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The Rule of Precedent In International Arbitration

Gibt es in der internationalen Schiedsgerichtsbarkeit eine Präzedenzregel oder wäre eine solche wünschenswert? Bisher ist keine klare Antwort auf diese Fragen ersichtlich und das Thema bleibt Diskussionsgegenstand unter Praktikern. Puristen verfechten die Auffassung, wonach die Schiedsverfahren gerade zum Ziel hätten, dass die Richter an keine anderen als die vereinbarten Rechtsquellen gebunden seien. Andere wünschen sich mehr Konsistenz in der internationalen Schiedsgerichtsbarkeit und empfehlen die Erarbeitung eines einheitlichen Streitbeilegungsverfahrens. Dieser Beitrag versucht den aktuellen Diskussionsstand festzuhalten und aufzuzeigen, welche Rolle das Fallrecht im Handelsschiedsverfahren und in anderen spezialisierten Schiedsverfahren einnimmt. (dh)

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I. The rule of precedent

[Rz 1] As such, the precedent is defined as a decided case that provides a basis for determining later cases involving similar facts or issues[1]. It is not a mere legal opinion given by a judge, rather the ground upon which the judge bases his decision[2]. This excludes *obiter dictum*[3] from the definition.

[Rz 2] The effects a precedent creates are twofold. First, an end is put to the dispute between parties. The second outcome is the creation of a legal principle that will serve to decide later cases in which similar or analogous issues arise[4]. This latter effect is known as *rule of precedent* or *stare decisis*[5], under which lower courts as well as the court that rendered the decision must comply with these legal principles. The second component of the *stare decisis* principle does not enjoy the same standing in civil law systems, international law as it does in common law. In common law, similar cases should be ruled according to principled rules so that they will reach similar results. Thus, in common law jurisdictions, courts are generally under a duty to follow prior cases[6]. In civil law countries the rule of precedent is less stringent however. If it is customary for lower courts to follow the decisions rendered by superior ones, they remain nevertheless free not to rely on precedents. Further, in international law, the rule is simply not recognized as binding authority[7].

1 Bryan A. Garner, *Black's Law Dictionary*, Third Pocket Edition, at p. 553.

2 *See* Arthur L. Goodhart, *Determining the Ratio Decidendi of a Case*, 40 Yale L.J. 161 (1930-31).

3 3 Arthur T von Mehren, Peter L. Murray, *Law in the United States*, Cambridge University Press, at p. 8.

4 *Id.*, at p. 9.

5 Or *stare decisis et non quieta movere*, which means «to stand by things decided».

6 Arthur T von Mehren, Peter L. Murray, *Law in the United States*, supra note 3, at p. 9.

7 Articles 59 38 (1)(d) of the Statute of the International Court of Justice provides that «[t]he decision of the Court has no binding force except between the parties and in respect of that particular case.» Under Article 38 (1)(d) of the same Statute, the International Court of Justice shall apply «[…], judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.» These provisions have led many scholars to find that, even if prior decisions may be use by both Court itself and counsels to support their findings, there is no doctrine of *stare decisis* in international law. See also Jeffery P. Commission, *Precedent in Investment Treaty Arbitration, A Citation Analysis of a Developing* Jurisprudence, 24 J. Int'L Arb.129 (2007), at p. 134.

II. Is There a need for consistency?

[Rz 3] Is there a real need for consistency as a means to promote predictability in international arbitration? Although the answer is controversial, the need for consistency is probably stronger in specialized arbitrations than in other general contract arbitrations. For instance, whether consistency must be ensured in commercial arbitration is highly debatable. After all, parties to a contract dispute will probably not have adapted their legal acts in consideration of arbitral precedents. At most, they will act depending on the (possible) governing law(s) applicable to the commercial relationship, including relevant domestic case law. In contrast, where a specific body of rules applies, as in investment or sport arbitrations, parties are more likely to have taken these precedents into account in their decision-making and, therefore, arbitrators are more likely to refer to arbitral case law.

[Rz 4] The need for consistency is also greater where the applicable law is at its early stage, as for instance in investment arbitration, than where it is well developed through a long practice[8]. This dichotomy between general commercial arbitration, on one hand, and other specialized arbitration, on the other, will recur when it comes to addressing the existence of a *de lege* and *de facto* rule of precedent. As discussed above, the different practices in commercial and specialized arbitration translate into the different need for consistency and predictability in the two areas of arbitration.

III. Is there such a thing as arbitral precedent?

[Rz 5] Does the arbitral precedent exist? Under the most common definition, to be deemed as a precedent, the findings of the court must be, first, final and not subject to any judicial review, second, consistent with prior decisions and, third, accessible to anyone[9]. In other words, a decision will qualify as a precedent only to the extent that it displays a certain autonomy, consistency and accessibility.

A. Autonomy

[Rz 6] The autonomy requirement entails that arbitral awards be impervious to the legal environment where the arbitral tribunal has its situs. To put it another way, judicial courts must not be empowered to revisit arbitral decisions on the merits.

[Rz 7] In commercial arbitration, if New York Convention Ar-

8 Gabrielle Kaufmann-Kohler, *Is Consistency a Myth?*, IAI Series on International Arbitration, No 5, p. 137, Juris Publishing, 2008.

9 See e.g Fouchard, Gaillard, Goldman on International Commercial Arbitration 184 , Emmanuel Gaillard & John Savage eds, 1999, at p. 200, n. 374.

ticle V(1)(e)[10] expressly gives the authority to the jurisdiction where the award was made and the jurisdiction under the law of which the award was made to set aside an award[11], awards may generally be vacated only for some limited grounds[12]. In addition, under some national arbitration rules, parties may decide to waive their right to set aside a final award[13], which narrows down the judicial control over the arbitrators' rulings[14].

[Rz 8] At first sight, the limitation of the grounds upon which awards can be set aside should satisfy the autonomy requirement. Yet many scholars stress that the standard will be met only to the extent that the value of awards as precedents is equally recognized by the legal system whose domestic rules they borrow[15]. In other words, if arbitral awards should be impervious to any judicial control, judicial courts should not be impervious to arbitral decisions. Indeed, what would be the value of an arbitral decision if it were to be ignored or contradicted by the relevant legal system? If arbitral precedent were to evolve regardless of the jurisprudence related to the domestic law at issue, would it not amount to annihilate precisely the consistency and predictability arbitral decisions should foster?

[Rz 9] This additional requirement deprives most, if not all, awards that are issued in contract disputes from meeting the test, as they are usually rendered under domestic laws. Conversely, where arbitrators may ground their decisions in general principles, which most national arbitration rules[16] and institutional rules[17] allow, arbitral awards display enough autonomy[18]. In short, where arbitrators apply a transnational law, arbitral awards evidence sufficient autonomy to create arbitral precedents. This is, however, no longer the case when it comes to applying a domestic body of rules.

[Rz 10] The situation is clearly different in investment-treaty and sport arbitrations. In investment-treaty arbitration, there is no judicial control over awards by an ICSID panel, as Article 53 of the «ICSID Convention»[19] provides that awards issued by an ICSID panel are final and binding, and cannot be revisited by any court, whether national or international[20].

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[10] New-York Convention Article V (1) (e) provides that « [r]ecognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that […] e) [t]he award [...] has been set aside or suspended by a competent authority in which, or under the law of which, that award was made. »

[11] United Nations Conference on Trade and Development, *Course on Dispute Settlement in International Trade, Investment and Intellectual Property*, United Nations, 2005. 5.8 [5.5], available on the UNCTAD website (www.unctad.org)

[12] Some awards may be fully reviewed, but they generally are concerned with procedural issues and not the merits. For instance, the decision of the tribunal with respect to its jurisdiction is subject to a complete control of the judicial authorities of the country where the arbitral has its situs. See e.g Article 190 (2) (b) of the Swiss Private International Law Statute of 18 December 1987 (SPIL) under which proceedings for setting aside the award may only be initiated where the arbitral tribunal has wrongly declared itself to have or not to have jurisdiction.

[13] See e.g SPIL 192 (1) under which «[w]here none of the parties has its domicile, its habitual residence, or a business establishment in Switzerland, they may, by an express statement in the arbitration agreement or by a subsequent agreement in writing, exclude all setting aside proceedings, or they may limit such proceedings to one or several of the grounds listed in Article 190, paragraph. 2.» This provision was enacted in order, first, to render attractive the Swiss arbitral place by avoiding a double check of the award (the award is likely to be review in the exequatur proceeding abroad) and, second, to unburden the Swiss Federal Court of setting aside proceedings (see Jean-François Poudret, Sébastien Besson, *Droit comparé de l'arbitrage international*, at p. 828; Bernhard Berger/Franz Kellerhals, *Internationale und interne Schiedsgerichtsbarkeit*, Berne 2006, no.1664).

[14] The award may, however, be reviewed in the proceeding of recognition and enforcement.

[15] Fouchard, Gaillard, Goldman *supra* note 9, at p. 202 n. 378.

[16] Gary B. Born, *International Commercial Arbitration, Commentary and Materials*, Kluwer Law International, 2001, at p. 526: «Many developed nations grant international arbitrators substantial discretion to select an appropriate set of conflict of laws rules and, applying these rules, to choose an applicable substantive law.» For instance, Article 28 (2) of the UNCITRAL Model Law provides that failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflicts of laws rules which it considers applicable (UNCITRAL Model Law Article 28). Swiss Arbitration Law provides also the parties with a large autonomy when it comes to determining the applicable law to the merits of the dispute. Under SPIL Article 187 (1) the arbitral tribunal shall decide according to the «rules of law» chosen by the parties or, in the absence of such choice, according to the law with which the action is most closely connected. The wording «rules of law», however, does not limit the choice of the parties to the designation of a particular national law. It is generally agreed that the parties may choose to subject the dispute to a system of rules which is not the law of a State and that such a choice is consistent with SPIL Article 187.

[17] Some institutional arbitration organizations exempt the arbitrators to proceed to a choice of law analysis and allow them to decide which substantive law should apply to the dispute. For instance, Article 17 (1) of the 1998 ICC Rules provides that «[in] the absence of any such agreement [as to the governing law], the Arbitral Tribunal shall apply the rules of law, which it determines to be appropriate.» Likewise, Article 29 AAA states that «[t]he Tribunal shall apply the substantive law or laws designated by the parties as applicable to the dispute» and «[f]ailing such a designation by the parties, the Tribunal shall apply such law or laws as it determines to be appropriate.»

[18] Likewise, where arbitrators are not constrained to apply a specific body of rules chosen by the parties, nothing prevents them from ruling upon different legal principles or others codified rules, such as the UNIDROIT Principles of International Commercial Contracts. See Ralph H. Folsom, Michael Wallace Gordon, John A. Spanogle, *International Business Transactions*, Seventh Edition, Thomson West, at p. 24.

[19] Convention on the Settlement of Investment Dispute between States and Nationals of Others States.

[20] Note that Article 53 also excludes any appeal against an ICSID award to the International Court of Justice (ICJ). Although Article 64 of the ICSID Convention provides that a dispute between Contracting Parties concerning the interpretation or application of the Convention may be referred to the ICJ, the preparatory works to the Convention make it clear that Article. 64 does not confer jurisdiction on the ICJ to review the decision of an arbitral tribunal. See United Nations Conference on Trade and Development, Course on Dispute Settlement in International Trade, Investment and Intellectual Property. Module 2.9.

Moreover, most substantive provisions and structure of most bilateral and multilateral investment treaties'[21] applied by ICSID arbitral panels are identical[22], and refer to legal concepts not tied to any domestic law. The same goes as for sport arbitration. Awards issued by the Court of Arbitration for Sport (CAS), whose situs is in Switzerland, are reviewed by the Swiss Supreme Court[23] to a very limited extent[24]. Moreover, the CAS also applies a particular body of rules on the basis of which arbitral case law may be created[25]. This legal framework allows sport and investment-treaty arbitrations to show sufficient autonomy.

B. Consistency

[Rz 11] To be deemed as precedents, awards must also be consistent with each other. In other words, one may be able to infer from different arbitral awards the same legal principles. If consistency is not a legal concept and merely «addresses a logical coherence among things or a uniformity of successive results[26]», it nevertheless entails a control mechanism. If no full legal control were possible, consistency could not be ensured, even though a practice might exist. Therefore consistency requires the arbitral institution or a superior panel be empowered to fully review the findings contained in the award.

[Rz 12] In commercial arbitration, a defeated party to the dispute has no other choice but to seek annulment of the award in a domestic court that will review the merits only to a very limited extent[27], so there is no tool to guarantee consistency. The situation is slightly different in institutional arbitrations, as the institution in charge of the arbitral proceeding may advise arbitrators on certain issues.[28]. If arbitrators are not bound by the suggestions and guidelines provided by the institution, it is nonetheless likely that they would follow them[29]. Another probable reason that enhances the likelihood institutional arbitral tribunal decisions be consistent with each other are the legal guidelines released by arbitral institutions. For instance, the ICC has codified legal guidelines recognized in international business transactions such as International Commercial terms (Incoterms), or the Uniform Customs and Practices for Documentary Credit (UCP) that most international letters of credit refer to[30]. Arbitrators appointed in ICC arbitration

[21] The structure of each and every BIT typically deals with: 1) Scope of Application; 2) Conditions for the Entry of Foreign Investment; 3) General Standard of Treatment of Foreign Investments – Fair and equitable treatment, Full Protection and Security, Unreasonable or Discriminatory Measures, International Law, Contractual Obligations. National and/or Most-Favoured Nation treatment; 4) Monetary Transfers; 5) Operational Conditions of the Investment; 6) Protection Against Expropriation and Dispossession; 7) Compensation for Losses; and 8) Investment Dispute Settlement.

[22] See also Pierre Duprey, *Do Arbitral Awards Constitute Precedents? Should Commercial Arbitration Be Distinguished In This Regard From Arbitration On Investment Treaties?*, in International Arbitration Institute (Iai), Towards A Uniform International Arbitration Law?, Staemplfli Publishers Ltd, 2005, at p. 276 – 277): «[E]ach treaty, whether bilateral or multilateral, applies to potential investors of a given country. Moreover, each States concludes, in general, several treaties on the protection of investments with several different States. Yet, whilst these treaties are signed during different periods of time and with different States, they remain similar in content. Numerous provisions of these treaties are identical. They use specific investment law vocabulary (with such notions as: 9fair and equitable treatment:, 9expropriation:, 9measures of equivalent effect:, 9expropriation:, 9measures of equivalent effect:, 9fork in the road clause:, 9mirror clause:, or 9umbrella clauses:). Thus, all of these treaties resemble legal texts of a general nature. Therefore, their interpretation by arbitral tribunals is governed by a concern to preserve such uniformity and the general character of the treaties. The result is a genuine arbitration case law specific to the field of investment».

[23] See *X v. ATP Tour*, Swiss Federal Court Decision of May 22 2007 (4P.172/2006).

[24] Rule 59 of the Statutes of the Bodies Working for the Settlement of Sports-related Disputes provides that «[t]he award, notified by the CAS Court Office, shall be final and binding upon the parties. It may not be challenged by way of an action for setting aside to the extent that the parties have no domicile, habitual residence, or business establishment in Switzerland and that they have expressly excluded all setting aside proceedings in the arbitration agreement or in an agreement entered into subsequently, in particular at the outset of the arbitration».

[25] R58 of the Statutes of the Bodies Working for the Settlement of Sports-related Disputes provides that «[t]he Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in absence of such choice, according to the law of the country in which the federation, association or sports body which has issued the challenged decision is domiciled.» For instance, in *Guillermo Canas v. ATP Tour* (CAS 2006/A/951), the CAS applied the ATP 2005 Official Rulebook (the ATP Rules). In *Edita Daniute v. International DanceSport Federation* (CAS 2006/A/1175), the panel applied the rules of the International DanceSport Federation. In ASADA v. Marinov (CAS 2006/A/1175), the arbitral tribunal applied the rules contained in the 2002 Anti-Doping Policy of the Australian Weightlifting Federation. Finally, one may mention the World Anti-Doping Code that standardizes the rules and regulations governing anti-doping across all sports and all countries for the first time. These specific regulations, independent from any domestic law, contribute obviously to the creation of an arbitral case law.

[26] Gabrielle Kaufmann-Kohler, *supra* note 8, at p. 137.

[27] This different manner that ad hoc and institutional tribunals could use the rule of precedent was already predicated by Pierre Lalive in 1986 in his introduction to *Contribution of Arbitration Case Law* 1986 published by the Institute on the Law and Practice of International Affairs of the ICC: «Talking about arbitral case law may seem to some to be of a remarkable audacity, in direct contradiction both with the consensual ad hoc nature of any arbitration, and with its confidential character. For others, it will be seen as a truism, especially for those familiar with the most common form of international arbitration, that of the ICC». Translation by Pierre Duprey, *supra* note 22, at. p. 255.

[28] For instance, in a ICC arbitration, Article 27 of the ICC Rules provides that «[b]efore signing any award, the Arbitral Tribunal shall submit it in draft form to the Court. The Court may lay down modifications as to the form of the Award and, without affecting the Arbitral Tribunal's liberty of decision may also draw its attention to points of substance […]. See also Article 6 Appendix II – Internal Rules of International Court of Arbitration under which, «[w]hen the Court scrutinizes draft Awards in accordance with Article 27 of the Rules, it considers, to the extent practicable, the requirements of mandatory law at the place of arbitration.»

[29] Fouchard, Gaillard, Goldman *supra* note 9, at p. 204, n. 381.

[30] Ralph H. Folsom, Michael Wallace Gordon, John A. Spanogle, International Business Transactions, Seventh Edition, Thomson West, at p. 134.

cannot ignore these principles[31], nor the decisions stemming from them. However, even in institutional arbitrations, arbitrators are free to depart from prior cases due to the lack of hierarchy between arbitral tribunals and the absence of a legal duty for arbitrators to comply with prior cases.

[Rz 13] Likewise, nothing compels arbitrators to refer to prior cases in investment-treaty arbitration[32] and in sport arbitration. If, as discussed above, ICSID tribunals strive to be consistent in their decisions, notably due to the fact investment-treaties usually refer to the same legal concepts, an award issued by an ICSID tribunal can be vacated only in some limited situations[33], so no mechanism guarantees consistency.

[Rz 14] In sport arbitration, under the CAS arbitration rules[34], arbitrators are to transmit a draft of the award to the CAS Secretary General who «may make rectifications of pure form and may also draw the attention of the Panel to fundamental issues of principle». This enhances the likelihood arbitral tribunals issue consistent awards. In addition, arbitrators who act within the perimeter of a specialized institution are more likely to be consistent, because the questions that arise will often be presented in similar terms, and because arbitrators are responsible for applying the usages of the trade, which they help to create or adapt[35]. Nonetheless, as mentioned above, arbitrators are not under a legal duty to comply with precedents and one party could not successfully seek the annulment of an award on this ground.

[Rz 15] Whether in commercial or sport arbitration, there is obviously no legal mechanism to ensure the consistency necessary to the creation of an arbitral *jurisprudence constante.*

C. Accessibility

[Rz 16] Arbitration is characterized by its confidential nature[36]. In general, the provisions on confidentiality are not found in national arbitration laws but in the arbitration rules[37] or in the arbitration agreement itself. The obligation of confidentially imposed upon arbitrators is often shown as an advantage of international arbitration as a mechanism of dispute resolution[38], and may also be one of the reasons that parties have decided to submit their dispute to an arbitral proceeding.

[Rz 17] At first sight, publication of the awards seems inconsistent with the principle of confidentiality[39]. However, this can be easily solved by preserving the anonymity of the parties to the dispute, a practice utilized in many forms of institutional arbitration. To date, there is an increasing tendency to publish important awards. Accessibility to the most important awards is therefore no longer an issue for the parties to an arbitral proceeding.

D. Conclusion

[Rz 18] There is no rule of precedent in international arbitration. Most *ad hoc* arbitral awards would in principle not meet any of the requirements discussed above. With respect to institutional arbitral proceedings, this finding is the same. While awards may be persuasive, published and based on a non-domestic law, arbitrators acting within the framework of an institutional organization are still not under a legal duty to comply with prior decisions issued by other panels. The same goes for investment-treaty arbitration and other specialized arbitration alike. While practitioners have access to most important decisions and those are usually consistent with each other, arbitrators are still free to depart from prior cases. So long as any court or superior judicial panel will not be empowered to ensure consistency in the arbitral decision-making, the rule of precedent will not be recognized as such.

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[31] In practice, arbitrators justify the application of the rules issued by the arbitral Institution relying and the arbitration agreement that provides for arbitration before the same institution. See Fouchard, Gaillard, Goldman *supra* note 9, at p. 205, no 382.

[32] Jeffery P. Commission raises, however, the possibility to have an award vacated on the ground the arbitrators did not discuss prior awards: «[w]hile the possibility of annulment because the tribunal has simply relied on earlier decisions without independent decision-making is likely possible it is equally likely possible that an annulment could occur if a tribunal did not discuss prior awards. Such an agreement could be framed as an excess of powers, a serious departure from a fundamental rule of procedure, or on the basis that the award has failed to state the reasons upon which it based.» Jeffery P. Commission, *Precedent in Investment Treaty Arbitration*, A Citation Analysis of a Developing Jurisprudence , at p. 156.

[33] Article 52 (1) of the ICSID Convention provides that «[e]ither party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds: a) that the Tribunal was not properly constituted; b) that the Tribunal has manifestly exceeded its powers; c) that there was corruption on the part of a member of the Tribunal; d) that there has been a serious departure from a fundamental rule of procedure; or e) that the award has failed to state the reasons on which is based». Moreover, an *ad hoc* committee acting under the ICSID Convention may not amend or replace the award by its own decision on the merits.

[34] See R59 of the Statutes of the Bodies Working for the Settlement of Sports-related.

[35] Pierre Duprey, *supra* note 22, at p. 272.

[36] *See* UNCITRAL Rules Article 32 (5); ICC Rules Article 21 (3); AAA International Rules 21 (4) and 28 (5); LCIA Rules Article 30.

[37] *See e.g* the very detailed Article 34.6 of the Singapore International Arbitration Centre's Arbitration Rules.

[38] See Gary B. Born, *supra* note 16 at p. 9. «[I]nternational arbitration typically is usually more confidential than judicial proceedings – as to submissions, evidentiary hearings, and final awards. This protects business and commercial confidences and can facilitate settlement by reducing opportunities and incentives for public posturing.»

[39] Pierre Duprey, *supra* note 22, at p. 257. «In general, the publication of arbitral decisions is limited. Yet in the absence of publication, an arbitral decision cannot have the value of legal precedent. And thus the question of the confidentiality of arbitral proceeding arises.»

IV. To the creation of a de facto rule of precedent?

[Rz 19] If arbitrators do not have a *legal* obligation to refer to prior cases to support their findings, are they nevertheless under a *moral* obligation to follow precedents? In other words, is there a *de facto* rule of precedent[40]? Again, the answer depends on the type of arbitration.

[Rz 20] In contract arbitration, although a handful of arbitrators base their awards upon prior decisions holding that arbitral awards create case law[41], most of them do not bestow the same value on prior cases. In a lecture given in 2006, Pr. Gabrielle Kaufmann-Kohler reached the conclusion that «there is no meaningful precedential value of awards in commercial arbitration[42]», after having observed that, first, a small percentage of awards cited previous arbitral decisions, second, references to previous cases were mostly done in connection with jurisdiction, procedure, and determination of the law governing the merits and, lastly, that substantive issues were seldom solved by reference to arbitral awards[43]. As a matter of fact, arbitrators serving in commercial disputes do not seem to attach importance to precedents.

[Rz 21] As for investment-treaty arbitrations, ICISID tribunals have often seized the opportunity to stress in their awards the place they are willing to grant to case law. If different answers have emerged, ICSID tribunals seem to concur, holding that there is no doctrine of precedent in investment arbitration, even though prior cases shall not be totally disregarded.

[Rz 22] Some scholars have inferred from the wording of Article 53 of the ICSID Convention under which «[t]he award shall be binding on the parties» that it excludes the applicability of the rule of precedent to later cases[44].» The ICSID Tribunal reached the same conclusion in different matters. For instance, in *SGS Société Générale de Surveillance S.A v. Republic of the Philippines*, the ICSID asserted that there was no doctrine of precedent in international law and no hierarchy of international tribunals[45]. Likewise, in *Casado v. Republic of Chile*, the ICSID panel considered international case-law to help provide rules to disputes[46]. In *Enron Corporation and Ponderosa Assets, L.P.v. Argentine Republic*, the Tribunal asserted that it was «[…] mindful that decisions of ICSID or other arbitral tribunals are not a primary source of rules». In *SGS Société Générale de Surveillance S.A v. Republic of the Philippines*, the ICSID Tribunal, relying upon Article 53 (1) of the ICSID Convention, held it could depart from a prior case rendered in the dispute opposing SGS v. Pakistan[47], as there was no doctrine of precedent in international law and no hierarchy of international tribunals. In *El Paso International Co. v. Argentine Republic*, the arbitrators upheld that «ICSID arbitral tribunals are established ad hoc, from case to case, in the framework of the Washington Convention, and [they] know of no provision, either in that Convention or in the BIT, establishing an obligation of stare decisis.» However, the Tribunal recognized that «[…] international arbitral tribunals, notably those established within the ICSID system, will generally take account of the precedents established by other arbitration organs, especially those set by other international tribunals[48].» In *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S.v. Islamic Republic of Pakistan*[49], and *Jan de Nul N.V. and Dredging International N.V.v. Arab Republic of Egypt*[50], arbitrators held that «[the ICSID Tribunal] was not bound by earlier decisions, but will certainly carefully consider such decisions whenever appropriate.» More recently, in *AES Corp. v. Argentine Republic*,[51] the ICSID tribunal stated clearly that «[t]here is so far no rule of precedent in general international law; nor is there any within the specific ICSID system for the settlement of disputes between one State party to the Convention and the National of another State Party. This was in particular illustrated by diverging positions[52] respectively taken by two ICSID tribunals on issues dealing with the interpretation of ar-

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[40] This term has been used by Raj Bahla in his contribution *The precedents setters: de facto decisis in WTO adjudication (Part two of a trilogy)*.

[41] See e.g Interim Award in ICC Case No. 4131 of September 23, 1982 excerpted in Gary B. Born, *supra* note 16, at p. 658:

[42] Gabrielle Kaufmann-Kohler, Arbitral *Precedent: Dream, Necessity or Excuse?, – The 2006 Fershfields Lecure*, 23(3), Arb. Int'L 357 (2007), at p. 10.

[43] Interestingly, when arbitrators are to apply a transnational body of law, such as the United Nations Convention on Contracts for the International Sale of Goods (CSIG), they do not refer to previous decisions. See Gabrielle Kaufmann-Kohler, *supra* note 52, at p. 4. This is surprising for a twofold reason: first, the decisions related to the application of that convention are easily accessible to the practitioners and, second, CSIG Article 7 (1) urges decision-makers to have regard to the «international character of the convention» and the «need to promote uniformity in its application.»

[44] Christoph H. Schreuer, *The ICSID Convention: A Commentary* 1082 (2001).

[45] The mere reliance on Article 53 (1) seems, however, weak to preclude a doctrine of *stare decisis* in investment dispute. See Gabrielle Kaufmann-Kohler, *supra* note 52, at p. 7: «[N]othing in the Convention's travaux preparatoires suggests that the doctrine of stare decisis should be applied, though nothing in the travaux preparatoires suggests that it should not be applied.»

[46] *Casado v. Republic of Chile* (Case no ARB/98/2), Decision on the Request for Provisional Measures 25 September 2001, p. 377.

[47] *SGS Société Générale de Surveillance S.A v. Republic of the Philippines*, ICSID Case N° ARB/02/6. para. 97.

[48] *El Paso International Co. v. Argentine Republic*, ICSID Case No. ARB/03/15, Decision on Jurisdiction, April 27, 2006, para. 39.

[49] *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S.v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29 (Turkey/Pakistan BIT) Decision on Jurisdiction, 14 November 2005., para. 76.

[50] *Jan de Nul N.V. and Dredging International N.V.v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13 (Belgo-Luxembourg/Egypt BIT), para. 62-63.

[51] *AES Corp. v. Argentine Republic*, ICSID Case No. ARB/02/06, Decision on Jurisdiction, April 26, 2005 para. 17-18.

[52] *See SGS Société Genérale de Surveillance S.A.v. Islamic Republic of Pakistan*, ICSID Case N° ARB/01/13 and *SGS Société Générale de Surveillance S.A v. Republic of the Philippines*, ICSID Case N° ARB/02/6.

guably similar language in two different BITs[53].» However, the Tribunal stressed, it was «not barred, as a matter of principle, from considering the position taken or the opinion expressed by other ICSID tribunals[54]..» More important, in this decision the ICSID tribunal expressly recognizes «[…] the institutional dimension of the control mechanisms provided for under the ICSID Convention might well be a factor, in the longer term, for contributing to the development of a common legal opinion or *jurisprudence constante*, in order to resolve some difficult legal issues discussed in many cases, inasmuch as these issues share the same substantial features[55].»

[Rz 23] The tendency to resort to precedents in investment arbitration is evidenced by recent research published by Jeffery P. Commission, whose arbitral award's survey shows an outstanding increase of citation to ICSID case law, especially since 2001[56]. This trend occurs not only before ICSID tribunals, but also before non-ICSID tribunal vested to arbitrate investment treaty disputes[57]. Thus, unlike commercial arbitration, one may distinguish a *de facto* rule of precedent that seems to strengthen throughout the years. Interestingly, the frequency arbitrators refer to prior cases differs, depending on the legal concept at issue. In a recent contribution[58], Pr. Gabrielle Kaufmann Koller noted a certain consistency on the distinction made by ICSID tribunals between treaty and contract claims. The same conclusion was reached as to the concept of fair and equitable treatment imposed on host States by various treaties[59]. Conversely, ICSID cases have yielded inconsistent results on the issue related to concept of state of necessity and in the interpretation of umbrella clauses alike[60].

[Rz 24] Evidence also indicates that a *de facto* rule of precedent exists in sport arbitration. While she concluded that one could see no precedential value in commercial arbitration awards[61], Pr. Gabrielle Kaufmann Koller noted a «strong reliance on precedents in both sport and domain name arbitration», as the survey accomplished by this scholar evidenced that nearly each decision rendered by the Court of Arbitration of Sport in 2003 contains one or more reference to earlier CAS award[62]. The fact that the website of the CAS[63] has devoted one of its sections to case law confirms the importance given to precedents in sport arbitration.

[Rz 25] To sum up, where a particular body of rules applies, arbitral panels tend to resort to precedents to enlighten and construe these rules. In commercial arbitration, however, arbitrators seldom rely on prior cases, even though they have to apply substantive rules contained in international conventions, such as the CSIG. In other words, commercial arbitrators feel no moral obligation to foster consistency, while they seem more concerned to comply with decisions rendered by others panels wherever a specialized institution oversees the arbitral proceeding.

[Rz 26] Why such differences? The reason is probably threefold. First, as mentioned above, specialized arbitral panels apply a specific body of rules that requires uniform construction. Second, when arbitrators are to apply a less developed *corpus iuris*, the need for consistency is greater and arbitrators are more likely to follow precedents. Lastly, where relevant case law might be easily accessible, arbitrators will be reluctant to depart from clear prior precedents for credibility reasons. If an arbitrator deemed the findings of a previous panel as wrongful, he would have the ability to depart from it, although he would have in principle to explain why. Not doing so could be seen as unprofessional.

V. Conclusion

[Rz 27] The doctrine of *stare decisis* does not apply in international arbitration, chiefly because of the lack of hierarchy among arbitral tribunals. There is no rule of precedent, but only a practice – a *de facto* rule of precedent which tends to promote uniformity in some very specific arbitral proceedings. The absence of such a rule does not, however, deter parties from settling their dispute in an arbitral proceeding. In other words, the system seems to work without an arbitral *jurisprudence*. One may understand that parties who rely to special institutions, such as ICSID Centre, which applies a specific body of law, expect their dispute to be settled in conformity with prior cases. On the other hand, the need for consistency is weaker in commercial arbitration, especially in ad hoc arbitration, where parties to the dispute are aware of the particular tailor-made character of the award issued by the arbitral tribunal. Unlike judges, arbitrators are not part of a specific judicial system. They intervene in another legal system where the sources of law are different and arbitral case law does not enjoy the same standing.

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[53] *AES Corp. v. Argentine Republic*, ICSID Case No. ARB/02/06, Decision on Jurisdiction, April 26, 2005 para. 23 *litt.* d.

[54] *Id.* para. 28-30-32.

[55] *AES Corp. v. Argentine Republic*, ICSID Case No. ARB/02/06, Decision on Jurisdiction, April 26, 2005 para. 33.

[56] Jeffery P. Commission, *supra* note 32, at p.149-150.

[57] Id. at p. 150-151.

[58] Gabrielle Kaufmann-Kohler, *supra* note 8, at p. 137, 139.

[59] Gabrielle Kaufmann-Kohler, *supra* note 8, at p. 137, 142-143.

[60] Gabrielle Kaufmann-Kohler, *supra* note 8, at p. 137, 139.

[61] Gabrielle Kaufmann-Kohler, *supra* note 52 at p. 4: «Aside from procedural issues, perhaps, one can see no precedential value or self-standing rule creation in commercial arbitration awards.»

[62] Gabrielle Kaufmann-Kohler, *supra* note 52, at p. 5.

[63] *See* www.tas-cas.org.

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