CONTRACTUAL INTERPRETATION OF THE STANDARD OF REVIEW IN INTERNATIONAL COMMERCIAL ARBITRATIONS: AN ALTERNATIVE TO TRANSPLANTING ADMINISTRATIVE LAW

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The judicial review of arbitral awards bears an intuitive similarity to the review of administrative decisions. Despite their reluctance, Canadian courts have long used administrative law concepts and statutory interpretation to determine the standard of review when an arbitral award is challenged in court. This paper considers a novel alternative: contractual interpretation of the parties' intended degree of susceptibility to judicial scrutiny based on their arbitration agreement.

The discussion about reviewing arbitral awards has taken on new significance due not only to the proliferation of arbitration but also to the Supreme Court's seminal administrative law decision of Vavilov. Vavilov simplified standards of review to promote consistency and access to justice. This paper argues that applying a uniform set of public law standards does not align with the contractual nature of arbitrator's authority and the narrow application of an arbitration between private parties. Administrative and contract law calls for different balances between maintaining legal control and respecting the non-judicial decision-maker's authority. For international commercial arbitrations at least, existing legislative schemes have not altered this balance to require uniform standards that cannot be contracted around. Not only is contractual interpretation a more principled approach, it benefits from a body of jurisprudence that will often in practice lead to standards that make the most commercial sense. This individualizes the difficult choice between expediency and quality of justice to the circumstances of each arbitration. It also allows courts to show comity by considering foreign law as part of the contractual context.

Le contrôle judiciaire des décisions arbitrales présente une similarité intuitive avec la révision des décisions administratives. Malgré leur réticence, les tribunaux canadiens appliquent depuis longtemps des concepts de droit administratif et l'interprétation des lois pour déterminer la norme de contrôle judiciaire quand une décision arbitrale est contestée en justice. L'auteure de cet article propose une solution : l'interprétation contractuelle du degré prévu de susceptibilité des parties à l'examen judiciaire d'après leur convention d'arbitrage.

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Le débat sur la révision des décisions d'arbitrage a pris un nouveau sens, non seulement avec la prolifération de ces décisions, mais aussi avec l'arrêt source Vavilov en droit administratif prononcé par la Cour suprême. Vavilov a simplifié la norme de contrôle judiciaire pour promouvoir l'uniformité et l'accès à la justice. L'auteure fait valoir que l'application de normes uniformes de droit public est peu compatible avec la nature contractuelle du pouvoir de l'arbitre et le champ d'application étroit d'une décision arbitrale entre des parties privées. Le droit administratif et le droit contractuel nécessitent différents jeux d'équilibre entre le contrôle judiciaire et le respect du pouvoir de l'arbitre, décideur non judiciaire. Du moins pour l'arbitrage commercial à portée internationale, les régimes législatifs actuels n'ont pas perturbé cet équilibre au point d'exiger des normes incontournables. L'interprétation contractuelle est non seulement une méthode raisonnée, mais elle s'appuie également sur une somme de jurisprudence qui en pratique se traduit souvent par les normes les plus logiques sur le plan commercial. Cela permet d'adapter à chaque arbitrage le choix difficile entre célérité et qualité de la justice. Cela permet aussi aux tribunaux de faire preuve de courtoisie en considérant le droit étranger comme une partie du contexte contractuel.

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Introduction

The Supreme Court released its decision in *Canada (Minister of Citizenship and Immigration) v Vavilov* five years ago, reforming much of the substantive review framework for administrative law.[1] Before *Vavilov*, the judicial review of arbitral awards in Canada followed a set of

[1] *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*].

standards from the then leading administrative law decision, [2] *Dunsmuir v New Brunswick.*[3] For parties to arbitral awards, a deferential standard of review facilitates efficient dispute resolution and recognizes the arbitrator's expertise, whereas rigorous judicial scrutiny promotes fairness and confidence in the outcome. The choice of a standard of review also reflects the reviewing court's understanding of its role in relation to other institutions and individuals in the justice system. The majority of the Supreme Court have left open whether the *Dunsmuir–Vavilov* evolution changed the standard of review for arbitral awards.[4] Other Canadian courts are divided on this question.[5] This paper takes a step back from the choice between *Dunsmuir* and *Vavilov* and argues that the review of arbitral awards should not follow any administrative law framework. The default approach should be contractual interpretation, subject to legislation that provides otherwise.

For this paper, the most important aspect of the *Dunsmuir–Vavilov* evolution is the trend towards simplifying the standard of review analysis.[6] In *Dunsmuir*, the Supreme Court unified patent unreasonableness and reasonableness *simpliciter* into one reasonableness standard.[7] This

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2 The Supreme Court has held that *Dunsmuir* should apply to domestic commercial arbitral awards in *Sattva Capital Corp v Creston Moly* Corp, 2014 SCC 53 at para 105 [*Sattva*]. It reiterated this position in *Teal Cedar Products Ltd v British Columbia*, 2017 SCC 32 at para 74 [*Teal Cedar*]. In the context of international arbitrations, the Court of Appeal for Ontario has also relied on concepts from *Dunsmuir*: *United Mexican States v Cargill*, 2011 ONCA 622 at paras 40, 45 [*Cargill*]. The next section of this paper explores these decisions in more detail.

3 *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*].

4 *Wastech Services Ltd v Greater Vancouver Sewerage and Drainage District*, 2021 SCC 7 at para 46 [*Wastech*].

5 For example, cases that held that *Vavilov* applies to domestic commercial arbitrations include *Manitoba (Hydro-Electric Board) v Manitoba (Public Utilities Board)*, 2020 MBCA 60 at paras 23–24, *Northland Utilities (NWT) Limited v Hay River (Town of)*, 2021 NWTCA 1 at para 44, and *Allstate Insurance Co. v. Ontario (Minister of Finance)*, 2020 ONSC 830 at paras 12–19. Cases holding that *Vavilov* does not change the standard of review for domestic arbitral decisions include *Cove Contracting Ltd. v Condominium Corporation No. 012 5598 (Ravine Park)*, 2020 ABQB 106 at para 12 and *Ontario First Nations (2008) Limited Partnership v Ontario Lottery and Gaming Corporation*, 2020 ONSC 1516 at paras 71–73. Cases that address this issue for international commercial arbitrations will be discussed later in this paper.

6 I do not mean to suggest that *Vavilov* is simplifying the substantive review framework overall. It arguably does the opposite for the reasonableness analysis itself (after the standard of review has been chosen). It takes a "thin" categorical approach to the selection of standard of review but a "thick" contextual approach to the reasonableness standard itself: see Paul Daly, "Unresolved Issues after *Vavilov*" (2022) 85:1 Sask L Rev 89 at 92.

7 *Dunsmuir*, *supra* note 3 at paras 34–45.

consolidated what used to be three tiers of judicial scrutiny into simply reasonableness versus correctness in administrative law. *Dunsmuir* required a reviewing court to choose between these two by analyzing a list of contextual factors that tend to increase or decrease the appropriate level of judicial scrutiny.[8] *Vavilov* went one step further: a reviewing court no longer needs to analyze these contextual factors but presumes that the reasonableness standard applies, unless the issue under review falls under an exception from a prescribed list.[9]

Dunsmuir and *Vavilov*'s "promise of simplicity and predictability" is driven by the need to facilitate access to justice in judicial review.[10] This is consistent with the Supreme Court's understanding that administrative law seeks to recognize the legitimacy in certain exercises of *public* power as well as to ensure they be justified to citizens.[11] Ultimately, standards of review in administrative law set out varying levels and manners of judicial scrutiny on *public* power. They contemplate disputes between a state institution and individuals who were the subjects of its exercise of power. The individuals are often numerous and are wide-ranging in their ability to navigate the court system. These individuals did not opt into the decision-maker's ambit of power in the sense that they did not choose which immigration officer or which licensing board to deal with. In this context, meaningful accountability requires an efficient and uncomplicated judicial process. Predictability and consistent outcome on the issue of standard of review promotes a sense of legitimacy both in state institutions and in administrative law.

The judicial review of arbitral awards does not fit into this paradigm. An arbitration is not an exercise of public authority. It is generally the

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[8] The contextual factors are the existence of a privative clause, the purpose of the tribunal based on its enabling legislation, the nature of the question at issue, and the expertise of the tribunal: *ibid* at para 64. A reviewing court need not engage in this analysis if case law has already determined the standard of review for the kind of question under review.

[9] The exceptions include when the statute has prescribed a different standard of review, when it provides a statutory appeal mechanism, and when the rule of law requires a correctness review, namely for constitutional questions, general questions of law of central importance to the legal system as a whole, and questions related to jurisdictional boundaries between two or more administrative bodies. See *Vavilov*, *supra* note 1 at paras 16–17. The list of exceptions is not closed, with one addition since *Vavilov*: see *Society of Composers, Authors and Music Publishers of Canada v Entertainment Software Association*, 2022 SCC 30.

[10] *Dunsmuir*, *supra* note 3 at paras 51–64; *Vavilov*, *supra* note 1 at paras 7, 21.

[11] *Dunsmuir*, *supra* note 3 at para 48; *Vavilov*, *supra* note 1 at paras 14, 95. The standard of reasonableness both respects administrative decision-maker's authority and ensure its exercise be justified.

parties who opted into arbitration[12] and selected their own arbitrator. In contrast to a statutory regime that uniformly applies to all decisions under it, there are infinite varieties of arbitration agreements[13] based on the preferences of private parties. This can of course be constrained by legislation and common law rules that deem certain contracts to be void or unenforceable. But fundamentally, a court reviewing an arbitral award does not seek to legitimize or scrutinize the exercise of *public* power. Nor is it concerned about a multitude of individuals confronted by an unknown bureaucrat whose authority they did not opt into. The court is simply enforcing a private contract under which the parties chose their own decision-maker. It should look to contract law principles rather than transplant *Dunsmuir* or *Vavilov*.

To develop this claim, section I argues that entangling the review of arbitral awards with administrative law is unprincipled. Courts reviewing both administrative decisions and arbitral awards perform an oversight function over non-judicial decision-makers. But that is where the similarity ends. Administrative and contract law calls for different balances between maintaining legal control and respecting the non-judicial decision-maker's authority, and judicial oversight should be structured accordingly. The *Dunsmuir–Vavilov* project to streamline administrative law standards of review brought this tension to the fore.

Section II considers how statutes may impact the application of contract law to arbitration agreements. In various provinces in Canada, different types of arbitrations—including family, insurance, domestic commercial and international commercial arbitrations—all fall under different statutory regimes. There may be a stronger argument for applying an administrative law approach to a tightly regulated type of arbitration where the legislature[14] has expressed a clear policy preference. This is not the case, for example,[15] in the context of international commercial

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[12] There are statutes that mandate arbitration. For example, under regulations under the Ontario *Insurance Act*, RSO 1990, c I.8, certain disputes between insurers must be resolved through arbitration: O Reg 283/95, s 7(1).

[13] I use the term "arbitration agreement" to refer to any contractual arrangement about submitting disputes to arbitration. This can be an arbitration clause, a general agreement to arbitrate, or submission agreements made after a particular dispute has arisen.

[14] I use the term "legislature" to refer both to Parliament and provincial legislatures, although arbitrations are mostly governed by provincial statutes.

[15] International commercial arbitrations best illustrate where contractual interpretation makes more sense than an administrative law/statutory interpretation approach. While this appears to be picking the most favourable example, I do not seek to advocate the same for all types of arbitrations. I only use international commercial arbitrations to show the principled misalignment between administrative law frameworks

arbitrations.[16] Section II interprets the *Model Law on International Commercial Arbitration* as implemented by various provincial statutes.[17] I argue that these statutes do not require a uniform rule for judicial oversight. Nor would their legislative purpose justify some scholars' proposal to apply international and foreign law. If anything, Hansard suggests that the legislature expects parties to contract for their own standards so as to keep the local norms of international arbitration up to date.

Section III shows how the standard of review of arbitral awards can be determined through contractual interpretation. Exemplified by the interpretation of contractual releases, this approach focuses on the parties' objective intent at the time of contracting, which does not require the particularities of future events be anticipated. Given the contextual factors at play in international commercial arbitrations, contractual interpretation will often lead to a deferential standard. But it preserves the flexibility for parties to tailor to their own needs the level of deference and how it applies to different types of disputes and issues.

Finally, section IV argues that the contextual sensitivity of this approach effectively addresses the policy concerns regarding commercial expertise and comity.

Section I: Arbitrations' Unprincipled Entanglements with Administrative Law

This section explores the entanglement between administrative law and arbitrations, which I argue is unprincipled. In both contexts, courts practice self-discipline when they are not tasked with primary decision-making authority. Choosing between multiple standards of review as in administrative law is one way of balancing the legitimacy of the primary decision-maker's authority against the need for legal control. The law of contractual discretion suggests another approach: a single contextual standard. Ultimately, the proper balance should reflect the source of the primary decision-maker's authority and the decision's context. Administrative decision-makers implement a legislative scheme, whereas arbitrators exercise authority granted by a contract. I therefore argue that the starting point for judicial oversight of arbitral awards should not be a

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and arbitrations, and I accept that there could be statutory and sound policy reasons to apply an administrative law approach in other types of arbitrations.

[16] Arbitrations arising from a broad range of business transactions may fall under this category, but employment disputes and ordinary consumer claims are excluded. See *Uber Technologies v Heller*, 2020 SCC 16 at paras 22–28 [*Uber*].

[17] *Model Law on International* Commercial *Arbitration*, GA Res 40/72, UNCITRAL, 40th Sess, Supp No 17 (UN doc A/40/17), as amended by GA Res 61/33, UNCITRAL 61st Sess, Supp No 17 (A/61/17), art 34(2)(a)(iii) [*Model Law*].

uniform public law framework but the parties' contractual arrangement, which can then be constrained or displaced by clear legislative intent or discrete doctrines such as unconscionability.

Courts reviewing arbitral awards often explicitly borrow administrative law concepts despite noting the difference between the two areas of law. This is clear in two influential decisions that concern the review of commercial arbitral awards. The first is *Sattva Capital Corps v Creston Moly Corp*, involving a domestic commercial arbitral award in a dispute about how a finder's fee should be calculated in a mining venture. *Sattva* is the leading authority in Canada on contractual interpretation, but here, the most relevant aspect is the Supreme Court's reluctant embrace of administrative law concepts. It recognized that arbitration is based on mutual consent, whereas administrative decisions result from statutory imposition.[18] But the Court eventually considered the *Dunsmuir* framework to be "helpful" and applied the reasonableness standard from *Dunsmuir* to the arbitral award.[19]

The second influential decision is that of the Court of Appeal in Ontario in *United Mexican States v Cargill Inc*. The underlying award came from a NAFTA treaty arbitration. The Court of Appeal also said that administrative law cannot be directly imported into the review of international arbitral awards.[20] Yet, its framing of the standard of review inquiry explicitly references *Dunsmuir*, and it adopted the concept of "true question of jurisdiction."[21] The Supreme Court from *Dunsmuir* coined this term to delineate a narrow range of scenarios "where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter"; a jurisdictional question in the broad sense no longer warranted a correctness review, a standard that the Supreme Court sought to discourage in the administrative law context.[22] In *Cargill*, the Court of Appeal held that the correctness standard did apply.[23] But it also went on to emphasize, like *Dunsmuir* did in the administrative law context, that deference to international arbitral tribunals requires reviewing courts to only find true questions of jurisdiction in rare circumstances.[24]

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18 *Sattva*, *supra* note 2 at para 104.

19 *Ibid* at paras 105–06; *Teal Cedar*, *supra* note 2 at paras 1, 74, 79 [*Teal Cedar*].

20 *Cargill*, *supra* note 2 at para 30.

21 *Ibid* at paras 35, 40.

22 *Dunsmuir*, *supra* note 3 at para 59.

23 *Cargill*, *supra* note 2 at para 41. The relevant provision of the *Model law* will be discussed in more detail in section II.

24 *Ibid* at paras 44–47, 53.

Reviewing arbitral awards is no doubt analogous to reviewing decisions of public authorities in that the court's role is one of oversight rather than primary decision-making. Both instances warrant deference. The UK Supreme Court made a similar point in *Braganza v BP Shipping Limited*. *Braganza* was about contractual discretion that allowed an employer to deny death benefits if it found the employee's death to be a suicide. The Court held that the *Wednesbury* standard from administrative law should be applied when reviewing the exercise of contractual discretion.[25] The *Wednesbury* standard requires that the right considerations be taken into account and that the conclusion not be so outrageous that no reasonable decision-maker could have reached it.[26] According to Lady Hale, transplanting the *Wednesbury* standard makes sense because "[t]here is an obvious parallel between cases where a contract assigns a decision-making function to one of the parties and cases where a statute (or the royal prerogative) assigns a decision-making function to a public authority. In neither case is the court the primary decision-maker."[27] Likewise, arbitrations involve contracts that assign a decision-making function to an arbitrator.

Because courts are not tasked with primary decision-making authority, judicial oversight over administrative decisions and contractual discretion both seeks to balance the recognition of a non-judicial decision-maker's lawful authority with the need for legal control. Administrative law jurisprudence recognizes this dual function and the delicate balance between them. Specifically, the Supreme Court has stated that the reasonableness standard is formulated "to give effect to the legislature's intent to leave certain decisions with an administrative body while fulfilling the constitutional role of judicial review to ensure that exercises of state power are subject to the rule of law."[28] The standard of reasonableness is an expression of deference, a central concept in administrative law, requiring courts to pay "respectful attention" to the primary decision-maker's reasons without blindly submitting to their conclusions.[29]

The law of contractual discretion in Canada requires courts to strike a similar kind of balance. In *Wastech Services Ltd v Greater Vancouver Sewerage and Drainage District*, a waste management company complained

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25 *Braganza v BP Shipping Limited and another*, [2015] UKSC 17 at paras 28–30 (Lady Hale), 53 (Lord Hodge), 103 (Lord Neuberger) [*Braganza*].

26 *Associated Provincial Pictures Houses Ltd v Wednesbury Corporation*, [1948] 1 KB 223 at 233–34; *ibid* at para 24.

27 *Braganza*, *supra* note 25 at para 19.

28 *Vavilov*, *supra* note 1 at 82; see also *Dunsmuir*, *supra* note 3 at paras 27–28, 48.

29 *Dunsmuir*, *supra* note 3 at para 48, citing David Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy", in Michael Taggart, ed., *The Province of Administrative Law* (Oxford: Hart Publishing, 1997) 279 at 286.

that a statutory corporation exercised its discretion to relocate waste in a manner that hurt the company's profit. The majority of the Supreme Court held that in adjudicating a claim about the duty to exercise discretion in good faith, a court should refrain from questioning whether the discretion was exercised "in a morally opportune or wise fashion from a business perspective."[30] At the same time, discretion is always constrained by the principle of good faith and cannot be exercised in a way "unconnected to the purposes underlying the discretion."[31] The majority explained that imposing this constraint does not unduly interfere with contractual freedom partly because "the content of the duty is guided by the will of the parties as expressed in their contract."[32] Tethering discretion to contractual purpose establishes a basic threshold of legal protection while using the parties' own bargain to supply the content of that protection. The law of contractual discretion thereby also seeks to balance the need to respect what parties bargained for and the need for legal control, similar to the conception of deference in administrative law.

However, the mere existence of similarities between different types of judicial oversight does not explain to what extent courts should transplant from one context to another. Canadian jurisprudence gives rise to at least one salient limit to transplanting administrative law, stemming from the unique source and context of public bodies' decision-making authority. The Supreme Court observed in *Sattva* that parties to arbitration exercise mutual control over the number and identity of arbitrators, unlike a statutory body designed by legislature.[33] Implicit in this comparison is the fact that arbitrators' decision-making authority derives from idiosyncratic private agreements, whereas an administrative body's authority is based on a statute with universal application.

Administrative law principles place central importance on the source of the primary decision-making authority. In administrative law, legislative intent is the "polar star" of judicial review and a recurring theme that animated much of the case law development in the recent decades.[34] Canadian courts used to apply a highly deferential "patent unreasonableness" standard if the legislature included privative clauses, which are statutory provisions stating that the administrative decision is final.[35] This was an approach adopted in 1979 to give partial effect to the

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30 *Wastech*, *supra* note 4 at para 73.

31 *Ibid* at para 4.

32 *Ibid* at para 93.

33 *Sattva*, *supra* note 2 at para 104.

34 *Vavilov*, *supra* note 1 at para 33, citing *C.U.P.E. v Ontario (Minister of Labour)*, 2003 SCC 29 at para 149.

35 *Canadian Union of Public Employees, Local 963 v New Brunswick Liquor Corp*, [1979] 2 SCR 227 at 237, 1979 CanLII 23.

legislature's desire that court refrain from intervening in administrative decision-making. In 2008 in *Dunsmuir*, the Supreme Court sought to simplify standards of review. It did away with the patent unreasonableness standard, stating that it could not be meaningfully distinguished from an unreasonable decision.[36] But it still treated privative clauses as a strong indicator that the reasonableness standard should apply.[37] In other words, legislative intent to pre-empt judicial review must still be taken seriously. Since 2019, *Vavilov* requires courts to no longer treat privative clauses as a separate consideration.[38] Its new framework, however, accounts for legislative intent in a different way: it uses a presumption of reasonableness to give effect to the legislature's "institutional design" choice to have administrative bodies rather than courts decide certain matters.[39] The framework further allows legislative intent to rebut the reasonableness presumption: if the text of the decision-maker's enabling statute provides for a standard of review, that standard applies; even without explicit provision, the presumption of reasonableness can be rebutted by "signals of legislative intent," namely statutory appeals.[40]

Administrative law's emphasis on legislative intent fits awkwardly in the arbitration context. Unless the arbitration is mandated by a statutory regime, the legislature's intent is not the most relevant. The parties' arbitration agreement is the source of the arbitrator's power, which derogates from courts' default jurisdiction over private disputes. A court reviewing an arbitral award is not in the same position vis-à-vis the private parties as it is vis-à-vis another branch of government. If an analogy had to be drawn, it is that the parties are the grantor of primary decision-making authority in the same way that the legislature provides and defines statutory powers in administrative law. They choose how to allocate adjudicative authority between the arbitrator and courts, like how the legislature has some say over the extent to which courts can scrutinize administrative decision-makers. This analogy would lead one to conclude that the private parties' intent must be given primacy. Therefore, applying administrative law's own logic about legislative intent, courts should look to the arbitration agreement to discern how deferential the parties intended judicial review to be, including what they contracted about appeal rights.

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36 *Dunsmuir*, *supra* note 3 at para 41.

37 *Ibid* at paras 44, 52, 55.

38 *Vavilov*, *supra* note 1 at para 49.

39 *Ibid* at paras 24, 26, 30.

40 *Ibid* at para 49. The reasonableness presumption can also be rebutted if the issue engages one of the rule of law exceptions outlined at para 53. These exceptions reflect the unique role of the judiciary in a constitutional democracy and are beyond the scope of my argument.

There is another salient difference in how courts structure judicial oversight in administrative versus contractual contexts. For administrative decisions post-*Vavilov*, courts presume that the standard of review is reasonableness, and correctness applies only where a recognized exception exists.[41] The two standards implement different degrees of deference defined through distinct methodologies when conducting judicial review. A reasonableness review requires the court to put the primary decision-maker's reasons first and refrain from substituting their own opinion; a correctness review empowers the court to come to its own conclusion.[42] I will call this approach the "defined standards" approach.

With the exception of the review of arbitral awards, court have taken a different approach in the contractual context. The review of contractual discretion in Canada does not use "standards of review". Courts interpret the contract to decide the content of the duty to exercise contractual discretion in good faith. The majority in *Wastech* analyzed the content of the duty in that case by looking at the text of the provision granting discretion and reading it in the context of the whole agreement.[43] The details of how courts interpret a contract will be explored later, but the most relevant observation here is that it can result in an infinite number of outcomes based on the text and context of a contractual provision. If there were a "standard of review" in contractual discretion cases, it would be described as an idiosyncratic one depending on the contract in question. In other words, the review of contractual discretion follows a single methodology, which is contractual interpretation, but its application is highly contextual. I will call this the "single contextual" approach.

The choice between the two approaches matters because they target different balances between the primary decision-maker's authority and legal control. The defined standards approach offers more structure and less flexibility than the single contextual approach. In administrative law, the reviewing court follows what is essentially a decision tree from *Vavilov*, starting with the presumption of reasonableness and analyzing whether the issue under review falls under a recognized exception that provides a route to correctness review. Prescribing a decision tree is part of the Supreme Court's project to fulfill *Dunsmuir*'s "promise of simplicity and predictability."[44] The Court seeks to reduce complex and costly debates on what test applies,[45] which is an important goal given the access to justice

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41 *Ibid* at para 23. Even before *Vavilov*, the majority in *Dunsmuir* laid out a framework that selects the reasonableness standard for most issues (paras 51–64); Binnie J's opinion in *Dunsmuir* treated it as a presumption (para 146).

42 *Vavilov*, *supra* note 1 at paras 54, 84.

43 *Wastech*, *supra* note 4 at paras 97–99.

44 *Vavilov*, *supra* note 1 at paras 4–10.

45 *Ibid* at paras 21–22.

crisis in administrative tribunals and the difficulty in navigating legal complexities faced by self-represented litigants.[46] This led the majority to streamline the previously contextual, multi-factorial test into a decision tree. The desire for simplicity is also clear in how the *Vavilov* framework treats the legislative intent exception to reasonableness. It requires only a quick search for words like "appeal" in the text, not a full-fledged interpretation analysis to discern a standard of review customized to the statutory regime. The reluctance to allow any detailed analysis on the standard of review question became more evident in the subsequent case of *Mason v Canada (Citizenship and Immigration)*. The majority there declined to recognize a new correctness exception for certified questions under the *Immigration and Refugee Protection Act*.[47] This was despite the fact that the statutory regime indicates clear legislative intent for judicial involvement.[48]

Canadian contract law has displayed the opposite tendency towards less legal control and more respect for the primary decision-maker's authority as an expression of the parties' bargain. One indication of this is the willingness to give effect to each agreement as a product of its idiosyncratic circumstances. The Supreme Court in *Sattva* observed that modern contractual interpretation has moved away from a textualist reading of words and is now a contextual exercise. It looks at both the agreement as a whole and certain unwritten aspects called the "factual matrix". The factual matrix comprises of various surrounding circumstances, such as the purpose and background of the contract, market conditions, and the parties' relationship.[49] The parol evidence rule has historically excluded the consideration of certain circumstances to achieve finality and certainty. It now takes a back seat to the factual matrix.[50] In other words, contractual interpretation under *Sattva* reacts

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[46] See e.g. Lilian Ma et al, "National Survey of Tribunal Responsiveness to Self-Represented Parties — Measuring Access to Justice for Canadian Administrative Tribunals" (2016) 29 Can J Admin L & Prac 165; Michelle Flaherty, "Self-Represented Litigants, Active Adjudication and the Perception of Bias: Issues in Administrative Law" (2015) 38:1 Dal LJ 119; Michelle A. Alton, "Rethinking Fairness in Tribunal Adjudication to Best promote Access to Justice" (2019) 32 Can J Admin L & Prac 151.

[47] *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21 at para 38. The *Immigration and Refugee Protection Act*, SC 2001, c 27, s 74 allows the Federal Court to certify "a serious question of general importance" to be appealed to the Federal Court of Appeal.

[48] See *ibid* at paras 146–57, Justice Côté.

[49] *Sattva*, *supra* note 2 at paras 47–48. See also Geoff R. Hall, *Canadian Contractual Interpretation Law*, 4th ed (Toronto: LexisNexis, 2020) at 111.

[50] *Sattva*, *supra* note 2 at paras 59–61. Notably, the Supreme Court has left open the question as to the exact role of the parol evidence rule in the factual matrix analysis. See *Corner Brook (City) v Bailey*, 2021 SCC 29 at paras 56–57.

sensitively to the fact that a private agreement is highly customizable based on the parties' background and goals in contracting. The developments on good faith in contract law similarly show a desire to facilitate idiosyncratic arrangements made by the parties themselves. Duties under the organizing principle of good faith do not require a party to act in a selfless, fiduciary-like manner; rather, "the bargain, the rights and obligations agreed to, is the first source of fairness between parties to a contract."[51] Courts are thereby directed to give effect to the parties' bargain and not superimpose free-standing legal obligations.

There are exceptions to this general tendency, especially when courts doubt whether the bargain is free and complies with the rule of law. The most notable development on this front is the *Uber v Heller* case. The majority of the Supreme Court applied the unconscionability doctrine to a standard form arbitration agreement between a multinational corporation and its delivery drivers. This doctrine allows courts to set aside unfair agreements made with unequal bargaining power. The majority noted "a significant gulf of sophistication" between the parties.[52] Justice Brown's concurrence would set aside the agreement based on the public policy doctrine because it mandates such an inaccessible arbitration forum that it practically denies access to civil justice.[53] Exploitative agreements or denial of civil justice are circumstances that indicate a need for more legal control and therefore warrant the imposition of uniform legal rules. Courts deal with them through discrete doctrines. As the unconscionability and the public policy doctrines illustrate, they are triggered by specific circumstances and are not universal rules of contractual interpretation.

Because of contract law's tendency to give effect to customizations in private agreements, the single contextual approach suits the review of decision-making authority that derives from contracts. The *Braganza* case illustrates this. While the Court there transplanted an administrative law standard, its application nevertheless resembles the single contextual approach. Lady Hale appeared to have expected this. She did not reach a final conclusion on how exactly the review of contractual discretion differs from that of administrative actions. She instead stated, "[g]iven that the question may arise in so many different contractual contexts, it may well be that no precise answer can be given."[54]

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[51] *C.M. Callow Inc v Zollinger*, 2020 SCC 45 at para 47; *Bhasin v Hrynew*, 2014 SCC 71 at para 65; *Wastech*, *supra* note 4 at paras 71, 110; *Ponce v Société d'investissements Rhéaume ltée*, 2023 SCC 25 at paras 41–43.

[52] See *Uber*, *supra* note 16 at para 93.

[53] *Ibid* at paras 101–02.

[54] *Braganza*, *supra* note 25 at para 32.

Jason NE Varuhas analysed cases that followed *Braganza* and reviewed contractual discretion on the *Wednesbury* standard. According to him, this standard gets applied with "variable intensity" depending on a series of contextual factors.[55] There are four key ones: the contractual context (including the type of contract and its terms and purpose), the nature and scope of discretion, the decision-maker's capacities, and the interests of the party subject to the discretion. As I will show in section III, these factors resemble what courts in Canada take into account when interpreting a contract. While *Braganza* only transplanted one administrative law standard, doing so in Canada, as shown in *Sattva* and *Cargill*, involves at least two standards. A study similar to Varuhas' has not been done in the Canadian context, but conceptually speaking, transplanting two standards with distinct judicial review methodologies reduces the contextual sensitivity afforded to the private parties' own agreement. This does not align with contract law's general tendency towards respecting decision-making autonomy rather than imposing legal control.

I do not mean to suggest a binary choice between the defined standards approach and the single contextual approach. It is more accurate to conceptualize them as polar ends of a spectrum. Various types of arbitrations fall in between based on the desired balance between legal control versus the parties' choice of what and how to arbitrate, often known as "party autonomy" in the arbitration context. For example, family law arbitrations require more legal control both to protect vulnerable spouses and children, and to promote expeditious dispute resolution between often unsophisticated parties. On the other hand, commercial arbitrations based on idiosyncratic agreements between well-resourced parties do not engage significant access to justice concerns and make a strong candidate for prioritizing party autonomy.

Notably, there are statutory regimes governing certain types of arbitrations in which the legislature has expressed policy choices that guide the balancing between legal control and party autonomy. Ontario's *Family Law Act* sets out a detailed regime for family law arbitrations. It prohibits parties from varying or excluding certain provisions in their arbitration agreement.[56] The legislature no doubt has the ability to regulate contracts and displace the common law. As a result, when deciding the framework for reviewing a type of arbitration, the focus on the arbitration agreement is only the default or starting point, and courts must look to applicable statutes to see whether the legislature has indicated that more legal control

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[55] Jason NE Varuhas, "Three Issues in the Law of Contractual Discretion" (2022) 42:3 Oxford J Leg Stud 787 at 793–803.

[56] *Family Law Act*, RSO 1990, c F3, s 59.3 [*Family Law Act*].

is desirable. For international commercial arbitrations, as I will argue in section II, the legislature has not displaced the default.

Section II: Difficulties in Applying *Vavilov* to International Commercial Arbitrations

In this section, I will apply my observations from section I about judicial oversight to international commercial arbitrations. My analysis starts with the *Model Law* drafted by the United Nations Commission on International Trade Law (UNCITRAL). It has been implemented by various provincial *International Commercial Arbitration Act*s (*ICAA*s) to govern international arbitrations.[57] I will argue that a statutory interpretation analysis[58] does not support uniform rules or strict legal control over international arbitrations; the legislative intent is not clear enough to displace contractual authority on this point.[59] Nor is there support for the proposal that courts freely adopt legal rules from international and foreign law. I will also critique cases that transplanted administrative law and their reliance on the notion of true question of jurisdiction.

The intuition that *Vavilov* applies to arbitrations generally can be traced to cases under provincial *Arbitration Act*s (*AA*s) that govern domestic commercial arbitrations. The domestic *AA*s provide similar regimes in different provinces. They often allow appeals to courts on

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[57] I will use the Ontario and BC *ICAA*s as examples: *International Commercial Arbitration Act*, SO 2017, c 2, Sched 5, s 5(1) [Ontario *ICAA*]; *International Commercial Arbitration Act*, RSBC 1996, c 233, s 6 [BC *ICAA*]. But see also *International Commercial Arbitration Act*, RSA 2000, c I-5; *International Commercial Arbitration Act*, RSNL 1990, c I-15; *International Commercial Arbitration Act*, RSNS 1989, c 234; *International Commercial Arbitration Act*, RSNB 2011, c 176; *International Commercial Arbitration Act*, RSNWT 1988, c I-6; *International Commercial Arbitration Act*, RSPEI 1988, c I-5.

[58] The Ontario *ICAA* directly incorporates the *Model Law* (s 5(1)). The BC *ICAA* is harmonizing legislation drafted in its own language, but it adopts the structure and essentially all the text of the *Model Law*; the differences do not matter for this paper. Strictly speaking, the interpretation of the *Model Law* text in the Ontario *ICAA* is governed by the *Vienna Convention* and the interpretation of the BC *ICAA* by domestic interpretation rules. But the interpretive approach under the *Vienna Convention* (art 31) also considers text, context, and the object of the agreement, so it suffices for this paper to analyze both *ICAA*s together.

[59] The *ICAA*s still provide the mechanism for challenging arbitral awards in court and regulate various procedural aspects of international commercial arbitrations. Parties cannot contract out of these basic mechanisms and standards. My argument is simply that the *ICAA*s fall short of prescribing a particular standard of review or displacing the starting point of contractual interpretation, which may provide different standards and structures of review.

questions of law,[60] making court proceedings on these questions statutory appeals rather than judicial review in the strict sense. Before *Vavilov*, the standard of review according to the *Dunsmuir* framework would often be reasonableness.[61] Under *Vavilov*, statutory appeals attract different standards: if the statute uses the word "appeal," appellate review standards from *Housen v Nikolaisen* apply.[62] This means that, according to the concurrence in *Wastech*, questions of law in a domestic commercial arbitral award are now subject to correctness review.[63] Notably, this holding is explicitly limited to the specific statute in question.[64]

The *Model Law* is different. Parties challenging substantive aspects of arbitral awards often rely on article 34(2)(a)(iii), which provides for set-aside applications, not appeals, on jurisdictional errors:

> (1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.
>
> (2) An arbitral award may be set aside by the court specified in article 6 only if:
>
> (a) the party making the application furnishes proof that:
>
> …
>
> (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award

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60 See e.g. *Arbitration Act*, 1991, SO 1991, c 17, s 45(1) [Ontario Domestic *AA*]; *Arbitration Act*, RSBC 2020, c 2, s 59 [BC Domestic *AA*].

61 *Sattva*, *supra* note 2 at para 106 and *Teal Cedar*, *supra* note 2 at para 74 indicate that the *Dunsmuir* framework when applied to the commercial arbitration context will often lead to a reasonableness standard. Questions triggering a correctness review under the *Dunsmuir* framework are not expected to be common. These include constitutional questions, true questions of jurisdiction, questions of law of central importance to the legal system as a whole and outside the administrative decision-maker's expertise, and questions about jurisdictional boundaries between multiple administrative bodies: *Dunsmuir*, *supra* note 3 at paras 58–61.

62 *Vavilov*, *supra* note 1 at para 37. The appellate standards of review are that all questions of law are subject to a correctness standard, and questions of facts or mixed questions of law and facts are subject to a palpable and overriding error standard.

63 *Wastech*, *supra* note 4 at para 120, Justices Brown and Rowe.

64 *Ibid* at para 121, Justices Brown and Rowe.

> which contains decisions on matters not submitted to arbitration may be set aside.[65]

This text does not indicate a clear legislative intent that a reviewing court apply any particular standard of review. Nor does it mention the magic word "appeal" so as to engage the *Vavilov/Housen* regime of statutory appeal. It instead states that set-aside applications are the "only" recourse to a court.

If we treat the domestic *AA*s as related legislation when interpreting the *ICAA*s,[66] the texts suggest that, when speaking of set-aside applications, the provincial legislatures refer to something different from an appeal. The domestic *AA*s provide for both appeals and set-aside applications—in separate and adjacent sections.[67] These two recourses address different issues in domestic arbitrations: appeals are to remedy legal errors in the award,[68] whereas set-aside applications deal with primarily procedural issues in the arbitration process, including legal capacity when entering into the arbitration agreement, composition of the tribunal, arbitral bias, notice of arbitration, and opportunity to be heard.[69] The provision under the domestic *AA*s that is most analogous to article 34(2)(a)(iii) of the *Model Law* is that courts can *set aside* an award if provincial law does not permit arbitration of the subject matter of the dispute.[70] In other words, this kind of issue is not dealt with through an *appeal* under the domestic *AA*s.

The overall scheme of the *Model Law* does not indicate a policy concern that calls for tighter legal control. To the contrary, it specifically limits the availability of appeals in many other sections;[71] it also makes it

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65 *Model Law*, *supra* note 17, art 34(2)(a)(iii).

66 As a rule of statutory interpretation, courts may treat the same words in other statutes as relevant (*United Food & Commercial Workers Union, Local 1518 v Sunrise Poultry Processors*, 2015 BCCA 354 at paras 80–83). But the weight given to related statutes is often modest and depends on many factors: Ruth Sullivan, *The Construction of Statutes*, 7th ed (Toronto: LexisNexis, 2022) at § 13.08 [Sullivan].

67 Ontario Domestic *AA*, *supra* note 60, ss 45(1), 46; BC Domestic *AA*, *supra* note 60, ss 58(1), 59.

68 The BC Domestic *AA* allows appeals on questions of law due to either the parties' consent or public importance: see ss 59(2)(a), 59(4). The Ontario Domestic *AA* is the same in this regard and also allows appeals on mixed questions of fact and law if the parties consent: see ss 45(1)–(3).

69 Ontario Domestic *AA*, *supra* note 60, s. 46(1); BC Domestic *AA*, *supra* note 60, s 58(1).

70 Ontario Domestic *AA*, *supra* note 60, s. 46(1).5; BC Domestic *AA*, *supra* note 60, s 58(1)(e).

71 *Model Law*, *supra* note 17, arts 11(5) (no further appeal is available from the appointment of arbitrator by a court), 13(3) (no further appeal from court challenges to

difficult for parties to prolong the arbitration process with objections to jurisdiction.[72] Some courts have pointed to the fact that a tribunal under the *Model Law* can rule on its own jurisdiction to support a deferential standard of reasonableness.[73] But it is equally plausible that article 34 speaks to legal control that is nevertheless preserved within an overall deferential regime. The legislatures may have intended a narrow provision to serve a "secondary purpose" of preserving some judicial oversight, which is distinct from the primary policy of efficiency and finality pursued by the broader scheme.[74]

Beyond the text of the *Model Law*, legislative debates only show that the *ICAA*s' primary purpose is to attract foreign parties to arbitrate in their province by adopting international standards. According to the member of the Ontario legislature who sponsored its *ICAA*, its purpose is "modernizing rules for commercial arbitration, which would make Ontario a more attractive jurisdiction for resolving cross-border disputes."[75] Similarly, the Legislative Assembly member who introduced the BC *ICAA* sought to use "language and concepts familiar to international business parties and counsel" so as to "position British Columbia as an arbitration destination for international commercial disputes."[76] It is not clear how much judicial oversight under article 34 the legislatures thought would achieve this purpose.

This primary purpose would appear to support Maureen Irish's proposal of a bespoke interpretive approach to the *Model Law* that avoids relying on domestic legal concepts but pursues harmonization with foreign jurisdictions.[77] Article 2A indeed states that "regard is to be had

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the appointment of arbitrators), 14(1) (no further appeal is available from a court decision on whether to terminate an arbitrator's mandate for failure or impossibility to act).

[72] Article 16(3) allows a court to review an arbitral tribunal's ruling on its own jurisdiction only if the decision is rendered in the form of a preliminary ruling before ruling on the merits and is challenged within 30 days; but further appeals from the first instance court's decision on preliminary jurisdiction questions are prohibited.

[73] *Lululemon Athletica Canada v Industrial Color Productions*, 2021 BCSC 15 at para 21, rev'd 2021 BCCA 428 [*Lululemon* BCSC]. The BC Court of Appeal decision reversing this decision on this point will be discussed later.

[74] The rules of statutory interpretation recognize that legislation often has implicit, secondary goals that qualify or modify the pursuit of its primary purpose: *R v Rafilovitch*, 2019 SCC 51 at para 9; see also Sullivan, *supra* note 66 at § 9.02.

[75] "Bill 27, An Act to reduce the regulatory burden on business", 2nd reading, *Legislative Assembly Debates*, 41-2 (5 October 2016) at 910 (Mrs. Cristina Martins, parliamentary assistant to Hon Duguid).

[76] "Bill 11, International Commercial Arbitration Amendment Act", 2nd reading, *Legislative Assembly Debates*, 41-3 (11 April 2018) at 3:20 pm (Hon Eby).

[77] Maureen Irish, "The Review of International Commercial Arbitral Awards and the New York Convention: Breaking the Link to Administrative Law" (2021) 52:2

to [the *Model Law*'s] international origin and to the need to promote uniformity." But even if international and foreign law expertise is not a concern for domestic courts, I believe there are two principled problems with this approach. First, as Irish herself states, "domestic legal cultures cannot be displaced entirely".[78] Canada remains a dualist system,[79] which means that domestic courts do not automatically apply foreign and international law *as law* (with the exception of *jus cogens*). It is only possible to do so if article 2A of the *Model Law* can be interpreted as the legislature implementing foreign and international law, but this provision does not refer to any particular foreign or international law. Its text only requires courts to have regard to international norms, not strictly abide by them. This is too ambiguous to be treated as implementation. Contractual interpretation, on the other hand, can account for foreign and international law *as facts*. This is because courts can hear expert evidence on the legal background of a contract as part of the factual matrix under the law of contractual interpretation.

It is open for courts to find foreign or international law persuasive, but the uncertainty with this potentially undermines the *ICAA*s' purpose of attracting foreign parties. As Irish acknowledges, private commercial law is still in the process of harmonization, and there are diverging norms that may or may not be suitable for adoption.[80] While UNCITRAL provides official explanatory notes and other resources, these will not encompass all issues that arise. The very uncertainty about which foreign law (or version of international law) a Canadian court will find persuasive is a factor that will discourage foreign parties from choosing a Canadian jurisdiction as their seat for arbitration. Developing a bespoke interpretive approach based on international norms therefore does not further the legislation's primary purpose. In contrast, the contextual nature of contractual interpretation, as I will explain later, can account for *the* foreign law that is the most relevant to the parties' circumstances and thus promote certainty.

While the primary purpose of the *ICAA*s does not shed light on how much judicial oversight is appropriate, minutes of committee proceedings on the Ontario *ICAA* support prioritizing party autonomy. Dr. Janet Walker testified as an expert in front of the committee considering the draft *ICAA*. When asked about the possibility of the *Model Law* text being

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Ottawa L Rev 355 [Irish]. At 393, Irish also discusses the possibility of using "autonomous interpretation," which is a set of rules independent of any legal system (based on Martin Gebauer, "Uniform Law, General Principles and Autonomous Interpretation" (2000) 5:4 Unif L Rev 683). My critiques apply to this approach as well.

78 *Ibid* at 393.

79 *Quebec (Attorney General) v 9147-0732 Québec inc*, 2020 SCC 32 at para 23.

80 Irish, *supra* note 77 at 392, 394–95.

amended and requiring new domestic legislation, she explained that amendments are highly unlikely due to its large number of signatories but also unnecessary in any event. This is because "the practice of international commercial arbitration includes within it huge opportunities for parties to customize and tailor their regime to suit their own needs. Those happen in their choice of an administering body and their own arbitral agreements."[81] In other words, the *Model Law*'s suitability for incorporation into domestic legislation assumes that parties will keep the law of international commercial arbitration up to date through the practice of customizing arbitration agreements. This requires the *Model Law* to be interpreted to allow such customization rather than embody static, uniform rules.

A comparison with other types of arbitrations further confirms that the *Model Law* regime is no indication of clear legislative intent to displace party autonomy. A lot more clarity exists under statutory regimes designed to either protect particular groups or regulate industry practices. In family law arbitrations, the Ontario *Family Law Act* uses mandatory provisions to protect vulnerable parties. For example, the arbitration agreement must be in writing and be based on independent legal advice evidenced by a lawyer's completion of a certificate, and the arbitral award must be in writing and provide reasons.[82] The *Act* also standardizes the arbitration process: all arbitrators are given jurisdiction to award pension benefits, the award must be enforced by filing certain documents with the Superior Court, and the Court is required to order enforcement unless certain exceptions are made out.[83] Another example is the Ontario *Insurance Act*'s regime for motor vehicle insurance arbitrations. It directs disputes to a statutory tribunal, sets out rules for certain aspects of dispute resolution, and entrusts the government to prescribe more details through regulations.[84] The regime's reliance on specialized expertise and its detailed regulatory schemes have allowed courts to discern the appropriate level of deference.[85] Unlike family law or motor vehicle insurance arbitrations, nothing in the *Model Law* suggests a desire to pursue a policy goal that requires strict legal control or warrants a uniform set of rules.

Because commercial arbitrations derive from the common law of contracts, an odd implication of using administrative concepts without

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[81] Legislative Assembly of Ontario, Standing Committee on General Government, *Evidence*, 41-2 (22 February 2017) at G-173 (Janet Walker). However, I note that testimony given in committee proceedings is not necessarily accorded significant interpretive weight (see Sullivan, *supra* note 66 at § 23.03(4)(d)).

[82] *Family Law Act*, *supra* note 56, s 59.6.

[83] *Ibid*, ss 59.4.1, 59.8.

[84] *Insurance Act*, RSO 1990, c I8, ss 279–83.

[85] See *Intact Insurance Co v Allstate Insurance Co of Canada*, 2016 ONCA 609 at paras 29–30, 48–53.

clarity from statutory interpretation is that the legislature is treated as inadvertently ousting the common law. Legislatures are generally presumed to preserve existing common law rights.[86] Because the common law is within courts' inherent jurisdiction, the presumption operates most strongly when the statute concerns common law, whereas courts who deal with statute-based schemes readily concede primacy to the legislature.[87] For an archetypal administrative law decision, legislatures have greater leeway to be unclear about statutory tribunals' susceptibility to judicial review. They created the tribunal and can provide a different standard of review if they do not like the judicial default. For arbitral awards, however, when courts impose a standard of review, they essentially restrict private parties' contractual right to limit their own use of courts without the parties having a similar ability to vary the default standard. A legislature may well impose such restrictions, but outside specific legal doctrines courts do not usually do so on their own motion.

This theoretical discordance underlies much of the jurisprudence on article 34, which has been on a bumpy ride trying to apply a uniform legal rule from administrative law. The standard of review analysis under article 34 has mirrored the difficulties in administrative law, grappling with the notion of jurisdiction in the abstract without the benefit of the contractual context. In *Cargill*, which was decided after *Dunsmuir* and before *Vavilov*, the Court of Appeal for Ontario sought to clarify article 34's application.[88] It explicitly borrowed from the administrative law framework of *Dunsmuir* and held that article 34 only permits judicial scrutiny of "true questions of jurisdiction". This notion narrowly defines jurisdictional questions, but once such a question is found, the correctness standard applies.[89] It is unlikely that parties to the arbitration intended the most exacting judicial review for some issues and no review at all for the others, a binary choice hinging on the meaning of a legal phrase that they never heard of. More tellingly, the stark contrast between these two standards only makes sense if one believes the distinction between jurisdiction and substantive merits to be clear and workable. The Court appears to believe so. It adopted the then-fresh notion of true questions of jurisdiction from *Dunsmuir* precisely to ensure that a reviewing court only determines whether an arbitral tribunal exceeded its jurisdiction and does not stray into the merits of their award.[90]

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86 *Lizotte v Aviva Insurance Company of Canada*, 2016 SCC 52 at para 56; *Moore v Sweet*, 2018 SCC 52 at para 70. See also Sullivan, *supra* note 66 at ch 17 Part I (2).

87 Sullivan, *supra* note 66 at ch 17 Part I (4).

88 *Cargill*, *supra* note 2 at para 30.

89 *Ibid* at paras 41–42, 53.

90 See *ibid* at paras 40, 44–53.

In 2019, *Vavilov* removed "true questions of jurisdiction" as a distinct category in the review of administrative decisions.[91] The majority recognized that this concept is "inherently 'slippery'" and difficult to apply, because any challenge to a decision can be characterized as "jurisdictional" in the sense that it questions whether the decision-maker has the authority to decide the way they did.[92]

Because the Court of Appeal did not distinguish its use of "jurisdiction" from administrative law, *Cargill* appears to rest on a shaky foundation. The application of this notion in *Cargill* exemplifies its "slippery" nature. The Court in *Cargill* framed the jurisdiction inquiry to include two questions: whether the issue falls within the submission to arbitration, and whether anything in the NAFTA, properly interpreted, prevents the tribunal from making the award it did.[93] A reviewing court can answer these questions without relying on the tribunal's reasoning, but they have to conduct their own interpretation. Under article 34, this interpretation question is often the very issue under challenge, requiring courts to form a substantive view of the underlying issue before choosing a standard of review. In *Cargill*, the issue under review was whether the NAFTA tribunal had jurisdiction to award damages to Cargill, a US company that sells to Mexico, for the lost capacity in its US plants caused by Mexico's breach. Mexico submitted that the NAFTA imposes territorial limits on damages, such that losses suffered by an investor in its home business operation are not compensable.[94] The Court held that, under the treaty interpretation principles of the *Vienna Convention*, the NAFTA parties did not have a clear and agreed common position to impose territorial limits.[95]

As Marc Gold pointed out, one could alternatively frame the issue in *Cargill* as whether the loss sustained by the investor was in relation to its investment;[96] this would appear to trigger a correctness review since the Court accepts that the "investment" definition must apply for the tribunal

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91 Only questions about "jurisdictional boundaries" between two or more administrative bodies attract correctness review. See *Vavilov*, *supra* note 1 at paras 63, 65.

92 *Ibid* at para 66.

93 *Cargill*, *supra* note 2 at para 52.

94 *Ibid* at paras 65, 79.

95 *Ibid* at paras 80–84. NAFTA's jurisdictional limits on damages may exist through the definition of investment. Therefore, there could be territorial limits to damages through the scoping of "investment" (i.e. whether the investor party's business is integrated across borders). The scoping of "investment" is a factual question on which the Court deferred to the tribunal: paras 69–71. The deference on clear questions of fact is meaningful; I do not criticize *Cargill*'s approach in this respect.

96 Marc Gold, "Judicial Review of International Arbitrations in Canada: Notes on *Mexico v Cargill*" (2011) 90 Can B Rev 717 at 724 [Gold].

to have jurisdiction.[97] The uncertainty in framing is a symptom of the fact that the standard of review and substantive analyses in *Cargill* not only slipped into each other but were blended together. It defeats the purpose of having standards of review: if the court agrees with the challenging party's interpretation of the submission to arbitration, it will choose a correctness review and simultaneously set aside the arbitral award. If the court agrees with the responding party's interpretation, there will be no review. *Cargill*'s recognition that non-jurisdictional issues cannot be reviewed amounts to merely notional deference because the very determination of what is non-jurisdictional requires the court to substitute its own interpretation. Further, courts are expected to do so without referencing the reasoning of the arbitrator. It is unclear why expertise, a factor often motivating parties to choose arbitration in the first place, will not be relevant to jurisdictional questions.

Post-*Vavilov* in 2021, the BC Court of Appeal considered the standard of review issue in *Lululemon Athletica Canada v Industrial Color Productions*, where Lululemon applied to set aside an arbitral award in favour of a former service provider. The BC Court of Appeal held that *Cargill* remains good authority for international commercial arbitrations.[98] Courts in other provinces have agreed.[99] Notably, the BC Court of Appeal stated that *Vavilov* is an administrative law decision and does not control the field of arbitration.[100] But the Court did not mention the fact that *Vavilov* abandoned the notion of "true question of jurisdiction" in administrative law. It is not clear why the difficulties in articulating this concept's scope and distinguishing it from ordinary issues[101] do not warrant concern in the arbitration context.

Cargill and *Lululemon* both pointed to the "furnish proof" language in article 34 as supporting the interpretation of a correctness review on jurisdictional issues.[102] But this could well mean a *de novo* hearing in the procedural sense, which is not the same as correctness review. Article 34 provides for a set-aside *application* to a court of first instance, not an *appeal*. An originating application obviously needs to be furnished by proof. This alone says nothing about how deferential courts should be to arbitral tribunals. The Alberta Court of Appeal once canvassed the imprecise use of the term "*de novo*" and held that it means making an entirely new decision,

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97 *Cargill*, *supra* note 2 at para 68.

98 *Lululemon Athletica Canada v Industrial Color Productions*, 2021 BCCA 428 at para 47 [*Lululemon* BCCA].

99 See e.g. *Russian Federation v Luxtona Ltd*, 2021 ONSC 4604 at para 38; *Ong v Fedoruk*, 2022 ABQB 557 at paras 35–37.

100 *Lululemon* BCCA, *supra* note 98 at paras 44, 46.

101 See *Vavilov*, *supra* note 1 at paras 65–66.

102 *Cargill*, *supra* note 2 at para 38; *Lululemon* BCCA, *supra* note 98 at para 41.

whereas "correctness" means agreeing with the previous decision.[103] The reasoning in *Cargill* demonstrated confusion precisely on this point. It rejected the reasonableness standard for jurisdictional questions on the basis that it inevitably invites courts to scrutinize the merits of the tribunal's decision by analyzing its reasons.[104] Underlying this critique in *Cargill* is the assumption that correctness means a *de novo* hearing—in the sense of deciding the issues afresh without looking at the tribunal's reasoning—and is thus free of the problem of scrutinizing merits. But if one accepts the Alberta Court of Appeal's distinction, "correctness" also speaks of the previous decision and invites courts to look at its merits, just like "reasonableness." *Vavilov* indeed describes correctness review as also requiring the court to take into account the previous decision-maker's reasons.[105] If anything, a correctness review would invite more scrutiny given the court's ability to substitute its own view. This is inconsistent with the Court of Appeal's intention in *Cargill* to stay out of the decision's merits. While the nuanced distinctions between correctness and *de novo* may seem too fine-grained, they do reveal the difficulty in applying the various administrative law concepts to the *Model Law* regime.

Another odd implication of the *Cargill* approach is that it has resulted in a uniform standard to both investor-state and purely private arbitrations. *Cargill* was decided in the context of an investor-state arbitration.[106] In *Consolidated Contractors v Ambatovy Minerals*, which involved a commercial arbitration between private parties, the Court of Appeal for Ontario simply adopted the correctness standard from *Cargill*.[107] All jurisdictional errors under article 34 are thereby subject to a uniform standard of correctness, whether the arbitration involves a state party or not.[108] But the private parties in *Consolidated Contractors* had their own agreement; they may not have intended the same degree of deference as the state signatories to NAFTA.

This uniform approach glosses over the fact that the source of primary decision-making authority is different between the two types of international arbitrations. Consent is multi-layered in investor-state arbitrations: state parties provide consent first by signing the treaty, and the investor perfects the consent by making a claim of treaty breach.

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103 *Pacer Construction Holdings Corp v Pacer Promec Energy Corp*, 2018 ABCA 113 at paras 64–66, citing Roger P. Kerans & Kim M. Willey, *Standard of Review Employed by Appellate Courts*, 2nd ed (Edmonton: Juriliber, 2006) at 43–44.

104 *Cargill*, *supra* note 2 at para 51.

105 *Vavilov*, *supra* note 1 at para 54.

106 *Cargill*, *supra* note 2 at para 1.

107 *Consolidated Contractors v Ambatovy Minerals*, 2017 ONCA 939 [*Consolidated Contractors* ONCA].

108 *Ibid* at paras 29–32.

Céline Lévesque argues that this complicates the review of investor-state arbitrations, because the court must focus not only on the specific investor and the state, but also the general consent of states as expressed in the treaty.[109] The standard of review in investor-state arbitrations is beyond the scope of this paper, but the difference between commercial and investor-state arbitration illuminates the connection between the nature of judicial oversight and the arbitrator's source of authority. The degree of deference owed is a matter of interpreting the document that creates the authority. Implemented treaties are essentially quasi-legislative, making investor-state arbitrations the midway between private arbitrations and administrative decisions. In *Cargill*, the public law flavour of imposing a set of defined standards may be justified by the state parties' involvement and the fact that NAFTA interpretation implicates future investors beyond the immediate parties. But in purely private arbitrations as in *Consolidated Contractors*, the public is not affected, and there is less need for imposing standards of review as uniform rules that parties cannot contract around.

Section III: Determining Standard of Review Based on Contractual Interpretation

While contractual interpretation is theoretically preferable to statutory interpretation in determining the standard of review of an international commercial arbitral award, there can be practical difficulties. Few parties foresee future issues that require court adjudication or explicitly set out a standard of review in their arbitration agreement. In this section, I argue that modern rules of contractual interpretation suffice to resolve this issue. I will show by analyzing examples from case law how contractual interpretation is a workable methodology for determining standards of review.

Contractual interpretation seeks to discern what a reasonable person would have understood from words of the agreement read as a whole and from the factual matrix.[110] Courts reviewing arbitral awards must therefore determine the parties' *objective* intention as to how susceptible to judicial review the issues in an arbitral award should be. The parties need not have put their minds to the legal terminology of the various standards of review.

Courts have resort to a wealth of interpretation tools and case law for discerning the scope of contractual terms when the parties have not spelled

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[109] Céline Lévesque, "'Correctness' as the Proper Standard of Review Applicable to 'True' Questions of Jurisdiction in the Set-Aside of Treaty-Based Investor-State Awards" (2013) 5 J Intl Disp Stlmt 69 at 71.

[110] *Sattva*, *supra* note 2 at paras 49–50; see also Hall, *supra* note 49, ch 2 at 111.

out various contingencies. A prime example of this is releases signed to settle claims, where courts have long grappled with broadly drafted provisions about future disputes. Historically, releases were governed by the *Blackmore* rule, which held that, despite the general words of releases, courts must examine the circumstances at the time the release was signed to determine its scope.[111] In 2021, the Supreme Court of Canada held in *Bailey* that this rule had been subsumed by the modern approach that reads words in their context to determine objective intentions.[112]

The same can be done with the implied degree of deference in arbitration agreements. Releases are often drafted in the broadest possible terms and involve an estimation of future risks,[113] features common to arbitration agreements. Releases can apply to both known and unknown claims,[114] in the same way that arbitration clauses often have to govern disputes or issues not foreseeable at the time of contracting. Despite their broad language and the lack of foreseeability at the time of contracting, the Court held in *Bailey* that the scope of releases turns on an interpretation of the text and context just like any other contract.[115] The interpretation of broadly drafted arbitration clauses can draw inspiration from this development. I acknowledge, however, that what I propose is even more abstract from the interpretation of a release's scope: courts would interpret not only what issues are covered by the arbitration agreement but also how the parties intended courts to go about reviewing the arbitral award on these issues.

Key to this development is the broad scope of the factual matrix in modern contractual interpretation, encompassing all surrounding circumstances reasonably known to the parties at the time of contracting.[116] Canadian courts have embraced the factual matrix as always relevant.[117] This will allow courts reviewing arbitral awards to take into account factors specific to the parties that would otherwise be ignored by the uniform approach under *Cargill*.

In practice, the factors that influence the determination of standard of review under a contextual interpretation approach may look similar to the factors that Varuhas found to influence how courts have applied the *Wednesbury* standard. The first two factors identified by Varuhas are readily part of interpreting the text of the arbitration agreement and

111 *London and South Western Railway Co v Blackmore* (1870), LR 4 HL 610 at 623.

112 *Corner Brook (City) v Bailey*, 2021 SCC 29 at paras 32–34 [*Bailey*].

113 *Ibid* at paras 36–37.

114 *Biancaniello v DMCT LLP*, 2017 ONCA 386 at paras 42, 49.

115 *Bailey*, *supra* note 112 at para 43.

116 *Sattva*, *supra* note 2 at para 46; see also Hall, *supra* note 49, ch 3 at 65–66, 73.

117 *Sattva*, *supra* note 2 at paras 46–48.

context of the arbitrator's authority. The other two factors, decision-maker's capacities and the interests of the party subject to the discretion, help the court infer the parties' *objective* intention. For example, did they expect to rely on the expertise of the arbitrator for the type of dispute in question? Would they have wanted extensive judicial involvement in a kind of dispute typically involving moderate financial stakes? A contractual interpretation approach would allow a court to explicitly address these considerations, rather than cloaking them in the language of standards of review and letting them subtly influence the substantive analysis.

The reviewing court would start with the text of the arbitration agreement. The text can provide clues on the intended degree of deference even if it does not explicitly set out a standard of review. The specificity of the language of the arbitration clause often indicates how deferential the contractual parties intended a reviewing court to be. Precise and narrow language suggests that the parties cautiously restricted the arbitrator's authority, contemplating heightened scrutiny from the judicial forum. Unspecific, broad grants of power afford the arbitrator more leeway, with judicial deference being the norm and scrutiny the exception. This approach would take existing jurisprudence one step further. Case law readily distinguishes between "limited" or "executory" versus "universal" arbitration clauses, and the latter is interpreted to give the arbitrator broader jurisdiction.[118]

Indeed, the generality or specificity of the text of arbitration clauses or agreements tends to fall on a spectrum. *Lululemon* involved an unspecific and all-encompassing arbitration clause in the parties' Services Agreement, and it purported to cover "any dispute" under the Agreement.[119] More detailed is the arbitration clause in *Consolidated Contractors*. The contract was for constructing a slurry pipeline in a nickel mine in Madagascar. The arbitration clause outlined several procedural steps that must be completed before arbitration, including determination by a supervising engineer and attempts to settle through a dispute adjudication board.[120] Even more specific is the agreement in *FCA Canada v Reid-Lamontagne*, which provides lists of disputes eligible and ineligible for arbitration and explicitly contemplates the possibility that the arbitrator will in some cases find themself with no jurisdiction over the claim submitted.[121] These situations suggest varying degrees of deference. When the parties wanted "any dispute" under their contract to be decided by an arbitrator, like in

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118 Hall, *supra* note 49, ch 9 at 296–97.

119 *Lululemon* BCSC, *supra* note 73 at para 5.

120 *Consolidated Contractors v Ambatovy Minerals*, 2016 ONSC 7171 at para 16.

121 2019 ONSC 364 at paras 5–6. This is a domestic arbitration in the consumer context, and I only use it to illustrate the range of specificity in arbitration clauses and agreements.

Lululemon, it signals an intention that the arbitrator's decision be as final as possible. In contrast, in cases like *FCA Canada*, where parties carefully specified the *types* of disputes that they agreed to arbitrate, the arbitrator should not be permitted to be wrong in deciding her scope of authority over the dispute in question.

The analysis is less straightforward when the agreement controls arbitrability through procedural requirements like in *Consolidated Contractors*. On the one hand, the parties limited arbitration to narrow circumstances, suggesting that a reviewing court should carefully police the boundaries of what is arbitrable. On the other hand, the procedural requirements were geared towards encouraging informal resolution and early settlement, which means that a deferential standard of review would better reflect the parties' overall desire to discourage court proceedings. Detailed procedural requirements therefore cut both ways, and contextual factors may shed more light. In *Consolidated Contractors*, the alleged jurisdictional error was that the tribunal considered certain counterclaims that had not been properly raised through the dispute resolution steps laid out in the arbitration agreement. Applying *Cargill*, the Court of Appeal for Ontario held that this was not a "true question of jurisdiction" and declined to set aside the award.[122] If we consider the factual matrix, contractual interpretation would also lead to a highly deferential review. The arbitration concerned mining and pipeline construction in the mountains of Madagascar.[123] The tribunal found that the counterclaims were intricately connected to the claims and declined to subject the counterclaims through the same dispute resolution steps.[124] This decision required detailed evidence about the parties' communications and conduct throughout the dispute and relies on the tribunal's expertise with mega-construction projects in the mining context. The parties at the time of making the arbitration agreement would not have intended courts to re-examine such decisions in detail. It would have defeated the very purpose of seeking efficiency and niche expertise through arbitration rather than court proceedings.

Ultimately, a deferential standard of review would often apply under the contractual interpretation approach. The contextual factors typically at play in commercial arbitrations include expertise, complexity, and desire for finality, which all point to judicial deference to the arbitrator. Likewise, under *Cargill*, true questions of jurisdiction attracting correctness review

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122 *Consolidated Contractors* ONCA, *supra* note 107 at paras 52, 54.

123 *Ibid* at para 3.

124 *Ibid* at paras 49–50.

are rare.[125] The overall balance between deference and scrutiny therefore may be similar between the two approaches. But as illustrated above with the examples from case law, contractual interpretation allows different levels of deference and structures of judicial scrutiny. The lack of uniformity suits the varying circumstances commercial parties find themselves in.

Section IV: Contextual Sensitivity and Policy Considerations

The previous sections of this paper endeavoured to show that contractual interpretation is a more principled and workable approach to determine standard of review in international commercial arbitral awards. This last section compared the contractual interpretation approach and the administrative law approach in their ability to address two policy considerations. Building upon section III, I argue that contractual interpretation individualizes a difficult policy balance—over which legislation has not provided clear guidance—to the circumstances of each arbitration. Unlike a uniform approach, this more likely strikes the right balance between efficient dispute resolution and quality of justice. Further, contractual interpretation leaves room for accommodating foreign law and promoting comity, or at least no less so than the administrative law approach.

A policy dilemma in international arbitration is the balance between factors militating in favour of the reasonableness standard, including the efficiency and finality of arbitration, versus the desire for quality of justice achieved through a correctness review. *Cargill* recognized that there is a "tension between the discouragement to courts to intervene" and "the court's statutory mandate to review for jurisdictional excess."[126]

As I explained in section II, statutory interpretation of the *Model Law* does not provide clear guidance. Contractual interpretation addresses this policy balance which would be difficult in the abstract: looking to the parties' own agreement individualizes the balance to the specific circumstances of their relationship. Although courts do not directly use policy concerns to interpret commercial contracts, interpretation is about what parties should *reasonably* be taken to have intended, which nevertheless reflects a policy balance in the outcome. For example, in the interest of efficiency and finality, two parties engaged in frequent transactions would not want the minutiae of one transaction to be reviewable on a correctness standard. But they may want the arbitrator to be correct when assuming

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125 *Cargill*, *supra* note 2 at paras 44, 46; *Consolidated Contractors* ONCA, *supra* note 107 at para 30.

126 *Cargill*, *supra* note 2 at para 48.

jurisdiction over a question common to many transactions that are now all under dispute. This reflects the contractual interpretation rule that, if possible, courts should choose meanings that accord with sound commercial principles and good business sense.[127] At the same time, this outcome also strikes a sensible balance between efficiency and fairness of dispute resolution in the specific commercial relationship.

Sophisticated commercial parties have a structural incentive to regulate their dispute resolution in a way that ends up balancing competing policy goals. A unique feature of arbitration agreements is that they embody perfectly mutual rights and obligations because both parties are subject to the same arbitration process without knowing which party the outcome will favour. In an international commercial arbitration, save for the occasional mom-and-pop business exporting overseas, parties have roughly equal bargaining power, so that neither expects to be more capable of exploiting the arbitration process than the other. The parties are in a sense setting rules behind a Rawlsian veil of ignorance. At the time of contracting, neither party knows whether the arbitration will ultimately favour itself or the other party. Both would prefer a fair process with a level of judicial scrutiny tailored to the nature of their businesses and the circumstances of their arrangement. Courts by interpreting their individual agreement thereby incorporate broader policy concerns by indirectly facilitating a sensible balance between expediency and quality of justice.

There is one policy concern that does not readily fit into the above analysis: comity and the desire for consistency with foreign jurisdictions. However, the administrative law approach is arguably no better than contractual interpretation in this regard.

First, jurisdiction is an amorphous concept, and there is no guarantee of alignment with foreign law if standard of review depends on the characterization of the issue under review as jurisdictional or not. Critics of *Cargill* have long argued that the standard of review should not turn on the characterization of the issue.[128] *Vavilov*'s criticisms of the previous administrative law frameworks apply equally to *Cargill*: even after adopting the narrower definition of "true questions of jurisdiction" in *Dunsmuir*, courts struggled to articulate its difference from other jurisdictional questions.[129] Professor Irish wanted international arbitration to break

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127 *Kentucky Fried Chicken Canada v Scott's Food Services*, 1998 CanLII 4427 at para 27, 41, 1998 CarswellOnt 4170 (ONCA); *Rainy Sky S.A. v Kookmin Bank*, [2011] UKSC 50 at para 40; Hall, *supra* note 49, ch 2 at 63.

128 See e.g. Gold, *supra* note 96 at 724.

129 *Vavilov*, *supra* note 1 at para 66.

from its administrative law entanglements to facilitate harmonization.[130] The very first step should be to dissociate from the notion of "true questions of jurisdiction". Otherwise, the law of international arbitration is subject to ever-changing concepts in domestic administrative law.

Even with a consistent understanding of jurisdiction, courts structure judicial review differently. For example, under *Cargill*, courts need to determine whether the tribunal was correct to enter into the inquiry.[131] In some courts in the United States however, not only is there no concept called "true questions of jurisdiction," the standard of review turns on a procedural question. A reviewing court first asks whether there is "clear and unmistakable evidence" that the parties raised the jurisdiction challenge in front of the arbitrator; if yes, deference applies; and if no, the court will conduct a full review.[132] If harmonization and comity require achieving similar outcomes regardless of where the litigation takes place, relying on a uniform set of standards developed by domestic courts does not assist. Domestic courts will find it most helpful to look to each other on how to apply this set of standards rather than seeking to harmonize foreign jurisprudence. Although generally speaking many foreign courts also require arbitral tribunals to be "correct" on jurisdictional issues,[133] the analyses look nothing alike and may well lead to diverging results.

Contractual interpretation, on the other hand, potentially shows comity. Conceptually, any inconsistency arises not from conflicting national laws on what is jurisdictional and how courts go about reviewing an arbitral award. It instead arises from the inherent variety in how different private parties may formulate their bargain. As mentioned earlier, the factual matrix analysis may account for foreign laws that are most relevant to the parties' contractual relationship. Sophisticated parties are often taken to negotiate with the knowledge of common law and statutory defaults. If the written agreement does not provide otherwise, they are presumed to intend that the default rules apply.[134] Likewise, the

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130 Irish, *supra* note 77.

131 *Cargill*, *supra* note 2 at paras 52–53.

132 Lévesque, *supra* note 109 at 89.

133 *Lululemon* BCCA, *supra* note 98 at para 43. *Cargill*, *supra* note 2 at para 38, took into account the UK Supreme Court's approach in *Dallah Real Estate and Tourism Holding Company v Pakistan*, [2010] UKSC 46 in selecting correctness standard for true questions of jurisdiction. See also Lévesque, *ibid*.

134 See e.g. *Puri Consulting v Kim Orr Barristers,* 2015 ONCA 727 at paras 26–30 (parties to a settlement agreement are taken to be aware of the relevant sections of *Rules of Civil Procedure*); *Marks and Spencer Plc v BNP Paribas Securities Services Trust Company (Jersey) Ltd*, [2015] UKSC 72 at para 46 (a commercial tenant's attempt to apportion unused rent failed: neither the common law nor statutes provide for apportionment and yet the parties did not specify otherwise in their lease).

meaning of an arbitration agreement negotiated against the background of international law and the law of a foreign state should be interpreted with these laws as part of the context. For example, the fact that foreign courts have consistently adopted a correctness standard of review for a certain type of dispute may support an inference that the parties acquiesced to that state of affairs unless they explicitly agree to a different standard. Courts may even develop interpretive presumptions in favour of international comity as a matter of contract law. The precise parameters of such an interpretive presumption are beyond the scope of this paper, but I merely point out that the contextual nature of contractual interpretation allows this possibility. To the extent that comity is a desirable goal, contractual interpretation achieves it better than a uniform set of standards based on a categorization of the issue as jurisdictional or not.

Conclusion

I have argued that the standard of review for arbitral awards under the *Model Law* should depend on the parties' agreement. The standards of review frameworks from administrative law prioritize legal control through uniformity, a goal that cannot be transposed to international commercial arbitrations. The narrow applicability of a contract between two private parties reduces the need to rely on uniform rules and clear categories to combat uncertainty or inconsistency. The courts' role here is not to maintain our constitutional structure as in administrative law, but to carry out a careful bargain between often sophisticated parties—the determination of which requires a contextual analysis of their agreement. *Vavilov*'s move towards a decision-tree approach to standards of review and its elimination of "true questions of jurisdiction" should be a reminder of these differences. Instead, the continued development of the law of contractual interpretation will hopefully instill confidence that courts can do tailored justice between private parties.