# "INTERNATIONAL STANDARDS" AS A CHOICE OF LAW OPTION IN INTERNATIONAL COMMERCIAL ARBITRATION

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## I. INTRODUCTION

A steady preoccupation of international arbitration has been the extent to which international arbitral tribunals should distance themselves in their conduct and practices from the conduct and practices of national courts. That distance is noticeably variable as one moves from one aspect of the adjudicatory process to another. Variable as well among aspects of the adjudicatory process is the degree of consensus as to what that distance on any given issue should be.[1]

## II. ARBITRAL AUTONOMY IN MATTERS OF PROCEDURE

At one end of the spectrum – both as to distance and consensus about distance – is arbitral procedure as such. From the start, it has been assumed that international arbitration should enjoy a high degree of what is called in the trade "procedural autonomy" vis-à-vis national courts in the conduct of adjudicatory business.[2] International arbitral tribunals are decidedly not bound in principle by the civil-procedure assumptions prevailing in any national legal system – be it (a) the country of the parties' principal affiliations; (b) the country whose substantive law the parties may have selected through a choice-of-law clause; (c) the country having the greatest contacts with or interest in the underlying dispute; (d) the country where the arbitration has its official "seat;" (e) the country of probable enforcement if ascertainable, or any other jurisdiction one might

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[1] *See*, *e.g.*, LUCA RADICATI DI BROZOLO & LORETTA MALINTOPPI, *Unlawful Interference with International Arbitration by National Courts of the Seat in the Aftermath of Saipem v. Bangladesh, in* LIBER AMICORUM BERNARDO CREMADES 993, 993-96 (Miguel Ángel Fernández-Ballesteros & David Arias eds., 2010); GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 75, 77, 84, 97 (2d ed. 2014); Loukas A. Mistelis, *Arbitral Seats – Choices and Competition*, *in* INTERNATIONAL ARBITRATION AND INTERNATIONAL COMMERCIAL LAW: SYNERGY, CONVERGENCE AND EVOLUTION § 3.1. (Stefan M. Kröll et al. eds., 2011); JULIAN D. M. LEW ET AL., COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION §§ 5.3-5.33, 15.1-15.57 (2003); NIGEL BLACKABY ET AL., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION § 7.04-7.05 (5th ed. 2009).

[2] BORN, *supra* note 1, at 1528; LEW ET AL., *supra* note 1, at § 5.27-5.33; REDFERN AND HUNTER, *supra* note 1, at § 3.04-3.05; Jan Paulsson, *Interference by National Courts*, *in* THE LEADING PRACTITIONER'S GUIDE TO INTERNATIONAL ARBITRATION Ch. 2 (Lawrence W. Newman & Richard D. Hill eds., 3d ed. 2014).

imagine.[3] Many of the initial impulses in favor of arbitration over litigation – whether economy, speed, informality, confidentiality or expertise – strongly support the notion of autonomy in regard to the arbitral process as such.[4]

This is not to say that tribunals always act on this autonomy. One of the longstanding critiques of international arbitration is its apparent capture by the U.S. procedural institution of discovery and, to a much less extent, evidentiary objections and rigorous cross-examination of witnesses.[5] Whether the international arbitration community is taking best advantage of its procedural autonomy is a constant topic of conversation within that community, but beyond the scope of this article.

It is also not to say that international arbitral procedure is random. The prevalence of influential "soft law" on issues of arbitral procedure (*e.g.*, the IBA Rules on the Taking of Evidence in International Arbitration) is conspicuous.[6]

The fact remains, however, that how an arbitration unfolds chiefly reflects some combination of (a) party autonomy (whether expressed directly, as through an express provision of the arbitration agreement, or indirectly, as through incorporation by reference of the rules of an arbitral institution); (b) arbitrator discretion on matters not so addressed; and in some measure (c) "soft" procedural law. It rightly does not reflect a wholesale borrowing of the byways of any single national jurisdiction's civil procedure.

## III. ARBITRAL AUTONOMY ON CHOICE OF LAW

Only slightly more debatable is the question of arbitral autonomy in the choice of law governing the merits of a dispute in arbitration. It is one thing to suppose that the parties knowingly opted out of the civil-procedure ground rules of national courts upon resorting to arbitration; they either knew or should have known they were doing so. But it is another thing to suppose that, in proceeding to arbitration, they sought to escape from the law otherwise applicable to determining the merits of a dispute.

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[3] *See* LEW ET AL., *supra* note 1, at § 2.31-2.32; BORN, *supra* note 1, at 210, 212, 1582-95, 1620; REDFERN AND HUNTER, *supra* note 1, at § 6.02-6.03.

[4] *See* ELLIOT E. POLEBAUM, INTERNATIONAL ARBITRATION: COMMERCIAL AND INVESTMENT TREATY LAW AND PRACTICE § 9.02 (2015); Julian D. M. Lew, *Achieving the Dream: Autonomous Arbitration*, 22 ARB. INT'L 179 (2014); Gerold Hermann, *The Role of the Courts under the UNCITRAL Model Law Script*, *in* CONTEMPORARY PROBLEMS IN INTERNATIONAL ARBITRATION 173 (Julian D.M. Lew ed.,1986).

[5] *See* Javier H. Rubinstein, *International Commercial Arbitration: Reflections at the Crossroads of the Common Law and Civil Law Traditions*, 5 CHI. J. INT'L L. 303, 304-06 (2004-2005); Bernardo M. Cremades, *Managing Discovery in International Arbitration*, 57(4) DISP. RESOL. J. 72 (Nov. 2002-Jan. 2003); Elena V. Helmer, *International Commercial Arbitration: Americanized, "Civilized," or Harmonized?,* 19 OHIO ST. J. ON DISP. RESOL. 35, 35-36, 50-54 (2003-2004).

[6] *See generally* Gabrielle Kaufmann-Kohler, *Soft Law in International Arbitration: Codification and Normativity*, J. INT'L DISP. SETTLEMENT 283 (2010); REDFERN AND HUNTER, *supra* note 1, at § 3.07.

There is reason to believe that parties who turn to arbitration do not view themselves as having submitted their disputes to largely unlimited arbitral autonomy on choice of law. Choice of law is simply, if only intuitively, too outcome-determinative. According to a widely held, if inchoate, assumption, cases should not come out substantively differently depending on whether the arbitration or litigation route is taken.[7] (The major exception is the real possibility that arbitrators, unlike judges, may be chosen on the basis of their substantive expertise, and the application of that expertise may have a bearing on outcome.) If this assumption is indeed widely held, the risk that the exercise of arbitral autonomy in choice of law will operate at cross-purposes with party expectations should be of serious concern.

To begin with, it is by no means clear that, when it comes to choice of substantive law, arbitral autonomy should trump the other "autonomy" on which international arbitration is based, namely "party autonomy."[8] Thus, international arbitral tribunals, both in theory and in practice, should show no less respect for contractual choice-of-law clauses than national courts do. (They should similarly be no less willing than courts of law to allow parties to acquiesce in the application of the "wrong" law.) In fact, when international arbitral tribunals do on occasion disregard the parties' choice of law, they generally do so only on the same sort of reasoning on which national courts might be prepared to do so, for example (a) that the choice-of-law clause itself is invalid (though determining the law governing the validity of that clause can be a headache); (b) that the issue to be determined falls outside the scope of application of a choice-of-law clause; (c) that application of the chosen law will offend forum public policy; or (d) that the mandatory law of the forum or of a third State properly trumps the chosen law).[9] We can be sure that if international arbitral tribunals were thought to treat contractual choice of law in a decidedly more cavalier fashion than national courts do, international arbitration would lose a great deal of its appeal.

The point at which national litigation and international arbitration begin to part ways in choice of law is when the parties to a contract have failed to include a choice of law in their contract, when their choice of law is for any reason unenforceable, or when the issue at hand patently falls outside the ambit of any choice-of-law agreement the parties may have made. The arbitral tribunal then finds itself in the choice of law "driver's seat," without, however, the benefit of the kind of existing framework of choice-of-law analysis typically enjoyed by national courts. Unlike national courts, international arbitral tribunals simply do not come to their task equipped with settled choice-of-law rules, any more than they come to their task with fixed rules of civil procedure. You may look at the

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[7] *See* LEW ET AL., *supra* note 1, § 17.11-17.12; REDFERN AND HUNTER, *supra* note 1, § 3.96.

[8] *See* LEW ET AL., *supra* note 1, § 17.4-17-6; REDFERN AND HUNTER, *supra* note 1, § 3.96.

[9] LEW ET AL., *supra* note 1, § 17.26; REDFERN AND HUNTER, *supra* note 1, §§ 3.101-3-103, 3.128-3.140; Giuditta Cordero-Moss, *International Arbitration Is Not Only International*, *in* INTERNATIONAL COMMERCIAL ARBITRATION: DIFFERENT FORMS AND THEIR FEATURES 35 (Giuditta Cordero-Moss ed., 2013).

international arbitration law of virtually any country, or the rules of procedure of virtually any international arbitral institution (like the International Chamber of Commerce, the AAA's International Center for Dispute Resolution, or the London Court of International Arbitration), and you will find that they all enjoin tribunals, absent an applicable and enforceable choice of law by the parties, to apply to any given issue the law they deem "most appropriate," or something of that sort. (Occasionally arbitration laws and rules make believe that tribunals will first "announce" a neutral conflicts of law rule, apply that conflicts of law rule to the case at hand, and apply the law to which the conflicts of law rule points. This is of course a myth. Few tribunals divide their choice of law task into these separate analytic stages.)

To my knowledge, no one has systematically examined the extent to which international arbitral tribunals do in fact apply to the disputes that come before them the same substantive body of national law that a national court, employing its own standing conflicts of law methodologies, would apply. But we have no reason to assume a gulf between the laws that would be applied to a given case in an arbitral and a judicial forum, particularly of course when the parties specified the applicable law.

I conclude that, while parties, in the absence of a choice-of-law clause, have somewhat less assurance in arbitration than they have in litigation concerning the law applicable to their disputes, the situation is by no means intolerable. Parties are not very likely to avoid arbitration of their international disputes in favor of national court litigation merely on account of the marginally lesser certainty about choice of law that exists in an arbitral as compared to a judicial forum.

I refrain from entering deeply here into a discussion of whether, in the absence of a choice of law by the parties, arbitral tribunals may determine the substantive rights and obligations of the parties under (a) so-called "non-State law," *e.g.*, *lex mercatoria*, or the unwritten understandings about legal rights and obligations among persons engaged in international commerce;[10] (b) a written substantive "soft" law instrument such as the Unidroit Principles of International Commercial Contracts;[11] or (c) plain old fairness and equity (known in arbitration as decision *ex aequo et bono*).[12] So far as non-State law in particular is concerned, I seriously doubt that applying such law to the definition of the substantive rights and obligations of the parties corresponds to the legitimate expectations of the

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[10] Berthold Goldman, *Lex Mercatoria*, 3 FORUM INTERNATIONALE 3 (Nov. 1983), *cited in* REDFERN and HUNTER, *supra* note 1, § 3.167 n.186; Loukas Mistelis, *Reality Test: Current State of Affairs in Theory and Practice Relating to "Lex Arbitri"*, 17 AM. REV. INT'L ARB. 155 (2006).

[11] The third edition was adopted at the 90th Session of the Governing Council of UNIDROIT, held in Rome from May 9 to 11, 2011, and is referred to as the UNIDROIT Principles 2010. *See* http://www.unidroit.org/publications/513-unidroit-principles-of-international-commercial-contracts.

[12] *See* REDFERN and HUNTER, *supra* note 1, § 3.198-3.202. The authors discuss at length when an arbitral tribunal can act as *amiables compositeurs* or *ex aequo et bono*, under various national laws as well as the UNCITRAL Rules.

parties at the time of contract. One could certainly take the position that, if the parties failed to specify a national body of law as governing their contractual relationship, they impliedly consented to the application of non-State law.[13] I am leery of such an assumption, however. Lawyers who draft commercial contracts may have had a perfectly good reason to refrain from inserting a choice-of-law clause into a contract. They might think that it is apparent from the constellation of facts likely to arise that a sensible choice of national law will, at that time, become obvious. They may want to reserve the right, when the time for arbitration comes, to argue that one body of national law rather than another (normally the body of law that turns out at the time of arbitration to be more favorable to them) deserves application. They may even be prepared to leave the choice of national law to the good judgment of the arbitrators, if and when the time comes. Though there is a range of views on this matter,[14] I submit that an international arbitral tribunal should apply a non-State body of law to the definition of the parties' contractual rights and obligations only in the presence of some strong positive indication that that was the parties' intention.[15]

## IV. ARBITRAL AUTONOMY ON ISSUES OF ARBITRAL PROCESS

When we delve further into choice of law, matters become more difficult. This is due to two considerations. One is that, though matters of arbitral process may be subject in principle to the arbitration law of the arbitral seat, that body of law may be altogether silent on any number of such matters. The other is that some decisions that arbitrators are called upon to make are not strictly speaking matters of arbitral procedure, even though they also certainly do not go to the merits of the dispute and therefore ought not in principle be governed by the parties' choice of substantive law.

So far as matters of arbitral process are concerned, international arbitration has been largely governed on a territorial basis, albeit potentially subject to international treaty. In principle, every jurisdiction has national legislation that puts in place some form of arbitral regime applicable to arbitration conducted on its territory – whether that arbitration is domestic or international in character (whatever the criteria for that distinction happen to be). This "law of arbitration" – in conflicts of law terminology, "*lex arbitri*" – is meant to establish international arbitration's legal framework.[16] When parties choose a seat of arbitration, they

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[13] *See* CODE OF CIVIL PROCEDURE, [CPC], Art. 1496 (Fr.); Swiss Private International Law Act 1987, Art. 187, *cited in* REDFERN and HUNTER, *supra* note 1, § 3.196. *See also* INTERNATIONAL CHAMBER OF COMMERCE (ICC) ARBITRATION RULES, Art. 21.

[14] Markus. A. Petsche, *International Commercial Arbitration and the Transformation of the Conflict of Laws Theory*, 18 MICH. ST. J. INT'L L. 453, 456-57 (2010), provides an overview of the range of views.

[15] *See* Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Art. 42, *discussed in* REDFERN AND HUNTER, *supra* note 1, § 3.195.

[16] REDFERN and HUNTER, *supra* note 1, § 3.39; Smith Ltd v. H International, [1991] 2 Lloyd's Rep. 127, 130.

subject their arbitration to that seat's *lex arbitri*.[17] Jurisdictions are in principle free to fashion their *lex arbitri* as they wish, again subject to any treaties into which they may have entered.[18] Many jurisdictions have adopted the Model Law promulgated by UNCITRAL (the United Nations Commission on International Trade Law), or some variation of it. The U.S. *lex arbitri* happens to be the lamentably inadequate 90-year old Federal Arbitration Act – so inadequate as to necessitate a Restatement of the Law of what is essentially a federal statutory subject.[19]

To the extent that the *lex arbitri* actually addresses issues of the international arbitral process, arbitrators (like courts entertaining arbitration-related cases) do not face a major choice-of-law challenge. The applicable law is in principle the *lex arbitri* itself (including whatever references to foreign law the *lex arbitri* itself happens to make). But while a *lex arbitri* may in theory govern the arbitral process comprehensively, none actually does. In fact, the law of international arbitration in any jurisdiction will be, to say the least, full of gaps. International arbitration is replete with important issues of arbitral process on which the *lex arbitri* is entirely silent. These issues may readily be illustrated:

1) By what standards is an international arbitral tribunal to determine the entitlement of a party to a measure of interim or provisional relief?[20]
2) What are the elements of procedural due process to be observed in international arbitral proceedings?[21]
3) When, if ever, is it justifiable for an international arbitral tribunal to issue an anti-suit injunction to prevent litigation of a dispute subject to arbitration or to issue an anti-arbitration injunction to prevent maintenance of another arbitral proceeding deemed to be abusive?[22]

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[17] William W. Park, *The Lex Loci Arbitri and International Commercial Arbitration*, 32 INT'L COMP. L.Q. 21 (1983); Sigvard Jarvin, *Le lieu de l'arbitrage*, 4(2) ICC BULL. 7 (1993); Jacomijn J. van Haersolte-van Hof & Erik V. Koppe, *International Arbitration and the Lex Arbitri*, 31 ARB. INT'L 27 (2015).

[18] Some states have separate statutes for international arbitration specifically. These include the Swiss Private International Law Act 1987 and the French Code of Civil Procedure, Book IV, Title V, International Arbitration. *See* REDFERN and HUNTER, *supra* note 1, § 3.41.

[19] *See* RESTATEMENT (THIRD) U.S. LAW OF INT'L COM. ARB. TD No. 3 (2013).

[20] Christopher Boog, *The Laws Governing Interim Measures in International Arbitration*, *in* CONFLICT OF LAWS IN INTERNATIONAL ARBITRATION 409, 438 (Franco Ferrari & Stefan Kroll eds., 2011); J. P. Beraudo, *Recognition and Enforcement of Interim Measures of Protection Ordered by Arbitral Tribunals*, 22(3) J. INT'L ARB. 245 (2005); Alan Redfern, *Interim Measures*, *in* THE LEADING ARBITRATORS' GUIDE TO INTERNATIONAL ARBITRATION, *supra* note 2, Ch. 15 at 367.

[21] MATTI S. KURKELA ET AL., DUE PROCESS IN INTERNATIONAL COMMERCIAL ARBITRATION Ch. 1 & Ch. 9 (2d ed. 2010); Queen Mary University and White & Case, *2015 International Arbitration Survey: Improvements and Innovations in International Arbitration*, *available at* http://www.arbitration.qmul.ac.uk/research/2015/index.html.

[22] POLEBAUM, *supra* note 4, § 8.06; Olga Vishnevskaya, *Anti-suit Injunctions from Arbitral Tribunals in International Commercial Arbitration: A Necessary Evil*?, 32(2) J.

4) How should an international arbitral tribunal decide matters of interest and costs?

The matters illustrated above may be viewed as matters of arbitral procedure, narrowly construed. But international arbitral tribunals also face issues of arbitral process that cannot, in any strict sense of the term, be considered matters of arbitral procedure. These, too, may well not be addressed by even the most gap-free *lex arbitri*. As the following illustrations show, they are in fact numerous and important:

1) Should arbitration clauses be construed broadly, or narrowly, or in no particular way?
2) When is it excusable for a party to resort directly to arbitration without first having satisfied certain procedural conditions precedent prescribed in the agreement to arbitrate (such as a requirement of six months of good faith conciliation prior to initiation of arbitration)?
3) Under what circumstances may or should non-signatories be bound by, or be entitled to invoke, an agreement to arbitrate?
4) What is the binding effect, if any, on issues of arbitral jurisdiction (such as whether a given dispute falls within the scope of an arbitration agreement) of prior judicial determinations that may have been made on these same issues at an earlier stage (such as the stage at which a court compelled arbitration)?
5) What suffices to constitute a waiver of the right to arbitrate?
6) By what ethical precepts are international arbitrators bound and what is the content of those precepts?[23]
7) What factors are to be consulted, and how are they to be weighed, in determining whether a body of law is an "appropriate" one for arbitrators to apply, within the meaning of the *lex arbitri* or the procedural rules of the chosen arbitral institution?[24]
8) When is it appropriate for an international arbitral tribunal to apply non-State law to the definition of the rights and obligations of the parties (a matter raised above)?
9) Is an arbitral tribunal bound by *res judicata* on the basis of a prior arbitral award or judicial judgment and, if so, what must be shown to justify

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INT'L ARB. 173 (2015); Emmanuel Gaillard, *Reflections on the Use of Anti-suit Injunctions in International Arbitration*, *in* PERVASIVE PROBLEMS IN INTERNATIONAL ARBITRATION Ch. 10 (Julian D. M. Lew & Loukas Mistelis eds., 2006); Gabrielle Kaufmann-Kohler, *How to Handle Parallel Proceedings: A Practical Approach to Issues such as Competence-Competence and Anti-Suit Injunctions,* 2 DISP. RESOL. INT'L (2008).

[23] Charles N. Brower, Keynote Address: *The Ethics of Arbitration: Perspectives from a Practicing International Arbitrator*, 5 BERKELEY J. INT'L L. PUBLICIST 1 (2010); BORN, *supra* note 1, § 12.05[A][6], [B]; REDFERN AND HUNTER, *supra* note 1, at 337-41.

[24] BORN, *supra* note 1, § 11.05.

giving that prior ruling claim preclusive effect?[25] Relatedly, but more problematic, should an arbitral tribunal give collateral estoppel or issue preclusive effect to a finding in a prior arbitral award or judicial judgment?[26]

10) Is a particular dispute arbitrable?

If these two sets of issues – and they are only a sampling – are not expressly addressed by the *lex arbitri* (and they seldom are), by reference to what body of law is the tribunal to address them? The question is not an idle one. Issues such as these arise constantly in arbitration, and they may on occasion be outcome-determinative.

## V. OVER-RELIANCE ON THE LAW OF THE PLACE OF ARBITRATION

One error into which the arbitral community may readily fall in facing these sets of issues of arbitral process is to apply, in the absence of guidance in the *lex arbitri,* the law that would be applied to those issues by a court of the place of arbitration in a case coming before it.[27] The chief explanation for the tendency of tribunals to turn to the law applied by courts of the seat is the habit of giving an altogether exorbitant meaning to the notion of *lex arbitri* itself; that is, understanding it to signify not merely the seat's arbitration law, but the law of the place of arbitration in general.

This is misguided because parties may choose a seat of arbitration in part on the basis of that seat's *lex arbitri* (or be assumed to have done so), but they do not do so on the basis of the law that the courts of the seat happen to apply in the cases they hear. It is entirely reasonable to suppose that the parties knowingly subjected themselves and their arbitration to the *lex arbitri* of the place of arbitration, but not to suppose that they knowingly subjected themselves and their arbitration to the general law of the seat.

Turning to the law of the seat in this indiscriminate fashion leads to applying in arbitrations conducted there a rule of law that has nothing to do with arbitration and neither suits its needs nor advances its purposes particularly well. For international arbitral tribunals to mimic the general practices and policies of the

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[25] Luca G. Radicati di Brozolo, *Res Judicata and International Arbitral Awards*, *in* ASA SPECIAL SERIES No.38 Ch.7 at 127 (Pierre Tercier ed., 2011); B. Günes; *Res Judicata in International Arbitration: To What Extent Does an Arbitral Award Prevent the Re-Litigation of Issues?*, TDM 6 (2015); Stavros Brekoulakis, *The Effect of an Arbitral Award and Third Parties in International Arbitration: Res Judicata Revisited*, 16 AM. REV. INT'L ARB. 177 (2005).

[26] Audley Sheppard, *Res Judicata and Estoppel*, *in* PARALLEL STATE AND ARBITRAL PROCEDURES IN INTERNATIONAL ARBITRATION 219 (Julian D. M. Lew & Bernardo M. Cremades Román eds., 2005).

[27] Loukas Mistelis, *Reality Test: Current State of Affairs in Theory and Practice Relating to "Lex Arbitri"*, 17 AM. REV. INT'L ARB. 155 (2006); REDFERN AND HUNTER, *supra* note 1, § 3.217.

courts of the seat of arbitration is in fact contrary to the assumption that in opting for arbitration the parties specifically intended to distance them and their arbitral proceedings precisely from those general practices and policies.[28] Keeping what is meant by the *lex arbitri* within proper bounds has become a greater choice-of-law problem than it ought to be. The place of arbitration has no greater claim to have its general law (i.e. law that does not form part of the *lex arbitri*) applied to these issues than any other jurisdiction has.

This is not to say that routine application of the law of the seat to issues of arbitral process left unanswered by *the lex arbitri* presents no advantages with respect to the kind of issues under consideration here. One putative advantage of having recourse to the general law applied by the courts of the seat is the presumably enhanced predictability that comes with applying to issues of international arbitral process the law of a pre-selected jurisdiction. And it is true that greater predictability flows from applying to any and all such issues the law of the arbitral situs as a default rule in preference to applying the law that three individual arbitrators in any given case happen to consider, whether by reference to a given conflicts of law rule or no conflicts of law rule at all, the most appropriate law to be applied. On the other hand, this approach invites and perpetuates wide discrepancies among answers to these important questions, without the benefit of ensuring respect for party consent.[29]

## VI. THE CASE FOR INTERNATIONAL STANDARDS ON ISSUES OF INTERNATIONAL ARBITRAL REGIME

The discussion thus far has proceeded on the assumption that, if international arbitrators are to select a law to govern an issue governed neither by the parties' chosen law nor by the arbitration law of the seat, that law must be the positive law of one national jurisdiction or another, the task merely being to pick the right, or at least the most defensible, one.

There are in fact alternatives to applying national law to such issues.

One such alternative is to refrain from applying any particular legal norm at all, and simply invite an international arbitral tribunal to apply whatever rule of decision it finds to be most appropriate under the circumstances. This approach would be consistent with the notion that, except as agreed by the parties (whether through a choice of substantive law, a choice of institutional rules, or a choice of arbitral situs), international arbitrators simply exercise their discretion. It is further supported by the notion that parties in international arbitration will have selected their arbitral tribunal in consideration of, among other things, the arbitrators' aptitude to exercise sound judgment. An obvious drawback of this approach is of

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[28] BORN, *supra* note 1, § 1.02[B][1].

[29] BORN, *supra* note 1, § 19.03; REDFERN AND HUNTER, *supra* note 1, § 3.223-225; Pippa Read, *Delocalization of International Commercial Arbitration: Its Relevance in the New Millennium*, 10 AM. REV. INT'L ARB. 177 (1999).

course the lack of certainty and predictability as to the applicable law and the failure to afford any real guidance to tribunals in future cases.

Another alternative is to apply to issues of arbitral process unaddressed by the arbitration law of the seat what may be termed an "international standard." Doing so, if it can responsibly be done, presents several important advantages. First, on many of these issues, no single jurisdiction has a particularly great interest in having its law applied. The only jurisdiction having a plausible interest in most of these issues – and the only one whose law the parties may plausibly have contemplated being applied to them – is the place of arbitration. But by definition that jurisdiction, having adopted a *lex arbitri* that is silent on the issue at hand, has expressed no such interest. Nor can legislators in the seat of arbitration realistically be assumed to intend that the law by which these gaps are to be filled is the law practiced by national courts.

Second, international arbitration and persons resorting to it for the resolution of international disputes would benefit from the greater predictability that can be expected to flow from the application of a single international standard, assuming one such standard can be divined. If the international standard, assuming there is one, proves to be contrary to the parties' intentions, the parties, barring exceptional circumstances, have contractual freedom to vary it, if not in their arbitration agreement or post-dispute agreement, then informally during the arbitral proceeding itself. Similarly, if a State regards the international standard on any such issue of arbitral process as undesirable, it has the option of amending its *lex arbitri* accordingly, and there is no reason to suppose that an international standard, assuming one to exist, should trump an express provision of the *lex arbitri* of the seat.

Support for resort to international standards on issues of arbitral process in appropriate cases is consistent with the reluctance, expressed above, to apply non-State sources of law, such as *lex mercatoria*, as the law applicable to a given international dispute. The purpose of resort to international standards, as contemplated, is not to replace State law as the substantive law applicable to the dispute, but simply to fill gaps in the *lex arbitri* on matters of arbitral process

Given the potential advantage of an international standard on at least some such issues, the time has come to think in some systematic way about the conditions under which it is appropriate to posit an international standard concerning them and about how any such standard is to be ascertained.

In this inquiry, it is useful to distinguish between (a) the question whether it is particularly advantageous to have an international standard, rather than the law of a State, applied to a given issue unaddressed by the *lex arbitri*, on the one hand, and (b) assuming it would be advantageous, the question of what the content of that international standard is or should be taken to be, on the other.

The answer to the first of these questions is reasonably straightforward. First, an issue deserving of an international standard should presumably be one that recurs with some frequency in international arbitration. Second, an issue potentially lends itself to an international standard to the extent that it is one in respect of which parties who have recourse to arbitration are likely to have a

significant interest, either *ex ante* or at the time a dispute arises, but that the parties would not ordinarily expect to be governed by the law of any particular jurisdiction, including the place of arbitration. Thus, it should not be one in which a given jurisdiction has so strong an interest that its law deserves application in place of an international standard.

However, while it might be desirable for an issue to be governed by an international standard (and perhaps even be made the subject of an international treaty), that does not in itself suffice to justify positing an international standard. The appropriateness of arbitral tribunals' announcing and applying an international standard in arbitration cannot be assumed.

Of what then – besides the desirability of an international standard – must an international arbitral tribunal be convinced in order to justify announcing and applying an international standard on an arbitral process matter? A potentially useful notion in this regard is the notion of "international consensus." To my knowledge, there exists no established methodology for ascertaining the existence of an international consensus or identifying its content. If the elaboration of international standards is to be seriously pursued and responsibly conducted, some sort of consensus must be established as to how that exercise is to be performed, i.e. some sort of *methodological consensus* for determining *normative consensus*.

It is useful in contemplating the prospects for identifying a methodological consensus for these purposes to consider how other kinds of tribunals have gone about performing a gap-filling function informed by international consensus. Thus, to take only the most salient example, the International Court of Justice is directed by Article 38(1)(c) of its own statute to consider among the sources of international law both customary international law and "general principles of law recognized by civilized nations." Its case law in this respect must be instructive as to the challenge of identifying a normative consensus.

Identifying the criteria of consensus employed by the ICJ and other international tribunals is a daunting task. It is not a task that scholars of international commercial arbitration have ordinarily considered as within their ken. To be sure, international standards play a central role in investor-State (as distinct from international commercial) arbitration because that species of arbitration, after all, is treaty-based and counts public international law among its sources.[30] But transposing the learning of public international law in investor-State arbitration to international commercial arbitration generally is a challenging task, since international law has traditionally played a largely marginal role at best in international commercial arbitration. Such a transposition would go a long way toward weakening the already much-criticized distinction between public and private international law, as well as the distinctiveness of international commercial from investor-State arbitration.

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[30] ERIC DE BRABANDERE, INVESTMENT TREATY ARBITRATION AS PUBLIC INTERNATIONAL LAW Ch. 1 (2014).

In the effort to identify an international standard on a matter of arbitral process that is neither addressed by the *lex arbitri* nor appropriately subject to the substantive law chosen by the parties, critical attention should also be given to the possibility of building upon the many soft law instruments that populate the international arbitration landscape. A particular challenge in this connection is distinguishing between soft law that is purely aspirational and soft law that purports to express a prevailing view. It is not always obvious from the face of a soft law instrument into which of these categories it is best placed.

## VII. THE PURSUIT OF CONGRUENCE BETWEEN INTERNATIONAL ARBITRAL AND NATIONAL COURT JURISPRUDENCE

There remains at least one other major challenge to the task envisaged by this article. It will have been noticed that some of the illustrative issues enumerated above contemplate decisions that not only arbitral tribunals, but also national courts to which arbitration-related matters are brought, are called upon to make. To what extent may it be said that, if the case has been made for international arbitral tribunals to employ an international standard on a matter of arbitral process, that same standard warrants application by national courts on the same matter of arbitral process when it comes before them? If all we were to do is pursue symmetry, the answer would be simple; the same international standard would receive application in both fora.

But the matter is far less simple. National courts properly value congruence not only between international arbitral tribunals and themselves on matters of arbitral process. They also value – and may even value to a greater degree – congruence within their own jurisprudence. For a national court to posit a different standard on an issue – for example, *res judicata* or the computation of interest on a monetary liability – than it ordinarily posits, merely because the issue arises in an international arbitration case coming before it is to invite incongruities within national law. This reality suggests that the task at hand entails not only all the challenges associated with identifying international standards for use by international arbitral tribunals, but also the challenge of determining whether the pursuit of symmetry between international arbitral jurisprudence and the arbitration-related jurisprudence of national courts on matters of arbitral process comes at too great a price in terms of the coherence of national court jurisprudence as a whole.

## VIII. CONCLUSION

International arbitral tribunals should resist the practice of falling back on the law applied by courts of the seat of arbitration in filling choice-of-law gaps on matters that are both (a) unaddressed by the *lex arbitri* of the seat and (b) not properly governed by the law that the parties designated as applicable to the merits of their dispute. But neither should tribunals subject to the law chosen by the parties issues that cannot fairly be described as the merits of the dispute.

The challenge is to identify alternative sources of law and guidance in determining such issues. An easy answer is simply to assume that the arbitrators, having been selected by the parties on account of their sound judgment, will address those issues in an entirely suitable fashion. But the cost of that assumption, in terms of certainty and predictability, and satisfaction of parties' legitimate expectations, is considerable.

An attractive alternative is to identify and utilize international standards. The problem is that such standards are not always easily ascertained, or even existent. Even assuming that "consensus" is our criterion for the emergence of an international standard, we have not as yet even arrived at a methodological consensus as to how a normative consensus should be identified. This is a long-term task to which counsel, arbitrators, arbitral institutions, academics, and professional associations should direct their energies.