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Comparative Analysis as an Autonomization Strategy in International Commercial Arbitration

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Abstract The article explores the unique character of international commercial arbitration as a globalized phenomenon, where universalizing and harmonizing effects have largely been achieved by private means and spontaneous expansion, outside the States' direct intervention and control. The evolution of arbitration in recent decades from an alternative to the core mechanism of deciding cross-border commercial controversies is considered. Privatization of this area of dispute resolution is examined in the context of its growing autonomization, marked—as observed by Emmanuel Gaillard—by notable changes in its theoretical representations and narratives. This specific conceptual, institutional, and procedural framework of commercial arbitration reflects the demands of decision-making exercised in a legally, linguistically, and culturally diversified environment. Interpretation and application of law in arbitral cases requires skillful navigation between the rules of domestic, international and transnational origin, performed not only on the level of substantive norms, but also on those involving conflict of laws and procedure. As a consequence, comparative analysis plays a critical and complex role in arbitral decision-making, reaching beyond the mere demands of rendition of relevant provisions, and has been defined sensu *largo* as a 'comparative mindset', characteristic to international commercial arbitration. The article examines this phenomenon and its mechanics, challenges for legal professions and the effect of transnationalization of relevant domestic rules. It also explains the role of comparative analysis as an important instrument, used strategically in the processes of autonomization of commercial arbitration.

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1 Introduction

Processes of legal globalization have been especially present in the activity of courts and tribunals resolving international cases and seeking recourse to international and transnational rules. The question of an emergence of areas of uniform international (or regional) law in the context of comparative analysis, and the tension between globalization and localization, have also been repeatedly addressed by legal commentators over the past decades.[1] In some fields the efforts of supranational lawmakers and adjudicators have led to very far-reaching outcomes. The regulatory 'islands' of international criminal law, human rights and international economic law have remarkably evolved thanks to the efforts of the States as well as to the active stance frequently undertaken by international courts and tribunals. The success of regional harmonizing initiatives, with the forming of the European Union (EU) being the most prominent example, adds yet another layer to this expanding, supranational legal landscape.

In light of such projects of universal regulatory systems, free from unnecessary domestic influence, a pervasive issue is one of an actual current significance of uniform supranational regulations and the scope of legal globalization. A further question is whether they have in practice led to an elimination, diminishment, or significant modification of standards of application of the law, developed and originally operating in domestic settings. The practice of international commercial arbitration offers a particularly interesting example of highly successful processes of legal globalization, facilitated by members of the private sector, and achieved to a large extent due to extensive use of the comparative method in adjudicatory practice. Functioning of international commercial arbitration may serve as a highly apt illustration of what Horatia Muir Watt has characterized as the subversive function of comparative law,[2] which 'demonstrates the relativity of our own national systems and deconstructs the myth of right answers'.[3] According to Martin Hesselink, comparative law 'makes national positivism look parochial and challenges the internal perspective and its related right answers'.[4] As discussed in detail below, this effect is in arbitration frequently and naturally complicated by the status of arbitrators as outsiders to the domestic legal system, the rules of which they are to apply.

Current significance of commercial arbitration is not a result of State-induced action and planned public international policy, but of a largely spontaneous expansion. Arbitration functions as a globally dispersed set of private, decentralized, and highly competitive institutions; administered organized proceedings, or *ad hoc* proceedings; international and domestic framework regulations; and procedural

[1] cf. [6], p. 150 and ff.

[2] [35], cf. also [51].

[3] [18], p. 47.

[4] [18].

rules as well as professional usages and practices. As discussed in detail *infra*, arbitration has undergone a striking revival in the second half of the twentieth century—contractually chosen by the parties to international commercial transactions as a method of dispute resolution preferred over domestic litigation.

From an alternative to judicial decision-making in the field of international commercial transactions, it has evolved into the dominant method of addressing such disputes.[5] Binding character of the outcome of proceedings, freedom from the courts' intervention, subject matter expertise of arbitrators in international transactions (not always demonstrated by domestic judges), neutrality of the forum, time efficiency and flexibility of procedure have often been indicated by practitioners and legal commentators among the reasons for this development.[6] All those factors, along with the fast-growing volume of trade exchange (and the concomitant and ever-increasing number of related disputes) in recent decades, have contributed to the phenomenon described as privatization of dispute resolution in international commercial cases and to the growing autonomization of arbitration from the States'. International commercial arbitration has been thus invoked as a particularly successful example of legal globalization, uniquely achieved 'without the State',[7] by private means.

This emancipation of arbitration, as Emmanuel Gaillard demonstrates, has been accompanied by the changing narrative of its theories, pointing to the sources of legitimacy. The first of representations of arbitration, identified by Gaillard, is a monolocal one, in which it is treated as a specialized form of adjudication functioning within the confines of a particular national legal order (of the place of arbitration). Thus it functions as domestic quasi-courts. The second—pluralistic, multilocal, or Westphalian representation—finds the legitimacy of arbitration in all legal systems interested in a specific case and award (in particular, in the legal order of the place of arbitration *and* in those of places of potential enforcement of the award). Finally, the third representation treats arbitration as an autonomous legal order, in which the arbitrators are vested with the authority do deliver a *sui generis*, denationalized administration of justice.[8]

Arbitration as an adjudicatory, binding method of dispute resolution is based on application of relevant rules of law to the merits of the dispute. Due to the international character of the disputes and composition of the parties, as well different legal systems interested in the outcomes of the case (such as those of the place of arbitration and of the place of enforcement) arbitrators are commonly confronted with the demands of decision-making in a legally, linguistically and culturally diversified environment. On the legal level this diversity is further present in different aspects of the arbitral process—in regard to relevant substantive law, but also rules of procedure and conflict of laws analysis.

For these reasons, comparative analysis plays a particularly significant role in commercial arbitration and has served as one of the instruments of the growing

[5] [30], p. 293.

[6] cf. [21], p. 21.

[7] [48].

[8] [14], p. 15 and ff.

autonomization of this field. It is argued that, whereas in the context of domestic adjudication comparative analysis has merely been one of many available interpretative methods (and not an overly popular one), in arbitration it has gained a critical status. It has also been consciously, strategically applied by arbitrators to the effect of rule-formulating and *de facto* rule-making. The use of the comparative method in creative legal interpretation in arbitration has been so prominent as to lead some commentators to defining *lex mercatoria* not as a body of substantive transnational rules, but as a characteristic method of arbitral decision-making, based on comparative inquiry.[9] Furthermore, in cases in which domestic law is to be applied, arbitrators use comparative analysis in order to 'transnationalize' them, achieving a middle ground between the positions of the parties and potentially interested legal systems. The resulting detachment of rules so interpreted from their original context of a domestic legal system augments processes of autonomization of arbitration from under the States' influence.

The article examines these phenomena and seeks to explore how the comparative method has been used in international commercial arbitration on the substantive, as well as on the procedural level. It explains how the comparative method, relatively scarcely used in the domestic adjudication practice, has evolved into a rudimentary interpretative tool in international commercial arbitration. It also demonstrates how it functions as an essential component of the modern-day arbitration practice in regard to applicable domestic law as well as a means of formulating transnational rules. The article explains how these creative processes support the autonomization trend in arbitration, as arbitrators expand the scope of their interpretative discretion and reach beyond the limits of originalistic rendition performed 'from within' the domestic legal system of applicable rules. The article further discusses consequences of extensive use of the comparative method in arbitration for legal professions and the challenges that it poses for practitioners.

2 International Commercial Transactions and the Comparative Method: A Tool or an Organizing Principle?

2.1 Career of the Concept

The significance of the comparative approach is certainly one of the characteristic features of the present-day practices of international lawmaking and legal interpretation observable in the field of international economic law. Originally largely perceived as just a functional technique, it has nevertheless evolved into one of the key strategies in legal drafting and dispute resolution. Harold Cooke Gutteridge's characterization of the very concept of comparative law as an 'unfortunate but generally accepted label for the comparative method of legal study and research'[10] has a long tradition. At the 1900 International Congress of Comparative Law in Paris, Frederick Pollock pointed out that comparative law is

[9] [13], p. 224.

[10] [16], p. ix.

not an autonomous branch of legal studies, but merely an introduction of the comparative method into law.[11]

As Konstantinos D. Kerameus remarks, this trend of identifying comparative law with an auxiliary method of legal research and reasoning is still prominent.[12] The comparative methods in the domestic setting had largely been perceived as an instrument of somewhat limited practical utility, which (besides such areas of direct applicability as legal reform and policymaking[13]) could have easily been perceived as either a noble academic hobby or just one of the interpretive instruments in a judge's or counsel's toolbox. The same method in an international setting, however, has gained much recognition and prominence. As a consequence, some commentators have indicated that the reductionist concept of comparative inquiry requires a revision, which would take into account changes in the role of the States in the sphere of cross-border and supranational economic and legal relations.

The rise of the comparative method as an essential legal practice has in recent decades accompanied processes of globalization and legal universalistic initiatives, proliferation of English as the new *lingua franca*, as well as what Vivian Grosswald Curran characterizes as the increasing importance of non-national structures in law. As she notices, in law

> former domains of pluralism and difference indeed are receding, but that difference itself remains undiminished. Rather, its nature and provenances are changing, due to rapidly multiplying reconfigurations that characterize our time. Comparative law's challenge lies in deciphering significance amid reconstituting categories so as to unravel deceptive appearances, whether of unchanged legal significance surviving under a mask of change, or, conversely, of changed legal significance evolving under a surface that appears to remain static.[14]

Several successful initiatives of legal harmonization on a global, as well as regional level, combined with the shifts of the authority of the State onto transnational institutions (most notably, international adjudicating bodies) provide examples of this 'new' comparative approach in action. A further factor, contributing to popularization of comparative analysis, and discussed in Subchapter 6, has been the internationalization of law firms and increased professional mobility of lawyers, who are, as a result, often practicing in a country other than on in legal system of which they had been primarily trained.

2.2 The Comparative Method in International and Transnational Projects of Harmonization of Law for Commercial Transactions

Recourse to the use of comparative analysis as a key strategy in the practice of international commercial transactions can be found on the level of law-making, as

[11] [5], p. 60.

[12] [27], p. 866.

[13] [16], p. 9.

[14] [7], p. 677.

well as in application of the law in processes of dispute resolution. In the former, a deliberate adoption of the comparative approach can be traced in the preparatory history of traditional public international law instruments. In this regard, arguably the most successful instrument of international harmonization of the substantive law of international commerce, the 1980 United Nations Convention on Contracts for the International Sale of Goods (the CISG), was prepared through a discussion and thorough collaboration of experts representing a variety of different legal regimes, so as to avoid a one-sided perspective. At the same time, the process of drafting of the CISG was not a harmonious exercise, but an arena of repeated clashes and conflicts between civil and common law specialists.[15] As a result, as Peter Huber observes,

> [t]he CISG is not necessarily the common denominator of an exercise in comparative law, but the result of a political negotiation process that aimed at establishing a workable and well suited instrument for international sales.[16]

Consequently, Huber postulates that a comparative interpretation of the Convention should be carefully undertaken; this reservation would be relevant, however, if such an analysis was executed from a primarily originalist angle. The issue of the use of the comparative method so as to provide autonomous interpretation of the provisions of the CISG is further discussed *infra*.

A decidedly comparative (and 'ecumenical') stance has also been adopted in the transnational 'soft law' initiatives, undertaken without an endorsement of the governments. The Principles of International Commercial Contracts of the International Institute for the Unification of Private Law (UNIDROIT), which were devised as a restatement of universally accepted contract law rules, are a prominent example of this strategy. As declared by the Governing Council of UNIDROIT in the Introduction to the 1994 edition of the Principles:

> [f]or the most part the UNIDROIT Principles reflect concepts to be found in many, if not all, legal systems. Since however the Principles are intended to provide a system of rules especially tailored to the needs of international commercial transactions, they also embody what are perceived to be the best solutions, even if still not yet generally adopted.[17]

This instrument has also been explicitly characterized by Klaus Peter Berger as 'comparative snapshots' of different contract law regimes of the world—which has served for Berger as a point of its critique as an insufficiently materially autonomous body of rules.[18] However, the cautiousness of drafters of the UNIDROIT Principles to avoid labeling of this instrument as a *lex mercatoria* contribution (and yet providing for its applicability in case of the parties choice of *lex mercatoria*) seems notable.

[15] cf. [31], p. 347 and ff.

[16] [20], p. 230.

[17] [49], p. xv.

[18] [1], p. 208.

2.3 The Comparative Method in Commercial Dispute Resolution

Comparative analysis as a key approach in relation to international business transactions can also be found on the level of adjudication. It has been increasingly present in the practice of domestic courts. As Mads Andenas and Duncan Fairgrieve demonstrate on the example of the UK judicial activity, repeated recourse to comparative analysis has taken a number of forms, ranging from avoidance of application of domestic law, through expression and explication of principles of domestic law, to application of European and international law.[19] Consequently, Andenas and Fairgrieve acknowledge that '[c]omparative law is no longer an impractical academic discipline',[20] yet they also observe that the proliferation of this method has resulted in a loss of adjudicatory consistency, which should be aided by a relevant development of legal scholarship.[21]

Comparative analysis has also remained at the very center of arbitral decision making. First, it has been applied in the *lex mercatoria* based adjudication and has largely contributed to the development of the body of transnational Law Merchant, defined from the beginnings of its revival in the 1950s and the 1960s as the 'common core' of different legal systems.[22] The new *lex mercatoria* has been crystallized over the last several decades through arbitral case law. As further discussed in detail *infra*, it has also notably been defined by some commentators as not a substantive body of uniform rules of international commerce, but as a specific way of applying the comparative method in adjudication.[23]

The use of the comparative method in commercial arbitration, however, is much more far-reaching and diversified than the cases of *lex mercatoria*—based decision-making. While the majority of the cases remain resolved on the basis of proper domestic law, arbitrators, as Gabrielle Kaufmann-Kohler observes, have an "inclination to 'transnationalise' the rules they apply".[24] This is achieved through an adoption of the comparative approach, and further augmented by the fact that the arbitral tribunals are not rendering awards in the name of any State, and the arbitrators are often not primarily trained in the law determined as *lex causae*, and thus they apply it as the outsiders to the legal system.[25]

As observed by a number of authors, the particularly intense use of the comparative method in commercial arbitration remains unparalleled:

[19] [52].

[20] [52], p. 59.

[21] [52], pp. 59–60.

[22] It is worth noting though, that the first post-WWII, lex mercatoria based awards in the 'oil cases' were not universally accepted as an expression of the 'common core' of different legal systems. In the Islamic countries skepticism was a prominent reaction of the commentators and had resulted in long term reluctance in usage of arbitration (cf. [4], p. 643 and ff.). These effects of ostensibly universalistic legal aspirations placed in a post-colonial context can be seen as analogous to Western legal transplants in the field of human rights ([45], p. 214 and ff.).

[23] [13], p. 224.

[24] [24], p. 364.

[25] [21], p. 34.

> international arbitrations are a teeming petri dish for the practice of comparative law. Nowhere is this practice more active than in the advocacy to international tribunals.[26]

Consequently, it has been characterized as an integral part of the 'advocacy tool kit'[27] of an arbitration practitioner. An in-depth comparative approach has been further emphasized as a key competence of an arbitration practitioner, who is by definition faced with plurality of legal systems and variety of cultural, political, and social traditions and sets of norms.[28]

Finally, in the field of the uniform law of international sales, comparative analysis has been explicitly indicated by Ingeborg Schwenzer and Pascal Hachem as the most natural and efficient tool for securing autonomous interpretation of the CISG (by the means of domestic litigation, as well as arbitration):

> [i]t is now common ground that uniform law has to be interpreted autonomously and regard is to be had to its international character. In this respect the comparative legal method has proven most adequate and successful. Part of this method involves giving due consideration to foreign court decisions and arbitral awards which are therefore becoming more and more important on the international level. Whatever the situation in a domestic legal system may be, there can be no doubt that foreign decisions do not have a binding effect upon national courts. Still, their potential persuasive authority is widely and justly recognized today.[29]

This particular feature of decision-making based on comparative analysis of international sales law is—as Schwenzer and Hachem demonstrate—present in adjudicator practice of both the domestic courts, as well as arbitral tribunals. However, as a way of accumulating a consistent body of case law further referred to worldwide, it can be seen as a factor strengthening autonomization processes within the field of commercial arbitration.

3 Arbitration as Adjudication in a Legally and Linguistically Diversified Environment

As already indicated, the necessity for a particularly careful and in-depth adoption of the 'comparative mindset' by a legal practitioner can be observed in the areas where legal diversity coincides with a linguistic one. This adds an entirely new level to the considerations related to proper organization and conduct of proceedings, particularly in the context of the neutrality and independence requirements, which are considered to be among the most rudimentary obligations of an arbitrator.[30]

[26] [46], p. 1.

[27] [46], p. 2.

[28] [28], p. 350.

[29] [44], p. 468.

[30] After: [29], p. 16.

International commercial arbitration is a prominent example of such a field, as not only do the parties represent different legal systems (and often also diverse legal traditions), but they (and their counsel) also usually have different native languages. Whereas *lex causae* is often a legal system of one of the parties, this is not an absolute rule. Substantive law determined as governing the case is thus frequently not only foreign to at least one of the parties, but it is also expressed in language that is likely nonnative to that party and to the arbitrators.

Furthermore, the arbitrators are often faced with the demands of conducting the proceedings and rendering an award in a language that is foreign to them, as well as applying law that was not part of their primary legal education. As the presence and scope of the *iura novit curia/iura noit arbiter* principle is not regulated in a uniform way in various jurisdictions, fulfillment of the latter demand might turn out to be very difficult for the tribunal.[31] The formal requirement, adopted by some of the leading arbitration centers,[32] restricting the possibility of appointing an arbitrator of the same nationality as any of the parties (aimed at securing procedural neutrality) further compounds this legal and linguistic challenge. An adjudicator in international commercial arbitration is thus faced with a complex linguistic landscape, including such key levels as the language of the contract (and the language of its translation), the languages of the parties, the language of the proceedings and of the award, and the language in which the applicable law has been enacted, as well as that in which a translation thereof has been offered.

Such a setting calls for a particularly conscious procedural approach and sensitivity to linguistic issues because many of the aspects that are predetermined in domestic litigation are not so designated in arbitration, but rather, must be addressed with regard to the circumstances of a specific case. In particular, the selection of the language of the proceedings, in case of lack of a relevant agreement by the parties, is generally left to the discretion of the arbitrators.[33]

It has been commented upon as a decision to be undertaken with a regard to the characteristics of the case in question and with an aim of securing a neutral setting for the process of dispute resolution (i.e., without favoring or discriminating any of the parties through linguistic preferences). However, some arbitration centers have a tradition of promoting a certain language of the proceedings; for instance, until the amendment in 2012, the rules of procedure of the China International Economic and Trade Arbitration Commission (CIETAC) provided for Chinese as the default option in this regard, unless the parties have explicitly indicated otherwise.[34]

Another linguistic issue pertaining to arbitration is that, in many disputes, the proper substantive law governing the case may be intermediated through translation. An arbitrator thus faces a problem of the applicable law being doubly transitioned: as foreign law, the content of which is being acquired; and as a text originally

[31] [23].

[32] c.f. e.g. the LCIA Rules, Art. 6.

[33] c.f. e.g. the UNCITRAL Model Law on International Commercial Arbitration, Art 22; UNCITRAL Arbitration Rules Art. 19; ICC Rules of Arbitration Art. 20; LCIA Arbitration Rules Art. 17; SCC Arbitration Rules Art. 21.

[34] See the 2005 CIETAC Rules, Art. 67(1) versus Art. 71(1) of the 2012 CIETAC Rules.

rendered in a foreign language and offered in translation onto the working language of the proceedings (which is also often a nonnative language to the arbitrator). On a regular basis, arbitrators are thus facing what Barbara Pozzo characterizes as one of the main features of the practice of comparative law—namely, that

> language is essential to the process of acquiring knowledge of foreign law. Information on foreign law is in fact embedded in the language, which is expression of the culture, of the particular set of values, and - finally – of the mentality of lawyers, representing the legal system under analysis.[35]

The access to sources of foreign applicable law in itself poses a number of questions, which can be described as the *iura novit arbiter* dilemma (should the contents of *lex causae* be ascertained by the tribunal *ex officio*, or can it rely on the submissions of the parties?).[36] Moreover, a number of sources of the law of different origin can be applied to the merits of a single case (including not only the sensu stricto *lex causae*, but also, for instance, public policy rules of the legal system of place of anticipated enforcement, and uniform usages and customs of international trade as expressed in such instruments as the UNIDROIT Principles). Their legal, but also linguistic variety adds to the complexity of the, already highly demanding, task of adjudicating in a multicultural and multilingual environment.

Finally, it should be emphasized that the determination of relevant rules—largely predetermined in domestic litigation—is, in arbitration, not limited to the proper law, applicable to the merits of the dispute and to the rules of procedure. The challenge of ascertaining these two sets of rules is further expanded by considerations as to the law governing the capacity of the parties to conclude an arbitration agreement; the law governing the arbitration agreement and its performance; *lex arbitri* governing the existence and general scope of powers of the arbitral tribunal; and the law (or, in the case of multiple possible locations, laws) governing the recognition and enforcement of the award.[37] This list can be further broadened by the relevant conflict of laws rules.[38] In addition, the substantive law or rules of law of the case (*lex causae*) might be the law of the (main) contract (*lex contractus*)—as the existence of the latter might also be an object of the dispute.

4 The Comparative Approach in Application of Substantive Rules

Frédéric Gilles Sourgens[39] distinguishes three main ways of utilizing the comparative method in arbitration advocacy. The first one is an identification of concepts present in the legal order, with which the arbitrators are familiar, so as to point to their similarity with concepts from the legal system that is to be applied to the merits of the case. Such a strategy serves the purpose of introduction of an

[35] [41], p. 88.

[36] [25].

[37] [42], p. 78.

[38] [21], p. 146.

[39] [46].

argument of the 'common legal language', shared by the arbitrators and the interested party, as a basis for arbitral decision-making. It might lead to controversial results though, due to the existence of legal 'false friends'—concepts that are only superficially similar or not fully interchangeable.

The second possibility is offering an analogy in situations, where the proper law is silent, not sufficiently developed, or has not been applied in cases of the same type as the one in question. Relevant examples from a legal system with which arbitrators are directly familiar might help in filling the legislative void, as well as creating a 'comfort zone' for the adjudicators.[40] Finally, comparative analysis might be employed as a negative counterargument, in order to demonstrate that attempted analogy or comparison is ungrounded, when in fact the seemingly similar notions embedded in different legal systems denote very different legal concepts.[41]

Linguistic variety in commercial arbitration cases poses additional challenges in comparative inquiry as it is:

> not atypical that a tribunal would have at least one member from the jurisdiction of the applicable law. In those cases, counsel must take care that the language used is not only accessible to the arbitrators that are foreign to the applicable law, but also that counsel's use of language remains plausible within the context of the original normative discourse.[42]

Probably the most far-reaching consequence of adopting the comparative approach in arbitration has been its use in the *lex mercatoria* based adjudication. Comparative analysis has been utilized as a key strategy in this area. The parties, seeking to avoid the application of domestic legal systems, have instead indicated in their contracts an intention to be bound by a set of rules shared by different legal systems (in practice: legal systems interested in the case). Hence the concept of *lex mercatoria* would be employed not as an artificial, nonnational creation (or, as indicated in the early decisions, a 'modern law of nature'), but as a synthetic outcome of search for shared rules across different legal orders.

Arguments explicitly rooted in comparative analysis have been used, *inter alia,* by the ICC arbitral tribunal in *Pabalk Ticaret Limited Sirketi v. Norsolor S.A.* wherein it was stated that the use of principle of good faith as a basis for the award is justified not only by the international character of the agreement, as:

> [T]he emphasis placed on contractual good faith is moreover one of the dominant tendencies revealed by the convergence of national laws on the matter.[43]

A concept of *lex mercatoria* as a body of principles distilled from a variety of national legal systems has been particularly clearly expressed by the UK Court of Appeal in the 1987 decision in *Deutsche Schachtbau- und Tiefbohr GmbH v. Rakoil*. The judge decided to uphold the arbitral award in this case, asserting that:

[40] [46], p. 18.

[41] [46], p. 19.

[42] [46], p. 16.

[43] [37], p. 110.

> I can see no basis for concluding that the arbitrators' choice of proper law – a common denominator of principles underlying the laws of the various nations governing contractual relations – is out with the scope of the choice which the parties left to the arbitrators.[44]

Popularity of this approach, combined with extensive use of comparative analysis in arbitration, has further led some commentators to apply the concept of *lex mercatoria* not as a substantive body of rules but as a method of adjudication, which relies on

> deriving the substantive solution to the legal issue at hand (…) through a comparative law analysis which will enable the arbitrators to apply the rule which is the most widely accepted.[45]

In the context of the still unresolved discussion of the validity of *lex mercatoria* as an autonomous legal system, this functional and not substantive concept thereof could have been seen as a quite sophisticated response to the legitimacy dilemma. Seen from such a perspective, *lex mercatoria* has not been legitimized by sources external to the will of sovereign States as a purely transnational construct, but it has been drawing from them directly as a common part of the sets consisting of domestic contract law rules. At the same time it has been reinforcing independence of arbitral decision-making from the influence of a specific national legal system through interpretation not embedded within this system.

5 The Comparative Approach in Arbitration at the Procedural Level

The conditions of adjudicating in a diversified legal and cultural environment, naturally connected with international commercial arbitration, pose a number of challenges for practitioners—arbitrators, as well as arbitration counsel. It is also worth noting that the same persons, while arbitrating some disputes, can also act as counsel in others, thus having experience in both roles (and the related issue of possible conflicts of interest has been addressed by legal practice[46]). The specific setting of arbitration thus calls for relevant skills and competencies, to be combined with awareness described as a 'comparative mindset', and required at the level of application of the substantive rules as well as the procedural ones.

This characterization of critical features of a successful professional in this field has become more pressing because of the unprecedented global popularity of commercial arbitration over the past decades. Some commentators have described it as a major shift of international commercial dispute resolution from under the authority of the domestic courts, claiming that the controversies still left to the latter 'concern less professional milieus', due to their reliance on 'homemade or obsolete

[44] [9].

[45] [13], p. 224.

[46] Cf. e.g. [38, 43].

contract forms'.[47] As further observed by Gabrielle Kaufmann-Kohler, '[t]he last decades of the twentieth century have seen a phenomenal boom in arbitration, with all the hazards and vagaries that come with sudden success'.[48] As a result of these processes, arbitration can no longer be treated as a way of resolving commercial disputes as an alternate (and at best secondary) choice to domestic litigation. Instead, it has become the dominant and standard way of approaching such cases.

This expansion of international commercial arbitration—an originally European mechanism[49]—has been marked by important regional developments, with parties and their counsel from new parts of the world joining the practice, and with the accompanying growth of arbitration centers. A widely discussed phenomenon of this kind was the "American wave" in the 1980s and 1990s, often connected with proceduralization of arbitration (or its 'colonization by litigation'[50])—a departure from original flexibility of procedure in favor of its increased quasi-judicial formalization. A number of commentators connected this development with the rapid increase of the U.S. parties arbitrating their disputes, and the influence of their counsel seeking in arbitration procedural standards familiar from their domestic litigation practice (such as insistence on a high number of hearings and orality of proceedings, or extensive discovery).[51]

However, as several authors observe, as a result of the '*American wave*' the arbitral procedure has not become 'Americanized' nor 'civilized'. Instead, a pragmatic approach has been worked out by arbitrators, acting within their broad limits of discretionary powers in regard to deciding upon the course of proceedings in particular cases. In those controversies, in which parties from both common law and civil law systems were present, their respective procedural demands would be reconciled and accommodated instead of a preference being given to one of the systemic approaches.[52] This widely implemented strategy in arbitral decision-making can thus be seen as a remarkable example of application of the comparative approach on the procedural level.

The 'American wave' had thus been absorbed by the global arbitration practice in a way compared by Eric Bergsten to the situation of migrants, who adapt to the customs of their new country, but are also influencing these very customs through their presence.[53] In this context, what is interesting to observe is the more recent phenomenon of the swift growth of arbitration practice in East Asia. This growth has been marked by the skyrocketing rise of the arbitration centers in the region. As the case load statistics demonstrate, CIETAC, Hong Kong International Arbitration Centre (HKIAC) and Singapore International Arbitration Centre (SIAC) are

[47] [34], p. 67.

[48] Gabrielle Kaufmann-Kohler, *Foreword*, *in* [40].

[49] [2].

[50] [36].

[51] Cf. [2].

[52] [11, 17].

[53] [2], *supra* note 67.

currently classified among the global leaders,[54] with CIETAC being the busiest arbitration institution in the world (with about one-third of its annual caseload being reported as foreign-related[55]). The rise of the largest centers is accompanied by a growing popularity of smaller, regional, and local arbitration commissions, all of which is indicative of the popularity of this method of dispute resolution in this area of the world, and particularly in the areas that are influenced by the Chinese culture. Thus it will be interesting to follow whether procedural components preferred in the region (such as extensive inclusion of conciliatory components, in which a very proactive stance is adopted by arbitrators, or hybrid processes, which combine arbitration with mediation[56]) may affect the arbitration practice in other parts of the world, analogically to the 'American wave'. A possible explanation of these interrelations and mutual influences between the transnational phenomenon of arbitration and the strongly culturally embedded Chinese approaches to dispute resolution in the light of glocalization theory is offered by Fan and Jemielniak.[57]

6 Consequences for Legal Profession

Arbitrating and advising in cross-cultural cases, which involve parties from different legal traditions, requires a constant maneuvering

> between the perils of legal parochialism on one side and excessive use of comparative analysis and transnationalizing trends on the other. The ability of leaving preconceptions, interpretive patterns, drafting mannerisms and procedural habits of one's domestic background is highly important, as one of the most frequently indicated reasons for selecting arbitration rather than domestic litigation is precisely the need for a neutral forum, free from the municipal particularities, which do not befit international character of the case.[58]

Thus there is the frequently repeated call for a neutral forum,[59] unfulfilled by the domestic courts, litigating before which is automatically easier for the party, for whom it is its own jurisdiction. Nevertheless, the arbitral 'comparative mindset' cannot in practice be considered tantamount to a capacity to deliver arguments completely devoid of any national influences. This is the more important, as the

[54] *Cf.* International Arbitration Cases Received—compilation by HKIAC, http://www.hkiac.org (last visited Oct. 25, 2014). According to the data on the 2012 caseload (the last year with comprehensive comparative statistics provided) CIETAC handled 1060 arbitration cases, HKIAC 456 disputes including 293 arbitrations, and SIAC 235 arbitrations (compared to 759 at ICC and 177 at SCC). In 2011 CIETAC handled 1435 arbitrations, HKIAC 502 dispute resolution matters, including 275 arbitrations, and SIAC 188 arbitrations (compared to 795 at ICC, 224 at LCIA and 199 at SCC).

[55] [53].

[56] Fan Kun, "An empirical study of arbitrators acting as mediators in China", 15 Cardozo J. of Conflict Resolution, pp. 777–811.

[57] [12].

[58] [22], p. 332.

[59] [10].

prevailing number of international commercial cases is resolved on the basis of proper domestic law, being in turn 'transnationalized' by the means of such interpretive considerations as the usages and customs of international trade, *lex mercatoria* and the public policy concerns (of the place of arbitration, but also of the place of anticipated enforcement).

Consequently, arbitration advocacy and decision-making has been empirically demonstrated to be highly saturated with advanced transitory skills, which allow the practitioners to switch fluently between national and international contexts and to draw from both, depending on the circumstances of the case and interests of the represented party.[60] Successful and sophisticated arbitration practitioners are thus not confined to the preconceptions, procedural solutions, interpretive directives, and substantive law concepts acquired throughout the course of their primary legal training. Instead:

> [t]he approach of most experienced advocates and arbitrators is rather more case-driven than ideological. Depending on the strength of a case or of a particular witness or of a single document, common law lawyers may well be comfortable in seeking limited cross-examination, no discovery, and lengthy witness statements. Depending on the nature of a particular case, civil law lawyers may seek a procedure in which oral submissions are extensive.[61]

These particularities of arbitration practice have been exposed in the multiple-years discourse analytical study led by Vijay Kumar Bhatia, and conducted by over 20 groups of his collaborators from different countries.[62] The researchers were, *inter alia*, exploring the issue of integrity of the international commercial arbitration discourse as compared to litigation. They examined to what extent behavior of legal practitioners in arbitral proceedings was disclosing discursive patterns acquired and utilized in domestic litigation. The study has shown that the professionals participating in arbitral proceedings (arbitrators and counsel) frequently employ a strategy of a transfer of their litigation-related patterns of communicative behavior on the lexical, syntactical, interpretive and argumentative levels. Experienced arbitration practitioners are to a large extent able to control the scope of this transfer, adjusting its application to the circumstances of a specific case. They are thus not bound by the communicative habits acquired throughout primary legal education, but neither are they attempting to abandon them. Instead, they are using them as a strategic asset in a manner dynamically adjusted to the specific proceedings. These results have been interpreted by Bhatia, Candlin and Gotti as indicative of the advanced arbitration professionals' capacity to make fluent shifts between discursive identities (professional, disciplinary, jurisdictional and individual), including those identities that are characteristic to their domestic legal

[60] Pierre Bourdieu, after: Niilo Kauppi & Mikael Rask Madsen, Transnational Power Elites: The New Professionals of Governance, Law and Security, 4–5 (2013).

[61] [33].

[62] *See generally* Vijay Kumar Bhatia, *International Commercial Arbitration Practice: A Discourse Analytical Study*, City University of Hong Kong, http://www1.english.cityu.edu.hk/arbitration/arbitration/index.html.

systems.[63] These professional skills can be further understood as a manifestation of the arbitral 'comparative mindset' in action—not only on the level of application of specific substantive and procedural rules (which is already in itself demanding), but in the complete creation of a coherent communicative behavior in a highly specialized setting, including lexical, argumentative and interpretive, as well as legal choices.

The issue of acquisition and employment of such advanced transitory skills has become more pressing along with arbitration gaining unprecedented worldwide popularity in the last decades, as discussed above. The subsequent waves of newcomers have brought increased numbers of legal professionals who are involved in arbitration only occasionally, and hence are more inclined to follow habits related to their domestic practice. However, the phenomenon of global proliferation of arbitration has also led to the consolidation of the narrower but expanding class of highly advanced arbitration specialists. Their expertise in using transitory skills makes them cosmopolitan not in the sense of being unrooted, but in being easily adaptable to various legal and institutional settings.

Such professionals, characterized as members of transnational power elites,[64] are according to Kauppi and Madsen not denationalized. Instead, they adopt a hybrid identity of 'legal cosmocrats', capable of utilizing domestic as well as supranational legal concepts, approaches and rules, and are 'transnational and reliant, to varying degrees, on both national and international resources and capitals'.[65] Such definition of a set of professional skills, sought after in the arbitration practice, has been in recent years combined with other factors (such as internationalization of legal education, increased professional mobility, and proliferation of international law firms[66]), thereby increasing exposure of legal professionals to legal standards other than their own municipal ones. All those processes have contributed to the solidification of relevant professional standards and fueled the discussion about an emergence of the '*international arbitration culture*'.[67]

7 Concluding Remarks

The extensive and diversified use of the comparative method in arbitration, and in particular its application in expression and formulation of the *lex mercatoria* principles, have thus been instrumental in the growing autonomization of this field. Comparative analysis has been employed as a tool for broadening the sphere of adjudicatory discretion of the arbitral tribunals in the current legal landscape, which has not been completely insulated from influences of the domestic regimes on the

[63] [3].

[64] [26].

[65] [26] 5.

[66] Cf. e.g. [19, 50].

[67] [47].

procedural or on the substantive level. The popular theory of arbitration as a nonnational, drifting or floating[68]—and hence appropriately neutral—method of addressing cross-border disputes must have been reviewed in the context of territoriality principle, still permeating the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards.

Known as the cornerstone of international commercial arbitration,[69] and adopted in 149 countries, the New York Convention requires localization of an award, and hence its binding with a specific national legal system, in which the annulment of an award can be sought. Furthermore, arbitration is connected with the legal system(s) of the place(s) of anticipated enforcement of an award, which affects the substantive side of arbitral decision-making (as arbitrators are obliged to issue an enforceable award, they shall take into account public policy rules of that place). The procedural side of arbitration and its extensively commented upon wide scope of self-governance is facilitated by arbitration laws of the jurisdiction, in which the resolution of the dispute takes place *(lex loci arbitri)*. Finally, despite the well-established trend of drafting international contracts as extensive and largely self-sufficient documents (with the aim of minimizing domestic influence), and the impact of transnational rules notwithstanding, the law applicable to the merits of the case is still predominantly national.

The comparative method, while operating largely on domestic (but also transnational and international) legal rules, can thus be seen as a vehicle of autonomization of arbitration. Application of domestic provisions, filtered through comparative lenses, results in their 'transnationalization', as indicated by Kaufmann-Kohler and discussed above. It detaches applicable rules from their specific domestic settings, while allowing for avoidance of unexpected legal particularities and parochialisms, often feared by the parties.[70] At the same time, as an interpretive strategy, it preserves formal legitimacy of adjudication drawn from national legal orders, as postulated in the Westphalian representation of arbitration according to Gaillard's typology.

As legal diversity in an arbitration setting is frequently accompanied by linguistic variety, a sensu *largo* comparative approach, encompassing the linguistic perspective, forms an important part of key competencies of a practitioner in this field. The use of advanced transitory skills by arbitration practitioners in such an environment, combined with the fact that the rules applied throughout the proceedings is often foreign to the arbitrators and linguistically intermediated through translation, turns out to be a successful discursive strategy. It also facilitates achievement of what Glenn describes as a reformulated comparative approach[71]: not driven by the demands of a specific municipal legal system, but oriented at realizing transnational goals, as befits the cross-border character of transactions, addressed in the process of dispute resolution.

[68] [8, 39].

[69] [32], p. 23.

[70] [34], p. 85.

[71] [15], *supra* note 8, at 979.

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