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## ARTICLES

### RESEARCH IN INTERNATIONAL COMMERCIAL ARBITRATION: SPECIAL SKILLS, SPECIAL SOURCES

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#### I. INTRODUCTION

International commercial arbitration is an advocacy-oriented endeavor, with parties engaging particular lawyers precisely because the parties believe that their chance of success increases proportionally with the skill and experience of their advocates.<sup>1</sup> Clients are not alone in this perception of expertise – arbitrators and lawyers have also indicated that a good advocate makes a material difference in the outcome of a dispute.<sup>2</sup>

Given the central role that advocacy plays in arbitral success, it is ironic how little practical issues are discussed in legal scholarship.<sup>3</sup> Instead, journals and

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<sup>1</sup> Samuel P. Baumgartner, *Transnational Litigation in the United States: The Emergence of a New Field of Law*, 55 AM. J. COMP. L. 793, 800 (2007); Alfredo Sciascia, *Would-Be Clients Watching, Weighing Online Evaluations*, 09-6 L. OFF. MGMT. & ADMIN. REP. 1 (2009) (describing empirical study on how clients chose counsel).

<sup>2</sup> Philip D. O'Neill, Jr., *Getting Involved Early and Making an Impact*, in BEST PRACTICES FOR INTERNATIONAL ALTERNATIVE DISPUTE RESOLUTION: LEADING LAWYERS ON UNDERSTANDING ADR LAW AND POLICIES, OVERCOMING CHALLENGES, AND SUCCEEDING IN A GLOBAL SETTING 105, 110 (2007) [hereinafter O'Neill, *Best Practices*].

<sup>3</sup> A recent search on Westlaw for the term “written advocacy” came up with only 146 hits, despite the hundreds of thousands of articles available in the “all journals” database. Even fewer hits – 137 – showed up in the Westlaw “world journals” database, and most of these were duplicates of the previous search results. Furthermore, not all of these articles were even relevant to the issue of best practices in written advocacy, and only 25 of the articles (22 in the “world journals” database) also included the word “arbitration.” A search for “written advocacy” on [kluwerarbitration.com](http://kluwerarbitration.com), one of the leading specialty databases for international arbitration, came up with only five hits. Similarly, in a book devoted to advocacy in arbitration, only two pages are devoted to written advocacy, compared to an entire chapter on oral advocacy at the hearing. JOHN W. COOLEY & STEVEN LUBET, *ARBITRATION ADVOCACY* 240-41, 107-235 (2003); *see also* Henri C. Alvarez et al., *The Hearing on the Merits*, in THE COLLEGE OF COMMERCIAL ARBITRATORS GUIDE TO BEST PRACTICES IN COMMERCIAL ARBITRATION 133, 170-72 (Curtis E. von Kann, James M. Gaitis, & June R. Lehrman, eds., 2006); Gerald Aksent et al., *International Arbitration*, in *id.* at 211, 230-33.

texts are filled with doctrinal research, with other forms of inquiry, such as theoretical analysis and empirical studies, appearing to a lesser extent.<sup>4</sup> While it is true that some pieces exist on best practices in advocacy, they appear most frequently in practitioner-oriented books or periodicals, rather than in the more rigorous academic journals, and tend to focus nearly exclusively on oral skills.<sup>5</sup> Discussions concerning advocacy in international commercial arbitration, particularly regarding research and writing, are particularly sparse.<sup>6</sup>

Some may say there is little need for scholarly work regarding written advocacy because lawyers obtain the necessary skills through other means, such as law school, continuing legal education and mentorship. While this may be true of domestic litigation skills, it is not the case with respect to international commercial arbitration, where traditional methods of practical training are minimal at best and non-existent at worst.<sup>7</sup>

The situation is particularly dire with respect to matters concerning research sources and methodologies. This is highly problematic, since the legal authorities used in international commercial arbitration are unique, and newcomers to the field often do not know that certain materials exist or how to find them. This puts

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<sup>4</sup> See, e.g., Susan D. Franck, *Empiricism and International Law: Insights for Investment Treaty Dispute Resolution*, 48 VA. J. INT'L L. 767, 775 (2008) (noting research in international law has historically been primarily normative or theoretical, rather than empirical); Michael R. Smith, *The Next Frontier: Exploring the Substance of Legal Writing*, 2 J. ASS'N LEGAL WRITING DIRECTORS 1 (2004) (discussing a study of the content of scholarship on legal writing).

<sup>5</sup> Smith, *supra* note 4, at 18-19. Exceptions, of course, exist. See, e.g., Mark C. Rahdert, *Comparative Constitutional Advocacy*, 56 AM. U. L. REV. 553, 656-65 (2007).

<sup>6</sup> Known works include volumes 21:4 and 23:2 of *Arbitration International* as well as THE ART OF ADVOCACY IN INTERNATIONAL ARBITRATION (R. Doak Bishop ed., 2004); C. Mark Baker, *Advocacy in International Arbitration*, in THE LEADING ARBITRATORS' GUIDE TO INTERNATIONAL ARBITRATION 381, 386-90 (Lawrence W. Newman & Richard D. Hill eds., 2008); and Laurent Hirsch, *Arbitral Procedure: New Developments and Good Practice*, IBA ARB. COMM. NEWSL. 13 (March 2009) (containing a summary of a conference on advocacy in arbitration sponsored by the International Bar Association in October 2008).

<sup>7</sup> See, e.g., Kate O'Neill, *Adding an Alternative Dispute Resolution (ADR) Perspective to a Traditional Legal Course*, 50 FLA. L. REV. 709, 709 ("The traditional model of legal writing courses [in the United States] can be faulted for implying that the only business of lawyers is litigation"); Jean R. Sternlight, *Separate and Not Equal: Integrating Civil Procedure and ADR in Legal Academia*, 80 NOTRE DAME L. REV. 681, 687 (2005) ("The typical arbitration course focuses on [U.S.] Supreme Court cases dealing with commercial and/or labor arbitration. Rather than teaching students to be arbitrators, or to be attorney-advocates within the arbitration process, the course more frequently examines case law on such issues as when and whether arbitration clauses are valid, the nature of arbitrators' powers and authority, and the circumstances under which arbitral decisions are to be enforced or instead vacated."). Similar problems exist outside the United States. See *infra* note 23.

inexperienced lawyers at a distinct disadvantage, since one cannot build a solid legal argument without the underlying authorities.

Furthermore, the best written submissions in this area of law adopt a purposeful blend of common-law and civil-law techniques. Any advocate who is unaware of how lawyers from different systems view legal authority will be unable to craft arguments that demonstrate the kind of sophistication and complexity that are the hallmarks of a good international practitioner. Again, this puts newcomers to the field at a comparative disadvantage.

Fortunately, it is relatively easy to remedy these problems by increasing the cross-cultural dialogue about the different strategies that can be used to produce exemplary written submissions in international commercial arbitration. Doing so will help preserve the distinctive aspects of this area of law and ensure that the process remains as straightforward and cost-effective as possible by avoiding inappropriate legalism based on national court practices.

This article attempts to fill this gap in the literature by proceeding as follows. First, section II defines the scope of the problem, beginning with the likely reasons behind the dichotomy between doctrinal and practical education and scholarship. This portion of the article also explains why it is important that experts in international commercial arbitration provide guidance on best practices in legal research. Section III provides the first step toward increasing access to the necessary authorities and developing the necessary practical skills by describing how experienced advocates and arbitrators research and present legal arguments in international commercial arbitrations. Section IV concludes the article by identifying a number of areas regarding research and written advocacy that could benefit from increased attention from academics and scholar-practitioners in the international arbitral community.

## II. THE CENTRAL IMPORTANCE OF RESEARCH AND WRITTEN ADVOCACY IN INTERNATIONAL COMMERCIAL ARBITRATION

It has been said that, “[u]nlike litigation, international arbitration is much more dependent on detailed written advocacy than oral presentations at hearings.”<sup>8</sup> Lawyers in an international commercial proceeding often provide the arbitral panel with several stages of written argument prior to any hearings, in addition to written witness statements covering much if not all of the direct testimony in the matter.<sup>9</sup> “Thus, by the time the final hearing on the merits rolls around, most of

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<sup>8</sup> Henry G. Burnett & Arif Hyder Ali, *Resolving Disputes in Cross-Border Commercial Transactions*, in BEST PRACTICES FOR INTERNATIONAL ALTERNATIVE DISPUTE RESOLUTION, *supra* note 2, at 149, 172; O’Neill, *Best Practices*, *supra* note 2, at 110.

<sup>9</sup> Frédéric Gilles Sourgens, *Comparative Law as Rhetoric: An Analysis of the Use of Comparative Law in International Commercial Arbitration*, 8 PEPPERDINE DISP. RESOL. L.J. 1, 10 (2007).

the advocacy has already been done and is firmly constricted within the confines of binders of documents and long pages of arguments and prior statements.”<sup>10</sup>

Given the emphasis on written submissions in international commercial arbitration, it is critical for practitioners to present their work in the best possible light. However, good written advocacy is not just a matter of style; it is fundamentally a matter of substance based on research that is both deep and broad.

Since good content is the central feature of good legal argument, it is imperative that advocates be able to find and use the necessary materials. The following subsection discusses why short shrift has been given to this issue in the past and lays to rest a number of preconceptions that might exist regarding the importance of scholarly debate on research methodologies and skills training, particularly in international commercial arbitration. It also describes why recent developments in law and business have made it particularly important to increase the amount of attention paid to these issues.

#### A. *The Marginalization of Scholarship on Research Methods and Materials*

For years, legal scholars have focused primarily on black letter analysis rather than issues relating to advocacy.<sup>11</sup> Scant guidance exists concerning the unique challenges associated with research and writing skills in international commercial arbitration.<sup>12</sup> The question arises whether the marginalization of scholarship on research methods and materials is merited, or whether the subordination of inquiries regarding research and advocacy to questions of substantive law exists for other reasons.<sup>13</sup>

Three reasons for the shortage of scholarly debate on research sources and strategies come immediately to mind. First, legal scholarship on research methods and materials might be limited because prospective authors and editors believe that law school and post-graduate professional courses have adequately prepared lawyers for practice and that further discussion of research and writing skills is unnecessary. Although this opinion may be widely held, it is based on faulty

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<sup>10</sup> *Id.* at 11.

<sup>11</sup> *See supra* notes 3-6 and accompanying text.

<sup>12</sup> For years, the only available resources in this area were two electronic guides. *See* Jean M. Wenger, *Features – Update to International Commercial Arbitration: Locating the Sources* (July 2, 2009), available at <http://www.llrx.com/features/arbitration2.htm>; Lyonette Louis-Jacques, *International Commercial Arbitration: Resources in Print and Electronic Format* (July 2, 2009), available at <http://www2.lib.uchicago.edu/~llou/intlarb.html>. The author recently published a book on this subject. *See* S.I. STRONG, *RESEARCH AND PRACTICE IN INTERNATIONAL COMMERCIAL ARBITRATION: SOURCES AND STRATEGIES* (2009). Other commentators have also recently recognized the need to provide information on the location of research sources in this area of law. *See* GARY B. BORN, *INTERNATIONAL COMMERCIAL ARBITRATION* 189-95 (3d ed. 2009).

<sup>13</sup> Smith, *supra* note 4, at 24 (concluding more should be done to legitimate works concerning legal research and writing).

facts. As described further below, there is little to no instruction provided on research skills in international commercial arbitration, either in students' initial legal education or in post-graduate offerings.<sup>14</sup> Furthermore, few senior lawyers actually appear to believe that law school adequately prepares newly qualified lawyers for practice,<sup>15</sup> particularly with respect to transnational disputes. Furthermore, the knowledge gap is not limited to new graduates, since a person may be an experienced lawyer in other regards and still a novice in international commercial arbitration.

The second reason why there may be so few materials available on research methodologies might be because some academics and/or practitioners believe that legal research is a highly individualized process that is not amenable to standardization or objective analysis. This does not seem to be a view that professional research and writing instructors share,<sup>16</sup> and certainly any senior lawyer who has mentored a junior associate does so in the belief that the associate's skills will improve as a result of the process. In any event, the view that research skills are subject to individual interpretation is one that this article – which calls for increased cross-cultural discussion on the subject of research methodologies in this area of law – would support. Although this article provides some necessary factual information and suggestions regarding research strategies, it does not go so far as to prescribe a single model that everyone should follow. Instead, it is hoped that this article will inspire increased transparency about best and alternative practices regarding the nature of legal authorities in international commercial arbitration and techniques for researching and presenting such authorities.

A third reason for the marginalization of advocacy-oriented works and the apparent preference for doctrinal research might relate to readers' tastes as a matter of intellectual curiosity. That, indeed, may in some ways be true. However, it is also at least equally likely that those who read black letter analyses do so in response to the immediate needs of paying clients, whereas inquiries into skills-based work can only be made in lawyers' (often scarce) leisure time.

Furthermore, editors' apparent preference for doctrinal research could also be responsible for creating a vicious circle. Because advocacy and skills-based works are published less frequently, they may be considered by the legal community to be less rigorous and worthy of scholarly attention, which leads fewer prospective authors to write on such subjects, which subsequently decreases the number of works available for publication, and so on.

Whatever the reason for the shortage of works in this field, some real problems arise as a result. For example, the absence of debate can be masking

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<sup>14</sup> See *infra* notes 20-32 and accompanying text.

<sup>15</sup> Steven M. Barkan, *Should Legal Research Be Included on the Bar Exam? An Exploration of the Question*, 99 L. LIBR. J. 403, 404 (2007); Andrew Boon, *History Is Past Politics: A Critique of the Legal Skills Movement in England and Wales*, 25 J. LAW & SOC'Y 151, 163 (1998) [hereinafter Boon, *History*].

<sup>16</sup> Barkan, *supra* note 15, at 404 (noting that research skills can be tested).

significant differences regarding the importance and relative weight of legal authorities in international commercial arbitration. Those disparities need to be fleshed out and brought into the open. Furthermore, the scarcity of information not only leaves newcomers to the field lacking in the means of developing the necessary skills, it suggests to them that there is nothing unique or special about working in this area of law. As those who have practiced in international commercial arbitration for any period of time know, nothing could be further from the truth.

B. *The Unique Challenges Regarding Research in International Commercial Arbitration*

Although there has always been a need for instruction and discussion regarding research sources and strategies in this area of law, the issue is particularly pressing now. International commercial arbitration is at a turning point in its development. Many of the special qualities associated with this unique dispute resolution device are in danger of disappearing as a result of shortcomings in legal education and recent changes in the practice of law.

In law, the biggest danger is when “you don’t know what you don’t know,” and newcomers to international commercial arbitration often are not even aware that they have blind spots. For example, many novices not only miss the opportunity to utilize specialized research methodologies, they are not even aware of the existence of vast quantities of relevant legal authorities.<sup>17</sup> While arguments can be made without recourse to these authorities, no competent advocate would consciously choose to ignore potentially helpful research material.

Furthermore, in the absence of any better alternatives, newcomers to the field tend to rely on misplaced analogies to domestic litigation techniques, sometimes on the advice of those who hold themselves out as experts.<sup>18</sup> The voices of the true experts in international commercial arbitration can be lost, sometimes – ironically – because their views are published in sources of which novices are unaware.<sup>19</sup> If international commercial arbitration is to preserve those qualities

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<sup>17</sup> Emmanuel Jolivet, *Access to Information and Awards*, 22 *ARB. INT’L* 265, 266 (2006).

<sup>18</sup> See, e.g., Kevin R. Casey & Marissa Parker, *Strategies for Achieving an Arbitration Advantage Require Early Analysis, Pre-Hearing Strategies, and Awards Scrutiny*, 26 *ALTERNATIVES HIGH COST LITIG.* 167 (Oct. 2008) (claiming “[e]ffective arbitration advocacy is remarkably similar to model advocacy in court”); Ariana R. Levinson, *Lawyering Skills, Principles and Methods Offer Insight as to Best Practices for Arbitration*, 60 *BAYLOR L. REV.* 1 (2008).

<sup>19</sup> For example, Jan Paulsson wrote recently that “the essential difference” between international and other types of arbitration “is so great that their similarities are largely illusory.” Jan Paulsson, *International Arbitration Is Not Arbitration*, 2008 *STOCKHOLM INT’L ARB. REV.* 1, 1. However, it is unclear whether an inexperienced advocate would (1) find this article or (2) understand the significance of both the author and the source.

that make it superior to other forms of dispute resolution, experienced arbitrators, advocates and academics must make concerted efforts to educate those who are new to this area of law.

Those who wish to take on that task have their work cut out for them, since there are few mechanisms aimed at creating competent advocates and arbitrators for international disputes. For example, many countries give short shrift to research skills in lawyers' formal legal education,<sup>20</sup> either because doctrinal law is considered to be a more worthy or appropriate subject for study<sup>21</sup> or because legal

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*See infra* notes 122-29 and accompanying text (regarding relative importance of authors and journals).

<sup>20</sup> Though a full survey of the routes to qualification in different countries is beyond the scope of this article, there obviously are a wide variety of models available. For example, lawyers in the U.S. must complete a three-year graduate degree (the *juris doctor*) after their four-year undergraduate education, then must pass a bar examination set by the individual state or states in which they intend to practice. Lawyers in England typically take a three-year undergraduate degree in law (or a one-year conversion course following a three-year degree in another subject), followed by a one-year professional or vocational course, followed by a one-year pupillage (for barristers) or a two-year traineeship (for solicitors). Germany's qualification route involves seven to eight years of training, which includes two state examinations and two years of practical education similar to the English traineeship. However, young lawyers still enter the German legal profession unprepared for the practical side of life, though reforms have recently been implemented to address these shortcomings. Andreas Bucker & William A. Woodruff, *The Bologna Process and German Legal Education: Developing Professional Competence through Clinical Experience*, 9 GERMAN L.J. 575, 609-17 (2008) (noting difficulties with both practical skills education and exposure to international issues). Australia has also investigated possible reforms of how to teach research methodologies. Terry Hutchinson, *Developing Legal Research Skills: Expanding the Paradigm*, 32 MELBOURNE U. L. REV. 1065 *passim* (2008).

<sup>21</sup> Smith, *supra* note 4, at 24. However, the traditional emphasis on doctrinal law has been criticized by those who study educational excellence in the legal setting. *See, e.g.*, WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007) (also known as the Carnegie Foundation Report; summary of conclusions available at [http://www.carnegiefoundation.org/sites/default/files/publications/elibrary\\_pdf\\_632.pdf](http://www.carnegiefoundation.org/sites/default/files/publications/elibrary_pdf_632.pdf)); RESEARCH INSTRUCTION CAUCUS, AM. ASS'N L. LIBR., CORE LEGAL RESEARCH COMPETENCIES: A COMPENDIUM OF SKILLS AND VALUES AS DEFINED IN THE ABA'S MACCRATE REPORT (1997), available at <http://www.aallnet.org/sis/ripssis/core.pdf>; TASK FORCE ON LAW SCHOOLS & THE PROFESSION: NARROWING THE GAP, AMERICAN BAR ASSOCIATION, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT – AN EDUCATIONAL CONTINUUM (1992), available at <http://www.abanet.org/legaled/publications/onlinepubs/maccrate.html> (also known as the MacCrate Report); *see also* Andy Boon, *Skills in the Initial Stage of Legal Education: Theory and Practice for Transformation*, in TEACHING LAWYERS' SKILLS 99, 106 (Julian Webb & Caroline Maughan eds., 1996) (discussing the MacCrate Report and related issues in the context of legal education in the United Kingdom); John Lande & Jean R. Sternlight, *The Potential Contribution of ADR to an Integrated Curriculum: Preparing Law Students for Real World Lawyering*, 25 OHIO ST. J. ON DISP. RESOL. 247 (2010) (discussing possible

research is combined with legal writing into a single course, resulting in very little practical training in research methodology.<sup>22</sup> To the extent that advocacy or other skills training exists in basic legal education – perhaps through clinical work or post-graduate vocational courses – the emphasis is primarily on litigation and courtroom tactics.<sup>23</sup> 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.<sup>24</sup>

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reforms in law school curricula); John O. Sonsteng et al., *Legal Education Renaissance: A Practical Approach for the Twenty-First Century*, 34 WM. MITCHELL L. REV. 303, 364-89 (2007) (noting empirical research on research skills training in U.S. law schools). There have even been calls to include legal research on bar exams. Barkan, *supra* note 15 *passim*. This focus on improving legal research skills and training is not limited to the United States. For example, Australia has recently revolutionized its approach to training in legal research. Hutchinson, *supra* note 20 *passim*.

<sup>22</sup> Ann Hemmens, *Advanced Legal Research Courses: A Survey of ABA-Accredited Schools*, 94 L. LIBR. J. 209, 212-13 (2002) (noting various reasons for decline in research skills).

<sup>23</sup> For example, of the approximately 520 legal clinics associated with U.S. law schools, only 31 are designated as having any connection to any form of alternative dispute resolution, including arbitration. Becky L. Jacobs, *A Lexical Examination (and Unscientific) Survey of Expanded Clinical Experiences in U.S. Law Schools*, 75 TENN. L. REV. 343, 354-55 (2008). The same orientation seems to exist in England. Boon, *History*, *supra* note 15, at 163-64 (noting litigation orientation to clinical studies in England). Other legal systems have no clinical education component in their law schools at all. See Stacy Caplow, *Clinical Legal Education in Hong Kong: Time to Move Forward*, 36 HONG KONG L.J. 229, 229 (2006) (identifying variety of nations that do or do not offer clinical education).

<sup>24</sup> Anita Bernstein, *On Nourishing the Curriculum With a Transnational Law Lagniappe*, 56 J. LEGAL EDUC. 578, 578, 584-85 (2006) (noting lack of attention in U.S. law schools to substantive foreign law or transnational legal research); Rahdert, *supra* note 5, at 663-64. However, some law schools – particularly those in Canada – have created effective cross-cultural legal training programs. Bernstein, *supra*, at 583 & nn. 29-32; Helena Whalen-Bridge, *The Reluctant Comparativist: Teaching Common Law Reasoning to Civil Law Students and the Future of Comparative Legal Skills*, 58 J. LEGAL EDUC. 364, 365-66 & n.5 (2008); see also Hutchinson, *supra* note 20, at 1080 (noting Australia's attempt to internationalize its law school curriculum); Alexander H.E. Morawa & Xiaolu Zhang, *Transnationalization of Legal Education: A Swiss (and Comparative) Perspective*, 26 PENN ST. INT'L L. REV. 811, 817-29 (2008). Furthermore, the situation may be changing as some institutions have begun to provide specialized certificates or degrees in international or transnational law. See Doug Jones, *Acquisition of Skills and Accreditation in International Arbitration*, 22 ARB. INT'L 275, 275 (2006). Among the universities that offer certificate programs and/or intensive summer courses in international commercial arbitration are American University Washington College of Law and the University of Missouri in the United States; the School of International Arbitration at Queen Mary University of London in the United Kingdom; the International Centre for Arbitration, Mediation and Negotiation of the Institute for European Studies of the CEU

The issue is not resolved post-qualification. Most continuing legal education courses prioritize the same issues that pre-qualification legal educators do: doctrinal matters, particularly as they relate to national law. While many of the leading international arbitral institutions provide seminars on topics of interest to those involved in international commercial arbitration, the emphasis is primarily on substantive or procedural legal issues rather than skills relating to research and written advocacy.<sup>25</sup> Thus, there are no formal mechanisms by which specialized training is transmitted to newcomers to this field of law.

The lack of formal training is just the tip of the iceberg. Significant changes in the practice of law have led to the weakening of informal mechanisms by which training on research and written advocacy is provided to those who are entering the field.

In the early days of international commercial arbitration, nearly all of the advocates and arbitrators came from a few specialist law firms located in cities such as London, Paris, Geneva or Stockholm that were also home to major arbitral organizations. This gave international commercial arbitration the reputation of being the ultimate “insider’s club,” and those who knew how to research and present arguments in international commercial arbitration protected that information as jealously as they did their client lists.

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San Pablo University in Spain; and the University of Hong Kong in Hong Kong. The International Bar Association also offers an LL.M. in international law in association with the Law College of England and Wales, and the Chartered Institute of Arbitrators offers a structured sequence of educational opportunities, either on its own or through recognized course providers in different countries, that leads to different levels of certification. Furthermore, law students from around the globe can participate in an international commercial arbitration moot competition. See, e.g., Eric E. Bergsten, *The Willem C. Vis International Commercial Arbitration Moot and the Teaching of International Commercial Arbitration*, 22 ARB. INT’L 309 (2006); Jack M. Graves & Stephanie A. Vaughan, *The Willem C. Vis International Commercial Arbitration Moot: Making the Most of an Extraordinary Educational Opportunity*, 10 VINDOBONA J. COMP. & INT’L L. 173 (2006); THE VIS BOOK – A PARTICIPANT’S GUIDE TO THE WILLEM C. VIS INTERNATIONAL COMMERCIAL ARBITRATION MOOT (Janet Walker ed., 2008). Commentators have acknowledged how useful internationally oriented moot competitions can be in developing internationally minded advocates. Rahdert, *supra* note 5, at 663-64. Some DVDs of experienced advocates and arbitrators role-playing in mock arbitrations are also now available. See Jack J. Coe, Jr., *Some Thoughts on Teaching International ADR and the Case for Reality-Based Simulations*, 22 ARB. INT’L 249, 257-58 (2006).

<sup>25</sup> Some of the arbitral institutions that offer continuing education courses include the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA) and the International Centre for Dispute Resolution (ICDR), which is the international arm of the American Arbitration Association (AAA). While these programs make efforts to ensure that written submissions meet certain minimum quality standards, the sessions are typically quite broad-ranging and do not devote significant time to questions regarding written advocacy. Matters relating to research are typically not addressed at all.

These firms' specialized resources were not just limited to their intellectual capital. Only those firms that were active in the field could afford to stock their libraries with the unique – and expensive – resource materials relating to international commercial arbitration. Thus, historically speaking, outsiders operated under a double handicap, not only lacking the reference materials from which to craft their legal arguments but also lacking the specialized know-how on how to conduct their research.

During this period, mentorship was taken seriously. Not only did senior practitioners provide one-on-one feedback to their junior associates, many firms also offered rigorous in-house training to those in the arbitration practice. This type of focused and individualized training was invaluable, since at that time there was – as is still the case – no formal means by which this practical information was passed on.

However, things have changed in the last 20 years. First, practitioners have become much more mobile, meaning that the insider knowledge that was once held exclusively by a few firms has been scattered throughout the profession as lawyers move to greener pastures. Although this phenomenon has demystified this area of law, at least to some extent, the increase in mobility has also led senior lawyers to take a less committed role (or junior lawyers to express less interest) in mentorship and in-house training programs, since the assumption is that most associates will leave before attaining partnership.<sup>26</sup> As a result, important information about research sources and strategies is not being conveyed to young lawyers, even through the informal mechanisms that were once the mainstay of the profession.

Second, the business world has changed radically during this same time period, becoming much more internationalized. Parties have also eagerly embraced arbitration in transnational disputes, leading to a dramatic increase in the number of international arbitrations that are brought each year.<sup>27</sup>

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<sup>26</sup> It could also be that junior lawyers are burdened by much heavier workloads than was the case 20 years ago. For example, the typical billable hours requirement in the United States has risen from 1350 hours per year in the 1960s to 1900 hours per year in 2002, plus 400 hours of non-billable work. AMERICAN BAR ASSOCIATION, ABA COMMISSION ON BILLABLE HOURS REPORT 2001-2002, 49-51 (2002), available at <http://www.abanet.org/careercounsel/billable/toolkit/bhcomplete.pdf> [hereinafter ABA REPORT]. Other countries, including Australia, have expressed concern about billable hour requirements. Iain Campbell et al., *The Elephant in the Room: Working-Time Patterns of Solicitors in Private Practice in Melbourne* 23-40 (Ctr. Emp. & Lab. Rel. L., U. Melbourne, Working Paper No. 43, May 2008). Increases in billable hour requirements also have been shown to result in decreased mentoring, training and collegiality, and in increased associate departure rates. ABA REPORT, *supra*, at 5-7.

<sup>27</sup> BORN, *supra* note 12, at 68-71 (noting increase in arbitrations in the last 20 years); Shahla F. Ali, *Approaching the Global Arbitration Table: Comparing the Advantages of Arbitration as Seen by Practitioners in East Asia and the West*, 28 REV. LIT. 791, 797-98 (2009) (noting incidence of proceedings filed with arbitration institutions worldwide); Jan Paulsson, *Arbitration Friendliness: Promises of Principle and Realities of Practice*,

With this rapid expansion in practice opportunities has come a similarly rapid increase in the number of lawyers holding themselves out as ready, willing and able to take on international commercial arbitrations, even if they have never represented a client in this type of forum in the past.<sup>28</sup> This interest in taking on international matters may stem from financial motivations (international arbitrations are seen as particularly profitable); from the desire to prevent clients from moving to other law firms; or from the belief that international arbitration is, at the end of the day, not so very different from other sorts of dispute resolution processes.<sup>29</sup> That final assumption is, this article contends, dangerously misguided.

The third change experienced in the last two decades has been the rise of electronic research and communication technology. In many ways, these advancements have done much to democratize international commercial arbitration and make it possible for non-specialists to enter the market. For example, the rise of electronic mail, document scanning and online filing have eliminated the need for arbitrators and advocates to be physically located in the same city as each other and/or the arbitral institution administering the proceeding.

However, not every advance has been beneficial. For example, technology has helped level the playing field with regard to legal research, but it has not eliminated discrepancies relating to lack of knowledge and experience. On the one hand, electronic databases provide easier and more affordable access to some of the relevant materials.<sup>30</sup> On the other hand, many of the truly specialized legal authorities still remain separate, and to some extent hidden, from the general practitioner. Even those law firms that hold subscriptions to electronic databases that purport to include information relating to international commercial arbitration often do not have access to the type of specialist sources that are at the heart of a sophisticated arbitral practice.<sup>31</sup> The problem, of course, is that lawyers who do

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23 ARB. INT'L 477, 478 (2007) [hereinafter Paulsson, *Arbitration Friendliness*] (noting rise in LCIA cases in last ten years).

<sup>28</sup> See Loukas Mistelis, *Workshop on Research, Teaching and Training in International Arbitration – An Introduction*, 22 ARB. INT'L 243, 244 (2006).

<sup>29</sup> See O'Neill, *Best Practices*, *supra* note 7, at 119 (noting that clients mistakenly believe their usual litigation counsel can handle international commercial arbitrations).

<sup>30</sup> See *infra* note 65 (regarding rising use of legal research freely available on the internet).

<sup>31</sup> For example, two of the most popular electronic research providers – Westlaw and LexisNexis – have both created specialized databases for international commercial arbitration. This suggests to many newcomers that they have all the information necessary to research issues arising in an international arbitral dispute. In fact, that is not the case, as described below; many of the most important arbitral materials are not available on either of these two subscription databases. See *infra* notes 92, 128 and accompanying text.

not know the area well believe that they are doing competent research without realizing what is missing from their search results.<sup>32</sup>

To remedy the situation, the international arbitral community must increase and diversify the ways in which it conveys information about research methods and materials to newcomers to the field. The following section begins to address that need by providing detailed information on what the relevant legal materials are and where they may be found.

### III. RESEARCH SOURCES AND STRATEGIES IN INTERNATIONAL COMMERCIAL ARBITRATION

Newcomers to international commercial arbitration face several obstacles immediately upon entering the field.<sup>33</sup> First, they must learn to recognize the special research materials unique to this area of law.<sup>34</sup> Second, they must find a way to access those materials, either electronically or in hard copy, in a cost-effective manner. Third, they must learn how to use those materials properly in their written submissions.<sup>35</sup>

Those are the easy challenges. The more difficult task requires incoming practitioners to re-evaluate their theoretical understanding of what constitutes legal authority. In particular, advocates and arbitrators must learn to accept the centrality of “private” sources of authority (i.e., those issued by non-state entities, such as arbitral institutions or the parties themselves).<sup>36</sup> These private sources of law, which include arbitral rules, arbitral awards, arbitral agreements and any procedural orders issued by the arbitral tribunal, can be binding or persuasive, depending on the circumstances.

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<sup>32</sup> Purchasing a subscription to an electronic database is not enough. Numerous studies have shown that electronic and traditional research methods typically yield vastly different results. See, e.g., Julie M. Jones, *Not Just Key Numbers and Keywords Anymore: How User Interface Design Affects Legal Research*, 101 L. LIBR. J. 7 (2009); Katrina Fischer Kuh, *Electronically Manufactured Law*, 22 HARV. J. L. & TECH. 223 (2008). Thus, parties should use both electronic and traditional research techniques to ensure optimal results. Jones, *supra*, at 16.

<sup>33</sup> See, e.g., Jolivet, *supra* note 17, at 266.

<sup>34</sup> There is a shortage of information on what constitutes a legitimate source of law in international commercial arbitration, but some materials exist. BORN, *supra* note 12, at 188-95; FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION ¶¶ 127-384 (Emmanuel Gaillard & John Savage eds., 1999) [hereinafter FOUCHARD, GAILLARD, GOLDMAN].

<sup>35</sup> This third task is addressed by the author in an upcoming article tentatively titled, “Written Advocacy in International Commercial Arbitration: Improving Cross-Cultural Practices.”

<sup>36</sup> This is in contradistinction to “public” sources of authority (i.e., those issued by state entities, such as courts and legislatures), which are used extensively in litigation. See, e.g., FOUCHARD, GAILLARD, GOLDMAN, *supra* note 34, ¶¶ 127-29, 303-06; Jolivet, *supra* note 17, at 266.

Each of these private sources of law will be discussed in turn, along with the various public sources of law that are relevant to international commercial arbitration. The emphasis in this article is on the law relating to procedural issues unique to arbitration; questions of substantive law – though potentially complicated – are addressed adequately elsewhere.<sup>37</sup>

In all, there are seven types of legal authority, including, in roughly descending order of importance:

- International conventions and treaties;
- National laws;
- Arbitral rules;
- Law of the dispute (procedural orders and agreements between the parties);
- Arbitral awards;
- Case law; and
- Scholarly work (treatises, monographs and articles).

#### A. *Sources of Law – International Conventions and Treaties*

In many people's minds, the arbitration agreement between the parties is the most important source of authority in an international proceeding.<sup>38</sup> While the arbitration agreement is obviously critical,<sup>39</sup> there are good reasons for ranking international conventions and treaties first, the most significant of which is that the failure to adhere to certain procedures early on can diminish the international enforceability of an award. Since easy enforceability of awards is one of the primary reasons why parties choose international commercial arbitration over litigation, both advocates and arbitrators must consider how any future award will be enforced from the very beginning of a proceeding.<sup>40</sup>

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<sup>37</sup> See, e.g., ADRIAN BRIGGS, AGREEMENTS ON JURISDICTION AND CHOICE OF LAW (2008); PATRICK J. BORCHERS & JOACHIM ZEKOLL, INTERNATIONAL CONFLICT OF LAWS FOR THE THIRD MILLENNIUM (2001); J.G. COLLIER, CONFLICT OF LAWS (2001); HORACIO A. GRIGERA NAON, CHOICE OF LAW PROBLEMS IN INTERNATIONAL COMMERCIAL ARBITRATION (1992).

<sup>38</sup> Julian D.M. Lew, *Does National Court Involvement Undermine the International Arbitration Process?*, 24 AM. U. INT'L L. REV. 489, 491 (2009).

<sup>39</sup> See *infra* notes 79-80 and accompanying text.

<sup>40</sup> While the vast majority of arbitral awards are enforced through either voluntary compliance or judicial action, approximately ten percent of all international enforcement actions brought under the New York Convention fail. Albert Jan van den Berg, *Why Are Some Awards Not Enforceable?*, in NEW HORIZONS IN INTERNATIONAL COMMERCIAL ARBITRATION AND BEYOND, ICCA CONGRESS SERIES NO. 12 at 291, 291 (Albert Jan van den Berg ed., 2005). This is only an international average, however; some countries, such

The most popular enforcement mechanism is the United Nations' 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).<sup>41</sup> However, those who are active in this field cannot forget that other regional and multi-national conventions on enforcement of arbitral awards also exist and may, in some cases, take precedence over the New York Convention.<sup>42</sup> Furthermore, it may be that no bilateral or multilateral enforcement mechanism applies, which parties should be aware of early on, since that may affect how the arbitration does or should proceed.

Enforcement agreements are not the only types of international treaties or conventions that may be relevant.<sup>43</sup> Some international instruments include procedural guidelines for the conduct of the arbitration in addition to provisions on enforcement. One of the most important of these multi-purpose agreements is the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (known as the "ICSID Convention" or the "Washington Convention").<sup>44</sup> Although investment arbitration is perhaps the most well-known type of proceeding involving a state and a non-state party,<sup>45</sup> arbitration is used to resolve other kinds of state or intergovernmental disputes as well.<sup>46</sup> There are also

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as Russia and China, have far higher non-enforcement rates. William R. Spiegelberger, *The Enforcement of Foreign Arbitral Awards in Russia: An Analysis of Relevant Treaties, Laws, and Cases*, 16 AM. REV. INT'L ARB. 261, 262 (2005) (noting 30% non-enforcement rate in Russia); Marcus Wang, *Dancing With the Dragon: What U.S. Parties Should Know About Chinese Law When Drafting a Contractual Dispute Resolution Clause*, N.W. J. INT'L L. & BUS. 309, 329 (2009) (noting 40% non-enforcement rate in China). Early identification of potential problems is critical to future success.

<sup>41</sup> Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2518, 330 U.N.T.S. 3 [hereinafter New York Convention].

<sup>42</sup> See, e.g., European Convention on International Commercial Arbitration, Apr. 21, 1961, 484 U.N.T.S. 349 (European Convention); Inter-American Convention on International Commercial Arbitration of 1976, Jan. 30, 1975, 1438 U.N.T.S. 245, 14 I.L.M. 336 (Panama Convention).

<sup>43</sup> The nomenclature of these instruments – which can include “convention,” “treaty” or “agreement” – is not necessarily indicative of the content or scope of the agreement.

<sup>44</sup> Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Mar. 18, 1965, 575 U.N.T.S. 159 [hereinafter ICSID Convention].

<sup>45</sup> The ICSID Convention is not the only international agreement giving rise to investment arbitration. A large number of multilateral investment treaties (MITs) and bilateral investment treaties (BITs) also require arbitration of disputes arising under those agreements.

<sup>46</sup> For example, the Permanent Court of Arbitration at The Hague will hear arbitrations between states, private parties and/or intergovernmental entities pursuant to the parties' agreement. The most recent proceeding of this type involved a boundary dispute in *The Government of Sudan v. The Sudan People's Liberation Movement/Army* (Abyei Arbitration). Further information on the Abyei Arbitration, as well as copies of certain underlying documents and a video of the April 2009 hearing, can be found at [http://www.pca-cpa.org/showpage.asp?pag\\_id=1306](http://www.pca-cpa.org/showpage.asp?pag_id=1306) [hereinafter Abyei Arbitration].

international agreements requiring arbitration as a means of resolving other types of narrowly defined transnational disputes.<sup>47</sup> To some extent, the various types of international arbitration are (or are becoming) distinct, so newcomers should be aware of how the unwritten conventions regarding practice and advocacy diverge even between different international proceedings.<sup>48</sup>

As a public source of law, international conventions and treaties are relatively easy to locate. Many can be found online, though researchers should be careful to obtain their information from reliable websites to ensure that the copy they use is the official, most up-to-date version.<sup>49</sup>

Printed copies of these instruments are also widely available, through either “official” (i.e., preferred) or “unofficial” international reporting series.<sup>50</sup>

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<sup>47</sup> The best-known of these is the Iran-United States Claims Tribunal. See Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, Jan. 19, 1981, 20 I.L.M. 230. However, arbitrators have also been involved in assisting the Claims Resolution Tribunal for Dormant Accounts in Switzerland, see [http://www.crt-ii.org/\\_crt-i/frame.html](http://www.crt-ii.org/_crt-i/frame.html), and the International Commission on Holocaust Era Insurance Claims, see <http://www.icheic.org>.

<sup>48</sup> Gabrielle Kaufmann-Kohler, *Arbitral Precedent: Dream, Necessity or Excuse?*, 23 ARB. INT’L 357, 361-78 (2007) (noting how international commercial arbitration differs from sports and domain name arbitration and investment arbitration).

<sup>49</sup> As a general rule, researchers should go first to the website of the international organization that promulgated the document. Other databases such as CENTRAL, a project supported by the University of Cologne, make a variety of relevant sources available, although it may be difficult for someone inexperienced in international commercial arbitration to evaluate the relative merits of all of the materials in that database. See Trans-lex.org Law Research, <http://www.tldb.de> or <http://www.trans-lex.org>.

<sup>50</sup> Difficulties in international commercial arbitration can arise because of the absence of an internationally recognized citation system. See Jolivet, *supra* note 17, at 267. For example, sources for the New York Convention include 330 U.N.T.S. 3, T.I.A.S. No. 6997, and 7 I.L.M. 1046. Similarly, citations to the ICSID Convention can be found at 575 U.N.T.S. 159, T.I.A.S. 6090, and 4 I.L.M. 524. In the United States, the T.I.A.S. (Treaties and Other International Acts Series) is preferred, since it is compiled by the U.S. Department of State and includes all treaties to which the United States is a party; however, the U.N.T.S. (United Nations Treaty Series) may also be required in some circumstances and may be an adequate official cite if the document does not exist in T.I.A.S. or another U.S.-generated source. THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R. 21.4.5 (Columbia L. Rev. Ass’n et al. eds., 2005) [hereinafter THE BLUEBOOK]. The United Kingdom prefers international sources, and thus would prefer U.N.T.S. over T.I.A.S. (and would consider T.I.A.S. on the same level as any other official source generated by a state party, including those issued by the U.K.). Faculty of Law, University of Oxford, *The Oxford Standard for Citation of Legal Authorities* 25 (2006) [hereinafter OSCOLA 2006], available at [http://denning.law.ox.ac.uk/published/oscola\\_2006.pdf](http://denning.law.ox.ac.uk/published/oscola_2006.pdf). Although neither the U.S. nor the U.K. consider I.L.M. an “official” source for any international treaty to which that nation is a party, it is the preferred “unofficial” source in both nations, since the documents included therein are entirely

Furthermore, some international treaties and conventions on arbitration may also be reproduced in various specialist resources. Indeed, for many years it was common for treatises on international commercial arbitration to include the text of often-used international agreements in the appendices.<sup>51</sup> This practice dates back to the days before electronic research, when access to materials was more difficult. However, this custom can still provide researchers with helpful shortcuts, so long as the lawyers confirm that the document reproduced in the treatise is still in effect.

Another practice that arose in the days before electronic research was common involves the compilation of treaties and conventions relating to international commercial arbitration in a single sourcebook. Many of these compilation texts are published in loose-leaf form to ensure their currency. Some useful series include *International Commercial Arbitration* and *International Commercial Arbitration Pacific Rim*, both edited by Eric E. Bergsten, and *International Arbitration Treaties* and *World Arbitration Reporter*, both edited by Hans Smit and Vratislav Pechota.

#### B. *Sources of Law – National Laws*

In litigation, the only relevant legal authority relating to procedure is national law. While national laws are also applicable to international commercial arbitration, they play a slightly different role. Furthermore, more than one nation's law may apply at different stages of the proceedings or to different aspects of the proceedings.<sup>52</sup>

When considering arbitral procedure, the most important national law to consider is the arbitration statute in effect in the arbitral forum (also known as the arbitral seat), as well as any cases construing the statutory provisions.<sup>53</sup> However, not all of the provisions of a national arbitration law will necessarily apply to an international dispute.<sup>54</sup> Similarly, some case law construing national arbitration

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reputable. Where appropriate, advocates should consider using parallel citations to accommodate the national preferences of the various members of the arbitral tribunal and ease access to the relevant authorities.

<sup>51</sup> See, e.g., FOUCHARD, GAILLARD, GOLDMAN, *supra* note 34, Annexes IV-VI; NIGEL BLACKABY ET AL., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION Apps. B-C (5th ed. 2009) [hereinafter REDFERN & HUNTER].

<sup>52</sup> The issue of which state laws control which issues and which state courts have the ability to intervene in an arbitration is beyond the scope of this article. However, plenty of information is available on this subject. See generally FOUCHARD, GAILLARD, GOLDMAN, *supra* note 34, ¶¶ 661-88, 1169-1208, 1421-1557; JULIAN D.M. LEW ET AL., COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION ¶¶ 15-01 to 15-57, 17-01 to 18-99 (2003); REDFERN & HUNTER, *supra* note 51, ¶¶ 3-01 to 3-232, 7-01 to 7-65.

<sup>53</sup> Case law is considered *infra* in section III(6).

<sup>54</sup> For example, the first chapter of the U.S. Federal Arbitration Act (FAA) covers domestic U.S. arbitration. See 9 U.S.C. §§ 1-16 (2007). International arbitrations governed by the New York Convention are covered in chapter two of the FAA, *see id.*

law will only pertain to domestic disputes.<sup>55</sup> The situation may be further complicated in federal states where several layers of legislation and precedent may overlap.<sup>56</sup> Yet another level of difficulty would arise if the parties attempted to have the procedural law of another nation apply instead of or in addition to the law of the arbitral forum.

Many aspects of a nation's arbitration law exist as default rules. Should the parties choose some other manner of addressing a particular procedural issue, courts will uphold that choice. However, some aspects of a nation's arbitration law are mandatory, and parties may not derogate from those principles.

The content of these national laws on arbitration often comes as a surprise to those who are more familiar with litigation than arbitration. Unlike a code of civil procedure, legislation on international commercial arbitration does not outline the precise procedural steps that parties must follow during the arbitration or provide the applicable rules of evidence. Instead, national laws on arbitration focus primarily on defining the relationship between the national courts and the arbitral tribunal, including, but not limited to, the role that the court plays in aiding the arbitration through motions to compel arbitration and motions to enforce or set aside an award.

National laws also indicate whether the dispute is one which can be properly resolved through arbitration. For example, state laws define that jurisdiction's interpretation of the doctrine of *compétence-compétence* (also known as

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§§ 201-08, while international arbitrations governed by the Panama Convention are covered in chapter three, *see id.* §§ 301-307. Chapter one of the FAA only applies to matters brought under chapters two and three of the FAA to the extent that it is not inconsistent with the later provisions. *See id.* §§ 208, 307. Other nations structure their legislation differently. For example, the English Arbitration Act 1996 requires detailed cross-referencing within the Act itself (as well as to previous legislation on arbitration) to understand which provisions apply to domestic arbitrations and which apply to international arbitrations. *See, e.g.*, Arbitration Act 1996 §§ 2, 85, 92, 94, 99.

<sup>55</sup> For example, for many years U.S. domestic awards could be set aside on the ground of "manifest disregard of law" even though many internationalists held that manifest disregard was an improper ground for non-enforcement of a foreign arbitral award under the New York Convention. *See, e.g.*, Hans Smit, *Is Manifest Disregard of the Law or the Evidence or Both a Ground for Vacatur of an Arbitral Award?*, 8 AM. REV. INT'L ARB. 341 (1997). However, this common-law basis for vacatur is now in doubt even in domestic matters. *See Hall Street Assoc., L.L.C. v. Mattel, Inc.*, 128 S.Ct. 1396 (2008); *see also Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S.Ct. 1758, 1768 n.3 (2010).

<sup>56</sup> For example, there is relatively constant debate in the United States about the extent to which state law provisions supplement the international aspects of the Federal Arbitration Act. *See, e.g.*, *Preston v. Ferrer*, 128 S.Ct. 978, 981 (2008) (holding "when parties agree to arbitrate all questions arising under a contract, state laws lodging primary jurisdiction in another forum, whether judicial or administrative, are superseded by the FAA"). Switzerland handles the matter somewhat differently, explicitly providing that the national legislation will apply unless the parties have agreed that it shall not or that cantonal law on arbitration shall apply. Swiss Private International Law of 1987, Art. 176.

*Kompetenz-Kompetenz*), which describes the extent to which an arbitral tribunal is competent to decide its own jurisdiction. Similarly, national laws outline the state's position on questions of arbitrability, which describes the extent to which a state has reserved certain disputes to its own national courts (i.e., has forbidden the arbitration of such matters) as a matter of public policy.

The issue of arbitrability demonstrates another of the pitfalls for newcomers to international commercial arbitration. While it is possible that arbitrability may be discussed in a country's arbitration law, reservations on the ability to arbitrate certain matters may also be found in other pieces of legislation or in case law.<sup>57</sup> Therefore, researchers who focus exclusively on a single statute, thinking that it embodies everything that is relevant about international commercial arbitration, could be missing important information.

However, mistakes regarding arbitrability are neither the most common nor the most egregious type of error made by newcomers to international commercial arbitration. That distinction falls to novices' unfortunate propensity to rely in arbitration on the rules of evidence and civil procedure that are used in state courts. As discussed further below, arbitral procedure is a matter for the arbitral tribunal to decide, subject to the agreement of the parties and any applicable arbitral rules.<sup>58</sup> Unless the parties have indicated that the proceedings are to be governed by a particular set of court or evidentiary rules,<sup>59</sup> the arbitral tribunal is not bound to apply those principles.

Of course, attorneys may argue – as a tactical matter – that certain rules of evidence or civil procedure should be applied as a matter of choice to a particular arbitration, but advocates should make it clear that they know that these provisions are not applicable as a matter of right,<sup>60</sup> since an unyielding insistence

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<sup>57</sup> For example, restrictions on the arbitrability of intellectual property matters in the European Union are not found in any of the national laws on arbitration, but in an E.U. regulation. See Council Regulation 44/2001 of Dec. 22, 2000 on Jurisdiction and the Recognition of Enforcement of Judgments in Civil and Commercial Matters, 2001 O.J. (L 12) 1, Art. 22(4) (giving courts exclusive jurisdiction over “proceedings concerned with the registration or validity of patents, trade marks, designs, or similar rights required to be deposited or registered”).

<sup>58</sup> See *infra* notes 78-82 and accompanying text.

<sup>59</sup> Notably, an indication in the arbitration agreement that the law of country X is to apply to procedural questions will not require the application of X's national rules of civil procedure or evidence; instead, it will typically invoke the arbitration law of country X, which focuses on the relationship between courts and arbitral tribunals, not arbitral procedure. REDFERN & HUNTER, *supra* note 51, ¶¶ 3-53 to 3-66. Similarly, seating an arbitration in country X is not enough to invoke national rules of civil procedure or evidence. To make such rules binding on the arbitration, parties must be very explicit, though it is unclear why they would wish to do so when arbitration is valued for its flexibility and lack of formalism.

<sup>60</sup> For example, a U.S.-trained lawyer might believe that the type of far-reaching discovery that is available in U.S. courts – including both extensive document discovery and oral depositions in advance of any hearing – is necessary or useful in proving his or

on the relevance of these rules can damage a lawyer's credibility with the arbitral panel. Furthermore, the failure to recognize the inapplicability of domestic rules of court can waste a great deal of the parties' time and money, thus diminishing the efficiency and informality that are supposed to be the hallmarks of international commercial arbitration.

Any discussion on national arbitration laws would be incomplete without a mention of the United Nations Commission on International Trade Law's Model Law on International Commercial Arbitration ("UNCITRAL Model Law").<sup>61</sup> Unlike other international instruments discussed herein, the UNCITRAL Model Law is not a binding treaty to which state parties adhere; instead, it is a piece of model legislation that UNCITRAL proposed to help harmonize national standards on arbitration. Originally promulgated in 1985 and revised in 2006, the UNCITRAL Model Law has been adopted in whole or in part by over 55 nation states or autonomous regions.<sup>62</sup> Ultimately, however, parties must remember that the UNCITRAL Model Law is just that – a model – that may be interpreted and applied differently in different jurisdictions.<sup>63</sup>

Locating national statutes on arbitration is relatively easy, even for newcomers to the field, since every lawyer knows how to find legislation in his or her home jurisdiction. However, sometimes it may also be necessary, or at least helpful, for a researcher to consider the national arbitration law from another jurisdiction. While it is becoming increasingly easy to conduct comparative legal research, advocates should do so only with caution.<sup>64</sup>

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her case in arbitration. However, discovery – both oral and written – is not available as of right in most international arbitrations, and any party disclosure ordered by the arbitrator is likely to be much narrower than what will be available in litigation in a U.S. court. FOUCHARD, GAILLARD, GOLDMAN, *supra* note 34, ¶¶ 1258-60. American lawyers are not the only ones who make this mistake. Nearly half (48%) of respondents to a survey on England's Arbitration Act 1996 thought the Act should be revised to include an explicit reminder that arbitrators are not to mimic court procedure. Bruce Harris, *Report on Arbitration Act 1996*, 23 *ARB. INT'L* 437, 444 (2007).

<sup>61</sup> UNCITRAL MODEL LAW, G.A. Res. 40/72, 40 U.N. G.A.O.R. Supp. (No. 17), U.N. Doc. A/40/17 (June 21, 1985), revised in 2006, G.A. Res. 61/33, U.N. Doc. A/61/33 (Dec. 4, 2006), *available at* [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/1985Model\\_arbitration.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html).

<sup>62</sup> *See* Status – 1985 UNCITRAL Model Law on International Commercial Arbitration, *available at* [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/1985Model\\_arbitration\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html).

<sup>63</sup> UNCITRAL has compiled a database known as CLOUT (Case Law on UNCITRAL Texts), which includes all known case law construing the UNCITRAL Model Law. CLOUT – which is available in both print and in electronic form – is intended to help in the harmonization process by providing courts and arbitral tribunals with easy access to decisions from other jurisdictions. The electronic version can be found at [http://www.uncitral.org/uncitral/en/case\\_law.html](http://www.uncitral.org/uncitral/en/case_law.html).

<sup>64</sup> Comparative legal research is always risky because subtle differences in language and legal traditions may not be apparent at first glance. Nevertheless, specialists in international commercial arbitration have always maintained at least a general familiarity

The most logical – and preferred – source from which to obtain national arbitration laws is the civil code in the relevant jurisdiction. These days, researchers are most likely to obtain electronic copies of legislation from subscription or free electronic databases.<sup>65</sup> However, national statutes on arbitration are also reprinted in other sources. For example, translated versions of arbitration statutes from states that are often used as arbitral seats may be found in the appendices of some of the leading treatises on international arbitration.<sup>66</sup> There are also a number of loose-leaf publications dedicated to translating and reproducing an even wider variety of national statutes on arbitration. These loose-leaf compilations are particularly useful because they often supplement the national arbitration statutes with excerpts from other relevant laws, thus minimizing the likelihood that a novice researcher will make errors based on an incomplete understanding of the structure of that nation's civil code.<sup>67</sup> A complete listing of titles is beyond the scope of this article, but materials can be found in *International Commercial Arbitration* and *International Commercial Arbitration Pacific Rim*, both edited by Eric E. Bergsten, *World Arbitration Reporter* and *National Arbitration Laws*, both edited by Hans Smit and Vratislav Pechota, and the annual issues of the *Yearbook Commercial Arbitration*, edited by the International Council for Commercial Arbitration (ICCA),<sup>68</sup> and the *International Handbook on Commercial Arbitration*, edited by Jan Paulsson.

Finding judicial opinions construing the national arbitration law (or other relevant provisions) is often a more difficult task, since researchers must have access to the nation's entire realm of case law, either in hard copy or through electronic subscription databases. However, relevant portions of key judicial decisions are sometimes discussed in treatises and law review articles, which can give researchers some guidance regarding the interpretation of statutory language.

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with different jurisdictions' national statutes so as to better advise clients on tactical matters. See Judd Epstein, *The Use of Comparative Law in Commercial Arbitration and Commercial Mediation*, 75 TULANE L. REV. 913, 915 (2001). Of course, even those who practice regularly in this field are quick to employ local counsel whenever a detailed question of local law becomes imminent. REDFERN & HUNTER, *supra* note 51, ¶ 11.169 - 11.171. Lawyers also need to be aware of any ethical and legal restrictions on multi-jurisdictional practice, both in their home state and abroad.

<sup>65</sup> In addition to subscription databases such as Westlaw and LexisNexis, researchers can consult the free database compiled by the World Legal Information Institute, which is available at <http://www.worldlii.org>. The use of free internet sources is becoming increasingly common in legal research. See Lisa Smith-Butler, *Cost Effective Legal Research Redux: How to Avoid Becoming the Accidental Tourist, Lost in Cyberspace*, 9 FLA. COASTAL L. REV. 293, 298-345 (2008) (outlining various methods of researching U.S. law on free databases).

<sup>66</sup> See, e.g., FOUCHARD, GAILLARD, GOLDMAN, *supra* note 34, Annexes I-III.

<sup>67</sup> See *supra* note 57 and accompanying text (regarding arbitrability).

<sup>68</sup> The tables of contents for all of the *Yearbooks* (which were first published in 1976) can be found at [http://www.arbitration-icca.org/publications/yearbook\\_table\\_of\\_contents.html](http://www.arbitration-icca.org/publications/yearbook_table_of_contents.html).

Nevertheless, advocates and arbitrators should always review any judicial opinion in its entirety before relying on it.

Furthermore, those who are trained outside the common-law tradition may be surprised to learn that some of the most important rules on arbitration are not addressed in any statute but are instead embodied in judicial decisions.<sup>69</sup> These and other problems concerning case law research are discussed more fully below.<sup>70</sup>

### C. *Sources of Law – Arbitral Rules*

When considering questions regarding arbitral procedure, it is critical to identify whether the parties have chosen to be bound by any arbitral rules, since those are one of the most important “private” sources of authority in this area of law. Typically parties indicate their desire to have a particular set of arbitral rules govern the proceedings by making that intent clear in the arbitration agreement. It is also possible for parties to choose to proceed on an *ad hoc* basis without adopting any formal procedural guidelines, in which case there is no need to conduct any research concerning this area of authority.<sup>71</sup>

Arbitral rules are generally promulgated by arbitral institutions,<sup>72</sup> although one well-known set of procedures – the UNCITRAL Arbitration Rules – was drafted by the United Nations Commission on International Trade Law, which does not administer arbitrations.<sup>73</sup> The content of the different arbitral rules varies slightly among the various institutions,<sup>74</sup> but no set of arbitral rules is as comprehensive as a national code of civil procedure. Instead, arbitral rules give the arbitral tribunal the discretion to decide any points of procedure that the parties have not already considered explicitly or implicitly.

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<sup>69</sup> See, e.g., S.I. Strong, *Invisible Barriers to the Enforcement of Foreign Arbitral Awards in the United States*, 21 J. INT’L ARB. 439, 441-42 (2004).

<sup>70</sup> See *infra* notes 95-116 and accompanying text.

<sup>71</sup> Parties can also choose to be bound by a particular rule set, even if the arbitration is not administered by the institution that promulgated those rules. These proceedings are sometimes also called *ad hoc* arbitrations, which can confuse inexperienced practitioners.

<sup>72</sup> There are dozens of national and international arbitral institutions, each with its own set of procedural rules. Parties may also choose rules that were drafted by something other than an arbitral institution, so long as the process meets minimum standards of international procedural fairness.

<sup>73</sup> UNCITRAL Arbitration Rules, G.A. Res. 31/98, U.N. Doc. A/RES/31/98 (Dec. 15, 1976), available at <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules/arb-rules.pdf>.

<sup>74</sup> For more on the differences among individual rule sets, see SIMPSON, THACHER & BARTLETT, LLP, *COMPARISON OF ASIAN INTERNATIONAL ARBITRATION RULES* (2003); SIMPSON, THACHER & BARTLETT, LLP, *COMPARISON OF INTERNATIONAL ARBITRATION RULES* (2008); HANS SMIT, *A CHART COMPARING INTERNATIONAL COMMERCIAL ARBITRATION RULES* (1998).

Arbitral rules are not only not as comprehensive as civil codes of procedure, they focus on different issues, concentrating on matters that are unique to arbitration, such as the procedures for naming, challenging and replacing arbitrators, or the manner in which an arbitral award is to be rendered. These issues are not discussed in national codes of civil procedure, though they may exist in some form in national arbitration statutes as default rules to be applied in the absence of party agreement.<sup>75</sup>

In addition to the various general rule sets, there are a growing number of subject-specific guidelines promulgated by institutional bodies with a special interest in arbitration. For example, the International Bar Association (“IBA”) has issued the IBA Rules on the Taking of Evidence in International Commercial Arbitration as well as the IBA Guidelines on Conflicts of Interest in International Commercial Arbitration.<sup>76</sup> Although few parties explicitly choose to have these or similar guidelines apply in a dispute, an arbitral panel may decide to make these or similar rules applicable, either in their entirety or as general principles.

Arbitral rules are among the easiest legal authorities for researchers to find. At this stage, it is perhaps best to obtain the most recent version of the rules in question from the website of the organization responsible for promulgating them. Many well-known arbitral rule sets are also reprinted in source books pursuant to a practice that dates back to the time before electronic research was common.<sup>77</sup> However, one must be careful that the versions reprinted in treatises and other texts are indeed still in effect.

Sometimes, parties wish to be governed by rules that were in effect at the time the arbitration agreement was written rather than those in effect at the time the dispute arose. In such instances, the researcher can contact the arbitral institution to obtain the older copy of the rules.

#### D. *Sources of Law – Law of the Dispute (Procedural Orders and Agreements Between the Parties)*

In the context of this article, the phrase “law of the dispute” includes two distinct elements. First, it reflects the consensual nature of arbitration by embracing any procedural agreements between the parties. While the arbitration agreement constitutes the single most important agreement between the parties,

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<sup>75</sup> Default provisions in national arbitration statutes only apply in the absence of party choice. In the world of arbitration, parties can express their choices explicitly through detailed provisions contained in the arbitration agreement itself or implicitly through the adoption of arbitral rules.

<sup>76</sup> See International Bar Association, Free Guides and free materials (July 2, 2009), [http://www.ibanet.org/publications/IBA\\_Guides\\_Practical\\_Checklists\\_Precedents\\_and\\_Free\\_Materials.cfm](http://www.ibanet.org/publications/IBA_Guides_Practical_Checklists_Precedents_and_Free_Materials.cfm).

<sup>77</sup> See, e.g., FOUCHARD, GAILLARD, GOLDMAN, *supra* note 34, Annexes VII-X; REDFERN & HUNTER, *supra* note 51, Apps. D-H, J-K.

the parties can also make other agreements that are embodied in letters, electronic messages or other documents.<sup>78</sup>

The central role of consent in arbitration leads some commentators to claim that the arbitration agreement is the foremost source of authority in an arbitral proceeding.<sup>79</sup> Certainly the existence of a binding arbitration agreement is a necessary precondition to an arbitration, and parties must consult the agreement to ascertain which other forms of authority – such as which national laws and which arbitral rules, if any – apply. However, parties are not free to disregard mandatory provisions of national or international law, nor can they ignore the mandatory requirements of any arbitral rules that they have chosen to apply to the proceedings.<sup>80</sup> Thus party agreement is fundamental in arbitration, but is not the absolute and final authority on every issue, including every procedural issue. For that reason, this article ranks the law of the dispute below any type of authority that can limit party autonomy.

Second, in the context of this article, the term “law of the dispute” includes procedural orders issued by the arbitral tribunal. Arbitral panels typically exercise more discretion than judges do in shaping procedure because there are no detailed codes of arbitral procedure. Although this discretion can be exercised orally, it is often memorialized in written procedural orders that are binding on the parties. These orders can cover a wide variety of matters, but because arbitrators’ procedural orders are seldom made publicly available, there is no way to compare content reliably.<sup>81</sup> However, these orders may describe the content and form of

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<sup>78</sup> Arbitration agreements typically must be in writing if they are to produce an internationally enforceable award, although the definition of a “writing” has been much debated. See, e.g., Toby Landau, *The Requirement of a Written Form For an Arbitration Agreement When “Written” Means “Oral,”* in INTERNATIONAL COMMERCIAL ARBITRATION: IMPORTANT CONTEMPORARY QUESTIONS, ICCA CONGRESS SERIES NO. 11 at 19 *passim* (Albert Jan van den Berg ed., 2003) (discussing differences in the definition of a “writing” and reasons behind those definitions).

<sup>79</sup> LEW ET AL., *supra* note 52, ¶¶ 5-2 to 5-33; Lew, *supra* note 38, at 491.

<sup>80</sup> For example, the ICC would doubtless not permit parties to an ICC arbitration to agree to waive the review of the award by the ICC International Court of Arbitration. YVES DERAÏNS & ERIC A. SCHWARTZ, A GUIDE TO THE ICC RULES OF ARBITRATION 7-8, 312-13 (2005).

<sup>81</sup> Recently, Jan Paulsson wrote an article lauding the procedural orders of highly respected international arbitrator Karl-Heinz Böckstiegel. The article contained the contents of an order that had been reprinted in the award issued in *Tradex Hellas SA v. Republic of Albania*, 29 April 1999, 14 ICSID REV. – FOREIGN INV. L.J. 161 (1999). See Jan Paulsson, *The Timely Arbitrator: Reflections on the Böckstiegel Method*, 22 ARB. INT’L 19 (2006); see also Karl-Heinz Böckstiegel, *Major Criteria for International Arbitrators in Shaping an Efficient Procedure*, ICC INT’L CT. ARB. BULL., 1999 SPECIAL SUPP. 49. The form and contents of typical procedural orders are also discussed by another preeminent international arbitrator, Hans Smit, in his article, *Managing an International Arbitration: An Arbitrator’s View*, 5 AM. REV. INT’L ARB. 129 (1994). See also Scott Armstrong Spence, *Organizing an Arbitration Involving an International Organization and Multiple Private Parties: The Example of the Bank for International*

any necessary pre-hearing submissions, as well as the dates that those submissions are due; the scope of any documents that may need to be produced; and/or procedures to be used during any oral hearings, including the possibility of oral examination of witnesses and the amount of time allocated to parties for argument and/or examination of witnesses. Interim awards in the dispute at issue could also be considered to fall under the heading of “law of the dispute,” although tribunals in international arbitrations seldom (or should seldom) issue such rulings, given the difficulty in enforcing anything other than a final award.<sup>82</sup>

The law of the dispute is a private form of authority that cannot be found through research in state-generated, public sources. Typically parties have copies of their arbitration agreements in their own files (though it is not unheard-of for the document to go missing, which can be catastrophic when it comes time to enforce the award<sup>83</sup>), but lawyers should be aware that the parties’ agreement can also be reflected in other types of documents, including letters or electronic messages. Procedural orders are typically found in the hands of the parties or their lawyers, but advocates must again be sure to keep detailed records so that binding decisions are filed as such, even if they are not formally designated as procedural orders. Furthermore, if an arbitral tribunal makes an oral ruling, advocates should take steps to memorialize that ruling promptly and properly in writing to avoid any later confusion.

#### E. *Sources of Law – Arbitral Awards*

In the context of this article, the term “arbitral awards” refers to awards arising out of disputes other than the one currently facing the parties. Newcomers may be surprised to learn that arbitral awards can constitute a source of authority in an international proceeding, since arbitration is commonly understood to be a private dispute resolution mechanism wherein no one other than the parties involved in the dispute ever sees the terms of the award issued by the tribunal.

This is true, but with some exceptions. Privacy and confidentiality have their downsides. For example, arbitral tribunals can find arbitral awards issued in other disputes helpful when considering a similar matter. Furthermore, commercial

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*Settlements Arbitration*, 21 J. INT’L ARB. 309 (2004) (discussing content of fourteen different procedural orders); Rolf Trittman, *When Should Arbitrators Issue Interim or Partial Awards and/or Procedural Orders?*, 20 J. INT’L ARB. 255 (2003). Sample precedents can also be found in JOHN TACKABERRY & ARTHUR MARRIOTT, BERNSTEIN’S HANDBOOK OF ARBITRATION AND DISPUTE RESOLUTION PRACTICE (2003).

<sup>82</sup> LEW ET AL., *supra* note 52, ¶¶ 23-82 to 23-99.

<sup>83</sup> For example, the New York Convention and a number of national laws require a party seeking enforcement of an award to produce the original copy of the arbitration agreement or a duly certified copy (a process which typically requires the production of the original document to a competent certifying authority). *See, e.g.*, New York Convention, *supra* note 41, Art. IV(1)(b); Piero Bernardini, *Italy*, in III INT’L HANDBOOK COMM. ARB. Supp. No. 49, Italy-1, 44 (Jan Paulsson ed., 2007); Promid Nair, *Surveying a Decade of the ‘New’ Law of Arbitration in India*, 23 ARB. INT’L 699, 735 (2007).

entities can better anticipate how to structure their affairs if they are able to identify any overarching trends in arbitral procedure or outcomes.<sup>84</sup>

Some of the leading international arbitral institutions have made efforts to address these issues by publishing a limited number of denatured arbitral awards that have been rendered under their rules.<sup>85</sup> Although published awards have no formal precedential value and are not binding on anyone other than the parties to whom the award was issued,<sup>86</sup> arbitral awards constitute highly persuasive forms of authority, particularly with respect to procedural matters that are not typically discussed in judicial opinions.<sup>87</sup> Thus, experienced advocates and arbitrators look to published awards for guidance concerning issues such as the interpretation of arbitral rules, the challenge of arbitrators, permissible procedures in hearings and the like.

Of the various kinds of legal authority available in an international commercial arbitration, newcomers are perhaps most likely to underestimate the significance of arbitral awards. Furthermore, those who have not trained in a law firm that specializes in international disputes may find it difficult to locate these awards. However, the effort one puts into researching arbitral awards typically yields high dividends, since these materials are often highly persuasive to arbitral tribunals.<sup>88</sup>

The content of arbitral awards can vary greatly. Some simply enumerate the resolution of the dispute, with very little in the way of reasoning or additional information.<sup>89</sup> These awards may be the least likely to be reproduced. Other awards contain more information, either regarding the outcome on the merits or on procedural questions such as choice of law, arbitral jurisdiction, introduction of evidence and so on.<sup>90</sup> This latter category of arbitral awards can be quite useful to

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<sup>84</sup> FOUCHARD, GAILLARD, GOLDMAN, *supra* note 34, ¶¶ 383-84.

<sup>85</sup> When publishing the awards, the institution removes any identifying information so that confidentiality is respected.

<sup>86</sup> This appears to be the case in international commercial arbitration, although the situation in sports and domain name arbitration and investment arbitration may be different. Kaufmann-Kohler, *supra* note 48, at 361-78.

<sup>87</sup> Because arbitral procedure is left almost entirely to the discretion of the arbitrator, courts very seldom opine on procedural irregularities unless they are so gross as to violate basic notions of procedural fairness or public policy.

<sup>88</sup> FOUCHARD, GAILLARD, GOLDMAN, *supra* note 34, ¶ 384; *see also* Kaufmann-Kohler, *supra* note 48 *passim*; William W. Park, *Non-signatories and International Contracts: An Arbitrator's Dilemma*, in MULTIPLE PARTY ACTIONS IN INTERNATIONAL ARBITRATION 1, 10-12 (Permanent Ct. Arb. ed., 2009).

<sup>89</sup> There is no universal requirement that an arbitral award be reasoned, though such an obligation may be imposed by the parties in their arbitration agreement or by applicable laws or arbitral rules. LEW ET AL., *supra* note 52, ¶¶ 24-64 to 24-69.

<sup>90</sup> Quite often, an arbitral tribunal will reserve its opinion on questions of procedure until the final award, both to avoid interim appeals (which are generally improper but occasionally attempted) and to ensure enforceability (since interim awards are often not

arbitral tribunals considering similar issues, even if the earlier decisions are in no way binding on other parties.

As always, research can be conducted electronically or through printed resources. The advent of electronic publishing has made investigating arbitral awards easier and more affordable than ever, and those who wish to pursue their inquiries online have two options. First, parties can look into whether any useful materials are freely available on the website of any of the international organizations that publish their awards.<sup>91</sup> Second, electronic research can also be conducted through one or more of the subscription databases now available.<sup>92</sup>

Parties can also conduct research through traditional means, which involves the bound and loose-leaf publications that specialist law firms have used for decades. Although it is impossible to include a comprehensive list of these printed sources, some of the best-known reporters of arbitral awards are the *ASA Bulletin*, compiled by the Swiss Arbitration Association; the *Collection of ICC Awards/Recueil des sentences arbitrales de la ICC*, published by the ICC; *ICSID Reports*, relating to ICSID arbitrations; *Journal de Droit International*, published by the French publisher Juris Classeur, which is now associated with LexisNexis;<sup>93</sup> the *SCC Arbitral Awards*, regarding arbitration associated with the Stockholm Chamber of Commerce; *The World Arbitration Reporter*, published by Juris Publishing; *World Trade and Arbitration Materials*, published by Kluwer Law International; and the *Yearbook Commercial Arbitration*, edited by the ICCA.<sup>94</sup>

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considered final and binding under enforcement mechanisms such as the New York Convention). *See supra* note 82.

<sup>91</sup> For example, UNILEX, a free, fully searchable electronic database containing court cases and arbitral awards relating to the Convention on the International Sale of Goods (CISG) and the UNIDROIT Principles of International Commercial Contracts, can be found at <http://www.unilex.info/>. The International Centre for the Settlement of Investment Disputes provides electronic access to decisions under the ICSID Convention at [http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ShowHome&pageName=Cases\\_Home](http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ShowHome&pageName=Cases_Home) and NAFTA awards and decisions can be found at <http://www.sice.oas.org/DISPUTE/nafdispe.asp>. The United Nations provides electronic access to *Reports of International Arbitral Awards/Recueil des sentences arbitrales* at <http://www.un.org/law/riaa>.

<sup>92</sup> While general legal databases like Westlaw and LexisNexis claim to offer materials in international commercial arbitration, they simply do not have access to very many international arbitral awards. Specialized subscription databases, such as [kluwerarbitration.com](http://kluwerarbitration.com) and Arbitration Law Online ([arbitrationlaw.com](http://arbitrationlaw.com)) can fill the gap left by more general legal databases, since the subject-specific databases include material from at least some of the major arbitral reporters.

<sup>93</sup> This journal – also known as “Clunet” after its founder, Edouard Clunet – includes both commentary (which is typically in French) and extracts of ICC arbitral awards (usually in both French and English).

<sup>94</sup> The tables of contents for all of the *Yearbooks* (which were first published in 1976) can be found at [http://www.arbitration-icca.org/publications/yearbook\\_table\\_of\\_contents.html](http://www.arbitration-icca.org/publications/yearbook_table_of_contents.html). Furthermore, a consolidated list of arbitral awards included in the various

Although an arbitrator may be most heavily influenced by an award dealing with the particularities of the rule set that governs the proceedings, there are some issues that are common to all arbitral rules. In these cases, it is less important whence the award originates and more important that the discussion be cogent and on point.

#### F. *Sources of Law – Case Law*

If arbitral awards are the legal authorities that are most often misunderstood by newcomers to international commercial arbitration, case law (i.e., judicial opinions) is perhaps the second most difficult form of authority. In this instance, the problem derives from different cultural understandings regarding the use of case law.

On the one hand, there are those who rely far too heavily on case law in international commercial arbitrations. This is an error most commonly made by lawyers trained in the United States. In some ways, it is not surprising that U.S. lawyers look first to case law when conducting legal research, since judicial opinions make up such a large proportion of what is considered “law” in the United States.

The problem, however, is that judicial opinions do not play the same role in arbitration that they do in litigation. First, judicial decisions often do not address the types of issues that arise most frequently in arbitration, such as those involving procedure or conflicts of interest. To the extent that courts have considered such questions, the decisions often arise out of different procedural postures (such as a motion to vacate an award or refuse enforcement) and thus may not be as on point as, for example, an arbitral award might be.<sup>95</sup> Judicial decisions are also viewed through the lens of national law and may therefore reflect different priorities and perspectives than arbitral awards do.

Second, excessive reliance on judicial opinions suggests a lack of understanding about how legal authorities are viewed in international commercial arbitration. For example, those who present case law as the exclusive or nearly exclusive source of authority fail to recognize that lawyers trained outside the common-law tradition often find other types of authority – including legislation and scholarly opinion – to be equally or even more persuasive than judicial opinions.<sup>96</sup> Since arbitrators and/or opposing counsel may come from a non-common-law background, advocates are well advised to internationalize their written submissions by diversifying their legal authorities. This approach is

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*Yearbooks* is available at [http://www.arbitration-icca.org/media/0/12126757832960/final\\_list\\_of\\_awards.pdf](http://www.arbitration-icca.org/media/0/12126757832960/final_list_of_awards.pdf). The consolidated list of arbitral awards relating to investment treaties and published in the *Yearbook Commercial Arbitration* appears at [http://www.arbitration-icca.org/media/0/12127369880360/iaa\\_digest\\_investment\\_awards.pdf](http://www.arbitration-icca.org/media/0/12127369880360/iaa_digest_investment_awards.pdf).

<sup>95</sup> Arbitral awards can include decisions on procedural issues as well as disposition of the matter on the merits. See *supra* notes 81-82 and accompanying text.

<sup>96</sup> Whalen-Bridge, *supra* note 24, at 367-69.

further supported by the fact that international commercial arbitration developed as a blend of common-law and civil-law practice,<sup>97</sup> which suggests that practitioners should adopt a uniquely international approach to legal argument even if everyone involved in the proceeding comes from the same legal tradition.<sup>98</sup>

On the other hand, there are those who overlook opportunities where judicial opinions may legitimately be used. This is an error most often made by those from civil-law jurisdictions. While lawyers trained in the civil-law tradition may find it difficult to interpret and implement common-law reasoning,<sup>99</sup> those who wish to cultivate a truly transnational practice must take the necessary steps. For example, if a question is governed by the law of a common-law jurisdiction, then it is not only permissible but proper to consult case law when preparing one's legal arguments. In those situations, judicial precedents are not simply persuasive authority; they are binding on the arbitral panel.

However, advocates are not limited to using case law only in situations where it constitutes binding authority. Case law can also be submitted – judiciously – for its persuasive power.<sup>100</sup> This is true even when one is not working in the common-law tradition or with common-law lawyers. As Gabrielle Kaufmann-Kohler has noted, “arbitrators have an inclination to ‘transnationalize’ the rules they apply.”<sup>101</sup> Thus, in international commercial arbitration, it is always a good idea to blend common-law and civil-law practices.<sup>102</sup>

Using case law as persuasive authority involves submitting judicial opinions to the arbitral tribunal to show that other esteemed decision makers have decided the issue in a certain way and that their actions suggest – but do not require – a similar outcome in the matter at hand. The most persuasive cases are obviously from the jurisdiction whose law controls the issue in question, since they suggest how courts in that state might consider the matter should it come to the courts’

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<sup>97</sup> LEW ET AL., *supra* note 52, ¶¶ 22-7 to 22-13.

<sup>98</sup> Classification of legal systems into common law, civil law and Islamic law is only a very general guide. Wide variations on procedure and practice exist even within the same legal tradition. REDFERN & HUNTER, *supra* note 51, ¶¶ 6-86.

<sup>99</sup> Whalen-Bridge, *supra* note 24, at 365.

<sup>100</sup> See, e.g., Sourgens, *supra* note 9, at 2 (noting how comparative law can be used persuasively).

<sup>101</sup> Kaufmann-Kohler, *supra* note 48, at 364.

<sup>102</sup> Although civil-law lawyers do not rely heavily on judicial precedent as a general rule, international commercial arbitration is one area where an exception may be made, at least among French courts and practitioners. See FOUCHARD, GAILLARD, GOLDMAN, *supra* note 34, ¶ 151 (stating “French international arbitration law is thus currently drawn from two sources: a brief, liberal Code of Civil Procedure, and well-established case law that is generally able to overcome the Code’s shortcomings . . . and to deal with difficulties of interpretation which may yet arise”); see also Kaufmann-Kohler, *supra* note 48, at 358 (noting civil-law countries respect precedent, albeit to a lesser degree than common-law countries).

attention. However, judicial decisions from states where enforcement of the award is anticipated can also be persuasive.<sup>103</sup>

Furthermore, arbitral tribunals can also be influenced by judicial opinions from jurisdictions that have no nexus to the dispute or to the parties. If the judicial decision includes a cogent discussion of a legally relevant issue, then an advocate might wish to reference that decision in written submissions. This is a particularly useful approach when none of the jurisdictions that are more logically related to the arbitration yield cases that are on point and the arbitral tribunal contains members from the common-law tradition. Some arbitrators from common-law backgrounds might be uncomfortable rendering an award based on submissions that are bereft of case law, so a wise advocate gives the arbitrators what they need to decide in his or her client's favor.

Whenever one introduces case law as persuasive authority, it is important to ensure that the opinion is on point and discusses the same or similar legal issues. It is best if the judicial opinion yields the same result that the proponent desires in his or her own case (i.e., granting a particular motion or concluding that a certain state's law applies). Advocates should avoid referencing cases that have good language on one point but ultimately resolve the issue in a detrimental manner.<sup>104</sup>

Just as importantly, it is best if the decision originates in a nation that carries some weight with the arbitral tribunal. Some jurisdictions – such as England, France and Switzerland – are recognized as leaders in the field of international arbitration, and judicial decisions rendered in those states might be considered particularly persuasive by the arbitral panel.<sup>105</sup>

Similarly, if a state has based its legal system on that of another nation, that other nation's laws and judicial interpretations might be considered particularly persuasive. For example, a civil-law nation whose code is based on the French (Napoleonic) model might be more persuaded by the reasoning of a French court than of a German (a non-Napoleonic code country) or Canadian (common-law) court.<sup>106</sup> Newcomers to international commercial arbitration might find this kind of cross-cultural comparative analysis difficult, depending on the extent to which their home jurisdiction encourages and trains lawyers to rely on analogies to

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<sup>103</sup> However, arbitrators do not necessarily have a duty to take the law of every possible place of enforcement into account. Martin Platte, *An Arbitrator's Duty to Render Enforceable Awards*, 20 J. INT'L ARB. 307, 311-13 (2003). *But see* Stavros L. Brekoulakis, *On Arbitrability: Persisting Misconceptions and Areas of Concern*, in *ARBITRABILITY: INTERNATIONAL & COMPARATIVE PERSPECTIVES* 19, 29-31 (Loukas A. Mistelis & Stavros L. Brekoulakis eds., 2009) (discussing the "second look doctrine").

<sup>104</sup> This is not to say that advocates should omit references to troubling precedent when it governs an issue; in those instances, the lawyer simply must try to distinguish the decision on some point of law or fact. However, there is no reason or obligation to introduce difficult precedents when one is operating in the realm of persuasive authority.

<sup>105</sup> Paulsson, *Arbitrator Friendliness*, *supra* note 27, at 477-78.

<sup>106</sup> Sourgens, *supra* note 9, at 13.

foreign law.<sup>107</sup> However, this is the kind of sophisticated, internationalist approach to law that makes experienced advocates and arbitrators so valuable, and it is an skill that those entering the field of international commercial arbitration should work to attain.

Case law research is becoming easier to conduct all the time. Typically, judicial opinions are contained in reporting series that are published in each country.<sup>108</sup> Every state has one or more “official” case reporting series, but lawyers sometimes also use opinions from “unofficial” reporting series that either publish judicial decisions more rapidly than the official reporting series does<sup>109</sup> or that include opinions that are not included among the official reports.<sup>110</sup> These unofficial reporting series (which can also include “unreported” or “unpublished” decisions that will never make it into an official reporter) may not carry the same weight as an official decision or may not reflect the final language of the opinion, so advocates should be cautious about relying on an unofficial decision unless they fully understand the use and value of unofficial and unreported decisions within the national judicial system. Furthermore, anyone who conducts research into case law must be aware of the need to conduct comprehensive searches that

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<sup>107</sup> Rahdert, *supra* note 5, at 592, 597-98 (noting the United States has “traditions of independence and separation” leading to “a fairly consistent habit of insularity in foreign policy and attitudes toward foreign law” and noting similar habits in U.S. legal education); *see also* Bernstein, *supra* note 24, at 581 (noting trends toward jurisdictional, doctrinal and methodological provincialism in U.S. courts).

<sup>108</sup> An extensive list of the official reporting series of a wide variety of states can be found in Tables 1 and 2 of THE BLUEBOOK, *supra* note 50.

<sup>109</sup> For example, in the United States, the official reporting series for the United States Supreme Court – United States Reports (abbreviated “U.S.”) – is quite slow. Practitioners routinely cite to privately published reports – including Supreme Court Reporter (abbreviated “S.Ct.”), United States Supreme Court Reports, Lawyers’ Edition (abbreviated “L.Ed.”) or United States Law Week (abbreviated “U.S.L.W.”) – while waiting for the official report to come out. Practitioners working with U.S. law also must distinguish between official and unofficial reporting series for lower federal court decisions as well as state court decisions. *See* THE BLUEBOOK, *supra* note 50, Table 1. As a rule, there are no differences in content between the official and unofficial versions of U.S. judicial opinions. The situation is somewhat different in England and Wales, where there can be slight variations in language between opinions printed in different reporting series, particularly when older cases are involved. Although the variations are usually not significant, practitioners may wish to be particularly careful about using the official text when closely parsing quoted excerpts on contested questions of English law. *See* OSCOLA 2006, *supra* note 50, at 8-14 (discussing preferred citations).

<sup>110</sup> The advent of electronic legal databases has dramatically increased researchers’ access to unpublished decisions. Kuh, *supra* note 32, at 232-40. In particular, the two major electronic publishers – Westlaw and LexisNexis – have made it a practice to include unpublished opinions in their search results. This can be helpful to researchers in international arbitration to the extent that it increases the universe of potentially relevant authority, but it also makes the research process more expensive, time consuming and potentially contentious, as advocates have more ammunition for argument.

flesh out issues in their entirety, rather than relying on a single opinion that may be overruled or distinguished by later decisions.

Case law research outside one's home or primary jurisdiction is both difficult and dangerous.<sup>111</sup> However, lawyers find it increasingly easy to conduct comparative research, since some specialist publishers have made judicial opinions concerning key points of arbitral law available, either in the original or in the form of translated abstracts. Although these materials should be used with caution, they can be very useful to those who wish to present comparative legal analysis to the arbitral tribunal.

Judicial opinions concerning national arbitration law are typically available in both electronic and print form. Electronic sources include the various subscription databases<sup>112</sup> as well as free online databases. One helpful free database supported by UNCITRAL and known as CLOUT (Case Law on UNCITRAL Texts) carries case law on UNCITRAL texts, including the UNCITRAL Model Law.<sup>113</sup> There is also a free, fully searchable electronic database known as UNILEX that contains court cases and arbitral awards relating to the Convention on the International Sale of Goods (CISG) and the UNIDROIT Principles of International Commercial Contracts, though these decisions will likely go more to matters of substance than procedure.<sup>114</sup> A variety of judicial opinions are also available online without cost from the World Legal Information Institute, which allows searches by subject matter area (such as alternative dispute resolution) or by country or region.<sup>115</sup>

Specialist print resources include a variety of books and loose-leaf periodicals in addition to the printed reporting series available in each country. Specialist sources carrying judicial opinions on arbitration include, but are not limited to, the *ASA Bulletin*, compiled by the Swiss Arbitration Association; *International Arbitration Court Decisions*, edited by Sigvard Jarvin and Annette Magnusson; *International Commercial Arbitration and the Courts*, edited by Hans Smit and Vratislav Pechota; *Lloyd's Maritime and Commercial Law Quarterly*, edited by F.D. Rose; *Mealey's International Arbitration Report*, published by LexisNexis; *Model Law Decisions: Cases Applying the UNCITRAL Model Law on International Commercial Arbitration*, edited by Henri Alvarez, Neil Kaplan and

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<sup>111</sup> Again, those who seek to conduct comparative legal research in the context of an international commercial arbitration must take great care when venturing outside their home jurisdictions, since subtle differences in language and legal traditions may not be apparent at first glance. Furthermore, certain aspects of relevant law may remain hidden from the casual or inexperienced researcher. See Strong, *supra* note 69, at 441-42.

<sup>112</sup> Case law is available on general legal databases such as Westlaw and LexisNexis, as well as specialized legal databases such as [kluwerarbitration.com](http://kluwerarbitration.com) and Arbitration Law Online.

<sup>113</sup> This database can be accessed free of charge at [http://www.uncitral.org/uncitral/en/case\\_law.html](http://www.uncitral.org/uncitral/en/case_law.html).

<sup>114</sup> See UNILEX on CISG and UNIDROIT Principles, <http://www.unilex.info>.

<sup>115</sup> See World Legal Information Institute, <http://www.worldlii.org>; see also Smith-Butler, *supra* note 65, at 298-345 (regarding free research on U.S. law).

David W. Rivkin; *Model Law Materials* (formerly *Model Arbitration Law Quarterly Reports*), published by interarb; *The Swiss International Arbitration Law Reports*, edited by Paolo Michele Patocchi and Matthias Scherer; *World Arbitration Reporter*, published by Juris Publishing; *World Trade and Arbitration Materials*, published by Kluwer Law International; and the *Yearbook Commercial Arbitration*, edited by the ICCA.<sup>116</sup>

G. *Sources of Law – Scholarly Works (Treatises, Monographs and Articles)*

Scholarly works hold a unique position of importance in international commercial arbitration for two reasons. First, arbitration is a private affair between the parties, which means that both the disposition of the dispute and the proceedings themselves are typically private and confidential. While rules on the extent to which arbitration is confidential may be easing,<sup>117</sup> parties and/or arbitrators still tend to keep the details of an arbitration private.

Furthermore, as indicated above, arbitrators' procedural orders are typically not published, and even the denatured final awards that are made available through international arbitral institutions contain very little information about the hearing or pre-hearing procedures. Judicial opinions on this subject are both scarce and sparse, for although courts are involved in motions to compel arbitration, motions to enforce arbitral awards and motions to challenge arbitrators, very few judicial decisions discuss matters of arbitral procedure, given the deference courts grant the arbitral tribunal in such matters.

Thus, the details of arbitral procedure are often cloaked in mystery. In the absence of any direct guidance on what is permissible, experienced advocates and arbitrators turn to expert commentary to fill in the gaps. This approach is particularly attractive given that many of the leading commentators have a great deal of practical experience in international arbitration, either as advocates or neutrals, in addition to their scholarly credentials.

The second reason why scholarly works are held in such high esteem relates to the way international commercial arbitration blends civil and common-law

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<sup>116</sup> The tables of contents for all of the *Yearbooks* (which were first published in 1976) can be found at [http://www.arbitration-icca.org/publications/yearbook\\_table\\_of\\_contents.html](http://www.arbitration-icca.org/publications/yearbook_table_of_contents.html).

<sup>117</sup> See, e.g., L. Yves Fortier, *The Occasionally Unwarranted Assumption of Confidentiality*, 15 ARB. INT'L 131 (1999); Catherine A. Rogers, *Transparency in International Commercial Arbitration*, 54 U. KAN. L. REV. 1301 (2006). Certain of the parties' initial filings are made available online in ICSID arbitrations, see [http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ShowHome&pageName=Cases\\_Home](http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ShowHome&pageName=Cases_Home), as is true with class arbitrations filed with the AAA, see <http://www.adr.org/sp.asp?id=25562>. Furthermore, in April 2009, in an extraordinary display of transparency, the parties and the Permanent Court of Arbitration permitted the proceedings in the Abyei Arbitration to be publicly webcast. See *Abyei Arbitration*, *supra* note 46.

practices.<sup>118</sup> Expert commentary plays a very important role in the civil-law tradition, analogous, perhaps, in some ways to the role that case law plays in the common-law tradition, in that scholarly works are used to interpret and elucidate the meaning behind somewhat terse statutory provisions.<sup>119</sup> As a result of their training, civil-law lawyers are thus perhaps more likely to include references to expert commentary in their written submissions than common-law lawyers are.

Newcomers to international commercial arbitration who come from the common-law world might find these sorts of citations inappropriate, particularly if other forms of “public” authority – such as judicial opinions – are also available. Nevertheless, those who work in this field must accept that expert commentary is a legitimate source of authority, even if such works are not used extensively in their own national courts.<sup>120</sup>

There are three types of legal commentary: treatises, monographs and articles. Treatises – which are comprehensive tomes written by esteemed experts in the field – are perhaps the most persuasive type of text. Treatises are often scholarly in tone, which increases their value as a means of summarizing the arbitral community’s considered wisdom on any particular matter.

Although experts may differ on what constitutes a treatise versus a monograph, four sources that would undoubtedly fall into the former category are Gary B. Born’s *International Commercial Arbitration*, which has a slight emphasis on U.S. law, albeit within a strongly comparative context; *Fouchard, Gaillard, Goldman on International Commercial Arbitration*, which provides a civil-law perspective; Julian D.M. Lew, Loukas A. Mistelis and Stefan Kröll’s *Comparative International Commercial Arbitration*, which adopts a comparative approach; and *Redfern and Hunter on International Commercial Arbitration*, which approaches the issues from an English viewpoint. All are excellent and are recommended as useful additions to any law library. In fact, an experienced practitioner will often consult several of these texts when considering a particularly thorny point of law or procedure, since it can be very enlightening to compare how the different authors handle the same issue.

One new development of note is the decision by the American Law Institute (“ALI”) to produce a *Restatement of International Commercial Arbitration*. While Restatements (which cover a variety of subject matters)<sup>121</sup> are in some ways analogous to treatises in that they do not carry the force of binding law, many U.S.

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<sup>118</sup> For example, arbitrators usually schedule oral hearings and give parties the right to cross-examine witnesses (two procedures that are central to the common-law tradition) but also give great weight to documentary evidence (which is a trait of the civil-law tradition). LEW ET AL., *supra* note 52, ¶¶ 21-32 to 21-57.

<sup>119</sup> Whalen-Bridge, *supra* note 24, at 367-69.

<sup>120</sup> *See id.* at 369 (noting that “[o]nce students receive their first training in the methodology of a particular legal system, they acquire a bias in favor of that system that is difficult to overcome”).

<sup>121</sup> *See* Past and Present ALI Projects, at [http://www.ali.org/doc/past\\_present\\_ALIprojects.pdf](http://www.ali.org/doc/past_present_ALIprojects.pdf).

courts consider the Restatements to be highly persuasive, and it is expected that the future Restatement of International Commercial Arbitration will play a significant role in the development of the law concerning international commercial arbitration in the United States.<sup>122</sup>

Monographs are narrower in focus than treatises, typically constituting single-author works (or occasionally co-authored works) on a single specialized area of arbitration law. It is impossible to list the entire universe of published monographs, since the list is growing rapidly, but there are bibliographies available to assist those who wish to look into a particular geographic region or area of law.<sup>123</sup>

The third source of expert commentary involves legal articles, found either as part of a book of essays or within a law review or journal. Though treatises are often considered the most prestigious and influential form of scholarly commentary, articles can be very persuasive as well, particularly since they can be the best means of obtaining insight into a highly detailed or rapidly changing area of law, or an overview of a jurisdiction beyond the well-known arbitral centers.

The persuasive value of a legal article depends on two different variables: the reputation of the author in the arbitral community and the reputation of the source in which it is found. Those who are new to international commercial arbitration may need to do a bit of research to identify who are the major influences in the field, but that is not a difficult procedure. For example, advocates can investigate how long an author has been active in this area of law, how often he or she has been published, and whether he or she holds a position of leadership in one of the major arbitral institutions. In the area of arbitration, many of the leading experts are still active as practitioners and arbitrators, and there is not necessarily a distinction (as is the case in other areas of law) between authors who are primarily scholars versus those who are primarily practitioners.

Evaluating the reputation of the source in which the article is published can be more difficult. First, those who work in this field must learn to look past national and regional differences regarding the form of the article. Two major differences relate to length and footnote conventions. For example, lawyers trained in the United States typically expect a scholarly article to run 40-100 pages in print, with hundreds of footnotes.<sup>124</sup> Anything shorter, or with less visible authority, is often considered a legal "lightweight." Lawyers trained outside the United States are much more likely to read and produce scholarly articles that are far shorter in

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<sup>122</sup> BORN, *supra* note 12, at 195.

<sup>123</sup> The most comprehensive source is *The Pechota Bibliography on Arbitration*, which appears in loose-leaf form, but the author's 2009 book on research sources and strategies also contains a useful working bibliography. See STRONG, *supra* note 12, at 71-137.

<sup>124</sup> Many of the top U.S. law reviews have recently placed an upper limit of 35,000 words (75 journal pages) on article submissions, although this standard has not been universally embraced. See Guidelines for Submitting Manuscripts, HARVARD L. REV., available at <http://www.harvardlawreview.org/manuscript.shtml>.

length, often running no more than 10-15 pages in print.<sup>125</sup> Furthermore, the articles tend to have significantly fewer footnotes than those found in U.S. law journals. This is not necessarily because there is less authority to support a particular proposition; instead, it may be simply because non-U.S. journals allow a single citation to support an entire paragraph's worth of discussion, rather than having a footnote at the end of every sentence.<sup>126</sup> Similarly, articles published in U.S. law journals often have a great deal of substantive discussion "below the line," i.e., in the footnotes, whereas articles published elsewhere in the world reserve the footnotes for legal authorities only. Authors from outside the U.S. also are not under any pressure from editors to provide "string cites" (i.e., parallel authority supporting a single proposition), either to demonstrate the researcher's competence or to act as a research guide for readers.

Second, those who are new to international commercial arbitration must learn to respect differences in presentation style. Although the scholarship published in U.S. law journals is more objective than the written submissions used by lawyers in U.S. courts, those who are used to the cool, clean style of jurisprudence outside the United States can find U.S. scholarship to be somewhat jarring and argumentative.<sup>127</sup> Conversely, those who are used to the American style of journal writing can find other styles of scholarship less persuasive and overly abstract. Because the difference here is one of style rather than substance, advocates and arbitrators would be well served by maintaining an open mind about the merit of any individual work based only on the writing style.

Third, those who practice in international commercial arbitration must avoid assumptions about the value of any particular piece of writing based only on whether the journal in which the piece appears is peer-reviewed or not. Most of the world has adopted a peer-reviewed approach to legal scholarship, but the U.S. is different.<sup>128</sup> Most law review articles that appear in the United States are published in student-edited journals associated with the 170+ law schools around the nation.<sup>129</sup> Furthermore, it is important to note that not every article concerning international arbitration published in the United States will be found in a journal that specializes in international matters. Instead, some meritorious articles appear

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<sup>125</sup> International journals typically prefer pieces in the range of 10,000 words or less. See Author Guidelines, J. INT'L DISP. SETTLEMENT, available at [http://www.oxfordjournals.org/our\\_journals/jids/for\\_authors/](http://www.oxfordjournals.org/our_journals/jids/for_authors/); Notes for Contributors, J. PRIV. INT'L L., available at <http://www.hartjournals.co.uk/JPrivIntL/contrib.html>.

<sup>126</sup> Part of the reason why U.S. law journals are so heavily footnoted is because they are edited by law students rather than by experienced attorneys. The heavy footnoting demonstrates to readers that the scholarship is rigorous and the theories posited are well-supported by authority. Peer-reviewed journals rely on the expertise of the review panel to ensure the accuracy of the article.

<sup>127</sup> See, e.g., Whalen-Bridge, *supra* note 24, at 369 (discussing civil-law lawyers' view of common-law reasoning as "inelegant").

<sup>128</sup> This difference in the review process is the reason behind the difference in the approach to footnoting. See *supra* note 126 and accompanying text.

<sup>129</sup> Each U.S. law school often has several law journals associated with it.

in general (i.e., non-subject specific) journals, whereas others appear in specialty (i.e., subject specific) journals relating to topics other than international or comparative law.<sup>130</sup> This of course makes research difficult for those who are based outside the United States.

Although there is no official means of gauging the relative importance of the hundreds of student-edited journals published within the United States, those who practice in the U.S. tend to adhere to certain unwritten conventions regarding the relative prestige of the various journals. For the most part, the status of a U.S. law journal is based on the ranking of the law school that sponsors the journal or law review. Law schools are ranked nationally by several different means, the most well-known of which is the annual list compiled by *U.S. News & World Report*.<sup>131</sup>

However, the prestige of a U.S. law review also depends on the type of journal, with general law reviews often taking precedence over specialty journals. Thus, *Harvard Law Review* is considered more prestigious than *Cornell Law Review* (based on relative law school rankings), but *Cornell Law Review* is more prestigious than *Harvard International Law Journal* (based on the rule of specialty journals). The merits and content of the ranking system is constantly under debate in the U.S., but the point that practitioners from outside the U.S. should take away from this discussion is that some of the best and most influential articles on international commercial arbitration published in the United States may be found in unexpected sources.

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<sup>130</sup> Useful articles in international arbitration could be found in journals specializing in international or comparative law, in dispute resolution, or even in some other specialty area such as technology or business law. An extensive list of English-language journals can be found in STRONG, *supra* note 12, at 108-25.

<sup>131</sup> The rankings are available online. See U.S. News and World Reports Rankings, available at <http://www.usnews.com/sections/rankings/index.html> (July 2, 2009) (reflecting 2009 rankings); see also Sonsteng et al., *supra* note 21, at 348 (noting importance of *U.S. News and World Reports* in legal academia in the U.S.). Other U.S. law journal ranking systems include the Jarvis-Coleman scale, which is based on the prominence of the authors published in the journal. Robert M. Jarvis & Phyllis Coleman, *Ranking Law Reviews Through Author Prominence – Ten Years On*, 99 L. LIBR. J. 573 (2007); see also Tracey E. George & Chris Guthrie, *An Empirical Evaluation of Specialized Law Reviews*, 26 FLA. ST. U. L. REV. 813 (1999) (applying the Jarvis-Coleman methodology to specialty law reviews). Attention must also be paid to rankings in specialty areas. For example, the University of Missouri is consistently ranked at the very top of the *U.S. News and World Report* rankings for programs specializing in dispute resolution and was recently recognized by the International Institute for Conflict Prevention & Resolution (CPR Institute) as having the most innovative dispute resolution program in the country (the only two-time winner). *Keynoter Feinberg, Crowell's Malson, Boston Law Collaborative, Collect CPR ADR Excellence Awards*, 28 ALTERNATIVES HIGH COST LITIG. 26 (Feb. 2010). As a result, Missouri's *Journal of Dispute Resolution* is often considered among the top dispute resolution journals in the United States.

Outside the United States, most writing on international commercial arbitration tends to be published in journals specializing in international or comparative law or in arbitration. The relative merit of these journals is generally gauged by the rigor with which the peer-review process is conducted, which will determine whether any reasonable article that is submitted to the journal is published or whether a significant proportion of the submissions are declined placement. Furthermore, researchers can look to see what proportion of the authors published in that journal are top-notch scholars (as determined by the criteria listed above) versus intermittent contributors to the scholarship in the field, on the assumption that leaders in the field tend to publish in the most prestigious journals. The reputation of the general editor(s) of the journal will also affect the periodical's reputation.

It is also possible that a legal article may be found in a collection of essays. Here, the persuasiveness of the piece depends on the reputation of the organization or editors responsible for compiling the various works and the status of the other contributors. However, these factors are often of minimal importance in comparison to the status of the author and the merits of the piece itself.

Finding legal articles in one's own jurisdiction is relatively easy, as is the task of finding collections of essays. Finding pieces that are published outside one's own country can be more difficult, though electronic research has made it easier.

The most straightforward way to search for legal articles that appear in periodicals is through commercial legal databases including, but not limited to, Arbitration Law Online, KluwerArbitration.com, Hein Online Law Journal Law Library, LexisNexis or Westlaw. The difficulty with these databases is that they can be quite expensive and do not reflect the entire universe of available documents. Both LexisNexis and Westlaw are heavily geared towards the subscriber's national law journals, although both services are beginning to offer an expanded selection of journals from other jurisdictions. The KluwerArbitration.com service provides several of the top international journals in the field (which are not currently available on either LexisNexis or Westlaw), but does not have the same depth as LexisNexis and Westlaw do in regard to general law journals and reviews. As a result, many practitioners find it necessary to obtain subscriptions to several different databases and conduct similar searches on each of the databases to avoid missing relevant articles. Such duplication of efforts is, of course, inefficient as a matter of time and costs. These databases also do not typically include articles that appear in collections of essays.

Several free web-based research tools are also available, including the World Legal Information Institute, which allows searches of secondary material by subject matter area (such as alternative dispute resolution) or by country or region,<sup>132</sup> the Library of the Max Planck Institute for Comparative Public Law and

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<sup>132</sup> See World Legal Information Institute, at <http://www.worldlii.org>.

International Law<sup>133</sup> and The University Law Review Project.<sup>134</sup> Working papers and reprints may also be found through the Social Science Research Network (SSRN).<sup>135</sup>

Researching legal articles outside one's home jurisdiction without the benefit of electronic databases is time consuming, but not difficult. The traditional method for finding relevant articles involves the use of resources such as the *Index to Legal Periodicals*, the *Index to Foreign Legal Periodicals* and/or *Current Law Index*. These texts index legal periodicals by author and subject. Furthermore, *The Pechota Legal Bibliography on Arbitration* lists legal articles by subject matter as well as by country.

This concludes the discussion of the types of legal authorities available in international commercial arbitration and suggestions on how to locate those materials. Although it is hoped that the preceding proves useful, there is still much to be done, both to develop a better understanding of cross-cultural research practices and strategies and to improve the quality of advocacy in this field of law. These issues will be discussed in the next section.

#### IV. GOING FORWARD

International commercial arbitration has a rich and unique history. First, it is perhaps the only dispute resolution mechanism that consciously blends elements of both civil-law and common-law traditions, which allows a uniquely expansive and inclusive interpretation of what constitutes legal authority. Second, it is a field in which scholarship holds a particularly important position, not only because many of the most successful and influential arbitrators and practitioners have also been academics, but because scholarly works written by academics-practitioners are often the only route into the inner workings of a procedure that is, for the most part, kept entirely private.

In the past, most scholars focused on doctrinal matters, relying on specialist law firms to pass the practical skills regarding research methods and materials on to newcomers to the field. Things have changed, however, and international commercial arbitration is now flooded with advocates and arbitrators who have not trained with a firm that specializes in these sorts of international disputes. As a result, many of the unique aspects of international commercial arbitration are at risk of being diminished or lost entirely.

Fortunately there is a relatively simple solution to the problem: increased dialogue and training regarding "best practices" in research and written advocacy in international commercial arbitration. Both individuals and institutions can help in this important work.

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<sup>133</sup> See Max Planck Institute for Comparative Public Law and International Law – Library, at [http://aleph.mpg.de/F?func=file&file\\_name=find-b&CON\\_LNG=eng&local\\_base=vrh01](http://aleph.mpg.de/F?func=file&file_name=find-b&CON_LNG=eng&local_base=vrh01).

<sup>134</sup> See University Law Review Project, at <http://www.lawreview.org>.

<sup>135</sup> See Social Science Research Network, at <http://www.ssrn.com/lisn/index.html>.

Individually, efforts can and must be made to increase the scholarly discussion regarding research methodologies, not to formalize or calcify such procedures, but to educate newcomers about the unique aspects of research in this field. Furthermore, scholarly inquiry into this area will help flesh out any differences of opinion that may exist regarding the nature and relative weight of different legal authorities. Debates along these lines will only help improve the level of advocacy and argument in this area of law. It will also eliminate the perception that questions regarding research and advocacy can only be addressed through anecdotal evidence. Best practices in research and writing do exist and can be conveyed to others.<sup>136</sup>

Those who are interested in working in this area can direct their inquiries along several different lines. First, there is a shortage generally of scholarship on legal method and the nature of legal authority.<sup>137</sup> This is particularly true in international commercial arbitration, even though there have been some efforts recently to discuss the nature and use of precedent in international proceedings.<sup>138</sup> Additional research in this area would be particularly welcome, particularly if it takes a comparative approach. For example, studies might attempt to discover any differences associated with the various types of legal systems<sup>139</sup> or ascertain any disparities among the different types of international arbitration.<sup>140</sup>

Second, individual researchers might conduct empirical studies to delve more deeply into the practices of experienced arbitrators and glean any preferences those arbitrators might have vis-à-vis advocates' research and presentation styles.<sup>141</sup> In an area where so much remains officially hidden, scholarly studies provide an excellent method of fleshing out information on a global rather than individual or anecdotal basis. Numerous models exist concerning the structure of possible inquiries.<sup>142</sup>

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<sup>136</sup> Smith, *supra* note 4, at 8-11.

<sup>137</sup> *Id.* at 14-16.

<sup>138</sup> See, e.g., PRECEDENT IN INTERNATIONAL ARBITRATION *passim* (Emmanuel Gaillard & Yas Banifatemi eds., 2008); Tai-Heng Cheng, *Precedent and Control in Investment Treaty Arbitration*, 30 FORDHAM INT'L L.J. 1014 *passim* (2007); Jeffery P. Commission, *Precedent in Investment Treaty Arbitration: A Citation Analysis of a Developing Jurisprudence*, 24 J. INT'L ARB. 129 *passim* (2007); Christopher S. Gibson & Christopher R. Drahozal, *Iran-United States Claims Tribunal Precedent in Investor-State Arbitration*, 23 J. INT'L ARB. 521 *passim* (2006); Kaufmann-Kohler, *supra* note 48, *passim*.

<sup>139</sup> See, e.g., Whalen-Bridge, *supra* note 24, at 367-69 (discussing different approaches to authority and legal reasoning).

<sup>140</sup> See, e.g., Kaufmann-Kohler, *supra* note 48, at 362-73 (distinguishing between international commercial arbitration, sports and domain name arbitration and investment arbitration).

<sup>141</sup> See, e.g., *id.* at 362-3 (discussing research on use of past precedents by arbitrators).

<sup>142</sup> See, e.g., Ali, *supra* note 27, at 799-802; Klaus Peter Berger, *Lex Mercatoria Online: The CENTRAL Transnational Law Database*, at [www.tldb.de](http://www.tldb.de), 18 ARB. INT'L 83, 83 (2002); Christopher R. Drahozal, *Arbitration by the Numbers: The State of Empirical Research on International Commercial Arbitration*, 22 ARB. INT'L 291, 299-305 (2006); Christopher R. Drahozal, *Of Rabbits and Rhinoceri: A Survey of Empirical Research on*

Third, the creation of comprehensive, cross-border bibliographies of materials relating to international commercial arbitration would be a great asset to those working in the field. At this point, the fragmentary nature of reporting series and the international scope of the authorities make it difficult for even the most adept practitioner to conduct thorough research.<sup>143</sup> While lawyers ought not aspire to exhaustive research on every issue that arises (since that would be neither time- nor cost-effective), creating a more centralized means of locating materials outside one's home state or region would result in great efficiencies of scope and help advocates make their legal arguments more transnational in nature.<sup>144</sup>

The preceding suggestions have focused on research agendas that individual scholars or research centers might possibly adopt. However, legal institutions also have a part to play in improving the level of knowledge and skills within the international arbitral community. For example, law schools and universities can diversify the type of practical training provided to students in the initial stages of their formal education to include instruction in research and advocacy in international arbitral proceedings.<sup>145</sup> Continuing legal education providers – particularly those that specialize in international commercial arbitration – can also adapt their programming to make attendees more aware of the issues relating to research methods and written advocacy. Often, those who have practiced exclusively and/or extensively in a particular area of law forget how difficult it can be for newcomers to adapt to new ways of practicing. Nowhere is this more true, perhaps, than in international commercial arbitration.

Although there is much that institutional actors can do to improve their practices, there are limits to what they can achieve. For example, specialist seminars and conferences are often too expensive for many small firm or general practice lawyers to afford, and while some might argue that these training sessions are the price of entry to the field, the truth is that there is no requirement that either advocates or arbitrators receive any special training before launching themselves into the international arena.

Therefore, both institutions and individuals must work cooperatively to cure the problems relating to the acquisition of practical skills and knowledge. It is a truism that “many hands make light work,” and it is hoped that the many capable scholars and practitioners who are active in this field will take up the challenge laid down in this article and contribute to the scholarship in this important area so as to make sure that international commercial arbitration retains its uniquely elegant and sophisticated approach to dispute resolution.

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*International Commercial Arbitration*, 20 J. INT'L ARB. 23, 23-34 (2003); Franck, *supra* note 4, at 774-813; *see also* THE PRACTICE OF TRANSNATIONAL LAW (Klaus Peter Berger ed., 2001) (containing the methodology and results for *The CENTRAL Enquiry on the Use of Transnational Law in International Contract Law and Arbitration*).

<sup>143</sup> *See* Jolivet, *supra* note 17, at 274.

<sup>144</sup> *See* Park, *supra* note 88, at 10-12 (noting the extent to which arbitrators and courts transnationalize their analyses).

<sup>145</sup> Indeed, some have already begun doing so. *See supra* notes 24-25.