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# Comparative Law and International Dispute Resolution Processes: Looking Forward, Looking Back

S.I. Strong\*

## I. INTRODUCTION

The last few years have been momentous ones in the area of cross-border dispute resolution. Numerous countries have sought to bring the innovations of international commercial arbitration into their national legal systems by creating international business courts operating in English and/or with foreign judges sitting alongside national judges,<sup>1</sup> while other jurisdictions have signed onto new international instruments facilitating the resolution of cross-border legal disputes. One of these agreements—the United Nations Convention on International Settlement Agreements Resulting from Mediation (Singapore Convention on Mediation)—came to fruition in record time (a mere five years from start to finish) and with record adherence (an unheard-of forty-six state signatories on the opening day),<sup>2</sup> while another—the Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (Hague

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1. See S.I. Strong, *International Commercial Courts and the United States: An Outlier by Choice and by Constitutional Design?*, in INTERNATIONAL BUSINESS COURTS: A EUROPEAN AND GLOBAL PERSPECTIVE 255, 260 (Xandra Kramer & John Sorabji eds., 2019) [hereinafter Strong, *International Commercial Courts*] (noting the United States appears to be lagging in this endeavor, as compared to European, Asian, and Middle Eastern jurisdictions). Some authorities suggest that international commercial arbitration is the predominant means of resolving cross-border commercial disputes. See GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 73 (2014). However, recent empirical work has suggested that other fora, most notably the English Commercial Court, compete directly with international commercial arbitration for large-value, international commercial disputes and may be as successful as international commercial arbitration. See generally chapter 4 of S.I. STRONG, LEGAL REASONING ACROSS COMMERCIAL DISPUTES: COMPARING JUDICIAL AND ARBITRAL ANALYSES (forthcoming 2021) [hereinafter STRONG, LEGAL REASONING] (undertaking a multi-faceted empirical study of legal reasoning in commercial disputes, studying purported differences across the arbitral-judicial, domestic-international, and common law-civil law divides).

2. See U.N. Comm. on Int'l Trade Law, Report of the U.N. Comm. on Int'l Trade Law, Fifty-First Session, U.N. Doc. A/73/17 (2018) at Annex I [hereinafter Singapore Convention on Mediation]; Timothy Schnabel, *The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements*, 19 PEPP. DISP. RESOL. L.J. 1, 4 (2019); see also Status: United Nations Convention on International Settlement Agreements Resulting from Mediation, [https://uncitral.un.org/en/texts/mediation/conventions/international\\_settlement\\_agreements/status](https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements/status) (last visited May 13, 2020) (showing fifty-two current signatories). The Singapore Convention on Mediation will go into force on September 12, 2020, following the deposit of instruments of ratification from three countries: Fiji, Qatar, and Singapore. See *id.* Saudi Arabia has also deposited an instrument of ratification, with the treaty going into effect on November 5, 2020. See *id.*

Judgments Convention)—has been more than twenty-five years in the making, proving that patience is a virtue in treaty deliberations.<sup>3</sup>

While these initiatives were doubtless influenced by a variety of factors<sup>4</sup> and can be analyzed from a variety of perspectives,<sup>5</sup> one approach that is often overlooked involves the role that comparative law plays in the process, both with respect to decisions involving which projects to pursue and decisions relating to the ultimate shape of the instruments and mechanisms themselves.<sup>6</sup> Comparative law also plays a vital role in the evaluation of the actual or prospective success of new proposals.<sup>7</sup>

While comparative law scholars have traditionally focused on substantive considerations, comparative analyses can also be extended to questions of procedural law.<sup>8</sup> Indeed, eminent comparatist Jürgen Basedow has argued that

3. See Louise Ellen Teitz, *Another Hague Judgments Convention? Bucking the Past to Provide for the Future*, 29 DUKE J. COMP. & INT'L L. 491, 493 (2019); Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters [hereinafter Hague Judgments Convention], <https://www.hcch.net/en/instruments/conventions/full-text/?cid=137> (last visited May 15, 2020) (at this point, only one country has signed the Hague Judgments Convention).

4. For example, law and economics scholars have discussed the concept of the “litigation market” and the extent to which different countries and different procedures compete for “litigation business” through the process of “forum selling.” See Pamela K. Bookman, *The Adjudication Business*, SSRN, (forthcoming 2020), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3338152](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3338152); Marta Requejo Isidro, *International Commercial Courts in the Litigation Market*, Max Planck Institute Luxembourg for Procedural Law Research Paper Series, No. 2019, § 3.2, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3327166](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3327166) (last visited May 15, 2020). “Forum selling” arises when a legal system attempts to attract foreign litigants to its courts, whereas “forum shopping” arises when parties attempt to locate their disputes in venues that maximize the benefit to themselves. See Pamela K. Bookman, *The Unsung Virtues of Global Forum Shopping*, 92 NOTRE DAME L. REV. 579, 582–83 (2016) [hereinafter Bookman, *Forum Shopping*]; Daniel Klerman & Gregory Reilly, *Forum Selling*, 89 SO. CAL. L. REV. 241, 242–43 (2016). Both phenomena have their advantages and disadvantages. See Bookman, *Forum Shopping*, *supra*, at 582–83; Klerman & Reilly, *supra*, at 242–43.

5. See, e.g., Schnabel, *supra* note 2, at 1 (reflecting the view of one of the primary negotiators of the Singapore Convention on Mediation); S.I. Strong, *Clash of Cultures: Epistemic Communities, Negotiation Theory, and International Lawmaking*, 50 AKRON L. REV. 495 (2017) (considering the process from the perspective of negotiation theory); S.I. Strong, *The Role of Empirical Research and Dispute System Design in Developing International Treaties: A Case Study of the Singapore Convention on Mediation*, 20 CARDOZO J. CONFLICT RESOL. 1103 (2019) [hereinafter Strong, *Singapore Convention*] (adopting a dispute system design perspective); Teitz, *supra* note 3, at 491 (reflecting the view of one of the negotiators of the Hague Judgments Convention).

6. See Strong, *Singapore Convention*, *supra* note 5, at 1120; see also S.I. Strong, *Realizing Rationality: An Empirical Assessment of International Commercial Mediation*, 73 WASH. & LEE L. REV. 1973, 2048 (2016) [hereinafter Strong, *Realizing Rationality*] (reflecting a comparative empirical analysis that was presented to state delegates debating the Singapore Convention on Mediation at the United Nations Commission on International Trade Law (“UNCITRAL”).

7. See Lisa Blomgren Bingham, *Designing Justice: Legal Institutions and Other Systems for Managing Conflict*, 24 OHIO ST. J. ON DISP. RESOL. 1, 9 (2008); Strong, *Realizing Rationality*, *supra* note 6, at 2048 (noting state delegates to UNCITRAL Working Group II asked for a comparative analysis prior to undertaking deliberations on the Singapore Convention on Mediation); Strong, *Singapore Convention*, *supra* note 5, at 1120.

8. See H. Patrick Glenn, *Comparative Law and Legal Practice: On Removing the Borders*, 75 TUL. L. REV. 977, 998 (2001) (noting that international commercial arbitration is “a *sui iuris* institution, with its own character and standing, independent of a national legal system” and is therefore suitable for comparative study); Andreas Lowenfeld, *The Two-Way Mirror: International Arbitration as Comparative Procedure*, XI REV. BRASILEIRA DE ARBITRAGEM 186, 189–99 (2014); Jan Paulsson, *Arbitration in Three Dimensions*, 60 INT'L & COMP. L. Q. 291, 312 (2011) (“Anyone who wishes to insist that various failed states, simply because their flags fly at the U.N., are more entitled to be considered ‘legal orders’ than, say, the institution of arbitral proceedings conducted under the rules of the United Nations Commission on International Trade Law (UNCITRAL) as supported by the New

international commercial arbitration has revolutionized the field of comparative law, transforming what was once characterized as a somewhat academic discipline with limited practical application outside of law–unification projects into “a kind of ‘living comparison’ of laws. . . emerging from the continuous communication between persons educated in different intellectual and legal contexts.”<sup>9</sup>

For these reasons, the American Society of Comparative Law (“ASCL”) decided to devote its 2019 Annual Meeting to the topic, “Comparative Law and International Dispute Resolution Processes.” In so doing, organizers sought to delve more deeply into how comparative law operates—formally and informally, visibly and invisibly, publicly and privately—in cases involving cross–border dispute resolution. In an attempt to capture a wide variety of procedural processes, the concept of “cross–border dispute resolution” was defined to encompass litigation, arbitration, mediation, conciliation, and negotiation, as well as related practical and theoretical concerns.

The papers published in this special issue of the *Journal of Dispute Resolution* were written by the plenary panelists at the Annual Meeting.<sup>10</sup> The first three papers

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York Convention, is perhaps a prisoner of hollow definitions.”); Javier H. Rubinstein, *International Commercial Arbitration: Reflections at the Crossroads of the Common Law and Civil Law Traditions*, 5 CHI. J. INT’L L. 303, 303 (2004); S.I. Strong, *General Principles of Procedural Law and Procedural Jus Cogens*, 122 PENN ST. L. REV. 347, 388 (2018) [hereinafter Strong, *Jus Cogens*] (discussing comparative law’s role in the development of general international principles). Indeed, the Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law recently initiated a new five–year project, “Comparative Procedural Law and Justice.” Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law, <https://www.mpi.lu/news-and-events/2019/october/copmerative-procedural-law-and-justice/comparative-procedural-law-and-justice/> (last visited May 13, 2020).

9. Jürgen Basedow, *Comparative Law and Its Clients*, 62 AM. J. COMP. L. 821, 856 (2014). Arbitration scholars have enunciated similar sentiments, indicating that:

International commercial arbitration has radically transformed the role of comparative law. Not long ago, comparative law was perceived to be an academic discipline. Its primary function was to provoke reflection on various legal systems and could at its best lead to legislative reform. International commercial arbitration revolutionized the field, transforming comparative law into an eminently practical and often lucrative discipline. Indeed, in many instances important international commercial litigations are won, based on the resolution of issues of comparative law.

Emmanuel Gaillard, *The Use of Comparative Law in International Commercial Arbitration*, in ICCA CONGRESS SERIES NO. 4: ARBITRATION IN SETTLEMENT OF INTERNATIONAL COMMERCIAL DISPUTES INVOLVING THE FAR EAST AND ARBITRATION IN COMBINED TRANSPORT 281, 283 (Pieter Sanders ed., 1989); see also Klaus Peter Berger, *International Arbitral Practice and the UNIDROIT Principles of International Commercial Contracts*, 46 AM. J. COMP. L. 129, 130–31 (1998).

10. The conference also included a works in progress conference, and two of those papers are also published in this volume. Csongor István Nagy contributed a piece titled *The Reception of Collective Actions in Europe: Reconstructing the Mental Process of a Legal Transplantation*, which discusses “the process of developing the European collective action and its outcome.” Specifically, Professor Nagy evaluates the legal transplantation—and “comprehensive adaptation”—of collective litigation from the United States to the European Union. Csongor István Nagy, *The Reception of Collective Actions in Europe: Reconstructing the Mental Process of a Legal Transplantation*, 2020 J. DISP. RESOL. 413 (2020). Asli E. Gurbuz Usuel’s piece, *Mandatory or Voluntary Mediation? Recent Turkish Mediation Legislation and a Comparative Analysis with the EU’s Mediation Framework*, “explore[s] mediation practice in Turkey and question[s] its success as a dispute resolution system” and “assesses EU legislation on mediation in civil and commercial disputes.” The main focus of Professor Usuel’s Article is, as the title suggests, a comparative analysis of EU versus Turkish mediation—both as it stands today and as it might be in the future. Asli E. Gurbuz Usuel, *Mandatory or Voluntary Mediation? Recent*

arose out of the first plenary session, which provided an overview of comparative law in traditional forms of cross-border dispute resolution: litigation, arbitration, and mediation. The second three papers arose out of the second plenary session, which focused on the future of the field. All six articles provide useful insights into an important and rapidly changing area of law.

## II. RETROSPECTIVE PERSPECTIVE

The first trio of submissions began with an article by Ronald Brand entitled “Comparative Method and International Litigation.”<sup>11</sup> In this piece, Professor Brand considers how the comparative method informs cross-border litigation by focusing on three basic questions: (1) *where* a researcher stands when looking at legal issues; (2) *what* law is considered when a researcher looks at legal issues; and (3) *how* a researcher looks at legal issues.<sup>12</sup> In so doing, Professor Brand used the Hague Judgments Project and analogous European Union innovations as analytical paradigms, a technique that not only provides important insights into how various instruments were developed, but also demonstrates the extent to which comparative law informed the individual processes.<sup>13</sup>

The second paper from the first plenary was “International Arbitration as Comparative Law in Action,” by Joshua Karton.<sup>14</sup> Unlike litigation, which tends to be situated within the procedural norms of a particular jurisdiction,<sup>15</sup> international commercial arbitration consciously combines elements of common law and civil law procedure and thus enjoys the reputation of being “comparative law-in-action.”<sup>16</sup> Professor Karton goes beyond the standard observations and recognizes that some aspects of international arbitration involve an array of potentially applicable laws, thereby creating the problem of “too many laws.”<sup>17</sup> In other instances, international arbitration suffers from “too little law,” meaning the absence of any formally binding legal principles.<sup>18</sup> According to Professor Karton, comparative law provides an essential means of determining the optimal outcome as a matter of both substantive and procedural law.<sup>19</sup>

The final contribution to the first plenary comes from Kun Fan and is entitled “Mediation of Investor-State Disputes: A Treaty Survey.”<sup>20</sup> This submission considers whether and to what extent mediation—an alternative dispute resolution

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*Turkish Mediation Legislation and a Comparative Analysis with the EU’s Mediation Framework*, 2020 J. DISP. RESOL. 445 (2020).

11. See Ronald A. Brand, *Comparative Method and International Litigation*, 2020 J. DISP. RESOL. 273 (2020).

12. See *id.*

13. See *id.*

14. See Joshua Karton, *International Arbitration as Comparative Law in Action*, 2020 J. DISP. RESOL. 293 (2020).

15. The new international commercial courts are challenging that particular approach. See Strong, *International Commercial Courts*, *supra* note 1, at 260.

16. See Gaillard, *supra* note 9, at 283.

17. See Karton, *supra* note 14.

18. See *id.*

19. See *id.* Interestingly, recent empirical studies have suggested that judges and arbitrators approach legal research differently, depending on whether the dispute is substantive or procedural in nature. STRONG, *LEGAL REASONING*, *supra* note 1.

20. See Kun Fan, *Mediation of Investor-State Disputes: A Treaty Survey*, 2020 J. DISP. RESOL. 327 (2020).

mechanism that has been typically framed as private in nature—can or should be used to resolve matters arising in investment arbitration, a quasi-public dispute resolution mechanism involving sovereign states as respondents.<sup>21</sup> Relying on a range of comparative and empirical studies, Professor Fan demonstrates that while many of the concerns relating to use of mediation in private disputes also affect mediation of investment concerns, the unique nature of investment dispute resolution gives rise to additional matters that must be addressed before mediation becomes widespread in the investment context.<sup>22</sup> Despite the difficulties involved, Professor Fan appears sanguine that recent developments, including the promulgation of the Singapore Convention on Mediation, will prove helpful in expanding the use of mediation in investment disputes.<sup>23</sup>

### III. THE FUTURE OF THE FIELD

Whereas the first plenary adopted something of a retrospective perspective on international dispute resolution by focusing on conventional means of addressing legal disputes (i.e., litigation, arbitration, and mediation), the second plenary was more prospective in its outlook and considered the ways in which the field of dispute resolution might change in the coming years and how comparative law might contribute to those developments. The authors of the second set of contributions contemplated how external pressures and innovations would affect procedural law and processes.

The first paper in this category was “International Dispute System Design: Shoals and Shifting Goals,” by Janet Martinez.<sup>24</sup> Dispute system design is a growing field of scholarly inquiry and focuses on the creation and optimization of dispute resolution at a systemic rather than individual level.<sup>25</sup> Comparative analyses are often an excellent way to evaluate system design, and Professor Martinez uses a comparative approach to consider whether and to what extent systems generated to resolve disputes involving international commerce, international trade, and international investments have developed, both historically and in response to contemporary pressures.<sup>26</sup>

The second piece from the second plenary is “Addressing the Class Claim Conundrum with Online Dispute Resolution,” by Amy Schmitz.<sup>27</sup> In this article, Professor Schmitz considers how a relatively new dispute resolution mechanism—online dispute resolution—can address the longstanding problems with large-scale consumer disputes.<sup>28</sup> Numerous practical and theoretical problems arise in matters involving large numbers of small-value claims, and the most well-known form of mass relief, the U.S. class action, has largely been rejected by other countries, which

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21. See Strong, *Jus Cogens*, *supra* note 8, at 364.

22. See Fan, *supra* note 20.

23. See *id.*; see also Singapore Convention on Mediation, *supra* note 2.

24. See Janet Martinez, *International Dispute System Design: Shoals and Shifting Goals*, 2020 J. DISP. RESOL. 343 (2020).

25. See NANCY H. ROGERS ET AL., *DESIGNING SYSTEMS AND PROCESSES FOR MANAGING DISPUTES* 4–5 (2d ed. 2018).

26. See Martinez, *supra* note 24.

27. See Amy J. Schmitz, *Addressing the Class Claim Conundrum with Online Dispute Resolution (ODR)*, 2020 J. DISP. RESOL. 361 (2020).

28. See *id.*

have instead developed their own collective redress mechanisms.<sup>29</sup> While global resolution of these matters might be appropriate from both an efficiency and regulatory perspective, difficulties can arise when the relief or procedures adopted in one country do not correlate with relief or procedures used elsewhere.<sup>30</sup> In her analysis, Professor Schmitz compares the U.S. class action with various forms of collective redress developed by the European Union and individual Member States, then considers how certain procedural challenges might be overcome through use of online dispute resolution.<sup>31</sup>

The final article from the plenary presentations comes from Jacqueline Nolan–Haley and is entitled “International Dispute Resolution and Access to Justice: Comparative Law Perspectives.”<sup>32</sup> Professor Nolan–Haley focuses on high–level concerns and discusses how different countries have responded to challenges brought about by increased reliance on extra–judicial forms of dispute resolution (often referred to as alternative dispute resolution) and whether the right to access to justice has been appropriately respected during that process.<sup>33</sup> Professor Nolan–Haley uses the United States, Europe, and parts of Africa as comparators, thereby bringing a suitably global conclusion to the conference submissions.<sup>34</sup>

#### IV. CONCLUSION

As the preceding suggests, comparative law has a vital role to play in the development and evaluation of cross–border dispute resolution. Hopefully the coming years will see more analyses of this nature, not only for the benefit of international actors but also for the benefit of domestic audiences, who can learn much from other legal systems. As Wendell Berry once said, “It is not from ourselves that we will learn to be better than we are.”<sup>35</sup>

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29. See S.I. STRONG, CLASS, MASS, AND COLLECTIVE ARBITRATION 2 (2012).

30. See *id.* at 3.

31. See Schmitz, *supra* note 27.

32. See Jacqueline Nolan–Haley, *International Dispute Resolution and Access to Justice: Comparative Law Perspectives*, 2020 J. DISP. RESOL. 391 (2020).

33. See *id.*

34. See *id.*

35. Wendell Berry, *A Native Hill*, in *THE ART OF THE COMMONPLACE: THE AGRARIAN ESSAYS OF WENDELL BERRY* 1, 29 (2002).