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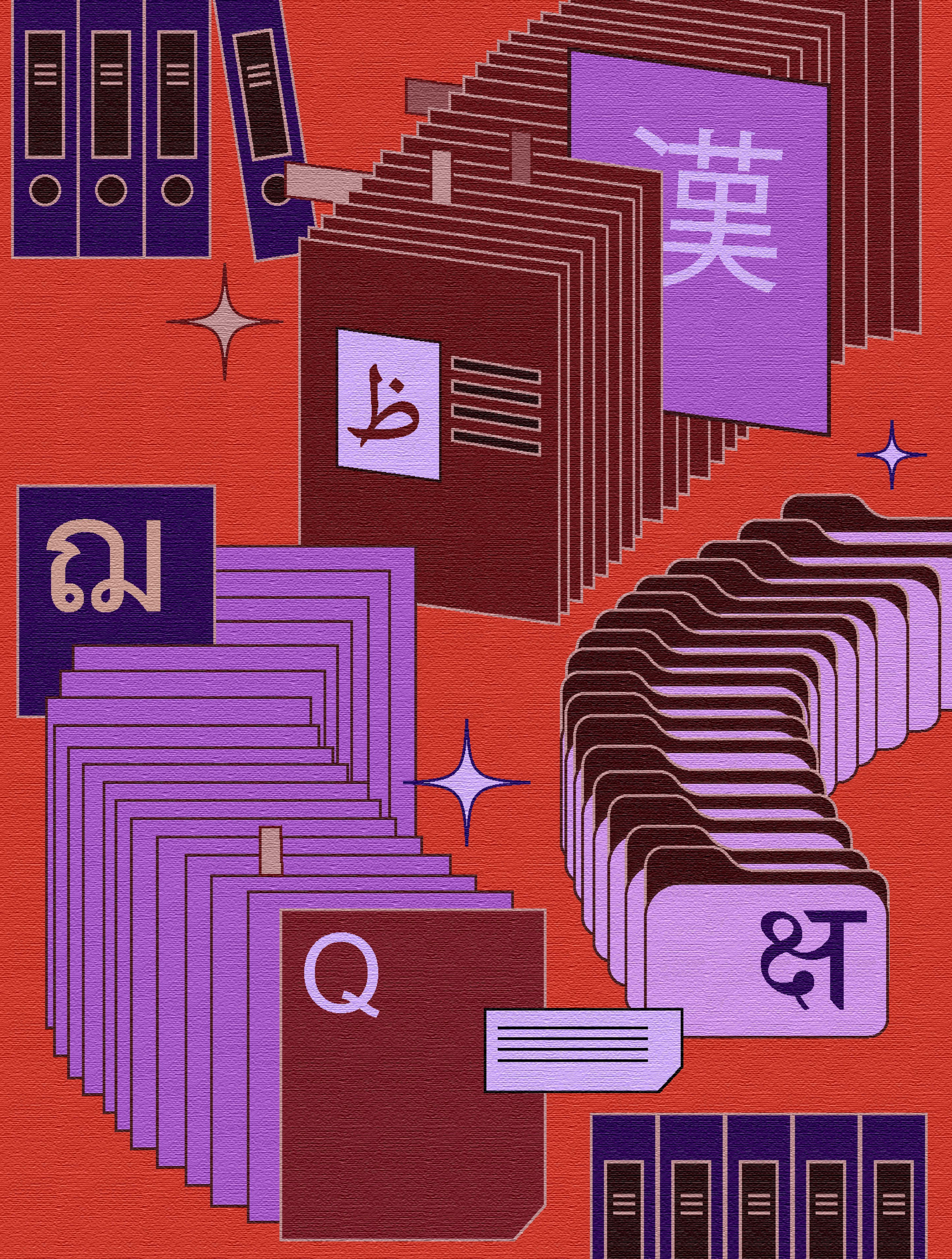
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COMMERCIAL CONTRACTS AND INTERNATIONAL ARBITRATION EMPIRICAL STUDIES

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This article outlines two interdisciplinary research projects designed by Cordero-Moss for the General Course she will hold in 2027 at The Hague Academy of International Law. The General Course is devoted to the role of national law in contract construction in international commercial arbitration. Legal literature on this subject is abundant; to meet the high expectations surrounding a General Course of The Hague Academy, she considered it appropriate to employ empirical methods to verify the prevailing narrative on this topic.

While the procedural framework of arbitration gives arbitral tribunals significant discretion – particularly concerning how, and on the basis of which sources, contracts are construed – there is little empirical data on how this discretion is exercised. This is mainly due to the confidentiality of commercial arbitration that prevents systematic analysis of arbitral decisions. Unlike awards rendered in investment disputes, which are regularly published, the few published commercial awards are typically excerpts, and their selection is not necessarily representative. If a systematic analysis of commercial arbitral awards is not possible, much of what is said about arbitral tribunals' approach to contract construction will be based on anecdotal knowledge, or the ideology of the speaker.

The narrative spans from asserting that arbitral tribunals are fully detached from any national law to insisting that they have to be faithful to the applicable law. International commercial arbitral tribunals are often said to make decisions solely based on a contract's wording and transnational principles, without concern for an accurate application of the applicable law. This would result in an autonomous and uniform approach, detached from specific legal traditions.

How can this narrative be verified? Our main aim is to explore whether there is a uniform approach to contract construction in arbitration and, if so, whether it leads to uniform outcomes. In our projects, we apply empirical methods to assess to what extent a contract's wording is given uniform legal effects in arbitration – without influence from national legal traditions – just like linguistics assesses whether words have an absolute meaning or instead take meaning on the basis of the reader's frame of reference, and psychology assesses to what extent perception is subject to cognitive bias. The projects also intend to ascertain to what extent there is a correlation between the arbitrators' legal background (education, type of practice, etc.) and their approach to contract construction, as well as its outcome – what could be defined as legal bias, and I have elsewhere defined as "legal imprinting".

The narrative our projects intend to verify is mainly based on the following features of international commercial arbitration:

I. Arbitration is, to a large extent, autonomous from state law thanks to its procedural legal framework – first and foremost the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, but also national arbitration laws, largely harmonized by the UNCITRAL Model Law on International Commercial Arbitration. Under these instruments, arbitral awards shall be recognized and enforced, subject to narrow exceptions, even if they apply the law incorrectly or do not apply state law at all.

   As arbitral awards can be valid and enforceable even when they are not accurately based on the applicable law, it is sometimes inferred that tribunals disregard the law and apply a uniform approach instead.

   The projects will verify whether arbitral tribunals in fact have a uniform approach to contract construction.

II. Sources of soft law such as the UNIDROIT Principles of International Commercial Contracts are proliferating, thereby

enhancing the harmonization of contract law. Tribunals also have flexibility to apply soft-law sources rather than state law.

It is sometimes maintained that – partly owing to growing harmonization – state laws are converging, and that the traditional divide between common law and civil law (not to mention differences existing even within each of these legal families) is overstated. On this basis, it is sometimes inferred that tribunals apply a uniform set of transnational principles.

The projects will verify whether contract construction in arbitration follows a transnational approach reflecting assumedly converging legal traditions.

III. Contracts are drafted in a relatively standardized style: they are mainly written in English and often adopt a lengthy and detailed style inspired by common law contracts. Contracts regulate not only the specific aspects of the legal relationship (such as the price and product specifications), but also the general operation of the contract: how it should be interpreted, how it should be performed, what remedies apply in case of breach, and so on.

As contracts set out, in relatively standardized language, rules of general contract law, it is sometimes asserted that the applicable state law is redundant.

The projects will verify whether contract wording is, in practice, self-sufficient.

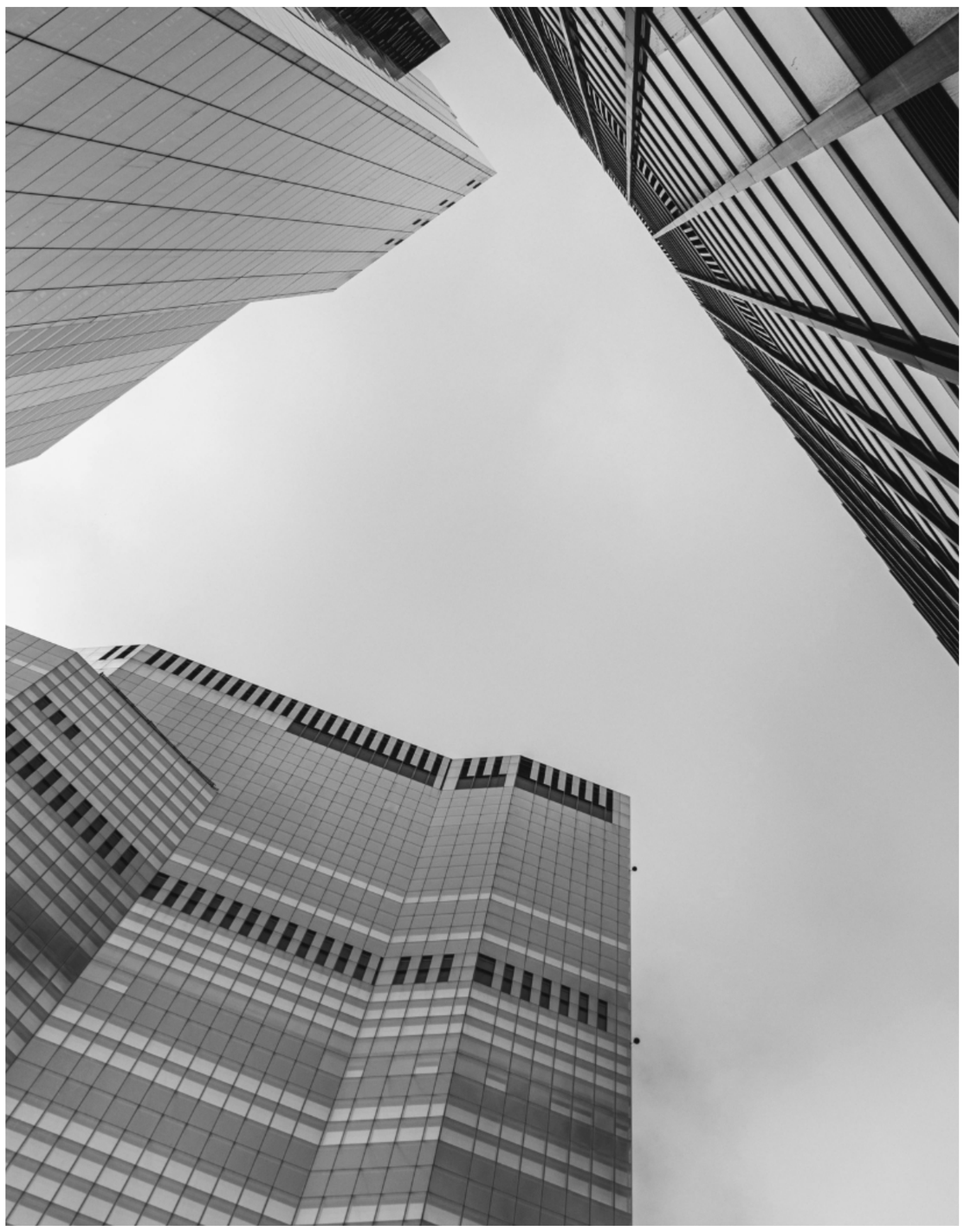
One of our projects consists of a systematic analysis of all awards rendered under the Arbitration Rules of the International Chamber of Commerce (ICC) in 2000, 2010, and 2020.

This systematic review of awards was carried out by Cordero-Moss thanks to the generosity of the ICC, which opened its archives to her. She reviewed all ICC awards in those years rendered in English, on the merits, and in international disputes (a total of 727 awards). Each award was broken down into the main issues that were decided, resulting in a total of 1,592 issues. For each issue, the tribunal's approach was registered, as well as the outcome. These data are now subject to quantitative analysis carried out by Miozzo.

The purpose of this project is to verify: (i) to what extent the contract was given effect solely on the basis of its language or was interpreted in combination with other elements; (ii) which elements, if any, were considered in addition to the contract terms (such as the governing law, transnational law, usages, generally recognized principles, etc.); and (iii) on what basis the arbitral tribunal determined these elements (conflict rules, comparative analysis, tribunal discretion, etc.).

The second project is based on a questionnaire featuring 10 hypothetical cases for which about 100 international arbitrators selected a solution from options reflecting different approaches. The list of participants will be published here.

The purpose of this project is to examine the basis on which arbitrators give legal effect to a contract's wording. A pilot project has already been concluded and is discussed here.



The questionnaire was developed by a team led by Cordero-Moss and consisting of: (i) lawyers from various legal systems – Diego Fernandez Arroyo (Sciences Po, Paris), Gary Bell (National University of Singapore), Franco Ferrari (New York University), and Cristiano Zanetti (University of São Paulo); (ii) linguists (in the pilot project) – Lucia Busso (Aston University) and Chiara Zanchi (University of Pavia); (iii) psychologists (in the main project) – Bruno Laeng (University of Oslo), Michele Miozzo (Columbia University), and Robert Wiley (University of North Carolina, Greensboro).

The cases were designed to highlight three decision-making approaches: (i) reliance on the applicable law; (ii) reliance on transnational principles; and (iii) reliance solely on contract wording. For the latter two approaches, two diverging outcomes were offered – reflecting, respectively, (i) common-law and (ii) civil-law solutions.

Pursuant to the comparative-law method developed in Rodolfo Sacco's seminal work (*Legal Formants: A Dynamic Approach to Comparative Law*, 39 AM. J. COMPAR. L. 1, 343 [1991]), the questionnaire was formulated so as to avoid bias that might arise from using legal concepts in the questions or from requesting that respondents define their own answers. The text of the questionnaire is available here.

The questionnaire's hypotheticals were developed on the basis of workshops held in Oslo, Rome, New York, Paris, Vienna, London, São Paulo, and Singapore, bringing together experienced transactional lawyers who regularly draft commercial contracts. More details on the workshops are available here.

As a benchmark for the arbitrators' answers and to verify the classification of the diverging outcomes as "common law" or "civil law" the questionnaire was also distributed to national reporters participating in the session of the XXII General Congress of the International Academy of Comparative Law (Berlin, 2026), coordinated by Marco Torsello (University of Verona) as General Reporter, titled "The Aspiration of Self-Sufficiency of International Contracts and the Challenge of Their Uniform Interpretation in the Resolution of Commercial Disputes." The reports will show how national judges in their respective jurisdictions would likely resolve the hypotheticals in the questionnaire under their domestic law. This will help to verify the extent of the abovementioned assumed convergence between legal families.

Analysis of the data collected in these projects has only just begun. It is intended to shed light on how arbitral tribunals exercise the discretion they enjoy due to the significant autonomy of arbitration.

A brief summary of some of the preliminary results follows, addressing five questions:

DO TRIBUNALS:

I. apply a state law?

II. consider themselves detached from state laws and apply transnational principles instead?

III. reach consistent results when applying transnational principles?

IV. deem contract wording to be a sufficient basis for decision-making without the need to consider other law?

V. reach consistent results when deciding solely based on contract wording?

The preliminary analysis shows that:

I. About 92% of the reviewed ICC awards are based on contracts in which the parties chose a state's law. Tribunals consider this law in 87.5% of cases and in 79% of issues. Therefore, within one and the same case, tribunals may adopt different approaches depending on the issue at stake.

II. Only 12% of the reviewed ICC awards are based on transnational principles. The percentage is lower (about 5%) when cases are broken down into issues. The percentage is slightly higher (about 15%) in the questionnaire's hypothetical cases than in the ICC awards.

III. When tribunals apply transnational law, outcomes are not uniform: about 25% of ICC awards reach outcomes inspired by common law, and about 75% by civil law. The corresponding percentages in the questionnaire's hypothetical cases are about 27% and 73%.

IV. About 33% of the reviewed ICC awards are based on contract terms only. The percentage is lower (about 16%) when cases are broken down into issues. Excluding decisions in which the meaning of the contract terms was not disputed, these percentages fall to about 13% and 8%, respectively. The percentage is somewhat higher (about 39%) in the questionnaire's hypothetical cases than in the ICC awards.

V. When tribunals decide solely on the basis of contract wording, outcomes are not uniform: about 75% of the ICC awards reach an outcome inspired by common law, and about 25% by civil law. The corresponding percentages in the questionnaire's hypothetical cases are about 52% and 48%.

These preliminary descriptive analyses suggest that neither parties nor tribunals consider state law as irrelevant or redundant. The percentage of issues decided under transnational law or solely based on contract wording is low. Furthermore, the latter two approaches do not ensure uniform outcomes: tribunals deciding on the same contract and the same set of facts may reach opposite results. Further analyses of the data will hopefully explain the correlation between the outcome of a decision and variables such as the arbitrators' legal background and professional experience.

The preliminary empirical results contradict the three abovementioned assumptions that often underpin the narrative of a uniform approach in arbitration:

I. although the autonomy of arbitration gives tribunals a wide scope of discretion, tribunals do not use it to disregard state law;

II. legal traditions continue to produce diverging outcomes, and transnational sources of soft law do not ensure uniform results;

III. despite more standardized contract drafting, the same wording may lead to diverging results.