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Court Intervention in International Arbitration: The Case for Compulsory Judicial Internationalism

*Frédéric Bachand**

One of the most interesting legal phenomena of our times is civil and common law courts' increasing willingness to refer to foreign or international normative sources to justify their legal holdings in hard cases.¹ Many judges have come to realize that it may be worthwhile to adopt, in cases where local sources provide no obvious answer, what may be described as an internationalist interpretive approach—in other words to consider how the issue in dispute is addressed in other domestic legal orders or on the international plane. The practice is not without its detractors though. Anyone who follows developments in United States constitutional law is well aware of this fact.² That said, it is beyond dispute there is an emerging non-tradition-specific trend that recognizes the value of considering the international normative context in at least some cases. As such, judicial internationalism is a reality.

Consideration of the international normative context is particularly prevalent in international arbitration. Decisions in which courts have openly considered the relevant international normative context can readily be found in numerous jurisdictions, including the United Kingdom, Singapore, Australia, Hong Kong, Bermuda and Canada.³ That said, it is not always clear whether, in such cases, courts

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1. See generally HIGHEST COURTS AND GLOBALISATION (Sam Muller & Sidney Richards eds., Hague Academic Press 2010); TOM BINGHAM, WIDENING HORIZONS: THE INFLUENCE OF COMPARATIVE LAW AND INTERNATIONAL LAW ON DOMESTIC LAW (Cambridge University Press 2010); JULIE ALLARD & ANTOINE GARAPON, LES JUGES DANS LA MONDIALISATION: LA NOUVELLE RÉVOLUTION DU DROIT (Éditions du Seuil 2005).

2. See, e.g., Martha Minow, *The Controversial Status of International and Comparative Law in the United States*, 52 HARV. INT'L L.J. ONLINE 1 (2010), available at http://www.harvardilj.org/2010/08/online_52_minow/. That the debate in the U.S. is mostly confined to constitutional law is apparent from decisions such as *Abbott v. Abbott*, 130 S. Ct. 1983 (2010), where all members of the Court relied on foreign sources while interpreting the Hague Convention on the Civil Aspects of International Child Abduction, on which see http://www.hcch.net/index_en.php?act=conventions.text&cid=24.

3. For recent examples, see the decision of the English Court of Appeal in *In the Matter of the Football Association Premier League Ltd. and In the Matter of the Companies Act 2006*, [2011] EWCA (Civ.) 855, available at <http://www.bailii.org/cw/cases/EWCA/Civ/2011/855.html>; the decision of the Singapore Court of Appeal in *AJU v. AJT*, [2011] SGCA 41, available at <http://www.worldservicesgroup.com/publications.asp?action=article&artid=4130>; the decision of the Supreme Court of New South Wales in *Gilgandra Marketing Co-Operative Limited v. Australian Commodities & Marketing Pty Ltd.*, [2010] NSWSC 1209, available at <http://www.lawlink.nsw.gov.au/scjudgments/2010nswsc.nsf/acf73009028d6777ca25673900081e8d/abc9c6cc9c3a78c7ca2577c2000bbba7?OpenDocument>; the decision of the Hong Kong Court of Final Appeal in *Karaha Bodas Co LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, [2009] 2 HKC 303, available at <http://legalref.judiciary.gov.hk/lrs/common/ju/judgment.jsp>; the decision of

voluntarily adopted an internationalist approach in international arbitration cases or rather did so out of a sense of obligation. Furthermore, anyone who has conducted comparative research on issues relating to judicial intervention relating to the international arbitral process knows that courts at times are inconsistent in their consideration of the international normative context. Courts in some jurisdictions seem more receptive to considering the international normative context than their foreign counterparts, and one often comes across—in the same jurisdiction—internationally-minded decisions sitting alongside decisions which inexplicably ignore the relevant international normative context. Such discrepancies seem to run afoul of the objectives of certainty and predictability which are central to the international arbitration system.⁴ There is little doubt that in many hard cases there is a real possibility that a court's stance towards the relevant international normative context may turn out to be determinative of the outcome. Therefore, it seems important to think more about how courts should take that context into consideration when they are called upon to intervene in connection with international arbitrations.

The basic argument I make here is that judges sitting in states that have signalled their willingness to support the international arbitration system must consider the relevant international normative context while answering questions of international arbitration law to which local sources offer no obvious answer. I choose my words carefully: I believe that consideration of the international normative context is warranted *when local sources that are binding on judges offer no obvious answer*, because I do not think one could go as far as to argue that the international normative context could somehow prevail over clearly expressed legislative intent or the pronouncements of higher courts empowered to issue binding precedents.⁵ Although legislation would be the proper instrument to clearly set out such an interpretative rule, I believe courts can and should recognize its existence independently of legislation.

At a more theoretical level, what I am mainly exploring is the extent to which domestic legal orders should be permeable to transnational rules of international arbitration. By “transnational rules of international arbitration,” I have in mind a body of rules that relate directly or indirectly to the international arbitration system and whose key feature is that they are widely accepted among states that have chosen to support that system.⁶ To some, these rules form an autonomous, transnational legal order—the arbitral legal order—which constitutes the ultimate

the Supreme Court of Bermuda in *Montpelier Reinsurance Ltd. v. Manufacturers Property & Casualty Limited*, [2008] Bda L.R. 24; and the decision of the Supreme Court of Canada in *Yugraneft Corp. v. Rexx Management Corp.*, 2010 SCC 19, available at <http://scc.lexum.org/en/2010/2010scc19/2010scc19.html>.

4. See generally William W. Park, *Neutrality, Predictability and Economic Co-Operation*, 12 J. INT'L ARB 99 (1995).

5. For an argument that, under some circumstances, consideration of the international normative context could justify that the common law rule affording binding effect to precedents be set aside, see Gary F. Bell, *Uniformity Through Persuasive International Authorities — Does Stare Decisis Really Hinder the Uniform Interpretation of the CISG?*, in CAMILLA B. ANDERSEN & ULRICH G. SCHROETER, *SHARING INTERNATIONAL COMMERCIAL LAW ACROSS NATIONAL BOUNDARIES — Festschrift for Albert H. Kritzer on the Occasion of his Eightieth Birthday*, 35 at 45-46 (Wildy, Simmonds & Hill 2008).

6. See Emmanuel Gaillard, *Transnational Law. A Legal System or a Method of Decision Making?*, 17 ARB. INT. 59 (2001).

source of the adjudicative power vested in international arbitrators.⁷ Whether these transnational rules do indeed form a distinct legal order is a controversial question⁸ which does not need to be addressed here. What underlies my thesis is not only the idea that domestic courts can and should recognize the existence of this body of transnational rules, but also—in some circumstances—that these rules have constraining effects in their domestic legal orders, and thus on their decision-making process.

Part I sets out in more detail the proposed interpretive rule. It does so by explaining why the relevant international normative context should always matter when courts are called upon to resolve questions of international arbitration law to which local sources provide no clear answers. In Part II, I address the issue of how precisely that context ought to bear upon the interpretive process. In doing so, I highlight some important distinctions regarding how that context should bear upon the courts' reasoning depending on whether the issue in dispute is governed by uniform law instruments—such as the New York Convention or UNCITRAL's model arbitration law—or local provisions designed to give effect to such instruments. I conclude with a brief overview of other aspects of the courts' duty to consider the international normative context that I intend to explore in future research projects.

I. WHY THE RELEVANT INTERNATIONAL NORMATIVE CONTEXT MATTERS

The starting point of my argument is the general principle of legal interpretation according to which legislative ambiguities ought to be resolved in a manner which is consistent with the purpose of the legislative instrument at issue. As this principle has been analyzed extensively in existing scholarship, I will not address it in detail here. It should be sufficient to point out that it has never been contentious in civil law jurisdictions, where teleological interpretation has always been viewed as key in resolving legislative ambiguities. In recent decades, common law jurisdictions have strongly embraced what they tend to refer to as a purposive approach to the interpretation of statutes. Moreover, the importance of interpreting treaties in light of their object and purpose has long been acknowledged in the public international law sphere.⁹ The second step of the argument concerns the basic or general purpose pursued by modern statutes dealing with international arbitration. That is to support the international arbitration system by laying out a regulatory framework intended to be responsive to the needs of users

7. Most notably, *see generally* EMMANUEL GAILLARD, *LEGAL THEORY OF INTERNATIONAL ARBITRATION* (Martinus Nijhoff 2010); *see also* Emmanuel Gaillard, *L'ordre juridique arbitral réel, utilité, spécificité*, 55 McGill L.J. 891 (2010).

8. *See, e.g.*, Jan Paulsson, *Arbitration in Three Dimensions*, 60 I.C.L.Q. 291, at 301 (2011) (critiquing Emmanuel Gaillard's theory of transnational rules).

9. *See, e.g.*, AHARON BARAK, *PURPOSIVE INTERPRETATION IN LAW*, at 340 (Princeton University Press 2005) ("Purposive interpretation is well established in comparative legal systems. Continental law refers to it as teleological interpretation (subjective and objective). Common law systems call it purposive interpretation . . .") As for the public international law sphere, *see* Art. 31 of the Vienna Convention on the Law of Treaties (1969), which requires that the terms of a treaty be interpreted in context and *in the light of its object and purpose.*" (emphasis added).

of that system. This is another trite point for which support can readily be found in the main comparative works on international arbitration law.¹⁰

I need to spend more time on the third and crucial step in the argument. It relates to some of the concrete implications for courts of that legislative mandate to support the international arbitration process by ensuring that it will be responsive to the users' needs. One observation which has often been made and which—by and large—has been accepted in most jurisdictions, is that courts should refrain from viewing arbitration suspiciously and abandon the kind of hostility towards private adjudication that was prevalent until only a few decades ago. Concretely, this means that, in hard cases to which local sources provide no obvious answer, courts should stay away from legal propositions which essentially rest on a suspicion that arbitration is an inherently inferior method of dispute resolution.¹¹ But the key point I want to develop here is that the legislative mandate to support the international arbitration process requires courts to go further. It also requires them to avoid adopting solutions that are inconsistent with those that prevail among states that support the international arbitration system or—when the issue is one upon which no consensus has yet emerged—solutions that fall outside the realm of what may be viewed as internationally acceptable. In other words, courts should proceed on the basis of an interpretive rule to the effect that, when the local statute provides no obvious answer to a disputed question of law, they should refrain from ruling in a manner that is inconsistent with internationally-acceptable solutions to the problem at hand. Otherwise, courts will most likely rule in a manner that is out-of-step with the expectations and needs of the users of the international arbitration system.

To understand why the adoption of such an approach in hard cases is essential to properly support the international arbitration system, it is necessary to underscore a crucial point concerning the needs of parties involved in international commercial disputes which they are unable to resolve amicably. Simply put, in an ideal world where all imaginable adjudicative systems were available, most parties would opt for a truly international system—that is, a system governed by international, rather than domestic, rules. The primary concern of most parties in such a situation is neutrality. For good or bad reasons, party A from country Y involved in a dispute with party B from country Z will usually want to stay out of the courts of country Z, and, likewise, party B will most likely consider litigation

10. Including: GARY B. BORN, *INTERNATIONAL COMMERCIAL ARBITRATION* (Kluwer, The Hague, 2009); NIGEL BLACKABY, CONSTANTINE PARTASIDES, ALAN REDFERN, & MARTIN HUNTER, *REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION* (Oxford University Press 2009); JEAN-FRANÇOIS POUURET AND SÉBASTIEN BESSON, *COMPARATIVE LAW OF INTERNATIONAL ARBITRATION* (Sweet & Maxwell 2007); JULIAN D.M. LEW, LUKAS MISTELIS & STEFAN KRÖLL, *COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION* (Kluwer, The Hague 2003), FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION (Emmanuel Gaillard & John Savage eds., Kluwer 1999).

11. A good example of a decision based on hostility towards arbitration is the Quebec Court of Appeal decision in *Desputcaux v. Éditions Chouette Inc.*, Can.LII 20609 (2001), which stands for the proposition that a legislative provision granting subject-matter jurisdiction to a court without explicitly providing for the possibility to arbitrate ought to be interpreted as rendering non-arbitrable all matters falling within its ambit. The decision was rightly overturned by the Supreme Court of Canada in *Desputcaux v. Éditions Chouette Inc.*, SCC 17 (2003), which—after adopting a much more favourable stance towards arbitration—reversed the presumption by holding matters arbitrable unless a statute clearly provides otherwise.

in country Y to be a most unappealing option. Therefore, parties involved in international commercial disputes do not want the process and the result thereof being influenced by rules emanating from, and courts operating in, their opponent's jurisdiction. But while turning to an international adjudicative process serves this purpose, doing so is not necessary to achieve this purpose. In theory at least, the parties could achieve neutrality by choosing, through a forum selection clause, the courts of a neutral jurisdiction—a jurisdiction with no connection whatsoever to either the parties or their dispute—as the exclusive forum in which their disputes will be adjudicated. Alternatively, they could opt into an arbitration process governed by rules of a neutral jurisdiction and supervised by neutral domestic courts intervening on the basis of purely domestic rules.

However, most parties would likely consider both options to be flawed. To start, neutrality would not necessarily be guaranteed given the possibility that a judgment or award granting the claim would need to be enforced in the responding party's home jurisdiction, by courts who would more often than not apply purely local rules.¹² Furthermore, parties to international commercial disputes are not only interested in neutrality. They are also very much concerned with efficiency, and domestic legislatures and courts tend to be perceived as unable to adequately understand and satisfactorily respond to the needs of international business. There are exceptions, but we are talking about only a handful of jurisdictions whose local law and courts tend to be seen as generally responsive to the needs of parties involved in international commercial disputes. Also, alongside the problem of the perceived inadequacy of local law and local courts, there is an additional problem arising from the regulatory discrepancies among the world's jurisdictions, which can significantly increase the risks and costs of doing business on an international scale. Thus, for reasons having to do with the parties' need for neutrality and efficiency, their interests will usually be best served by an adjudicative process in which the influence of purely domestic rules is as limited as possible.

This idea is by no means novel. On the contrary, it has permeated numerous initiatives undertaken over the years by stakeholders of the international arbitration system. A prime example is the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, better known as the New York Convention, which today is in force in no less than 146 states.¹³ The result of a collaborative effort by both states and the international arbitration community, it seeks to subject to international rules—*public international law* rules—the two most important aspects of the arbitral process, namely the enforcement of arbitral agree-

12. There is no global treaty on the recognition and enforcement of foreign judgments. On the challenges in devising an internationally-acceptable treaty of that nature, see Peter D. Trooboff, *Ten (and Probably More) Difficulties in Negotiating a Worldwide Convention on International Jurisdiction and Enforcement of Judgments: Some Initial Lessons*, in *A GLOBAL LAW OF JURISDICTION AND JUDGMENTS: LESSONS FROM THE HAGUE 263* (John J. Barceló & Kevin M. Clermont eds., Kluwer 2002).

13. For an up-to-date list, see http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html. On the Convention, see Albert Jan van den Berg's classic work, *THE NEW YORK CONVENTION OF 1958 —TOWARDS A UNIFORM JUDICIAL INTERPRETATION* (The Hague, Kluwer 1981). See also Emmanuel Gaillard & Domenico Di Pietro, *ENFORCEMENT OF ARBITRATION AGREEMENTS AND INTERNATIONAL ARBITRAL AWARDS: THE NEW YORK CONVENTION IN PRACTICE* (Cameron May 2008).

ments and the recognition and enforcement of arbitral awards. The Convention does not seek to comprehensively regulate these aspects: much room is left to domestic law with respect to both arbitration agreements and arbitral awards.¹⁴ And, of course, the task of enforcing arbitration agreements and arbitral awards was left to national courts, rather than confided to some international institution. Yet, the Convention unquestionably rests on the idea that limiting the influence of domestic rules by subjecting the international arbitration system to international rules tends to serve the needs of its users.

So do the arbitration rules adopted by leading international dispute resolution institutions. Pursuant to the principle of party autonomy, a key principle underlying the New York Convention is that parties to international arbitration have extensive freedom with respect to the rules governing arbitral proceedings as well as the manner in which arbitral tribunals are to be constituted. Theoretically, their freedom is such that the parties could even include in their arbitration agreement what would essentially be the equivalent of a complete code of arbitral procedure—in other words, detailed provisions purporting to deal with every imaginable question of procedure that could arise in the course of arbitration. Of course, this never happens in practice, as drafters of international contracts have better things to do than to pen hundreds of procedural provisions. In light of this reality, dispute resolution institutions have made available to contract drafters sets of arbitration rules that they may conveniently incorporate by reference in their arbitration agreement. There are two important points to highlight here. First, the dispute resolution institutions are private bodies whose primary mission is to serve the interests of international business. Second, the arbitration rules they have devised and made available to parties to international commercial transactions with a view to furthering the latter's interests share two key features: they are all intended to regulate comprehensively the procedure to be followed in arbitral proceedings, and they are all designed to leave as little room as possible to domestic rules of procedure.¹⁵ Thus, the basic thrust of the institutions' regulatory initiatives is to subject as many aspects of the arbitral process as possible to international rules of procedure, as this is believed to best serve the parties' interests. Experience has shown this belief to be spot on, as in the overwhelming majority of cases, parties who agree to arbitrate will also incorporate in their arbitration agreement the rules of one of the leading dispute resolution institutions.¹⁶

14. For example, the Convention does not regulate the validity of consent to arbitration agreements, nor does it set out rules relating to the interpretation of such agreements. As for the recognition and enforcement of awards, the Convention provides for the applicability of domestic law to several issues, including the question of whether the underlying dispute is arbitrable. See Art. V(2)(a) of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

15. See, e.g., the UNCITRAL ARBITRATION RULES (*revised* 2010); the 1998 ARBITRATION RULES OF THE LONDON COURT OF INTERNATIONAL ARBITRATION; the 2011 RULES OF ARBITRATION OF THE INTERNATIONAL CHAMBER OF COMMERCE; the 2010 ARBITRATION RULES OF THE ARBITRATION INSTITUTE OF THE STOCKHOLM CHAMBER OF COMMERCE; the 2010 ARBITRATION RULES OF THE SINGAPORE INTERNATIONAL ARBITRATION CENTRE; as well as the 2009 INTERNATIONAL ARBITRATION RULES OF THE INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION.

16. Reference can also be made to instruments devised by the international arbitration community with a view to subjecting more specific issues to transnational norms, such as the 2004 IBA GUIDELINES ON CONFLICTS OF INTEREST IN INTERNATIONAL ARBITRATION as well as the 2010 IBA RULES ON THE TAKING OF EVIDENCE IN INTERNATIONAL ARBITRATION.

Another key element of the international arbitration system's current architecture that buttresses the idea that the parties' interests will usually be best served by an adjudicative process in which the influence of purely domestic rules is as limited as possible is UNCITRAL's Model Law on International Commercial Arbitration. Finalized in 1985 and amended in 2006, the Model Law proposes rules touching on the formal validity of the arbitration agreement, the constitution of the arbitral tribunal, the procedure applicable to arbitral proceedings as well as the crucial question of the courts' intervention before, during and after arbitral proceedings. What bears emphasizing, firstly, is that UNCITRAL's initiative was premised on the perceived inadequacy of domestic law. Indeed, as UNCITRAL's Secretariat noted in its Explanatory Note, "[t]he Model Law was developed to address considerable disparities in international laws on arbitration" and "[t]he need for improvement and harmonization was based on findings that *national laws were often particularly inappropriate for international cases.*"¹⁷ Furthermore, as was underscored in the United Nations General Assembly's Resolution 40/72 of 11 December 1985, the Model Law was intended to unify the law among jurisdictions, and was thus intended to be treated by those vested with the responsibility of applying it as laying down rules having an international character.¹⁸ This point was made explicit by the adoption in 2006 of Article 2A, which notably states that while interpreting the Model Law, "regard is to be had to its international origin and the need to promote uniformity in its application." That these ideas have gained widespread acceptance globally is illustrated by the Model Law's resounding success: it has so far been adopted in more than sixty jurisdictions,¹⁹ and—tellingly—a clear majority of arbitration laws that have been adopted around the world in the past twenty years have implemented the Model Law.²⁰

Furthermore, decisions made in some jurisdictions not to embark on UNCITRAL's unification project should not necessarily be viewed as rejecting the idea that it is in the interest of arbitrating parties to limit as much as possible the influence of purely domestic rules on the arbitral process. In many cases—France, Switzerland, England, Sweden and the Netherlands readily come to mind—it is well known that the statute governing international arbitration was drafted with the assistance of leading international experts who took great care to ensure that the provisions were consistent with internationally-accepted general rules and principles.²¹ While the resulting statutes cannot be said to be designed to

17. *Explanatory Note by the UNCITRAL Secretariat on the 1985 Model Law on International Commercial Arbitration as Amended in 2006*, in UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION 1985 – WITH AMENDMENTS AS ADOPTED IN 2006, 23 ¶ 5 (Vienna, United Nations 2008), available at http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf.

18. Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law, United Nations General Assembly Resolution 40/72 (1985) available at <http://www.un.org/depts/dhl/rcsguide/r40.htm>.

19. For an up-to-date list of Model Law jurisdictions, see http://www.uncitral.org/uncitral/cn/uncitral_texts/arbitration/1985Model_arbitration_status.html.

20. Of the arbitration laws made available on www.kluwerarbitration.com and that were adopted within the past twenty years, 61% have adopted the Model Law.

21. On the 2011 French decree on arbitration, see Emmanuel Gaillard and Pierre de Lapasse, *Le nouveau droit français de l'arbitrage interne et international*, 3 RECUEIL DALLOZ 175 (2011). The recent French reform was initiated by a draft proposed by the Comité français de l'arbitrage, which comprised a sub-commission on international arbitration presided by Professor Pierre Mayer, a leading

give effect domestically to international rules *per se* (except, of course, insofar as they purport to implement the New York Convention), the important point is that the relevant international normative context nevertheless constituted a key source of inspiration for the legislatures involved, and this fact supports—at least indirectly—the idea that purely domestic regulatory frameworks are not conducive to the pursuit of efficiency of the international arbitration system.

Further evidence of a consensus on the fact that the arbitrating parties' interests are best served by a process in which the influence of domestic law is as limited as possible can be found in the work of international arbitrators. A prime example relates to the manner in which a growing number of arbitrators approach the delicate and controversial question of the law applicable to the arbitration agreement, which sometimes arises when a challenge is made to their jurisdiction. While arbitration laws sometimes specify under which law courts ought to rule on objections to the arbitrators' jurisdiction,²² they are usually silent as to the law arbitrators ought to apply to jurisdictional issues.²³ The same is true of arbitration rules proposed by leading international dispute resolution institutions.²⁴ Whereas some arbitrators continue to analyze their jurisdiction in light of the law of the seat of arbitration, there is a strong trend in arbitral case law whereby tribunals prefer

expert in the field. On the 1987 Swiss act see Pierre Lalive, Jean-François Poudret, & Claude Reymond, *Le droit de l'arbitrage interne et international en Suisse – Edition annotée et commentée du Concordat sur l'arbitrage du 27 mars 1969 et des dispositions sur l'arbitrage international de la loi fédérale du 18 décembre 1987 sur le droit international privé* 272, ¶ 20 (Lausanne, Payot, 1989) (translation: "the general idea and content of a chapter that has been thought and designed for international arbitration only, with a view to promoting liberalism, in accordance with the needs and expectations of international trade actors, also in line with the most recent international legislation and international conventions, in sum in accordance with the liberal philosophy which is shared by market economies and the Swiss tradition."). On the 1996 English act, see Departmental Advisory Committee on Arbitration Law, *1996 Report on the Arbitration Bill*, 13 ARB. INT. 275 at 276 (1997) ("The DAC remained of the view, for the reasons given in the Mustill Report, that the solution was not the wholesale adoption of the Model Law. However, at every stage in preparing a new draft Bill, very close regard was paid to the Model Law, and it will be seen that both the structure and the content of the July draft Bill, and the final draft, owe much to this model.") On the 1999 Swedish act, see Ulf Franke, *National Report for Sweden in INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION 1* (Jan Paulsson ed., Kluwer 1984 with updates) ("Although [the Act] is not identical to the UNCITRAL Model Law on International Commercial Arbitration [. . .] the utmost attention was given to each provision of the Model Law when drafting the Act, and as can be seen there are in substance few differences between the Act and the Model Law.") On the 1986 Dutch Act, see Pieter Sanders, *The New Dutch Arbitration Act*, 3 ARB. INT. 194, 195 (1987) ("The new law is characterised by its great flexibility, and by the freedom it imparts to parties, and to arbitration institutes (the latter as regards their rules) to deviate from the law when this is considered to be desirable. The drafters of the law paid due attention to the new arbitration laws and conventions that saw the light after World War II; extensive comparative research underlies the new Dutch Arbitration Act. As such it may serve as a good example of modern arbitration legislation.")

22. See, e.g., Art. 34(2)(a)(1) of the Model Law, echoing the New York Convention by providing that an award can be set aside if a party furnishes proof that "the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State [. . .]"

23. See, e.g., Art. 16(1) of the Model Law, which merely states that the "arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement."

24. See, e.g., Art. 6(3) of the 2012 ICC ARBITRATION RULES; Art. 23 of the 1998 LCIA ARBITRATION RULES; Art. 23 of the 2010 UNCITRAL ARBITRATION RULES; Art. 25 of the 2010 SIAC ARBITRATION RULES.

to dispose of jurisdictional objections on the basis of transnational rules.²⁵ Their approach is based on the idea that the legitimate expectations of the parties is best served by not subjecting their arbitration agreement to the domestic law of a particular jurisdiction. Another example of developments in arbitral case law which contribute to the internationalization of the process relates to the nature of the public policy-based limits to the parties' freedom to select the law applicable to the merits of their dispute. Whereas traditionally arbitrators tended to consider that the relevant limits emanated from the legal order of the seat of arbitration, a substantial trend in arbitral case law nowadays stands for the proposition that these limits ought to be conceived as deriving from a transnational public policy.²⁶

In sum, the contemporary evolution of the international arbitration system shows vividly that, generally speaking, the interest of its users is best served by limiting the influence of purely local—and potentially ill-adapted—solutions to disputed questions of law. And it is on that key consideration that rests the courts' duty to take into consideration the relevant international normative context with a view to avoiding ruling in a manner which is inconsistent with internationally-accepted solutions to the problem at hand.

II. HOW THE RELEVANT INTERNATIONAL NORMATIVE CONTEXT SHOULD BEAR UPON THE INTERPRETIVE PROCESS

Because I derive the obligation to adopt an internationalist interpretive approach from an objective that is common to all modern international arbitration statutes, I believe that such an approach is by no means solely warranted in cases where the issue at hand is governed by uniform law instruments such as the New York Convention or the Model Law (or domestic provisions designed to give effect to such instruments). I believe that it is also warranted where, say, a judge in a non-Model Law jurisdiction is called upon to interpret ambiguous statutory provisions which are in no way designed to implement the New York Convention or any other uniform law instrument. However, I am also of the view that there are notable differences in how the international normative context should bear upon the interpretive process depending on whether or not that issue falls within the ambit of international instruments which were given effect in the court's jurisdiction.

A. Issues Governed By Purely Domestic Sources

When it is not the case, consideration of the relevant international context should essentially involve embarking on a fairly straightforward comparative enquiry guided by two basic questions.

25. Indeed, more than ten years ago Professors Fouchard, Gaillard and Goldman already noted that “[t]here is [. . .] a strong tendency in arbitral case law to examine the existence and validity of the arbitration agreement exclusively by reference to transnational substantive rules, in keeping with the transnational nature of the source of the arbitrators’ powers.” GAILLARD AND SAVAGE, *supra* note 10, at 234-35, § 444.

26. See Gaillard, *supra* note 7, at 126-34, § 115-23.

First, courts should attempt to determine whether a consensus exists on the answer that ought to be given to the question posed. It is probably pointless to seek to articulate a clear-cut standard to establish that a consensus indeed exists, but relevant markers surely include whether the question has arisen in a substantial number of jurisdictions, whether it tends to be answered consistently, and whether that answer is generally approved by leading doctrinal commentators. To give an example of the kind of questions that would fall within this first category, imagine a judge seized of an application to set aside an award in a non-Model Law country that recently modernized its international arbitration statute. The statute enumerates the grounds on the basis of which an award can be set aside, and the list includes the familiar public policy exception. Now, suppose that the main argument put forward by the applicant is that the award ought to be set aside on the ground that, being tainted by an error of law, it conflicts with public policy within the meaning of the relevant provision of the statute. The case provides the first opportunity for a court in that jurisdiction to rule on the scope of the public policy exception. There are thus no directly relevant local precedents. However, a perusal of leading comparative treatises would quickly show that the idea of invoking the public policy exception to perform merits review on points of law is not only unanimously condemned by commentators but has also been generally rejected in the numerous jurisdictions in which it has arisen in recent years.²⁷ The court's duty to rule in a manner which is consistent with the statute's purpose should logically lead it to follow that view.

If the inquiry into the relevant international context initially leads to the conclusion that no consensus exists on one appropriate answer to the question at hand, courts should then ask a second question, which is whether, among the imaginable answers to that question, it can be said that only some of them are internationally acceptable. For example, imagine that a court sitting in a Model Law jurisdiction is asked to review, pursuant to Article 16(3), a decision rendered in a preliminary phase of the proceedings and in which the arbitral tribunal dismissed an argument asserting that the claim fell outside the ambit of the arbitration clause. Imagine further that a conflict-of-laws analysis leads the court to conclude that the issue ought to be decided in light of local law. Now, suppose that the argument put to the court requires that it determine how arbitration agreements are to be interpreted—an issue which is not regulated by the Model Law—and that local sources provide no clear answer. A comparative inquiry would first lead to the court to understand that there are essentially three possible answers: first, that arbitration agreements should be interpreted narrowly, so as to preserve as much as possible the claimant's fundamental right to have its case heard in court; second, that arbitration agreements should be interpreted like all other contracts, in other words in light of the generally-applicable rules of contractual interpretation; third, that arbitration agreements should be interpreted broadly, meaning that in case of doubt as to the agreement's scope, a court ought to conclude that the arbitral tribunal has

27. See, e.g., BORN, *supra* note 10, at 2624 (Kluwer 2009) ("It is trite to observe that application of the public policy doctrine is potentially unpredictable and expansive. Nonetheless, national courts in most developed jurisdictions have annulled international arbitral awards on the basis of public policy only in limited, exceptional cases. Public policy has generally been invoked only in cases of clear violations of fundamental, mandatory legal rules, *not in cases of judicial disagreement with a tribunal's substantive decisions or procedural rulings.*") (emphasis added).

jurisdiction.²⁸ Furthermore, the comparative inquiry would also show that, while there is no consensus on one right approach, there is a consensus on the inadequacy of the first approach, which tends to be rejected for being inconsistent with the pro-arbitration policy underlying modern arbitration statutes.²⁹ In such a case, consideration of the relevant international normative context would further the interpretive process by narrowing the realm of acceptable answers to questions at hand. A court that is mindful of its duty to rule consistently with the statute's purpose ought to refrain, in such circumstances, from venturing outside that realm.

There is, of course, a third possible outcome, and it is that the comparative inquiry will prove fruitless in that it will reveal not only that there is no consensus on one appropriate answer to the question at hand, but also that—among the imaginable answers—none really stand out as being more internationally acceptable than others. A good example is the controversial question of the timing of the courts' consideration of objections to arbitral jurisdiction. The debate concerns whether the responding party in a pending or anticipated arbitration who denies that the claim ought to be resolved in arbitral proceedings should be able to apply to a court as soon as it wishes, or whether it should only be allowed to do so after the arbitral tribunal has made a first ruling on its own jurisdiction. In some countries like the United States³⁰ and Sweden,³¹ the respondent can bring its jurisdictional objection to a court as soon as it sees fit. In others, like in France, it can only do so after the tribunal has made a jurisdictional ruling.³² And some jurisdictions, like England and Germany, have opted for a middle-ground position, whereby the respondent will be allowed to apply immediately to a court either with the court's permission, or prior to having taken substantial steps in the arbitral proceedings.³³ The diversity in approaches adopted across jurisdictions mirrors the lack of consensus on this issue among leading commentators, whose writings reveal that there are strong arguments as to why each position can be said to better promote the efficiency of the international arbitration system.³⁴ In such a case, the only sensible conclusion is that the court should not feel constrained by the international normative context to rule one way or another.³⁵

B. Issues Governed By Uniform Law Instruments

How should the inquiry into internationally-acceptable solutions differ when the issue in dispute is governed by uniform law instruments—or by domestic provisions adopted with a view to giving effect domestically to such instruments? To

28. On these approaches, as well as the rejection of the strict interpretive approach, see *id.* at 1066.

29. See, e.g., J.D. LEW, L. MISTELIS & S. KRÖLL, *supra* note 10, at 150-51, §§ 7-61 & 7-62.

30. Provided, however, that the parties have not submitted the jurisdictional issue at hand to a final and binding decision of the arbitral tribunal. On this peculiar feature of American arbitration law, see Alan Scott Rau, *Arbitral Jurisdiction and Dimensions of "Consent,"* 24 ARB. INT. 199 (2008).

31. See Art. 2 of the 1999 Arbitration Act.

32. See, e.g., GAILLARD AND SAVAGE, *supra* note 10 at n. 407.

33. For England, see Art. 32 & 72 of the Arbitration Act of 1996. For Germany, see Art. 1032(2) of the CODE OF CIVIL PROCEDURE.

34. Compare, e.g., BORN, *supra* note 10, at 971 with GAILLARD AND SAVAGE, *supra* note 10, at 410, § 677.

35. This, of course, does not mean that it would be prevented from voluntarily choosing to rely on foreign or international sources to justify its ruling.

start, it is important to highlight that in addition to pursuing the general objective analyzed in the first part of this paper—which is to serve the needs of the users of the international arbitration system—instruments such as the New York Convention and the Model Law also pursue a second, more specific objective, which is to unify certain aspects of the law of international arbitration. Achieving this objective logically requires that such instruments be interpreted with a view to promoting their uniform application throughout the jurisdictions where they have been implemented. This point was made explicit in the 2006 amendments to the Model Law, but a provision such as Article 2A must be viewed as merely emphasizing a requirement which implicitly flows from the legal unification objective being pursued by instruments of that nature.³⁶ This requirement bears on the court's task in an important manner: whereas in the context alluded to in the previous section, the inquiry into internationally-acceptable solutions essentially entails engaging in freestanding comparative analysis, the legal unification objective pursued by uniform law instruments requires that the inquiry be conducted within an analytical framework which reflects the need to strive for a uniform application of the instrument at issue.

A first practical consequence of this distinction concerns the scope of the court's comparative inquiry. Take for example a case where a court sitting in a Model Law jurisdiction is seized of an application under Article 16(3) to rule on the arbitral tribunal's jurisdiction. Also, imagine that the issue in dispute is whether the court should review the tribunal's earlier jurisdictional ruling on a deferential or *de novo* standard. Because the court's task is essentially to engage in an exercise of legislative interpretation, the starting point of its analysis should be to determine whether there is a consensus on the answer to the question at hand—not generally among all countries which lend their support to the international arbitration system, but rather among jurisdictions in which the provisions at issue are also in effect. In other words, courts should look for a consensus among Model Law jurisdictions which have implemented Article 16 without significant modifications. If the conclusion was that there is indeed one internationally-acceptable standard of review under Article 16(3) of the Model Law, then the comparative inquiry would be completed and the court would have enough to carry out its obligation to rule consistently with the statute's purpose.

But a properly conducted comparative analysis would reveal that there is no consensus on the standard pursuant to which courts should review jurisdictional rulings under Article 16(3). Some decisions stand for the proposition that courts are empowered to fully review questions of fact and law relevant to determining whether the arbitral tribunal has jurisdiction over the case.³⁷ However, many decisions point in the opposite direction on the ground that the tribunal's ruling on its own jurisdiction is owed deference and should thus not be disturbed unless it is

36. Even before UNCITRAL's adoption of article 2A with the 2006 amendments, some Model Law jurisdictions, such as Zimbabwe and Hong Kong, had already included a similar provision in their implementing legislation. For Zimbabwe, see Art. 1(3) of the 1996 ARBITRATION ACT; for Hong Kong, see Art. 2(3) of the 1997 ARBITRATION ORDINANCE.

37. See, e.g., *PT Tugu Pratama Indonesia v. Magma Nusantara Ltd.*, [2003] SGHC 204 (Singapore High Court); *Christian Mut. Ins. Co. v. Ace Bermuda Ins. Ltd.*, [2002] Bda LR 56 (Bermuda Ct. of App.); *United Mexican States v. Cargill Inc.*, [2011] ONCA 622 (Ontario Ct. of App.).

unreasonable or tainted by a manifest error of fact or law.³⁸ What should the court called upon to interpret Article 16(3) then do? If it was not sitting in a Model Law jurisdiction, and if the issue was not governed by some other uniform law statute, its quest for internationally-acceptable solutions would end. Consideration of the relevant international normative context would not have allowed the court to identify one right answer, although it would have helped narrow the realm of acceptable solutions. However, where the issue is governed by a uniform law instrument such as the Model Law, the court's task is also to strive to arrive at a solution that will promote the uniform application of the instrument at issue. Consequently, the choice between alternatives—between a deferential or *de novo* standard, in my example—ought to be made in a manner that will further this legal unification objective, and the best way for courts to do this is by undertaking to follow uniform interpretive rules while making that choice. In other words, the international acceptability of a proposed solution to the issue at hand will depend on whether it can be justified on the basis of interpretive rules designed to further the legal unification objective being pursued.

If my example involved an issue governed by the New Convention rather than the Model Law, identifying those rules would not be a problem. The international community has long agreed on uniform rules governing the interpretation of treaties. They are set out in Articles 31-33 of the Vienna Convention on the Law of Treaties, which have often been said to codify customary law.³⁹ As those provisions have already been analyzed extensively,⁴⁰ I will not examine them in detail here. Suffice it to recall that they notably require that the treaty be interpreted in good faith and in accordance with the ordinary meaning to be given to its terms; that these terms ought to be interpreted in their context and in light of the treaty's object and purpose—which, in the case of a treaty seeking to unify certain areas of the law, unquestionably requires that the interpreter refrain from assuming that those terms have the same meaning than in a purely domestic context; that consideration should be given to the practice of states parties to the treaty (which practice includes decisions rendered by their courts, as well as statutes giving an indication of their understanding of the meaning and effect of the treaty's provision) which reveal an agreement regarding its interpretation; and that attention must be paid to the other versions of a treaty that was adopted in more than one language, as well as the related presumption according to which the terms of the treaty have the same meaning in each authentic version of the treaty.

Those rules also address the use of a treaty's *travaux préparatoires*, but it is clear from Article 32's text and context of adoption that they are to play, in the interpretive process, a less important role than the factors just alluded to. First, whereas the drafters used mandatory language in Article 31 and 33 of the Conven-

38 See *Acc Bermuda Ins. Ltd. v. Allianz Ins. Co. of Canada*, 2005 ABQB 975 (Alberta Ct. of Queen's Bench).

39 See Mark E. Villinger, *The 1969 Vienna Convention on the Law of Treaties: 40 Years After*, R.C.A.D.I. 9, 132 (2009).

40 See OLIVIER CORTEN & PIERRE KLEIN, *THE VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY* 804 (Oxford University Press 2011); MALGOSIA FITZMAURICE, OLUFEMI ELIAS & PANOS MERKOURIS, *TREATY INTERPRETATION AND THE VIENNA CONVENTION ON THE LAW OF TREATIES: 30 YEARS ON 39* (Martinus Nijhoff 2010); ANTHONY AUST, *MODERN TREATY LAW AND PRACTICE* 233 (Cambridge University Press 2007); SIR IAN SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* 114 (Manchester University Press 1984).

tion, they used merely permissive language—“may”—in Article 32. Furthermore, the *travaux préparatoires* were clearly envisaged as secondary means of interpretation, because the interpreter is only authorized to take them into consideration in one of two situations: to confirm the meaning resulting from the application of the Convention’s primary rules of interpretation, or if the analysis conducted pursuant to those rules either leaves the impugned terms’ meaning ambiguous or obscure, or leads to a manifestly absurd or unreasonable result. Article 32 leaves many important questions unanswered, such as what may the interpreter do when, in an attempt to confirm the interpretation arrived at pursuant to the primary rules of interpretation, he or she discovers that the *travaux préparatoires* actually contradict that initial interpretation.⁴¹ Nevertheless, the fact remains that the Convention’s provisions clearly indicate that the *travaux préparatoires* were intended to play a secondary role in the interpretive process. This is not surprising given that the compromise that allowed for the adoption of Articles 31-33 was based on the pre-eminence of the formal expression of the parties’ intentions.⁴²

A textbook example of the manner in which courts should interpret the New York Convention can be found in the recent decision of the Supreme Court of Canada in the *Yugraneft* case.⁴³ The key issue in dispute concerned whether an application made to Alberta courts and seeking the recognition and enforcement of an award made in Russia was time-barred under Alberta law. The application was governed by a local statute giving effect to the New York Convention, and the Court had to determine whether the application of domestic time limitations was permissible under the Convention. It could be argued that it was, on the ground that time limitations deserve to be characterized as procedural rules within the meaning of Article III. But it could also be argued that time limitations deserve to be characterized as substantive rules, in which case rejecting an application to recognize and enforce a foreign award on the ground that it is time-barred would amount to an impermissible extension of the grounds of defence which are exhaustively listed in Article V.

Throughout its reasoning on this issue, the Supreme Court was mindful to interpret the Convention with a view to promoting its uniform interpretation. It explicitly noted the importance of interpreting the Convention’s provisions in light of Articles 31-33 of the Vienna Convention of the Law of Treaties, and it was rightly adamant in dismissing as immaterial the fact that, under Canadian common law, time limitations were characterized as substantive rules. In preferring the view that time limitations ought to be characterized as procedural rules for the purposes of the Convention, the Court took into consideration the fact that, at the time of its drafting, time limitations were characterized as procedural rules in many states. The Court was also swayed by relevant state practice, as evidenced in

41. For divergent views on this point, compare Stephen M. Schwabcl, *May Preparatory Work be Used to Correct Rather than Confirm the ‘Clear’ Meaning of a Treaty Provision?*, in JERZY MAKARCZYK, *THEORY OF INTERNATIONAL LAW AT THE THRESHOLD OF THE 21ST CENTURY: ESSAYS IN HONOUR OF KRZYSZTOF SKUBISZEWSKI* 545 (Kluwer, 1996), with Santiago Torres Bernárdez, *Interpretation of Treaties by the International Court of Justice Following the Adoption of the 1969 Vienna Convention on the Law of Treaties*, in IGNAZ SEIDL-HOHENVELDERN, *LIBER AMICORUM: PROFESSOR IGNAZ SEIDL-HOHENVELDERN IN HONOUR OF HIS 80TH BIRTHDAY 739* (Kluwer Law International 1998).

42. Sinclair, *supra* note 40, at 115; Bernárdez, *supra* note 41 at 739 & 746.

43. *Yugraneft Corp. v. Rexx Mgmt. Corp.*, 2010 SCC 19 (S. Ct. of Canada).

a recent study of the International Chamber of Commerce showing that at least 53 states subjected—or would likely subject, should the question arise—applications seeking the recognition and enforcement of awards governed by the New York Convention to a time limitation. It lastly referred to the opinion of leading doctrinal commentators taking for granted that the application of local time limitations was permissible under the Convention. The Supreme Court’s interpretive approach in that case ought to be approved without any reservation.

The Model Law’s situation is different. As it is not a treaty, the interpretive rules set out in Articles 31-33 of the Vienna Convention are of course not applicable to it. Yet, there is no doubt that the legal unification objective pursued by UNCITRAL requires that the Model Law be interpreted pursuant to international and uniform interpretive rules. As was convincingly stated in one particularly well-reasoned decision from Bermuda:

The Model Law must . . . be construed in a distinctive way from the approach that would be adopted when construing ordinary domestic legislation. It is essentially international legislation, the language of which largely reflects the compromises and negotiations conducted by expert representatives from a wide array of national legal systems. [T]he Model Law [is] international in character, giving rise to the need for a distinctive interpretive approach. . . .⁴⁴

But the question arises: what, precisely, are those distinctive interpretive rules? An argument could certainly be made that Article 2A of the Model Law echoes an international consensus as to the manner in which uniform law instruments ought to be interpreted, as it uses wording found in the great majority of such instruments adopted in the past thirty years or so.⁴⁵ But that does not take us very far beyond affirming that the general principles underlying the Model Law as well as the need to promote the observance of good faith ought to be taken into consideration; the question as to what courts should precisely do to “promote uniformity in [the Model Law’s] application” would, to a significant extent, remain unanswered.

This being said, there is little reason to believe that the interpretation of the Model Law should follow rules that differ markedly from those set out in the Vi-

44. *Montpelier Reinsurance Ltd. v. Mfrs. Prop. & Cas. Ltd.*, [2008] Bda L.R. 24, § 21 (S. Ct. of Bermuda).

45. *See, e.g.*, the 1980 United Nations Convention on Contracts for the International Sale of Goods, Art. 7; the 1983 UNIDROIT Convention on Agency in the International Sale of Goods, Art. 6; the 1988 UNIDROIT Convention on International Factoring, Art. 4; the 1988 UNIDROIT Convention on International Financial Leasing, Art. 6; the 1988 United Nations Convention on International Bills of Exchange and International Promissory Notes, Art. 4; the 1991 United Nations Convention on the Liability of Operators of Transport Terminals in International Trade, Art. 14; the 1995 United Nations Convention on Independent Guarantees and Stand-By Letters of Credit, Art. 5; the 1997 UNCITRAL Model Law on Cross-Border Insolvency, Art. 8; the 2001 United Nations Conventions on the Assignment of Receivables in International Trade, Art. 7; the 2001 UNIDROIT Convention on International Interests in Mobile Equipment, Art. 5; the 2001 UNCITRAL Model Law on Electronic Signatures, Art. 4; the 2005 United Nations Conventions on the Use of Electronic Commerce in International Contracts, Art. 5; the 2008 United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, Art. 2; the 2008 UNIDROIT Model Law on Leasing, Art. 4; the 2009 UNIDROIT Convention on Substantive Rules for Intermediate Securities, Art. 4; the 2010 UNIDROIT Principles on International Commercial Contracts, Art. 1.6.

enna Convention. Taking into consideration relevant foreign cases—which UNCITRAL itself has encouraged courts to do since the early days,⁴⁶ but particularly forcefully since it decided to launch its CLOUT reporting system⁴⁷—is obviously a must, and it is therefore not surprising that in the most internationally-minded decisions, courts have not hesitated to consider foreign case law to elucidate an ambiguous provision of the Model Law. Common sense also suffices to support the proposition that judges who take the promotion of uniformity in the Model Law’s application seriously refrain from assuming that the terms thereof ought to be given the same meaning, or that legal institutions ought to be characterized in the same way, as in a purely domestic context.⁴⁸ Furthermore, as the Model Law was drafted in six different languages, the terms thereof must be deemed to have the same meaning in all versions, which means that courts ought to reject an interpretation of a provision that cannot be supported by the text of all versions of the Model Law.

The only real point of divergence concerns the use of the *travaux préparatoires*. As was mentioned earlier, the Vienna Convention affords to a treaty’s negotiating history a subsidiary role in the interpretive process. The interpreter is formally authorized—not required—to consider them to confirm the meaning derived from the Convention’s primary rules of interpretation, or where the analysis conducted pursuant to those rules either does not eliminate the ambiguity or leads to a manifestly absurd or unreasonable result. However, there is much to be said for not treating the Model Law’s *travaux préparatoires* as a merely secondary source. Indeed, the General Assembly of the United Nations underscored the importance of the *travaux préparatoires*—specifically those relating to UNCITRAL’s eighteenth session, which include a detailed analytical commentary, as well as the Commission’s article-by-article analysis of the Model Law’s last draft—when it recommended that they be sent to the world’s governments together with the text of the Model Law.⁴⁹ This strongly suggests that they ought to be given more than a secondary role. And it is worth noting that courts that have turned to the *travaux préparatoires* to interpret the Model Law have generally not expressed any reservations as to the circumstances under which they ought to be considered.⁵⁰ In other words, the practice of those internationally-minded

46. UNCITRAL, *Dissemination of Decisions Concerning UNCITRAL Legal Texts and Uniform Interpretation of Such Texts: Note by Secretariat*, A/CN.9/267, ¶ 9, 21 February 1985.

47. Report of the United Nations Commission on International Trade Law on the Work of its Twenty-First Session (New York, 11-20 April 1988), § 98, A/CN.9/SER.C/GUIDE/1/Rev.2.

48. A good example of what not to do is provided in an early Canadian Model Law decision, in which a first instance court unfortunately analysed the scope of the arbitral tribunal’s obligation to state the reasons upon which its award is based (Art. 31(2)) by referring to domestic precedents in the field of administrative law. See *Navigation Sonamar Inc. v. Algoma Steamship Limited*, [1987] R.J.Q. 1346 (Superior Ct. of Québec).

49. See United Nations General Assembly Resolution, *supra* note 18, at 40/72; Explanatory Note by the UNCITRAL Secretariat on the 1985 Model Law on International Commercial Arbitration as Amended in 2006, *supra* note 17, at Ch. vii.

50. See, e.g., *Skandia Int’l Ins. Co. and Others v. Al Amana Ins. and Reinsurance Co. Ltd.*, [1994] Bda LR 30, 43 (Bermuda S. Ct.) (“[I]n light of the foregoing the construction of the words of the document cannot be on the ‘literal rule’ basis. It has to take into account the ‘travaux préparatoires’ that shed light on Article 7 of the Model Law.”), *Christian Mut. Life Ins. Co. and Others v. ACE Bermuda Ins. Ltd.*, [2002] Bda LR 1 (Bermuda S. Ct.) (in that ruling, at 23, the Judge first “consider[ed] Article 16 by using the *travaux préparatoires* . . . [and] mention[ed] that section 24 of the 1993 [Bermuda International Conciliation and Arbitration] Act permits use of *travaux préparatoires* [sic] for

courts that have considered the Model Law's *travaux préparatoires* does not tend to support the idea that they ought to be treated as a secondary source that courts would be under no duty to consider.

This being said, there are compelling reasons why courts should be careful when considering what weight ought to be given to statements made by the Model Law's drafters regarding how a given provision ought to be interpreted. They may be tempted to always treat such statements as determinative, on the grounds that doing so will surely promote certainty, predictability and, most importantly, the uniformity in the Model Law's application. However, it must never be forgotten that achieving unity is not the end in itself; it is merely a means to achieve the ultimate objective, which is to ensure that the rules governing the arbitral process—and the courts' interaction therewith—will be responsive to the users' needs. Giving determinative weight to the *travaux préparatoires* could, in some situations, be inconsistent with that goal, as the passage of time may have shown that another interpretation of an ambiguous provision than the one envisaged by the drafters in the early 1980s best serves the needs of the users of the international arbitration process. In other words, there is risk that, by giving too much importance to the *travaux préparatoires*, courts will prevent the Model Law from adapting to changes of circumstances regarding the parties' needs and, in so doing, fail to properly further the statute's fundamental objective.

III. CONCLUSION

There is a compelling case for expecting from judges, who sit in states that have signalled their willingness to support the international arbitration system, to always consider the relevant international normative context while resolving issues of international arbitration law to which local sources those judges are bound to apply offer no obvious answer. That said, we need to be mindful of further, more practical, questions that arise from the adoption of an internationalist interpretive approach. One relates to the allocation of responsibilities between the parties and the courts in seeking out the materials on the basis of which the comparative inquiry will be conducted. Should courts rely entirely on the materials submitted by the parties, or should they instead be authorized, and even encouraged, to conduct their own research into the relevant international normative context? My preliminary view is that judges should not remain passive when they feel that the

the purposes of interpreting the Model Law", to then expressly state, at 29, that his conclusion was based on "[his] analysis of, the ruling of the Courts of Bermuda, *travaux préparatoires* and commentaries on the Model Law . . .", without establishing a hierarchy between the three sources); *WSG Nimbus Pte Ltd. v. Bd. of Control for Cricket in Sri Lanka* [2002] SGHC 104 (Singapore High Ct.), at ¶ 18 ("[s]ection 4 of the [Singapore International Arbitration] Act provides that, for the purposes of interpreting the Model Law, reference may be made to *travaux préparatoires* of the UNCITRAL and its working group relating to the Model Law."), *Montpelier Reinsurance Ltd. (Bermuda) v. Mfrs. Prop. & Cas. Ltd.*, [2008] Bda LR 24, ¶ 20 (Bermuda S. Ct.) ("[i]nterpreting the Model Law still presents new challenges, partly because a variety of issues have yet to be determined by this Court or the courts in any jurisdiction where the Model Law applies. There is only really one prominent practitioner's text on the Model Law, Holtzmann and Neuhaus, "A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary" The commentary in this text is authoritative because it is based on the *travaux préparatoires* of the Conference which adopted the Model Law..."). See also *Comandac Marine Corp v. Pan Australia Shipping Pty Ltd*, [2006] FCAFC 192, ¶ 200 (Australia Fed. Ct., Ct. of App.).

parties' submissions do not allow them to get a good enough understanding of how the questions at hand tend to be answered in other jurisdictions. A more proactive stance is preferable, given the basic duty all judges have to correctly apply the law in force in their own jurisdiction. A good example was set by the Court of Appeal of Singapore in a case involving the reviewability of negative jurisdictional rulings under the local statute governing international arbitration, which implements the Model Law. One issue that arose was whether such rulings ought to be characterized as arbitral awards, which would make them subject to setting aside proceedings under Article 34. Feeling that the parties had not sufficiently argued the point, the Court asked them to file further submissions. It also sought the opinion of Professor Lawrence Boo, who provided an internationalist perspective on the issue in dispute which proved to be determinative.⁵¹

Another important practical question that I intend to explore further in future research projects is the extent to which experts should be allowed to assist courts in ascertaining the relevant international normative context. It may be tempting, especially for judges who have little experience in international arbitration but who nevertheless understand the importance of adopting an internationalist approach, to be quite permissive in either allowing the parties to submit expert evidence or appointing an expert themselves. However, given the crucial importance of cost-efficiency to most users of the international arbitral process, as well as the significant impact that involving experts may have on the cost and duration of proceedings, my preliminary view is that courts should be strongly encouraged to restrict this practice to those cases where—and to the extent that—expert evidence is clearly necessary. Such a cautious approach seems all the more justified since authoritative comparative analysis of most issues of international arbitral law is already available in leading treatises and law journals articles that judges are perfectly capable of sufficiently deciphering without the help of experts.

51. PT Asuransi Jasa Indonesia (Persero) v. Dexia Bank SA, [2006] SGCA 41.