International Arbitration as Comparative Law in Action

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The idea of "comparative law in action" seems nonsensical given the sterile and academic reputation of comparative law as a discipline. This Article argues that comparative law in action does not merely exist, it thrives in the field of international commercial arbitration ("ICA"). Comparative law methods pervade every stage of an international arbitration and are indispensable to ICA practice.

For many aspects of international arbitral proceedings, multiple laws conceivably apply. With no default options, the parties must make numerous choices: there is "too much law." For other aspects of ICA, there is "too little law": no applicable body of law provides any legal rule binding the parties or the arbitral tribunal, which must instead determine or develop the governing legal regime anew for each arbitration. In both situations—too much law and too little—comparative law methods are essential. Moreover, even if arbitrators and counsel were not constrained to think comparatively, the professional context within which they work would ensure that comparativism remains central to ICA practice.

The Article concludes by considering the implications of international arbitration as comparative law in action, for comparative law as a discipline and for the development of transnational law in the Twenty–First Century.

I. INTRODUCTION

It is hard to know whom to credit for the insight that "international arbitration is comparative law in action." I first heard the phrase in 2012 when I interviewed the late Pierre Lalive, one of the fathers of the field.[1] In the interview, he attributed it to Andreas Lowenfeld, another leading arbitrator of the elder generation, but I have never been able to track down a published source. Karrer also used the phrase in his treatise on international arbitration practice.[2] Whatever its provenance, the concept stuck in my mind; it has intrigued me but also bothered me.

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1. JOSHUA KARTON, THE CULTURE OF INTERNATIONAL ARBITRATION AND THE EVOLUTION OF CONTRACT LAW (2013) (excerpts from the interview were presented anonymously, but since Professor Lalive has since passed away, I feel comfortable using his name in association with this general observation).

2. PIERRE KARRER, INTRODUCTION TO INTERNATIONAL ARBITRATION PRACTICE 18 (2014).

It seems odd or incorrect to speak of comparative law *in action*. Comparative law is not itself a field of substantive or procedural law, so it seems nonsensical to think of comparative law as being put into action. When Roscoe Pound coined the phrase "law in action,"[3] he emphasized the way law actually operates in people's lives—what we would now call their lived experience of the law. How can one speak of a "lived experience" of comparative law?

In this Article, I argue that comparative law in action not only exists; it is *thriving*. The field is international arbitration, and the experience of it—for counsel, arbitrators, and arbitrants—is innately and pervasively comparative. This Article attempts to make three key contributions. First, it makes a doctrinal contribution by charting the myriad of ways that comparative law methods are implicated in arbitration practice. Second, it makes a socio–legal contribution by explaining the pervasiveness of comparative law methods by reference to the professional context within which international arbitration is practiced. Finally, it makes a theoretical contribution by setting out the implications of comparative–law–in–action, both for comparative law as a discipline and for the evolution of transnational law.

Before I outline this Article further, a few points must be raised about its limits. I will not discuss international arbitration as a subject of comparative law study. There is much to say about the field from a comparative perspective—comparing states' legislative regimes regulating arbitrations, for example, or comparing arbitral processes with other forms of dispute resolution like litigation—but these do not concern law *in action*.[4] I will also not discuss the uses of comparative law methods in drafting or reforming arbitration legislation or rules of procedure—the way that comparative law is most often operationalized. In addition, I will focus on international commercial arbitration ("ICA"), and not on investor–state arbitrations governed by public international law. Many of the observations made here could apply to investor–state arbitrations as well,[5] but the line must be drawn somewhere. Primarily, I will focus on comparative law methods and mentalities from an internal perspective, within the international arbitration system, through the life cycle of an international arbitral proceeding.

Comparative law's central role in ICA—and ICA's value as a subject of comparative law study—has been recognized since the early years of the field's modern development. As David, the great French comparativist and arbitrator, observed in 1959, the year after the *New York Convention*[6] was signed and the year it entered into force:

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3. Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12 (1910).

4. All treatises on ICA—and most articles on specific aspects of ICA law and practice—contain a significant comparative element, and numerous explicitly comparative tomes exist. *See generally* JULIAN D.M. LEW, LOUKAS A. MISTELIS, & STEFAN M. KRÖLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION (2003); JEAN–FRANÇOIS POUDRET & SÉBASTIEN BESSON, COMPARATIVE LAW OF INTERNATIONAL ARBITRATION (Stephen V. Berti & Annette Ponti trans., 2d ed. 2007).

5. *See, e.g.*, Valentina Vadi, *Critical Comparisons: The Role of Comparative Law in Investment Treaty Arbitrations*, 39 DENV. J. INT'L. L. & POL'Y 57, 100 (2010) (arguing that the practice of investment treaty arbitration involves extensive use of comparative law methods).

6. Formally known as the U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958. The New York Convention is the key document of the modern ICA system, which it helped to usher in. Its role and importance will be discussed at various points throughout this Article. *See* René David, *Arbitrage et Droit Comparé*, 11(1) REVUE INTERNATIONALE DE DROIT COMPARE [R.I.D.C.] 5 (1959) (Fr.) (*Arbitration and Comparative Law*).

> The current spread of arbitration and the international character of its development give particular interest to the study of arbitration in comparative law. The import of this study is at once theoretical and practical[:] . . . we will show, with regard to the study of arbitration, the truly indispensable character of comparative law studies, and [also] showcase the variety of potential applications of these studies.[7]

As will be seen, comparativism is pervasive in international arbitrations. Comparative law methods are employed at every stage, even where the circumstances do not require a comparative analysis or assessment. Comparative law goes beyond merely a method of deriving rules; it constitutes an ethos of the field, a core aspect of its professional culture. That is, comparative law is not just something that is *used* in international commercial arbitrations; it is an essential constituent of the field.[8]

The remainder of this Article proceeds in four parts. Sections II and III describe what I call the twin phenomena of too much law and too little law in ICA. For many aspects of an international arbitration, a multiplicity of laws might apply, and either the parties or the arbitral tribunal must make a choice (and sometimes resolve conflicts between two or more laws that have some claim to govern the issue). At the same time, a huge range of issues arises in arbitrations for which there is no legal rule on point, and either the parties must agree to one or the tribunal must craft one. Both of these circumstances—too much law and too little—demand a comparative law analysis in order to identify a rule that will, in turn, determine the issue. Section IV describes the professional context within which ICA is practiced and explains how this context embeds comparativism as a core value of ICA. Through self–selection and acculturation, ICA practitioners are comparativists both in their brains and in their hearts. Finally, Section V, the Conclusion, briefly discusses the implications of international–arbitration–as–comparative–law–in–action for the discipline of comparative law and for transnational law more generally.

II. ICA AND "TOO MUCH LAW"

Arbitration is as old as human societies,[9] and international arbitration is not much younger—arbitrations among the Greek city–states are described in

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7. *Id*. at 5 (original text in French: "*La diffusion actuelle de l'arbitrage et le caractère international que revêt le développement de cette institution donnent un intérêt particulier à l'étude de l'arbitrage en droit comparé. L'intérêt de cette étude est à la fois d'ordre théorique et d'ordre pratique: nous nous proposons dans cette conférence de montrer, à propos de cette matière de l'arbitrage, le caractère vraiment indispensable des études de droit comparé, et de mettre en valeur la variété des applications de ces études.*").

8. I make no claim that the phenomenon of comparative law in action is unique to ICA. All transnational legal practice necessarily involves comparativism, as Glenn notes: "For transnational legal practice, comparative legal thought is therefore possible. Comparative legal practice, pace the traditional teachings of comparative law, therefore exists in the world." H. Patrick Glenn, *Comparative Law and Legal Practice: On Removing the Borders*, 75 TUL. L. REV. 977, 985 (2001). However, comparative law reaches its greatest practical extent in the processes and decisions of international arbitral tribunals.

9. Its prevalence across ancient societies is rooted in the status of "town elders" as resolvers of disputes from before the time humans first gathered into permanent settlements. *See* David W. Rivkin, *Towards a New Paradigm in International Arbitration: The Town Elder Model Revisited*, 24 ARB. INT'L

Thucydides' *History of the Peloponnesian War*.[10] International *commercial* arbitration, however, arose in the first era of globalization, before World War I, and did not take on its modern form until the 1950s.[11] It arose as a legal response to social and economic globalization, generated by pressure from the business community for a dispute resolution method that was effective, neutral, efficient, and perhaps most important, globally enforceable. Although international arbitrations have public consequences, like enforceability in court, ICA is a private system of dispute resolution.[12] It is private not only in the sense that arbitrators are private citizens, but also in that the whole ICA system was developed, and continues to evolve, as an adjunct to the commercial system rather than the legal system.

As Holtzmann, a leading figure in the rise of ICA in the mid–Twentieth Century, wrote: "aiding commerce is the *raison d'etre* of international *commercial* arbitration."[13] Lord Mustill, an English House of Lords judge and leading arbitrator, went a step further, stating that "[c]ommercial arbitration exists for one purpose only: to serve the commercial man. If it fails in this, it is unworthy of serious study."[14] The entire system of arbitration therefore takes on the characteristics of a commercial relationship: freedom of choice, exercised to promote efficacy of the business deal while maintaining efficiency and predictability.[15]

A. Preliminary Choices

All international commercial arbitrations begin with some kind of commercial relationship, normally embodied in a contract, that yields a dispute.[16] The parties must affirmatively agree to arbitrate, either in advance in their contract or after a dispute arises.[17] Arbitration is a creature of consent, and party autonomy is its

375 (2008) ("When arbitration began, a town elder would simply listen to both sides of the dispute and issue his decision.").

10. *See* W.L. Westermann, *Interstate Arbitration in Antiquity*, 2 THE CLASSICAL J. 197 (1907) ("Of recent years there has been much discussion of the history and possibilities of international arbitration."). For a history of international arbitration from the middle ages to the inter–war period, see Henry S. Fraser, *Sketch of the History of International Arbitration*, 11 CORNELL L. REV. 179 (1926).

11. GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 97–98 (2d ed. 2014).

12. *See, e.g.*, W. Laurence Craig, *The Arbitrator's Mission and the Application of Law in International Commercial Arbitration*, 21 AM. REV. INT'L ARB. 243, 243 (2010) ("It is a trite observation that arbitration is a hybrid institution. On the one hand, its origin is contractually based on an agreement between the parties to appoint a third party to resolve any potential dispute between them. On the other hand, the law endows the arbitrator with jurisdictional powers to give his decision the force of law and the attribute of enforceability before the courts, both domestically and internationally.").

13. Howard M. Holtzmann, *Centripetal and Centrifugal Forces in Modern Arbitration*, 65 ARB. INT'L 302, 302 (1999) (observing that international commercial arbitration's commercial character is just as important as its international and arbitral character, but that it receives less attention).

14. Michael Mustill, *The New Lex Mercatoria: The First Twenty–Five Years*, 4 ARB. INT'L 86, 86 (1988), https://www.trans-lex.org/126900.

15. Kenneth S. Carlston, *Theory of the Arbitration Process*, 17 L. & CONTEMP. PROBS. 631, 635 (1952) ("[A]rbitration is an allowable extension of the sphere of contract.").

16. The conclusion of an international contract in itself requires a degree of not just cross–border but also cross–cultural exchange. *See* Judd Epstein, *The Use of Comparative Law in International Commercial Arbitration and Mediation*, 75 TUL. L. REV. 913, 920–21 (2001) ("In order for a contract to be reached in the first instance, persons from different states and different cultures must have had enough in common to be able to negotiate the contract.").

17. Kenneth S. Carlston, *Theory of the Arbitration Process*, 17 LAW & CONTEMP. PROBS. 631, 635 (1952) (noting that party consent has long been seen as core to arbitration).

watchword.[18] The arbitration agreement is said to have both positive and negative effects. Its positive effect is to endow the arbitrator or arbitrators—who are otherwise ordinary private citizens—with the power to issue a decision binding upon the parties, while its negative effect is to oust the jurisdiction of any state courts that would otherwise have jurisdiction over the dispute.[19] If a dispute is raised in court and the parties have entered into a valid arbitration agreement, the court must dismiss the litigation, or at least stay it pending completion of the arbitral process.[20] If there are questions about the arbitrators' jurisdiction, the arbitrators themselves must have the first opportunity to rule on their own jurisdiction.[21] Thanks to the *New York Convention*, often called the most successful of all commercial law treaties, virtually every state has committed itself to these principles.[22]

Thus, we have the first dimension of comparison: the parties must choose arbitration instead of litigation.[23] In order to make such a choice in an informed manner, the parties must engage in a comparative law analysis that goes beyond blackletter rules to consider how litigation operates in any state whose courts might have jurisdiction over a dispute between them. Some relevant considerations include whether the judiciary is neutral and independent, whether the procedures are fair to foreign litigants, how much litigation costs, and how long the process takes. Given the vast impact the method of dispute resolution can have, a lawyer who fails to make at least a quick–and–dirty comparison of the relative merits of litigation and arbitration for the particular transaction fails in their duty to their client.[24]

The arbitration may be managed only by the parties and their tribunal, which is called an *ad hoc* arbitration, but it is more common for arbitrations to be administered by an arbitral institution.[25] These may be for–profit entities, such as

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18. See the encomia to the party autonomy principle collected in KARTON, *supra* note 1, at 78–79.

19. BORN, *supra* note 11, at 1253.

20. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. II (3), June 10, 1958, 330 U.N.T.S. 38 (1958).

21. This is known as the competence–competence principle and is recognized in all modern arbitration legislation. *See, e.g.*, United Nations Comm'n on Int'l Trade Law, UNCITRAL Model Law on Int'l Commercial Arbitration, art. 16., U.N. Doc. A140117 (1985) (amended 2006), http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/ 1985Model_arbitration_status.html.

22. *Status: Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the "New York Convention")*, UNITED NATIONS COMM'N ON INT'L TRADE LAW (2020), https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2.

23. Arbitration can be combined with consensual methods of dispute resolution like mediation, but arbitration and litigation are mutually exclusive. *See* Glenn, *supra* note 8, at 998 ("There is comparison first of all between arbitration as a process and the various national processes of litigation."). A vast body of literature exists describing when and why parties choose or ought to choose litigation or arbitration.

24. *Cf.* Michael Pryles, *Assessing Dispute Resolution Procedures*, 7 AM. REV. INT'L ARB. 267, 268 (1996) ("Not long ago it was remarked that a lawyer may be negligent if he or she fails to advise a client of the possibilities of dispute resolution other than litigation. In my view, a lawyer drafting an agreement, particularly an international contract, may also be derelict if he or she does not advise of the inclusion in the agreement of an appropriate dispute resolution provision."); *see* GARY B. BORN, INTERNATIONAL ARBITRATION AND FORUM SELECTION AGREEMENTS: DRAFTING AND ENFORCING 64–79 (5th ed. 2016) (on the importance of choosing a seat and the factors that may lead parties to choose among seats).

25. *2015 International Arbitration Survey: Improvements & Innovations in International Arbitration*, QUEEN MARY UNIV. OF LONDON 17 (2015), http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2015_International_Arbitration_Survey.pdf (showing that roughly eighty percent of all international commercial arbitrations are administered by an institution); BORN, *supra* note 24, at 60 (suggesting that

JAMS,[26] but more often they are non–profits associated with chambers of commerce.[27] Each arbitral institution promulgates its own rules of procedure to govern the arbitral proceedings it administers, and each institution has other particular features, such as scrutiny of awards before they are sent to the parties or internal tribunals for resolving challenges to arbitrators for conflicts of interest. Parties will compare the rules promulgated by the different institutions, the services they provide, the administrative fees they charge, and other factors.

If, on the other hand, the parties opt for *ad hoc* arbitration, so that no institutional rules of procedure will apply, they may choose each aspect of the procedural rules themselves or delegate some or all of those choices to their tribunal.[28] Often, they will adopt a set of procedural rules promulgated by the United Nations Commission on International Trade Law ("UNCITRAL"). The UNCITRAL Arbitration Rules are specifically designed for use in *ad hoc* arbitrations.[29]

All arbitrations must have a "seat." This is the arbitration's legal venue, which need not be the place where any oral hearings are held or where the arbitrators deliberate. The seat must be some legal jurisdiction, either a country or sub–national unit.[30] The courts of the seat have a range of supervisory powers over arbitrations conducted in the jurisdiction, most importantly the power to annul awards issued there (called vacatur in the U.S. and "setting aside" in many jurisdictions).[31] In addition, the arbitration legislation of the seat, called the *lex arbitri*, applies to arbitrations seated there. Every state (and for federal states, each sub–unit[32]) has some kind of arbitration legislation in force. Sometimes these statutes apply to both domestic and international arbitrations, and sometimes separate legislation applies to each. Many are verbatim adoptions of, or at least based on, the UNCITRAL Model Law on International Commercial Arbitration, an international uniform law that now serves as the model for legislation in eighty states and represents a kind of international mainstream.[33] Examples of important

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ad hoc arbitration "ordinarily is advisable only where a dispute has already arisen and it is clear that all parties are prepared to proceed cooperatively with an arbitration.").

26. THE JAMS NAME: WHAT DOES JAMS STAND FOR?, JAMS, https://www.jamsadr.com/about-the-jams-name/ (last visited Feb. 25, 2020) (JAMS was originally an acronym for "Judicial Arbitration and Mediation Services" but is now the name of the company in itself and a registered trademark).

27. This underlines the private, commercial character of arbitration. KARTON, *supra* note 1, at 108–09. Dezalay and Garth observe that the location of many arbitral institutions within chambers of commerce means that ICA benefits from a "double sponsorship"—that of the world of business and that of the world of "learned jurists." YVES DEZALAY & BRYANT GARTH, DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER 45 (1996).

28. BORN, s*upra* note 11, at 168–69.

29. UNCITRAL ARBITRATION RULES (2013), https://uncitral.un.org/en/texts/arbitration/contractualtexts/arbitration.

30. BORN, s*upra* note 11, at 206.

31. *Id.* at 206–07.

32. *Id.* at 161. The U.S. is an outlier among federal states for regulating international arbitration at the federal level. In most other federal states in the common law world, such as Canada, Australia, and the U.K., arbitration (domestic and international) is regulated primarily at the sub–national level.

33. If one includes sub–national units, the UNCITRAL Model Law is in force in 111 jurisdictions. Eight U.S. states have adopted legislation based on it. *See Status: UNCITRAL Model Law on International Commercial Arbitration (1985), with Amendments as Adopted in 2006*, UNCITRAL, https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status (last visited Mar. 20, 2020).

arbitration seats that have adopted the Model Law are Singapore, Germany, and Hong Kong.[34] On the other hand, some states have enacted or maintained older laws that differ quite markedly from the laws of other states. These include some of the most frequently chosen seats, such as England, France, and the U.S.

In addition to the seat's arbitration legislation, which becomes the *lex arbitri* for all arbitrations seated in that jurisdiction, other laws of the seat may also be relevant. For example, each state may impose its own rules on what is generally called arbitrability,[35] the notion that certain types of disputes may not be resolved by private arbitration.[36] Thus, all jurisdictions prohibit arbitration of matters involving core exercises of government power like criminal culpability or tax liability, and some jurisdictions prohibit arbitration of categories of disputes they reserve for the courts for cultural or policy reasons, such as divorce and custody disputes, consumer disputes, or intellectual property disputes.[37]

Parties have near–total freedom to choose the seat of their arbitration, which means that they have total freedom to choose which jurisdiction's law will become the *lex arbitri* and which jurisdiction's courts will have the exclusive power to annul any award issued by the tribunal. Parties will make a critical assessment of different seats, not only with regard to the features of their arbitration legislation, but also the efficiency and reliability of their courts, the availability of local counsel with expertise in international arbitration law, and any mandatory laws that might make an arbitral award hard to enforce in that jurisdiction—the whole legal ecosystem.[38] If the parties fail to choose a seat, either the administering institution or the tribunal must choose. In practice, the tribunal will choose a seat that will vindicate the parties' presumptive desire for modern, predictable laws, reliable courts, and other factors such as cultural affinity.[39]

Although the choice of seat has important consequences, it would be wrong to confuse an arbitral seat with a litigation forum. Choosing a seat determines much less, due to the phenomenon called "delocalization." Unlike a court, an international arbitral tribunal has no *lex fori*, substantive or procedural.[40] The civil procedure and court rules of the seat, or of any other national jurisdiction, are entirely irrelevant (unless the parties make the rare and ill–advised choice to hold

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34. *Id.*

35. This is the meaning of "arbitrability" adopted in most jurisdictions. Confusingly, many U.S. courts use the term "arbitrability" to refer to any legal matter that relates to the validity of the arbitration agreement or jurisdiction of the tribunal, rather than to the narrower concept of suitability of the subject matter of the dispute for arbitration. *See, e.g.*, George A. Bermann, *The "Gateway" Problem in International Commercial Arbitration*, 37 YALE J. INT'L L. 1, 10–13 (2012) (seeking to dispel the "serious confusion" that surrounds the term "arbitrability").

36. Under Articles II(a) and V(2)(a) of the New York Convention, state courts may refuse to enforce arbitration agreements and arbitral awards if the dispute relates to subject matter that is not "capable of settlement by arbitration." *See* Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *supra* note 20, at art. II (1).

37. *See generally* ARBITRABILITY: INTERNATIONAL AND COMPARATIVE PERSPECTIVES 4 (Loukas A. Mistelis & Stavros L. Brekoulakis eds., 2009).

38. As Gaillard notes, it is "no longer conceivable" for a lawyer to properly advise a client on the choice of seat without engaging in a comparative law analysis. Emmanuel Gaillard, *The Use of Comparative Law in International Commercial Arbitration*, 55 ARB. 263, 263 (1989).

39. BORN, *supra* note 11, at 2100–01.

40. Insurer (U.S.) v. Manufacturer (Italy), Interim Award, ICC Case No. 11333 (2002), 31 Y.B. Comm. Arb. 117, 119–20 (2006).

their proceedings according to some state's civil procedure rules).[41] Further, the governing substantive law need not be that of the seat, and hearings or tribunal deliberations may be held anywhere in the world.[42]

B. Choices of Law and Choices About Law

Parties are also free to choose any substantive law to govern their dispute. This is the step in the process most similar to the classical understanding of comparative law activities.[43] The most advantageous choice of law depends on the particulars of the parties' transaction and their dispute. "For example, does it involve a contract for sale or for purchase? Does the concerned party have a greater chance of finding himself in the position of plaintiff or defendant? . . . It is here, perhaps, where comparative law is potentially most useful."[44]

It must be acknowledged that, in practice, many parties do not engage in a detailed comparative law exercise to determine the law most suitable for their transaction. Often, they default to a familiar law, either their own national law or one of a well–known arbitral seat.[45] Nevertheless, they may, and sometimes do, consider all kinds of comparisons between different national laws and non–national rules of law.

Moreover, the parties are free to choose a *different* contract law to govern their arbitration agreement, even if that agreement is embedded in a commercial contract (i.e., one law to determine the contract's validity, the meaning of its substantive obligations, and to provide default rules, and another to determine the validity and meaning of their arbitration agreement). Here, too, the parties must engage in some kind of comparative assessment to make a well–founded choice.

If the parties do not choose a governing law, a choice must be made once the dispute arises—typically by the tribunal. Until the governing law is identified, the parties cannot settle on their litigation strategy without conducting an in–depth comparative analysis.[46] Moreover, unless the arbitrators render an interim decision specifying the governing law, the parties must continue to argue their cases comparatively across multiple laws up through the end of the arbitration. Writes Gaillard:

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41. The application of domestic rules of civil procedure is strongly disfavored in ICA because they "have been promulgated exclusively for the regulation of litigation proceedings, reflecting features and objectives of the forum state." Soterios Loizou, *Revisiting the "Content–of–Laws" Enquiry in International Arbitration*, 78 LA. L. REV. 811, 831 (2018) (citing several commentators, who are unanimous on the inappropriateness of national rules of civil procedure for use in arbitrations). *See also* KARTON, *supra* note 1, 140–41 (observing that party choice of national rules of civil procedure is one of the few circumstances where arbitrators are likely to push back against the parties' mutually–expressed preference on a matter of procedure).

42. BORN, *supra* note 11, at 211.

43. Gary F. Bell, THE CAMBRIDGE COMPANION TO INTERNATIONAL ARBITRATION 5 (Chin Leng Lim ed., 2020).

44. Gaillard, *supra* note 38, at 265.

45. Gilles Cuniberti, *The International Market for Contracts: The Most Attractive Contract Laws*, 34 NW. J. INT'L L. & BUS. 455, 473–74 (2014) (surveying more than 4,400 international contracts that contained ICC arbitration clauses to determine which national laws contracting parties tend to prefer, and determining that in most cases the parties choose one of five well–established laws: those of England, Switzerland, New York, France, and Germany).

46. Gaillard, *supra* note 38, at 279.

> In practice, the arbitrators are often reluctant to choose the applicable law in advance without first analyzing the consequences this choice could have on the outcome of the litigation. . . . [I]n most instances the pleadings must reflect all of the potentially applicable laws.[47]

When the tribunal determines the governing law, this too requires a threshold comparative analysis. Under most rules of procedure, arbitrators have the power to choose the law directly, so–called *voie directe* ("direct route"), without even having to identify a choice of law rule.[48] Under other rules of procedure, arbitrators may select whatever they consider to be the most appropriate choice of law rule, then apply the law yielded by application of that rule ("indirect route").[49] Arbitrators will consider the consequences of different governing laws for the parties, such as whether the law would render the arbitration agreement invalid, thereby frustrating the parties' intention to arbitrate, or whether the law is particularly well–developed in the relevant area, like English law with respect to shipping goods. In addition to an understanding of the legal issues implicated by the dispute, comparative law knowledge that is both wide and deep is required to make a good decision.[50]

If the parties disagree on the governing law, perhaps each arguing for application of its own national law, tribunals will often consider both proposed laws. For example, in an arbitration between German and French parties,[51] the tribunal held unanimously that French law governed the dispute.[52] Nevertheless, it held that it "may not ignore the provisions of German law, as the arbitral clause was concluded by officers of a German company."[53] As discussed below, such references are best understood as a function of arbitrators' desire to make the outcome acceptable to even the losing party.[54] Comparative law "provides the means to do justice to all legal systems involved."[55]

In some cases, comparative analysis will be forced on the tribunal by the parties' choice to be governed by the cumulative or concurrent application of more than one law. Such a choice is sometimes the product of an awkward compromise, especially when state entities are involved and insist on application of their own laws. In the multiparty *Eurotunnel* arbitration, the parties included the English and French governments, and the relevant choice of law provision called for cumulative

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47. *Id*.

48. For example, Article 21(3) of the Rules of Arbitration of the International Chamber of Commerce (the "ICC Rules") provides that "[t]he parties shall be free to agree upon the rules of law to be applied by the arbitral tribunal to the merits of the dispute. In the absence of any such agreement, the arbitral tribunal shall apply the rules of law which it determines to be appropriate."

49. *See, e.g.*, *UNCITRAL Model Law on International Commercial Arbitration*, supra note 21, at art. 28(2) ("Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.").

50. *See generally* BENJAMIN HAYWARD, CONFLICT OF LAWS AND ARBITRAL DISCRETION 12 (2017) (canvassing the legal requirements and actual practices of ICA tribunals with respect to choice of the governing substantive law and arguing that in most cases arbitrators choose the law of the state they see as most closely connected to the parties and their transaction).

51. ICC Case No. 6850 of 1992, 23 Y.B. COMM. ARB. 37, at 78 (1998).

52. *Id*. at ¶ 8.

53. *Id*.

54. *See infra* text accompanying notes 138–11.

55. Klaus Peter Berger, *International Arbitral Practice and the UNIDROIT Principles of International Commercial Contracts*, 46 AM. J. COMP. L. 129, 131 (1998).

application of English and French law.[56] Cumulative application of multiple laws requires tribunals to apply both laws to the extent that they coincide. For this reason, cumulative application is sometimes called *tronc commun*, meaning the shared "trunk" of the laws is applied, and the areas where they branch away from each other disregarded.[57]

The identification or selection of the governing law must be distinguished from the ascertainment of that law's content. In ordinary litigation, or even in domestic arbitrations, the parties may disagree on the content of the law but will at least follow the same means for ascertaining that law. Namely, the sources of law accepted as authoritative in the jurisdiction and the prevailing rules of interpretation needed to apply those sources of law to the parties' case. In ICA, even the process of determining how to ascertain the content of the law is contested and uncertain.[58]

In comparison with the conflict–of–laws inquiry, the *content*–of–laws inquiry, though often neglected, can be equally decisive. Its importance is highlighted by an example proposed by Loizou:

> Party A and Party B entered into an international agreement for the distribution of heart rate monitors in Ruritania. The distribution agreement contained an arbitration clause for the resolution of all disputes arising from or in connection with the agreement. Following the unilateral termination of the contract by B, A filed a motion to initiate arbitral proceedings for breach of the distribution agreement. Both A and B made legal submissions on contract law grounds.
>
> This theoretical example raises a series of content–of–laws–related questions: who bears the burden of establishing the content of the applicable rules? Does it fall on the parties or the arbitral tribunal? Is the tribunal limited by the arguments of the parties? Should it look beyond the submissions of the latter? What should the tribunal do if the parties have overlooked any relevant rules? Particularly under this latter scenario, what is the effect of any overriding mandatory rules on goodwill indemnity on the law applicable to the dispute? Depending on the approach adopted

56. The Channel Tunnel Grp. Ltd. v. United Kingdom of Great Britain and Northern Ireland, PCA Case No. 2003–06, ¶ 1 (Jan. 30, 2017).

57. *See generally* Bernard Ancel, *The Tronc Commun Doctrine: Logic and Experience in International Arbitration*, 7 J. INT'L ARB. 3 (1990). To fill the gaps left when the cumulatively applied laws do not clearly agree with each other or cannot be interpreted harmoniously, tribunals often reach for general principles of international commercial law. See *infra*, Section III(B).

58. Mohamed S. Abdel Wahab, *Ascertaining the Content of the Applicable Law in International Arbitration: Converging Civil and Common Law Approaches*, 83 INT'L. J. ARB., MEDIATION & DISP. MGMT. 412 (2017) (asserting that "uncertainty reigns with respect to the limits and boundaries of ascertaining and applying the contents of the *lex causae*."). The best analogue in national court litigation to the state of affairs in ICA arises when litigation is governed by a foreign law. State laws on proof of the content of foreign law vary widely and, in many jurisdictions, are as contested and uncertain as they are in ICA. *See, e.g.*, Rainer Hausmann, *Pleading and Proof of Foreign Law: A Comparative Analysis*, 1 EUR. LEG. FORUM I–1, I–1 (2008) (surveying the rules on pleading of proof of foreign law across European common and civil law jurisdictions). In ICA, since arbitral tribunals have no *lex fori*, any governing law is "foreign."

> to the content–of–laws enquiry, the outcome of this dispute could vary significantly.[59]

It is unusual for national laws to address the role of arbitrators in ascertaining the content of the governing law. In a few states, though, legislation or case law binds tribunals seated in those jurisdictions.[60] In Switzerland, for example, the Swiss Federal Tribunal has held that the *iura novit curia* principle applies to international arbitrations seated in Switzerland, so that tribunals have both the power and duty to ascertain the content of the law themselves.[61] Other states' laws mention the content–of–laws issue but merely flag it as something that must be considered. The English *Arbitration Act 1996* expressly empowers tribunals to determine "whether and to what extent the tribunal should itself take the initiative in ascertaining the facts and the law."[62] Thus, a comparative law analysis is required in order to determine whether the arbitrators may themselves ascertain the content of the law, or whether it is instead part of the parties' evidentiary burden.

In practice, even if the seat of arbitration mandates a *iura novit curia* approach, international arbitral proceedings often involve extensive pleadings, including written and oral submissions and expert reports, on the content of the governing law. After all, arbitrators are frequently called upon to apply laws with which they are unfamiliar. They may also lack the language skills to read that law's sources in their original language, so they will depend on counsel and expert witnesses for a double translation, both linguistic and legal.[63] Advocates and counsel must therefore unlearn and relearn the law. For counsel, the situation is particularly fraught, as it "involves walking the tightrope between disabusing the arbitrators from some of their preconceived notions of the law while appealing to these very notions in other parts of [their] case."[64]

For this reason, far more so than in litigation, advocacy in ICA includes educating the arbitrators about the content of the governing law. No less for counsel than for arbitrators, this is an exercise in the rhetorical deployment of comparative law:

> The fundamental task of counsel is to transform these divergent rules, which the arbitrators thus far may have had little or no exposure to, into something that is inherently familiar to them. Analytically, this task breaks into three different components: (i) recasting rules which already seem

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59. Loizou, *supra* note 41, at 814.

60. That is, if the tribunal fails to ascertain the content of the governing law in the prescribed manner, the award may be subject to annulment. Abdel Wahab, *supra* note 58, at 414.

61. Tribunal fédéral [TF] [Federal Supreme Court] Dec. 19, 2001, 4P.114/2001, ASA Bull. 493, 510 (Switz.). However, if the tribunal bases its decision on a statutory provision or other source of law that was not raised during the proceedings or established in the facts, it has a duty to inform the parties so as to permit them an opportunity to comment. Tribunal fédéral [TF] [Federal Supreme Court] Jan. 17, 20003, 4A_538/2012 (Switz.).

62. Arbitration Act, 9 U.S.C. § 34(2)(g) (West 1996). This flexibility is notable, given that England, typical of common law jurisdictions, treats foreign laws as facts—albeit "facts of a peculiar kind." Parkasho v. Singh [1966] P 737 (Eng.).

63. Bell, *supra* note 43, at 11.

64. Frédéric Gilles Sourgens, *Comparative Law as Rhetoric: An Analysis of the use of Comparative Law in International Arbitration*, 8 PEPP. DISP. RES. J. 1, 13 (2007).

> familiar, (ii) explaining rules that are entirely foreign, and (iii) applying these legal concepts to an alien business setting.[65]

Thus, effective advocacy and arbitral decision–making on the merits of international arbitral disputes—in practice, even when not in theory—depends on comparative law thinking.[66] Since all three members of a tribunal are unlikely to be of the same nationality, "the applicable law is not discussed in the abstract, but is more or less consciously compared with the home legal system of the arbitrators."[67] Advocates and arbitrators alike often analogize to laws that are more familiar to them, or (particularly where the governing law is underdeveloped or outdated) to laws from the same legal family that contain modern rules specific to the legal issues that arise in a given case. Such reasoning–by–comparative–analogy is particularly common when the law that governs the merits is based on the legal system of a different state; that other state's laws and judicial interpretations will *prima facie* be the most persuasive to the tribunal. Of course, opposing counsel will have contrary arguments, themselves relying on comparative analogies, that may also prove persuasive.[68]

Complicating this exercise is the fact that ICA tribunals commonly include at least one member from the jurisdiction of the governing law. In such cases, counsel must balance the need to explain the content of the law in such a way as to make it accessible to the arbitrators who are unfamiliar with the need to use language "plausible within the context of the original normative discourse."[69] This comparative law balancing act makes advocacy on the governing law a delicate matter, for which both comparative law skill and ICA–specific advocacy experience are valuable.[70]

C. Choice of Arbitrators

Perhaps the starkest difference between the freedom of arbitration and the relative rigidity of litigation is that the parties may choose their own arbitrators. In most cases, the dispute will be decided by a three–member tribunal, with each party choosing one arbitrator and the two co–arbitrators or the administering institution appointing the chair.[71] A huge number of factors go into the choice of arbitrator, but surveys confirm that one of the main ones is the arbitrator's legal background and training.[72]

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65. *Id.* at 13.

66. *Id.* at 1–2 ("The bulk of the comparative work of an arbitration counsel will go towards finding effective means of persuading a tribunal. It is part of his advocacy tool kit.").

67. Gaillard, *supra* note 38, at 265.

68. S.I. Strong, *Research in International Commercial Arbitration: Special Skills, Special Sources*, 2 AM. REV. INT'L ARB. 119, 147–48 (2009).

69. Sourgens, *supra* note 64, at 16.

70. Strong, *supra* note 68, at 147–48.

71. BORN, *supra* note 11, 1069–70.

72. Specifically, expertise in the governing law was the sixth–most–mentioned factor influencing parties' choice of arbitrator. *2010 International Arbitration Survey: Choices in International Arbitration*, QUEEN MARY UNIV. OF LONDON 30 (2010), http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2010_InternationalArbitrationSurveyReport.pdf.

Most obviously, parties will consider whether the arbitrator is qualified in the governing law, or at least able to make themselves sufficiently familiar with it.[73] But a range of other factors relating to the arbitrators' legal background apply. Are they a civil lawyer who can be expected to rely on notions of good faith? Or an American litigator or English barrister who might take a more literal approach to interpreting the contract and assessing compliance? Do they have training and expertise in the governing substantive law, or similar laws? Are they from a country with a tradition of judicial mediation, and so might be expected to push the parties to settle? What a party wants will depend on the particulars of their case, so the choice must be made anew for each arbitration. These choices require a subtle understanding of varying legal cultures and their likely impacts on a prospective arbitrator's management of the proceedings and decision on the merits.

With respect to the choice of party–appointed arbitrators specifically, arbitrants unsurprisingly seek advantage. As Hunter famously put it, "When I am representing a client in arbitration, what I am really looking for in a party–nominated arbitrator is someone with the maximum predisposition towards my client, but with the minimum appearance of bias."[74] In particular, parties often seek as their party–appointed arbitrator a compatriot who will be familiar with the party's national customs, language, business practices, and laws. Their appointed arbitrator can act as a "legal translator" to ensure that all members of the tribunal, even those who do not share the nationality of the appointing party, at least understand its perspective.[75]

D. Choices in the Final Stages of an Arbitration

At the end of the process, if the losing party does not pay up, the winner must move to enforce the arbitrators' award. This, too, is governed by the *New York Convention*, which requires all signatory countries—nearly 160 of them—to enforce the award subject only to narrow exceptions unrelated to the arbitrators' decision on the merits (primarily defects in jurisdiction and procedure). To a large extent, the choice of where to seek enforcement is driven by the fact that one has to go where the losing party's assets are located. If those assets can be found in more than one jurisdiction, however, prevailing parties will compare the procedural ease of enforcement across the different jurisdictions, including not only statutes and case law, but also whether the courts are corrupt or xenophobic (e.g., whether they exploit the public policy exception to enforcement in Article V of the *New York Convention* to avoid enforcing awards against local firms).

The party that loses the arbitration also has a tactical decision to make, which again must be informed by comparative analysis. An award may be

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73. As Bell notes, "[t]he choice of arbitrators is not an exercise in comparative law but [it is] an exercise in comparative qualifications for the comparative law work the tribunal will need to undertake." Bell, *supra* note 43, at 7.

74. Martin Hunter, *Ethics of the International Arbitrator*, 53 ARB. 219, 223 (1987).

75. See also the separate opinion of Sir Elihu Lauterpacht, sitting as judge of the ICJ in Application of Genocide Convention (Separate opinion by Lauterpacht, J.), 1986 I.C.J. 408, 409 ¶ 6 (Feb. 19) (arguing that the institution of the *ad hoc* judge at the International Court of Justice, which permits a disputing state that has none of its nationals sitting on the court to appoint a judge *ad hoc*, serves a similar function).

annulled/vacated/set aside in the seat of arbitration, rendering it a dead letter in most cases.[76] Alternatively, the losing party can wait until the winning side seeks to enforce the award and then resist enforcement in the jurisdiction(s) where it is sought.[77] Although such a choice involves pragmatic considerations, such as where the assets of the party resisting enforcement are located, it is also—you guessed it—an exercise in comparative law. A party seeking to resist enforcement must make a holistic assessment of the odds that an award will be annulled in the seat, based on its legislation, case law, and court practices, as compared with the prospects for enforcement of the award elsewhere. As for the prevailing party, this includes not only a comparison of law on the books on matters such as arbitrability and public policy,[78] but also an assessment of the cost and time required to enforce the award in the jurisdictions where the losing party's assets are located.

Working backward, when arbitrators make procedural decisions during the arbitration, they have a duty to take reasonable steps to ensure the enforceability of an eventual award.[79] This requires an understanding of the potential hurdles to enforceability in several jurisdictions including, at a minimum, the seat of arbitration where the award could be annulled and other jurisdictions where enforcement might reasonably be sought (such as the home jurisdictions of the parties and other jurisdictions where they have major operations or assets).

Often, arbitration legislation and other statutes relevant to enforceability are based on an international uniform law instrument like the *New York Convention* itself, the UNCITRAL Model Law on International Commercial Arbitration, or other instruments of more specific scope. As comparativists know well, courts interpreting such uniform law instruments should have regard to the ways that courts in other jurisdictions that have adopted the same instrument have interpreted

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76. The New York Convention, Article V(1)(d), provides only that an award "may" be refused enforcement on the ground that it has been annulled in the seat. Most jurisdictions, including those that have adopted the UNCITRAL Model Law, will normally refuse to enforce an award that has been annulled. Nevertheless, a minority of jurisdictions, most notably France, take the position that annulment of an award by the courts of the seat only binds subsequent courts of the same jurisdiction, so that the award could still be enforced elsewhere. BORN, *supra* note 11, at 3625–29. U.S. courts will generally refuse to enforce awards annulled in their state of origin but have recognized narrow circumstances where enforcement is justified. The best–known such case is Chromalloy Aeroservices v. Arab Republic of Egypt, 939 F. Supp. 907 (D.D.C. 1996), in which a U.S. court enforced an award annulled by the courts in Egypt, the seat of arbitration, on the basis that the annulment violated a fundamental public policy of the U.S. against substantive review of arbitral awards by courts, and that the parties had expressly waived resort to judicial review. While the case law is somewhat inconsistent, the trend is toward recognizing annulments of awards as precluding enforcement. A prominent recent case in this vein is Thai–Lao Lignite (Thailand) Co., Ltd. v. Gov't of the Lao People's Democratic Republic, 864 F.3d 172 (2d Cir. 2017).

77. Under the New York Convention, the party opposing enforcement has the onus to demonstrate one of the grounds for non–enforcement under Article V(1), unless the award deals with a non–arbitrable issue or enforcement would violate the public policy of the enforcing state (Art. V(2)(b)). Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *supra* note 20, at art. V(1)–(2).

78. *Id.* at art. V(2); *see also* UNCITRAL Model Law on International Commercial Arbitration, *supra* note 21, art. 34(2)(b).

79. To be sure, this is a duty of best efforts, not an inexorable command, since awards will sometimes be rendered unenforceable for reasons out of the tribunal's control. Nevertheless, several institutional rules of procedure mention this obligation. For example, Art. 42 of the ICC Rules provides that the tribunal "shall make every effort to ensure that the award is enforceable at law." ICC 2017 ARBITRATION RULES, art. 4 (2017), https://iccwbo.org/publication/arbitration-rules-and-mediation-rules/.

it, so as to promote uniformity of interpretation.[80] In fact, the most recent version of the UNCITRAL Model Law, in Article 2A, explicitly requires this. Thus, when an arbitration is seated in a Model Law jurisdiction, counsel and members of the tribunal must consider not only how the courts of the seat have interpreted their arbitration statute, but also how the courts of other Model Law jurisdictions have interpreted the same provisions.

E. Arbitration à la Carte

What this review shows is that throughout each arbitration, at every stage, there is a radical availability of choice for the parties. Laws and jurisdictions are an *á la carte* menu from which the parties may mix and match at will. Taken together, this is the "too much law" phenomenon in ICA: many choices, no defaults. Indeed, there are now so many choices available on so many issues that no individual, no matter how well–schooled and well–prepared, can possibly take stock of all them.[81] This has, in practice, led to reliance on the numerous comparative guides that have been published with respect to each of the choices described above.

The "too much law" phenomenon means that choice is *forced* upon the parties or, if they decline to choose, upon the tribunal. Unless counsel or arbitrators are entirely derelict in their duty, they will have to engage in a series of careful, informed comparative law analyses throughout the proceedings. By putting choice front–and–center at every stage of the proceedings, ICA compels participants to think constantly about legal difference, to make comparisons, and to consider which rules are most appropriate for their particular circumstances or which they can accept given their legal and cultural background.[82]

III. ICA and "Too Little Law"

Coexisting with the overabundance of law at many stages of an international arbitration, important areas exist where there is *too little* law. A huge number of procedural and substantive matters are simply undetermined and must be chosen or designed *ad hoc* for the proceeding. Will there be a hearing? If so, will there be witnesses? If so, will they be directly examined live in the hearing? Cross–examined? What categories of evidence are admissible? What will be the scope of discovery? What documents are privileged? How will expert evidence be introduced? How, if at all, will the costs of the proceedings be allocated among the parties? What rate of interest will be assessed on the damages, pre–judgment and post–judgment? On all of these matters, there is simply no rule, or else the

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80. *See, e.g.*, Frédéric Bachand, *Court Intervention in International Arbitration: The Case for Compulsory Judicial Internationalism*, 2012 J. DISP. RESOL. 83, 88 (2012) (arguing that even courts in *non*–Model Law jurisdictions called upon to implement the New York Convention must consider the "international normative consensus" because the New York Convention "unquestionably rests on the idea that limiting the influence of domestic rules by subjecting the international arbitration system to international rules tends to serve the needs of its users.").

81. Bell, *supra* note 43, at 2.

82. It is worth noting that these kinds of exercises resemble discussions about whether and why a proposed legal transplant across national systems will succeed; in this, comparative law in action shows its close relationship with more traditional comparative law activities, such as law reform. For a look at the different functions of comparative law analysis, see Jürgen Basedow, *Comparative Law and its Clients*, 62 AM. J. COMP. L. 821 (2014) (categorizing various "clienteles" of comparative law).

governing rules give complete discretion to the parties to make a choice, with the choice falling to the tribunal when the parties do not agree. If the tribunal is to avoid rank arbitrariness, it must identify some applicable rule.

A. Choice of Rules of Procedure and Evidence

Matters of procedure and evidence are *prima facie* governed by the rules of procedure chosen by the parties to govern their dispute, usually the rules of the administering institution. These rules are, however, written to give maximum latitude to the parties and the tribunal. They are so sparse with respect to matters of evidence that litigators unfamiliar with ICA find themselves disoriented and even offended by the lack of guidance.[83] For example, most institutional rules of procedure say nothing whatsoever about the admissibility of evidence, except to empower the tribunal to decide matters of admissibility.[84] On questions of evidence, as with many aspects of arbitral procedure, the institutional rules are no more than a guide. The tribunal and parties, usually working collaboratively, must design a bespoke procedural regime for each individual arbitration.[85]

How are such matters determined in practice? Mostly by comparative analysis. As noted in the previous Section, the tribunal will likely be composed of arbitrators from different jurisdictions, and the parties by definition come from different jurisdictions since we are speaking of international arbitration. Unsurprisingly, they typically take their cues from the legal systems with which they are familiar, then consider which of these options would be most appropriate for the case.[86] Czech writes:

> Some arbitration enthusiasts can cast around for the "harmonization" of international arbitration through the process of reaching subtle procedural compromises in a given case—usually at its early stage or subsequent procedural conferences—which participants can adopt certain practices, patterns and habits directly or indirectly from one's legal culture, and even exactly from their home countries, or adopt patterns from more supranational sources such as different notes, guidelines, and protocols.[87]

In some areas, they are assisted by soft law instruments promulgated by ICA institutions. On evidentiary matters, the best known such document is the International Bar Association Rules on the Taking of Evidence in International Arbitration, drafted by the arbitration committee of the International Bar

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83. For a list highlighting the extraordinary range of evidentiary matters on which the parties have free choice to select a rule, see François Ruhlmann & Olivier Gutkes, *The Absence of Specific Rules of Evidence in International Arbitrations: Desirable Remedies*, 4 INT'L BUS. L.J. 437, 447–49 (1995).

84. A representative example is UNCITRAL's Arbitration Rules, art. 27(4), the only provision governing the admission of evidence in the UNCITRAL Rules, which states only that "[t]he arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered." UNCITRAL ARBITRATION RULES, *supra* note 29, art. 27(4).

85. Epstein, *supra* note 16, at 917.

86. *Id.* at 916.

87. Konrad Czech, *The Distinctive Characteristics of Commercial and Investment Arbitration Proceedings: Lex Multiplex, Universita Curiositas, Ius Unum*, 35 POLISH Y.B. INT'L L. 293, 296 (2015).

Association ("IBA Rules").[88] Documents like the IBA Rules often function in practice like international uniform laws for ICA, so widely are they adopted (although, as in everything else, the parties may agree to exclude their application).[89]

There is a strong universalizing impulse within international arbitration, since legal uncertainty imposes significant costs on commercial parties. Why should an arbitration conducted in one seat by one tribunal operate under different rules of evidentiary privilege than an arbitration between the same two parties conducted by a different tribunal seated in a different jurisdiction? Given the enormous number of permutations, this way lies madness. The profound differences between different legal systems' approaches to procedure and evidence also create a risk of unfairness when one, but not both, parties are forced to proceed according to rules they find unfamiliar and possibly peculiar.[90]

Soft law instruments like the IBA Rules represent a response to the risk to the legitimacy and popularity of ICA posed by the diversity of procedural approaches taken by different national jurisdictions. They were all drafted by committees composed of experienced arbitration lawyers from a range of jurisdictions, and all represent something of a compromise between, or hybrid of, common law and civil law approaches, with comparative analysis again lying at the heart of the endeavor.[91] For example, the IBA Rules tried to find a compromise between civil law and common law procedure by allowing the production of documents (i.e., discovery), as is the case in common law jurisdictions,[92] but prescribing a much more limited scope than is permitted in U.S. civil procedure.[93] This was explicitly intended as a compromise with the civil law, which permits only very limited document discovery.[94] The same is often true of institutional rules of procedure. While some institutional rules wear their common law or civil law origins on their sleeves,[95] most rules attempt to strike a compromise between (or develop a hybrid of) civil and common law procedure.[96]

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88. *IBA Rules on the Taking of Evidence in International Arbitration*, INT'L BAR ASS'N (2010), https://www.ibanet.org/Document/Default.aspx?DocumentUid=68336C49-4106-46BF-A1C6-A8F0880444DC [hereinafter *IBA Rules*].

89. According to a 2012 survey, the IBA Rules were used as guidelines in fifty–three percent of cases and as binding rules (as agreed by the parties) in seven percent of cases, for an overall penetration of sixty percent. *2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process*, QUEEN MARY UNIV. OF LONDON 11 (2012), http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2012_International_Arbitration_Survey.pdf.

90. Ruhlmann & Gutkes, *supra* note 83, at 438.

91. Gómez–Palacio and Epps vividly described the common law and civil law in ICA as "two cultures in a state of courtship and potential marriage of convenience." *Cf.* Ignacio Gómez–Palacio & Garrett Epps, *International Commercial Arbitration: Two Cultures in a State of Courtship and Potential Marriage of Convenience*, 20 AM. REV. INT'L ARB. 235 (2009).

92. *IBA Rules*, *supra* note 88, at art. 3(2).

93. *Id.*

94. *Id.* at art. 3(3)(a) (requiring the party to provide "a description of each requested Document sufficient to identify it, or . . . a description in sufficient detail (including subject matter) of a narrow and specific requested category of Documents that are reasonably believed to exist.").

95. For example, the ICC Terms of Reference are clearly of civil law origin. *See, e.g.*, ICC 2017 ARBITRATION RULES, *supra* note 79, at art. 23.

96. For a list of the differences in procedure between civil and common law, see Urs Martin Laeuchli, *Civil and Common Law: Contrast and Synthesis in International Arbitration*, *in* ICDR HANDBOOK ON INTERNATIONAL ARBITRATION & ADR (International Center for Dispute Resolution ed., 3d ed. 2017).

Despite their attempt to balance common law and civil law traditions, the IBA Rules have been criticized for taking too much of a "common law approach," usually meaning broad, American–style document discovery, which non–American parties prefer to avoid. The IBA Rules have now attracted a competitor, the Rules on the Efficient Conduct of Proceedings in International Arbitration ("Prague Rules"),[97] which adopt a more continental European approach to evidence–taking and thereby purport to yield quicker, cheaper proceedings.[98] The Prague Rules discourage extensive document discovery[99] and encourage the tribunal to examine witnesses itself and manage examination of witnesses by counsel.[100] I take no position here on the relative merits of the IBA Rules and Prague Rules; the salient point is that the Prague Rules represent another choice on the legal menu, and yet another comparison for parties and tribunals to make. In a recapitulation of the "too much law" phenomenon within the "too little law" context of evidentiary rules in ICA, the simple existence of an alternative to the IBA Rules encourages the parties to consider the different ways that they could proceed, compelling them to think comparatively.

The dearth of procedural law is a feature of ICA, not a bug. The absence of rigid rules of procedure, in particular, is seen as a way to tailor each arbitration to the particularities of the dispute: the nationality of the parties and the arbitrators, the various legal systems whose rules of public policy may have some bearing on the case, the subject matter of the litigation, the seat of arbitration, and the place where an award may be enforced. The parties or the arbitrators may choose or design rules suitable to the individual dispute.[101] This flexibility is particularly valuable for preserving the legitimacy of arbitration among parties who, due to their different national legal traditions, have very different conceptions of what a fair process looks like.[102] Such buy–in is enhanced when the tribunal can show that it appreciates those different conceptions and delivers a procedure recognized as fair by parties with widely varying expectations. Comparative law is the means by which such procedures are identified.

B. Choices of Substantive Law that Call for Further Comparative Analysis

The too little law phenomenon can also extend to the substantive law governing the merits of the dispute. It arises in three areas: the application of non–national rules of law, the application of national laws that are underdeveloped or outdated (and therefore contain important gaps or provide rules unsuited to modern

97. *See Rules on the Efficient Conduct of Proceedings in International Arbitration (Prague Rules)*, PRAGUE RULES (Sept. 22, 2019), https://praguerules.com/upload/medialibrary/9dc/9dc31ba7799e26473d92961d926948c9.pdf [hereinafter *Prague Rules*].

98. *Id.*

99. *Id.* at art. 4.2.

100. *Id.* at art. 5.9.

101. Ruhlmann & Gutkes, *supra* note 83, at 444.

102. *See, e.g.*, René David, *The Methods of Unification*, 16 AM. J. COMP. L. 13, 13–27 (1968) (arguing that for ICA, it is most appropriate to leave the arbitrators as much latitude as possible to take account of the differing conceptions of the parties coming from different countries as to the rules to be observed for the administration of justice).

commercial disputes), and the cumulative or concurrent application of multiple laws.

Parties to contracts that will be resolved by arbitration have the freedom to choose not only national laws but also "rules of law," a term of art in ICA referring to bodies of substantive rules that are not the law of any state. Such rules of law may be found in "codified" soft law instruments, most notably the UNIDROIT Principles of International Commercial Contracts.[103] Alternatively, parties may choose to be governed by *lex mercatoria*, or "general principles of international commercial law." They may choose expressly to be governed by no law at all, as happened in a notorious arbitration between Arthur Andersen Consulting (now Accenture) and Arthur Andersen Accounting (now defunct).[104] To resolve cases governed by rules of law, tribunals must identify the content of those rules.[105] In the case of the codified instruments, this task may appear easy, but instruments like the UNIDROIT Principles, which are thoroughly drafted in the areas they cover, do not even purport to govern all aspects of a commercial relationship. Accordingly, they frequently require supplementation.

The second scenario involving governing rules of law involves cases decided according to general principles of law or *lex mercatoria*. These concepts, synonymous as generally construed, refer to a purported global law of commerce, detached from national laws and arising from the usages of commercial parties engaged in international commerce.[106] They are notoriously vague and grant arbitrators very wide discretion to identify the content of the relevant substantive rules. *Lex mercatoria* is closely associated with ICA. In fact, it is almost purely a phenomenon of international arbitration, and to the extent it can be identified, it will be through the published decisions of ICA tribunals.

In some cases, tribunals take it upon themselves to apply *lex mercatoria*, either to fill gaps in the governing law or as itself the governing rules of law, on the theory that the parties, simply by choosing international arbitration, want their dispute to be governed by non–national, "truly global" rules. *Lex mercatoria* is thus the apotheosis of delocalization, the autonomy from local courts and laws that remains a normative commitment of the ICA field.[107] The normative dimension of delocalization—the fact that it is not simply a response to consumer demand for globally enforceable awards—can be seen in the rhetoric often adopted by ICA practitioners and scholars, which consistently glorifies the international

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103. *The UNIDROIT Principles of International Commercial Contracts (UPICC)*, UNIDROIT (Feb. 26, 2020), https://www.unidroit.org/contracts#UPICC.

104. Andersen Consulting Bus. Unit Member Firms vs. Arthur Andersen Bus. Unit Member Firms & Andersen Worldwide Societe Coop., ICC Int'l Court of Arbitration (2000) (note that the tribunal decided to apply the UNIDROIT Principles).

105. I exclude, for the purposes of this Article, the possibility of amiable composition (also called decision *ex aequo et bono*), under which arbitrators are empowered to decide according to their own sense of fairness, without a requirement that the decision be justified in any legal manner, and thus without involvement of any "rules of law." Amiable composition is contemplated by most arbitration laws and rules of procedure but is marginal in practice.

106. Gilles Cuniberti, *Three Theories of Lex Mercatoria*, 52 COLUM. J. TRANSNAT'L L. 369, 371 (2014).

107. As Michaels describes it, much ICA literature is utopian in character, "dreaming" of a law that exists beyond the state. Ralf Michaels, *Dreaming Law Without a State: Scholarship on Autonomous International Arbitration as Utopian Literature*, 1 LONDON REV. INT'L L. 35 (2013).

(characterized as modern and pragmatic) over the national (characterized as old–fashioned and dogmatic).[108]

At the same time, *lex mercatoria* is controversial; many see it as a fig leaf for arbitrariness, especially where well–fed arbitrators from Western Europe or North America justify its application on the basis of the "inadequacy" of a developing state's law that the parties have chosen to govern their contract. Parties expressly choose *lex mercatoria* very rarely, mostly due to its obvious unpredictability, rendering *lex mercatoria* of more theoretical than practical interest.[109] Nevertheless, *lex mercatoria* continues to generate interest and attention, which is likely due to the fact that many arbitrators remain devoted to it as a truly autonomous commercial law, free from the peculiarities of different national laws and particularly adapted to the needs of the global commercial community.

One influential conception of *lex mercatoria* was developed by Gaillard, the French scholar and arbitrator who is its best–known proponent. Gaillard argues that *lex mercatoria* is not a set of rules at all, but rather a method of decision–making.[110] When drafting awards in arbitrations governed by *lex mercatoria*, arbitrators should conduct a comparative analysis to assess how the majority of national laws govern each particular issue that arises, and then apply the most widely–accepted solution on the basis that any rule common to most national legal orders would be acceptable (or at least unsurprising) to commercial parties.[111] Thus, for Gaillard, decision according to *lex mercatoria* does not *involve* comparative methodology, but is itself a concrete expression *of* comparative methodology.[112]

Although others reject Gaillard's position, the various theories of *lex mercatoria* all acknowledge a central role for comparative analysis in identifying individual *lex mercatoria* principles.[113] If taken seriously, this is an arduous task requiring "knowledge of a large number of legal systems, a qualification that most practitioners who act as arbitrators lack. This probably explains why arbitrators limit themselves to citing a few sources of inspiration rather than undertaking a comprehensive comparative analysis."[114] They are aided by more thorough comparisons produced by large research teams, such as the TransLex–Principles, a compilation of *lex mercatoria* rules produced by the Center for Transnational Law ("CENTRAL") at the University of Cologne.[115] The drafters of the TransLex–Principles claim to justify each principle they identify as being a rule of *lex mercatoria* with "comprehensive comparative references taken from international arbitral awards, domestic statutes and court decisions, international conventions, soft law instruments including international restatements of contract law, standard contract forms and contract clauses taken from international one–off contracts, trade

108. *See infra* text accompanying notes 123–34.
109. KARTON, *supra* note 1, at 46.
110. Emmanuel Gaillard, *Transnational Law: A Legal System or a Method of Decision Making?*, 17 ARB. INT'L 59, 62 (2001).
111. Emmanuel Gaillard, *Thirty Years of Lex Mercatoria: Towards the Selective Application of Transnational Rules*, 10 ICSID REV.—FOREIGN INV. L.J. 208, 210–11 (1995).
112. *Id.* at 211.
113. *See generally* Cuniberti, *supra* note 106, at 383.
114. DOLORES BENTOLILA, ARBITRATORS AS LAWMAKERS 95 (2017).
115. *See generally Center. for Transnational Law*, UNIV. OF COLOGNE, https://www.trans-lex.org/ (last visited Feb. 25, 2020).

practices and usages, and academic sources."[116] This wide scope of comparison—which encompasses a range of sources both public and private, soft law and hard law—is consistent with the private and transnational character of *lex mercatoria*. After all, as Gaillard observes, "The object of comparative law is to transcend the peculiarities of a single legal system, and it is understandable that one would naturally turn to comparative law to do so."[117]

Even where state law applies to the merits of a dispute, that choice may require tribunals to engage in further analysis that goes beyond the boundaries of that state's law. This arises in two circumstances. First, the parties may choose a law that contains no rule that would help decide issues that arise in the dispute. This usually arises when the chosen law is outdated or underdeveloped. Second, they may choose to be governed cumulatively by the law of two states, and an issue arises in the arbitration on which the two states' laws differ and cannot be reconciled.[118]

In both of these circumstances, arbitral tribunals are faced with situations where there is no rule that would dictate an outcome—a problem of too little law. What can they do to avoid arbitrariness? Almost invariably, they apply a comparative analysis. For example, when dealing with a governing law that contains no rule on point, they may consider the laws of both parties' home countries, or of past colonial powers that influenced their laws, on the theory that such an analysis will yield a rule that comports best with the parties' presumptive intentions or reasonable expectations. They may consider whether there is convergence on the issue among developed legal systems, perhaps even a sufficiently robust consensus to constitute a matter of international public policy.[119] They may look to various national models to determine which rule is best suited to particular legal issues that arise in the case.[120] And they may refer to *lex mercatoria* or general principles as an expression of global rules of law particularly adapted for cross–border commerce.[121] All of these different means of determining a rule, whether they involve supplementing or improving state law or working beyond it, are methodologically comparative.[122]

C. The Comparative Law Toolkit

In contrast to situations of too much law, the too little law phenomenon does not actually force parties and arbitrators to engage in comparative analyses. Nevertheless, comparativism reigns all the same. To find rules in areas where there are none, and to operationalize the deliberately vague rules of procedure that govern arbitration proceedings, arbitrators and counsel reach for comparative law methods.

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116. Klaus Peter Berger, *The Lex Mercatoria (Old and New) and the TransLex–Principles*, ¶ 68, https://www.trans-lex.org/ (last visited Feb. 26, 2020) (provision of such comparative sources is intended to help parties and tribunals "save time and money that must be invested in comparative research required to determine the contents of transnational law.").

117. Gaillard, *supra* note 38, at 280.

118. On the cumulative application of national laws, see UNICITRAL, *supra* note 49; Hayward, *supra* note 50.

119. Emmanuel Gaillard, *Du bon Usage du Droit Comparé dans l'Arbitrage International*, 2005 R. DE L'ARBITRAGE 375, 383 (2005) (Fr.) (*The Proper use of Comparative Law in International Arbitration*).

120. *Id.* at 380.

121. Gaillard, *supra* note 38, at 279 ("Arbitrators additionally will prefer to have recourse to the general principles of law where it is difficult to determine the applicable law because the controversy is linked to many different countries and legal systems.").

122. Glenn, *supra* note 8, at 995.

Comparativist ways of thinking about law also inform the drafting of many bodies of procedural rules, in particular soft law instruments like the IBA Rules on the Taking of Evidence in International Arbitrations. These instruments were all drafted by legally diverse[123] committees of lawyers under explicit mandates to develop sets of uniform rules that promote efficient resolution of disputes yet are simultaneously acceptable to counsel and parties from a wide variety of backgrounds.[124] Equally, comparative methods inform the agreements of parties and the procedural decisions of arbitral tribunals in individual arbitrations. Comparative law is a vital part of counsel's advocacy toolkit because it is a necessary part of tribunals' decision–making toolkit.

The same practices can also be seen in the development of substantive law through the decisions of ICA tribunals. Just as arbitrators fill gaps in the procedural rules by reference to comparative analogies, they also fill gaps in governing laws. General principles of international commercial law (*lex mercatoria*) are defined through comparative exercises and deployed to supplement or update governing national laws and to provide substantive rules in cases where national laws do not apply.

In short, wherever the governing law or rules of law do not dictate a particular result or approach, ICA looks to provide rules that are effective, non–arbitrary, predictable, and acceptable to the parties regardless of their origins. Tribunals identify those rules by means of comparative analysis.

IV. THE PROFESSIONAL CONTEXT OF ICA PRACTICE

A purely doctrinal analysis cannot account for all the features of the ICA system described in the previous Sections. In this Section, I will outline some of the ways in which ICA practice is experienced by practitioners and explain how that professional context embeds comparative law methods and comparativist thinking into the field. After all, "[c]omparative legal practice . . . involves more . . . than the simple movement of legal ideas. It also involves, and flows from, the movement of people."[125]

Given the potentially vast scope of such a socio–legal inquiry, what follows is merely a sketch. However, in addition to drawing on the existing socio–legal literature on ICA, this sketch provides some corroboration from a new empirical study.

A. International Arbitration as a Crossroads of Laws and Lawyers[126]

The ICA system is radically decentralized. There is no central institution, nor is there any comprehensive legal instrument. The closest candidate, the *New York Convention*, deals only with a few (albeit some of the most important) matters and

123. That is, the committees are diverse in the sense that their membership represents a variety of legal systems. They are composed entirely of business lawyers, mostly white men from developed countries.
124. Holtzmann, *supra* note 13, at 302.
125. Glenn, *supra* note 8, at 989.
126. *Cf*. Ruhlmann & Gutkes, *supra* note 83, at 439.

leaves many frequently–arising issues to be determined by national law.[127] Instead, a kind of glorious cacophony reigns, with numerous states, private and public arbitral institutions and rulemaking bodies, and individual arbitrators and law firms jockeying for attention and market share. At the level of each individual arbitration, the same applies, with lawyers from the full global variety of backgrounds working together case–by–case and institution–by–institution.[128] International arbitration is "a place of convergence and interchange."[129]

This pluralism recapitulates the structures and reflects the ideals of the commercial community, which disdains government intervention and thrives on flexibility. After all, one of the most important aspects of arbitration is that it means freedom *from courts*. In such a context, a range of options must always be made available, which means that comparisons—and perhaps compromises—will always have to be made.

The micro–level equivalent of this macro–level phenomenon is the radical pluralism exhibited within individual arbitrations. Members of a tribunal will usually have received their training and built up their experience in different legal systems from each other and from the parties. To persuade such heterogeneous tribunals, parties must pitch their arguments in such a way as to appeal to arbitrators with diverse backgrounds. Most prominently, this includes the explicitly comparative advocacy discussed above, whereby parties will explain unfamiliar governing laws in terms of laws with which the arbitrators may have more experience.[130]

Advocacy in other areas also involves explicit comparisons, especially in those aspects of arbitrations where there is too little law. Tribunals tend to reach for international or harmonized solutions, so parties often try to persuade a tribunal to adopt their preferred solution by arguing that it is representative of an international mainstream or modern trend. Such an argument can only be supported with a comparative analysis, across jurisdictions and across eras.

Within tribunals, there are strong pressures to achieve unanimity, so arbitrators will have to find solutions among themselves that are acceptable to lawyers with different perspectives.[131] In this process, party–appointed arbitrators may see it as

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127. Most notably, under the New York Convention, national law governs the scope of public policy that would prevent enforcement of an award and the rules on arbitrability. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *supra* note 20, at art. V(2)(b). The procedures for enforcing foreign awards are also left up to national law, so long as the state does not impose "substantially more onerous conditions or higher fees or charges" on foreign arbitral awards than it imposes on domestic awards. *Id.* at art. III.

128. It must be acknowledged that practitioners from a relatively small number of developed states continue to dominate, especially when one includes lawyers from developing countries who pursued graduate training in the Global North and/or developed their professional skills in an Anglo–American law firm. IBA Arb. 40 Subcommittee, *The Current State & Future of International Arbitration: Regional Perspectives*, INT'L BAR ASS'N (2015) (available for download at https://www.ibanet.org/LPD/Dispute_Resolution_Section/Arbitration/Publications.aspx).

129. *See* Tom Ginsburg, *The Culture of Arbitration*, 36 VAND. J. TRANSNAT'L L. 1335 (2003).

130. *See* Permanent Court of Advocacy, *supra* note 56; Ancel, *supra* note 57; Abdel Wahab, *supra* note 58; Loizou, *supra* note 41; Swiss Federal Tribunal, *supra* note 60; Arbitration Act, 9 U.S.C. §§ 1–208 (West 1996).

131. These pressures are partly social and partly professional. Arbitrators have an incentive to get along with each other. Further, losing parties may be less likely to comply voluntarily with a majority award when their party–appointed arbitrator dissented. For example, the Chartered Institute of Arbitrators, one of the few institutions that maintains a successful program training lawyers in how to act as international arbitrators, states explicitly that arbitrators should attempt to decide unanimously.

part of their role to explain the perspective of the party that appointed them, especially if the other two members of the tribunal come from a legally and culturally different background. The tribunal's deliberations, therefore, tend toward comparative law discussion even where the status of the governing law or the parties' arguments would not require the arbitrators to engage in comparative analyses.

The primary implication of ICA as a crossroads of legal systems is that all participants—the parties, their counsel, the arbitrators, as well as others such as tribunal secretaries and members of the administering institutions' secretariats—are constantly confronted with different legal systems and with lawyers whose diverse perspectives are shaped by the variety of their legal training. In such a context, comparative law methods are arguably the only means by which fair processes and effective outcomes can be fashioned in what would otherwise be a tower of babel.[132] The next Subsection explores the consequences of this fact for professional competition within the field.

B. International Arbitration as a Competitive Marketplace

Like any field of professional activity, ICA is defined by the terms of competition within the field—for social capital and for the market share it confers. Competition persists at every level, between lawyers for clients, between arbitrators for appointments, and between arbitral institutions and states for a greater share of the overall dispute resolution market.[133] As a service industry created by and for the international commercial community, ICA must respond to the demands of that community for dispute resolution services that are effective (i.e., final and enforceable), efficient, flexible, and fair.[134] These factors combine to produce the quality of legitimacy that is vital for arbitration, as a voluntary system of dispute resolution, to maintain its vitality.

Comparative law provides the means for arbitrators, counsel, and arbitral institutions to respond to market demands and confer legitimacy on the system. The first level on which comparative law represents a response to market demands is simply the complexity engendered by the mixing of too much law and too little law. The pervasiveness of comparative law methods in ICA practice, especially for

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International Arbitration Practice Guideline: Drafting Arbitral Awards, CHARTERED INST. OF ARBITRATORS 12, https://www.ciarb.org/media/4206/guideline-10-drafting-arbitral-awards-part-i-general-2016.pdf (last visited Feb. 26, 2020).

132. Genesis 11:1–9.

133. *See generally* KARTON, *supra* note 1, at 56–75 (explaining the nature and effects of market competition in ICA).

134. Of course, commercial parties also have other characteristics they want from a dispute resolution system, although these appear to be the most important. *See 2018 International Arbitration Survey: The Evolution of International Arbitration*, QUEEN MARY UNIV. OF LONDON, SCH. OF INT'L ARBITRATION 3 (2018), http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF (reporting that enforceability, avoiding particular national courts, flexibility, and the ability to select one's arbitrator are the most valuable characteristics of ICA to its users). *See generally* Joshua Karton, *A Conflict of Interests: Seeking a Way Forward on Publication of International Arbitral Awards*, 28 ARB. INT'L 447, 458–61 (2012) (exploring the characteristics of an ideal dispute resolution system from the point of view of commercial parties, and in comparison, with systemic interests in the dispute resolution system's characteristics).

advocacy purposes, means that counsel cannot effectively serve their clients without significant comparative expertise. Lawyers unable to provide such a service will find that their practice, like their knowledge itself, fails to cross borders.

Comparative knowledge is also essential to an individual's advancement within the field, as is the kind of comparative mentality that accompanies cultural cosmopolitanism (explored more in the next Subsection). A career in international arbitration is often seen as progressing from graduate education, to practice as a junior associate in a business law firm or as counsel in the secretariat of an international arbitral institution, to developing one's clientele and beginning to attract appointments as an arbitrator, to being able to sustain work full–time as an arbitrator.[135] Advancement, therefore, depends heavily on developing social networks that can supply referrals and arbitral appointments. After all, the majority of arbitral appointments come from other ICA lawyers, either acting as outside counsel for parties selecting party–appointed arbitrators or as leaders in arbitral institutions acting as appointing authorities.[136] Esteem within the ICA professional community is essential.

Comparative law *bona fides* are, in turn, essential to garnering that esteem. Legal chauvinists will be sidelined both professionally and socially, as will any lawyer who simply finds it baffling that legal matters could be approached differently elsewhere. Every ICA practitioner possesses the trick of mind of considering any given legal issue from multiple perspectives, seeing the law as just one more variable that can be manipulated in the search for a favorable or just outcome. This is the essence of comparative law as an analytic method. Gaillard, always an eager evangelist for the field, suggests that ICA has transformed the field of comparative law by providing lucrative jobs for comparativists.[137]

It is particularly important for arbitrators, who are, after all, free agents selling their services in a competitive market, to show that they can understand and take into account the perspectives of parties from varying legal systems. To gain the respect of the parties—and with it voluntary compliance with awards and more appointments as an arbitrator—they must be able to demonstrate that they approach the case with cross–cultural and cross–legal sensitivity and without home–law bias.

One of the best ways to do that is to flex one's comparative law muscles. For example, in a review of the published awards, I found when one party's home law governs the merits of a dispute, tribunals more often than not will take pains to show that outcome would not have changed if the other party's home law had governed. Such argumentation is entirely unnecessary in terms of legally justifying the decision, but it is helpful in maintaining the goodwill of a losing party.[138] Waincymer, an Australian academic who is active as an arbitrator, said of his own

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135. Of course, not every ICA lawyer wants to follow such a career path. If nothing else, practice as counsel, especially in a multinational firm that employs large teams of associates, is more lucrative than arbitrating full time. Nevertheless, proceeding from counsel to arbitrator is seen as part of the conventional *cursus honorum* in ICA, along with such other markers of success in the field as part–time professorships at universities and leadership roles in arbitral institutions and professional associations like the International Bar Association, the International Council for Commercial Arbitration, and the more U.S.–oriented Institute for Transnational Arbitration.

136. *See* Magdalene D'Silva, *Dealing in Power: Gatekeepers in Arbitrator Appointment in International Commercial Arbitration*, 5 J. INT'L DISP. SETTLEMENT 605 (2014) (explaining and critiquing the "networks of community" that account for most arbitral appointments).

137. Gaillard, *supra* note 38, at 263.

138. KARTON, *supra* note 1, at 139–40.

practice: "In the majority of cases where I have sat as an arbitrator, at least one party has come from a civilian jurisdiction. I always want to have the respect of both parties that I approach the case without any domestic baggage."[139]

Thus, comparative law provides a means to promote the legitimacy of ICA at the level of the individual dispute and, consequently, for the ICA system as a whole.[140] It is one of the main methods by which ICA counsel and arbitrators attract the favor of commercial parties and collectively maintain ICA as a robust system of dispute resolution that compares favorably with litigation and with consensual methods of dispute resolution like mediation. Market competition within ICA incentivizes practitioners to develop their comparative law expertise. At the same time, competition with other forms of dispute resolution incentivizes ICA practitioners as a community to employ comparative law methods in order to ensure that the field continues to serve the interests of commercial parties of diverse backgrounds, needs, and priorities.

C. International Arbitration as a Cosmopolitan Community

The market competitive forces described in the previous Subsection mean that, to be successful, anyone practicing in ICA must leave behind much of the "bag and baggage" of their home jurisdiction.[141] Still, comparativism is more than just a matter of client service. ICA is a global professional community that shares a coherent professional culture, along with a set of common values.[142] Given the heterogeneity of the field and its relative youth (and corresponding lack of deeply rooted traditions), it is debatable whether ICA possesses a singular or dominant professional culture. At minimum, though, it is undeniable that ICA practitioners

139. Jeffrey Waincymer, Indep. Arbitration Practitioner, Adjunct Professor of Law, Nat'l Univ. of Sing., The Implications of New Procedural and Evidence Soft Law Instruments, Presentation at the 2019 Taipei Int'l Conference on Arbitration and Mediation (Aug. 15, 2019).

140. Similarly, with respect to investment treaty arbitration, a number of commentators have argued that a comparative *public* law approach to the obligations of states under investment treaties will build and preserve the legitimacy of the investor–state dispute settlement system in a politically fraught environment. The best–known exponent of this point of view is Schill, who has pursued it across a number of publications. *See* Stephan W. Schill, *Reforming Investor–State Dispute Settlement: A (Comparative and International) Constitutional Law Framework*, 20 J. INT'L ECON. L. 649 (2017) (arguing, with respect to investment treaty arbitration, that a comparative public law approach to the obligations of states under investment treaties will build and preserve the legitimacy of the investor–state dispute settlement system in a politically fraught environment); *see also* Stephan W. Schill, *Developing a Framework for the Legitimacy of International Arbitration*, *in* 18 ICCA CONGRESS SERIES 789 (Albert Jan Van den Berg ed., 2015); Stephan W. Schill, *Enhancing International Investment Law's Legitimacy: Conceptual and Methodological Foundations of a New Public Law Approach*, 52 VA J. INT'L L. 57 (2011); Stephan W. Schill, *International Investment Law and Comparative Public Law—An Introduction*, *in* INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW 3 (Stephan. W. Schill ed., 2010).

141. *See* Bernardo M. Cremades, *Overcoming the Clash of Legal Cultures: The Role of Interactive Arbitration*, 14 ARB. INT'L 157, 170 (1999).

142. At least, I have described it that way. *See* KARTON, *supra* note 1 at 78–142; *see also* Stavros Brekoulakis, *Systemic Bias and the Institution of International Arbitration: A New Approach to Arbitral Decision–Making*, 4 J. OF INT'L DISP. SETTLEMENT 553 (2013) (arguing that decision–making in ICA is shaped by a common set of biases shared across the ICA system and determined by the institutional structures of that system).

tend to share cosmopolitanism as both a personal characteristic and a set of value commitments.

The term "cosmopolitan" has different meanings in different fields, but all definitions share the notion that cosmopolitans see humanity as engaged in a common enterprise, despite the diversity of human culture, politics, economics, and even biology.[143] Here, I use the term in a non–technical sense to describe a set of cultural commitments that are collectively globalist and anti–chauvinist but not homogenizing, that de–emphasize (or even disparage) national or ethnic identities and are accepting of (or even revel in) cultural differences. Cosmopolitans are the kind of people who might describe themselves as "citizens of the world."

The ICA professional community is cosmopolitan *par excellence*. ICA practitioners are often multilingual, trained in multiple legal systems, work outside their home jurisdiction for at least part of their careers, and are comfortable working day–in–and–day–out with lawyers who possess varied backgrounds.[144] Today, cosmopolitan credentials of this sort have become an informal requirement for entry into the field. An established, London–based arbitrator who speaks English, French, and Russian fluently and has both common law and civil law training described that kind of background as indispensable:

> It's absolutely essential in this field to have, if not languages, certainly the cultural awareness at the very, very least. . . . In the big firms nowadays I don't think they even consider you if you have only one language . . . I think also that my civil law–common law background was invaluable [to the firm where I was first hired], although at the time I did not realize it.[145]

Law firms with significant ICA practice groups all tout the multinational, multilingual, and multijural character of their teams and, correspondingly, their ability to represent clients in arbitrations conducted in any language, under any laws and rules of procedure, and before arbitrators of any nationality.[146] While such

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143. *See, e.g.*, KWAME ANTHONY APPIAH, COSMOPOLITANISM: ETHICS IN A WORLD OF STRANGERS xii–xiv (1st ed. 2006).

144. *See* Catherine A. Rogers, *The Vocation of the International Arbitrator*, 20 AM. U. INT'L L. REV. 957, 958–59 (2005).

145. KARTON, *supra* note 1, at 136 (interviewees emphasized cross–cultural sensitivity and personal cross–cultural experience as crucial to success in ICA, to the point of disparaging practitioners who are not equally cosmopolitan).

146. *See International Arbitration*, CLIFFORD CHANCE, https://www.cliffordchance.com/expertise/services/litigation_dispute_resolution/international_arbitration.html (last visited Feb. 26, 2020) ("We draw upon the resources of our global arbitration practice to deploy teams that are adapted to the specific requirements of the dispute, in terms both of geographic and industry–specific expertise . . . We are able to run arbitrations in any of the world's major languages . . . We conduct arbitrations pursuant to the rules and procedures of all the major arbitral institutions."); *see also International Arbitration*, WHITE & CASE, https://www.whitecase.com/law/practices/international–arbitration (last visited Feb. 26, 2020) (bragging that its diversified team, spread among numerous cities around the world, enables it to "cover every jurisdiction, arbitral forum and industry sector, and work under multiple laws and in diverse languages."); *International Arbitration*, CLEARY GOTTLIEB, https://www.clearygottlieb.com/practice-landing/international-arbitration (last visited Feb. 26, 2020) (highlighting its status as the first U.S. firm to hire and promote non–U.S. lawyers as equal partners, as a way to emphasize its "global perspective"); *International Commercial Arbitration*, LALIVE, https://www.lalive.law/practices/international-commercial-arbitration/ (last visited Feb. 26, 2020) ("Our arbitration team is composed of highly talented international disputes lawyers qualified in Switzerland and 15 other jurisdictions, with strong academic backgrounds and who together speak more than 16 languages and are able to handle proceedings

marketing language should be treated for what it is—advertising copy intended to sell the firms' services, rather than to describe an objective reality—it shows that the providers of ICA services value (or at least think their clients value) language skills, legal diversity, and international experience, the hallmarks of the legal cosmopolitan.

To enter the field, therefore, law students and young lawyers must develop cosmopolitan credentials, in particular their comparative legal knowledge. For example, Strong argues that specialized education and training is necessary for success in ICA practice, in part because most law schools, at least in the U.S., do not provide sufficient training in comparative law.[147] Even in Singapore, known as a crossroads of East and West, Bell argues that law schools must incorporate more comparative law into their curricula in order to maintain Singapore's place as a hub for legal services, especially for ICA.[148]

Just as law firms are likely to hire cosmopolitan lawyers into their international arbitration groups, and those same lawyers are likely to appoint cosmopolitan lawyers as their arbitrators, so too young lawyers with cosmopolitan values are likely to be attracted to the field in the first place. This is not a new phenomenon. As Dezalay and Garth note in their pioneering socio–legal study of the international arbitration field, the solicitors who were influential in developing international arbitration in England, beginning in the 1960s, were drawn to what was then seen as a continental European field "because of their own cosmopolitan, hybrid backgrounds . . . [T]hey were born or had been educated abroad, including especially German immigrants; or they had foreign, typically French, spouses."[149]

Comparativism is the legal expression of cosmopolitanism.[150] Unlike globalists, cosmopolitans do not homogenize, but rather celebrate difference. They do not seek to remake the global order, but rather to improve it through application of technical expertise and cultural sensitivity.[151] The same is true of comparative law. In contrast to the often–revolutionary aims of international law, comparative law crosses borders but does not try to erase them. Describing the divergent values, goals, and professional cultures of comparative law and international law, Kennedy

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involving a broad range of substantive laws, arbitration laws and arbitration rules all around the world. This diversity and international reach are the key components of the firm's DNA as a disputes powerhouse.").

147. *See* Strong, *supra* note 68, at 126 ("The skills and knowledge gap in international commercial arbitration is exacerbated by the fact that legal education programs often fail to provide information on any type of international and comparative legal research, let alone address the specialized needs of international arbitration.").

148. *See* Gary F. Bell, *Teaching More Civil Law at the National University of Singapore: A Necessity for Singapore as a legal Hub for Asia*, 2019 ASIAN J. COMP. L. 1, 5 (arguing that "Singapore cannot become a serious legal hub for the region that includes so many civil law jurisdictions unless it is able to handle civil law matters.").

149. DEZALAY & GARTH, *supra* note 27, at 136.

150. William Twining, *Implications of 'Globalisation' for Law as a Discipline*, *in* 3 LEGAL THEORY & THE LEGAL ACADEMY 129, 146 (Maksymilian Del Mar, Williams Twining, & Michael Giudice eds., 2010) ("How can one seriously claim to be a universalist, if one is ethnocentrically unaware of the ideas and values of other belief systems and traditions?").

151. *See* Horacio A. Grigera Naon, *The Role of International Commercial Arbitration*, 65 ARB. 266, 267 (1999) ("Though cultural openness may lead to legal solutions based on a blend of the different cultural identities at stake resulting from a comparative law analysis, such exercise also implies recognising that in the present world, cultural differences and respect for cultural 'otherness' is a value in itself, and that uniformity may not be advanced without due respect for such factors.").

associates cosmopolitanism with the former and globalism with the latter.[152] Indeed, Kennedy's list of the kinds of professional activities typically engaged in by comparativists reads like a list of the activities engaged in by ICA practitioners:

> [E]laborating rules, manning institutions devoted to the restatement and reform of private law rules, developing a scholarly consensus on the most reasonable or workable rules, resolving disputes through arbitration or the provision of legal opinions, advising legislators in the periphery on how such matters are handled in the most advanced economies[,] or advising at the center on the applicability of common commercial rules in peripheral settings.[153]

In this way, the cosmopolitan ethos, operationalized through comparative law methods, can be seen as fundamental not only to ICA practice but to the construction of the field's identity. The cosmopolitan character of the ICA profession is maintained by a three–legged stool of self–selection, professional acculturation, and economic incentives.

D. Corroboration from a Recent Empirical Study

In November 2018, together with a collaborator, Tony Cole, I conducted a series of individual and group interviews in Egypt, encountering a total of twenty–seven Egyptian international arbitration practitioners. These interviews were part of the pilot for a large–scale, socio–legal exploration of the international arbitration profession across fifty–three countries in Europe and central Asia, which is now in its data–collection phase.[154] The interviewees are not necessarily representative of the whole Egyptian ICA bar (although attempts were made to reach a representative sample), and the reporting of the qualitative data here is brief and illustrative. It is not intended to "prove" anything, but only to show that the claims made in the previous Sections can be empirically corroborated, limited though the available data may be for the time being.

The interviews were semi–structured and explored a range of issues related to the practice of international arbitration in Egypt and by Egyptian lawyers. Interviewees were guaranteed anonymity so that they could speak without fear of professional repercussions. Thus, they remain unidentified here, with only the occasional addition of background information necessary to contextualize their remarks. Of particular interest are the biographical characteristics of the Egyptian

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152. *See* David Kennedy, *New Approaches to Comparative Law: Comparativism and International Governance*, 1997 UTAH L. REV. 545, 554–606 (1997) ("Common to all these comparativisms, of both expertise and erudition, is a stance which we might term 'cosmopolitanism' . . . For the cosmopolitan, values are universal and humanist, projects rational and pragmatic, knowledge—of the self as of the other—good for its own sake.").

153. *Id.* at 622–23.

154. Anthony N. Cole & Joshua D. Karton, *The Social & Psychological Underpinnings of Commercial Arbitration in Europe*, U.K. RESEARCH & INNOVATION, https://gtr.ukri.org/projects?ref=ES%2FR005664%2F1 (last visited Mar. 26, 2020) (made possible by a grant from the U.K. Economic and Social Research Council. ESRC Research Grant No. ES/R005664/1).

international arbitration community, their attitudes toward the comparative law aspects of ICA practice, and their degree of cosmopolitanism more generally.

The interviews were conducted in English, and it is telling that every interviewee spoke English with fluency and comfort, on topics of both casual conversation and technical legal discourse, despite the fact that for all of them, English is a second or third language.[155] Moreover, every single interviewee had been trained in the law of at least one jurisdiction other than Egypt, most commonly France.[156] Nearly all interviewees expressed their conviction that training in multiple systems, in particular exposure to common law, is essential for entry into the field and advancement within it.[157] One interviewee, who himself holds a doctorate from an American law school, related that "people are obsessed with having a foreign law degree."

Aside from formal multi–system training *per se*, most interviewees stressed the importance of being able to work across multiple legal systems. As part of the interviews, we posed various hypothetical but realistic scenarios, prompting interviewees to explain how they would act if they encountered the situations described. Almost without fail, interviewees began by stating that their actions would depend in the first instance on the governing law or applicable rules, and moreover on whether the relevant provisions were mandatory or derogable. Often, they then went on to describe, with some specificity, how they would act under different legal contexts.

Several interviewees cited the opportunity to work in and learn about multiple laws as an appealing aspect of ICA practice. One young female law firm associate was attracted to ICA practice by what she described as the "openness" of the rules, which "allows you to create, to work with the law, to create arguments, to be creative." A more senior interviewee, who heads a dedicated international arbitration team at a leading business firm, stressed that inter–cultural communication was a cornerstone of his career: "[t]he ability to understand, and accept, and embrace the fact that others may do things differently and in a proper and right way as well."

The interviews show the Egyptian ICA community to be highly cosmopolitan. ICA practitioners are multilingual and often trained in both civil law and common law. At a minimum, the practitioners are comfortable with legal diversity.[158] They embrace comparative law methods and perspectives and display significant comparative law expertise. They see ICA as a field of practice in which legal and social cosmopolitanism is not just a professional advantage, but a prerequisite both

155. According to interviewee, an Egyptian international arbitration practitioner, most of the major ICA cases in Egypt are conducted in English, and a lack of English language skills excludes most of the Egyptian bar from succeeding in ICA, regardless of their other virtues (Nov. 2018).

156. Several had attended, for their initial legal training, a dual–degree program in Egyptian and French law offered by Cairo University's Institute of International Law in collaboration with Paris–Sorbonne University (since 2018, a constituent part of what is now called Sorbonne University). The next–most–common foreign laws in which interviewees had been trained were, perhaps unsurprisingly, English and American.

157. For example, one interviewee observed that "most of the international firms are hiring the common law qualified practitioners." Another noted that her law firm "leaned more towards [hiring] younger people that are . . . more open towards crossing boundaries and being different."

158. In other parts of the interviews not described here, interviewees also displayed high levels of comfort with cultural diversity and—at least to the foreign interviewers probing their views—comfort with gender equality.

for admission to the field and progress within it. In short, Egyptian ICA practitioners display pervasive comparativism as a function of the nature of their daily work, as a response to market incentives, and as a personal value. Cosmopolitans are attracted to the field and find themselves encouraged to develop that cosmopolitanism professionally, as expressed through comparative law.

E. Inherent and Integral Comparativism

While a doctrinal analysis can explain *what* is happening in ICA—it demonstrates the pervasiveness of comparative law methods—a socio–legal analysis that puts ICA into its professional context can help explain *why* comparativism is so pervasive. Attention to the professional context of ICA practice shows that, even if there were not too much law in some areas and too little in others, comparativism would still be prevalent due to the structural features of the ICA system, the forms market competition takes in ICA, and the values of the field. At the same time, those with a cosmopolitan mindset are attracted to ICA and seek to join its ranks and to progress along its *cursus honorum* to garner appointments as arbitrators, in large part through developing and displaying their comparative law expertise. Operating through self–selection, acculturation, and market pressures, comparativism is inherent to the professional context within which arbitration practitioners work.

V. CONCLUSION: LOOKING FORWARD AND OUTWARD

Taking these strands together, one can see that comparative law methods are necessary and desirable at nearly every stage of international arbitral proceedings. Comparative law is a source of inspiration, of legitimacy, and of substantive and procedural law.[159] It is simply unavoidable—not that ICA practitioners would want to avoid it. The field attracts cosmopolitan practitioners with a comparative mindset, enshrines that mindset at the heart of its training and professional acculturation processes, and reinforces it through the terms of market competition for appointments as counsel and arbitrator. Comparative analysis can be found not just at each stage of the proceedings, but also in the professional culture of the field. ICA is comparative law operationalized case–by–case: comparative law in action. Thinking about ICA in this way suggests two sets of potential implications, offered here speculatively and as an invitation to further research.

The first set of implications is for the comparative study of law. Comparative law is often taken as kind of a sterile and esoteric subject, a matter for academics and sometimes legislatures, but not for practicing lawyers. ICA in particular, and modern transnational legal practice more generally, shows that comparative law is a living discipline, one that is used by lawyers to win cases like any other source of legal authority or form of legal argument. Education in law schools and professional formation in law firms should reflect that reality. Indeed, given the increasing penetration of international law into domestic realms and the blurring of

159. Gaillard, *supra* note 111, at 376.

lines between the two, comparative law knowledge and skills will only become more relevant with time, even to lawyers whose practices never cross borders.

Similarly, ICA shows that comparative law as an academic discipline is overdue for a re–conceptualization. Comparative law has an enduring identity crisis: it is not itself a field of law, but equally it is not a theory of law or a legal research method. Where, then, does comparative law fit in the universe of legal thought? ICA provides an answer, or at least part of one; it reveals comparative law to be a practice skill, a form of legal reasoning that can be employed in drafting (of legislation, contracts, court rules, etc.), negotiation, advocacy, and decision–making.

The second set of implications is for the development of law at the transnational level. The experience of ICA is that decentralized, accretive developments have yielded widely–accepted global standards, mixing common law and civil law elements, with an increasing influence of Asian, especially Chinese, legal traditions. This has been true even of procedural law, which has shown itself to be especially difficult to harmonize, at least outside the arbitration context.[160]

Thus, ICA as comparative law in action furthers legal harmonization, one of the traditional uses for comparative law.[161] But in ICA, that harmonization develops organically, reactively, and accretively through individual cases, the advocacy of counsel, and the decisions of arbitrators, without the need for multi–year drafting conferences, grand codifications, or legal transplants.[162] Indeed, since ICA is not a legal system unto itself, there is no receptacle into which laws may be transplanted. But the law nevertheless evolves through a constant comparative process. The overall drive is toward harmonization, but the end result is not a homogeneous global order. Instead, the market–driven logic of ICA—the need to serve an enormously diverse pool of commercial parties—means that ICA will reflect the pluralism of its users.[163]

Fan describes the resulting dynamic tension using the evocative term "glocalization," which she defines as "the entanglement process between 'global standards' and 'local norms.'"[164] Fan writes:

> On the one hand, global norms are localized with adaptations to accord more closely with local cultures—'localized globalism.' On the other hand, through interactions with different cultures, local practices may produce shared norms and expectations, and eventually form a common

160. Ingeborg Schwenzer & Lina Ali, *The Emergence of Global Standards in Private Law*, 18 VIND. J. INT'L COMM. L. & ARB. 93, 102–03 (2014).

161. Basedow, *supra* note 82, at 849–51 (describing unification agencies' position as one of the primary consumers of comparative law research).

162. Halil Rahman Basaran, *Identifying International Commercial Arbitration*, 22 INT'L TRADE L. REV. 91, 91 (2016) ("ICA may be deemed a *dialogue* between parties to a dispute and the relevant arbitrators. . . . That is to say, ICA is dynamic and consists of re–descriptions of international commerce through dialogue.").

163. Bell expresses a similar sentiment, tying the preservation of a range of options in ICA to the field's respect for party autonomy: "To some extent, shouldn't international commercial arbitration be more about legal pluralism than the harmonisation of laws? If we believe in party autonomy, we must give the parties real choices, which means that not everything should be harmonised and that comparative law should continue to play a key role in international arbitration." Bell, *supra* note 43, at 12.

164. Kun Fan, *"Glocalization" of International Arbitration—Rethinking Tradition: Modernity and East–West Binaries Through Examples of China and Japan*, 11 U. PENN. ASIAN L. REV. 243, 252 (2016).

> culture—'globalized localism.' The future of international arbitration will continue to be influenced by the combined forces of globalism and localism.[165]

Indeed, glocalization represents the likely future of transnational law generally. More and more areas of transnational law will be harmonized through a continual process of comparison and hybridization. At the same time, a durable, desirable diversity will remain in a variety of areas, in order to preserve the autonomy of individuals to choose legal solutions that suit their particular circumstances.[166]

To extend the biological metaphor, instead of a transplant, ICA is recombinant DNA—a genetically modified organism in which different elements are constantly borrowed, mixed, hybridized, and evolved into new forms.[167] Comparative law in action, but also more than this: comparative law brought to life.

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165. *Id.* at 290.

166. Such "convergence" accompanied by "informed divergence" is visible in many areas of globalization. These terms were coined and elucidated by Anne–Marie Slaughter in ANNE–MARIE SLAUGHTER, A NEW WORLD ORDER (2004) (giving a detailed account of global politics in transformation). For a similar point made in a more specifically legal context, see H. PATRICK GLENN, LEGAL TRADITIONS OF THE WORLD 378 (4th ed. 2010) (referring to "sustainable diversity" among disparate legal traditions).

167. Horacio A. Grigera Naon, *supra* note 151, at 267 ("The solutions reached by international commercial arbitral tribunals, both at the substantive and procedural law levels, are not necessarily a cultural blend but the outcome of a harmonic combination of elements originating from different cultural sources.").