012 ; dans laquelle il a été affirmé que les modes alternatifs garantissent le droit d'accès au juge autant que la justice judiciaire.

⁵⁵ Kim M. Rooney, *Conciliation and Mediation of International Commercial Disputes in Asia and UNCITRAL's Working Group on the International Enforcement of Settlement Agreements*; *Asian Dispute Review* 2016, p. 195 – S. Greenberg, Ch. Kee, J. R. Weeramantry, *International Commercial Arbitration: An Asia-Pacific Perspective*, Cambridge University Press, 2011, p. 44 et s. – A titre d'illustration, relevons que le récent règlement de l'Asian International Arbitration Centre (ancien KLRCA), suggère dans sa clause-modèle d'ajouter la clause suivante : « *Before referring the dispute to arbitration, the parties shall seek an amicable settlement of that dispute by mediation in accordance with the AIAC Mediation Rules as in force on the date of the commencement of mediation* ».

⁵⁶ Sur l'ensemble de la question: H. Tang, *Is there an Expanding Culture that Favors Combining Arbitration with Conciliation or Other ADR Procedures?*; *ICCA Series* n° 8 1996, p. 101 – M. Schott Donahey, *Seeking Harmony : Is the Asian Concept of the Conciliator/ Arbitrator Applicable in the West ?*; *Dispute Resolution International* 1995, p. 2.

alternatif est le plus usitée. En effet, bien que l'impérativité des clauses graduées puisse parfois sembler fluctuante en jurisprudence⁵⁷, le rôle de l'arbitre de conduire les parties à un règlement amiable⁵⁸ y est admis depuis longtemps. En Chine, pays de l'« arb-med » par excellence, la médiation a toujours été considérée comme étant le mode de résolution des litiges le plus adapté à la notion confucéenne de « *He Wei Gui* » (l'harmonie par-dessus tout)⁵⁹. Depuis les années 1950, la plus grande partie des arbitrages administrés par la CIETAC se terminent ainsi par une médiation⁶⁰. Il en va de même en Inde, où la conciliation est encore aujourd'hui le mode le plus commun de résolution des différends en matière interne, notamment à travers l'institution des *Lok Adalats*. Une des conséquences de cette conception de la justice, selon laquelle

⁵⁷ Pour des illustrations en Inde, v. par ex. Delhi High Court, 15 avr. 2012, *M/s Haldiram Manufacturing Company Pvt Ltd c/ M/s DLF Commercial Complexes Ltd*, 2012 DLT 193 (De) 410, dans laquelle il a été estimé que ne pouvait être opposée au juge une convention d'arbitrage dès lors que la condition de négociations préalables n'avait pas été satisfaite – comp. Delhi High Court, 18 nov. 2014, *Ravindra Kumar Verma c/ M/s BPTP Ltd & Anr*, 2015 DRJ 147 (Del) 175, où il a été jugé que le non-respect d'une condition de discussions préalables n'empêchait pas une partie d'introduire une procédure arbitrale notamment lorsque les discussions prévues n'étaient pas enfermées dans un délai déterminé – A l'inverse, à Singapour, l'efficacité des clauses graduées est pleinement consacrée : v. *Ling Kong Henry v Tanglin Club* [2018] SGHC 153.

⁵⁸ Sur le sujet v. not. K. P. Berger & J. O. Jensen, *The Arbitrator's Mandate To Facilitate Settlement*; *Fordham Int'l L.J.* 2017, p. 887 – S. Pfisterer, *The Arbitrator as Settlement Facilitator*; *American Review of International Arbitration* 2013, Vol. 24, No. 4 – B. Ehle, *The Arbitrator as a Settlement Facilitator* ; in O. Caprasse et al. (sous la dir.), *Walking a thin line : what an arbitrator can do, must do or must not do : recent developments and trends*, Bruylant, 2010, p. 79 – G. Kaufmann-Kohler, *When Arbitrators Facilitates Settlement : Towards a Transnational Standard* ; *Arb. Int'l* 2009, p. 2 – A. J. van den Berg (sous la dir.), *New Horizons in International Commercial Arbitration and Beyond*, ICCA Congress series n° 12, Kluwer Law International, 2005, p. 529 et s. – v. également les CEDR Settlement Rules de 2009, qui visent à établir des standards transnationaux en matière de règlement amiable du litige par l'arbitre.

⁵⁹ M. Gotti, P. Pellegrinelli & E. Signorini, *The combinaison of arbitration with conciliation/mediation in the legislation of the People's Republic of China* ; in V. Bhatia, M. Gotti et al. (ed.), *International Arbitration Discourse and Practices in Asia*, Routledge, 2017 – K. Fan, *Arbitration in China A Legal and Cultural Analysis*, Hart Publishing, 2013, p. 155 et s. – G. Kaufmann-Kohler, K. Fan, *Integrating Mediation into Arbitration: Why it works in China*; *Journal of Int'l Arb.*, Vol. 25, 2008, p. 479, spéc. p. 480.

⁶⁰ Il fallut cependant attendre 1989 pour que le Règlement CIETAC intègre cette pratique ; v. W. Sun & M. Willems, *Arbitration in China: A Practitioner's Guide*, Wolters Kluwer, 2015, p. 423 – v. également Ch. Kang, *Oriental Experience of Combining Arbitration with Conciliation: New Development of CIETAC and Chinese Judicial Practice* ; *Fordham International Law Journal* 2017, p. 919.

le juge amène les parties à trouver une solution mais ne *tranche* pas le litige (comme c'est le cas en Occident), c'est que contrairement à la Loi-type CNUDCI, dont elles sont pourtant inspirées, les lois d'arbitrage de ces deux pays prévoient que le tribunal arbitral peut conduire une procédure de conciliation ou de médiation avant de rendre sa sentence⁶¹. L'influence des traditions juridiques sur la pratique arbitrale peut ainsi être illustrée par une affaire assez surprenante dans laquelle la Cour d'appel de Hong Kong avait, en se fondant sur des aspects culturels, accepté de faire exécuter une « sentence » rendue en Chine continentale qui résultait d'une « médiation »⁶² conduite par le co-arbitre nommé par le demandeur, le président de l'institution d'arbitrage et un tiers lié au défendeur, malgré l'absence des parties et de leurs conseils⁶³.

Cette mission de l'arbitre d'agir comme un facilitateur de règlement à l'amiable du différend est depuis longtemps acceptée dans certains pays européens, comme en Allemagne ou en Suisse⁶⁴. Elle tend néanmoins à être de plus en plus souvent posée, que ce soit directement ou indirectement, par la loi⁶⁵ et par les règlements institutionnels⁶⁶. Ce développement s'inscrit dans le mouvement plus général d'expansion des modes alternatifs, dont les origines sont multiples, d'un point de vue de droit comparé. Ce mouvement prend sa source dans l'américanisation du droit qui prévaut dans de nombreux pays depuis deux décennies. En effet, la pratique américaine, qui fait la part belle aux modes alternatifs, s'est très largement exportée tant en Europe qu'en

⁶¹ Loi chinoise d'arbitrage, art. 51 – Arbitration & Conciliation Act, sect. 30.1.

⁶² Cette médiation résultait d'un « arb-med », c'est-à-dire qu'elle était conduite en parallèle de la procédure arbitrale.

⁶³ CA Hong Kong, 2 déc. 2011, Gao Haiyan and Xie Heping c/ Keeneye Holdings Ltd and New Purple Golden Resources Development Ltd, [2012] 1 HKLRD 627.

⁶⁴ B. Ehle, *op. cit.*, p. 80 et s.

⁶⁵ v. par ex. HK Arbitration Ordinance, art. 33(1) – Singapore International Arbitration Act, art. 17(1) – Loi japonaise d'arbitrage, art. 38 (4) – Loi néerlandaise d'arbitrage, art. 1043 – Notons que dans de nombreux pays, si la loi d'arbitrage ne prévoit pas explicitement la faculté pour l'arbitre de procéder à une conciliation, on considère cependant que les dispositions qui prévoient ce pouvoir pour les magistrats s'appliquent par extension à l'arbitre (ex. CPC, art. 21 – ZPO, §278(1)).

⁶⁶ v. par ex. R. CCI, App. IV h) – R. CIETAC, art. 47 – R. BAC, art. 67 – R. CAMARB, art. 8.1 – R. DIS, art. 26.

Amérique latine, que ce soit par l'extension internationale de nombreux cabinets américains mais aussi et surtout par la montée en puissance de certains secteurs d'activités. Un exemple assez significatif est celui du secteur de l'IT (Entreprises de services du numérique, éditeurs de logiciels, sociétés de conseil en technologies), dont le poids est aujourd'hui considérable dans les économies développées. Or, les plus grandes entreprises de ce secteur, qui sont souvent américaines ou américanisées dans leur fonctionnement, tendent à recourir de façon beaucoup plus modérée à l'arbitrage que les entreprises de secteurs plus traditionnels, comme ceux de la construction ou de l'énergie. Néanmoins, à cette influence américaine vient aujourd'hui s'ajouter une influence asiatique indéniable. Bien qu'elle reste difficilement perceptible du point de vue français ou européen, le fait qu'il y ait désormais plus d'arbitrages administrés en Asie qu'en Europe, a pour conséquence inéluctable que la combinaison de l'arbitrage avec une conciliation ou tout autre mode alternatif, intègre peu à peu la pratique internationale et devrait ainsi tendre à se systématiser. Le fait que Convention de Singapour sur la Médiation de 2018⁶⁷ ait été signée principalement par des Etats asiatiques, quand la Convention de New York de 1958 avait été signée principalement par des Etats européens, est à cet égard assez révélateur du glissement vers l'Est aujourd'hui à l'œuvre dans l'innovation juridique et dans l'influence des modèles.

II. LA METHODE DU DROIT COMPARE : UN OUTIL DE PREMIER CHOIX POUR OBSERVER LES MUTATIONS DE L'ECONOMIE ET DU DROIT

Le renouvellement nécessaire du spectre des droits à prendre en considération, dans le cadre d'une étude droit comparé, doit permettre de prendre conscience des mutations profondes de notre monde et notamment d'observer que la mutation du droit découle très souvent des changements de

⁶⁷ Convention des Nations Unies sur les accords de règlement internationaux issus de la médiation (Convention de Singapour sur la Médiation) du 20 déc. 2018, signée le 7 août 2019 par 46 Etats.

paradigmes économiques. On observe ainsi que l'affirmation progressive de particularismes locaux peut conduire à la remise en cause du modèle dominant et de l'efficacité des instruments d'harmonisation (A). Pour autant, il serait erroné de voir dans l'émergence d'un monde multipolaire, dans lequel certains nouveaux acteurs font prévaloir leur propre conception de la justice, la fin de toute transmission des modèles (B).

A. La remise en cause du modèle dominant et des instruments d'harmonisation

Le droit comme composante du *soft power* – Les dernières décennies ont montré qu'à mesure qu'augmentaient les exportations de biens manufacturés puis culturels d'un pays, son influence tant économique que politique ne pouvait faire que grandir. Pensons notamment à comment la diffusion de la « culture pop » japonaise, sous forme de mangas et de jeux vidéo, a contribué dans les années 1980-90 à façonner la perception du Japon dans de nombreux pays. Plus récemment, la *Hallyu* ou « vague coréenne », tirée par le succès de la musique populaire coréenne (*K-pop*) et des feuilletons coréens (*K-drama*), a sur le même modèle renforcé la réputation de la Corée du Sud⁶⁸. Un pays qui monte économiquement et qui déploie sa culture à travers la planète voit ainsi son « *soft power* » s'accroître. Cette notion, théorisée par l'américain Joseph S. Nye⁶⁹, veut en effet que l'image renvoyée par un pays à l'étranger peut constituer une vraie forme de pouvoir dans la conduite des relations internationales. Le *soft power* s'oppose ainsi au *hard power*, qui consiste en la puissance militaire et la coercition économique - plus souvent admises comme étant les sources principales de la puissance d'un pays. Si en dehors des concepts de Droits de l'Homme et de Démocratie, la règle de droit est rarement associée au *soft power*, nous souscrivons cependant à l'idée selon laquelle la loi

⁶⁸ D. Horigan, *Law as Soft Power in Asia*, mai 2018 ; disponible sur https://www.researchgate.net/publication/325070624_Law_as_Soft_Power_in_Asia (consulté en oct. 2020).

⁶⁹ J. S. Nye, Jr., *Soft Power: The Means to Success in World Politics*, New York: Public Affair, 2004.

ou les tribunaux d'un pays peuvent exercer une force d'attraction importante pour les gouvernements, les entreprises et les peuples d'autres pays. L'arbitrage, qui constitue une justice sur-mesure, le démontre d'ailleurs tous les jours. Lorsqu'un rédacteur de contrat décide que celui-ci et/ou sa clause compromissoire seront soumis à une loi étrangère ou que le siège de l'arbitrage sera dans un autre pays, n'est-ce pas en considération de l'image que le pays sélectionné renvoie ? La concurrence normative à laquelle se livrent les différents législateurs, qui n'hésitent pas à multiplier les réformes pour renforcer l'attractivité de leur loi et de leurs tribunaux, ne constitue-t-elle pas également une illustration parfaite d'une utilisation du *soft power* ? Ainsi, dès qu'un pays acquiert une image de faveur à l'égard de l'arbitrage, qu'il est perçu comme étant « *arbitration-friendly* », sa loi et ses tribunaux sont de plus en plus choisis par les utilisateurs de l'arbitrage, quelle que soit leur nationalité. Cela explique que la loi suisse ou la loi anglaise soient, par exemple, régulièrement choisies par les parties à des arbitrages internationaux. Pour autant, le processus d'harmonisation des législations relatives à l'arbitrage commercial, depuis les années 1980, pourrait remettre en cause l'utilité qu'il y a à user du *soft power* en la matière.

Les limites de l'harmonisation – A la suite de la Seconde Guerre Mondiale, l'harmonisation des systèmes juridiques était considérée non pas comme un idéal juridique mais surtout comme un idéal politique à atteindre⁷⁰. Les différents congrès de l'arbitrage qui se sont tenus à partir des années 1950, et qui ont débouché notamment sur l'adoption de la Convention de New York de 1958 puis du Règlement et de la Loi-type CNUDCI, montrent d'ailleurs que l'arbitrage a été un des domaines dans lequel cette ambition a été la plus

⁷⁰ A. E. Platsas, *The Harmonisation of National Legal Systems – Strategic Models and Factors*, Edward Elgar Publishing, 2017, p. 1 et s. – Sur la promotion de valeurs communes à la fin du siècle dernier v. également A.Y. Seita, *Globalization and the Convergence of Values* ; *Cornell Int'l L.J.* 1997, p. 429 – Pour un bilan plus critique : L. Mistelis, *Is Harmonisation a Necessary Evil? The Future of Harmonisation and New Sources of International Trade Law*; in I. Flechter, L. Mistelis, M. Cremona (eds.), *Foundations and Perspectives of International Trade Law*, Sweet & Maxwell, 2001.

concrétisée⁷¹. En 2020, on dénombre ainsi pas moins de 165 Etats parties à la Convention de New York⁷² et 111 pays qui ont adopté une loi d'arbitrage fondée en tout ou partie sur la Loi-type CNUDCI⁷³. Beaucoup considèrent ces formidables outils d'uniformisation des droits de l'arbitrage comme un réel succès⁷⁴. Il est en outre indéniable que la jurisprudence, au sein des différents Etats ayant adopté une loi inspirée de la Loi-type⁷⁵, a généralement évolué dans un sens très favorable à ce mode de règlement des litiges. Néanmoins, la pratique démontre souvent que cet enthousiasme doit être en réalité nuancé et que les changements législatifs seuls s'avèrent insuffisants⁷⁶. L'adoption d'une loi favorable au développement de l'arbitrage en Inde en constitue un parfait exemple.

En effet, avec l'adoption de l'*Arbitration & Conciliation Act* en 1996, inspiré de la Loi-type et du Règlement de la CNUDCI, le législateur indien a intégré les principes les plus essentiels pour que son droit de l'arbitrage puisse être qualifié de « moderne »⁷⁷. Parmi ces principes, on trouve notamment le principe d'autonomie de la convention d'arbitrage, le principe de compétence-

⁷¹ B. Hanotiau, International Arbitration in a Global Economy: The Challenges of the Future; *Journal of International Arbitration* 2011, p. 89.

⁷² <https://treaties.un.org>.

⁷³ P. Binder, International Commercial Arbitration and Mediation in UNCITRAL Model Law Jurisdictions, 4^e éd., Kluwer Law International, 2019, p. 2.

⁷⁴ v. par ex. J. Paulsson & G. Petrochilos, UNCITRAL Arbitration, Kluwer Law International, 2017 – I. Chabbi, La mondialisation du Droit de l'arbitrage : la contribution de la loi-type de la CNUDCI, sous la dir. de J.-B. Racine & L. Chedly, Université Côte d'Azur, 2017. – G. Vieillard, La contribution de la Commission des Nations Unies pour le droit commercial international (CNUDCI) à l'harmonisation et l'uniformisation du droit commercial international, sous la dir. de E. Loquin & L. Ravillon, thèse dactyl., Université de Bourgogne, 2014.

⁷⁵ Rappelons que sa vocation universelle a toujours été affirmée ; dans une recommandation du 11 déc. 1985, l'Assemblée générale des Nations Unies avait ainsi demandé à ses membres de prendre en considération la Loi-type CNUDCI lorsqu'ils adopteraient ou réviseraient leur loi d'arbitrage.

⁷⁶ Pour une analyse assez critique des instruments d'uniformisation, v. not. : D. Greineder, The limitations of Soft Law instruments and Good Practice Protocols in International Commercial Arbitration ; *Bull. ASA* 2018, p. 907 – H. Wang, Multidimensional Thinking about the 'Soft Laws' Phenomena in International Commercial Arbitration: A Chinese Perspective ; *Bull. ASA* 2018, p. 615.

⁷⁷ F. S. Nariman, La nouvelle loi indienne sur l'arbitrage ; *Bull. CCI* 1997, p. 38.

compétence⁷⁸, la limitation du pouvoir d'intervention du juge⁷⁹, ou encore les principes directeurs de la Convention de New York de 1958⁸⁰. Néanmoins, la plupart de ces principes ont par la suite été vidés de leur substance par la jurisprudence, démontrant à quel point la « greffe » de certaines institutions dans un système juridique qui n'y est pas préparé peut s'avérer désastreuse. Cela a commencé avec la décision *Bhatia* de 2002, dans laquelle la Cour suprême indienne a énoncé que la première partie de l'A&C Act - normalement uniquement applicable aux arbitrages ayant leur siège en Inde et qui confère de larges pouvoirs au juge judiciaire - pouvait également s'appliquer aux arbitrages ayant leur siège à l'étranger⁸¹. Cette fameuse décision favorisa ainsi l'immixtion du juge indien dans les procédures internationales pendant de nombreuses années. Ensuite, dans sa décision *Patel Engineering* de 2005, la Cour suprême a considéré qu'à défaut d'entente entre les parties sur la composition du tribunal arbitral, le juge pouvait connaître de toute demande et notamment statuer sur l'existence et la validité de la convention d'arbitrage ainsi que sur la compétence des arbitres éventuellement nommés⁸². Ecartant de fait l'effet de compétence-compétence, pourtant posé dans la loi indienne, cette décision fut de surcroît confirmée en 2008⁸³. Enfin, dans sa décision *Venture Global* de 2008, la Cour suprême indienne décida qu'elle était

⁷⁸ A&C Act, sect. 8(1), 16.

⁷⁹ A&C Act, sect. 5.

⁸⁰ A&C Act, sect. 36.

⁸¹ CSI, 13 mars 2002, *Bhatia International c/ Bulk Trading S.A. and Anr.*, (2002) 4 SCC 105: "the [A&C Act, 1996] does not appear to be a well drafted legislation. Therefore the High Courts of Orissa, Bombay, Madras, Delhi and Calcutta cannot be faulted for interpreting it in the manner indicated above. However, in our view a proper and conjoint reading of all the provisions indicates that Part I is to apply also to international commercial arbitrations which take place out of India, unless the parties by agreement, express or implied exclude it or any of its provisions. Such an interpretation does not lead to any conflict between any of the provisions of the said Act. On this interpretation there is no lacunae in the said Act. This interpretation also does not leave a party remedyless. Thus such an interpretation has to be preferred to the one adopted by the High Courts of Orissa, Bombay, Madras, Delhi and Calcutta. It will therefore have to be held that the contrary view taken by these High Courts is not good law" – Sur cette décision v. R. Sharma, *Bhatia International v. Bulk Trading: Ambushing International Commercial Arbitration Outside India?*; *J. Int'l Arb.*, 2009, n° 26, p. 357.

⁸² CSI, 26 oct. 2005, *M/S S.B.P. & Co. c/ M/S Patel Engineering Ltd.*, (2005) 8 S.C.C. 618.

⁸³ CSI, 18 sept. 2008, *National Insurance Co. Ltd. c/ Boghara Polyfab Pvt. Ltd.*, (2009) 1 S.C.C. 267.

compétente pour annuler une sentence qui avait été rendue à Londres⁸⁴, ce qui allait à l'encontre de la notion même de siège.

Si depuis, avec les réformes de l'*Arbitration & Conciliation Act* de 2015 et de 2019, le législateur indien a largement rectifié ce que l'on pourrait qualifier de « faux départ » (qui aura tout de même duré près de 20 ans), l'exemple indien montre néanmoins les limites des instruments d'harmonisation, en particulier lorsqu'il s'agit de *soft law*. Bien qu'ils puissent s'avérer décevants, il faut cependant garder à l'esprit que la standardisation et la prétendue modernisation d'un droit qui en découle, ne doivent pas constituer une fin en soi. En plus d'une volonté politique, une véritable adhésion à la fois des praticiens et de la doctrine locale est nécessaire. Sans pareille prise de conscience de la nécessité d'accepter certains mécanismes, les concepts si particuliers du droit de l'arbitrage international ne peuvent que difficilement être mis en œuvre. Dès lors, en observant les évolutions très récentes et la montée en puissance de nouveaux acteurs privés, en Inde mais également au Brésil⁸⁵, on ne peut que constater une véritable autonomisation de la justice arbitrale par rapport aux Etats. Ainsi, on constate l'affirmation progressive, par les acteurs issus des nouvelles puissances économique, de leur propre culture juridique. Si cela peut, dans une certaine mesure, remettre en cause l'avenir des instruments d'harmonisation, ce phénomène traduit avant tout une multiplication des modèles de droit qui doit être saluée.

Vers la multiplication des modèles – Comme dans toutes les branches du droit, la volonté d'uniformisation, qu'elle passe par des conventions internationales ou par la *soft law*, est généralement positive en ce qu'elle permet de prévenir les contradictions résultant des conflits de règles dans

⁸⁴ CSI, 10 janv. 2008, *Venture Global Engineering c/ Satyam Computer Services*, (2008) 4 SCC 190.

⁸⁵ Pensons notamment aux importants travaux de lobbying accomplis ces dernières années par le CAM-CCBC au Brésil ou par le MCIA en Inde pour pousser les autorités à réformer leurs lois d'arbitrage.

l'espace⁸⁶. Celle-ci peut néanmoins s'avérer défectueuse « dès lors qu'elle sacrifie l'identité culturelle de la région qui véhicule le modèle le plus faible, sans tenir compte des demandes d'un pourcentage très important d'insatisfaits » ; la réduction du nombre de modèles en vigueur conduisant finalement à « restreindre les points de départ possibles des évolutions et progrès futurs, et, plus grave encore, empêche de profiter de la concurrence qui s'instaure entre eux »⁸⁷. Doit-on dès lors regretter la nouvelle ferveur pour l'arbitrage et l'alignement de nombreux droits sur les standards internationaux ? En regardant dans le détail, on s'aperçoit en réalité que des grands pays, comme l'Inde et la Chine, n'hésitent plus à s'émanciper des règles importées d'Occident pour les adapter à des considérations politiques et culturelles qui leur sont propres. Par exemple, si le principe de compétence-compétence semble gagner du terrain en droit chinois (sous l'effet d'une influence des règlements institutionnels étrangers), son exclusion a néanmoins été récemment réaffirmée par la Cour populaire suprême, qui est venue consolider le rôle des tribunaux populaires en tant que juges de droit commun de la validité de la convention d'arbitrage⁸⁸. En Inde, la volonté du législateur d'établir une institution d'arbitrage nationale, avec le New Delhi International Arbitration Centre Act, 2019 témoigne également d'une certaine originalité par rapport à ce qui se fait en Europe ou aux Etats-Unis, où les institutions ont traditionnellement relevé du secteur privé. Sans aller jusqu'à parler de « désoccidentalisation » des droits, ces phénomènes témoignent en tout cas de l'impact qu'a l'émergence d'un monde multipolaire sur le droit de l'arbitrage international. Le bénéfice qui pourrait en résulter dans les années à venir est finalement une réponse à une trop grande uniformisation par la

⁸⁶ Elle peut cependant également susciter la critique; v. par ex. : D. Favalli (dir.), *The Sense and Non-sense of Guidelines, Rules, and other Para-regulatory Texts in International Arbitration*, ASA Special Series n° 37, 2015 – M. E. Schneider, *The essential guidelines for the preparation of guidelines, directives, notes, protocols and other methods intended to help international arbitration practitioners to avoid the need for independent thinking and to promote the transformation of errors into "best practices"*, in *Liber Amicorum en l'honneur de Serge Lazareff*, Pedone, 2011, p. 563.

⁸⁷ A. Gambaro, R. Sacco, L. Vogel, *op. cit.*, note 57 p. 28.

⁸⁸ v. en particulier l'Avis de la Cour populaire suprême du 7 déc. 2017, 法[2017]359号.

démultiplication des « points de départ » possibles vers des évolutions et des progrès futurs. Faut-il pour autant voir dans l'affirmation par chaque pays de sa propre culture juridique la fin de la circulation des modèles ? Il semble, au contraire, que cette multiplication des modèles peut en réalité déboucher sur une transmission des modèles renouvelée.

B. Une transmission des modèles renouvelée

Il serait en effet inexact de déduire de la remise en cause de la prédominance du modèle occidental que chaque pays cherche à tout prix à imposer son modèle ou encore que la transmission des modèles tendrait à disparaître. D'abord, il semble très difficile d'élaborer un droit national en se coupant de toute influence extérieure. Ensuite, la transmission des modèles ne paraît plus jouer simplement par le présupposé qu'un modèle serait supérieur à un autre, comme cela était le cas avant (notamment lorsque les pays asiatiques, latino-américains ou africains adoptaient in extenso les codes européens), mais par une circulation des idées et des notions qui se fait aujourd'hui de manière continue.

L'absence d'autarcie dans un monde « globalisé » – Dans la mesure où la méthode du droit comparé permet un certain recul sur la règle de droit, de comprendre pourquoi une règle est élaborée et de faire ressortir les motivations de son élaboration, elle suppose la possibilité d'une mise en perspective du ou des droits étudiés. La seule hypothèse dans laquelle une telle mise en perspective pourrait éventuellement échouer, et donc dans laquelle la mise en parallèle, la comparaison des institutions ne seraient pas possibles, serait celle dans laquelle un droit serait dans une situation d'autarcie totale. Or, dans le monde « globalisé » contemporain, dans lequel l'interdépendance des pays est à un niveau jamais atteint, celle-ci est pour ainsi dire inexistante. En effet, à moins de comparer une loi d'arbitrage inspirée de la Loi-type CNUDCI avec les règles qui régissent certaines formes de justice religieuses ou

traditionnelles, l'ensemble des pays de la planète prévoient aujourd'hui des règles applicables à l'arbitrage international qui permettent la comparaison - y compris les plus fermés économiquement comme la Corée du Nord⁸⁹ ou le Bhoutan⁹⁰.

Il est donc primordial de garder à l'esprit que lorsqu'une règle est adoptée en matière d'arbitrage international, que ce soit par l'élaboration d'une nouvelle loi ou par la jurisprudence, celle-ci se fait de nos jours toujours en tenant compte des droits étrangers. En plus des succès rencontrés par l'arbitrage accéléré et par la combinaison de l'arbitrage avec d'autres modes alternatifs, l'adoption croissante par les différents juges nationaux de l'effet négatif de compétence-compétence (selon lequel les arbitres bénéficient d'une priorité chronologique pour statuer sur leur propre compétence) se fait ainsi très souvent par le biais d'une référence directe avec la pratique de leurs homologues étrangers⁹¹. Néanmoins, il ne faudrait pas en déduire que la comparaison conduit systématiquement à l'uniformisation. Le droit français, qui est le seul droit à reconnaître une « autonomie complète » de la convention d'arbitrage, et l'un des très rares droits à offrir la possibilité d'exécuter une sentence annulée à l'étranger, démontre parfaitement que pour favoriser l'efficacité de l'arbitrage international un droit ne doit pas nécessairement se fondre dans la standardisation. En effet, si c'était au départ pour écarter les règles étrangères pouvant venir amoindrir l'efficacité de la convention d'arbitrage que le principe de sa validité a été adopté, la règle matérielle posée initialement dans l'arrêt *Dalico* est aujourd'hui avant tout signal qui renforce l'image du droit français. Usant de son « soft power juridique », le juge français

⁸⁹ Loi sur l'arbitrage économique externe de 1999, révisée en 2014.

⁹⁰ Loi de 2013 sur le règlement extrajudiciaire des différends.

⁹¹ v. par ex. la décision *Titan Unity*, dans laquelle le juge singapourien s'est directement référé à la doctrine française et la jurisprudence indienne; High Court (Singapour), 19 déc. 2013, *The 'Titan Unity'* [2013] SGHCR 28 – v. également: Singapore Court of Appeal, 26 oct. 2015, *Tomolugen Holdings c/ Silica Investors*, [2015] SGCA 57 ; M. Hwang & A. Chang, A contribution by the ITA Board of Reporters, Kluwer Law International.

témoigne ainsi, en dépit de son originalité, d'une grande faveur reconnue internationalement pour l'arbitrage.

Une méthode du droit comparé renouvelée – Enfin, malgré le mouvement de standardisation qui a suivi l'adoption par la plupart des pays d'une législation basée sur une même Loi-type, la transmission des modèles ne saurait être interrompue. Si hier les pays réputés les plus avancés, les nations dites « civilisées », tendaient à imposer leur modèle du fait de leur puissance économique, le rééquilibrage actuel et la diffusion instantanée des idées par la circulation des personnes, les réseaux sociaux et par les revues et sites internet spécialisés, font que les parties, les arbitres et les juges, peuvent désormais comparer en temps réel leur propre raisonnement juridique avec l'ensemble des droits de la planète. Il en découle une méthode du droit comparé renouvelée. Qu'elle soit appliquée en droit de l'arbitrage ou dans d'autres domaines, celle-ci ne consiste en effet plus seulement en une analyse purement doctrinale, qui viserait uniquement à classer les droits, ou purement pragmatique, qui mettrait côte à côte sans vraiment comparer. Elle tend dorénavant, du moins c'est notre souhait, à devenir un raisonnement essentiel, voire qui relève de l'automatisme (au même titre que le syllogisme), pour chaque juriste dans l'appréhension de son droit et des droits.

LEX SPORTIVA: EX JUS COMPARATUM AD INDEPENDENTIAM?

Charles-Maurice Mazuy¹

Résumé

La Lex sportiva est l'ensemble des règles créées par le mouvement sportif international, qui préside à l'organisation des épreuves sportives. Sa création est d'origine principalement privée, grâce à l'action des fédérations internationales, du comité olympique et du tribunal arbitral du sport. Étant appliquée à une communauté et à des activités dépassant les frontières, elle entre dans la catégorie des droits transnationaux. Et, comme pour tous ces droits, le droit comparé est une source importante de création normative du droit sportif. Ainsi le tribunal arbitral du sport a été amené, en utilisant les méthodes du droit comparé, à extraire des principes généraux du droit. Par ailleurs, les règles appliquées par le TAS doivent souvent être interprétées en prenant en compte une pluralité d'ordres juridiques dans lesquels la sentence est susceptible d'évoluer.

Mots clés : arbitrage international, TAS, droit comparé, droit transnational, droit sportif, lex sportiva, ordre juridique, principes généraux

Abstract

Lex sportiva is the set of rules created by the international sports movement, which presides over the organization of sporting events. Its creation is mainly of private origin, thanks to international federations (related to national federations), the Olympic committee and the Court of Arbitration for Sport. Being applied to a community and to activities transcending borders, it falls into the category of transnational rights. And, as with all these rights, comparative law is an important source of normative creation for sports law. Thus the Court of Arbitration for Sport was led, using methods of comparative law, to extract general principles of law (both endogenous and exogenous). Furthermore, the rules applied by the CAS must often be interpreted taking into account several legal orders in which the award is likely to be implemented.

Keywords: international arbitration, CAS, comparative law, transnational law, sports law, lex sportiva, legal order, general principles

¹ Doctorant à Paris 2 Panthéon-Assas et chargé d'enseignements à Paris 2 Panthéon-Assas et Paris Nanterre.

TABLE OF CONTENTS

I.	INTRODUCTION.....	66
II.	L'EXTRACTION DE PRINCIPES GENERAUX DU DROIT	72
A.	Origines	73
B.	Les PGD intégrés au monde sportif	74
C.	Les principa sportiva	75
III.	LA PRISE EN COMPTE DES DROITS NATIONAUX PAR LE TAS.....	77
A.	Les règles impératives de droit interne.....	78
B.	L'articulation des sources internes non-impératives.....	80
IV.	PRISE EN COMPTE DES DROITS SUPRANATIONAUX INTEGREES	83
A.	Le droit de l'UE.....	83
B.	Les garanties de la CESDH.....	85
V.	ET LE DROIT INTERNATIONAL PUBLIC ?	89
VI.	CONCLUSION	91

I. INTRODUCTION

Un titre tout en latin ne retient généralement l'attention que pour de mauvaises raisons. Il semble obscur, d'autant plus que cet article est consacré à un thème peu familier des juristes, mêmes internationaux : la *Lex sportiva*. Cette appellation matérialise le droit transnational du sport au sein de l'ordre juridique sportif. Et, comme beaucoup de droits transnationaux², la *Lex sportiva*

² Sur la *Lex sportiva* comme droit transnational, v. Latty, F., *La lex sportiva – Recherche sur le droit transnational*, Leiden/Boston, Martinus Nijhoff Publishers, 2007, pp. 21-31 ; Duval, A., *What Lex Sportiva tells you about*

a grandi avec l'appui du droit comparé.

Mais avant de considérer les apports et rapports entre ces deux matières, quelques éléments sur les ordres juridiques nécessitent un éclairage. Un ordre juridique est un « ensemble de règles de droit, constituant un système régissant une société ou un groupement donné »³. L'ordre juridique interne est à cet égard un ordre juridique parfait. Or de nouvelles sociétés non-étatiques sont apparues, revendiquant dans les rapports entre leurs membres des règles propres⁴ : la communauté internationale, l'humanité, la communauté des marchands, etc. Mais, malgré un XXI^e siècle bien entamé, la reconnaissance d'une pluralité d'ordres juridiques - sans renier l'importance, voire la primauté, de l'ordre juridique étatique - est toujours source de débat. L'idée même d'un ordre juridique international n'est pas forcément évidente⁵, la multiplicité des conceptions du droit international à travers le monde ne facilitant pas l'exercice⁶.

L'apparition ou la résurgence, depuis la fin de la seconde guerre

transnational law, *in* Zumbansen, P. (ed.), *The many lives of transnational law. Critical engagements with Jessup's bold proposal*, Cambridge, Cambridge University Press, 2020, pp. 269-293.

³ Salmon, J., *Dictionnaire de droit international public*, Bruxelles, Bruylant, 2001, p. 786. V. également Leben, C., *De quelques doctrines de l'ordre juridique*, *Droits*, n°33, 2001, pp. 19-40 ; une définition similaire est donnée par Charles Leben : "On appelle ordre juridique l'ensemble, structuré en système, de tous les éléments entrant dans la constitution d'un droit régissant l'existence et le fonctionnement d'une communauté humaine.", Leben, C., *De quelques doctrines de l'ordre juridique*, *Droits*, vol. 33, no. 1, 2001, p. 20.

⁴ Carbonnier, J., *Sociologie juridique*, Paris, Presses Universitaires de France, 1978, p. 204.

⁵ Hart, H. L. A., *The Concept of Law*, Oxford, Clarendon Law Series, 1961, pp. 213-238 ; Sur, S., *Système juridique international et utopie*, *Archives de philosophie du droit*, tome 32, Sirey, 1987, pp. 35-46 ; Alland, D., *De l'ordre juridique international*, *in* *Droits*, Paris, Presses Universitaires de France, 2002, vol.1, n°35, pp. 79-102 ; Corten, O., *Une introduction critique au droit international*, Bruxelles, Editions de l'Université. 2017, pp. 33-46.

⁶ Roberts, A., *Is International Law International?*, Oxford, Oxford University Press, 2017, 432 pages.

mondiale, de droits régionaux/sectoriels⁷ et transnationaux⁸ complique un peu plus l'équation. Enfin, le retour actuel du protectionnisme et d'une tendance nationaliste remet en question l'existence de ces nouveaux ensembles juridiques, dépendant de la liberté ou de la licence - et parfois des crédits - accordée par les Etats.

Bien qu'il soit nécessaire de garder en mémoire ces considérations, il n'est pas ici crucial d'approfondir plus le débat - rentrer dans les ordres prendrait une vie - afin de se concentrer sur le droit transnational. Il est simplement nécessaire de le conserver à l'esprit afin de considérer par la suite ses potentiels effets.

Le droit transnational est difficile à définir car il est en réalité pluriel - l'utilisation de « droits transnationaux » serait plus pertinente. Les principaux éléments communs sont : une origine principalement privée⁹, l'application à une communauté dépassant le cadre national d'un seul Etat, l'absence d'ancrage dans un ordre juridique particulier¹⁰ et une sanction émanant essentiellement d'une justice privée - l'arbitrage.

⁷ Valticos, N., Pluralité des ordres juridiques internationaux et unité du droit international, *in* Mélanges Skubiszewski, 1996, pp. 301-322 ; Koskenniemi, M., Fragmentation du droit international : difficultés découlant de la diversification et de l'expansion du droit international - rapport du Groupe d'étude de la Commission du droit international, Geneva, UN, 2006, 279 pages ; Pellet, A., Notes sur la 'fragmentation' du droit international : Droit des investissements internationaux et droits de l'homme, *in* Unity and Diversity in International Law. Essays in Honour of Professor Pierre-Marie Dupuy, Martinus Nijhoff Publishers, Leiden/Boston, 2014, pp. 757-784.

⁸ Viraly, M., Un tiers droit ? Réflexions théoriques, *in* Etudes offertes à Berthold Goldman, Paris, Litec, 1982, pp. 373-385 ; Rigaux, F., Les situations juridiques individuelles dans un système de relativité générale, RCADI, 1989-I, vol. 213, pp. 45-83 ; Mayer, P., Le phénomène de la coordination des ordres juridiques étatiques en droit international privé, RCADI, 2003, vol. 327, pp. 48-78 ; Gaillard, E., Aspects philosophiques du droit de l'arbitrage international, RCADI, 2008, vol. 329, pp. 46-100.

⁹ Ce point est à relativiser dans le cadre de l'arbitrage d'investissement qui voit depuis la sentence AAPL (CIRDI, Asian Agricultural Products Ltd. v. Republic of Sri Lanka, sentence du 27 juin 1990, No. ARB/87/3) une importance croissante des sources publiques, exacerbée ces dernières années par la réaffirmation de l'Etat en la matière, v. El Ghadban, T., Mazuy, C.-M. & Senegacnik, A. (dir.), The Protection of Foreign Investments: A Reaffirmation of the State?, Paris, Pédone, 2018, 196 pages.

¹⁰ Ce point est à relativiser dans le cadre de l'arbitrage sportif, v. Rigozzi, A., L'importance du droit suisse de l'arbitrage dans la résolution des litiges sportifs internationaux, ZSR, 2013, pp 301-317.

L'invention du terme « transnational law » est à mettre au crédit de l'éminent juriste américain Philip C. Jessup¹¹, même si la notion actuelle s'éloigne de la conception qu'en avait l'auteur. En effet, Jessup envisageait un remplacement du terme « droit international » par « droit transnational » tout en conservant la prépondérance de l'Etat¹², tandis que les droits transnationaux contemporains tendent à donner à l'Etat un rôle subsidiaire.

Une des premières allégories du droit transnational fut (et est toujours) la *lex mercatoria* (loi des marchands - *law of merchants*¹³). Elle se veut - abusivement - une réminiscence des usages du commerce au Moyen-Âge¹⁴. A cette époque, les échanges internationaux étaient facilités par les grandes foires (en Champagne, à Cologne, en Lombardie, etc). Mais, les frontières étant plus poreuses et les Etats moins présents, ces échanges nécessitaient un encadrement, d'où l'intervention spontanée des marchands afin de réglementer leur pratique. Tombée quelque peu en désuétude au cours des siècles, la mondialisation et l'approche libérale de la plupart des Etats rendirent son intérêt à la *lex mercatoria*.

Dans son acception moderne, la *lex mercatoria* est un ensemble hétéroclite de règles écrites (conventions internationales, lois nationales ou uniformes, règlements d'arbitrages, etc) et non-écrites (principes généraux, coutumes, pratiques, etc), applicables aux relations commerciales internationales et indépendant de tout système juridique. De par ses sources, la création normative mercantile est en partie due aux méthodes de droit comparé¹⁵. En France, bien que nommée « droits corporatifs » et décrite par Edouard Lambert dès 1935¹⁶, sa renaissance théorique fut l'oeuvre de Berthold

¹¹ Jessup, P. C., *Transnational law*, New Haven, Yale University Press, 1956, 113 pages.

¹² *Ibid.*, p. 2.

¹³ Schmitthoff, M., *International Business Law: A New Law Merchant*, Current Law and Social Problems, 1961, pp. 12-17.

¹⁴ Bart, J., *La Lex mercatoria au Moyen âge : mythe ou réalité ?*, in *Souveraineté étatique et marchés internationaux à la fin du 20e siècle - Mélanges en l'honneur de Philippe Kahn*, Paris, Litec, 2000, pp. 9-22.

¹⁵ V. notamment l'article de Marco Torsello dans ce volume, pp. 211-253.

¹⁶ Lambert, E., *Sources du droit comparé ou supranational. Législation uniforme et jurisprudence comparative*, in *Recueil d'études sur les sources du droit en l'honneur de François Gény*, Tome III, Paris Librairie du Recueil Sirey, 1935, pp. 478-510, spec. 497-502.

Goldman¹⁷ et de l'école de Dijon.

À sa suite, de nombreux domaines ont cherché une reconnaissance similaire : *lex petrolea*¹⁸, *lex maritima*¹⁹, *lex informatica*²⁰, etc. L'intérêt des néologismes, surtout latinisant, est avant tout déclamatoire : ils attirent l'attention sur un nouveau corpus juridique revendiquant une certaine autonomie²¹, sans forcément y réussir²². Or, pour la *lex sportiva*, le but semble cependant atteint. Elle jouit en effet d'une grande autonomie²³. Mais l'utilisation du droit comparé, qui a permis cette autonomisation, est aussi une preuve de la dépendance du droit sportif à l'égard d'autres droits.

¹⁷ Goldman, B., *Frontières du droit et Lex Mercatoria*, Archivages de philosophie du droit, Sirey, Paris, 1964, pp. 177-192 ; Goldman, B., *Nouvelles réflexions sur la lex mercatoria*, in *Études de droit international en l'honneur de Pierre Lalive*, Bâle/Francfort-sur-le-Main, Editions Helbing & Lichtenhahn, 1993, pp. 241-255. ; pour une biographie du professeur Goldman, voir le site de la SFDI : <http://www.sfdi.org/internationalistes/goldman/>.

¹⁸ Appelée "Petro-Droit" par Claude-Albert Colliard (*L'intervention de l'Etat en matière d'hydrocarbures en France*, *Annales de la faculté de droit d'Aix-en-Provence*, Aix-en-Provence, La Pensée Universitaire, n° 52, 1960-1961, pp. 61-88) puis théorisée par Ahmed Sadek El-Koshery (*Le régime juridique créé par les accords de participation dans le domaine pétrolier*, in *RCADI*, 1975 IV, Tome 174, The Hague, Sijthoff & Noordhoff, 1978, pp. 217-405), elle apparaît pour la première fois dans la sentence AMINOIL (*Government of the State of Kuwait v. AMINOIL*, Award of 24 May 1982, *International Legal Materials*, vol. 21, Issue 5, 1982, p. 1047).

¹⁹ Tetley, W., *The general maritime law - The lex maritima*, *Syracuse Journal of international Law and Commerce*, vol. 20, 1994, pp. 105-146.

²⁰ Reidenberg, J. R., *Lex Informatica: The Formulation of Information Policy Rules through Technology*, *Texas Law Review*, volume 76, n°3, 1997-1998, pp. 553-593 ; Mefford, A., *Lex Informatica: Foundations of Law on the Internet*, *Indiana Journal of Global Legal Studies*, Volume 5, Issue 1, 1997, pp. 211-237 ; Gautrais, V., Lefebvre, G., & Benyekhlef, K., *Electronic Commerce Law and Applicable Norms : the Emergence of the Lex Electronica*, *Revue de droit des affaires internationales*, n°5, 1997, pp. 547-583.

²¹ Merle, M., *Le concept de transnationalité*, in *Humanité et droit international - Mélanges R.-J. Dupuy*, Paris, Pedone, 1991, p. 225.

²² e.g., Daintith, T., *Against 'lex petrolea'*, *The Journal of World Energy Law & Business*, Vol. 10, Issue 1, 2017, pp 1-13 ; Même l'existence de la *Lex Mercatoria* est critiquée, v. Lagarde, P., *Approche critique de la lex mercatoria*, in *Etudes offertes à Berthold Goldman*, Paris, Litec, 1982, pp. 125-150.

²³ Latty, F., *La lex sportiva...*, *Op. Cit.*, pp. 415-766 ; Latty, F., *Lex sportiva et autonomie du sport*, in Chappelet, J.-L. (dir.), *L'autonomie des organisations sportives*, OIPPS, Université de Lausanne / Université Paris 1 Panthéon-Sorbonne, 2019, pp. 35-43.

L'expression « Lex sportiva » est née en doctrine en 1990²⁴, avant d'être reprise dans les sentences du Tribunal Arbitral du Sport ("TAS") à partir de 2003²⁵. Sa démocratisation est à mettre au crédit du professeur Franck Latty avec sa thèse publiée en 2007. La Lex sportiva peut être définie comme l'« ensemble des règles créées par le mouvement sportif international et qui président à l'organisation des épreuves sportives »²⁶. Trois sources irriguent ce droit : les réglementations produites par les fédérations sportives internationales, le droit olympique et les décisions rendues par le TAS²⁷.

La cohérence du droit du sport est assurée par un système pyramidal à 3 échelons : au niveau national les fédérations nationales (e.g. Fédération Française de Rugby, Rugby Football Union, etc.), au niveau mondial, une fédération internationale (e.g. World Rugby) ayant un monopole sur son sport (soutenue en ce sens par le Comité Internationale Olympique²⁸) et enfin, pour contester les décisions, le TAS²⁹. Les sentences de ce dernier sont contraignantes pour l'ensemble des acteurs et forment une jurisprudence suivie, ce qui donne à la Lex Sportiva une plus grande cohérence que la Lex Mercatoria³⁰.

²⁴ Summerer, T., *Internationales Sportrecht vor dem staatlichen Richter in der Bundesrepublik, Schweiz, USA und England*, Tübingen, Mohr, 1990, p. 95 ; en France, le terme apparaît en 1994 chez D. Hahn (Présentation de la jurisprudence du T.A.S., R.J.E.S., n° 31, 1994, p. 29).

²⁵ TAS, 2002/A/417, I.A.A.F. c. C.A.D.A. & S. Witteveen, sentence du 12 mai 2003 (non publiée).

²⁶ Loquin, E., obs. sur TAS, 2014/A/3505, Al Khor SC c. C., 3 décembre 2014, JDI 2015, p. 397.

²⁷ *Ibid.* ; Latty, F., *La lex sportiva...*, *Op. Cit.*, p. 41 ; Simon, G., *La contribution d'Eric Loquin à la Lex Sportiva*, in *Droit sans frontières - Mélanges en l'honneur d'Eric Loquin*, Paris, LexisNexis, 2018, p. 848.

²⁸ Latty, F., *Les règles applicables aux relations sportives transnationales. Le regard de l'internationaliste publiciste*, in Forteau, M. (dir.), *La fragmentation du droit applicable aux relations internationales. Nouveaux défis, nouveaux outils. Regards croisés des internationalistes publicistes et privatistes*, Paris, Pedone, 2011, p. 86 ; Principes 25 et 26 de la Charte Olympique, état en vigueur au 2 août 2015.

²⁹ Latty, F., *Les règles applicables aux relations...*, *Op. Cit.*, pp. 83-87 ; Simon, G., *Puissance sportive et ordre juridique étatique*, Paris, LGDJ, 1990, p. 45 & pp. 56-65 ; Loquin, E., obs. sur TAS, 2014/A/3629, Parma F.C. S.p.A. v. FIGC & Torino F.C. S.p.A., sentence du 31 octobre 2014, JDI, 2017 ; TAS, 94/128, UCI & CONI, avis consultatif du 5 janvier 1995, paras. 21 & 22 ; TAS, 93/109, FF Tri & ITU, avis consultatif du 31 août 1994 ; TAS, 2002/O/401, IAAF v. USATF, sentence du 10 janvier 2003, para. 12.

³⁰ Kaufmann-Kohler, G., *Arbitral Precedent: Dream, Necessity or Excuse? (The 2006 Freshfields Lecture)*, *Arbitration international*, 2007, p. 365 ; Latty, F., *La lex sportiva...*, *Op. Cit.*, pp. 260-284 ; Mayer, P., *Le phénomène de la coordination...*, *Op. Cit.*, pp. 64-73.

Comme pour la Lex Mercatoria, le droit comparé a été l'un des moteurs de la création normative du droit sportif. Plusieurs méthodes ont pu être (et sont encore) utilisées. Tenant de la théorie que les moyens du droit comparé ont nécessairement un objectif à atteindre, en particulier l'amélioration du droit national³¹, il est possible de retenir trois catégories afin de classer les méthodes de cette matière : la macro-comparaison, l'étude du droit étranger afin d'améliorer le droit national et la recherche d'un droit commun³². La première catégorie tend à l'étude globale des systèmes - elle ne retiendra pas notre attention pour cette étude ; la seconde permet l'importation de figures juridiques étrangères au sein d'un système juridique originel ; la troisième enfin cherche à créer un langage commun aux droits. Par le truchement de ces deux dernières méthodes apparaît une création normative « subversive »³³.

Les méthodes du droit comparé sont particulièrement perceptibles dans l'activité du TAS par la révélation de principes généraux du droit. Il semble inhérent aux pouvoirs d'un organe de règlement des litiges de dégager des principes généraux du droit³⁴. En ce sens, le TAS ne fait pas exception (II). Par ailleurs, la sentence arbitrale ayant vocation à être influencée par plusieurs droits et à évoluer dans plusieurs ordres juridiques, le TAS est dans l'obligation de considérer une multitude de sources, nationales (III), supranationales intégrées (IV), voire internationales (V), dans l'application et l'interprétation des normes de Lex sportiva. Le but est de conserver la cohérence du droit sportif.

II. L'EXTRACTION DE PRINCIPES GENERAUX DU DROIT

Quel que soit l'ordre juridique considéré, les principes généraux du droit (PGD) naissent de la liberté accordée aux arbitres (A). Deux catégories sont

³¹ Markesinis, B., Unité ou divergence : à la recherche des ressemblances dans le droit européen contemporain, *in* Revue internationale de droit comparé, vol. 53, n°4, 2001, pp. 807-808.

³² Jaluzot, B., Méthodologie du droit comparé : bilan et prospective, *in* Revue internationale de droit comparé, vol. 57, n°1, 2005, p. 45.

³³ Muir-Watt, H., La fonction subversive du droit comparé, *in* Revue internationale de droit comparé, vol.52, n°3, 2000, pp. 503-527.

³⁴ Hamson C.J., La notion de légalité dans les pays occidentaux, *in* Revue internationale de droit comparé, Vol. 10, n°1, 1958. p. 11.

révélées par le TAS : les principes généraux du droit intégrés au monde sportif (B) et les principa sportiva (C).

A. Origines

Les PGD peuvent être définis comme « des règles qui ne sont pas tirées d'un seul ordre juridique étatique mais qui sont dégagées soit de la comparaison de droits nationaux, soit directement de sources internationales telles que les conventions internationales, en vigueur ou non, ou de la jurisprudence des tribunaux internationaux »³⁵. Ils sont le fruit de l'analyse comparatiste effectuée par les arbitres³⁶.

Si le Code de l'arbitrage en matière de sport³⁷, qui règle la procédure devant le TAS et en particulier le droit applicable³⁸, ne prévoit pas explicitement le recours à ces principes, il laisse aux parties le choix du droit applicable. L'expression « règles de droit dont [la formation du TAS] estime l'application appropriée » de l'article R58 semble cependant le permettre. L'article R 45 donne également la possibilité aux arbitres de « statuer en équité »³⁹. Le droit suisse, droit du siège, n'en dit pas plus⁴⁰, tout comme la plupart des droits

³⁵ Gaillard, E., La distinction des principes généraux du droit et des usages du commerce international, in Etudes offertes à Pierre Bellet, Paris, Litec, 1991, p. 203.

³⁶ Loquin, E. Règles matérielles du commerce international et droit économique, Revue internationale de droit économique, vol. XXIV, no. 1, 2010, p. 88.

³⁷ Entré en vigueur le 1er janvier 2019, disponible sur le site du TAS (www.tas-cas.org).

³⁸ Article R45 pour la procédure ordinaire ("La Formation statue selon les règles de droit choisies par les parties ou, à défaut de choix, selon le droit suisse. Les parties peuvent autoriser la Formation à statuer en équité.") et article R58 pour la procédure d'Appel ("La Formation statue selon les règlements applicables et, subsidiairement, selon les règles de droit choisies par les parties, ou à défaut de choix, selon le droit du pays dans lequel la fédération, association ou autre organisme sportif ayant rendu la décision attaquée a son domicile ou selon les règles de droit que la Formation estime appropriées...").

³⁹ Karaquillo, J.-P., Les principes fondamentaux propres à la *lex sportiva*, Jurisport 127, Dalloz, janv. 2013, p. 35.

⁴⁰ Art. 187 de la Loi fédérale de droit international privé (LDIP) du 18 décembre 1987 (2011- 2019) : "Le tribunal arbitral statue selon les règles de droit choisies par les parties ou, à défaut de choix, selon les règles de droit avec lesquelles la cause présente les liens les plus étroits."

nationaux favorables à l'arbitrage international⁴¹.

La seule mention explicite des PGD se trouve au sein des règlements d'arbitrage de la Chambre anti-dopage du TAS, que ce soit pour les JO de Rio 2016 ou ceux de PyeongChang 2018⁴². En effet, l'article 17 dispose que : « La Formation statue en vertu des règles anti-dopages du CIO, (...), des règlements applicables, du droit suisse et des principes généraux du droit ».

Cette liberté accordée aux parties, trait saillant de l'arbitrage en général, amène les arbitres à se comporter comme des juges et à appliquer trois types de PGD : les principes généraux du droit (de droit interne ou international) intégrés au monde sportif, les PGD propres à la matière sportive et enfin ceux propres aux droits nationaux lorsqu'ils sont applicables. L'arbitre sportif est le révélateur de ces deux premières catégories⁴³.

B. Les PGD intégrés au monde sportif

La première catégorie de principes, les principes généraux, a pour but principal d'assurer la légalité de l'ordre juridique sportif, proche de l'idée d'Etat de droit⁴⁴. Dès lors, et assez logiquement, les PGD importés au sein de l'ordre sportif sont principalement issus du droit public et du droit pénal⁴⁵. Le TAS a ainsi reconnu et appliqué, entre autres⁴⁶, le principe de non bis in idem⁴⁷, le

⁴¹ Par exemple, en droit français, l'article 1511 du Code de Procédure Civile dispose : « Le tribunal arbitral tranche le litige conformément aux règles de droit que les parties ont choisies ou, à défaut, conformément à celles qu'il estime appropriées.

Il tient compte, dans tous les cas, des usages du commerce. ».

⁴² Disponible sur le site du TAS (<https://www.tas-cas.org/fr/arbitrage/chambre-anti-dopage-du-tas.html>).

⁴³ Latty, F., *La lex sportiva...*, *Op. Cit.*, p. 305 ; Loquin, E., *L'utilisation par les arbitres du TAS des principes généraux du droit et le développement d'une Lex sportiva*, in *The proceedings before the court of arbitration for sport*, 2006, Lausanne, Suisse. p. 93.

⁴⁴ Loquin, E., *L'utilisation par les arbitres du TAS...*, *Op. Cit.*, p. 101.

⁴⁵ Kaufmann-Kohler, G., *Nagano et l'arbitrage - ou vers une justice de proximité (Nagano and arbitration - Towards a proximity justice)*, *ASA Bulletin*, 1998, p. 319.

⁴⁶ Pour une liste des PGD, v. Latty, F., *La lex sportiva...*, *Op. Cit.*, p. 316-323.

⁴⁷ TAS 2007/A/1396 & 1402, *WADA and UCI v. Alejandro Valverde & RFEC*, sentence du 31 mai 2010 ; TAS 2013/A/3256, *Fenerbahçe Spor Kulübü v. UEFA*, sentence du 1er avril 2014 ; TAS 2015/A/4319 *Bulgarian Weightlifting Federation (BWF) v. International Weightlifting Federation (IWF)*, sentence du 15 février 2016.

principe de proportionnalité de la sanction par rapport à l'infraction⁴⁸ ou encore le principe de bonne foi⁴⁹. Pour les révéler, l'arbitre ne fera que constater l'existence d'une règle pré-existante sans forcément la relier avec un système juridique donné, règle qu'il pourra éventuellement « déraciner » afin de la transposer dans l'ordre juridique sportif. Une fois ce travail réalisé dans un certain nombre de sentences, le principe pourra être repris sans effectuer l'opération d'extraction. D'où l'importante utilisation des précédents dans l'arbitrage sportif⁵⁰.

Les PGD sont devenus monnaie courante au sein des sentences. Par exemple, une sentence récente et très médiatisée a appliqué 5 PGD différents dans son raisonnement⁵¹. Et, à chaque fois, le TAS justifie l'existence du PGD en se basant sur des décisions antérieures - voir simplement un seul précédent. Cependant, cela ne veut pas dire que les sentences ont l'effet de stare decisis comme en droit anglais⁵².

C. Les principia sportiva

À côté de ces principes traditionnels co-existe une seconde catégorie, les

⁴⁸ TAS, 2011/A/2325, UCI c. Roel Paulissen & RLVB, sentence du 23 décembre 2011 ; TAS, 2016/A/4643, Maria Sharapova v. International Tennis Federation (ITF), sentence du 30 septembre 2016 ; TAS, 2016/A/4474, Michel Platini c. Fédération Internationale de Football Association, 16 septembre 2016.

⁴⁹ CAS 2006/A/1100, E. v. Club Gaziantepspor, sentence du 15 novembre 2006 ; CAS 2009/A/1756, FC Metz v. Galatasaray SK, sentence du 12 octobre 2009 ; CAS 2017/A/5290, Florent Malouda c. CONCACAF, sentence du 19 avril 2018, para. 89.

⁵⁰ Rigozzi, A., L'arbitrage international en matière de sport, Bâle, Helbing & Lichtenhahn, 2005, p. 636, n° 1261 ; Latty, F., La lex sportiva..., *Op. Cit.*, p. 268 ; M. Maisonneuve, L'arbitrage des litiges sportifs, Paris, LGDJ, 2011, p. 377 et s. ; Ben Abdallah, H., Le TAS et l'ordre juridique sportif, in Sport et droit international (Aspects choisis), Latty, F., Marmayou, J.-M., et Racine, J.-B. (dir.), Aix-en-Provence, PUAM, 2016, p. 261.

⁵¹ Ont été utilisés les principes « *lex mitior* » (para. 148), « *actor incombait probatio, reus in excipiens fit actor* » (para. 214), « *non concedit venire contra factum proprium* » (para. 296), « *lex specialis* » (para. 335) et le principe de proportionnalité (para. 356), TAS 2016/A/4474 Michel Platini c. FIFA, sentence du 16 septembre 2016.

⁵² TAS, 2015/A/3874, FSS c. UEFA, sentence du 23 janvier 2017, para. 119 ; CAS, 2008/A/1545, Andrea Anderson, LaTasha Colander Clark, Jearl Miles-Clark, Torri Edwards, Chryste Gaines, Monique Hennagan, Passion Richardson v. IOC, sentence du 16 juillet 2010, para. 53 ; TAS, 2004/A/628, IAAF v. USATF & Y., sentence du 28 juillet 2004, para. 19.

principa sportiva (terme créé par Franck Latty)⁵³. Ce sont les principes propres au droit du sport, qui n'ont aucun lien avec le droit des Etats et qui proviennent de la synthèse de textes réglementaires des institutions sportives et de la jurisprudence du TAS⁵⁴. Révélés pour la première fois par la jurisprudence en 1999⁵⁵, ils apparaissent sous différentes dénominations⁵⁶.

Les principa sportiva ont une triple utilité : harmoniser le droit des fédérations, combler les lacunes du droit du sport et inspirer l'interprétation des règles sportives par les tribunaux⁵⁷. Dans ces principes se retrouvent, par exemple, le principe d'intégrité/équité (fairness)⁵⁸, le fair-play⁵⁹ et le principe d'indépendance des fédérations internationales vis-à-vis du CIO⁶⁰, tiré de l'article 26 de la Charte Olympique.

Mais la cohérence n'est pas toujours absolue dans l'application de ces principes. Par exemple, au vu de l'organisation pyramidale sportive, les règles des fédérations internationales priment sur celles des fédérations nationales - principe faisant parti des principa sportiva. Or, dans une sentence récente, le

⁵³ Latty, F., *La lex sportiva...*, *Op. Cit.*, p. 323.

⁵⁴ Loquin E., obs. sur TAS 94/126, JDI, 2002, p. 344 ; Karaquillo, J.-P., *Les principes fondamentaux...*, *Op. Cit.*, p. 37

⁵⁵ TAS, 98/200, AEK Athens and SK Slavia Prague v. UEFA, sentence du 20 août 1999, para. 156 ("unwritten legal principles") & para. 158 ("unwritten principles of sports law").

⁵⁶ "general principles of sports law" (TAS, 2011/A/2625, Mohamed Bin Hammam c. FIFA, sentence du 19 juillet 2012, mentionné par le demandeur) ; "general principle of *lex sportiva*" (TAS, 2008/A/1545, Andrea Anderson, LaTasha Colander Clark, Jearl Miles-Clark, Torri Edwards, Chryste Gaines, Monique Hennagan, Passion Richardson c. IOC, sentence du 16 juillet 2010) ; pour d'autres dénominations, v. Latty, F., *La lex sportiva...*, *Op. Cit.*, p. 323.

⁵⁷ Rigozzi, A., *L'arbitrage international...*, *Op. Cit.*, p. 633 ; Loquin, E., *L'utilisation par les arbitres du TAS...*, *Op. Cit.*, p. 94 ; Latty, F., *La lex sportiva...*, *Op. Cit.*, p. 324.

⁵⁸ TAS, 2015/A/4005, IAAF c. ARAF, Sergey Kiryapkin & RUSADA, sentence du 25 avril 2016, para. 121 ; TAS, 2013/A/3274, Mads Glasner c. FINA, sentence du 31 janvier 2014, para. 85 ; TAS, 2008/A/1744, UCI c. Monika Schachl & ÖRV, 27 juillet 2009, para. 74.

⁵⁹ TAS, 2015/A/3975, Nassir Ali N. Alshamrani c. AFC, sentence du 31 août 2015 ; TAS, 2014/A/3665, 3666 & 3667, Luis Suárez, FC Barcelona & AUF v. FIFA, sentence du 2 décembre 2014 ; TAS, 2016/A/4703, Lyukman Adams & autres v. IAAF, sentence du 14 octobre 2016.

⁶⁰ TAS ad hoc Division (O.G. Salt Lake City), 02/001, Prusis & LOC c. IOC, sentence du 5 février 2002 ; TAS, 2014/A/3828, IHF c. FIH & Hockey India, sentence du 17 Septembre 2015.

TAS a estimé que cette primauté ne permettait pas une application directe d'une norme d'une fédération internationale dès lors qu'elle n'était pas transposée par la fédération nationale concernée⁶¹. La norme non-transposée portait en l'espèce sur l'obligation d'ouvrir un recours devant le TAS contre les décisions nationales. Ce dernier s'est déclaré incompétent pour trancher le litige.

Les aléas dans l'interprétation du principe de primauté en matière procédurale sont assez prégnants dans la jurisprudence du TAS⁶². Cette « frilosité » peut être imputée à la possibilité d'un recours en annulation de la sentence pour incompétence⁶³, la norme donnant compétence au TAS n'étant pas transposée.

Les principes généraux permettent donc de déconnecter certaines règles juridiques du cadre national, voire de créer des normes propres au monde sportif. Pour autant, cela n'est rendu possible que par la licence donnée par le droit applicable. De plus, le TAS est obligé de prendre en compte les droits pertinents dans ses raisonnements.

III. LA PRISE EN COMPTE DES DROITS NATIONAUX PAR LE TAS

Sans forcément avoir recours à la création normative, les arbitres du TAS sont amenés à appliquer de multiples droits et à les prendre en compte dans l'interprétation qu'ils ont des règles sportives. L'article 58 du règlement d'arbitrage du TAS prévoit en effet que les droits nationaux sont des sources subsidiaires applicables au litige. Même si cette disposition peut parfois conduire à des dérives autarciques⁶⁴, l'intérêt est de percevoir au mieux la

⁶¹ TAS, 2014/A/3629, Parma F.C. S.p.A. c. FIGC & Torino F.C. S.p.A., sentence du 31 octobre 2014.

⁶² TAS, 2013/A/3199, Rayo Vallecano de Madrid SAD v. RFEF, sentence du 22 octobre 2013 ; TAS, 2010/A/2170, Iraklis Thessaloniki FC c. HFF & TAS, 2010/A/2171, OFI FC c. HFF, sentence du 23 février 2011 ; TAS, 2005/A/952, Ashley Cole c. FAPL, sentence du 24 janvier 2006 ; TAS, 2004/A/676, Ismailia Sporting Club c. CAF, sentence du 15 décembre 2004.

⁶³ Art. 190 al. 2 LDIP ; Article 1520 al. 1 du Code de Procédure Civil français.

⁶⁴ Rigozzi, A., *L'arbitrage international...*, *Op. Cit.*, p. 625.

relation transnationale, tout en garantissant une effectivité maximale des sentences dans les ordres juridiques concernés.

Cette superposition de règles juridiques diverses applicables par les arbitres est nommée « dépeçage des droits »⁶⁵. Dans l'application des droits d'origine purement interne, une distinction peut être faite entre les règles impératives (A) et les autres normes (B).

A. Les règles impératives de droit interne

Dans le premier cas seront prises en compte en particulier les lois de police (« LP ») des pays ayant un lien avec le litige. Ces lois sont « d'une nature positive rigoureusement obligatoire, dictées par un motif d'intérêt général »⁶⁶. Les parties à l'instance - ou au moins une des parties - sont généralement tenues de les respecter. Même si, comme le précise le professeur Mayer :

« dans bien des cas l'« attente des parties » était d'échapper à la loi de police, [mais] les arbitres ne l'ont pas entendu ainsi. [...] les lois de police sont les lois impératives au niveau international. Certes le passage de la sphère interne à la sphère internationale rend en général l'impératif juridique de chacun des pays concernés plus flou, plus diffus ; mais certains impératifs sont si étroitement fonction d'un lien déterminé du rapport juridique avec le territoire qu'ils doivent être respectés dès lors que l'existence de ce lien est constatée, l'absence d'autres liens étant indifférente. »⁶⁷

L'article 19 de la LDIP reprend cette conception dans la prise en

⁶⁵ TAS, 2015/A/3882, Club Olimpia c. Sergio Sebastián Ariosa Moreira, sentence du 29 juillet 2015, JDI, 2017, obs. E. Loquin, p. 327 ; TAS, 2006/A/1082 & 1104 Real Valladolid CF SAD c. Diego Daniel Barreto Càceres & Club Cerro Porteño, sentence du 19 janvier 2007, para. 14.

⁶⁶ Savigny (von), F. C., *Traité de droit romain*, t. VIII, trad. Guénoux, 1856, para. 349, cité par Mayer, P., *Les lois de police*, in *Droit international privé : travaux du Comité français de droit international privé*, hors-série, 1988, p. 105 ; v. également article 9§1 du règlement (CE) n° 593/2008 du Parlement européen et du Conseil du 17 juin 2008 sur la loi applicable aux obligations contractuelles (Rome I) : une loi de police est une « disposition impérative dont le respect est jugé crucial par un pays pour la sauvegarde de ses intérêts publics, tels que son organisation politique, sociale ou économique, au point d'en exiger l'application à toute situation entrant dans son champ d'application, quelle que soit par ailleurs la loi applicable au contrat d'après le présent règlement ».

⁶⁷ Mayer, P., *Les lois de police*, *Op. Cit...*, p. 113-114.

considération des LP⁶⁸. Afin de déterminer ce qu'est une loi de police, le TAS considère 3 conditions cumulatives :

- « i. Ces dispositions relèvent d'une catégorie de normes qui doivent recevoir application quel que soit le droit applicable au fond du litige ;
- ii. Il existe une relation étroite entre l'objet du litige et le territoire où les dispositions impératives du droit étranger sont en vigueur ;
- iii. Au vu de la théorie et la pratique du droit Suisse, les dispositions impératives doivent viser à la protection des intérêts légitimes et des valeurs fondamentales et leur application doit mener à une décision appropriée. »⁶⁹

Le TAS appliquera les LP s'il existe des circonstances exceptionnelles⁷⁰ ou si elles ont un impact sur la résolution du litige⁷¹, faisant ainsi écho aux « intérêts légitimes et manifestement prépondérants » mentionnés à l'article 19 de la LDIP.

Ce caractère restrictif s'explique par l'impact réel des LP sur l'exécution des sentences. La plupart des sentences du TAS n'ont pas besoin de l'exequatur⁷². Soit les sanctions infligées aux sportifs ne nécessitent pas de procédure d'exequatur pour être mises en œuvre (e.g. suspension d'un

⁶⁸ « Lorsque des intérêts légitimes et manifestement prépondérants au regard de la conception suisse du droit l'exigent, une disposition impérative d'un droit autre que celui désigné par la présente loi peut être prise en considération, si la situation visée présente un lien étroit avec ce droit. ».

⁶⁹ TAS, 2016/A/4490, RFC Seraing c. FIFA, sentence du 9 mars 2017, para. 75 ; TAS, 2016/A/4492, Galatasaray c. UEFA, Sentence du 3 octobre 2016, para. 41 ; TAS, 98/200, AEK Athens and SK Slavia Prague c. UEFA, sentence du 20 août 1999, para. 10.

⁷⁰ TAS, 2017/A/5277, FK Sarajevo c. KVC Westerlo, sentence du 16 avril 2018, para. 71 : « unless explicitly prohibited by mandatory provisions » ; TAS, 2013/A/3314, Villareal CF SAD c. SS Lazio Roma, sentence du 7 mars 2014, para. 42 : « a provision of law which is not applicable as *lex causae* would be considered mandatory and directly applied only in exceptional circumstances » ; TAS 2008/A/1485 FC Midtjylland A/S c. FIFA, sentence du 6 mars 2009, para. 29 : « an Arbitral Tribunal having its seat in Switzerland has, to a certain extent, to take into consideration the application of mandatory foreign laws where this is justified by a sufficient interest ».

⁷¹ TAS, 2014/A/3652 KRC Genk c. LOSC Lille Métropole, sentence du 5 juin 2015, para. 38 ; TAS, 92/81 L. c. Y. SA, sentence du 30 novembre 1992, para. 14.

⁷² Pour des problèmes de reconnaissance, v. par exemple Tribunal suprême espagnol, ch. contentieux adm., 5e section, sentence n° 708/2017, 25 avril 2017, Roberto Heras et Béjar & Barcycling Sports SL., Revue de l'arbitrage, 2017, p. 1019, note J. D. Crespo Perez.

athlète), soit le recours à l'autorité publique n'est pas nécessaire car la contrainte privée, reposant sur le pouvoir disciplinaire des institutions sportives, est suffisante⁷³. A titre d'anecdote, le TAS a rappelé que l'exécution des sentences ne relevait pas de sa compétence⁷⁴.

Le TAS est également amené à considérer les LP indirectement, dans l'interprétation de la *Lex sportiva*. Une affaire récente devant le TAS illustre particulièrement bien ce point⁷⁵. Un joueur de football à fort potentiel de 15 ans évoluait au niveau amateur dans un club belge depuis plusieurs années. Un contrat professionnel ne pouvait lui être proposé avant ses 16 ans car le droit belge l'interdit, sous peine de sanctions pénales. Courtisé par un club français, le jeune joueur donne alors sa démission et est recruté. La sous-commission du statut du joueur de la FIFA autorise le transfert. Le club belge a dès lors demandé une indemnité de formation au club français au titre de l'article 6 de l'annexe 4 du Règlement du Statut et du Transfert des Joueurs de la FIFA. Pour se voir accorder cette indemnité, le club doit « pour démontrer l'intérêt sincère et de bonne foi à conserver le joueur »⁷⁶. Ayant caractérisé l'intérêt du club, le TAS s'est basé sur l'interdiction prescrite par le droit belge - qui empêchait de matérialiser par un contrat l'intérêt du club - pour allouer l'indemnité au club originaire.

B. L'articulation des sources internes non-impératives

Comme vu précédemment, le TAS peut être amené à appliquer une pluralité de droits. Dans cet exercice, il se base sur plusieurs principes : le principe d'uniformité de l'ordre sportif⁷⁷ afin de garantir aux membres de cet

⁷³ Maisonneuve, M., *L'arbitrage des litiges sportifs...*, *Op. Cit...*, n° 980 et s.

⁷⁴ TAS, 2012/A/2705, Le Mans FC c. FIFA (Olympique Bamako), sentence du 11 mars 2013, para. 166.

⁷⁵ TAS, 2014/A/3652 KRC Genk c. LOSC Lille Métropole, sentence du 5 juin 2015, JDI, 2016, obs. E. Loquin.

⁷⁶ *Ibid.*, para. 52.

⁷⁷ Sur l'utilisation du principe, v. TAS 2014/A/3505 Al Khor SC c. C., sentence du 3 décembre 2014 ; TAS, 2009/A/1994, Xavier Malisse c. VDT & TAS 2009/A/2020 AMA c. VDT, VTV et Xavier Malisse, sentence partielle du 10 juin 2011, para. 39 ; TAS, 2009/A/2014, AMA c. ASBL RLVB & Iljo Kisse, sentence du 6 juillet 2010.

ordre, et en particulier aux athlètes, la sécurité juridique⁷⁸ et l'égalité de traitement entre les destinataires des normes⁷⁹. Une formulation est souvent reprise (avec quelques nuances) par les tribunaux :

“le sport est par nature un phénomène transcendant les frontières. Il est non seulement souhaitable, mais indispensable que les règles régissant le sport au niveau international aient un caractère uniforme et largement cohérent dans le monde entier. Pour en assurer un respect au niveau mondial, une telle réglementation ne doit pas être appliquée différemment d'un pays à l'autre, notamment en raison d'interférence entre droit étatique et réglementation sportive. Le principe de l'application universelle des règles de la FIFA ... répond à des exigences de rationalité, de sécurité et de prévisibilité juridique”⁸⁰

Une affaire intéressante permet de comprendre, par plusieurs exemples, la multiplicité des solutions possibles⁸¹. Étaient en concurrence trois droits : la *Lex sportiva* (en particulier le droit de la FIFA), le droit du contrat de travail (paraguayen) et le droit du siège de l'arbitrage (le droit suisse). Après avoir rappelé la primauté du droit du sport, le tribunal informe qu'il appliquera subsidiairement le droit suisse et le droit paraguayen, conformément aux articles R58 du règlement d'arbitrage du TAS et 187 de la LDIP.

Il s'agissait en l'espèce pour le TAS de statuer sur les conséquences de la

⁷⁸ Sur l'utilisation du principe, v. TAS 2015/A/4069 Yeli Sissoko e.a. c. FEMAFOOT, sentence du 16 novembre 2015, para. 153 ; TAS 2012/A/2830 Africa Sports d'Abidjan c. Fédération Ivoirienne de Football (FIF) & USC Bassam, ordonnance du 29 juin 2012, para. 20 ; TAS 2015/A/3930 Hatem Ben Arfa c. FIFA, sentence du 18 septembre 2015, para. 30 (argument de l'intimé).

⁷⁹ Sur l'utilisation du principe, v. TAS 2017/A/5147 Club Avenir Sportive d'Oued Ellil & Association Avenir Sportive de l'Union Sportive de Matouia & Club de l'Etoile Sportive d'Al Weslatya c. FTF, sentence du 6 mars 2018, para. 68 ; TAS 2014/A/3475 Charline Van Snick c. FIJ, sentence du 4 juillet 2014, para. 66 ; TAS, 2010/A/2101, UCI c. A. & FFC, sentence du 18 février 2011, para. 28.

⁸⁰ TAS, 2005/A/983 & 984, Club Atlético Peñarol c. Carlos Heber Bueno Suarez, Cristian Gabriel Rodriguez Barrotti & Paris Saint-Germain, sentence du 12 juillet 2006, para. 68 ; TAS, 2006/A/1180, Galatasaray SK v. Frank Ribéry & Olympique de Marseille, sentence du 24 avril 2007, para. 12 ; TAS, 2014/A/3505, Al Khor SC c. C., sentence du 3 décembre 2014, para. 2 ; TAS, 2013/A/3165, FC Volyn v. Issa Ndoye, sentence du 14 janvier 2014, para. 67.

⁸¹ TAS, 2015/A/3871, Sergipe Sebastian Ariososa Moreira c. Club Olimpia, sentence du 29 juin 2015, JDI, n°1, 2017, obs. E. Loquin.

rupture d'un contrat de travail. Le joueur demandait une indemnisation pour rupture et pour préjudice moral, le paiement des primes et des sanctions sportives à l'égard du club en vertu du règlement FIFA.

Concernant l'indemnité de rupture, la Lex sportiva et le droit du contrat se contredisent. Certains contrats prennent en compte l'existence du droit du sport et lui donnent préséance⁸². Mais ce n'était pas le cas en l'espèce. Logiquement, au vu de l'ordre juridique sportif, le TAS fait primer les règles de la FIFA, d'ailleurs plus favorables. Pour autant, il va aussi ajouter à l'indemnité le « solde annuel complémentaire ». Cela est prévu par le droit paraguayen. Or la règle de la FIFA permet de prendre en compte le droit local.

Le TAS applique ensuite le droit du contrat pour les primes, seul droit les mentionnant. Le joueur y a droit, qu'il ait participé aux compétitions ou non, comme le prévoit le droit paraguayen. Quant au préjudice moral, le tribunal constate la concordance des 3 lois applicables. Sur ce point, un conflit entre les droits aurait été résolu à l'aune du droit international privé du droit du siège et en particulier de la conformité à l'ordre public international suisse⁸³. Enfin, la lex sportiva prévoit une indemnisation spéciale fondée sur la spécificité sportive prévu à l'article 17 du règlement FIFA⁸⁴. Elle est également accordée par le TAS.

L'arbitrage sportif a fait preuve d'ingéniosité tant en droit matériel qu'en matière procédurale. En effet, une fédération nationale prévoyait le recours à l'arbitrage concernant son règlement. Cela n'a pas empêché un recours à double degré par la suite devant le TAS⁸⁵, figure inédite en arbitrage, ce qui a été approuvé par les juridictions suisses⁸⁶.

Pour autant, malgré la prise en compte des droits nationaux par le TAS,

⁸² TAS, 2013/A/3165, FC Volyn v. Issa Ndoye, sentence du 14 January 2014, para. 63.

⁸³ Obs. E. Loquin, sur TAS, 2015/A/3871, Sergipe Sebastian Ariosia Moreira c. Club Olimpia, sentence du 29 juin 2015, JDI, n°1, 2017, p. 400.

⁸⁴ TAS, 2017/A/4935, FC Shakhtar Donetsk v. Olexandr Vladimirovich Zinchenko, FC UFA & FIFA, sentence du 26 octobre 2017, para. 70 ; TAS, 2016/A/4605, Al-Arabi Sports Club Co. For Football v. Matthew Spiranovic, sentence du 22 février 2017, para. 7.1 et s. ; TAS, 2015/A/4042, Gabriel Fernando Atz v. PFC Chernomorets Burgas, sentence du 23 décembre 2015, para. 94.

⁸⁵ TAS, 2013/A/3285, Johan Bruyneel c. USADA, sentence du 13 mai 2014, JDI, n°1, 2016, obs. E. Loquin.

⁸⁶ Trib. féd. suisse, arrêt du 28 janvier 2016, X. c. USADA & AMA, 4A_222/2015, Revue de l'Arbitrage, n°3, 2016, note S. Besson.

des conflits peuvent survenir. Et que ce soit concernant des normes impératives⁸⁷ ou des législations divergentes entre droit national et Lex sportiva⁸⁸, des solutions opposées co-existent, chacune dans leur ordre propre, interne et transnational⁸⁹.

IV. PRISE EN COMPTE DES DROITS SUPRANATIONAUX INTEGREES

Au sein de l'ordre interne sont venus se superposer puis s'insérer de nouveaux systèmes juridiques supranationaux. Après des interactions parfois houleuses, le TAS est désormais amené à considérer, entres autres, le droit de l'Union Européenne (A) et le droit de la Convention de sauvegarde des droits de l'homme et des libertés fondamentales (CESDH) (B).

A. Le droit de l'UE

Le droit de l'Union Européenne est directement applicable au sein des ordres juridiques internes et jouit d'un statut normalement supérieur aux autres normes⁹⁰. C'est sur demande de renvoi préjudiciel, devant n'importe quelle cour interne, qu'interviendra la Cour de Justice de l'Union Européenne (CJUE⁹¹).

Ses premières rencontres avec la Lex sportiva furent musclées. Avec l'arrêt Bosman, la CJCE a rappelé au TAS et à la FIFA que l'ordre juridique sportif

⁸⁷ V. Latty, F., Les règles applicables..., *Op. Cit.*, p. 89, à propos de affaire Krabbe : Landgerichtl. Munich. 17 mai 1995. K. Krabbe / DLV el IAAF. SPURI, 4/95, p. 162 & Oberlandesgerichtl. Munich, 28 mars 1996, K. Krabbe / DLV el IAAF, SpuRI, 4/96, p. 133.

⁸⁸ V. Latty, F., Les règles applicables..., *Op. Cit.*, p. 89, à propos de l'affaire Chouki : TA Strasbourg, 6 avril 2004. Fouad Chouki c. FFA. AIDA. 2004, p. 1265. concl. P. Devillers, CAA Nancy. 21 mars 2005, Fouad Chouki c. FFA. n° 04NCOOS03 ; C.A.S. 2004/A/633, I.A.A.F. / F.F.A. & F. Chouki, 2 mars 2005 (non publiée).

⁸⁹ V. aussi *infra* nbp 101 concernant l'affaire RFC Seraing.

⁹⁰ CJCE, Costa c. Enel, 15 juillet 1964, C-6/64 (Primauté du droit communautaire sur les législations nationales) ; CJCE, Simmenthal, 9 mars 1978, 106/77 (Juridictions nationales doivent assurer la primauté du droit communautaire sur les droits nationaux) ; CJCE, Van Gend en Loos v. Nederlandse Administratie der Belastingen, 26/ 62 (Effet direct des normes communautaires).

⁹¹ Avant 2007, Cour de Justice des Communautés Européennes (CJCE).

devait prendre en compte le droit de l'Union, en particulier le principe communautaire de libre circulation⁹². Puis c'est au tour du CIO d'être sanctionné pour ses règles anti-dopages ne respectant pas le droit de la concurrence⁹³. La CJUE se penchera aussi sur les liens entre *Lex sportiva* et accords de partenariat et de coopération de l'UE⁹⁴. À chaque fois, c'est le droit matériel qui est visé et non l'institution du TAS⁹⁵.

Depuis, les relations se sont apaisées. L'UE a reconnu la nature particulière du sport⁹⁶. Les mesures prises par les organisations sportives doivent être nécessaires et proportionnées par rapport à l'objectif légitime à atteindre⁹⁷. Une plus grande autonomie est donnée dans le domaine extra-économique.

Et le TAS s'est mis au droit de l'Union européenne. Ont été considérés les droits fondamentaux de l'Union⁹⁸, le principe de libre circulation⁹⁹, le principe de non-discrimination¹⁰⁰, le droit de la concurrence¹⁰¹ et même la valeur d'une

⁹² CJCE, 15 décembre 1995, Union royale belge des sociétés de football association ASBL e.a. v. Jean-Marc Bosman, aff. C-415/93, Rec. p. I-4921 ; Latty, F., *La lex sportiva...*, *Op. Cit.*, pp. 723-730 ; v. aussi CJCE, 8 mai 2003, Deutscher Handballbund eV et Maros Kolpak, aff. C-438/00.

⁹³ CJCE, arrêt du 18 juillet 2006, Meca-Medina et Majcen, alT. C-519/04 P, Rec., 2006, p. 1-6991 ; Latty, F., L'arrêt, le livre blanc et le traité : la *Lex sportiva* dans l'ordre juridique communautaire développements récents, *Revue du Marché commun et de l'Union européenne*, n°514, janvier 2008, pp. 43-52.

⁹⁴ CJCE, 12 avril 2005, Igor Simutenkov c. Ministerio de Educaciòn y Cultura, aff. C-265/03.

⁹⁵ Duval, A., *La Lex Sportiva* face au droit de l'Union européenne : guerre et paix dans l'espace juridique transnational, Thèse, Institut universitaire européen et Lyon 2, 2015, 529 pages.

⁹⁶ CJUE, Olympique Lyonnais SASP c. Olivier Bernard et Newcastle UFC, arrêt du 16 mars 2010, C-325/08, para. 40.

⁹⁷ CJCE, Bosman, précité, para. 104 & Latty, F., *L'Union européenne et la lex sportiva*, in M. Benlolo-Carabot, U. Candas, E. Cujo (dir.), *Union européenne et droit international*. En l'honneur de Patrick Daillier, Paris, Pedone, 2012, p. 845.

⁹⁸ TAS, 2016/A/4492, Galatasaray v. UEFA, sentence du 3 October 2016, para. 41

⁹⁹ TAS, 2009/A/1957, FFN v. LEN, sentence du 5 juillet 2010, para. 32-38 ; CAS 2014/A/3813, RFEF v. FIFA, 27 November 2015 (non publié) ; CAS 2014/A/3852, Ascoli Calcio 1898 S.p.A. v. Papa Waigo N'diaye & Al Wahda Sports and Cultural Club, 11 janvier 2016 (non publié).

¹⁰⁰ TAS, 2009/A/1788, UMMC Ekaterinburg v. FIBA Europe e. V., award of 29 October 2009, para. 8 ; CAS 2009/A/1788 UMMC Ekaterinburg v. FIBA Europe e. V., award of 29 October 2009, para. 22.

¹⁰¹ TAS, 2016/A/4492, Galatasaray v. UEFA, sentence du 3 October 2016, para. 41 ; TAS, 2009/A/1957, FFN v. LEN, sentence du 5 juillet 2010, para. 32-38.

directive non-transposée¹⁰². Certaines normes de l'UE ayant un caractère impératif, le TAS leurs applique alors l'article 19 de la LDIP¹⁰³. Et comme pour les lois de police internes, le droit impératif de l'Union est également utilisé pour interpréter des règles de la Lex sportiva¹⁰⁴.

Enfin, même si le problème de l'exequatur ou reconnaissance des jugements se pose rarement¹⁰⁵, le TAS n'hésite pas à motiver abondamment les sentences particulièrement exposées au droit de l'Union afin de parer à d'éventuels recours¹⁰⁶.

B. Les garanties de la CESDH

La CESDH est directement applicable au sein des ordres juridiques internes et jouit d'un statut normalement supérieur aux autres normes¹⁰⁷. A la différence de la CJUE, la Cour européenne des droits de l'Homme (CEDH) peut

¹⁰² TAS 2017/A/5051 Jarmo Ahjupera v. Ujpest 1885 Futball Kft., award of 29 September 2017, para. 75.

¹⁰³ TAS, 2016/A/4492, Galatasaray v. UEFA, sentence du 3 October 2016, para. 41 ; obs. Johanna Guillaumé, sur TAS 2016/A/4474 Michel Platini c. FIFA, sentence du 16 septembre 2016 & TAS, 2016/A/4490, RFC Seraing c. FIFA, sentence du 9 mars 2017, JDI, n°1, 2018 ; TAS, 2008/A/1485, FC Midtjylland A/S v. FIFA, sentence du 6 mars 2009, para. 27.

¹⁰⁴ TAS, 2016/A/4903, Club Atlético Vélez Sarsfield v. The Football Association Ltd., Manchester City FC & FIFA, sentence du 16 avril 2018, para. 64 ; CAS, 2011/A/2354, E. v. FIFA, sentence du 24 août 2011, para. 20 (rejeté en l'espèce).

¹⁰⁵ V. le cas Oberlandesgericht Bremen, 2 U 67/14, SV Wilhelmshaven c/Norddeutscher Fußball-Verband e.V., 30 décembre 2014, *in* Yearbook of international Sports Arbitration 2015, Springer, 2016, note A. Duval, pp. 183-196.

¹⁰⁶ Concernant le droit de la concurrence et l'abus de position dominante, v. TAS 2016/A/4490, RFC Seraing c. FIFA, sentence arbitrale du 9 mars 2017, paras. 90-144 ; recours en annulation rejeté, v. Trib. féd. suisse, 20 février 2018, ATF 144 III 120, RFC Seraing c/ FIFA, Revue de l'Arbitrage, 2018, p. 653 et s., obs. M. Maisonneuve ; contestation de l'exception d'arbitrage acceptée, v. CA Bruxelles, 29 août 2018, arrêt n° 2016/Ar/2048, Sté Doyen Sports Investments Ltd, RFC Seraing & al. c/ Union royale belge des sociétés de football association, FIFA & al., Revue de l'Arbitrage, 2018, p. 654, note S. Besson.

¹⁰⁷ Article 1 du protocole n° 15 portant amendement à la CESDH & CEDH, 7 décembre 1976, Handyside c/ Royaume-Uni, n°5493/72 (Principe de subsidiarité) ; CEDH, 29 oct. 1992, Open Door c. Irlande n°14234/88 et n°14235/88 (Principe de primauté de la Convention sur le droit national, même constitutionnel) ; CEDH, Van Oosterwijck c. Belgique, 6 nov. 1980, n°7654/76, (effet direct) ; le miroir des introduction est volontaire et les questions concernant l'adhésion de l'UE à la CEDH (article 6 § 2 Traité sur l'Union Européenne) ne semblent pas prêtes d'être résolues (CJUE, Avis 2/13, 18 décembre 2014).

être saisie par un ressortissant d'un Etat membre après épuisement des voies de recours internes et, depuis l'entrée en vigueur du protocole 16 de la CESDH, par une haute juridiction sur renvoi préjudiciel. Mais à la différence du droit de l'UE, la CESDH ne peut être invoquée horizontalement, c'est-à-dire dans des relations entre personnes privées¹⁰⁸.

Même si le tribunal fédéral suisse n'a pas considéré que l'arbitre avait à prendre en compte la CESDH dans ses décisions¹⁰⁹, le TAS considère qu'elle est « indirectly applicable even before an arbitral tribunal – all the more so in disciplinary matters – because the Swiss Confederation, as a contracting party to the ECHR, must ensure that its judges, when checking arbitral awards (at the enforcement stage or on the occasion of an appeal to set aside the award), verify that parties to an arbitration are guaranteed a fair proceeding within a reasonable time by an independent and impartial arbitral tribunal »¹¹⁰. Pour autant, dans une affaire de 2013, l'application de la CESDH a été clairement rejetée par le tribunal en rappelant que la convention n'était invocable que directement contre l'Etat¹¹¹.

Outre cette exception, le TAS a pris en compte la CESDH dans ces décisions mais n'a jamais déclaré un règlement incompatible en constatant, soit que convention n'a pas vocation à s'appliquer¹¹², soit qu'il n'y avait pas violation¹¹³. Mais des contestations de décisions disciplinaires ont été

¹⁰⁸ Mais la CESDH peut être invoquée à l'encontre de l'Etat qui n'a pas pris les mesures dans le cadre de relations privées, v. CEDH, 26 mars 1985, *X. et Y. c. Pays-bas*, n°8978/80.

¹⁰⁹ Pris sous l'angle de la contrariété à l'ordre public suisse (art. 190 al. 2 LDIP) intégrant la CESDH, v. Trib. féd. suisse, arrêt du 15 juillet 2015, 4A_246/2014, consid. 7.2.2 ; Trib. féd. suisse, arrêt du 4 octobre 2017, 4A_384/2017, consid. 4.2.1.

¹¹⁰ TAS, 2015/A/4304, Tatyana Andrianova v. ARAF, sentence du 14 avril 2016, para. 46 ; TAS, 2011/A/2433, Amadou Diakite c. FIFA, sentence du 8 mars 2012, para. 24 ; TAS, 2013/A/3139, Fenerbahçe SK v. UEFA, sentence du 5 décembre 2013, para. 93.

¹¹¹ TAS 2012/A/2862 FC Girondins de Bordeaux c. Fédération Internationale de Football Association (FIFA), sentence du 11 janvier 2013, paras. 106-108 (invoquée par la FIFA).

¹¹² TAS 2016/A/4490 RFC Seraing c. Fédération Internationale de Football Association (FIFA), sentence du 9 mars 2017, paras. 145-151 ; CAS, 2013/A/3139, Fenerbahçe SK v. UEFA, sentence du 5 décembre 2013, para. 99 ; CAS, 2011/A/2433, Amadou Diakite c. FIFA, sentence du 8 mars 2012, para. 27.

¹¹³ TAS, 2016/A/4474, Michel Platini c. Fédération Internationale de Football Association, 16 septembre 2016, paras. 340 et 364.

acceptées¹¹⁴.

Du côté de la CEDH, plusieurs recours ont été formés. Tout d'abord, contre le droit français anti-dopage. Suite à une réforme, le droit français a harmonisé les dispositions du code du sport avec les dispositions de la dernière version du code mondial antidopage. Relevant les éléments propres au sport (fair play, égalité des chances et loyauté des compétitions sportives), la CEDH a considéré que les dispositions légales sont proportionnées au but recherché et relèvent d'un besoin impérieux au regard de l'article 8¹¹⁵. Aucune violation n'a donc été caractérisée.

Ensuite contre le rejet d'une décision d'annulation. La Cour a jugé que le pouvoir d'examen restreint dont dispose le Tribunal fédéral au stade du recours en annulation contre les sentences du TAS ne méconnaît pas l'article 6 § 1 de la Convention¹¹⁶.

Mais la plus importante des décisions porte sur l'essence même du TAS¹¹⁷. Une partie de la doctrine avait mis en avant ses faiblesses¹¹⁸. Au moment de sa création, l'indépendance et l'impartialité de l'institution avaient fait l'objet de critiques de la part des juridictions suisses, le TAS étant lié au Comité Internationale Olympique (CIO) et financé par lui¹¹⁹. Puis, suite à sa déconnexion d'avec le CIO en 1993¹²⁰, elles se sont tues¹²¹. Un autre problème vint des clauses d'arbitrage TAS contenues dans les règlements sportifs. Elles

¹¹⁴ TAS, 2015/A/4304, Tatyana Andrianova v. ARAF, sentence du 14 avril 2016, paras. 43-50.

¹¹⁵ CEDH, 19 janvier 2018, FNASS et autres c. France, n°48151/11 et 77769/13, JDI, obs. P. von Mühlendahl, n°4, 2019.

¹¹⁶ CEDH, 26 septembre 2019, Erwin Bakker c. Suisse, 7198/07.

¹¹⁷ CEDH, 2 octobre 2018, Mutu et Pechstein c. Suisse, n° 40575/10 et 67474/10, JDI, n° 4, 2019, obs. E. Decaux.

¹¹⁸ Maisonneuve, M., L'arbitrage TAS est-il menacé ?, in F. Latty, J.-M. Marmayou, J.-B. Racine (dir.), Sport et droit international, Aix-en-Provence, PUAM, 2016, pp. 305-325 ; Rigozzi, A., L'importance du droit suisse..., *Op. Cit.*, pp. 301-317 ; Zen-Ruffinen, P., La nécessaire réforme du Tribunal arbitral du sport, in Mélanges D. Oswald, Bâle, Helbing & Lichtenhahn/Faculté de droit de l'Université de Neuchâtel, 2012, p. 503.

¹¹⁹ Trib. féd. suisse, arrêt du 15 mars 1993, E. Gundel c. FEI & TAS, ATF 119 II 271, Bull. ASA 1993, p. 398.

¹²⁰ Latty, F., La lex sportiva..., *Op. Cit.*, pp. 253-267 ; pour l'institution originelle, v. M'Baye, K., Une nouvelle institution d'arbitrage, le Tribunal arbitral du Sport, in AFDI, vol. 30, 1984, pp. 409-424.

¹²¹ Trib. féd. suisse, arrêt du 27 mai 2003, L. Lazutina et D. Danilova c. CIO, FIS & TAS, ATF 129 III 445, JDI, 2003, p. 1096, note A. Plantey ; ce qui n'a pas effacé les critiques d'une partie de la doctrine, v. Rigozzi, A., L'arbitrage international..., *Op. Cit.*, p. 287 et s.

sont imposées, plus qu'acceptés, aux personnes, physiques ou morales, souhaitant prendre part aux compétitions sportives¹²², constituant ainsi un arbitrage « forcé ». Mais les juridictions suisses ont toujours considéré avec « bienveillance »¹²³ ces clauses qui ont pour but, en soustrayant l'application du droit sportif au juge national, de préserver l'uniformité des solutions et l'égalité de traitement des sportifs à travers le monde.

Deux procédures vont alors se rencontrer devant la CEDH : celle de Claudia Pechstein, suspendue 2 ans par l'Union internationale de patinage pour dopage, et celle d'Adrian Mutu, condamné à payer 17,1 millions d'euros à son ancien club suite à un contrôle positif à la cocaïne. Dans le premier cas, la clause d'arbitrage était insérée dans le règlement de la fédération, dans le second, sa source était contractuelle. Les sentences n'ont pas été publiées mais les parties ont cherché à les annuler, sans succès¹²⁴. Mme Pechstein cherchera même à être indemnisée, en contestant au passage l'indépendance et l'impartialité du TAS, devant les juridictions de son pays. Sa demande fut accueillie par les juridictions du fond¹²⁵, avant d'être rejetée par le Bundesgerichtshof¹²⁶.

Saisie, la CEDH décide de joindre les affaires. Et c'est l'institution sportive qui sera confortée. Rappelant que les garanties de l'article 6§1 de la CESDH doivent être respectées, en particulier dans le cadre des arbitrages forcés, la

¹²² Trib. féd. suisse, 22 mars 2007, G. Cañas c. ATP Tour, BGE 133 III 235, sections 243-244, *Revue de l'Arbitrage*, 2008, p. 570, note M. Maisonneuve ; Latty, F., *La lex sportiva...*, *Op. Cit.*, pp. 535-537 ; Rigozzi, A., *L'arbitrage international...*, *Op. Cit.*, p. 179.

¹²³ Trib. féd. suisse, X. c. Y. & FIFA, arrêt du 20 janvier 2010, 4A_548/2009, consid. 4.1, *Revue de l'Arbitrage*, 2010, p. 609, note M. Peltier ; Trib. féd. suisse X. Malisse et Y. Wickmayer c. AMA et Fédération flamande de tennis, arrêt du 13 février 2012, 4A_428/2011, consid. 3.2.3, *Revue de l'Arbitrage*, 2012, p. 653, note S. Besson.

¹²⁴ Trib. féd. suisse, Mutu c. Chelsea FC Ltd., arrêt du 10 juin 2010, 4A_458/2009 ; Trib. féd. suisse, Pechstein c. ISU, arrêt du 10 février 2010, 4A_612/2009.

¹²⁵ Oberlandesgericht München, 15 janvier 2015, KZr 6/15, ISU c/ Pechstein, *Revue de l'Arbitrage*, 2015, p. 909, note M. Maisonneuve ; et, dans le même sens, la première instance, v. Landesgericht de Munich, 26 février 2014, Claudia Pechstein c. ISU, *Rev. arb.*, 2014, p. 670, obs. M. Maisonneuve.

¹²⁶ Bundesgerichtshof, 7 juin 2016, Pechstein c/ ISU, Az. KZr 6/15, *Revue de l'Arbitrage*, 2016, p. 908, note M. Maisonneuve.

Cour considère que le TAS est impartial et indépendant¹²⁷. Cependant elle condamne partiellement la Suisse car les audiences de Mme Pechstein auraient dû être publiques. Des améliorations seront donc à apporter. La doctrine a d'ailleurs proposé de nombreux ajustements¹²⁸.

La CEDH a confirmé sa décision en ne la renvoyant pas devant la Grande Chambre, malgré deux opinions dissidentes véhémentes. La solution fut reprise dans un arrêt récent. Réaffirmant qu'il n'y avait pas de doute sur l'indépendance et l'impartialité du TAS, la Cour considère que l'institution de Lausanne, en répondant de manière exhaustive et détaillée aux griefs du demandeur dans sa sentence¹²⁹, ce qui avait été constaté par le tribunal fédéral suisse¹³⁰, a pris en compte les garanties de la CESDH¹³¹. Le cadre semble donc être posé pour l'institution.

Comme le résume bien Franck Latty :

« à ce stade les limites européennes à la *lex sportiva* résultent principalement des libertés économiques des sportifs tirées du droit de l'UE et de leurs droits fondamentaux découlant de la Convention européenne des droits de l'homme. »¹³².

V. ET LE DROIT INTERNATIONAL PUBLIC ?

Le droit international public n'est pas la source la plus fréquemment utilisée par le monde sportif¹³³, étant en dehors de l'ordre juridique

¹²⁷ Pour une analyse, v. obs. E. Decaux, sur CEDH, 2 octobre 2018, Mutu et Pechstein c. Suisse, nos 40575/10 et 067474/10, JDI, n° 4, 2019 ; Latty, F., Le TAS marque des points devant la CEDH, *Jurisport*, n° 192, décembre 2018, pp. 31-36 ; Guillaumé, J., *Chronique des sentences arbitrales*, JDI, n°1, 2019.

¹²⁸ Maisonneuve, M., L'arbitrage TAS est-il menacé... *Op. Cit.*, pp. 319-322 ; Latty, F., Le TAS marque des points... *Op. Cit.*, p. 35.

¹²⁹ TAS, 2016/A/4474, Michel Platini c. Fédération Internationale de Football Association, 16 septembre 2016.

¹³⁰ Trib. féd. suisse, Platini c. FIFA, arrêt du 29 juin 2017, 4A_600/2016.

¹³¹ CEDH, Platini c. Suisse, 5 mars 2020, n°526/18.

¹³² Latty, F., *Lex sportiva* et autonomie du sport..., *Op. Cit.*, p. 42.

¹³³ V. cependant l'étude approfondie des relations : F. Latty, J.-M. Marmayou, J.-B. Racine (dir.), *Sport et droit international*, Aix-en-Provence, PUAM, 2016, 344 pages.

international¹³⁴. Même si les rapports entre la « puissance sportive » et les athlètes ont souvent été assimilés à ceux entre la puissance publique et les individus¹³⁵, les prérogatives des organisations sportives ne sont pas celles d'un Etat. Et même si la CEDH a utilisé mutatis mutandis l'arrêt Nada, applicable au Conseil de sécurité des Nations Unies, le monde sportif n'est pas une organisation internationale.

La majeure partie de la Lex sportiva est d'origine privée, tout comme ses institutions. Le TAS est une émanation du Conseil International de l'Arbitrage en matière de Sport, fondation de droit suisse. Il y a bien la Convention internationale contre le dopage dans le sport, entrée en vigueur le 1er février 2007 et la résolution du Conseil de sécurité 757 (1992) imposant aux États membres un embargo sportif à l'égard de l'ex-Yougoslavie et de ses athlètes. Le TAS fait parfois référence à la convention de Vienne sur le droit des traités pour interpréter des textes¹³⁶. Certains concepts du droit international public sont repris et appliqués au contexte sportif, comme la responsabilité de l'institution pour les actes commis par ses organes¹³⁷. D'autres sont repris et déracinés, comme les notions d'Etat¹³⁸ ou de national¹³⁹. Il a même été fait mention du respect des exigences du droit international et des droits de l'Homme¹⁴⁰. Mais le droit international peut aussi faire référence simplement au droit international privé¹⁴¹. L'impact est donc relatif, mais il n'est pas inexistant.

¹³⁴ Latty, F., *La lex sportiva...*, *Op. Cit.*, pp.662-651.

¹³⁵ Simon, G., *Puissance sportive et ordre juridique étatique*, Paris, LGDJ, 1990, 430 pages.

¹³⁶ TAS, 2009/A/1948, Robert Berger v. WADA, sentence du 23 mars 2010, para. 17.

¹³⁷ TAS 2014/A/3842 WADA c. CBF & Erivonaldo Florêncio De Oliveira Filho, sentence du 9 juillet 2015, para. 48 ; TAS 2017/A/5139 WADA c. CBF & Olivio Aparecido da Costa, sentence du 7 décembre 2017, para. 97 ; TAS, 2017/A/5022, FIFA c. CBF & Cristiano Lopes, sentence du 28 septembre 2017, para. 80.

¹³⁸ TAS, 2016/A/4602, Football Association of Serbia c. UEFA, sentence du 24 January 2017, paras. 123-126.

¹³⁹ TAS ad hoc Division (O.G. Sydney) 00/008 Arturo Miranda c. IOC, sentence du 24 septembre 2000, para. 11-34.

¹⁴⁰ TAS, 2010/A/2307 WADA c. Jobson Leandro Pereira de Oliveira, CBF & STJD, sentence du 14 septembre 2011, para. 106.

¹⁴¹ TAS, 2014/A/3757, AFC Astra c. Kevin Hatchi, sentence du 4 mai 2015, para. 45.

VI. CONCLUSION

Le titre de cette contribution posait une question, dont la réponse s'est trouvée éclairée par ces développements : la Lex sportiva est autonome mais pas indépendante. Le droit comparé a été un des moteurs de sa création et de son autonomisation. Il conserve une place importante au sein du droit sportif. Mais l'indépendance de ce dernier ne pourra passer que par un abandon - au moins temporaire - du droit comparé pour affirmer la déconnexion de l'ordre sportif des autres ordres juridiques. En effet, pour arriver à la *societas humanis sportivas*¹⁴², la Lex sportiva devra dépasser le droit comparé pour affirmer sa complétude et s'affranchir des autres droits. Or son caractère transnational n'est pas exorbitant. Les mécanismes mis en avant rappellent tant l'autonomie qu'a acquise le droit sportif grâce au droit comparé que l'importance d'autres droits en son sein. Et si le titre de cette contribution était finalement :

Lex sportiva : ex jus comparatum ad vitam aeternam ?

¹⁴² Terme pris à Giorgio Del Vecchio qui parle de l'achèvement d'une *societas humanis generis* par le droit comparé (Del Vecchio, G., Les bases du droit comparé et les principes généraux du droit, *in* Revue internationale de droit comparé. Vol. 12, n°3, 1960. p. 499.

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

S.I. Strong¹

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

¹ Associate Professor, University of Sydney Law School; stacie.strong[at]sydney.edu.au.

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)

TABLE OF CONTENTS

I.	INTRODUCTION.....	95
II.	COMPARING LEGAL METHODOLOGY IN INTERNATIONAL COMMERCIAL ARBITRATION: BEST VERSUS ACTUAL PRACTICES	99
A.	International Treaties and Conventions.....	100
1.	Relevance, Purpose and Use of Authorities	100
2.	Locating Authorities	104
B.	National Arbitration Laws	105
1.	Relevance, Purpose and Use of Authorities	105
2.	Locating Authorities	108
C.	Judicial Decisions	109
1.	Relevance, Purpose and Use of Authorities	109
2.	Locating Authorities	113
D.	Arbitral Rules and Other Forms of Soft Law.....	114
1.	Relevance, Purpose and Use of Authorities	114
2.	Locating Authorities	117
E.	Arbitral Awards and Institutional Decisions	117
1.	Relevance, Purpose and Use of Authorities	117
2.	Locating Authorities	122
F.	Scholarly Commentary.....	123
1.	Relevance, Purpose and Use of Authorities	123
2.	Locating Authorities	125

III.	CONCLUSION	126
IV.	APPENDIX	128

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

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

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 (α) 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 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

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 mercatoria* 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. 'Legal 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

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

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.

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.

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

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 procedure⁴⁷ 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

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

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.

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 reporters⁶³ 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

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 Arbitration⁷⁴ 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

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 autonomy⁸⁷ 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

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.

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 accessible⁹⁵ 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

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,

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.

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

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

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. APPENDIX¹¹³

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	10.76***
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***

APPLIED COMPARATIVE LAW — FIVE STEPS TO SUCCESS

Johannes Landbrecht¹

Résumé

Le débat en matière de droit comparé se focalise traditionnellement sur l'approche méthodologique utilisée, les buts visés, son utilité pratique ainsi que sur l'approche à adopter pour son enseignement. Néanmoins, un aspect semble souvent être oublié dans le débat ainsi que dans l'enseignement du droit comparé. C'est la question de savoir comment préparer les juristes à un dialogue effectif et efficace à travers les ordres juridiques. Ni les scientifiques ni les praticiens ne disposent eux-mêmes des moyens de faire systématiquement l'intégralité des recherches comparatives souvent requises. Être capable de communiquer à travers les ordres juridiques devient alors indispensable lorsque l'on applique le droit comparé en pratique, par exemple dans le contexte d'une procédure arbitrale. Dans cette perspective, cet article présente une approche en cinq pas – testés en pratique – afin de rendre la communication entre juristes d'ordres juridiques différents effective et efficace. En outre, l'article cherche à guider les futurs scientifiques et praticiens dans leur quête afin de mieux se préparer pour une application du droit comparé en pratique.

Mots clés : arbitrage, communication, contentieux transnational, dialogue comparatif, droit comparé, langage juridique, pratique juridique.

Abstract

A long-standing debate deals with comparative law methodology, the goals of comparative law, its practical usefulness, and how to teach it. Yet one aspect seems to be missing, both from the debate and the curriculum of comparative law, namely how to prepare lawyers for effective and efficient legal communication across legal orders. Neither scholars nor practitioners have the capacity to do all the comparative research that is often required themselves. Skilful legal communication across legal orders is therefore a prerequisite for applying comparative law successfully, for instance in the context of arbitration proceedings.

¹ Dr. iur., LL.B.; Rechtsanwalt & Barrister, GABRIEL Arbitration, Zurich, j.landbrecht[at]gabriel-arbitration.ch; lecturer at the University of Zurich and the Westfälische Wilhelms-Universität Münster; post-doctoral researcher at the University of Fribourg, Switzerland. The author wishes to thank *Mrinali Komandur*, Khaitan & Co., for her valuable input. (Submitted 20 October 2020.)

This article lays out a five step roadmap—tested in practice—for effective and efficient legal communication between lawyers from different legal backgrounds. Furthermore, it seeks to give guidance for prospective scholars and practitioners on how best to prepare for applied comparative law.

Keywords: arbitration, communication, comparative law, comparative dialogue, cross-border litigation, legal language, legal practice.

TABLE OF CONTENTS

I.	EFFECTIVE AND EFFICIENT LEGAL COMMUNICATION BETWEEN LAWYERS FROM DIFFERENT LEGAL BACKGROUNDS	133
II.	COMPARATIVE LAW’S PLURALITY OF GOALS AND PERSPECTIVES	136
A.	The Traditional Goals and Perspectives	136
B.	The Needs of Legal Practice.....	138
C.	Applied Comparative Law in Arbitration	141
III.	POTENTIAL PITFALLS HAMPERING LEGAL COMMUNICATION	142
A.	(Legal) Convictions (<i>Vorverständnis</i>)	143
B.	The Unconsciousness of Convictions in Particular	144
C.	Example: Contract Interpretation	146
D.	Reflections.....	151
IV.	LEGAL COMMUNICATION IN FIVE STEPS.....	152
A.	Step 1: Full Legal Analysis by the Lawyer Requesting Advice—Avoiding Heuristics and Biases	153
B.	Step 2: Detailed Factual Description (Case Scenario)	155
C.	Step 3: Legal Analysis Under Foreign Law—with Sensitivity Analysis ..	156
D.	Step 4: Evaluation of the Foreign Law Input and Providing Feedback .	157
E.	Step 5: Translating the Input into the Requesting Lawyer’s Language	157
V.	PREPARING FOR APPLIED COMPARATIVE LAW—A TWO-STEP PROCESS	158
VI.	CONCLUSION	162

I. EFFECTIVE AND EFFICIENT LEGAL COMMUNICATION BETWEEN LAWYERS FROM DIFFERENT LEGAL BACKGROUNDS

Legal research and scholarship centre on understanding law—foreign and domestic. Legal practice, on the other hand, focuses on applying law to facts. If a comparative (foreign) law element is involved in the latter context, the need for ‘applied comparative law’ arises, i.e. for the application of a comparative (foreign) law analysis to the facts of the case.

The English term ‘comparative law’ and its French equivalent *droit comparé* are somewhat unfortunate. Despite being ambiguous, these terms are generally not meant to refer to a specific legal order (like English law) or field of law (like family law),² although this view is not undisputed.³ The German term *Rechtsvergleichung*, meaning literally the comparison of or the act of comparing law(s), brings out more clearly the aspect of comparative law as a methodological approach to (studying) law—a distinct type of legal analysis and reasoning.

In line with this focus on a distinct approach, ‘comparative law’ is used in a broad sense throughout this article, encompassing any type of legal analysis, and for whatever purpose, that is not limited to one legal order.⁴ More specifically, the article’s focus is on the communication aspect of comparative law that arises whenever lawyers from different legal backgrounds interact—rather than on any ontological understanding of what comparative law ‘is’.⁵

² Maybe this is what André Tunc had in mind when he famously observed that ‘comparative law does not exist’; see the quote in Banakas, *The Method of Comparative Law and the Question of Legal Culture Today*, Tilburg Law Review 113, 113 (1994).

³ Cf. Pfersmann, *Le droit comparé comme interprétation et comme théorie du droit*, 53(2) *Revue internationale de droit comparé*, 275, 277 (2001), who discusses, and rejects, the notion that comparative law would be a legal order of its own.

⁴ See already Vallindas, *A Plea for an International Legal Science*, 8(4) *The International and Comparative Law Quarterly* 613, 614 (1959): ‘Comparative law as a branch of legal science ought necessarily to have an international character, as it does deal with more than one national legal system.’

⁵ This avoids a discussion of what comparative law ‘is’ as much as it avoids a detailed analysis of what it is that scholars and practitioners actually do under this heading.

‘Legal practice’ is also understood broadly. Legal scholars and professors, when preparing research projects or exams, also apply comparative legal research to factual scenarios. These scenarios may be hypothetical, but the methodological way to deal with them can be identical to handling ‘real’ cases (on which they are often based)—and is therefore legal practice of sorts. Quite appropriately, some understand comparative law as ‘disciplined practice’.⁶

In today’s globalised world, most lawyers—academics as much as practitioners⁷—come into contact with foreign legal orders. They will then have to apply comparative law in the broad sense used herein. Few modern-day lawyers can thus avoid applied comparative law.⁸

Many comparatists consider the practical use of comparative law to be relevant⁹ and prepare their students accordingly.¹⁰ It has been rightly pointed out that, in the study and teaching of comparative law, the tasks of educating prospective lawyers (practitioners) and conducting comparative research should be clearly distinguished.¹¹ Others do neither—although that may be due to a narrow understanding of ‘comparative work’¹² or a concern about

⁶ Adams/Bomhoff, *Comparing law: practice and theory* in *Practice and Theory in Comparative Law*, 1, 4 (Adams/Bomhoff (eds.), Cambridge University Press: Cambridge, 2012) (emphasis added).

⁷ Squelch/Bentley, *Preparing law graduates for a globalised world*, 51(1) *The Law Teacher* 2, 4-5 (2017) (from an Australian perspective).

⁸ Similar terminology (*angewandte Rechtsvergleichung*) use v. Bar/Mankowski, *Internationales Privatrecht*, Vol. 1, § 2 no. 95 (2nd ed., Beck Verlag: München, 2003). However, they only refer to comparative law activity by courts, on which see also *infra* note 28.

⁹ See e.g. Markesinis, *Comparative Law—A Subject in Search of an Audience*, 53 *The Modern Law Review* 1 (1990).

¹⁰ E.g. Kischel, *Rechtsvergleichung*, § 2.B.I.3 (C.H. Beck: München, 2015) highlights challenges for *practising* lawyers in a cross-cultural environment.

¹¹ Husa, *Comparative law in legal education—building a legal mind for a transnational world*, *The Law Teacher* (2017) (DOI: 10.1080/03069400.2017.1340532).

¹² See e.g. Legrand, *Comparative Law* in *Encyclopedia of Law and Society*, 220, 222 (Sage: Los Angeles, 2007): ‘The vocation of comparative work about law is intrinsically scholastic and its agenda is, therefore, incongruent with that of practitioners or lawmakers seeking to elicit epigrammatic answers from foreign laws.’ That is of course a legitimate way to see things and a way to define ‘comparative work’ although—intentionally—not one that is oriented toward legal practice.

promising too much¹³ rather than a general disdain for legal practice. Many, if not most, comparatists aim at being practical in at least some respects.¹⁴

Yet it is respectfully submitted that the traditional approaches to researching and teaching comparative law focus too much on the acquisition of knowledge and the skills to be developed by individual lawyers. They thereby fail to prepare for exchanges between lawyers in a comparative law setting, i.e. for legal communication between lawyers from different legal backgrounds.

However, given the capacity constraints of individual researchers, scholars and practitioners alike, it is precisely the effective and efficient legal communication between lawyers from different legal backgrounds that is often a prerequisite for being able to apply comparative law successfully—in academia as well as in legal practice.

Preparing for legal communication should therefore be added to the traditional goals of comparative law (II). While important pitfalls exist that potentially hamper such legal communication (III), they can be avoided by structuring it in five steps (IV). Lawyers should specifically prepare for such legal communication (V).

¹³ See e.g. Sacco, *Legal Formants: A Dynamic Approach to Comparative Law*, 39 American Journal of Comparative Law 1, 2 (1991): ‘the effort to justify comparative law by its practical uses sometimes verges on the ridiculous’. The quote is from a section in which Sacco defends comparative law against perceived pressures to justify its usefulness in practice, although, for Sacco, the ‘primary and essential aim of comparative law *as a science* ... is better knowledge of legal rules and institutions’ (*ibid.*, 5) (emphasis added).

¹⁴ Incidentally, one of the world’s leading comparative law institutes, the Max Planck Institute for Comparative and International Private Law in Hamburg, was originally founded (as *Kaiser-Wilhelm-Institut für ausländisches und internationales Privatrecht*) partly with a view to providing legal advice to the German business community. The institute’s founding director, Ernst Rabel, was not only one of the most eminent scholars of comparative law of the 20th century, but also incessantly curious about practical matters; see Kunze, Ernst Rabel und das Kaiser-Wilhelm-Institut für ausländisches und internationales Privatrecht 1926-1945, 53-54 (Wallstein Verlag: Göttingen, 2004).

II. COMPARATIVE LAW'S PLURALITY OF GOALS AND PERSPECTIVES

In recent years, a lively debate¹⁵ has emerged regarding the appropriate methodology of comparative law analysis.¹⁶ There appears to be less of a debate about comparative law's goals and perspectives,¹⁷ to which we must briefly turn. Comparative law is traditionally centred on comparative research (A), while many seem to overlook the need to prepare for practical aspects precisely of legal communication between lawyers from different legal backgrounds (B). This need is particularly felt in the context of international arbitration (C).

A. The Traditional Goals and Perspectives

It has been stated that '[n]o single universally-accepted, unequivocal, homogeneous set of goals of comparative legal research'¹⁸ has yet been identified, although 'standard lists of the discipline's practical uses and educational benefits'¹⁹ have been drawn up. This appears to be a fair summary. The following lists can indeed be considered 'standard' only in the sense of having been established by comparative law scholars that were probably most influential in the study and teaching of comparative law in the second half of the 20th century.²⁰ They continue to be influential in particular with regard to comparative law training.

¹⁵ See Akkermans, *The Functional Method in Comparative and European Property Law*, 2(1) *European Property Law Journal* 1, 2 (2013).

¹⁶ For overviews see Siems, *Comparative Law*, Part I and Part II (Cambridge University Press: Cambridge, 2014); Oderkerk, *The Need for a Methodological Framework for Comparative Legal Research*, 79 *RabelsZ* 589 (2015); Kischel, *Rechtsvergleichung*, § 3 (C.H. Beck: München, 2015).

¹⁷ But see e.g. Michaels, *The Functional Method of Comparative Law* in *The Oxford Handbook of Comparative Law*, Section III ('Functions of Function') (Reimann/Zimmermann (eds.), 2nd edn., Oxford University Press: Oxford, 2019); Werro, *Notes on the Purpose and Aims of Comparative Law*, 75 *Tul L Rev* 1225 (2001).

¹⁸ Oderkerk, *The Need for a Methodological Framework for Comparative Legal Research*, 79 *RabelsZ* 589, 599 (2015) (emphasis added).

¹⁹ Reimann, *The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century*, 50 *American Journal of Comparative Law* 671, 697 (2002).

²⁰ Siems, *Comparative Law*, 77 (Cambridge University Press: Cambridge, 2014).

The French scholars René David and Camille Jauffret-Spinosi summarise the relevance of comparative legal analysis under three headings.²¹ First, comparative legal analysis benefits legal scholarship in the context of historical and philosophical studies as well as in the context of a study of general legal theory (*théorie générale du droit*). Second, comparative legal analysis helps better understand and improve a particular domestic law. Third, comparative legal analysis furthers the understanding of foreign peoples and thereby potentially improves international relations.

Konrad Zweigert and Hein Kötz also identify a long list of functions and goals of comparative legal research:²² ‘discovery of models for preventing or resolving social conflict’; comparative law as an *école de vérité*, enriching the ‘supply of solutions’ (Zitelmann); offering the opportunity for finding the ‘better solution’ for the time and place of the comparing lawyer; dissolving national prejudices; helping to ‘fathom the different societies and cultures of the world’; increasing international understanding; supporting law reform in developing countries; contributing to the development of one’s own system through creating a ‘critical attitude’; aiding the (domestic) legislator; as a tool of construction, as a component of the curriculum at universities and law schools; contribution to the unification of law.²³

To bring order into this plethora of goals and perspectives, some distinguish ‘normative’ and ‘non-normative’ goals.²⁴ While normative research has ‘evaluative’ or ‘regulatory’ aims, non-normative research focuses on

²¹ David/Jauffret-Spinosi/Goré, *Les grands systèmes de droit contemporains*, nos. 3-6 (12th edn., Dalloz: Paris, 2016) (the leading French textbook on comparative law).

²² Zweigert/Kötz, *Einführung in die Rechtsvergleichung*, § 2 (3rd edn., J.C.B. Mohr: Tübingen, 1996); the classic 20th century textbook on comparative law in Germany, translated into English by Tony Weir: Zweigert/Kötz, *Introduction to Comparative Law* (3rd edn., Oxford University Press: Oxford, 1998).

²³ The goals identified by Uwe Kischel in the most recent comprehensive textbook on comparative law in German language (Kischel, *Rechtsvergleichung*, § 2 (C.H. Beck: München, 2015)) are very similar to the list drawn up by Zweigert and Kötz.

²⁴ Oderkerk, *The Need for a Methodological Framework for Comparative Legal Research*, 79(3) *RabelsZ* 589, 600 *et seq.* (2015).

‘describing’ and ‘exploring’. Another way to classify goals of comparative law involves distinguishing between ‘knowledge and understanding’, ‘practical use at [the] national level’ and ‘practical use at [the] international level’.²⁵

B. The Needs of Legal Practice

Comparatists thus follow many goals, all of which have their place. Yet for applying comparative law successfully in practice, it is precisely the effective and efficient exchange of legal analyses between lawyers from different legal backgrounds that is decisive—as no individual comparatist will be able to learn and research all that might be required under several different legal orders.

Academics and practitioners alike face the challenge of legal communication between lawyers from different legal backgrounds. However, some potential pitfalls are especially troublesome for practitioners—for they need a fully accurate analysis, and they need it fast.

First, legal practitioners—be they advocates in judicial proceedings, legal advisers, judges, or arbitrators applying an unfamiliar law—require fully accurate information. Otherwise they risk professional liability.

The financial risks are inherently lower if the purpose of comparative law is solely one of research or inspiration, for instance in the case of legislators, contract drafters, or academic scholars. All of them aim at obtaining a correct understanding of the foreign law. Yet what matters most to them is that their understanding is helpful to their own particular exercise that motivated them to conduct a comparative law analysis in the first place (of drafting a statute, a contract, a harmonisation project etc).

For instance, whatever the risks of legal transplants in theory,²⁶ legislators take responsibility for such transplant within their own system—no

²⁵ Siems, *Comparative Law*, 3 (Cambridge University Press: Cambridge, 2014). For further possibilities to classify the goals of comparative law see the references *ibid.*, 2, fn. 2.

²⁶ Siems, *Comparative Law*, 191 *et seq.* (Cambridge University Press: Cambridge, 2014).

matter how it functioned in its environment of origin. Even if misunderstood (and although this is unsatisfactory from an intellectual and potentially a scientific point of view), a foreign solution can inspire a useful solution at home. After all, if the purpose is to seek inspiration, such inspiration could come from texts that are no longer in force (historical comparison²⁷) or never reflected the state of the law (such as books of authority advocating reform).

The situation is similar for a court seeking foreign law inspiration when dealing with a situation still unresolved in its own law. The court will have to fit the foreign-inspired solution into its own legal order. Whether it is permitted to do so is a question of legal theory.²⁸ Yet it matters little whether the result fully corresponds to the law as in force abroad.

Second, practitioners often operate under stringent budgetary and time constraints. Their clients rarely afford them the opportunity to study a foreign law at the level of sophistication needed for properly serving those clients all by themselves. Rather, they must generally seek advice from foreign lawyers.

In other words, it is more important for practitioners to be able to communicate across legal orders than to be able to conduct comparative legal research themselves. It is therefore respectfully submitted that the current approach to the teaching of comparative law, i.e. focusing on the individual comparatist gaining knowledge and methodological understanding in foreign law(s), while neglecting the preparation for communication between lawyers from different legal backgrounds, should indeed be turned on its head—prioritising the preparation for effective and efficient comparative law communication.

²⁷ Comparative law and historical analysis are not identical but share common traits, see Siems, *Comparative Law*, 290 (Cambridge University Press: Cambridge, 2014).

²⁸ See e.g. Kadner Graziano, *Rechtsvergleichung vor Gericht. Legitim, nützlich, praktikabel?*, 60 *Recht der Internationalen Wirtschaft* 8, 473 (2014); Coendet, *Rechtsvergleichende Argumentation* (Mohr Siebeck: Tübingen, 2012).

To focus on the (practical) goal of being able to make a ‘skilful choice between different laws’²⁹ is too imprecise. On the one hand, the choice of law and forum is, in practice, most often driven by bargaining power, tax considerations, tradition, habit, or mere chance, for instance which law is known or familiar to a relevant external advisor or in-house counsel.³⁰ A ‘skilful’ choice is rarely what clients are ready to pay for. More often than not, parties lack not only the inclination but also the means and material³¹ for a fully ‘rational choice’.³² On the other hand, a ‘skilful’ choice would require either extensive research by one lawyer³³ or communication between lawyers from different backgrounds. Again, preparing for and improving legal communication between lawyers from different legal backgrounds is what matters most.

The needs are somewhat different for comparative law scholars. But they also face constraints of time and cost and often rely on hints and support from foreign colleagues for research ‘shortcuts’. Legal communication between lawyers from different legal backgrounds becomes even more important where scholars collaborate on large comparative law projects.

²⁹ Siems, *Comparative Law*, 4 (Cambridge University Press: Cambridge, 2014).

³⁰ Siems, *Comparative Law*, 229 (Cambridge University Press: Cambridge, 2014), correctly observes that ‘it cannot simply be assumed that individuals and firms compare the advantages and disadvantages of all legal systems’.

³¹ The cost of fully researching several laws that could be chosen would often be discouragingly high and out of proportion to possible gains as regards the quality of the solution, see v. Bar/Mankowski, *Internationales Privatrecht*, Vol. 1, § 7 no. 76 (2nd ed., Beck Verlag: München, 2003).

³² The notion has its origin in economic studies, see van Aaken, “Rational Choice” in der Rechtswissenschaft (Nomos: Baden-Baden, 2003).

³³ Cf. e.g. Wagner, *Rechtsstandort Deutschland im Wettbewerb. Impulse für Justiz und Schiedsgerichtsbarkeit* (C.H. Beck: München, 2018) on forum selection. Considering that Wagner conducted this study (only) from a German perspective, it becomes apparent how voluminous a fully comparative study from various perspectives would need to be. One recent example where extensive comparative research was considered worthwhile in practice is private enforcement in antitrust matters, see e.g. Basedow/Francq/Idot (eds.), *International Antitrust Litigation. Conflict of Laws and Coordination* (Hart Publishing: Oxford, 2012).

C. Applied Comparative Law in Arbitration

Being able to communicate effectively and efficiently with lawyers from other legal backgrounds is particularly important in the context of transnational dispute resolution, and, even more so, in arbitration. The term ‘arbitration’ is used to designate the proceedings conducted by and in front of decision-making bodies that are appointed ad hoc to decide individual cases. The focus on this type of decision-making bodies is due to the fact that they lack a uniform communication context and their members lack a uniform educational background—which makes legal communication potentially difficult and, in any event, which most often results in the need for effective and efficient communication between lawyers from different legal backgrounds.

The specific challenge of legal communication in transnational dispute resolution is at least twofold.

First, in transnational dispute resolution generally, many legal orders interact and need to be coordinated. This concerns domestic court proceedings, for instance if a French judge ascertains a party’s capacity to contract under Italian law, but also regimes of public international law, for instance in the context of investor-state dispute settlement.

Second, and more specifically to arbitration, the context of legal understanding, i.e. the communication context, is often far from clear. While also state court judges (or any judges of a standing decision-making body) may have to deal with a transnational scenario, their own communication context is known and mostly uniform. Even in international decision-making bodies, if they are standing bodies and although not belonging to a domestic legal order, like the Appellate Body of the World Trade Organisation (WTO)³⁴ or the European Court of Human Rights,³⁵ such specific communication context can develop over time.

³⁴ Established in 1995 under Art. 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes, see www.wto.org/english/tratop_e/dispu_e/appellate_body_e.htm.

³⁵ See www.echr.coe.int.

Yet the arbitrators of an individual arbitral panel may come from very different legal backgrounds. They may have a very different level of experience with regard not only to arbitration but also with regard to communicating with lawyers from different legal backgrounds. They may never have met before, they may never sit together again—and not all arbitration counsel may be equally familiar with the arbitrators' respective backgrounds. As an additional challenging factor, there is not even a need for an arbitrator to have any kind of legal training (unless the parties agree otherwise).

Therefore, without a thorough understanding of the challenges of applied comparative law, and without appropriate and, admittedly, fairly cumbersome and thorough preparation for legal communication between lawyers from different legal backgrounds, arbitration practitioners—whether acting as counsel or as arbitrators—cannot hope to perform to the standards required to serve the users of arbitration well.

III. POTENTIAL PITFALLS HAMPERING LEGAL COMMUNICATION

The key to effective and efficient legal communication between lawyers from different legal backgrounds is awareness of the risk that there will be misunderstandings—and why these misunderstandings are bound to occur.

The most important structural cause of such misunderstandings arises from the fact that every lawyer approaches any type of legal analysis with baggage in the form of intellectual predispositions as to how legal reasoning should be conducted (**A**). More dangerous still, such predispositions are often unconscious (**B**). An example of contract interpretation serves to highlight the pitfalls that this creates (**C**). Such risks can be defused to some degree by communicating on the basis of factual scenarios rather than legal categories (**D**).

A. (Legal) Convictions (*Vorverständnis*)

Trained lawyers have a predetermined understanding (unconscious convictions) of legal reasoning, given that they use terminology and a language, their ‘legal language’, that deviates from ‘everyday language’.³⁶ This understanding, and extensive training needed to acquire such understanding, are required to facilitate legal communication within a legal order—rendering such communication more efficient and setting the legal professional apart from the lay person. Yet this understanding potentially inhibits legal communication between lawyers from different legal backgrounds.³⁷

A detailed reconstruction of legal communication, i.e. of communication using legal language, and in particular of legal communication between lawyers from different legal backgrounds, using the tools of modern communication theory and epistemology, is beyond the scope of this article. It suffices to highlight that legal communication between lawyers from different legal backgrounds, in contrast to communication between lawyers from the same legal order, has additional layers of complexity. This is due to the fact that the communication context (context of understanding) is not uniform: both sides operate in their own—and differing—legal contexts, both have their own and differing ‘horizons’³⁸ of understanding, both have their own and differing unconscious convictions, as we shall see. In essence, and in contrast to communication between professional and lay person in general, communication between lawyers from different legal backgrounds is communication between professionals from a different ‘trade’—for instance professionals of Swiss law and professionals of Canadian law. A lay person will understand that it may have difficulties following a legal discourse. For lawyers, who are both legal professionals, this may be less obvious.

³⁶ Luhmann, *Law as a Social System*, 340 (Oxford University Press: Oxford, 2004).

³⁷ See Kischel, *Vorsicht, Rechtsvergleichung!*, 104 *Zeitschrift für vergleichende Rechtswissenschaft* 10, 14 (2005); Vogt, *The International Practise of Law and the Anglo-Internationalisation of Law and Language* in *Festschrift Tugrul Ansay*, 455, 457 (Kluwer Law International: Alphen aan den Rijn, 2006).

³⁸ Immenhauser, *Wozu Hermeneutik im Rechtsdenken?*, in *Festschrift Eugen Bucher*, 297, 324 (Stämpfli Verlag: Bern, 2009).

B. The Unconsciousness of Convictions in Particular

Nietzsche famously observed that the truth has more potent enemies in convictions than in lies.³⁹ Yet more serious for present purposes is the fact that convictions can be conscious and unconscious. While Nietzsche probably referred to the former, the more dangerous ones for legal communication between lawyers from different legal backgrounds are the latter.

The key concern when conducting comparative legal analyses is not a purposefully wrong or incomplete understanding⁴⁰ of a foreign law. Rarely will someone consciously misunderstand, mischaracterise or misjudge a foreign law.⁴¹ The main concern arises when lawyers are oblivious to the very existence of their own unconscious convictions.

In German legal theory, unconscious convictions (*Vorverständnis*⁴²) are predispositions that determine or influence the choice of a legal method, or, more specifically, that determine the way an orthodox methodology (in the

³⁹ Nietzsche, *Menschliches, Allzumenschliches* I, 483 (Colli/Montinari (eds.), *Kritische Studienausgabe*, Vol. 2, dtv de Gruyter: München, 1999): '*Feinde der Wahrheit. – Ueberzeugungen sind gefährlichere Feinde der Wahrheit, als Lügen.*'

⁴⁰ One might call this 'prejudice', although no 'fault' may be involved. Indeed, the term 'prejudice' did not always have its present day negative connotation, see Gadamer, *Truth and Method*, Part II, 4-1, 268 (3rd edn., Continuum: London, 2004). Gadamer uses the term 'prejudice' in a more neutral way as 'a judgment that is rendered before all the elements that determine a situation have been finally examined' (*ibid.*, 273), not in the sense of a false judgment, which makes this notion suitable in the present context.

⁴¹ If this happens, it is not an exercise of comparative law (in the sense of a comparative legal analysis) but legal propaganda or, in more neutral terms, legal marketing. It would seem that lawyers from some legal orders are more adept at such marketing than others. It may make a difference whether practising law is considered a business or a profession in the respective system.

⁴² The German '*Vorverständnis*' (literally: pre-understanding) does not translate easily into English. The English 'understanding' has several meanings. On the one hand, it can refer to the activity of making sense of something (*Verstehen*). On the other hand, 'understanding' can refer to the result of such activity, i.e. how something is actually understood (neutral as to whether that is correct) (*Verständnis*). The process of understanding (*Verstehen*) may be distorted by a predisposition, an unconscious conviction (*Vorverständnis*), affecting the way something is understood, i.e. affecting the outcome (*Verständnis*) of the process of making sense of something.

sense of a methodology accepted by most) is applied within a legal order.⁴³ In the following, the term ‘unconscious convictions’ is used more broadly, referring to any methodological predisposition that can be traced to a lawyer being used to his or her home jurisdiction, being predisposed to a certain kind of legal reasoning.

The specific challenge for legal communication between lawyers from different legal backgrounds is thus at least twofold.

On the one hand, there is the general epistemological problem of discovering truth (primarily on the part of the lawyer requested to provide input). This is a problem encountered in all endeavours of human understanding and not particular to comparative law. Although an important consideration in view of potential unconscious convictions, the epistemological problem can be remedied, at least to a degree that is sufficient to avoid problems for the purposes of legal practice or scholarship, by selecting appropriate (i.e. sufficiently competent) foreign law experts.

On the other hand, unconscious convictions (on the part, and this is very important to keep in mind, of *both* the requesting and the requested lawyer) are particularly problematic, even more so in a practical setting given the time pressures involved.⁴⁴ First, unconscious convictions influence the way queries are made by the lawyer requesting input. Considering her unconscious convictions, she may have difficulties asking the ‘right’ (i.e. helpful for the particular purpose) question to begin with. Second, unconscious convictions influence, albeit potentially in a dissimilar way, the understanding of the query by the requested lawyer. Third, they influence the input provided. Finally, they influence the way the input is understood by the requesting lawyer. Thus, at all stages, unconscious convictions potentially distort the legal communication between lawyers from different legal backgrounds.

⁴³ See Laudenklos/Rohls/Wolf/Rückert/Seinecke in *Methodik des Zivilrechts – von Savigny bis Teubner*, no. 1542 (Rückert/Seinecke (eds.), 2nd edn., Nomos: Baden-Baden, 2012).

⁴⁴ *Supra* Section II.B.

The following example of contract interpretation demonstrates that lawyers from different legal backgrounds need to communicate very carefully in order to avoid misunderstandings. In particular legal practitioners are less concerned about the correct legal reasoning (all the steps of the legal analysis) than they are about the correct outcome of the analysis. They must plan their communication accordingly.⁴⁵

C. Example: Contract Interpretation

The principles of contract interpretation may differ from one system to another, but the outcome in a particular case can still be identical.

Example: S(eller) and B(uyer) sign a sales contract with the provision 'Item sold: Hoover'; the price is specified. S sells all types of vacuum cleaners, including one model produced by Hoover and several models produced by Siemens. The Hoover model and one Siemens model (the 'Siemens SuperClean x56') have the same price, i.e. the one indicated in the contract. S sells also a wide range of other household appliances.

Variant 1: To the contract is attached a detailed description of the item sold, namely a vacuum cleaner 'Siemens SuperClean x56'.

Variant 2: The type of vacuum cleaner sold is not further specified in the contract. However, S and B had concluded the contract in view of a specific item that was on display in S's window on that specific day. There was only one vacuum cleaner (a 'Siemens SuperClean x56') on display on that day for the price stipulated in the contract. B has a picture of the vacuum cleaner and the price tag. The Hoover model was on sale for the same price as stipulated in the contract, but S and B had never talked about the Hoover model. Yet S and B had discussed other appliances on sale and displayed in the window.

Question: In case there is a dispute between S and B as to whether the Hoover model or the 'Siemens SuperClean x56' was sold, what

⁴⁵ For further details *infra* Section IV.

does the contract provide for? Does the answer differ depending on whether the contract is governed by German or English law?

The apparent ‘problem’ in this example is that the item sold is not specified in the contract beyond doubt. The reference to ‘Hoover’ could mean a particular brand of vacuum cleaner or a vacuum cleaner in general (British English term). The contract thus needs to be interpreted.

A detailed comparative account of the principles of contract interpretation under German and English law is beyond the scope of this article.⁴⁶ Suffice to mention—in necessarily simplified terms—the two principles most frequently pointed out. First, English law follows an objective approach, interpreting the contract from the perspective of a third party,⁴⁷ whereas German law focuses primarily on the parties’ (subjective) joint actual intentions (*übereinstimmendes tatsächliches Verständnis*).⁴⁸ Second, English law focuses on the words used. As Lord Hofmann formulated in *ICS* (fifth principle), the “rule” that words should be given their “natural and ordinary meaning” reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents’⁴⁹. Yet under German law the wording will ultimately play a limited role.⁵⁰

⁴⁶ See e.g. Spellenberg, *Stellvertretung und Vertragsauslegung im englischen Recht* in Festschrift für Ernst A. Kramer, 311 (Helbing & Lichtenhahn: Basel, 2004); Hadžimanović, *Auslegung und Ergänzung von Verträgen* (Schulthess: Zürich, 2006); Stölting, *Vertragsergänzung und implied terms* (Sellier European Law Publishers: München, 2009); Czarnecki, *Vertragsauslegung und Vertragsverhandlungen* (Mohr Siebeck: Tübingen, 2011); Egli, *Parol Evidence Rule*, Jusletter 27. Februar 2012; Landbrecht, *Treu und Glauben im englischen Vertragsrecht*, *Recht der internationalen Wirtschaft* 592 (2013). Focusing on the contract drafting perspective Triebel/Vogenauer, *Englisch als Vertragssprache* (Helbing Lichtenhahn: Basel, 2018).

⁴⁷ For details see McMeel, *The Construction of Contracts: Interpretation, Implication, and Rectification* (3rd edn., Oxford University Press: Oxford, 2017); *Wood v Capita* [2017] UKSC 24; U. K. Supreme Court, 29.03.2017 (note *Hübner*), *Zeitschrift für Europäisches Privatrecht* 684 (2018).

⁴⁸ Flume, *Allgemeiner Teil des Bürgerlichen Rechts. Zweiter Band Das Rechtsgeschäft*, § 16.2.a (4th edn., Springer: Berlin, 1992).

⁴⁹ Per Lord Hofmann, *Investors Compensation Scheme Ltd v West Bromwich Building Society* (HL) [1998] 1 WLR, 896 (913D).

⁵⁰ See German Federal Court of Justice, *Neue Juristische Wochenschrift* 1528, 1529 (1994): the parties’ joint intention prevails over the wording of the contract and any other approaches to interpretation; German Federal

This summary is not wrong. However, it is also not nuanced enough to be fully accurate, let alone usable in practice. Therefore, the question remains whether the outcome of a legal analysis of the above example under German and English law differs. Is there any doubt what the term ‘Hoover’ in the contract ‘means’?

Variant 1: Under German law, the parties’ joint actual understanding of the content of their agreement would prevail over any objective reading of its text (subjective approach).⁵¹ Yet no such understanding (other than what is reflected in the text of the contract) can be ascertained. The normative interpretation, which then comes into play, has as the starting point logical and grammatical elements (i.e. the wording in the context of the agreement as drafted).⁵² The detailed product description points to the Siemens model. A German lawyer would most likely not worry too much about the term ‘Hoover’ and its ‘meaning’.

English law would start, in applying the objective principle,⁵³ with the wording of the contract rather than the parties’ intentions, framing the issue as one of interpreting the term ‘Hoover’. However, as one commentator puts it, the ‘first and least-controversial source of assistance for the purpose of construing particular contractual words is the remainder of the instrument or the “internal context”’.⁵⁴ The attached product description indicates that the

Court of Justice, *Neue Juristische Wochenschrift* 3139, no. 13 (2006): the parties’ joint understanding prevails over a content of the contract objectively determined; Flume, *Allgemeiner Teil des Bürgerlichen Rechts. Zweiter Band Das Rechtsgeschäft*, § 16.2.a (4th edn., Springer: Berlin, 1992).

⁵¹ Flume, *Allgemeiner Teil des Bürgerlichen Rechts. Zweiter Band Das Rechtsgeschäft*, § 16.2.a (4th edn., Springer: Berlin, 1992).

⁵² Flume, *Allgemeiner Teil des Bürgerlichen Rechts. Zweiter Band Das Rechtsgeschäft*, § 16.3.b (4th edn., Springer: Berlin, 1992).

⁵³ In the context of interpreting contracts, the ‘detached objectivity’ or ‘fly-on-the-wall objectivity’ applies; McMeel, *The Construction of Contracts: Interpretation, Implication, and Rectification*, 3.04-3.05 (3rd edn., Oxford University Press: Oxford, 2017). The language used is thus interpreted from the ‘perspective of a reasonable bystander, or eavesdropper on the parties’.

⁵⁴ McMeel, *The Construction of Contracts: Interpretation, Implication, and Rectification*, 4.01 (3rd edn., Oxford University Press: Oxford, 2017).

parties intended to sell the Siemens model and the term ‘Hoover’ is only used as a reference to a vacuum cleaner (in order to distinguish the item sold from other household appliances on sale in S’s shop).

Thus, in Variant 1, it appears that both under German and English law the parties agreed on a sale of the ‘Siemens SuperClean x56’. The legal reasoning differs—or at least the rhetorical packaging of such reasoning. The outcome is the same.

Variant 2: In this scenario, the wording of the contract does not help to determine whether S and B agreed on the Hoover or the Siemens model. The wording of the contract (‘Hoover’) and the objective circumstances in the shop (a Hoover model being on display for the price indicated) might indicate that the contract needs to be interpreted as referring to the Hoover model.

Yet under German law, other circumstances of the parties’ discussions would be taken into account. In particular B’s picture of the Siemens model with the price tag (or any other relevant evidence) would render credible that the Siemens was discussed, which would in turn point to a joint actual understanding of the parties that the Siemens model was sold. If one were to understand the reference to ‘Hoover’ as an incorrect labelling of the product sold, a German lawyer would reason that using a wrong term does not matter in the context of interpretation (*falsa demonstratio non nocet*) if the parties intended to make a certain declaration and had a joint understanding of its content, even though the common (i.e. objective or objectivised) understanding of the term may be different.⁵⁵ Under German law, the parties have agreed on a sale of the Siemens model on display, irrespective of how an independent third party would interpret the term ‘Hoover’.

Under English law, the reasoning will likely be more complex. Some observers might invoke the principle that no interpretation is warranted if the

⁵⁵ Cf. *supra* note 50.

wording is clear⁵⁶ and that the parties' negotiations are not relevant or admissible (exclusionary rule) when interpreting an agreement.⁵⁷ This could result in the Hoover model being sold. On the other hand, it has been held that the content of the parties' negotiations may be used to establish 'the genesis and object'⁵⁸ of a provision—pointing to the Siemens model. In the present case, the fact that the parties only discussed the Siemens model in the window could be used to inform the reading of the term 'Hoover'—as referring to a vacuum cleaner in general, rather than a particular model, in order to distinguish the product sold from the other items discussed by S and B (other household appliances on sale that day).

More generally, one commentator concludes 'that, as a matter of English law, there is no parol evidence rule ... to restrict the evidence which is admissible for the purpose of construing a written contract'.⁵⁹ That alone would settle the case in favour of the Siemens model.

Yet even if the parol evidence rule were to play any role to restrict the available evidence, or if the correct interpretation of the contract under English law pointed to the Hoover model for other reasons, this would still not be the end of the analysis. English law has developed the safety nets of rectification and estoppel by convention in order to circumvent the rules restricting the evidence that may be adduced for interpretation purposes. Evidence of the parties' negotiations may be used in the context of requesting either of these

⁵⁶ On this principle see Grabiner, *The Iterative Process of Contractual Interpretation*, 128 *Law Quarterly Review* 41, 61 (2012). For the avoidance of doubt, Lord Grabiner does not allege that there is 'no' room for interpretation in this context, and it is not suggested that he would come to any particular conclusion regarding the above Example.

⁵⁷ Per Lord Hofmann, *Investors Compensation Scheme Ltd v West Bromwich Building Society* (HL) [1998] 1 WLR, 896 (913A): 'The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent.'

⁵⁸ Per Sales J, *Investec Bank (Channel Islands) Ltd v The Retail Group plc* [2009] EWHC 476 (Ch), paras. [75]-[76].

⁵⁹ McMeel, *The Construction of Contracts: Interpretation, Implication, and Rectification*, 5.12 (3rd edn., Oxford University Press: Oxford, 2017).

(equitable) remedies, a tactic that, according to recent case law, appears to continue to be legitimate.⁶⁰

Thus, under English law, the result also in Variant 2 is likely to be the same as under German law, i.e. that the parties agreed on a sale of the Siemens model on display in S's shop.

D. Reflections

This example demonstrates that legal communication between lawyers from different legal backgrounds must work with factual descriptions, as and to the extent these factual descriptions are convertible across 'cultures'.⁶¹ This is not a new insight,⁶² and also not an insight limited to legal theory or comparative law.⁶³ Yet its implications are often forgotten.

Communication on the basis of legal concepts must be avoided, at the very least in practice (due to cost and time constraints). Although such communication appears, at first sight, like a convenient shortcut, it is extremely risky with little chance of controlling the outcome in terms of success of the communication. It is not excluded that the legal communication between lawyers from different legal backgrounds yields a 'correct' outcome even when they 'compare' legal concepts directly, but this, more often than not, is a matter of mere happenstance.

To demonstrate this by reference to the above example: A German lawyer, having solved Variant 2 under his own law on the basis of the German

⁶⁰ McMeel, *The Construction of Contracts: Interpretation, Implication, and Rectification*, 5.86 (3rd edn., Oxford University Press: Oxford, 2017), referring to *Chartbrook Ltd v Persimmon Homes Ltd* [2008] EWCA Civ 183.

⁶¹ See also Wyatt, *Intertemporal Linguistics in International Law. Beyond Contemporaneous and Evolutionary Treaty Interpretation* (Hart: Oxford, 2019), 8: 'legal issue detached from any doctrines or principles used by any specific systems'.

⁶² See already Zweigert/Kötz, *Einführung in die Rechtsvergleichung*, § 3.II. (3rd edn., J.C.B. Mohr: Tübingen, 1996).

⁶³ Edmund Husserl cautioned, in a similar vein, against reasoning on the basis of philosophical doctrines. He emphasised the need to use problems as the starting point for scientific analyses, see Husserl, *Philosophie als strenge Wissenschaft*, 72 (Felix Meiner Verlag: Hamburg, 2009).

falsa demonstratio principle, might ask an English colleague whether English law knows of such principle. The English lawyer, searching for a *falsa demonstratio* principle, will find that such ‘rule’ exists but is apparently used only in the conveyancing context.⁶⁴ Her answer might therefore be: no, such principle does not exist in English law generally for contract interpretation purposes. If the German lawyer then simply takes this piece of information and concludes that, in Variant 2 and under English law, the parties had agreed on a sale of the Hoover model (contrary to the German law solution), he might be seriously wrong.

The mistake appears obvious in light of the above very detailed account. Yet it is a mistake that is all too often made in practice. Focusing on a factual framing of issues for the purposes of legal communication between lawyers from different legal backgrounds is thus of prime importance.

We must now turn to the question of how such communication should be structured in order to duly take into account the challenges and needs of legal practice in particular.

IV. LEGAL COMMUNICATION IN FIVE STEPS

In order to tackle the described challenges of legal communication between lawyers from different legal backgrounds, in particular in legal practice,⁶⁵ the seeking, receiving and implementing of foreign law input should be structured according to the following Five Steps: full legal analysis of the case by the lawyer requesting foreign law input—under his or her *own* law in order to avoid the ‘loaded query problem’ (A); detailed *factual* description of the case on the basis of this legal analysis—to be transmitted to the foreign lawyer requested to provide input (foreign law advice) (B); legal analysis under foreign law—together with a *sensitivity analysis* (C); evaluation of the foreign law input

⁶⁴ See Carter, *The Construction of Commercial Contracts*, no. 4-50 (Hart Publishing: Oxford, 2012).

⁶⁵ These Five Steps can also serve comparative legal research projects, in particular if research is undertaken with regard to factual scenarios as it often is. The legal analysis in one legal order could be the starting point for determining the factual matrix of the research project, a legal analysis of that matrix then be conducted in other legal orders (with feedback loops to determine all the relevant factual issues).

by the lawyer requesting it and, if need be, follow-up discussion between requesting and requested lawyer—installing a *feedback-loop* (D); translating, by the requesting lawyer, the foreign law input into her own terminology (if required) (E).

A. Step 1: Full Legal Analysis by the Lawyer Requesting Advice—Avoiding Heuristics and Biases

The starting point of legal communication between lawyers from different legal backgrounds should be a full legal analysis of the case under the law of the lawyer requesting foreign law input—irrespective of the law ultimately applicable.

Step 1 is designed to counterbalance unconscious convictions⁶⁶ at the initial stages of the communication between lawyers from different legal backgrounds. The effect is to avoid jumping to conclusions, to avoid heuristics and biases, and to uncover, if need be, unconscious convictions—on the part of the lawyer requesting information.

Without attempting an exhaustive analysis,⁶⁷ the psychology underlying such jumping to conclusions shall briefly be outlined by reference to Daniel Kahneman's 'Thinking, Fast and Slow'.⁶⁸ This outline also demonstrates how Step 1, i.e. the full legal analysis of the case under the law of the lawyer requesting advice, can help avoid distortions in the legal communication between lawyers from different legal backgrounds.

Kahneman distinguishes between two modes of thinking. While System 1 'operates automatically and quickly, with little or no effort and no sense of voluntary control',⁶⁹ System 2 'allocates attention to the effortful mental activities that demand it'.⁷⁰ System 1 is in operation when we think fast,

⁶⁶ *Supra* Section III.A.

⁶⁷ For details see e.g. Gigerenzer/Engel (eds.), *Heuristics and the Law* (The MIT Press: Cambridge/Mass., 2006).

⁶⁸ Kahneman, *Thinking, Fast and Slow* (Penguin Books: London, 2011).

⁶⁹ Kahneman, *Thinking, Fast and Slow*, 20 (Penguin Books: London, 2011).

⁷⁰ Kahneman, *Thinking, Fast and Slow*, 21 (Penguin Books: London, 2011).

System 2 operates when we think slowly. Usually we do both at the same time. When conducting legal research, System 2 is used to work on the specific (legal) problem. System 1 provides a (trained lawyer) with the underlying assumptions, terminology, thought patterns, legal instincts etc.⁷¹ Efficient thinking, judging and decision-making would not be possible otherwise, but the problem is that System 1 has biases, i.e. ‘systematic errors that it is prone to make in specified circumstances’.⁷² To avoid those errors, by switching to System 2, effort has to be exercised, attention paid. Yet one of System 2’s ‘main characteristics is laziness, a reluctance to invest more effort than is strictly necessary’.⁷³ In order to get System 2 going, a lawyer needs to invest extra effort and care.⁷⁴

The lawyer requesting foreign law input—before formulating her questions to the foreign law expert—should thus switch consciously to System 2 in order to analyse the case from a legal perspective, thereby making sure that she is not tricked by unconscious convictions into wrong conclusions about relevant legal issues. As a solution of legal issues, this analysis is of course only a workaround that may ultimately be irrelevant if the case is to be determined according to a foreign law—it serves as scaffolding for the legal communication between lawyers from different legal backgrounds and will be removed once such communication has been successfully completed. The law of the requesting lawyer is chosen for the purpose of activating System 2 because it requires the least effort, the lawyer requesting input being most familiar with her own law.

Trained lawyers have a strong yet vague feeling about an appropriate solution to a legal problem (*Rechtsgefühl*), as well as an intuitive understanding

⁷¹ See Kahneman, *Thinking, Fast and Slow*, 22 (Penguin Books: London, 2011): some ‘mental activities become fast and automatic through prolonged practice’.

⁷² Kahneman, *Thinking, Fast and Slow*, 25 (Penguin Books: London, 2011).

⁷³ Kahneman, *Thinking, Fast and Slow*, 31 (Penguin Books: London, 2011).

⁷⁴ Considering the complexity of the field, it is unlikely that any lawyer could ever develop, beyond a very (extremely) limited area, a type of understanding that Kahneman would accept as the type of expertise (has ‘seen everything’, Kahneman, *Thinking, Fast and Slow*, 242 (Penguin Books: London, 2011)) that can serve as a valid basis for ‘expert intuition’.

of the legal implications of a case. Such intuition is used when determining the appropriate starting point for legal research in one's own law. In the purely domestic context, relying on intuition in this context is unproblematic because it will eventually be checked and corrected by detailed research. But this intuition is also used when communicating with foreign law experts, influencing what a lawyer requesting input asks for and considers relevant. If the intuition, not tempered by thorough research, is wrong or incomplete (under the requesting lawyer's own law!), it potentially distorts legal communication between lawyers from different legal backgrounds already from the outset—as the requesting lawyer might not ask the appropriate questions to begin with.

The purpose of Step 1 is therefore to understand potential legal implications and to determine a possible legal solution to the case (leaving aside, for the moment, whether it is the 'correct' one in view of the applicable law). This step is rarely ever mentioned in the debates about comparative law yet very important, not only in practice but also in comparative law scholarship. The concern is not that this step is not taken—it always is—but that it is taken unconsciously and in a somewhat fleeting manner.

B. Step 2: Detailed Factual Description (Case Scenario)

Following the full legal assessment in her own law, the lawyer requesting foreign law input needs to describe the case in factual terms, i.e. she needs to reduce the case to a factual scenario that can be communicated to the foreign lawyer. She also needs to be aware that some words of the everyday language may have a different (or specific) meaning when used in a legal context—which may render them unusable for the purposes of a factual description.

The lawyer requested to give advice will then analyse this set of facts from the perspective of his (foreign) law. He will return the outcome of this analysis and provide the lawyer requesting input with the result as well as the underlying legal reasoning (under the foreign law).

Yet even if framed on the basis of facts, and even though she has sought, under Step 1, to neutralise her own legal convictions to the largest extent

possible, the requesting lawyer must be aware of the fact that her query will be somewhat loaded (the ‘loaded query problem’). Since she uses, under Step 1, her own law to determine the relevance of facts, before communicating those facts to the foreign lawyer, the structure of her own law might distort what facts she considers relevant and thus transmits.⁷⁵ She might omit, without knowing it, facts that could turn out to be relevant from the perspective of a particular foreign law. This is where the requested foreign lawyer must now, which is also often overlooked in practice, play an active role under Step 3 and Step 4.

C. Step 3: Legal Analysis Under Foreign Law—with Sensitivity Analysis

There is little additional risk that the foreign lawyer falls into the trap of legal intuitions and convictions when assessing under his own law the factual scenario provided. He will directly activate System 2 in the course of his legal research.⁷⁶

Yet in order to provide input that is as useful as possible to the requesting lawyer, and in order to counterbalance the problem of the ‘loaded query’ described in the context of Step 2 above, the requested lawyer should transmit not only the bare result of the legal analysis as well as his legal reasoning, but also indicate how the result would change if the fact pattern were slightly different. Mathematicians (and, in practice, economic experts) call this a ‘sensitivity analysis’, i.e. a re-assessment of the outcome of the (in our case legal) base assessment using different input (factual patterns). In order to encourage and trigger such additional advice from the requested lawyer, a feedback-loop is provided for under Step 4.

⁷⁵ Determining facts in issue is not a neutral exercise but informed by one’s understanding of a legal order. Facts are only in issue because a law makes them so, *see e.g.* McKeown, *Evidence*, ch. 1.2 (16th edn., Oxford University Press: Oxford, 2012).

⁷⁶ Subject to making mistakes, but the possibility of making mistakes, on either side, is not relevant for the *structuring* of the legal communication between lawyers from different legal backgrounds itself—although it affects the *quality* of the result of such communication.

D. Step 4: Evaluation of the Foreign Law Input and Providing Feedback

Once the requesting lawyer has reviewed the advice, she should ask follow-up questions, slightly modifying the fact pattern, and also encourage feedback questions from the requested lawyer (the ‘sensitivity analysis’ mentioned under Step 3 above). These follow-up questions also serve to double-check both sides’ understanding of the factual scenario and its legal implications. The purpose is yet again to activate System 2 on both sides of the legal communication.

For the avoidance of doubt, such sensitivity analysis is not meant to encourage falsification of the evidence or distorting the facts of the case. Rather, those modifications of the fact pattern serve the *analytical* purpose of finding out whether both sides think in appropriate legal categories. They also help identify the need for further factual research and instructions from the client.

In practice, the factual scenario is rarely fully transparent and undisputed. Different facts may be relevant if a different legal strategy is chosen. Some legal arguments will not work simply because the corresponding facts in issue cannot be proven and are thus inexistent for the purposes of the proceedings (although they may be correct from an epistemological point of view).

E. Step 5: Translating the Input into the Requesting Lawyer’s Language

Based on the foreign law input provided, a solution will often have to be formulated in the requesting lawyer’s own words—ideally double-checked by the requested lawyer. Step 3, Step 4, and Step 5 may go hand in hand.

Usually the lawyer requesting input will need to further build on that input, for instance because a foreign law must be pleaded in front of a court or arbitral tribunal or because a judge applies the foreign law in the context of a case heard by her. The foreign law research is thereby assimilated in the mind of the lawyer requesting input.

In arbitration proceedings, there is sometimes a further layer of complexity that is added by the fact that all the members of the arbitral tribunal do not necessarily have the same legal background.⁷⁷ Careful legal communication is even more important in this setting—and carefully translating the received foreign law input in one's own words might help such communication as it, to a certain extent, emulates the steps the arbitrators also need to undertake when explaining their reasoning for instance in an arbitral award.

V. PREPARING FOR APPLIED COMPARATIVE LAW—A TWO-STEP PROCESS

Let us finally turn to the question of how academics and practitioners, given the challenges described above, might prepare for effective and efficient legal communication between lawyers from different legal backgrounds. It is submitted that this should be a two-step process.

(1) As demonstrated, the most important prerequisite for being able to communicate across legal orders, and thus the most important prerequisite for ultimately applying comparative law successfully in many cases, is to fully grasp the legal framework of at least one legal order. It matters little which one that is. Otherwise it is impossible to perform Step 1 and Step 5, and difficult to perform Step 2 and Step 4.

The purpose of mastering one legal order in its entirety is to learn all the legal convictions, instincts, and predispositions that come with being fully versed in one law. This does not require knowing all the details of a country's law (which is impossible to achieve in practice), but it requires a thorough understanding of the methodology used and the most relevant elements of such legal order.

⁷⁷ See *supra* Section II.C.

The benefits of studying comparative law have been pointed out for decades.⁷⁸ There is no denying those benefits. However, it is submitted that there is no substitute for studying and mastering at least one legal order in its entirety—not for the purposes of legal practice and applied comparative law at the very least (one might still become a good politician or business leader).

There is a reason why examiners at university and bar exam level require the study of certain subjects. It is highly likely that all subjects combined provide not only for a broad but also an integrated understanding of the whole legal order, not just isolated aspects of it. It need not concern us here that some jurisdictions allow the practice of law with only a university (law) degree or with only a professional certification. On the one hand, there are apparently only very few legal orders that do so.⁷⁹ On the other hand, if those legal orders consider the respective degree or certification to be enough for an integrated understanding of the whole legal order, we have no reason to second-guess that choice.

This is not to advocate against studying comparative law,⁸⁰ transnational law⁸¹ or domestic law from a transnational perspective.⁸² It should only be

⁷⁸ See e.g. Ault/Glendon, *The Importance of Comparative Law in Legal Education: United States Goals and Methods of Legal Comparison*, 27(4) *Journal of Legal Education* 599 (1976).

⁷⁹ Cf. Chesterman, *The Evolution of Legal Education. Internationalization, Transnationalization, Globalization in Comparative Law as Transnational Law. A Decade of the German Law Journal*, 41, 41-2 (Miller/Zumbansen (eds.), Oxford University Press: Oxford, 2012).

⁸⁰ On which see e.g. Brand, *Conceptual comparisons—Towards a coherent methodology of comparative legal studies*, 32 *Brooklyn Journal of International Law* 405 (2007); Fauvarque-Cosson, *The Rise of Comparative Law: A Challenge for Legal Education in Europe* (Europa Law Publishing: Leuven, 2007); Gordley, *Comparative Law and Legal Education*, 75 *Tul L Rev* 1003 (2001); Großfeld, *Sinn und Methode der Rechtsvergleichung* in *Festschrift Sandrock*, 329 (Verlag Recht und Wirtschaft: Heidelberg, 2000); Hazard, *Comparative Law in Legal Education*, *The University of Chicago Law Review* 264 (1951); Husa, *Comparative law in legal education—building a legal mind for a transnational world*, *The Law Teacher* (2017) (DOI: 10.1080/03069400.2017.1340532); Kadner Graziano, *A Multilateral and Case-Oriented Approach to the Teaching and Studying of Comparative Law: A Proposal*, 6 *European Review of Private Law* 927 (2015).

⁸¹ On which see e.g. Arjona/Anderson/Meier/Robart, *What law for transnational legal education? A cooperative view of an introductory course to transnational law and governance*, 6(2) *Transnational Legal Theory* 253 (2015).

⁸² See e.g. Berger, *Vom praktischen Nutzen der Rechtsvergleichung. Die 'international brauchbare' Auslegung nationalen Rechts* in *Festschrift Sandrock*, 49 (Verlag Recht und Wirtschaft: Heidelberg, 2000).

remembered that legal education in these areas raises additional challenges.⁸³ From the perspective of legal practice, including scholarship that wishes to be relevant for legal practice, this is the icing on the cake, not the cake itself.

One could, in theory, study two entire legal orders (subsequently or in parallel, as some double-degrees somehow seem to attempt to do). It would be indeed very valuable, for the purposes of communicating with lawyers from different legal backgrounds as well as for applied comparative law, to have mastered two legal orders in their entirety, to gain an integrated understanding of two entire legal orders. However, the exercise would require studying those two legal orders fully (and would need to include obtaining two bar admissions). It would make the overall legal education more onerous, not easier.

Studying two (or more) legal orders only superficially, on the other hand, provides very limited gains in practice—and is potentially dangerous for applied comparative law. The risk is that scholars and practitioners only confuse methodologies, predispositions, convictions, and concepts, and are thus simply incapable of performing Step 1, Step 2, Step 4, and Step 5 in a controlled fashion. Having Step 3 performed in isolation (the assessment of the case under foreign law), even if done in the highest quality possible, is then of no use whatsoever for applied comparative law. To make matters worse, the respective scholar or practitioner has virtually no way of verifying, for lack of solid ‘external reference points’⁸⁴—that he or she would have acquired by

⁸³ See e.g. Balan, *Meeting the challenges of globalisation in legal education*, 51(3) *The Law Teacher* 274 (2017); Chesterman, *The Globalisation of Legal Education*, *Singapore Journal of Legal Studies* 58 (2008); Gerber, *Globalization and Legal Knowledge: Implications for Comparative Law*, 75 *Tul L Rev* 949 (2001); O’Sullivan/McNamara, *Creating a global law graduate: The need, benefits and practical approaches to internationalise the curriculum*, 8(2) *Special Issue: Legal Education* 53 (2015); Smits, *European legal education, or: how to prepare students for global citizenship?*, 45(2) *The Law Teacher* 163 (2011); Squelch/Bentley, *Preparing law graduates for a globalised world*, 51(1) *The Law Teacher* 2 (2017); Tamm/Letto-Vanamo, *Innovation and Law in Liber Amicorum Ole Lando*, 369 (DJØF Publishing: Copenhagen, 2012); Winterton, *Comparative Law Teaching*, 23(1) *The American Journal of Comparative Law* 69 (1975).

⁸⁴ I borrow this term from Comey, *A Higher Loyalty. Truth, Lies, and Leadership*, xi (Flatiron Books: New York, 2018), who highlights the value of such reference points for effective leadership that transcends the situation, the tribe, the ego of the leader. In a similar vein, external reference points are needed to enable communication

studying one legal order in its entirety—, the correctness and usefulness of the advice obtained.

One might argue that students learn legal instincts regardless of whether they study one or more legal orders, and whether they do so thoroughly or superficially. To a certain extent, this is correct. They would still develop convictions and instincts. But those convictions and instincts would be very personal to them—and therefore not a basis for communicating with others or, at the very least, not a basis for facilitating communication with others.

The legal theory background to this argument in favour of studying at least one legal order fully is the contingency of the structures and rules developed in today's legal orders, i.e., to put it colloquially, the fact that all structures and rules could in theory also be different (although, within one legal order, they are not arbitrary and could not be modified all at the same time). All legal orders, and the structures and rules they contain, are possible (else they would not exist), but there is no reason, extraneous to the respective legal order, why they would necessarily be precisely the way they are (*möglich aber nicht-notwendig*).⁸⁵ There is no supreme authority, such as God, Nature, Reason, or a Supreme Leader, that would dictate the content of legal orders,⁸⁶ or that would dictate that all legal orders must have the same structures or content.

Many legal orders across the world will have developed similar structures, as there is a 'strong "equal-finality" of legal institutions'.⁸⁷ However, both the structures and the precise content of the corresponding rules may still differ—which is why comparative law is an endeavour worth undertaking in the first place. For instance, one legal order might address a particular concern with

that transcends the situation, the small group of like-minded people someone might belong to, the individual mind of one person.

⁸⁵ See Luhmann, *Rechtstheorie im interdisziplinären Zusammenhang* in *Ausdifferenzierung des Rechts*, 191, 200 *et seq.* (*idem*, Suhrkamp: Frankfurt am Main, 1981).

⁸⁶ Luhmann, *Law as a Social System*, 215, 431 *et seq.* (Oxford University Press: Oxford, 2004).

⁸⁷ Luhmann, *Law as a Social System*, 481 (Oxford University Press: Oxford, 2004).

private law remedies (private enforcement). Others might prefer administrative law measures (public enforcement).

The important thing for students to learn would be that measures are taken to address a particular problem (whatever they are)—which means that they also learn that a problem or issue exists. If students study no legal order in its entirety, they might miss out on understanding a potentially important aspect of what constitutes a modern-day legal order.

(2) Once they have mastered one legal order fully, practitioners and scholars of comparative law must set out to specifically realise their unconscious convictions that they have thereby acquired—by learning about foreign legal orders and how they can differ, for instance by working through case studies.⁸⁸

At this stage, there is no need to study a foreign legal order in its entirety, as the only purpose is to become aware, and understand, that one indeed has unconscious convictions and (roughly) what they are. This can be done with regard to specific areas of law that are of particular interest to the respective legal scholar or practitioner—which makes the task manageable. A case-based, fact-oriented approach to the study of comparative law, like the approach developed by Kadner Graziano,⁸⁹ appears to be particularly valuable in this context—and perfectly calibrated to the practical needs of applied comparative law as well as to the practical constraints of studying law.

VI. CONCLUSION

In a nutshell, the key to effective and efficient legal communication between lawyers from different legal backgrounds, and thus an indispensable

⁸⁸ A 'learning-by-doing approach', see Kadner Graziano, *A Multilateral and Case-Oriented Approach to the Teaching and Studying of Comparative Law: A Proposal*, 6 *European Review of Private Law* 927, 943 (2015).

⁸⁹ Cf. Kadner Graziano, *Comparative Contract Law: Cases, Materials and Exercises* (2nd edn., Edward Elgar Publishing: Cheltenham, 2019); Kadner Graziano, *Comparative Tort Law: Cases, Materials, and Exercises* (Routledge: Abingdon-on-Thames, 2018).

prerequisite for applying comparative law successfully, whether in practice or in academia, is to become an expert in one legal order, acquiring all the legal instincts and all the understanding that come with it—but then to ‘unlearn’ those instincts⁹⁰ when it comes to communicating with foreign lawyers.

In legal communication between lawyers from different legal backgrounds, it is fundamental not to take anything for granted. It is imperative never to jump to conclusions, and certainly not to do so at an early stage in the communication process. The key to this is using factual scenarios to communicate wherever possible, not legal concepts.

⁹⁰ See Eberle, *The Method and Role of Comparative Law*, 8 Wash U Global Stud L Rev 451, 457 (2009): ‘we need to shed our built-in, native bias or “cognitive lock-in” so that we can review the data objectively’.

THE USE OF THE COMPARATIVE METHOD IN INTERNATIONAL ARBITRATION SCHOLARSHIP

Morad El Kadmiri

Résumé

La méthode comparative est au cœur des développements de l'arbitrage international. Les controverses épistémologiques récurrentes sur la nature du droit comparé et ses relations avec la méthode ont constitué un obstacle au développement du sujet ainsi redéfini. Partant du principe que la méthode est particulière à l'individu qui se propose d'étudier un objet comparativement, la question initiale détermine également la méthode à déployer. Conséquemment, une appréhension du regard de la comparaison ainsi que de la méthodologie sont nécessaires. Puisque la méthode comparative n'est pas universelle, la question de la méthodologie est spécifiquement abordée. Le second développement important de cet article concerne la contribution que le droit comparé peut apporter à l'enseignement de l'arbitrage international. Les usages légitimes et les détournements de la méthode comparative sont mis en évidence. Identifiant la fonction éducative du droit comparé comme une de ses facettes principales et l'arbitrage comme appartenant au domaine de la pratique, la réconciliation de ces deux composantes semble difficile. Un examen critique du traitement du droit comparé dans la littérature est entrepris avant d'aborder les lacunes et besoins du sujet dans une conclusion sur l'orientation devant être prise pour traiter des questions de comparaison en matière d'arbitrage international.

Mots clés : Arbitrage, Arbitrage international, Comparaison, Droit comparé, Éducation, Enseignement, Épistémologie, Fonctionnalisme, Grille de lecture, Méthode, Méthodologie, Perspective, Pluridisciplinarité, Savoir

Abstract

The comparative method is central to the developments of international arbitration. The recurrent epistemological debates on the nature of comparative law and its relationship with method have constituted a hindrance to the developments of the subject thus redefined. Starting from the premise that method is particular to the individual who sets to study an object comparatively, the initial question also determines the method to deploy. Therefore, an awareness of both the gaze of the comparison and methodology is necessary.

Since the comparative method is not pan-disciplinary, the question of methodology is specifically addressed. The second salient development of this paper is concerned with the contribution comparative law can make to the teaching of international arbitration. Uses and misuses of the comparative method are underlined. Identifying the educational function of comparative law as one of its principal facets and arbitration as belonging to the realm of practice, the reconciliation of these two components seems difficult. A critical investigation on the treatment of comparative law in the literature is conducted before discussing shortcomings and needs in a conclusion on the direction scholarship should take to challenge comparative issues in international arbitration.

Keywords: Arbitration, Comparative Law, Comparison, Education, Epistemology, Functionalism, Interdisciplinarity, International Arbitration, Method, Methodology, Perspective, Scholarship, Teaching, Framework

TABLE OF CONTENTS

I.	EXORDIUM.....	168
A.	Summary Definition: Identification of the Object.....	168
B.	Method as a Particular Yardstick: Lessons from Modern Rationalism .	171
C.	Formulation of a Reliable Framework: Amateurism, Specialism and Exclusivity.....	174
II.	THE COMPARATIVE METHODS	177
A.	Comparative Law and Method: Persistence of Terminological Uncertainties.....	178
1.	Epistemological Disambiguation: The Methods of Comparison	178
2.	Within and Beyond Method: Controversial Dichotomy.....	181
3.	Plurality of Views and Unity of Approach: Systematism as Guidance	183
B.	The Gaze of the Comparison: The Subject at the Source of the Understanding	185
1.	Preponderance of Perspective: Parable of the Comparatist's Foot	185
2.	Difficulties in the Characterisation of the Comparatist's Outlook	188
C.	Focus on Methods: A Systematic Comparison Process Beyond Amateurism.....	189
1.	The Comparison Process: Relevance of the Syllogistic Reasoning Method	189
2.	Functionalism: Old Fashioned Tool?	192

III.	COMPARATIVE LAW AND INTERNATIONAL ARBITRATION SCHOLARSHIP ..	195
A.	Comparative Law and the Arbitral Practice: Uses and Misuses	195
1.	Uses of Comparative Law in International Arbitration: Legitimate Benefits	195
2.	Misuses of Comparative Law in International Arbitration: Diverted Science.....	197
B.	Comparative Law for Educational Purposes: Reconciliation of Practice and Theory	199
1.	A Focus on the Educational Function of Comparative Law	199
2.	Some Remarks on Reconciling Practice and Theory	202
C.	The Treatment of Comparative Law in the Literature: Critical Examination	204
1.	Explicit Treatment of Comparative Law: Perspectivism and Imperialism	204
2.	Implicit Treatment of quasi-Comparative Law: Unsystematic Coverage	206
IV.	THE FUTURE OF COMPARATIVE INTERNATIONAL ARBITRATION SCHOLARSHIP.....	208
V.	APPENDIX	210

I. EXORDIUM

On ne peut se passer d'une méthode pour se mettre en quête de la vérité des choses. [...] Toute la méthode réside dans la mise en ordre et la disposition des objets vers lesquels il faut tourner le regard de l'esprit, pour découvrir quelque vérité...

René Descartes¹

A. Summary Definition: Identification of the Object

Ius Comparatum – It is customary to introduce a subject by defining its key terms. When the opportunity arose to publish under the aegis of the venerable International Academy of Comparative Law which is on the verge of celebrating its centenary anniversary, the topic to be discussed in the field of ‘international arbitration’ was the use made therein of ‘comparative law methodology’.² Two and three words to be defined then – making up for a mere total of five. A simple task in appearance. The reality is far more convoluted but shall be kept within reasonable limits. The birth of *Ius Comparatum* augurs the scientific orientation of the Academy and, hopefully, the publication shall be a continuous testament of its progress in the fulfilment of the mission entrenched in article 2 of its Statutes providing that “[t]he purpose of the Academy is the comparative study of legal systems.” Prominent comparative law scholars agree on the fact that a publication based on international cooperation and focusing on specific methodological issues is the most

¹ René Descartes, *Règles pour la direction de l'esprit* (Librairie Générale Française 2002) Rules IV & V, 88, 98. Rule V is akin to the third precept of the *Discourse* in René Descartes, *Discours de la méthode* (LGF 2000) 90. See René Descartes, *A Discourse on the Method* (Ian Maclean tr, OUP 2006) 17 for an English translation. French citations are reproduced in original language in accordance with the publication's bilingualism. See Xavier Blanc-Jouvan, ‘Le cinquantième de la Revue’ (1999) 51 *Revue internationale de droit comparé* 751.

² The International Academy of Comparative Law was founded at The Hague, Netherlands on 13 September 1924 and is now headquartered 28 rue Saint-Guillaume in Paris, France with the co-tenant *Institut de Droit Comparé* of the University of Paris founded in 1931.

appropriate format for the refinement of the subject.³ Thus, papers of this inaugural volume should correlate with and complement each other.

Definitions – The term ‘use’ is understood in its general acceptance and will not require an in-depth examination. In this regard, however, Immanuel Kant seemed to consider in *De mundi sensibilis atque intelligibilis forma et principiis* (simplified by *Dissertation of 1770*) that the use of method was the premise of science. In his words,

*[i]n all the sciences of which the principles are given intuitively, [...] use gives method. After a science has attained a certain fullness and orderliness, trial and error show what path and what procedure must be pursued if it is to be brought to completion, and made to shine more purely, once the blemishes both of mistakes and of confused thoughts have been eliminated.*⁴

The author introduced the term ‘scholarship’ to the discussion. This is perfectly in line with the Academy’s ethos. In fact, ‘comparative law methodology’ and ‘teaching comparative law’ along with the ‘future of the International Academy of Comparative Law’ were the three core topics under discussion during the Ceremony of 15 May 2017 in Honour of Five Great Comparatists. The first two mentioned here are the concern of this paper. These topics,

...represent the avenues by means of which we intend to develop the reflections about the role of the Academy in order to cope with the current challenges of comparative law. [...] If the Academy itself and the comparative law methodology are important to us and require clear definitions for any future project, the aspects related to teaching are not less significant. In fact, the growing internationalisation of legal education

³ André Tunc, ‘France, Notion et objectifs d’une revue de droit comparé’ (1975) 27 (1) RIDC 52; Xavier Blanc-Jouvan, ‘Le rôle international d’une revue de droit comparé’ (1975) 27 (1) RIDC 58; Mathias Reimann, ‘The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century’ (2002) 50 Am J Comp L 673, 699.

⁴ Immanuel Kant, *Theoretical Philosophy, 1755–1770* (David Walford and Ralf Meerbote eds, CUP 1992) Section 5, 406 (original emphasis). Kant’s metaphysical dimension of method is beyond the scope of this paper; our focus is on the logical use of the understanding in the intuitive sphere. For an antagonistic view, see Paul Feyerabend, *Against Method* (4th edn, Verso 2010). Its 1975 original subtitle: *Outline of an Anarchistic Theory of Knowledge*.

plays today a key role in advancing the comparative legal method. Knowledge of other legal systems can be acquired through studying abroad and following courses which address international and regional legal questions. What about the comparative approach in legal education? What does it entail, and how should it be implemented? The Academy should not be absent in this crucial debate. [...] In reality, the main contribution other legal researchers are expecting from us is the answer to the question 'how to compare?' [...] We think that the Academy could offer the instruments to deal with comparative law more systematically. In doing so, we would encourage young scholars to deal seriously with comparative law, which ultimately could have a positive impact on the improvement of legal scholarship in general.⁵

Regarding 'international arbitration', there is no generic acceptance for this process. Jurisdictions across the globe differ in their conceptions of its nature and sources. Suffice to provide here a summary definition. Thus, according to the authors of a leading treatise, "arbitration should be defined by reference to two constituent elements which commentators and the courts almost unanimously recognize. First, the arbitrators' task is to resolve a dispute. Second, the source of this judicial role is a contract."⁶ Therefore, arbitration is the extrajudicial⁷ binding process whereby one, or many, independent and impartial individual(s) is, or are, entrusted by the equally binding private will of litigants to settle their dispute. The international dimension of arbitration can be resulting from – among other criteria – many connecting factors such as, for instance, the place of business, subject matter or place of arbitration.⁸

Object – It might be considered that the title of the current contribution is in its essence subversive.⁹ Indeed, the alert reader will note that the term

⁵ Katharina Boele-Woelki and Diego P Fernández Arroyo (eds), *The Past, Present and Future of Comparative Law* (vol 29, Springer 2018) Preface, v–xiv.

⁶ Emmanuel Gaillard and John Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Kluwer Law International 1999) 11.

⁷ Nigel Blackaby and Constantine Partasides, *Redfern and Hunter on International Arbitration* (6th edn, OUP 2015) 2. Although this is partially incorrect in general and especially in the enforcement stage.

⁸ Article 1 (3) of the UNCITRAL Model Law on International Commercial Arbitration (amended on 7 July 2006).

⁹ George Fletcher, 'Comparative Law as a Subversive Discipline' (1998) 46 Am J Comp L 684. It is suggested the whole discipline carries a subversive nature.

‘law’ has been omitted from the ‘comparative law methodology’ triad. The *res* (object to be known)¹⁰ is both the comparative method and international arbitration scholarship. Hence, ‘law’ appears totally superfluous since “method and methodology are to be distinguished from the substance of a discipline.”¹¹ Five terms to examine then with scholarship carrying the meaning elicited by the Academy, that is, the teaching of the comparative method.

B. Method as a Particular Yardstick: Lessons from Modern Rationalism

Definition of method – Method also replaced methodology in the title of this paper. The reason is that the accepted definition of methodology entails a systematic approach while method alone accounts for particularity. Etymologically, “method connotes the search for a certain form of truth. The word originates from the Greek ‘methodos’ (‘μέθοδος’), which consists of the prefix ‘meta-’ (‘after’) and of the suffix hodos (‘way’). The compound suggests ‘pursuit of knowledge’ and ‘mode of investigation’.”¹² Simply put, a “method is a means of obtaining data” according to Professor Esin Örüçü.¹³ Similarly, Professor Geoffrey Samuel explained,

*[m]ethodology [...] has been described as a route to follow in order to achieve a result; and the expression ‘methodology’ is a scientific study of these methods, of these ‘routes to follow’. More precisely method has been seen as a ‘manner of conducting thought’ [...] different approaches entail different methods.*¹⁴

Rationalism and method – Without a doubt, the vocable is also inherited from the founding father of modern rationalism, whose influence on the world’s ideas is still pregnant in our age.¹⁵ René Descartes released in 1637 a

¹⁰ Geoffrey Samuel, ‘Taking Methods Seriously (Part Two)’ (2007) 2 J Comp L 211.

¹¹ Geoffrey Samuel, *An Introduction to Comparative Law Theory and Method* (Hart Publishing 2014) 2.

¹² Simone Glanert, ‘Method?’ in Pier G Monateri (ed), *Methods of Comparative Law* (Edward Elgar 2012) 65.

¹³ Esin Örüçü, ‘Methodological Aspects of Comparative Law’ (2006) 8 Eur J L Reform 29.

¹⁴ Samuel, *An Introduction to Comparative Law Theory and Method* (n 11) 2.

¹⁵ René Guénon, *Orient et occident* (Véga 2006) 43–4; René Guénon, *La crise du monde moderne* (Gallimard 1973) 108. See also Feyerabend (n 4) 223 for a dismissal of the universal relevance of science and rationality,

seminal and biographical *magnum opus* entitled *A Discourse on the Method of Correctly Conducting One's Reason and Seeking Truth in the Sciences*.¹⁶ A decade prior to this classical masterpiece, *Regulae ad directionem ingenii* (*Rules for the Direction of the Understanding*) was written but not completed. The *Rules* were designed in a more systematic manner than the later *Discourse* and formed part of the *Opuscula posthuma, physica et mathematica* only published in 1701 (in Latin) together with, among other writings, *The Search for Truth by the Natural Light*.¹⁷ Originally published in French at a time when Latin was the learned language of intellectual elites, the *Discourse on 'the' Method* aimed at a larger – albeit not vulgar – audience, but particularity was the essence of its exposition.¹⁸ Descartes provided a definition of his personal conception of method in his earlier *Rules*.¹⁹ The following discussion is openly subsumed under Cartesian philosophy.

State of experimenting? – It seems crucial to emphasise here that our rejection of methodology as an epistemological framework is also a result of the fact that systematism and comparativism in law may prove to be an irreconcilable oxymoron.²⁰ “Methodology is riddled with problems” admitted Professor Örücü.²¹ Former Director of the Max Planck Institute for Comparative and International Private Law based in Hamburg, Professor Konrad Zweigert,

and 241 for the admission of the relative validity of rationality and the contingent improvements it may be subject to.

¹⁶ Descartes, *A Discourse on the Method* (n 1) vii; Descartes, *Discours de la méthode* (n 1) 12, 65: “*Discours de la méthode pour bien conduire sa raison et chercher la vérité dans les sciences, plus la dioptrique, les météores et la géométrie qui sont des essais de cette méthode.*”

¹⁷ René Descartes, *La recherche de la vérité par la lumière naturelle* (LGF 2010).

¹⁸ Descartes, *Discours de la méthode* (n 1) 70: “*Ainsi mon dessein n’est pas d’enseigner ici la méthode que chacun doit suivre pour bien conduire sa raison ; mais seulement de faire voir en quelle sorte j’ai tâché de conduire la mienne*” (emphasis added). See Descartes, *A Discourse on the Method* (n 1) 6 for an English translation.

¹⁹ Descartes, *Règles pour la direction de l’esprit* (n 1) Rule IV, 89: “*Ce que j’entends maintenant par méthode, ce sont des règles certaines et faciles, par l’observation exacte desquelles on sera sûr de ne jamais prendre une erreur pour une vérité, et, sans y dépenser inutilement les forces de son esprit, mais en accroissant son savoir par un progrès continu, de parvenir à la connaissance vraie de tout ce dont on sera capable.*”

²⁰ Konrad Zweigert, ‘Methodological Problems in Comparative Law’ (1972) 7 *Isr L Rev* 465; Samuel, *An Introduction to Comparative Law Theory and Method* (n 11) 6, 173.

²¹ Örücü (n 13) 30.

even suggested unreliability was the fate of methodology in comparative law. In his terms,

[t]his is too young a discipline to expect of it a definite set of methods. Even today, the proper method for tackling a problem of comparative law must usually be found by trial and error. It is part of the comparatist's experience that his method is not predetermined in detail; if at all, it may be proposed as an hypothesis to be verified or falsified by its results. A basic error of earlier theoretical concepts of comparative law was that its premises, its aims and methods, were definable by philosophical or systematic deduction. It still remains doubtful whether any logical and complete methodology of comparative law which can claim absolute reliability is at all possible.²²

Professor Patrick Glenn also acknowledged that “the history of comparative law is not one of adherence to a methodological norm but rather one of deviation and variety” and “reveals a preoccupation with principles of method, though no consistency in their application.”²³ In the same vein, Paul Feyerabend explained,

[t]he idea of a method that contains firm, unchanging, and absolutely binding principles for conducting the business of science meets considerable difficulty when confronted with the results of historical research. We find, then, that there is not a single rule, however plausible, and however firmly grounded in epistemology, that is not violated at some time or other.²⁴

This does not mean, however, that attempts to formalise a framework for a viable approach to comparative legal studies are in vain.²⁵ Far from it. Almost half a century has passed since Professor Zweigert's observation and one has to acknowledge that various efforts have been attempted to extract the discipline outside of its 'state of experimenting'.²⁶

²² Zweigert (n 20).

²³ Patrick Glenn, 'Against Method?' in Maurice Adams and Dirk Heirbaut (eds), *The Method and Culture of Comparative Law* (Hart Publishing 2014) 177.

²⁴ Feyerabend (n 4) 7; Glenn, 'Against Method?' (n 23) 186, 188.

²⁵ Stephen Smith, 'Comparative Legal Scholarship as Ordinary Legal Scholarship' (2010) 5 J Comp L 355.

²⁶ Zweigert (n 20); Samuel, *An Introduction to Comparative Law Theory and Method* (n 11) 3, 6.

C. Formulation of a Reliable Framework: Amateurism, Specialism and Exclusivity

Theoretical framework – Repeated calls for the establishment of such framework have been made in the past decades and the Academy's initiative appears to be the perfect occasion to insist on its modalities. In this regard, Professor Walter Kamba declared,

...comparative law still lacks a clearly formulated and widely accepted theoretical framework within which specific comparative legal studies and research may be undertaken in a meaningful and effective manner – a framework which would also be valuable to the legal practitioner for the recognising and handling of legal problems involving foreign law. [...] A theoretical framework is a necessary guide to action and impinges upon, and constitutes the foundation of, all specific comparative legal studies and research. It is this framework which gives unity to what appear to be discreet particular projects of comparative law. It is this theoretical aspect around which a common tradition can derive – around which a stock of knowledge capable of transmission and refinement can accumulate.²⁷

Professor Arthur von Mehren gave the same account three years before Professor Kamba.²⁸ Some three decades following the observation of von Mehren and the efforts of Kamba, the situation remained identical in Professor Mathias Reimann's words and this leads to revisiting the validity of the methodological dimension of comparative law. According to Reimann,

...the lack of theoretical foundations is the main (or at least a major) reason for the failure of comparative law to make overall progress [...] the field as a whole lacks a sound theoretical framework. [...] Comparative law will probably not make serious progress until it bids farewell to its current laissez faire approach to theoretical and methodological basics. The discipline would be better off if comparatists gathered the courage to define a common canon of knowledge, to agree on a limited set of ultimate goals, and to commit to long-term and interdisciplinary cooperation. By

²⁷ Walter Kamba, 'Comparative Law: A Theoretical Framework' (1974) 23 Intl Comp L Q 485, 518.

²⁸ Arthur von Mehren, 'An Academic Tradition for Comparative Law?' (1971) 19 Am J Comp L 624.

*taking these steps, comparative law can perhaps learn to walk in a chosen direction rather than continue to stumble along without aim.*²⁹

Amateurism – Anarchy and amateurism are the resultant of the lack of systematism in the discipline. These are detrimental to legal science and constitute an impediment to the fruits that may otherwise be validly yielded by a methodological approach. Thus, Professor Annelise Riles felt able to declare that “amateurism is perhaps comparative law’s defining methodological trait” and its persistence “in late twentieth century comparative law, long after the infusion of modern social scientific paradigms and methods into other fields of legal scholarship, then, is treated as something of an embarrassment.”³⁰ For Professor Samuel,

*...law is governed not by an epistemological approach of inquiry, but by one of authority, and that while such an approach is adequate, indeed necessary, for national lawyers, it is inadequate for comparative lawyers.*³¹

*...[M]oving from ‘black-letter’ law to comparative legal studies is fraught with danger [...] because one is forced to make methodological, paradigm and orientation shifts if a lawyer is to do serious comparative work. [...] Only by operating outside the authority approach will the comparison aspect of comparative law escape from being amateurish.*³²

*Amateurism can be fatal to a serious research project and can result in work that is pretentious and ridiculous and (or) full of errors.*³³

Discussing its effects on education, Professor Reimann seemed less concerned than Samuel when he acknowledged “[i]t is true that the danger of amateurism looms large – even among comparatists and certainly among others. [...] Specialists are always tempted to believe that nonspecialists just cannot [use comparative or other perspectives], but at least on a basic level, they often can.”³⁴

²⁹ Reimann, ‘The Progress and Failure of Comparative Law’ (n 3) 695, 699–700.

³⁰ Annelise Riles, ‘Encountering Amateurism: John Henry Wigmore and the Uses of American Formalism’ in *Rethinking the Masters of Comparative Law* (Annelise Riles ed, Hart Publishing 2001) 94.

³¹ Geoffrey Samuel, ‘Taking Methods Seriously (Part One)’ (2007) 2 J Comp L 94–5.

³² Samuel, ‘Taking Methods Seriously (Part Two)’ (n 10) 235–6.

³³ Samuel, *An Introduction to Comparative Law Theory and Method* (n 11) 35.

³⁴ Mathias Reimann, ‘The End of Comparative Law as an Autonomous Subject’ (1996) 11 Tul Eur & Civ LF 67.

Specialism and exclusivity – The obverse pitfall to amateurism would be specialism confining the method to a small group of highly trained individuals. These specialists would in turn provide their expertise to lawyers and judges who admittedly face severe time constraints and a general incompetence impinging upon their ascertainment of foreign law – let alone comparison thereof.³⁵ This process has been amusingly designated as ‘packaging’ by a foremost scholar in the person of Professor Sir Basil Markesinis. Such ‘package’ is devised to meet the needs of practitioners by making foreign law ‘easily digestible’.³⁶ Regardless of the various difficulties encountered by practitioners and jurists, relying on a *delivery* (albeit express) from a third party seems unsatisfactory. Awareness of the comparative method should contribute to the development of an *autonomously conducted* and *time effective* discipline. This is one of the guiding hopes of this humble contribution. Could packaging apply to the comparative method instead of the interstitial dissemination by experts of partial and casuistic foreign law findings? This is an essential question as former President of the Academy, Professor Konstantinos Kerameus revealed the dangers of specialism leading to exclusivity which he attributed to the potential neglect of other branches of domestic or international law.

Exclusivity would result in making comparative law an esoteric, and for most lawyers inaccessible, intellectual activity. The comparative method, which had to work hard in order to gain general acceptance, would again be eroded to a seclusive business, reserved for the luxurious curiosity of a few strange human beings. Comparative law runs the serious risk of being marginalized unless it tries to be established as a central, frequent, and almost indispensable method of legal research. [...] [C]omparative law, because it is a descriptive rather than a normative or interpretative discipline, is accustomed to well-rounded presentations of legal issues but not necessarily to clear-cut answers. By engaging in comparative law exclusively, a lawyer may go astray and lose sight of the main structure of

³⁵ Basil Markesinis, *Comparative Law in the Courtroom and Classroom: The Story of the Last Thirty-Five Years* (Hart publishing 2003) Foreword by former UK Supreme Court President Lord Phillips of Worth Matravers, vii.

³⁶ *ibid* 36, 158; Basil Markesinis, ‘Scholarship, Reputation of Scholarship and Legacy: Provocative Reflections from a Comparatist’s Point of View’ (2003) 38 *Irish Jurist* 20, 23. See also Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* (Tony Weir tr, 3rd edn, OUP 1998) 20.

*legal problems and their expected solutions. Therefore, a conjunction of comparative law and any branch of substantive or procedural law will probably have the benefit of keeping lawyers in the mainstream of legal reasoning while enriching it with the comparative dimension.*³⁷

Furthermore, Professor Glenn regarded comparative legal practice as a “rapidly expanding field of legal practice” and “a new addition to the discipline of comparative law and implies its generalization and democratization.” In his view, the comparative methods “should become more mainstream in legal thought. This has important consequences, among other things, for legal education.”³⁸

This contribution will be the perfect opportunity to introduce an uninitiated audience to the characteristics and uses of the comparative method in the area of international arbitration with a particular focus on the academic literature; breaking with the exclusivity of theorists who tend to study the subject in isolation – at the exclusion of few notable exceptions.³⁹ Beginning with definitions, the first question addressed is: what is it to compare (II.A)? Then, who compares (II.B)? Finally, how to compare (II.C)?

II. THE COMPARATIVE METHODS

Pour parfaire la science, il faut passer en revue dans leur totalité et une par une, d'un mouvement continu et absolument ininterrompu de la pensée, toutes les choses qui concernent notre propos, et les embrasser en une énumération suffisante et ordonnée.

René Descartes⁴⁰

³⁷ Konstantinos Kerameus, ‘Comparative Law and Comparative Lawyers: Opening Remarks’ (2001) 75 Tul L Rev 868–9. See also Smith (n 25).

³⁸ Patrick Glenn, ‘Comparative Law and Legal Practice: On Removing the Borders’ (2001) 75 Tul L Rev 1002.

³⁹ Maurice Adams and Jacco Bomhoff (eds), *Practice and Theory in Comparative Law* (CUP 2012).

⁴⁰ Descartes, *Règles pour la direction de l'esprit* (n 1) Rule VII, 106. This rule is akin to the fourth precept of the *Discourse* (n 1) 90 in French and 17 for the English translation.

A. Comparative Law and Method: Persistence of Terminological Uncertainties

1. *Epistemological Disambiguation: The Methods of Comparison*

Epistemological debates – The assumptions underpinning the recurrent semantic controversies that lie in the definition of comparative law are not to be confused with a worn academic quarrel; they hinder the progress of the subject.⁴¹ According to Professor Reimann, the beginning of the 21st century was “a time of rising complaints about the discipline’s malaise” since “comparative law has been a serious failure because it has not developed into a coherent and intellectually convincing discipline. [...] The most embarrassing theoretical weakness is the continuing lack of an understanding of what it really means to compare.”⁴² Professor Xavier Blanc-Jouvan also noted “[t]he more progress a science makes, the more crucial it becomes to reach a bare consensus on its goals and methods.”⁴³ Although these controversies stem from a philological debate, jurists have been bold enough to venture outside their territory with more or less success.⁴⁴ Some suggest settling the misunderstanding would be a futile endeavour.⁴⁵ This terminological ascertainment, however, responds to an epistemic duty to characterise the nature of the subject – it is a matter of truth and authenticity. In this regard, Professor Samuel noted that “methodology rightly forms a central part of epistemology. To take methods seriously is to take knowledge (epistemology) seriously” and “[b]efore one can examine the methods of comparative law, the subject itself needs to be defined, since definition and method are quite closely linked.”⁴⁶ Likewise, Professor Valentina Vadi declared that “[d]iscourse on

⁴¹ Blanc-Jouvan, ‘Le cinquantenaire de la Revue’ (n 1) 748.

⁴² Reimann, ‘The Progress and Failure of Comparative Law’ (n 3) 672–3, 686.

⁴³ Xavier Blanc-Jouvan, ‘Centennial World Congress on Comparative Law: Opening Remarks’ (2001) 75 Tul L Rev 862–3.

⁴⁴ Maximilian Schmitthoff, ‘The Science of Comparative Law’ (1939) 7 (1) Cambridge L J 95.

⁴⁵ *id.*; Zweigert (n 20); Xavier Blanc-Jouvan, ‘Centennial World Congress on Comparative Law: Closing Remarks’ (2001) 75 Tul L Rev 1235.

⁴⁶ Samuel, ‘Taking Methods Seriously (Part One)’ (n 31) 118; Samuel, *An Introduction to Comparative Law Theory and Method* (n 11) 8.

method is essential because it clarifies the tools of the discipline and its objectives.”⁴⁷

Methods rather than method – It appears appropriate to begin here with an exegetic assessment of the meaning of the topic by reviewing conceptions expressed in a fairly abundant literature. Perhaps to extinguish any established illusion at the outset, will be quoted first the late Professor Sir Otto Kahn-Freund whose views were characterised with audacity.

*The trouble is that [comparative law] [...] has by common consent the somewhat unusual characteristic that it does not exist. Comparative law – this has almost become a common place – is not a topic, but a method. Or better: it is the common name for a variety of methods of looking at law, and especially of looking at one’s own law.*⁴⁸

This far from marginal nihilistic appreciation of the subject is shared by a legion of scholars.⁴⁹ This enlightening negation does not appear abusive – although denied by later scholars as will be seen – but may fail to help characterise the subject of this paper. Defining a concept negatively is only partially revealing its nature. Fortunately, Kahn-Freund’s inaugural lecture upon taking the Chair of Comparative Law at the University of Oxford did not end there. Indeed, there would be little motives of pride in the promotion. His following statement is, however, highly interesting. For it acknowledges the existence of a ‘variety of methods’ and the verb to ‘look’ appears twice. Would there be many *methods* of comparison as many scholars noted? What do these methods entail? Professors Maurice Adams and John Griffiths identified the cause of the variety of methods in comparative law in these terms.

All scientific work begins with a question about the world we live in. Questions go before methods, and until one has specified what the question is, no sensible discussion of methodology is possible. [...] Actually, it is a whole collection of methods that may be helpful in seeking answers

⁴⁷ Valentina Vadi, ‘Critical Comparisons: The Role of Comparative Law in Investment Treaty Arbitration’ (2010) 39 Denv J Intl L & Poly 77.

⁴⁸ Otto Kahn-Freund, ‘Comparative Law as an Academic Subject’ (1966) 82 LQR 41. See also Markesinis, ‘Scholarship, Reputation of Scholarship and Legacy’ (n 36) 9.

⁴⁹ ‘Bibliographie, J. Hall, Comparative Law and Social Theory’ (1996) 18 RIDC 307.

to a variety of sorts of questions about law. What legal comparison entails in a concrete situation depends on the sort of question one wants to try to answer. [...] [T]here is no such thing as a single method which, applied as a sort of recipe, will lead to the right results.⁵⁰

This view is widely accepted among the scholarly community.⁵¹ Dr Simone Glanert affirmed “*method is not absolute*. Within the diversity of methods obtaining in each discipline, it will be claimed by the proponents of one particular method that their model ought to prevail, that it must be regarded as the best method.”⁵² For Professor Örüçü,

[s]ince there is no single method or single perspective exclusive to comparative law, we cannot talk of one ‘comparative law method’ or ‘comparative law methodology’ or even one ‘methodology of comparative law’, but of ‘methods employed in comparative law research’. [...] When one accepts that there is no one methodological paradigm, then a plurality of methods can be practised. I believe that the availability of a multiplicity of approaches can only enrich research possibilities. As the comparative law research is open-ended, the methodology is determined by the strategy of the comparative lawyer.⁵³

Are these various methods then also the corollary of the *subjectivity* of the *intellectus* (knowing subject)?⁵⁴ (see Sect. II. B) Also, to which extent does this outlook interfere with, or merely influence, his assessment? Are these questions, by any means, relevant for international arbitration? If so, to which extent? (see Sect. III. C) Some answers will be provided to these questions with no pretention to be exhaustive considering the vastness of the subject.

⁵⁰ Maurice Adams and John Griffiths, ‘Against ‘Comparative Method’: Explaining Similarities and Differences’ in Adams and Bomhoff (n 39) 279–281, 301.

⁵¹ Kamba (n 27) 511; Örüçü (n 13) 41; Catherine Valcke, ‘Reflections on Comparative Law Methodology: Getting Inside Contract Law’ in Adams and Bomhoff (n 39) 23; Glenn, ‘Against Method?’ (n 23); Samuel, *An Introduction to Comparative Law Theory and Method* (n 11) 45.

⁵² Glanert (n 12) 66 (original emphasis).

⁵³ Örüçü (n 13) 41, 31.

⁵⁴ Samuel, ‘Taking Methods Seriously (Part One)’ (n 46).

2. *Within and Beyond Method: Controversial Dichotomy*

Comparative ‘law’ – Examining the subject further, increasing the characterisation difficulty, it is essential to dissipate the recurrent misconceptions about ‘comparative law’ and the ‘method(s)’ pertaining to it. Misunderstandings that are in part due to their definition but also to the ambit and aims of the subject. Professor Glenn revealed “the origin of the word ‘compare’, as a combination of the Latin words ‘with’, or cum (com), and ‘pare’, or peer or equal.”⁵⁵ According to Kamba,

*Convenience and historical accident seem to account for the choice and continued use of the somewhat misleading name ‘comparative law.’ Other names which would more accurately designate the subject have been suggested – names such as ‘the comparison of laws,’ ‘the comparative study of law or laws,’ ‘comparative legal study and research’.*⁵⁶

Professor Kerameus noted in this regard that “because law is not only a reference but is the very field of our study, the traditional term of comparative law is fully justified and suitably reflects the field of our scholarly endeavors.”⁵⁷ It is somehow amusing and quite disturbing at the same time to note that Professor Blanc-Jouvan, then treasurer of the Academy, declared “we all admit that the expression is inadequate” adopting a general opinion omitting the view expressed in the same congress by President Kerameus and published in the same review!⁵⁸

Beyond method? – Few early exponents of comparative law as a science seemed to have attributed an independent realm to the discipline.⁵⁹ This was the prevailing conception on comparative law during the early 20th century as expressed in the seminal Congress of 1900 with some notable dissenting opinions such as Frederick Pollock who declared “*le droit comparé n’est pas une science propre, mais [...] n’est que l’introduction de la méthode comparée dans*

⁵⁵ Glenn, ‘Against Method?’ (n 23) 186.

⁵⁶ Kamba (n 27) 487.

⁵⁷ Kerameus (n 37) 866.

⁵⁸ Blanc-Jouvan, ‘Centennial World Congress on Comparative Law: Closing Remarks’ (n 45) 1235.

⁵⁹ Harold Gutteridge, ‘The Value of Comparative Law’ (1931) J Soc Pub T L 27.

le droit.”⁶⁰ A quite debated view would be to consider comparative law as a branch of law, that is a subject akin to the substantive areas of the law such as contract or property law. According to some comparatists, it is not.⁶¹ However, Professor Reimann recently assumed at the dawn of the 21st century that this view belonged to the past, since the accumulated knowledge resulting from the various comparative endeavours have amounted to the establishment of an independent field of law. In his view, the claims confining the discipline to method may have been valid more than half a century ago since “the discipline consisted mainly of a particular way of looking at law and of a research agenda [...] [but] the actual *knowledge* accumulated in the meantime makes [this] position indefensible.”⁶² For Professor Kerameus, among these “two schools of thought, which qualify comparative law either as an auxiliary method of engaging in serious legal research or as a quasi-autonomous branch of law aspiring to equal treatment with other, more traditional and down-to-earth, parts of a legal system [...] the first scholarly direction [...] is the prevailing one.”⁶³ Professor Vadi simply considered this as a false dichotomy.⁶⁴ In the same vein, Professor Smith indicated that “[c]omparative legal scholarship is simply scholarship that compares legal phenomena.”⁶⁵

It remains to be seen if in the area of international arbitration, the use of the comparative method has contributed to the development of an autonomous and coherent body of knowledge which constitutes ‘comparative international arbitration’ or does the controversial dichotomy still make sense in that arbitration still requires the support of method.

⁶⁰ Frederick Pollock in *Congrès international de droit comparé, Procès-verbaux des séances et documents* (vol 1, LGDJ 1905) 60.

⁶¹ Kamba (n 27) 486–7; Ugo Mattei, ‘Some Realism about Comparativism: Comparative Law Teaching in the Hegemonic Jurisdiction’ (2002) 50 Am J Comp L Supp 87.

⁶² Reimann, ‘The Progress and Failure of Comparative Law’ (n 3) 683–4 (original emphasis).

⁶³ Kerameus (n 57).

⁶⁴ Vadi (n 47) 77.

⁶⁵ Smith (n 25) 336.

3. *Plurality of Views and Unity of Approach: Systematism as Guidance*

Comparison and systematism – Yet, there seems to be an inexcusable misunderstanding which would be to treat foreign or international law as comparative for the mere reason that one is looking outside his own. According to Professors Zweigert and Kötz, “the mere study of foreign law falls short of being comparative law.”⁶⁶ This aberration is not only the fact of busy practitioners. The academic curricula and works are not remote from this deceptive fallacy. Perhaps is it the result of an “absence of any serious interest in method (and epistemology) by academic lawyers.”⁶⁷ Those who fall in this shortcoming seem to reduce comparative law to its ‘extra dimension of internationalism’ using the formula of our learned German Professors discarding by the same fact its determining facet.⁶⁸ Taking a step further in the elicitation of the formulation, Professor Kamba is of the opinion that “comparative law is the *systematic application* of comparison to law.”⁶⁹ It is not without significance that Professor Harold Gutteridge attempted to settle the question of the meaning of comparative law in an article discussing its *value* indicating that, “the comparative method lends itself to the study of any branch of legal learning, and that its division into separate categories serves no useful purpose, and may cause confusion.”⁷⁰ Pondering on the uses of methodology in comparative law, the Academy – in agreement with Gutteridge – disclosed its agenda noting that “notwithstanding the particular elements which remain specific to each legal field, it is nevertheless possible to establish a general methodological framework for all areas of the law. The Academy should provide the tools to elaborate such framework.”⁷¹ This methodological framework is not incompatible with the plurality of methods used. Thus, Professor Samuel

⁶⁶ Zweigert and Kötz (n 36) 6. See also Roscoe Pound, ‘The Place of Comparative Law in the American Law School Curriculum’ (1934) 8 Tul L Rev 168; Kamba (n 27) 505–6; Blanc-Jouvan, ‘Centennial World Congress on Comparative Law: Closing Remarks’ (n 45) 1236.

⁶⁷ Samuel, ‘Taking Methods Seriously (Part One)’ (n 31) 94.

⁶⁸ Zweigert and Kötz (n 36) 2.

⁶⁹ Kamba (n 27) 486, 489, 506 (original emphasis). See also René David, *Traité élémentaire de droit civil comparé* (LGDJ 1950) 4.

⁷⁰ Gutteridge (n 59) 28.

⁷¹ Boele-Woelki and Fernández Arroyo (n 5) Preface, x.

observed “[j]ust as one uses different maps in different situations, so the comparatist should employ different methodologies to reveal different kinds of knowledge [...] and not seek to impose a single knowledge ‘map’. Difference is what matters.”⁷² Instead, a general approach is to be favoured regardless of the applicative substantive subject.

Comparison of (and in) law – It is regrettable, however, that comparative law cannot derive its methodology from a universal science of comparison as it is contained in law which is characterised with a plurality of approaches. Professor Kerameus astutely noted,

*[a] general science of comparison is, at least up to now, nonexistent. [...] Therefore, as things stand now, comparative law is neither supported by an established discipline of general comparison nor fertilized by any comparative glimpses produced in other areas of social or human sciences. It stands alone, embodied in law and law only and put in the service of law and law only. [...] [C]omparative law cannot rely on any developed general theory of comparison, it is more law than comparison. For our discipline, law is not a point of reference, it is our very subject matter.*⁷³

Similarly, Dr Glanert simply remarked, “*method is not pan-disciplinary.*”⁷⁴ The opposite opinion of Professor Gutteridge noting that “[i]n effect, this method of study applies to law similar processes to those which have already been adopted in other sciences” appears too ambitious and impractical.⁷⁵ If it is doubtful these processes would apply equally to law; Professor Samuel believes that, at least, social science methodology is relevant to law and that its neglect is the principal source of amateurism in comparative law.⁷⁶ Professor Blanc-Jouvan also considered that “different approaches to law, to legal science, and to legal education” are “reflected in comparative law” noting that this diversity was “desirable and healthy, as in any science, insofar as divergences nourish

⁷² Samuel, ‘Taking Methods Seriously (Part Two)’ (n 10) 236.

⁷³ Kerameus (n 37) 867.

⁷⁴ Glanert (n 12) 65 (original emphasis).

⁷⁵ Gutteridge (n 59).

⁷⁶ Samuel, ‘Taking Methods Seriously (Part One)’ (n 67).

the debate and further deepen our understanding of the problems.”⁷⁷ Indeed, as Professor Stephen Smith indicated,

*[n]o amount of goodwill and effort will ever produce a shared vision of comparative law. The obstacle is structural: there is nothing in the methodology, subject-matter, challenges or aims of comparative scholarship that does or should distinguish it from domestic scholarship. Comparative legal scholarship is just legal scholarship. Comparative scholars are thus no more likely to agree to a set of common aims and assumptions than are legal scholars generally.*⁷⁸

Professor Zweigert favoured an idiosyncratic, purposive and contextual approach to comparative law which can be manifold depending on the applications, making all the foregoing claims valid.⁷⁹ For the purposes of this article, comparative law will be considered in its methodological dimension. These considerations call into the questioning of subjectivity.

B. The Gaze of the Comparison: The Subject at the Source of the Understanding

1. *Preponderance of Perspective: Parable of the Comparatist's Foot*

Preponderance of perspective – Kahn Freund's definition of comparative law relying on the comparatist's outlook is reminiscent of Descartes' notion of 'regard de l'esprit'⁸⁰ which the subject directs at the objects of comparison following an orderly and particular method. One has to consider that "*method is speculative*. Scholarly work [...] dwells in the realm of representation. Because any representation is generated by a situated observer [...] it is inevitably other than mere description."⁸¹ As Professor Samuel noted, comparative law would be a 'perspective' and "if one sees method as an epistemological issue and

⁷⁷ Blanc-Jouvan, 'Centennial World Congress on Comparative Law: Closing Remarks' (n 45) 1235.

⁷⁸ Smith (n 25).

⁷⁹ Zweigert (n 20) 465.

⁸⁰ Descartes, *Règles pour la direction de l'esprit* (n 1) Rule V, 98.

⁸¹ Glanert (n 12) 69 (original emphasis).

embedded in theory, the dichotomy between ‘method’ and ‘perspective’ becomes very much less pronounced.”⁸² According to Professor Mitchel Lasser,

*[t]his problem of perspective spills into that of methodology and theory. The comparatist must come to terms with the fact that the object of analysis does not simply ‘exist’ and ‘speak for itself’. The comparatist must recognize that she selects what to describe, decides what to focus on and edits the description and analysis accordingly. The adoption of a methodological approach and thus of a theoretical framework, therefore, constructs the object even as it describes it.*⁸³

Günter Frankenberg declared that “perspective [is] a central and determinative element in the discourse of comparative law.”⁸⁴ Professor Vadi affirmed that “depending on the perspective adopted, comparisons may have completely different outcomes. In other words, where one stands on any particular issue is nearly always dependent upon where one sits.”⁸⁵ In the same vein, Professor Blanc-Jouvan believed that “a professor’s approach is not necessarily the same as a practitioner’s; a lawmaker’s approach is not necessarily the same as a judge’s. As important as each approach is, none should be regarded as exclusive. All of them are valid and even complementary.”⁸⁶ To this statement the author would add that the professor’s view assesses and is influenced by the views of the lawmaker and judge (the latter himself should be strongly influenced by the lawmaker in any serious democracy committed to the rule of law, and by the professor for the sake of critical argumentation). Hence the emphasis on *complementarity*.

Comparatist’s foot – In comparative law, this outlook seems to be a determining factor since it is embodied in method. As Glanert noted, “*method is not objective*. Although the promotion of a given method often discloses universalizing aspirations, the fact remains that any method is necessarily

⁸² Samuel, *An Introduction to Comparative Law Theory and Method* (n 11) 2.

⁸³ Mitchel Lasser, ‘The Question of Understanding’ in Pierre Legrand and Roderick Munday (eds), *Comparative Legal Studies: Traditions and Transitions* (CUP 2003) 217.

⁸⁴ Günter Frankenberg, ‘Critical Comparisons: Re-thinking Comparative Law’ (1985) 26 Harv Intl L J 411.

⁸⁵ Vadi (n 47) 78.

⁸⁶ Blanc-Jouvan, ‘Centennial World Congress on Comparative Law: Closing Remarks’ (n 45) 1236.

produced by a particular individual situated in time and space. In other words, any method is someone's method."⁸⁷ The famous parable of John Selden concerning Equity would equally apply to comparative law and epitomises its contingent nature.

[Comparative Law] is a Roguish thing: for Law we have a measure, know what to trust to; [Comparative Law] is according to the Conscience of him that is [Comparatist], and as that is larger or narrower, so is [Comparative Law]. [It is] all one as if they should make the Standard for the measure, we call a Foot, a [Comparatist]'s Foot; what an uncertain Measure would this be? One [Comparatist] has a long Foot, another a short Foot, a Third an indifferent Foot: [It is] the same thing in the [Comparatist]'s Conscience.⁸⁸

Igor Stramignoni identified this issue as the '*question de la comparaison*' which he deemed a "*question vitale pour la connaissance comparatiste du droit*" and is related to the issue of representation.⁸⁹ This question has been formulated in plain terms by a giant comparative theorist by the name of Professor Pierre Legrand.⁹⁰ The late Professor Rudolf Schlesinger employing a less philosophical verbosity noted in his leading casebook *Comparative Law: Cases–Text–Materials*⁹¹ that "[a]n individual's jurisprudential outlook [...] is bound to have a strong influence on the direction and intensity of his interest in Comparative law."⁹² Such 'jurisprudential outlook' has been laconically summed up by Professor Kamba as corresponding to "the comparatist's general attitude to law."⁹³ In the same vein, Professor Roscoe Pound also affirmed "[w]hat we may expect from comparative law depends upon the comparative lawyer and the kind of thing he sets before us as comparative law."⁹⁴

⁸⁷ Glanert (n 12) 67 (original emphasis).

⁸⁸ John Selden, *The Table-Talk* (2nd edn, John Russell Smith 1856) 49. In this metaphor, *Equity* has been replaced by *Comparative Law*; and *Chancellor* by *Comparatist*.

⁸⁹ Igor Stramignoni, 'Le regard de la comparaison : Nietzsche, Heidegger, Derrida' in Pierre Legrand (ed), *Comparer les droits, résolument* (PUF 2009) 161–2.

⁹⁰ Pierre Legrand, 'John Henry Merryman and Comparative Legal Studies: A Dialogue' (1999) 47 *Am J Comp L* 3.

⁹¹ Bertram Willcox, 'Rudolf B. Schlesinger – World Lawyer' (1975) 60 (6) *Cornell L Rev* 921.

⁹² Rudolf Schlesinger, *Comparative Law: Cases–Text–Materials* (5th edn, Foundation Press 1988) 40.

⁹³ Kamba (n 27) 512–3.

⁹⁴ Roscoe Pound, 'What May We Expect from Comparative Law?' (1936) 22 *ABA J* 56.

2. *Difficulties in the Characterisation of the Comparatist's Outlook*

Inquiry on perspective – If perspective plays a central role in the developments of the comparative method, an investigation on its presumptions should be carried out. Only by meaningfully discerning the extent of prejudice in representation will one have a clearer view of the object represented by a comparative study. In this regard, it appears necessary to recall here the astute observation of Professor Legrand concerning the gaze of the comparison.

Since the instrument of the comparison is the comparatist himself, it seems important that information about the comparatist should be accessible to those interested in evaluating his results. In fact, I argue that a meaningful apprehension of any significant comparative discourse must involve an assessment of the gaze of the comparatist on the law and the law-world which he purports to re-present and, therefore, an appreciation of the referential framework which sustains that gaze. It follows that there is a merit in making explicit the basic assumptions that underlie a comparatist's choice in formulating his questions and identifying the evidence he regards as relevant to answer them.⁹⁵

The issue lies here in the difficulty to characterize that gaze, assuming comparison itself is already challenging for practitioners and academics considering contingencies of time. This is however a process which is not stranger to the field of international arbitration since, for instance, the selection and appointment of arbitrators relies mostly on a preliminary assessment of their jurisprudential outlook and their ideological tendencies. This is a comparative process by nature. Studies revealed that “[a]rbitrators, like judges, are influenced by anchoring, framing, representativeness, and egocentric bias” and are “diverse, independent, and hold resolutely different opinions...”⁹⁶

Awareness of perspective – Failure to expose the comparative method is thus also accompanied by an absence of self-appraisal among international arbitration actors. According to Professor Vadi, “a more conscious use of the comparative method needs to be promoted. [...] Once aware of perspective,

⁹⁵ Legrand, ‘John Henry Merryman and Comparative Legal Studies’ (n 89).

⁹⁶ Susan Franck, Anne van Aaken and others, ‘Inside the Arbitrator's Mind’ (2017) 66 Emory LJ 1173; James Crawford, ‘The Ideal Arbitrator: Does One Size Fit All’ (2017) 32 Am U Intl L Rev 1003.

arbitral tribunals and interpreters can make conscious use of the instruments of law. [...] [S]uch awareness [would] limit eventual abuses of the comparative method..."⁹⁷ Similarly, Professor Kahn-Freund indicated "the choice of subject and the choice of method are inevitably conditioned by the past experience of him who makes them. I should like to submit that this subjective element in teaching and in research need not have any disadvantageous effect – if, but the 'if' is essential, it is raised to the level of consciousness."⁹⁸ Readers can venture a guess on the ideological substrate of authors by reviewing their other writings. Implicit comparison being offered as a package by most authors, this would add a difficulty to the existing ascertainment and explanation of the comparison which remains mostly merely at the description stage.

Hence the necessity to focus on methods by making explicit the stages through which a viable comparison may be valid and produce certain and accurate results.

C. Focus on Methods: A Systematic Comparison Process Beyond Amateurism

1. *The Comparison Process: Relevance of the Syllogistic Reasoning Method*

Systematic comparison – The mission of the Academy to provide useful answers to the question 'how to compare?' (see Sect. I. A) by formulating a framework that should be applicable to any subject – including international arbitration – (see Sect. I. C) can benefit from the insight and support of scholars who have experimented comparison beyond theory. Professor Örüçü believed this question had "no fixed answer."⁹⁹ Professor Vadi considered, however, that "[o]nly by knowing the merits and limits of the comparative method can interpreters and adjudicators make an appropriate use of it."¹⁰⁰ Professor

⁹⁷ Vadi (n 47) 100.

⁹⁸ Kahn-Freund (n 48) 41.

⁹⁹ Örüçü (n 13).

¹⁰⁰ Vadi (n 47) 69.

Kamba indicated that the comparison process was the most difficult aspect of comparative law.

Having decided on the purpose or purposes for undertaking a specific comparative project, and having selected the legal systems and topics, the next problem is that of methodology – how should one, carry out the comparison in a systematic manner? The application of a proper method is generally a pre-requisite for success in any area of study. In comparative law it is of paramount importance because on it will depend: first, whether the specific comparative inquiry effectively serves the function or functions which the comparatist has decided to emphasise; and secondly, the accuracy and value of the results secured and the validity of conclusions drawn.¹⁰¹

In this regard, more generally, Professor Smith asserted that “arguments about the ‘right way’ to do comparative law, *qua* comparative law, are not helpful. Such arguments should be understood, or reframed, as arguments about how to do legal scholarship generally.”¹⁰² Mark Van Hoecke also remarked that “[i]n order to develop a suitable methodology of comparative law, one needs a better view on the methodology of legal scholarship within domestic legal systems.”¹⁰³ If arguably the only difference with domestic scholarship would be the resort to foreign law, it remains to be seen what methods are favoured when comparing.

Deductive/syllogistic reasoning method – What does the comparison process consist of?

There are, thus, three main operations or stages involved in comparative law. The first may be called the descriptive phase. This may take the form of a description of the norms, concepts and institutions of the systems concerned or it may consist in the examination of the socio-economic problems and the legal solutions provided by the systems in question. The second stage may, for convenience, be described as the identification phase and is concerned with the identification or discernment of

¹⁰¹ Kamba (n 27) 510–1.

¹⁰² Smith (n 25) (original emphasis).

¹⁰³ Mark Van Hoecke (ed), *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Hart Publishing 2011) Preface, v.

*differences and similarities between the systems under comparative consideration. The third stage is the explanatory phase under which the divergencies and resemblances are accounted for.*¹⁰⁴

These three phases are further found in the writings of other scholars.¹⁰⁵ Kamba also emphasised “[t]hese phases are not always distinctly separated from each other nor are they always dealt with in a particular order. They may all be intermingled in the same discussion. But all three are essential for any legal study which claims to be comparative law.”¹⁰⁶ Systematism appears opposed to implicit or inexistent comparison. The emphasis on the explanatory phase and the systematic requirement for a discussion of the observed divergencies and similarities correspond to the basic requirements of the subject.¹⁰⁷ Failure to comply with this traditional syllogism has been, among other issues, at the source of labels of amateurism the discipline has suffered from.¹⁰⁸ Thus, Professor Zweigert noted “[a] critical evaluation of the results gleaned from comparative law is a necessary part of every comparative study.”¹⁰⁹ Dean Pound insisted that “a fruitful comparative law, even looking only at the precept element in legal systems of different lands, has to do much more than set side by side sections of codes or of general legislation.”¹¹⁰ Similarly, Professor Blanc-Jouvan explained that “[i]f [study of foreign law] is purely informative or descriptive, of course, or if it consists of a mere juxtaposition of solutions, it leaves no place for comparison.”¹¹¹ Contrary to Kamba, Blanc-Jouvan admitted the validity of ‘implicit’ and various ‘degrees’ of comparison (see Sect. III. C. 2).

Perspective and systematism – It is evident that subjectivity plays a great role in the comparison process and in accordance with Professors Blanc-Jouvan,

¹⁰⁴ Kamba (n 27) 511–2 (original emphasis).

¹⁰⁵ Gutteridge (n 59). Ambiguously referred to as ‘objects’.

¹⁰⁶ Kamba (n 27) 512.

¹⁰⁷ *id.*

¹⁰⁸ For an exposition of deductive reasoning in comparative law see Samuel, *An Introduction to Comparative Law Theory and Method* (n 11) 35, 46–7; Samuel, ‘Taking Methods Seriously (Part One)’ (n 31) 101–2, 104.

¹⁰⁹ Zweigert (n 20) 473.

¹¹⁰ Roscoe Pound, ‘Comparative Law in Space and Time’ (1955) 4 *Am J Comp L* 75.

¹¹¹ Blanc-Jouvan, ‘Centennial World Congress on Comparative Law: Closing Remarks’ (n 45) 1235.

Frankenberg, Kahn-Freund, Lasser, Legrand, Pound, Schlesinger, and others, the comparatist's outlook prevails despite the systematisation efforts. Professor Zweigert thus considered that "any legal critique by way of comparative law will of necessity retain certain subjective aspects."¹¹² In relation to the foregoing syllogism and more generally, Kamba finally confessed that,

*[t]he proper execution of the three phases of comparison is greatly influenced by three main factors: the first may, for convenience, be called the comparatist's Jurisprudential Outlook; the second is the Social Context of the legal systems under comparison; and the third is the Legal Context of the legal topics under study in the case of micro-comparison. [...] [S]ystematic comparison consists of a combination of a number of techniques or approaches which leave considerable room for individual judgment.*¹¹³

Professor Samuel indicated in this regard that "[i]n the social sciences [...] the distinction between observer [*intellectus*] and object [*res*] is not so clear-cut, since the latter includes the former..." This is also true for law. Imperialism can thus affect both the jurisprudential outlook and the observation of the socio-legal context corrupting the results of the comparison (see Sect. III. A. 1).¹¹⁴ What are the alternative ways to compare? Are there any?

2. *Functionalism: Old Fashioned Tool?*

Exposition – A very 'popular' method of investigation in comparative law would be that of functionalism.¹¹⁵ According to Professor Samuel, functionalism operates at both the levels of 'legal reasoning' and in 'legal theory' as a scheme.¹¹⁶ In his view,

[t]he reason why functionalism is so attractive to comparative legal studies lies in its ability to take researchers, to some extent at least, beyond the

¹¹² Zweigert (n 20) 474.

¹¹³ Kamba (n 27) 512, 517 (original emphasis).

¹¹⁴ Samuel, 'Taking Methods Seriously (Part One)' (n 31) 99.

¹¹⁵ Michele Graziadei, 'The Functionalist Heritage' in Legrand and Munday (n 83) 100.

¹¹⁶ Samuel, 'Taking Methods Seriously (Part Two)' (n 10) 219.

*formal conceptual authority of the textual or unwritten rule and to locate them in the facts within which the formal rule is alleged to be operating.*¹¹⁷

Functionalism denotes the latent perception among lawyers and academics that an authoritative approach to comparison is insufficient and flawed.¹¹⁸ According to Professor Graziadei, “[f]unctionalism also promised to cast light on the relationship between law and society. [...] The results of sophisticated functional investigations have widened our comparative knowledge and have become part of mainstream legal thinking.”¹¹⁹ Professor Zweigert, one of the most fervent exponent of functionalism, declared that “the basic methodological principle of all comparative law is that of *functionality*.”¹²⁰ He witnessed the early transition from dogma to functionalism highlighting the fundamental “methodological dichotomy surrounding the *source* of knowledge [...] between inquiry and authority” identified by Samuel (see Sect. I. C).¹²¹ Knowledge drawn exclusively from an authoritative standpoint would be amateurish. Insisting on this point could resolve most of the problems in international arbitration. According to Professor Zweigert,

*[t]he basic principle of comparative law methods is that of functional equivalence; and all other methodical rules – for the selection of legal systems for analyzing a given problem, the scope of investigation, the setting up of a system, etc. – derive from this principle. You cannot compare the incomparable, and in law, the comparable is only that which fulfils the same task, the same function. [...] The one fundamental experience which goes to the very roots of comparative law is that every society poses the same problems to be solved by its law but the different legal orders solve these problems by very different means, although in the end and for practical purposes the solutions are about equal.*¹²²

¹¹⁷ *ibid* 220.

¹¹⁸ Zweigert (n 20) 466.

¹¹⁹ Graziadei (n 115) 125.

¹²⁰ Zweigert and Kötz (n 36) 34 (original emphasis).

¹²¹ Samuel, ‘Taking Methods Seriously (Part One)’ (n 46).

¹²² Zweigert (n 20) 466–7. See also Zweigert and Kötz (n 36) 33–40.

Critique and alternatives – The universality of functionalism appears dubious.¹²³ Almost half a century has passed since this comment and it is also no longer a novel approach. The views expressed by Professor Zweigert are impregnated with universalist ideals which seem unrealistic but are able to justify the relative validity of the method.¹²⁴ He also acknowledged that if legal systems at different stages of development might pose difficulties in the comparison process; ‘system-neutral’ areas of the law should not constitute a problem.¹²⁵ Is international arbitration a ‘system-neutral’ area where a functional approach would be valid? This calls into the notion of the *anational* nature of the subject. Other terms are ‘internationalisation’, ‘denationalisation’.¹²⁶ If international arbitration is seen as ‘floating’ over nations as an independent means of resolving disputes, using nonstate norms and other forms of soft laws, then it seems appropriate to recognise the validity of functionalism in the field. Problems may arise in other circumstances as indicated – these are particularly affecting the uninitiated.¹²⁷ Either way, the deductive use of logic and functionalism are only some of the different levels at which comparison can be effective, bearing in mind that “*all methodologies, even the most obvious ones, have their limits.*”¹²⁸ Various approaches have been thoroughly examined by Samuel, for instance, in his papers on ‘taking methods seriously’ and other works, therefore, it is not the place to exhaustively address them.

In the next section, three issues need to be addressed. Firstly, the relationship and tension between comparative law scholarship and international arbitration practice (III. A.). Secondly, the contribution comparative law as an educational tool can make to the field of international arbitration (III. B.). Thirdly, the treatment of comparative law in the literature (III. C.). Finally, it seems important to discuss the direction scholarship should take in responding to the needs of practice.

¹²³ Örücü (n 13) 33–37 on ‘functional comparability’.

¹²⁴ *ibid* 467.

¹²⁵ *ibid* 474.

¹²⁶ Julian Lew (ed), *Contemporary Problems in International Arbitration* (Springer-Science 1987) 1.

¹²⁷ Zweigert (n 20) 467.

¹²⁸ Feyerabend (n 4) 16 (original emphasis).

III. COMPARATIVE LAW AND INTERNATIONAL ARBITRATION SCHOLARSHIP

For when method in all its intellectual richness is taken seriously by comparatists [...] such a comparatist is no longer an amateur.

Geoffrey Samuel¹²⁹

The nature of the forces that shape individuals and their societies are such that [...] the comparative task is eternal.

Arthur von Mehren¹³⁰

A. Comparative Law and the Arbitral Practice: Uses and Misuses

1. *Uses of Comparative Law in International Arbitration: Legitimate Benefits*

Different applications – Comparison can be used between arbitration and the various national forms of litigation, that is, for the selection of the most viable process and for the arbitral process itself.¹³¹ Supporting this claim, Judd Epstein considered each arbitral procedural decision as “a comparative law creation or application in practice.”¹³² To the same effect was Andreas Lowenfeld who saw international arbitration “as an exercise in comparative procedure.”¹³³ It is also used in advocacy. In this regard, Professor Frédéric Sourgens observed that comparative law would be used by counsel as a ‘rhetorical’ tool for three main reasons. Firstly, “to explain law foreign to the tribunal in a manner helpful to his case”; secondly, “as a means to close legal gaps in the law applicable to the dispute”; and thirdly, “to extract general

¹²⁹ Samuel, ‘Taking Methods Seriously (Part Two)’ (n 10) 237.

¹³⁰ Arthur von Mehren, ‘The Rise of Transnational Legal Practice and the Task of Comparative Law’ (2001) 75 Tul L Rev 1224.

¹³¹ Glenn, ‘Comparative Law and Legal Practice’ (n 38) 998.

¹³² Judd Epstein, ‘The Use of Comparative Law in Commercial International Arbitration and Commercial Mediation’ (2001) 75 Tul L Rev 917.

¹³³ Andreas Lowenfeld, ‘The Two-Way Mirror: International Arbitration as Comparative Procedure’ (1985) 7 Mich YBI Legal Stud 163.

principles of international law or trade usages.”¹³⁴ Stepping back from the arbitral process, comparative law is also used in international arbitration regarding the earlier choice of the substantive law and the dispute resolution clause.¹³⁵ It is also used in legal doctrine, which will be discussed especially in the last subsection (see Sect. III. C).¹³⁶ Professor Vadi insisted on the centrality of comparative law in the field in these terms,

*[n]ot many fields of law use comparative law as extensively as international arbitration. International arbitration is a method for settling transnational disputes, involving parties and adjudicators of different nationalities, and requiring the application of different sets of procedural and substantive norms. For its intrinsic characteristics, international arbitration constitutes the Walhalla for comparative law experts...*¹³⁷

Benefits of comparing – The intensity of the uses of foreign law in every stage of the arbitral process and in the scholarly considerations on the topic more generally makes it difficult to disregard the comparative method. More than a simple tool for the solving of practical issues with a desired outcome in view, its use leads to the broadening of horizons and to a more developed consciousness of the alternatives and opportunities available. All of this leads to a betterment of the subject and, ultimately, to the realisation of justice. Judd Epstein, assessing the situation from the broader perspective of alternative dispute resolution processes, believed,

[c]omparative law studies and comparative cultural studies have provided sensitivity to different ways of negotiation and different methods of thinking about the use of law. Through the study of comparative law and allied disciplines of comparative sociology and anthropology, legal practitioners serving as mediators or representing parties within a mediation can make use of comparative law in a way not traditionally thought common. [...] [Practitioners] sensitive to the lessons of

¹³⁴ Frédéric Sourgens, ‘Comparative Law as Rhetoric: An Analysis of the Use of Comparative Law in International Arbitration’ (2007) 8 Pepp Disp Resol LJ 1.

¹³⁵ E J Cohn, ‘Commercial Arbitration and the Rules of Law a Comparative Study’ (1941) 4 U Toronto LJ 1; Glenn, ‘Comparative Law and Legal Practice’ (n 38) 998–9; Epstein (n 132) 915–7.

¹³⁶ Vadi (n 47) 81.

¹³⁷ *ibid* 68 (original emphasis).

*comparative law and its classifications may reduce the effects of ethnocentrism...*¹³⁸

Two topics are highlighted by Epstein; interdisciplinarity and ethnocentrism. The latter is a notion akin to imperialism and constitutes an epistemological pitfall in comparative law.¹³⁹ Imperialism consists in the “imposition, via a universal theory, of a definition fashioned in one legal culture on the law of another culture [which] may simply obscure rather than highlight this other culture.”¹⁴⁰ In this regard, Professor Zweigert explained that “successful work in comparative law requires a radical yielding of every prejudice of a dogmatic or habitual or other nature resulting from one’s own law.”¹⁴¹ Interdisciplinarity is yet another key feature distinguishing law as authority from comparative law as inquiry which warrants a broader approach.¹⁴²

In these circumstances, the developments and support of comparative law theory appear crucial and can remedy the deficiencies of transnational practice. Practice which can also lead to serious diversions of the legitimate uses of comparative law.

2. Misuses of Comparative Law in International Arbitration: Diverted Science

Comparison and practice – The call for harmonisation of the Academy (see Sect. II. A. 3) also lies in the misuses of comparative law that may be attributed to developments of transnational practice for instance. Professor Sourgens indicated that “[t]hrough the crucible of empirical testing, international arbitration, hand-in-hand with other aspects of the legal profession, will help shape the contours of comparative law. It will certainly push the outer boundaries of comparative law further than many scholars’

¹³⁸ Epstein (n 132) 920–1.

¹³⁹ Samuel, ‘Taking Methods Seriously (Part Two)’ (n 10) 230–1; Samuel, *An Introduction to Comparative Law Theory and Method* (n 11) 6, 9.

¹⁴⁰ Samuel, *An Introduction to Comparative Law Theory and Method* (n 11) 9.

¹⁴¹ Zweigert (n 20) 467.

¹⁴² Samuel, *An Introduction to Comparative Law Theory and Method* (n 11) 5, 23–4, 28, 119; Samuel, ‘Taking Methods Seriously (Part Two)’ (n 10) 229 on the ‘cultural paradigm’.

comfort zones. [...] As such, the practice of advocacy in international arbitration will be one of the agents of progress.”¹⁴³ This is equally true for all the areas in which the method can be deployed (see Sect. III. A. 1). While this development is certainly beneficial, it does result in some diversions. Professor Blanc-Jouvan addressed the broader relationship between comparative law and *legal practice*.

*This is, naturally, another function of comparative law: to help judges, arbiters, lawyers, and contracting parties conduct their affairs, because it has become more and more common to be in a situation where foreign law must be applied, especially in business life. Comparative law is no longer simply a learned law; it has increasingly become a practical law. [...] I will just mention the risk of a superficial knowledge or an insufficient understanding of foreign laws, due precisely to the absence of a scientific approach, which may be worse than complete ignorance and lead to serious setbacks. There is also the threat of a sort of confiscation of comparative law by those who are just interested in ‘doing business abroad’ [...]. In fact, comparative law should not be the monopoly of any particular group or profession. It can only benefit from the conjunction of academic impulse and professional support.*¹⁴⁴

Challenging diversions – Comparative law is seen in international arbitration as a ‘transactional tool’ responding to some ‘commercial objectives’.¹⁴⁵ There surely are ways to tackle risks of illegitimate use of the subject for interested ends and their corollary which is amateurism – recalling to the mind the old adage *fraus omnia corrumpit* and its consequences. It would be interesting to take Professor Blanc-Jouvan’s observation further on the need for a supportive scientific or academic approach. For Epstein, this would be “a new use of comparative law that allows academics to investigate and chronicle its developments and assist the legal profession in its practice.”¹⁴⁶ In this regard, Professor Arthur von Mehren considered that,

¹⁴³ Sourgens (n 134) 23.

¹⁴⁴ Blanc-Jouvan, ‘Centennial World Congress on Comparative Law: Closing Remarks’ (n 45) 1224; Blanc-Jouvan, ‘Le cinquantenaire de la Revue’ (n 1) 749–50.

¹⁴⁵ Sourgens (n 134) 5; Kamba (n 27) 501.

¹⁴⁶ Epstein (n 132) 921.

...comparative practice will have alerted jurists to the problems that legal diversity creates; [...] the broader and deeper perspectives and learning associated with comparative law can contribute in ways that comparative legal practice alone can not. [...] [T]ransnational practice makes comparison more frequently necessary but not intellectually easier [...] misunderstandings and misappreciations may pose serious dangers for comparative legal practice. [...] [T]ransnational legal practice will continue to need comparative law in the deep sense [...]. The rise of comparative legal practice clearly has significance for the role and contribution of comparative law as it will be studied and practiced in the next century; it should not, however, be seen as a substitute for comparative law.¹⁴⁷

Before turning to an examination of the literature exerting a widespread educative function within and beyond academia, it appears pertinent to introduce the reader to the educational function of comparative and to examine its relationship with international arbitration.

B. Comparative Law for Educational Purposes: Reconciliation of Practice and Theory

1. A Focus on the Educational Function of Comparative Law

Educational purpose – Apart from the debatable terminological inappropriateness disentangled in the foregoing developments (see Sect. II. A), it seems that the functions of comparative law provide for a clearer meaning of its essence.

One of the main factors that impeded progress in comparative legal studies was the absence of a systematic and comprehensive treatment and appreciation of the functions of comparative law. [...] The clarification of its functions is, therefore, necessary for an appreciation of its value and importance. Moreover, the main purpose for which a particular project of comparative study or research is undertaken will, to a large extent, dictate the choice of legal systems or topics to compare and the method of comparison.¹⁴⁸

¹⁴⁷ von Mehren, 'The Rise of Transnational Legal Practice' (n 130) 1223.

¹⁴⁸ Kamba (n 27) 489. See also von Mehren, 'An Academic Tradition for Comparative Law?' (n 28).

Furthermore, Professor Maximilian Schmitthoff believed that “[n]o lawyer would embark on a comparative legal study without intending that his endeavours should be utilized either by him or by others.”¹⁴⁹ What then are these functions? In other words, for the purposes of this article, why does one compare in the field of international arbitration? Dissociating the functions of comparison from their application appears pertinent, although the two can often be assimilated. Thus, comparative law can be employed purely for the “improvement of the general knowledge of the law” which is one of the two main functions identified by Schmitthoff and is interested with *jurisprudence* and *legal history*.¹⁵⁰ It is noteworthy to mention that the views expressed 80 years ago by Schmitthoff may appear outdated as the subject has developed beyond these areas since then. More recently, Professor Kamba in his attempt to provide a common framework for the validity of comparative legal studies identified six functions pursued by those who have an interest in the subject which he deemed where neither exhaustive nor clear-cut. Namely, *Academic Studies*; *Legislation and Law Reform*; *The Judicial Process*; *Unification and Harmonisation*; *International Law*; and *International Understanding*.¹⁵¹ Where does international arbitration stand in all these functions? Everywhere it seems, *prima facie*. This paper is concerned with *Academic Studies* and *International Understanding*; however, scholars of international arbitration will be chiefly interested in the other four functions. The former two functions being respectively merely the scholarly vehicle of exposition and result of their primary concerns. *Academic Studies* involve two components, the ‘*teaching and study of law*’ and ‘*legal research*’.¹⁵² The latter serving as a basis to the former which is, more specifically, the object of this paper.

Curriculum – Considering the separate comparative law course is usually offered by an increasing number of universities primarily as a postgraduate

¹⁴⁹ Schmitthoff (n 44) 99.

¹⁵⁰ *id.*

¹⁵¹ Kamba (n 27) 490 (emphasis added).

¹⁵² *id.*

elective course,¹⁵³ the situation may not improve in the field of international arbitration unless the different actors are willing to challenge and instruct themselves, however imperfectly. The example of the founding of the School of International Arbitration at Queen Mary University in London some three decades ago – and the emphasis on the ‘comparative approach’ in its curriculum – is uncharacteristic of the state of the discipline but underlines the needs of the subject.¹⁵⁴ Roy Goode affirmed “[i]ts outlook will be international and its method comparative.”¹⁵⁵ Peter Sanders indicated that “[a]n introduction to *comparative law* may well be included in the curriculum of the School.”¹⁵⁶ He further contemplated the necessity of “a comparative approach as well in regard to questions of arbitral procedure as to questions of substance that may arise in arbitration. All this to achieve the goal of training truly international arbitrators.”¹⁵⁷ The old dichotomy between the ‘teaching of comparative law’ (as a separate course) and the ‘comparative teaching of law’ (in mainstream subjects) highlighted by Schlesinger would still make sense if the international arbitration course offered neglected the introduction to the comparative method.¹⁵⁸ Professor Reimann seemed to strongly favour the approach according to which “the truly comparative study of law, should become part and parcel of other courses” instead of “an autonomous subject” noting that “the goal is not to turn every student into a comparative lawyer, but only to expose all of them to the comparative dimension of law.”¹⁵⁹ This is not a novel idea.¹⁶⁰ Furthermore, Reimann also believed that, “[t]eaching comparative law in a decentralized fashion also has a greater educational impact because it

¹⁵³ Rudolf Schlesinger, ‘Teaching Comparative Law: The Reaction of the Customer’ (1954) 3 Am J Comp L 492; Rudolf Schlesinger, ‘The Role of the ‘Basic Course’ in the Teaching of Foreign and Comparative Law’ (1971) 19 Am J Comp L 618.

¹⁵⁴ The ‘*comparative and internationalist approaches*’ seemed to have been determining criteria in the founding of the School of International Arbitration. See Lew (n 126) 5.

¹⁵⁵ Roy Goode, ‘The School of International Arbitration: Aspirations and Objects’ in Lew (n 126) 12–3.

¹⁵⁶ Peter Sanders, ‘The Birth of the School of International Arbitration’ in *ibid* 10 (original emphasis).

¹⁵⁷ *ibid* 11.

¹⁵⁸ Schlesinger, ‘The Role of the ‘Basic Course’ (n 153) 616.

¹⁵⁹ Reimann, ‘The End of Comparative Law as an Autonomous Subject’ (n 34) 50, 66; Max Rheinstein, ‘Teaching Comparative Law’ (1938) 5 U Chi L Rev 623.

¹⁶⁰ Pound, ‘The Place of Comparative Law in the American Law School Curriculum’ (n 66); Rheinstein, ‘Teaching Comparative Law’ (n 159).

leaves deeper impressions and reaches more students.”¹⁶¹ International arbitration is also usually offered as a postgraduate course.¹⁶² If it systematically includes elements of comparison, therefore, it could be sufficient for students who would have not elected comparative law as a ‘basic course’.

2. *Some Remarks on Reconciling Practice and Theory*

Teaching and practice – It must be stated unequivocally here that international arbitration is definitely belonging to the realm of practice. According to Patrick Glenn, transnational practice contributes to comparative legal thought by propagating legal ideas “outside their place of origin” thus “[c]omparative legal practice, *pace* the traditional teachings of comparative law.”¹⁶³ For Judd Epstein, “[a]n area that was exclusively the province of specialist academics has been transformed and is now made and used by legal practitioners daily.”¹⁶⁴ However, Professor von Mehren assumed some half a century ago that “academic study of comparative and foreign law will neither be substantially encouraged nor definitely shaped in our lifetimes by the requirements of the practicing profession.”¹⁶⁵ What he had in view were, more specifically, other subjects with a local orientation. Teaching and study of international arbitration require an advanced understanding of foreign and international law, the conflict of laws or private international law and public international law, as well as the different areas of business law.¹⁶⁶ For instance, the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards constitutes a landmark and is interpreted in light of the 1969 Vienna Convention on the Law of Treaties which is a foundational text of public international law. A prominent arbitrator by the name of Pierre Lalive noted that,

¹⁶¹ Reimann, ‘The End of Comparative Law as an Autonomous Subject’ (n 34) 64.

¹⁶² Mihail Danov, ‘Teaching International Commercial Arbitration at Postgraduate Level – Techniques for Enhancing Students’ Learning’ (2011) 45 *Law Teacher* 101.

¹⁶³ Glenn, ‘Comparative Law and Legal Practice’ (n 38) 984–5 (original emphasis).

¹⁶⁴ Epstein (n 132) 913.

¹⁶⁵ von Mehren, ‘An Academic Tradition for Comparative Law?’ (n 28) 626.

¹⁶⁶ Roy Goode, ‘The School of International Arbitration: Aspirations and Objects’ and Pierre Lalive, ‘International Arbitration: Teaching and Research’ in Lew (n 126) 14, 16.

...the 'ideal' [or] 'good' international arbitrator [...] should have a certain amount of training in and experience of comparative law and the comparative method [...] [and] must show proof of a comparative or comparatist mind, open to legal pluralism, to various cultures and various political and social systems.¹⁶⁷

Teaching tools – Mastery of the comparative method in the field is of utter importance because of the various extraneous factors affecting the arbitral process, namely, the places of business, substantive laws, *lex arbitri*, the law of the seat. Its neglect however appears to be recurrent among busy arbitration practitioners who face time constraints and a general incompetence. Academics addressing these audiences and their students alike are clearly neglecting theory. In an ideal world, scholars practicing in the field should be both conversant with the comparative method and willing to transmit it. Unfortunately, this is not the case.¹⁶⁸ Unsystematic comparison remains the norm. Certainly, the teaching of law is not exclusively performed through textbooks, however, this format – referred to as proper ‘teaching tools in comparative law’ by Professor Max Rheinstein – provides meaningful and tangible information on the use of the comparative method and will serve as the basis of our assessment (see Sect. III. C).¹⁶⁹ According to Professor von Mehren,

[u]nlike most other fields of legal study, comparative law is not self-defining nor is it taught in response to rather specific professional needs. [...] Professional imperatives are not a likely source of an academic tradition for the comparative study of law. [...] [T]he subject matters most consistently involved in legal practice with significant foreign elements, and hence the topics that would presumably be emphasized in comparative-law courses with a professional orientation, do not provide a particularly apt vehicle for

¹⁶⁷ Lalive (n 166) 16 (original emphasis).

¹⁶⁸ Julian Lew, Loukas Mistelis and Stefan Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003). This book, referring first to the term ‘comparative’ in its title, contains 28 Chapters, none of which introduce the reader to the comparative method. Another leading textbook in the field by Gaillard and Savage (n 6), although not devising a specific chapter to comparative law methodology, makes at least explicit reference to comparative law in its subsections (see Sect. III. C. 1).

¹⁶⁹ Max Rheinstein, ‘Teaching Tools in Comparative Law: A Book Survey’ (1952) 1 Am J Comp L 95.

*introducing students to the problems of approaching and understanding in a profound sense the rules and workings of another legal order.*¹⁷⁰

Since international arbitration is shaped by practice, the academic literature available on the subject is mostly based on practical considerations for the simple reason that authors themselves are largely established practitioners, be they scholars in conjunction with their stake in the business. In the following subsection, an assessment of the state of international arbitration scholarship will be succinctly and critically conducted in respect of its use of comparative law.

C. The Treatment of Comparative Law in the Literature: Critical Examination

1. *Explicit Treatment of Comparative Law: Perspectivism and Imperialism*

Analytical framework – As suggested in the foregoing developments (see Sect. III. B. 2), the treatment of comparative law in the academic literature is very summary and unsophisticated. Setting aside theory, it hardly articulates comparative law within the methodological sphere in which it truly belongs. The below example extracted from a leading treatise is only a partial sample of the literature and is representative of this poor treatment. It has been selected for its systematic presentation of the subject impregnated with rationalism. Same degree subsections and their immediate arborescence are fully reproduced.

Table 1 *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (KLI 1999): see the appendix.

Critical examination – Explicit reference to comparative law is found in three instances in the subsections of the book. Comparative law appears thus on the same line as ‘Treaty’ and opposed to ‘French Law’. It is also opposed to ‘International Conventions’; ‘International Arbitral Case Law’; ‘Resolution of the Institute of International Law’ and even to ‘Policy Considerations’. This

¹⁷⁰ von Mehren, ‘An Academic Tradition for Comparative Law?’ (n 28) 624, 626.

observation alone is not sufficient to form an estimate of the use of comparative law by the authors.

Looking closer at the first example, the subsection on 'Treaty and Comparative Law' in Part I, Chapter I, sets out the meaning of 'international' arbitration as defined in various instruments such as international conventions (New York 1958; European Convention of 1961) and national legislations as well as soft laws (UNCITRAL Model Law). The specificities of each national legislation described independently are highlighted and opposed to that of other countries in the continuous flow of five paragraphs.¹⁷¹ A further paragraph attempts a summary conclusion revealing a 'distinct tendency' in light of the French position.¹⁷² Thus, the authors' jurisprudential outlook seems here to affect greatly the conclusion. This paragraph even starts from the premise that international arbitration should be classified as such on the basis of its international economic nature before acknowledging that the nations mentioned prefer to define it in light of a connecting factor. Finally, to comfort their bias, some countries adopting the French model are explicitly mentioned before turning to French Law in the next subsection. It seems obvious that this is a somewhat meagre treatment of 'comparative law' and the imperialistic outlook is here patent. The subsection should have been entitled 'Treaty and French and Foreign Law'.

The second example is perfectly illustrative of this prejudice. In Part II, Section III on Arbitrability, and under a subsection on the 'General Principles of International Arbitration', the subsection on 'Comparative Law' starts with the following sentence. "The position of French law, as illustrated by the *Galakis*, *Gatoil* and *Bee Frères* decisions, has been followed in many other jurisdictions."¹⁷³ The following statements are simply discussing the position of other national legislations in light of posited French law and the UNCITRAL Model Law.

The third example is similar but presents a clear advantage. In Part II, Chapter III, the subsection on 'The Position Adopted in Comparative Law' concerning the 'Review by the Courts of the Existence and Validity of the

¹⁷¹ Gaillard and Savage (n 6) 51–5 [101–5].

¹⁷² *ibid* 55 [106].

¹⁷³ *ibid* 323 [549].

Arbitration Agreement’ starts with the following sentence. “French law was quick to recognize the negative effect of the competence-competence principle.”¹⁷⁴ The next paragraph states, “[h]owever, the major international conventions on arbitration and arbitration legislation in other legal systems do not always endorse this approach very clearly.”¹⁷⁵ There is thus a discernable systematic reference to French Law as a starting point concerning any matter under consideration. The advantage of this development lies in the subsection entitled ‘Policy Considerations’.¹⁷⁶ It follows immediately the subsection on ‘Comparative Law’ which should be entitled instead ‘The Position Adopted in *Foreign and International Law*’. The discussion here is normative. “From a legislative standpoint, each of the two approaches to the question of when the courts should be entitled to rule on the existence and validity of the arbitration agreement has its own *advantages and disadvantages*” states the first paragraph of this subsection.¹⁷⁷ The following paragraphs discuss the merits and demerits of the two approaches in light of various national developments and approaches.¹⁷⁸ This is clearly better than just reviewing each national legislation separately and leaving it to the reader to form a value judgement and estimate of the various positions under consideration.

2. Implicit Treatment of quasi-Comparative Law: Unsystematic Coverage

Analytical framework – It should be mentioned that the foregoing examples are prominent for their explicit reference to ‘comparative law’. However, a similar reasoning has been adopted in various other subsections of the treatise with the same goal in mind. The below table is illustrative of that use of foreign law and its unsystematic coverage.

Table 2 *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (KLI 1999): see the appendix.

¹⁷⁴ *ibid* 407 [672].

¹⁷⁵ *ibid* 408 [673].

¹⁷⁶ *ibid* 410 [677].

¹⁷⁷ *id* (emphasis added).

¹⁷⁸ *ibid* 410–413 [677–82].

Critical examination – In these instances, ‘French Law’ constitutes the starting point of the analysis and is opposed to ‘Other Legal Systems’ and ‘International Conventions’. One can again assume that the gaze of our authors is strongly influenced by a civilian outlook. Further, this is an archetypal example of the juxtaposition of various legal orders with no effort to relate them to each other with a constructive discussion, except for Part I on ‘Definition and Sources’.¹⁷⁹ The subsection entitled ‘Trends’ corresponds to the *identification* (Diversity of Legislative Technique) and *explanatory* (Convergence of Legislative Objectives) phases mentioned in the foregoing developments; while the subsection on ‘Analysis’ would correspond to the *descriptive* phase where the various legal systems of the world are described. It is regrettable that this effort of systematic coverage of one issue, namely, the ‘Public Sources’ of International Arbitration is not found in other sections of the book – at least not systematically. Professor Lasser explained that “[t]his basic level of explanation represents, of course, but the tip of the comparative iceberg. The comparatist can go into infinitely greater depth in an attempt to offer evermore incisive analysis.”¹⁸⁰ He further insisted that, at least, “serious study should generate increasingly rich description.”¹⁸¹ Similarly, Mark Van Hoecke observed that “[c]omparative law usually remains at the level of description, combined with some comparison (but mostly at the ‘tourist’ level).”¹⁸² Emeritus Professor John Bell noted,

*[f]or many comparative lawyers [...] the focus of comparative law is to present an analysis of internal dynamics and principles of the existing laws of the countries studied. This may seem predominantly descriptive, particularly when studying a foreign system. How can a foreigner do more than describe what foreign lawyers think their legal rules are?*¹⁸³

Considering the vastness of the subject, the authors have chosen to expose various problems in light of foreign and international developments

¹⁷⁹ *ibid* 71–103. See also Pound, ‘Comparative Law in Space and Time’ (n 110).

¹⁸⁰ Lasser (n 83) 238.

¹⁸¹ *id.*

¹⁸² Van Hoecke (ed), *Methodologies of Legal Research* (n 103) Preface, vi.

¹⁸³ John Bell, ‘Legal Research and the Distinctiveness of Comparative Law’ in *ibid* 158.

which is commendable. These are enlightening the reader who wishes to grasp a phenomenon beyond his land, in this case, the French legal system. However, once faced with the task of meaningfully comparing various substantive laws or institutions or concepts and forming an estimate on their merits, one must admit that the tools are simply missing.

IV. THE FUTURE OF COMPARATIVE INTERNATIONAL ARBITRATION SCHOLARSHIP

This section will be in the form of a succinct conclusion. This paper has attempted to underline misconceptions on comparative law. The genuine efforts of improvement that occurred since its initial 'experimental stage' have not been translated in the field of international arbitration. By no means this article is to be conceived as containing the last word of the comparative method – or rather, with deeper insight, methods. International arbitration relies eminently on the developments of the comparative method. As in any science, the developments of method are closely linked with the flourishing of law. These developments are to a large extent guided by experimentation and the systematic use of method exceeding the limits of doctrinal and academic knowledge.¹⁸⁴ Thus, it appeared pertinent to clarify some of its characteristics and also to reveal potential misuses. The refinement of the comparative method should be shaped by practice, under the scientific guidance of comparative law as an academic discipline. Diverted uses of the comparative method resulting from the transactional nature of arbitration can be prevented by establishing a scientific cooperation. The formulation of a general framework challenging methodological issues should be the crux of such scientific endeavour. The current state of scholarship tends to confirm the thesis of a pure neglect of theory. A better articulation of comparative methodology must be the subject of a serious and rigorous implementation. A more systematic use of, at least, the deductive reasoning method should lead to much richer developments than those confined to a purely descriptive approach. Focusing perhaps on what Professor Mark Van Hoecke described as 'deep level'

¹⁸⁴ Sourgens (n 143).

comparative law – that is beyond a methodology concerned with rules and cases.¹⁸⁵ Despite the density of arbitration-specific content in textbooks and specialised works, an introductory chapter must familiarise the reader with the comparative method. International arbitration courses should include significant developments concerning comparative law theory. Perhaps the problems arising with method may paradoxically find their solution in a pure emancipation from it.¹⁸⁶ This is yet another consideration and it seems that method is still a favoured tool in the solving of the problems of comparative law.¹⁸⁷ Therefore, unless arbitration practitioners, academics or their students alike are willing to go off the beaten track, amateurism will continue to characterise the state of scholarship in comparative international arbitration.

¹⁸⁵ Mark Van Hoecke, 'Deep Level Comparative Law' in Mark Van Hoecke (ed), *Epistemology and Methodology of Comparative Law* (Hart Publishing 2004) 165.

¹⁸⁶ Glanert (n 12) 81. See also Feyerabend (n 4) 11–12 on the anarchistic 'principle' of *anything goes*, and 17 on his arguments against the 'consistency condition'.

¹⁸⁷ Glanert (n 12) 63.

V. APPENDIX

Table 1 *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (KLI 1999)

Part I – Definition and Sources	Part II – The Arbitration Agreement	
Chapter I – Definition of International Commercial Arbitration Section III. – The Meaning of ‘International’ §2. – The International Nature of Arbitration and the Application of Specific Substantive Rules <u>A. – Treaty and Comparative Law</u> B. – French Law	Chapter II – Formation of the arbitration agreement Section III. – Arbitrability §1. – Subjective Arbitrability B. – Substantive Rules <i>2° General Principles of International Arbitration</i> a) International Conventions <u>b) Comparative Law</u> c) International Arbitral Case Law d) Resolution of the Institute of International Law	Chapter III – Effects of the arbitration agreement Section II. – Negative Effects of the Arbitration Agreement §2. – Implementation of the Principle that the Courts Have No Jurisdiction B. – When Can the Courts Review the Existence and Validity of the Arbitration Agreement? <u>1° The Position Adopted in Comparative Law</u> <i>2° Policy Considerations</i>

Table 2 *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (KLI 1999)

Part I – Definition and Sources		Part III – The Arbitral Tribunal		
Chapter II – Sources of International Commercial Arbitration Section I. – Public Sources §1. – National Sources A. – French Law B. – Other Legal Systems		Chapter I – The Constitution of the Arbitral Tribunal Section I. – National and International Rules		Chapter II – The Status of the Arbitrators Section I. – Arbitrators as Judges §2. – Protection of the Arbitrators A. – The Principle of Immunity <i>1° French Law</i> <i>2° Other Legal Systems</i>
		§1. – The Appointment of the Arbitrators B. – The Subsidiary Role of National Laws <i>1° French Law</i> <i>2° Other Legal Systems and International Conventions</i>	§2. – Difficulties in the Constitution of the Arbitral Tribunal A. – French Law B. – Other Legal Systems C. – International Conventions	
<i>1° Analysis</i> a) Europe i) UK ii) [etc...] b) Other Continents i) USA ii) [etc...]	<i>2° Trends</i> a) Diversity of Legislative Techniques b) Convergence of Legislative Objectives			

A NEW (QUASI-)CODIFIED LEX MERCATORIA BASED ON SOFT LAW REGULATORY COMPETITION AND THE USE OF COMPARATIVE LAW METHODOLOGY IN INTERNATIONAL COMMERCIAL ARBITRATION

Marco Torsello

Résumé

Bien que dans la plupart des cas corroborant les solutions fondées sur le droit national, l'utilisation de règles a-nationales produites dans le domaine du droit transnational du commerce n'est pas rare dans l'arbitrage commercial international. Cependant, contrairement à la lex mercatoria traditionnelle, à laquelle on faisait référence principalement sous la forme de droit coutumier supranational non codifié, la tendance actuelle semble favoriser le recours à des instruments de soft law (quasi-)codifiés produits par divers acteurs et sous différents formats.

Partant de cette observation, cet article examine de manière critique (et rejette) certaines des explications alternatives proposées dans la recherche juridique sur les raisons pour lesquelles les arbitres peuvent recourir à la lex mercatoria (comme celles qui se concentrent sur la réduction alléguée des coûts de transaction, ou les avantages pour les arbitres ou les organismes de formulation) et embrasse une théorie de la lex mercatoria basée sur une méthodologie comparative fonctionnelle. Contrairement à d'autres théories fonctionnelles, cependant, celle proposée ici postule que le recours des arbitres à des sources de droit non nationales est, dans la plupart des cas, strictement lié à la quête des parties d'impartialité et d'indépendance du tribunal arbitral, qui est mieux servie lorsque, en l'absence d'un choix de loi fait par les parties, les arbitres s'abstiennent de recourir à la loi nationale applicable en vertu des règles objectives de conflit de lois pertinentes. On observe ainsi que, lorsqu'ils adoptent cette approche, les arbitres s'appuient de plus en plus sur des instruments de soft law, tels que des collections (« codifiées » ou « quasi-codifiées ») de règles ou de principes, dont la légitimité et l'applicabilité peuvent être remises en question, à moins qu'elles ne soient dûment étayées par des arguments juridiques solides. De plus, on observe que l'essor récent de la promulgation d'instruments de soft law conduit à une sorte de concurrence réglementaire entre les instruments de soft law, qui appelle à une méthodologie pour sélectionner parmi les nombreux instruments (de hard et soft law) mis à la disposition des tribunaux arbitraux internationaux.

L'affirmation de cette contribution, à cet égard, est que les arbitres devraient recourir à une méthode comparative en deux étapes afin de déterminer quels instruments juridiques (hard ou soft) appliquer. Premièrement, les arbitres devraient rechercher une solution fondée sur la volonté des parties, en examinant ainsi quelles règles les parties auraient choisies comme applicables à leur relation, si les parties avaient choisi une loi ou un instrument juridique applicable. À titre subsidiaire, si la première approche ne conduit pas à une solution satisfaisante, les arbitres devraient sélectionner et appliquer les règles juridiques (hard ou soft) qui semblent plus adaptées aux transplantations juridiques et plus adaptables à l'environnement juridique et aux circonstances spécifiques de l'affaire. Cette approche peut être dûment poursuivie en recourant à la recherche juridique comparative bien développée traitant de la mobilité transfrontalière du droit et des défis des transplantations juridiques, à condition que l'adaptabilité de l'instrument soit à tout moment mesurée au regard de sa compatibilité avec l'ordre public et les lois de police des systèmes juridiques concernés.

Mots clés: Lex mercatoria; soft law; droit transnational du commerce; arbitrage international; concurrence réglementaire; méthodologie du droit comparé; transplantations juridiques

Abstract

Although mostly corroborative of solutions based on national law, the use of a-national rules produced in the realm of transnational commercial law is not infrequent in international commercial arbitration. Unlike the traditional lex mercatoria, however, which was referred to primarily in the form of supranational, uncoded customary law, the current trend seems to favor recourse to (quasi-)codified soft law instruments produced by various actors and in various formats.

Starting from this observation, this paper critically reviews (and rejects) some of the alternative explanations proposed in legal scholarship as to why arbitrators may resort to lex mercatoria (such as those focusing on the alleged reduction of transaction costs, or the advantages for arbitrators or formulating agencies) and embraces a theory of lex mercatoria based on a functional comparative methodology. Unlike other functional theories, however, the one proposed here posits that arbitrators' reliance on non-national sources of law is, in most cases, strictly connected to the parties' quest for impartiality and independence, which is best served when, in the absence of a choice of law made by the parties, arbitrators refrain from resorting to the national law applicable by virtue of the relevant objective conflict-of-laws rules. It is thus observed that, when embracing this approach, arbitrators increasingly rely on soft law instruments, such as ("codified" or "quasi-codified") collections of rules or

principles, whose legitimacy and enforceability may be called into question, unless duly supported by solid legal arguments. Moreover, it is observed that the recent booming in the enactment of soft law instruments is leading towards a sort of soft law regulatory competition, which calls for a methodology to select among the many (hard and soft law) instruments made available to international arbitral tribunals.

The paper's claim, in this respect, is that arbitrators should resort to a two-step comparative methodology in order to determine which (hard or soft) legal instruments to apply. First, arbitrators should search for a solution based on the parties' own will, thus investigating which rules the parties would have selected as applicable to their relationship, had the parties chosen an applicable law or legal instrument. In the alternative, should the former approach fail to lead to a satisfactory solution, arbitrators should select and apply the (hard or soft) legal rules which appear to be more suitable for legal transplants and more adaptable to the specific legal environment and circumstances of the case. This approach can be duly pursued by resorting to the well-developed comparative legal scholarship dealing with the trans-frontier mobility of law and the challenges of legal transplants, provided that the adaptability of the instrument should at all times be measured having regard to its compatibility with the public policy and mandatory laws of the legal systems involved.

Keywords: Lex mercatoria; soft law; transnational commercial law; international arbitration; regulatory competition; comparative law methodology; legal transplants

TABLE OF CONTENTS

I.	INTRODUCTION.....	214
II.	THE TRADITIONAL NOTION OF <i>LEX MERCATORIA</i> AS AN AUTONOMOUS LEGAL ORDER APPLICABLE TO THE MERITS OF THE DISPUTE IN INTERNATIONAL COMMERCIAL ARBITRATION	219
III.	A CRITICAL REVIEW OF THE ALLEGED GOALS AND BENEFITS OF THE TRADITIONAL NOTION OF <i>LEX MERCATORIA</i>	228
IV.	A NEW FORM OF <i>LEX MERCATORIA</i> : THE SHIFT FROM UNCODIFIED SUPRANATIONAL PRINCIPLES TO A REGULATORY COMPETITION AMONG HARD LAW AND (QUASI-)CODIFIED SOFT LAW INSTRUMENTS	234
V.	THE USE OF COMPARATIVE LAW METHODOLOGY TO SELECT AMONG SOFT (AND HARD) LAW INSTRUMENTS: THE PARTIES' WILL AND THE INSTRUMENTS' SUITABILITY FOR LEGAL TRANSPLANT.....	242
VI.	CLOSING REMARKS	251

I. INTRODUCTION

Although mostly corroborative of solutions based on national law, the use of a-national rules produced in the realm of transnational commercial law is not infrequent in international commercial arbitration.¹ However, whereas the traditional notion of *lex mercatoria* was conceived and described primarily in the form of supranational, uncoded customary law originating from the

¹ For similar observations see, e.g., Harold J. Berman and Colin Kaufman, *The Law of International Commercial Transactions (Lex Mercatoria)*, 19 Harv. Int'l L. J. 221, 224 (1978); Roy Goode, Herbert Kronke and Ewan McKendrick, *Transnational Commercial Law. Text, Cases and Materials* (2nd ed., 2015); Jan H. Dalhuisen, *Dalhuisen on Transnational Comparative Commercial, Financial and Trade Law* (3 volumes, 7th ed., 2019).

Medieval *ius mercatorum*,² and revived into contemporary *lex mercatoria*,³ (or new *law merchant*)⁴, the current trend in the application of transnational commercial law seems to favor the recourse to multiple and diverse (quasi-)codified soft law instruments, produced by various actors and in various formats.⁵

The increasing use of soft law instruments in international commercial arbitration cannot come as a surprise, as one of the characteristic features of soft law is its adaptability, while one of the most appreciated features of international commercial arbitration, as opposed to court litigation, lies in the former's more flexible approach to the case, guided by a pragmatic problem-solving attitude. Indeed, unless otherwise instructed by the parties, arbitrators can act in a way that is firmly precluded to national courts, in that they can somehow disregard the conflict of laws rules of the *forum* (for long time

² For a paper focusing on the application of the *lex mercatoria* in arbitration, see Berthold Goldman, *The Applicable Law: General Principles of Law - The Lex Mercatoria*, in Contemporary Problems in International Arbitration 113, 121 (Julian Lew, ed., 1986); for a revisited notion of the Medieval *ius mercatorum*, as a mixture of autonomous mercantile rules and official laws, see Emily Kadens, *Order Within Law, Variety Within Custom: The Character of the Medieval Merchant Law*, 5 Ch. J. Int'l L. 39, 42 (2004).

³ See, among others, Philip Jessup, *Transnational Law* (1956); Clive Schmitthoff, *International Business Law: A New Law Merchant*, 2 Current Law and Social Problems 129 et seq. (1961); Id., *The Law of International Trade: Its Growth, Formulation and Operation*, in Sources of the Law of International Trade 3 (ICC ed., 1964); Berthold Goldman, *Frontières du droit et lex mercatoria*, Archives de philosophie du droit 177 (1964); Francesco Galgano, *Lex Mercatoria. Storia del diritto commerciale* 239 (Bologna, 4th ed., 2001); Michael Joachim Bonell, *La moderna lex mercatoria tra mito e realtà*, Dir. Comm. Int. 315 et seq. (1992). For a study on the renaissance of the *lex mercatoria* in the 20th Century, see Jan H. Dalhuisen, *Legal Orders and Their Manifestation: The Operation of the International Commercial and Financial Legal Order and Its Lex Mercatoria*, 24 Berkeley J. Int'l L. 129 (2006).

⁴ For one of the first legal definitions of *Law Merchant*, see the one provided by John Bouvier and reported by Fabrizio Marrella, *La nuova Lex Mercatoria. Principi UNIDROIT ed usi dei contratti del commercio internazionale* 23 (Trattato di diritto commerciale e di diritto pubblico dell'economia, dir. Francesco Galgano, 2003); John Bouvier, *A Law Dictionary Adapted to the Constitution and Laws of the United States of America and of the Several States of the American Union, with Reference to the Civil and other Systems of Foreign Law* (6th ed. 1856), where the *Law Merchant* is defined as: «A system of customs acknowledged and taken notice of by all commercial nations; and those customs constitute a part of the general law of the land; and being a part of that law their existence cannot be proved by witnesses, but the judges are bound to take notice of them *ex officio*».

⁵ For a review of the genealogy of soft law, see Anna di Robilant, *Genealogies of Soft Law*, 54 Am. J. Comp. L. 499, 500 (2006); for an analysis of its notion in international law, see Andrew T. Guzman and Timothy L. Meyer, *International Soft Law*, 2 J. Legal Analysis 171 (2010).

deemed to coincide with the conflict rules of the *seat* of arbitration), as well as domestic substantive laws, and adopt a more flexible approach in their search for the proper rules applicable to the case.⁶ This approach appears to be all the more justified when the arbitration rules applicable to the dispute contain a provision stating that, in the absence of an agreement between the parties as to the applicable law, «*the arbitral tribunal shall apply the rules of law which it determines to be appropriate*»,⁷ a solution which is deemed to authorize resort to non-national legal rules.

The increasing attention gained by soft law instruments in recent years and the pivotal role played by these instruments in the adjudication of international commercial disputes require a careful review of the relationship between soft law and *lex mercatoria*. These two notions seem to share some relevant and highly appreciated features, such as flexibility, adaptability and problem-solving capacity, which make them extremely suitable to serve effectively regulatory goals which cannot be properly pursued by means of hard law instruments, due to the rigidity of the latter ones. As referred to soft law, these features make it suitable to be used in different fields of the law, as well as with respect to different geographical scopes, ranging from merely local to truly global ones.⁸ In the context of the present work, however, as the focus is on international commercial arbitration, soft law is analyzed primarily as a legal tool used to promote the supranational unification of private and commercial

⁶ For a paper dealing with the law applicable to the merits in arbitration, see Linda Silberman and Franco Ferrari, *Getting the Law Applicable to the Merits in International Arbitration and the Consequences of Getting it Wrong*, in *Conflict of Laws in International Arbitration* 371-442 (Franco Ferrari and Stefan Kröll, eds., 2nd ed., 2019).

⁷ Article 21(1) ICC Arbitration Rules (2017). For a very similar language, see Article 31(2) of SIAC Arbitration Rules (2016). Conversely, under Article 28(2) of the UNCITRAL Model Law on International Commercial Arbitration (1985, as amended in 2006), failing a designation of the applicable rules by the parties, «*the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable*», thus suggesting that the arbitral tribunal enjoys a certain degree of flexibility with respect to the determination of the relevant conflict rules, but has to abide by those rules as regards the determination of the domestic law applicable to the dispute. In particular, the reference only to the 'law' applicable, without mention of the 'rules of law' may seem to limit the possibility to resort to a-national sources of law, such as the *lex mercatoria*.

⁸ See, for instance, Marrella, *supra* n. 4, 63 et seq. and 89 et seq., who distinguishes between *lex mercatoria* 'universal in scope' and 'local in scope'.

law,⁹ a field where traditionally any reference to non-state law has been ascribed to the general notion of *lex mercatoria*, conceived as the global merchants' system of self-regulation¹⁰, applicable in international commercial arbitration. *Lex mercatoria* and soft law, however, seem to refer to rather different phenomena, the former one being characterized by its supranational (i.e. global¹¹) scope and its uncoded, customary format; the latter one claiming its role in transnational commercial law irrespective of its status as an autonomous system of global law, and being susceptible of codification into collections of principles or rules. In fact, an overview of recent activities of most norm-formulating agencies shows that significant efforts have been put in the last decades into the enactment in a "codified" format of collections of rules or principles that allegedly already existed in the form of "uncodified" practices or usages.

The most notable example, in this regard, is that of the UNIDROIT Principles of International Commercial Contracts ("UNIDROIT Principles"), whose latest edition was published in 2016.¹² The phenomenon, however, is not limited to substantive rules, as "codified" collections of rules, principles, or model laws are increasingly being enacted also in the field of procedural law (in particular as regards the procedural rules applicable in international arbitration), and even in the field of conflict-of-laws. To provide just a few examples of "codifications" of procedural rules in soft law format, one can refer

⁹ For a general overview of the topic of unification of private law, see René David, *The International Unification of Private Law* (International Encyclopedia of Comparative Law. Vol. II, Chapter V. The Legal Systems of the World: Their Comparison and Unification, 1971), for a more recent account on the subject, see Katharina Boele-Woelki, *Unifying and Harmonizing Substantive Law and the Role of Conflict of Laws* (2010).

¹⁰ Filip De Ly, *Uniform Commercial Law and International Self-Regulation*, in *The Unification of International Commercial Law* 59 (Franco Ferrari ed., 1998); Gabriella Saputelli, *The European Union, the Member States, and the Lex Mercatoria*, 8 *Notre Dame J. Int'l & Comp. L.* 1, 2 et seq..

¹¹ See Harold J. Berman, *Law and Revolution. The Formation of the Western Legal Tradition* 332 et seq. (1983).

¹² The UNIDROIT Principles are available at: <https://www.UNIDROIT.org/instruments/commercial-contracts/UNIDROIT-principles-2016>. For a recent paper dealing with the UNIDROIT Principles and their role in the assessment of the law applicable to international commercial contract, see Michael J. Bonell, *The Law Governing International Commercial Contracts and the Actual Role of the UNIDROIT Principles*, 23 *Unif. L. Rev.* 15 (2018); for a paper on the use of the UNIDROIT Principles in investment arbitration, see Giuditta Cordero-Moss and Daniel Behn, *The Relevance of the UNIDROIT Principles in Investment Arbitration*, 19 *UNIF. L. REV.* 57 (2014).

to the 2006 UNIDROIT / ALI Rules on Transnational Legal Procedure,¹³ to the UNCITRAL Model Law on International Commercial Arbitration,¹⁴ or to the IBA Rules on the Taking of Evidence in International Arbitration.¹⁵ One notable example of a soft law instrument in the field of conflict-of-laws is that of the 2015 Hague Principles on Choice of Law in International Commercial Contracts.¹⁶

At first sight, this massive production of codified collections of rules and principles may be regarded as a paradox, in that most of the benefits of soft law, such as flexibility, adaptability, and problem-solving capacity, are likely to be frustrated if confined into the rigid structure of a “codified” text. The question thus arises as to the reasons leading to this process of (quasi-)codification, and whether the ultimate goal of these efforts is the codification not only of collections of soft law principles, but of the *lex mercatoria* altogether.

This paper posits that the relationship between the traditional *lex mercatoria* and the current relevant production of (quasi-)codified soft law instruments should be described in terms of a progressive shift from the traditional uncoded *lex mercatoria*, to a new (codified, or quasi-codified) *lex mercatoria*, resulting from a regulatory competition of soft law instruments, whose claim for legitimacy and enforceability, and whose suitability to be applied by arbitrators, must be based on a comparative law methodology.

¹³ 2006 ALI / UNIDROIT Principles on Transnational Civil Procedure, available at: <https://www.UNIDROIT.org/instruments/transnational-civil-procedure>. Parallel to the ALI / UNIDROIT Principles, a working group is currently engaged in the draft of the ELI – UNIDROIT Principles of Transnational Civil Procedure, whose draft is available at: <https://www.UNIDROIT.org/work-in-progress/transnational-civil-procedure>.

¹⁴ UNCITRAL Model Law on International Commercial Arbitration (1985, with amendments as adopted in 2006), available at: https://www.UNCITRAL.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf.

¹⁵ IBA Rules on the Taking of Evidence in International Arbitration, adopted by a resolution of the International Bar Association’s Council of 29 May 2010, available at: https://www.ibanet.org/ENews_Archive/IBA_30June_2010_Enews_Taking_of_Evidence_new_rules.aspx.

¹⁶ Hague Principles on Choice of Law in International Commercial Contracts, approved by the Hague Conference on Private International Law on 19 March 2015, available at: <https://www.hcch.net/en/instruments/conventions/full-text/?cid=135>.

The paper will thus proceed as follows: Section 2 will review the theories supporting the use of *lex mercatoria* as an autonomous legal order available in international commercial arbitration; Section 3 will provide a critical account of some of the most popular explanations of the goals and benefits of *lex mercatoria*, and will offer an alternative, functional approach to *lex mercatoria* as a tool serving the parties' quest for arbitrators' independence and impartiality; on the basis of the proposed approach, Section 4 will analyze the progressive shift from the use of uncoded rules and principles to that of competing soft law instruments; Section 5 will call for recourse to a comparative law methodology to review the mechanisms of selection among the multiple (hard and soft) law instruments available to international arbitrators, and will propose the use of an approach based on the analysis of the goals and will of the parties, as well as on the available instruments' suitability for legal transplant and adaptation to different legal environments. Section 6 will sum-up the analysis and draw some conclusions.

II. THE TRADITIONAL NOTION OF *LEX MERCATORIA* AS AN AUTONOMOUS LEGAL ORDER APPLICABLE TO THE MERITS OF THE DISPUTE IN INTERNATIONAL COMMERCIAL ARBITRATION

The prevailing notion of modern *lex mercatoria* originates from a revival of the Medieval *ius mercatorum*.¹⁷ This notion emphasizes the autonomy and universality of commercial law, and the benefits of law-making mechanisms relying on merchants' self-regulation. Accordingly, the traditional theory of *lex mercatoria* posits the existence of a supranational autonomous legal order,¹⁸

¹⁷ Cf. Francesco Galgano, *Lex Mercatoria*, *supra* n. 3, *passim* *Storia del diritto commerciale* (Bologna, 4th ed., 2001).

¹⁸ For a national court's acknowledgment that *lex mercatoria* is an autonomous legal system, see Italian Supreme Court (*Corte di cassazione*), 8 February 1982, n. 722, *Damiano v Topfer*, Riv. dir. int. priv. proc. 835 (1982), with comment by Andrea Giardina, *Arbitrato transnazionale e lex mercatoria di fronte alla Corte di Cassazione*, at 835; for a similar ruling by the French Supreme Court (*Cour de cassation*), see decision of 22 October 1991, *Compania Valenciana v Primary Coal*, Yearbook 137 (1993), and the decision of 10 March 1993,

whose rules are applied primarily in international commercial arbitration.¹⁹ The autonomous legal order, in particular, consists of rules originating from multiple sources, including customary commercial usages, generally accepted contractual practices, and arbitral tribunals' decisions rendered in international commercial arbitration.²⁰

Under the theory at hand, when seeking for legal rules applicable to a dispute without resorting to domestic laws,²¹ arbitrators may look into, and apply, *lex mercatoria* in search for a solution capable of avoiding the claim that the decision was rendered *ultra petita*, as would be the case if they were to decide *ex aequo et bono* in the absence of a specific mandate from the parties to that effect.²² In fact, applying the *lex mercatoria* does not correspond to deciding *ex aequo et bono*, as *lex mercatoria* is deemed to represent the (uncodified) transnational law of international commercial transactions.

This traditional notion of *lex mercatoria* encompasses an implicit claim of normative legitimacy and enforceability, clearly evoked by the use of the Latin

Polish Ocean, J. Dr. Int. 360 (1993); in England, see *Home and Overseas Insurance Co. v. Mentor* [1989] 1 Lloyd's Rep. 473.

¹⁹ *Accord*, Christopher R. Drahozal, *Diversity and Uniformity in International Arbitration Law*, 31 Emory Int'l L. Rev. 393, 393 et seq. (2017).

²⁰ For further references, see Aldo Frignani and Marco Torsello, *Il contratto internazionale. Diritto comparato e prassi commerciale*, 24 et seq. (Trattato di diritto commerciale e di diritto pubblico dell'economia, dir. Francesco Galgano, 2nd ed., 2010).

²¹ As is the case when the applicable arbitration rules authorize, in the absence of a choice of law by the parties, the resort to «*rules of law which [the arbitral tribunal] determines to be appropriate*».

²² Indeed, it is well-known that, according to an approach largely adopted in international arbitration, arbitrators may «*assume the powers of an amiable compositeur or decide ex aequo et bono only if the parties have agreed to give it such power*»: Article 21(3) ICC Arbitration Rules (2017). This solution coincides also with the one set forth in Article 28(3) of the UNCITRAL Model Law on International Commercial Arbitration (1985, as amended in 2006), which states that «[t]he arbitral tribunal shall decide *ex aequo et bono* or as *amiable compositeur* only if the parties have expressly authorized it to do so». An exception to this, broadly accepted, rule is reported by Luca Radicati di Brozolo, *Applying the Rules Governing the Merits in International Commercial Arbitration. What Role for Inherent Powers?*, in *Inherent Powers in International Arbitration* 235, 241 (Franco Ferrari and Friedrich Rosenfeld, eds., 2019), who refers to Article 3 of the Law on arbitration and mediation of Ecuador (Ley de Arbitraje y Mediación de Ecuador, Codificación 14, Registro Oficial 417 de 14 de diciembre del 2006, as amended on May 22nd, 2015), which states that «*the parties shall indicate whether the arbitrators must decide in equity or in law. In the absence of agreement, the award will be in equity*». A similar approach is adopted also by Article 32 of the Arbitration Rules of the Mercosur International Arbitration Court.

noun “*lex*”.²³ The discussion about the notion, theoretical foundations and practical functions of *lex mercatoria*, however, has focused more on the possible grounds of its legal enforceability, than on its normative legitimacy,²⁴ the latter being, in most cases, given for granted.

In fact, the notion and binding force of *lex mercatoria* can neither be explained solely on the basis of a reference to “party autonomy”,²⁵ nor by merely invoking the binding force of “usages”.²⁶ This is because neither one of these argumentative options would lead to the acknowledgment of *lex mercatoria* as an autonomous and exclusively applicable transnational legal order, existing and enforceable irrespective of an *imprimatur* received from a national sovereign jurisdiction.²⁷

Reliance on party autonomy, on the one hand, would prove unsatisfactory in that *lex mercatoria* would not be applicable in the absence of an agreement between the parties on that private legal regime. Moreover, the scope of application of the rules incorporated by reference into the contract as a result of the parties’ choice would be restricted and limited by all the mandatory rules of the otherwise applicable domestic law, so that *lex mercatoria* could not be referred to as an autonomous legal order.

²³ It has been observed, however, that «[t]he main issue is not the existence of a *lex mercatoria*, in the past or in the present. It is the theoretical possibility of a law merchant, and whether it can be considered to be law»: Ralf Michaels, *The True Lex Mercatoria: Law Beyond the State*, 14 Indiana J. Global Leg. St. 447, 449 (2007), where the Author further posits (at 451) that «a *lex mercatoria* as a truly anational legal system, though theoretically possible, has never existed [...] At all times, the transnational law of commerce included both state and non-state norms and institutions».

²⁴ Cf. Filip De Ly, *International Business Law and the Lex Mercatoria* 207 et seq. (1992).

²⁵ For a description of *lex mercatoria* focusing mainly on the role of party autonomy and freedom of contract (*contrat sans loi*), see Alfred E. von Overbeck, *L’irrésistible extension de l’autonomie en droit international privé*, in Hommage Rigaux 618, 619 et seq. (1992); for a revisited and actualized position based on the interplay between contracts and social institutions, see Gunther Teubner, *Breaking Frames: The Global Interplay of Legal and Social Systems*, 45 Am. J. Comp. L. 149, 162 et seq. (1997).

²⁶ For an approach to *lex mercatoria* primarily based on the notion of commercial customs and usages, see Roy Goode, *Usage and Its Reception in Transnational Commercial Law*, 46 Int’l & Comp. L. Q. 1, 1 et seq. (1997).

²⁷ This notion of *lex mercatoria* as an autonomous transnational legal order was proposed and strongly supported by Berthold Goldman, *Frontières du Droit et ‘Lex Mercatoria’*, 9 Arch. de Philosophie du Droit 177 (1964).

Reference to usages, on the other hand, is also unsatisfactory. In fact, if *lex mercatoria* could simply be equated to usages, one could legitimately conclude that there would be no need for an autonomous concept of *lex mercatoria*, since the application of usages is broadly affirmed in most domestic legal systems, as well as in international conventions, as exemplified by the paradigmatic rule provided in Article 9 of the 1980 United Nations Convention on Contracts for the International Sale of Goods (“CISG”).²⁸ In other words, usages play a role as suppletory rules to the extent that states recognize the applicability of those usages, whereas proponents of *lex mercatoria* claim for it the status of an autonomous legal order, capable of displacing in its entirety any national commercial law.²⁹

The conclusion that usages in international commerce are entirely compatible with the application of national laws is confirmed by the fact that several trade associations provide model contracts, which are largely autonomous expressions of self-regulation based on sector-specific trade customs, but at the same time contain a gap-filling mechanism based on the choice of a national law, rather than on *lex mercatoria*, or the like. Just to give one example, the model contracts of the Grain and Feed Trade Association (“GAFTA”) present themselves as self-sufficient autonomous contracts expressing the customs and usages of the associates’ business community. With a view to preserving the autonomy and independence of the system, these contracts include a dispute resolution clause providing for arbitration under the GAFTA Arbitration Rules. However, they do not reject the application of national law, but, instead, provide that the contract «*shall be construed and take effect in accordance with the law of England*».³⁰

²⁸ Under Article 9 CISG, «(1) *The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves.* // (2) *The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned*». For a comment on this provision, see, *ex multis*, Franco Ferrari and Marco Torsello, *International Sales Law – CISG in a Nutshell* 53 et seq. (2nd ed., 2018).

²⁹ For a similar description, see Gilles Cuniberti, *Three Theories of Lex Mercatoria*, 52 Colum. J. Transnat’l L. 369, 374 (2014).

³⁰ See, e.g., GAFTA Contract No. 64, *General Contract for Grain in Bulk*, Art. 24 (2006).

If proponents of the *lex mercatoria* wish to claim for it the status of an autonomous legal order, they cannot but reject the equation between *lex mercatoria* and usages and describe the former as an exclusively applicable system of law. A practical example of this approach, in sharp contrast with the GAFTA model referred to above, can be found in most ICC model contracts, which contain an optional model choice of law,³¹ which provides for the choice of «*the rules and principles of law generally recognized in international trade as applicable to international contracts [...]*», supplemented by the UNIDROIT Principles.³² Under the latter provision, no national law is chosen, but instead an autonomous system of “rules and principles of law”, which has led proponents of the *lex mercatoria* to conclude that one should, at least, admit that the *lex mercatoria* exists («*admettons au moins que la lex mercatoria peut prétendre qu'elle existe*»).³³

Arguments positing the existence and autonomous status of *lex mercatoria* point at two different socio-economic and legal processes, which have led to its emergence in contemporary commercial practice. On the one hand, there stands the argument which emphasizes the need for an autonomous a-national legal order to govern commercial relationships where one of the parties is a State or a governmental entity.³⁴ Under these circumstances, it is posited, neither would the private party accept the contract to be governed by the national law of the governmental entity (not to mention disputes adjudicated by the national courts of the State of that counterparty),

³¹ Usually ‘Option A’, presented with the alternative (‘Option B’) of the choice of a national law.

³² See, e.g., ICC Model Form of International Sole Distributorship Contract, Publ. 646, Art. 24.1(A) (3rd ed., 2002). An identical, or very similar solution is found in Article 24.1 (Option A) of the 2002 ICC Model Commercial Agency Contract, Article 23.1 (Option A) of the 2004 ICC Model Selective Distributorship Contract, Article 18.1 (Option B) of the 2004 ICC Model Mergers & Acquisitions Contract, Article 13(1) of the ICC Model Occasional Intermediary Contract and Article 12 of the ICC Model International Franchising Contract. For a comment on this type of clauses, see Herbert Kronke, *The UN Sales Convention, the UNIDROIT Contract Principles and the Way Beyond*, 25 J. L. & Comm. 451, 454 et seq. (2005-2006).

³³ Dale Thompson, note to Cass. Civ. 1^{re} 9 October 1984 (*Société Pabalk Ticaret Sirketi v Société Norsolor*) [English translation of the original French decision], 2 J. Int. Arb. 67, 76 (1985).

³⁴ Cf. Prosper Weil, *Principes généraux du droit et contrats d’Etat*, in *Le droit des relations économiques internationales. Etudes offertes à Berthold Goldman* 387 et seq. (1982); Jean-Flavien Lalive, *Contrats entre Etats ou entreprises étatiques et personnes privées. Développements récents*, 9 Recueil des Cours 12 et seq. (1983).

as this would bear the risk of arbitrary changes in the applicable law,³⁵ nor could the State or governmental entity accept to be subject (not only to the law of the private counterparty, but also) to any foreign law, as this is perceived as incompatible with the national sovereignty of the State.³⁶ Under these circumstances, the only possible way out of the deadlock seems to be the resort to international arbitration to adjudicate possible disputes and to the choice of an entirely a-national legal order, such as the “the rules and principles of law generally recognized in international trade”, or the like.³⁷

The alternative argumentative path used to affirm the existence of *lex mercatoria* is more arbitration-specific, as it emphasizes the progressive loosening of the (*conflictualist*) connection³⁸ between the arbitrators’ decision-

³⁵ Only to a limited extent could this risk be reduced by the inclusion in the agreement of a stabilization clause, on which see, e.g., Wolfgang Peter, *Stabilization Clauses in State Contracts*, 8 Int’l. Bus. L. J. 875 (1998); Abdullah Al Faruque, *The Rationale and Instrumentalities for Stability in Long-term State Contracts: The Context for Petroleum Contracts*, 7 J. World Invest. & Tr. (2006); May Tai, *Stabilisation Clauses: Is There A Middle Ground Between Competing Interests? Comments from the AIPN Europe and Africa Region Chapter Meeting and the Special Representative of the Secretary General of the UN’s Consultation Meeting*, 13 IBA Arb. Newsl. 52 (2008); Katja Gehne and Romulo Brillo, *Stabilization Clauses in International Investment Law: Beyond Balancing and Fair and Equitable Treatment* 6 et seq. (2017).

³⁶ For a similar statement, see Fabio Bortolotti, *Manuale di diritto commerciale internazionale*, Vol. 1. Diritto dei contratti internazionali 32 (2nd ed., 2001).

³⁷ Yves Dezalay and Bryant G. Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (1996). By way of example of the type of clause under consideration, see, e.g., the Accords establishing the Iran-United States Claims Tribunal, which provided that «[t]he tribunal shall decide cases on the basis of respect for law, applying such choice of law rules and principles of commercial and international law as the Tribunal determines to be applicable, taking into account relevant usages of the trade, contract provisions and changed circumstances»: Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, Article V, available at <http://www.iusct.org/claims-settlement.pdf>. See also, *ex multis*, the reference to «*principles of law common to and recognized by civilized nations*» in Article XXI of the 1974 Agreement between Egypt and Esso, in I.L.M. 915 et seq. (1975), and reference to «*principes de droit généralement reconnus, en particulier le droit international*» in Article 41 of the 1966 Agreement between NIOC and ERAP, reported by Weil, *Principes généraux du droit et contrats d’Etat*, *supra* n. 34, 391.

³⁸ For a similar use of the term ‘conflictualist’, as opposed to ‘internationalist’, see Friedrich K. Juenger, *The lex mercatoria and private international law*, 5 Unif. L. Rev. 171 et seq. (2000), volume containing a collection of papers presented at the symposium on “International Uniform Law Conventions, Lex Mercatoria and Unidroit Principles” held at Verona University (Italy), Faculty of Law, 4-6 November 1999.

making process and the seat of arbitration. Unlike national courts, which are strictly bound to apply the conflict of laws rules of the *forum* in order to determine the applicable law, arbitral tribunals have long been granted more discretion in the selection of the conflict rules. A clear sign of this greater (conflict-of-laws) freedom can be found in Article 28 of the UNCITRAL Model Law, which states that, in the absence of a choice of law made by the parties, the arbitral tribunal shall apply the law determined by the «*conflict of laws rules which it considers applicable*».³⁹ However, once the rigid mechanics of the *conflictualist* approach are abandoned, the gates are open to further estrangement from the *forum* (*rectius*, in arbitration, the seat), and the discretion of the arbitral tribunal can reasonably be expected to focus on the substantive rules, rather than on the conflict of laws rules. Accordingly, in some Arbitration Rules, such as the UNCITRAL Rules, the solution to be adopted by the arbitrators in the absence of a choice of law expressed by the parties does no longer contain a reference to external conflict of law rules, but, instead, operates directly as a conflict rule by setting forth the criterion to select the applicable substantive law and requiring the arbitral tribunal to apply «*the law which it determines to be appropriate*»,⁴⁰ thus granting to the arbitral tribunal the power to select the *proper* (national) law to be applied to the case at hand.

The relevant loosening of the *conflictualist* connection to the *forum* (i.e., the arbitral *seat*) favors the further decisive step towards the establishment of *lex mercatoria* as an autonomous legal order. This last step consists of the substitution of the notion of “rules of law” for “law”,⁴¹ as illustrated by the

³⁹ UNCITRAL Model Law on International Commercial Arbitration, *supra* n. 14, Article 28.

⁴⁰ UNCITRAL Arbitration Rules (originally adopted in 1976, revised in 2010, with a new Article 1, par. 4 as adopted in 2013), Article 35(1).

⁴¹ In fact, the reference to “rules of law” instead of “law” was first used by the 1981 French law on international arbitration, which provided in the new Article 1496 of the Code of Civil Procedure that the parties were to select the “rules of law” applicable to their dispute. A similar solution is found also in Article 187(1) of the Swiss Private International Law Act (1987), Article 1054(1)(2) of the Dutch Code of Civil Procedure (1986), and other national laws on international arbitration. Under Article 46 of the English Arbitration Act (1996), instead, the arbitral tribunal shall decide the dispute in accordance with the law chosen by the parties, or, «*if the parties so agree, in accordance with such other considerations as are agreed by them or determined by the tribunal*». For a thorough analysis of the consequences of this change, see, *inter alia*, Giuditta Cordero-Moss, *Limitations on Party Autonomy in International Commercial Arbitration*, Recueil des cours, vol. 372 (2015).

comparison between the aforementioned provision of the UNCITRAL Rules and the corresponding provision in the ICC Rules, which states that, in the absence of a choice of law, the arbitral tribunal shall apply «*the rules of law which it determines to be appropriate*», a solution which is also to be found in some domestic arbitration laws.⁴² It is thus maintained that the reference to “rules of law” (instead of “law”) is meant to include not only national legal systems, but also rules developed in the context of the a-national autonomous legal order which is being discussed here as *lex mercatoria*.⁴³

Proponents of the *lex mercatoria* draw very far-reaching conclusions from the observation of the socio-economic phenomena that have just be described, in that they conclude that the foregoing is evidence of the existence of an autonomous a-national legal order, that perpetuates itself from the standpoint of a *contrat sans loi*.⁴⁴ By contrast, skeptical commentators observe that, in the end, not only does *lex mercatoria* lack comprehensiveness⁴⁵ (which thus requires a gap-filling role of national laws), but it could not exist altogether, unless national laws were to recognize freedom of contract and party autonomy, and to enforce foreign arbitral awards,⁴⁶ and it can only exist within the limits set by national laws.⁴⁷ National states, therefore, operate as conduits

⁴² See ICC *Arbitration Rules* (in force as from 1 March 2017), Article 21(1). A substantially identical solution is provided, for instance, by Article 31 of SIAC *Arbitration Rules* (2016).

⁴³ For a similar description of the phenomenon, see, *ex multis*, Lord Justice Michael Mustill, *The New Lex Mercatoria: The First Twenty-five Years*, in 4 *Arb. Int'l* 86, 103 et seq. (1988); for one of the first reported arbitral awards applying the approach described in the text, see Award of 26 October 1979 (*Pabalk Tikaret Limited Sirketi v Norsolor S.A.*), *Rev. Arb.*, 525 (1983).

⁴⁴ Cf. Galf-Peter Calliess, *Reflexive Transnational Law: The Privatisation of Civil Law and the Civilisation of Private Law*, 23 *Zeitschrift für Rechtssoziologie* 185 (2002); on the notion of ‘*contrat sans loi*’, see Partice Level, *Le contrat dit sans loi*, in 25-27 *Travaux du Comité français de droit international privé* 209, 209-243 (1964-1966); L. Peyrefitte, *Le problème du contrat dit sans loi*, *Chron.* 113 et seq. (1965); Jean-Paul Beraudo, *Faut-il avoir peur du contrat sans loi?*, in *Mélanges Paul Lagarde* 93 et seq. (2005).

⁴⁵ *Accord*, Gary Born, *International Commercial Arbitration* 2236 (2009).

⁴⁶ Cf., e.g., Paul Lagarde, *Approche critique de la lex mercatoria*, in *Le Droit des Relations Economiques Internationales: Etudes Offertes a Berthold Gldman* 123 (1987); Keith Highet, *The Enigma of the Lex Mercatoria*, 63 *Tulane L. Rev.* 613 et seq. (1989).

⁴⁷ For a court decision applying this approach, see Bundesgericht (Switzerland), 20 December 2005, available at: <http://www.unilex.info/case.cfm?pid=2&do=case&id=1124&step=Abstract>. For an analysis of the limits of mandatory rules in arbitration, see George A. Bermann, *Mandatory Rules of Law in International*

of the *lex mercatoria* by “re-stating”⁴⁸ it in different forms, including *incorporation*⁴⁹ into the national legislation of the state, *deference* in the form of recognition of a normative role to usages, or *delegation* by granting wide enough a space to freedom of contract to develop an autonomous system.⁵⁰

Whatever the position with respect to the degree of autonomy of *lex mercatoria* from national states, a crucial practical aspect to overcome the criticism of its being «*a myth without substance*»⁵¹ relates to its contents. Given the difficulties in defining the true notion and the very existence of *lex mercatoria*, a deductive approach has proved unfeasible and scholars who have addressed the issue have primarily taken an inductive approach, focusing on the possibility to provide a list of rules and principles that are constituents of the *lex mercatoria*.⁵² The need for prompt availability and systematicity of the system has not been addressed through a change in the approach (from an inductive to a deductive one), but rather through a change of paradigm, by introducing into the picture a *restatement method*, which is very well exemplified by the UNIDROIT Principles, with a view to systematizing, rationalizing and improving the accessibility to the *lex mercatoria*.⁵³

Arbitration, in *Conflict of Laws in International Arbitration* 325 et seq. (Franco Ferrari and Stefan Kröll eds., 2010)

⁴⁸ Cf. Ralf Michaels, *The Re-state-ment of Non-State Law: The State, Choice of Law, and the Challenge from Global Legal Pluralism*, 51 Wayne L. Rev. 1209, 1238 (2005).

⁴⁹ The option of incorporating trade usages into national codes is deemed inappropriate by Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code’s Search for Immanent Business Norms*, 144 Penn. L. Rev. 1765 (1996); on the same issue, see also Clayton P. Gillette, *The Law Merchant in the Modern Age: Institutional Design and International Usages under the CISG*, 5 Chi. J. Int’l L. 157 (2004).

⁵⁰ Accord, Michaels, *The True Lex Mercatoria*, *supra* n. 23, 461.

⁵¹ Georges R. Delaume, *The Proper Law of State Contracts and the Lex Mercatoria: A Reappraisal*, 3 ICSID Rev. For. Invest. L. J. 79, 81 (1988).

⁵² For a similar ‘list method’ (as labeled by Cuniberti, *Three Theories of Lex Mercatoria*, *supra* n. 29, 380), see Klaus-Peter Berger, *The Creeping Codification of the Lex Mercatoria*, *passim* (1999).

⁵³ See, *ex multis*, Michael Joachim Bonell, *The law governing international commercial contracts and the actual role of the UNIDROIT Principles*, Unif. L. Rev. 15, 15 et seq. (2018); Allan E. Farnsworth, *An Interntional Restatement: The UNIDROIT Principles of International Commercial Contracts*, 26 Univ. Balt. L. Rev. 1 et seq. (1996); Ole Lando, *The Lex Mercatoria in International Commercial Arbitration*, 34 Int’l & Comp. L. Quart. 747 (1985).

III. A CRITICAL REVIEW OF THE ALLEGED GOALS AND BENEFITS OF THE TRADITIONAL NOTION OF *LEX MERCATORIA*

Given the *lex mercatoria*'s proclaimed status as an autonomous legal order, scholars have long discussed about its ultimate purpose and practical effectiveness, to be assessed on the basis of the identification of its ultimate goals and of the beneficiaries thereof.

The original claim of the proponents of *lex mercatoria* was that, notwithstanding the lack of specificity and predictability, *lex mercatoria* is better suited than national laws to serve the needs of the international business community. The alleged superiority of *lex mercatoria* has been argued on several different grounds,⁵⁴ including the fact that it provides rules that are specifically tailored for transnational commercial transactions, that it avoids the uncertainties of conflict of laws, and that it reduces transaction costs compared to the *conflictualist* approach leading to the application of national laws.⁵⁵

None of the reported arguments, however, is entirely convincing, nor decisive in supporting the claim of *lex mercatoria*'s benefits. In particular, as regards the argument that *lex mercatoria* is better suited to serve the needs of the business community because it provides rules that are specifically tailored for transnational commercial transactions, this position is often presented in a dogmatic form, relying on the authority of some of the early proponents of the international unification of private law, who argued that the use of domestic tools to solve questions that are essentially international «*is to square the circle*».⁵⁶

In practice, however, it is very difficult to identify any specific substantive rules which would apply under the system of *lex mercatoria*, but which, on the other hand, could not be found in at least some national legal systems. In other words, the specificity of *lex mercatoria* seems to be often proclaimed in abstract

⁵⁴ For a similar presentation of the arguments, see Cuniberti, *Three Theories of Lex Mercatoria*, *supra* n. 29, 384 et seq.

⁵⁵ For a study addressing this issue, see Jürgen Basedow, *Lex Mercatoria and the Private International Law of Contracts in Economic Perspective*, in *An Economic Analysis of Private International Law* 63 (Jürgen Basedow and Toshiyuki Kono eds., 2006).

⁵⁶ David, *The International Unification of Private Law*, *supra* n. 9, 7.

terms, but never convincingly supported through concrete examples of specific substantive legal solutions that truly meet the demands of transnational commerce better than the corresponding domestic solutions. In fact, commercial practice seems to prove exactly the opposite, as in the vast majority of international contracts parties either ignore the issue of the law governing the contract,⁵⁷ or choose a national law to govern their transaction.⁵⁸

Also the variant according to which the benefits of *lex mercatoria* stem from the fact that it gives the authority to adjudicate to highly-skilled adjudicators⁵⁹ is not convincing. In fact, prior to the appointment of the arbitral tribunal, the parties do not know the identity of the arbitrators, so the idea that they would trade specificity and predictability of legal rules for the benefit of being (possibly) assigned highly skilled arbitrators is, at best, doubtful.

The argument that *lex mercatoria* avoids the uncertainties of conflict of laws seems to rest on a purely dogmatic premise, according to which «*the disparity of national laws is contrary to the requirements of modern economy and inimical to the development of international relations; a uniform law is superior to a system of conflicts of law, which allows the existence of those specific differences on which it is based*».⁶⁰ The merits of this argument have been effectively contrasted by highlighting the possible benefits arising from regulatory competition.⁶¹ Moreover, even if one were to agree with the claim

⁵⁷ As observed by Cuniberti, *Three Theories of Lex Mercatoria*, *supra* n. 29, 385.

⁵⁸ See Frignani and Torsello, *Il contratto internazionale*, *supra* n. 20, 18; Bortolotti, *Manuale di diritto commerciale internazionale*, *supra* n. 36, 8-9. Moreover, see the ICC data collection reported in Cuniberti, *Three Theories of Lex Mercatoria*, *supra* n. 29, 398, where the Author informs that «*parties chose the law governing their contract in 80-85% of the cases. [...] when they made a choice, they almost always chose a national law; on average, non-national rules were chosen in only 1-2% of the cases*».

⁵⁹ Reference to this possible argument is made by Cuniberti, *Three Theories of Lex Mercatoria*, *supra* n. 29, 394-395, who recalls the similar debate in the context of the US corporate charter competition debate and the arguments pointing at the experience and quality of the judges sitting in Delaware's Court of Chancery.

⁶⁰ Marc Ansel, *From the Unification of Law to its Harmonization*, 51 Tul. L. Rev. 108 (1976); for a critical comment on this position, see, e.g., Paul Stephan, *The Futility of Unification and Harmonization in International Commercial Law*, 39 Va. J. Int'l L. 743, 746 (1999).

⁶¹ For a thorough analysis of the relationship between unification and regulatory competition from a primarily European perspective, see the various contributions collected in Horst Eidenmüller (ed.), *Regulatory Competition in Contract Law and Dispute Resolution* (2013); as well as those collected in Andrea Zoppini (ed.), *La concorrenza tra ordinamenti giuridici* (2004).

of superiority of uniform law, one would still have to address the question why *lex mercatoria* should be preferred over other forms of uniform law, including (more detailed and predictable) uniform commercial law conventions, whose contents and enforceability are directly controlled by national states.

Finally, also the line of argument that *lex mercatoria* reduces transaction costs cannot be fully accepted. The argument largely reproduces the broader debate about the ability of uniform law to reduce transaction costs.⁶² However, unlike legislative-based uniform law (in the form of treaties and conventions), *lex mercatoria* cannot claim a degree of comprehensiveness and legal certainty sufficient to rebut the criticism that it increases the uncertainty and resulting transaction costs inherent in its vagueness.⁶³

Scholars have thus looked beyond the interests of the parties, in search for alternative explanations for the supportive sympathy to *lex mercatoria* often shown by scholars and (yet less often) practitioners. Some scholars, in particular, have argued that *lex mercatoria* serves primarily the interests of the International Chamber of Commerce and other international norm-making agencies, that have actively promoted *lex mercatoria*.⁶⁴ This *Production Cost Theory of Lex Mercatoria* maintains that one of ICC's most important activities is to produce international model contracts and «[r]emarkably, the model contracts typically include a choice of law clause that encourages the parties to choose non-national rules to govern their relationship».⁶⁵ Therefore, it is posited, in order to prevent possible issues of compatibility of the terms of the model contracts with any given national law, the ICC promotes the choice of *lex mercatoria*, thus displacing the application of any national law, which could override the terms of the model contracts, and by doing so, the ICC reduces its costs of production of viable model contracts.

⁶² For a paper addressing the debate referred to in the text, see Clayton P. Gillette and Robert E. Scott, *The Political Economy of International Sales Law*, 25 Int'l Rev. L. & Econ. 446, 446 et seq. (2005).

⁶³ For papers focusing on transaction costs of uniform law, see Paul B. Stephan, *The Futility of Unification and Harmonization in International Commercial Law*, *supra* n. 60, 743 et seq.; John Linarelli, *The Economics of Uniform Law and Uniform Lawmaking*, 48 Wayne L. Rev. 1387 (2003).

⁶⁴ Cuniberti, *Three Theories of Lex Mercatoria*, *supra* n. 29, in particular at 424 et seq..

⁶⁵ *Id.*, 425.

This argument, however, is not convincing. First, if *lex mercatoria* were not *per se* otherwise acceptable to business operators, the ICC would suffer from a loss of credibility and its model contracts would become less and less successful and possibly give way to other, more competitive models. It is, in fact, revealing that the ICC model contracts containing a choice of *lex mercatoria* combine that option with the alternative of a choice of national law.

Secondly, yet most importantly, the *Production Cost Theory of Lex Mercatoria* rests on the doubtful assumption that the contractual choice of an a-national legal regime can exempt the contract from the scrutiny of compatibility with domestic laws (thus reducing the costs of monitoring compatibility of the ICC models with domestic laws), whereas the contrary seems true. In fact, even if the parties choose *lex mercatoria*, the terms of the contract must not be contrary to the public policy of the states possibly involved and compliant with their overriding mandatory rules.

In support of this conclusion, one may refer to the 2015 Hague Principles of Private International Law,⁶⁶ which, although conceding that «[t]he law chosen by the parties may be rules of law that are generally accepted on an international, supranational or regional level as a neutral and balanced set of rules», further specify that the foregoing holds true «unless the law of the forum provides otherwise» (Article 2) and that the Principles shall not prevent a court (Article 11(1)) or an arbitral tribunal (Article 11(5)) «from applying or taking into account public policy (*ordre public*) or from applying or taking into account overriding mandatory provisions of a law other than the law chosen by the parties, if the arbitral tribunal is required or entitled to do so».⁶⁷

⁶⁶ For a comment on the Principles, see, e.g., Andreas Schwartz, *New Trends in Parties' Options to Select the Applicable Law? The Hague Principles on the Choice of Law in International Contracts in a Comparative Perspective*, 12 U. St. Thomas L. J. 87 (2015); Francesca Ragno, *I Principi dell'Aja e il Regolamento Roma I: complementarità o alternatività?*, in Studi in onore di Maurizio Pedrazza Gorlero: I diritti fondamentali tra concetti e tutele (2014).

⁶⁷ On this topic see, among others, Giuditta Cordero-Moss, *Limits to Party Autonomy in International Commercial Arbitration*, Oslo L. Rev. 47 (2014); Luca Radicati di Brozolo, *Party Autonomy and the Rules Governing the Merits of the Dispute in Commercial Arbitration*, in *Limits to Party Autonomy in International Commercial Arbitration* 331 (Franco Ferrari ed., 2016); Id., *Mandatory Rules and International Arbitration*, 23 Am. Rev. Int'l Arb. 49 (2012).

Other scholars have argued that *lex mercatoria* serves primarily the interests of arbitrators, who can ‘signal’ their being *arbitration insiders* with unique specific skills by showing their knowledge and understanding of the autonomous legal order to be applied in international commercial arbitration.⁶⁸ Others have elaborated on this argument by turning to agency theory⁶⁹ to support the view that *lex mercatoria* was mainly conceived and developed to assure arbitrators discretion in adjudicating cases, either in the interest of developing countries willing to emancipate from the legal regimes of former colonies,⁷⁰ or in their own interest, so as to reduce their accountability in the event of erroneous application of national law, with which they are often not familiar.⁷¹ However, the interest of the arbitrators *per se* could not provide legitimacy to the application of the *lex mercatoria*, unless its existence and the benefits of its application were shared also by the other stakeholders involved. Furthermore, if the interests of the arbitrators (as agents) and those of the parties (as principals) were conflicting, the formers’ resort to vague and unspecified a-national principles would negatively affect the legitimacy and credibility of the arbitrators, as well as the legitimacy of international arbitration as a system of resolution of commercial disputes.

The foregoing agency theory may provide a valuable justification for the emergence of the ‘restatement-method’ as regards the definition of the contents of *lex mercatoria*, as is well exemplified by the success of the UNIDROIT Principles.⁷² It does not, however, provide a satisfactory explanation of the purposes and effectiveness of *lex mercatoria*.

⁶⁸ Christopher R. Drahozal, *Contracting Out of National Law: An Empirical Look at the New Law Merchant*, 80 Notre Dame L. Rev. 523, 550 et seq. (2005).

⁶⁹ Cf. the opinion of Judge Frank Easterbrook in *George Watts & Son, Inc. v Tiffany and Co.*, 248 F.3d 577 (7th Cir. 2001), arguing that the relationship between the parties and the arbitrators in arbitration proceedings was one of agency; see also Tom Ginsburg, *The Arbitrator as Agent: Why Deferential Review is Not Always Pro-Arbitration*, 77 U. Chi. L. Rev. 1013 (2010).

⁷⁰ Dezalay and Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order*, *supra* n. 37, 136.

⁷¹ Julian Lew, Loukas Mistelis and Stefan Kröll, *Comparative International Commercial Arbitration* § 18-2 (2003); see also Cuniberti, *Three Theories of Lex Mercatoria*, *supra* n. 29, 412-417.

⁷² Accord, Ole Lando, *Assessing the Role of the UNIDROIT Principles in the Harmonization of Arbitration Law*, 3 Tul. J. Int’l & Comp. L. 129, 129 et seq. (1995).

All the proposed theories reported above, elaborated to identify goals and beneficiaries of the *lex mercatoria*, and ultimately to justify its existence and practical use, have proved unsatisfactory. Therefore, it is here argued that a more convincing explanation of the ultimate goal and effectiveness of *lex mercatoria* can be provided by applying a functional approach and by redefining *lex mercatoria* as a comparative legal methodology rather than a system.⁷³ In this perspective, the focus is back on the parties and their intent and *lex mercatoria* can be explained as a valuable tool serving the parties' quest for neutrality in the resolution of international disputes.

In fact, one of the main reasons for the parties to choose arbitration as the mechanism of resolution of international disputes is to avoid the possible (real or feared) bias of a national court adjudicating a case where one of the parties is a national of the court's same State.⁷⁴ Without overlooking the significant difference between the nationality of the adjudicator and the nationality of the applicable law, it is posited here that, in the view of the parties, also the application of the domestic law of one party could be perceived by the other party as an undue advantage to the former, which the latter is not willing to concede. Therefore, when the parties are called upon to choose the law applicable to their transaction, it is understandable that, as an alternative to the (still largely prevailing) solution to choose the national law of a State⁷⁵ (possibly a neutral third state, even if not otherwise connected to the parties),

⁷³ Emmanuel Gaillard, *Transnational Law: A Legal System or Method of Decision Making?*, 17 Arb. Int'l 59 (2001); Id., *The Emerging System of International Arbitration: Defining 'System'*, in 106 Proceedings of the Annual Meeting of the American Society of International Law 287-92 (2012). See also Georges R. Delaume, *Comparative Analysis as a Basis of Law in State Contracts: The Myth of the Lex Mercatoria*, 63 Tul. L. Rev. 575, 575 et seq. (1989).

⁷⁴ Cf. Jan Paulsson, *Delocalisation of International Commercial Arbitration: When and Why it Matters*, 32 Int'l & Comp. L. Quart. 53 et seq. (1983).

⁷⁵ It is a largely accepted principle of private international law that in commercial contracts parties can choose the law of a state that presents no connections whatsoever to the parties or the transaction. This principle is now enshrined in Article 2(4) of the 2015 Hague Principles of Private International Law, which states that «[n]o connection is required between the law chosen and the parties or their transaction».

the parties may choose a non-State regime, such as the *lex mercatoria* or the like, thus contracting out of any national law for the sake of neutrality.⁷⁶

On the other hand, in the absence of a choice of law by the parties to a contract subject to an arbitration agreement, it is up to the arbitrators to duly serve the quest for neutrality implicit in the selection of the dispute resolution mechanism. Under these circumstances, if the arbitrators decide to exclude, for the sake of neutrality, the application of the national laws of the parties, in most cases they also find themselves deprived of the possibility to refer to the law that would be applicable under a conflict of laws analysis. Moreover, also the application of a 'neutral' third-country law (not otherwise connected to the contract or to the parties) could appear to the losing party, *ex post*, arbitrary and suspiciously leaning in favor of the winning party.

Therefore, in the absence of different indications by the parties, arbitrators may conclude that their mandate requires them to look into, and compare, the many possible legal solutions available with respect to the disputed issue, and to draw a conclusion on the basis of what appears to be the prevailing, or majoritarian solution.⁷⁷

IV. A NEW FORM OF *LEX MERCATORIA*: THE SHIFT FROM UNCODIFIED SUPRANATIONAL PRINCIPLES TO A REGULATORY COMPETITION AMONG HARD LAW AND (QUASI-)CODIFIED SOFT LAW INSTRUMENTS

For more than four decades since its first appearance on the scene of the debate on transnational uniform commercial law, *lex mercatoria* has been depicted as a flexible toolbox of general principles and trade usages, whose rules were «*codified – if at all – in the form of lists of principles, rules and standards, codes of conduct, or best practices promulgated by private norm*

⁷⁶ For an analysis of this option, see Alejandro M. Garro, *The Contribution of the UNIDROIT Principles to the Advancement of International Commercial Arbitration*, 3 Tul. J. Int'l & Comp. L. 93, 111 (1995).

⁷⁷ The majoritarian solution is referred to also by Emmanuel Gaillard, *Legal Theory of International Arbitration* 48 et seq. (2010).

entrepreneurs».⁷⁸ None of those collections of rules and standards, however, presented itself with the authority, systematicity, claim of comprehensiveness, which typically characterize a “Code”.

The foregoing changed dramatically in 1994, with the publication of the first edition of the UNIDROIT Principles, which appeared on the scene of transnational commercial law in the form, and with the status, of a soft law instrument, but with much greater aspirations. Indeed, not only did the UNIDROIT Principles provide, unlike any prior similar instrument, a comprehensive and systematic private “codification” of the law of international commercial contracts, but they also claimed for themselves the status of a restatement of the *lex mercatoria*,⁷⁹ thus conjugating the two categories of soft law and *lex mercatoria* into one single codified instrument.

The debate on the conditions and scope of application of the UNIDROIT Principles is still far from settled. No one doubts that they can be applied in cases where the parties chose them as the applicable law; however, the prevailing view is still that, as this application is based on the principle of freedom of contract, it is subject to the mandatory provisions of the law applicable by virtue of the conflict of laws rules of the forum. Moreover, the equation of the UNIDROIT Principles with *lex mercatoria* is at least questionable, as the former ones claim for themselves an innovative character in many respects, which seems incompatible with the long-standing, customary nature of *lex mercatoria*.

Whatever the view on the UNIDROIT Principles and their relationship with *lex mercatoria*, it is undeniable that the UNIDROIT Principles triggered a very significant shift in the approach used to identify a-national legal solutions applicable to the merits of disputes in international commercial arbitration. Indeed, the publication of the UNIDROIT Principles paved the way to a

⁷⁸ Graf-Peter Calliess, *Lex mercatoria*, in Encyclopedia of Private International Law 1119, 1125 (Jürgen Basedow, Giesela Rühl, Franco Ferrari and Pedro de Miguel Asensio eds., 2017), citing Berger, The Creeping Codification of the New Lex Mercatoria, *supra* n. 52.

⁷⁹ See the Preamble to the UNIDROIT Principles, where, starting from the 2004 edition (in addition to the provision that the Principles «*may be applied when the parties have agreed that their contract be governed by general principles of law, the lex mercatoria or the like*»), the provision was added according to which the Principles may also be applied «*when the parties have not chosen any law to govern their contract*».

progressive shift from reference to *uncodified customary law* to the more accessible use of *codified (or quasi-codified) collections of soft law rules and principles*, more readily available for present and future reference. In turn, the facilitated solution of resorting to a readily available legal text has led to a substantial increase in number and raise in targets of codified collections of rules and principles, to the extent that the “creeping codification of the *lex mercatoria*”⁸⁰ seems now to have become a *flooding codification of soft law instruments*.

Emphasis on the normative role of soft law raises, in the first place, a problem of definition. A positive definition of soft law, however, «*appears problematic, given the multiplicity and complexity of legal regimes*».⁸¹ In fact, even if one were to limit the scope of the analysis only to transnational commercial transactions, soft law instruments would still appear to exist in very different, a-systematic and unrelated contexts, ranging from procedural law, to conflict-of-laws, to substantive contract law, corporate law, and many others.⁸²

Also actors active in the production of soft law are numerous and diverse. Business associations, such as the International Chamber of Commerce (“ICC”),⁸³ the International Bar Association (“IBA”),⁸⁴ the International

⁸⁰ See Berger, *The Creeping Codification of Lex Mercatoria*, *supra* n. 52.

⁸¹ Di Robilant, *Genealogies of Soft Law*, *supra* n. 5, 500 (2006).

⁸² Based on anti-formalistic theories of social law and legal pluralism, soft law is a by-product of the privatization of law, which has led to a profound revision of the Westphalian notion of sovereignty and the role of the states and individuals in the production of law in the domestic context, as well as in the international arena; this statement points primarily to the fact that private law plays an increasingly pivotal role in governing not only the relations between individuals, but also those between individuals and governments, as well as those between governments or other sovereign entities (*cf.* Ronald A. Brand, *Sovereignty: The State, the Individual and the International Legal System in the Twenty First Century*, 25 *Hastings Int’l & Comp. L. Rev.* 279, 279 et seq. (2002)). The privatization of law, however, also implies that the law-making process is increasingly privatized, as sovereign governments and parliaments can no longer claim a monopoly on the production of legal rules.

⁸³ Among the many Soft Law instruments adopted by the International Chamber of Commerce, see, *e.g.*, the *ICC Incoterms® 2020*, publication No. 723 (2020), the *Uniform Customs and Practice for Documentary Credit* (publication “UCP, 600”, 2007)), the *Uniform Rules for Demand Guarantees* (publication “URDG, 758”, 2010), and many others.

⁸⁴ Among the Soft Law instruments adopted by the International Bar Association are the *IBA Rules on the Taking of Evidence in International Arbitration* (2010), which replaced the *Supplementary Rules Governing the*

Federation of Consulting Engineers (“FIDIC”)⁸⁵ and many others coexist with mainly academically-oriented study groups, such as the Academy of European Private Lawyers,⁸⁶ Ole Lando’s Commission on European Contract Law,⁸⁷ or Christian von Bar’s Study Group on a European Civil Code.⁸⁸ Furthermore, also institutional actors are present and active on the scene of soft-law-making, including EU institutions,⁸⁹ the United Nation Commission on International Trade Law (“UNCITRAL”),⁹⁰ the International Institute for the Unification of

Presentation of Evidence in International Commercial Arbitration (1983), the *IBA Guidelines on Party Representation in International Arbitration* (2013), the *IBA Guidelines on Conflicts of Interest in International Arbitration* (2014), and others.

⁸⁵ Among the many (about 150) instruments published by FIDIC are: the *Conditions of Contract for Construction* (2010), the *Conditions of Subcontract for Construction* (2011), the *Model Joint Venture (Consortium) Agreement* (2nd ed., 2017), and many others.

⁸⁶ Académie Des Privatistes Européens, *Code européen des contrats, Avant-projet, Coordinateur Giuseppe Gandolfi, Livre premier* (2001). On the activity of the Academy, see Jürgen Hans Sonnenberger, *Der Entwurf eines Europäischen Vertrag Gesetzbuchs der Akademie Europäischer Privat Rechtswissenschaftler – ein Meilenstein*, *Recht der Internationalen Wirtschaft* 409, 409 et seq. (2001).

⁸⁷ The ‘Lando Commission’ produced the well-known Principles of European Contract Law (‘PECL’): Ole Lando and Hugh Beale (eds.), *Principles of European Contract Law - Parts I & II* (1999) and Ole Lando, Eric Clive, André Prün and Reinhard Zimmerman (eds.), *Principles of European Contract Law - Part III* (2003). On the PECL see Ole Lando, *Salient Features of the Principles of European Contract Law: a Comparison with UCC*, 13 *Pace Int’L. Rev.* 340 (2001); Carlo Castronovo, *Il diritto europeo delle obbligazioni e dei contratti. Codice o restatement?*, *Eur. Dir. Priv.* 1019, 1019 et seq. (1998).

⁸⁸ On the activities of the Group and the several Working Teams, see Christian von Bar, *From Principles to Codification: Prospects for European Private Law*, 8 *Colum. J. Eur. L.*, 379, in particular at 387 et seq. (2002).

⁸⁹ Among the instruments of typical secondary legislation adopted by EU institutions are Opinions and Recommendations; other atypical Soft Law acts routinely adopted by EU institutions include ‘Common Statements’, ‘Communications’, ‘Codes of Conduct’, ‘Green Papers’, ‘White Papers’, and others. On the role of soft law in EU law, see David M. Trubek, Patrick Cottrell and Mark Nance, *Soft Law, Hard Law and EU Integration*, in *Law and Governance in the EU and the US* 65 (Gráinne de Búrca and Joanne Scott, eds., 2006).

⁹⁰ Soft Law instruments adopted by UNCITRAL include, *inter alia*, ‘Model Laws’, such as the *Model Law on Secured Transactions* (2016), the *Model Law on International Commercial Arbitration* (1985, amended in 2006), the *Model Law on Electronic Commerce* (1996), the *Model Law on International Credit Transfer* (1992); ‘Guides’, such as the *Legislative Guide on Secured Transactions* (2007), the *Legislative Guide on Insolvency Law* (2004), the *Model Legislative Provisions on Privately Financed Infrastructured Projects* (2003), the *Legal Guide on International Countertrade Transactions* (1992); ‘Contractual Texts’, such as the *Legal Guide on Drawing Up International Contracts for the Construction of Industrial Works* (1987), and the *Uniform Rules on Contract Clauses for an Agreed Sum Due upon Failure of Performance* (1983).

Private Law (“UNIDROIT”),⁹¹ the Hague Conference on Private International Law,⁹² and others. In recent years, the institutional actors seem to have acknowledged the difficulty in pursuing the international unification of private law through “hard law” treaties and conventions (as evidenced by the fact that most conventions adopted after the CISG have obtained scant attention and a limited number of adoptions or ratifications),⁹³ and seem to be increasingly favoring the format of soft law for the pursuance of their harmonizing goals.⁹⁴

Not only the producers of soft law, but also the products of soft law are multiple and diverse, and they can be divided into three different groups. The first group of instruments includes documents of a descriptive, rather than preceptive, nature. This group (which can be referred to here as “Descriptive Soft Law Instruments”) includes instruments such as Recommendations, Opinions, Position Papers, and the like. The second group includes instruments which are addressed primarily, although not exclusively, to business operators. These instruments seem to aim at becoming rules in the form of usages (so this group can be referred to as “Usage-Type Soft Law Instruments”), and they include Codes of Conduct, Model Contracts, Model Clauses, Sets of Principles, and other similar instruments. The third group includes instruments which are

⁹¹ Soft Law instruments adopted by UNIDROIT include one of the best-known and most relevant instrument, namely the *UNIDROIT Principles of International Commercial Contracts* (“UNIDROIT Principles”, or “PICC”), originally adopted in 1994 and now available in their fourth edition, published in 2016 (the text of the PICC is available online at: <https://www.UNIDROIT.org/instruments/commercial-contracts/UNIDROIT-principles-2016>). Other Soft Law instruments adopted by UNIDROIT include the *Legislative Guide on Intermediated Securities* (2017), the *UNIDROIT / FAO / IFAD Guide on Contract Farming* (2015), the *Model Law on Leasing* (2008), the *ALI / UNIDROIT Principles of Transnational Civil Procedure* (2006), the *Model Franchise Disclosure Law* (2002).

⁹² One example of Soft Law instrument adopted under the auspices of the Hague Conference on Private International Law is the 2015 *Hague Principles on Choice of Law in International Commercial Contracts*.

⁹³ *Accord*: Herbert Kronke, *International Uniform Commercial Law Conventions: Advantages, Disadvantages, Criteria for Choice*, 5 Unif. L. Rev. 13, 13-20 (2000); for further references to the salient features of the CISG and the extent to which those features can be found also in subsequent conventions, see Marco Torsello, *Common Features of Uniform Commercial Law Conventions. A Comparative Study beyond the 1980 Uniform Sales Law*, *passim* (2004).

⁹⁴ For an authoritative and influential position in favor of unification through conventions, see Jürgen Basedow, *International Economic Law and Commercial Contracts: Promoting Cross-Border Trade by Uniform Law Conventions*, 23 Unif. L. Rev., 1, 1-14 (2018).

addressed primarily to States and national governments and legislatures, although they can also be used, or referred to, by business operators, courts and other legal actors. The instruments in this group (which can be referred to as “Treaty-Type Soft Law Instruments”) include Legislative Guides, Model Laws and other similar instruments.⁹⁵

The overview and grouping of soft law instruments is relevant in that it provides guidance as to some of the most salient features of soft law, which relate to its legitimacy and enforceability. In fact, the *softness* of soft law instruments varies on a sliding scale, possibly peaking towards hard law,⁹⁶ and the view can be shared that soft law instruments exhibit (varying degrees of) normative legitimacy, as evidenced by the fact that, «[i]n spite of the lack of enforceability, the addressees of soft law norms can perceive it as binding and, even if they do not, they may choose to abide by it on their own accord».⁹⁷

The progressive shift from a *lex mercatoria* based on uncoded general principles to one based on (quasi-)codified soft law instruments carries relevant consequences. First, the growing phenomenon of (quasi-)codification of soft law instruments raises the question whether, besides and beyond the easy accessibility ensured by their codified format, the soft law instruments made available to international arbitrators should possess any specific normative requirements in order to qualify for use as legitimate sources of the law applicable in international arbitration. Secondly, the significant production of (codified and thus) easily accessible soft law instruments leads to a sort of soft law regulatory competition, and raises the question of the methodology that

⁹⁵ For a similar approach, see Diego P. Fernández Arroyo, *The Growing Significance of Sets of Principles to Govern Trans-boundary Private Relationships*, in Eppur Si Muove: The Age of Uniform Law. Essays in Honour of Michael Joachim Bonell, Vol. 1, 251 (UNIDROIT ed., 2016), in particular at 257-258, where the Author observes that «international instruments are often presented as if they had a progressive degree of feasibility. Consequently, if the conditions for the adoption of a convention do not seem favourable, a model law may be presented as a more accessible option. The same relation may be established between a model law and a legislative guide, or between any of these instruments and a set of principles» (footnotes omitted).

⁹⁶ Cf. Friedrich Rosenfeld, *The Hardening of Soft Law in International Arbitration*, 7 Europ. Int'l Arb. Rev. 19 (2018).

⁹⁷ Gabrielle Kaufmann-Kohler, *Soft Law in International Arbitration: Codification and Normativity*, J. Int'l Disp. Settl. 1, 3 (2010).

arbitrators are required to adopt in selecting among the many (hard and soft) law instruments that are made available to them.

Indeed, codifying a soft law instrument makes it more readily available to its users, and reference to (quasi-)codified instruments on the part of arbitrators makes it easier for the parties to check and monitor the correct application of the instrument and to present their case in a more effective way. Hence, in a competitive environment, where the contents of the a-national applicable legal rules are increasingly being assessed on the basis of a comparative analysis of existing sources, which include both national sources and soft law instruments, the availability and accessibility of a soft law instrument is a key to its success, and an indispensable requirement for its very existence.

All in all, the more codified instruments are available to users, the less non-codified norms are likely to be relied upon. The change is of great significance, in that it marks the abandonment of an approach (the traditional *lex mercatoria*) based on the idea of the existence of a supranational unitary and autonomous legal system, and the emergence of a different approach (a new *lex mercatoria*) based on legal relativity and regulatory competition among multiple sources of (hard and soft) law.

In this respect, the conclusion that the environment is becoming increasingly competitive is difficult to deny as it is supported by the observation that soft law instruments are becoming not only more numerous, but also more specialized in various ways. *Sector-specific soft law instruments*, such as those produced by trade association like FIDIC, GAFTA and others, have long and successfully existed; more recently, however, also *region-specific soft law instruments* have been produced in unprecedented number and at an unprecedented pace. Examples of the latter ones include the ALI / UNIDROIT Principles on Transnational Civil Procedure,⁹⁸ which are now being paralleled by the ELI / UNIDROIT corresponding project.⁹⁹ Other examples in the field of substantive law include the projects (echoing the European PECL and the

⁹⁸ ALI / UNIDROIT Principles on Transnational Civil Procedure, *supra* n. 13.

⁹⁹ ELI / UNIDROIT Transnational Principles of Civil Procedure, as well as the joint Project "From Transnational Principles to European Rules of Civil Procedure".

UNIDROIT Principles) which have led to the establishment of a working group for the draft of the Principles of Asian Contract Law (PACL)¹⁰⁰ and to the recent enactment of the Principles of Latin-American Contract Law (PLACL).¹⁰¹ Also long existing and successful soft law instruments like the ICC Incoterms seem to have acknowledged the importance of further specialization, in that starting from the 2010 edition the general clauses are clearly divided between rules applicable for any mode of transport (EXW, FCA, CPT, CIP, DAT, DAP and DDP), and rules specifically tailored for sea and inland waterway transport (FAS, FOB, CFR and CIF), and the 2020 edition of the ICC Incoterms has confirmed the same approach.

It is therefore safe to conclude that the proliferation of codified soft law instruments and their increasing specialization are producing a mechanism of soft law regulatory competition. Parties and arbitrators relying on the comparative functional approach to *lex mercatoria* are increasingly likely to be faced with the alternative between the various legal solutions provided (not only in different national legal systems, but also and increasingly) in competing soft law instruments. In the field of general contract law, for instance, they could be faced with the alternative between the global UNIDROIT Principles and the local Principles of Latin-American Contract Law. In the field of procedural rules in arbitration – to give just another example – they could be faced with the alternative between the IBA Rules on the Taking of Evidence in International Arbitration¹⁰² and the recently drafted “Prague Rules”.¹⁰³

¹⁰⁰ On the PACL project, which is now moving at a discontinued pace, see Shiyuan Han, *Principles of Asian Contract Law: An Endeavor of Regional Harmonization of Contract Law in East Asia*, 58 Villanova L. Rev. 589 (2013).

¹⁰¹ On the PLACL see Rodrigo Momber and Stefan Vogenauer, *The Principles of Latin American Contract Law: text, translation, and introduction*, 23 Unif. L. Rev. 144 (2018), where the PLACL are defined as «the most recent soft law instrument in the field of contract law» (at 144); see also Pietro Sirena, *I “Principios Latinoamericanos de Derecho de los Contratos” e il diritto nazionale dei consumatori*, 8 Osserv. Dir. Civ. Comm. 3 (2019).

¹⁰² IBA Rules on the Taking of Evidence in International Arbitration, *supra* n. 15.

¹⁰³ *Rules on the Efficient Conduct of Proceedings in International Arbitration* (“Prague Rules”), draft of 1 September 2018 available at: <http://praguerules.com>; according to Article 1.2 of the Prague Rules «[t]he Arbitral Tribunal may apply the Rules or any part thereof upon the Parties’ agreement or on its own initiative after having heard the Parties».

As the process of codification of soft law moves forward, the price that *lex mercatoria* might pay is yet to be fully understood. It is apparent that codification comes at the price of a loss of flexibility, to the extent that some commentators have concluded that the attempts at codifying *lex mercatoria* constitute a step towards its decline.¹⁰⁴

If the loss of flexibility were to result in the complete loss of dynamism of non-state transnational commercial law, one could not but agree with the reported conclusion about the prospective decline of *lex mercatoria*. The process of comparative assessment of the *lex mercatoria*, however, is a dynamic one,¹⁰⁵ and its dynamism results from the flexible mechanisms of production of soft law instruments, which rely on social and legal actors coordinating and adapting their actions to those of others that preceded. Accordingly, far from facing a decline, the development of a uniform system of transnational commercial law is likely to benefit from the competitive interaction of multiple private soft-law-makers, competing with each other in a fast-communicating system.

The paradigm is changing: the prevailing attitude seems no longer to be favoring the aspiration towards an autonomous supranational legal order based on customary law, but rather a supranational system based on multiple competing sources and legal relativity, which calls for a comparative methodology in order to develop selective criteria necessary for the system to operate.

V. THE USE OF COMPARATIVE LAW METHODOLOGY TO SELECT AMONG SOFT (AND HARD) LAW INSTRUMENTS: THE PARTIES' WILL AND THE INSTRUMENTS' SUITABILITY FOR LEGAL TRANSPLANT

Scholars who have proposed or endorsed the comparative approach to *lex mercatoria* have focused primarily on the comparison among national legal

¹⁰⁴ Celia Wasserstein Fassberg, *Lex Mercatoria – Hoist with Its Own Petard?*, 5 Chi. J. Int'l L. 67, 81-82 (2004).

¹⁰⁵ The dynamic typology of soft law is emphasized by Arroyo, *The Growing Significance of Sets of Principles*, *supra* n. 95, 255 et seq..

systems.¹⁰⁶ Conversely, under the functional approach to *lex mercatoria* proposed here arbitrators may also refer to a-national legal sources in order to meet the parties' quest for independence and impartiality. Rather than selecting one national law (according to a conflict of laws approach or otherwise), which may result in the application of a set of rules more favorable or at least more familiar to one party, arbitrators (and parties) may deem it preferable to rely on a supranational set of rules suited to apply to international commercial transactions. Under these circumstances, instead of limiting the analysis to a comparison between (hard) national laws, in search for a *tronc commun*¹⁰⁷ (expression of the aspiration towards a systematic supranational legal order), arbitrators can extend the spectrum of regulatory sources to be considered through the comparative analysis to soft law instruments, which are nowadays more readily available due to the extensive activity of (quasi-)codification carried out by many norm-formulating agencies. In turn, this progressive process of (quasi-)codification of soft law instruments facilitates their enactment and accessibility, and leads to a mechanism of dynamic soft law regulatory competition.¹⁰⁸ Hence, the aspiration towards unity gives way to

¹⁰⁶ See, e.g., Gaillard, *Transnational Law: A Legal System or Method of Decision Making?*, *supra* n. 73, 59 et seq..

¹⁰⁷ On the so-called *tronc commun* doctrine, see Bertrand Ancel, *The Tronc Commun Doctrine: Logics and Experience in International Arbitration*, 7 J. Int'l Arb. 65 (1990); Mauro Rubino-Sammartano, *International Arbitration. Law and Practice* 630 (3rd ed. 2014).

¹⁰⁸ The application of the comparative approach to determine the prevailing solution in transnational commercial law is frequent not only before arbitral tribunals, but also before national courts. Just to provide a few examples, let us refer to the decision rendered by Cour d'appel Grenoble (France) 23 October 1996, available at: http://www.UNCITRAL.org/docs/clout/FRA/FRA_231096_FT_205.pdf, where the court, called upon to decide on the place of payment in international contracts applied a solution in contrast with French law (as in force at the time of the decision) on the basis of a comparison between several national laws, international conventions (CISG, 1972 Basle Convention and 1968 Brussels Convention), and soft law instruments (UNIDROIT Principles, ICC Incoterms). See also Tribunale Napoli (Italy) 29 March 2001 and Cass. (Italian Supreme Court), 16 November 2007, which in a domestic financial leasing transaction carried out a comparison of international instruments, including the 1988 UNIDROIT Convention on International Financial Leasing and the 2008 UNIDROIT Model Law on Leasing. Another field where the comparative approach is frequently applied before both domestic courts and arbitral tribunals is disputes arising from an allegedly fraudulent call on demand guarantees, where it is all but rare to encounter decisions resulting from the (express or implicit) comparison of domestic laws (such as, e.g., Article 5:114 of the UCC), international conventions, whether or not applicable to the case (such as the 1995 U.N. Convention on Independent Guarantees and

a multicentric system fostering legal relativity based on the competition among multiple legal instruments.

Considered from a different perspective, the increasing production of soft law instruments raises the question of legitimacy of these privately-produced legal instruments,¹⁰⁹ whose application cannot be simply justified on the grounds of their being readily available due to their codified format. In fact, whereas hard law instruments seem to qualify by definition for possible application, although their weight may vary in practice, the suitability of soft law instruments to be weighted in comparison to other instruments must be filtered by setting a minimum threshold of normative legitimacy. In particular, it has been noted, the soft law instrument must constitute a “*paradigmatic source*”¹¹⁰ of transnational law, so as to be a clear expression of normativity, although possibly of mere “*soft normativity*”.¹¹¹

The review of the key question of the assessment of a minimum threshold of legitimacy of soft law instruments sheds lights on the importance of critically addressing the relationship between the formality of a codified style and layout and the substantive quality of normativity. In this regard, it has been observed that «[a]t first sight, the strength of a norm should not depend on the form it adopts, whether codified or uncoded. Upon a closer look, however, this may not be as obvious»,¹¹² and a formalistic and quantitative criterion to assess legitimacy may even become more relevant than a qualitative one.

As the theoretical notion of “normative legitimacy” *per se* seems unfit to serve the goal of selecting among multiple (quasi-)codified soft law instruments, a different methodology must be adopted to choose among the

Stand-By Letters of Credit, Articles 14 and 19) and soft law instruments (such as the ICC URDG 758, Article 15-A).

¹⁰⁹ See Barack D. Richman, *Firms, Courts and Reputation Mechanisms: Towards a Positive Theory of Private Ordering*, 104 Colum. L. Rev. 2328 (2004); Christopher R. Drahozal, *Private Ordering and International Commercial Arbitration*, 113 Penn St. L. Rev. 1031, 1034 et seq. (2009).

¹¹⁰ For a similar expression, used with respect to the UNIDROIT Principles, see Luca Radicati di Brozolo, *Non-National Rules and Conflict of Laws. Reflections in Light of the UNIDROIT and Hague Principles*, 48 Riv. Dir. Int. Priv. Proc. 841, 841 (2012).

¹¹¹ The expression is used by Kaufmann-Kohler, *Soft Law in International Arbitration*, *supra* n. 97, 13.

¹¹² *Id.*, at 15.

(possibly multiple) available instruments of hard and soft law competing with each other on the scene of supranational commercial law. Comparative law methodology may thus be helpful in guiding arbitrators through the process of selection among multiple legal instruments, in search for the most suited one to be applied to the case at hand.

Accordingly, when faced with the issue of legitimacy of a soft law instrument and with the possible need to select among multiple instruments, arbitrators must, in the first place, review and scrutinize the parties' contractual goals and will,¹¹³ so as to determine what instrument the parties would have chosen for themselves, had they been required to make an express choice at the time of the conclusion of the contract (or, anyway, prior to the start of the dispute). To provide one example, if the review of the parties' goals and will reveals deference by the parties to an existing ICC instrument, such as a model contract that they used as a template for the drafting of their agreement, the arbitrators may well comfortably refer to a different soft law instrument prepared by the same law-formulating agency, even though not expressly incorporated by reference in the contract, if that soft law instrument deals with an issue that was not otherwise addressed in the contract by the parties, and it is based on general principles similar to (or at least not incompatible with) those underpinning the contract between the parties.

The comparative analysis based on the parties' goals and will mimics an approach already largely applied in international commercial arbitration, due to the pivotal role of party autonomy and the broad mandate usually assigned to arbitrators to interpret the parties' will and to fill any gaps in the contract by resorting, in the first place, to implied terms, which the parties did not expressly set forth in the contract, but which can be inferred from an overall review of the contractual arrangements.

In addition to the approach based on the review of the parties' goals and will - and in any event if the former method cannot lead to a satisfactory result

¹¹³ An approach showing deference to the will of the parties is in compliance with the contractual nature of international arbitration and with the approach primarily employed to determine the law applicable to the merits of the dispute. Cf. Lew, Mistelis and Kröll, *Comparative International Commercial Arbitration*, *supra* n. 71, 411.

-, arbitrators should base their choice on the analysis of the available instruments' suitability for legal transplant and adaptability to different legal environments, on the assumption that the mandate received from the parties, in the absence of a choice of law, includes the power to fill any gaps in the contract by resorting to a neutral supranational set of rules, which – in the alternative to a solution drawn from a comparative review of domestic laws – may be based on soft law instruments, provided that they can be regarded as a paradigmatic expression of supranational commercial law.

Under these circumstances, arbitrators may deem appropriate to explore other routes to corroborate the results thus far reached and this approach raises the question of legitimacy of the resort to soft law instruments that the parties had not chosen, in the absence of an explicit or implied expression of their will. A positive answer as to the legitimacy of the recourse to soft law instruments is possible on the basis of the assumption that the parties' choice of arbitration to settle their future disputes, without any choice of law, indicates that the parties intended to disengage their contractual relationship and any resulting dispute from any national legal system and to submit them to a system of a-national sources of transnational commercial law. A similar conclusion can only be reached after a careful review of the circumstances of the case, as it requires a positive and clear assessment as to the parties' will to detach the contract, as far as possible, from any national legal system. This conclusion, for instance, seems problematic when the parties, although failing to choose the law applicable to the contract, choose the seat of arbitration, thus linking the dispute to a specific national legal system.

If the foregoing assumption can be made as to the parties' intention to detach the contract from any national legal system, then arbitrators are called upon to fulfil their mandate by filling any regulatory gap by resorting to an external source of a-national legal rules. Again, arbitrators might address this issue by resorting to a domestic law, either by virtue of some conflict of laws rules (either those of the seat, or those deemed appropriate), or by resorting to the so-called *voie directe* approach,¹¹⁴ which enables the arbitral tribunal to

¹¹⁴ For an overview of the use of the so-called *voie directe* approach, which is exemplified in national legal systems such as the French one (as from Décret No. 81-500 of 12 May 1981, which introduced Art. 1496 to the

decide the dispute according to the substantive law that the tribunal considers appropriate. This approach, however, does not duly serve the quest for disengagement from national law, which has been assumed as a starting point of the analysis. Hence, according to an alternative scheme, arbitrators could consider multiple legal systems and compare them in search for a common core of rules and principles. This approach, however, may prove difficult in practice and its outcomes may be rather uncertain and questionable, so that it is not surprising that arbitrators are often reluctant either to use this methodology, or to use it on its own. Therefore, the search for alternative gap-filling methodologies is often not satisfied by the mere reference to one or more domestic laws.

As already mentioned, the loosening of the conflictualist connection to the forum (*i.e.*, the seat) and the abandonment of the rigid conflict of laws approach leading to the selection of the applicable law of a national state have opened the way to solutions based on the application of rules of law enacted in the form of soft law instruments. In turn, the application of soft law instruments raises the question of legitimacy of the instruments and that of the methodology to be adopted to select the most suitable instrument in the case at hand.

Comparative law provides a valuable methodology to serve the needs under discussion here. In fact, comparative lawyers are inclined to reject the unitary idea of law and are thus well equipped to deal with, and manage, the relativity of legal solutions and the multitude of legal sources. Moreover, comparative lawyers are used to study the changes and mobility of the law and to observe what makes certain legal solutions more suitable to circulate and be transplanted from one legal system to another.¹¹⁵

Code of civil procedure) and the Dutch one (as from the Law of July 2nd, 1986, which introduced Art. 1054 to the Code of civil procedure), see Doug Jones, *Choosing the law or rules of law to govern the substantive rights of the parties: A discussion of voie directe and voie indirecte*, 26 Singapore Acad. L. J. 911 (2014); Declan MacGuinness, *Applicable Law Chosen by Arbitrators. A Critical View on Arbitrators' Use of the Method of Voie Directe, Lex Contractus and Equity*, Stockholm Arbitration Reporter (2003).

¹¹⁵ The main reference, in this respect, is to Alan Watson, *Legal Transplants: An Approach to Comparative Law* (Edinburg, 1974); see also, *ex multis*, Esin Örüçü, *Law as Transposition* 51 Int'l Comp. L. Q. 205 (2002); M. Langer, *From Legal Transplants to Legal Translations*, 45 Harv. Int'l L. J. 1 (2004); Helen Xanthaki, *Legal*

All these comparatists' skills can be of paramount importance in the selection of the soft law instruments to be applied in international commercial arbitration. Indeed, the selection of the applicable instrument can be based on a comparative analysis of the instruments that address the issue in question, whereby arbitrators select the one that is more suitable to be transplanted from one legal context to another, and more likely to adapt to different legal environments and circumstances.

Under the aforementioned approach, arbitrators may rely on various hints, which provide valuable guidance as to the suitability for legal transplant and adaptability of the soft law instruments under consideration, and allow arbitrators to draw a conclusion about the instruments' being paramount expressions of transnational commercial law.

One of the main factors that arbitrators should consider, in this respect, is the extent to which a soft law instrument has already been used in diverse legal contexts, whether or not as a result of an express incorporation by reference made by the parties. In this regard, for instance, it would be hard to deny the adaptability to different legal contexts of an instrument such as the ICC Incoterms, which is often incorporated by reference, but also often applied in the absence of an express choice, as usages of international commerce.¹¹⁶

It is apparent, however, that linking the legitimacy and applicability of soft law instruments only to their prior application might limit excessively the possibility to rely on newly codified instruments. Therefore, the quantitative criterion based on an instrument's prior application may be regarded as a very important one, but certainly not the only one available to arbitrators.

Transplants in Legislation: Defusing the Trap, 57 Int'l & Comp. L. Q. 659 (2008); George Mousorakis, *Legal Transplants and Legal Development: A Jurisprudential and Comparative Law Approach*, 54 Hungarian J. Leg. St. 219 (2013); Jaakko Housa, *Developing Legal Systems, Legal Transplants, and Path Dependence: Reflections on the Rule of Law*, 6 Chinese J. Comp. L. 129 (2018). For a critical review of the notion and outcomes of legal transplants, see Otto Kahn-Freund, *On Use and Misuse of Comparative Law*, 37 Modern L. Rev. 1 (1974); Pierre Legrand, *The Impossibility of Legal Transplants*, 4 Maastricht J. Eur. & Comp. L. 111 (1997); Gunther Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergencies*, 61 MLR 11 (1998).

¹¹⁶ See, among others, United States 11 June 2003 Federal Appellate Court [5th Circuit] (*BP Oil International v. Empresa Estatal Petroleos de Ecuador*), available at: <http://cisgw3.law.pace.edu/cases/030611u1.html>.

An alternative (institutional) criterion, for instance, can be based on the reliability of the norm-formulating agency. This criterion may come into play primarily with respect to government-participated norm-formulating agencies, such as UNCITRAL, UNCTAD, WIPO, UNIDROIT, the Hague Conference of Private International Law, and the like, but also with respect to widely recognized business associations, such as the International Chamber of Commerce and others. The factor based on the authority of the norm-formulating agency, however, is not limited only to government-participated agencies. In particular, this factor may come into play as a relevant one in disputes arising in sectors where there exists an active and prestigious sector-specific norm-formulating agency, even if it is not a government-participated one. This is the case, for instance, as regards the FIDIC model contracts in the construction industry, the GAFTA model contracts and arbitration rules in the grain and feed industry, and other similar sector-specific entities.

An additional criterion that arbitrators may take into account is the extent to which the soft law instrument has been preceded by accurate comparative law studies, which ensure that the instrument be the expression of rules and principles shared in multiple jurisdictions. In this respect, for instance, that of the UNIDROIT Principles is a very good example of a soft law instrument that was preceded by extensive comparative studies, and which, in fact, began to be applied very soon after its enactment, irrespective of the lack of prior application.¹¹⁷ Reference to preliminary comparative studies does not mean that region-specific instruments (such as, for instance, the Principles of Latin American Contract Law) don't meet this requirement. In fact, these instruments are also often preceded by accurate comparative studies, although with a focus on the needs of the region where the instrument is intended to apply. Accordingly, also arbitrators should consider these instruments exclusively (or at least primarily) in cases with relevant connections to the region in question.

While the foregoing criteria are all relevant, the final assessment as to the legitimacy and applicability of a soft law instrument requires arbitrators to

¹¹⁷ For a collection of cases applying the UNIDROIT Principles, see the Unilex database, at: <http://www.unilex.info>.

look more closely into the merits of the various instruments according to a functional criterion, and to come to a conclusion as to their suitability to be adapted to the dispute under consideration. This can be done only by determining the prevailing legal culture(s) on which the relationship between the parties in dispute is based, and by measuring the proximity to that legal culture of the competing soft law instruments. This task clearly requires a comparative methodology to measure similarities and differences between different legal texts.¹¹⁸ In particular, as far as (hard) national laws are concerned, the analysis must focus on the suitability of those laws to be transplanted and likelihood of their being adaptable to different legal environments, including the one relevant to the case at hand. As far as soft law instruments are concerned, the analysis must focus on the trans-frontier mobility of the instrument in question and its compatibility with different contractual schemes commonly used in transnational commercial practice.

In all cases, however, the proposed functional criterion requires that the adaptability of the instruments in question be assessed from two specular perspectives: on the one hand, the instrument must be adaptable and suitable to enter the multiple potential legal environments of destination; on the other hand, however, a positive conclusion is necessary about the readiness of the legal systems of destination to allow the entry of the instrument in question, in light of the public policy and of the overriding mandatory law of that legal system. In other words, when selecting the instruments to be applied to the case, arbitrators cannot overlook the fact that the validity of the award will ultimately be reviewed by the domestic courts of the State of the seat and that the award must be suitable to be recognized and enforced not only in the State of the seat, but also in (possibly multiple) other States, including (but not limited to) those where the parties are located or domiciled.

Therefore, in compliance with the generally recognized duty of the arbitral tribunal to render an enforceable award, the selection of the (hard or

¹¹⁸ For instance, when selecting between the IBA Rules on the Taking of Evidence in International Arbitration and the Prague Rules, in the absence of guidance from the parties, the arbitral tribunal may base its decision on the alleged IBA Rules' more vicinity to common law legal systems, as opposed to the Prague Rules' more civilian approach.

soft) legal instruments applicable to the case, although primarily guided by different criteria inspired by the will of the parties and the adaptability of the instrument, must in all cases be compliant with the public policy and the overriding mandatory law of the legal systems possibly involved. This conclusion is in line with the solution embraced by the 2015 Hague Principles on Choice of Law in International Commercial Contracts, which, although conceding that «[t]he law chosen by the parties may be rules of law that are generally accepted on an international, supranational or regional level as a neutral and balanced set of rules», specify that the foregoing shall not prevent an arbitral tribunal (Article 11(5)) «from applying or taking into account public policy (*ordre public*) or from applying or taking into account overriding mandatory provisions of a law other than the law chosen by the parties, if the arbitral tribunal is required or entitled to do so».¹¹⁹

VI. CLOSING REMARKS

Lex mercatoria and soft law instruments often play a similar role, but cannot be treated as expressions of the same phenomenon. The former is mainly regarded as a customary supranational autonomous legal order, whose flexibility and adaptability arise from its not being rigidly codified. Various different arguments have been put forward to justify the very existence of *lex mercatoria*, ranging from theories based on the assumption that *lex mercatoria* may reduce transaction costs to the benefit of the parties, to those claiming that *lex mercatoria* is primarily beneficial to arbitrators or to norm-formulating agencies. These theories have been rejected in this paper and the claim has been made that *lex mercatoria* serves primarily the goal of addressing the parties' quest for independence and impartiality of the arbitral tribunal, which in turn implies a disengagement from national courts and national laws, including, in the absence of parties' choice, as regards the law applicable to the merits of the dispute.

¹¹⁹ Cf. Giuditta Cordero-Moss, *Limits to Party Autonomy in International Commercial Arbitration*, Oslo L. Rev. 47 (2014).

The identification of the goals of *lex mercatoria* in terms such as those described above, makes it easier to understand the rationale of the current shift from the uncoded *lex mercatoria* to a dynamic phenomenon of regulatory competition among a multitude of (quasi-)codified soft law instruments, the format of which makes them more readily available for reference and application. Arbitrators are, in fact, increasingly relying of these soft law instruments as the source of supranational commercial law applicable to the dispute in the absence of a choice of law made by the parties. This approach raises the question of legitimacy of the soft law instruments, and of the criteria on the basis of which arbitrators must choose among several (hard and) soft law instruments.

This paper's claim, in this respect, is that arbitrators should resort to a comparative methodology in order to determine, from an *ex ante* perspective and in light of the specific circumstances of the case, which (hard or soft) legal rules the parties would have selected as applicable to their relationship, had the parties chosen an applicable law or legal instrument. In other words, the arbitrators should not choose the functionally "best" solution according to their *ex post* evaluation, but rather the source of law that most likely, from an *ex ante* perspective, the parties would have selected to supplement their contractual arrangements. Relevant factors to be taken into account for this purpose include the review of the overall goals pursued by the parties by means of the contract to which the dispute to be arbitrated relates, and the suitability of the legal solutions under scrutiny to be transplanted and adapted to different legal environments.

This entire process, however, is not taking place in a legal vacuum. The parties' mandate to arbitrators may well be to disengage from any national legal system. In the end, however, the parties' relationship cannot be entirely detached from all national legal systems, and the arbitral award that the arbitrators are called upon to render may be annulled in the state of the seat, and must be capable of enforcement in multiple national legal systems. The foregoing does not mean that the approach that has been supported here cannot be adopted. In fact, most legal systems will pose no obstacle to the applicability of the said approach and the enforceability of the resulting arbitral award. However, the awareness that, in the end, the arbitral award must be

capable of being enforced in national legal systems suggests that there is a last (yet fundamental) review that the arbitrators must perform, namely the review of compatibility of the soft law instruments deemed applicable with the public policy of the state of the seat and of those states where the enforcement of the award will most likely be sought.

All in all, the proposed theory of a new (quasi-)codified *lex mercatoria* based on soft law regulatory competition and the use of comparative law methodology, although possibly less flexible than the traditional one, based on an uncoded autonomous legal order, presents relevant advantages in that it is less ideological and divisive. Indeed, on the one hand, the abandonment of the claim of autonomy and systematicity of the supranational legal order is consistent with the persistent final word reserved to national States, which is epitomized by the monitoring role played by the public policy exception, the notion of arbitrability, and the application of the overriding mandatory rules of the *forum* or seat; on the other hand, national legal systems may in the end be relieved by the multitude of soft law instruments and the resulting dynamic competition and therefore more inclined at operating as conduits and allowing the privatization of law-making in the field of transnational commercial law, whether through incorporation, deference, or delegation.

CHINESE CONTEXT AND COMPLEXITIES — COMPARATIVE LAW AND PRIVATE INTERNATIONAL LAW FACING NEW NORMATIVITIES IN INTERNATIONAL COMMERCIAL ARBITRATION

Ulla Liukkunen¹

Résumé

À l'échelle mondiale, l'organisation de la résolution des litiges transfrontaliers évolue dans le cadre du développement de la Belt and Road Initiative (BRI). Avec l'initiative BRI, l'intérêt de la Chine pour l'arbitrage commercial international a acquis une nouvelle dimension alors que la BRI promeut l'expansion des institutions chinoises de règlement des différends et leur compétitivité internationale. Ces développements remettent en question la description actuelle de l'arbitrage international. Dans cet article, le droit international privé est exploré comme un cadre de discussion des caractéristiques notables du système juridique chinois et de la culture juridique qui sont présentes dans l'arbitrage commercial international. Il est proposé de repenser la méthodologie du droit comparé afin de favoriser une compréhension du droit chinois dans le processus d'arbitrage. Cet article plaide pour l'adoption de la comparaison comme approche méthodologique de l'arbitrage. La comparaison pénètre en tant que processus dans la prise de décision des arbitres, régissant également la dimension de conflit de lois. De plus, l'article soutient que les considérations du droit international privé chinois et du régime d'arbitrage plaident en faveur d'une perspective de recherche comparative plus large sur l'arbitrage commercial international.

Mots clés: droit comparé, droit international privé, arbitrage commercial international, Chine, autonomie de la volonté, Belt and Road Initiative, comparaison

¹ Professor of Labour Law and Private International Law, University of Helsinki. Director of the Finnish Center of Chinese Law and Chinese Legal Culture, Finland, [ulla.liukkunen\[at\]helsinki.fi](mailto:ulla.liukkunen[at]helsinki.fi)

Abstract

In global terms, the organization of cross-border dispute resolution is changing as a part of the Belt and Road Initiative (BRI) development. With the BRI, Chinese interest in international commercial arbitration has gained a new dimension as BRI promotes the expansion of Chinese dispute resolution institutions and their international competitiveness. These developments challenge the current narrative of international arbitration. In this article, private international law is explored as a framework for discussion of noteworthy characteristics of the Chinese legal system and legal culture that are present in international commercial arbitration. Comparative methodology is proposed to be rethought so that it can promote an understanding of Chinese law in the arbitration process. This article argues for adopting comparison as a methodological approach in arbitration. Comparison as a process penetrates the decision-making of arbitrators, also governing the conflict-of-law dimension. Moreover, the article argues that considerations of the Chinese private international law and arbitration regime speak for a broader comparative research perspective towards international commercial arbitration.

Keywords: comparative law, private international law, international commercial arbitration, China, party autonomy, Belt and Road Initiative, comparison

TABLE OF CONTENTS

I.	INTRODUCTION.....	256
II.	SETTING THE SCENE	262
III.	TRANSITION AS A CONTEXT FOR BUILDING A CONTRACT-CENTERED PRIVATE LAW REGIME.....	265
IV.	LEGALIZATION, CHOICE-OF-LAW AND CULTURAL LAYERS OF LAWS	266
V.	LEGAL REGIME OF INTERNATIONAL COMMERCIAL ARBITRATION – EVOLUTION AND IMBALANCES	272
A.	Party Autonomy – Chinese Framework.....	275
B.	Party Autonomy – Chinese Peculiarities	277
VI.	METHODOLOGICAL OBSERVATIONS – COMPARISON IN ARBITRATION.....	279
VII.	DYNAMICS OF CHANGE AND THE GLOBAL FRAMEWORK FOR INTERNATIONAL ARBITRATION	282
VIII.	CONCLUSION	284

I. INTRODUCTION

Following the opening-up policy, the People's Republic of China (hereinafter China or PRC) has actively developed its business laws in a more investor-friendly direction. Notwithstanding, legal uncertainty remains a major challenge for foreign actors. Chinese law, like any national law, may have an impact on international commercial arbitration in several ways. An ability to navigate in the Chinese legal environment is a key issue for foreign parties who should be aware of the complexity of the legal culture. Knowledge of the Chinese legal system is paramount in China-related international arbitration.

Moreover, there is a growing need to examine how this should affect the way comparative law is utilized in international commercial arbitration.

With the growing shift to China in terms of globalized trade and commerce, international commercial arbitration calls for the role of legal comparison to be developed in arbitration. Several reasons explain the need to search for renewed approaches. China as a major global economic actor is increasing its influence in cross-border dispute resolution and building institutional capacities for international commercial arbitration. With the Belt and Road Initiative (BRI), Chinese interest in international arbitration has gained a new dimension, as BRI promotes the expansion of Chinese dispute resolution institutions and China actively introduces reforms to enhance their international competitiveness. The deepening of BRI is matched by growth in the volume of related contracts – for international projects, international sales of goods, stock acquisition as well as financing agreements – that opt for international arbitration.²

The policy papers of the Chinese government highlight not only the Chinese but also the Asian perspective of enhancing the efficiency and competitiveness of arbitration taking place in BRI countries. In April 2015, the State Council promulgated the Plan for Further Deepening the Reform and Opening-up of China (Shanghai) Pilot Free Trade Zone, requiring Shanghai to accelerate the establishment of a global-oriented Asia-Pacific international arbitration centre.³ In August 2016, the Shanghai Government issued the Plan for the Construction of Shanghai International Trade Centre in the Era of “Thirteenth Five-Year Plan”, aiming at building the centre and an international commercial arbitration system.⁴ In this context, Shanghai's commercial

² Wang W. 2018. [The rising tendency of cross-border dispute cases of enterprises – how Chinese arbitration institutions improve international competitiveness] 企业跨境纠纷案件呈上升态势|中国仲裁机构如何提高国际竞争力. Available at http://www.sohu.com/a/282399722_744278. Unofficial translation by Di Yang.

³ [Notice of the State Council on Issuing the Plan for Further Deepening the Reform and Opening-up of China (Shanghai) Pilot Free Trade Zone] 国务院关于印发进一步深化中国（上海）自由贸易试验区改革开放方案的通知, issued and effective 8 April 2015, Part II, Article 1, Section 11. Unofficial translation available at <http://en.pkulaw.cn/display.aspx?cgid=4e06f033823fa370bdfb&lib=law>. Accessed 14 September 2020.

⁴ According to Part III, Article 1, Section 3 of the Shanghai International Financial Plan, Shanghai should construct an Asia-Pacific arbitration centre for international commercial disputes, further promote local commercial

arbitration business has rapidly developed. Being one of the oldest Chinese arbitration institutions engaged in international commercial arbitration services, the Shanghai International Arbitration Centre has witnessed an increase in the number of cases, and has also launched a series of initiatives to promote the development of arbitration.⁵

In 2018, the General Office of the Central Committee of the Communist Party of China and the General Office of the State Council issued an Opinion concerning the Establishment of the Belt and Road International Commercial Dispute Resolution Mechanism and Institutions.⁶ The Opinion pointed out that the Supreme People's Court (SPC) will set up international commercial courts, take the lead in setting up a committee of international commercial experts, support a BRI-related international commercial dispute resolution mechanism, and promote the establishment of litigation, mediation and arbitration which meets the parties' needs within the BRI region from China and abroad. The aim is that the BRI dispute resolution mechanism would form a convenient, speedy and low-cost "one-stop" dispute resolution centre to provide high-quality and efficient legal services for parties involved in BRI construction.⁷ Domestic arbitration institutions will be supported to conduct international commercial arbitration under BRI and they will be encouraged to establish joint arbitration mechanisms with other arbitration institutions from countries participating in BRI.⁸

Strengthening and mobilizing cross-border dispute resolution mechanisms is sought for the benefit of deepening BRI further. In building the competitiveness of Chinese arbitration, both institutional and regulatory efforts

arbitration and dispute resolution institutions, improve their professional capacities and international influence, attract and accumulate internationally known commercial disputes resolution institutions, and construct an oriented dispute resolution platform.

⁵ See *supra* n*2 - Wang (2018).

⁶ General Office of the Central Committee of the Communist Party of China and General Office of the State Council, [Opinion Concerning the Establishment of the Belt And Road International Commercial Dispute Resolution Mechanism and Institutions] 关于建立“一带一路”国际商事争端解决机制和机构的意见, issued and effective 27 June 2018. Unofficial translation available at:

<http://cicc.court.gov.cn/html/1/219/208/210/819.html>. Accessed 14 September 2020.

⁷ *Ibid.*

⁸ *Ibid.*

serve long-term political deliberations as well as the objective of economic and commercial success. The most important international commercial arbitration institution in China is the China International Economic and Trade Arbitration Commission (CIETAC) whose caseload is significantly on the rise. According to statistics, in 2019, CIETAC accepted a total of 3333 arbitration cases, a year-on-year increase of 12.53%, of which 617 were foreign-related⁹ cases. The amount of the subject matter involved in all cases reached roughly RMB 122 billion, a year-on-year growth of 20.13%. The total amount of the disputes of foreign-related cases was around RMB 38 billion, a year-on-year increase of 30.79%. Notably, there were 211 cases with the disputed amount exceeding RMB 100 million (a year-on-year increase of 23.39%), of which 19 cases reached more than RMB 1 billion. The parties involved in the cases came from 72 countries and regions, mainly from Hong Kong,¹⁰ the United States, Taiwan, South Korea, Singapore, Japan, Germany, British Virgin Islands, Russia, Italy, Australia, Cayman Islands, France, and Mongolia. There were a total of 75 appointments of foreign arbitrators in 75 cases.¹¹

⁹ The term has been adopted from Chinese legislation, which divides arbitration cases into domestic, foreign-related and foreign, and used in this article as referring to cases that have connections to foreign jurisdictions. See SPC's [Interpretations of the SPC on Several Issues Concerning Application of the Law of the People's Republic of China on Choice of Law for Foreign-Related Civil Relationships (I)] 最高人民法院关于适用〈中华人民共和国民事诉讼法涉外民事关系法律适用法〉若干问题的解释（一），issued 28 December 2012, effective 7 January 2013 [hereinafter SPC Interpretations (I)]. Unofficial translation available at <http://en.pkulaw.cn/Display.aspx?lib=law&Cgid=192329>. Accessed 14 September 2020. Article 1 of the Interpretations states that a "foreign-related civil relationship" includes situations where either party or both parties are foreign citizens, foreign legal persons or other organizations or stateless persons. It is worth noting that cases involving a wholly owned foreign enterprise (WOFE) are heard by the Foreign Related Division in People's Courts, although WOFEs are domestically incorporated legal persons. See SPC, [Notice of the SPC on Clarifying Relevant Matters Concerning the Standards for Hierarchical Jurisdiction over and Centralized Handling of Foreign-related Civil and Commercial Cases of First Instance] 最高人民法院关于明确第一审涉外民商事案件级别管辖标准以及归口办理有关问题的通知, issued 7 December 2017, effective 1 January 2018, Article 2, Section 4. Unofficial translation available at https://www.pkulaw.com/en_law/f6b0744d27af6775bdfb.html. Accessed 14 September 2020.

¹⁰ The Hong Kong Special Administrative Region of the People's Republic of China is not explored in this article, nor are intra-regional questions of Chinese arbitration addressed.

¹¹ China International Economic and Trade Arbitration Commission, CIETAC 2019 Work Report. Available at <http://www.cietac.org/index.php?m=Article&a=show&id=16871&l=en>. Accessed 14 September 2020.

In global terms, the organization of cross-border dispute resolution is changing as part of BRI developments and Asian economic integration. BRI countries face a certain interdependence which contributes to a way of viewing the international commercial arbitration system more from the Asian point of view. China has made initiatives to develop a joint dispute resolution circle for BRI countries so that there would be an area in the BRI sphere which offers effective and foreseeable dispute resolution based on jurisdictions close to the disputing parties. Arguably, with these developments, ongoing changes in the international commercial arbitration regime are so huge that they should affect the way international arbitration is approached in research. In the Western debate, the current narrative of international arbitration builds on regulatory perspectives reflecting the Western rhetoric of available and preferred legal approaches, leaving largely aside what it means that China is becoming a major player in the field. China-related – and BRI-related – disputes are challenging the Western-emphasized scene of arbitrators' decision-making process and its regulatory frame. These developments erode categorizations embedded in Western legal thinking about the regulatory setting of arbitration.

Currently, considerable gaps in international research remain in terms of China-related international commercial arbitration and China's influence on cross-border dispute resolution. So far, research on international arbitration has largely de-prioritized a global account of legal comparisons, laying emphasis, for example, on EU – US comparisons or comparisons between the civil and common law traditions.¹² Only a small, albeit growing, amount of arbitration research includes comparisons from different legal cultural spheres so that China is also included.¹³ There is scarce research on the paramount

¹² Comparative efforts with diverse approaches have been carried out by both academics and practitioners. To illustrate, see for example Bantekas I. 2008. The Foundations of Arbitrability in International Commercial Arbitration. *Australian Year Book of International Law Online* 27: 193–223; Elsing S.H. and Townsend J.M. 2002. Bridging the Common Law – Civil Law Divide in Arbitration. *Arbitration International* 18: 59–66. See also Lowenfeld A.F. 1985. The Two-Way Mirror: International Arbitration as Comparative Procedure. *Michigan Yearbook of International Legal Studies* 7: 163–188.

¹³ See for example Gu W. 2016. When Local Meets International: Mediation Combined with Arbitration in China and its Prospective Reform in a Comparative Context. *Journal of Comparative Law* 10: 84–105. See also Zhou J. 2006. Judicial Intervention in International Arbitration: A Comparative Study of the Scope of the New York Convention in U.S. and Chinese Courts. *Pacific Rim Law & Policy Journal* 15: 403–456.

question, namely how to approach the Chinese legal system in international arbitration and how to utilize legal comparison in that effort.

In the theory of international commercial arbitration, elaboration of a doctrine based on the claimed autonomous nature of international arbitration exists, resting on views of self-standing transnational legal standards that distance arbitration from state-bound laws as well as a state-bound setting.¹⁴ Again, the growing role of China in international arbitration – and the state interest embedded therein – challenges this picture which has been built within international arbitration doctrine and which has resulted in loosening the scene of the role of state law in arbitration. It can be argued that Chinese development makes it imperative for the arbitration field to approach these issues differently from the past.

Foundations of an international arbitration mechanism that rest on the interface with state laws are important when we evaluate the building of the Chinese regulatory framework. The focus of analysis needs to encompass regulatory actors and their strategies. At the same time, China-related arbitration and Chinese arbitration institutions should be seen in the light of the transnational frame for international commercial arbitration. The transnational frame which places domestic laws in interaction with transnational rules that function in arbitration operates to a certain extent distantly and differently from state laws within a frame deriving from state legal systems. More generally, the relationship between transnational private dispute resolution and national laws could be seen as a dialectical one, where private international law rules form an important part of a dialectical relationship in which neither enjoys clearly dominant status.¹⁵

In the following, a general overview is offered of some regulatory developments that are noteworthy when seeking the role that comparative law should play in international commercial arbitration. With its particular features,

¹⁴ Critically on elaboration of the doctrine of autonomous international arbitration, see Michaels R. 2013. *Dreaming Law without a State: Scholarship on Autonomous International Arbitration as Utopian Literature*. *London Review of International Law* 1: 35–62.

¹⁵ Wai R. 2002. *Transnational Liftoff and Juridical Touchdown: The Regulatory Function of Private International Law in an Era of Globalization*. *Columbia Journal of Transnational Law* 40: 209–274, 267.

private international law is explored as a framework for noteworthy characteristics of the Chinese legal system and legal culture that may be present in international arbitration. Arguably, Chinese developments open renewed avenues to viewing comparative law in international arbitration in terms of both arbitration practice and research. These same developments also enable renewed discussion of the operation of legal constraints in the regulatory framework of international arbitration that derive from state law. Observations to be made convey an image of how Chinese developments of private international law affect international commercial arbitration. Moreover, these observations are employed to suggest how comparative methodology could be utilized in international arbitration. In addition, they reveal issues where significant room exists for broader comparative insights into developments in the field of international commercial arbitration.

II. SETTING THE SCENE

As international commercial arbitration is rooted in party autonomy throughout the arbitration process, the voluntary self-commitment of parties to arbitration is highlighted in several choices that parties are expected to make and arbitrators to respect. One of the most central issues for the contracting parties is how the law applicable to the contract is determined. It is in the interests of parties to clarify choice-of-law questions and remove related uncertainties beforehand. However, legal-cultural differences between the contracting parties may hamper negotiations on dispute resolution clauses. A choice-of-law clause does not always succeed in the way one expects. The applicable law (*lex causae*) may not be clear even if the parties have made a choice of law. Determining which law should be applied may turn out to be a process where interpretation of the choice-of-law clause requires utilizing comparative information. The process of determining the applicable law on the basis of a choice-of-law clause may require paying heed to the legal-cultural backgrounds of the parties.

When legal problems associated with the use of party autonomy are assessed in the Chinese context, a particular legal-cultural framework calls for attention. Both the process of selecting applicable norms and applying those

norms require an understanding of the normativities that lie behind Chinese law and contractual practices. These may include complicated clauses on choice of law drafted in an unfamiliar way from a Western perspective. The choice-of-law process also involves situations where arbitrators have to consider restrictions on party autonomy. An assessment may be required of mandatory rules that may have to be applied regardless of the *lex causae*. In international arbitration, arbitral tribunals have to develop approaches that take into account legal-cultural differences but are sustainable from the point of view of the principle of party autonomy on which the entire arbitration process rests, and from the point of view of being bound to apply applicable norms correctly.

Even when the use of party autonomy has resulted in a choice-of-law clause which satisfies the parties, the impact of private international law in arbitration does not necessarily end there. Several legal questions are involved in international contracts that cannot be resolved without also knowing conflicts rules in other respects than merely with regard to determining the applicable law. For example, rules that concern the application of mandatory rules of different degrees as well as the public policy ("*ordre public*") may need to be considered. In the end, recognition and enforcement of an arbitral award may be asserted in a court by one of the parties, which takes the award into the state law framework of private international law rules.

It is striking that while China-related international commercial arbitration is growing rapidly, Chinese private international law is often viewed through relatively simplistic lenses. In China, the field of private international law was born in the late 1980s, and the role and status of private international law as a discipline is still quite weak. Chinese academia has not been much involved in the international discussion of private international law, while private international law itself has only been regarded as an independent discipline since 1978, when China adopted the opening-up policy. For several years, private international law was regarded by Chinese scholars as a forbidden, even perilous, academic effort. Anti-foreign sentiments that dominated from the 1950s to the 1970s were so pervasive that it was difficult to consider any Western ideas or influence, even in academic studies. A similar attitude was also manifested by the legislature and the judiciary in their reluctance to

recognize the effect of foreign law in cases involving foreign elements.¹⁶ Defining the sphere of private international law has caused controversy in China. It has been quite widely viewed that the sphere of private international law includes conflicts of laws, the legal status of nationality and foreigners as well as international civil litigation and arbitration procedure, including jurisdiction, judicial assistance and recognition and enforcement of foreign judgments and arbitration awards.¹⁷

In October 2010 China adopted its first extensive law on private international law in the form of the Law of the PRC on Choice of Law for Foreign-related Civil Relationships. We can observe that while Chinese private international law holds to certain general principles there is no tradition from which these principles and dealing with private international law cases and problems at first hand might evolve.¹⁸ However, the gradually developing system of private international law blends elements of Western law with elements of the Chinese legal system and Chinese legal tradition.

As true as it is that comparative law exercises are often integral to the application of private international law rules, there is also a growing need for research on comparisons between systems of private international law to broaden our view of similarities and differences that may have an impact on the outcome of a cross-border dispute. However, it must be pointed out that the Chinese legal environment where international arbitration takes place and Chinese private international law rules are applied involves elements that do not easily reveal themselves to outsiders. This has a bearing on the conduct of comparative research.

¹⁶ Huang J and Huo Z. 2014. A Commentary on Private International Law in East Asia – From the Perspective of Chinese Law. In *Codification in East Asia: Selected Papers from the 2nd IACL Thematic Conference. Ius Comparatum – Global Studies in Comparative Law*, ed. Wang W.Y, pp 215–232. Cham: Springer.

¹⁷ See He Q. 2010. China's Private International Law (1978–2008). *Frontiers of Law in China* 5: 188–214, 195–196. See also Tu G. 2016. *Private international Law in China*. Singapore: Springer, 19–20.

¹⁸ See supra n*17 - He (2010), 205–207.

III. TRANSITION AS A CONTEXT FOR BUILDING A CONTRACT-CENTERED PRIVATE LAW REGIME

Over the course of the past few decades, China has faced profound transition while adopting the role of a major global economic player. At the same time, a legal framework based on private law has been built for the opening-up of Chinese society. Historically, law in China has not been focused around contractual legal relationships. With post-Mao reforms, a move to a contract-centred private law regime and market has been rapid, being motivated by economic demands. The concept of contract in civil relations was defined in Chinese law with the enactment of the General Principles of the Civil Law of the PRC in 1986.¹⁹ Simultaneously, when laws have largely changed and widened the legal culture, traditional thinking has nevertheless kept its hold on normative layers that shape the legal reality and the position of law in Chinese society.²⁰

The development of law has been rapid but challenges remain. There are gaps in regulation and the hierarchy between different rules remains unclear so that in a case of conflict between different rules it may not be possible to resolve which rule prevails. Local-level rules may limit the impact of national rules in certain subject matters. A noteworthy feature is the lack of precedential power of court decisions.²¹ Although there has been a shift in the regulatory framework towards a more business-oriented model, it should be noted that the legal system is upheld by policymakers who do not separate the legal from the political and who view law as a tool of governance.²²

¹⁹ The concept was first used in Chinese law in 1985 with enactment of the Law of the PRC on Economic Contracts Involving Foreign Interest (1985). This law, while stipulating the clauses that a contract should have (Article 12), did not include a definition of contract.

²⁰ See also Chen J. 2015. *Chinese Law: Context and Transformation, 2nd revised and expanded edition*. Leiden: Martinus Nijhoff, 5–7 and Peerenboom R. 2006. What have we learned about law and development? Describing, predicting, and assessing legal reforms in China. *Michigan Journal of International Law* 27: 823–871.

²¹ However, *de facto* legal effect of court decisions should be noted.

²² See Clarke D, Murrell P, and Whiting S. 2006. The Role of Law in China's Economic Development. In *China's Great Economic Transformation*, eds. Brandt L and Rawski T.G, pp 375–428. Cambridge: Cambridge University Press, 396–397.

A unique feature of the Chinese system is regulatory development based on experimentation. In the absence of formal regulation, informal developments have been important to the development of the cross-border dispute resolution regime affecting commercial actors. Sometimes informal regulatory initiatives have served to fill gaps in legislation. The opportunity for gradual development without the support of formal laws is something that should also be noticed in considerations of the current arbitration regime. Arbitration commissions and pilot programmes enhancing the international role of Chinese arbitration institutions have served as channels for updating regulation. The Shanghai International Arbitration Centre formulated the China (Shanghai) Pilot Free Trade Zone Arbitration Rules in 2014 and 2015. These have been integrated in international rules. Since the Arbitration Law has remained unchanged, these local rules together with institutional development have paved the way towards a more appropriate international arbitration regime. There are also cases where local regulations have provided experimentation that has later materialized at the level of national laws. Moreover, the SPC has assumed an active role in promoting relevant amendments to the Civil Procedure Law and the Arbitration Law, also providing regulatory support for building the BRI-related international commercial dispute settlement mechanism.²³

IV. LEGALIZATION, CHOICE-OF-LAW AND CULTURAL LAYERS OF LAWS

Although Chinese laws present themselves as seemingly similar to their foreign counterparts, they often function in profoundly different ways. These relate to strong connections between laws, the state, and the Communist Party of China. Moreover, the judicial system is unique, while Chinese legal institutions may perform different functions from those located elsewhere. Although sources of law can be outlined in various ways, the regulatory framework cannot be divorced from the societal order of the country. Essentially, the Chinese system should be understood in its historical context.

²³ Over the years, the SPC has promulgated many interpretations and guidelines on how the Civil Procedure Law should be applied in practice and how specific types of civil cases should be tried at different levels of the people's courts.

Also important is the context of transition, which has been in progress since the late 1970s. Moreover, the political context is essential in terms of understanding the power structures that directly affect the status of law. In sum, the legal system and the political system are intertwined as the legal system is anchored to complex power structures that link together the law and the ruling party.

From the perspective of comparative law, the question of the nature of law arises from a macro perspective which allows an assessment of recognizable features of law that implicitly affect the micro perspective. Law as a social phenomenon is deeply embedded in the culture and traditions of a particular community. Yet comparatists tend to focus on the normative structure and system and remain at the surface level of the legal system, treating any extra-legal cultural and social factors either as irrelevant or as something to overcome.²⁴ Arguably, though, to view the frame of Chinese tradition together with the modernization process of law is possible only if we consider factors external to formal law. Instead of measuring the level of “catch up” by evaluating creation of laws, the Chinese legal system can better be characterized by placing regulatory moves within a larger framework of legal reality. In this reality, formal regulatory acts and actors are integrated with tradition and legal reality stems from the particular way the societal order functions and filters the desired impact of laws.

Hence, instead of solely focusing on existing laws we should see through the formal legal structures a culture-specific value system that has its own identity.²⁵ Chinese society has not experienced legalization going as far as Western societies and the legal system could be characterized as one of the sub-systems used for governance of the society by the state and the party. True, the increase of written laws has been expansive, and widely integrated into the international opening of the country. However, the real impact of laws has been

²⁴ Liukkunen U and Chen Y. 2016. Developing Fundamental Labour Rights in China – A New Approach to Implementation. In *Fundamental Labour Rights in China – Legal Implementation and Cultural Logic*. eds. Liukkunen U and Chen Y, *Ius Gentium: Comparative Perspectives on Law and Justice*, pp 1–17. Cham: Springer, 5.

²⁵ See also Menski W.F. 2009. *Comparative law in a global context: The legal systems of Asia and Africa*. Cambridge: Cambridge University Press, 584.

limited. Although law has been a significant tool for major social change, it has not assumed a strong status as a tool for creating and protecting self-standing rights. For legal comparatists, these observations emphasize the need for a view that goes beyond the visible systemic features to the basic premises of law.

Cultural layers of law also deserve attention in evaluating the role of private international law. Chinese courts have growing experience of the application of private international law rules. As regards application of foreign laws, a *homeward trend* has often prevailed despite the fact that the Law of the PRC on Choice of Law for Foreign-related Civil Relationships provides rules for identifying applicable foreign laws.²⁶ According to Article 10 of the Law, foreign laws applicable to foreign-related civil relations are to be ascertained by the people's court, arbitral authority or administrative organ.²⁷ If foreign laws cannot be ascertained, the law of China will apply. Courts have tended to apply Chinese law instead of foreign law after a superficial process of attempting an identification of the applicable foreign law.²⁸ The problem of proof of foreign law has been a major obstacle in China for developing a foreign-related dispute resolution mechanism. For international arbitration, how the court system functions in the country where the arbitration institution operates, and how the attitude towards foreign laws is manifested in foreign-related cases, is important in terms of the proper functioning of the arbitration process.

Emphasis should be laid on the fact that international commercial arbitration needs to be seen as dependent on the methodological and regulatory framework provided by private international law.²⁹ Party autonomy has been recognized in China as a key principle of choice of law, but private

²⁶ See also Liu R.P. 2001. China's Practice of Private International Law. *Comparative and International Law Journal of Southern Africa* 34: 1–33, 8–9 and 12.

²⁷ Supplementary provisions on ascertaining foreign law are contained in SPC Interpretations (I), Article 17.

²⁸ See also [Notice of the SPC on Issuing the Opinions on Several Issues concerning the Implementation of the General Principles of the Civil Law of the PRC (For Trial Implementation)] [Partially Invalid] 最高人民法院印发《关于贯彻执行〈中华人民共和国民法通则〉若干问题的意见(试行)》的通知, issued and effective 2 April 1988, Article 193. Unofficial translation available at https://www.pkulaw.com/en_law/36d5796192fb4235bdfb.html. Accessed 14 September 2020. This Notice specifies how the applicable foreign law is ascertained.

²⁹ See also Xiao Y and Long W. 2009. Contractual Party Autonomy in Chinese Private International Law. *Yearbook of Private International Law* 11: 193–209, 202.

international law mechanisms that enable adjusting the outcome of choice of law in order to ensure compliance with certain important aims of society have gained support from the legislature as channels for expressing public interest. A particular provision on overriding mandatory rules (“*lois de police*”) is included in the Law of the PRC on Choice of Law for Foreign-related Civil Relationships. Article 4 states’, “[i]f there are mandatory provisions on foreign-related civil relations in the laws of the PRC, these mandatory provisions shall directly apply”. The SCP has taken a stance on the issue in SPC Interpretations (I), stating that the mandatory provisions in Article 4 of the Law shall refer to those provisions whose application is deemed necessary for the purpose of safeguarding major public interests of the country.³⁰

Private international law rules serve a variety of purposes. In the classic theory of private international law, choice-of-law rules were neutral and strove for international uniformity of decisions. However, result-oriented considerations have come to affect the regulatory development and choice-of-law process in various ways.³¹ Overriding mandatory rules that can be applied regardless of the *lex causae* may affect the outcome of the international commercial arbitration process. It is possible that the arbitral tribunal needs to consider questions of substantive law that highlight the state’s particular perspective on the rationale of mandatory rules. Overriding mandatory rules give expression to the basic values and objectives of the legal system but their determination and the extent to which they should be applied often entail

³⁰ SPC Interpretations (I). Article 10 of the Interpretations also sets out several examples of mandatory rules (labour protection, food or public health, environment, foreign exchange control and financial security, anti-monopoly and anti-dumping, and other situations). Moreover, Article 4 of the same Interpretations provides that “[w]here the application of law of any foreign-related civil relationship involves the application of any international treaty, the people’s courts shall allow the application thereof in accordance with Article 142(2) of the General Principles of the Civil Law of the PRC, Article 95(1) of the Negotiable Instruments Law of the PRC, Article 268(1) of the Maritime Law of the PRC and Article 184(1) of the Civil Aviation Law of the PRC except those international treaties on intellectual property that have been or are required to be transformed into domestic laws.”

³¹ See for example Liukkunen U. 2007. The Method of Understanding and an Internal Viewpoint: on the Interface between Comparative Law and Private International Law. *Zeitschrift für Vergleichende Rechtswissenschaft* 2: 141–157.

difficulties.³² Although it is difficult to provide clear answers as to determining overriding mandatory rules, such rules can be found in the vast area of Chinese business law. Nevertheless, the effect of overriding mandatory rules is a complicated issue.³³

Scholarly discussion in China has begun to pay attention to the purposes that mandatory rules serve and the methods for limiting the effects of the law selected by the parties as applicable.³⁴ There is a wide understanding of separating certain rules which protect the public interest from the sphere of party autonomy but the lack of profound discussion in Chinese academia on the role of overriding mandatory rules in choice of law is evident. On the other hand, Chinese parties have smoothly argued for an application of overriding mandatory rules of Chinese law in China-related cases of international commercial arbitration.

Chinese discussion of the classic public policy exception of private international law touches upon the basic dimensions of the public policy.³⁵ In addition to emphasis on limited and non-discriminatory application of the public policy exception, it is stressed that the use of public policy should not conflict with the sovereignty of other countries and not be confused with the exclusion of foreign public law.³⁶ There is no unanimity as to what is applied instead of foreign law rules that are not applied due to public policy.³⁷ In the enforcement and recognition of international arbitration awards, China is

³² See also Bermann G.A. 2011. The Origin and Operation of Mandatory Rules. In *Mandatory Rules in International Arbitration*, eds. Bermann G.A. and Mistelis L.A., pp 1–28. Huntington: JurisNet, 6–7 and Cordero Moss G. 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. Ferrari F, pp 289–330. Huntington: JurisNet.

³³ See also generally Basedow J. 2013. The Law of Open Societies: Private Ordering and Public Regulation of International Relations. General Course on Private International Law. In *Collected Courses of The Hague Academy of International Law – Recueil des cours 2013 Volume 360*, pp 9–515. Leiden: Brill.

³⁴ See supra n*29 - Xiao and Long (2009).

³⁵ Ibid.

³⁶ See Xiao Y and Huo Z. 2005. Ordre Public in China's Private International Law. *American Journal of Comparative Law* 53: 653–678, 673–674.

³⁷ Ibid, 674–675.

bound by the standards of the New York Convention³⁸, including the public policy reservation in Article V(2)(b) of the Convention.³⁹ The SPC has stated that the principle of public policy should be applicable only under the circumstances that recognition of an arbitral award would violate China's basic legal system and cause damage to China's fundamental social interests.⁴⁰

Generally, the developments which have led to broad international discussion on the role of mandatory rules in private international law have not by themselves much affected views on the dominance of party autonomy in international commercial arbitration.⁴¹ Overriding mandatory rules are considered in international arbitration from a transnational dispute resolution perspective, but public interest may be manifested in these rules in a way which deserves broader attention.⁴² Although private international law was originally considered to be a field of law comprising formal norms, the interests and objectives promoted in substantive law have long been taken into account in various ways in forming choice-of-law rules. This has led to an increasingly stronger materialization development – taking into account the desired outcome of choice of law in the drafting and application of choice-of-law rules – in private international law.⁴³

Materialization of private international law also involves emphasis on the status of mandatory rules of various degrees in choice of law and weighing

³⁸ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958.

³⁹ China became a party to the New York Convention in 1987 and made two reservations to the Convention on accession: the reciprocity reservation and the commercial reservation.

⁴⁰ See [Reply of the SPC to the Request for Instructions on Non-Recognition of No. 07–11 (Tokyo) Arbitral Award of the Japan Commercial Arbitration Association] 最高人民法院关于不予承认日本商事仲裁协会东京07-11号仲裁裁决一案的请示的复函, issued and effective 29 June 2010. Unofficial translation available at <http://en.pkulaw.cn/display.aspx?cgid=9c1fb82b51eb96a4bdfb&lib=law>. Accessed 14 September 2020.

⁴¹ See *supra* n*32 - Bermann (2011), 6–7.

⁴² On the specific framework of the use of mandatory rules in international commercial arbitration, see Naón H.A.G. 2001. Choice-of-law Problems in International Commercial Arbitration. In *Collected Courses of The Hague Academy of International Law – Recueil des cours 2001 Volume 289*, pp 9–395. Leiden: Brill, 202–205.

⁴³ See Liukkunen U. 2012. Collision between the Economic and Social – What Has Private International Law Got to Do with It? In *Coherence and Fragmentation in European Private Law*, eds. Letto-Vanamo P and Smits J, pp 125–150. Munich: Sellier European Law Publishers; Liukkunen U. 2004. *The Role of Mandatory Rules in International Labour Law – A Comparative Study in the Conflict of Laws*. Helsinki: Talentum, 11–12.

substantive law interests more broadly and explicitly.⁴⁴ Chinese discussion related to result-orientation of private international law has been based on relatively vague terminology and it quite often appears to start from and end with considerations that highlight state sovereignty. This can be viewed to reflect not only the less mature theory of Chinese private international law but traditional characteristics of the legal system and also, to some extent, the influence of international law developments on the debate.⁴⁵ The trend of materialization, which has become characteristic to private international law, has not been assessed in the Chinese context so as to pay heed to structures deeper in the legal system.

V. LEGAL REGIME OF INTERNATIONAL COMMERCIAL ARBITRATION – EVOLUTION AND IMBALANCES

Until the opening up, law had been held as a secondary and less relevant tool of governance in China. This heritage still affects the lens through which the legal system is seen in Chinese society. We can see the impact of the past when law did not occupy a central role in the society. Compared to Western countries, law does not play a similar role between individuals or in relations between the individual and the state. The legal regime of international commercial arbitration is complex and fragmented in China. Although the 1994 Arbitration Law divides arbitral awards into domestic, foreign-related and foreign, it only applies to arbitration conducted in China.⁴⁶ Therefore, the Arbitration Law lays down provisions only for the enforcement of domestic

⁴⁴ See supra n*31 - Liukkunen (2007), 144–145. See also Symeonides S. 2009. Result-Selectivism in Conflicts Law. *Willamette Law Review* 46: 1–32.

⁴⁵ On the need to develop a more mature theory of private international law with Chinese characteristics, see for example supra n*17 - He (2010), 207 and 212.

⁴⁶ China's domestic law regulating international commercial arbitration mainly consists of the Arbitration Law promulgated in 1994. In addition, the Civil Procedure Law, the Law of the PRC on Chinese-Foreign Equity Joint Ventures, the Law of the PRC on Chinese-Foreign Contractual Joint Ventures, and the Contract Law also contain provisions on the settlement of disputes between parties through arbitration. The regulatory framework for international arbitration also encompasses interpretations of the SPC. Moreover, the Law of the PRC on Choice of Law for Foreign-related Civil Relationships and its accompanying SPC interpretations were recently included in the regulatory framework of international arbitration in China.

arbitral awards and foreign-related arbitral awards. However, there are no specific provisions in the Arbitration Law for recognition and enforcement of foreign arbitral awards under the New York Convention.⁴⁷

The expansion of international arbitration cases has begun to change the understanding of the character of international arbitration in China. Broadening of the cross-border regulatory framework puts pressure on Chinese private international law accompanied by considerations of the development of party autonomy and limitations on it in the Chinese international commercial arbitration system. However, connections between private international law and international commercial arbitration should also be seen from the perspective of the Chinese legal regime being a part of the international commercial arbitration system.

Problems of enforceability of foreign judgments in China have long been recognized. In December 2016, the Nanjing Intermediate People's Court (the Nanjing court) recognized and enforced a foreign judgment for the first time based on the principle of reciprocity.⁴⁸ The foreign judgment was issued by the High Court of Singapore in favour of a Swiss company, Kolmar Group AG. As Chinese law does not contain a clear definition of reciprocity, the Nanjing court's decision to enforce a Singaporean court judgment based on reciprocity was a breakthrough in private international law in China. It was the first time that the principle of reciprocity has been clarified by judicial practice.

⁴⁷ The SPC issued a Notice of the SPC on Implementing the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Acceded to by China in 1987. See [Notice of the SPC on Implementing the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Acceded to by China] 最高人民法院关于执行我国加入的《承认及执行外国仲裁裁决公约》的通知, issued and effective 10 April 1987. Unofficial translation available at https://www.pkulaw.com/en_law/b96476088a462bafbdbf.html. Accessed 14 September 2020.

⁴⁸ Nanjing City Intermediate People's Court of Jiangsu Province, [No.5 of Second Group of Model Cases Involving Construction of the "Belt and Road" Published by the Supreme People's Court: Gore Group Co., Ltd. v. Jiangsu Textile Industry (Group) Import & Export Co., Ltd. Case concerning Application for Recognizing and Enforcing the Foreign Civil Judgment] 最高法院发布的第二批涉“一带一路”建设典型案例之五: 高尔集团股份有限公司 (KolmarGroupAG) 与江苏省纺织工业 (集团) 进出口有限公司申请承认和执行外国法院民事判决纠纷案, 9 December 2016. Unofficial translation available at <http://en.pkulaw.cn/display.aspx?cgid=a25051f3312b07f331efcc048c3bbac2d3f9e8c666440742bdfb&lib=cas>. Accessed 14 December 2020.

According to Article 283 of the Civil Procedure Law, where an arbitration award by a foreign arbitral institution requires recognition and enforcement by a people's court, the party seeking to do so must apply directly to the intermediate people's court at the place of domicile of the party against whom enforcement is sought or at the place where the property thereof is located, and the court will process the application in accordance with an international treaty concluded or acceded to by China or under the principle of reciprocity. The 2012 revision of the Civil Procedure Law of the PRC, complemented by interpretations of the SPC, has to some extent improved the system of recognition and enforcement of foreign arbitral awards. In addition to judicial interpretations, the SPC has issued guiding documents and cases involving recognition and enforcement of foreign arbitral awards. These are utilized as legal sources for judicial review of cases of recognition and enforcement of foreign arbitral awards by Chinese courts.

The SPC has also taken initiatives to strengthen the capacity of Chinese courts in dealing with cross-border civil and commercial disputes. It has provided judicial interpretations for lower courts and support for property preservation as well as evidence preservation for international commercial arbitration and mediation. Moreover, the SPC has promoted amendments to the Civil Procedure Law and the Arbitration Law that would further construct the international commercial dispute settlement mechanism and provide a further legal basis for BRI-related dispute resolution. As is known, the Arbitration Law is not in full compliance with the UNCITRAL Model Law.

In 2015, the SPC issued Several Opinions of the SPC on Providing Judicial Services and Safeguards for the Construction of the "Belt and Road" by People's Courts.⁴⁹ According to the Opinions, local courts should promote reciprocity and enforcement of arbitral awards of BRI countries even if some of those countries may not be parties to the New York Convention.⁵⁰ Previously, China

⁴⁹ [Several Opinions of the SPC on Providing Judicial Services and Safeguards for the Construction of the "Belt and Road" by People's Courts] 最高人民法院关于人民法院为“一带一路”建设提供司法服务和保障的若干意见, issued and effective 16 June 2015 [hereinafter SPC Opinions on Judicial Services]. Unofficial translation available at https://www.pkulaw.com/en_law/96f2607d78e93212bdfb.html. Accessed 14 September 2020.

⁵⁰ Ibid, Article 8.

has applied the New York Convention on the basis of reciprocity, recognizing and enforcing only arbitral awards issued in the territory of another contracting state of the Convention.⁵¹ Moreover, the SPC has issued two sets of model cases to guide local courts in their adjudication of new cases that are linked to the BRI. Most of the model cases concern cross-border commercial disputes. Legal issues covered by these cases include jurisdiction, commercial contracts, share transfer, maritime contract disputes, arbitration agreements and foreign direct investment.⁵²

A. Party Autonomy – Chinese Framework

Chinese legal development that has enabled formation of a legal regime for party autonomy to evolve can be seen as a consequence of the economic need to open towards international business realities. The development, which has entailed resolving legal problems relating to the applicable law from the viewpoint of legal relationships, and which entails development of party autonomy as well as the rule of the closest connection in choice of law, has occurred in a short time frame. Contractual choice of law is regarded as the cornerstone of Chinese private international law. However, it has not been fully clear how to apply the statutory provisions embodying the principle of party autonomy in practice.⁵³ It is also noteworthy that real discussion of party autonomy in contracts emerged no earlier but only with the opening-up policy.⁵⁴ Previously, the entire concept and idea of party autonomy were strange to Chinese legal culture.⁵⁵

In 1985, choice-of-law rules for contractual matters were first provided in legislation regulating foreign contractual businesses in the form of the Law

⁵¹ See Contracting States to the New York Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Available at <http://www.newyorkconvention.org/countries>. Accessed 14 September 2020.

⁵² The Nanjing court's judgment mentioned above has been included in the second set of model cases.

⁵³ See *supra* n*17 - Tu (2016), 71.

⁵⁴ See Zhang M. 2006. Choice of Law in Contracts: A Chinese Approach. *Northwestern Journal of International Law & Business* 26: 289–334, 289.

⁵⁵ See Lian X. 2012. Cross-Cultural Perspectives on the Business Dispute Resolution System in China. *Contemporary Readings in Law and Social Justice* 4: 398–419, 401.

of the PRC on Economic Contracts Involving Foreign Interest. To specify the relatively abstract provisions of the law, the SPC issued an interpretation in 1987 containing some sophisticated clauses dealing with contractual conflicts and interpreting the contractual choice-of-law rules of this law. The contractual choice-of-law rules in the Law of the PRC on Economic Contracts Involving Foreign Interest, therefore, came into being even earlier than the choice-of-law rules in the General Principles of the Civil Law of the PRC that were issued in 1986.⁵⁶ Article 145 of the General Principles of the Civil Law of the PRC states that the parties to a contract involving foreign interests may choose the law applicable to the settlement of their contractual disputes, except as otherwise stipulated by law. Additionally, Article 3 of the Law of the PRC on Choice of Law for Foreign-related Civil Relationships allows party autonomy in foreign-related civil relations.

Party autonomy does not operate in a vacuum. The sphere and function of the party autonomy principle should be weighed against the regulatory framework, which sets out limitations on making choices and limitations on application of the law selected by the parties as the *lex causae*. The broader regulatory framework of the judiciary may contain different elements that limit possibilities to exercise the liberty to choose the applicable law in an efficient way. When choices of the laws of some jurisdictions as applicable can be labelled as more predictable over others by contracting parties, this readily means that legislatures' regulatory strategies for various reasons are considered to either favour or disfavour party autonomy.

In China, the wording of the law enables an explicit choice of law by the parties. The expansion of the doctrine of party autonomy amplifies the tension between law and reality.⁵⁷ Chinese private international law has not usually provided different choice-of-law rules for different issues or aspects of one legal relationship, and, thus, *dépeçage* has not been favoured in the Law of the PRC on Choice of Law for Foreign-related Civil Relationships. However, it has been noted that Article 13 in the SPC Interpretations (I) may have changed the

⁵⁶ See Zhang M. 2011. Codified Choice of Law in China: Rules, Processes and Theoretic Underpinnings. *North Carolina Journal of International Law and Commercial Regulation* 37: 83–158, 86.

⁵⁷ See *supra* n*17 - Tu (2016), 41.

situation.⁵⁸ It provides that if a case concerns more than one foreign-related civil legal relationship, the people's court shall respectively determine the applicable laws for them.⁵⁹

B. Party Autonomy – Chinese Peculiarities

The way choice-of-law clauses have been drafted in international contracts involving Chinese parties may embody elements that are not familiar to Western contracting parties. These elements have their background and explanation in the Chinese way of forming and viewing the private international law regime. This means that interpretation of a choice-of-law clause and the exercise of party autonomy presupposes an understanding of Chinese legal thinking. To begin with, heed needs to be paid to the impact of international law obligations on the Chinese legal system. First of all, international conventions have had a broader influence on the development of private international law than can be seen from the substance of ratified conventions and related changes in Chinese legislation. International conventions have spelled out international vocabulary and values also in terms of the development of the use of choice-of-law clauses in international commercial arbitration. Secondly, the sphere of international conventions that are discussed in the context of party autonomy and the private international law framework can be considered notably large in China.

There is no regulation about the status of international conventions in the Chinese legal order. The status of international conventions has remained undefined under the Constitution of the PRC and there is no general rule about it. The Law of the PRC on the Procedure of the Conclusion of Treaties stipulates the competent organs and specified procedures as to how different types of international treaties may be signed, ratified, approved and acceded to. As international treaties do not become part of the Chinese legal order after they have been ratified, this would suggest that China does not follow a monistic

⁵⁸ See *Ibid*, 47.

⁵⁹ See SPC Interpretations (I), Article 13.

approach.⁶⁰ When international treaties are implemented, China generally seeks to guarantee their compliance within the domestic legal order via legislation which gives precedence to treaty provisions when domestic laws are contradictory.

Most international treaties are implemented by enactment of domestic laws without direct reference to these treaties. If there is a difference between domestic law and an international treaty to which China is a party, or domestic law shies away from the subject matter, the treaty in question may be invoked by the court to settle a case involving a foreign element. This approach was introduced by Article 189 of the Civil Procedure Law of the PRC (For Trial Implementation) enacted in 1982 and it has later been used in a number of laws in other fields.⁶¹ However, the approach mainly concerns treaties of international civil and economic co-operation.⁶²

These observations raise the possibility of viewing the use of choice-of-law clauses that contain references to international treaties.⁶³ In international commercial arbitration, it has not been uncommon that contracts involving Chinese parties include a choice-of-law clause where the governing law is, at least partially, an international treaty or treaties which the states of both contracting parties are bound by and which regulate the subject matter of the contract. This raises the question of understanding the broader framework within which choice-of-law clauses are drafted and party autonomy is used.

According to Article 142 of the General Principles of the Civil Law of the PRC, if any international treaty concluded or acceded to by China contains provisions differing from those in the civil laws of China, the provisions of the international treaty will apply, unless the provisions are those on which China

⁶⁰ See Liukkunen U and Chen Y. 2014. Introduction. In *China and ILO Fundamental Principles and Rights at Work*, eds. Liukkunen U and Chen Y, pp 1–18. Alphen aan den Rijn: Wolters Kluwer, 6.

⁶¹ *Ibid*, 6–7.

⁶² See Chen Y. 2017. International Law as mere Obligations: Supremacy of International Law and a Chinese Conception. *Peking University Law Journal* 5: 285–308.

⁶³ See also Hague Conference on Private International Law. 2015. Principles on Choice of Law in International Commercial Contracts. The Hague Conference on Private International Law Permanent Bureau: The Hague. Available at <https://assets.hcch.net/docs/5da3ed47-f54d-4c43-aaef-5eafc7c1f2a1.pdf>. Accessed 14 September 2020.

has made reservations. It has not been held clear if treaties can be used as the governing law or if they simply override any conflicting domestic provisions.⁶⁴ This uncertainty has not prevented the practice of choice-of-law clauses referring to treaties in China-related cases of international commercial arbitration from evolving. Choice-of-law clauses referring to a relatively wide array of international treaties demonstrate how orientation towards substantive law harmonization through international treaties may be reflected in the ways party autonomy is used in international arbitration.

VI. METHODOLOGICAL OBSERVATIONS – COMPARISON IN ARBITRATION

Pierre Legrand has remarked that many comparativists have ignored the question of the concept of law.⁶⁵ There is a need to make private international law consider the same basic question as well.⁶⁶ In private international law, choice of law is always made on the basis of some concept of law. The concept of law has to do with the functions of law. In private international law one cannot operate with a concept of law where law is perceived only as a regulatory instrument without quality and value. This relates to a requirement for respect for foreign law as a basis upon which expectations and interests have been built and choices made: law as the basis for a person's sense of justice.⁶⁷

In order to identify what existing law is we have to have an understanding about what law itself is. Legal norms express, albeit indirectly, the mentality of, or behind, a legal system. It is important to bear this in mind even when the first and foremost goal is to compare different legal cultures and the focus is the

⁶⁴ See Tang Z.S. 2012. International Treaties in Chinese Private International Law. *Hong Kong Law Journal* 42: 311–346.

⁶⁵ See Legrand P. 2006. Comparative Legal Studies and the Matter of Authenticity. *Journal of Comparative Law* 1: 365–460.

⁶⁶ See Thue H.J. 2004. Private International Law as Geisteswissenschaft – Reflections. In *Festschrift für Erik Jayme. Band I*, eds. Mansel H.P, Hausmann R, Kohler C, Kronke H and Pfeiffer T, pp 971–975. Munich: Sellier, 975.

⁶⁷ *Ibid*, 975. See also Legrand P. 1997. The Impossibility of Legal Transplants. *Maastricht Journal of European and Comparative Law* 4: 111–124.

macro-level of legal systems instead of, or in addition to, particular norms or institutions. In the Chinese context, the idea of rules expressing the mentality of the system appears to be quite illustrative but it does require drawing a distinction between formal rules and legal reality. The emphasis on understanding the context of law must be considered a special value of comparative law which entails acquiring knowledge of the cultural dimension of a foreign law.

We refer to rules both when explaining why intentional phenomena occur and when understanding the meaning of such phenomena.⁶⁸ Hence, it is important to distinguish between norms which regulate conduct and those which define various social practices and institutions. These two groups of norms are easily confused since they are simultaneously characteristically different but intricately related. Norms of conduct determine that certain things ought to or may not be done. Norms defining social practices and institutions determine how certain acts are performed. Often a norm of the latter type is needed in order to enable compliance with a rule of conduct.⁶⁹ Moreover, norms defining social practices and institutions are of fundamental importance in understanding behaviour.

Comparative law can benefit from this basic distinction between norm types because it enables a compact characterisation of the manner in which rules relate to the understanding of behaviour. The starting point of comparison of institutional norms differs from that of comparison of norms of conduct, which can keep to micro-level comparison. Comparison of institutional norms is often a macro-level comparison. Structures of a legal system cannot be understood without paying heed to the legal culture on which they are based. At the core of the qualification theories used in private international law, on the other hand, are the constitutive norms of legal systems since the concepts qualifying a legal relationship may often have very different meaning-contents in different legal systems.⁷⁰

⁶⁸ See von Wright G.H. 1981. *Humanism and the Humanities*. In *Philosophy and Grammar. Papers on the Occasion of the Quincentennial of Uppsala University*, eds. Kanger S and Öhman S, pp. 1–16. Dordrecht: Reidel.

⁶⁹ See von Wright G.H. 1971. *Explanation and Understanding*. London: Routledge & Kegan Paul, 151–152.

⁷⁰ See *supra* n*31 - Liukkunen (2007), 151.

How should one approach the Chinese legal-cultural context in international commercial arbitration where the transnational regulatory framework readily produces normativities that arbitrators need to consider? This article suggests what could be called comparison as a methodological point of departure for international commercial arbitration. We can identify law only if we take into account both its contents and its functions. Individual norms need to be seen as a part of the wider normative entity they belong to so that the values and objectives as manifested by applicable norms are taken into account when determining the content of those norms. There is, in the end, the question of interpretation.

Legal norms should be interpreted in relation to the entity they belong to, as they become understandable only as a part of the legal regime. The decision-making process in arbitration means interpreting legal sources in order to settle what kind of solution is in accordance with valid law. The above-given example of the particular way of using party autonomy in choice of law concerning China-related contracts is illustrative here. The logic behind the particular way party autonomy is used becomes better understandable when placed in the broader context of the legal regime.

Comparison as a process penetrates the decision-making of arbitrators, also governing the conflict-of-law dimension. The idea advocated here is that both the process of determining the governing law – be it state law or non-state law – and applying it become subject to comparative efforts that encompass the question of the function of law. Comparisons need to move between micro and macro levels in search of an appropriate contextual approach, which is a fundamental element in the comparative process. The contextual understanding required can be established by turning to insights that comparison enables. This two-level approach means that traits underlying formal legal provisions need to be looked at contextually to establish the content of law.

In essence, comparative methodology in arbitration is proposed to be rethought so that it can promote an understanding of Chinese law. Hence, the focus here is not on developing a method for comparisons between different legal regimes but on developing an approach to Chinese law under the general

theme of arbitration. There is also a need for comparative efforts to increase understanding of private international law in the transnational legal environment where international commercial arbitration takes place. There has been too little use of comparisons between different private international law approaches although the regulatory solutions adopted clearly imply a need to assess the operation of private international law rules and principles from a comparative perspective.⁷¹

VII. DYNAMICS OF CHANGE AND THE GLOBAL FRAMEWORK FOR INTERNATIONAL ARBITRATION

We have to expand our horizon and reconsider the conceptual framework which is generally used in international commercial arbitration research. Particular systemic features are present in the development of the Chinese arbitration regime that relate to the unique characteristics of the Chinese legal system. In addition, the research perspective advocated here encompasses the conduct of the state as an actor building or dismantling boundaries when arbitration capacities are constructed within BRI.⁷² Different perspectives on arbitration often imply different understandings of the complex relations between arbitration and state law. Although some claim that we are witnessing a decline of the need for the state law frame in international arbitration, Chinese development highlights inclusion of the state-law frame in assessing the interests and objectives as well as the regulatory priorities involved.

Moreover, considerations of Chinese private international law and arbitration regime speak for a broader comparative research perspective on

⁷¹ On the need for comparative research on the development of private international law in East Asia, see *supra* n*16 - Huang and Huo (2014), 229.

⁷² A demonstration of the eagerness to develop commercial dispute resolution framework is the Nanning Declaration at the 2nd China – ASEAN Justice Forum, which states that improving the cross-border dispute resolution mechanism is important to the formation of a harmonious and orderly legal environment for economic and trade investment within the region. See Nanning Declaration at the 2nd China – ASEAN Justice Forum, 8 June 2017. Unofficial translation available at <http://cicc.court.gov.cn/html/1/219/208/209/800.html>. Accessed 14 September 2020.

international commercial arbitration. Chinese conceptions of law, including the private international law dimension, increasingly influence the legal landscape that shapes interaction between legal systems in international arbitration. The scenario of private international law has to do with ambivalence in the meaning of “private” in private international law, and unravelling the dilemma of the rise of international commercial arbitration as a system of economic power asserted under the cover of “private”.⁷³ Comparisons that evaluate private international law regimes and the interests and objectives they advocate can unravel factors that influence the sphere of party autonomy and the limitations thereto in a more nuanced way. They also relate to exploring the question of the extent of judicial control present in the system of international commercial arbitration.

It can be argued that development with a shift of the locus of international arbitration more towards China introduces the complex language of regional exclusion and inclusion in the field of international arbitration. In terms of comparative law, in the Western debate, the formation of regionalism has mostly resulted in highlighting Asian countries’ difference and distance from Western countries in ways that highlight unknown as known. On the other hand, when the development of the international arbitration regime is put into a perspective that derives from regional interest in economic integration in Asia, particular policy objectives involved in the development of regulatory approaches to international commercial arbitration are to be noted. In countries of East Asia, legal problems of private international law nature have been constantly on the rise as inter-regional trade and business have been expanding but also because of the diversity of substantive laws in different jurisdictions.⁷⁴ This has led to more attention to the influence of private international law rules. As China builds a BRI-related dispute resolution mechanism that crosses borders, one of the ideas expressed is to support the exercise of party autonomy to encourage choosing domestic or foreign laws familiar to the parties.⁷⁵

⁷³ See Muir Watt H. 2011. Private International Law beyond the Schism. *Transnational Legal Theory* 2: 347–428, 392.

⁷⁴ See *supra* n*16 - Huang and Huo (2014), 215–216.

⁷⁵ See SPC Opinions on Judicial Services.

In arbitration research, it is important to maintain perspectives on the evolution of the Chinese arbitration regime and China as an actor that shapes the international commercial arbitration regime. Instead of sticking to geographical regions, we should use regions in comparative research more like perspectives, or entities whose borders are constantly on the move. From the Western perspective, BRI-related cross-border dispute resolution mechanism initiatives look like attempts at changing the relationship between universalism and regionalism. However, what might look in the West like resistance towards greater universalism in international arbitration may look from the Chinese perspective like resistance towards Western universalization in international arbitration.

VIII. CONCLUSION

A shift in contractual autonomy, as the basis of private business relations, and in party autonomy in cross-border contractual relations, has occurred within a relatively short time frame in China. Lack of clarity of existing laws has not prevented cross-border contractual practices from flourishing and economic developments have facilitated an increase in the autonomy of contracting parties. As there is, however, a certain mismatch between legal standards that are formally in force and rules that are applied in practice, capacities to operate regardless of the disconnect between written law and legal reality become important for foreign actors. Despite the broader transnational regulatory framework in which China's international arbitration regime is inextricably linked to Chinese legal culture and mentality necessitate attention. This article has argued for adopting comparison as an approach in arbitration penetrating the decision-making of arbitrators. Making legal assessment often requires a broader contextual evaluation of different types of normativities in international commercial arbitration.

Building an attractive international commercial arbitration regime has a lot to do with efficiency of party autonomy and related contractual rights of the parties to make valid choices. Arbitration builds on norms and values that are essential to the parties but – regardless of the autonomous shape of the

process – the state-law frame is present whether invited by the parties or not.⁷⁶ Hence, we also have to assess party autonomy from the perspective of the regulatory framework of private international law that expresses complex dichotomy between private and public interests. Chinese development underlines the connection between the legal regime of arbitration and the endeavours of the state. Efforts to build an internationally strong and attractive arbitration mechanism can be read as manifestations of the growth of state interest that call for closer attention to the interface between international commercial arbitration regime and state law. In the international commercial arbitration frame, we can see the conception of party autonomy placed in a Chinese context where the state is shaping the private international law frame for exercise of this freedom and certain institutional structures are advocated where party autonomy is placed.

Chinese development calls for opening the research perspective towards developing more global insights on globally relevant problems in international commercial arbitration. New challenges for international commercial arbitration derive from BRI-related development, which amalgamates culturally divergent regulatory approaches to arbitration. The evolution of Chinese private international law and its impact on the development of the international arbitration regime in the country deserve more attention than they have received so far. China is seeking to establish a competitive dispute resolution system that aligns with its global endeavours in trade and investment. With BRI, this appears to mark an era where arbitration law's transnational adaptability resonates with values of regionalism that aim at building arbitration mechanisms whose sustainability is not solely assessed by the end-users of the international arbitration system but, importantly, also by the regulators and policymakers of Asian economic governance.

⁷⁶ See also *supra* n*33 - Basedow (2013), 162–163.

Official Documents

Translations of Chinese legislation used in this article are taken from the Chinalawinfo database available at <https://www.pkulaw.com/english>. Accessed 14 September 2020.

China International Economic and Trade Arbitration Commission, CIETAC 2019 Work Report. Available at <http://www.cietac.org/index.php?m=Article&a=show&id=16871&l=en>. Accessed 14 September 2020.

General Office of the Central Committee of the Communist Party of China and General Office of the State Council, [Opinion Concerning the Establishment of the Belt And Road International Commercial Dispute Resolution Mechanism and Institutions] 关于建立“一带一路”国际商事争端解决机制和机构的意见, issued and effective 27 June 2018. Unofficial translation available at <http://cicc.court.gov.cn/html/1/219/208/210/819.html>. Accessed 14 September 2020.

Hague Conference on Private International Law. 2015. Principles on Choice of Law in International Commercial Contracts. The Hague Conference on Private International Law Permanent Bureau: The Hague. Available at <https://assets.hcch.net/docs/5da3ed47-f54d-4c43-aaef-5eafc7c1f2a1.pdf>. Accessed 14 September 2020.

[Interpretations of the Supreme People's Court on Several Issues Concerning Application of the Law of the People's Republic of China on Choice of Law for Foreign-related Civil Relationships (I)] 最高人民法院关于适用〈中华人民共和国民事诉讼法〉若干问题的解释（一）, issued 28 December 2012, effective 7 January 2013. Unofficial translation available at <http://en.pkulaw.cn/Display.aspx?lib=law&Cgid=192329>. Accessed 14 September 2020.

Nanjing City Intermediate People's Court of Jiangsu Province, [No.5 of Second Group of Model Cases Involving Construction of the “Belt and Road” Published by the Supreme People's Court: Gore Group Co., Ltd. v. Jiangsu Textile Industry (Group) Import & Export Co., Ltd. Case concerning Application for Recognizing and Enforcing the Foreign Civil Judgment] 最高法院发布的第二批涉“一带一路”建设典型案例之五：高尔集团股份有限公司（KolmarGroupAG）与江苏省纺织工业（集团）进出口有限公司申请承认和执行外国法院民事判决纠纷案, 9 December 2016. Unofficial translation available at <http://en.pkulaw.cn/display.aspx?cgid=a25051f3312b07f331efcc048c3bbac2d3f9e8c666440742bdfb&lib=case>.

Accessed 14 September 2020.

Nanning Declaration at the 2nd China – ASEAN Justice Forum, 8 June 2017. Unofficial translation available at <http://cicc.court.gov.cn/html/1/219/208/209/800.html>.

Accessed 14 September 2020.

[Notice of the State Council on Issuing the Plan for Further Deepening the Reform and Opening-up of China (Shanghai) Pilot Free Trade Zone] 国务院关于印发进一步深化中国（上海）自由贸易试验区改革开放方案的通知, issued and effective 8 April 2015. Unofficial translation available at <http://en.pkulaw.cn/display.aspx?cgid=4e06f033823fa370bdfb&lib=law>.

Accessed 14 September 2020.

[Notice of the Supreme People's Court on Clarifying Relevant Matters Concerning the Standards for Hierarchical Jurisdiction over and Centralized Handling of Foreign-related Civil and Commercial Cases of First Instance] 最高人民法院关于明确第一审涉外民商事案件级别管辖标准以及归口办理有关问题的通知, issued 7 December 2017, effective 1 January 2018. Unofficial translation available at https://www.pkulaw.com/en_law/f6b0744d27af6775bdfb.html.

Accessed 14 September 2020.

[Notice of the Supreme People's Court on Implementing the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Acceded to by China] 最高人民法院关于执行我国加入的《承认及执行外国仲裁裁决公约》的通知, issued and effective 10 April 1987. Unofficial translation available at https://www.pkulaw.com/en_law/b96476088a462bafdbfb.html.

Accessed 14 September 2020.

[Notice of the Supreme People's Court on Issuing the Opinions on Several Issues concerning the Implementation of the General Principles of the Civil Law of the People's Republic of China (For Trial Implementation)] [Partially Invalid] 最高人民法院印发《关于贯彻执行〈中华人民共和国民事诉讼法〉若干问题的意见(试行)》的通知, issued and effective 2 April 1988. Unofficial translation available at https://www.pkulaw.com/en_law/36d5796192fb4235bdfb.html.

Accessed 14 September 2020.

[Reply of the Supreme People's Court to the Request for Instructions on Non-Recognition of No. 07-11 (Tokyo) Arbitral Award of the Japan Commercial Arbitration Association] 最高人民法院关于不予承认日本商事仲裁协会东京07-11号仲裁裁决一案的请示的复函, issued and effective 29 June 2010. Unofficial translation available at <http://en.pkulaw.cn/display.aspx?cgid=9c1fb82b51eb96a4bdfb&lib=law>.

Accessed 14 September 2020.

[Several Opinions of the Supreme People's Court on Providing Judicial Services and Safeguards for the Construction of the "Belt and Road" by People's Courts] 最高人民法院关于人民法院为“一带一路”建设提供司法服务和保障的若干意见, issued and effective 16 June 2015. Unofficial translation available at https://www.pkulaw.com/en_law/96f2607d78e93212bdfb.html.

Accessed 14 September 2020.

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

Alyssa S. King¹

Résumé

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

Mots clés : principes généraux, arbitrage international, droit comparé

Abstract

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

¹ Assistant Professor, Queen's University Faculty of Law, alyssa.king@queensu.ca. Thanks to Emilie Dillon and Kathy Jiang for excellent research assistance, to Alvin Cheung, Joshua Karton, Jacob Weinrib, and participants in the IADC-ACL Ius Comparatum Inaugural Conference for comments, and to Alexandre Senegacnik for editing. All translations from French are the author's.

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

Keywords: general principles, international arbitration, comparative law

TABLE OF CONTENTS

I.	COMPARATIVE LAW AND GENERAL PRINCIPLES	290
II.	THE PROBLEM OF IDENTIFYING GENERAL PRINCIPLES IN INTERNATIONAL ARBITRATION	295
III.	THE IMPORTANCE OF A LEGAL ORDER.....	300
	A. The French Approach.....	300
	B. The Arbitrators' Approach	302
IV.	GENERAL PRINCIPLES AND JUDICIAL POWER	306
	A. In French Public Law	306
	B. The French Template in International Arbitration	310
	1. Content-Based Legitimation.....	311
	2. Judicialization	312
V.	A QUESTION OF AUDIENCE.....	314
VI.	CONCLUSION	318

I. COMPARATIVE LAW AND GENERAL PRINCIPLES

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

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

³ Ibid at 116.

century authors might announce that they were comparing the legal systems of “civilised” nations. Modern authors might seek to distance themselves from those colonial overtones while retaining the method. A recently published treatise on general principles in arbitration contends that “ [i]n many ways, identifying cross-similarities is the *raison d’être* of the mainstream comparative discipline.”⁴ Comparison animated various attempts at codification or restatement⁵ of international commercial law.⁶ Others, notably Emmanuel Gaillard, argue that tribunals can use comparison to identify trends in the law on a case-by-case basis.⁷ Skeptics can use comparison as evidence that the search for general principles is a waste of time.⁸ They might cite the difficulty of truly comprehensive comparison or point to the Euro-centric assumptions behind many uses of general principles.

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

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

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

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

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

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

⁸ Mustill, *op. cit.* 2, at 106.

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

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

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

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

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

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

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

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

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

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

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

¹⁴ Kahn, Phillippe. 1992. ‘La “lex mercatoria” : point de vue français après quarante ans de controverses.’ *McGill Law Journal*, 34 :413-427, 427.

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

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

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

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

¹⁶ Fouchard, *opus cit.* 61, at 432.

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

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

II. THE PROBLEM OF IDENTIFYING GENERAL PRINCIPLES IN INTERNATIONAL ARBITRATION

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

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

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

¹⁸ Ibid.

¹⁹ Ibid at 32 (emphasis original), 40.

general principles, whether in the abstract or when faced with a concrete case.

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

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

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

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

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

²² Schwarzenberger, Georg. 1953. Foreward. in *ibid* at xi.

²³ See Mustill, *opus cit.* 2, at 92.

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

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

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

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

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

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

²⁶ Ibid at 19.

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

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

²⁹ See ibid at 25.

³⁰ Ibid at 23-24, 59-61.

³¹ Ibid at 55-69.

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

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

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

³² Ibid at 18-19 (emphasis original).

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

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

³⁵ Ibid.

³⁶ Gaillard, opus cit. 13, 48.

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

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

³⁷ Gaillard, *opus cit.* 27, at 897.

³⁸ Gaillard, *opus cit.* 13, at 53.

³⁹ Gaillard *opus cit.* 34, at 226.

⁴⁰ *Ibid* at 227.

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

III. THE IMPORTANCE OF A LEGAL ORDER

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

A. The French Approach

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

General principles in French law emanate from a unitary legal order reflected in the laws of the Republic. Judges can use general principles without “making law” because the general principles emanate from this broader legal order elaborated by Parliament and the constituent power.⁴⁵ Genevois identifies three types of general principles in administrative law: general

⁴² Gaillard, opus cit. 13, at 58.

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

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

⁴⁵ Genevois, opus cit. 44, at 332.

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

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

⁴⁶ Ibid at 326-27.

⁴⁷ Ibid at 325-26.

⁴⁸ Ibid.

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

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

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

B. The Arbitrators' Approach

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

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

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

⁵³ Morvan, opus cit. 52, 321.

⁵⁴ See Ibid at 320.

⁵⁵ Gaillard, opus cit. 13, at 38.

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

⁵⁷ Ibid at 191.

⁵⁸ Ibid at 192.

system of law.”⁵⁹ It was missing a “politically organized collectivity” to give it coercive force.⁶⁰

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

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

⁵⁹ Ibid (“la *lex mercatoria* n’est pas un système juridique complet.”).

⁶⁰ Ibid.

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

⁶² Ibid.

⁶³ Ibid at 24-25.

⁶⁴ Ibid at 24.

⁶⁵ Ibid at 25.

⁶⁶ Ibid at 10.

⁶⁷ Ibid at 10-11.

⁶⁸ See *ibid* at 5, 11 (discussing arbitrator as “private judge”).

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

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

⁶⁹ Ibid at 25.

⁷⁰ Ibid at 25-26.

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

⁷² Ibid at 93.

⁷³ Ibid at 97.

⁷⁴ Ibid at 35.

⁷⁵ Ibid.

⁷⁶ Ibid.

⁷⁷ Ibid.

⁷⁸ Ibid at 37.

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

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

⁷⁹ Ibid at 54.

⁸⁰ Ibid at 58.

⁸¹ Ibid.

⁸² Ibid at 59.

⁸³ Ibid at 60-66.

⁸⁴ Cheng, opus cit. 21, at 17.

⁸⁵ Ibid at 19 (emphasis original).

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

⁸⁷ Mustill, opus cit. 2, at 91.

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

IV. GENERAL PRINCIPLES AND JUDICIAL POWER

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

A. In French Public Law

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

⁸⁸ Thanks to Jacob Weinrib for suggesting this image.

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

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

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

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

⁹⁰ See *ibid* at 330.

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

⁹² *Ibid* at 92.

⁹³ *Ibid* at 94-95, 97.

⁹⁴ *Ibid* at 102.

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

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

⁹⁵ Ibid at 107.

⁹⁶ Ibid at 114.

⁹⁷ Ibid at 107.

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

⁹⁹ Ibid.

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

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

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

¹⁰³ See Ibid.

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

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

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

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

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

¹⁰⁷ Sauvé, opus cit. 104.

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

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

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

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

¹¹² Stone, opus cit. 110, at 69.

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

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

B. The French Template in International Arbitration

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

¹¹³ Ibid.

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

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

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

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

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

1. Content-Based Legitimation

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

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

¹¹⁸ Gaillard, opus cit. 27, at 902.

¹¹⁹ Ibid.

¹²⁰ Ibid at 899.

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

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

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

2. Judicialization

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

¹²² Fouchard, *opus cit.* 61, at 25.

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

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

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

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

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

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

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

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

V. A QUESTION OF AUDIENCE

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

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

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

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

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

Abu Dhabi raises the question of what audience arbitrators who cite general principles should write for. Top arbitration practitioners have historically shared a very similar pedigree.¹³⁰ Thus, they might be able to convince each other, without being convincing to legal professionals in the parties’ home jurisdictions—to say nothing of business clients, bureaucrats, or the public at large. This position represents a difference with the French law context. Elite law in France is a relatively small world, even if it is larger than it once was. Administrative and constitutional judges often share the same background as members of the legal academy, politicians, and bureaucrats,¹³¹

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

¹²⁸ Ibid at 33.

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

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

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

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

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

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

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

¹³² Goldman, opus cit. 56, at 192.

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

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

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

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

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

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

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

¹³⁶ Gaillard, opus cit. 13, at 53.

VI. CONCLUSION

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

THE LIMITS OF THE COMPARATIVE PUBLIC LAW METHODOLOGY IN INTERNATIONAL INVESTMENT LAW: AN AUSTRALIAN CASE STUDY

Alexander Ferguson

Résumé

La conduite du gouvernement peut de plus en plus être examinée par les tribunaux des traités d'investissement. Ces tribunaux examinent souvent si un État hôte n'a pas réussi à accorder un traitement juste et équitable en allant à l'encontre des attentes légitimes d'un investisseur étranger. Afin de discerner ce à quoi un investisseur étranger peut légitimement s'attendre, certains tribunaux utilisent une méthodologie de droit public comparé qui s'inspire du droit public national. En utilisant le droit australien comme étude de cas, il est suggéré que la méthodologie du droit public comparé ne pourra peut-être pas atteindre tous ses objectifs.

Mots clés : droit public compare, traité d'investissement, traitement juste et équitable, attentes légitimes, état de droit, bonne foi

Abstract

Government conduct is increasingly reviewable by investment treaty tribunals. These tribunals often consider whether a host state has failed to afford fair and equitable treatment by defeating a foreign investor's legitimate expectations. To discern what a foreign investor can legitimately expect, some tribunals use a comparative public law methodology that draws on domestic public law. Using Australian law as a case study, I suggest that the comparative public law methodology may not be able to achieve all of its aims.

Keywords: Comparative public law, investment treaty, fair and equitable treatment, legitimate expectation, rule of law, good faith

TABLE OF CONTENTS

I.	INTRODUCTION.....	321
II.	THE PURPOSE OF A LEGITIMATE EXPECTATION	326
A.	A Legitimate Expectation as a Constraint on Power in Australian Law	327
B.	A Right to the Fulfilment of a Legitimate Expectation in International Investment Law	333
C.	The Implications for the Comparative Public Law Methodology.....	341
III.	CONFLICTING AND DIFFERING UNDERPINNINGS	344
A.	Good Faith and Estoppel	344
B.	Rule of Law	346
IV.	ILLUSTRATION THROUGH CASES WHERE A LICENCE WAS NOT RENEWED..	351
A.	An Australian Insurer's Legitimate Expectation	351
B.	A Spanish Investor's Legitimate Expectation	352
C.	Not All Legitimate Expectations Are the Same	353
V.	CONFLICT BETWEEN DIFFERENT DOMESTIC LEGAL SYSTEMS	354
A.	Substantive Legitimate Expectations in English Law.....	355
B.	Absence of Substantive Legitimate Expectations in Australian Law.....	356
C.	Implications for the Comparative Public Law Methodology.....	357
VI.	CONCLUSIONS.....	358

I. INTRODUCTION

In Australia, like numerous other countries, a review of government conduct, such as an administrative act, is not confined to domestic law. Increasingly, international law provides a way for government conduct to be reviewed.¹ For example, investment treaties² confer on foreign investors a right to be treated according to certain standards by governments and to a process of reviewing government conduct that the foreign investor perceives has failed to meet that standard. Foreign investors can challenge government conduct in a quasi-judicial process before a tribunal, typically consisting of three arbitrators.³ If the tribunal is satisfied that the government has not fulfilled its duties to the foreign investor, then a significant sum can be awarded,⁴ which is enforceable throughout most of the world.⁵

One of the aims of investment treaties is to promote and protect investments in the state receiving the investment ('host state').⁶ In furtherance of this aim, investment treaties impose duties on host state governments. One common duty is for the host state to provide 'fair and equitable treatment'

¹ Justin Gleeson, 'Australia's Increasing Enmeshment in International Law Dispute Resolution: Implications for Sovereignty' (Speech delivered at the Kirby Lecture in International Law, Canberra, 30 June 2016) 32.

² I use 'investment treaties' or 'investment treaty' to refer to a bilateral investment treaty ('BIT'), a multilateral investment treaty, or the investment protection provisions contained within a trade agreement, such as the North American Free Trade Agreement, Canada-Mexico-United States, signed 17 December 1992, [1994] CTS 2 (entered into force 1 January 1994) ('NAFTA').

³ Salacuse, Jeswald W. 2015. *The Law of Investment Treaties* Oxford University Press, 2nd ed 403, 413.

⁴ Dolzer, Rudolf and Christoph Schreuer. 2012. *Principles of International Investment Law*. Oxford University Press ch 10. The largest public award was over US\$50 billion, awarded in three related proceedings: *Yukos Universal Ltd v Russia (Final Award)* (Permanent Court of Arbitration, Case No AA 227, 18 July 2014) [1888](f); *Hulley Enterprises Ltd v Russia (Final Award)* (Permanent Court of Arbitration, Case No AA 226, 18 July 2014) [1888](f); *Veteran Petroleum Ltd v Russia* (Permanent Court of Arbitration, Case No AA 228, 18 July 2014) [1888](f).

⁵ Dolzer and Schreuer, above n 4, 310.

⁶ Roberts, Anthea. 2014. State-to-State Investment Treaty Arbitration: A Hybrid Theory of Interdependent Rights and Shared Interpretive Authority. *Harvard International Law Journal* 55: 1-70, 20. See, eg, *Agreement between the Government of Australia and the Government of the Republic of the Philippines on the Promotion and Protection of Investments, and Protocol*, signed 25 January 1995, [1995] ATS 28 (entered into force 8 December 1995) Preamble ('Australia-Philippines BIT'); *Técnicas Medioambientales Tecmed SA v Mexico (Award)* (2004) 43 ILM 133, 174 [156] ('Tecmed').

(‘FET’) to foreign investors.⁷ Indeed, foreign investors regularly invoke and have been successful in alleging that they have not been afforded FET.⁸

By itself, the phrase ‘fair and equitable’ is ‘nebulous’.⁹ Tribunals also have ‘very different understandings of the legal content’ of FET¹⁰ and some states resist attempts to ‘define a taxonomy’ of the ‘component[s]’ of FET.¹¹ Notwithstanding this uncertainty, a ‘high degree of consensus’ has emerged among tribunals¹² that the ‘most important function’ of FET is to prevent a host state from defeating a foreign investor’s legitimate expectations.¹³ However, ‘legitimate expectation’ is a similarly jargonistic term.¹⁴

Tribunals and legal scholars alike have sought to ‘concretize the normative content’ of a legitimate expectation, as well as FET, using a comparative public law methodology.¹⁵ The comparative public law methodology draws parallels between international investment law and domestic public law, rather than public international law or international

⁷ Salacuse, above n 3, 241. See, eg, Australia-Philippines BIT art 3.

⁸ Arato, Julian. 2015. Corporations as Lawmakers *Harvard International Law Journal* 56: 229-295, 265; Bonnitcho, Jonathan. 2014. *Substantive Protection under Investment Treaties: A Legal and Economic Analysis*. Cambridge University Press 144; United Nations Conference on Trade and Development. 2017. Special Update on Investor–State Dispute Settlement: Facts and Figures. *IIA Issues Notes* 1.

⁹ Sornarajah, M. 2004. *The International Law on Foreign Investment*. Cambridge University Press 332.

¹⁰ Bonnitcho, above n 8, 166.

¹¹ Hartmann, Jacques, Sangeeta Shah and Colin Warbrick. 2012. United Kingdom Materials on International Law 2011. *British Yearbook of International Law* 82: 676-1105, 693.

¹² Bonnitcho, above n 8, 154.

¹³ *Electrabel SA v Hungary (Jurisdiction)* (ICSID Arbitral Tribunal, Case No ARB/07/19, 30 November 2012) [7.75] (‘*Electrabel*’). See also *EDF (Services) Ltd v Romania (Award)* (ICSID Arbitral Tribunal, Case No ARB/05/13, 2 October 2009) [216] (‘*EDF*’); *Saluka Investments BV v Czech Republic (Partial Award)* (2010) 15 ICSID Rep 274, [302] (‘*Saluka*’). Cf Dumberry, Patrick. 2014. The Protection of Investors’ Legitimate Expectations and the Fair and Equitable Treatment Standard under NAFTA Article 1105. *Journal of International Arbitration* 31: 47-73, 63–4. Noting that legitimate expectations are not typically found in the text of an investment treaty: Crawford, James. 2012 *Brownlie’s Principles of Public International Law*. Oxford University Press, 8th ed, 617–18. See, eg, *Electrabel* (ICSID Arbitral Tribunal, Case No ARB/07/19, 30 November 2012) [7.79]; *EDF* (ICSID Arbitral Tribunal, Case No ARB/05/13, 2 October 2009) [215]–[216]; *Impregilo SpA v Argentina (Final Award)* (ICSID Arbitral Tribunal, Case No ARB/07/17, 21 June 2011) [285].

¹⁴ Schill, Stephan W. 2010. International Investment Law and Comparative Public Law – An Introduction. In *International Investment Law and Comparative Public Law*, ed. Stephan W Schill, 3-37. Oxford University Press, 2010, 3, 6.

¹⁵ Schill, Stephan W. 2012. General Principles of Law and International Investment Law. In *International Investment Law: The Sources of Rights and Obligations*, eds. Tarcisio Gazzini and Eric De Brabandere, 133-181. Martinus Nijhoff. 133, 162, 170.

commercial arbitration.¹⁶ It is easy to see the attractiveness of applying such a methodology, given the ‘close resemblance between the problems arising’ in international investment law and domestic public law, namely individuals ‘faced with the misuse of governmental powers’.¹⁷ Proponents of this methodology argue that its application helps develop consistency ‘in the interpretation and application of investment treaties’,¹⁸ legitimises existing jurisprudence by focusing on the overlap between the two legal systems, facilitates reform based on ‘solutions adopted in other public law systems’,¹⁹ and vindicates the international investment law system.²⁰ The first use of the comparative public law methodology to concretise the content of a legitimate expectation by an investment treaty tribunal was in *International Thunderbird Gaming Corporation v Mexico (Separate Opinion of Thomas Wälde)*.²¹ Subsequent tribunals have endorsed²² and applied the comparative public law methodology.²³

When applying the comparative public law methodology, parallels are typically drawn between international investment law and the ‘principal legal

¹⁶ Schill, ‘Introduction’, above n 14, 24–5. This view is not without its critics: see, eg, Foster, Caroline. 2015. A New Stratosphere? Investment Treaty Arbitration as “Internationalized Public Law”. *International and Comparative Law Quarterly* 64: 461–485.

¹⁷ Schill, ‘Introduction’, above n 14, 24. See also Foster, above n 16, 466; Schill, Stephan W. 2011. Enhancing International Investment Law’s Legitimacy: Conceptual and Methodological Foundations of a New Public Law Approach. *Virginia Journal of International Law* 52: 57–102, 59–60, 88. The comparative public law methodology can also draw on supranational and other international law, such as the World Trade Organization, but that is not the focus of this article.

¹⁸ Schill, ‘Introduction’, above n 14, 26.

¹⁹ Ibid 27. See generally Bassiouni, Mahmoud. 1989. A Functional Approach to General Principles of International Law. *Michigan Journal of International Law* 11: 768–818, 775–6.

²⁰ Schill, ‘Enhancing International Investment Law’s Legitimacy’, above n 17, 60.

²¹ (North American Free Trade Agreement Chapter 11 Arbitral Tribunal, 1 December 2005) (*‘Thunderbird Separate Opinion’*). It has been suggested that in *Saar Papier Vertriebs GmbH v Poland (Final Award)* (German-Polish Investment Protection Treaty Arbitral Tribunal, 16 October 1995) a comparative public law approach was used: Hepburn, Jarrod. 2014. Comparative Public Law at the Dawn of Investment Treaty Arbitration: *Saar Papier Vertriebs GmbH v Republic of Poland*. *Journal of World Investment and Trade* 15: 705–715, however, that case did not relate to FET, but rather indirect expropriation: at 707–8.

²² *Toto Costruzioni Generali SPA v Lebanon (Award)* (ICSID Arbitral Tribunal, Case No ARB/07/12, 7 June 2012) [166], [193] (*‘Toto’*); *Total SA v Argentina (Decision on Liability)* (ICSID Arbitral Tribunal, Case No ARB/04/1, 21 December 2010) [111] (*‘Total v Argentina’*).

²³ *Gold Reserve Inc v Venezuela (Award)* (ICSID Arbitral Tribunal, Case No ARB(AF)/09/1, 22 September 2014) [576].

orders of the world',²⁴ of which Australia probably does not rank. However, one proponent of the methodology notes that case studies of less prominent legal systems, such as Australia, may enrich and strengthen the comparative public law methodology,²⁵ and 'a single legal order may suffice when suggesting legal reform'.²⁶ The comparative public law methodology is suited to drawing parallels from rule of law based systems²⁷ and the rule of law is the 'dominant ideology' of Australian administrative law,²⁸ such that the Australian legal system is an uncontroversial case study. Two prominent international investment law scholars have drawn parallels between a legitimate expectation in international investment law and Australian administrative law.²⁹ However, Australian law is typically only considered cursorily, with scholars just looking for the presence of the phrase 'legitimate expectation' in Australian law to concretise the doctrine of legitimate expectations in international investment law.³⁰

Using Australian administrative law as a case study, I argue that there are limitations with the current use of the comparative public law methodology to develop the doctrine of legitimate expectations in international investment law.

²⁴ Schill, 'Introduction', above n 14, 29 (emphasis altered).

²⁵ Schill, 'Enhancing International Investment Law's Legitimacy', above n 17, 93.

²⁶ Ibid 90.

²⁷ Ibid 93; Schill, Stephan W. 2010. Fair and Equitable Treatment, the Rule of Law, and Comparative Public Law. In *International Investment Law and Comparative Public Law*, ed. Stephan W Schill, 151-182, 151, 154.

²⁸ Cane, Peter and Leighton McDonald. 2012. *Principles of Administrative Law: Legal Regulation of Governance*. Oxford University Press, 2nd ed 307.

²⁹ Brown, Chester. 2009. The Protection of Legitimate Expectations as a "General Principle of Law": Some Preliminary Thoughts. *Transnational Dispute Management* 1-10, 4; Mairal, Hector A. 2010. Legitimate Expectations and Informal Administrative Representations. In *International Investment Law and Comparative Public Law*, ed. Stephan W Schill, 413-451. Oxford University Press. 413, 416. See also Snodgrass, Elizabeth. 2006. Protecting Investors' Legitimate Expectations: Recognizing and Delimiting a General Principle. *ICSID Review* 21: 1-58, 26-7. Michele Potestà notes that Australia has been 'reluctant so far to extend judicial protection in cases of frustration of substantive expectations, and ... [has] generally taken the view that expectations about the exercise of administrative powers may only give rise to procedural rights': Potestà, Michele. 2013. Legitimate Expectations in Investment Treaty Law: Understanding the Roots and the Limits of a Controversial Concept. *ICSID Review* 28: 88-122, 97. In Potestà's work the purpose and underpinnings of a legitimate expectation in Australian administrative law are not discussed and it is nonetheless concluded that legitimate expectations is an 'emerging general principle': at 98.

³⁰ Cf Zeyl, Trevor. 2011. Charting the Wrong Course: The Doctrine of Legitimate Expectations in Investment Treaty Law. *Alberta Law Review* 49: 203-235, where some of the Australian constitutional issues in Part V are discussed.

I discuss the implications of these limitations with reference to the aims of the comparative public law methodology.³¹ In Parts II–IV, I undertake a novel analysis on the conflicts between Australian administrative law and international investment law. In Part II, I probe the different purposes of a legitimate expectation in Australian administrative law and international investment law. In Part III, I scrutinise the conflicting and differing underpinnings of Australian administrative law and international investment law.

In Part IV, I illustrate how the differences discussed in Parts II–III affect the enforcement of a legitimate expectation. I illustrate this through cases in both legal systems where a government has not renewed a licence. It is relevant to look at these types of cases because tribunals have emphasised the importance of the circumstances of each case.³² In Australian administrative law, the circumstances are also relevant, because they shape how a legitimate expectation informs procedural fairness. In Part IV, I show that a cursory look at the cases suggests similarities, but when the purpose and underpinnings are considered, significant differences are evident. These differences relate to the effect of defeating a legitimate expectation, the role of compensation and a libertarian view of the rule of law in the chosen investment arbitral award.

In Part V, I consider the issues for the comparative public law methodology when two domestic legal systems, Australian and English, conflict. I draw on the difference between the enforceability of a substantive legitimate expectation in English law and its conscious disavowal in Australian law.

This article identifies a number of limitations with the current comparative public law methodology. Analytical tools could be developed so that the methodology can overcome these limitations. However, until that time, questions loom about the extent to which domestic law, and Australian administrative law in particular, can concretise the normative content of international investment law.

³¹ See Part I above.

³² *Mondev International Ltd v United States of America (Award)* (2003) 42 ILM 85, 88 [118]; *CME Czech Republic v Czech Republic (Partial Award)* (2006) 9 ICSID Rep 113, 156 [157], 183 [336] ('CME'); *Toto* (ICSID Arbitral Tribunal, Case No ARB/07/12, 7 June 2012) [159]; *MTD Equity Sdn Bhd and MTD Chile SA v Chile (Award)* (2004) 12 ICSID Rep 6, 22 [109] ('MTD'). See also Dolzer and Schreuer, above n 4, 146.

II. THE PURPOSE OF A LEGITIMATE EXPECTATION

There are differing purposes of a legitimate expectation in Australian administrative law and international investment law. In Australian administrative law, a legitimate expectation provides the content of the fair hearing rule of procedural fairness and an exercise of power that does not provide a fair hearing can be unlawful or invalid – a power-constraining legitimate expectation.³³ In international investment law the doctrine of legitimate expectations gives foreign investors an enforceable right to the fulfilment of their legitimate expectations – a right-conferring legitimate expectation.

I adopt the distinction between a power-constraining and right-conferring purpose of a legitimate expectation from Joanna Bell's work, which observes a similar distinction within English administrative law.³⁴ The significance of the distinction between the two purposes of a legitimate expectation lies in the consequences. On the one hand, the consequence of defeating a power-constraining legitimate expectation in either English or Australian administrative law is that the exercise of administrative power is invalid or unlawful.³⁵ On the other hand, Bell argues the breach of a legal right to a legitimate expectation in English law often entails 'a monetary payment making good the right-holder's loss'.³⁶ Similarly in international investment law, compensation is the most frequently awarded remedy.³⁷ To help illustrate these differences, I analyse cases where a representation from the government has given rise to a legitimate expectation.

³³ *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, 259 [13] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

³⁴ Bell, Joanna. 2016. The Doctrine of Legitimate Expectations: Power-Constraining or Right-Conferring Legal Standard?. *Public Law* 437-455, 451.

³⁵ *Ibid*; *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326, 334 [26]–[27], 340 [47]–[48] (Kiefel, Bell and Keane JJ), 345 [69] (Gageler and Gordon JJ) ('*MIBP v WZARH*').

³⁶ Bell, above n 34, 453.

³⁷ Sabahi, Borzu. 2011. *Compensation and Restitution in Investor-State Arbitration: Principles and Practice*. Oxford University Press 4; Schreuer, Christoph. Investment Arbitration. 2014. In *The Oxford Handbook of International Adjudication*, eds. Cesare P R Romano, Karen J Alter and Yuval Shany. Oxford University Press. 295-315, 310.

A. A Legitimate Expectation as a Constraint on Power in Australian Law

To understand the contemporary relevance of a legitimate expectation, it is necessary to track how the concept has developed in Australian administrative law. Initially, a legitimate expectation gave rise to a procedural fairness obligation and informed the content of the fair hearing rule of procedural fairness. The fair hearing rule 'requires that a person who may be adversely affected by a decision be given an opportunity "to put their case" prior to the decision being made'.³⁸ Today, a legitimate expectation finds utility as a conceptual tool to understand how a fair hearing is to be afforded.

Originally, a legitimate expectation satisfied the threshold question of whether there was a need to afford a hearing. That is, if someone held a legitimate expectation, the decision-maker had to provide a fair hearing, otherwise, the decision would be made without procedural fairness and could be quashed. This use of a legitimate expectation can be seen in Mason J's influential statement in *Kioa v West* that 'when an order is to be made which will deprive a person of some right or interest or the legitimate expectation of a benefit, he is entitled to know the case sought to be made against him and to be given an opportunity of replying to it'.³⁹ McHugh J in *Haoucher v Minister for Immigration and Ethnic Affairs* also considered that if a person had a legitimate expectation of obtaining or continuing to enjoy 'any right, interest, benefit or privilege', the person was entitled to be heard, before an exercise of statutory power deprived them of their right, interest, benefit or privilege.⁴⁰

Using a legitimate expectation to enliven procedural fairness extended the application of procedural fairness⁴¹ to 'uncertain' areas.⁴² There was uncertainty, in part because a legitimate expectation was used to enliven a fair

³⁸ Cane and McDonald, above n 28, 117.

³⁹ (1985) 159 CLR 550, 582; see also at 564 (Gibbs CJ).

⁴⁰ (1990) 169 CLR 648, 679 ('*Haoucher*').

⁴¹ *Ibid* 680 (McHugh J).

⁴² Aronson, Mark and Matthew Groves. 2013. *Judicial Review of Administrative Action*. Thomson Reuters, 5th ed 418. See also Cane and McDonald, above n 28, 119.

hearing when there was something less than a right at stake. Jacobs J in *Salemi v MacKellar [No 2]* stated that a person ‘may have ... a “legitimate expectation”’. That does not mean that the expectation is itself the right. The right is the right to natural justice in certain circumstances and a “legitimate expectation” is one of those circumstances’.⁴³ Brennan J observed in *Annetts v McCann*: ‘judicial review may protect “legitimate expectations”, in the sense of interests which do not amount to legal rights, powers or privileges’.⁴⁴ Similarly, Mason J in *Kioa v West* observed that ‘the reference to “legitimate expectation” makes it clear that the doctrine applies in circumstances where the order will not result in the deprivation of a legal right or interest’.⁴⁵

As part of a broader normative restructuring of Australian administrative law and the ‘rare absence of parliamentary act’,⁴⁶ the threshold for the fair hearing rule moved towards a statutory presumption – reference to a legitimate expectation became ‘unnecessary’.⁴⁷ The normative restructure may have arisen in part from a desire to increase democratic legitimacy and respect for parliamentary sovereignty by focusing on interpreting parliamentary acts, particularly in a sensitive political context.⁴⁸ Once we appreciate the normative restructuring, we can ascertain a greater understanding of the marked differences between the decisions in *Minister of State for Immigration and Ethnic Affairs v Teoh*⁴⁹ and *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam*.⁵⁰ In *Teoh*, Mason CJ and Deane J took the view that a legitimate expectation could satisfy the threshold question of whether a fair hearing was required ‘if a decision-maker proposes to make a decision inconsistent with a legitimate expectation, procedural fairness requires that the

⁴³ (1977) 137 CLR 396, 452.

⁴⁴ (1990) 170 CLR 596, 605. See also *Salemi v MacKellar [No 2]* (1977) 137 CLR 396, 404 (Barwick CJ); *Haoucher* (1990) 169 CLR 648, 680 (McHugh J); Mason, Sir Anthony. 2005. Procedural Fairness: Its Development and Continuing Role of Legitimate Expectation. *Australian Journal of Administrative Law* 12: 103-110, 106.

⁴⁵ (1985) 159 CLR 550, 582–3.

⁴⁶ Bateman, Will and Leighton McDonald. 2017. The Normative Structure of Australian Administrative Law. *Federal Law Review* 45: 153-179, 176.

⁴⁷ *MIBP v WZARH* (2015) 256 CLR 326, 335–6 [30] (Kiefel, Bell and Keane JJ).

⁴⁸ Bateman and McDonald, above n 46, 166, 171–3, 175.

⁴⁹ (1995) 183 CLR 273 (*‘Teoh’*).

⁵⁰ (2003) 214 CLR 1 (*‘Lam’*).

persons affected should be given notice and an adequate opportunity of presenting a case against the taking of such a course'.⁵¹

The views of Mason CJ and Deane J did not go unchallenged. McHugh J, the sole dissenter in *Teoh*, stated that 'the rules of procedural fairness are presumptively applicable to administrative and similar decisions made by public tribunals and officials'.⁵² In *Lam*, McHugh and Gummow JJ explicitly adopted McHugh J's statement⁵³ and expressed their view of the relevant Act in that case:

*[The] exclusion of the operation of the rules of natural justice is not expressed as applying to the exercise of power under s 501(2) [of the relevant Act], the power exercised in this present case. The section, in addressing the power under s 501(3), assumes the operation of those rules where what is at stake is a decision made under s 501(2).*⁵⁴

Callinan J in *Lam* was of a similar view, observing that the decision-maker's 'obligations and processes owe their existence to, and are defined by, the [relevant] Act'.⁵⁵ The views of McHugh, Gummow and Callinan JJ have subsequently been followed. In *Saeed v Minister for Immigration and Citizenship*, the majority observed: 'Observance of the principles of natural justice is a condition attached to such a statutory power and governs its exercise'.⁵⁶

The shift towards procedural fairness as a presumption and the large number of decisions now made under a statute⁵⁷ mean that when determining whether procedural fairness is to be afforded, a legitimate expectation 'adds

⁵¹ (1995) 183 CLR 273, 291–2.

⁵² Ibid 311.

⁵³ (2003) 214 CLR 1, 28 [83].

⁵⁴ Ibid 16 [47].

⁵⁵ Ibid 48 [147].

⁵⁶ (2010) 241 CLR 252, 259 [13] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

⁵⁷ Bateman and McDonald, above n 46, 175–6.

nothing'⁵⁸ and is 'unnecessary'.⁵⁹ Focusing on whether a legitimate expectation gives rise to an obligation to afford procedural fairness may therefore distract from the 'true inquiry'⁶⁰ and 'critical question in most cases':⁶¹ what does procedural fairness require in the circumstances?

The concept of a legitimate expectation has been and continues to be used 'in so far as'⁶² it has a 'bear[ing] upon the practical content of that obligation' to afford procedural fairness as part of the fair hearing rule.⁶³ This view of a legitimate expectation was accepted by McHugh and Gummow JJ in *Lam*, who concluded that '[t]he notion of legitimate expectation serves only to focus attention on the content of the requirement of natural justice in this particular case'.⁶⁴

Notwithstanding the doubts cast on the utility of legitimate expectations in *Lam*, cases decided before then are useful, because they explicitly identified the expectation and its source, such as a representation from a government. Those cases also show how a legitimate expectation can constrain an exercise of administrative power. For instance, the High Court in *Haoucher* considered that Mr Haoucher, a migrant, had an expectation that he would only be deported in accordance with a policy announced by the Minister for Immigration in Parliament. The policy stated that the Minister would only depart from a recommendation from the Administrative Appeals Tribunal ('AAT') in 'exceptional circumstances' with 'strong evidence'.⁶⁵ The policy thus formed the basis for Mr Haoucher's legitimate expectation that the AAT

⁵⁸ *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636, 658 [65] (Gummow, Hayne, Crennan and Bell JJ).

⁵⁹ *MIBP v WZARH* (2015) 256 CLR 326, 335 [30] (Kiefel, Bell and Keane JJ).

⁶⁰ *Ibid* 343 [61] (Gageler and Gordon JJ).

⁶¹ *Kioa v West* (1985) 159 CLR 550, 585 (Mason J).

⁶² *MIBP v WZARH* (2015) 256 CLR 326, 343 [61] (Gageler and Gordon JJ).

⁶³ *Lam* (2003) 214 CLR 1, 12–13 [34] (Gleeson CJ), quoted with approval in *MIBP v WZARH* (2015) 256 CLR 326, 343 [61] (Gageler and Gordon JJ). See also *Lam* (2003) 214 CLR 1, 34 [105] (Gummow and McHugh JJ); Dyer, Bruce. 2005. Legitimate Expectations in Procedural Fairness after *Lam*. In *Law and Government in Australia*, ed. Matthew Groves. Federation Press 184–212, 191; Burmester, Henry. 2004. Teoh Revisited after *Lam*. *Australian Institute of Administrative Law Forum* 40: 33–39, 36.

⁶⁴ (2003) 214 CLR 1, 34 [105].

⁶⁵ (1990) 169 CLR 648, 665 (Toohey J).

recommendation would not be rejected, unless there were exceptional circumstances with strong evidence.⁶⁶ The Minister rejected the AAT's recommendation that Mr Haoucher not be deported by weighing the factors differently.⁶⁷ However, the Minister did not provide the evidence that demonstrated exceptional circumstances, nor did the Minister provide an opportunity for Mr Haoucher to comment on those circumstances.⁶⁸ The exercise of power to deport Mr Haoucher was held to be exercised invalidly because there was a failure to afford Mr Haoucher a fair hearing.⁶⁹ The legitimate expectation derived from the publicly announced policy helped to provide the content of procedural fairness, because the policy created an expectation that exceptional circumstances would be disclosed.

A more recent example of a legitimate expectation as a conceptual tool to inform the content of a fair hearing is *MIBP v WZARH*. In that case, the respondent contested an unfavourable assessment of his refugee status. An issue arose because the first reviewer of the respondent's refugee status had been replaced by a second reviewer. On the basis of written materials and a recording, the second reviewer made an adverse assessment of his refugee status. The High Court held that there was a failure to afford procedural fairness, because the second reviewer did not inform the respondent that they were taking over the case⁷⁰ and the respondent's answers were not personally observed.⁷¹

Using a legitimate expectation as a conceptual tool helps to explain why there was a failure to afford a fair hearing and thus a denial of procedural fairness. The representations by the first reviewer provided two legitimate expectations about the process and conduct of the assessment. The first legitimate expectation was that the process stipulated would be followed.⁷²

⁶⁶ Ibid 682 (McHugh J).

⁶⁷ Ibid 682–3.

⁶⁸ Ibid 684–5.

⁶⁹ Ibid 685.

⁷⁰ *MIBP v WZARH* (2015) 256 CLR 326, 340 [46] (Kiefel, Bell and Keane JJ), 349 [69] (Gageler and Gordon JJ).

⁷¹ Ibid 339 [43] (Kiefel, Bell and Keane JJ).

⁷² Ibid 340 [46] (Kiefel, Bell and Keane JJ).

This expectation was defeated when there was a departure from the stated process, and a reviewer was replaced without the respondent being informed. The plurality considered that this meant the respondent should have had an opportunity to comment on the change of process, stating: 'Elementary considerations of fairness required that the respondent be informed that the process explained to him by the First Reviewer would not be completed so that he would have the opportunity to be heard on the question of how the process should now proceed'.⁷³

Gageler and Gordon JJ looked at the impact on the submissions that would have been made, stating:

*The Second Reviewer ought reasonably to have considered that the evidence and submissions presented to the First Reviewer could reasonably be expected to have differed in their coverage, detail and emphasis had the respondent and his advisors been aware that the First Reviewer would not be making the assessment.*⁷⁴

The second legitimate expectation was that all the information provided by the respondent would be considered. This expectation was defeated when the second reviewer did not personally interview the respondent. Of particular importance, given the respondent's credibility was in issue, were the 'impressions gained from his demeanour at the interview'.⁷⁵ As the plurality observed, the respondent 'may have been in a better position if the Second Reviewer had formed the impression that he was genuinely doing his best to give truthful evidence in difficult circumstances'.⁷⁶ The respondent's legitimate expectation based on the representation from the first reviewer thus constrained the power of the second reviewer to make a determination of the respondent's refugee status that was inconsistent with their representations. When a legitimate expectation is viewed as a conceptual tool to inform the content of the fair hearing rule it becomes evident that the legitimate

⁷³ Ibid.

⁷⁴ Ibid 344 [66]

⁷⁵ Ibid 338 [37] (Kiefel, Bell and Keane JJ), see also at 338–9 [40], [44] (Kiefel, Bell and Keane JJ).

⁷⁶ Ibid 339 [44].

expectation can constrain power. The same cannot be said of international investment law.

B. A Right to the Fulfilment of a Legitimate Expectation in International Investment Law

Foreign investors have a right to the fulfilment of their legitimate expectations. There is a debate about the nature of the rights and obligations provided by investment treaties. At least four theories have been proposed: derivative rights, intermediary rights, direct rights and triangular treaties. Part of the contestation relates to who can hold the rights, because investment treaties 'do not clarify' if 'the investor, the home state, or both' have substantive rights under investment treaties.⁷⁷ To demonstrate that foreign investors have rights, I highlight the conceptual difficulties with the derivative rights and intermediary rights theories. This leaves the direct rights and triangular treaties theories, both of which accommodate foreign investors having a right to the fulfilment of their legitimate expectations.⁷⁸

Within the four theories it is possible that the word 'right' is being used with different meanings or that uncertainty persists as to whether foreign investors have rights. To bring greater clarity to answering the question of whether a foreign investor has a right to the fulfilment of their legitimate expectations, I turn to Joseph Raz's rights theory. It provides an analytical framework to assess the rights in question. To the extent that the word 'right' is used with different meanings, Raz's theory is useful as it purportedly encapsulates the 'common core of all rights', moral and legal.⁷⁹ I pass no judgment on a foreign investor's moral rights; my focus is on legal rights. To this end it should be noted that Raz claimed that his 'account [of rights] applies to legal rights'.⁸⁰ The justification for using Raz's rights theory 'is in its use in moral, political and legal thought'.⁸¹

⁷⁷ Roberts, Anthea. 2015. Triangular Treaties: The Extent and Limits of Investment Treaty Rights. *Harvard International Law Journal* 56: 353-417, 355, 369.

⁷⁸ It may still be possible for a state to possess rights under an investment treaty, an issue which is beyond the scope of this article.

⁷⁹ Raz, Joseph. 1986. *The Morality of Freedom*. Oxford University Press. 167.

⁸⁰ Raz, Joseph. 1984. Legal Rights. *Oxford Journal of Legal Studies* 4: 1-21, 1.

⁸¹ Raz, Joseph. 1984. On the Nature of Rights. *Mind* 93: 194-214, 212.

Before understanding the purpose of a legitimate expectation in international investment law, it is useful to refer to the most often quoted,⁸² albeit controversial,⁸³ description of the doctrine. The Tribunal in *Tecmed* stated ('the Tecmed principle'):

*[FET] requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment. The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand ... the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations ... The foreign investor also expects the host State to act consistently, ie, without arbitrarily revoking any preexisting decisions or permits issued by the State that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities.*⁸⁴

The Tecmed principle was stated before a comparative public law methodology was explicitly applied. However, in the first application of the comparative public law methodology to a legitimate expectation, the *Thunderbird Separate Opinion*, the Tecmed principle was considered an 'authoritative [precedent]'⁸⁵ that aligned with English and Latin American notions of a legitimate expectation.⁸⁶ Thus suggesting that the Tecmed principle could have been arrived at had the comparative public law methodology been applied.

⁸² Dolzer and Schreuer, above n 4, 142; Alvarez, José Enrique. 2011. The Once and Future Investment Regime. *Recueil des Cours* 344: 434-516, 504. See, eg, *Eureko BV v Poland (Partial Award)* (2007) 12 ICSID Rep 331, 383 [235]; *Thunderbird Separate Opinion* (North American Free Trade Agreement Chapter 11 Arbitral Tribunal, 1 December 2005) [41], [45]; *MTD* (2004) 12 ICSID Rep 6, 23 [114]–[115]; *Occidental Exploration and Production Co v Ecuador* (Final Award) (London Court of International Arbitration, Case No UN3467, 1 July 2004) [185].

⁸³ See, eg, Crawford, Brownlie's Principles, above n 13, 614–15; Douglas, Zachary. 2006. Nothing if Not Critical for Investment Treaty Arbitration: Occidental, Eureko and Methanex. *Arbitration International* 22: 27-51, 28. See also Schneiderman, David. 2001. Investment Rules and the Rule of Law. *Constellations* 8: 521-537, 522.

⁸⁴ *Tecmed* (2004) 43 ILM 133, 173 [154] (emphasis added).

⁸⁵ (North American Free Trade Agreement Chapter 11 Arbitral Tribunal, 1 December 2005) [30].

⁸⁶ *Ibid* [47]–[48], [52].

The root of the derivative theory is a public international law approach to international investment law.⁸⁷ The derivative theory is based on diplomatic protection cases,⁸⁸ where it has been reasoned that a home State brings an action for one of its nationals, and is asserting 'its own right'.⁸⁹ The Tribunal in *Archer Daniels Midland Co and Tate & Lyle Ingredients Americas Inc v Mexico* endorsed the derivative theory,⁹⁰ stating that 'the investor will be in reality stepping into the shoes and asserting the rights of the home State'.⁹¹ The Tribunal in *Loewen* also adopted the derivative theory, describing a foreign investor as being permitted 'for convenience' to enforce 'what are in origin the rights of Party states'.⁹² If this view is accepted, a foreign investor would not have a right to the fulfilment of their legitimate expectations. Rather, their home state has the right. Whilst the derivative theory probably has a solid basis in public international law, it overlooks the operation of investment treaties.

James Crawford has observed that an investment treaty typically 'disaggregates the legal interests that were clumped together under' diplomatic protection.⁹³ The direct rights theory reflects that disaggregation. The Tribunal in *Corn Products International Inc v Mexico* concluded that investment treaties confer 'upon investors substantive rights separate and distinct from those of the State of which they are nationals'.⁹⁴ The Tribunal reasoned that the 'central purpose' of investment treaties was to allow investors to 'assert their rights directly against a host State'.⁹⁵ The English Court of Appeal accepted as much when it reviewed the *Occidental Exploration and Production Co v Ecuador* (Final

⁸⁷ See, eg, *Loewen Group Inc v United States of America (Award)* (2003) 42 ILM 811, 848–9 [233] ('*Loewen*').

⁸⁸ The International Law Commission described diplomatic protection as 'the procedure employed by the State of nationality of the injured persons to secure protection of that person and to obtain reparation for the internationally wrongful act inflicted': International Law Commission, Report of the International Law Commission Fifty-Eighth Session, UN GAOR, 61st sess, Supp No 10, UN Doc A/61/10 (2006) 24.

⁸⁹ *Barcelona Traction, Light and Power Co Ltd (Belgium v Spain)* (Judgment) [1970] ICJ Rep 3, 44. See also *Mavrommatis Palestine Concessions (Greece v United Kingdom)* (Judgment) [1924] PCIJ (ser A) No 2, 7, 12.

⁹⁰ (2012) 146 ILR 439, 501 [168] ('*ADM*').

⁹¹ *Ibid* [169].

⁹² (2003) 42 ILM 811, 848–9 [233].

⁹³ Crawford, James. 2002. The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect. *American Journal of International Law* 96: 874–890, 888.

⁹⁴ (Decision on Responsibility) (2012) 146 ILR 581, 631 [167] ('*Corn Products*').

⁹⁵ *Ibid* 629–30 [161].

Award) award and endorsed Zachary Douglas's observation that '[t]he functional assumption underlying the investment treaty regime is clearly that the investor is bringing a cause of action based upon the vindication of its own rights rather than those of its national state'.⁹⁶ This accords with recent analysis by the International Court of Justice, in the context of the provision of consular assistance to foreign nationals, that treaties can confer 'individual rights'.⁹⁷

There are two significant problems with the derivative theory. First, as the Tribunal in *Corn Products* explained, there is no longer a need for the legal fiction of diplomatic protection that an injury to a national of the home state was 'an injury to the State itself'.⁹⁸ The legal fiction is redundant in international investment law, because a foreign investor 'is vested with the right to bring claims of its own'.⁹⁹ Secondly, states have made submissions that are opposed to the interests of their investors,¹⁰⁰ which 'contradicts the view that investors are bringing derivative claims on behalf of their own national state'.¹⁰¹ Another theory, the intermediary theory, posits that the substantive protections contained in investment treaties 'remain at an intergovernmental level while the procedural right to arbitration is applied to the investor as its own right after the filing of a notice of arbitration'.¹⁰² The Tribunal in *ADM* described this theory in the context of NAFTA:

the Chapter Eleven scheme establishes rights regarding the treatment of investors, but these rights are not owed by the host State to the investors, but to the investors' home State ... [T]he only individual right investors enjoy

⁹⁶ Douglas, Zachary. 2004. The Hybrid Foundations of Investment Treaty Arbitration. *British Yearbook of International Law* 74: 151-289, 182, quoted in *Ecuador v Occidental Exploration and Production Co* [2006] QB 432, 450-1 [20] (Mance LJ). See also *Ecuador v Occidental Exploration and Production Co* [2007] 2 CLC 16, 25-6 [19], 32-3 [39].

⁹⁷ *LaGrand (Germany v United States of America) (Judgment)* [2001] ICJ Rep 466, 494; cf Foster, above n 16, 476-7.

⁹⁸ *Corn Products* (2012) 146 ILR 581, [170]. See also Bennouna, Mohamed, Special Rapporteur, Preliminary Report on Diplomatic Protection, 50th sess, Agenda Item 6, UN Doc A/CN.4/484 (4 February 1998) [40].

⁹⁹ *Corn Products* (2012) 146 ILR 581, 632-3 [173].

¹⁰⁰ Douglas, 'The Hybrid Foundations of Investment Treaty Arbitration', above n 96, 170. See also Roberts, 'State-to-State Investment Treaty Arbitration', above n 6, 49-50.

¹⁰¹ Douglas, 'The Hybrid Foundations of Investment Treaty Arbitration', above n 96, 170.

¹⁰² Braun, Tillmann Rudolph. 2014. Globalization-Driven Innovation: The Investor as a Partial Subject in Public International Law. *Journal of World Investment and Trade* 15: 73-116, 88-9.

*under Chapter Eleven is the procedural right[s] under Section B to invoke the responsibility of the host State.*¹⁰³

There are three reasons why the intermediary theory is not suited to analysing whether a foreign investor has a right to the fulfilment of their legitimate expectations. First, if we accept the *ADM* Tribunal's reasoning that the primary obligation is owed to the host state, it is not clear how compensation can be calculated without reintroducing the legal fiction that an injury to the investor is an injury to the state. This takes us back to the conceptual difficulties with the derivative theory.¹⁰⁴ Secondly, the intermediary theory was posited in the context of an argument about countermeasures. It does not appear to have been adopted elsewhere. To the extent the intermediary theory has relevance it may be better confined to its unique circumstances. Thirdly, as the concurring opinion in *ADM* observed: 'Nowhere in the case law of Chapter Eleven [of NAFTA] or of BITs will you find the suggestion that claimants are enforcing the rights of the State. Nowhere do you find the suggestion that somehow investors are just deputized to enforce the rights of the State'.¹⁰⁵

Investment treaties have also been conceptualised as 'triangular treaties', that is 'agreements between sovereign states that create enforceable rights for investors as non-sovereign, third-party beneficiaries'.¹⁰⁶ This theory, it is said, focuses attention on the 'extent and limits' of the rights under investment treaties.¹⁰⁷ It is nonetheless implicit in this theory that a foreign investor can have a right, as Roberts states:

a strong argument can be made that investment treaties should be understood as contracts between A and B (the home and host state) that create enforceable rights for C (the class of investors from A and B investing

¹⁰³ *ADM* (2012) 146 ILR 439, 504 [178]–[179]. I note that in the unreported version the plural 'rights' is used: *Archer Daniels Midland Co and Tate & Lyle Ingredients Americas Inc v Mexico* (ICSID Arbitral Tribunal, Case No Arb(AF)/04/05, 21 November 2007) [178]–[179].

¹⁰⁴ See McLachlan, Campbell, Laurence Shore and Matthew Weiniger. 2017. *International Investment Arbitration: Substantive Principles*. Oxford University Press, 2nd ed 76 [3.120], where this argument is made with respect to the derivative rights theory.

¹⁰⁵ *ADM* (2012) 146 ILR 439, 457 [45].

¹⁰⁶ Roberts, 'Triangular Treaties', above n 77, 356.

¹⁰⁷ *Ibid* 416.

*in B and A respectively) ... Investors are not mere beneficiaries of investment treaties; rather, they are a specific, identifiable class of intended third-party beneficiaries with enforceable rights.*¹⁰⁸

Roberts also argues that we should presume that both the home state and investor have substantive rights, because they both have an interest in ‘vindicating investment treaty obligations’ and both typically have ‘procedural mechanism[s]’ for so doing.¹⁰⁹

While the direct rights and triangular treaty theories accommodate a foreign investor having a right to the fulfilment of their legitimate expectations, the contested nature of this proposition suggests greater analytical authority may be needed. Raz’s rights theory offers one such source.

Raz theorised that an entity can possess a right if the entity can have rights and that other things being equal, the entity’s interests are a sufficient reason for holding someone else to be under a duty.¹¹⁰ This theory has three components. The first component is that the entity must be capable of possessing rights. Foreign investors may be natural persons who Raz considered were capable of possessing rights.¹¹¹ However, the claimant in an investment treaty arbitration is more frequently a corporation.¹¹² Raz stated that corporations could possess rights,¹¹³ because they could be subject to duties.¹¹⁴ Typically, a host state has duties under international investment law, but it is also possible for a foreign investor to have duties. The foreign investor’s duties can include the duty to appoint an arbitrator when requesting an arbitration,¹¹⁵ to reasonably assess investment risks,¹¹⁶ to admit the investment in accordance

¹⁰⁸ Ibid 372.

¹⁰⁹ Roberts, ‘State-to-State Investment Treaty Arbitration’, above n 6, 39.

¹¹⁰ Raz, *The Morality of Freedom*, above n 79, 166.

¹¹¹ Ibid.

¹¹² Dolzer and Schreuer, above n 4, 250.

¹¹³ Raz, *The Morality of Freedom*, above n 79, 166.

¹¹⁴ Ibid 176.

¹¹⁵ See, eg, Australia-Philippines BIT art 12(3).

¹¹⁶ Muchlinski, Peter. 2006. “Caveat Investor”? The Relevance of the Conduct of the Investor under the Fair and Equitable Treatment Standard. *International and Comparative Law Quarterly* 55: 527-557, 542.

with the host state's laws,¹¹⁷ sometimes to exhaust local remedies,¹¹⁸ and may extend to compliance with host state laws.¹¹⁹ It has been suggested that international investment law is analogous to human rights,¹²⁰ but, as Raz acknowledged, a corporation's rights are of a lesser quality than an individual's rights¹²¹ and are not 'morally fundamental right[s]'.¹²²

The second component of Raz's rights theory is an interest that provides a reason for a host state 'to behave in a way which protects or promotes' the foreign investor's interest.¹²³ The foreign investor's interest that international investment law protects is commonly, albeit controversially,¹²⁴ understood as the 'protection and promotion' of a foreign investor's investment. This interest is found in the preamble of numerous investment treaties.¹²⁵ According to Raz, the foreign investor's right will be legal in character if the 'law holds' the foreign investor's 'interest to be sufficient ground to hold another to be subject to a duty'.¹²⁶ The foreign investor's interests, identified in the preamble, is considered a sufficient basis for subjecting host states to substantive duties or

¹¹⁷ See, eg, Australia-Philippines BIT arts 1(1)(a), 3. See *Fraport AG Frankfurt Airport Services Worldwide v Philippines (Award)* (ICSID Arbitral Tribunal, Case No ARB/03/25, 16 August 2007) [398], [401], [404].

¹¹⁸ See, eg, *Agreement between Australia and the Republic of Hungary on the Reciprocal Promotion and Protection of Investments*, signed 15 August 1991, [1992] ATS 19 (entered into force 10 May 1992) art 12(4). The duty of the foreign investor to exhaust local remedies is not the norm: Dolzer and Schreuer, above n 4, 264–5. In customary international law, local remedies must generally be exhausted: see *Interhandel (Switzerland v United States of America) (Judgment)* [1959] ICJ Rep 6, 26–7; *Elettronica Sicula SpA (ELSI) (United States of America v Italy) (Judgment)* [1989] ICJ Rep 15, 42; Crawford, Brownlie's Principles, above n 13, 711.

¹¹⁹ Government of India, 'Model Text for the Indian Bilateral Investment Treaty' (2016) arts 11–12, at the time of this re-published article, a modified version of those provisions was adopted in the *Treaty Between The Republic of Belarus and The Republic of India On Investments*, signed 24 September 2018 (not yet in force) art 11.

¹²⁰ See, eg, Klein, Nicolas. 2012. Human Rights and International Investment Law: Investment Protection as Human Right?. *Goettingen Journal of International Law* 4: 179–195, 186; contra Alfred-Maurice de Zayas, Promotion of Democratic and Equitable International Order, UN GAOR, 70th sess, Agenda Item 73(b), UN Doc A/70/285 (5 August 2015) [27].

¹²¹ Raz, The Morality of Freedom, above n 79, 179.

¹²² Ibid 192.

¹²³ Ibid 183.

¹²⁴ See, eg, Sornarajah, M. 1997. Power and Justice in Foreign Investment Arbitration. *Journal of International Arbitration* 14: 103–140, 104.

¹²⁵ Roberts, 'State-to-State Investment Treaty Arbitration', above n 6, 20; *Tecmed* (2004) 43 ILM 133, 174 [156]. See, eg, Australia-Philippines BIT Preamble.

¹²⁶ Raz, 'Legal Rights', above n 80, 14.

obligations in the investment treaty itself, such as the obligation to afford FET.¹²⁷ Under the triangular treaties theory there are no rights, only obligations on host states.¹²⁸ The Razian theory takes the obligations as grounding the rights of the foreign investor.

The second component of Raz's theory also requires the host state's reason for promoting the foreign investor's interests to be of a peremptory nature.¹²⁹ The peremptory reason a host state intends to protect the foreign investor's interests is because it may increase foreign investment, as explicitly stated in some investment treaties.¹³⁰ Whilst it is debated whether investment treaties actually increase foreign investment,¹³¹ this is immaterial because as Raz observed, '[m]any rights ground duties which fall short of securing their object'.¹³² Raz's theory requires that the right conferred on the foreign investor makes a 'significant difference' to the foreign investor.¹³³ Protecting the foreign investor's interests via an investment treaty makes a significant difference to the foreign investor because the foreign investor is otherwise at a purported disadvantage to a domestic investor¹³⁴ and the foreign investor does not need to rely on their home state to assert their rights, which can be considerably difficult.¹³⁵

¹²⁷ *CME* (2006) 9 ICSID Rep 113, 237–8 [611].

¹²⁸ Roberts, 'State-to-State Investment Treaty Arbitration', above n 6, 37.

¹²⁹ Raz, *The Morality of Freedom*, above n 79, 183.

¹³⁰ See, eg, *Agreement between the Government of Australia and the Government of the Argentine Republic on the Promotion and Protection of Investments, and Protocol*, signed 23 August 1995, [1997] ATS 4 (entered into force 11 January 1997) preamble; *Saluka* (2010) 15 ICSID Rep 274, 337 [300]; *Tecmed* (2004) 43 ILM 133, 174 [156].

¹³¹ Vandevelde, Kenneth J. 1998. The Political Economy of a Bilateral Investment Treaty. *American Journal of International Law* 92: 621–641, 627; Roberts, 'Triangular Treaties', above n 77, 409–10; Yackee, Jason Webb. 2010. Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence. *Virginia Journal of International Law* 51: 397–442; Yackee, Jason Webb. 2008. Bilateral Investment Treaties, Credible Commitment, and the Rule of (International) Law: Do BITs Promote Foreign Direct Investment?. *Law and Society Review* 42: 805–832; Roberts, 'State-to-State Investment Treaty Arbitration', above n 6, 27.

¹³² Raz, *The Morality of Freedom*, above n 79, 170–1.

¹³³ *Ibid* 183.

¹³⁴ See, eg, Paulsson, Jan. 2005. *Denial of Justice in International Law*. Cambridge University Press. 149; *Thunderbird Separate Opinion* (North American Free Trade Agreement Chapter 11 Arbitral Tribunal, 1 December 2005) [34].

¹³⁵ Dolzer and Schreuer, above n 4, 252–3.

The third component of Raz's rights theory is that a right is a ground for a duty if 'not counteracted by conflicting considerations'.¹³⁶ A conflicting consideration could be the host state's 'legitimate regulatory interests',¹³⁷ because as Christopher Campbell argues it is 'not reasonable for [the foreign investor's] legitimate expectations to wholly tie the hands of a state from regulating in the public interest'.¹³⁸ In some situations, a competing public interest can justify defeating a foreign investor's legitimate expectation,¹³⁹ but that is not always the case.¹⁴⁰ In cases where the foreign investor's interests outweigh the host state's, the foreign investor has a right to the fulfilment of their legitimate expectations.

C. The Implications for the Comparative Public Law Methodology

The differing power-constraining and right-conferring purposes of a legitimate expectation in Australian administrative law and international investment law pose issues for attaining the aims of the comparative public law methodology.

One of the purposes of the comparative public law methodology is to draw on domestic law to legitimise existing international investment law jurisprudence. However, it is unclear how domestic law can fulfil this legitimising function when the purpose of a doctrine or concept differs in domestic law from international investment law, as this case study has shown.

More significantly, the Australian case study shows two issues with the comparative public law methodology. First, one of the purposes of the comparative public law methodology is to suggest reforms to international

¹³⁶ Raz, *The Morality of Freedom*, above n 79, 171, 181.

¹³⁷ *Saluka* (2010) 15 ICSID Rep 274, 339 [306]. See also *Duke Energy Electroquil Partners & Electroquil SA v Ecuador (Award)* (ICSID Arbitral Tribunal, Case No ARB/04/19, 18 August 2008) [340] ('*Duke*'); *International Thunderbird Gaming Corporation v Mexico (Award)* (North American Free Trade Agreement Chapter 11 Arbitral Tribunal, 26 January 2006) [148]; *Continental Casualty Co v Argentina (Award)* (ICSID Arbitral Tribunal, Case No ARB/03/9, 5 September 2008) [233] ('*Continental Casualty*').

¹³⁸ Campbell, Christopher. 2013. House of Cards: The Relevance of Legitimate Expectations under Fair and Equitable Treatment Provisions in Investment Treaty Law. *Journal of International Arbitration* 30: 361-379, 373.

¹³⁹ See, eg, *Continental Casualty* (ICSID Arbitral Tribunal, Case No ARB/03/9, 5 September 2008) [233], [266].

¹⁴⁰ See, eg, *Tecmed* (2004) 43 ILM 133, 171 [145], 177 [164].

investment law. The Australian case study shows that domestic legal systems may conceptualise an idea (such as a power-constraining legitimate expectation) differently to international investment law (right-conferring legitimate expectation). If the reform function of the comparative public law methodology is followed through, changes to international investment law may occur. For example, Australian administrative law suggests that a legitimate expectation should be considered power-constraining in international investment law. Given the *de facto* arbitral precedent that exists in international investment law,¹⁴¹ it is unclear how domestic public law would affect that precedent. In *Duke* the Tribunal described following a *de facto* precedent as its duty, '[w]hile the Tribunal considers that it is not bound by previous decisions, it is of the opinion that it must pay due consideration to earlier decisions', such that 'subject to compelling contrary grounds, it has a duty to consider the solutions consistently established in prior similar cases ... [and] a duty to seek to contribute to the harmonious development of investment law'.¹⁴² Given the widespread support for the Tecmed principle in arbitral awards, it could be considered a *de facto* precedent. In these circumstances, it is unclear whether reforms proposed by the outcomes of the comparative public law methodology could justify a departure from a *de facto* precedent like the Tecmed principle.

The lack of clarity about the hierarchy of comparative public law is in stark contrast to the considered interaction between sources of law in the *Statute of the International Court of Justice* ('ICJ Statute'). Article 38(1)(c) of the ICJ Statute states that a source of international law is general principles of law recognised by civilised nations, which is somewhat similar to the comparative public law methodology.¹⁴³ Article 38(1)(d) of the ICJ Statute states that 'judicial decisions' are a source of law, which is somewhat similar to the *de facto*

¹⁴¹ Salacuse, above n 3, 17; Kaufmann-Kohler, Gabrielle. 2007. Arbitral Precedent: Dream, Necessity or Excuse?. *Arbitration International* 23: 357-378, 371-3.

¹⁴² *Duke* (ICSID Arbitral Tribunal, Case No ARB/04/19, 18 August 2008) [117]. See also *Saipem SpA v Bangladesh* (Decision on Jurisdiction and Recommendation on Provisional Measures) (ICSID Arbitral Tribunal, Case No ARB/05/7, 21 March 2007) [67].

¹⁴³ Foster, above n 16, 468; Schill, 'Enhancing International Investment Law's Legitimacy', above n 17, 89. The comparative public law methodology is similar to the approach described in Friedmann, Wolfgang. 1963. The Uses of "General Principles" in the Development of International Law. *American Journal of International Law* 57: 279-299, 282.

precedent system in international investment law. It has been considered likely that the law emerging from article 38(1)(c) of the ICJ Statute would prevail over article 38(1)(d), because the latter is a 'subsidiary means for the determination of rules of law'.¹⁴⁴ If the comparative public law methodology is indeed similar to article 38(1)(c), this may suggest that the outcomes of that methodology should prevail over the de facto arbitral precedent. However, as discussed below, there may be difficulties in identifying the results from a closer application of the methodology.

The Australian case study on the purpose of a legitimate expectation suggests a second issue for an aim of the comparative public law methodology. One of the purposes of the comparative public law methodology is to assist with the interpretation of an investment treaty. Proponents of the comparative public law methodology argue that, in accordance with article 31(3)(c) of the *Vienna Convention on the Law of Treaties* ('VCLT'), the outcomes of the methodology are binding interpretative statements as one of the 'relevant rules of international law applicable in the relations between the parties'.¹⁴⁵ Some tribunals have developed the doctrine of legitimate expectations in international investment law based on the object and purpose of an investment treaty.¹⁴⁶ Referring to the object and purpose of a treaty is a well-accepted treaty interpretation practice. The Australian case study shows that a legitimate expectation has a different purpose in Australian law than international investment law. It is unclear how an interpretation of an investment treaty flowing from the comparative public law methodology that is based on domestic legal systems could be incorporated or reconciled with an interpretation flowing directly from the object and purpose of an investment treaty. Particularly given that article 31(3)(c) is merely to be 'taken into account' together with context, where the context forms part of the general rule of interpretation in article 31(1) of the VCLT. The absence of clarity on this point

¹⁴⁴ Crawford, Brownlie's Principles, above n 13, 34.

¹⁴⁵ *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 31(3)(c); Schill, 'Enhancing International Investment Law's Legitimacy', above n 17, 89.

¹⁴⁶ Campbell, above n 138, 377–8. See also *Suez v Argentina (Separate Opinion of Pedro Nikken)* (ICSID Arbitral Tribunal, Case No ARB/03/19, 30 July 2010) [21]; VCLT art 31(1).

suggests that the comparative public law methodology may not be able to achieve its aim of assisting with the interpretation of an investment treaty.

III. CONFLICTING AND DIFFERING UNDERPINNINGS

The underpinnings of a legitimate expectation in international investment law conflict and differ with Australian administrative law. Good faith and estoppel underpin a legitimate expectation in international investment law, but this conflicts with Australian administrative law where a link between estoppel and administrative law has been explicitly rejected. It has been separately argued that the rule of law underpins both international investment law and Australian administrative law. I argue that upon closer examination the feature of the rule of law are different in the two legal systems. These conflicts and differences pose issues for the comparative public law methodology that are yet to be addressed.

A. Good Faith and Estoppel

One of the underpinnings of the doctrine of legitimate expectations in international investment law is good faith and estoppel. The Tecmed principle was stated ‘in light of the good faith principle’.¹⁴⁷ Similarly, Thunderbird Separate Opinion considered a legitimate expectation to be the common law equivalent of estoppel and based on the principle of good faith.¹⁴⁸ A prominent international investment law scholar has suggested that a legitimate expectation ‘bears some relation’ to the concept of estoppel.¹⁴⁹ This shows that at least some tribunals and commentators consider good faith and estoppel to provide the underpinning for a legitimate expectation in international investment law.

¹⁴⁷ *Tecmed* (2004) 43 ILM 133, 173–4 [154]. See also *Saluka* (2010) 15 ICSID Rep 274, 338 [302]; *El Paso Energy International Co v Argentina (Award)* (ICSID Arbitral Tribunal, Case No ARB/03/15, 31 October 2011) [348] (‘*El Paso*’).

¹⁴⁸ (North American Free Trade Agreement Chapter 11 Arbitral Tribunal, 1 December 2005) [25], [27].

¹⁴⁹ Mairal, above n 29, 421. On the meaning of estoppel in international law, see *Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections (Cameroon v Nigeria)* (Judgment) [1998] ICJ Rep 275, 303–4 [57].

Australian law does not rely on estoppel to underpin a legitimate expectation, indeed a link between the two concepts has been rejected. There are at least two reasons why estoppel and a legitimate expectation are not connected in Australian administrative law. First, there is no administrative estoppel. As Brennan J observed in *Annetts v McCann*, '[n]o doctrine of administrative estoppel has emerged' in Australian law.¹⁵⁰ In fact, 'estoppel has been rejected in Australian administrative law',¹⁵¹ making it 'difficult to draw a parallel with estoppel' and a legitimate expectation.¹⁵² Secondly, as Mason CJ observed in *Attorney-General (NSW) v Quin*, 'a public authority ... cannot be estopped from doing its public duty'.¹⁵³ Therefore, a legitimate expectation cannot operate to prevent a public authority from exercising its administrative powers. In contrast to Australian law, a person can have a right to the fulfilment of their legitimate expectations in English law (see Part V).¹⁵⁴ But even in English law, Bell observes that this right bears 'no necessary relationship' to estoppel.¹⁵⁵ This further demonstrates that a legitimate expectation is distinct from estoppel in Anglo-Australian law. It may appear that there is a link, albeit weak, between estoppel and a legitimate expectation, because one of the elements of estoppel, detriment, emerged in Gleeson CJ's judgment in *Lam*.¹⁵⁶ However, the detriment Gleeson CJ referred to was the 'loss of an opportunity to make representations'.¹⁵⁷ Understood this way, detriment is really just a guide for determining what procedural fairness requires in the circumstances.

¹⁵⁰ (1990) 170 CLR 596, 605, quoted in *Lam* (2003) 214 CLR 1, 22 [69] (McHugh and Gummow JJ).

¹⁵¹ Groves, Matthew. 2008. Substantive Legitimate Expectations in Australian Administrative Law. *Melbourne University Law Review* 32: 470-523, 506; *Annetts v McCann* (1990) 170 CLR 596, 605 (Brennan J).

¹⁵² Mason, Sir Anthony. 2005. The Place of Estoppel in Public Law. In *Law and Government in Australia*, ed. Matthew Groves. Federation Press. 160-183, 179. See also *Annetts v McCann* (1990) 170 CLR 596, 605 (Brennan J); *Haoucher* (1990) 169 CLR 648, 669-70 (Toohey J); *Minister for Immigration and Ethnic Affairs v Kurtovic* (1990) 21 FCR 193, 207 (Gummow J); contra Groves, Matthew. 2007. Is Teoh's Case Still Good Law?. *Australian Journal of Administrative Law* 14: 126-144, 138.

¹⁵³ (1990) 170 CLR 1, 17 ('Quin'), quoting *Lever Finance v Westminster London Borough Council* [1971] 1 QB 222, 230 (Lord Denning MR). See also *Lam* (2003) 214 CLR 1, 22 [69] (McHugh and Gummow JJ); *Annetts v McCann* (1990) 170 CLR 596, 605 (Brennan J).

¹⁵⁴ See, eg, *R v North and East Devon Health Authority; Ex parte Coughlan* [2001] QB 213, 242 [57] (Lord Woolf MR).

¹⁵⁵ Bell, above n 34, 446-7. See also Brown, above n 29, 9.

¹⁵⁶ Lacey, Wendy. 2004. A Prelude to the Demise of Teoh: The High Court Decision in *Re Minister for Immigration and Multicultural Affairs: Ex Parte Lam*. *Sydney Law Review* 26: 131-156, 140.

¹⁵⁷ *Lam* (2003) 214 CLR 1, 13 [37].

One of the purposes of the comparative public law methodology is to legitimise existing international investment law jurisprudence by demonstrating a resemblance to domestic law. A superficial similarity in terminology between domestic law and international investment law may suggest a line of enquiry for investigating whether domestic law can legitimise international investment law. However, where the underpinnings of domestic law and international investment law conflict, it is not possible to argue that the domestic law legitimises international investment law. This suggests that a greater degree of sophistication and analysis is needed when applying a comparative public law methodology to international investment law.

B. Rule of Law

The following consideration of the rule of law underpinnings of a legitimate expectation in Australian administrative law and international investment law demonstrates the need for a detailed analysis of the foundations of domestic law before it can be used to draw parallels with international investment law. It is not enough to simply state that the rule of law provides an underpinning for a legitimate expectation, because the rule of law is a contested concept.¹⁵⁸ The features of the rule of law to which a legitimate expectation gives effect must be identified. After identifying the central features of the rule of law reflected in a legitimate expectation in Australian administrative law and international investment law, it becomes evident that they differ.

The rule of law is the ‘dominant ideology’ of Australian administrative law.¹⁵⁹ A legitimate expectation gives effect to the rule of law feature of due process, by providing the content of the fair hearing rule.¹⁶⁰ More significantly, one of the features of the rule of law is Raz’s minimum content for rule of law. Raz stated that unless an act is authorised by the law, it cannot be an action ‘of

¹⁵⁸ See, eg, Waldron, Jeremy. 2002. Is the Rule of Law an Essentially Contested Concept (in Florida)? *Law and Philosophy* 21: 137-164.

¹⁵⁹ Cane and McDonald, above n 28, 307.

¹⁶⁰ Raz, Joseph. 1979. *The Authority of Law: Essays on Law and Morality*. Oxford University Press. 217; Rawls, John. 1971. *A Theory of Justice*. Harvard University Press. 239.

the government as a government'.¹⁶¹ Raz argued that in the absence of authorisation by the law, the administrative act will be 'without legal effect and often unlawful'.¹⁶² This feature of the rule of law can be seen in Gaudron J's statement in *Enfield*, that it is the 'rule of law that requires the courts' to intervene when administrative powers are not exercised 'in accordance with the laws which govern their exercise'.¹⁶³

In Australian administrative law, a legitimate expectation can provide the basis for a court's intervention to ensure administrative power is lawfully exercised by providing a fair hearing when one is due. If the procedural fairness afforded does not meet the content required, as informed by a legitimate expectation, the exercise of power may be invalid or unlawful. For example, in *Heatley v Tasmanian Racing and Gaming Commission*, the applicant, Mr Heatley, had a legitimate expectation of continuing to receive 'customary permission' to enter a racecourse.¹⁶⁴ This expectation was defeated when a warning-off notice was issued by a statutory body that precluded Mr Heatley from entering any racecourses in Tasmania. This case arose before procedural fairness was a statutory presumption, so the legitimate expectation gave rise to the need to afford procedural fairness.¹⁶⁵ The basis upon which procedural fairness arose is only of historical relevance for this article, given the normative shift towards a statutory presumption. Of contemporary relevance is that Mr Heatley's legitimate expectation also influenced the content of procedural fairness. Mr Heatley should have been afforded an opportunity to comment before he was issued with the 'warning-off',¹⁶⁶ because he had a legitimate expectation that the statutory body would not prevent him from accessing racecourses. Consequently the Commission's decision was invalidated via the remedy of certiorari.¹⁶⁷ *Heatley* is consistent with the more recent case of *MIBP v WZARH*, as the legitimate expectation in *Heatley* in part provided the content

¹⁶¹ Raz, *The Authority of Law*, above n 160, 212.

¹⁶² *Ibid.*

¹⁶³ *City of Enfield v Development Assessment Commission* (2000) 199 CLR 135, 158 [59]. See also *Quin* (1990) 170 CLR 1, 35–6, 38 (Brennan J).

¹⁶⁴ (1977) 137 CLR 487, 509 (Aickin J) ('*Heatley*').

¹⁶⁵ *Ibid* 494 (Mason J).

¹⁶⁶ *Ibid* 495 (Murphy J), 516 (Aickin J).

¹⁶⁷ *Ibid* 516.

of the fair hearing rule of procedural fairness. Heatley demonstrates that an Australian court may intervene where there is an exercise of administration that requires a fair hearing, but the content of that hearing, informed by the expectation, has not been provided.

In international investment law, it has been argued that a legitimate expectation, as described in the Tecmed principle and elsewhere, pursues or even embodies the rule of law.¹⁶⁸ However, international investment law does not pursue the same rule of law features as Australian administrative law. It has been suggested that a legitimate expectation in international investment law embodies the rule of law feature of subjecting ‘public power to legal control’.¹⁶⁹ However, any subjugation of public power to legal control by a tribunal will generally result in an award of compensation.¹⁷⁰ The award may have a deterrent effect,¹⁷¹ but that does not render the exercise of power invalid. It is also demonstrable that international investment law is not concerned with the validity or lawfulness of government conduct. For example, in *Saluka* the Tribunal observed that ‘the unlawfulness of a host State’s measures under its own legislation ... is neither necessary nor sufficient for a breach of’ the relevant FET obligation.¹⁷² Thus implying that the Tribunal would not consider whether the expectation was created lawfully.¹⁷³ In Australian administrative law, an invalid or unlawful act could not provide a legitimate expectation, because the act would be of no legal consequence. This demonstrates that a legitimate

¹⁶⁸ Schill, ‘General Principles of Law and International Investment Law’, above n 15, 162–3, 165; Schill, ‘Fair and Equitable Treatment, the Rule of Law, and Comparative Public Law’, above n 27, 175. See also Kulick, Andreas. 2012. *Global Public Interest in International Investment Law*. Cambridge University Press. 84.

¹⁶⁹ Schill, ‘General Principles of Law and International Investment Law’, above n 15, 162–3, 165. See also Kulick, above n 168, 84.

¹⁷⁰ Sabahi, above n 37, 4.

¹⁷¹ Kulick, above n 168, 82.

¹⁷² (2010) 15 ICSID Rep 274, 363 [442].

¹⁷³ By implying that the legality of the expectation would not be considered, the Tribunal in *Saluka* appears to have endorsed the Tribunal’s analysis in *Southern Pacific Properties (Middle East) Ltd v Egypt (Award)* (1995) 3 ICSID Rep 189 (‘*SPP*’). *SPP* did not arise from an investment treaty, but from a national law on foreign investment. The tribunal was faced with administrative action that was ‘null and void or susceptible to invalidation’ in domestic law. Rather than invalidating the conduct of government officials, the Tribunal considered whether actions ‘cloaked with the mantle of Governmental authority ... created expectations’: at 208 [82]–[83].

expectation in international investment law does not seek to subject public power to legal control by the same methods as Australian administrative law.

There are also doubts about the strength of the claim that a legitimate expectation in international investment law attains the rule of law. One tribunal suggested that a legitimate expectation attains the rule of law value of stability,¹⁷⁴ but another tribunal disagreed.¹⁷⁵ Another feature of the rule of law is that ‘the law should not demand the impossible of the subject’,¹⁷⁶ where the subject in international law is the state.¹⁷⁷ The Tecmed principle demands the impossible of its subject (a host state), because, as Crawford has observed, ‘many governments would fail to meet’ the ‘utopian standard [of the Tecmed principle] much of the time’.¹⁷⁸ Whilst a bit unclear what features of the rule of law such a legitimate expectation aims to pursue, it is clear that those features are different to Australian administrative law.

The rule of law features that have been identified as being pursued by international investment law are different to Australian administrative law. Benjamin Guthrie has suggested that the Tecmed principle gives effect to the rule of law features of consistency, prevention of a host state acting in an ambiguous or arbitrary manner, and transparency.¹⁷⁹ Another feature of the rule of law value is the libertarian idea of freedom, which has been expressed as requiring ‘minimal interference’.¹⁸⁰ In the international investment law context, this could mean minimal interference with an investment. The Tribunal in *ADC Affiliate Ltd v Hungary* appears to have accepted this view of the rule of

¹⁷⁴ See generally Fuller, Lon L. 1969. *The Morality of Law*. Yale University Press, 2nd ed 45; *Suez v Argentina (Decision on Liability)* (ICSID Arbitral Tribunal, Case No ARB/03/19, 30 July 2010) [222].

¹⁷⁵ *Total v Argentina* (ICSID Arbitral Tribunal, Case No ARB/04/1, 21 December 2010) [115].

¹⁷⁶ Fuller, above n 174, 71.

¹⁷⁷ Waldron, Jeremy. 2011. Are Sovereigns Entitled to the Benefit of the International Rule of Law. 22 *European Journal of International Law* 22: 315-343, 322-3; Hart, H L A. 1961. *The Concept of Law*. Oxford University Press. 215.

¹⁷⁸ Crawford, Brownlie’s Principles, above n 13, 615. See also Douglas, ‘Nothing if Not Critical for Investment Treaty Arbitration’, above n 83, 28; Schneiderman, above n 83, 522.

¹⁷⁹ Guthrie, Benjamin K. 2012. Beyond Investment Protection: An Examination of the Potential Influence of Investment Treaties on Domestic Rule of Law. *New York University Journal of International Law and Politics* 45: 1151-1200, 1188.

¹⁸⁰ Laws, John. 1996. The Constitution: Morals and Rights. *Public Law* 622-635, 630.

law, having stated that ‘the rule of law, which includes treaty obligations’, provides the boundaries for the state’s right to regulate.¹⁸¹ Regulation falls within the boundary of the libertarian rule of law when it is for a legitimate regulatory interest and is not outweighed by the foreign investor’s legitimate expectations.¹⁸² If the regulation is not legitimate, or is outweighed by the investor’s interests, then there will be substantial interference which undermines the investor’s freedom. This suggests that one of the rule of law features a legitimate expectation in international law gives effect to is minimal interference.

The rule of law has been proposed as one of the indicia for identifying a domestic legal system that the comparative public law methodology prefers to draw upon. However, the rule of law features sought by the comparative public law methodology have not been specified. It is not enough to identify the name of a legal theory that the comparative public law methodology will seek out in domestic legal systems, because, as the rule of law example demonstrates, the theory can be contested and have multiple dimensions. Further, it is unclear how a domestic legal system emphasising significantly different features of a legal theory can be used to draw parallels with international investment law. This suggests that further work is needed to identify the theoretical underpinnings of international investment law before domestic law can be used as part of the comparative public law methodology.

Another aim of the comparative public law methodology is to legitimise existing jurisprudence in international investment law by showing a resemblance to domestic law. It is arguable that a similarity in theoretical underpinnings between the two legal systems legitimises international investment law. However, where the features of the theory are different, this argument carries no weight because it is merely superficial. Further, where

¹⁸¹ (*Award*) (2010) 15 ICSID Rep 539, 606–7 [423].

¹⁸² *Saluka* (2010) 15 ICSID Rep 274, 338–9 [305]; *Thunderbird Separate Opinion* (North American Free Trade Agreement Chapter 11 Arbitral Tribunal, 1 December 2005) [30]; *El Paso* (ICSID Arbitral Tribunal, Case No ARB/03/15, 31 October 2011) [356]; *Toto* (ICSID Arbitral Tribunal, Case No ARB/07/12, 7 June 2012) [165]; *Parkerings-Compagniet AS v Lithuania (Award)* (ICSID Arbitral Tribunal, Case No ARB/05/8, 11 September 2007) [332].

international investment law has chosen not to pursue one of the aims of domestic law, such as the subjugation of public power to legal control, there is arguably no resemblance between the two legal systems. Therefore, for domestic law to legitimise existing jurisprudence in international investment law it is necessary to show that the particular aspects of the theory underpinning domestic law are pursued by international investment law.

IV. ILLUSTRATION THROUGH CASES WHERE A LICENCE WAS NOT RENEWED

Examining cases where a licence was not renewed illustrates how the different purposes and underpinnings of a legitimate expectation affect the application of a legitimate expectation in Australian administrative law and international investment law. The superficial parallels between legitimate expectations arising from an annually renewable licence in each legal system should not distract from looking more closely at the cases. Upon a close examination of the purpose and underpinnings of a legitimate expectation, significant differences are evident. Cases where a licence was not renewed have been chosen because a consensus is building in the literature that a legitimate expectation can arise from such conduct in both international investment law¹⁸³ and Australian administrative law.¹⁸⁴

A. An Australian Insurer's Legitimate Expectation

In the Australian case of *FAI Insurances Ltd v Winneke*, a workers' compensation insurer was found to have a legitimate expectation that the Victorian Governor in Council would renew their annual licence granted under a statute.¹⁸⁵ The relevant minister wrote a letter to the insurer summarising the

¹⁸³ Henckels, Caroline. 2015. Will Greater Precision in Investment Treaties Protect the Right to Regulate? An Assessment of the TPP's Investment Chapter. *New Zealand Business Law Quarterly* 21: 351-371, 365; Dolzer and Schreuer, above n 4, 145; *Metalpar SA v Argentina (Award on the Merits)* (ICSID Arbitral Tribunal, Case No ARB/03/5, 6 June 2008) [186].

¹⁸⁴ Groves, 'Substantive Legitimate Expectations in Australian Administrative Law', above n 151, 472-3; Tate, Pamela. 1988. The Coherence of "Legitimate Expectations" and the Foundations of Natural Justice. *Monash University Law Review* 14: 15-81, 31.

¹⁸⁵ (1982) 151 CLR 342, 356, 362, 369 (Mason J) ('*FAI Insurances*').

case against them and informing them that their licence would not be recommended for renewal.¹⁸⁶ The insurer requested better particulars and an opportunity to comment, but this fell on deaf ears.¹⁸⁷ The Minister's recommendation against renewal was accepted by the Victorian Governor in Council. A majority of the High Court declared the decision not to renew the licence invalid.¹⁸⁸ In light of the insurer's expectation, procedural fairness in this case required the insurer to be given the adverse material and an opportunity to comment.¹⁸⁹ Consistent with *MIBP v WZARH*, the expectation that the licence would be renewed was a conceptual tool to find that the insurer should have had an opportunity to know and comment on the material against them.

B. A Spanish Investor's Legitimate Expectation

In *Tecmed*, a Spanish investor had an annually renewable licence to operate a hazardous waste facility in Mexico.¹⁹⁰ After community opposition, Mexican authorities wanted to move the facility to a new location and refused to renew the licence at the existing location.¹⁹¹ The Tribunal found that the Mexican authorities breached the Spanish investor's legitimate expectation that the waste site would continue to operate until relocated.¹⁹² The Spanish investor's expectation arose from what the Tribunal described as the Mexican authorities' failure to give 'an explicit, transparent and clear warning' that the facility would be closed prior to relocation.¹⁹³ The Tribunal awarded US\$5 533 017.12 plus interest in part because the Spanish investor's legitimate expectation was defeated.¹⁹⁴

¹⁸⁶ Ibid 358 (Mason J), 376 (Aickin J).

¹⁸⁷ Ibid.

¹⁸⁸ Ibid 351 (Gibbs CJ), 421 (Wilson J).

¹⁸⁹ Ibid 355 (Stephen J), 372 (Mason J), 395 (Wilson J), 383 (Aickin J).

¹⁹⁰ (2004) 43 ILM 133, 179 [170].

¹⁹¹ Ibid 139 [42], 177 [164].

¹⁹² Ibid 175 [160].

¹⁹³ Ibid 175 [160], 176–7 [163].

¹⁹⁴ Ibid 186 [201].

C. Not All Legitimate Expectations Are the Same

The facts of *FAI Insurances* and *Tecmed* appear somewhat similar: the renewal of a renewable licence was denied. Both cases in part rely on a legitimate expectation. Concern was expressed in both cases about the financial implications flowing from the defeat of the legitimate expectation.¹⁹⁵ However, when the purpose and underpinnings are considered, three significant differences emerge. The first difference is that in Australian administrative law it is lawful to defeat a legitimate expectation if a fair hearing is provided beforehand.¹⁹⁶ That is because the power to deny the licence has been exercised lawfully by providing procedural fairness. While procedural fairness may be required in international investment law,¹⁹⁷ if it is provided, a legitimate expectation can still be defeated.¹⁹⁸ That is because a foreign investor has a right to the fulfilment of their legitimate expectation, which is still breached by the defeat of their expectation in the fairest possible process. This demonstrates the different relationship between procedural fairness and a legitimate expectation which is due, at least in part, to the differing purposes of the two legal systems.

The second difference between the cases is the effect of compensation. In Australian administrative law, compensation does not cure the defeat of a legitimate expectation, because the defeat of the expectation without procedural fairness is void. As Aickin J observed, the Minister 'mistakenly exceeded his powers' by defeating the insurer's legitimate expectations without affording procedural fairness.¹⁹⁹ Consequently the 'proceedings before the Governor in Council have miscarried so that no effective Order in Council has been made'.²⁰⁰ However, an award of compensation can cure a defeat of a foreign investor's legitimate expectation in international investment law,²⁰¹ because the breach of the right is compensable. This demonstrates the

¹⁹⁵ *FAI Insurances* (1982) 151 CLR 342, 348 (Gibbs CJ), 360 (Mason J), 411 (Brennan J); *Tecmed* (2004) 43 ILM 133, 177 [164].

¹⁹⁶ *FAI Insurances* (1982) 151 CLR 342, 348 (Gibbs CJ), 369 (Mason J), 378 (Aickin J), 395 (Wilson J).

¹⁹⁷ *Tecmed* (2004) 43 ILM 133, 176 [162], 180 [173].

¹⁹⁸ *Ibid* 179 [170].

¹⁹⁹ *FAI Insurances* (1982) 151 CLR 342, 383.

²⁰⁰ *Ibid*.

²⁰¹ *Tecmed* (2004) 43 ILM 133, 177 [164].

difference in the power- constraining and right-conferring approach in the two legal systems.

The third difference is the underpinnings. The rule of law requirement that an exercise of power not in accordance with law is invalid is manifested in *FAI Insurances*, where the decision to defeat a legitimate expectation without a fair hearing was invalid. The libertarian rule of law idea of freedom, manifested as minimal interference with an investment, is evident in *Tecmed*. In that case, the Spanish investor's legitimate expectation was that the existing landfill site would continue until 'effective relocation'.²⁰² Health and safety, and political pressure were not legitimate regulatory objectives or interests that outweighed the foreign investor's legitimate expectation.²⁰³ Thus, compensation was awarded.

Whilst this is merely a case study of two similar cases in different legal systems, it shows that the concept of a legitimate expectation is significantly different in both legal systems. A possible reason for the difference is that the purpose, consequences and underpinnings of a legitimate expectation in the two systems differ and conflict. These differences suggest that although there may appear to be similarities between a concept in domestic law and international investment law, that appearance can be deceptive. Consequently, there may be limits to the usefulness of the comparative public law methodology.

V. CONFLICT BETWEEN DIFFERENT DOMESTIC LEGAL SYSTEMS

There can be a conflict between two domestic legal systems, but the comparative public law methodology is yet to develop a way to resolve these conflicts. The absence of a resolution mechanism in the methodology suggests that it is ill-suited for practical application. For instance, a substantive legitimate expectation is enforceable in English law, but not enforceable in Australian administrative law, in part because of the Australian Constitution. It is

²⁰² Ibid 175 [160].

²⁰³ Ibid 171 [145], 177 [164].

particularly relevant to compare these two legal systems because the Australian understanding of a legitimate expectation was, at least initially, heavily influenced by English law.²⁰⁴

A. Substantive Legitimate Expectations in English Law

On one view of English law, a substantive legitimate expectation confers 'prima facie legal rights to be treated in particular ways' by a public body that gives a representation.²⁰⁵ One of the 'concrete instances'²⁰⁶ of a substantive legitimate expectation is *R v North and East Devon Health Authority; Ex parte Coughlan*. In that case, Miss Coughlan, a tetraplegic, had been promised that she would have a 'home for life' at a purpose-built health facility.²⁰⁷ Subsequently, the health authorities decided to close the facility. The English Court of Appeal held that this defeated Miss Coughlan's legitimate expectation that she could remain at the facility. The court held that Miss Coughlan's case fell within the category of a substantive legitimate expectation, which is:

*Where the court considers that a lawful promise or practice has induced a legitimate expectation of a benefit which is substantive, not simply procedural, authority now establishes that here too the court will in a proper case decide whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power.*²⁰⁸

The defeat of Miss Coughlan's legitimate expectation could not have been cured by providing procedural fairness, because the expectation was substantive.

²⁰⁴ *Haoucher* (1990) 169 CLR 648, 679 (McHugh J); *Quin* (1990) 170 CLR 1, 20 (Mason CJ), 40 (Brennan J), 54 (Dawson J).

²⁰⁵ Bell, above n 34, 438. See also *Lam* (2003) 214 CLR 1, 10 [28] (Gleeson CJ); contra Pandya, Abhijit PG. 2009. Legitimate Expectations in English Law: Too Deferential an Approach?. *Judicial Review* 14:170-176.

²⁰⁶ *R (Niazi) v Secretary of State* [2008] EWCA Civ 755, [44] (Laws LJ).

²⁰⁷ [2001] QB 213, 260 (Lord Woolf MR) ('*Coughlan*').

²⁰⁸ *Ibid* 242 [57] (Lord Woolf MR).

B. Absence of Substantive Legitimate Expectations in Australian Law

A substantive legitimate expectation is not enforceable in Australian administrative law.²⁰⁹ Australian law has developed independently of English law.²¹⁰ In *Quin*, decided before Coughlan, the High Court explicitly rejected that an Australian court could enforce a substantive legitimate expectation.²¹¹ In that case, the majority held that a magistrate did not have an enforceable substantive legitimate expectation to be re-appointed as a magistrate after a restructure of courts in New South Wales. In separate judgments, Deane and Dawson JJ reasoned that to allow the enforcement of a substantive legitimate expectation would require the concept of a legitimate expectation to be removed from its roots in procedural fairness and take on a life of its own.²¹² To introduce a substantive legitimate expectation into Australian administrative law would require a 'revolution in Australian judicial thinking',²¹³ including in judicial thought on the separation of powers.²¹⁴ The separation of powers requires governmental power to 'be split between the Legislature, Executive and Judiciary'.²¹⁵ The separation of powers is embodied in the Australian Constitution via a 'federal written constitution with its express or implied limitations on legislative, executive and judicial powers', which differs from the unwritten English constitution.²¹⁶ A manifestation of the separation of powers in Australian administrative law is the distinction between judicial review and merits review.²¹⁷ Australian courts undertake judicial review to determine the

²⁰⁹ Cane, Peter. 2003. The Making of Australian Administrative Law. *Australian Bar Review* 24: 114-134, 126.

²¹⁰ Allars, Margaret. 1995. One Small Step for Legal Doctrine, One Giant Leap Towards Integrity in Government: Teoh's Case and the Internationalisation of Administrative Law. *Sydney Law Review* 17: 204-241, 236.

²¹¹ *Quin* (1990) 170 CLR 1, 23-4 (Mason CJ).

²¹² *Ibid* 48-9 (Deane J), 53-4 (Dawson J).

²¹³ Mason, 'Procedural Fairness', above n 44, 108.

²¹⁴ Aronson and Groves, above n 42, 428. See also Stern, Kristin. 2007. Substantive Fairness in UK and Australian Law. *Australian Bar Review* 29: 226, 280.

²¹⁵ Bathurst, Thomas. 2013. 'Separation of Powers: Reality or Desirable Fiction?' (Speech delivered at the JCA Colloquium, Sydney, 11 October 2013). See *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 275 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

²¹⁶ Mason, 'Procedural Fairness', above n 44, 109. See also *Lam* (2003) 214 CLR 1, 10 [28] (Gleeson CJ), 24-5 [76]-[77] (McHugh and Gummow JJ).

²¹⁷ Cane and McDonald, above n 28, 33.

legality or validity of an administrative act.²¹⁸ It is for the executive to make a decision on the merits; a judge is not to put themselves in the shoes of the decision-maker and make a decision.²¹⁹ However, enforcing a substantive legitimate expectation undermines the distinction between the two types of review, because it tends towards merits review.²²⁰ Thus, the possibility of a court giving effect to a substantive legitimate expectation is significantly impeded by the constitutionally limited role of courts in Australia. It is therefore incorrect to characterise the Australian position as one of reluctance,²²¹ rather, there has been an intentional disavowal based on constitutional principles.

C. Implications for the Comparative Public Law Methodology

It has been acknowledged that one of the challenges facing a methodology like the comparative public law methodology is finding universal agreement.²²² One proponent of the comparative public law methodology has found a way to overcome this with respect to differences between French and English law. That proponent claimed that although there is no explicit recognition of a legitimate expectation in French law, there are a range of equivalents so that there is no need for a doctrine of legitimate expectations.²²³ Whilst this legal manoeuvring may work with French law, the same cannot be said of the differences between English law and Australian law. There is no equivalence in the enforceability of a substantive legitimate expectation in English and Australian law. Rather, there is explicit disagreement and Australian law has made a conscious turn away from English law.²²⁴ Another proponent

²¹⁸ *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 393 (McHugh, Gummow, Kirby and Hayne JJ).

²¹⁹ *Quin* (1990) 170 CLR 1, 36 (Brennan J); *Minister for Immigration and Border Protection v Stretton* (2016) 237 FCR 1, 26 [76] (Griffiths J).

²²⁰ *Quin* (1990) 170 CLR 1, 23 (Mason CJ), 39–40 (Brennan J); *Lam* (2003) 214 CLR 1, 23, 25 (McHugh and Gummow JJ); Mason, 'Procedural Fairness', above n 44, 109; Cane and McDonald, above n 28, 129; Groves, 'Substantive Legitimate Expectations in Australian Administrative Law', above n 151, 480; Teoh (1995) 183 CLR 273, 321 (McHugh J).

²²¹ *Contra Potestà*, above n 29, 97.

²²² Ford, Christopher A. 1994. Judicial Discretion in International Jurisprudence: Article 38(1)(c) and "General Principles of Law". *Duke Journal of Comparative & International Law* 5: 35-86, 68.

²²³ Snodgrass, above n 29, 27.

²²⁴ See, eg, *Lam* (2003) 214 CLR 1, 10 [28] (Gleeson CJ).

has acknowledged differences, but suggested that ‘core similarities’ within domestic legal systems ‘could be highlighted’.²²⁵ This conclusion plainly does not apply to the role of substantive legitimate expectations in English and Australian law. Whilst these differences are just with Australian law and English law, it is possible that other domestic legal systems could also conflict. The difference between Australian law and English law on the enforceability of a substantive legitimate expectation highlights an issue that the comparative public law methodology is yet to confront. There is no mechanism to reconcile laws in domestic legal systems that conflict. It is unclear how domestic legal systems can help develop a consistent interpretation and application of an investment treaty, when there are inconsistencies in the domestic legal systems. The absence of such a mechanism appears to limit the comparative public law methodology to concretising international investment law in situations where there is no conflict between domestic legal systems.

VI. CONCLUSIONS

Reviewing government conduct in international investment law could be legitimised and developed based on parallels with domestic legal systems through the application of the comparative public law methodology. However, a comparison between international investment law and Australian administrative law suggests that there are marked differences (and sometimes conflicts) in the purpose, consequences and underpinnings of a legitimate expectation. Cases where a legitimate expectation was defeated by the non-renewal of a licence confirms these differences and conflicts.

Australian administrative law is by no means the only domestic legal system worth considering, but it does illuminate issues with the comparative public law methodology. These issues suggest that the aims of the comparative public law methodology, such as legitimising existing jurisprudence, may not be attainable. Considering Australian administrative law as a case study also reveals that reforming international investment law will require difficult

²²⁵ Potestà, above n 29, 121.

questions about departing from the de facto precedent in international investment law and existing interpretations of investment treaties.

When two domestic legal systems are considered, another issue with the comparative public law methodology becomes evident. It is possible that two domestic legal systems, even those with similar historical roots, will develop independently and inconsistently. The comparative public law methodology currently does not offer a way to reconcile these differences, which significantly limits the attainment of the aims of the comparative public law methodology. Until the comparative public law methodology develops a greater degree of sophistication and internal conflict resolution processes, there will continue to be limits on the extent to which it can achieve its aims.

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

Luis Bergolla* and Dorothee Goertz**

Résumé

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

* J.S.D. Candidate, Stanford Law School.

e-mail: bergolla [at] stanford [dot] edu

** S.J.D. Candidate, Central European University.

e-mail: goertz [underscore] dorothee [at] phd [dot] ceu [dot] edu

We wish to thank Professor Diego Fernández Arroyo and Dr. Alexandre Senegacnik for the invitation to participate in the conference "The Use of Comparative Law Methodology in International Arbitration" held in Paris on October 8, 2019 at Sciences Po. We also thank all the participants who provided invaluable feedback at the conference as well as Professor Rogelio Pérez Perdomo who read and commented an earlier draft of this article. We finally thank Professor Deborah Hensler for introducing us to each other. All mistakes remain our own.

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

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

Abstract

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

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

TABLE OF CONTENTS

I.	INTRODUCTION.....	363
II.	LITERATURE REVIEW	364
III.	RESEARCH QUESTION & METHODOLOGY	372
IV.	FINDINGS	373
A.	The Court of Arbitration for Sport (CAS)	373
1.	<i>CAS 2015/A/4303</i>	374
2.	<i>CAS 2016/A/4921, 4922</i>	375
3.	<i>CAS 2017/A/5133</i>	376
4.	<i>CAS 2018/A/5509</i>	378
B.	ICC Arbitration.....	380
1.	<i>Partial Award in Case No. 13696</i>	380
2.	<i>Final Award in Case No. 13730</i>	383
3.	<i>Final Award in Case No. 13756</i>	385
4.	<i>Partial Award in Case No. 13774</i>	386
C.	ICSID Arbitration	390
1.	<i>Tenaris v. Venezuela</i>	391
2.	<i>Santa Elena v. Costa Rica</i>	393
3.	<i>TECMED v. Mexico</i>	395
4.	<i>Pluspetrol v. Perupetro</i>	397
V.	CONCLUSIONS.....	398

I. INTRODUCTION

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

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

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

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

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

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

II. LITERATURE REVIEW

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

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

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

say that the functional method “serves as shorthand for traditional comparative law.”⁶

But what does this functional method entail?

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

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

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

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

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

⁸ *Id.* at 73.

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

¹⁰ *Id.*

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

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

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

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

¹² *Id.* at 12.

¹³ *Id.*

¹⁴ *Id.* at 12-13.

¹⁵ *Id.* at 13-14.

method with the previous one. How this materializes in real life is an interesting empirical question. One attempt to answer it, cited by Van Hoecke, is Arnaud's structural analysis of the French Civil Code of 1973.¹⁶ In that analysis, Arnaud identifies what he calls "jural opposites"—well beyond the official concept of opposites in the Code—to build a comprehensive taxonomy of 32 possible legal relationships arising from the Civil Code.¹⁷

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

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

¹⁷ *Id.*

¹⁸ *Id.* at 16.

¹⁹ *Id.* at 17.

²⁰ *Id.* at 19.

²¹ *Id.* at 21.

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

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

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

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

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

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

Table 1

Sourgens³² approaches the use of CLM in international arbitration via the lenses of the legal counsels’ role and the work undertaken during the

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

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at 90.

²⁷ *Id.* at 91.

²⁸ *Id.* at 92.

²⁹ *Id.* at 93-95.

³⁰ *Id.* at 90.

³¹ *Id.* at 97.

³² See Sourgens, *supra* note 1.

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

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

³³ See Sourgens, *supra* note 1.

³⁴ *Id.* at 12.

³⁵ *Id.* at 4.

³⁶ *Id.* at 15.

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

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

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

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

³⁹ *Id.*

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

⁴¹ *Id.* at 435–38.

⁴² *Id.*

⁴³ *Id.* at 442.

⁴⁴ *Id.* at 444.

⁴⁵ *Id.* at 456–57.

⁴⁶ *Id.* at 458.

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

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

III. RESEARCH QUESTION & METHODOLOGY

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

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

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

IV. FINDINGS

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

A. The Court of Arbitration for Sport (CAS)

The CAS is an arbitral institution founded in 1983 by the International Olympic Committee (IOC) that specializes in the resolution of any disputes related or connected to international sports.⁴⁸ One of CAS's specificities is that the awards can be made publicly available on the CAS website⁴⁹ either if the parties agree to it or if the president of the division so decides (under the

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

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

⁴⁹ <https://www.tas-cas.org/en/index.html>

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

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

1. CAS 2015/A/4303

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

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

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

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

⁵² See CAS 2015/A/4303, at 8.

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

2. CAS 2016/A/4921, 4922

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

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

⁵³ See CAS 2015/A/4303 at 9, ¶38.

⁵⁴ *Id.* at 9-10, ¶39.

⁵⁵ *Id.* at 11-12, ¶40-41.

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

⁵⁷ *Id.* at 10, ¶54-55.

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

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

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

3. CAS 2017/A/5133

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

⁵⁸ See CAS 2016/A/4921, 4922 at 8, ¶150.

⁵⁹ *Id.* at 12, ¶162.

⁶⁰ *Id.* at 16, ¶170 & 72.

⁶¹ *Id.* at 18, ¶183-84 (citing that: “[i]n order to come to the conclusion that the Appellants violated the Dressage Judges’ Codex, the Panel finds that the score deviation and lack of satisfactory explanations need to be supported by other, different and external elements pointing in the same direction, cf. CAS 2016/A/4650.”).

⁶² *Id.* at 19, ¶195 (holding that: “[a]ccording to well-established CAS jurisprudence, even though the CAS panels retain the full power to review the factual and legal aspects involved in a disciplinary dispute, they must exert self-restraint in reviewing the level of sanctions imposed by the disciplinary body; accordingly, CAS panels should reassess sanctions only if they are evidently and grossly disproportionate to the offence.”).

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

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

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

⁶³ See CAS 2017/A/5133 at 2, ¶16.

⁶⁴ *Id.* at 3, ¶11-13.

⁶⁵ *Id.* at 8, ¶42.

⁶⁶ *Id.* at 8, ¶43.

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

In relation to the second issue, the arbitrator “finds necessary to peruse how CAS jurisprudence and Swiss procedural law have regarded appeals that were based upon ‘requests for reconsideration’ in relation to the time limit for appeal”⁶⁸ and literally bases his decision to dismiss the appeal⁶⁹ on the analysis of a previous CAS case wherein “the panel was faced with an almost identical situation.”⁷⁰

4. CAS 2018/A/5509

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

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

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

⁶⁸ See CAS 2017/A/5133 at 10, ¶154.

⁶⁹ *Id.* at 11, ¶157 (holding that: “[t]he Sole Arbitrator fully agrees with the opinion of the panel above.”).

⁷⁰ *Id.* at 11, ¶156.

⁷¹ See CAS 2018/A/5509 at 126, ¶1639.

was determined to be the applicable standard for the doping offense⁷² and quoted previous CAS decisions to circumvent its interpretation.⁷³ The same methodology was used in the panel's search for interpretation of the means of proof.⁷⁴ Both the provisions of the applicable regulations and the case law helped the panel "identify the (...) principles that must guide its assessment of the allegations and evidence in the present case."⁷⁵

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

Finally, the panel had to determine whether the athlete was guilty of covering up or of complicity in the scheme. To determine the scope of application of this offense, the panel distinguished previous CAS jurisprudence⁷⁷ from the present case⁷⁸ and decided against the offense of complicity.

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

⁷² See CAS 2018/A/5509 at 128, ¶¶655.

⁷³ *Id.* at 128-129 ¶¶659-662.

⁷⁴ *Id.* at 130 ¶¶667.

⁷⁵ *Id.* at 130 ¶¶668.

⁷⁶ *Id.* at 134, ¶¶691.

⁷⁷ *Id.* at 154-156, ¶¶817-826.

⁷⁸ *Id.* at 156, ¶827.

⁷⁹ See *supra* Table 1.

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

B. ICC Arbitration

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

In this framework, the four awards selected⁸⁰ for our empirical analysis gave us a wider range but also a more contrasted view of the use of CLM by ICC arbitrators, as illustrated in the following subsections discussing the cases. For the sake of clarity, the subsections below discuss each time we encountered a hint of CLM use.

1. Partial Award in Case No. 13696⁸¹

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

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

⁸¹ *Id.* at 227.

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

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

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

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

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

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

⁸³ *Id.* at 229 & 233-234.

⁸⁴ *Id.* at 242.

⁸⁵ *Id.* at 245, ¶164 (citing: “[s]ince the Arbitral Tribunal finds that Professor A did contribute to Respondent the know-how which Respondent expected from him, and that Respondent used that know-how for the development of the product, the Arbitral Tribunal could abstain from examining the legal theories relied upon Respondent. However, overabundantly, it will briefly summarize them and express its views as to their merits.”).

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

categorized as the use CLM. Neither can be the panel's analysis of EU competition law. Indeed, the latter is considered as mandatory law according to the rules of international arbitration and as a matter of public policy⁸⁷ that "would need to be taken into account even if the substantive law chosen by the parties were not a European national law."⁸⁸

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

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

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

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

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

2. Final Award in Case No. 13730⁹¹

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

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

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

The three-arbitrator panel used the parties’ intent and the applicable Japanese law to analyze the first issue and relied on the opinion of party-appointed legal experts to interpret the relevant provisions of the applicable law. In this framework, the panel entered into a short digression on comparative law⁹⁴ before entering into a lengthy analysis of Japanese case law

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

⁹² *Id.*

⁹³ *Id.* at 92.

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

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

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

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

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

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

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

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

3. Final Award in Case No. 13756⁹⁹

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

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

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

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

¹⁰⁰ *Id.* at 266.

¹⁰¹ *Id.* at 273.

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

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

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

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

4. Partial Award in Case No. 13774¹⁰⁷

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

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

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

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

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

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

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

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

To decide on the first issue, the arbitrators used a “well-settled (principle) in international arbitration”¹⁰⁹—and referred in this regard to a previous ICC award¹¹⁰—to support their argument that under the *Kompetenz-Kompetenz* principle, arbitrators have the power to decide on their own jurisdiction. This principle supported the panel’s determination that although the ICC court of arbitration could be satisfied that a *prima facie* valid arbitration agreement existed,¹¹¹ it was in the panel’s power to decide on its own jurisdiction (i.e., to determine the validity of the arbitration clause). This recourse to a previous ICC award concurs with Vadi’s qualification of the use of CLM.¹¹²

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

¹⁰⁹ *Id.* at 292, ¶6.

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

¹¹¹ *Id.* at 291-292, ¶¶5-6.

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

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

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

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

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

¹¹⁶ *Id.* at 294, ¶15.

¹¹⁷ *Id.* at 294-295, ¶¶16-23.

¹¹⁸ *Id.* at 295-296 ¶24.

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

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

To decide on the third issue related to the seat of arbitration in Cairo as "*forum non conveniens*," the panel referred to the related common law doctrine¹²¹ and used CLM to define it and circumvent its application. Starting from the origins of the doctrine in Scotland and its acceptance by other common law countries,¹²² the panel moved on to an analysis of the interpretation of the concept by scholars¹²³ to an illustration of the doctrine by US and UK case law¹²⁴ to determine that the latter could be applied to really "extreme situations."¹²⁵ Analyzing that such was not the case, the panel rejected the argument. Here as well, the panel's use of CLM relates to Gaillard's assessment mentioned above, according to which the use of CLM is qualified when the applicable law is not set forth in the contract and "comparative law analysis tends to continue up to the very end of the arbitration."¹²⁶

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

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

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

¹²² *Id.* at 299, ¶42.

¹²³ *Id.* at 300, ¶¶44-45.

¹²⁴ *Id.* at 299-300, ¶¶42-43, 46-47.

¹²⁵ *Id.* at 300, ¶45.

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

¹²⁷ See *supra* Table 1.

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

C. ICSID Arbitration

The explosion of bilateral investment treaties or BITs in the latter part of the 20th century and the entry into force of the Washington or ICSID Convention¹²⁸ contributed to the creation of a new legal framework that affords disgruntled investors a few additional alternatives and meaningful avenues for obtaining redress.¹²⁹ These alternatives include submitting the investment claims to an arbitration that, in essence, is very much like international arbitration. However, ICSID awards are directly enforceable in states that have ratified the Washington Convention, without recourse to national courts. This crucial feature of ICSID arbitration is likely responsible for the sharp increase in investor-state arbitration and one that clearly distinguishes the Washington Convention from the New York Convention.¹³⁰ Another important feature of the Washington Convention, and one that makes this study possible, is the fact that neither the conventions nor the ICSID Arbitration Rules impose any confidentiality requirements.¹³¹ ICSID awards are publicly available on the Centre's website,¹³² thereby making ICSID arbitration cases much more accessible than, for instance, commercial arbitration cases subject to strict confidentiality clauses.

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

¹²⁹ See Redfern and Hunter, note 88 *supra* at 444, ¶18.10 (reporting the number of BITs in the world went from 385 to 2,926 in a little less than 25 years according to the United Nations Conference on Trade and Development (UNCTAD)).

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

¹³¹ See <https://icsid.worldbank.org/en/Pages/process/Confidentiality-and-Transparency.aspx#>

¹³² See <https://icsid.worldbank.org/en/Pages/cases/searchcases.aspx>

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

1. *Tenaris v. Venezuela*

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

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

¹³³ See *Tenaris v. Venezuela*, ICSID Case No. ARB/11/26, Award, 29 January 2016.

¹³⁴ *Id.* at 40, 42, ¶¶ 114, 120.

¹³⁵ *Id.* at 79, 42, ¶226.

¹³⁶ *Id.* at 47, ¶135.

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

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

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

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

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

¹⁴⁰ *Id.* at 58-60; ¶¶155-61.

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

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

2. *Santa Elena v. Costa Rica*¹⁴⁶

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

¹⁴² *Id.* at 60, ¶163.

¹⁴³ *Id.* at 62, ¶169.

¹⁴⁴ *Id.* at 62-63, ¶171.

¹⁴⁵ *Id.* at 79-80, ¶¶226-27.

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

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

¹⁴⁸ *Id.* at 193.

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

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

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

¹⁴⁹ *Id.* at 193, ¶75.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 193, ¶77.

¹⁵² *Id.* at 194, FN 36.

¹⁵³ *Id.* at 195, ¶78.

¹⁵⁴ *Id.* at 195, ¶85.

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

parties' proposed valuation figures (\$1,900,000 for the Respondent and \$6,400,000 for the Claimant),¹⁵⁶ the tribunal proceeded, in one of the most controversial valuation cases in ICSID history, to "split the baby" evenly between the parties and fixed the valuation amount at \$4,150,000.¹⁵⁷

3. *TECMED v. Mexico*¹⁵⁸

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

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

¹⁵⁶ *Id.* at 199, ¶93.

¹⁵⁷ *Id.* at 199-200, ¶95.

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

¹⁵⁹ *Id.* at 15, ¶54.

¹⁶⁰ *Id.* at 16, ¶55.

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

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

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

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

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

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

¹⁶² See *TECMED*, *supra* note 158 at 16, ¶155, FN 7 (citing to the *Mondev v. United States*, Award, ICSID Case No. ARB(AF)/99/2, 11 October 2002, at 14, ¶143).

¹⁶³ *Id.* at 21, ¶163.

¹⁶⁴ See *Mondev v. United States*, Award, ICSID Case No. ARB(AF)/99/2, 11 October 2002, at p. 23, ¶170 (cited in *TECMED v. Mexico*, Case No. ARB (AF)/00/2, Award 29 May 2013, pp. 22-23, ¶166, FN 35).

¹⁶⁵ See *TECMED*, *supra* note 158 at 23, ¶166.

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

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

“qu’il est de principe que déjà avec la signature d’un Traité et avant sa mise en vigueur, il existe pour les parties contractantes une obligation de ne rien faire qui puisse nuire au Traité en diminuant la portée de ses clauses.

Qu’il est intéressant de faire observer que ce principe –lequel en somme n’est qu’une manifestation de la bonne foi qui est la base de toute loi et de toute convention – a reçu un certain nombre d’applications...”¹⁶⁸

4. *Pluspetrol v. Perupetro*¹⁶⁹

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

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

¹⁶⁷ *Id.* at 23, ¶68.

¹⁶⁸ *Id.* at 23, ¶68.

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

¹⁷⁰ *Id.* at 74, ¶¶218-20.

¹⁷¹ *Id.* at 4, ¶11.

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

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

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

V. CONCLUSIONS

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

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

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