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Dreaded Dearth of Precedent in the Wake of International Arbitration - Could the Cause also Bring the Cure?

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DREADED DEARTH OF PRECEDENT IN THE WAKE OF INTERNATIONAL ARBITRATION—
COULD THE CAUSE ALSO BRING THE CURE?

By
Ank Santens & Romain Zamour¹

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I. INTRODUCTION

The remarkable success of international arbitration has caused anxiety in the common law world. By taking cases away from courts, international arbitration causes a dearth of precedent in certain areas of the law and is perceived as a threat to the healthy development of the law. This article suggests that the cause could also be the cure: legal techniques used by international arbitration practitioners, who routinely have to cope with a dearth of case law, might be what common law practitioners need when deprived of precedents.

The argument unfolds as follows. Part II explains the effect of international arbitration on case law. The success of international arbitration as a means of settling international commercial disputes means that many disputes are transferred from courts to arbitration tribunals. Additionally, the traditional confidentiality of international arbitration means that most arbitral awards are not published. These two phenomena result in a severe dearth of precedent in certain areas of the law where international arbitration is popular. We focus on three examples: the construction industry; the excess insurance (and reinsurance) industry; and the oil and gas industry.

Part III contrasts common and civil law reactions to this phenomenon and seeks to explain the contrast. For common law jurists, the very success of arbitration is a threat to the healthy development of the law. Its confidentiality adds insult to injury. By contrast, civil law jurists are not concerned by the success of international arbitration; at most, they believe it would be useful to reduce confidentiality. Different traditional concepts of law in these two legal traditions explain the contrast between common law anxiety and civil law serenity.

Part IV discusses how, in our experience, international arbitration practitioners deal with a dearth of precedent. This is a difficulty that they often face, and they have adopted certain legal techniques to address it. We examine four in particular: reference to academic treatises and other scholarly writings; a comparative approach; reliance on industry practice; and reasoning from abstract principles.

Part V then raises the question whether precedent-deprived common law practitioners might address the dearth of precedent by using similar techniques as international arbitration practitioners employ. The question might seem incongruous. To show that it is not, we use the example of U.S. courts facing issues of first impression—by definition issues on which no precedent is available. We show that, at the margin, U.S. advocates and judges resort to similar techniques.

We conclude that experience in international arbitration would indicate that, in precedent-deprived areas, common lawyers may be forced to amend their approach and the margin may need to become the center. International arbitration is a cause of anxiety for common lawyers; it may also offer the cure.

II. THE EFFECT OF INTERNATIONAL ARBITRATION ON CASE LAW

International arbitration is the dispute resolution method of choice in international trade. The success of international arbitration as a means of settling international commercial disputes means that many disputes that in the absence of international arbitration would be decided by domestic judges are instead decided by international arbitrators. In other words, international

arbitration has the effect of diminishing the amount of court precedents in the fields in which arbitration is a popular method of dispute settlement. Additionally, the typical confidentiality of international arbitration means that most arbitral awards are not published. These two phenomena, taken together, result in a severe dearth of precedents, whether court precedents or arbitral precedents, in certain areas of the law where arbitration is a popular method of dispute settlement.

A. Arbitration is the Method of Choice for the Settlement of Disputes in International Commerce

“International arbitration is now known to be ‘*the*’ ordinary and normal method of settling disputes of international trade.”² This observation, made in 1987 by the late Pierre Lalive, one of the pioneers of international arbitration, rings even more true today. In particular, international arbitration has become the method of choice for dispute resolution in certain industries when operating on the international plane, such as major construction projects, excess insurance (and reinsurance), and the oil and gas industry.³ Because arbitration proceedings are often confidential,⁴ it is difficult to cite numbers to support these assertions. Klaus Peter Berger, a German international arbitration scholar, has stated that 90% of international economic contracts have an arbitration clause.⁵ This may be an exaggeration.⁶ But any suggestion that a “flight from arbitration” is occurring⁷ is incorrect when it comes to international commerce. Data from the major international arbitration institutions demonstrates a steady growth in the number of disputes they administer.⁸

² Pierre Lalive, *Transnational (or Truly International) Public Policy and International Arbitration*, in *COMPARATIVE ARBITRATION PRACTICE AND PUBLIC POLICY IN ARBITRATION* 257, 293 (Pieter Sanders ed., 1987) (emphasis in the original).

³ See *infra* Part II.C.

⁴ See *infra* Part II.B.

⁵ Klaus Peter Berger, *INTERNATIONAL ECONOMIC ARBITRATION* 8 n.62 (1993) (“About ninety percent of international economic contracts contain an arbitration clause.”).

⁶ See, e.g., GARY BORN, *INTERNATIONAL COMMERCIAL ARBITRATION* 97 (2d ed. 2014) (“This figure lacks empirical support and is almost certainly inflated: in reality, significant numbers of international commercial transactions – certainly much more than 10% of all contracts – contain either forum selection clauses or no dispute resolution provision at all.”).

⁷ Compare Theodore Eisenberg & Geoffrey P. Miller, *The Flight from Arbitration: An Empirical Study of Ex Ante Arbitration Clauses in the Contracts of Publicly Held Companies*, 56 *DEPAUL L. REV.* 335, 336 (2007) (suggesting that “sophisticated actors prefer litigation to arbitration”), and Theodore Eisenberg, Geoffrey P. Miller & Emily Sherwin, *Arbitration Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 *U. MICH. J.L. REFORM* 871, 893 (2008) (concluding that “consumer arbitration clauses are used as a means for avoiding aggregate dispute resolution”), with Christopher R. Drahozal & Stephen J. Ware, *Why Do Businesses Use (and Not Use) Arbitration Clauses?*, 25 *OHIO ST. J. ON DISP. RESOL.* 433, 435-36 (2010) (refuting the conclusions of the above-quoted studies).

⁸ See *TOWARDS A SCIENCE OF INTERNATIONAL ARBITRATION: COLLECTED EMPIRICAL RESEARCH* app. 1, at 341 (Christopher R. Drahozal & Richard W. Naimark eds., 2005); see also BORN, *supra* note 6, at 94.

Several features of international arbitration explain its success in the settlement of disputes in international commerce. Among the most often cited are neutrality, enforceability, flexibility, and confidentiality. Indeed, in the international context, the actual and apparent neutrality of an arbitral tribunal makes it, as compared to the domestic courts of each of the parties, “the only game” or a “de facto monopoly.”⁹ The New York Convention¹⁰ makes recognition and enforcement of international arbitration awards easier than the recognition and enforcement of foreign judgments.¹¹ The flexibility of arbitration enables the parties to tailor the proceedings to their specific needs.¹² Finally, parties often value the confidentiality of international arbitration proceedings.¹³

B. The Confidentiality of International Arbitration

Confidentiality is traditionally viewed as a hallmark of international arbitration.¹⁴ It imposes an obligation on the parties (and the arbitral tribunal and the arbitration institution) not to disclose information concerning, or acquired in the course of, the arbitral proceedings. This traditional regime of strong confidentiality is backed by default rules. In the absence of specific party agreement on confidentiality, several national arbitration laws and arbitration rules provide for

⁹ Jan Paulsson, *International Arbitration Is Not Arbitration*, STOCKHOLM INT’L ARB. REV., 2008, at 1, 2 (neither party wants the home courts of the other party to decide on the dispute).

¹⁰ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 4739.

¹¹ ALAN REDFERN ET AL., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION § 1.93, at 33 (5th ed. 2009) (“In its *international* enforceability, an award *also* differs from the judgment of a court of law, since the international treaties that govern the enforcement of an arbitral award (such as the New York Convention) have much greater acceptance internationally than treaties for the reciprocal enforcement of judgments”); see John B. Bellinger, III & R. Reeves Anderson, *Tort Tourism: The Case for a Federal Law on Foreign Judgment Recognition*, 54 VIRG. J. INT’L L. 501 (2014) (describing the maze of statutory and common law rules governing the recognition of foreign judgments in the United States and proposing a federal rule to promote uniformity and consistency). Attempts at enacting a global convention on the recognition and enforcement of foreign judgments have failed. See generally A GLOBAL LAW OF JURISDICTION AND JUDGMENTS: LESSONS FROM THE HAGUE (John J. Barceló III & Kevin M. Clermont eds., 2002); Bellinger & Anderson, *supra* at 529 (stating that “despite decades of negotiations, U.S. officials have been unable to conclude a multilateral judgments agreement comparable to the New York Convention” and summarizing these decades of failed negotiations).

¹² REDFERN, *supra* note 11, § 1.95, at 33.

¹³ *Id.* § 1.96, at 33-34.

¹⁴ PRECEDENT IN INTERNATIONAL ARBITRATION (Emmanuel Gaillard & Yas Banifatemi eds. 2008); REDFERN, *supra* note 11, § 2.145, at 136 (“The confidentiality of arbitral proceedings has traditionally been taken to be one of the important advantages of arbitration.”); Karl-Heinz Böckstiegel, *Introductory Remarks*, in PRECEDENT IN INTERNATIONAL ARBITRATION 17, 17 (Emmanuel Gaillard & Yas Banifatemi eds. 2008) (discussing “[t]he traditional confidentiality of arbitration”).

the confidentiality of the arbitral proceedings and the arbitral award.¹⁵ Of most important practical importance, none of the major arbitral institutions publishes copies of the arbitral awards rendered under its auspices.¹⁶

The current trend in international arbitration is to “diminish, or at least question, the confidentiality of arbitral proceedings as a whole.”¹⁷ This is particularly acute in the field of international investment arbitration,¹⁸ but the same trend can be noted in relation to international commercial arbitration. The ICC, for instance, deliberately decided not to include default confidentiality obligations in its latest arbitration rules.¹⁹ Again, this push against confidentiality and for more transparency operates at the level of default rules: in the absence of specific party agreement on confidentiality, it is now typically suggested that no confidentiality obligation should be implied.

¹⁵ The New Zealand arbitration statute provides for the confidentiality of arbitration. Arbitration Act 1996 §14B(1) (N.Z.) (“Every arbitration agreement to which this section applies is deemed to provide that the parties and the arbitral tribunal must not disclose confidential information.”). English courts have found a general principle of confidentiality in English law. See REDFERN, *supra* note 11, §§ 2.149-50, at 137 (citing to *Ali Shipping Corp. v. ‘Shipyard Trogir,’* [1998] 1 Lloyd’s Rep. 643; *Hassneh Insurance Co. of Israel v. Mew,* [1993] 2 Lloyd’s Rep. 243; *Dolling-Baker v. Merrett,* [1991] 2 All. E.R. 890). This principle is subject to limited exceptions. See Born, *supra* note 6, at 2794 n.61 (citing to *Emmott v. Michael Wilson & Partners Ltd* [2008] EWCA Civ 184 (English Ct. App.); *Milsom v. Mukhtar* [2011] EWHC 955 (Ch) (English High Ct.)). The UNCITRAL Model Law is silent on the question of confidentiality, as the drafters considered that it was better to leave the issue to arbitration rules. See Pieter Sanders, *UNCITRAL’s Model Law on International and Commercial Arbitration: Present Situation and Future*, 21 ARB. INT’L 443 (2005). Some arbitration rules provide for the confidentiality of the award. See, e.g., UNCITRAL Arbitration Rules, art. 34(5) (2010); LCIA Arbitration Rules, art. 30 (2014); CPR Rules for Administered Arbitration of International Disputes, r. 20 (2014).

¹⁶ The International Court of Arbitration of the International Chamber of Commerce (“ICC”) at times publishes redacted portions of arbitral awards rendered under its auspices. But neither the ICC nor any other of the major arbitral institutions administering international commercial and investment arbitration (the International Centre for Settlement of Investment Disputes (“ICSID”), the Permanent Court of Arbitration (“PCA”), the London Court of International Arbitration (“LCIA”), the International Center for Dispute Resolution (“ICDR”), the Arbitration Institute of the Stockholm Chamber of Commerce (“SCC”), the Singapore International Arbitration Center (“SIAC”), the Hong Kong International Arbitration Center (“HKIAC”)) systematically publishes arbitral awards rendered under its auspices.

¹⁷ REDFERN, *supra* note 11, § 2.152, at 138; see BORN, *supra* note 6, at 2779-80 (“The confidentiality and privacy of international arbitration proceedings is a contentious and unsettled subject.”).

¹⁸ See UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (2014); United Nations Convention on Transparency in Treaty-based Investor-State Arbitration, Dec. 10, 2014, (the “Mauritius Convention on Transparency”).

¹⁹ See ICC Rules of Arbitration, r. 22(3) (2012); Jason Fry et al., *The Secretariat’s Guide to ICC Arbitration*, ¶ 3-807 at 235 (2012) (“The Rules do not provide that the arbitration proceedings are confidential. Rather than creating a general rule requiring the proceedings to be kept confidential and then attempting to define the exceptions that will inevitably arise, the Rules take a more flexible and tailor-made approach, leaving the matter for the parties or the arbitral tribunal to address in light of the specific circumstances of the case”). In addition, in recent years, several national courts have found that the country’s arbitration law does not include an express or implied duty of confidentiality. See, e.g., *Esso Australia Res. Ltd v. Plowman*, XXI Y.B. Comm. Arb. 137, 151 (Australian High Ct. 1995) (1996); Judgment of 27 October 2000, *Bulgarian Foreign Trade Bank Ltd v. A.I. Trade Fin. Inc.*, XXVI Y.B. Comm. Arb. 291, 298 (Swedish S.Ct.) (2001).

The fact remains, however, that, parties often agree that the arbitral proceedings and the arbitral award are to be confidential, and many arbitration rules continue to contain a confidentiality requirement.²⁰ The current move away from confidentiality in international arbitration, therefore, does not fundamentally alter our general assessment of the arbitral landscape in terms of confidentiality. Most arbitration proceedings and awards are confidential. Even the ICC, for instance, continues to publish only certain awards and then only in redacted form; and the same remains through for most if not all other arbitral institutions. Proceedings and awards that emerge, through official publication or leaks, are only the tip of the arbitral iceberg. Even when awards do get published, they are not always easy to search or find.²¹

C. Dearth of Precedent in Areas of Law Where International Arbitration is the Dispute Resolution Method of Choice

The success and confidentiality of international arbitration, taken together, mean that in certain areas of the law, there is a severe dearth of precedent—be it judicial or arbitral. We focus below on three industries where the dearth of relevant precedent is particularly striking – construction, excess insurance, and oil and gas.

1. Construction

The FIDIC²² contracts are the most widely used standard forms of international construction contract. Since the first FIDIC form was published in 1957, FIDIC contracts have provided for the final settlement of disputes under the Rules of Arbitration of the ICC.²³ As a result, there are few court precedents directly interpreting the FIDIC contracts.²⁴ What is true in particular of the FIDIC contracts is true, though to a lesser degree, of construction disputes in general. To quote the former Chief Justice of Canada:

The trend is clear. Fewer and fewer construction cases are reaching the courts where the law is developed. Increasingly, instead of being resolved by judges, construction disputes are being sent to

²⁰ See *supra* note 16.

²¹ See generally S.I. Strong, *Research in International Commercial Arbitration: Special Skills, Special Sources*, 20 AM. REV. OF INT’L ARB. 119 (2009).

²² “FIDIC” is the acronym for “Fédération Internationale des Ingénieurs Conseils,” or International Federation of Consulting Engineers. See *About FIDIC*, INTERNATIONAL FEDERATION OF CONSULTING ENGINEERS, <http://fidic.org/about-fidic> (last visited on June 15, 2015).

²³ Christopher R. Seppälä, *The Development of a Case Law in Construction Disputes Relating to FIDIC Contracts*, in PRECEDENT IN INTERNATIONAL ARBITRATION 67, 67 (Yas Banifatemi ed., 2008).

²⁴ Note that “English court decisions dealing with issues relevant to FIDIC contracts have been published, notably, in *Building Law Reports* in England,” and that “the main published commentaries, in book form, on the FIDIC contracts, are by British lawyers and engineers, and that they refer primarily to English case law precedent.” *Id.* at 71 n.2.

mediation, arbitration, or other forms of alternate dispute resolution (ADR).²⁵

Construction contracts are complex, long-term contracts which give rise to many disputes. There must have been hundreds, if not thousands, of arbitrations under the FIDIC contracts. It would therefore not be unreasonable to assume that “if ever there was an area where an arbitration case law should have developed, it would be in relation to the FIDIC contracts.”²⁶ Such an assumption, however, would be erroneous. In 2008, our colleague Christopher Seppälä, who for many years acted as the legal advisor to FIDIC, set out to collect arbitration awards rendered in arbitrations under a FIDIC contract. After reviewing all major international arbitration sources as well as other sources,²⁷ he identified only about 40 arbitral awards interpreting the FIDIC contracts.²⁸ Forty awards over a period of over fifty years of use of these contracts is not a lot, and any practitioner with experience would agree that it is only a small sample of the awards that must have been rendered during that time period.²⁹

2. Excess insurance (and Reinsurance)

Another striking domain for its dearth of precedent is excess insurance, and in particular excess insurance disputes under the so-called “Bermuda Form.” The Bermuda Form is an excess liability insurance form that was introduced to the commercial insurance market in 1985, following the crisis of the excess liability insurance market in the United States in the mid-1980s, and that has since “grown to be a mainstay policy option for large commercial policyholders,

²⁵ Beverley McLachlin PC, *Judging the “Vanishing Trial” in the Construction Industry*, 2 FAULKNER L. REV. 315 (2011).

²⁶ Seppälä, *supra* note 23, at 68.

²⁷ Chris describes that he reviewed the collections of ICC awards (1974-2000), the ICCA Yearbook of Commercial Arbitration (1976-2007), the ICC Bulletin, and the International Construction Law Review (1983-2007), as well as the ASA Bulletin, Mealey’s and several other sources. Seppälä, *supra* note 23, at 69.

²⁸ *Id.* Chris commented on some of these awards at Christopher R. Seppälä, *International Construction Contract Disputes: Commentary on ICC Awards Dealing with the FIDIC International Conditions of Contracts*, 9/2 ICC BULLETIN 32 (1998) (commenting on *Extracts from ICC Awards, Construction Contracts Referring to the FIDIC Conditions—Part I*, 9/1 ICC BULLETIN 74 (1998) and *Extracts from ICC Awards, Construction Contracts Referring to the FIDIC Conditions—Part II*, 9/2 ICC BULLETIN 46 (1998)).

²⁹ Subsequently, at Chris’ behest, some more FIDIC awards have been published in the ICC Bulletin. See Christopher R. Seppälä, *International Construction Contract Disputes: Second Commentary on ICC Awards Dealing Primarily with FIDIC Contracts*, 19/2 ICC BULLETIN 41 (2008) (commentary on 2008 extracts); *Extracts from ICC Arbitral Awards in International Construction Disputes*, 19/2 ICC BULLETIN 71 (2008); Christopher R. Seppälä, *International Construction Contract Disputes: Third Commentary on ICC Awards Dealing Primarily with FIDIC Contracts*, 23/2 ICC BULLETIN 23 (2012) (commentary on 2012 extracts); *Extracts from ICC Arbitral Awards in International Construction Disputes*, 23/2 ICC BULLETIN 45 (2012); Christopher R. Seppälä, *International Construction Contract Disputes: Fourth Commentary on ICC Awards Dealing Primarily with FIDIC Contracts*, 24/2 ICC BULLETIN 49 (2013) (commentary on 2013 extracts); *Extracts from ICC Arbitral Awards in International Construction Disputes*, 24/2 ICC BULLETIN 59 (2013).

especially those with significant North American liability exposures.”³⁰ Bermuda Form policies are typically governed by New York law and provide for the final settlement of disputes by ad hoc arbitration in London under the English Arbitration Act.³¹ As a result, the Bermuda Form is “the subject of almost no significant reported decisions.”³²

Given that New York law governs the Bermuda Form, many of the Bermuda Form’s clauses may be interpreted on the basis of relevant New York precedent. Certain clauses, however, have no equivalent in the insurance contracts typically interpreted by New York courts (one example is the notion of “integrated occurrence”³³). In these cases, there are no precedents directly on point, even though hundreds of disputes have been arbitrated on the basis of policies written on the Bermuda Form.

In a similar vein, many significant reinsurance disputes are settled by arbitration and the resulting arbitral awards are almost never published. In the words of leading authors on English reinsurance law:

One frustration . . . is the fact that some of the most illuminating recent decisions in this field must remain confidential. . . . Some of the finest judges and lawyers in the reinsurance field have produced detailed arbitration awards in difficult areas of reinsurance litigation, but the learning must remain hidden. . . . As a result the majority of contested decisions are not available to the researcher and the reinsurance wheel has to be reinvented time and again.³⁴

3. Oil and Gas

According to the United States Court of Appeals for the Second Circuit (“Second Circuit”), “there is a dearth of authority in New York relating to oil and gas leases.”³⁵ Commentators go

³⁰ DAVID SCOREY, RICHARD GEDDES & CHRIS HARRIS, *THE BERMUDA FORM— INTERPRETATION AND DISPUTE RESOLUTION OF EXCESS LIABILITY* ix (Oxford University Press, 2011).

³¹ See John Fellas, *International Arbitration under the Bermuda Form*, 8 *DISP. RESOL. INT’L* 129, 129 (2014).

³² RICHARD JACOBS QC, LORELIE S. MASTERS & PAUL STANLEY, *LIABILITY INSURANCE IN INTERNATIONAL ARBITRATION—THE BERMUDA FORM* vii (2d ed. 2011) (calling this fact “an embarrassment to commercial certainty” and adding that “[a] few reported cases exist, now, largely touching on tangential issues (such as the law governing the arbitration clause)”).

³³ SCOREY, GEDDES & HARRIS, *supra* note 30, at ¶ 8.25 at 146 (Oxford University Press, 2011) (“The overall point to be taken is that New York law interpreting the scope of injuries and damages that may be swept within a single occurrence has been driven by occurrence definitions that are significantly different, and more limited in scope, than those appearing in the Bermuda Form”).

³⁴ COLIN EDELMAN QC & ANDREW BURNS, *THE LAW OF REINSURANCE* x–xi (Oxford University Press, 2d ed. 2013).

³⁵ *Beardslee v. Inflection Energy, LLC*, 761 F.3d 221, 228 (2d Cir. 2014) (internal quotation marks omitted) (citing *Wiser v. Enervest Operating, L.L.C.*, 803 F. Supp. 2d 109, 117 (N.D.N.Y. 2011)).

further: “New York presents essentially a blank slate as to all significant oil and gas lease issues.”³⁶ The lack of court precedent in the field of oil and gas leases is so stark that the Second Circuit recently took the highly unusual³⁷ step of certifying questions of contract interpretation in the context of oil and gas leases to the New York Court of Appeals (the highest state court).³⁸

We have noted the dearth of New York law precedent in relation to oil and gas matters in our own work. For instance, while so-called “take or pay” clauses are common in gas supply contracts, when we handled a dispute regarding such a provision in an international arbitration, we could find almost no New York case law on the matter. One explanation might be that New York law is not often chosen for international oil and gas contracts; but in our experience, this is not the case. We believe the real reason is that the vast majority of international oil and gas contracts contain an arbitration clause.

Construction, insurance, and oil and gas are three sectors involving numerous disputes, with significant financial and legal stakes. This makes the dearth of precedent in these fields all the more striking. This dearth of precedent has prompted different reactions among civil law and common law jurists.³⁹

III. CONTRASTING COMMON LAW AND CIVIL LAW REACTIONS TO THE DEARTH OF PRECEDENT

Common law and civil law jurists react very differently to the above-described phenomenon. Many common law jurists see in arbitration a threat to the healthy development of the law. The very existence of arbitration is a source of anxiety for them, and arbitration’s confidentiality only adds insult to injury. For civil law jurists, by contrast, arbitration is not a cause for great concern. Some push for more transparency and for the publication of arbitration awards. But this is not because they think that the healthy development of the law demands it, but simply because, all things being equal, some guidance is better than no guidance. This section describes and explains the contrast between this common law anxiety and civil law serenity.

³⁶ George A. Bibikos & Jeffrey C. King, *A Primer on Oil and Gas Law in the Marcellus Shale States*, 4 TEX. J. OIL GAS ENERGY L. 155, 191 (2008–2009); *see also id.* at 157 (asking “how does one comply with the law of a state when it has very limited oil and gas jurisprudence, and its most recent leading cases are over one hundred years old?”).

³⁷ 761 F.3d at 228 (acknowledging that the case turned on “questions of contract interpretation that may not be the typical material for certification”).

³⁸ *See id.* at 232 (The court certified two questions. First, “[u]nder New York law, and in the context of an oil and gas lease, did the State’s Moratorium [on the use of horizontal drilling and high-volume hydraulic fracturing] amount to a *force majeure* event?” Second, “[i]f so, does the *force majeure* clause modify the habendum clause and extend the primary terms of the leases?”) (emphasis in the original). The New York Court of Appeals answered only the second question. *See Beardslee v. Inflection Energy, LLC*, 31 N.E.3d 80, 85-86 (2015) (answering the second question in the negative and declining to answer the first question because it was, consequently, “academic”).

³⁹ “‘Common law’ and ‘civil law’ refer not to specific systems, but are instead used as ideal types.” CATHERINE A. ROGERS, *ETHICS IN INTERNATIONAL ARBITRATION* 12 (2014) (citing to MIRJAN R. DAMAŠKA, *THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS* 130 n.60 (1986)). On the usefulness and limitations of these ideal types, *see* ROGERS, *supra*.

A. Common Law Anxiety and Civil Law Serenity

1. Common Law Anxiety

The dearth of precedent caused in certain areas of the law by the success and confidentiality of international arbitration has led to a significant amount of commentary by common law practitioners. One point in particular comes back with regularity, from all corners of the common law world: the dearth of precedent caused by international arbitration is perceived as a pathological phenomenon endangering the healthy development of the common law.

Common law judges have given voice to this anxiety. Thus, for instance, Beverley McLachlin, the former Chief Justice of Canada, with specific reference to the construction industry, warns: “court decisions, over the years, build up a settled legal framework against which contracts can be drawn and disputes settled, whatever the forum.”⁴⁰ Talking of ADR, she asserts in a striking metaphor: “The living tree of the law finds little nourishment in such arid soil. The age-old fruits of the law – helping people predict the probable outcomes of their actions and to modify their behavior intelligently – do not grow.”⁴¹

Common law scholars have also joined the chorus. For instance, Kenneth Abraham, a prominent insurance law scholar in the United States, in an article focusing on the use of binding arbitration for the resolution of insurance disputes, states: “This lawlessness [of arbitration] not only adversely affects the parties to each dispute, but the legal system as a whole.”⁴² Further, “[b]ecause arbitrations are essentially confidential and set no precedents, they lack an important feature of the rule of law: each arbitration is an island unto itself, not governed by any prior arbitration outcomes and incapable of having an effect on any future arbitration.”⁴³

This anxious concern for a healthy development of the law is even one of the reasons for a famous international arbitration “oddity” – Section 69 of the 1996 English Arbitration Act, which provides for the possibility of appeals on questions of English law. Thus, according to a distinguished English practitioner, “[i]t remains unthinkable that the symbiotic link should be broken between commercial arbitration, the development of the English law and the English Commercial Court.”⁴⁴ The symbiotic and organic link between the law courts and the law is thus maintained by the possibility of appealing arbitration awards on questions of English law.

⁴⁰ McLachlin, *supra* note 25, at 321.

⁴¹ *Id.* at 322.

⁴² Kenneth S. Abraham & J. W. Montgomery, III, *The Lawlessness of Arbitration*, 9 CONN. INS. L.J. 355, 357 (2003).

⁴³ *Id.* at 360.

⁴⁴ Taner Dedezade, *Are You In? Or Are You Out? An Analysis of Section 69 of the English Arbitration Act 1996: Appeals on a Question of Law*, 2006 INT’L A.L.R. 56, 59 (quoting V.V. Veeder, *On Reforming the English Arbitration Act of 1996*, in COMMERCIAL LAW: PERSPECTIVES AND PRACTICE 243 (John Lowry & Loukas Mistelis eds., 2005)).

For the common lawyer, the real source of anxiety is not the confidentiality of international arbitration, but international arbitration itself. The common law is developed by the courts, and international arbitration (and alternative dispute resolution in general) takes cases away from the courts. Even if international arbitration awards were published, the problem would remain: because arbitral awards, unlike court precedents, cannot be the building blocks of the common law edifice, the success of international arbitration, confidential or not, endangers the development of the law. Justice McLachlin makes this very clear:

In the area of construction law, the operative legal principles are not set out in any Code. Rather, they have been developed, and must continue to develop, through the common law *as applied by the courts*. It thus emerges that even in a world dominated by ADR, the courts are essential. *They, and they alone, can discharge the task of norm-setting.*⁴⁵

2. Civil Law Serenity

Civil lawyers do not suffer from the same anxiety as their common law colleagues. For them, the cause for concern is not international arbitration (or alternative dispute resolution) itself, but only its confidentiality.

Some, like the French practitioner Alexis Mourre, push for the publication of awards. In a piece on this topic, Mourre concludes: “the public interest in the development of arbitral case law, in the enhancement of the quality of arbitration, and in providing transparency and predictability to the business community overrides the principle of confidentiality as far as the publication of arbitration awards is concerned.”⁴⁶ One sees here something analogous to the anxieties of the common law scholars, discussed above. But the emphasis is different. The common law critics are concerned that “the law” is endangered by arbitration: arbitration kills the tree of the law, arbitration is an island and is isolated from the rest of the law. Mourre’s concern instead is for international arbitration *itself*: he refers to the “enhancement of the quality of arbitration” and “the public interest in the development of *arbitral* case law.” In short, where the common law critics see in arbitration a danger for the common law that needs to be addressed or eliminated, Mourre sees a missed opportunity for the law of international arbitration. While many common law critics come to the conclusion that the problem is arbitration and there should be less of it, Mourre suggests that the problem is confidentiality, and argues that there should be less confidentiality so that there is even more and better arbitration.

Other civil law scholars are even less concerned than Mourre. In an article on the legitimacy of international arbitration, Professor Pierre Tercier, a Swiss jurist, concludes that international arbitration derives legitimacy from “the coherence of published decisions” and “the community of arbitrators.” He notes that the publication of awards “makes them subject to control: not by

⁴⁵ McLachlin, *supra* note 25, at 321 (emphasis added).

⁴⁶ Alexis Mourre, *Precedent and Confidentiality in International Commercial Arbitration—The Case for the Publication of Arbitral Awards*, in PRECEDENT IN INTERNATIONAL ARBITRATION 39, 65 (Emmanuel Galliard & Yas Banifatemi eds. 2008).

hierarchical authorities, but by other professionals and scholars.”⁴⁷ Worries about the erosion of the law do not appear.

Another example is found in an article by Professor Jean-Michel Jacquet, a respected French jurist. His article, tellingly, is entitled: “Do we need an arbitral case law?”⁴⁸ He believes we do, but still strikes a very optimistic note: “The decisions of arbitral tribunals are more and more known, and are frequently cited and analysed. There is no doubt as to the usefulness of such a body of reported decisions, since this provides greater certainty.”⁴⁹

It is of course easier to prove that something exists than to prove that it does not exist. With this caveat in mind, it is submitted that one would have great difficulty finding a civil law lawyer, say a Belgian or French lawyer, arguing that the growth of international arbitration endangers the well-being of the *droit des obligations* (contract law). Civil lawyers push for the publication of international arbitration awards, not for the sake of the healthy development of the law, but as a form of guidance for the arbitrators themselves.

B. The Cause of the Contrast: Different Concepts of Law

The reason for these different reactions lies in different concepts of what law is. The success of international arbitration and the resulting dearth of precedent affect traditional concepts of law differently, and lawyers from civil law and common law traditions react accordingly.

For the civil lawyer, the legislature alone makes law, and the judiciary applies it.⁵⁰ This principle in turn requires that legislation be “complete, coherent, and clear;”⁵¹ for if it is not, judges might have to make law (and not just apply it) when faced with a gap, a contradiction, or an ambiguity. The Code, and in particular the “iconic”⁵² Napoleonic Code Civil, is the embodiment of that ideal. Of course, that ideal is unattainable. However complete, coherent, and clear, codes need to be interpreted. This is why “[t]he teacher-scholar is the real protagonist

⁴⁷ See Pierre Tercier, *La légitimité de l'arbitrage*, 2011 REVUE DE L'ARBITRAGE 653, 667 (authors' translation).

⁴⁸ Jean-Michel Jacquet, *Avons-nous besoin d'une jurisprudence arbitrale?*, 2010 REVUE DE L'ARBITRAGE 445 (authors' translation).

⁴⁹ *Id.* at 445.

⁵⁰ JOHN HENRY MERRYMAN & ROGELIO PÉREZ-PERDOMO, *THE CIVIL LAW TRADITION—AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA* 30 (3d ed. 2007).

⁵¹ *Id.*

⁵² James Q. Whitman, *No Right Answer*, in *CRIME, PROCEDURE AND EVIDENCE IN A COMPARATIVE AND INTERNATIONAL CONTEXT: ESSAYS IN HONOUR OF PROFESSOR MIRJAN DAMASKA* 371, 376 (John Jackson, Maximo Langer & Peter Tillers eds., 2008).

of the civil law tradition” and “[t]he civil law is a law of the professors.”⁵³ Civil law scholars elaborate on the Code and build conceptual cathedrals to approximate the civil law ideal of completeness, coherence, and clearness. This is what the comparative law scholar Mirjan Damaška has called “the Continental grammar of law.”⁵⁴ This scholarly legal architecture is generally accepted by the legal profession and has a profound influence on the development of the law.⁵⁵ Legal reasoning is essentially deductive, descending from the Code provisions, through abstract and refined conceptual distinctions, to the facts. Judges, at least in theory, only apply the law to the facts of the case.⁵⁶ “The net image is of judges as operators of a machine designed and built by legislators.”⁵⁷ The judge is the anonymous applier of the law. “[W]ho knows the name of a civil law judge?”⁵⁸ A corollary to this theory of judging is that court decisions are not law, but simply application of law to facts. There is no (formal) doctrine of precedent in civil law.⁵⁹ In fact, in many civil law countries, court decisions are not published or they are quite difficult to find.

For the common lawyer, by contrast, law is essentially judge-made case law.⁶⁰ The law grows organically,⁶¹ by the accretion of decided cases, bound together by the doctrine of *stare decisis*.⁶²

⁵³ MERRYMAN & PÉREZ-PERDOMO, *supra* note 50, at 56. A funny story of Justice Scalia illustrates both the civil law’s admiration for legal scholars and the common law’s reverence for judges. Before he was appointed to the United States Court of Appeals for the District of Columbia Circuit, Justice Scalia was a professor of constitutional law at the University of Chicago. While his nomination was pending, one of his daughters was visiting relatives of her German professor in Germany. She told them that her father was a professor and added that he soon would be a judge. “Their faces dropped.” See Antonin Scalia, *The Role of the Judiciary*, C-SPAN (Nov. 22, 2008), <http://www.c-span.org/video/?282547-1/role-judiciary&start=3012>.

⁵⁴ Mirjan Damaška, *A Continental Lawyer in an American Law School: Trials and Tribulations of Adjustment*, 116 U. PA. L. REV. 1363, 1365 (1968).

⁵⁵ *Id.*

⁵⁶ See generally Mitchel Lasser, *Judicial (Self)-Portraits: Judicial Discourse in the French Legal System*, 104 YALE L.J. 1325 (1995).

⁵⁷ MERRYMAN & PÉREZ-PERDOMO, *supra* note 50, at 36.

⁵⁸ *Id.*

⁵⁹ That said, decisions of the highest court in the country, as well as certain appeals courts, tend to have significant persuasive weight and may in practice have “precedential” force. André Tunc, *Methodology of the Civil Law in France*, 50 TUL. L. REV. 459, 465 (1976) (“Generally, it is only at the level of the courts of first instance and courts of appeal that conflicting decisions may be found. Once the Court of Cassation has spoken, it normally will be obeyed.”).

⁶⁰ MERRYMAN & PÉREZ-PERDOMO, *supra* note 50, at 34 (“to us the common law means the law created and molded by the judges, and we still think (often quite inaccurately) of legislation as serving a kind of supplementary function”).

⁶¹ McLachlin, *supra* note 25, at 315 (“But all areas of law, including construction law, are living, constantly evolving, trees. Some branches sprout and grow; others crack and need trimming. Thus, the law develops and remains responsive to changes in society.”).

The judge is the central figure of the common law.⁶³ In contrast with the anonymous civil law judge, common law judges are “culture heroes, even parental figures.”⁶⁴ Legal reasoning is essentially pragmatic and inductive, ascending from facts to principles.⁶⁵ One illustrious sentence summarizes the essentially pragmatic and concrete nature of the common law: “The life of the law has not been logic: it has been experience.”⁶⁶

Civil lawyers find this aphorism perplexing. The reaction of André Tunc, a French scholar, is representative:

If there is a sentence which a French lawyer has great difficulty in understanding, it is Holmes’ famous saying: “The life of the law has not been logic: it has been experience.” It is questionable whether the opposition between logic and experience has any justification. Exact sciences are equally based on experience and on logic. To deny that the world is governed by rules making a coherent whole would amount to asserting that it is chaotic, an unduly sinister view.⁶⁷

Tunc’s reaction illustrates another crucial aspect of the civil law/common law divide: diverging levels of tolerance for uncertainty. To him, the common law approach runs the risk of being “chaotic.” The civil law is profoundly adverse to uncertainty, which it sees as lawlessness in disguise.⁶⁸ In French law for instance, “la sécurité juridique” or “legal security”—which designates at the same time the intelligibility, predictability and stability of the law—is regarded as an essential feature of the rule of law.⁶⁹ The common law, on the other hand, tolerates a remarkably high level of uncertainty. Numerous questions are unsettled. Decided cases can remove the uncertainty, but they need to be numerous, published and readily accessible. It is

⁶² MERRYMAN & PÉREZ-PERDOMO, *supra* note 50, at 34 (“...our legal tradition was originally created and has grown and developed in the hands of judges, reasoning closely from case to case and building a body of law that binds subsequent judges, through the doctrine of *stare decisis*, to decide similar cases similarly.”).

⁶³ MERRYMAN & PÉREZ-PERDOMO, *supra* note 50, at 56 (“It is reasonable to speak of the common law as a law of the judges...”).

⁶⁴ *Id.* at 34 (citing the names of Coke, Mansfield, Marshall, Story, Holmes, Brandeis, Cardozo).

⁶⁵ *Id.* at 66 (“[c]ommon law judges are problem solvers rather than theoreticians”).

⁶⁶ OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (1881).

⁶⁷ Tunc, *supra* note 59, at 468. The comparison between the law on the one hand, and the “exact sciences” and the “rules” that govern the world, on the other, is striking. Tunc seems to compare the law with the laws of physics.

⁶⁸ *See* MERRYMAN & PÉREZ-PERDOMO, *supra* note 50, at 48 (“There is a great emphasis in the literature of the civil law tradition on the importance of certainty in the law. Certainty is, of course, an objective in all legal systems, but in the civil law tradition it has come to be a kind of supreme value, an unquestioned dogma, a fundamental goal.”).

⁶⁹ *See generally* Conseil d’État, *Sécurité juridique et complexité du droit*, ÉTUDES ET DOCUMENTS DU CONSEIL D’ÉTAT 1, 223 (2006), <http://www.ladocumentationfrancaise.fr/var/storage/rapports-publics/064000245.pdf>.

expected that several decided cases will result in the possibility to enunciate a general principle.⁷⁰ The whole system thus rests on a steady stream of decided cases. If the cases disappear, the system collapses. Although the common law tolerates more uncertainty than the civil law, it demands, like any system of law, a minimum level of certainty.⁷¹ Without cases, the common law presents too much uncertainty for anyone to bear.

These contrasting traditional concepts of law, and their corresponding diverging tolerance for uncertainty, explain the contrast between, on the one hand, the anxiety of common lawyers about the success and confidentiality of arbitration, and on the other hand, the relative serenity of civil lawyers.

For the common lawyer, arbitration endangers the common law because it takes cases away from the courts, and thus reduces the stream of cases that a minimum level of certainty requires. Confidentiality adds insult to injury. But even if arbitration awards were not confidential, the problem would remain. Judges, not arbitrators, build the edifice of the common law. For the civil lawyer, by contrast, the fact that courts decide less cases is not a cause for concern. Judges do not make law; they simply apply it. Certainty is not the result of a long accumulation of cases; it rests on the achievement of the Code's original designers, and the subtle elaborations of its exegetes. All things being equal, publication of arbitration awards is desirable, because guidance is helpful (though not necessary). Confidentiality may be criticized; but the existence of arbitration itself is not a cause for concern.

Now that we have a better understanding of how and why different legal traditions react differently to international arbitration, let us turn to how the dearth of precedent in industries prone to international arbitration has influenced the practice of international arbitration, with particular emphasis on legal reasoning.

IV. HOW INTERNATIONAL ARBITRATION PRACTITIONERS DEAL WITH THE DEARTH OF PRECEDENT

International arbitration practitioners often have to deal with a dearth of precedent. This section discusses how, in our experience, they do it. Four techniques in particular come to mind: reference to academic treatises and other scholarly writings; a comparative approach; reliance on industry practice; and reasoning from abstract principles.

A. Reference to Academic Treatises and Other Scholarly Writings

A first technique that is prevalent in international arbitration is reference to academic treatises and other scholarly writings. Recourse to scholarly works is particularly prevalent in relation to

⁷⁰ The case book method in U.S. law schools illustrates this principle: one learns the law and its principles by reading cases.

⁷¹ MERRYMAN & PÉREZ-PERDOMO, *supra* note 50, at 48 (“It is recognized [in the common law] that people should, to the extent possible, know the nature of their rights and obligations and be able to plan their actions with some confidence about the legal consequences; but it is also widely recognized that there are limits on the extent to which certainty is possible.”).

questions of arbitral procedure.⁷² But it is also common regarding the substantive merits of the dispute.

In an international construction arbitration, for example, one would be remiss not to make reference to the seminal treatises on the FIDIC forms of contract: Nael Bunni, *The FIDIC Forms of Contract* (2005); I.N. Duncan Wallace, *The International Civil Engineering Contract* (1974, 1980); E.C. Corbett, *FIDIC 4th—A Practical Legal Guide* (1991); and J. Glover & S. Hughes, *Understanding the New FIDIC Red Book: A Clause by Clause Commentary* (2006).⁷³

Similarly, in international arbitrations arising out of a Bermuda Form insurance contract, insurers and policyholders rely heavily on the two major scholarly commentaries on the Bermuda Form: Richard Jacobs QC, Lorelie S Masters, Paul Stanley, *Liability Insurance in International Arbitration—The Bermuda Form* (2d ed. 2011) and David Scorey, Richard Geddes, Chris Harris, *The Bermuda Form—Interpretation and Dispute Resolution of Excess Liability Insurance* (2011). The Jacobs treatise generally takes a pro-policyholder position, while the Scorey treatise tends to be pro-insurer.

In oil and gas arbitration, reference is often made to, for instance, Howard R. Williams & Charles J. Meyers, *Oil and Gas Law* (2003 ed.).

B. Comparative Approach

A second feature of advocacy in international arbitration is the use of a comparative approach.

Emmanuel Gaillard, a distinguished scholar and practitioner of international arbitration, explains that, because of the systematic lack of precedent directly on point in international arbitration, a sort of “instinctive” comparative law method is omnipresent:

Of course, arbitration practitioners invoke decisions that support the argument they wish to convince the arbitral tribunal of in exactly the same way as arbitrators will refer to what other arbitrators have done before them whenever they have access to such arbitral precedents. Very often, this practice goes beyond the relevant applicable law of the dispute. It is almost second nature to invoke arbitral awards in support of one’s argument, without even giving a second thought to the applicable law of the award that one is invoking.⁷⁴

⁷² Some oft-cited works on international arbitration law and procedure are: KLAUS PETER BERGER, *INTERNATIONAL ECONOMIC ARBITRATION* (1993); BORN, *supra* note 6; EMMANUEL GAILLARD & JOHN SAVAGE, *FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION* (1999); JEAN-FRANÇOIS POUURET & SÉBASTIEN BESSON, *COMPARATIVE LAW OF INTERNATIONAL ARBITRATION* (Stephen Berti & Annette Ponti trans., 2d ed. 2007); REDFERN ET AL., *supra* note 11.

⁷³ See Seppälä, *supra* note 23, at 72.

⁷⁴ Emmanuel Gaillard, *Foreword*, to *PRECEDENT IN INTERNATIONAL ARBITRATION* 1, 3 (Emmanuel Gaillard & Yas Banifatemi eds. 2008).

Christopher Seppälä tells the story of an ICC construction arbitration that illustrates the importance of the comparative approach in international arbitration.⁷⁵ In that case, the governing law was “that of an Arab country with an undeveloped law.”⁷⁶ The dispute related to a project to build a town. The employer had let the works out to three different contractors under three different main construction contracts (so-called “multi-prime” construction contracts). The question arose: what duty does an employer owe to its various prime contractors in the case of a multi-prime construction project where no provision is made for coordination of the performance of the work among the contractors by the employer? Unsurprisingly, the substantive applicable law did not address the issue. According to Chris:

[W]e, as counsel to the contractor, undertook some research in comparative law and discovered that the law relating to the rights and duties of owners and contractors in multi-prime construction contract situations, though not much developed in Europe (e.g., in England or France), is highly developed in the United States.

[...]

The U.S. case law made clear that even where nothing is specified in the relevant construction contracts, where an owner has entered into multiple prime construction contracts whose performance can impact the performance of others, the owner has an implied affirmative duty to coordinate those contracts and to limit the risk that performance under one will or may prevent or hinder performance under another.⁷⁷

Chris recounts next how the arbitral tribunal, composed of two Arab lawyers (including one from the country of the governing law) and one English Queen’s Counsel, “expressed relief at the hearing that concrete expression had been found” as to the concrete issue they faced.⁷⁸ The tribunal even cited to passages from the relevant U.S. cases in its award.

C. Reliance on Industry Practice

A third common feature of advocacy in international arbitration is the reliance on industry practice and general principles recognized in the industry.

⁷⁵ Seppälä, *supra* note 23, at 74-77.

⁷⁶ *Id.* at 74.

⁷⁷ *Id.* at 76.

⁷⁸ *Id.*

In fact, one of the attractive features of arbitration is that, for disputes involving a technical or otherwise specialized field, the parties can appoint arbitrators with the relevant expertise or experience, who usually will be attuned and receptive to such arguments.⁷⁹

The term *lex mercatoria* – a term of art in the international arbitration world for decades – has given rise to much intellectual debate,⁸⁰ which is not the purview of this brief article. It suffices to note that the term’s existence and continued appeal demonstrate that contemporary international arbitration practice shares with the “law merchant” of old⁸¹ a recognition that when deciding disputes in international trade, it is relevant to consider practices that are generally accepted in the relevant trade. One can also observe the development of bodies of principles accepted in a given industry, such as a “lex petrolea” in the oil and gas industry⁸² or a “lex sportiva” in sports cases.⁸³ Finally, parties and arbitrators often rely on “trade usages” in arguing for their position and in justifying their decisions.⁸⁴

In particular, Article 28(4) of the UNCITRAL Model Law provides that “in all cases, the arbitral tribunal shall decide in accordance with the terms of the contract *and shall take into account the usages of the trade applicable to the transaction.*”⁸⁵ Similarly, Article 35(3) of the 2010 UNCITRAL Arbitration Rules provides that “[i]n all cases, the arbitral tribunal shall decide in accordance with the terms of the contract, if any, *and shall take into account any usage of trade applicable to the transaction.*”⁸⁶ In the words of one commentator:

Unlike some national laws that treat usages as secondary sources of law, international commercial law confers trade usages a more

⁷⁹ See, e.g., BORN, *supra* note 6, at 80–83 (discussing “[t]he parties’ desire for commercially-experienced decision-makers”); REDFERN ET AL., *supra* note 11, at 260 (“Part of the attraction of arbitration is the way in which the expertise necessary for the understanding and resolution of the dispute may be found amongst the arbitrators themselves.”).

⁸⁰ Compare Berthold Goldman, *Frontières du droit et “lex mercatoria,”* 9 ARCHIVES DE PHILOSOPHIE DU DROIT 177 (1964), and Berthold Goldman, *La Lex Mercatoria dans les Contrats et l’Arbitrage Internationaux: Réalité et Perspectives*, 106 J. DU DROIT INT’L 475 (1979), with Michael J. Mustill, *The New Lex Mercatoria: The First Twenty five Years*, 4 ARB. INT’L 86 (1988). For a relatively recent restatement, see Emmanuel Gaillard, *Transnational Law: A Legal System or a Method of Decision Making?*, 17 ARB. INT’L 59 (2001).

⁸¹ See BORN, *supra* note 6, at 30-35.

⁸² Doak Bishop, *International Arbitration of Petroleum Disputes: The Development of a Lex Petrolea*, 23 ICCA Y.B. COM. ARB. 1131 (1998).

⁸³ ANTONIO RIGOZZI, *L’ARBITRAGE INTERNATIONAL EN MATIERE DE SPORT* 628 (2005).

⁸⁴ See generally BORN, *supra* note 6, at 2664–68.

⁸⁵ UNCITRAL Model Law on International Commercial Arbitration, art. 28(4) (2006) (emphasis added); see BORN, *supra* note 6, at 2665 n.266 (listing arbitration laws with similar language).

⁸⁶ UNCITRAL Arbitration Rules, Art. 35(3) (as revised in 2010) (emphasis added); see BORN, *supra* note 6, at 2665 n.270 (listing arbitration rules with similar language).

active role compared to those national legal systems. This active and significant role materializes in two different ways. Firstly, trade usages may be recognized as a part of the contract between the parties, where governing law permits such an application, under the “implied terms” doctrine that governs the common law jurisdictions. Secondly, international arbitration rules may provide that arbitrators shall, along with the national and/or a-national substantive rules applicable to the merits of the dispute, take into account the trade usages relevant with the transaction.⁸⁷

D. Reasoning from Abstract Principles

Finally, international arbitration practitioners often make arguments based on abstract principles.⁸⁸ A manifestation of this tendency is the reference to Latin maxims such as *nemo auditur turpitudinem suam allegans* – no one can use his own wrongdoing in his favor – or *pacta sunt servanda* – one must abide by one’s agreements. International arbitration practitioners often refer to these maxims without feeling the need to support them with another authority (such as a case endorsing them, for instance); the principles are intrinsically authoritative.

V. COULD THE EXPERIENCE OF INTERNATIONAL ARBITRATION PRACTITIONERS BE OF USE TO THE COMMON LAW PRACTITIONER?

The techniques on which international arbitration practitioners rely when facing a dearth of precedent tend to stem from the civil law. Recourse to treatises and other scholarly writings, for instance, is a quintessential civil law technique. In the civil law, as explained above, the “doctrine” – a term that intriguingly for the common lawyer designates at the same time the community of respected scholars and the body of scholarship they produce⁸⁹ – has a significant influence on the development of the law.⁹⁰ And while the comparative approach is not unique to the civil law system, it has been conceptualized and studied more by civil lawyers.⁹¹ Reliance on

⁸⁷ Tolga Ayoğlu, *Application of Trade Usages in International Institutional Arbitration – Some Reflections*, 30 ASA BULL. 539, 539 (2012).

⁸⁸ On the canonical distinction between rules and principles, see RONALD DWORKIN, *The Model of Rules I*, in TAKING RIGHTS SERIOUSLY 29 (1977).

⁸⁹ See generally PHILIPPE JESTAZ & CHRISTOPHE JAMIN, *LA DOCTRINE* (2004).

⁹⁰ While in the common law, the authority figures (and the law makers) are the judges, in the civil law, they are the professors. See *supra* at III.B.

⁹¹ See Konrad Zweigert & Hein Kötz, *AN INTRODUCTION TO COMPARATIVE LAW* (3d ed. 1998). The authors of this reference work are German scholars. According to them: “Comparative Law as we know it started in Paris in 1900, the year of the World Exhibition. At this brilliant panorama of human achievement there were naturally innumerable congresses, and the great French scholars Edouard Lambert and Raymond Saleilles took the opportunity to found an International Congress for Comparative Law.” *Id.* at 2. See also *id.* at 51–62 (describing the heavy German and French influence on the discipline); *id.* at 56 (discussing the very practical emphasis of early English comparative law scholarship, aimed at assisting the Privy Council, as the highest court of the Empire, in applying foreign law, and English tradesmen in knowing the commercial law of other peoples).

abstract principles is another hallmark of civil law reasoning which, as explained above,⁹² is quintessentially deductive.⁹³

Might the experience of international arbitration practitioners nonetheless be of use to the common law practitioner facing a dearth of precedent? The question might seem strange, even shocking; but upon closer examination it is not revolutionary. In fact, we observe that U.S. advocates and judges, at the margin, when facing “issues of first impression”—by definition issues on which no precedent is available—deploy the very same techniques.⁹⁴

This is well illustrated by two recent New York cases, one federal and one state, relating to New York’s moratorium on high-volume hydraulic fracturing. In *Wiser v. Enervest Operating L.L.C.*, the Northern District of New York found that the occurrence of the New York state moratorium during the primary term of oil and gas leases but prior to commencement of drilling did not end the requirement to make delay rental payments, and held that the lessees’ failure to make the required payments resulted in automatic termination of the leases.⁹⁵ In *Beardslee v. Inflection Energy LLC*, the New York Court of Appeals, answering a certified question from the Second Circuit, held that the force majeure clause in oil and gas leases did not modify the habendum clause in the leases and therefore did not extend their primary terms.⁹⁶ In making these decisions, the courts used a comparative approach and relied on academic works and the industry practice – three of the four techniques on which international arbitration practitioners rely.

As to the comparative approach, for example, the *Wiser* court stated:

There is a dearth of authority in New York relating to oil and gas leases such as those now at issue. Both sides to this litigation have therefore identified cases from other jurisdictions where the law concerning such leases is far more developed, though not necessarily uniform, and have asked that the court draw upon the principles emanating from those cases.⁹⁷

The court proceeded to cite abundantly to decisions from other U.S. jurisdictions and discussed several of them.⁹⁸ Similarly, in *Beardslee*, in reaching its conclusion that the force majeure

⁹² See *supra* at III.B.

⁹³ This is perhaps most obvious in the use of Latin maxims. Civil lawyers use such maxims without any additional reference to a code or case. In contrast, common law practitioners are typically recalcitrant to stating a general principle of law without backing it with authoritative decisions.

⁹⁴ Being based in New York, we focus on the United States, which is the common law jurisdiction with which we are most familiar. We suspect, however, that our findings in relation to U.S. practice largely apply in other common law jurisdictions as well.

⁹⁵ *Wiser v. Enervest Operating L.L.C.*, 803 F. Supp. 2d 109, 112 (N.D.N.Y. 2011).

⁹⁶ 31 N.E.3d 84-85.

⁹⁷ 803 F. Supp. 2d at 117.

⁹⁸ 803 F. Supp. 2d at 118–20.

clause did not extend the primary terms of the leases, the New York Court of Appeals noted that its holding was “consistent with out-of-state ‘oil’ jurisdictions.”⁹⁹ It cited and discussed cases decided by its “sister courts,”¹⁰⁰ notably Texas and California courts.

Both courts also relied on scholarly works. The *Wiser* court referred to numerous oil and gas treatises: Howard R. Williams & Charles J. Meyers, *Oil and Gas Law* (2003 ed.); W.L. Summers, *The Law of Oil and Gas* (Perm. ed. 1959); Nancy Saint–Paul, *Summers Oil & Gas* (3d ed.); and Eugene O. Kuntz, *Oil and Gas* (1967). The *Beardslee* Court also referred to two of these,¹⁰¹ to support its assertion that “an agreement for the production of oil and gas must be construed with reference to both the intention of the parties and *the known practices within the industry.*”¹⁰²

As can be seen from this last quote, in *Beardslee*, the New York Court of Appeals relied on generally recognized industry practices. The *Wiser* Court also relied on industry practice. The Court stated that “an understanding of the development of the industry is critical when construing the terms of an oil and gas lease.”¹⁰³ It proceeded to present a detailed discussion of the “historical context” of delay rental provisions in oil and gas leases, relying on decisions from other jurisdictions and on scholarly works.¹⁰⁴ It stated that its conclusion that the leases terminate automatically in the event that the lessor fails to commence drilling of a well or to pay delay rentals timely within the primary term of the leases was supported by “the clear and unequivocal terms of the leases in issue, *as universally understood in the oil and gas industry.*”¹⁰⁵

And while the *Wiser* and *Beardslee* courts did not rely on abstract principles of law, other U.S. courts have done so when facing issues of first impression. A *locus classicus* of legal theory in the United States—*Riggs v. Palmer*¹⁰⁶—illustrates this well. Elmer murdered his grandfather to prevent him from changing certain provisions in his will that were favorable to Elmer. The question was whether Elmer could inherit from his grandfather. Nothing in the relevant statutes prohibited it. The majority of the court nonetheless held that Elmer could not inherit. In reaching this conclusion, the court stated:

⁹⁹ 31 N.E.3d at 85.

¹⁰⁰ *Id.*

¹⁰¹ W.L. SUMMERS, *THE LAW OF OIL AND GAS* (1959); HOWARD R. WILLIAMS & CHARLES J. MEYERS, *OIL AND GAS LAW* (2003). *See* 31 N.E.3d at 84.

¹⁰² *See* 31 N.E.3d at 84 (emphasis added).

¹⁰³ 803 F. Supp. 2d at 117.

¹⁰⁴ *Id.* at 117–19.

¹⁰⁵ *Id.* at 120 (emphasis added).

¹⁰⁶ *Riggs v. Palmer*, 22 N.E. 188 (N.Y. 1889); *see* RONALD DWORKIN, *Jurisprudence, in TAKING RIGHTS SERIOUSLY* 13, 23 (1977).

[A]ll laws, as well as all contracts, may be controlled in their operation and effect by general, fundamental maxims of the common law. No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime. These maxims are dictated by public policy, have their foundation in universal law administered in all civilized countries, and have nowhere been superseded by statutes.¹⁰⁷

In sum, in those rare cases when they are faced with issues of first impression, U.S. courts and advocates resort to the same techniques that international arbitration practitioners, who are often faced with such issues, routinely employ.

VI. CONCLUSION

The dearth of precedent that international arbitration sometimes causes has generated anxiety in some common law quarters. But what brings the harm might also bring the cure: common law practitioners may find inspiration in the techniques used by international arbitration practitioners who are often faced with a lack of precedent. While these techniques are more typical of the civil lawyer's toolkit, U.S. litigators and judges do at times employ them, but only at the margins, when dealing with issues of first impression. Experience in international arbitration indicates that in the areas of dearth, for instance in those cases in international commerce that still reach the common law courts, common lawyers may be forced to expand their toolkit and the margin may need to become the center.

¹⁰⁷ 22 N.E. at 190.