5 CONCLUSION

The arbitral choice-of-preclusion-law regime is broken. A tentative consensus has emerged that a transnational approach is needed, but the path to that outcome remains unclear. Despite the ILA’s codification effort, the resulting recommendations have yet to be widely used – likely in part because they fail to resolve key questions or insulate arbitral tribunals from idiosyncratic national laws. However, it provides an informational public good for what is ultimately a more effective and normatively desirable approach: employing the TRM to facilitate the development of sui generis standards through a combination of comparative and common law techniques. Yet in contrast to existing calls for employing comparative techniques, I propose a more realistic approach. Namely, relying on the rich decisional law on res judicata in international tribunals, and on the noted tendency for arbitrators to look to past decisions when faced with an interstitial question – especially one of procedure – I suggest that the comparative exercise can and should be restricted to other international tribunals. The resulting regime would permit the development of a freestanding preclusion standard for international arbitration, the preclusion law of FA. This approach will best bring the preclusion regime into line with structural and arbitral values that underpin this area of private international law.

Referring Principles:

XIII.4.5 - Conclusive and preclusive effects of awards; res judicata