LUISS

Department of Law

Ph.D in Law and Business

Cycle XXXVII

Due Process and Rules of Evidence in International Commercial Arbitration

Prof. Pietro Pustorino

SUPERVISOR

Prof. Mamadou Hébié

CO-SUPERVISOR

Elena Terrizzi

CANDIDATE

Academic Year 2023/2024

TABLE OF CONTENTS

CHAPTER 2

THE TAKING OF EVIDENCE IN COMMON LAW AND CIVIL LAW: AFTERMATHS IN THE POST-AWARD STAGE

CHAPTER 3

MITIGATING DUE PROCESS CONCERNS: PROCEDURAL FAIRNESS AND EFFICIENCY AS COMPLEMENTARY VALUES OF ARBITRATION

INTRODUCTION

Due process constitutes a key element of every judicial mechanism of dispute resolution. It is well known that State court proceedings are mostly regulated by specific procedural rules which are enshrined in national codes of procedure or have been developed in case law. As such, these rules are often an expression of a jurisdiction's legal tradition, thus reflecting values and principles that are not *per se* universally shared.

Conversely, international arbitration confers the parties a substantial autonomy in establishing the comprehensive set of rules governing the proceeding. Given that party autonomy, efficiency and flexibility constitute hallmarks of arbitration, the attempt to link fixed due process guarantees to the arbitral proceeding might thus be problematic.

Although international arbitration generally avoids the adoption of rigid rules of procedure, it is common wisdom that the arbitral proceeding cannot be completely extraneous to any procedural safeguards. By entering into an arbitration agreement, indeed, parties to the dispute have consciously given up their right to start a judicial proceeding before a domestic competent court. Therefore, as it constitutes a legitimate alternative to the judicial proceeding, arbitration cannot reasonably avoid adhering to fundamental procedural guarantees.

At the same time, there is no doubt that the full extension of national rules of due process may undermine the very essence of arbitration, especially regarding party autonomy and arbitral discretion, as arbitration is not subject to the same regulations which apply to State court proceedings.

For these reasons, the following dissertation aims to examine how due process guarantees can be carefully calibrated as to comply with the more flexible and private nature of international commercial arbitration. By striking a balance between the scope of these procedural guarantees and the exercise of arbitral discretion, the discussion will show that the parties' rights to be heard and to be

treated equally, which constitute the essence of due process, are not unrelated to the hallmarks of arbitration – these being speediness, flexibility and efficiency. On the contrary, such procedural guarantees are deemed to strengthen the growth and acceptance of arbitration as an alternative method of dispute resolution, as long as these rules are tailored to the proceeding and reasonably applied.

Hence, Chapter 1 will start discussing the fragmented legal framework of due process at the international level, with the aim to define its core elements. More specifically, the analysis will focus on the influence that the parties' procedural guarantees exercise towards the arbitral discretion in conducting the proceeding, especially when evidentiary issues are at stake. Indeed, as the taking and presentation of evidence to the arbitral tribunal represents a paramount phase of the proceeding – upon which the final outcome of most arbitrations is strongly based – the work primarily focuses on the interplay between due process and evidentiary issues.

From a very general perspective, the legal framework of arbitration is characterized by the interaction among three main instruments: first, the mandatory norms of the State in which the arbitration is seated (so-called *lex arbitri*); second, the arbitration agreement concluded between the parties; third, the arbitral tribunals' discretionary powers, to be exercised on matters which are not expressly regulated by the aforesaid sources.

With regard to the *leges arbitri*, evidence shows that the so-called *UNCITRAL Model Law on International Commercial Arbitration* ("UNCITRAL Model Law") – which constitutes a non-binding instrument – has been widely interpreted in many national legislations as a benchmark for implementing the core basis and harmonizing arbitration laws. In particular, by stating that «[t]he parties shall be treated with *equality* and each party shall be given *a full opportunity of presenting his case*» (emphasis added), Article 18 of the Model Law undoubtedly recognizes a prominent importance to "fair trial rights".

Notwithstanding the various differences among jurisdictions in this field, the aforesaid harmonization of domestic arbitration provisions makes it possible to identify some recurring principles representing well-rooted manifestations of due process, which are expressly: (i) the right to be heard and to be afforded proper notice (ii) the right to be treated equally, (iii) the principle of independence and impartiality of the arbitral tribunal.

Regarding the recognition and enforcement of foreign arbitral awards, the discussion will then focus on the *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards* ("New York Convention") and the UNCITRAL Model Law, as both these instruments provide two relevant grounds for refusal of recognition and enforcement of an award: the "due process" and the "public policy" ground (respectively stated in Article V(1)(b) and Article V(2)(b) of the New York Convention and in Article 34(2)(a)(ii) and Article 34(b)(ii) of the UNCITRAL Model Law). In this context, the national judicial control over arbitral awards exercises a decisive influence, provided that States have a legitimate interest in ensuring that the outcome of the proceeding is worth the domestic support.

As a response to the judicial control, arbitrators are thus required to make every "reasonable effort" to ensure that the award is legally recognizable and enforceable in the requested State. In this sense, it has been supported the existence of a specific "arbitrator's duty to render an enforceable award", which shall guide the tribunal's conduct in managing the proceeding. However, it must be noted that national courts applying the New York Convention, as well as those operating in Model Law jurisdictions, tend not to interpret the corollaries of the principle of due process and public policy from a formalistic perspective, being them rather focused on preserving and granting the "objective fairness" of the procedure.

In addition to the level of harmonization and uniformity provided for by the New York Convention and the UNCITRAL Model Law, also the arbitration rules regulating due process are deemed to lessen the distance between the divergent legal and cultural backgrounds of both parties and arbitrators, with a view to foster the "efficiency and fairness framework" of the international commercial arbitration

(*see,* for instance, Article 2(2) of the ICC Arbitration Rules 2021; Articles 5(4), 10, 14 and 18(4) of the LCIA Arbitration Rules 2020; Articles 1 and 17 of the UNCITRAL Arbitration Rules 2021; Articles 13(3), 19(3)(7) of the Singapore Arbitration Rules 2016; as well as to the "opportunity to present the case" in Article 2(5) of the LCIA Arbitration Rules 2020; articles 15(3), 17(2), 22(4) of the ICC Arbitration Rules 2021; Articles 4(6), 6(5), 17 of the UNCITRAL Arbitration Rules; Articles 5(4), 7(10), 20(9) of the Singapore Arbitration Rules 2016).

Due to the increased use of technological tools, which are nowadays adopted for the resolution of transnational disputes, the discussion will also highlight the importance that remote hearings have earned over time. Along with the benefits of such a technological development, however, the analysis will focus on the concerns that virtual hearings bring in relation to due process. In particular, the concrete compatibility of remote hearings with the arbitrators' duty to safeguard the parties' rights to be heard and to be treated equally will be discussed, especially in those cases where the parties have not previously regulated this specific issue within their agreement.

The discussion will then consider the admissibility of *ex post* and *ex ante* waivers of due process exercised by the parties. Provided that the latter have freely decided to resort to "private justice" instead of "State justice", they might be willing to waive some of the typical measures that would otherwise apply in national court proceedings, including some procedural guarantees. Parties' waivers of due process rights might indeed be reasoned on their interest to foster the efficiency of the proceeding, as well as on their intent to safeguard the finality of the award (*e.g.* waiver to the right to challenge the arbitral award). Accordingly, it will be assessed when and how such waivers can be exercised by the parties, within the specific limitations provided by mandatory rules of procedure.

In this respect, the applicability of the European Convention on Human Rights' ("ECHR") principles to the arbitral venue will also be considered, especially by examining the recent case law on the relationship between international commercial arbitration and the protection of human rights. By

referring to the due process rights under Article 6 (1) of the ECHR, the discussion will analyse the European Court of Human Rights' approach towards the parties' voluntary waiver of procedural guarantees, which represents one of the maximum expressions of the principle of parties' autonomy.

Lacking any tailored set of procedural rules designed for arbitration, the analysis will then focus on the recent arbitral trend to adopt overly cautious decisions related to due process, which is deemed to jeopardize the very essence of arbitration itself. The awareness of the importance of respecting due process rights may indeed have also some side effects, thus influencing the way the tribunal will conduct the proceeding. More specifically, the arbitrators' fear of adopting decisions which might adversely affect the party's "right to present its case" could lead the tribunal to take decisions heavily influenced by anxiety or fear, and, consequently, to approve unreasonable procedural requests, causing delays and additional costs.

Indeed, evidence in this field shows that the claim of a party "to be heard" is sometimes perceived as a threat towards the way the tribunal shall conduct the proceeding. The fear of violating a fundamental right, or of having the award set aside due to a breach of due process, represent the symptoms of a disease which is nowadays known as the *"*due process paranoia". This phenomenon constitutes a growing issue in international commercial arbitration, as certain arbitral conducts are deemed to weaken the stability and legitimacy of arbitration, by lessening its speediness and efficiency, along with causing an avoidable increase of its costs.

In this framework, an experienced arbitrator should always discern whether the party's request represents a legitimate exercise of a procedural right rather than an unjustified attempt to employ a "guerrilla tactic", merely intended to cause delays. Indeed, while it is unquestionable that the arbitral tribunal must recognize a reasonable opportunity to present each party's case, at the same time, this does not mean that, in order to accomplish the aforementioned task, it must sacrifice efficiency by allowing parties' unreasonable procedural requests.

By showing that arbitrators might be excessively fearful of their awards being challenged on due process grounds, this first part of the research lays the foundation to the main question of the following discussion: whether arbitrators have reasons for the "due process paranoia" and how to dispel it for the benefit of future arbitrations.

Chapter 2 is aimed at assessing how arbitral tribunals generally deal with the evidentiary requests presented by the parties, provided that, in lack of any specific set of provisions, the very basic rules of evidence are those arising from the definition of due process that generally operates at the international level. In particular, within few limitations stated by the rules arising from the parties' agreement, and from mandatory obligations, it emerges that arbitrators may be called to take unpredictable decisions on the taking of evidence during the proceeding.

Since evidentiary issues play a remarkable role for the final resolution of the dispute, the way arbitrators exercise their discretionary powers in this field may constitute a ground for challenging the arbitral decision at the post-award stage. In this sense, the more the arbitral decision will be vague, the more the losing party will likely challenge the final award on due process grounds, as it could perceive the decision to be "arbitrary" rather than "arbitral".

Moreover, as international transactions involve parties from different legal and cultural background, this chapter examines the current approach undertaken in civil-law and common-law jurisdictions towards due process and evidentiary issues in international commercial arbitration. In particular, the analysis will cover judicial views taken from countries that have been selected among "leading" seats of arbitration – namely, Switzerland, UK, Singapore – and "less preferred" ones – Italy, the Netherlands and USA –, as to draw some conclusions on their respective strengths and drawbacks. By highlighting some of the most striking differences in the field of the collection and presentation of evidence before arbitral tribunals, the discussion will mainly focus on issues related to the admissibility and weight of

evidence, document discovery, confidentiality and legal privilege, as well as expert and witness evidence.

Although each examined country enacts its own national regulation, it must be noted that, in essence, all legal frameworks seem to have reached a certain degree of convergence on the discussed topic. In this sense, arbitrators are called to balance the efficiency of arbitration and the procedural requests of the parties, assessing whether the latter are "reasonably" and might thus have a qualitative impact on the final award. It follows that, for an award to be successfully challenged, the opposing party must have demonstrated that the arbitrators' conduct has been enacted in violation of the party's fundamental procedural rights – amounting to a substantial prejudice suffered by the opponent – which could have reasonably been avoided if only the arbitrators had correctly considered the specific circumstances of the case.

Therefore, through the analysis of the approaches adopted by several jurisdictions towards due process violations, it clearly emerges that minor breaches of procedural rights cannot prejudice the validity of arbitral awards. On this matter, national courts show a certain deference towards arbitral discretion, thus preventing parties' abusive conducts – which are grounded on alleged procedural violations – from causing the set aside of an award, and therefore fostering the finality of arbitration.

The awareness of the comparative jurisprudence might thus operate as a remedy to the disease of "due process paranoia", as it helps arbitrators overcoming unwarranted concerns on due process matters, leading them to undertake an informed approach towards the legitimate claim of a party to present its case.

Chapter 3 will support the idea that due process and efficiency shall be considered as complementary – rather than opposing – goals. By highlighting the distinction between procedural (objective) and substantive (subjective) fairness, some conclusions will be drawn on how arbitrators should deal with due process concerns during the proceeding. In the attempt to foster a balance between procedural fairness and efficiency, reference will be made to some instruments that the arbitral tribunal shall undertake, from the outset of arbitration, as to better

safeguard the finality of the arbitral award. More precisely, such procedural tools include the implementation of early case-management techniques, the development of renewed rules of evidence, to be adopted as instruments of soft-law, and, finally, the need to empower the finality of the awards through "strong" arbitral tribunals.

Supporting the idea that evidentiary rules are necessary for the fair and efficient conduct of arbitral proceedings, the research will examine how such procedural rules should be designed and applied to the arbitral venue, without compromising the flexibility of the procedure. In this field, since legal traditions vary significantly, one of the major issues is constituted by the concrete difficulty in choosing a set of procedural rules which could satisfy each party's expectations, without particularly favoring any of the conflicting approaches. The analysis will thus focus on the content of the existing IBA Rules on the Taking of Evidence, which actually constitute a useful guideline for the efficient conduct of international arbitrations.

The exam will then question whether it is time to look for a renewed and harmonized regulation as to better govern evidentiary issues, especially those triggered by the parties' different jurisdictional background. In this respect, while no doubts exist on the fact that the IBA Rules constitute a remarkable procedural option – being characterized by their non-binding but still influential nature – it is also believed that the actual legal framework leaves fertile ground for further regulation, which shall not be left to uncertainty and unpredictability.

As arbitrators lack coercive powers, the discussion will also consider the pivotal interaction between State courts and arbitral tribunals in the taking of evidence. Indeed, the court assistance during the evidentiary phase might become necessary in certain situations, for example in cases where evidence is in control of third parties that are extraneous to the proceeding, as well as when the witness whose presence is required is not connected with the parties to the proceeding.

In this respect, the analysis will support the idea that court intervention is not *per se* incompatible with the arbitration agreement, provided that whenever a

party, without satisfactory explanation, does not act in good faith – for instance, as it refuses to produce relevant evidence – the court intervention would find its legitimacy directly in the party's breach of the arbitration agreement.

In addition, as to grant equality between the parties, the resorting to court assistance will only be justified in those cases where evidence which is relevant for the case could have not been taken to the proceeding trough the adoption of a different mechanism. In this view, it is thus evident that resorting to domestic courts – instead of lessening the powers of the arbitrators – can help reinforcing arbitral tribunals and their legal authority.

In conclusion, according to the relevant case law and scholarship outlined in this work, the research will prove that the "due process paranoia" has no reasonable nor legal basis. Indeed, evidence shows that domestic courts are quite reluctant to refuse recognition and enforcement of foreign arbitral awards. It follows that arbitral tribunals should have the confidence to act decisively in safeguarding the parties' right to be heard and to be treated equally. Accordingly, arbitrators should not be excessively cautious and fearful of having their award vacated due to a potential violation of due process.

To this end, the procedural techniques suggested in Chapter 3 are deemed to increase the arbitrators' confidence in taking charge of the proceeding, as well as to lessen the aforesaid paranoia. The implementation of such procedural tools is hence believed to better grant the efficiency of the proceeding, by strengthening the legitimacy and finality of arbitration.

CHAPTER 1

DUE PROCESS AS A LIMIT TO ARBITRAL DISCRETION

SUMMARY: 1. Due process in international commercial arbitration. – 2. The general framework of due process as a limit to arbitral discretion. – 2.1. *Lex arbitri* and the national mandatory provisions. – 2.1.1. The right to be heard and to be afforded proper notice. – 2.1.2. The right to be treated equally. – 2.1.3. The principle of independence and impartiality. – 2.2. The arbitrators' duty to render an enforceable award. – 2.2.1. The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. – 2.2.2. The UNCITRAL Model Law on International Commercial Arbitration. – 2.2.3. Institutional v. *ad hoc* arbitration rules. – 2.3. Due process in virtual arbitration: is there a right to a physical hearing? – 3. Party autonomy: *ex post* and *ex ante* waivers of due process rights. – 3.1. Article 6 (1) of the European Convention on Human Rights (ECHR) and international commercial arbitration – 3.2. (*following*) The European Court of Human Rights' approach to the "doctrine of waiver". – 4. The arbitrators' duty of due diligence: discerning the parties' legitimate exercise of a procedural right v. the unjustified employment of "guerrilla tactics" . – 4.1. Beyond the protection of fundamental rights: "due process paranoia" and its detrimental effects on international commercial arbitration.

1. *Due process in international commercial arbitration*

Due process constitutes a fundamental right enshrined in judicial procedure. Being considered as a cornerstone principle of international law, ([1]) it generally embraces the legitimate expectation of parties appointing a decision maker to be treated in a fair and equal manner, thus avoiding arbitrary or discriminatory decisions to be undertaken during (or to constitute the outcome of) the proceeding.

Before examining its content in more detail, it is necessary to question whether and how due process guarantees, which commonly apply to the judicial procedure, may equally be enforced in the arbitral seat. Indeed, thanks to its historical evolution over the years, ([2]) international arbitration has nowadays

[1] Among the others, see Article 10 of the Universal Declaration of Human Rights; Article 14 of the International Covenant on Civil and Political Rights; Article 6 of the European Convention on Human Rights; Article 8 of the American Convention on Human Rights; Article 7 of the African Charter on Human Rights and Peoples' Right.

[2] The wide development of arbitration across the globe, as well as across the ages, makes it almost impossible for scholars to trace a general history of such an alternative mechanism of dispute

become the principal alternative resolution method of disputes between States, individuals and corporations, thus embracing almost every aspect of international trade and investment. ([3]) At its core, arbitration confers the parties a substantial autonomy in establishing the comprehensive set of rules governing the proceeding, thus supporting the fact that every business dispute has its own characteristics and constraints, which shall be solved within the adoption of procedures tailored to the specific needs of the parties involved. Absent any detailed and pre-fixed procedural rules, the parties' opportunity to tailor the dispute resolution process according to their needs and expectations, as well as the possibility to appoint arbitrators which are experts on the subject matter of the dispute, represent key advantages of international arbitration and they have progressively helped increasing its attractiveness to the public.

Since the essence of arbitration founds its grounds on party autonomy, efficiency and flexibility, the attempt to link fixed due process guarantees to the arbitration proceeding has originally raised doctrinal clashes.

---

resolution. It has been indeed considered that providing a truly general history «would be no easy task since, as a method of resolving disputes, arbitration in one form or another has been in existence for thousands years» (BLACKABY N., PARTASIDES C., REDFERN A. and HUNTER M., *Redfern and Hunter on International Arbitration*, Oxford University Press, 2015, 4). However, from a general perspective, it can be said that arbitration constitutes a «system of justice, born of merchants» (see LAZAREFF, S. *L'arbitre singe ou comment assassiner l'arbitrage*, in *Global Reflections on International Law, Commerce and Dispute Resolution: Liber Amicorum in honour of Robert Briner*, ICC Publishing, 2005, 477-478), as dispute resolution mechanisms of the mercantile world were originally conducted by communities which «gave birth to the implicit expectations and peer-group pressures which both shaped and enforced the resolution of disputes by an impartial and often prestigious personage» (MUSTILL, *Is it a bird?*, in Reymond-Bernardini (ed.), *Liber amicorum Claude Reymond: autour de l'arbitrage* 2004, 209). Indeed, from the earliest times, merchants exercised their commercial activities under their own law (the so-called *lex mercatoria*), which was not constituted by the statutory law of any specific country nor was it enforceable in any domestic court, but still represented a (unwritten) code of the trade customs and practices uniformly followed by the merchants of every country. In order to overcome the potential normative obstacles stemming from the different legal traditions of each state, the merchants thus fostered the necessity to apply a uniform code of commerce, instead of the national law of their own countries, in regard to all business transactions. A more detailed description of the historical origins of arbitration, which goes beyond the scope of this work, can be found in MACASSEY L., *International Commercial Arbitration: Its Origin, Development and Importance*, in *Transactions of the Grotius Society*, Cambridge University Press, 1938, Vol. 24, 179-202.

[3] See *Queen Mary 2021 International Arbitration Survey: Adapting Arbitration to a Changing World,* according to which 90% of the respondents stated that International commercial arbitration is their preferred cross-border dispute resolution mechanism. Through the above-mentioned survey, it clearly emerges that speed, efficiency, expertise, as well as flexibility and autonomy of the arbitration procedure represent key points for the needs of large commercial and investment disputes.

In order to understand the foundation of these divergences, one basic principle must be first stressed out: national provisions of civil procedure, which apply in domestic courts (so-called *lex fori*), do not apply to the arbitration proceeding – unless parties have otherwise and expressly convened – being the arbitral mechanism normally subject only to the national arbitration laws of the State where the arbitration has its seat (so-called *lex arbitri*, which is known to provide only general procedural frameworks).

According to this basic assumption, on the one hand, it has been argued that, being parties free to decide whether to resort to public (domestic court) or private (arbitration tribunal) mechanisms of dispute resolution, whenever they choose the private ones, parties may also well decide to avoid the application of any procedural safeguard, provided that they (i) trust the arbitrators, which have been appointed among experts on the subject matter; and (ii) ought to benefit from the efficiency and speediness of the arbitral proceeding, which might be comprised by the application of rigid rules of procedure. Therefore, this approach tends to stress the dichotomy between public and private mechanisms of dispute resolution, considering the different nature of the proceedings as a turning point in the assessment of the non-necessity to extend due process guarantees also to the arbitral venue.

On the other hand, according to the prevailing doctrine, it is impossible to assert that international arbitration is absolutely unrelated to fundamental rights. ([4]) This is especially true considering that the increase of international business relationships – and their related dispute resolution mechanisms – may well cause, directly or indirectly, human rights implications. ([5]) Accordingly, the fact that

---

[4] CONSOLO C., *L'equo processo arbitrale nel quadro dell'art. 6, § 1, della Convenzione europea dei diritti dell'uomo*, in *Rivista di diritto civile*, 1994, 453; PUNZI C., *Disegno sistematico dell'arbitrato*, Padova, 2000, I, 17; PULLE A.I, *Securing Natural Justice in Arbitration Proceedings*, in *Asia Pacific Law Review*, 2012, 63; BENEDETTELLI M., *Human Rights as a litigation tool in international arbitration: reflecting on the ECHR experience*, in *Arbitration International*, 2015, Oxford University Press; LOCATELLI F., *Arbitrato e principio del contraddittorio, ovvero dell'esistenza di un principio di collaborazione tra giudicanti e parti anche nel procedimento arbitrale*, in *Rivista dell'Arbitrato*, 2015, 743; RAGNO F., *Il giusto processo nell'arbitrato commerciale internazionale: gli orientamenti della giurisprudenza italiana*, in *L'arbitrato amministrato: profili interni e internazionali*, (eds.)Attila Tanzi and Alessandra Sardu,Editoriale Scientifica, 2021.

[5] In this sense, it has been argued that «over the past forty years national legislation and international conventions have famously given arbitrators ever increasing freedom and power by restricting interference by the courts with arbitrators' procedures and awards. Any increase in freedom or power carries a concomitant increase in responsibility, and an increase in arbitral powers must be accompanied by an increased responsibility to observe fundamental rights» (LORD NEUBERGER

international arbitration generally avoids rigid rules of procedure that apply to litigation before domestic courts, thus fostering speediness and procedural flexibility, does not mean that arbitration shall be completely extraneous to any procedural safeguards.

The solidity of the above statement can be better understood when considering that, by entering into an arbitration agreement, parties to the dispute consciously give up their right to start a judicial proceeding before an otherwise domestic competent court. Therefore, given that arbitration represents a legitimate alternative to the authority of civil and commercial courts – which are mandatorily subject to fair trial guarantees – arbitral proceedings cannot reasonably avoid adhering to such guarantees. ([6])

However, it should also be considered that the full extension of due process guarantees may undermine the very essence of arbitration, especially with regard to party autonomy and arbitral discretion, since the arbitral proceeding is necessarily structured on a different nature and regulation than ordinary jurisdiction. ([7]) Therefore, striking a balance between the public and private context, it could be argued that those guarantees related to due process in judicial proceedings shall apply to arbitration, as long as they comply with its private nature and the arbitral rules.

In light of the above, although various opinions have been expressed on the content of such procedural guarantees, no doubts shall be thus raised on the fact that due process constitutes an integral aspect also of the international arbitral proceedings. ([8])

D., *Arbitration and the Rule of Law* (Speech given at 2015 Chartered Institute of Arbitrators Centenary Celebration).

[6] ZUCCONI GALLI FONSECA E., *Il processo arbitrale (con il focus sull'istruttoria)*, Napoli, 2018, 47; CARPI F., *L'indipendenza e l'imparzialità dell'arbitro. La sua responsabilità*, in *Rivista dell'Arbitrato*, 2002, 188 ff.; RAGNO F., *Il giusto processo nell'arbitrato commerciale internazionale: gli orientamenti della giurisprudenza italiana,* above-cited*,* 65, arguing that, with a focus to the Italian legal system: «[p]oiché l'arbitrato rituale si connota come processo e tali garanzie sono connaturate alla nozione stessa di processo, la loro valenza nel contesto della giustizia privata va considerata *in re ipsa* alla luce degli artt. 2, 3 e 24 Cost., dell'art. 6 CEDU e, secondo parte della giurisprudenza, dell'art. 101 cod. proc. civ.».

[7] MANDUJANO RUBÌN J. L., *Due process in arbitration*, in Journal of Positive Psychology and Wellbeing, 2022, Vol. 6, n. 2, 1280.

[8] Accordingly, it is believed that «the observance of due process is a key component of the arbitration framework and one of its important legitimizing factors» (FERRARI F., ROSENFELD F., CZERNICH D., *Due Process as a Limit to Discretion in International Commercial Arbitration*, Wolters Kluwer, 2020, 1). See also CARBONE S. M., *Per una interpretazione internazionalmente orientata della*

However, despite being nowadays considered as a fundamental pillar of the arbitration framework, there is no fixed definition of what due process means, being its normative contours somewhat undefined. These uncertainties are more perceivable in the context of international arbitration, which relates to cross-border disputes arising from business activities exercised at a multinational level, given that parties and arbitrators from different legal and cultural traditions may have a vastly different perception of the concept of "due process rights" and "fairness". ([9])

In this regard, it is thus necessary to assess the impact that due process exercises towards both the structure and the way international commercial arbitration is conducted, further questioning whether it is possible to find a balance between efficiency and fairness, in order to safeguard the core principles of arbitration, as long as the need to protect the parties' fundamental rights.

2. *The general framework of due process as a limit to arbitral discretion*

The delegation of adjudicatory powers to arbitrators, through an arbitration agreement concluded by the parties, would have no consequences in the absence of a legal framework which enforces the arbitration agreement itself, supports the arbitration proceedings and legitimizes its outcome: the final award. ([10])

However, the attempt to identify the normative basis for due process in international commercial arbitration is not an easy task, given that arbitration rules, statutes and international conventions rarely contain – if not never – express references to this principle. ([11]) As a consequence, due process has been widely interpreted as an umbrella concept, or as a «bundle of rights that derives its content

---

disciplina italiana dell'arbitrato: prospettive di sviluppo, in *Rivista dell'Arbitrato*, 2015, 431; CARPI F., *Profili del contraddittorio nell'arbitrato*, in *Rivista dell'Arbitrato*, 2002, 5 ss; KURKELA M. S. and TURUNEN S., *Due Process in International Commercial Arbitration*, 2nd edition, Oxford University Press, 2010.

[9] ARBISMAN J., GENEST A., GIAKOUMAKIS E., *Due Process and Procedural Irregularities*, in *Global Arbitration Review*, 2023.

[10] See *Coppèe Lavalin NV v. Ken-Ren Fertilisers and Chemicals* (1994) House of Lords, in which it is stressed the fact that, notwithstanding the fundamental concept of arbitration as a consensual process, «it is only a Court possessing coercive powers which could rescue the arbitration if it is in danger of foundering».

[11] For instance, as it will be later discussed in this work, neither the New York Convention nor the UNCITRAL Model Law expressly refer to due process.

from usage», thus embracing various guarantees of procedural justice which can be extrapolated from the general arbitration framework. ([12])

Therefore, in order to lessen the uncertainty and vagueness which evidently persist in the application of such a principle – with the consequence of jeopardizing the finality of the arbitral award – the following analysis will focus on the various existing sources of fundamental procedural guarantees, in the attempt to identify a common ground as to what constitutes the core of due process. More specifically, due to the impossibility of establishing one single and detailed legal basis for the principle in exam, it will be questioned on which ground and to which extent «fundamental norms [may] limit parties' and arbitrators' freedom». ([13])

2.1. *The lex arbitri and the national mandatory provisions*

From a very general perspective, it is possible to identify three main sources of the arbitral proceeding's legal framework: first, the mandatory norms of the State in which the arbitration is seated (so-called *lex arbitri*); second, the arbitration agreement settled in the exercise of the parties' autonomy; third, the arbitral tribunals' power to issue discretionary decisions on matters which are not expressly regulated by the aforesaid sources. ([14])

To begin with, the *lex arbitri* – otherwise known as "national arbitration law" – is deemed to create a juridical link between the arbitration proceeding and the procedural arbitration law applicable to it, as it is determined by the place where the arbitration is seated. ([15]) In other words, arbitration is inevitably subject to the

---

[12] SHROFF P., *Due Process in International Arbitration: Balancing Procedural Fairness and Efficiency*, in *International Arbitration and the Rule of Law: Contribution and Conformity*, (ed.) Menaker A., ICCA Congress Series, Kluwer Law International, 2017, 798. See also PARK W., *The Procedural Soft Law of International Arbitration: Non-Governmental Instruments*, in *Persuasive Problems in International Arbitration*, (eds.) Julian D.M. Lew-Loukas Mistellis, Kluwer Law International, 2006, 114-154.

[13] SCHWEBEL S.M. and LAHNE S.G., *Public Policy and Arbitral Procedure*, in *ICCA Congress Series no*. 3, 206.

[14] This hierarchy of sources can be derived from Article 19 UNCITRAL Model Law, better discussed below, which ranks first mandatory provisions (including the right to be heard and the right to be treated equally), second the parties' agreement and third arbitrators' discretion.

[15] BORN, G., *International Commercial Arbitration*, 3rd edition, Wolters Kluwer, 2021, p. 371 ff.; BANTEKAS I., *An Introduction to International Arbitration*, Cambridge University Press, 2015, 13; ZARRA, G. *La legge applicabile nell'arbitrato commerciale internazionale*, in *L'arbitrato*

mandatory rules set forth by the *lex arbitri*, that is the national arbitration law of the place where the proceeding is conducted.

However, most – if not all – national arbitration laws provide only broad and general – but still mandatory – norms, rather than detailed rules of procedure. Such a flexible legal framework provided at the domestic level helps fostering the speediness and efficiency of international arbitration; nonetheless, there is a great difference between the general provisions stated by the law governing the arbitration (*lex arbitri*) and the more specific procedural rules that, in any case, need to be applied for the fair and efficient conduct of every proceeding. ([16])

Hence it is clear that, in order to grant the parties' fundamental rights, it will also be necessary to set up some detailed rules governing the specific proceeding, thus clearly defining the edges of the arbitrators' discretionary powers. In this scenario, as commercial parties generally come from different legal traditions – and may thus have potential divergent expectations on the way the procedure shall be conducted – it might be advisable for the parties themselves to agree on such procedural rules at the very outset of the arbitration.

More precisely, parties may choose the rules governing the *procedure* of an arbitration (for instance, by opting for the arbitration rules of a specific arbitral institution to be applied); however, it must always be considered that the *procedural law* established by the above-mentioned *lex arbitri*, which contains few but mandatory/peremptory norms, sets non-derogable limitations both to the powers of the tribunal and to the parties' autonomy. ([17]) Indeed, mandatory provisions represent norms from which the parties cannot generally opt out and that, at the same time, cannot be disregarded by arbitrators, as they aim at defending the judicial nature of the arbitration proceeding.

---

amministrato: profili interni e internazionali, (eds.) Attila Tanzi and Alessandra Sardu, Editoriale Scientifica, 2021.

[16] BLACKABY N., PARTASIDES C., REDFERN A., HUNTER M., *Redfern and Hunter on International Arbitration*, above-cited, p. 179.

[17] BREKOULAKIS S., *Public Policy and Mandatory Laws in International Arbitration*, Oxford University Press, 2019; PETROCHILOS G., *Procedural Law in International Arbitration*, Oxford, 2004. It is worth noting that, absent a uniform definition of the term "procedural law" of arbitration, it might be generally considered «as the law governing all aspects of the conduct of the arbitral proceedings, including the internal procedures of the arbitration (such as standards of procedural fairness, timetables and confidentiality) and the external relationship between the arbitration and the courts and law of the arbitral seat (such as annulment and appointment and removal of arbitrators)» (see BORN, G., *International Commercial Arbitration*, above-cited, p. 1724).

Therefore, in order to infer the main mandatory features of due process in the context of international arbitration, it is first necessary to examine and compare the content of the different national arbitration provisions (*lex arbitri*) adopted by several States, being each of them responsible for creating their own domestic arbitration law.

In this context, evidence shows that the so-called *UNCITRAL Model Law on International Commercial Arbitration* ("UNCITRAL Model Law") ([18]) – which constitutes a non-binding instrument – has been widely interpreted in many national legislations as a benchmark for implementing the core basis and harmonizing arbitration laws. ([19]) Indeed, it is evident that most national legislation have drawn inspiration from the principles set out in Article 18 of the Model Law which, by providing that «[t]he parties shall be treated with *equality* and each party shall be given *a full opportunity of presenting his case*» (emphasis added), undoubtedly recognizes a prominent place to "fair trial rights". ([20]) Although being expressed in only one sentence, the content of Article 18 is deemed to be the «heart of the law's regulation of arbitral proceedings» ([21]) as it constitutes a sort of mandatory "due

---

[18] General Assembly Resolution 40/72 (11 December 1985).

[19] The UNCITRAL Model Law provides the basis for national arbitration laws adopted in 87 States in a total of 120 jurisdictions (see *Status: UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006* [accessible at: *https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status*]). For a deeper analysis, see also ROTH M., *UNCITRAL Model Law on International Commercial Arbitration*, in *Practitioner's Handbook on International Commercial Arbitration*, (ed.) F.B. Weigand, 2nd edition, Oxford University Press, 2009, p. 953 ff.

[20] For instance, see Section 18 of the Indian Arbitration Act, which provides that «[t]he parties shall be treated with equality and each party shall be given a full opportunity to present his case»; Section 1(b) of the UK Arbitration Act 1996 also states that «the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest». Moreover, even those States whose national arbitration law is not expressly based on the UNCITRAL Model Law still provide similar procedural guarantees in the field of international arbitration. See Article 1510 of the French Code of Civil Procedure, providing that «irrespective of the procedure adopted, the arbitral tribunal shall ensure that the parties are treated equally and shall uphold the principle of due process»; Article 182(3) of the Swiss Law on Private International Law, according to which «Irrespective of the procedure chosen, the arbitral tribunal shall accord equal treatment to the parties and their right to be heard in an adversarial proceeding»; Article 816-*bis*, paragraph 1, of the Italian Code of Civil Procedure, stating that the arbitrators «must respect in any case the adversarial principle ("principio del contraddittorio") by granting both parties reasonable and equivalent opportunities to present their case»;

[21] HOLTZMANN H. M. and NEUHAUS J. E., *A guide to the UNCITRAL model law on international commercial arbitration: legislative history and commentary*, Kluwer Law and Taxation Publishers, 1994, p. 550. It is interesting to note that, in the early draft of the UNCITRAL Model Law, the provision in exam constituted the third paragraph of the following Article 19; however, in order to emphasize its relevance, the principle of equality and fairness has later been introduced in a separate article, the current Article 18 (see Commission Report, A/40117, para. 176, 562-63). Moreover, according to the importance that has been recognized to the provision in comment, Article 18 has

process" clause of arbitration – applying both to those actions undertaken by the arbitral tribunal and to the parties' agreement – ([22]) which is similar to those provisions established in national constitutions, aimed at granting procedural fairness and indispensable foundations to the system of justice. ([23])

The aforesaid harmonization of domestic arbitration provisions, fostered by the UNCITRAL Model Law, makes it thus possible to identify some recurring principles representing specific and well-rooted manifestations of due process. These are: (i) the right to be heard and to be afforded proper notice (ii) the right to be treated equally, (iii) the principle of independence and impartiality of the arbitral tribunal.

2.1.1. *The right to be heard and to be afforded proper notice*

To begin with, the right to be heard requires that every party must be granted a reasonable opportunity to effectively argue his/her case and to make submissions in its support, as well as to introduce evidentiary offers.

Accordingly, even if, in the exercise of its discretionary power, the arbitral tribunal can ignore what it considers as irrelevant for the ruling of a specific case, this prerogative can only be effective if the parties' claims have been concretely "heard". ([24]) That being said, it is evident that live hearings help fostering and

---

been expressly recognized as the "Magna Carta of arbitral procedure". See UNCITRAL, report of the Secretary General on the *Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration*, U.N. Doc. A/CN/9/264, 44 (1985).

[22] At the early stages of its draft, the principle set out in Article 18 of the Model Law seemed to be limited only to the discretion of the arbitral tribunal, thus excluding its applicability also to parties' autonomy. However, advancing in time (in its fifth and final session), the Model Law has been amended as to emphasize that the principles of equal treatment and full opportunity to present one's case «should be observed not only by the arbitral tribunal but also by the parties when laying down any rules of procedure» (Fifth Working Group Report, A/CN.9/246, para. 62, 556).

[23] The mandatory nature of Article 18 Model Law, meaning that parties may not derogate from it, is widely accepted. Among the others, HOLTZMANN H. M. and NEUHAUS J. E., *A guide to the UNCITRAL model law on international commercial arbitration: legislative history and commentary*, above-cited, p. 550; BINDER P., *International Commercial Arbitration and Mediation in UNCITRAL Model Law Jurisdictions*, 4th edition, Wolters Kluwer, 2019, p. 330; SHROFF P., *Due Process in International Arbitration: Balancing Procedural Fairness and Efficiency*, above-cited, p. 801.

[24] Accordingly, it has been argued that «the right to be heard would be an empty shell if a tribunal was at liberty to simply ignore the parties' submissions and evidentiary offers» (FERRARI F. and ROSENFELD F., *International Commercial Arbitration: A Comparative Introduction*, Edward Elgar Publishing, 2021, p. 92). As a consequence, a breach of the right to be heard would emerge in cases

safeguarding the concrete adversarial exchange between the parties themselves and the arbitral tribunal, especially at some stages of the proceeding (*e.g.* acquisition of witness testimony and cross-examination). Indeed, a party's right to make submissions and evidentiary offers symmetrically triggers the opposing party's right to comment and to introduce evidence in rebuttal, as well as – in certain circumstances – the right to comment on the tribunal's findings. ([25]) Nonetheless, the right to be "heard" does not necessarily entail a duty upon the arbitrators to conduct oral hearings, having indeed some jurisdictions considered the recognition to the parties to make written submissions as sufficient. ([26])

Moreover, in order to save time and costs of the arbitration, the arbitral tribunal is not bound to recognize to the parties unlimited opportunities to present their case – or to rebut. ([27]) In this context, one of the main tools which helps arbitrators ensuring due process rights, along with the need to preserve the efficiency of the procedure, is generally represented by the setting of (preclusive) deadlines within which parties must file their submissions, ([28]) so as the tribunal

---

where the arbitral tribunal does not take cognizance of the parties' submissions or rejects a party's submission based without adducing adequate reasoning.

[25] The question of whether the right to be heard applies also towards the tribunal's legal findings is controversial, as scholars and practitioners have widely debated on the possibility to extend the *principle iura novit curia* to international arbitration. There is indeed no consolidated and unique view on this topic, as different jurisdictions have adopted several and contrary solutions. Therefore, absent a harmonized case-law on this principle, it should be advisable for arbitrators to recognize the right to the parties to be heard on issues raised by the tribunal itself, as to avoid the risk of a due process violation. For a deeper analysis of such a relevant matter, see FERRARI, F. and CORDERO-MOSS G., *Iura Novit Curia in International Commercial Arbitration*, 2018.

[26] For instance, see Court of Appeals Frankfurt, decision of January 16, 2014, case reference 26 Sch 2/13 (Germany); *Government of the Republic of the Philippines v. Philippine International Air Terminals Co, Inc* (2006), Singapore High Court, case no. OM 3/2005 (Singapore); *Kempinski Hotels SA v. PT Prima International Development* (2011) Singapore High Court, originating summons no. 121 of 2009 (Singapore); Swiss Federal Supreme Court, BGE 142 III 360, con. 4.1.1. (Switzerland). However, in some jurisdictions (e.g. Austria and Germany) it is possible for each party to expressly require an oral hearing, being in this case necessary for the tribunal to justify its decision to allow or not to allow such a request, according to the needs and characteristics of the concrete case (as it will be better discussed further in this work).

[27] In support of this principle, see *Superior Energy Management, a Division of Superior Plus Inc. v. Manson Insulation Inc.* (2011) Superior Court of Quebec, para. 55. For a dismissal of the right to reply unlimitedly through written submissions, see also Swiss Federal Tribunal, 26 April 2016, BGE 142 III 360, at 4.1.2.

[28] It is believed that «as far as the length of the deadlines themselves are concerned, arbitral tribunals enjoy a considerable degree of discretion» (FERRARI F., ROSENFELD F., CZERNICH D., *Due Process as a Limit to Discretion in International Commercial Arbitration*, above-cited, 20). In case-law, see Italian Court of Cassation, 21 January 2016, n. 1099 (Italy); Paris Court of Appeals, 28 January 2014, in *Recueil Dalloz*, vol. 44, 2548 (France); Naumburg Court of Appeals, 26 November 2014, docket 10 Sch 03/04 (Germany).

may reject such submissions – without the risk of breaching the parties' right to be heard – every time a party fails to meet a pre-established deadline. ([29])

Closely connected to the parties' right to be heard is also the arbitral tribunal's duty to ensure proper notice, which requires that each participant shall be given "proper" information of the initiation of the proceedings, as well as of the constitution of the tribunal, and of all the essential steps of arbitration until the final award is issued. ([30]) Each party must thus be notified of every document that has been put on record by the opponent, being it possible for a lack of proper notification to justify a party's challenge against the recognition and enforcement of the arbitral award, based on the breach of due process rights.

In practice, however, evidence shows that most of the cases in which the violation of this principle has been invoked were characterized by the implementation of a party's strategy to default during the arbitration proceedings, as to create the grounds for a further potential challenge of the arbitral decision in the post-award stage. Luckily, a long line of case-law demonstrates that, with the aim to prevent parties from jeopardizing the efficiency of international arbitration, courts tend to reject claims alleging that the award has been issued in violation of due process protections – such as the duty to ensure proper notice and the right to be heard – whenever these claims are brought by parties which have *deliberately* decided not to participate in that arbitration. ([31])

---

[29] However, this principle must not always be considered as non-derogable. Indeed, the arbitral tribunal will be required to make different and more complex assessments in cases where facts are proven to have been discovered only after the established due date.

[30] See, for instance, *Dalmine S.p.A. v. M. & M. Sheet Metal Forming Machinery A.G.* (1997) Italian Court of Cassation, in *Yearbook Commercial Arbitration*, (eds.) A.J. Van Den Berg, 1999, vol. XXIV, 709-713; Tradigrain, S.A. v. Sociedad Ibèrica de Molturaciòn, SA (SISMA) (2004) Spanish Supreme Court, in *Yearbook Commercial Arbitration*, (eds.) A.J. Van Den Berg, 2007, vol. XXXII, p. 603-607.

[31] See, for example, *SJP Motors v. TVS Motors Company Ltd* (2008) High Court of Kerala, case no. 19, available at: https://www.casemine.com/judgement/in/56e66b0d607dba6b534376d6, [accessed 25 September 2023]; *European Grain & Shipping Ltd v. Seth Oil Mills Ltd* (1981) in *Yearbook Commercial Arbitration*, (eds.) A.J. Van Den Berg, 1984, vol. IX, p. 411.

2.1.2. *The right to be treated equally*

In light of the above, there is an evident interplay between the right to be heard and the right to be treated equally, ([32]) as the latter entails the right of the parties to have an "equal" opportunity to make submissions – and/or comments on the opposing party's case – ([33]) as well as to make evidentiary offers (so-called "equality of arms"). ([34])

However, it has been argued that not every form of unequal treatment may result in the breach of the right in exam; accordingly, different treatment might be well justified in cases where parties to the proceeding are involved in divergent situations which are not comparable. ([35])

In addition, the notion of equal treatment has been differently interpreted by courts from several jurisdictions, which have adopted either a formal or substantive approach over the years. As for the first tendency, the right to be treated equally is deemed to be fully respected anytime each party's treatment complies with the formal applicable law, thus without any need for the tribunal to consider the specific and substantive circumstances of the case. On the contrary, the substantive approach – also endorsed by the European Court of Human Rights – entails the need for equal opportunities to be, in concrete, recognized towards the parties to an arbitration proceeding, thus adapting the formalities of the applicable law to the practical facts of the dispute. ([36])

---

[32] Proof of it can be found in the above-discussed Article 18 of the UNCITRAL Model Law, which highlights the importance of these principles by referring to them in the same sentence.

[33] GEISINGER E. and MAZURANIC A., *Challenge and revision of the award*, in *International Arbitration in Switzerland: A Handbook for Practitioners*, (eds.) E. Geisinger *et al.*, 2nd edition, Wolters Kluwer, 2013, p. 247.

[34] Discussing the principle of "equality of arms", COLESANTI V., *Principio del contraddittorio e procedimenti speciali*, in *Rivista di diritto processuale*, 1975, p. 584 ff. Moreover, with regard to the standards of treatment provided in investment arbitration, «it could be mentioned that under the label of "fair and equitable treatment" arbitrators have involved standards of due process, legitimate expectations and proportionality» (ZARRA G., *Parallel proceedings in investment arbitration*, Giappichelli Editore, 2016, p. 4, mentioning, PALOMBINO F., *Il trattamento giusto ed equo degli investimenti stranieri*, il Mulino, 2012, p. 61 ff.).

[35] This is the case when, during a hearing, an arbitral tribunal recognizes a different amount of time to each party, in order to make everyone present its submissions, for instance due to the different number of witnesses that each party has requested in support of its case. See GEISINGER E. and DUCRET P., *The Arbitral Procedure*, in *International Arbitration in Switzerland: A Handbook for Practitioners*, above-cited, p. 90; FERRARI F., ROSENFELD F., CZERNICH D., *Due Process as a Limit to Discretion in International Commercial Arbitration*, above-cited, p. 31.

[36] The substantive notion of equal treatment is indeed well-recognized in the European Court of Human Rights' (ECtHR) case law. For example, see European Court of Human Rights, *Dombo*

2.1.3. *The principle of independence and impartiality of the arbitral tribunal*

Finally, another principle which is deemed to constitute a fundamental manifestation of fair trial rights is the arbitrators' duty to remain independent and impartial.

Generally speaking, absent a specific and unique definition of such concepts, "independence" is deemed to relate to the arbitrator's external relations, while "impartiality" is said to affect his or her inner state of mind. ([37])

Focusing on the role that due process plays in limiting arbitral discretion, it is thus relevant to consider in which circumstances an arbitrator's conduct may constitute a breach of independence and impartiality, hence legitimating a potential successful challenge against an arbitrator, as well as the set aside of the final award.

In order to avoid prejudices to the fair conduct of the arbitral proceeding and, eventually, to the enforceability of its final award, arbitrators are generally required to disclose – since the very early stage of arbitration – any situation that would justify reasonable doubts on their independence and impartiality. ([38]) In other terms, being the principles of independence and impartiality key pillars of arbitration, it appears that arbitrators are bound to an ongoing duty to disclose any circumstance that – from the outset to the final outcome of the proceeding – might influence the required neutrality of their decisions regarding the case.

Therefore, in the attempt to balance the width of the arbitrators' discretionary power and the parties' prerogative to be judged in a fair and equal manner, it has been found that courts tend to adopt a very high threshold as to legitimate challenges against the arbitrators' conduct on the grounds of independence and impartiality.

Beheer B.V. v. the Netherlands, 27 October 1993, application no. 14448/88. Examples of this approach can also be seen in national case-law. For instance, the Hamburg Court of Appeal has ruled that, by excluding the possibility for a party to be called as a witness, the arbitral tribunal had caused a substantial breach of the right to equal treatment towards one of the parties to the proceeding which had no any other evidentiary offer than its own testimony in support of its case (while the other party had been recognized the possibility to present his wife as a witness in his favor). See Hamburg Court of Appeal, 16 September 2004, case reference 6 Sch 01/04.

[37] ROGERS C., *Ethics of International Arbitration*, Oxford University Press, 2014; FAZZALARI E., *Ancora sull'imparzialità dell'arbitro*, in *Rivista dell'Arbitrato*, 1998, p. 4 ff.

[38] This principle is expressly contained in Article 12(1) of the UNCITRAL Model Law. See also BORN G., *International Commercial Arbitration*, above-cited, p. 1760 ff.

Although there is no uniform standard, most national statutes and arbitration rules set the necessity of "justifiable doubts" to be raised in order for a party to be legitimated at challenging an arbitrator. ([39])

Accordingly, in order for the courts to recognize a breach of the examined principles, the interested party must prove that the contested conduct undertaken by the arbitrator has effectively prevented him/her from a fair hearing, with the consequence of him/her suffering the detrimental effects of the unfair arbitration's outcome. ([40])

2.2. *The arbitrators' duty to render an enforceable award*

As the final arbitral award marks the end of the arbitration proceeding, it is not surprising that both parties and arbitrators pay a considerable attention towards

[39] The notion of "justifiable doubts", contemplated in most national and institutional arbitration provisions, is inspired by the content of Article 12 Model Law. This term is also provided by the *IBA Guidelines on Conflicts of Interest in International Arbitration*, approved on 22 May 2004 by the International Bar Association, which – although being not-legally binding – reflect international best practices and provide guidance for the various arbitration practitioners. In this sense, the IBA Guidelines expressly state that «doubts are justifiable if a reasonable and informed third party would reach the conclusion that there was a likelihood that the arbitrator may be influenced by factors other than the merits of the case as presented by the parties in reaching his or her decision» (IBA Guidelines, General Standard 2(c)). In light of the above, the national courts tend to apply a case-by-case test, which considers the specific elements of each single circumstance. Accordingly, this test will include: (i) first, the assessment of whether material circumstances linked to the arbitrator's conduct raise doubts on his or her independence or impartiality; (ii) second, whether those doubts, if existent, are "justifiable". Instead, in the context of international investment arbitration, it is worth noting that, ICSID Rules expressly require a manifest lack of qualities to sit as arbitrator in order for parties to uphold successful challenges (Article 57 ICSID Convention).

[40] Among the others, in U.S. case-law see *Spector v. Torenberg* (1994), United States District Court of New York, case no. 93 Civ. 5865 (PKL); *U.S.Life Ins. Co. v. Superior Nat'l Ins. Co.* (2010), United States Court of Appeals (9th Circ.), case no. 07-55938; *Kennecott Utah Copper Corp. v. Becker*, (1999) United States Court of Appeals (10th Circ.). In German case-law, this principle is also endorsed in the decision of the Higher Regional Court of Frankfurt, 24 January 2019, case reference 26 Sch 2/18, ruling that a successful challenge against an arbitrator, on the grounds of his impartiality and independence, requires the proof of objective reasons raising serious concerns that a member of the tribunal is biased towards the case.

it. ([41]) Indeed, absent a common and tailored appeal mechanism, ([42]) the finality of the award generally precludes – or at least strongly limits – the possibility for the arbitral tribunal to review factual or legal errors, as well as to introduce corrections or to make interpretations. ([43]) Nevertheless, parties are not left without any guarantee against potential defective arbitral awards, being it possible – under certain circumstances – to file a motion to set-aside the verdict before the competent national courts. ([44])

Given that arbitration represents a legitimate and alternative dispute resolution mechanism, it consequently affects the parties' right to start a judicial proceeding before domestic courts. For this reason, the *ex post* judicial control over arbitral awards is deemed to fulfill a remarkable and decisive position.

Through the intervention of their national courts, States play the role of guardians entitled to oversee that the arbitration does not prejudice the parties' right to access to justice and that final awards are thus worth the recognition and

---

[41] There is no common definition of "arbitral award" in arbitration statutes and international conventions. Consequently, the aforesaid provisions may well differ in establishing the requirements that a decision shall meet in order to be recognized as an arbitral award. For the aims of the following analysis, a definition can be found in Article I of the New York Convention (1958), which states that its provisions concerning the recognition and enforcement of arbitral awards apply to those decisions «made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal», including those awards «not considered as domestic awards in the State where their recognition and enforcement are sought». In this context, case-law also suggests that in order for a decision to be qualified as an "arbitral award", it is not necessary for it to have been formally designated as such, being necessary to consider not its label but its content and the circumstances in which it has been issued. See, e.g. *Publics Communication v. True North Communications* (2000) United States Court of Appeals (7th Circ.), where the court found that the decision issued by the arbitral tribunal, labelled as "procedural order", was instead to be qualified as an award; Paris Court of Appeals, *Braspetro Oil Services Co. v. The Management and Implementation Authority of the Great Man-Made River Project*, 1 July 1999, in *Yearbook Commercial Arbitration*, (eds.) A.J. Van Den Berg, 1999, vol. XXIV, p. 1.

[42] The fact that the awards are final and binding with no opportunity for appeal has been considered as a key element of efficiency and efficacy of international arbitration (HYDER ALI A. et al., *The International Arbitration Rulebook: A Guide to Arbitral Regimes*, (eds.) Hyder Ali A. et al., 2019, p. 537). Nevertheless, it must also be considered that some arbitral rules exceptionally confer parties the power to agree on appeals mechanisms (for example, see the Optional Appellate Arbitration Rules of the American Arbitration Association).

[43] For instance, see Article 33 UNCITRAL Model Law.

[44] By contrast, it must be said that ICSID awards cannot generally be challenged before national courts, being them automatically enforceable in all those countries that have signed the ICSID Convention. More precisely, any request for annulment of an ICSID award shall be addressed to the Secretary-General who will appoint a an ICSID *ad hoc* annulment committee. Moreover, in this context, some commentators have outlined the possibility for the enforcement to be blocked on the ground of sovereign immunity, in those cases where the execution of the award affects assets that are used for public, rather than commercial, objectives (LAMM C. B. and HELLBECK E. R., *The Enforcement of Awards,* in *Litigating International Investment Disputes: A Practitioner's Guide*, (ed.) Chiara Giorgetti, Brill Nijhoff, 2014).

enforcement in the territory of the expected enforcing States. ([45]) In doing so, national courts' supervision is aimed at enhancing fairness by testing whether the arbitral award has been issued in compliance with basic due process standards, being this a necessary step as to confer *res judicata* effects upon the decision. ([46])

Considering the decisive influence that national judicial control may have towards the finality of the award, the arbitrators are thus required to make every "reasonable effort" to ensure that the award is legally recognizable and enforceable. This principle – which is expressly provided by the sources discussed below – has been regarded by some commentators as creating an autonomous and specific "arbitrator's duty to render an enforceable award". ([47])

Accordingly, arbitrators are called to take considerable account of the procedural guarantees that must be ensured as to grant the fairness of the arbitral proceeding, ([48]) in order to assess – *ex ante* – the potential enforceability of the final award in each of the countries where parties are interested to take advantage of the arbitral decision's effects. ([49]) Otherwise, recurring annulments of the awards by

---

[45] With reference to the public function of adjudication, it has been said that, in the context of arbitration, it would require «a measure of judicial policing to ensure the procedural as well as the overall integrity of the adjudication (which courts are ordinarily expected to endure), as well as the worthiness of the resulting award for recognition and enforcement» (BERMANN G. A., *International Arbitration and Private International Law*, in *Recueil des Courts*, 2015, 41, p. 381).

[46] PARK W., *The Procedural Soft Law of International Arbitration: Non-Governmental Instruments*, above-mentioned, p. 141.

[47] Reference of such a duty upon arbitrators can be found in some arbitration rules, such as Article 41, International Chamber of Commerce (ICC) Arbitration Rules («shall make every effort to make sure that the award is enforceable»); Article 32(2), London Court of International Arbitration (LCIA) Rules («shall act at all times in good faith, respecting the spirit of the arbitration agreement, and shall make every reasonable effort to ensure that any award is legally recognized and enforceable at the arbitral seat»); Article 41(2) of the Singapore International Arbitration Center Rules (SIAC) («shall act in the spirit of these rules and shall make every reasonable effort to ensure the fair, expeditious and economical conclusion of the arbitration and the enforceability of any award»). See also HORVATH G., *The Duty of the Tribunal to Render an Enforceable Award,* in *Journal of International Arbitration*, 2001, 18, p. 135; ALLSOP J.L.B. AC, *Keynote Address: International Arbitration and Conformity with International Standards of Due Process and the Rule of Law*, in *International Arbitration and the Rule of Law: Contribution and Conformity*, (ed.) Menaker A., ICCA Congress Series, Kluwer Law International, 2017, p. 786. Some authors have also argued that the «enforceability of the award is the raison d'etre of the arbitration process» (SCHWARTZ E. A. and DERAINS Y., *Guide to the ICC Rules of Arbitration,* 2nd ed., Kluwer Law International, 2005, p. 385).

[48] In this sense, «the finality of international arbitration has to be […] balanced against the requirement that the arbitration process must be fair» (SHROFF P., *Due Process in International Arbitration: Balancing Procedural Fairness and Efficiency*, above-cited, p. 817).

[49] BARRACLOUGH A. and WAINCYMER J., *Mandatory Rules of Law in International Commercial Arbitration*, in *Melbourne Journal of International Law*, 2005, 6, n. 2, p. 215-216; BLAVI F., *The Role of Public Policy in International Commercial Arbitration*, in *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management*, 2016, vol. 82, issue 1, p. 2. It has been argued that the recognition of a duty upon arbitrators based on the necessity to assess *ex ante* the enforceability of an arbitral award in specific countries might excessively influence the entire

reasons of fundamental procedural breaches, as well as their potential non-recognition or non-enforcement, would deprive arbitration of its strategic importance and efficiency, thus putting the very hallmarks of international arbitration at risk. ([50])

In light of the above, the undisputable relevancy of arbitral awards' enforcement and recognition make it necessary to explore in detail the specific grounds for set-aside which are related to procedure and public policy, as currently provided at the international level.

Hence, the following discussion will analyze the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the UNCITRAL Model Law on International Commercial Arbitration, as both these instruments provide two relevant grounds for refusal of recognition and enforcement of an award (precisely, the "due process" ground – stated respectively in Article V(1)(b) and Article 34(2)(a)(ii) – and the "public policy" ground – provided in Article V(2)(b) and Article 34(b)(ii)).

The investigation will then focus on one further set of instruments, namely the arbitration rules.

---

arbitration proceeding, whether arbitrators were specifically required to respect the procedural requirements of an expected enforcing country. Such an extended interpretation of the content of the arbitrators' duty has been criticized by some commentators, according to which the principle in exam only requires that «the tribunal will do its best to ensure that appropriate procedure is followed and, above all, that each party is given a fair hearing». Accordingly, requiring more than this would result in introducing an almost impossible duty upon the arbitrators. Hence, the duty in comment shall be intended as an «obligation to use best endeavors, rather than an obligation to secure a result» (BLACKABY N., PARTASIDES C., REDFERN A., HUNTER M., *Redfern and Hunter on International Arbitration*, above-cited, p. 608).

[50] Indeed, as it will be further discussed with regard to the New York Convention, evidence shows that one of the main reasons of success of international arbitration stands in the possibility for parties to obtain an arbitral award which is recognized and enforced internationally (see 2018 *International Arbitration Survey: The Evolution of International Arbitration*, accessible at http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey-report.pdf [accessed 20 September 2023].

2.2.1. *The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards*

The New York Convention constitutes the key source of regulation for the recognition and enforcement of arbitral awards.

One feature of the Convention, which has considerably contributed to its success, can be found in the fact that it operates as a uniform law instrument, being it binding under international law. In particular, as an instrument of international law, the Convention cannot be construed by resorting to domestic law and national rules of interpretation, being it subject to the rules embodied in Article 31 *et seq*. of the Vienna Convention on the Law of the Treaties 1969 ("Vienna Convention"). ([51])

Although the notions of "recognition" and "enforcement" of arbitral awards are referred to as if they were inextricably linked, a distinction between these two terms obviously exists. ([52]) From a theoretical perspective, recognition might be defined as a defensive process which, in cases where a domestic court is asked to decide over a dispute that has already been subject to a previous arbitration, allows the winning party of the arbitral proceeding to object that the same case has already been decided and has thus already acquired its nature of *res judicata*. ([53])

---

[51] Even if the latter has been concluded after the New York Convention and does not apply retroactively, it is worth noting that the Vienna Convention codifies the pre-existing customary international law guiding the treaty relations between States. Accordingly, the rules of interpretation under the Vienna Convention are applied as reflecting customary international law. More specifically, Article 31 of the Vienna Convention provides that the interpretation of a treaty must be based on its wording – whose ordinary meaning must be evaluated in good faith – as well as taking into account the context and the object and purpose of the convention. In addition, under Article 32 of the Vienna Convention, the interpretation reached according to Article 31 shall be helped by the consultation of the preparatory works and the circumstances of a treaty's conclusion. In alternative, such latter grounds might be adopted in cases where the meaning of the interpretation reached under Article 31 is ambiguous or obscure, or amounts to a manifestly absurd or unreasonable result. Finally, as the New York Convention was prepared in five official languages, whenever issues arise in relation to the interpretation of different terms, and these cannot be resolved under Article 31 and 32 of the Vienna Convention, one shall refer to «the meaning which best reconciles the texts, having regard to the object and purpose of the treaty (Article 33)».

[52] On this ground, some commentators have outlined the major accuracy in the wording adopted by the Geneva Convention on the Execution of Foreign Arbitral Awards (1927), which expressly spoke of "recognition or enforcement" (BLACKABY N., PARTASIDES C., REDFERN A., HUNTER M., *Redfern and Hunter on International Arbitration*, above-cited, p. 611).

[53] In this sense, some scholars have compared the functioning of such a recognition to that of a shield (BLACKABY N., PARTASIDES C., REDFERN A., HUNTER M., *Redfern and Hunter on International Arbitration*, above-cited, p. 612). Of course, in cases where the award has not decided upon all the issues involved in a specific dispute – but only upon some of them – the effects of such an arbitral award's recognition will be limited only to those issues that have been effectively subject to the arbitral decision.

Conversely, enforcement is aimed at ensuring that, after its recognition, the award's legal force and effects will be concretely carried out. ([54])

In practice, it is possible to state that a court will grant the enforcement of an arbitration awards every time the award itself is recognized to be valid and binding upon parties – and thus suitable for enforcement – with the evident result that, if considered in these terms, one notion ("recognition") constitutes a necessary and preparatory part of the other ("enforcement"). ([55])

In addition, evidence shows that courts have adopted a pro-enforcement approach towards the interpretation of the New York Convention. This means that judicial authorities tend to adopt, among the possible suitable interpretations, the one that recognizes the most effectiveness to the Convention. In this respect, it is worth outlining that domestic courts have thus narrowly interpreted the scope of the grounds for refusing recognition and enforcement of an arbitral award, with the aim to promote the effectiveness of arbitral awards at the international level. ([56])

With these preliminary observations in mind, the New York Convention is said to dictate few (and exclusive) limitations towards States with regard to their domestic set-aside regimes, expressly recognizing the authority of domestic courts (under Article V(1)(e)) in reviewing commercial and – non-ICSID – investment awards on specific grounds. ([57]) Accordingly, all States parties are required to implement the grounds set forth in the New York Convention by means of their national arbitration law.

---

[54] Therefore, by contrast, enforcement is said to operate like a sword (BLACKABY N., PARTASIDES C., REDFERN A., HUNTER M., *Redfern and Hunter on International Arbitration*, above-cited, 612).

[55] Indeed, in the large majority of the cases, parties simultaneously seek recognition and enforcement of the arbitral award, thus being the theoretical distinction between the two notions of minor practical relevance. Moreover, being true that an award might well be recognized without necessarily being enforce, by contrast, a decision of enforceability must always be preceded by an act of recognition.

[56] In addition to the rules of interpretation provided by the Vienna Convention, Article VII(1) of the New York Convention states that any interested party shall not be deprived of the right to rely on a more favorable domestic law or treaty. First, the provision in exam ensures the compatibility between the New York Convention and pre-existing multilateral or bilateral agreements, as it grants those rights related to the recognition and enforcement of arbitral awards that might exist under such pre-existing treaties. Second, Article VII(1) recognizes the right of the party seeking enforcement to make use of more favorable provisions, which might include either substantive or procedural requirements for recognition and enforcement (so-called "more favorable rights" principle).

[57] An example of the recognition of such a principle can be found in US case-law, where it has been ruled that «there is no indication in the Convention of any intention to deprive the rendering state of its supervisory authority over an arbitral award, including its authority to set aside that award under domestic law» (*Yusuf Ahmed Alghanim Sons v. Toys "R" US, Inc.* (1997), United States Court of Appeals (2nd Circ.) case no. 96-9692).

The core aim of the Convention is thus to ensure the finality of arbitration, which would necessarily be undermined if States were to create procedures admitting a full *de novo* review of arbitral decisions in domestic courts. ([58])

Although it does not expressly refer to "due process" in any of its provisions regarding the recognition and enforcement, the New York Convention still confers the power upon States to deny legal effect to arbitral awards breaching fundamental procedural guarantees, and precisely those representing a manifestations of the above-discussed due process rights.

In this context, it is thus necessary to examine Article V(1)(b) – which allows the State denial of recognition and enforcement when a party has not been given proper notice or not been granted the opportunity to present his/her case – ([59]) and Article V(2) – regulating the disregard of the arbitral award in case of breaches related to the "public policy" of the enforcing State. ([60])

(i) *Article V(1)(b): grounds related to "due process"*

Pursuant to Article V(1)(b), the recognition and enforcement of the award may be refused only if «[t]he party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case». ([61])

---

[58] This principle has also been referred to as the Convention's "pro-enforcement" objective or purpose (BORN, G., *International Commercial Arbitration*, above-cited, p. 3721); FERRARI F. and ROSENFELD F., *International Commercial Arbitration: A Comparative Introduction*, above-cited, p. 174. See also Florence Court of Appeal, *XV,* Judgement of 3 June 1988, in *Yearbook Commercial Arb*itration, 1990, p. 498-499, stating that «[t]he New York Convention clearly aimed at making the enforcement of foreign arbitral awards easier»; Singapore High Court *Aloe Vera of Am. Inc. v. Asianic Food (S) Pte Ltd*, 2006, 78 §40, according to which «there is the principle of international comity enshrined in the Convention that strongly inclines the courts to give effect to foreign arbitration awards».

[59] JANA A. and ARMER A. et al., *Article (V) (1) (b)*, in *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention*, (eds.) H. Kronke and P. Nacimiento et al., Wolters Kluwer, 2010, p. 231 ff.

[60] OTTO D. and ELWAN O., *Article (V) (2) (a)*, in *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention*, above-cited, p. 345 ff.

[61] See New York Convention, Article V(1)(b); Inter-American Convention, Article 5(1)(b); UNCITRAL Model Law, Article 36(1)(a)(ii); English Arbitration Act, 1996, §103(2)(c); Swiss Law on Private International Law, Article 190(2)(d); French Code of Civil Procedure, Articles 1520 and 1525; Singapore International Arbitration Act, §24(b); Brazilian Arbitration Law, Article 32.

This provision – which refers to the concepts of equality, justice and fairness – reflects the notion that a party's right of participation can only be exercised if that party has been promptly and effectively noticed of the initiation of the arbitral proceeding along with the arbitrators' appointment.

The decision to create a specific procedural ground within Article V(1)(b) – which is autonomous and separate from the catch-all provision contained in Article (V)(2)(b), discussed below – highlights the importance that the framers of the Convention have recognized to those fundamental due process guarantees, whose protection has involved the necessity not to include them in the broader "vagueness" of Article (V)(2)(b). ([62])

From this process of separation and particularization, it may be inferred that the Convention implicitly distinguishes and elevates the due process protections from other and more general issues – enclosed in "public policy" concerns – thus potentially suggesting that the grounds in comment must be dealt with a different approach. ([63])

Moreover, Article V(1)(b) introduces only a *minimum* standard which arbitral tribunals and enforcing States are required to safeguard for the benefit of the parties and the judicial system at large, being parties and domestic courts legitimated to require – only whether considered necessary, based on the specific circumstances of the case – the compliance of the award also to additional procedural elements, eventually derived from procedural public policy guarantees.

Fostering a systematic interpretation of this article, the consistent approach has preferred looking beyond the mere formality of the notice itself, drawing the conclusion that failure to give proper notification to the losing party might be not enough – if considered alone – as to refuse recognition and enforcement of the award, being otherwise necessary to prove that, by reason of the failure to notice or

---

[62] It is also worth noting that Article V(1)(d) of the New York Convention separately regulates another procedural irregularity, by expressly allowing courts of Contracting States to refuse recognition and enforcement of the award where «the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place».

[63] From it, it follows that «whereas procedural protections raised under Article V(2)(b) might be subject to additional scrutiny or stricter interpretation, the due process protections in Article V(1)(b) are not to be any further constrained or diluted» (ALLSOP J.L.B. AC, *Keynote Address: International Arbitration and Conformity with International Standards of Due Process and the Rule of Law*, above-cited, p. 775).

improper notification, the losing party has been effectively denied his/her opportunity to present the case. ([64])

Therefore, what really matters is the actual and concrete degree of participation that a party has been granted in arbitration, irrespective of how the notice about arbitration has been obtained, being also certainly possible for a party to deliberately decide not to take part to the proceeding, regardless of any lack of proper notice. From a different perspective, as the burden of proof is concerned, it follows from a literal interpretation that, when occurring, inappropriate notification must be proven by the same losing party alleging procedural unfairness. ([65])

Taking all of this into account, while in set-aside proceedings Article V(1)(b) is said to be one of the most invoked provisions, however, evidence shows that courts have rarely denied recognition on this ground, thus narrowly interpreting the "due process exception" through setting a very high standard of proof. ([66]) In

---

[64] TODUA O., ZENKOVA M. and SYSOEV A., *Article V(1)(b)*, in *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention*, 2010, p. 345 ff.; ICCA, *ICCA's Guide to the Interpretation of the 1958 New York Convention*, 2011, p. 90, where it is argued that «[i]f a party has actively participated in an arbitration, it is impossible for it to complain later that notice was inadequate. In proceedings where the respondent defaults, on the other hand, proof of notice must be given serious attention at all stages». Accordingly, in case-law it has been stated that «due process is not violated if the hearing proceeds in the absence of one of the parties when the party's absence is the result of his decision not to attend» (*Bernstein Seawall & Kove v. Bosarge* (1987) United States Court of Appeals (5th Circ.)); see also *Geotech Lizenz AG v. Evergreen Sys Inc* (1988), United States District Court, case no. CV 88-1406; *Yukos Capital S.A.R.L. v. OAO Samaraneftegaz*, (2013), United States Court of Appeals (2nd Circ.) case no. 13-3357-cv. It obvious that, instead, where there has clearly not been notice at all, thus precluding a party its concrete participation to the arbitral proceeding, courts have refused to enforce the arbitral award. For instance, see Bavarian Highest Regional Court, 16 March 2000, 4 Z Sch 50/99, where the German court refused the enforcement of an award made in Russia against a German corporation as it was shown that the claimant had not properly investigated to ascertain the respondent's current address.

[65] This determination of the burden of proof has been regarded as a voluntary swift from the treatment that the lack of notice had under the Geneva Convention (1927), which expressly finds its reasons in the New York Convention's drafting history. See *U.N. Economic and Social Council, Consideration of the Draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Sweden: Amendment to the Draft Convention*, U.N. Doc. E/CONF.26/L.8, 2 (1958); *U.N. Economic and Social Council, Consideration of the Draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, U.N. Doc. E/CONF.26/L.43, 1 (1958).

[66] It must be thus clarified that the burden of proof normally identifies the party who has to prove the facts on which he/she relies in order to support his/her claim or defense; whereas the standard of proof represents the degree of likelihood that the party who intends to rely its case on a fact must meet, as to prove the relevancy of that fact to the dispute. On the courts' tendency to set a high standard of proof, see VERBIST H., *Challanges on Grounds of Due Process Pursuant to Article V(1)(b) of the New York Convention*, in *Enforcement of Arbitration Agreements and International Arbitral Awards*, (eds.) Emmanuel Gillard and Domenico di Pietro, 2008, p. 692 ff.; KRONKE H., *Recognition and Enforcement of Foreign Arbitral Award: A Global Commentary on the New York Convention*, Wolters Kluwer, 2010. Examples in case-law are: *X v. Y,* Swiss Federal Tribunal (*Bundesgericht*), 4 October 2010, case no. 4A_124/2010; *Consorcio Rive S.A. de C.V. v. Briggs of*

other words, it appears that only serious violations of the fundamental procedural guarantees (namely equal treatment, proper notice and fair and equal opportunity to present the case) might legitimate the refusal of recognition and enforcement. ([67])

This approach seems consistent with the duly consideration that many courts have expressed in interpreting the concept of due process as referred to the international nature of the arbitration proceedings, which is also in line with the courts' acceptance that arbitral tribunals are not bound to apply all those procedural and detailed rules that would otherwise be applied in domestic proceedings.

Therefore, notwithstanding the fact that national courts' decisions may be influenced by domestic standards defining their (national) concept of due process, the case-law at large has revealed that a considerable degree of convergence among different jurisdictions is consistent with this principle, thus contributing to the creation of a harmonized regime on "international" due process. ([68])

Accordingly, such an approach suggests that Article V(1)(b) can be viewed as providing the basis for a uniform international standard of procedural fairness in international commercial arbitration.

Cancun, Inc. (2003) United States Court of Appeals (5th Circ.), case no. 99-2204, available at: https://newyorkconvention1958.org/index.php?lvl=notice_display&id=1115&opac_view=6 [accessed 29 September 2023]; *Unìon Generale de Cinèma SA v. XYZ Desarrollos SA* (2000), Spain Supreme Court.

[67] UNCITRAL Settlement of commercial disputes, *UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, *Article V(1)(b)*, 15 October 2015; VAN DEN BERG A.J., *New York Convention of 1958: Refusal of Enforcement*, in *ICC International Court of Arbitration Bulletin* 2007, no. 2, 18, 8-9; ; KARRER P.A., *Must An Arbitral Tribunal Really Ensure That Its Award Is Enforceable?*, in *Global Reflections on International Law, Commerce and Dispute Resolution*, *Liber Amicorum in Honour of Robert Briner*, (eds.) G. Aksen et al., 2005, pp. 429-431.

[68] In this sense, «[w]hile courts have not adopted a purely international standard, they have demonstrated a willingness to tailor their analysis to international procedures and practices» (American Law Institute's Restatement (Third) on International Commercial and Investor-State Arbitration, § 4.11, citing *Generica Ltd. v. Pharm. Basics, Inc.*, (1997) United States Court of Appeals (7th Cir.), case 96-4004, available at: https://newyorkconvention1958.org/index.php?lvl=notice_display&id=1137&opac_view=6 [accessed 29 September 2023].

(ii) *Article V(2)(b): grounds related to "public policy"*

Under Article V(2)(b) an award may be denied recognition whether it is «contrary to the public policy» of the country where recognition and enforcement is sought. ([69])

Being characterized by a certain fluidity and vagueness, which might be considered as to include a «wide variety of facts», this provision is said to introduce a specific form of *ex post* control over the arbitration proceedings. ([70]) Indeed, according to the «open texture» of the concept of public policy, ([71]) it is commonly believed that any definition of this notion would never be entirely clear or precise, ([72]) to the end that a circumscribed attempt to enclose specific types of matters in this field might result futile. ([73])

---

[69] From a literal interpretation, it is clear that public policy invoked under Article V(2)(b)refers to the "national" public policy, therefore «[t]he standard for public policy is primarily to be deduced under the *lex fori*» (Bavarian Highest Regional Court, Judgment of 20 November 2003, in *Yearbook Commercial Arbitration*, XXIX, 2004, pp. 771-773).

[70] *The Attorney General of Belize v. BCB Holdings Limited and The Belize Bank Limited* (2012) Supreme Court of Belize, available at: https://jusmundi.com/fr/document/decision/en-bcb-holdings-limited-and-the-belize-bank-limited-v-the-attorney-general-of-belize-on-behalf-of-the-government-of-belize-order-of-the-united-states-district-court-for-the-district-of-columbia-friday-18th-august-2017 [accessed 29 September 2023], and Carribbean Court of Justice, 26 July 2013, in *Yearbook Commercial Arbitration*, (ed.) Van Der Berg, 2013, vol. XXXVIII, 324-329, para 102.

[71] HART H. L. A., *The Concept of Law*, 3rd edition, Oxford University Press, 2012, p.128.

[72] An attempt to define this principle is contained in the UNCITRAL commentary to the Model Law, where it is considered to be «a serious departures from fundamental notions of procedural justice» (see Explanatory Note to UNCITRAL Model Law, secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006); as well as in the Final Report issued by the International Law Association, stating that
«[t]he international public policy of any State includes: (i) fundamental principles, pertaining to justice or morality, that the State wishes to protect even when it is not directly concerned; (ii) rules designed to serve the essential political, social or economic interest of the State, these being known as "lois de police" or "public policy rules"; and (iii) the duty of the State to respect its obligations towards other States or international organizations» (International Law Association (ILA) Committee on International Commercial Arbitration, *Final Report on Public Policy as a Bar to Enforcement of International Arbitration Awards*, 2002, p. 6).

[73] Some commentators have expressed their concern regarding the unclear definition of the notion in exam, arguing that «an overly broad interpretation of public policy might undermine the benefits of the New York Convention» (FERRARI F. and ROSENFELD F., *International Commercial Arbitration: A Comparative Introduction*, above-cited, p. 231), to the point that it could be referred to as a very "unduly horse" on a run (MISTELIS L., *Keeping the Unruly Horse in Control or Public Policy as A Bar to Enforcement of Foreign Arbitral Awards*, in *International Law Forum du Droit International*, 2000, 2, p. 248; BORN, G., *International Commercial Arbitration*, above-cited, p. 4007). On the contrary, some authors have emphasized the importance that the fluidity of such principle has in shaping its content, with the consequence that «[t]o define the provision too carefully may prevent it from performing that role» (ALLSOP J.L.B. AC, *Keynote Address: International Arbitration and Conformity with International Standards of Due Process and the Rule of Law*, above-cited, p. 784).

Notwithstanding the lack of a universally accepted notion referred to the principle in comment, domestic courts have showed a certain reluctance towards a wide interpretation of this tool, hence generally excluding broad defense strategies against the recognition and enforcement of arbitral awards based on the invocation of an alleged breach of public policy. ([74])

Considering the characteristics of "due process" grounds discussed in the previous paragraph, some commentators have thus raised questions and doubts upon the extent to which the vague notion of "public policy" shall be intended, with specific regard to challenges grounded on procedural concerns. In other terms, it has been questioned whether Article V(2)(b) might be broadly interpreted as to include also matters of procedure.

Case-law from various jurisdictions supports the idea that, although in some cases courts have rejected challenges grounded on public policy when they were aimed at challenging the procedures used in arbitration, nevertheless certain procedural irregularities may still be referred to as a breach of public policy. Therefore, in attempt to identify some distinctions between "due process" – under Article V(1)(b) – and "public policy" – pursuant to Article V(2)(b) – most courts are deemed to have «taken a restrictive interpretation of public policy and implemented a high[er] standard of proof in that respect, by comparison to the standard of proof under article V(1)». ([75])

Accordingly, public policy grounds are said to encompass a wider and less defined area of subjects – if compared to the more defined content of due process rights discussed above – with the consequence that domestic courts are recognized a greater discretion over decisions and interpretations concerning a potential breach on this ground. ([76])

---

[74] By contrast, the courts' tendency to interpret "public policy" as a narrow ground for refusal of recognition and enforcement is showed in several domestic decisions, such as *Mangistaumunaigaz Oil Production Association v. United World Trade, Inc.* (1997) US District Court of Colorado, in *Yearbook Commercial Arbitration*, (eds.) Van Der Berg A.J., XXIV, 1999, 806-812, para. 13; *Beijing Sinozonto Mining Investment Co Ltd v. Goldenray Consortium Pte Ltd.* (2013) Singapore High Court, in *Yearbook Commercial Arbitration*, (eds.) Van Der Berg A.J., XXXIX, 2014, 489-492; *SpA Ghezzi v. Jacob Boss Söhne* (1988) German Federal Court of Justice, in *Yearbook Commercial Arbitration*, (eds.) Van Der Berg A.J., XV, 1990, pp. 450-454, para. 6.

[75] UNCITRAL Settlement of commercial disputes, *UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, *Article V(2)(b)*, 24 October 2014, p. 46.

[76] In this context, some authors have expressly contested the possibility to invoke Article V(2)(b) as to challenge matters of procedure, arguing that the latter shall be granted only through reference of

Being public policy aimed at preventing the enforcement of awards which might "disturb" the public conscience, as well as they might injure the public good, case-law reviews in these areas have shown that, in order for courts to intervene as to refuse recognition or enforcement, serious irregularity must have occurred, giving rise to a «patently unreasonable award». ([77])

2.2.2. *The UNCITRAL Model Law on International Commercial Arbitration*

The aforementioned grounds for refusal of recognition and enforcement enshrined in the New York Convention are largely reflected in the UNCITRAL Model Law.

With regard to the procedural elements for setting aside an award, this symmetry clearly emerges both in Article 34(2)(a)(ii) of the Model Law – which expressly refers to the failure to give proper notice of the appointment of an arbitrator or of the arbitral proceeding, as well as to the ability to present each party's case – ([78]) and in Article 34(2)(b)(ii) – dealing with public policy concerns.

---

due process rights indirectly contemplated in Article V(1)(b) (BLAVI F., *The Role of Public Policy in International Commercial Arbitration*, above-cited, p. 8. By contrast, others have sustained that Article V(2)(b) constitutes a residual instrument which may well include those procedural concerns also protected by Article V(1)(b). Accordingly, this latter approach recognizes the admissibility of procedural public policy, which is still far broader than the right to proper notice and to be heard. (SCHWEBEL S.M. and LAHNE S.G., *Public Policy and Arbitral Procedure*, above-cited, p. 208; GARCIA DE ENTERRIA J., *The Role of Public Policy in International Commercial Arbitration*, in *Law and Policy in International Business*, 1990, vol. 21, issue 3, pp. 389-440; VAN DEN BERG A.J., *New York Convention of 1958,* Wolters Kluwer, 1981, p. 301).

[77] *Karaha Bodas Company L.L.C. v. Perusahaan Petrambangan Minyak Dan Gas Bumi Negara and P.T. PLN* (2007) Alberta Court of Queen's Bench, case no. 616, available at: https://jusmundi.com/fr/document/decision/en-karaha-bodas-company-l-l-c-v-perusahaan-pertambangan-minyak-dan-gas-bumi-negara-and-pln-decision-of-the-hong-kong-court-of-final-appeal-friday-5th-december-2008 [accessed 29 September 2023]. Examples of case law reviews in this area may generally involve cases such as: fraud or bribery (*e.g. Gater Assets Ltd. V. Nak Naftogaz Ukrainy* (2008) England and Wales High Court, case no. 237, available at: https://newyorkconvention1958.org/index.php?lvl=notice_display&id=893 [accessed 29 September 2023]); breaches of independence and impartiality principles (*e.g. Excelsior Film TV v. Soc. UGC-PH* (1998) French Court of Cassation, case no. 95-17.285, available at: https://newyorkconvention1958.org/index.php?lvl=notice_display&id=152, [accessed 29 September 2023]); arbitral tribunal's decisions exceeding the scope of the mandate given to it (*e.g. Louis Dreyfus S.A.S. v. Holding Tusculum B.V.* (2008), Superior Court of Canada, case no. 5903, available at: https://www.uncitral.org/clout/clout/data/can/clout_case_1049_leg-2773.html [accessed 29 September 2023]).

[78] As for Article V(1)(b) of the New York Convention, neither the Model Law specifies an exact time limit according to which the notification can be deemed as "properly" delivered, being it necessary for the information to be exhaustively furnished to each party as to allow them preparing

The decision to align the grounds for setting aside with those for refusal and recognition expressly provided in Article V of the New York Convention has been deliberately undertaken by the Working Group – and also applied in Article 36 Model Law – with the aim to «help prevent [...] an international award [from] fall[ing] victim to local particularities of law». ([79]) Accordingly, the express purpose not to replace or to add a variety of additional possible grounds is deemed to have laid the basis for the creation of a harmonized system of "restricted recourse" against the recognition and enforcement of arbitral awards.

Due to the existing similarities between the New York Convention and the UNCITRAL Model Law in this area, it is thus possible to extend the considerations made in the previous paragraphs also to this latter instrument of regulation. In doing so, however, it must be always taken into account that the UNCITRAL Model Law constitutes an instrument of soft law, while the Convention constitutes an agreement which is binding upon its signatories.

With these preliminary observations in mind, there is no doubt that Article 34(2) provides an exclusive and exhaustive list of grounds for annulment, as it clearly emerges from the fact that – as well as above-seen with regard to the New

---

their case and participating in the arbitral proceeding. On this ground, some commentators have stressed the need for this principle to be restrictively interpreted, as «if the tribunal and/or the participating party (or parties) were required to inform the defaulting party of every single procedural step, the burden arising out of this duty of information would likely threaten the practical viability of arbitration» (ORTOLANI P., *Article 34: Application for Setting Aside*, in *UNCITRAL Model Law on International Commercial Arbitration: A Commentary*, (eds.) Bantekaset I. al., 2020, 873). In this context, national courts have adopted different approaches on when a notice could be recognized as "proper". For instance, sometimes it has been considered sufficient the fact that the information about the arbitral proceeding had entered the sphere of the recipient, irrespectively of any potential and express acceptance by the party of that delivery (see CLOUT Case 870, *Oberlandesgericht Dresden*, (2006), case no. 11 Sch. 19/05); by contrast, other courts have considered a breach of this principle to have occurred absent a proof that the party had effectively received the notice of arbitration (see, e.g. *Yukos Capital SARL (Luxembourg) v. OAO Tomskneft VNK* (2010), Federal Arbitrazh Court, District of Tomsk, case no. A67-1438/2010, available at: https://newyorkconvention1958.org/index.php?lvl=notice_display&id=1587 [accessed 29 September 2023]. However, the challenge under Article V(1)(b) of the New York Convention, claiming the lack of notice, must be considered in relation to the alleged fictitious nature of that arbitration and the peculiarity of the case.

[79] First Secretariat Note, Possible Features of a Model Law, A/CN.9/207, 18 May 1981, para. 110, full text available in HOLTZMANN H. M., and NEUHAUS J. E., *A Guide to UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary*, Wolters Kluwer, 1995, p. 923 ff., where a more detailed description also of the drafting history of this article can be found. Indeed, the delicacy in determining such grounds for setting aside has represented an arduous task for the Working Group, which is also shown by the fact that the *travaux preparatoires* of Article 34 took much more time than those of any other article of the Model Law, with the sole exception of Article 1.

York Convention – an award may be annulled "only if" the challenge is based on one of the six grounds stated in the Article 34's subsections. ([80])

It is equally evident that the list mentioned in Article 34(2) leaves broad space to the national courts' discretion, as they "may" annul an award in cases where one or more exclusive grounds are met in a given circumstance. As a consequence, courts are not obliged to annul an arbitral award for the mere fact that one or more grounds stated in Article 34(2) have been met, ([81]) as not every procedural irregularity is deemed to justify a set-aside.

In order for a breach to be considered as relevant, it is thus necessary for it to be either material, or outcome-determinative, ([82]) or to have caused a prejudice

---

[80] See UNCITRAL Model Law, Article 34(2)(a) and (b); GHARAVI H., *The International Effectiveness of the Annulment of An Arbitral Award*, 2002, p. 31. The exclusive and exhaustive nature of the grounds listed in Article 34 is also confirmed in case-law, among the others, see Quèbec Superior Court, *Holding Tusculum BV v. Louis Dreyfus SAS*, [2008] QCCS 5904, Singapore Court of Appeal, *Swissbourgh Diamond Mines (Pty) Ltd v. Lesotho*, [2018] SGCA 81, Dublin High Court, *Ryan v. Kevin O'Leary (Clonmel) Ltd*, [2018] IEHC 660, paras. 25-26.

[81] This statement founds its reason in the explicit content of Article 34(2), which states that an «award may be set aside by the court [...] only if» specific requirements are present. In this context, it has been affirmed that «the possibility for the courts of the requested State to recognise and enforce a foreign award, despite the presence of one of the grounds of refusal enshrined in Article V of the New York Convention, serves the main purpose of guaranteeing the overall fairness of the final outcome, in cases where the existence of the aforementioned ground(s) is the consequence of idiosyncratic or discriminatory practices and/or decisions that have taken place at the seat of arbitration» (ORTOLANI P., *Article 34: Application for Setting Aside*, above-cited, p. 864).

[82] For instance, with regard to the right to present the case, most of the national courts applying Article 34 have required the challenging party not only to demonstrate that the right in comment had been breached, but also to prove that, in the absence of such a procedural irregularity, the result of the arbitration would have been different. This approach adopted by national courts is consistent with their objective to exclude the unreasonable recourse to Article 34(2)(ii) as a tool for challenging arbitral awards, when it is likely that the procedural decisions adopted by the tribunal have not concretely affected the outcome of the proceeding. Among the others, see *Brunswick Bowling & Billiards Corp. v. ShangHai ZhongLu Industrial Co. Ltd and Another* (2011) Court of First Instance of the High Court of Hong Kong, case no. 2456/2008, available at: https://jusmundi.com/fr/document/decision/en-brunswick-bowling-billiards-corp-v-shanghai-zhonglu-industrial-co-ltd-and-chen-rong-reason-for-judgment-of-the-high-court-of-hong-kong-hcmp-2456-2008_tuesday-13th-january-2009 [accessed 29 September 2023]; and *Grand Pacific Holdings Ltd v. Pacific China Holdings Ltd (in liq.)* (2012) case no. 15/2010, available at: https://newyorkconvention1958.org/index.php?lvl=notice_display&id=1162&opac_view=2 [accessed 29 September 2023]; *AMZ v. AXX* (2015) Singapore High Court, case no. 283, available at: http://www.singaporelaw.sg/sglaw/laws-of-singapore/case-law/free-law [accessed 29 September 2023] *Soh Beng Tee & Co. v. Fairmount Dev. Pte* (2007), Singapore Court of Appeal, case no. 100/2006, available at: https://jusmundi.com/fr/document/decision/en-soh-beng-tee-co-pte-ltd-v-fairmount-development-pte-ltd-judgment-of-the-high-court-of-singapore-2006-sghc-189-tuesday-17th-october-2006 [accessed 29 September 2023]; *Trustees of Rotoaira Forest Trust v. Attorney-Gen*. (1999) High Court (Commercial List) Auckland, case no. 658, abstract available at: https://www.uncitral.org/clout/clout/data/nzl/clout_case_658_leg-1905.html [accessed 29 September 2023]; *Jacob Securities Inc. v. Typhoon Capital BV* (2016), Ontario Superior Court of Justice, case no. 604, available at: https://www.uncitral.org/docs/clout/CAN/CAN_260116_FT.pdf [accessed 29 September 2023].

or otherwise to have met a certain threshold set by the domestic court. ([83]) For these reasons, on the one hand, the grounds of annulment set in Article 34(2) are evidently directed to the protection of the party's fundamental procedural rights in arbitral proceedings; however, case-law shows that these grounds are also aimed at preserving the autonomy of arbitration and at reducing the judicial intervention in its proceeding, with the consequence that the same grounds are to be construed and interpreted in a strict manner. ([84])

The minimal curial intervention is thus consistent with the need to preserve the effectiveness and smooth functioning of the arbitration, which has been voluntarily chosen and initiated by the parties in the exercise of their autonomy, as it encourages the predictability of dispute resolution mechanisms in the field of international commerce. ([85])

In conclusion, it can be stated that both national courts applying the New York Convention and those operating in Model Law jurisdictions tend not to interpret the corollaries of the principle of due process and public policy from a formalistic perspective, being them rather focused on preserving and granting the "objective fairness" of the procedure.

2.2.3. *Institutional v. ad hoc arbitration rules*

As above seen, besides the mandatory principles stated in the *lex arbitri* and the set of (minimum) procedural guarantees provided for in the New York Convention and in the Model Law, parties are generally free to agree on the procedure to be followed by the arbitral tribunal. ([86]) Nevertheless, any discussion on the legal framework of due process protections in arbitral proceedings shall also

---

[83] Accordingly, «minor or trivial violations of procedural rights or inequalities in treatment are inevitable in any adjudicative process and do not provide grounds for annulment» BORN, G., *International Commercial Arbitration*, above-cited, p. 3538 ff.

[84] This principle has been clearly stated by the Ontario Superior Court of Justice, affirming «that the grounds for refusal of enforcement [under Article 34] are to be construed narrowly» (*Corporación Transnacional de Inversiones, SA de CV v. STET Int'l SpA*, (1999) 45 OR3d 183, para. 26).

[85] Singapore Court of Appeal, *CRW Joint Operation v. PT Perusahaan Gas Negara (Persero) TBK*, [2011] SGCA 3, para. 25.

[86] Article 19 UNCITRAL Model Law.

consider the distinction between "institutional" and "*ad hoc*" international arbitration.

Hence, it must be noted that the first instrument is characterized by the involvement of an arbitral institution, which administers the proceedings according to a set of arbitration rules that are generally established by the institution itself; ([87]) whereas *ad hoc* arbitrations, in the lack of any institutional support, are governed only by the set of rules on which the parties have expressly agreed.

A prominent example of uniform rules that may guide both parties and arbitrators – and which have been originally designed to be used in *ad hoc* proceedings – ([88]) is represented by the UNCITRAL Arbitration Rules (so-called Model Rules), ([89]) as they provide internationally recognized solutions to procedural issues related to the resolution of commercial disputes by the arbitral tribunal. Indeed, the scope of the Model Rules was to introduce a more predictable and stable procedural framework for international arbitral proceedings, without prejudice to the flexible nature and to the capacity of arbitration to adapt to diverse circumstances, whose complexity is increased by the fact that each dispute is simultaneously linked to several legal systems. ([90])

---

[87] For example, see the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA); the Singapore International Arbitration Centre (SIAC), the Permanent Court of Arbitration (PCA), the Stockholm Chamber of Commerce Arbitration Institute (SCC), the Swiss Chambers' Arbitration Institution (SCAI), the Hong Kong International Arbitration Centre (HKIAC).

[88] Advancing in time, such arbitration rules have been successfully implemented not only in commercial disputes but also in investor-State and State-to-State arbitrations, as it is shown by the Permanent Court of Arbitration (PCA) arbitral jurisprudence (e.g. *Stabil LLC v. Russia*, *Final Award*, Permanent Court of Arbitration, case no. 2015-35, 24 April 2019; *WNC Factoring Ltd v. Czechia*, *Award*, Permanent Court of Arbitration, case no. 2014-34, 22 February 2017 *British Caribbean Bank Ltd v. Belize*, *Award*, Permanent Court of Arbitration, case no. 2010-18, 19 December 2014). See also BORN, G., *International Commercial Arbitration*, above-cited, 194; CARON D.D. and CAPLAN L. M., *The UNCITRAL Arbitration Rules: A commentary*, 2nd ed., Oxford, 2013.

[89] These rules were first adopted by the United Nations Commission On International Trade Law in 1976 (General Assembly Resolution 31/98, 15 December 1976) and then revised in 2010 (General Assembly Resolution 65/22, 10 January 2011), 2013 (General Assembly Resolution 68/109, 16 December 2013) and in 2021 (General Assembly Resolution 76/108, 9 December 2021). In this context, it is worth stressing that the parties' decision to resort to the UNCITRAL Arbitration Rules in *ad hoc* arbitration does not trigger the initiation of an administered arbitration. For a deeper analysis of such rules see CROFT C. *et al.*, *A Guide to the UNCITRAL Arbitration Rules*, Cambridge University Press, 2013; MONTINERI C., *The UNCITRAL Arbitration Rules and their use in ad hoc arbitration*, in Cordero-Moss (ed.), *International Commercial Arbitration*, Cambridge Press University, 2013; PAULSSON J. and PETROCHILOS G., U*NCITRAL Arbitration*, Kluwer Law International, 2018.

[90] The basic procedural framework provided for by the UNCITRAL Arbitration Rules includes, for instance, the steps for initiating and conduct the proceeding (Articles 4, 5 and 17), the appointment

Significantly, evidence shows that the general content of the arbitration rules, including those created by specific institutions, is mostly inspired by the above-mentioned Model Rules, as it is possible to catch a certain degree of uniformity among the different arbitral proceedings, which proves that some measures of soft law are deemed to be universally accepted within the arbitration community. ([91])

More specifically, arbitration rules are evidently focused on due process guarantees, as it emerges, for instance, by the fact that these instruments frequently resort to the same terms, such as "equality", "full opportunity to present its case/right to be heard", "fair treatment/ unfair prejudice". ([92])

It is thus possible to state that the conduct of the arbitral proceeding – either it be institutional or *ad hoc* – is ruled by a main and superior principle, aimed at granting procedural fairness, that must be necessarily respected and interpreted by the arbitrators as an essential guiding line governing the entire procedure, until the final arbitral award is issued. In doing so, arbitration rules foster and interpret the terms equality, fairness, efficiency, impartiality and, more in general, due process, as fundamental and commonly shared principles which represent the unavoidable cornerstones of international arbitration, regardless of the fact that they might be differently regulated in the various jurisdictions.

The degree of harmonization and uniformity provided for by these rules in the field of due process rights, together with the principles enshrined in the New York Convention and the UNCITRAL Model Law, is thus deemed to lessen the

---

of arbitrators (articles 8 to 10), the choice of applicable law to the dispute (Article 35), the award (Article 33 and following), as well as the costs of arbitration (Article 40).

[91] Indeed, a number of arbitral institutions have adopted the UNCITRAL Rules, either in their entirety or just by drawing inspiration from them (e.g. International Centre for Dispute Resolution – ICDR – of the American Arbitration Association; Hong Kong International Arbitration Centre – HKIAC). Therefore, it has been argued that «there is little doubt that for the conduct of international arbitration a procedural convergence of the civil-law and common-law approaches has already largely occurred» (MOLINEAUX C., *Appplicable Law in Arbitration: The Coming Convergence of Civil and Anglo-Saxon Law via Unidroit and Lex Mercatoria*, in *The Journal of World Investment and Trade*, 2000, p. 127); see also KAUFMANN-KOHLER, G., *Soft Law in International Arbitration: Codification and Normativity*, in *Journal of International Dispute Settlement*, 2010.

[92] See, for instance, some references to the "efficiency" in Article 2(2) of the ICC Arbitration Rules 2021; Articles 5(4), 10, 14 and 18(4) of the LCIA Arbitration Rules 2020; Articles 1 and 17 of the UNCITRAL Arbitration Rules 2021; Articles 13(3), 19(3)(7) of the Singapore Arbitration Rules 2016; as well as to the "opportunity to present the case" in Article 2(5) of the LCIA Arbitration Rules 2020; articles 15(3), 17(2), 22(4) of the ICC Arbitration Rules 2021; Articles 4(6), 6(5), 17 of the UNCITRAL Arbitration Rules; Articles 5(4), 7(10), 20(9) of the Singapore Arbitration Rules 2016.

distance between the divergent legal and cultural backgrounds of both parties and arbitrators, being these rules mainly aimed at fostering the development of what is deemed to be a "fairness framework" of the international commercial arbitration. ([93])

2.3. *Due process in virtual arbitration: is there a right to a physical hearing?*

The increased use of technological tools for the resolution of transborder disputes makes it necessary to introduce some procedural considerations related to those circumstances in which hearings take place remotely.

More precisely, virtual hearings are generally understood as hearings in which, through the use of technology, participants are simultaneously connected and can concurrently interact from different locations. Despite the fact that such hearings are not a new phenomenon in international arbitration, ([94]) there is no doubt that the spread of the Covid-19 pandemic has accelerated the use of technological tools during the last few years in many different sectors, among which the dispute resolution systems represent one of the areas facing relevant challenges and changes.

For the purposes of this work, it must be thus questioned whether a right to physical hearing exists in international arbitration – in lack of any specific agreement between the parties on this issue – and, in case of a negative response, whether virtual hearings are able to grant the parties' due process rights, such as the equal treatment and the opportunity to fully present their case. ([95])

---

[93] According to the opinion of some commentators, this principle is already existent and well-established in international arbitration proceedings. See ALLSOP J.L.B. AC, *Keynote Address: International Arbitration and Conformity with International Standards of Due Process and the Rule of Law*, above-cited, p. 786.

[94] For instance, the majority of the hearings held by the International Center for Settlement of Investments Disputes (ICSID) have been conducted virtually in 2019. See ICSID, *A Brief Guide to Online Hearings at ICSID*, 2020.

[95] See ICCA General Report, *Does a Right to a Physical Hearing Exist in International Arbitration?*, available at: https://www.arbitration-icca.org/right-to-a-physical-hearing-international-arbitration [accessed 26 October 2023].

In order to assess whether or not virtual hearings are admissible in international arbitration, it is necessary to outline the applicable regulatory framework, which is characterized in particular by the national law of the seat of the arbitration (*lex arbitri*), the parties' agreement and the arbitration rules, as above described.

It is clear that, if a right to a physical hearing actually exists, a party may invoke its breach as a ground for opposing the virtual hearings and the subsequent recognition and enforcement of arbitral awards issued in its connection; therefore, a specific assessment of the legal frameworks applicable in this case will help parties and arbitrators understand the edges among which virtual hearings may be potentially adopted, without the risk of jeopardizing the enforceability of the arbitration awards.

With regard to the national arbitration laws and institutional arbitration rules, evidence shows that they generally entitle parties with the right to request an "oral hearing", albeit without specifically providing that such a hearing shall be conducted physically. ([96])

In this context, for instance, the UNCITRAL Model Law confers freedom to the parties as to choose the format of the oral hearing, as well as it recognizes a wide discretion upon the arbitral tribunal with regard to the way the proceeding shall be conducted, in the absence of a specific agreement between parties, being it necessary for the arbitrators to take into account all the relevant factors of the given case.

In the same vein, most institutional arbitration rules provide that parties may freely agree on the hearing format, otherwise it will be on the tribunal to decide the way the proceeding is to be conducted, considering the opportunity to resort to virtual hearings, in part or fully, where it might be appropriate for the efficient resolution of the dispute. ([97]) Moreover, due to the sudden changes faced by the

---

[96] In this context, it is interesting to note that Article 25(2) of the ICC Rules expressly requires the tribunal to hear the parties «together in person». However, the ICC has expressly made clear that the requirements of Article 25(2) can be met also by resorting to remote hearings. Accordingly, the term "in person" shall be interpreted as the need for the arbitral tribunal to grant the parties a hearing in which they can interact live with each other, with no need for it to be in a physical or virtual meeting. See ICC, *Guidance Note on Possible Measures Aimed at Mitigating the Effect of the COVID-19 Pandemic*, 2020), para. 23.

[97] For instance, see Article 26(1) of the ICC Rules 2021; Article 19(2) of the LCIA Rules 2020; Article 32(1)(2) of the SCC Rules 2023.

society at large in the recent years, few national arbitration provisions and arbitration rules contain specific provisions on the possibility to resort to virtual hearings, with the aim to promote such proceedings – always in permissive terms ("may") – as an alternative solution to physical meetings in certain circumstances. ([98])

In light of the above, in order to understand the reasons to favorably admit virtual hearings in international arbitration, it is helpful to focus on the concrete content of the party's right to a hearing, which, as above-seen, constitutes a fundamental principle in international arbitration.

Indeed, if considered from a practical perspective, every hearing consists of an oral and simultaneous exchange of arguments and evidence between the participants to arbitration; therefore, it is difficult to argue that, in any case, virtual hearings should not be suitable *per se* to accomplish the same tasks in between the parties.

Accordingly, given that most of the national laws and arbitration rules remain silent on this topic, the opinion that the party's right to an "oral hearing" does not automatically implicate a specific right to a "physical hearing" has been widely supported by scholars and case-law. ([99])

---

[98] For instance, see Rule 43(a) of the Federal Rule of Civil Procedure (which allows the use of videoconferencing for witness testimony "for good cause in compelling circumstances"); Article 1072b(4) of the Dutch Code of Civil Procedure (allowing the general use of "electronic means"); Article 19.2 of the LCIA (providing for the use of "video or telephone conference"); Article 8(2) of the IBA Rules on the Taking of Evidence 2020, which states that «[a]t the request of a Party or on its own motion, the Arbitral Tribunal may, after consultation with the Parties, order that the Evidentiary Hearing be conducted as a Remote Hearing». For a deeper analysis of the national laws and arbitration rules containing specific provisions on remote hearings, see also SCHERER, M., *Remote Hearings in International Arbitration: An Analytical Framework*, in *Journal of International Arbitration* 2020, p. 414.

[99] This does not mean, however, that it is always appropriate to conduct proceedings virtually, being it necessary to consider the specific circumstances of the dispute to be solved on a case-by-case basis. See PAVIĆ, V. and a ĐORĐEVIĆ, M., *Virtual Arbitration Hearings: The New Normal?*, in *Annals*, 2021, p. 555, available at SSRN: https://ssrn.com/abstract=4280404 [accessed 24 October 2023]; LEI C., *Will Virtual Hearings Remain in Post-pandemic International Arbitration?*, in *International Journal for the Semiotics of Law - Revue internationale de Sémiotique juridique*, 2023, p. 20, available at: https://link.springer.com/article/10.1007/s11196-023-10054-7#:~:text=As%20a%20result%2C%20virtual%20hearings,and%20greater%20flexibility%20in%20scheduling [accessed 24 October 2023]; SCHERER, M., *Remote Hearings in International Arbitration: An Analytical Framework*, above-cited, p. 418; CHAN D. and GOH G., *Hearing*, in *Handbook of Evidence in International Commercial Arbitration: Key Issues and Concepts*, (eds.) Franco Ferrari and Friedrich Rosenfeld, 2022, p. 268 ff.. In case-law, among the others, see *China National Building Material Investment v. BNK Internationa* (2009), U.S. District Court for the Western District of Texas, case no. A-09-CA-488-SS, available at: https://law.justia.com/cases/federal/district-courts/texas/txwdce/1:2009cv00488/371660/24/;

However, once it has been assessed that virtual hearings are generally admissible in international arbitration, one of the most potential pitfalls in this regard concerns the need to protect due process guarantees and procedural fairness, as these principles are relevant in order to grant the enforceability of the final award. Indeed, especially in the context of virtual hearings, parties may seek to challenge the awards in certain circumstances by alleging, for instance, a breach of their right to be heard and to be treated equally, as provided in the above-discussed Article V(1)(b) of the New York Convention and in Articles 34(2)(a)(ii) and 36(1)(a)(ii) of the UNCITRAL Model Law. ([100])

In terms of a party's right to be heard, it has already been assessed that the hearing might be conducted remotely without determining *per se* any breach in the possibility for the participants to effectively exchange arguments or evidence, provided that parties may well interact remotely in the same way they would be able to do in physical hearings. However, despite the abstract suitability of remote hearings in granting such a party's right, it is clear that there might also be occasions where concrete breaches occur.

For instance, this could be the case where one party in a remote hearing does not have a strong internet connection – thus being essential to grant that the participants have access to high-quality internet and/or *ad hoc* facilities, ([101]) provided that «access to justice should not be dependent on access to high quality

---

Consorcio Rive, S.A. de C.V. v. Briggs of Cancun, Inc. (2001), U.S. District Court, Eastern District of Louisiana, case no. A. 99–2204; *Eaton Partners, LLC v. Azimuth Capital Management IV, LTD* (2019), U.S. District Court for the Southern District of New York, case no. 18Civ. 11112.

[100] Besides the discussion of the due process rights already subject to this examination, virtual hearings are also concerned with additional issues related, for instance to time-zones, cybersecurity and confidentiality. With regard to time-zones, where a considerable difference in time occurs (e.g. twelve hours), a party might for instance argue that the testimony of a witness, that has been examined late at night or early in the morning, might have been prejudiced to the detriment of one of the parties, who has thus not been treated "equally" to the other. In relation to cybersecurity, there is no doubt that the increased resort to remote hearings might aggravate the risk for the integrity of the information shared during the proceeding to be compromised. Confidentiality is also strongly linked to cybersecurity, as there is a general perception that the first is more difficult to protect in virtual hearings rather than in in person hearings (provided that, for instance, videos could be unlawfully and more easily recorded during the first kind of proceeding). For a deeper analysis concerning these issues related to time-zones, cybersecurity and confidentiality see LEI C., *Will Virtual Hearings Remain in Post-pandemic International Arbitration?*, above-cited, p. 9 ff.; MADYOON, N. *Virtual Hearings in International Arbitration: Challenges, Solutions, and Threats to Enforcement*, in *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management*, 2021, p. 607 ff.

[101] For instance, the Hong Kong International Arbitration Center (HKIAC) provides a virtual hearing platform to the users; the Singapore International Arbitration Center (SIAC) provides access to facilities to the users also in order to grant the (cyber)security of the proceeding.

technology» – ([102]) as well as where serious concerns arise with regard to the way evidence has been taken and considered by the arbitral tribunal, such as in cases of witness testimony. ([103])

Similar considerations seem also to be applicable with regard to the parties' right to be treated equally. First, this right is not violated in cases where hearings are conducted fully remotely, except for specific instances where one party's right might be breached, for instances, due to technological issues as well as where suspects arise regarding the possibility that witnesses or experts have been coached in favor of one party. In addition, when hearings are conducted in a semi-remote way – meaning that only one party (or its witnesses and/or experts) participates virtually – it is believed that a breach of the parties' right to be treated equally does not occur whenever the decision to resort to such a "hybrid" proceeding is justified due to the relevant facts of the specific case (such as the impossibility for only that party to physically participate to the hearing in person).

Interestingly, case-law shows that, even in cases where breaches of the parties' right to be heard or to be treated equally have potentially occurred, this does not automatically entail the non-recognition and enforcement of the final award, being necessary for the party seeking refusal to prove the existence of a causal nexus between the alleged breach and the final outcome of the arbitration.

In conclusion, there is no doubt that procedural fairness and due process rights must be mandatorily guaranteed irrespective of the way the arbitral proceeding is conducted – whether it be physically or virtually. Therefore, in cases where parties have specifically agreed to hold a remote hearing, given the importance that the party autonomy principle plays in international arbitration, the tribunal will typically follow the parties' will in such circumstances. ([104]) Whereas, absent a specific agreement between the parties, the arbitral tribunal will be asked

---

[102] See BUTT, R. *COVID-19 Disputes: Zooming Ahead – The Challenges of Virtual Hearings in International*
Arbitration, in *MONDAQ*, 2020, available at: https://www.mondaq.com/uk/operational-impacts-and-strategy/928078/covid19-disputes-zooming-ahead-the-challenges-of-virtual-hearings-in-international-arbitration [accessed 24 October 2023].

[103] Indeed, there is no doubt that one of the most relevant concerns related to virtual hearings is with regard to-cross examination, being this instrument considered as a fundamental opportunity to assess the credibility of a witness. See SCHERER, M., *Remote Hearings in International Arbitration: An Analytical Framework*, above-cited, p. 441.

[104] *Ibid*. p. 419.

to carefully assess all the relevant circumstances of the case as to determine whether to conduct a virtual hearing might be appropriate in relation to the characteristics of the given dispute. ([105])

In this sense, in order to render an enforceable and final award, the tribunal's decision on how to proceed – in relation to which the case management conferences between arbitrators and parties are deemed to be crucial – ([106]) necessarily involves the need to consider which are the best solutions to grant the parties' rights to be heard and to be treated equally, irrespective of the location from which each party participates to the arbitral proceeding.

3. *Party autonomy: ex post and ex ante waivers of due process rights*

According to the principle of party autonomy, when deciding to resort to arbitration as an alternative dispute resolution mechanism, the parties may well be interested in shaping the arbitral proceeding in a way that better fits their interests and their needs related to the specific case. In this context, provided that they have freely decided to resort to "private justice" instead of "State justice", the parties might thus be willing to waive some of the typical measures that would otherwise apply in national court proceedings, including some procedural guarantees.

First, one may question why parties shall be interested in waiving due process protections in arbitral proceedings, provided that, as above seen, some

---

[105] In this field, it is worth noting that the Austrian Supreme Court has ruled favorably on the possibility for the arbitral tribunal to carry out virtual proceedings also against the objection of a party, as long as that the tribunal's conduct does not concretely result in a serious procedural violation or in a permanent and significant disadvantage to that opposing party (Austrian Supreme Court, case No. 18 ONc 3/20s, 23 July 2020). See SCHERER M. ET AL., *"First" Worldwide, Austrian Supreme Court Confirms Arbitral Tribunal's Power to Hold Remote Hearings over One Party's Objection and Rejects Due Process Concerns*, in *Kluwer Arbitration Blog,* 24 October 2020, available at: https://arbitrationblog.kluwerarbitration.com/2020/10/24/in-a-first-worldwide-austrian-supreme-court-confirms-arbitral-tribunals-power-to-hold-remote-hearings-over-one-partys-objection-and-rejects-due-process-concerns/ [accessed 26 October 2023]; MAK Y., *Do Virtual Hearings Without Parties' Agreement Contravene Due Process? The View from Singapore*, in *Kluwer Arbitration Blog*, 20 June 2020, available at: https://arbitrationblog.kluwerarbitration.com/2020/06/20/do-virtual-hearings-without-parties-agreement-contravene-due-process-the-view-from-singapore/ [accessed 26 October 2023].

[106] Indeed, some commentators have considered that «[a] proactive and experienced arbitrator should therefore seek to implement a virtual hearing protocol, in consultation with the parties», which can surely be implemented during the aforementioned case-management conference (CHAN D. and GOH G., *Hearing*, above-cited, p. 272).

fundamental procedural guarantees are already part of the arbitration framework and find application irrespective of any express agreement of the parties upon them. In this field, however, recognizing the parties' legitimate interest to benefit from the efficiency and finality of the arbitration proceeding, some jurisdictions have acknowledged – within specific limitations – that parties may freely agree on waiving certain due process guarantees (*e.g.* waiver to the right to challenge the arbitral award). ([107])

Secondly, one of the most relevant aspects in this context is the time frame in which a party's waiver concretely occurs. In particular, many jurisdictions have recognized the admissibility of *ex post* waivers, which are those emerging after a breach of due process has already occurred, except for cases where higher public interests are at stake (as the latter are deemed to be not waivable by the parties in any case). This open approach has thus led the courts to consider that, where a party fails to raise a breach of due process during the proceeding, the party's "passive" conduct may amount to an implicit *ex post* waiver. ([108]) Indeed, when considering that such an inactive participation to the arbitral proceeding by the parties may amount into an implicit *ex post* waiver of due process rights, courts have justified their decision, for example, on the grounds of the principles of good faith, ([109])

---

[107] SCHERER M. and SILBERMAN L., *Limits to Party Autonomy at the Post-Award Stage*, in *Limits to Party Autonomy in International Commercial Arbitration*, (ed.) F. Ferrari, 2016, p. 441 ff.

[108] For instance, in relation to the Netherlands, see Article 1065(4) of the Dutch Code of Civil Procedure, pursuant to which a party cannot raise the violation of a tribunal's mandate if he/she has failed to invoke such ground during the arbitral proceeding; moreover, Article 1076(4) of the Dutch Code of Civil Procedure, stating that the violation of a tribunal's mandate «shall not constitute a ground for refusal of recognition or enforcement if the party who invokes this ground has participated in the arbitral proceedings without raising it, although it was known to him that the arbitral tribunal did not comply with its mandate»; in relation to France see Article 1466 of the French Code of Civil Procedure, providing that «[a] party which, knowingly and without a legitimate reason, fails to object to an irregularity before the arbitral tribunal in a timely manner shall be deemed to have waived its right to avail itself of such irregularity». In French case-law see also *M. Marillier et Mlle Ecoiffier v. S.A. SECAG* (2003), Paris Court of Appeal, case no. 02/12724; *Compagnie Generali Iard v. Société Consortium d'Assurance de Participation "CAP"* (2009) Paris Court of Appeal, case no. 08/2658; *République de Guinée équatoriale*, Paris Court of Appeal (2013), case no. 12/01370. Considering the case-law of Singapore, see *Kempinski Hotels SA v. PT Prima International Development* (2012), Singapore Court of Appeal; *ADG v. ADI* (2014), Singapore High Court. In relation to US, see *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara* (2002) United States District Court, S.D. Texas, Houston Division, case no. CIV.A.H 01-0634. As for the Italian case-law, see Court of Appeal of Milan, 1 July 2014, in *Giurisprudenza Italiana*, 2015, p. 172 ff..

[109] *X AG v. Y AS*, (2010), Swiss Supreme Court, in *Yearbook Commercial Arbitration*, (eds.) A.J. Van Den Berg, 2011, vol. XXXVI, pp. 340-342.

contradictory behavior, ([110]) the duty of loyalty and the role of arbitration in granting the efficient resolution of commercial disputes. ([111])

Therefore, what clearly emerges from the prevalent case-law is that courts recognize the importance for the arbitral tribunal to be given the possibility to promptly fix any procedural error, which has already occurred during the proceeding and before the final awards has been issued. Accordingly, the parties shall demonstrate their active participation to arbitration, as they shall be motivated to raise procedural issues during the proceeding, instead of raising challenges only after one of them has suffered the "loss". However, in order for such a "positive" conduct to occur, it is obvious that each party shall be aware of the existence of a procedural deficiency, that must have thus necessarily materialized in a given moment before the end of arbitration. ([112])

Shifting the view towards those waivers that may intervene before a breach has concretely taken place, it is possible to state that domestic courts have been looking at *ex ante* waivers critically.

Indeed, such waivers might appear to be more counterintuitive if one considers that almost all jurisdictions – whether they implement the UNCITRAL Model Law or not – recognize the mandatory nature of the parties' right to be heard and that of being treated equally. Nevertheless, certain jurisdictions are positively oriented also towards *ex ante* waivers of set-aside proceedings (except, again, in cases where public interests are involved). ([113])

Normative examples of such an open approach might be found, for instance, in Article 1522 of the French Code of Civil Procedure, providing that «parties may, at any time, expressly waive their right to bring an action to set aside», without prejudice to the parties' opportunity, in any case, to exercise their right to appeal an

---

[110] *Werner Schneider as liquidator of Walter Bau A.G. v. The Kingdom of Thailand*, Higher Regional Court of Berlin, case no. III ZB 40/12, 30 January 2013, in *Yearbook Commercial Arbitration*, (eds.) A.J. Van Den Berg, 2013, vol. XXXVIII, pp. 384-391.

[111] *Chemical Overseas Holdings, Inc., et al. v. Republica Oriental del Uruguay*, United States District Court, Southern District of New York, 25 March 2005 and 10 May 2005, in *Yearbook Commercial Arbitration*, (eds.) A.J. Van Den Berg, 2005, vol. XXX, pp. 1130-1135.

[112] For instance, see section 73 of the English Arbitration Act, which excludes that the right to ask for the annulment of the award is waived if «at the time [the applicant] took part or continued to take part in the proceeding, he did not know and could not with reasonable diligence have discovered the grounds for the objection».

[113] For instance, the express recognition of a party's possibility to waive his/her right to oppose recognition and enforcement can be found in *Food Services of America Inc. (c.o.b. Amerifresh) v. Pan Pacific Specialties Ltd.*, (1997) British Columbia Supreme Court, case no. 1921, para 10.

enforcement order on the grounds stated in Article 15 of the French Code of Civil Procedure. ([114])

Similarly, Article 192 of the Swiss PILA confers parties the possibility to waive their right to seek *annulment* in advance, where none of them has its domicile, habitual residence or business establishment in Switzerland; in such a circumstance, however, the *enforcement* of the arbitral award will still be subject to the provisions of the New York Convention – which apply by analogy – with the result that domestic courts always retain the power to oversee the correct *enforcement* of that arbitral award. ([115]) Indeed, in order for an arbitral award to be correctly enforced, no doubts shall be raised on the impossibility to totally prevent the enforcing State, through its domestic courts, to assess whether the arbitral proceeding has been prejudicial against the fundamental rights of the parties. ([116])

In light of the above, it is clear that the rationale behind the general admissibility of waivers of due process rights lies on the principle of party autonomy. More precisely, given that the parties have deliberately agreed to comply with an arbitral award, they shall also be free to decide whether (or not) to oppose the recognition and enforcement of that arbitral award. On the other hand, however, courts are always entitled with the power (and duty) to assess whether the final award complies with the legal requirements stemming from the applicable arbitration framework, especially in cases where public interests are involved.

---

[114] SCHERER M. and SILBERMAN L., *Limits to Party Autonomy at the Post-Award Stage*, above-cited, p. 449; see also GAILLARD E. and DE LAPASSE, P., *Commentaires Analytique du Dècret du 13 Janvier 11 Portant Rèforme du Droit Francais de l'Arbitrage*, in *Paris Journal of International Arbitration*, 2011, p. 263 ff.

[115] Indeed, some commentators have argued that, in such a circumstance, «[l]o Stato non viene meno al suo obbligo di assicurare un controllo giurisdizionale del lodo, dato che in ogni caso la rinuncia delle parti non puo` riguardare il controllo giurisdizionale delle corti dell'esecuzione, e l'eliminazione di un doppio grado di controllo da parte delle corti nazionali appare auspicabile anche agli occhi di parte della dottrina» (SARDU A., *Arbitrato volontario e giusto processo nella giurisprudenza CEDU*, in *Rivista di diritto internazionale privato e processuale*, 3/2018, p. 709). See also KUNZ, C. A., *Waiver of Right to Challenge an International Arbitral Award is not Incompatible with ECHR: Tabbane v Switzerland*, in *European International Arbitration Review*, 2016, p. 125.

[116] It is thus necessary to distinguish between the waiver of set-aside proceedings from the recognition and enforcement of the final award. Indeed, if a party decides to waive the right to seek annulment, the courts still have to assess whether the conditions for the recognition and enforcement are existent. Whereas if a party also waives his/her right to oppose recognition and enforcement, this prevents domestic courts from exercising any control over the enforceability of the final award. Therefore, jurisdictions may well be interested in excluding such a possibility to occur. See FERRARI F. and ROSENFELD F., *International Commercial Arbitration: A Comparative Introduction*, above-cited, p. 246.

Therefore, in order to balance the above-mentioned competing interests between the parties and the enforcing States, most jurisdictions seem to have acknowledged a certain degree of party autonomy upon waivers of due process rights, but within certain limitations.

In particular, *ex post* waivers have been widely considered as a relevant tool to foster the efficiency of the arbitral proceeding, thus preventing parties from raising procedural objections only at the end of the proceedings – and just in cases where such proceedings have ended to their disadvantage. ([117]) Accordingly, parties are required to intervene during the proceeding actively and promptly, in order to confer to the arbitrators the possibility to fix procedural mistakes that have already materialized before the end of the proceeding. ([118])

3.1. *Article 6(1) of the European Convention on Human Rights (ECHR) and international commercial arbitration*

For a long time, the opinion commonly shared by some scholars and practitioners was to exclude any potential relation between international commercial arbitration and human rights. ([119]) The rationale behind this position was based on the fact that international business relationships were deemed to be unrelated to human rights implications, considering that the content and the aims of international human rights treaties were not referred, nor extendable, to arbitration.

---

[117] In this sense, the opinion of who considers that «il mancato tempestivo rilievo del vizio processuale riscontrato determini una sanatoria della nullità dell'atto viziato tranne che nei casi in cui la violazione assuma contorni così gravi da compromettere l'integrità dell'intero processo arbitrale» (RAGNO F., *Il giusto processo nell'arbitrato commerciale internazionale: gli orientamenti della giurisprudenza italiana*, above-cited, p. 74).

[118] Consequently, as it has been previously stated, absent such an active and collaborative conduct, parties might be prevented to raise procedural objections at the post-award stage.

[119] See SAMUEL A., *Arbitration, Alternative Dispute Resolution Generally and the European Convention of Human Rights*, in *Journal of International Arbitration*, 2004, p. 413 ff.; MC DONALD, N. *More Harm Than Good? Human Rights Considerations in International Commercial Arbitration*, in *Journal of International Arbitration*, 2003, p. 523 ff. For a contrary opinion, among the others, see PETROCHILOS, G., *Procedural Law in International Arbitration*, Oxford University Press, 2004. See also NINO, M., *Il Rapporto tra Arbitrato e Diritto al Giusto Processo nella Convenzione Europea dei Diritti dell'Uomo: Quali Risultati e Quali Prospettive?*, in *Ordine Internazionale e Diritti Umani*, 2019, p. 756 ff.; KNIGGE, M. and RIBBERS, P., *Waiver of the Right to Set-Aside Proceedings in Light of Article 6 echr: Party-Autonomy on Top?*, in *Journal of International Arbitration*, 2017, p. 775 ff..

For the aim of this work, one of the most important outcomes of such an orientation was that the European Convention on Human Rights (the "Convention" or "ECHR") and the procedural guarantees contained therein were thus considered to be irrelevant with regard to arbitration proceedings. As a consequence, Article 6 of the ECHR, pursuant to which the parties' "right to a fair trial" is regulated, ([120]) was deemed to be non-applicable to the arbitral venue.

A comprehensive discussion concerning the critics that have been raised over the years against the applicability of Article 6(1) of the ECHR to arbitration is far beyond the intentions of this work. ([121]) In sum, among the arguments aimed at challenging the applicability of the ECHR to arbitration, it has been claimed that: first, nowhere in the Convention it is possible to find an express reference to arbitration; second, none of the human rights contemplated by the Convention would relate to issues that may arise in an arbitral proceeding, being the Convention aimed at granting the protection of individuals' rights against the State; and third, the Convention can be applied only where private parties interact with public powers, not also with private entities (as arbitrators are).

Contrary to the aforementioned arguments, it can be generally stated that, according to Article 1 of the ECHR, contracting States are required to grant the rights and freedoms recognized by the Convention to everyone within their jurisdiction. ([122]) In these terms, the provision in exam shall be interpreted as creating a positive obligation upon the contracting States as to implement measures of domestic law which are necessary to prevent and/or to sanction human rights'

---

[120] Pursuant to Article 6(1) of the European Convention of Human Rights: «[i]n the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law […]».

[121] For a deeper analysis on the application of Article 6(1) of the ECHR in international commercial arbitration, among the others, see BENEDETTELLI, M. V., *The European Convention on Human Rights and Arbitration: The EU Law Perspective*, in *The Impact of EU Law on International Commercial Arbitration*, (ed.) Franco Ferrari, 2017, p. 499 ff.; SEATZU, F. and VARGIU, P., *Three Views of a Secret: Missed Opportunities in the ECHR's Recent Case-Law on International Commercial Arbitration*, in *The Italian Review of International and Comparative Law*, 2021, p. 209 ff.; KNOX, J. H., *Horizontal Human Rights Law*, in *American Journal of International Law*, 2007, p. 102.

[122] In this context, the obvious consideration that only contracting States might be held liable under the Convention shall thus take into account the fact that States may well be responsible, for their own behavior, when their domestic courts are called to enforce arbitration agreements or awards. See BENEDETTELLI, M. V., *The European Convention on Human Rights and Arbitration: The EU Law Perspective*, above-cited, p. 503.

violations, including those committed by private actors in certain circumstances. ([123])

Accordingly, the opinion that human rights are relevant only with regard to "vertical relationships" – namely those between private parties and public authorities – appears to be inconsistent, being rather preferrable to recognize also the "horizontal effects" of the rights enshrined in the Convention, with the result that human rights can also become relevant in the field of private-to-private relationships. In this respect, the obvious consideration that only contracting States might be held liable under the Convention shall take into account also the fact that States may be responsible, for their own behavior, when their domestic courts are called to enforce arbitration agreements or awards. ([124])

In light of the above, the following examination will thus be conducted on the premise that human rights are relevant for civil and commercial disputes arising before an arbitral tribunal, and therefore no obstacles shall exist as to allow the application of those procedural guarantees, expressly regulated in the aforesaid Article 6(1), also towards the arbitral proceeding. ([125])

3.2. *(following) The European Court of Human Rights' approach to the "doctrine of waiver"*

Once it has been stated that Article 6(1) of the ECHR is applicable also to arbitration, it is worth focusing on the European Court of Human Rights' approach

---

[123] GAJA, G., *Article 1*, in *Commentario alla Convenzione Europea per la tutela dei diritti dell'uomo e delle libertà fondamentali*, (eds.) Sergio Bartole, Benedetto Conforti and Guido Raimondi, 2001, p. 23.

[124] In this context, the European Court of Human Rights has recognized the "horizontal effect" of the rights enshrined in the Convention, thus expressly assuming that human rights might become relevant also in those relationships which involve private actors only. More specifically, provided that only State measures can be subject of applications filed to the Court, the above-mentioned "horizontal effect" can be activated "indirectly", that is in cases where the State is required to intervene as to remedy against those private behaviors adopted in breach of human rights in the context of arbitration. See BENEDETTELLI, M. V., *The European Convention on Human Rights and Arbitration: The EU Law Perspective*, above-cited, p. 503.

[125] Arbitral tribunals and domestic courts may be bound to apply the ECHR, for example, in cases where the arbitration is seated in one of the contracting States or in those circumstances in which the law of a contracting States has been chosen as *lex processus* or as *lex causae*. See BENEDETTELLI, M. V., *Human rights as a litigation tool in international arbitration: reflecting on the ECHR experience*, in *Arbitration International*, 2015, vol. 31, p. 656.

towards the parties' waiver of the procedural guarantees that are enshrined in the Convention.

First, as a matter of fact, it is nowadays undisputed that the implicit waiver to ordinary jurisdiction, that occurs when parties resort to voluntary arbitration, does not amount to a complete waiver of all the rights guaranteed by the ECHR. ([126])

Indeed, the European Court of Human Rights has found that the right to "access to justice" – besides the fact that its wording might suggest a reference only to judicial proceedings before State courts – is consistent with the parties' referral of disputes also to arbitral tribunals, provided that certain conditions are observed. ([127]) In particular, when the waiver arises from an arbitration agreement, it is necessary for the parties to have freely ([128]) and unequivocally expressed their consent to it; ([129]) otherwise, in lack of a free and unequivocal agreement between the parties, such a circumstance may constitute a ground for challenging the arbitration agreement, as it would breach the party's right to accede to the domestic courts for the resolution of that commercial dispute. Accordingly, the parties' choice to resort to "private" international tribunals also affects their "right to a public hearing", which might thus be legitimately waived within the express decision to defer the dispute to the arbitral proceeding, ([130]) instead of a "public" court.

Secondly, with regard to the other due process rights provided for in Article 6(1), the Court has generally ruled in favor of the admissibility of *ex post* waivers,

---

[126] For an analysis concerning the application of Article 6 to mandatory arbitration, see BENEDETTELLI, M. V., *The European Convention on Human Rights and Arbitration: The EU Law Perspective*, above-cited, p. 505.

[127] See European Court of Human Rights, *Golder v. United Kingdom*, judgement of 21 February 1975, application no. 4451/70, paras 35-37; ID., *X v. Germany*, judgement of 5 July 1977, application no. 7705/76. Accordingly, «to be valid a waiver of access to courts, arbitration has to provide a reasonable possibility of legal protection» (KURKELA, M. S. AND TURUNEN S., *Due Process in International Commercial Arbitration*, above-cited, p. 142).

[128] European Commission of Human Rights, *X v. The Federal Republic of Germany*, judgement of 5 March 1962, no. 1197/61; European Court of Human Rights, *Deweer v. Belgium*, judgement of 27 February 1980, application no. 6903/75, para. 49; European Commission of Human Rights, *Nordström-Janzon and Nordström-Lehtinen v. The Netherlands*, decision 27 November 1996, application no. 28101/95.

[129] European Court of Human Rights, *Suovaniemi and others v. Finland*, judgement of 23 February 1999, application no. 31737/96; ID., *Suda v. Czech Republic*, judgement of 28 January 2011, no. 1643/06, par. 48.

ID., *Tabbane v. Switzerland*, judgement 24 March 2016, application no. 41069/12, para. 27.

[130] See European Court of Human Rights, *Suovaniemi and others v. Finland*, above-cited; European Commission of Human Rights, *Nordström-Janzon and Nordström-Lehtinen v. The Netherlands*, above-cited.

thus recognizing a legitimate interest upon a party to voluntarily exclude his/her right to raise an opposition every time he/she has suffered a breach of such procedural rights, provided that the waiving party has had the concrete opportunity to estimate the effects of such a waiver. ([131])

A relevant and concrete example of the Court's approach towards *ex post* waivers can be seen in the recent *Beg v. Italy* case, which interestingly represents the first time a breach of the right to a fair trial, as contemplated in Article 6(1) of the ECHR, has been found. ([132]) In this case, the Court has been called to assess the existence of an alleged *ex post* waiver of the party's right to an impartial adjudicator, provided that the challenging party in that arbitration had not raised any opposition towards the "apparent" lack of impartiality of one of the arbitrators during the proceeding.

In particular, the alleged prejudice suffered by the opposing party ("BEG") derived from the fact that one arbitrator had previously been the vice-chairman and director of one of the party's ("ENELPOWER") parent company ("ENEL"), and more precisely that arbitrator had accepted his appointment without disclosing his former positions in the parent company itself.

Due to the circumstances of the case, in the opinion of the Court, the lack of impartiality of the arbitrator had amounted to a violation of due process guarantees, ([133]) provided that it was not possible to evaluate the opposing party's "silence"

---

[131] More precisely, in these cases the Court has considered as necessary the fact that the waiving party must have had sufficiently granted in taking such a decision, such as through the assistance of a legal counsel on the possibility to undertake this conduct. See *Suovaniemi and others v. Finland*, above-cited.

[132] European Court of Human Rights, *Beg V. Italy*, 20 May 2021, application no. 5312/11. See also *Suovaniemi and others v. Finland*, above-cited, in which the Court has recognized that a party's right to an independent and impartial arbitral tribunal can be legitimately waived through a conclusive behavior which amounts in that party's abstention from raising the challenge within the deadline provided by the applicable *lex arbitri*. However, it must also be stressed that, according to the European Court's approach towards the "doctrine of waiver", certain due process rights cannot be waived in any case. See European Court of Human Rights, *Albert and Le Compte v. Belgium*, judgement of 10 February 1983, applications no. 7299/75 and 7496/76, in which the Court has stated that «the nature of some of the rights safeguarded by the Convention is such as to exclude a waiver of the entitlement to exercise them»; ID., *De Wilde Ooms and Versyp*, judgement 18 June 1971, applications no. 2832/66, 2835/66 and 2899/66.

[133] More precisely, in this case the Court has considered impartiality from two different perspectives: a subjective and an objective one. First, it has thus stated that, with respect to the subjective test, there was no evidence to suggest any personal prejudice or bias on the part of the arbitrator whose impartiality was challenged. Secondly, in relation to the objective test, the Court has ruled that even appearances may be of a certain importance when the judging authority's impartiality is to be assessed. Therefore, provided that the arbitrator had previously been vice-chairman and member of the Board of Directors, as well as lawyer of ENEL (whose subsidiary was ENELPOWER, a party

during the proceeding as amounting to an implicit waiver of rights, considering that the same opposing party had acknowledged the existence of such a procedural deficiency (namely, the lack of impartiality of one of the arbitrators) only after the final award had been deposited. ([134])

In other words, the Court's decision is consistent with the opinion that, in order for the parties to be able to actively participate and to timely oppose procedural inefficiencies during the proceeding – thus promptly informing the arbitral tribunal – it is necessary that those deficiencies have been manifested and concretely acknowledged by the parties before the end of arbitration. Accordingly, it is possible to assess the existence of a valid *ex post* waiver of due process rights only when a party, which is fully aware of the existence of a procedural irregularity, consciously decides not to raise any opposition in relation to it.

Being thus possible to catch the European Court of Human Rights' favorable approach towards *ex post* waivers in international arbitration, more doubts still exist on the parties' possibility to exercise *ex ante* waivers of due process rights.

In this field, besides the considerations already expressed in the previous paragraph, a remarkable decision has been held in the *Tabbane v. Switzerland* case, as the European Court of Human Rights has here been called to decide whether a waiver of the right to challenge an international arbitral award was admissible under the ECHR, and provided that such a waiver had expressly been included by the parties in the arbitration agreement. ([135])

In other words, the Court had to evaluate the validity of a waiver which had been expressly exercised by the parties *before* any breach had concretely and effectively materialized in the arbitration proceeding. ([136]) More specifically, the possibility for the parties to waive their right to challenge an international arbitral

---

to the proceeding), the applicant's fears in respect to the impartiality of the arbitrator have been considered reasonable and objectively justified by the Court.

[134] In this occasion, indeed, the Court did «not agree with the Government's argument that the fact that the applicant had not challenged the lack of an explicit negative disclosure demonstrates a waiver of its right to have its dispute settled by an independent and impartial tribunal» (*Beg v. Italy*, above-cited, par. 138). For a deeper analysis of the examined case, among the others, see PAUCIULO D., *Imparzialità degli arbitri secondo la Corte Europea dei Diritti dell'Uomo nel caso Beg S.p.A. c. Italia*, in *Rivista di Diritto del Commercio Internazionale*, 2021, 4.

[135] *Tabbane v. Switzerland*, judgement 24 March 2016, application no. 41069/12.

[136] See LEANDRO, A., *Arbitration, Multi-tier Waiver of the Access to Courts and the European Convention on Human Rights: Some Remarks on the Tabbane Decision*, in *Dialoghi con Ugo Villani*, (eds.) Triggiani et al., 2017, p. 321 ff.; KUNZ, C. A., *Waiver of Right to Challenge an International Arbitral Award is not Incompatible with ECHR: Tabbane v Switzerland*, above-cited.

award was expressly provided under Article 192(2) of the Swiss Private International Law Act (PILA), ([137]) to which the parties' agreement was unequivocally referred. Being called to consider the effective compatibility of such a national arbitration provisions with the ECHR, the Court has given an affirmative response on this issue, stating that such an explicit and *ex ante* waiver pursues a legitimate aim – namely, the Swiss' interest to attract international arbitrations – with a view to implement the efficiency and flexibility of the proceeding, in proportion and with due respect to the parties' contractual autonomy and procedural guarantees. Accordingly, by dismissing the opposition of the complaining party, the decision in comment has found that the party's right of "access to a court" and "to a fair trial" had not been breached by the explicit *ex ante* waiver contained in the parties' agreement, ([138]) as both parties involved in the proceeding had freely and unequivocally agreed to such a waiver in advance. ([139])

In conclusion, it possible to state that the question of whether the parties have freely and consciously waived their due process rights in international commercial arbitration should be answered by looking, at first, at the arbitration agreement, and, further, at the other measures that might be adopted by the parties in the exercise of their autonomy (*i.e.* terms of reference, specific agreements reached on a given procedural matter).

---

[137] Pursuant to Article 192 Swiss Private International Law Act (PILA): «(1) If none of the parties has their domicile, habitual residence or seat in Switzerland, they may, by a declaration in the arbitration agreement or by subsequent agreement, wholly or partly exclude all appeals against arbitral awards; the right to a review under Article 190a paragraph 1 letter b may not be waived. The agreement requires the form specified in Article 178 paragraph 1. (2) Where the parties have excluded all setting aside proceedings and where the awards are to be enforced in Switzerland, the New York Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards applies by analogy».

[138] On this ground, however, concrete difficulties exist in practice as «the exact nature and scope of the rights that the parties are entitled to waive *ex ante* by way of an arbitration agreement still remain unclear» (KUNZ, C. A., *Waiver of Right to Challenge an International Arbitral Award is not Incompatible with ECHR: Tabbane v Switzerland*, above-cited, p. 130).

[139] A similar conclusion had already been achieved by the Swiss Federal Supreme Court, judgement 4 January 2012, no. 4A-238/2011, case *X v. Z. S. A.*, where, by making reference to the case law of the European Court of Human Rights, the Court stated that Article 192 Swiss Private International Law Act constitutes the «incarnation of the procedural principle of party autonomy», in absolute compliance with the conditions enshrined in the European Convention on Human Rights. For a comment of the decision of the Swiss Federal Supreme Court see POTESTÀ, M., *La rinuncia preventiva all'impugnabilità del lodo arbitrale è compatibile con la Convenzione europea dei diritti dell'uomo? Il Tribunale federale svizzero si pronuncia sulla questione*, in *Rivista dell'arbitrato*, 1/2013, 171-185.

In this context, the parties' intention to waive due process rights can be manifested either before or during the proceeding, expressly or implicitly, for instance, by acquiescence to the activity and orders issued by the arbitral tribunal. Besides these circumstances, waivers of human rights cannot thus be generally presumed, as the relevancy of the human rights dimension also in international arbitration cannot be disregarded anymore.

Therefore, as arbitral tribunals have the duty to render an enforceable award, particular attention must be paid towards the protection of human rights granted by the ECHR, provided that their breach might represent a ground for the setting aside, as well as for refusing recognition and enforcement of the final award.

4. *The arbitrators' duty of due diligence: discerning the parties' legitimate exercise of a procedural right v. the unjustified employment of "guerrilla tactics"*

The fundamental principle of party autonomy, pursuant to which the arbitral proceeding has been deemed as "belonging" to the parties, ([140]) not only amounts in the parties' decision on *whether* to arbitrate the case, but also in the question of *how* the proceeding shall be conducted.

As above-seen, the possibility for the parties to tailor the proceeding in a way that better fits with the peculiarities of each specific case represents a fundamental element of arbitration, as well as it constitutes one of the greatest differences between arbitration and domestic litigations. ([141]) However, it is also likely that, especially with regard to *ad hoc* arbitrations, parties will not specifically agree in advance on certain procedural aspects of the proceeding, thus being necessary to fill this void through the intervention of the arbitral tribunal.

Absent a detailed agreement between parties, it has already been stated that the arbitrators' discretion to conduct the proceeding in a way that they consider

---

[140] KARTON, J. *The Culture of International Arbitration and the Evolution of Contract Law*, 2013, p. 43.

[141] See LEW, J.D.M., MISTELIS, L.A. and KRÖLL, M.S., *Comparative International Commercial Arbitration*, 2003, paras 1-14; PAVÌC, V. *Disciplinary Powers of the Tribunal*, in *Austrian Yearbook on International Arbitration,* (eds.) C. Klausegger et al., 2014, p. 168.

appropriate – subject only to the arbitral mandatory provisions and to the parties' due process rights – is generally provided in all national arbitration laws, as it represents one of the hallmarks of the international arbitration process. Indeed, discretionary powers enable the arbitrators to seek to achieve efficiency and to reduce the unnecessary delays, such as, for example, by preventing or holding back the dilatory tactics employed by one of the parties to the proceeding (which is, usually, the respondent).

The essential role played by the arbitrators' discretion during the different phases of the proceeding clearly arises if one considers that parties – especially when they come from different legal traditions – could never be able to anticipate all the potential procedural scenarios in advance, as well as they will unlikely convene any common procedural ground after the dispute has already occurred.

In such a "rule-free zone", when called to answer to the *ad hoc* procedural requests presented by the parties, arbitrators are thus required to carefully assess whether the protection of a party's right shall legitimate a specific procedural demand by that requesting party. ([142]) Sometimes this task is relatively easy to accomplish, as parties' procedural requests might clearly represent the exercise of a legitimate procedural right; whereas, in some other circumstances, arbitrators could face the difficult task to detect and, consequently, to avoid the so-called "guerrilla tactics", which can be described as strategies that are solely aimed at hindering the arbitral proceeding. ([143])

At the same time, it must also be considered that many procedural requests might fall into a "grey zone", in which the reasons for a party's procedural request are not immediately and univocally discernible by the arbitrators (*i.e.* in case of a late filing or an additional submission or evidence), thus making it difficult to determine whether the tribunal is facing a legitimate requests or an unjustified

---

[142] BERGER, K.P.B. and JENSEN, J.O., *Due process paranoia and the procedural judgment rule: a safe harbour for procedural management decisions by international arbitrators*, in *Arbitration International*, 2016, p. 417.

[143] It has been considered that guerrilla tactics have the aim «to exploit procedural rules for their own advantage, seeking to delay the hearing and (if they get any opportunity) ultimately to derail the arbitration so that it becomes abortive or ineffective» (ROWLEY, J.W. *Guerrilla Tactics and Developing Issues*, in *Guerrilla Tactics in International Arbitration*, (eds.) Günther J Horvath G. J.and Stephan Wilske, 2013, p. 21). See also WILSKE, S., *Arbitration Guerrillas at the Gate: Preserving the Civility of Arbitral Proceedings When the Going Gets (Extremely) Tough*, in *Austrian Yearbook on International Arbitration*, (eds.) Christian Klausegger et. al., 2011, p. 315; HORVATH J.G. and WILSKE S. (eds.), *Guerrilla Tactics in International Arbitration*, 2013.

attempt to delay the proceeding. In such a scenario, the difficulty in assessing the legitimacy of a procedural request by one of the parties to the proceeding might lead the arbitral tribunal not to dismiss such a request on a formal ground, but rather to take some extra time to consider the merits of it. ([144])

In arbitral practice, conducts that might fall into the aforementioned "grey zone" are, for instance, the request for the extension of a deadline, the late introduction of a new claim or late submission of documents, as well as the request to reschedule a hearing "at the eleventh hour". In these cases, the tribunal's conduct will thus be conflicted by the potential breach of one of the parties' due process rights (such as the right to fully present the case), on the one hand, and, at the same time, by the risk to prejudice the efficiency and speediness of arbitration, provided that any late or additional procedural request is able to increase the time and costs of the proceeding. ([145])

However, it is worth noting that arbitrators not only have the power to speed arbitration, but they also have a duty to do so.

Besides being considered as an implicit element of the arbitrator's mandate, the tribunal's duty of due diligence is also expressly provided in some institutional arbitration rules. Examples of such a duty can be found, for instance, in Article 25(1) of the ICC Rules, providing that «[t]he arbitral tribunal shall proceed *within as short a time as possible* to establish the facts of the case by all appropriate means» (emphasis added); in the same vein, Article 14(1) of the LCIA Rules states the arbitral tribunal's general duty «to adopt procedures suitable to the circumstances of the arbitration, *avoiding unnecessary delay and expense*, so as to provide a fair, efficient and expeditious means for the final resolution of the parties' dispute» (emphasis added); moreover, pursuant to Article 21(2) of the Australian Center for International Commercial Arbitration Rules ("ACICA Rules") «the

---

[144] This might happen, for example, when the requesting party believes that the tardiness of his/her filing is justified given the circumstances of the specific case and that a potential dismissal of such a procedural move might amount to a breach of that party's due process rights. See OLDENSTAM, R. *Chapter 8: Due Process Paranoia or Prudence?*, in *Stockholm Arbitration Yearbook 2019*, (eds.) Axel Calissendorff and Patrik Schöldstrom, p. 122.

[145] See FORTIER, L. Y., *The Minimum Requirements of Due Process in Taking Measures against Dilatory Tactics: Arbitral Discretion in International Commercial Arbitration - "A Few Plain Rules and a Few Strong Instincts",* in *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention*, (ed.) Albert Jan van den Berg, 1999, p. 397; citing also TAVENDER E.D.D., *Considerations of Fairness in the Context of International Commercial Arbitration*, in *Alberta Law Review*, 1996, p. 509.

Arbitral Tribunal shall adopt suitable procedures for the conduct of the arbitration in order *to avoid unnecessary delay or expense*, having regard to the complexity of the issues and the amount in dispute, and provided that such procedures ensure equal treatment of the parties and afford the parties a reasonable opportunity to present their case» (emphasis added).

Therefore, if one considers the broad discretionary powers granted to the arbitrators in determining the conduct of the proceeding and their duty to grant the efficiency of arbitration, along with the parties' due process rights, it is clear that the arbitral tribunal is entitled to exercise its power (and duty) to fight against prejudicial dilatory tactics firmly and concretely. ([146])

In other words, while it is unquestionable that the arbitral tribunal must recognize a reasonable opportunity to present each party's case, at the same time, this does not mean that, in order to accomplish the aforementioned task, it must sacrifice efficiency by allowing parties' unreasonable procedural requests. ([147]) Indeed, the right to be heard is not absolute in nature and, in fact, it is manifestly in contrast with unreasonable, dilatory procedural requests, ([148]) provided that «justice too long delayed becomes justice denied». ([149])

---

[146] In the sense that arbitrators should «take a firm position when parties are not playing by the rules or are openly obstructing the proceedings», see WILSKE, S., *Work Ethics of the International Arbitrator, or: The Distinction Between Rendering a Service to the Parties and Being the Parties' Slave*, in *The Powers and Duties of an Arbitrator: Liber Amicorum Pierre A Karrer*, (eds.) Patricia Shaughnessy and Sherlin Tung, 2017, p. 423. Some commentators have also suggested that guerrilla tactics shall be contrasted through the implementation of interim costs awards to be issued by the arbitral tribunal. See HALPRIN, P. A., *Resisting Guerrilla Tactics in International Arbitration,* in *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management*, 2019.

[147] FORTIER, L. Y., *The Minimum Requirements of Due Process in Taking Measures against Dilatory Tactics: Arbitral Discretion in International Commercial Arbitration - "A Few Plain Rules and a Few Strong Instincts",* above-cited, p. 399.

[148] BERGER, K.P.B. and JENSEN, J.O., *Due process paranoia and the procedural judgment rule: a safe harbour for procedural management decisions by international arbitrators*, above-cited, p. 422. Similar considerations have been shared also with regard to the right to fully present each parties' case. Accordingly, scholars have stated that «the term "full" does not mean that arbitrators must sacrifice all efficiency in order to accommodate unreasonable demands of the parties» (OLDENSTAM, R. *Chapter 8: Due Process Paranoia or Prudence?*, above-cited, p. 77).

[149] FORTESE, F. and HEMMI, L. *Procedural Fairness and Efficiency in International Arbitration*, in *Groningen Journal of International Law*, 2015, p. 116. For instance, the UNCITRAL Rules expressly regulate certain circumstances in which a party's refusal to participate to arbitration does not amount to a breach of due process rights. See Article 30(2)(3) («2. [i]f a party, duly notified under these Rules, fails to appear at a hearing, without showing sufficient cause for such failure, the arbitral tribunal may proceed with the arbitration. 3. If a party, duly invited by the arbitral tribunal to produce documents, exhibits or other evidence, fails to do so within the established period of time, without showing sufficient cause for such failure, the arbitral tribunal may make the award on the evidence before it»); see also Article 6(8) of the ICC Rules («[i]f any of the parties refuses or

In light of the above, it can be stated that the arbitrators' power and duty to avoid unnecessary delays must always be balanced with their duty to ensure due process at every stage of the proceeding. As it emerges from the analysis conducted so far, when a potential conflict occurs between speed and fairness in the conduct of arbitration, it is not clear how the arbitrators shall determine the specific point at which a reasonable delay turns into an unnecessary and strategical dilatory tactic, considered that the wide discretionary powers conferred upon the tribunal are not without limitations.

Therefore, the pitfall of such a system lays on the fact that it is extremely difficult to provide a specific and widely accepted definition to terms such as "fairness", "equality", "due diligence", as well as "due process". The different legal cultures and jurisdictions, from which parties and arbitrators generally come from, increase the complexity of such a regulatory vacuum.

However, the aforementioned lack of specificity amounts in the flexibility of arbitration, which must always be considered as an advantage, rather than a defect, of the arbitral proceeding. Accordingly, it is up to the arbitrators to decide the best procedural solutions to be preferred on a case-by-case basis, for instance by adopting the most suitable interpretation of the above-mentioned principles in relation to the specific circumstances of each case.

4.1. *Beyond the protection of fundamental rights: "due process paranoia" and its detrimental effects on international commercial arbitration*

As above-seen, one of the most critical steps in arbitral proceedings is represented by the need for the arbitrators to balance their duty to grant the efficiency and cost-effective resolution of disputes, on the one hand, and their fear that the refusal of a party's procedural request might amount into a violation of his/her due process rights, with the result of having their final award challenged on the basis of such a procedural violation. ([150])

---

fails to take part in the arbitration or any stage thereof, the arbitration shall proceed notwithstanding such refusal or failure»).

[150] WILLIAMS, E., FAS, H. and HANNAH, T., *Due process paranoia and its role in the future of international commercial arbitration*, in *The Arbitrator & Mediator*, 2018, p. 43.

Indeed, evidence shows that arbitrators' fear of their award being challenged makes them more generous in admitting the parties' procedural demands in certain circumstances. ([151]) According to the 2015 Queen Mary University of London International Arbitration Survey – whose results have been further confirmed in its 2018 edition – in cases where the arbitrators' attitude turns to be extremely cautious, this conduct shall be referred to as "due process paranoia", as this term specifically addresses a «perceived reluctance by tribunals to act decisively in certain situations for fear of the award being challenged on the basis of a party not having had the chance to present its case fully». ([152])

Therefore, it is not a secret that the adoption of such a contested conduct risks to decrease the efficiency of the proceedings, as well as it increases the parties' perception of a lack of firmness on the part of the arbitral tribunal. This is true, for instance, where the admission of unnecessary procedural demands amounts to the arbitrators being excessively amenable in extending deadlines or postpone hearings, thus increasing the time and costs of the proceeding, to the detriment of the counterparty. ([153])

The real problem is that due process paranoia tends to strengthen the erroneous understanding that due process and efficiency are not complementary, but rather opposite values. ([154]) As such, the tribunal's decision to prefer one of the two values might always result to the deprivation of one of the essential hallmarks of international arbitration, without providing benefits for any of the participant to the proceeding.

For all of these reasons, it is necessary to assess from where the "due process paranoia" arises and why arbitrators take it into due consideration, in order to

---

[151] OLDENSTAM, R. *Chapter 8: Due Process Paranoia or Prudence?*, above-cited, p. 121.

[152] Queen Mary University of London School of Law and White & Case, *2015 International Arbitration Survey: Improvements and Innovations in International Arbitration*, available at: arbitration.qmul.ac.uk/media/arbitration/docs/2015_International_Arbitration_Survey.pdf [accessed 31 October 2023]. This survey has been then followed by the subsequent Queen Mary University of London School of Law and White & Case, *2018 International Arbitration Survey: The Evolution of International Arbitration*, available at: arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey—The-Evolution-of-International-Arbitration-(2).PDF [accessed 31 October 2023].

[153] REED, L., *Ab(use) of Due Process: Sword vs Shield*, in *Arbitration International*, 2017, p. 376; BERGER, K.P.B. and JENSEN, J.O., *Due process paranoia and the procedural judgment rule: a safe harbour for procedural management decisions by international arbitrators*, above-cited, p. 419.

[154] MENON, S., *Dispelling Due Process Paranoia: Fairness, Efficiency and the Rule of Law*, in *Asian International Arbitration Journal*, 2021, p. 4.

further evaluate if such a paranoia has any effective and justified foundation in the arbitral practice or, rather, if such due process concerns are only excessive and unreasonable, thus being necessary, in this latter case, to find a way to overcome them for the benefit of future arbitrations.

The first perception, as above-mentioned, is that arbitrators' conduct might be excessively influenced by the fear of their final award being challenged. Indeed, the absence of any specific system aimed at appealing the decisions of the arbitral tribunals makes arbitration a "one stop shop". ([155]) In particular, this represents one of the essential characteristics of the arbitral proceeding, upon which the parties have increasingly decided over the years to get their commercial disputes sorted out sooner by arbitral tribunals rather than by domestic courts.

At the same time, however, the "finality" of the arbitral award intensifies the necessity of the arbitral tribunal to prevent a party from raising oppositions on the ground that he/she has not been granted the opportunity to fully present the case, without good reason. This may thus lead the arbitrators to consider a raise on the costs and delays as preferrable, rather than assuming the risk of a potentially unenforceable award.

Hence, provided that there will not be a second chance to oppose the merits of the arbitral case before a higher authority, the arbitrators must employ their best efforts as to assess whether procedural requests advanced by the parties are reasonable and proportionate – when compared to the specific circumstances of each case – or if they are only deployed with the aim to harm the correct conduct of the proceeding.

From a different perspective, as it is not uncommon for the losing party to feel a certain level of dissatisfaction towards the outcome of the proceeding, it is also likely that he/she will try to challenge the award in cases where such a dissatisfaction derives from procedural matters. Indeed, when a party believes that the dispute would have ended differently if he/she only had the opportunity to fully present his/her case, such a party will likely not be willing to comply to the arbitral tribunal's final decision. Therefore, when arbitrators get a sense of such a dissatisfaction by one of the parties, they may prefer to adopt a more generous

[155] OLDENSTAM, R. *Chapter 8: Due Process Paranoia or Prudence?*, above-cited, p. 122.

approach towards the potentially losing party, which, however, might turn into the tribunal's adoption of uneconomical procedural decisions based on an incorrect risk assessment. ([156])

Moreover, the fear of having the final award set-aside increases when considering that the domestic courts' approach towards due process violations might vary depending on the different jurisdictions and legal cultures, with the clear result that such a risk may be more significant when courts from less arbitration-friendly jurisdictions are taken into account. This may thus lead to the arbitrators' consideration that a more cautious approach on procedural demands by the parties may well be preferred, being the enforceability of the award mainly dependent by the seat of the arbitration and the specific jurisdiction(s) where the enforcement of the upcoming award will be sought by the parties.

Furthermore, even if the arbitral tribunal was to rely on the fact that the enforcement of the award will be successful against challenges of due process violations – for example by relying on the favorable previous case-law of domestic courts on this topic – it might not be unreasonable for the tribunal to attempt to avoid oppositions and challenges anyway. ([157])

This being said, there is no doubt that any disproportionate attempt to secure due process at the detriment of efficiency (and vice versa) will turn into the emergency of an unfair and incorrect final outcome of the arbitration. Moreover, by repeatedly allowing abusive procedural requests in the long-term, the arbitral practice could create an «inefficient norm against which future complaints of insufficient opportunity to be heard are judged». ([158]) For these reasons, it shall be born in mind that due process and efficiency are not competing values, as they are

---

[156] In this sense, it has been argued that « [r]ather than fixating on the theoretical risk of unenforceability, the arbitrator's attention should be directed firmly to the task at hand, and that is the fair but efficient conduct of proceedings» (MENON, S., *Dispelling Due Process Paranoia: Fairness, Efficiency and the Rule of Law*, above-cited, p. 21). See also SHARMA, S., *Due Process 'Paranoia': Turning Away from Judicial Attitudes and Looking for Answers Within*, in *International Journal of Arbitration, Mediation and Dispute Management*, 2018, p. 314-325.

[157] Indeed, some authors believe that there is «enough variability and unpredictability» in relation to how domestic courts will approach due process issues, with the result that such circumstances thus «create a persistent, albeit minimal, risk of set[ting] aside or non-enforcement on due process grounds». (BATES JR, A. AND TORRES-FOWLER, R. Z., *Abuse of Due Process in International Arbitration: Is Due Process Paranoia Irrational?*, in *American Journal of Construction Arbitration & ADR*, 2017, pp. 248 and 254).

[158] PARTASIDES C. and PREWETT, B., *Chapter 5: Rediscovering the Lost Promise of International Arbitration*, in *Expedited Procedures in International Arbitration, Dossiers of the ICC Institute of World Business Law*, (eds.) Laurent Levy and Michael Polkinghorne, 2017, p. 146.

equally essential to achieve the purposes of international arbitration and neither of them is sufficient without the other.

Therefore, the following chapter will examine the approach followed by the domestic courts, from both civil and common law jurisdictions, in relation to the annulment and non-enforcement of arbitral awards on the grounds of due process rights' violations. The aim is to assess whether the (excessively) cautious attention that arbitrators put towards the various parties' procedural requests is justified or, on the contrary, it has no concrete foundation, and thus operates only at the detriment of international arbitration at large.

CHAPTER 2

THE TAKING OF EVIDENCE IN COMMON LAW AND CIVIL LAW: AFTERMATHS IN THE POST-AWARD STAGE

SUMMARY: 1. Due process and rules of evidence: the interplay between the pre-award and the post-award stage. – 2. Reasons for a tailored comparative analysis between common law and civil law. – 3. Judicial reviews of the arbitral awards in civil law and common law traditions. – 3.1. Italy: the Italian Arbitration Law. – 3.1.1. (*following*) The Italian case-law on the right to be treated equally. – 3.2. The Netherlands: the Dutch Arbitration Act. – 3.2.1. (*following*) The Dutch case-law on the refusal, disregard or exclusion of evidence. – 3.3. Switzerland: the Swiss Private International Law Act (PILA). – 3.3.1. (*following*) The Swiss case-law on the right to submit evidence. – 3. 4. The United Kingdom: the "reasonable opportunity" to present ones' case under the Arbitration Act. – 3.4.1. (*following*) The English case-law on the arbitrators' duty to act fairly and impartially. – 3.5. Singapore: International Arbitration Act (IAA). – 3.5.1. (*following*) The Singaporean case-law on cross-examination, document production and the exclusion of evidence. – 3.6. The United States of America: the Federal Arbitration Act (FAA) and the American case-law on the arbitrators' "misconduct". – 4. Conclusive notes on comparative juris(&)prudence: "reasonable" v. "unwarranted" due process concerns in relation to evidentiary issues.

1. *Due process and rules of evidence: the interplay between the pre-award and the post-award stage*

In the majority of cases, fact-finding activities are deemed to be crucial for the resolution of commercial disputes. Accordingly, most jurisdictions expressly provide a detailed set of rules of evidence aimed at regulating how their domestic courts shall deal with the presentation and taking of evidence in judicial proceedings.

However, it is common wisdom that those specific rules governing the national proceedings do not directly apply to the arbitral venue; of course, this is true unless the parties have expressly agreed on the application of such local rules

for the resolution of a given dispute before the arbitral tribunal, ([159]) given that parties to an international commercial agreement are generally interested in selecting a "neutral" place as the seat of arbitration, regardless of any specific connection with themselves and their business relationship.

Once it has been clarified that the existing domestic rules of evidence do not automatically apply in arbitration proceedings, it is nonetheless worth noting that neither the national arbitration laws (*lex arbitri*) nor the general arbitration rules provide a comprehensive and detailed set of provisions regulating the taking of evidence. Instead, almost all international arbitration rules introduce only a basic guidance on the presentation of evidence, thus conferring a wide discretion to the arbitral tribunal in setting forth the details of the evidentiary procedure. Of course, such a discretionary power must be exercised within the limitations stated by the parties' agreements and by mandatory provisions.

Starting from the overview of the current regulatory framework in relation to evidentiary issues, it is thus possible to state that, in lack of any specific set of provisions, the "very basic rules of evidence" are those arising from the definition of due process that generally operates at the international arbitration level. ([160])

The principles of due process – which naturally encompass the parties' right to be heard and the right to be treated equally, as an expression of the wider parties' opportunity to fully present each one's case – ([161]) are embodied in mandatory provisions, which are generally applied by virtue of the *lex arbitri*, and thus become relevant also for the taking of evidence. For instance, the concrete opportunity to present one's case necessarily requires that parties have been granted the possibility to submit evidence in support of their factual allegations; consequently, each party

---

[159] Historically, however, the opportunity to borrow the evidentiary rules of procedure from the jurisdiction in which the arbitration was seated had been shared by some commentator. See CRAIG W., PARK, W. and PAULSSON J., *International Chamber of Commerce Arbitration*, 2000, p. 423. However, it is possible to state that such an orientation has been now largely dismissed. See also O' MALLEY, N., *Rules of Evidence in International Arbitration*, 2nd edition, 2019, paras. 1.17. and 1.18; Born, G., *International Commercial Arbitration*, above-mentioned, para. 15.09; BUXTON, R. *The Rules of Evidence as Applied to Arbitration*, in *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management*, 1992, vol. 58, issue 4, p. 230 ff.

[160] In this sense, it has been argued that «[il] principio del contraddittorio e di […] parità delle armi […] certo disciplinano l'arbitrato anche in materia di prova» (SALVANESCHI, L. *Dell'arbitrato, Art. 806-840. Commentario del Codice di Procedura Civile,* Zanichelli, 2014, pp. 425-426).

[161] O' MALLEY, N., *Rules of Evidence in International Arbitration*, above-mentioned, para. 1.12.

must be informed about the evidence presented in support of the other party's case, as to be granted the possibility to rebut to it. ([162])

In the same vein, the principle of equal treatment and equality of arms imposes the duty upon the arbitral tribunal to confer an equal opportunity to the parties when making submissions, which may also include evidentiary requests and offers in support of their case. Accordingly, where the opportunity to produce evidence is granted only towards one of the parties to the proceeding, this arbitral conduct might be judged in breach of the due process right to be heard, whether there is no justifiable reason to treat the parties' situations differently. ([163]) However, it is clear that equal treatment does not necessarily mean identical treatment, as the arbitral tribunal might legitimately set a different time for each party to examine witnesses or experts in an oral hearing, ([164]) as well as regarding the potential restrictions that arbitrators may impose for the disclosure of documents. ([165])

The extension of due process principles towards issues of procedural evidence does not come without practical challenges. In fact, in relation to the taking of evidence, the arbitral tribunal must balance the attempt to grant equality and fairness with the other legal principles generally applicable to evidentiary issues, such as, for instance, the admissibility of evidence, confidentiality (*e.g.* in relation to business *know-how*) as well as the existence of legal privileges (*e.g.*

---

[162] This right is referred to also as the "right to contradiction", which entails each party's opportunity to comment and to introduce rebuttal evidence. As an example of the importance that courts recognize towards this principle, see *Austria C v. Vladimir Z*, with regard to which it has been stated that «it is true that the Supreme Court has repeatedly held that there is a violation of due process in civil proceedings not only when a party may not present its case in the proceeding at all, but also when the decision is based on factual evidence that the defendant could not contest» (*Austria C v. Vladimir Z*, (2005) Austrian Supreme Court, in *Yearbook Commercial Arbitration*, (eds.) A.J. Van Den Berg, 2006, vol. XXXI, p. 583, para 7). See also KURKELA, M. S. and TURUNEN S., *Due Process in International Commercial Arbitration*, above-cited, p. 142.

[163] Indeed, it is common wisdom that potential unequal treatments towards parties do not necessarily constitute a breach of due process rights in cases where situations are not comparable. See HOHLER, S. *Country Report: Switzerland*, in *Due Process as a Limit to Discretion in International Commercial Arbitration*, (eds.) Franco Ferrari and Friedrich Rosenfeld, above-cited, p. 379 ff.

[164] CARTWRIGHT-FINCH U. and TEVENDALE C., *Privilege in International Arbitration: Is It Time to Recognize the Consensus?*, in *Journal of International Arbitration*, 2009, vol. 26, p. 832.

[165] For instance, see *China Machine New Energy Corp. v. Jaguar Energy Guatemala LLC and Another*, (2018) Singapore High Court, where it has been stated that the arbitral tribunal's imposition of the possibility to disclose documents on an attorney's eye only basis – meaning that the documents would only be made available to the other party's external counsel and expert witnesses but not to its employees – had not violated the right to equal treatment and therefore could not justify the annulment of the arbitral award.

client-attorney privilege), which will be further discussed in more detail. ([166]) Nonetheless, when the dispute involves parties, counsels and arbitrators from different jurisdictions, the legal cultural background of each participant will increase the challenges linked to the protection of due process rights in relation to evidentiary demands. ([167])

In this scenario, besides the few mandatory provisions provided by the *lex arbitri*, the parties' agreement plays a pivotal role in shaping the way the proceeding will be directed in relation to the taking of evidence. Accordingly, rules set by the parties could emerge either from the agreement which has triggered the dispute or from tailored documents on which parties and the tribunal have specifically agreed (*e.g.* the *Terms of Reference* and the *Procedural Order No.1*). In doing so, parties can select the arbitration rules which shall govern the evidentiary procedural aspects of the dispute, for instance, by referring to the arbitration rules of an institution (*e.g.* ICC Arbitration Rules; LCIA Arbitration Rules), ([168]) or to instruments of soft law specifically focused on the taking of evidence (*e.g.* IBA Rules on the Taking of Evidence 2020 - "IBA Rules"; Rules on the Efficient Conduct of Proceedings in International Arbitration – "Prague Rules"). ([169])

---

[166] In relation to legal privileges, issues may raise where the tribunal has to deal with the production of documents held by in-house counsels, as parties coming from different legal systems have different views on the possibility to extend the legal professional privilege also towards in-house counsels themselves. In such a circumstance, the mere possibility that the losing party will bring a challenge against the arbitral award can thus influence the proceeding.

[167] Clearly, as international arbitration calls upon the service of arbitrators and counsel from a wide variety of legal systems, and involves parties of similarly wide backgrounds, what is considered a "fair opportunity" to present evidence must appeal to those of multiple jurisdictions (O' MALLEY, N., *Rules of Evidence in International Arbitration*, above-mentioned, para. 1.13). In relation to the IBA Rules of evidence, that will be better discussed below, the concrete influence of multiple legal backgrounds involved in international arbitration is argued in SHENTON, D.W., *An introduction to the IBA Rules of Evidence*, in *Arbitration International*, 1985, p. 123.

[168] However, also arbitral rules say very little about matters of evidence. For instance, Article 25(1) of the ICC Rules merely provides that «the arbitral tribunal shall proceed [...] to establish the facts of the case by all appropriate means»; Article 22(1)(vi) of the LCIA Rules pursuant to which the arbitral tribunal may decide to «whether or not to apply any strict rules of evidence»; with regard to investment arbitration, Article 34(1) ICSID, stating that the tribunal «shall be the judge of the admissibility of any evidence adduced and of its probative value».

[169] It is quite rare for parties to agree on specific issues related to the taking of evidence. In arbitral practice, examples of such detailed agreements can be found, for instance, with reference to the language to be used during the proceeding, which also includes the presentation and examination of evidence. The fact that parties rarely explicitly convene on evidentiary issues mainly depends on the fact that they basically do not know which specific evidential norm might be further suitable for the dispute at the time they sign the contract. For these reasons, it is more common for parties to conclude agreements during the course of an arbitral proceeding.

In particular, the IBA Rules provide for mechanisms to be (voluntarily) adopted where statutory or *ad hoc* arbitration rules are silent. ([170]) These Rules, which are nowadays particularly influential, normally represent an informal guide for the broad discretion of the tribunal: nonetheless, they may assume binding force (only) when a positive agreement in this field has been concluded between the parties. Following this path, the promotion of efficiency and flexibility is fostered by Article 2.3(a) of the IBA Rules, which encourages the arbitral tribunal to «identify to the Parties […] any issues» that may be regarded as "relevant" to the case and its material outcome, thus addressing an express recommendation to the tribunal as to early consult with the parties for the best satisfaction of their expectations (so-called *meet and consult method*). In this sense, the IBA Rules are deemed to provide a series of general procedural options which are inspired by different transnational procedural approaches. Nevertheless, it has been noted that the standards adopted in arbitration practice are necessarily unpredictable and more specific than what is generally provided by the conceptual framework of the Rules. ([171])

In a quite consistent way, failing a specific agreement between parties, the arbitral tribunal is thus conferred broad discretion in relation to fact-finding mechanisms. ([172]) A formal attempt to develop an internationally recognized standard can be seen in Article 19(2) of the UNCITRAL Model Law on International Commercial Arbitration, according to which «the power conferred upon the Arbitral Tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence». Moreover, the same principle has already been embraced by most domestic arbitration laws, with the result that – behind mandatory rules – arbitral tribunals are granted wide discretion when

---

[170] Pursuant to Article 1(4) of the IBA Rules: «[i]n the event of any dispute regarding the meaning of the IBA Rules of Evidence, the Arbitral Tribunal shall interpret them according to their purpose and in the manner most appropriate for the particular arbitration». Therefore, the IBA Rules are deemed to fill the vacuum left by most arbitration rules which make little or no reference to evidence in relation to the arbitral proceeding. In this sense, they are considered as supplementary in nature. However, this topic will be better discussed later in this work.

[171] Moreover, critics have been raised in relation to the alleged excessive common law orientation of the IBA Rules, thus fostering the need to implement a more balanced and neutral legal framework. An interesting attempt to challenge the above-mentioned IBA Rules has been undertaken by the Prague Rules on the Efficient Conduct of Proceedings in International Arbitration (2018).

[172] Indeed, in arbitral practice, it is rare for parties to expressly agree on evidentiary rules in their arbitration agreement as well as after the dispute has occurred, provided that, in this latter case, specific provisions on evidence might favor one party over the other.

dealing with evidentiary matters. ([173]) Hence, the tribunal has the power to conduct the arbitration in such a manner that it considers appropriate, provided that parties are treated with equality and are granted adequate opportunity for the presentation of their own cases. ([174])

The above-described legal framework on the rules of evidence suggests that, except for rare circumstances where a specific (either normative or conventional) rule is to be applied, arbitrators may be called to take unpredictable decisions on the taking of evidence during the proceeding, ([175]) within the limits stated by those provisions arising from the parties' agreement and from mandatory obligations, in respect of the parties' right to be heard and to be treated equally at the pre-award stage. In particular, provided that evidentiary issues play a remarkable role for the correct conduct of the proceeding, the tribunal's conduct in this field may constitute a ground for challenging the arbitral decision at the post-award stage. As a consequence, the analysis of the arbitrators' approach towards evidentiary issues during the proceeding can help preventing potential procedural pitfalls which might justify a party's opposition against the recognition and enforcement of the final award. Therefore, with the aim to assess the concrete approaches undertaken by different arbitral tribunals regarding evidentiary issues, the following discussion will specifically focus on the comparison between common-law and civil-law orientations in this field.

---

[173] See*, e.g.* Article 816-*bis* of the Italian Code of Civil Procedure; Article 21 of the Brazilian Arbitration Law; Articles 43-47 of the Chinese Arbitration Law; Sections 33-34 of the English Arbitration Act; Article 1460 of the French New Code of Civil Procedure; Articles 1036 and 1039 of the Dutch Code of Civil Procedure.

[174] For a deeper analysis concerning the substantial or procedural nature of evidentiary questions, see WAINCYMER J., *Procedure and Evidence in International Arbitration*, Wolters Kluwer, 2012, p. 749.

[175] Some commentators have suggested that an additional source of guidance with regard to the taking of evidence could arise from rules and practices governed by public international law and the conduct of other international adjudicatory bodies. It is worth noting that, also in public international law, evidentiary issues are dealt with through consent and find their discipline in statues and treaties (see, *e.g.* the discipline of evidence contained in Articles 36(2)(c), 43(5), 48, 50 and 52 of the Statute of the International Court of Justice). In this sense, it has been also considered that the practice of courts over time might lead to the development of customary law which could be referred to as *lex ecidentia*. See WAINCYMER J., *Procedure and Evidence in International Arbitration*, above-cited, p. 753; BROWER, C. N., *The Anatomy of Fact-Finding before International Tribunals: An Analysis and a Proposal Concerning the Evaluation of Evidence*, in *Fact-Finding before International Tribunals: Eleventh Sokol Colloquim*, (ed.) Richard B. Lillich, 1992, p. 150.

2. *Reasons for a tailored comparative analysis between common law and civil law*

When disputes arising from international transactions are referred to the arbitral tribunal, the different legal and cultural background of the parties involved in the arbitration (including the arbitrators and the legal counsels) may influence the way the arbitral proceeding will be conducted. Indeed, even if arbitration is perceived as a "neutral" dispute resolution mechanism, it is not uncommon for the parties to bring their legal and cultural assumptions to the proceeding, with the result that they may come up with some expectations towards the way the arbitrators shall deal with procedural issues.

In order to assess whether and when due process concerns might be well reasoned and prudently safeguarded, it is worth examining both the common law and civil law traditions, which are deemed to be «the predominant and generic legal systems and cultures». ([176]) In doing so, the analysis will start with an overview of the general existing differences between the aforesaid legal families, being aware that divergent approaches may also exist between legal regimes belonging to the same legal system.

To begin with, civil law traditions are mainly based on a written civil code, whereas common law traditions strongly rely on court practice and precedents. Accordingly, one of the most evident discrepancies between these approaches lies in the role of the judges (hence, the arbitrators), which necessarily amounts to procedural differences impacting the way the proceeding is conducted. The civil law system is referred to as "inquisitorial" (or "judge-led"), provided that the whole process is usually conducted by the judge, who – with the ancillary participation of the parties' and their counsels – decides upon the relevancy of the facts, examines the witnesses and eventually requests the introduction of supplementary evidence.

---

[176] LEW J.D.M. and VALKOVA S., *Cultures and the Taking of Evidence*, in *Handbook of Evidence in International Commercial Arbitration*, 2022, p. 4. Moreover, it has been stated that «it is valuable to analyse the issue from a comparative perspective, particularly as differences between legal families are probably greatest in relation to evidentiary matters» (WAINCYMER J., *Procedure and Evidence in International Arbitration*, above-cited, p. 746).

([177]) The judge is thus conferred the power and the duty not only to assess the issues arising from the dispute, but also to decide over the law to be applied for the resolution of the case. Instead, the common law system is deemed to be "adversarial" (or "party-led"), as the judge mainly supervises the proceeding whose main actors are the parties and their counsels. In this sense, the role of the judges in common law tradition is more passive, considered that lawyers have the duty to present the legal issues, to provide the relevant evidence in support of the case, as well as to examine and cross-examining witnesses.

As far as evidentiary issues are concerned, the main differences that can be found in common and civil law systems encompass the way evidence is presented and relied upon by the parties in support of their own case. Such differences are particularly evident when the arbitral tribunal is called to decide upon the admissibility and weight of evidence, document discovery, confidentiality and legal privilege, as well as expert and witness evidence.

First, principles regarding the admissibility and weight of evidence generally determine whether a party is allowed to present a specific type of evidence as to meet his/her burden of proof. In this context, one of the most challenging issues is to define the fleeting border between a reasonable arbitral decision and, on the other hand, a prejudicial outcome which might compromise the ability for a party to properly present the case. More specifically, when the arbitral tribunal is called to decide over the weight of evidence, it must consider two key aspects to resolve disputes on factual elements: burden and standard of proof. In sum, the burden of proof normally identifies the party who has to prove the facts on which he/she relies in support of his/her claim or defense; whereas the standard of proof represents the degree of likelihood that the evidence presented must meet as to prove the relevancy of that fact to the dispute. Accordingly, the adjudicator must reach a certain degree of subjective conviction, which, in common law systems, is based on the "balance of probabilities", whereas, under civil law tradition amounts to the adjudicator's "inner conviction". In this context, it can be thus stated that, while there is common consensus on the fact that the party making the allegation

[177] See HAZARD, G. and DONDI, A., *Responsibilities of Judges and Advocates in Civil and Common Law: Some Lingering Misconceptions Concerning Civil Lawsuits*, in *Cornell International Law Journal*, 2006, p. 59 ff.

must sustain the burden of proving it, differences still exist on the way each legal family determines how and whether a party has met that burden of proof. ([178])

Secondly, common law systems consider document discovery as a "central feature", ([179]) thus recognizing each party the right to request the production of a series of documents which are presumably in possession of the opponent, although the information contained in those documents could be unfavorable to that party. ([180]) On the contrary, the claimant in civil law systems is required to exhibit evidence on which he/she relies, without the possibility to obtain it from the opponent, unless exceptional needs are at stake; accordingly, when the arbitral tribunal is made up only by civil law-educated practitioners, it is likely for them not to issue procedural orders admitting broad discovery, with a view to grant the protection of the parties' privacy. ([181]) Moreover, while civil law arbitrators are not keen to be overloaded with huge volumes of documents to review, on the other hand, wider forms of disclosure will be normally expected in cases handled by English and U.S. arbitrators. ([182]) As a result, when arbitration proceedings involve parties from different legal traditions, conflicts on procedural matters are likely to raise.

---

[178] SCHLAEPFER, A.V., *The Burden of Proof in International Arbitration*, in *Legitimacy: Myths, Realities, Challenges*, (ed.) Albert Jan van den Berg, ICCA Congress Series No. 18, 2015, pp. 127-133.

[179] SALOMON, C. and FRIEDRICH, S., *Obtaining and Submitting Evidence in International Arbitration in the United States*, in *American Review of International Arbitration*, 2013, p. 549. In the same vein, document discovery has been considered as an «indispensable element of the fact-finding process» (MARGHITOLA, R. *Document Production in International Arbitration*, Wolters Kluwer, 2015, p. 11 ff.).

[180] Among the other cases, the adoption of such an approach can be found in the field of investment disputes, where the Permanent Court of Arbitration has clarified that «for a party to claim that documents are not in its control, it must have made "best efforts" to obtain documents that are in the possession of persons or entities with whom or which the party has a relevant relationship» (see *Clayton v. Government of Canada*, Permanent Court of Arbitration (PCA) Case No. 2009-04, Procedural Order No. 8, November 25, 2009, paragraph 1(h)).

[181] With regard to the striking difference that exists between common law and civil law systems in the field of document production, it has been stated that civil law jurisdictions «do not in general have anything equivalent to the document disclosure procedure» as intended according to the common law approach (TRITTMANN R. and KASOLOWSKY, B., *Taking Evidence in Arbitration Proceedings Between Common Law and Civil Law Traditions: The Development of a European Hybrid Standard for Arbitration Proceedings*, in *UNSW Law Journal*, 2008, vol. 31(1), p. 330).

[182] The 2012 Queen Mary Survey confirms that «requests for document production are more frequent in common law world: 74% of common lawyers, compared to only 21% of civil lawyers, said that 75-100% of their arbitrations involved such requests».

In a quite consistent way, as previously discussed, arbitral tribunals have been granted broad discretion also in relation to fact-finding mechanisms; ([183]) however, it must be stressed that, unlike state court judges, arbitrators lack coercive powers as they may only draw adverse inferences or issue an adverse cost order when a party fails to comply with the request to produce evidence. ([184])

Third, due to the private nature of arbitration proceedings, confidentiality remains a matter of some importance, especially when it involves crucial industrial sectors (*e.g.* technology industries and business know-how). Indeed, given the specificities of those disputes, users tend to expect that confidentiality of proceedings and information shall be protected and that materials would be used only for the purposes of arbitration. Some scholars have considered confidentiality as an inner element of arbitration; whereas, in arbitral practice, parties have been often required to conclude a specific agreement in order for confidentiality to be extended also to the arbitral venue. For instance, this latter principle was held in *Esso Australia Resources Ltd v. Plowman*, ([185]) where the High Court of Australia stated that a general duty of confidentiality is not *per se* implied in arbitration proceedings; as well as in *United States v. Panhandle Eastern Corp*, ([186]) where the U.S. Federal District Court held that confidentiality is not inner to arbitration unless parties have agreed on that. The conflicting jurisdictional views on the scope of confidentiality in arbitration make clear that no certainty exist on whether the appointed arbitral tribunal will admit the applicability of the confidential duty to each single case. To this end, commercial parties who wish to obtain a resolution and to be protected from the media attention – as to preserve their commercial reputation in the business market – shall negotiate an express agreement which imposes the duty of confidentiality upon arbitrators and, most importantly, upon all

[183] *Société Nu Swift plc v. Société White Knight* (1997) Paris Court of Appeal, Judgement 21 January 1997, in *Revue de l'Arbitrage,* 1997, p. 429.
[184] See Art. 27 of the UNCITRAL Model Law, providing for domestic courts' assistance in the taking of evidence, pursuant to the provisions of the *lex fori*. Moreover, some national legislations specifically allow arbitrators' lack of coercive powers to be helped by the State courts intervention (*e.g.* Art. 43(1) of the English Arbitration Act; Art. 184 of the Swiss Federal Law; Art. 816-*ter* of the Italian Code of Civil Procedure).
[185] *Esso Australia Resources Ltd v Plowman* (1995), High Court of Australia.
[186] *United States v. Panhandle Eastern Corp* (1988), US District Court for the District of Delaware, case no. 87-190-JLL.

those people involved in arbitration proceedings. ([187]) Moreover, similar concerns also exist on the way legal privilege shall be interpreted and applied, as this principle is differently disciplined from country to country. ([188]) It means that any potential attempt to solve the problem through the application of domestic laws would not grant the equality of treatment, as it would create unacceptable disparity between parties from different legal systems. ([189])

Lastly, witness testimony is known to have a significant weight in common law systems compared to the importance recognized to it in civil law traditions. It is thus worth noting that oral testimony is deemed to play a relevant role in international commercial arbitration, to the extent that broad discretion is left upon the arbitrators with regard to decisions concerning the admissibility and weight of witness testimony. Hence, the arbitral tribunal is generally free to hold whether, how, when and where witnesses shall be examined. ([190]) In this field, to better understand the crucial role played by oral testimony in arbitration proceedings, it is necessary to examine two further aspects which are worth a deeper attention: the nature of the witnesses and the possibility to conduct preventive discussions on prospective testimony. As for the nature of the witness, in compliance to the common law approach, Article 4.2 of the IBA Rules on Evidence provides for «any person», including parties, the faculty to act as a witness. ([191]) This provision raises

---

[187] See, for instance, Procedural Order of 31 July 2003 in ICC Case 12279, Section 4 («the parties shall enter into a suitable protective order to protect the confidentiality of documents and other evidence exchanged and produced in these proceedings») and Procedural Order of May 2004 in ICC Case 13046, paragraph 4.6, in *Special Supplement 2010: A Selection of Procedural Orders issued by Arbitral Tribunals acting under the ICC Rules of Arbitration*.

[188] As it will be further discussed in more detail, Article 9.2 of the IBA Rules on Evidence, provides that each party has the right to identify the specific law applicable to privilege, as to refuse, in whole or in part, the production of documents on any of the following grounds: (a) lack of sufficient relevance; (b) legal impediment or privilege; (c) unreasonable burden to produce the requested evidence; (d) loss or destruction of the document; (e) commercial or technical confidentiality; (f) special political or institutional sensitivity; (g) procedural economy, proportionality, fairness or equality of the parties.

[189] For instance, common law systems (*e.g.* U.S.) seem to extend legal privilege also to communications with in-house counsels, whereas civil law systems (*e.g.* Continental Europe) tend to be less inclined to the broad application of this principle, although the approach on the matter varies from State to State.

[190] *See e.g.,* Model Law Article 19(2); Article 22 of the Brazilian Arbitration Law; Sections 34(2)(f) and 38(5) of the English Arbitration Act; Article 1041(1) of the Dutch Code of Civil Procedure; Article 182(2) of the Swiss Arbitration Law; Section 7 of the US Federal Arbitration Act.

[191] See also Article 27.2 of the UNCITRAL Rules; Article 20.6 of the LCIA Rules; Procedural Order of 12 May 2004 in ICC Case 12990, paragraph 4.1; Procedural Order of 19 May 2004 in ICC Case 13046, paragraph 5.3; Procedural Order of 20 September 2004 in ICC Case 13054, paragraph 7; Procedural Order of 8 October 2004 in ICC Case 13225, paragraph 3.2.1.

grounds for an interesting debate. On one hand, the civil law attitude not to allow parties to act as witnesses is grounded upon the need to preserve the reliability of oral testimony, along with the right of the party not to make declarations against itself. On the other hand, common law systems argue the relevance that cross-examination plays in assessing the testimony reliability, as well as each party's general duty to declare all information, also against its own case. Regarding the content of witness testimony, different jurisdictions provide for limitations on the possibility for counsels to meet witnesses to prepare their declarations. A formal attempt to regulate this issue in international commercial arbitration can be found in Article 4.3 of the IBA Rules, which seems to legitimate the potential contact («interview») – in preparation of the hearing – between a party's counsel and the witness that party wants to rely on. The conflict between this arbitration practice and the civil law approach is clear. However, even if only few domestic Bar Associations have introduced specific provisions on the matter, international arbitration seems to be guided only by the weak general principle that lawyers shall not, in any case, influence the content of oral testimonies. This general assumption, not supported either by any tailored rule or practical international sanction in case of violation, is further undermined by attitudes normally assumed in cross-examination by common law counsels. This phase of the arbitration procedure is of crucial relevance: in short, cross-examination is known to create contrasts between different jurisdictions, representing an uncomfortable area in which civil law counsels are asked to reconsider their professional attitude. In light of the above, it is not unlikely for common law cross-examiners to better succeed over civil law opponents – clearly not accustomed to it – having the former trained, at a domestic level, their professional skills on strategies as to decrease the witness' reliability. ([192])

[192] Similar concerns also exist in relation to expert evidence. Indeed, in civil-law jurisdictions experts are generally called by the judges to assist themselves in assessing specific technical issued in dispute, with a limited possibility for parties and their counsels to pose questions to the appointed experts. Differently, in common-law systems, a general rule requires parties, instead of the court, to appoint their own expert.

3. *Judicial reviews of the arbitral awards in civil law and common law traditions*

The analysis conducted so far has been aimed at highlighting some of the most striking differences between civil law and common law systems in the field of the collection and presentation of evidence before the arbitral tribunal. In this way, general basis can be provided as to detect the main pitfalls that may occur when arbitrators are called to decide on issues characterized by a variety of procedural solutions, at the level of different legal systems.

As international commercial arbitration represents a neutral and dynamic dispute resolution mechanism which combines different legal traditions, it is common wisdom that it should not be identified with either specific legal system.

The possibility to combine different procedural elements, indeed, confers parties and arbitrators the power to tailor each proceeding to the specific circumstances of the dispute. However, it is understandable – rather, inevitable – that the existence of different legal traditions results in a diverse perception of what is meant for a "proper" conduct for the proceeding. Therefore, even if the development of international arbitration has fostered the creation of certain common procedures, when called to interpret the grounds for setting aside or refusing recognition and enforcement of the arbitral award, domestic courts might still tend to approach the question on whether the arbitration was conducted properly by being influenced by their own national background. ([193])

Nevertheless, it is worth stressing that, when assessing the arbitrators' conduct towards the taking of evidence, courts have not generally adopted an interpretation oriented to the domestic rules of evidence governing national litigations. ([194]) In particular, case law shows that courts tend to rule on the conduct of the arbitral tribunal considering the fundamental norms of due process, which

---

[193] REDFERN A. and HUNTER M., *Redfern and Hunter on International Arbitration*, above-cited, p. 588, para 10.56. This assumption has been historically sustained in a study of the evidentiary approaches of international tribunals, where it has been considered that each tribunal «tends to be a law unto itself, the rules adopted and applied for the occasion being to a considerable degree determined by the legal background of the members of the tribunal» (SANDIFER, D. V., *Evidence before International Tribunals*, Revised Edition, University Press of Virginia, 1975, p. 8).

[194] FERRARI F. and ROSENFELD F., *The Interplay Between the Post-award and the Pre-award Regimes with Respect to a Tribunal's Treatment of Evidentiary Issues*, in *Handbook of Evidence in International Commercial Arbitration*, (eds.) Franco Ferrari and Friedrich Rosenfeld, 2022, p. 47.

are mainly deduced from domestic constitutional guarantees. ([195]) In this scenario, provided that not every breach of due process amounts to a valid ground for post-award relief, courts across different jurisdictions have established diverse thresholds to deal with the parties' oppositions against arbitral awards on this ground.

As further discussed in this chapter, some jurisdictions consider whether the alleged breach of due process rights is outcome-determinative or not. Following this approach, courts are required to assess whether the arbitral tribunal would have ruled differently on the dispute, in lack of the alleged due process violation. ([196])

On the contrary, some other jurisdictions focus on the "quality" of the breach, rather than on the impact that it has produced towards the arbitral decision. Pursuant to this approach, courts are conferred a broader discretion, for instance, in assessing the relevance of the violated norm and the circumstances of the breach, instead of solely focusing on its effects. ([197])

Lastly, there are also jurisdictions where the aforesaid approaches (namely, the "qualified impact" and the "qualified breach") are both taken into account by domestic courts in order to rule on the recognition and enforceability of arbitral awards. ([198])

---

[195] Among the others, see Italian Supreme Court of Cassation, 20 November 2003, n. 17636; Swiss Federal Supreme Court, 26 April 2016, 142 III 360.

[196] Some jurisdictions following this approach have further distinguished between the existence of a "substantial prejudice" or an "appreciable impact" exercised by the due process violation towards the final outcome of arbitration. In terms of "substantial prejudice", see *Calbex Mineral Ltd. V. ACC Resources Co.*(2015), United States District Court of Pennsylvania, case no. 13-276, where the fact that the arbitral tribunal had violated its own governing rules in the phase of the adjudication has not been deemed by the court as sufficient in order to invalidate the award, provided that a substantial prejudice had not emerged). Whereas, in relation to the "appreciable impact", see *Soh Beng Tee & Co Pte Ltd v. Fairmount Development Pte Ltd* (2007), Singapore Court of Appeal, CLOUT case 743, para. 77, where it has been stated that there would have been no appreciable difference in the outcome of arbitration even if the arbitral tribunal had acted differently with regard to the principle of "time set at large".

[197] This is, for instance, the case of Canada, where courts tend to allow the refusal of recognition and enforcement of the arbitral award only in cases of a significant breach. See *Hachette Distribution Services (Canada) inc. v. 2295822 Canada inc.* (2018), Superior Court of Quebec, case no. 500-11-046917-148. See also *United Paperworkers v. Misco, Inc.* (1987), U.S. Supreme Court, case no. 86-651, para 40, stating that even assuming «that the arbitrator erred in refusing to consider the disputed evidence, his error was not in bad faith or so gross as to amount to affirmative misconduct».

[198] *Lesotho Highlands Development Authority v. Impregilo SpA* (2005), England and Wales, House of Lords; *Navigator Spirit SA v Five Oceans Salvage SA* (2018), High Court of Justice, Queen's Bench Division (UK), Commercial Court; *Terna Bahrain Holding Company WLL v Bin Kamil Al Shamsi and Others* (2012), Queen's Bench Division (UK), Commercial Court. Moreover, it is worth

Notwithstanding the different attitudes that have been embraced by domestic courts in this field over time, no doubts shall be raised on the fact that minor breaches of due process rights cannot prejudice the validity of arbitral awards, as all the above-mentioned thresholds aim to foster the efficiency of the arbitral proceeding, by preventing minor procedural violations from justifying the set aside of an award. In other terms, it is still possible to catch a certain degree of convergence among the attitude of domestic courts from different jurisdictions towards the arbitral decisions, with due consideration of efficiency concerns. ([199])

In light of the above, it is generally possible to state that civil-law and common-law systems originally flourished from more polarized positions which, however, have tended to merge to more common procedure over the time. Indeed, it can be seen how each legal family tries to promote compromise solutions to complex legal issues, whose resolution is necessarily based on the application of different legal and cultural values; nevertheless, it is unquestionable that neither legal system refers always to fixed values in a way that renders them unmodifiable in the future, for instance, because of historical and cultural changes.

Therefore, as one of the aims of arbitration is to foster compromise positions that can comply with the parties' expectations on a case-by-case basis – and provided that neither legal system can abstractly be deemed as "optimal" – ([200]) international arbitration can become the forum in which a more coherent pattern for the resolution of transboundary commercial disputes shall be developed, through the promotion of common international procedures and practices. ([201])

Accordingly, it is necessary to examine the way arbitrators have concretely dealt with evidentiary issues in previous cases, as to deter the possibility for further challenges to occur in relation to the same procedural questions. In this sense, the

---

noting that the term "serious irregularity", which may affect the tribunal, the proceeding or the award, is expressly contained in Section 68(3) of the English Arbitration Act.

[199] FERRARI F., ROSENFELD F. and CZERNICH D., *Due Process as a Limit to Discretion in International Commercial Arbitration*, above-cited, p. 12.

[200] In this sense, some commentators have supported the idea that «[c]hoosing the "best" procedure when it comes to international arbitration simply means choosing the procedure that fits the circumstances of the case, reflects the needs of the parties and responds to their expectations» (LEW J.D.M. and VALKOVA S., *Cultures and the Taking of Evidence*, above-cited, p. 22).

[201] The opinion that international arbitration is developing an increasingly uniform pattern on evidentiary issues is sustained in GAILLARD E. and SAVAGE J. (eds.), *Fouchard Gaillard Goldman on International Commercial Arbitration*, Kluwer Law International, 1999, p. 690, para 1260.

existing case law provides a useful and practical guidance for parties and tribunals on how due process challenges will be addressed in certain factual scenarios.

The following discussion is thus aimed at introducing an overview of how courts from different legal traditions usually face challenges on evidentiary issues, as to better define the limits that arbitral discretion suffers in relation to due process concerns arising in arbitration. To do so, the analysis will cover judicial views taken from some civil and common law countries, selected both among "leading" seats of arbitration – namely, Switzerland, UK, Singapore – and "less preferred ones" – Italy, the Netherlands and USA –, ([202]) as to draw some conclusions on their respective strengths and drawbacks.

3.1. *Italy: the Italian Arbitration Law*

Commercial arbitration in Italy is governed by Articles 806 to 840 of the Italian Code of Civil Procedure ("ICCP"), as well as by the provisions contained in the bilateral and multilateral conventions entered into force therein – such as the New York Convention of 1958 ([203]) and the European Convention on International Commercial Arbitration of 1961, ([204]) whose discipline prevails over the national domestic norms. ([205])

---

[202] See *Queen Mary International Arbitration Survey (2021): Adapting Arbitration to a Changing World*, available at: https://arbitration.qmul.ac.uk/research/2021-international-arbitration-survey/

[203] The New York Convention has been ratified in Italy through Law n. 62 of 19 January 1968 and has entered into force since 1 May 1969.

[204] The European Convention has been ratified by Italy through Law n. 167 of 3 August 1970 and has entered into force since 11 November 1970.

[205] According to the hierarchy of sources operating in the Italian legal system, applicable international conventions prevail upon the otherwise applicable provisions contained in the domestic law (which, in this case, is represented by the Italian Code of Civil Procedure). For a deeper discussion on this topic, see BENEDETTELLI, M. and TORSELLO, M., *Italy*, in *The Guide to Challenging and Enforcing Arbitration Awards*, (eds.) J. William Rowley, Emmanuel Gaillard and Gordon E. Kaiser, 2019, p. 345, stating that: «since the ratification took place by way of an instrument (*i.e.* an execution order) whereby an international treaty is directly incorporated in the Italian legal system, the rules set out by the New York Convention apply directly in lieu of the provisions laid down by Articles 839 and 840 of the CCP, which remain applicable only for matters not regulated by the Convention, or when providing for a regulation that is "more favourable" to the recognition and enforcement of a foreign award within the meaning of Article VII of the Convention».

Although Italy has not implemented the Model Law, the Italian arbitration law mostly reflects its fundamental principles. ([206]) In particular, as far as a functional convergence between arbitration and court proceeding is accepted, ([207]) the Italian case law supports the idea that some due process guarantees, which are provided at the constitutional level and expressly apply to judicial litigations, ([208]) also find place in arbitration proceedings.

More precisely, among the procedural guarantees provided at the constitutional level, the principle of adversarial proceedings (*principio del contraddittorio*) plays a remarkable role in the Italian system, as it is aimed at granting the right to defense ([209]) and to be treated equally. ([210])

The principle of adversarial proceeding constitutes a corollary of the equality of arms – which includes the right to be heard, as well as to introduce and to rebut to evidence presented by the other party – and, by being expressly mentioned also in Article 816-bis ICCP, it thus provides a limit towards parties' autonomy and arbitral discretion. ([211]) In addition, the provision in comment is pivotal as, pursuant to Article 829, paragraph 1, n. 9, ICCP, «an appeal for nullity

---

[206] Before the reform introduced in Italy through Legislative Decree 10 October 2022 n. 149 (so-called Riforma Cartabia), which has modified the content of Article 818 CCP, the Italian arbitration law differed from the Model Law as the first did not conferred upon the arbitral tribunal the power to issue interim measures of protection, except if otherwise provided by the law. More in general, the Italian arbitration law provisions concerning evidence are deemed to be *de minimis*. See EMANUELE, F. and MOLFA, M., *Evidence in International Arbitration. The Italian Perspective and Beyond*, Thomson Reuters, 2016, p. 19; LA CHINA, S. *L'arbitrato, Il sistema e l'esperienza*, Giuffrè, 2011, p. 183.

[207] Supreme Court of Cassation, 25 October 2013, n. 24153; Constitutional Court, 17 July 2013, n. 223. See also RICCI G. F., *Il lodo rituale di fronte ai terzi*, in *Rivista di diritto processuale*, 1989, p. 654.

[208] See Article 111 of the Italian Constitution, pursuant to which «jurisdiction is implemented through due process regulated by law. All court trials are conducted with adversary proceedings and the parties are entitled to equal conditions before an impartial judge in third party position. The law provides for the reasonable duration of trials».

[209] Pursuant to Article 24, paragraphs 1 and 2, of the Italian Constitution, «[a]nyone may bring cases before a court of law in order to protect their rights under civil and administrative law. Defense is an inviolable right at every stage and instance of legal proceedings».

[210] According to Article 3, paragraph 1, of the Italian Constitution «[a]ll citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinion, personal and social conditions».

[211] Article 816-*bis* CCP states that «[t]he parties may establish in the arbitration agreement or in a separate document, prior in any case to the commencement of the arbitral proceedings, the rules that the arbitrators must apply in the proceedings and the language of the arbitration. In the absence of such rules, the arbitrators are free to regulate the course of the proceedings and to determine the language of the arbitration in the manner they deem most convenient. They must respect in any case the principle of adversarial process by granting both parties reasonable and equivalent opportunities to present their case».

may be filed, notwithstanding any prior waiver, if […] the principle of adversarial process has not been respected in the arbitration proceedings».

Provided that a breach of the principle of adversarial proceedings may constitute a ground for the annulment of the arbitral award, it is interesting to note that this circumstance represents the most common ground claimed to challenge arbitral awards before the Italian domestic courts. ([212]) In particular, what can be seen from the Italian case law on this topic is that courts have changed their approach towards due process concerns over time, precisely by moving from the adoption of a formalistic viewpoint to an outcome-determinative approach based on effects. ([213])

Indeed, evidence shows that Italian courts were previously more inclined to consider the principle of adversarial proceedings only from a merely formal perspective. For instance, the conduct of the judging authority was deemed to be in compliance with such principle for the sole fact that the tribunal had formally established certain time limits for the parties to introduce their claims, to produce evidence, and thus rebut to the other party. ([214])

Advancing in time, Italian courts have shown a different tendency towards the assessment of the adversarial principle's breach during the proceeding, expressly requiring for the violation to be concrete and substantial. ([215]) According to the latter approach, it is thus necessary for a party to have been concretely and substantially prejudiced in the presentation of its own case in order for a breach of due process right to occur; in turn, the opposing party must justify its request to set-aside, as well as to oppose recognition or enforcement of the arbitral award, on the

---

[212] Among the others, see Supreme Court of Cassation, 30 December 2021 n. 41955, stating that «[c]on specifico riguardo […] al principio del contraddittorio, questa Corte ha affermato che, anche nel procedimento arbitrale, l'omessa osservanza del contraddittorio non è un vizio formale, ma di attività, sicché la nullità che ne scaturisce ex articolo 829 c.p.c., n. 9, implica una concreta compressione del diritto di difesa della parte processuale: deve, cioè, aversi riguardo al modo in cui le parti hanno potuto confrontarsi in giudizio in relazione alle pretese ivi esplicate, giacché il vizio di violazione del contraddittorio consegue alla concreta menomazione del diritto di difesa»; ID. 1 June 2023, n. 15521; ID. 28 March 2023, n. 8760; ID. 21 January 2016, n. 1099; ID. 6 May 2015, n. 10809.

[213] LOCATELLI, F. *Arbitrato e principio del contraddittorio, ovvero dell'esistenza di un principio di collaborazione tra giudicanti e parti anche nel procedimento arbitrale*, above-cited, pp. 744–776.

[214] Supreme Court of Cassation 17 March 1960, n. 540, in *Il Foro Italiano*, 1961, Vol. 84, no. 1, p. 99 ff.; ID., 15 October 1954, n. 3732, in *Il Foro Italiano*, 1955, Vol. 78, no. 1, p. 25 ff.

[215] Supreme Court of Cassation, 27 October 2004, n. 20828, in *Il Foro Italiano*, vol. 128 n. 6, 2005, p. 1767 ff.

basis that it has suffered a concrete – rather than merely formal – prejudice during arbitration. ([216])

This remarkable shift in approach, recently followed by domestic courts, has been mirrored in the amendments introduced in the Italian legislation, regarding the aforesaid Articles 816 and 816-*bis* ICCP. In particular, the 2006 version of Article 816, paragraph 4, ICCP stated that the arbitral tribunal had to establish «time-limits for the parties to produce documents and briefs and to present their replies», whereas the renewed version of Article 816-*bis* ICCP highlights the arbitral tribunal's duty to «grant both parties *reasonable* and *equivalent opportunities* to present their case» (emphasis added). ([217])

3.1.1. (*following*) *The Italian case-law on the right to be treated equally*

As far as evidentiary issues are concerned, the need to concretely grant the principle of adversarial proceedings during the entire course of arbitration ([218]) inevitably entails the recognition towards the parties – in particular – of an equal opportunity to submit their own claims, to produce documents and to rebut to the other party's submissions and evidence. ([219])

Although in most cases – absent a detailed agreement of the litigants – courts have recognized wide discretion upon the arbitral tribunal on how to balance due process and efficiency, a remarkable decision has been issued by the Supreme

---

[216] Supreme Court of Cassation, 23 February 2016, n. 3481; ID., 24 July 2013, n. 17990.

[217] If one takes a closer look at the renewed provision of Article 816-*bis* CCP and compares it with the wording of Article 18 of the Model Law, it is easy to note an immediate difference between the two. Indeed, as just said, the first Article stresses the right of the party to be given a "reasonable" opportunity to present their case; whereas, pursuant to Article 18 of the Model Law, each party is granted "a full" opportunity of presenting the case in his/her favor. In doctrine, such a specific choice of the Italian legislator to resort to the term "reasonable" instead of "full" «indicates that the Italian courts will follow an approach of self-restraint at the post-award stage» (RAGNO, F. *Country Report: Italy*, in *Due Process as a Limit to Discretion in International Commercial Arbitration*, (eds.) Franco Ferrari, Friedrich Rosenfeld, Dietmar Czernich, Wolters Kluwer, 2020, p. 242).

[218] Supreme Court of Cassation 8 April 1998, n. 3632, where the court has declared that the principle of adversarial proceedings «non è riferibile solo all'atto introduttivo del giudizio ma deve realizzarsi nella sua piena effettività durante tutto lo svolgimento del processo».

[219] Supreme Court of Cassation, 16 May 2000, n. 6288 stating that the principle of adversarial proceedings must be interpreted in the sense that «gli arbitri devono consentire alle parti di esporre i rispettivi assunti, di conoscere le prove e le risultanze del processo, di presentare entro un termine prefissato memorie e repliche e di prendere visione in tempo utile delle istanze e delle richieste avversarie»; ID., 2 February 2001, n. 1496;

Court with regard to the arbitrators' imposition of peremptory deadlines to submit statements of claim/defense, documents and evidence. In the case at hand, ([220]) notwithstanding the fact that courts generally admit the imposition of peremptory deadlines by arbitrators, when aimed at fostering the efficiency of the proceeding, the Supreme Court found the tribunal's conduct to be in breach of due process rights, provided that the arbitrators had not timely informed the parties that they would have lost their rights in case of failure to take action within the expiry of the imposed time-limit. Therefore, striking a balance between due process and arbitral discretion, the Supreme Court set aside the arbitral award not because the arbitrators had imposed fixed time-limits for the exercise of the parties' prerogatives, but instead for the fact that the arbitral tribunal had violated the parties' fundamental procedural right to be informed of the procedural consequences.

On the same vein, the Supreme Court annulled an arbitral award pursuant to Article 829, paragraph 1, n. 9 ICCP, on the basis that the arbitral tribunal had decided the dispute after the closing of the evidentiary phase (*fase istruttoria*) but without recognizing the parties' right to conduct a final hearing, where the participants to arbitration could have had the possibility to rebut to evidence introduced by the other party. ([221])

While recognizing a wide discretion towards the arbitral tribunals, in lack of a specific agreement between the parties on the matter at issue, Italian courts have nevertheless found breaches of due process anytime discretionary powers have not been followed by a likewise safeguard towards the parties' rights to be heard, and to reasonably present their case towards the judging authority. ([222])

---

[220] Supreme Court of Cassation 21 January 2016, n. 1099. For a comment see SALVANESCHI, L. *Procedimento arbitrale: via libera agli arbitri sui termini perentori*, in *Il Corriere Giuridico*, 10/2016.

[221] Supreme Court of Cassation, 27 October 2004, n. 20828, above-cited, citing Supreme Court of Cassation 23 June 2000 n. 8540, where, however, the latter court has stated that the principle of adversarial proceedings represents a non-derogable procedural rule whose respect must be assessed *ex ante*, with the result that its respect shall be verified from a formal standpoint, irrespective of the final and substantial outcome of the court's decision (according to the previous courts' tendency above described in this chapter); ID., 12 April 2001, n. 5498.

[222] Indeed, consistent case law of the Italian Supreme Corut of Cassation shows that violations of due process rights which occur in arbitration must be assessed in light of the broad procedural discretion recognized towards the arbitrators, whenever an agreement between the parties is missing. See, Supreme Court of Cassation, 21 February 2019, n. 5243, in *De Jure*; ID., 4 April 2018, n.8333, in *De Jure*; ID., 26 May 2015, n. 10809.

Accordingly, when the arbitrators' discretionary powers are exercised in respect of the parties' due process guarantees, the Italian courts tend to disregard challenges for the set aside or annulment of arbitral awards. For instance, due process violations may not occur when the tribunal confers a party the right to present new evidence even after the pre-fixed deadline, provided that the counterparty has been given the possibility to rebut and to make comments against it, in any manner considered appropriate by the arbitral tribunal. ([223]) In the same vein, a breach of the due process might be excluded when the tribunal does not set an extra hearing after the conclusion of the evidentiary phase, provided that both parties had been granted the opportunity to present their respective cases (condition that is deemed to be respected, for example, where the participation of expert witnesses has been granted during the site inspections undertaken before the awards being issued, as this represents a reasonable possibility for the opposing party to exercise its right to be heard). ([224])

In terms of recognition and enforcement of foreign awards, Article 840 ICPP mirrors the grounds for refusal contained in Article V of the New York Convention.

---

[223] For example, see Supreme Court of Cassation, 19 January 2011, n. 3917, where the court has not dismissed the arbitral award provided that one of the parties had introduced new evidence, after the expiry of the time limit, during the evidentiary phase at which the counsel of the counterparty had participated, without raising any comment or opposition to it («[a]ssicurato alla parte, odierna ricorrente, il diritto di prendere visione e controdedurre alla memoria istruttoria del D.S., [gli arbitri] non erano perciò tenuti a concederle anche il termine per formulare controdeduzioni, atteso che, secondo quanto riscontrato, a fronte di ogni istanza e deduzione di quest'ultimo era stata data loro comunicazione per replicare, tant'è che partecipò alla fase istruttoria il loro difensore che, presente all'udienza d'assunzione della prova, non si oppose al suo espletamento»). Conversely, Italian courts have set aside arbitral awards, for instance, when the arbitral tribunal has refused to consider the submissions made by one of the parties because of her failure to promptly join the proceeding, irrespective of the fact that no due date had been previously set in order for a party to participate (Court of Appeal of L'Aquila, 18 May 2020, in *De Jure*; Supreme Court of Cassation, 21 January 2016, n. 1099), as well as when the arbitral tribunal has grounded its decision only on the basis of the content of the request for arbitration and the reply to such a request, with no indication of a time limit within which the parties should have filed their submissions (Court of Appeal of Firenze, 5 October 2007, in *De Jure*).

[224] Supreme Court of Cassation 16 November 2015, n. 23402, in *De Jure*; ID. 1 February 2005, n. 1988, in *De Jure*.

([225]) However, evidence shows that challenges of international awards before Italian domestic courts are quite rare. ([226])

Accordingly, Italian case law in this field demonstrates a certain inclination by the domestic courts to set a high standard for the judging authority to rule in favor of due process challenges. The opposing party is indeed required to prove that the arbitral conduct has relevantly and concretely prevented him/her from exercising the right to be heard. In light of the above, it is easy to draw a similarity between the courts' approach towards national and foreign arbitral awards, given that, in order for the breach to count, it must have been outcome-determinative in any case, in the sense that the party has suffered, in concrete, a serious violation of the principle of adversarial proceedings and, thus, his/her right to defense. ([227])

---

[225] Pursuant to Article 840 ICCP «(a)n opposition may be filed against the decree granting or denying enforcement of the foreign award by filing a writ of summons with the court of appeal within thirty days of communication of the decree denying enforcement or notification of the decree granting enforcement. After the filing of the opposition, the proceedings shall be held in accordance with Article 645 and following in so far as they are applicable. The court of appeal decides with a judgment subject to recourse before the supreme court. The court of appeal shall refuse the recognition or the enforcement of the foreign award if in the opposition proceedings the party against which the award is invoked proves the existence of one of the following circumstances: 1) the parties to the arbitration agreement were, under the law applicable to them, under some incapacity, or the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the State where the award was made; 2) the party against which the award is invoked was not informed of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present its case in the proceedings; 3) the award decided upon a dispute not contemplated in the submission to arbitration or in the arbitration clause, or exceeded the limits of the submission to arbitration or of the arbitration clause; nevertheless, if the decisions in the award which concern questions submitted to arbitration can be separated from those concerning questions not so submitted, the former can be recognized and enforced; 4) the composition of the arbitration tribunal or the arbitration proceedings was not in accordance with the agreement of the parties or, failing such an agreement, with the law of the place where the arbitration took place; 5) the award has not yet become binding on the parties or has been set aside or suspended by a competent authority of the State in which, or under the law of which, it was made. If an application for the setting aside or suspension of the effects of the award has been made to the competent authority indicated at number 5) of the third paragraph, the court of appeal may adjourn the decision on the recognition or enforcement of the award; on the request of the party seeking enforcement it may, in the case of suspension, order the other party to give suitable security. Recognition or enforcement of a foreign award shall be refused also where the court of appeal shall ascertain that: 1) the subject matter is not capable of settlement by arbitration under Italian law; 2) the award contains provisions contrary to public policy. In all cases, the provisions of international treaties shall be applicable».

[226] Court of Appeal of Trieste, 7 August 2023; Court of Appeal of Milano 10 June 2019; ID. 12 July 2019.

[227] Supreme Court of Cassation, 11 December 2013, n. 27734 («[…] con la lesione del contraddittorio è *in re ipsa* la violazione del diritto di difesa»). In the sense that the prejudice suffered by the party must be actual and material, see also Supreme Court of Cassation, 7 September 2020, n.18600, in *De Jure*; ID. 23 February 2016, n. 3481, in *De Jure*; ID., 8 January 2014, n. 131, in *De Jure*; ID., 21 Jan. 2007, n. 2021, in *De Jure*.

In conclusion, the above-discussed case law is proof of the Italian courts' tendency to require the existence of a "qualified breach" as to assess a due process violation and, therefore, to justify the refusal of the recognition and enforcement of an arbitral award. It is thus upon the opposing party to demonstrate that the arbitral proceeding has been conducted in such a manner that it has inferred a relevant loss towards the party itself, amounting to the impossibility – rather than the mere difficulty – of presenting its own case. ([228])

Therefore, only when a party can present such crucial evidence, an objection raised under Article V(1)(b) of the New York Convention against the foreign arbitral award is likely to succeed.

3.2. *The Netherlands: the Dutch Arbitration Act*

Commercial arbitration in the Netherlands is governed by Articles 1020 to 1076 of the Dutch Code of Civil Procedure ("DCCP"), along with the provisions contained in the applicable international treaties. ([229]) Similar to the Italian framework, the provisions governing arbitration under the DCCP are largely inspired by the UNCITRAL Model Law.

Under the Dutch arbitration law, Article 1036(2) specifically imposes the arbitral tribunal's duty to grant the parties' equal treatment, including the right to comment on the other's position and to have a "sufficient" opportunity to be heard. ([230]) For this reason, the content of the aforesaid Article 1036(2) is deemed to embody the fundamental due process guarantees which must always be applied and respected also during the arbitral proceeding.

---

[228] Supreme Court of Cassation, 30 May 2006, n. 12873 («in tale giudizio non è ravvisabile alcuna violazione dell'art. 840 c.p.c., comma 3, n. 2, laddove dispone che il riconoscimento e l'esecuzione del lodo straniero sono rifiutati, se la parte interessata provi che nel procedimento arbitrale è stata nell'impossibilità di far valere la propria difesa»).

[229] The New York Convention has been ratified by the Netherlands on 24 April 1964 and entered into force on 23 July 1964.

[230] According to Article 1036(2) of the DCCP: «[t]he arbitral tribunal shall treat the parties equally. The arbitral tribunal shall give the parties the opportunity to set out and explain their positions and to comment on each other's positions and on all documents and other information brought to the attention of the arbitral tribunal during the proceedings. The arbitral tribunal shall not base its decision, where it is unfavorable for one party, upon documents and other information on which that party was not *sufficiently* able to comment» (emphasis added).

Moreover, Article 1036(3) expressly obliges both arbitrators and parties to avoid unreasonable delays of the proceedings, ([231]) with the result that, under the Dutch arbitration law, the arbitral tribunal's duty to strike a balance between the parties' due process rights and the efficiency of the proceeding becomes even more compelling. Indeed, the provision contained in Article 1036(3) imposes that, when dealing with procedural requests raised by the parties, such as the introduction of new evidence, the tribunal will have to take due consideration of these requests, in particular by considering the way they could eventually impact on the overall length and conduct of the arbitration. In light of the above, the aforementioned articles are thus deemed to constitute the normative basis of the due process guarantees in arbitral proceedings under the Dutch arbitration law. ([232])

Shifting the view to the enforcement of the arbitral awards, a different discipline is formally provided depending on whether the awards are issued by tribunals seated in the Netherlands (domestic awards) or whether they are rendered by tribunals seated outside the Netherlands (foreign awards). ([233])

As for the domestic awards, Article 1065(1) of the DCCP introduces five grounds for setting aside, among which the ones that are deemed to represent the main expression of the fundamental due process rights are: 1) the breach of the tribunal's mandate ([234]) and 2) the violation of public policy. ([235]) However, it is worth noting that the grounds for reversal of domestic awards (Article 1065 of the DCCP) and those provided for the recognition and enforcement of foreign arbitral awards (Article 1076 DCCP), widely mirror the principles contained in the New York Convention, with the result that the considerations that will be drawn below regarding the domestic awards can be extended also to international arbitral proceedings.

---

[231] Article 1036(2) of the DCCP: «[t]he arbitral tribunal shall guard against unreasonable delay of the proceedings and, if necessary, at the request of a party or of its own motion, take measures. The parties shall mutually be obliged to prevent unreasonable delay of the proceedings».

[232] VAN DE VELDEN J. B. and ZIRAR A. K., *Country Report: the Netherlands*, in *Due Process as a Limit to Discretion in International Commercial Arbitration*, (eds.) Franco Ferrari, Friedrich Rosenfeld, Dietmar Czernich, Wolters Kluwer, 2020, p. 281 ff..

[233] The discipline of domestic awards is contained in Articles 1062-1063 of the DCCP; whereas the recognition and enforcement of foreign arbitral awards is governed by Article 1076 of the DCCP.

[234] Article 1065(1)(c).

[235] Article 1065(1)(e).

Starting from the tribunal's mandate, it is necessary to point out that this instrument is primarily aimed at delimiting the scope of the arbitration, as well as at regulating the way the proceeding will be administered by the arbitrators, in compliance with the *lex arbitri* and with the provisions expressly agreed by the parties. The party who seeks the reversal of an arbitral award based on this ground will have to raise its objections during the proceeding – as long as, at the time of the proceeding, the same opposing party was aware of the contested breach – and to prove the severe nature of the violation (*e.g.* evident breach of the party's due process rights). ([236]) Indeed, it is common wisdom that the party who wants to rely on the tribunal's mandate violation shall demonstrate that such a violation has exercised a substantial – rather than formal – impact towards the outcome of the proceeding. Accordingly, it is necessary for the opponent to prove that, lacking such a contested violation, the content of the final award would have been different.

Secondly, when dealing with the ground of public policy violations, the provision contained in Article 1065(1)(e) has been strictly interpreted by domestic courts, with the result that it has been deemed as a basis for the annulment of arbitral awards only when a violation of fundamental procedural rights has concretely occurred. ([237]) In particular, given that a specific due process ground is not expressly provided by the Dutch law, domestic courts have considered the alleged violations of fundamental procedural rights within the scope of public policy. ([238])

---

[236] Pursuant to Article 1065(4) DCCP, however, a party cannot seek the reversal of an arbitral award on the ground of the violation of the tribunal's mandate if «the party who invokes this ground has participated in the arbitral proceedings without invoking such ground, although it was known to him that the arbitral tribunal did not comply with its mandate».

[237] Although Article 1065 DCCP does not expressly requires that the objections of public policy violations shall be raised during the proceedings, the Dutch Supreme Court has stated that it is the case for oppositions raised on the grounds of the lack of independence or impartiality of the arbitral tribunal. For instance, see *Nordström v. Van Nievelt Goudriaan & Co*., Dutch Supreme Court, 18 February 1994. Moreover, it is interesting to note that, as previously discussed, a similar approach is also welcomed by the Italian courts, according to which objections such as those related to the impartiality of the tribunal shall be promptly raised against the arbitral tribunal itself, as to help it fix any procedural deficiencies during the proceeding and thus before issuing the final award.

[238] Among the others, see District Court of Amsterdam, 26 July 2012, stating that the breach of the right to be heard constituted a ground for the refusal of recognition and enforcement of the award under public policy grounds. From a different perspective, it is interesting to note that even when the *lex arbitri* of a State expressly provides a ground for annulment based on the parties' impossibility to present their case (intended as a due process ground), domestic courts may still interpret the content of some procedural violations as falling into the scope of public policy concerns instead. For instance, this is the case of Spain, where the domestic courts' extensive reliance on public policy amounts to the fact that violations of a party's right to present its case are considered to fall under public policy rather than due process grounds. Among the others, see High Court of Catalonia, 15 March 2012, order no. 37. For a more detailed comment on the Spanish case law on

In this context, the Supreme Court's case law helps us finding a definition of "fundamental procedural right", as it expressly states that such rights are those generally provided by mandatory norms, which are non-derogable in nature, and cannot thus be subject to limitations. ([239])

In addition, when public policy (and thus due process) grounds are related to the recognition and enforcement of foreign arbitral awards, the Supreme Court has clarified that, according to the interpretation of the wording of Article 1076(1)(b), such grounds must be assessed *ex officio* by the domestic courts, ([240]) whereas the other five grounds listed in the same article must be invoked by the same party who seeks to resist recognition and enforcement. ([241])

3.2.1. (following) The Dutch case-law on the refusal, disregard or exclusion of evidence

In order to assess the domestic courts' approach towards due process violations and their effects upon the validity of arbitral awards, the Dutch case law provides some concrete examples, especially linked to evidentiary issues.

First, when dealing with the parties' right to be heard and to present their case, there is no doubt that the tribunal's decision not to allow the submission of evidence could potentially violate a party's due process rights, provided that certain conditions are met. However, it must be stressed that the arbitral tribunal is not obliged to admit a party's request to submit new evidence in any case, as such a

---

this topic, see CANAL A. L. and DUVANEL V. A., *Annulment of Commercial Arbitral Awards by State Courts*, in *ASA Bulletin*, 2020 vol. 39, issue 4.

[239] *Ecuador v. Chevron*, Dutch Supreme Court, 12 April 2019, n. 54, para 4.3.2.

[240] *Vastint Holding v. Scensson c.s*., Dutch Supreme Court, 24 December 2010, para 3.5.3.

[241] Pursuant to Article 1076 DCCP, the enforcement of a foreign award cannot be sought in the Netherlands if: «[…] (A) the party against whom recognition or enforcement is sought, asserts and proves that:
(a) a valid arbitration agreement under the law applicable thereto is lacking;
(b) the arbitral tribunal is constituted in violation of the rules applicable thereto;
(c) the arbitral tribunal has not complied with its mandate;
(d) the arbitral award is still open to an appeal to a second arbitral tribunal, or to a court in the country in which the award is made;
(e) the arbitral award has been reversed by a competent authority of the country in which that award is made;
(B) the court finds that the recognition or enforcement would be contrary to public policy […]».

request must be necessarily balanced, first, with the counterparty's right to rebut to that evidence and, in addition, with the arbitrators' and parties' duty to avoid unnecessary delays (according to the aforementioned Article 1036(3) DCCP).

Accordingly, in the case *International Military Service Ltd. V. Iranian Ministry of Defence*, ([242]) the Supreme Court declined the request to set aside the arbitral award based on an alleged violation of due process rights raised by one of parties, which specifically argued that the arbitral tribunal had unlawfully rejected its request to submit further evidence. In the case at hand, indeed, the domestic court stated that the opposing party had not been deprived of its right to furnish any further evidence, as the party's request had been denied because it had failed to provide the arbitral tribunal with the details of the evidence that it wanted to submit. In other words, the applicant failed to prove that it had suffered a substantial breach of its fundamental due process rights, as it was not able to demonstrate that the arbitral tribunal had erred by not allowing the submission of new evidence, nor to prove that such evidence was not in its possession at an earlier stage of the proceeding, and that it was striking for the decision of the case.

In a different occasion, the Court of Appeal of the Hague rejected the request to set aside an award grounded on the basis that the tribunal's decision not to allow the introduction of certain evidence during the proceeding – and which was deemed to be in strong support of the opposing party's position – had violated that party's right to be heard. ([243]) In such a case, indeed, the Court found that the conduct of the arbitral tribunal had not breached any due process rights, expressly because the tribunal had granted the parties' equal treatment in their exercise of the right to be heard. More precisely, if the arbitral tribunal had accepted one of the party's late submissions of evidence – whose request had occurred only a few days prior the hearing, and which amounted to a large size of documents that, in the opinion of the judging authority, could have been presented at an early stage – it would have potentially breached the counterparty's right to rebut to that new evidence.

This case represents a clear example of the importance that domestic courts recognize towards the arbitral tribunal's discretion, as the arbitrators are generally

---

[242] *International Military Services v. Modsaf*, Dutch Supreme Court, 17 January 2003. The decision of the Supreme Court has thus affirmed the previous decision of the Court of Appeal of the Hague, 21 December 2006, on the same issue.
[243] Court of Appeal of the Hague, 27 January 2017.

empowered to decide the best way to grant both parties' procedural rights. ([244]) In a similar circumstance, for instance, the arbitral tribunal could have granted the counterparty's right by conferring it more time to review and to respond to the further evidence presented by the opposing party out of time. However, with a view to grant the efficiency and economy of the proceeding, the decision undertaken by the tribunal not to allow the submission of new evidence was considered as legitimate, as far as it granted the equal treatment of both parties to the proceeding, without breaching none of the parties' due process rights. ([245])

Fundamental procedural rights might also be breached in relation to the parties' faculty to present evidence by means of witness or expert testimony. ([246]) In this context, Article 1041(1) of the DCCP expressly provides that, when the examination of witnesses or experts takes place, the arbitral tribunal shall determine whether and how such kind of evidence can be used by the parties in order to corroborate their allegations, ([247]) unless parties have expressly and otherwise agreed. ([248]) It can be stated that the tribunal can discretionarily refuse to hear a witness without *per se* breaching any due process rights, as it is well possible for the arbitrators to consider such evidence irrelevant for the final decision of the case. Accordingly, in this latter circumstance, the arbitral tribunal shall justify its decision by providing that the testimony was not "essential" or "crucial" to a party's case,

---

[244] As far as evidentiary issues are concerned, a normative basis of the tribunal's broad discretion can be found in Article 1039(1) DCCP, which expressly confers upon the arbitrators a wide discretion with regard to the allocation of the burden of proof. See MARSMAN, A. and MARNIX, L. *International Arbitration in the Netherlands: With a Commentary on the NAI and PCA Arbitration Rules*, Kluwer Law International, 2021, p. 277.

[245] Similarly, see *Attero Zuid v. Omgevingsdienst Brabant Noord*, Court of Appeal of the Hague, 27 June 2017, where the court has dismissed the request to set aside an award by the opposing party claiming that the arbitral tribunal's refusal to accept documentary evidence had breached its right to be heard, affirming the tribunal's right conduct to dismiss such further evidence that had been filed only shortly before the hearing.

[246] The considerations that will be carried out below with regard to witness testimony can also be extended to experts, as the procedure for presenting evidence by means of experts generally mirror the one provided for the presentation of witnesses under Article 1041 DCCP.

[247] Pursuant to Article 1041(1) DCCP: «[i]f an examination of witnesses takes place, the arbitral tribunal shall determine the time and place of the examination and the manner in which the examination shall proceed».

[248] In particular, if parties have agreed that witness testimony and expert evidence may always be presented, the arbitral tribunal cannot refuse to hear the witness or the expert unless exceptional circumstances have occurred in this regard.

([249]) and therefore that it's admission would have not changed the outcome of the final award. ([250])

As a flipside of the decision to refuse the taking of witness evidence, the arbitral tribunal shall also effectively safeguard the counterparty's right to be heard in cases where it decides to allow witness or expert evidence. A remarkable example from the case law in this field can be found in the *Spaanderman v. Anova* case, where the arbitral tribunal decided to admit a witness testimony, even if the witness had been called to testify at the hearing without a previous approval by the same tribunal. ([251]) In the case at stake, the Supreme Court affirmed the decision of the Amsterdam Court of Appeal by stating that, even if the counterparty ("Anova") had not contested the tribunal's decision to allow such a testimony during the proceeding and had decided not to cross-examine the witness, the arbitral tribunal was equally required to grant to that counterparty the concrete opportunity to rebut to such an unexpected evidence, especially considering the high value that the same tribunal gave to the late testimony in its final award. ([252]) Hence, the aforesaid case is important as it shows that the tribunal's discretion is limited by the concrete exercise of due process rights by the parties, which result to be breached in cases where a party is merely given the possibility to ask questions to a witness introduced at the hearing without prior permission of the tribunal, given that in such a circumstance the counterparty is not conferred a reasonable period of time to discredit the content of that unexpected evidence – for instance, by calling a rebuttal witness in support of its case. ([253])

---

[249] District Court of Rotterdam, 31 July 2013, paras 4.11-4.14.
[250] Court of Appeal of Amsterdam, 23 November 2010.
[251] *Spaanderman v. Anova Food*, Dutch Supreme Court 25 May 2007.
[252] Similarly, in the context of expert testimony and the protection of the right to be heard, the Court of Appeal of the Hague set aside an award on the basis that the arbitral tribunal had relied on an expert report without making it available to one of the parties to the proceeding, who had thus been violated in its right to be heard. See Court of Appeal of the Hague, 28 October 2010. In the same vein, the Supreme Court denied the enforcement of an arbitral award in the case where the decision of the arbitral tribunal had been influenced by a letter sent by a party to the arbitrators, and the content of which had not been shared with the counterparty to the proceeding. See *De Jong Technisch Handelsbureau v. Quaade-Holm*, Dutch Supreme Court, 8 November 1963.
[253] Put in different terms, when rendering its award, «the tribunal may not, to the detriment of one party, base its decision on documents and other information in respect of which that party has not sufficiently been heard» (MARSMAN, A. and MARNIX, L. *International Arbitration in the Netherlands: With a Commentary on the NAI and PCA Arbitration Rules*, above-cited, p. 276). This principle can also be found in Court of Appeal of the Hague, 10 May 2016, para 12, where the Court has stated that the only things that really matters is that the party has received a concrete and

From the above-described case law it clearly emerges that, even if domestic courts are generally required to – and mostly do –interpret the public policy ground stated in Articles 1065(1)(e) and 1076(1)(b) in a strict manner, this restrictive approach does not apply when the case involves the violation of fundamental procedural rules, such as the right to be heard. ([254])

In conclusion, no doubts shall be raised on the fact that the setting aside of arbitral awards constitutes a remedy of last resort, as the domestic courts' intervention is limited only to extraordinary circumstances and shall tend not to overturn the results of the arbitration, unless substantial breaches have occurred. ([255]) The above-described case law taken from the Dutch experience shows a certain reluctance of domestic courts in declaring the existence of violations in arbitral proceedings, which, indeed, are not found in many cases. Accordingly, the instrument of the set aside cannot be used with the aim to introduce a sort of appeal on the merits of the arbitral award, being instead domestic courts required to assess whether the decision of the arbitral tribunal is consistent with the specific principles which limit its discretion, and to grant the parties' fundamental procedural rights.

In conformity with this latter approach, and pursuant to Article 1065a of the DCCP, the Dutch arbitral law provides a specific instrument through which the Court of Appeal, when asked to assess the existence of the grounds to set aside an arbitral award, may remit a case towards the arbitral tribunal – on its own motion or by following the request of a party. In such a circumstance, the domestic court may thus suspend the proceeding for setting aside, in order to allow the arbitral tribunal to remedy to the potential breaches that have occurred during the arbitral proceeding. Therefore, this instrument fosters the cooperation among the

---

sufficient opportunity to respond to the documents or information produced by the other party, irrespective of the fact that the first actually decides to rebut to it.

[254] *Spaanderman v. Anova Food,* above-cited, para 3.5. Moreover, the case at hand introduces a remarkable guide for the interpretation of cross-examination in international commercial arbitration under the Dutch law, as the latter does not provide any specific norm on this issue. Therefore, the principle that can be extrapolated from the *Spaanderman v. Anova Food case* is that the arbitral tribunal shall grant parties the right to cross-examine witnesses and experts every time the same tribunal grounds its final decision (or even only part of it) on that witness or expert testimony. See VAN DE VELDEN J. B. and ZIRAR A. K., *Country Report: the Netherlands*, above-cited, p. 304.

[255] See Article 1063(1) DCCP, according to which: «[e]nforcement of an arbitral [domestic] award may be refused by the Provisional Relief Judge of the District Court only if the award or the manner in which it was made is manifestly contrary to public policy or good morals […]». See also *International Military Services v. Modsaf*, above-cited, para 3.3; *Kers v. Rijpma*, Dutch Supreme Court, 22 December 2006.

participants to arbitration (namely, parties and arbitrators) and the domestic courts, as it allows the arbitral tribunal to render a new award – which replaces the one that is subject to the court's scrutiny – and, at the same time, requires the Court of Appeal to consider the existence of those grounds for setting aside with respect to the amended award.

3.3. *Switzerland: the Swiss Private International Law Act (PILA)*

The rules governing international commercial arbitration in Switzerland are provided by Chapter 12 of the Swiss Private International Law Act ("PILA"), which specifically consists of Articles 176 to 194. ([256])

Although Switzerland has not formally adopted the UNCITRAL Model Law, its domestic provisions on arbitration largely reflect the international standards, especially when due process concerns are at issue. Indeed, pursuant to Article 182(3) PILA, ([257]) the arbitrators must ensure that the parties are treated equally and that they are granted the right to be heard, as the aforesaid provision represents a mandatory norm from which also the parties cannot derogate. ([258]) The exercise of these procedural rights takes place by mean of the adversarial principle, meaning that each party must be recognized the right to comment on the opponent's arguments, as well as to discuss and to rebut the evidence introduced by the counterparty.

---

[256] Switzerland follows a dualistic approach through which international and domestic arbitration are regulated separately. Indeed, provisions regarding domestic arbitration are contained in the Swiss Code of Civil Procedure ("SCCP"), whereas international arbitration is ruled by Chapter 12 of the PILA.

[257] Pursuant to Article 182 PILA: «1. [t]he parties may, directly or by reference to rules of arbitration, determine the arbitral procedure; they may also submit the arbitral procedure to a procedural law of their choice.
2. If the parties have not determined the procedure, the arbitral tribunal shall determine it to the extent necessary, either directly or by reference to a statute or to rules of arbitration.
3. Regardless of the procedure chosen, the arbitral tribunal shall ensure equal treatment of the parties and the right of the parties to be heard in adversarial proceedings».

[258] See e.g. *Tvornica* (2003) Swiss Federal Supreme Court, 130 III 35, para. 5; Swiss Federal Supreme Court, July 25, 2017, case n. 4A_80/2017, para. 3.1. See also KNOLL, J. *Article 182 PILS*, in *Arbitration in Switzerland: The Practitioner's Guide*, (ed.) Manuel Arroyo, 2nd edition, Kluwer Law International, 2018, p. 141.

As clearly emerges both in doctrine and case law, the arbitral tribunal must thus take due consideration of the way parties are treated during the proceeding, in particular when the final award is strongly based on specific evidence introduced in support of one of the parties' case. ([259]) In this context, indeed, the right of equal treatment – which, as outlined in chapter one, does not necessarily entail an identical treatment of the parties but rather a "similar" one – ([260]) is deemed to impose both a positive and negative obligation on the arbitral tribunal, as the latter shall «not grant to one party what it has refused to the other» and, in turn, it shall not «refuse one party what it has granted to the other». ([261])

Like the Italian and the Dutch experiences discussed above, also the Swiss legal framework considers the aforesaid fundamental rights as constituting an expression of the due process. As a consequence, the right to be heard and the right to be treated equally exercise a strong influence towards the tribunal's discretionary powers, since awards rendered by arbitral tribunals seated in Switzerland may be set aside by the Swiss Federal Supreme Court, if such fundamental rights are violated (Article 190 PILA).

More precisely – likewise the Italian legislative framework and differently from the Dutch one – the Swiss arbitration law provides an autonomous due process ground for setting aside the arbitral awards, which is expressly set forth in Article 190(2)(d) PILA, and which is thus formally distinguished from the public policy ground (Article 190(2)(e) PILA). ([262])

Limiting the following analysis only to the due process ground, it is possible to see from the Federal Tribunal case law that this principle is interpreted in a very

---

[259] In this field, some commentators have stressed that the arbitral tribunal cannot base its award on facts which the parties had no opportunity to address (KAUFMANN-KOHLER G. and RIGOZZI, A. *International Arbitration: Law and Practice in Switzerland*, Oxford University Press, 2015, p. 282). However, as it has been previously discussed in this work, the right to be heard is not unlimited, as it does not amount to an uncontrolled right to response to the opposing party's claims, as well as it does not impose the need to conduct an oral hearing. In case law, among the others, see Swiss Federal Supreme Court, 26 April 2016, 142 III 360, para. 4.1.1 and 4.1.2; ID., 31 October 2003, 4P.149/2003, para. 3.1; ID. 14 July 2003, 4P.114/2003, para. 2.2; ID., 17 March 2011, 4A_600/2010, para. 4.1.

[260] KAUFMANN-KOHLER G. and RIGOZZI, A. *International Arbitration: Law and Practice in Switzerland*, above-cited, p. 279. Swiss Federal Supreme Court, 31 January 2012, para. 4.1, 4A_360/2011.

[261] KNOLL, J. *Article 182 PILS*, in *Arbitration in Switzerland: The Practitioner's Guide,* above-cited, p. 143.

[262] Pursuant to Article 190(2)(d) PILA: «[t]he award may only be annulled: […] (d) if the principle of equal treatment of the parties or the right of the parties to be heard was violated». Instead, public policy grounds are autonomously provided in Article 190(2)(e) PILA.

restrictively manner when the annulment of arbitral awards is at stake. Indeed, as a matter of principle, the Swiss Supreme Court – which constitutes the only forum before which an award issued in Switzerland may be challenged – has shaped its pragmatic approach towards the challenges for setting aside arbitral awards by resorting to the provisions of the Swiss Constitution, ([263]) being its main role «to rectify severe procedural defects» rather than to review the merits of the case. ([264])

3.3.1. (*following*) *The Swiss case-law on the right to submit evidence*

The approach of the Swiss Supreme Court towards due process concerns has profoundly changed over time. In particular, the Court's orientation has shifted from a phase where the judges emphasized the "formal nature" of procedural guarantees, to the different – and more recent – phase where a greater importance has been recognized towards the existing interconnection between "substantial procedural rights" and the outcome of the arbitration.

Starting from the analysis of the traditional approach, which stressed the formal nature of the due process ground, the Supreme Court considered that the party seeking to challenge the award was not required to prove any potential chances of success of the arguments that were refused or disregarded by the arbitral tribunal, as it was sufficient for that party to demonstrate that its arguments were relevant and material, and therefore that a "formal denial of justice" had occurred. ([265])

More precisely, this traditional approach was based on two main principles. First, the right to be heard does not confer to the parties a real guarantee against a substantial denial of justice, as parties are only given the possibility to participate to a proceeding where they can obtain an independent and impartial assessment of

---

[263] Swiss Federal Supreme Court, 142 III 360, para. 4.1.1; ID., 26 April 2016, 142 III 360, paras. 4.1.1 and 4.1.2, above-cited, where the court held that «[t]he right to be heard, as guaranteed by art. 182(3) and 190(2)(d) PILA, does not in principle have a content different from that enshrined in constitutional law […]».

[264] KAUFMANN-KOHLER G. and RIGOZZI, A. *International Arbitration: Law and Practice in Switzerland*, above-cited, p. 88.

[265] Swiss Federal Supreme Court, 31 January 2012, 4A_360/2011, above-cited, para. 5.1.

their submissions by an arbitral tribunal. ([266]) Secondly, the challenging party must prove that the formal violation has concretely prevented it from presenting its arguments and evidence on an issue that is relevant to the proceeding.

Contrary to the aforesaid formal approach, the Swiss Supreme Court has started following a different tendency advancing in time, as it has begun considering that, in order to be successful, the challenge raised by the party must demonstrate that the alleged breach of fundamental rights has not only been relevant for its case, but also outcome-determinative. ([267])

It is thus easy to understand that such a different tendency adopted by the Swiss court necessarily exercises an impact on the way the judges deal with the assessment of due process violations, provided that the latter approach entails a more restrictive interpretation of the grounds for setting aside an arbitral decision, by highlighting the content and the effects of the proceeding's result. ([268])

Accordingly, when a party seeks the annulment of an arbitral award, it shall prove, at the same time, that its right to be heard has been breached with regard to an important point of the proceeding, and, most importantly, that the nature of the violation was concretely able to affect the outcome of the dispute. ([269]) In other words, to seek the application of the due process ground in annulment proceedings brought before the Supreme Court, the challenging party must demonstrate that the arbitral award has not taken into account some relevant aspects of the case and that

---

[266] Following the traditional approach, the Swiss Supreme Court has stated that: «[a] formal denial of justice only exists if the parties are prevented from participating in the proceeding, influencing it and putting forward their point of view, and thus their right to be heard is effectively undermined by the obvious oversight. This alone justifies annulling the decision without regard to the substantive chances of success of the complaint, since the right to be heard does not guarantee substantive correctness but the right of the parties to participate in the decision-making process» Swiss Federal Supreme Court, 10 September 2001, 127 III 576, para. 2(d).

[267] Swiss Federal Supreme Court, 29 January 2019, 4A_424/2018, para. 5.2.2.

[268] In doctrine, it has been considered that «[t]his new approach taken by the Swiss Supreme Court has set the scene for a de facto change of the nature of the right to be heard» (GABRIEL S. and SCHREGENBERGER A., *The new Swiss approach to the right to be heard – balancing challenging fairness and efficiency concerns*, in *Indian Journal of Arbitration Law*, vol. 8, issue, 2, 2020, p. 55). The tendency to adopt a restrictive approach is also described in GEISINGER E. and MAZURANIC, A. *Challenge and Revision of the Award in International Arbitration in Switzerland: A Handbook for Practitioners*, (eds.) Elliott Geisinger, Nathalie Voser and Angelina M. Petti, 2nd ed., Kluwer Law & Business, 2013, p. 244; HURNI, C., *How Arbitration-Friendly is the Swiss Federal Supreme Court?*, in *New Developments in International Commercial Arbitration*, (eds.) Christoph Müller and Antonio Rigozzi, 2012, p. 79 and 89.

[269] See *Cañas* case, Swiss Federal Supreme Court, 133 III 235, para. 5.2, where the Court held that the subsidiary arguments presented by the opposing party were likely to influence a different outcome of the arbitral proceeding.

such rejected or disregarded elements could have impacted the outcome of the arbitral proceeding in favor of the party seeking the annulment.

In this context, when due process concerns are considered in relation to evidentiary issues, it is worth stressing that the right to be heard is however subject to specific limitations. As a basic and common principle, while assessing the admissibility of evidence to the proceeding, the arbitrators must thus verify whether a party's procedural request is material for the resolution of the dispute, as it is undisputed that parties are not entitled to adduce evidence in an unlimited way. It follows that the arbitrators' decision to refuse to take evidence shall never be questioned in those cases where the submitted evidence is not relevant for the resolution of the case (*e.g.* because the facts that it supports are already proven by other evidence that has already been recorded), nor able to prove material facts. ([270])

Moreover, from the recent case law of the Swiss Federal Supreme Court, it is possible to see that parties must prove their allegations by means of evidence that must be presented to the proceeding in due time and in accordance with the applicable formal rules. ([271]) Otherwise, the decision as whether to refuse (or not) the late or non-conforming evidence falls under the scope of the arbitral discretion.

In this scenario, for instance, among the reasons that may justify the tribunal's refusal or disregard of certain evidence, the right to be heard is deemed to be breached when: 1) the parties submit their evidence after the time limits set by the tribunal or provided by the institutional rules ([272]); 2) a party merely criticizes the way the tribunal has applied the rules on the burden of proof; ([273]) 3) a party merely argues that the arbitrators have incorrectly weighted the evidence when each party has been anyway granted the opportunity to rebut to the other's evidence. ([274])

---

[270] Swiss Federal Supreme Court 23 January 2012, 4A_526/2011 and 4A_528/2011, para. 2.1..
[271] Swiss Federal Supreme Court, 11 April 2019, 4A_54/2019 para. 5.1. BERGER B. and KELLERHALS F., *International and Domestic Arbitration in Switzerland*, 3rd edition, 2015, p. 462.
[272] Indeed, the tribunal's decision not to confer the parties extra time to file additional evidence cannot be considered *per se* a violation of the party's right to be heard. In case law, among the others, see Swiss Federal Supreme Court18 October 2011, 4A_214/2011, para. 2.3.2; ID., 5 August 2013, 4A_274/2013, para. 3.2; ID., 20 July 2011, 4A_162/2011, para. 2.3.2 For a comment in doctrine, GIRSBERGER D. and VOSER N., *International Arbitration in Switzerland*, 2nd ed., 2012, p. 337.
[273] Swiss Federal Supreme Court, 18 March 2010, 4A_584/2009, para. 3.3.
[274] Swiss Federal Supreme Court, 14 July 2003, 4P.114/2003, para. 2.2; *B AS et C AS v. A SpA*, Swiss Federal Supreme Court, 22 February 1999, in *ASA Bulletin*, 1999, vol. 17, issue 4, 537.

However, the extent of the tribunal's discretion might suffer a limitation when the resolution of the dispute requires a specific and technical knowledge in order to deal with certain issues. Therefore, in such a circumstance, the right to be heard is deemed to be granted if the arbitral tribunal expressly obtains the opinion of an expert on the specific matter that cannot be wisely resolved by the arbitrators themselves. A similar circumstance has effectively occurred in a specific case, where the Swiss Federal Supreme Court has found a concrete breach of one of the party's right to be heard to have occurred, provided that the arbitral tribunal had refrained from obtaining the opinion of an expert with respect to an issue that fell outside its knowledge. The general principle arising from the aforementioned decision is thus that the arbitrators cannot substitute themselves in place of the opinion of an external subject who is qualified to assess a specific (and technical) matter. ([275])

Another limitation related to the exercise of the right to be heard, supported in most of the Swiss case law, regards the fact that it does not automatically confer the parties a right to obtain a reasoned award, but it only imposes upon the arbitrators a minimal procedural duty to take into account the relevant issues of the case. ([276]) This means that the potential insufficiency (or even absence) of a justification does not necessarily amounts to a breach of the parties' due process rights. Accordingly, if an argument is objectively irrelevant for the decision of the case, the arbitrators are not asked to justify their refusal; whereas, when the

---

[275] Swiss Federal Supreme Court, 28 March 2007, para. 3.1, 4A_2/2007. See also ARROYO M., *Article 190 PILS*, in *Arbitration in Switzerland: The Practitioner's Guide*, (ed.) Manuel Arroyo, 2nd edition, Kluwer Law International, 2018, p. 314. With regard to the importance that experts' opinion has in arbitral proceedings, it must however be stressed that, following the opinion of the Swiss Federal Supreme Court, the arbitral tribunal is never requested to obtain the opinion of an expert in cases where none of the parties has specifically requested it. In other words, the arbitral tribunal cannot be called to remedy to the parties' failures in presenting evidence to the proceeding. Indeed, the fact that the parties are entitled the right to present their case means that it is up to themselves, and not to the arbitral tribunal, to find and to present the necessary evidence in support of their case. See, 19 June 2014, para. 3.2.2 4A_597/2013.

[276] Swiss Federal Supreme Court, 134 III 186, 187; ID., 116 II 373, 375. See also KAUFMANN-KOHLER G. and RIGOZZI, A. *International Arbitration: Law and Practice in Switzerland*, above-cited, 515-516. In the *Errani* case, Swiss Supreme Court, 4A_424/2018, para. 5.2.1, the Court has held that «[t]he right to be heard […] does not require that an international arbitral award be reasoned. However, jurisprudence has inferred a minimum duty on arbitral tribunals to analyse and deal with the relevant issues. This duty is violated if an arbitral tribunal inadvertently or due to a misunderstanding fails to consider allegations, arguments, evidence or offers of evidence which have been raised by a party and are important for the award».

omission regards a pertinent argument, it is advisable for the arbitrators to justify, at least in brief, the fundamental reasons of their decision. ([277])

Shifting the view to the recognition and enforcement of foreign arbitral awards (namely, those rendered by arbitral tribunals which are not seated in Switzerland), it must be clarified that, pursuant to Article 194 PILA, ([278]) the latter are governed by the provisions of the New York Convention. ([279]) For the aim of this work, it is thus worth noting that the Supreme Court's case law considers any violation of the right to be heard to fall under the scope of Article V(1)(b) of the New York Convention. ([280])

Evidence shows that the domestic case law has mainly followed a pro-enforcement approach of foreign arbitral awards, as the grounds for refusing recognition and enforcement under Article V of the New York Convention have been interpreted restrictively. For this reason, the Swiss courts are deemed to be very "arbitration-friendly". Moreover, even if the ground for refusing recognition and enforcement of a foreign arbitral award in Switzerland has been raised only in a few cases, it is likely that, when the domestic courts will be asked to assess such ground, the scope of the right to be heard under the New York Convention will not go beyond the guarantees provided by Article 182(3) PILA. ([281])

As long as many similarities can be found between the content of Article V(1)(b) of the New York Convention and the guarantees provided by the Swiss *lex arbitri*, the considerations above discussed with regards to the Supreme Court's approach on the requests for setting aside arbitral awards under Article 190 PILA

---

[277] Even if some procedural rules require that awards must be reasoned (think, for example, at the ICC Rules), this fact is not relevant *per se*, as with regard to the Swiss legal framework an award can only be annulled if a breach of the applicable rules that violates the parties' fundamental due process rights has concretely occurred, thus being necessary to assess whether the violation has materially infringed one of the principles set forth in the Swiss arbitration law. See CANAL A. L. and DUVANEL V. A., *Annulment of Commercial Arbitral Awards by State Courts*, above-cited, p. 342; KAUFMANN-KOHLER G. and RIGOZZI, A. *International Arbitration: Law and Practice in Switzerland*, above-cited, p. 519.

[278] Pursuant to Article 194 PILA: «[t]he recognition and enforcement of foreign arbitral awards is governed by the New York Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards».

[279] The fact that Swiss courts are arbitration-friendly amounts to their adoption of what has been considered as a «liberal, pragmatic and pro-enforcement approach to the New York Convention» (KUNZ, C. *Enforcement of Arbitral Awards under the New York Convention in Switzerland*, 2016, in *ASA Bulletin*, vol. 34, issue 4, p. 864).

[280] Swiss Federal Supreme Court, 26 July 2013, 5A_68/2013, para. 4.2.1.

[281] This opinion is supported also by HOHLER, S. M., *Country Report: Switzerland*, above-cited, p. 384.

might thus be extended and used as a guideline also for the assessment of due process issues which may raise under the application of the New York Convention.

To conclude, in compliance with the approach recently adopted by the Swiss Supreme Court, it seems that annulment actions (as well as, for the above-discussed reasons, those regarding the recognition and enforcement of foreign arbitral awards) are not likely to succeed in Switzerland, unless exceptional, relevant and outcome-determinative breaches have occurred during the arbitral proceeding. In this latter case, the same party seeking for annulment bears the duty to prove such violations. For the purposes of this work, the aforesaid substantial approach constitutes the evident expression of an arbitration-friendly environment, which is more and more aimed at fostering the efficiency of the arbitral proceeding, thus limiting the domestic courts' intervention to what is strictly necessary to safeguard the parties' essential due process rights. ([282])

3.4. *The United Kingdom: the "reasonable opportunity" to present ones' case under the Arbitration Act*

The analysis of the case law conducted so far has outlined the approach followed by the domestic courts from civil law tradition towards the set aside and the refusal of recognition and enforcement of arbitral awards. Shifting now the view to the common law experience, the following examination will start considering the case of England and Wales.

Under the English Arbitration Act 1996, the legal framework governing international commercial arbitration provides norms aimed at regulating the annulment, recognition and enforcement of arbitral awards. Like the other countries that have been previously discussed in this work, also England has not adopted the Model Law. However, a remarkable distinction from the previously analysed cases can be seen in the fact that, with regard to England and Wales, the English

[282] GABRIEL S. and SCHREGENBERGER A., *The new Swiss approach to the right to be heard – balancing challenging fairness and efficiency concerns*, above-cited, p. 60; CANAL A. L. and DUVANEL V. A., *Annulment of Commercial Arbitral Awards by State Courts*, above-cited, p. 353; HOHLER, S. *Country Report: Switzerland*, p. 397.

arbitration law adopts a more restrictive approach towards due process concerns, in comparison to what is provided by the Model Law.

Indeed, without expressly mentioning any party's right to be heard, Section 33 of the Arbitration Act imposes the duty upon the arbitral tribunal to «act fairly and impartially as between the parties, giving each party a *reasonable* opportunity of putting his case and dealing with that of his opponent» (emphasis added), as well as it introduces the arbitrators' and parties' duty to avoid unnecessary delays or expenses. ([283])

In this scenario, the legislator's decision to adopt the term "reasonable" – instead of the "full opportunity" expressly provided by Article 18 of the Model Law – constitutes an important element that has necessarily influenced the domestic courts' approach over time, and which has in practice delimited the scope of the (implicit) parties' right to be heard. ([284])

According to Section 68(2)(a) of the Arbitration Act, the failure of the tribunal to comply with the aforesaid duties enshrined in Section 33 may constitute a ground for setting aside actions in cases where such a failure implicates a «*serious irregularity* affecting the tribunal, the proceedings or the award» (emphasis added). It is thus possible to state that not every breach of the aforesaid Section 68 may lead to the annulment of an arbitral award, being instead necessary for the challenging party to demonstrate that: 1) the contested conduct is linked to one of the irregularities exhaustively listed in Section 68(2) of the Arbitration Act – among which the tribunal's failure to comply with the duties of Section 33 stands out; ([285])

---

[283] Pursuant to Section 33 of the Arbitration Act: «[t]he tribunal shall: (a) act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and (b) adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined».

[284] According to some commentators, «[t]he term "a reasonable opportunity" conveys an objectively viewed balance of what is fair to the party, but is also compatible with expedition and economy» (HARRIS B., PLANTEROSE, R and TECKS, J., *The Arbitration Act 1996: A Commentary*, 2014, 5th edition, Section 33(1)(a)). A similar approach based on "reasonableness" is also provided by the ICC Rules, pursuant to Article 22(4), and, as above seen, by the revised version of Article 816-bis of the Italian Code of Civil Procedure.

[285] See *X v. Y* [2018] England and Wales High Court (Comm.), no. 741, para. 26, where the court held that «a successful challenge under section 68 of the Arbitration Act requires proof of a procedural irregularity falling into one or more of the categories exhaustively listed in section 68(2) which has caused or will cause a "substantial injustice" to the challenging party».

and 2) that such an irregularity is "serious" and has thus caused a "substantial injustice" towards the applicant. ([286])

However, being quite impossible for the applicant to prove that the result of arbitration would have necessarily been different if a certain arbitral conduct had not occurred, courts agree on the fact that it is sufficient for the challenging party to show that, «had he had an opportunity to address the point, the tribunal might well have reached a different view and produced a significantly different outcome». ([287])

3.4.1. (*following*) *The English case-law on the arbitrators' duty to act fairly and impartially*

For the aim of this work, the violations of the duty to act fairly that are provided by Section 33 of the Arbitration Act – and which are also contemplated in Section 68(2)(a), as above discussed – must be taken into account by the arbitral tribunal anytime an alleged breach of due process emerges with respect to matters of procedure or evidence. ([288])

However, case law shows that English courts have been reluctant towards the attempts undertaken by those parties who invoke the application of Section 68, and which are mainly based on the alleged failure of the arbitral tribunal to comply with the aforesaid duty provided by Section 33, as they are frequently found to challenge the arbitral awards improperly. The outcome of such annulment

---

[286] The "serious irregularity" requirement has been widely emphasized by English Courts. Among the others, see *Lesotho Highlands Development Authority v. Impregilo SpA and ors* [2005] England and Wales, House of Lords. See also *Navigator Spirit SA v. Fire Oceans Salvage SA* [2018] England and Wales High Court (Comm.) no. 1108, para. 50, and *Terna Bahrain Holding Company WLL v. Al Shamsi* [2012] England and Wales High Court (Comm.) no. 3283.

[287] *Grindrod Shipping PTE Ltd v. Hyundai Merchant Marine Co. Ltd* [2018] England and Wales High Court (Comm.) no. 1284, para. 40(7), citing also *Terna Bahrain*, above-cited; *Reliance Industries Ltd and another v. The Union of India* [2018] England and Wales High Court (Comm.) no. 822, paras 12–15.

[288] The fact that grounds provided in Section 68 are deemed to involve always "due process considerations" has been supported in case law, for instance in *UMS Holdings and others v. Great Station Properties and others* (2017) England and Wales High Court (Comm.), para. 28.

proceedings is mainly proof of the high degree of deference that the English courts pay towards the tribunal's discretion in managing arbitration. ([289])

The approach adopted by domestic courts is based on the fact that the aim of Section 68 is to grant due process rights, whereas it does not seek to ensure the "correctness" of the decision adopted by the arbitral tribunal. This implicates that courts tend to consider the "substantial injustice test" as operating in support of the arbitral process, ([290]) instead of as a way to interfere with it. ([291]) In other words, the substantial injustice does not depend on the arbitrators' adoption of a "wrong" conclusion, but instead such an injustice must have been caused by an inappropriate conduct assumed by the tribunal, which, had it not been adopted, would have led to a different conclusion of the proceeding in favor of the applicant. ([292])

Accordingly, courts have dismissed the challenging party's requests to set aside arbitral awards, for instance, when the arbitral tribunal had: 1) failed to ask questions to the respondent's witnesses, as «it cannot be said that an arbitrator must always put points to a party's witness in the absence of another party»; ([293]) 2) relied on privileged material, when the contested material has been voluntarily produced in the proceeding by the challenging party itself; ([294]) 3) failed to take into account relevant evidence, as while it is true that arbitrators have the duty to decide on essential issues presented to them, such a duty does not entail that they have to deal

---

[289] In this field, in *A v. B* [2018] England and Wales High Court (Technology and Construction) no. 3366, para. 34, it has been held that «clearly where discretion is involved the court must be alive to the wide latitude given to the tribunal as to how it exercises its powers».

[290] *Abuja International Hotels Ltd v. Meridien SAS* [2012] England and Wales High Court (Comm.) no. 87, paras 47–52; *Sonatrach v. Statoil Natural Gas* [2014] England and Wales High Court (Comm.), no. 875, para. 11; *Secretary of State for the Home Department v. Raytheon Systems Ltd* [2015] England and Wales High Court (Technology and Construction) no. 311, para. 33(d).

[291] *St. George's Investment Co v. Gemini Consulting Ltd* [2004] England and Wales High Court, no. 2353.

[292] In this context, the Court of Appeal of England and Wales stated that the court deciding over the challenge shall consider if the outcome would have been materially different had the opposing party argued its case without the alleged violation of its right to be heard (*Warborough Inv. Ltd. v. S. Robinson & Sons (Holdings) Ltd*. [2003] England and Wales Court of Appeal (Civ.) no. 751 [57] «the court should try to assess how the applicant would have conducted his case but for the irregularity».

[293] *Interprods Ltd v. De LaRue International Ltd*, [2014] England and Wales High Court (Comm.) no. 68, para. 36.

[294] *Double K Oil Products 1996 Ltd v. Neste Oil OYJ* [2009] England and Wales High Court (Comm.) no. 3380. In particular, in this case the tribunal had been previously asked to issue an order of production of the material in question, but it had refused to accept such a request.

«with each point made by a party in relation to those essential issues or refer to all the relevant evidence». ([295])

Shifting the view to the grounds for refusal of recognition and enforcement of arbitral awards, it is possible to find them in Section 103(2) of the Arbitration Act, which incorporates the same grounds contained in the New York Convention. For the purposes of this work, it is worth noting that Section 103(2)(c), which – embodies the content of Article V(1)(b) of the aforesaid Convention – grants the protection of the parties' ability to present their case. ([296])

However, also in this field, evidence shows that examples of successful challenges are rare. Indeed, as a general principle, domestic courts have held that the party seeking for the refusal of recognition and annulment of an arbitral award must demonstrate that the concrete inability of presenting its case has derived from matters that where "outside its control". ([297]) The court will thus likely reject a request to refuse the enforcement when it is possible to assess that the opposing party has not taken advantage of the opportunity granted to him to present the case, due to his own fault – for instance, because it has not required to rebut to the expert testimony that has been introduced to the proceeding in support of the counterparty's case. ([298]) In turn, due process rights will be safeguarded through the

---

[295] *UMS Holdings and others v. Great Station Properties and others*, above-cited, para 28. In the same circumstance, the court has stated that the manner in which the arbitral tribunal decides how to assess and evaluate evidence is a matter that stays on the tribunal itself and in relation to which the court has no right to interfere. Moreover, in another case concerning the alleged tribunal's lack of consideration of evidence in support of certain conclusions contained in the award, it has been held that such an arbitral conduct could, but only in exceptional cases, give raise to a challenge under Section 68, as a breach of the duty set forth in Section 33. However, for this to happen, it is necessary, for instance, that the arbitrator's conduct has derived from a misunderstanding or from a genuine error that has made him overlook that evidence. See *Arduina v. Celtic Resources Holdings PLC*, [2006] England and Wales High Court (Comm.), no. 3155.

[296] The legislator's decision to reproduce the due process grounds contained in the New York Convention into the English *lex arbitri* is proof of the strong pre-disposition to advantage the enforcement of awards rendered under the Convention. Accordingly, the Supreme Court held that, in this field, «the trend, both national and international is to limit reconsideration of the findings of arbitral tribunals both in fact and in law» (*Dallah Real Estate and Tourism Holding Co v. The Ministry of Religious Affairs, Govt of Pakistan* [2010] Supreme Court of the United Kingdom, no. 46, para 101.

[297] *Minmetals Germany GmbH v. Ferco Steel Ltd* [1999] England and Wales High Court (Comm.).

[298] See *Eastern European Engineering Ltd v. Vijay Construction (Proprietary) Ltd* [2018] England and Wales High Court (Comm.) no. 2713, where the court held that the opposing party (the defendant) had not demonstrated that it was prevented from presenting his case due to issues that were outside his control, given that each party had been granted the same opportunity to rely on expert evidence. More precisely, even if the claimant's expert evidence had been produced also after the expert witness had already been cross-examined at the main evidentiary hearing, the court found

court's intervention when extreme and external circumstances have occurred, which thus justify the refusal of enforcement.

An example in this field can be taken by reference to the *Kanoria and others v. Guinness* case, ([299]) where the enforcement of the arbitral award was refused by the court on the basis that the arbitration had been conducted (after a series of adjournments) in the defendant's absence, even if the latter had demonstrated that its incapacity to take part to the proceeding derived from his serious illness. Therefore, being the aforesaid illness outside the control of the opposing party, the judge found that the arbitral tribunal's conduct had effectively and unlawfully prevented that party from presenting its case.

Due to this well-rooted pro-arbitration approach, domestic case law in the UK shows a general tendency to foster arbitral decisions guided by procedural economy and efficiency concerns, in cases where the procedural objection raised by one of the parties does not concretely add any further guarantee towards the party itself.

For instance, in the *Omnium de Traitement et de Valorisation SA v. Hilmarton* case the judge observed that the second arbitrator's decision to refuse to hear oral evidence – thus relying only a short hearing taken for the parties' closing submissions – had not breached the party's right to be heard, as «the facts of main issue had already been examined in detail by the first arbitrator», and none of the parties had requested to submit new evidence. ([300])

Therefore, what mainly matters for the purposes of this work is that, when balancing potential due process concerns and the efficiency of the arbitral proceeding, English courts will tend to justify the arbitral decisions when reasons of procedural economy are found to be at the basis of the tribunal's conduct, also considering that Section 33 of the Arbitration Act expressly imposes the arbitrators' duty to avoid unnecessary delays and expenses.

In conclusion, it is possible to find that English courts have adopted a pro-enforcement approach by showing a certain deference towards arbitral decisions

---

that the defendant had voluntarily decided not to call an expert testimony to rebut to the counterparty's one and, therefore, was not denied an equal treatment.

[299] *Kanoria and others v. Guinness* [2006] England and Wales Court of Appeal (Civ.) 222.

[300] *Omnium de Traitement et de Valorisation SA v. Hilmarton* [1999] England and Wales High Court (Comm.) 146, 151c., 1 e-g.

and by limiting the parties' attempts to compromise their effects, when serious and outcome-determinative circumstances are not substantially found.

This courts' tendency to confirm the outcome of the arbitral proceeding also complies with the Arbitration Act's provisions which expressly contemplate a series of procedural mechanisms aimed at ensuring the effectiveness of arbitral awards, by introducing remedies that must have been exhausted by the parties before challenging the award. More precisely, the Arbitration Act imposes that a request to set aside based on an alleged serious irregularity cannot be advanced before domestic courts, unless the applicant has already exhausted any available arbitral process of appeal or review and any other instrument set forth by the Arbitration Act (*e.g.* provisions regarding the possibility to correct or to make an additional award). ([301])

However, even if English courts have set a high threshold over time, case law also shows that, when the particular circumstances of the case so require, judges will necessarily intervene in order to grant the party's fundamental due process rights, where the latter has not been granted a reasonable opportunity to present its case for matters that fell outside its own control (*e.g.*, as above-seen, a serious illness).

3.5. *Singapore: the International Arbitration Act (IAA)*

In Singapore, international commercial arbitration is regulated by the International Arbitration Act ("IAA") and by the provisions of the Model Law, being the latter expressly recalled in Section 3(1) of the IAA. ([302])

---

[301] Sections 57 and 70(1)-(2) of the Arbitration Act. Moreover, according to Section 70(4): «the court may order the tribunal to state the reasons for its award in sufficient detail», as this instrument may help the requested court in assessing the grounds for setting aside the award in light of the further explanations provided by the arbitral tribunal.

[302] Pursuant to Section 3(1) of the IAA: «[s]ubject to this Act, the Model Law, with the exception of Chapter VIII of the Model Law, has the force of law in Singapore». This provision is consistent with the fact that, differently from the other jurisdictions above-described, Singapore is a Model Law country (as well as a contracting State of the New York Convention). In this field, it must be clarified that, even if the aforesaid Section 3(1) excludes the application of Chapter VIII of the Model Law – which contains Articles 35 and 36 – nonetheless the Singapore Court of Appeal has held that a party seeking to obtain the refusal of enforcement of a domestic award may act under Section 19 of the IAA, by invoking the same grounds provided for in Article 36(1) of the Model Law. See *PT First*

In this area, case law shows a general tendency of the courts to embrace a pro-arbitration approach, as domestic judges exhibit a significant deference towards the arbitral tribunal's discretionary powers, when they are called to decide upon requests for setting aside and/or refuse recognition and enforcement of arbitral awards. Such a deference towards arbitral tribunals is based on Article 19(2) of the Model Law, which expressly states that, unless otherwise agreed by the parties, arbitrators are conferred wide freedom in establishing procedural rules. ([303])

Moreover, the high degree of deference that domestic courts show towards the tribunal's discretionary powers constitutes an expression of the principle of "minimal curial intervention" in arbitral proceedings, in compliance to Article 5 of the Model Law. ([304]) Accordingly, courts have frequently emphasized that «the grounds for curial intervention are narrowly circumscribed», ([305]) and therefore parties must demonstrate that the breach is evident, in order to meet the high threshold set by courts and to raise a successful challenge.

Regarding the grounds for setting aside, which are generally contemplated in Section 24 of the IAA and in Article 34 of the Model Law, ([306]) an important and additional element differs the Singapore *lex arbitri* from the other legal frameworks analyzed so far: the violation of the so-called "rules of natural justice". ([307]) Indeed, such a ground is expressly provided in Section 24(b) of the IAA and it is additional to the criteria contemplated in Article 34 of the Model Law.

However, the ambiguous wording of the concept "natural justice" has required the intervention of the Singapore courts to interpret the scope and the

---

Media TBK v. Astro Nusantara International BV and others and another (2013) Singapore Court of Appeal, para. 99.

[303] Pursuant to Article 19(2) of the Model Law: «[…] the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of goods, other property or documents». In this context, the wide procedural powers recognized towards the arbitral tribunal have been considered by domestic courts as one of the foundational elements of the international arbitral process. See *Triulzi Cesare SRL v. Xinyi Group (Glass) Co Ltd* (2014) Singapore High Court, CLOUT case 1472, para. 131.

[304] Article 5 of the Model Law states that «[i]n matters governed by this Law, no court shall intervene except where so provided in this Law».

[305] *Triulzi Cesare SRL v. Xinyi Group (Glass) Co Ltd*, above-cited, paras. 37-38.

[306] In particular, as already seen in chapter 1 of this work, the content of Article 34(2)(a)(ii) of the Model Law mirrors Article V(1)(b) of the New York Convention.

[307] A similar ground is rarely adopted by other jurisdictions. For instance, it can be found – as a ground of public policy violations – in Section 34(6) of the New Zealander Arbitration Act 1996, in Section 19 of the Australian International Arbitration Act 1974.

extent of this principle, ([308]) as well as to prevent parties from weaponizing due process guarantees to gain their own procedural advantages. For these reasons, being it undisputed that "natural justice" embodies the parties' rights to be treated equally and fairly, as well as to be granted the opportunity to be heard, the Singapore Court of Appeal has set out a series of criteria that must necessarily occur for a breach of the natural justice to exist.

According to the decision held in *Soh Beng Tee v. Fairmount Development*, ([309]) the party challenging the award on such ground must thus demonstrate: 1) which rule of natural justice was breached; 2) how the tribunal's conduct has amounted to that breach; 3) the existence of a "causal nexus" between the alleged breach and the final outcome; 4) the concrete prejudice suffered by the party itself. ([310])

In light of the above, a practical and substantial overlap has thus been found between the ground for setting aside provided in Section 24(b) of the IAA and Article 34(2)(a)(ii) of the Model Law, as they both deal with due process concerns whose relevancy might justify the annulment of an award. ([311])

It is worth noting that due process violations represent the most invoked grounds to challenge arbitral awards in Singapore. However, as a general principle, judicial decisions have repeatedly sustained that parties shall be recognized a "reasonable" opportunity to present their case, which must be necessarily balanced with the other fundamental principles of arbitration, such as the tribunal's duty to conduct the arbitration expeditiously and with limited costs.

---

[308] Scholars have considered the origins of the concept of natural justice as deriving from the English common law tradition and embedded in the Latin sayings: *nemo judex in causa sua* and *audi alteram partem*. See SHAHDADPURI, K. H., *The Natural Justice Fallibility in Singapore Arbitration Proceedings,* in *Singapore Academy of Law Journal*, 2014, vol. 26, no. 2, p. 563.

[309] *Soh Beng Tee & Co Pte Ltd v. Fairmount Development Pte Ltd* (2007), Singapore Court of Appeal, CLOUT case 743, para.42.

[310] *Soh Beng Tee & Co Pte Ltd v. Fairmount Development Pte Ltd,* above-cited, para. 29, citing *John Holland Pty Ltd v Toyo Engineering Corp (Japan)* (2001) Singapore High Court, at [18]. With a focus to the negative effects that the award must have produced against the challenging party, some authors have stressed the fact that «[t]he breach of natural justice must be so grave to amount to a "prejudice" for it to be successfully set aside by the court» (SHAHDADPURI, K. H., *The Natural Justice Fallibility in Singapore Arbitration Proceedings*, above-cited, p. 567).

[311] In this sense, the Singapore courts tend to interpret Section 24(b) of the IAA and Article 34(2)(a)(ii) of the Model Law as constituting a single ground for setting aside an arbitral award. See *Government of the Republic of the Philippines v. Philippine International Air Terminals Co, Inc*., (2006) Singapore High Court, para. 18, where the Singapore High Court held that «[…] the ground for setting aside an award on the basis that the party applying was unable to present its case is the same as the ground arising from a breach of the rule of natural justice».

In the attempt to balance these competing interests, the Singaporean courts have stressed the importance of looking at the concrete content of the arbitration agreement concluded by the parties, as arbitrators' case management powers must be interpreted in light of the parties' covenant to arbitrate their dispute. ([312]) Accordingly, if parties have agreed to settle the dispute expeditiously, they won't likely be afforded the same reasonable opportunity to present their case as if they had agreed to conduct a full-length arbitration. ([313])

From a different perspective, as above-mentioned, courts have also stressed the need for the challenging party to demonstrate the existence of a "causal nexus" between the alleged violation and the prejudice suffered by the party itself, due to the adverse award. ([314])

Such an additional requirement is expressly set forth in the aforesaid Article 24(b) of the IAA, pursuant to which the breach must have occurred «*in connection* with the making of the award by which the rights of any party have been prejudiced» (emphasis added). In particular, the causal nexus has been invoked by domestic courts to develop an "appreciable impact test", aimed at assessing whether a certain threshold has been met, as to prove that the breach has substantially influenced the final award. ([315])

---

[312] *China Machine New Energy Corp. v. Jaguar Energy Guatemala LLC and Another*, (2018) Singapore High Court, para. 118(a). The same case has been recently judged also by the Singapore Court of Appeal (see *China Machine New Energy Corp v. Jaguar Energy Guatemala LLC and Another* (2020), Singapore Court of Appeal), where the court held that, when called to decide upon due process violation, judges must consider if the arbitral tribunal's conduct – simply, what it did or did not – falls within the range of reasonable and fair-minded tribunal would do in same circumstances.

[313] *China Machine New Energy Corp v. Jaguar Energy Guatemala LLC and another*, above-cited,para. 125-127.

[314] *Triulzi Cesare*, above-cited, para. 126; *John Holland Pty Ltd v. Toyo Engineering Corp (Japan)* above-cited, para. 18.

[315] In this context, for instance, courts have found the breach not to have occurred where the matters related to the alleged violation are not considered in the final reasoning of the tribunal and, therefore, have not represented a basis on which arbitrators have established their decision. See *Soh Beng Tee & Co Pte Ltd v. Fairmount Development Pte Ltd*, above-cited, para. 77-81-130-139. Moreover, being it quite impossible for a party to demonstrate that, had the breach not occurred, the award would have inevitably been different, Singaporean courts agree on the fact that the claimant shall demonstrate that the contested violation "could" have reasonably led to a different outcome. See *L W Infrastructure Pte Ltd v. Lim Chin San Contractors Pte Ltd* (2012) Singapore Court of Appeal, paras. 51-54.

3.5.1. (*following*) *The Singaporean case-law on cross-examination, document production and the exclusion of evidence*

In case law, several examples can be mentioned as to concretely assess how parties and arbitral tribunals have applied the above-mentioned principles in cases regarding due process challenges, especially when evidentiary issues were at stake.

For instance, about witness testimony, the Singapore Court of Appeal has rejected a party's argument that it had been prevented from cross-examining the counterparty's expert witness, having the challenging party not expressly requested the possibility to cross-examine that expert, and having both parties been granted the same opportunity to present their experts' written opinions. ([316])

Another alleged violation of a party's right to present its case has also been dismissed by the Singapore High Court in a dispute involving the presentation of documents containing sensitive information. In the case at hand, the possibility granted to one of the parties to analyse the counterparty's sensitive documentation on an "attorney's eye only" basis only – meaning that the documents would only be made available to the other party's external counsel and expert witnesses, but not to its employees – ([317]) has been deemed by the court as sufficient in order to safeguard both parties' equal treatment, without jeopardizing one of the party's right to secure the confidentiality of that sensitive information. ([318])

Moreover, with a view to balance the parties' due process rights and the efficiency of the proceeding, the tribunal's decision to exclude one party's evidence does not automatically amount to an unreasonable and prejudicial conduct, especially when the refusal is reasoned on the fact that such evidence was produced by the challenging party after the expire of the deadline set by the tribunal.

A similar circumstance specifically occurred in the *China Machine New Energy Corp. v. Jaguar Energy Guatemala LLC and Another* case, where the

---

[316] *Kempinski Hotels SA v. PT Prima International Development* (2012) Singapore Court of Appeal, paras 63-67.

[317] Such an "attorney's eye only" mechanisms had already been mentioned in this work (see *supra* note 6).

[318] See *China Machine New Energy Corp. v. Jaguar Energy Guatemala LLC and Another*, above-mentioned. In particular, the challenging party argued that its right to be treated equally had been breached, provided that the counterparty was in possession of a huge volume of documents that had not been disclosed in the proceeding, with the result that the claimant had to suffer a heavier burden of proving its case.

Singapore High Court dismissed the claimant's argument that it had suffered a breach of the equal treatment. In particular, the court assessed that the tribunal had excluded the claimant's expert report as it had been submitted after the timeline set by the same tribunal – and to which the parties had expressly adhered – whereas the counterparty's expert testimony had been presented to the arbitrators before the aforementioned deadline had elapsed, in lack of any objection raised by the claimant. ([319])

On the contrary, a decision to set aside an award due to a breach of the right to be heard – already issued by the High Court – has been recently confirmed by the Singapore Court of Appeal in the *CBS v. CBP* case. ([320]) Most importantly, from this circumstance it has emerged that «the expeditious resolution of the dispute is but part of the considerations which an arbitrator must have in mind when determining the process to be adopted; it cannot be the paramount consideration above all other considerations, such as the need to ensure a just determination of the dispute» ([321])

From a general perspective, it is necessary to outline that the same considerations regarding the set aside of arbitral awards also apply to challenges seeking the refusal of enforcement of foreign arbitral awards (namely, those issued by arbitral tribunals seated outside Singapore) pursuant to Section 31(2)(c) of the IAA, which mirrors the grounds contained in Article V(1)(b) of the New York Convention. ([322])

Importantly, it must be clarified that the set aside of international arbitration awards made in Singapore is instead governed by Article 36(1)(a)(ii) of the Model Law, as these latter decisions fall outside the definition of "foreign" arbitral awards, according to Section 27(1) of the IAA.

---

[319] *China Machine New Energy Corp,* above-cited, para 189. The decision of the court took also into account the fact that the claimant had obtained a series of extensions of the timeline by the tribunal, even if it contested that such additional time was not sufficient nor as long as requested by that party.
[320] *CBS v. CBP* (2021), Singapore Court of Appeal. The case concerned a commercial dispute between CBP (an Indian Company, the "Buyer") and CBS (a Singaporean bank, the "Bank"), where the Buyer argued a violation of due process, as the arbitrator had breached the duty to conduct a fair hearing, whereas the Bank sustained that the arbitrator's procedural decisions constituted a legitimate exercise of its discretionary power.
[321] *CBP v. CBS* (2020) Singapore High Court, para. 71.
[322] LIM, J., *Country Report: Singapore*, in *Due Process as a Limit to Discretion in International Commercial Arbitration*, above-cited, p. 357.

In conclusion, case law shows that courts from Singapore tend to interpret due process grounds narrowly in setting-aside and enforcement proceedings. In turn, if courts interpreted this latter ground too openly, such a circumstance could result in a failure to foster arbitration as an efficient alternative dispute resolution mechanism, with the consequence of lessening its efficiency and finality. In addition, the significant deference showed by domestic courts to the arbitral tribunals' powers sets a high threshold for a challenge to be successful, being it necessary for the challenging party to demonstrate the seriousness of the breach and the prejudicial effects caused towards it.

Remarkably, a significant aspect arising from the Singaporean experience is also the high degree of consideration that courts have given towards the content of the arbitration agreement convened by the parties, as this instrument constitutes the expression of the parties' autonomy and sets the boundaries within which their procedural rights can be exercised. Therefore, unless concrete and serious circumstances are found to have occurred and to have prevented a party to effectively present its case, courts will generally tend to grant stability to the decision issued by the arbitral tribunal.

3.6. *The United States of America: the Federal Arbitration Act (FAA) and the American case-law on the arbitrators' "misconduct"*

International commercial arbitration in the United States is mainly governed by the Federal Arbitration Act ("FAA") as well as, on a residual basis, by state laws. ([323])

More precisely, while Chapter 1 of the FAA regulates domestic arbitrations (namely, those conducted within the United States), its Chapter 2 enforces the New York Convention and thus deals with international commercial transactions. ([324]) Therefore, provided that any case governed by the New York Convention falls

[323] Indeed, in case of conflict, the provisions stated by the Federal Arbitration Act prevail over domestic arbitration law.

[324] See 9 U.S.C. §201, which states that «[t]he Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall be enforced in United States courts in accordance with this chapter».

under the jurisdiction of the federal courts, it is possible to state that most (if not all the) cases regarding international commercial arbitration are hence decided by the same federal courts. ([325])

Under the FAA, Section 10(a)(3) provides only strict and exclusive grounds on which an arbitral award may be set aside. Among these grounds, with regard to due process concerns, ([326]) a pivotal relevance is to be recognized towards the arbitrators' misconduct «in refusing to postpone the hearing», or «in refusing to hear evidence pertinent and material to the controversy», as well as to «any other misbehavior by which the rights of any party have been prejudiced».

As case-law shows, when called to assess due process violations, US courts have expressed a high degree of deference towards arbitral decisions over time, thus exercising a decisive influence in shaping and narrowing the content of such grounds for setting aside. ([327])

Starting with the refusal to postpone a hearing, the challenging party shall demonstrate that the arbitrator's denial was not established on a reasonable basis and that, following such an arbitral "misconduct", the complainant has thus suffered prejudice. ([328]) In this field, courts are required to carefully assess the circumstances upon which the tribunal has based its refusal to postpone the hearing, as well as the judges must consider the consequences that the arbitral denial has caused towards the legal sphere of the complaining party.

In practice, even if US courts show a certain degree of deference towards arbitrators, this does not automatically amount to the acceptance of any procedural decision favoring speediness over fairness, being it necessary to detect those cases

---

[325] POPOVA I. C. and PICKARD D., *Country Report: The United States of America*, in *Due Process as a Limit to Discretion in International Commercial Arbitration*, (eds.) Franco Ferrari and Friedrich Rosenfeld, above-cited, p. 430 ff.

[326] "Due process of law" is expressly guaranteed in the US Constitution under the Fifth – which applies to the federal government – and Fourteenth – which applies also to states – Amendments. As such amendments apply only to those actions undertaken by the government against individuals (so-called "state action doctrine"), it has been held that the due process standards provided at the constitutional level do not directly apply to arbitration, provided that this latter area lack of any state action. However, even if arbitral tribunals differ from the judicial proceedings, courts mainly tend to interpret due process principles in light of the Fifth and Fourteenth Amendments, also when dealing with the review of arbitral awards.

[327] Among the others, see *United Paperworkers Int'l Union v. Misco, Inc*. (1987), U.S. Supreme Court case no. 86-651, where it has been stated that, when called to review arbitral decisions, domestic courts do not operate as appellate courts.

[328] See *Sungard Energy Sys. v. Gas Transmission N.W. Corp*. (2008), United States District Court, S.D. Texas.

where the postponement of the hearing might likely represent a concrete solution to effectively grant the party's due process rights.

In this context, case-law provides some useful examples on what is deemed to constitute a relevant violation, even if domestic courts are found to have vacated arbitral awards only on rare occasions. For instance, the impossibility for a crucial witness to take part to the proceeding on objective circumstances (*e.g.* hospitalization) constitutes a reasonable cause for the postponement of the hearing, ([329]) with the result that the tribunal's refusal in this regard will likely amount to the set aside of the arbitral award.

In other terms, the more a witness plays a pivotal role for the presentation of a party's case, ([330]) the more arbitrators shall accurately balance the party's procedural right to obtain the postponement of the hearing with the need to speed the arbitral proceeding, for the sake of efficiency. In doing so, arbitrators must thus assess the objective reasons that justify the impossibility of a witness to participate to the hearing, as well as the prejudice that such an absence might cause towards the concrete possibility for a party to present its case.

Along the same line, the refusal to hear pertinent and material evidence can justify the setting aside of an award only when the opposing party shows that such denied evidence was fundamental for the decision of the case, [331]and that, consequently, the opponent suffered prejudice due to the tribunal's denial. ([332])

Even in these circumstances, courts generally show a tendency not to discredit the merits of the arbitral determination on evidentiary relevancy and

---

[329] See, e.g. *Allendale Nursing Home, Inc. v. Local* (1974), United States District Court, S.D. New York, where the witness felt ill during the hearing and needed to go to the hospital; *Tempo Shain Corp. v. Bertek, Inc*., (1977) United States Court of Appeals (2nd Cir.), where the witness declared to be temporarily unavailable due to the fact that his wife had been diagnosed with cancer. On the contrary, less serious circumstances will likely not be considered by courts as justifying the postponement of a hearing. For instance, see *Berlacher v. PaineWebber Inc.*, (1991) US District Court for the District of Columbia, where the court stated that the fact that a party's daughter had broken her arm did not constitute a compelling circumstance for what concerned the arbitral proceeding.

[330] *Schmidt v. Finberg*, (1991) United States Court of Appeals (11th Circ.).

[331] It must be outlined that, when considering the refusal to hear pertinent and material evidence in relation to document production, that section 10(a)(3) FAA shall not be interpreted as requiring arbitral tribunals to apply US-style discovery, being arbitrators allowed to limit the extent of such a production. See MARGHITOLA, R., *Document Production in International Arbitration*, above-cited, p. 206.

[332] *Grinnell Hous. Dev. Fund Corp. v. Local* (1991), Appellate Division of the Supreme Court of the State of New York, First Department; *Sungard Energy Sys. v. Gas Transmission N.W. Corp*, above-cited.

admissibility, unless objective facts can prove the inconsistency of the arbitrators' decision. Such a latter (and rare) circumstance has been found, for instance, in *Gulf Coast Indus. Workers Union v. Exxon Co., U.S.A*, where the court held that the arbitrator refusing to consider evidence, and preventing the party to introduce additional and foundational testimony, amounted to a misconduct falling within the scope of Section 10, thus justifying the vacatur of the award. ([333])

On a residual ground, complaints based on "other misbehaviors" are frequently grounded on *ex parte* communications between a party and an arbitrator. However, the arbitration friendly approach mainly adopted by US courts makes it necessary, for a complaint to be successful on this ground, to prove that the alleged damaging arbitral conduct has effectively «deprived [the challenging party] of a fair hearing and influenced the outcome of the arbitration». ([334])

Accordingly, courts will likely vacate arbitral awards when the content of such communications regards the merits of the dispute, whereas no relevancy will be recognized towards information related to ancillary or technical aspects of the proceeding, ([335]) as well as to those data that are easily accessible to both parties. Moreover, to obtain the setting aside of an arbitral award, the opposing party must demonstrate that such an *ex parte* communication has caused him prejudice, due to the arbitrator's misbehavior. ([336])

In light of the above, it is evident that the aforesaid grounds are generally based on the arbitrators' duty to grant each party the ability to present its case, which represents an expression of the due process rights enshrined in Article V(1)(b) of the New York Convention.

When interpreting the scope of the due process standard, however, American courts often outline the discrepancy between proceedings that take place

---

[333] *Gulf Coast Indus. Workers Union v. Exxon Co., U.S.A*, (1995) United States Court of Appeals (5th Cir.). In particular, the court found that the arbitrators' conduct in assuring the party that certain documents represented sufficient evidence, with no need to add further evidence in support, concretely misled the challenging party which suffered prejudice.

[334] *Spector v. Torenberg*, (1994) U.S. District Court for the Southern District of New York, case no. 93 civ. 5865 (citing *M & AElec. Power Coop. v. Local Union no. 702, Int'l Bhd. of Elec. Workers*, (8th Cir. 1992).

[335] *Spector v. Torenberg*, above-cited, where the communication concerned a computer problem; *Remmey v. PaineWebber, Inc.*, (1994) United States Court of Appeals (4th Cir.), where information regarded the organization of the seating at the proceedings, provided that the hearing room was crowded.

[336] *Lefkovitz v. Wagner*, (2005) United States Court of Appeals (7th Circ.), where the court held that *ex parte* communications with neutral expert witness was improper but still harmless.

in judicial courts and arbitration. In particular, domestic courts have frequently supported the idea that, considering the arbitral venue, the right to due process «does not include the complete set of procedural rights guaranteed by the Federal Rules of Civil Procedure». ([337])

The scope of due process violations thus differs in the arbitration context if compared to the judicial proceeding, with the result that the arbitrators' discretionary powers, which necessarily cover evidentiary issues, might legitimate – within certain limitation – the arbitral decision to refuse a party's evidentiary request for the sake of efficiency.

In this field, indeed, US courts highlight the primary role that the parties' decision to appoint an arbitral tribunal plays regarding the exercise of due process rights, provided that a voluntary agreement necessarily brings with it both the advantages and drawbacks of a proceeding not conducted in a judicial court.

In conclusion, American courts' arbitration friendly approach amounts to a general approval of the decisions undertaken by the arbitral tribunal, regarding both evidentiary rulings and other decisions linked to the management of the proceeding, with the result that judges will not second-guess arbitral determinations on the taking of evidence, unless objective and well-proven facts occur. Indeed, evidence shows that the threshold set by US courts for setting aside or refusing enforcement of an award on due process grounds is very high.

As complaints grounded on the inability to present one's case are rarely successful before the American courts – and considering the underlined discrepancy with US litigation – the party seeking for the vacatur of an arbitral award must not only prove the facts that could amount to a "misconduct" or "misbehavior" of the arbitral tribunal, but also – and most importantly – the opponent must demonstrate that such an arbitral conduct was outcome determinative and caused detrimental effect against him.

---

[337] *Trans Chem. Ltd. v. China Nat. Mach. Imp. & Exp. Corp*., (1997) US District Court for the Southern District of Texas.

4. *Conclusive notes on comparative juris(&)prudence: "reasonable" v. "unwarranted" due process concerns in relation to evidentiary issues*

It is clear from the previous analysis that, beyond the existing differences between common and civil law systems, an underlying element in international commercial arbitration can be found in the State courts' dedicated effort to strike a balance between arbitral discretion and the effective protection of the litigants' fundamental procedural rights.

From a general perspective, neither legal system provides detailed due process guarantees tailored for the arbitral venue. Accordingly, arbitral tribunals must consider the legitimacy of their procedural choices on a case-by-case basis, being conferred a certain degree of discretion on such matters, especially when it comes to the taking of evidence.

In particular, the scope of the arbitral discretion is limited by mandatory provisions and by norms contained in the parties' agreement, but it is also believed that the arbitrators' procedural decisions constitute – in any case – an expression of their "inherent or implied powers", meaning that such latter powers exist irrespective of the fact that they have been specifically and *ex ante* established or not. ([338]) Hence, arbitrators exercise an indispensable function in balancing the fairness of the proceeding and circumscribing the grounds for challenge, as to prevent that parties' expectations of efficiency and finality will be frustrated by the resort to unwarranted dilatory tactics.

Thanks to the analysis conducted so far, it is possible to organize the main grounds for annulment or non-enforcement in three macro-areas: 1) the violation of the parties' right to present their case, 2) the breach of the parties' right to be treated equally, and 3) the violation of provisions specifically convened by the parties in their agreement.

---

[338] With regard to "inherent" powers, it has been stated that «[b]eyond the express powers provided for in the various arbitration laws, rules and conventions, it is understood that arbitral tribunals also retain a supplementary discretionary power to control arbitral procedure […], notwithstanding express conferral, [as such powers] arise from the tribunal's adjudicatory function and position as a quasi-judicial actor» (HANEFELD, I. and DEJONG, A. *Inherent Powers to Streamline the Proceedings*, in *Inherent powers of arbitrators*, (eds.) F. Ferrari and F. Rosenfeld, 2019, p. 252). Similarly, BROWN, C. *Inherent Powers in International Adjudication* in *The Oxford Handbook of International Adjudication*, (eds.) C. Romano, K. Alter, Y. Shany, 2013, p. 832, according to which «[a]n inherent power of a court might, then, derive 'from its nature as a court of law».

In such a context, the main source of "due process paranoia" is triggered by the interpretation of what is meant for "full" opportunity of the parties to present their case, as some arbitrators fear that their award will be challenged if litigants are not granted all and any opportunity to bring their claim or to defend it. ([339]) However, case-law taken from the above-discussed legal experiences provides us some common elements which constantly appear in the judgements of domestic courts from different legal traditions.

It is thus possible to draw some conclusions on the adoption of excessively indulgent conducts by arbitrators influenced by "due process paranoia".

Indeed, none of the examined countries considers the "opportunity to present one's case" as entitling «a party to obstruct the proceedings by dilatory tactics and, for example, present any objections, amendments, or evidence only on the eve of the award». ([340]) Accordingly, scholars strongly support the idea that the aforesaid opportunity might be always understood as a "reasonable" one (instead of a "full" one), irrespective of the wording of the provision that is considered for the settlement of a given case.

The preference towards the "reasonable" opportunity of the parties' is expressly showed in some arbitration rules, ([341]) as well as in the English Arbitration Act 1996, Section 33(1)(a). ([342]) Accordingly, the parties' right to be heard is not unlimited, provided that arbitrators are not required to accept unreasonable and dilatory procedural requests raised by the parties, as «there is nothing fair about long, delayed, over-detailed, and expensive arbitral litigation». ([343]) As a flipside, however, the need to foster efficiency shall never bring to the understatement of the

---

[339] BERGER, K.P.B. and JENSEN, J.O., *Due process paranoia and the procedural judgment rule: a safe harbour for procedural management decisions by international arbitrators*, above-cited, p. 421.
[340] Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration, 25 March 1985, UN Doc A/CN.9/264, p. 46.
[341] See art. 17(1) of the UNCITRAL Arbitration Rules; art. 13 of the HKIAC Rules 2018; art. 22(4) of the ICC Rules 2021; art. 14.1(i) of LCIA Rules 2020.
[342] In this sense, when «asking whether the tribunal's conduct or decision was reasonable – rather than whether it would have done the same – the court recognizes that the tribunal has an important discretion in matters of procedure» (MENON, S., *Dispelling Due Process Paranoia: Fairness, Efficiency and the Rule of Law*, above-cited, p. 12). Accordingly, the "test of reasonabless" is not based on «what would have happened had the matter been litigated, as [t]o apply such a test would be to ignore the fact that parties have agreed to arbitrate, not litigate» (see *Vee Networks Limited v Econet Wireless International Ltd* (2004), Queen's Bench Division (UK), Commercial Court, par. 90).
[343] ALLSOP J.L.B. AC, *Keynote Address: International Arbitration and Conformity with International Standards of Due Process and the Rule of Law*, above-cited, p. 779.

litigants' due process rights, especially when the circumstances require arguments and evidence to be carefully considered. ([344])

On a different ground, for the benefit of its further implementation, it shall also be considered that the private nature of arbitration in some way increases the need to avoid any potential parties' feeling to have been prejudiced by the adoption of such a procedure, having them voluntarily preferred the latter over a judicial and domestic one.

A comprehensive guide on what is meant to be reasonable or not is nonexistent in practice. Therefore, here is when the arbitrators' discretion clearly comes to light. Indeed, lacking any formal instruction, it is rational to consider that potential due process violations shall be assessed from an *ex ante* perspective, thus considering the information that the arbitrators had (or could have diligently obtained) at the moment the procedural decision has been taken, based on the given circumstances of the dispute; in addition, however, the arbitrators' conduct must be assessed with regard to the concrete consequences that a given procedural decision has substantially caused against the opposing party, as a necessary effect of the final award (*ex post*).

From a different perspective, the case-law history on due process violations related to evidentiary issues in arbitration shows a general shift, undertaken by domestic courts, from a formal to a substantive and qualitative interpretation of such fundamental rights. ([345]) This is proven by the generalized conviction that, for an award to be successfully challenged, the opposing party must have demonstrated that the arbitrators' conduct has been enacted in violation of the party's fundamental procedural rights, resulting in a substantial prejudice suffered by the opponent, which could have reasonably been avoided if only the arbitrators had correctly considered the specific circumstances of the case. Interestingly, even if each examined country enacts its own regulation with slight differences in wording, in essence, all legal frameworks seem to have reached a certain degree of convergence on the discussed topic, irrespective of the more or less developed arbitration history

---

[344] In this sense, it has been stated that «[t]oo much efficiency may mean too little time to hear evidence» (PARK, W.W. *Arbitration in Autumn*, in *Journal of International Dispute Settlement*, Volume 2, Issue 2, 2011, p. 293).

[345] ALLSOP J.L.B. AC, *Keynote Address: International Arbitration and Conformity with International Standards of Due Process and the Rule of Law*, above-cited, p. 778.

of a given seat. In this sense, arbitrators are called to balance the efficiency of arbitration and the procedural requests of the parties which could "reasonably" have a qualitative impact on the final award.

It is common wisdom that unnecessary delayed and expensive arbitrations not only decrease the proceedings' efficiency, but also compromise their fairness. At the same time, none of the provisions regarding the conduct of arbitration fosters fairness without efficiency. For these reasons, domestic courts are more and more willing to refuse objections based on formal rather than substantive grounds, recognizing a certain degree of deference towards arbitral discretion.

In practical terms, such a tendency reflects into a basic but effective principle: domestic courts' task is never to evaluate the merits of the alleged claim, but rather to assess if the procedural defects have had any material effect on the party seeking to invoke it as a ground for setting aside the arbitral award. Only when there be a real possibility that the final arbitral deliberation would have been different, absent such a challenged procedural defect, the setting aside of the award by judicial courts will be likely to occur.

CHAPTER 3

MITIGATING DUE PROCESS CONCERNS: PROCEDURAL FAIRNESS AND EFFICIENCY AS COMPLEMENTARY VALUES OF ARBITRATION

SUMMARY: 1. The blurred line between due process and "fairness" in international arbitration. – 2. Balancing procedural fairness and efficient conduct of the arbitral proceeding. – 2.1 Case-management techniques and transparency: the outset of arbitration. – 2.2. Fostering a constant dialogue between the arbitral tribunal and the parties: the "meet and consult method". – 3. The impact of evidentiary rules towards fairness and efficiency. – 3.1 Rules of evidence and *soft law*. – 3.2. (*following*) Looking for a renewed and harmonized regulation? – 4. Empowering the finality of the awards through "strong" arbitral tribunals. – 4.1. The interaction between State courts and arbitral tribunals in the taking of evidence – 4.2. (*following*) Is court assistance compatible with the arbitration agreement and the right of equal treatment? – 5. Conclusive remarks on the need to lessen unwarranted due process concerns for the future of international commercial disputes.

1. *The blurred line between due process and "fairness" in international arbitration*

The concept of "fairness" in international arbitration has been widely discussed over time, especially in relation to the taking and presentation of evidence. ([346]) However, fairness *per se* constitutes a vague and uncertain concept, which, depending on the way it is interpreted, might embody both objective elements and subjective perceptions from the participants to arbitration. ([347])

---

[346] It is worth noting that, according to a survey conducted among in-house corporate counsels, "fairness" has emerged above all other considerations when users choose a dispute resolution mechanism to another. See Queen Mary University of London School of International Arbitration and PWC, "Corporate Choices in International Arbitration: Industry Perspectives",1 2013, International Arbitration Survey, p. 6–7, available at: www.arbitration.qmul .ac.uk/research/2013 [accessed 27 February 2024]. See also NAIMARK R. W. AND KEER S. E., *International Private Commercial Arbitration: Expectations and Perceptions of Attorneys and Business People*, in *International Business Lawyer*, 2002.

[347] In this sense, it has been argued that fairness constitutes a "problematic concept" characterized by a "slim objective content" (PARK, W.W., *Arbitration of International Business Disputes: Studies in Law and Practice*, 2nd ed., Oxford University Press, 2012, p. 91).

As to better define the content and limitations of such principle, the following discussion will examine the distinction between due process and fairness in international commercial arbitration. By doing so, the analysis will help outlining the differences between what is meant for a "right process" and what for a "right result", ([348]) stressing the fact that arbitrators are formally obliged to safeguard only the first of these objectives.

First, although a fixed definition of due process is not universally accepted, it has been seen that this notion commonly embodies the parties' right to be heard, the right to present their case and the right to be treated equally. Accordingly, due process governs the way the procedure shall be conducted, irrespective of the substantive content (that is, the merits) of its outcome. Put in these terms, the aforesaid principle represents an expression of "procedural fairness", whose elements – as already discussed in this work – are well-known and widely accepted by the international community at large. ([349]) In contrast, fairness is commonly considered as a relative and subjective quality of the proceeding, which is thus related to a contingent and personal sphere. Such a "substantive fairness" is indeed linked to the outcome of the proceeding (namely, the award), as it mainly depends on what the participants perceive as a "fair result". However, the attempt to define what concretely represents a fair result raises significant challenges, as subjective notions are not only uncertain, but they may also vary depending on jurisdiction-specific approaches, as well as due to the arbitrators' and users' individual perceptions.

For the aim of this work due process is thus referred to as procedural fairness, while substantive fairness, which is related to the subjective expectations of the parties, does not *per se* constitute a compelling objective

---

[348] See NAIMARK R. W. AND KEER, S. E., *What Do Parties Really Want from International Commercial Arbitration?*, in Dispute Resolution Journal, 2002, vol. 57, no. 4, p. 78.

[349] In brief, due process can be obtained by the sum of three principles: first, the right to be heard; second, the adversarial principle (*audit alteram partem*); and third, the principle of equal treatment. See BERNARDINI P., *The Role of the International Arbitrator*, in *Arbitration International*, 2004, vol. 20, no. 2, p. 117.

of international arbitration. ([350]) The concept of procedural fairness is indeed prevalent both in literature and in practice, provided that it helps assessing the legitimacy of the judging authority's conduct, without being limited by subjective and relative considerations which might jeopardize the strength and finality of arbitration. ([351]) Indeed, it is common wisdom that procedural fairness grants a more pragmatic and objective alternative to substantive fairness, as it is based on pre-existing grounds that are not susceptible to change due to individual expectations. Therefore, fairness of the proceeding shall never be considered as equivalent to an individual winning result, ([352]) but rather to a principle which embodies objective procedural safeguards. ([353])

From a different perspective, when defining and measuring fairness, it is necessary to make a distinction between national judicial adjudication and international arbitration. On the ground of procedural fairness, as already discussed in this work, arbitration emphasizes the principle of party autonomy, which allows disputing parties to appoint the arbitrators and to

---

[350] For an analysis concerning whether an appeal mechanism would improve substantive fairness in international commercial arbitration, see LARSON C., *Substantive Fairness in International Commercial Arbitration: Achievable through an Arbitral Appeals Process?*, in *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management*, 2018, vol. 84, issue 2, p. 104 ff., where – among the other issues – the author argues that, if the parties wish to emphasize the substantive fairness, they can bring the dispute before a national court, given that national procedures provide for a mechanism of appeal regarding the merits of the case.

[351] See JAPARIDZE, N., *Fair Enough? Reconciling the Pursuit of Fairness and Justice with Preserving the Nature of International Commercial Arbitration*, in *Hofstra Law Review*, 2008, vol. 36, issue 4, p. 1417, according to which «international commercial arbitration procedures are capable of autonomously ensuring sufficient safeguards on fairness and justice». Moreover, see BONE, R. G., *Agreeing to a Fair Process: The Problem with Contractarian Theories of Procedural Fairness*, in *Boston University Law Review*, 2004, vol. 83, no. 3, p. 485 arguing that, sometimes, the fairness of the procedure is itself determined by the quality of the outcome.

[352] In this sense, it has been argued that «[e]ven for the cynic who believes that parties want only to win the case, winning would be included in the concept of substantive justice, whereas procedural justice (getting a result in the 'right way') provides a whole other dimension to the goal of the parties» (NAIMARK R.W. and KEER S. E., *International Private Commercial Arbitration: Expectations and Perceptions of Attorneys and Business People*, in *International Business Lawyer*, 2002, vol. 30, no. 5, p. 203).

[353] However, given the existence of different legal cultures, it is known that also some arbitrators' procedural decisions might not be in compliance with a party's expectation of procedural integrity. In this field, it has been indeed stated that «[p]ractices that constitute an expression of procedural fairness in one legal system may not be used in another due to being unethical or even prohibited» (FORTESE F. and HEMMI L., *Procedural Fairness and Efficiency in International Arbitration*, in *Groningen Journal of International Law*, vol. 3, no. 1, 2015, p. 124).

decide upon the law applicable to a given dispute. Contrary to judicial adjudication, which is grounded on pre-fixed procedural rules, parties to international arbitration are thus conferred a greater power in shaping the proceeding as to adapt it to their specific needs. Therefore, even if both the aforesaid mechanisms are designed to resolve disputes, the concept of "fair process" is not necessarily intended in the same way in international arbitration and in judicial proceedings. This brings to the general consideration that some of those critiques arguing the "unfairness" of international arbitration, in concrete, stem from the fact that parties usually bring their own expectations related to the way a domestic proceeding would have been conducted if parties had subjected the same dispute to a judicial court. ([354]) For instance, in lack of any specific agreement, parties may expect that the procedures governing the taking of evidence and discovery will be analogous to those applying in court litigations, thus foreseeing the application of a detailed set of procedural provisions also in arbitration. However, it is common wisdom that seeking for the introduction of "more procedural due process" reforms in international arbitration would result in no more than extending the application of the same rules which already govern the traditional court proceedings. Such an intervention could thus unfavorably bring to the "transformation" of international arbitration into a judicial proceeding, rather than to reform it, with the result that a procedural intervention of this kind would necessarily jeopardize – among other factors – the flexibility of the arbitral proceeding. ([355])

---

[354] DESIERTO D. A., *Rawlsian Fairness and International Arbitration*, in *University of Pennsylvania Journal of International Law*, 2015, vol. 36(4), p. 961 ff.

[355] Indeed, «[a] recurrent complaint is the "judicialization" of arbitration, that is, the procedure becoming as equally formal dispute resolution proceeding as litigation» (FORTESE F. and HEMMI L., *Procedural Fairness and Efficiency in International Arbitration*, above-cited, p. 111). In this sense, some authors argue that arbitration has become «formal, costly, time-consuming, and subject to hardball advocacy» which makes it no longer distinct from litigation as it previously was (STIPANOWICH T. J., *Arbitration: The "New Litigation"*, in *University of Illinois Law Review*, 2010, no. 1, p. 1). With regard to the "judicialization" of international arbitration see also GERBAY R., *The Functions of Arbitral Institutions,* Kluwer Law International, 2016, p. 51 ff.

Grounded on these premises, the understanding of an existing difference between due process and substantive fairness represents a remarkable step which might help reducing the intensification of due process concerns. Indeed, in addition to the general deference showed by domestic courts towards arbitral discretion, ([356]) when arbitrators are well aware of the distinction between procedural and substantive fairness they are more prepared in deciding whether a specific party's request might comply with a necessary procedural safeguard (namely, a procedural right) or, on the other hand, if that request represents an individual and subjective expectations which, as such, falls far and beyond the arbitral tribunal's duties and scope.

2. *Balancing procedural fairness and efficient conduct of the arbitral proceeding*

It has been seen that the arbitrators' duty to act fairly and impartially, ensuring each party the same opportunity to present its case, must be combined with their duty to conduct arbitration in an expeditious manner. ([357]) If such obligations were considered disjunctively, the first set of duties would potentially push arbitrators towards the adoption of overly cautious decisions, being more focused on the protection of the parties' procedural position; whereas, a preeminent focus on efficiency would encourage the

[356] As already discussed in this work, a limited appellate review of awards – which excludes further decisions on its merits – exercised by domestic courts is aimed at safeguarding the hallmarks of arbitration (namely its finality, its diversity from the rigid schemes of judicial proceedings, as well as cost and time savings). See LARSON C., *Substantive Fairness in International Commercial Arbitration: Achievable through an Arbitral Appeals Process?,* above-cited, p. 107; AIMORÉ CARRETEIRO, M., *Appellate Arbitral Rules in International Commercial Arbitration*, in *Journal of International Arbitration*, vol. 33, no. 2, p. 185 ff.; PLATT, R., *The Appeal of Appeal mechanisms in international arbitration: Fairness over finality?*, in *Journal of International Arbitration*, 2013, vol. 30, issue 5, p. 531; THIRGOOD R., *Appeals in Arbitration: "To Be or Not to Be"*, in *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management*, vol. 87, issue 3, 2021.

[357] In particular, scholars have identified two main dimensions of expediency: «first, getting an award in a reasonable time is an important prerequisite, or better, a part of the effective enforcement of substantive rights […]. Second, the longer the process is, the more expensive it generally becomes» (KURKELA, M. S. AND TURUNEN S., *Due Process in International Commercial Arbitration*, above-cited, p. 192).

tribunal to assume less prudent choices, as the "need for speed" would prevail over procedural safeguards. ([358]) However, the combination of both values makes it necessary for the arbitrators to balance procedural fairness and efficient conduct of the proceeding: accordingly, in managing arbitral cases, due process must be harmonized with the arbitrators' duty to provide efficient and expeditious means for the final resolution of a given dispute. ([359])

Indeed, one of the hallmarks of international commercial arbitration – which creates a clear distinction from judicial proceedings – is represented by the tribunal's will (and duty) to foster flexibility and speediness of the proceeding, as to grant the parties the achievement of a final decision on a specific commercial issue, within a limited and certain time-period. Put in different terms, a fast(er) conclusion of a commercial controversy characterized by international features makes it easier for the disputing parties to assess in advance the risks deriving from a potential loss, as well as to foresee the possible benefits that could arise in case of win, with due regard to the timing.

In this context, also due to the increased number and complexity of cases subject to the attention of the arbitral tribunals, the alleged existing conflict between due process and efficiency has lately resulted in the intensification of the so-called "due process paranoia", which, in practice, worsens the risks of increasing costs and delays in international arbitration, without providing benefits towards its participants. ([360])

---

[358] BERGER K.P., *The Need for Speed in International Arbitration: Supplementary Rules for Expedited Proceedings of German Institutions of Arbitration (DIS)*, in *Journal of International Arbitration* 2008, vol. 25, issue 5, p. 595.

[359] According to the concrete difficulty of this task, some authors have defined this circumstance as «the never-ending battle between efficiency and due process» (FORTIER L.Y., *The Minimum Requirements of Due Process in Taking Measures Against Dilatory Tactics: Arbitral Discretion in International Commercial Arbitration 'A few Plain Rules and a Few Strong Instincts'*, above-cited, p. 397).

[360] Delays and excessive costs have indeed been defined as «two chief concerns of users of arbitration» (METSCH, R. AND GERBAY, R, *Prospect Theory and due process paranoia: what behavioural models say about arbitrators' assessment of risk and uncertainty*, in *Arbitration International*, 2020, vol. 36, p. 237). See also KAPLAN N., *Winter of Discontent*, in *Journal of International Arbitration*, 2017, vol. 34, issue 3.

As previously mentioned, the emergency and raise of due process paranoia is generally grounded on two main common perceptions: first, arbitrators perceive a potential rise of costs and delays as less "dangerous" than the risk of having their award set aside or unenforced; ([361]) second, as the parties' ability to select their decision makers represents a unique element of international arbitration, ([362]) arbitrators themselves fear the negative reputational consequences that might arise from an unenforceable award. ([363])

Following these premises, it is questioned whether a real conflict between procedural fairness and efficiency exists and if, in essence, the latter can be aligned with the requirements of due process, as to grant the finality of arbitration. The following analysis will thus support the opinion that the discussed principles constitute complementary values, rather than opposed ones, and will then suggest the opportunity to improve some instruments which might lessen due process paranoia, by reinforcing the legitimacy of international commercial arbitration. ([364])

In this sense, when courts are called to decide upon the enforceability of an arbitral award, they generally consider whether the arbitral tribunal acted "reasonably" in light of its duties, including the one to conduct the proceeding in an efficient and flexible manner. Arbitrators are thus not legitimated but rather obliged to undertake procedural decisions with the aim to safeguard the effectiveness of the procedure. As a result, when a certain

---

[361] See PLATTE M., *An Arbitrator's Duty to Render Enforceable Awards, 2003, in Journal of International Arbitration*, vol. 20, issue 3, p. 307 ff.

[362] See GOMEZ-ACEBO, A., *Party-Appointed Arbitrators in International Commercial Arbitration*, Kluwer Law International, 2016, p. 39.

[363] BATES AND TORRES-FOWLER, R. Z. *Abuse of Due Process in International Arbitration: Is Due Process Paranoia Irrational?*, above-cited, p. 251.

[364] As already discussed in chapter 1, in the 2015 Queen Mary University of London International Arbitration Survey the problem is defined as "both problematic and commonplace", whose concerns have been also expressed in the most recent 2018 edition of the survey. See Queen Mary University of London School of Law and White & Case, *2018 International Arbitration Survey: The Evolution of International Arbitration*, available at: arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey—The-Evolution-of-International-Arbitration-(2).PDF [accessed 31 October 2023].

degree of guarantees towards the parties' due process rights appears to be sufficient, based on the specific circumstances of the case, it is hard for the court to state that the tribunal has acted unreasonably.

As both due process and efficiency constitute key elements of arbitration, the tribunal shall avoid any admission of a party's procedural request that does not meet a certain threshold of "reasonabless" by balancing the two, thus preventing any individual abuse. In other terms, provided that due process is not unrelated to efficiency, any attempt to unreasonably delay the conduct of the proceeding, by resorting to an abuse of procedural requests, shall be sanctioned as well as a breach of due process safeguards would be.

This assumption is indeed consistent with the fact that due process rights shall never legitimate the parties to prevent the efficient resolution of a dispute; instead, they exist to grant each party the possibility to bring reasonable procedural requests. Therefore, both values are deemed to pursue the same objectives, as efficiency does not represent a limitation to due process and party autonomy, but rather «their realization», ([365]). In this view, any overindulgent approach towards one party's procedural requests would automatically infringe the other party's equally legitimate expectation to obtain the efficient resolution of the dispute, as the arbitrator's fear to violate a party's due process rights could amount to the violation of the same due process rights of the opposing party, provided that «justice too long delayed is justice denied». ([366])

Another concrete reason to dispel the growing phenomenon of due process paranoia clearly emerges from the empirical studies on case-law conducted so far in this work. Domestic courts from different jurisdictions

---

[365] BERGER, K.P.B. AND JENSEN, J.O., *Due process paranoia and the procedural judgment rule: a safe harbour for procedural management decisions by international arbitrators*, above-cited, p. 423.
[366] FORTESE F. and HEMMI L., *Procedural Fairness and Efficiency in International Arbitration*, above-cited, p. 116; PARK W. W., *Arbitration and Fine Dining: Two Faces of Efficiency*, in *The Powers and Duties of an Arbitrator: Liber Amicorum Pierre A. Karrer,* (eds.) Patricia Shaughnessy and Sherlin Tung, Kluwer Law International, 2017, p. 254.

have showed that it is exceptional for national judges to dismiss arbitral awards when they are called to decide challenges based on due process grounds. ([367]) It is thus possible to glimpse a notable gap between the alleged risk of unenforceability and the concrete practice of the national courts called to decide on the dismissal of arbitral awards. ([368])

In this sense, as successful challenges against awards on procedural grounds are rare, it is possible to state that the arbitrators' efforts to chase efficiency are well compatible with their duty to grant the parties a reasonable opportunity to be heard. It means that any alleged conflict between these two objectives is not concrete, as due process and efficiency shall rather coexist than clash. ([369]) Both values are thus necessary to increase public confidence and to intensify the acceptance and credibility of international commercial arbitration as a valid dispute resolution mechanism, which is alternative to traditional court proceedings. ([370])

However, despite the fact that successful challenges are very rare, it is still existent a general tendency among arbitrators to lean on the side of due process when they are called to consider and to balance both values in concrete circumstances. Such an attitude is said to be triggered by the fact that a risk, although minimal, of seeing the award dismissed on due process grounds still exists, provided that case-law might vary depending on different

---

[367] VERBIST H., *Challenges on Grounds of Due Process Pursuant to Article (V)(1)(B) of the New York Convention*, in *Enforcement of Arbitration* Agreements *and International Arbitral Awards: The New York Convention in Practice*, (eds.) Emmanuel Gaillard, Domenico Di Pietro and Nanou Leleu-Knobil, 2008, p. 679 ff.

[368] Some authors have indeed opined that «[a]rbitrators are shunted from their arbitral tracks by *unnecessary worry* about the *fate* of their award» (emphasis added) (SHARMA S., *Due Process "Paranoia": Turning Away from Judicial Attitudes and Looking for Answers Within*, in *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management*, 2018, vol. 84, issue 4, p. 325).

[369] In this sense, «due process paranoia seems to be borne out of a fundamental misunderstanding as to what due process requires as well as the true nature of the relationship between due process and efficiency» (MENON, S., *Dispelling Due Process Paranoia: Fairness, Efficiency and the Rule of Law*, above-cited, p. 5).

[370] Indeed, it has been argued that the "appearance of due process" is indispensable, «as arbitration would be dead wood if it lacks *public* confidence and legitimacy» (SHARMA S., *Due Process "Paranoia": Turning Away from Judicial Attitudes and Looking for Answers Within*, above-cited, p. 317). See also PAULSSON J., *The idea of arbitration*, Oxford Univeristy Press, 2013, p. 91.

factors – such as time, legal tradition, cultural changes – as this uncertainty introduces a certain level of unpredictability for the resolution of future disputes. With the aim to bring out the weakness of such observations, the following analysis will thus show some potential responses which are aimed at avoiding, in essence, excessive due process concerns, by fostering the adoption of effective tools in this area.

2.1. *Case-management techniques and transparency: the outset of arbitration*

To better balance the requirements of procedural fairness and efficiency, the adoption of appropriate instruments and measures at the outset of arbitration should be fostered.

The peculiar features of arbitration – among which flexibility stands out – make it necessary for the proceedings to be carefully planned and managed, provided that – in lack of a standardized set of procedural rules applicable to arbitration – the parties must be safeguarded through the adoption of a tailor-made procedural format, to be structured on a case-by-case basis. ([371]) Therefore, the introduction of preventive measures is deemed to help setting an environment that prevents the likelihood of abusive conducts at the very early stage of the proceeding.

In this view, after the tribunal is correctly constituted, arbitrators shall hold an initial procedural conference with the parties, especially in cases where participants come from different legal traditions and cultural

[371] However, it is still advisable for the parties not to agree on a strict set of procedures which could bring to the «risk that all participants will later be bound by such agreements even in constellation where the case evolved in a manner that had not been anticipated when the respective agreement was concluded» (PORNBACHER K. AND DOLGORUKOW A., *Reconciling due process and efficiency in International Arbitration*, in *Belgrade Law Review*, 2013, no. 3, p. 62).

backgrounds. ([372]) Such an initial meeting shall be aimed at discussing the organization of the arbitral proceeding, by establishing the basis for good work relations between the tribunal and the parties (along with their counsels). ([373]) Most importantly, early meetings make it possible to highlight the crucial procedural and case management issues, from the very beginning of arbitration.

Effective measures undertaken by the tribunal at this stage are indeed considered critical in granting the efficiency and procedural fairness of the arbitral process, as preventive discussions on procedural and organizational matters can foster the adoption of mutually shared approaches and time setting, thus preventing potential challenges.

In practice, such initial procedural meetings already constitute an instrument which has been mainly adopted in administered arbitrations – being it referred to as "case management conference" – as efforts to promote the adoption of these tools can be seen in some arbitral institutions' rules and guidelines.

A leading example can be found in the ICC Rules 2021, whose Article 22 not only requires arbitrators and parties to «make every effort to conduct the arbitration in an expeditious and cost-effective manner», ([374]) but also states that, «in order *to ensure effective case management*, the arbitral tribunal, *after consulting the parties*, may adopt such procedural measures as it considers appropriate» (emphasis added). ([375])

Moreover, and most significantly, Article 24 of the aforesaid Rules prescribes the introduction of an initial procedural conference as a mandatory

---

[372] This initial conference is considered to be essential by some arbitrators, who also insist on the importance of meetings to be conducted in person between the tribunal and the parties (and their representatives). See BLACKABY N., PARTASIDES C., REDFERN A., HUNTER M., *Redfern and Hunter on International Arbitration*, above-cited, p. 366 ff.

[373] BORN, G., *International Commercial Arbitration*, above-cited, p. 2401.

[374] For a discussion on who is in the position to make international arbitration more efficient, see KIRBY J., *Efficiency in International Arbitration: Whose Duty Is It?*, in *Journal of International Arbitration*, 2015, vol. 32, no. 6.

[375] For a detailed comment on the content of Article 22, see VERBIST H., SCHÄFER E. and IMHOOS C., *ICC Arbitration in Practice,* 2nd edition, 2005, p. 120 ff.

requirement of the proceeding, by stating that «during such conference, or as soon as possible thereafter, the arbitral tribunal shall establish the procedural timetable that it intends to follow for the efficient conduct of the arbitration». ([376])

Along the same line, other arbitral institutions have recently introduced rules designed at guiding both parties and arbitrators towards the adoption of efficient measures for the resolution of commercial and investments disputes. ([377]) However, besides the discussed examples, it is worth stressing that the introduction of early meetings does not constitute a mandatory principle of due process, as it is up to the tribunal – and to the parties – to decide upon the enforcement of such a preliminary instrument of consultation.

---

[376] Appendix IV provides examples of case management techniques that can be enacted by parties and arbitrators as to save time and costs of the proceeding. Regarding procedural decisions on evidentiary issues, for instance, the aforesaid appendix states the following suggestions: «[…] d) Production of documentary evidence:
(i) requiring the parties to produce with their submissions the documents on which they rely;
(ii) avoiding requests for document production when appropriate in order to control time and cost;
(iii) in those cases where requests for document production are considered appropriate, limiting such requests to documents or categories of documents that are relevant and material to the outcome of the case;
(iv) establishing reasonable time limits for the production of documents;
(v) using a schedule of document production to facilitate the resolution of issues in relation to the production of documents.
e) Limiting the length and scope of written submissions and written and oral witness evidence (both fact witnesses and experts) so as to avoid repetition and maintain a focus on key issues.
f) Using telephone or video conferencing for procedural and other hearings where attendance in person is not essential and use of IT that enables online communication among the parties, the arbitral tribunal and the Secretariat of the Court. […]».

[377] Among the others, see also Rule 40, ICSID Additional Facility Arbitration Rules 2022 («With a view to conducting an expeditious and cost-effective proceeding, the Tribunal shall convene one or more case management conferences with the parties at any time after the first session to: (a) identify uncontested facts; (b) clarify and narrow the issues in dispute; or (c) address any other procedural or substantive issue related to the resolution of the dispute»); Article 14(1)(ii) and (2) LCIA Arbitration Rules 2020; Article 13(5) HKIAC Administered Arbitration Rules 2018 («The arbitral tribunal and the parties shall do everything necessary to ensure the fair and efficient conduct of the arbitration»); Article 2 of the IBA Rules on the Taking of Evidence 2020 («The Arbitral Tribunal shall consult the Parties at the earliest appropriate time in the proceedings and invite them to consult each other with a view to agreeing on an efficient, economical and fair process for the taking of evidence»).
See also RIVKIN D.W. AND ROWE S. J., *The Role of the Tribunal in Controlling Arbitral Costs*, in *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management*, 2015, vol. 81, no. 2.

To foster the growing adoption of these tools, the following analysis will outline some concrete effects that such a preventive instrument can positively bring to arbitration.

First, by adopting a case management conference at the early stage of the proceeding, effective and fair communication among all the participants to arbitration can be encouraged. ([378]) Indeed, it is easy to infer that the same result could not be equally safeguarded in cases where parties would consult with the tribunal, for the first time, during a further step of the arbitration, provided that individual considerations at that time could be made according to each party's position at that specific moment of the dispute. ([379])

Thanks to the participated discussions that are made at the outset of the proceeding, arbitrators would thus be helped in the preparation of the further hearings and in better managing the parties' expectations, as well as in understanding the core issues of the dispute at hand. To identify in advance the real objective of the dispute, its legal and factual matters, along with the parties' expectations on procedural requirements, will indeed result in the possibility for the tribunal to develop a precise procedural timetable.

Immediate benefits of such a preventive mechanism are the clear and efficient organization of the arbitral procedure since its beginning. Accordingly, effective case management is advantageous to combine efficiency and procedural fairness, as each party will acknowledge in advance how the tribunal will deal with certain procedural issues within a prescribed timetable.

Secondly, when procedural concerns arise at an earlier stage of the proceeding, and suitable measures to overcome such concerns have already been discussed between parties and arbitrators, the participants will likely

---

[378] PORNBACHER K. AND DOLGORUKOW A., *Reconciling due process and efficiency in International Arbitration*, above-cited, p. 59.

[379] This is the opinion shared by some authors, arguing that «the inevitable tension between efficiency and fairness takes different forms depending on the stage of a business relationship. Both sides may want some ideal of efficiency when a contract is signed. However, after the dispute arises, the party with the weaker case may look for a fuller opportunity to present its case» (PARK, W.W., *Arbitration of International Business Disputes: Studies in Law and Practice*, above-cited, p. 451).

feel confident that the tribunal will further adopt fair and efficient procedural decisions, in compliance with the parties' due process rights and needs. ([380])

As a consequence, the possibilities for each party to feel that it has had the "opportunity to fully present its case" will necessarily increase, with relevant benefits in saving time and costs of arbitration. ([381]) Moreover, proactive cooperation between parties and the tribunal will enhance and increase a mutual trust, thus reducing «the likelihood of surprises during the proceeding». ([382])

Following this path, providing clear and mutually agreed rules at the outset will help increasing the parties' better understanding of the tribunal's procedural and discretional decisions, hopefully resulting in a reduced attempt to resist and to oppose the final determination of the tribunal. ([383])

An innovative attempt in this field is also represented by the *UNCITRAL Notes on Organizing Arbitral Proceedings* (lastly updated in 2016), whose objective is to foster the implementation of well-structured case managements by providing a list of core issues on which parties and the tribunal may wish and shall thus promptly formulate decisions, for the efficient resolution of any given dispute. ([384])

---

[380] ALLSOP J.L.B. AC, *Keynote Address: International Arbitration and Conformity with International Standards of Due Process and the Rule of Law*, above-cited, p. 792; DIAMOND S. S., *Psychological Aspects of Dispute Resolution Issues in International Arbitration*, in *ICCA Congress Series Vol. 11*, (ed.) Albert Jan van den Berg, 2003, Kluwer Law International, p. 329.

[381] With regard to savings of time and costs, some have argued that parties are «under a duty to mitigate the time and expense of the arbitral proceedings in good faith» (KURKELA, M. S. AND TURUNEN S., *Due Process in International Commercial Arbitration*, above-cited, p. 194).

[382] BERGER, K.P.B. AND JENSEN, J.O., *Due process paranoia and the procedural judgment rule: a safe harbour for procedural management decisions by international arbitrators*, above-cited, p. 430. In this sense, it is also believed that «a fair procedure might enhance the possibilities of future business relations among the parties» (KURKELA, M. S. AND TURUNEN S., *Due Process in International Commercial Arbitration*, above-cited, p. 205).

[383] BÖCKSTIEGEL K. H., *Case Management by Arbitrators: Experiences and Suggestions*, in *Global Reflections on International Law, Commerce and Dispute Resolution: Liber Amicorum in Honour of Robert Briner*, (ed.) Gerald Aksen, 2005, p. 118; REICHERT K., *The Organizational Meeting*, in *Leading Arbitrators' Guide to International Arbitration*, (eds. Lawrence W. Newman and Richard D. Hill, 2014, 3rd edition, p. 415.

[384] Their objective of such Notes is clear and well-described in their own introduction, where it is expressly stated that: «[t]he purpose of the Notes is to list and briefly describe matters relevant to the organization of arbitral proceedings». Even if the Notes do not have a legal binding nature, they still represent a relevant tool for both parties and the tribunal, who can thus use or refer to them at their discretion. Moreover, although the Notes recognize the tribunal's procedural discretion, which would theoretically legitimate it to take decisions also without consulting with the parties, however

In light of the above, it is clear that the introduction of methods supporting the early and proactive case management in arbitration are not only suitable for the realization of commercial interests (such as the economical and quick resolution of the dispute), but also for legal prerogatives (namely, the need to safeguard the procedural regularity of arbitration). Therefore, the implementation of a robust case management of the proceeding, along with all of the above discussed features that concretely promote an arbitration-friendly environment, is able to strengthen the legitimacy of any rejection of abusive procedural requests by the arbitral tribunal.

2.2. *Fostering a constant dialogue between the arbitral tribunal and the parties: the "meet and consult method"*

The parties' presentation of their cases constitutes the largest part of the total increase in time and costs in arbitration. As above seen, such an increase not only undermines efficiency, but equally amounts to a concrete breach of due process. Accordingly, if the efficiency of the arbitral proceeding is to be fostered, a prominent attention must be paid on those steps aimed at reducing the overall costs pertinent to each party's presentation of its case.

At this point, it is well-known that delays are often caused by unreasonably long and complex proceedings, characterized by the presentation of excessive requests for document discovery and unfocused introduction of witness and expert evidence. The fact that parties' (and their counsels) usually come from different legal backgrounds – which amounts to each participant being familiar with a different procedural scheme – may also

---

they encourage a constructive dialogue with the parties, as this requirement is deemed to be «intrinsic to the consensual nature of arbitration» (par. 9).

lead to a needless duplication of requests and unnecessary complexity of the proceeding. In this sense, it is possible to adjust the aforesaid paradigm in "justice too long delayed is justice too highly priced". ([385])

Along with the promotion of early case management conferences, as discussed in the previous paragraph, the tribunal should thus be willing to hold additional procedural meetings with the parties (*e.g.* "preparatory conferences" or "pre-hearing conferences") at further stages of the proceeding (so-called "meet and consult method").

Measures of this kind have been expressly promoted by the *ICC Arbitration Commission Report on Techniques for Controlling Time and Costs in Arbitration* (2018), ([386]) which is designed to suggest a range of techniques to increase the time and cost efficiency of arbitration. In particular, the report considers further case management conferences as "appropriate" during the course of arbitration, especially when such interim meetings are held prior to significant phases in the procedure. In these occasions, indeed, parties and arbitrators may consider whether additional submissions shall be required for the presentation of each case, as well as if further evidence shall be introduced in support of a party's claim, or, moreover, if issues related to the practical organization of a hearing are to be discussed. ([387]) Therefore, it is easy to note that such interactive initiatives can help parties, and in particular arbitrators, to timely and efficiently deal with some critical aspects of the arbitration proceeding, especially when complex legal or technical issues may raise, as well as in cases of a vast documentary evidence being presented.

The promotion of a continuous interactivity between the tribunal and the parties (and/or their counsels) makes it also possible to update the procedural timetable with the needs of the arbitral proceedings progress.

---

[385] See paragraph 2 of this chapter.
[386] This report has been issued by the ICC Commission on Arbitration and ADR in order to find solution to the growing complaints about the excessive duration and the high costs in international arbitration.
[387] See *UNCITRAL Notes on Organizing Arbitral Proceedings* (2016), p. 8.

Indeed, the scheduling of interim meetings confers the parties a continued opportunity to reassess the prominent matters of the case and to cooperate with the tribunal. ([388]) It follows that a stronger "partnership" between the two is going to be built. ([389])

On the flip side, it is worth stressing that such measures shall never result in the parties seeking to obtain tactical advantages by converting interim meetings into parallel-full hearings, provided that this latter circumstance would necessarily delay, rather than speed, the conduct of the proceedings. ([390]) In other terms, this would end up developing a scenario which was sought to be avoided in the first place: the violation of one party's due process rights through the false conviction of having acted in protection of the opposing party's same rights. Accordingly, the continuous dialogue through the proceeding shall always be aimed at «shaping the process to be the most appropriate for the case», not instead at facilitating the adoption of abusive conducts by the parties ([391])

Progress in means of telecommunications have also helped tribunals managing international arbitrations entirely without prescribing the organization of physical meetings. It follows that such technological advantages may well be used for the promotion of additional procedural meetings when arbitrators and parties (as well as their counsels) reside in different countries.

On some occasions, indeed, the simultaneous participation in person of all the actors involved in arbitration can be difficult. ([392]) By allowing

---

[388] An example of such an early oral meeting is the so-called "Kaplan Opening", proposed in KAPLAN N., *If It Ain't Broke, Don't Change It*, in *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management*, 2014, vol. 80, issue 2, p. 172.

[389] In this sense, «[i]nternational commercial arbitration should be seen by the arbitrators and parties in terms of a partnership» (BROWN D., *What Steps Should Arbitrators Take to Limit the Cost of Arbitration?*, in *Journal of International Arbitration*, 2014, vol. 31, no. 34, p. 505).

[390] BERGER, K.P.B. AND JENSEN, J.O., *Due process paranoia and the procedural judgment rule: a safe harbour for procedural management decisions by international arbitrators*, above-cited, p. 434.

[391] RIVKIN D. W., *Form of Deliberation*, in *Inside the Black Box: How Arbitral Tribunals Operate and Reach Their Decisions*, (eds.) B. Berger and M. E. Schneider, 2014, p. 21.

[392] As a consequence, «[t]he importance of such a meeting, especially in cross-cultural disputes, cannot be over-estimated» (KAPLAN N., *Winter of Discontent*, above-cited, p. 376).

remote videoconferencing or telephonic interactions, the use of modern technology may well accomplish the same objectives and results of physical meetings, if accurately and thoroughly organized. Most importantly, in the field of interim meetings, such technological tools may help improving proactive interactions between parties and the tribunal, without at the same time prolonging the length of the overall proceeding. ([393])

In conclusion, a developed atmosphere of mutual understanding between parties and arbitrators will hopefully make it easier for the latter to guide the litigants towards a shared path of presenting their own arguments and evidence, in a way that accomplishes both the parties' expectations and the tribunal's recommendations. Moreover, such an attitude would necessarily decrease the likelihood of any further potential challenge against the award, provided that the losing party would feel less frustrated if arbitrators appear to have taken decisions on arguments which have already been discussed not only among them, ([394]) but also with the parties. ([395]) It follows that the tribunal shall encourage the parties' good faith continuous cooperation in case management, not only for a smoothly conduct of the arbitral proceeding, but especially to prevent challenges based on due process grounds to be raised before national courts.

---

[393] The above-mentioned ICC Arbitration Commission, *Report on Techniques for Controlling Time and Costs in Arbitration* (2018) expressly provide that «[…] short telephone conferences may also be held at regular intervals (e.g. once a month) to enable the arbitral tribunal to check on progress and discuss with the parties any unforeseen procedural issues that have arisen or may shortly arise» (par. 33)

[394] Indeed, the promotion of a continuous interaction also applies towards the tribunal. In particular, scholars suggest that arbitrators shall schedule periodic meeting as to discuss the most critical issues of the dispute. Such an initiative is often referred to as "Reed Schedule/Retreat" (taking its name by its inventor, Lucy Reed), representing it a proposal for the three arbitrators, in complex disputes, to schedule a fixed date into the timetable of arbitration in which they gather together to study the files and to analyze the main issues at stake. This would help the tribunal to provide better directions towards the parties for the hearing which follows. See REED L., *The 2013 Hong Kong International Arbitration Centre Kaplan Lecture – Arbitral Decision-Making: Art, Science or Sport?*, in Journal of International Arbitration, 2013, vol. 30, issue 2, p. 95 ff.; BERGER, K.P.B. AND JENSEN, J.O., *Due process paranoia and the procedural judgment rule: a safe harbour for procedural management decisions by international arbitrators*, above-cited, p. 434.

[395] CREMADES B. M., *Overcoming the Clash of Legal Cultures: The Role of Interactive Arbitration*, in *Arbitration International*, 1998, vol. 14, no. 2, p. 161.

3. *The impact of evidentiary rules towards fairness and efficiency*

As the principle of due process embraces the right of each party to exhibit evidence in support of its case, it follows that the taking and presentation of evidence to the arbitral tribunal constitutes a paramount phase of the proceeding, provided that the final outcomes of most arbitrations are strongly based on factual presentations. However, it has also been seen that almost all international arbitration rules provide only basic guidance on the presentation of evidence, addressing the arbitral tribunal wide discretion with respect to the details of the evidentiary procedure – except for those limitations stated by parties' agreements or mandatory provisions.

Being arbitration statues and rules not specific, it is not uncommon for the arbitral tribunals to make factual and discretionary decisions in lack of any prescriptive guidance. In such an environment, the existing differences among cultural and legal backgrounds influence the approach of the participants to international arbitration, as they usually expect the procedure to be similar to the one applied in their own legal system.

The difference in approach between civil (judge-led) and common law (part-led) traditions becomes particularly evident when evidentiary issues are at stake, as arbitrators may lack familiarity with the foreign courts' interpretations and application of domestic norms in this field. ([396]) In this context, arbitration shall always be aimed at finding a compromise position which could best satisfy the procedural expectations of the parties themselves, with due respect to their agreement and to the tribunal's discretionary powers.

[396] Hence, «[t]he legal and cultural background, even of arbitrators, is not to be underestimated» (KUBALCZYK A. M., *Evidentiary Rules in International Arbitration – A Comparative Analysis of Approaches and the Need for Regulation*, in *Groningen Journal of International Law*, 2015, vol. 31, issue 1, p. 99).

Following these premises, it has been questioned whether more precise evidentiary rules are needed in arbitration and, if so, what should or could these rules look like. ([397])

Starting from the first issue, the implementation of more detailed rules of evidence has been deemed as necessary in order to reduce those flaws which threaten the predictability and legal certainty of arbitration. Hence, being factual presentations crucial for business disputes resolution, it is believed that more defined and specific standards, instead of boundless discretionary powers, shall guide the attitude of the arbitral tribunal towards evidentiary matters. In other words, if the arbitrators' conduct was not guided by tailored rules, the tribunal's decision on how to handle evidence presented by the parties would be surrounded by an excessive uncertainty and unpredictability.

The adoption of predetermined evidentiary rules would thus potentially reduce the negative impact that the vastly different expectations of the parties might exercise towards arbitration, as long as such rules do not undermine its procedural flexibility. Hence, the arbitral proceeding would benefit from greater transparency as to how rules and principles on the taking of evidence should be applied, with the result that arbitration could become more predictable and, consequently, the finality of its outcomes more certain. ([398])

Along with the advantages that the introduction of evidentiary rules could produce towards the predictability of arbitration, it is also believed that such a solution would increase its procedural fairness.

---

[397] In support of the idea that more detailed evidentiary rules are needed in arbitration, see WANG H. Z., *Aternative Evidence Rules for Arbitration*, in *Nevada Law Journal*, 2023, p. 5 «[c]onsidering that the choices arbitrators make in taking evidence have a direct impact on the outcome of arbitration […] the lack of evidentiary rules in arbitration is at least controversial, if not outrageous».

[398] WANG H. Z., *Aternative Evidence Rules for Arbitration*, above-cited, p. 9: «arbitrators could be more consistently apprised of evidence-based reasons to admit and weigh evidence, lawyers could better determine the value of both favorable and unfavorable evidence and prepare and make evidentiary arguments in arbitration».

First, it is unlikely for the parties in dispute to voluntarily agree on evidentiary provisions to be created *ex novo* for every specific case, given that each of them will physiologically try to push for those evidentiary mechanisms which could favor a party over the opponent. Second, a vast flexibility in arbitration may work well when the dispute involves two equally experienced parties which are both able to shape the arbitration procedure in conformity with their needs. However, commercial disputes are likely to rise also between parties which do not share the same knowledge and bargaining power, with the result that, in lack of evidentiary rules, the more skilled party could be incentivized to adopt abusive strategies aimed at undermining the procedural position of the less resourceful party. ([399])

Therefore, the adoption of well-structured rules of evidence in arbitration is deemed to foster procedural fairness throughout the arbitral proceeding, as it could provide a greater sense of equal treatment between parties, in conformity with their right to be heard. In this sense, commercial parties from different jurisdictions would increase their reliance on arbitral decisions if more detailed and predictable rules were adopted, thus better granting the effectiveness and fairness of arbitration. ([400])

At this point, it is worth considering the impact of some harmonization initiatives adopted in this field. In particular, a number of institutions have made efforts to provide evidentiary rules aimed at guiding the arbitral conduct in those cases where critical conflicts on procedural evidentiary requests may rise.

---

[399] Among the abusive tactics, for instance, a party could initiate a "battle of experts", meaning that it could ask the tribunal to admit a vast number of expert witnesses to rebut to those presented by the counterparty. See PARADISE A. G., *Arbitration of Patent Infringement Disputes: Encouraging the Use of Arbitration Through Evidence Rules Reform,* in *Fordham Law Review*, 1995, vol. 64, issue 1, p. 271.

[400] PARK W., *The Procedural Soft Law of International Arbitration*, in *Pervasive Problems in International Arbitration,* 2006, p. 144, «[t]he potential benefit of procedural soft law is that it can enhance the type of fairness business managers expect in dispute resolution, helping to strike the right equilibrium between fairness and efficiency».

Examples of such institutional initiatives can be found in the UNCITRAL, ([401]) ICC, ([402]) LCIA Rules, ([403]) with the clarification that they usually contain few generic articles and thus provide only general and basic principles, leaving the details to be shaped by the parties and the tribunal. As already noted, such institutional arbitration rules do not only apply in cases of administered arbitrations, given that also when parties resort to an *ad hoc* arbitration – and in those rare cases where evidentiary rules are expressly agreed by the parties – the principles governing the taking and presentation of evidence are chosen by the participants among the rules of the major arbitral institutions. ([404]) Indeed, when parties coming from different jurisdictions enter into an *ad hoc* arbitration, it is highly difficult for them to agree on a specific set of provisions governing the taking of evidence which shall be created from the scratch.

On the other hand, the parties' inclination to select a preexisting set of rules for the resolution of the dispute is proof of the fact that participants tend to be generally available in determining the "rules of the game", as to make the proceedings less a game of blind man's bluff and more a neutral playing field, whenever these rules already exist and are able to promote a compromise solution between different legal traditions.

To conclude on the need for more precise evidentiary rules to be implemented in arbitration, it is believed that such an intervention would also support the rationality of the arbitral awards, provided that the final decisions shall be reasoned on the results of an accurate factfinding activity. On the

---

[401] United Nations Commission on International Trade Law (UNCITRAL), *Arbitration Rules (as revised in 2021)*, accessible at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/21-07996_expedited-arbitration-e-ebook.pdf

[402] International Chamber of Commerce (ICC), *Rules of Arbitration*, in force as 1 January 2021, accessible at https://iccwbo.org/dispute-resolution/dispute-resolution-services/arbitration/rules-procedure/2021-arbitration-rules/.

[403] London Court of International Arbitration, *Arbitration Rules*, effective 1 October 2020, accessible at https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2020.aspx

[404] See RAESS, L. *Court Assistance in the Taking of Evidence: Switzerland's Way Forward*, in *Swiss Revies of International and European Law*, 2020, vol. 30, no. 1, p. 35.

contrary, in lack of precise rules and standards, the tribunal could hypothetically allow the presentation of any kind of evidence – such as hearsays made by witnesses – being it legitimated to decide upon the admissibility, weight, relevancy and materiality at its discretion. ([405]) Such a scenario could thus increase the vagueness of the arbitral decision, with the result that the losing party will likely challenge the final award on due process grounds, as it will likely perceive the decision to be "arbitrary" rather than "arbitral".

In conclusion, while theoretically the principle of flexibility could discourage the adoption of a set of more detailed and pre-fixed evidentiary rules, at the same time, it is also believed that provisions like these could increase the predictability and the overall fairness of arbitration. Therefore, the real problem is how such evidentiary rules shall be designed in order to balance the "need to speed" arbitration and the duty to safeguard the fundamental principles of due process, especially when parties from different legal traditions bring divergent expectations on the way evidentiary issues shall be dealt with.

[405] According to a survey conducted between October 2012 and February 2013, it has emerged that 34% of the arbitrators do not tend to exclude evidence that would be inadmissible in court. See SUSSMAN E., *The Arbitrator Survey: Practices, Preferences and Changes on the Horizon,* in The American Review of International Arbitration, 2015, vol. 26, no. 4, p. 522. With regard to the admissibility and weight of evidence, it has been seen that rigid national rules do not apply to arbitration and thus limitations in this field may be flexibly defined according to the tribunal's discretion and the content of the parties' agreement. Whereas the implementation of a principle supporting relevancy and materiality should foster the tribunal's duty to assess the authenticity of any evidence introduced in the proceeding, as well as to exclude certain types of evidence which could cause prejudicial effects also towards third parties (e.g. testimony of a person which is directly or indirectly interested in the facts of the dispute). For example, the current framework makes it highly difficult for the tribunal to detect potential counterfeited documents or electronic evidence, as no instruments of control upon the reliability of evidence are expressly provided with regard to the arbitral proceeding, condition that makes it even more arduous to prevent deepfakes.

3.1. *Rules of evidence and soft law*

Once it has been stated that evidentiary rules are necessary for the fair and efficient conduct of arbitral proceedings, it is time to assess how such procedural rules should be designed and applied to the arbitral venue, without compromising the flexibility of the procedure. In particular, since legal traditions vary significantly, one of the major issues is constituted by the concrete difficulty in choosing a set of procedural rules which could satisfy both parties' expectations, without specifically favoring any of the approaches.

In this scenario, evidence shows that the growth of procedural *soft law* has rapidly increased during the last decades. The main reason why instruments of soft law seem to have been preferred over harder norms (provided by arbitration statues and treaties) is mainly grounded on the evident need to balance certainty versus flexibility of the procedure.

The adoption of instruments of soft law is indeed suitable to safeguard the flexible nature of arbitration, as the decision to select a set of precise (non-binding) rules is consistent with the principle of party autonomy, provided that parties may adopt such norms in their own voluntary choice. ([406]) Procedural rules of evidence may thus be helpful in developing a form of "guided flexibility", with the aim to decrease the uncertainty of unregulated procedural decisions, but still in respect of the arbitration's hallmarks.

In other words, non-binding norms are adequate to grant enough flexibility for the participants to deal with the different circumstances of each specific case, as well as to enhance the predictability and consistency of arbitral tribunals' decisions, by providing enough practical guidance to the

[406] Moreover, in case of conflict, the provisions contained in the arbitration agreement will prevail over the IBA Rules on the Taking of Evidence 2020. See Article 1(3), stating that «[i]n case of conflict between any provisions of the IBA Rules of Evidence and the General Rules, the Arbitral Tribunal shall apply the IBA Rules of Evidence in the manner that it determines best in order to accomplish, to the extent possible, the purposes of both the General Rules and the IBA Rules of Evidence, *unless the Parties agree to the contrary*» (emphasis added).

arbitrators. ([407]) Indeed, their non-binding nature allows parties and the tribunal to freely assess whether evidentiary rules are suitable to govern the proceeding, with the result that only if and when parties have expressly agreed on the application of such rules, the latter will then be binding upon arbitrators.

On the contrary, in cases where no agreement has been reached with regard to the evidentiary phase, the tribunal will retain a vast discretion in deciding whether (and, if so, to what extent) instruments of soft law shall be addressed for the resolution of a given dispute. It follows that the aim of carefully balancing the three major hallmarks of arbitration – fairness, efficiency and flexibility – is deemed to be achievable by regulating evidentiary rules in the form of soft law.

Notwithstanding their non-binding nature, there is no doubt that such guidelines produce far-reaching effects, still conferring the power upon the parties to tailor the arbitral process in a way that might serve their particular needs. ([408])

In this context, the IBA Rules on the Taking of Evidence constitute a sort of codification of the best practices in evidentiary issues, inspired both by the civil law and the common law tradition. ([409]) In particular, the success of the IBA Rules is grounded on several features, among which the safeguard of due process, the attempts of harmonization, the non-binding nature and the promotion of a constant consultation with the parties stand out.

First, being such norms suitable to be adopted in any type of arbitration (*e.g.* commercial or investment; institutional or *ad hoc*), regardless of where the latter is seated, the IBA Rules aim to protect the

---

[407] WAINCYMER J., *Procedure and Evidence in International Arbitration*, above-cited, p. 756.
[408] It is indeed believed that «[i]n almost all cases, these guidelines will have far-reaching effects, notwithstanding that they are non-binding on their face» (PARK W., *The Procedural Soft Law of International Arbitration*, above-cited, p. 142); see also WANG H. Z., *Aternative Evidence Rules for Arbitration*, above-cited p. 22.
[409] See EMANUELE, F. and MOLFA, M., *Evidence in International Arbitration. The Italian Perspective and Beyond*, above-cited, p. 57 ff..

principle of due process, ([410]) expressly providing that they do not apply in case of «conflict with any mandatory provision of law determined to be applicable to the case by the Parties or by the Arbitral Tribunal». ([411])

Second, the IBA Rules are said to represent a compromise solution between common law and civil law traditions. With the aim to harmonize the different legal approaches and views on the taking of evidence, these norms constitute a well-established compromise, which is particularly useful when parties to the dispute come from different legal systems. However, it must be stressed that the IBA Rules shall not be intended as a mere collection of procedural solutions taken from the different legal traditions, as they rather suggest the adoption of a hybrid system which, on the one hand, replicates solutions taken from both legal approaches, but at the same time also introduces its own procedures, which are unique and different from the ones adopted in civil and common law systems. ([412])

Third, when parties have not expressly convened to adopt the provisions in exam, arbitral tribunals may nonetheless consider the IBA Rules as guiding principles, in accordance with their non-binding nature. It follows that, in such circumstances, a potential departure from these norms during the arbitration would not lead to a legitimate challenge of the award, which would otherwise undermine the finality of arbitration. Therefore, such an "informal" adhesion to the IBA Rules will not only preserve the flexibility of arbitration, for the reasons above described, but it will also serve as a useful guideline for the tribunal in managing the evidentiary phases of the

---

[410] References to due process can be found in the Preamble of the IBA Rules on the Taking of Evidence 2020, whose paragraph 3 expressly states that «[t]he taking of evidence shall be conducted on the principles that each Party shall act in good faith and be entitled to know, reasonably in advance of any Evidentiary Hearing or any fact or merits determination, the evidence on which the other Parties rely».

[411] Art. 1(1) IBA Rules on the Taking of Evidence 2020.

[412] In this sense, it has been stated that «the mechanism present in the IBA Rules is a new system, which combines some of the aspects of each legal system, but also implements new solutions» (KUBALCZYK A. M., *Evidentiary Rules in International Arbitration – A Comparative Analysis of Approaches and the Need for Regulation*, above-cited, p. 106).

proceeding. ([413]) Accordingly, in such cases the proceeding will surely become more predictable, but the tribunal will still retain the right to shape these non-binding provisions in accordance with the special needs of the specific dispute.

Lastly, the IBA Rules have also been appreciated for their attempt to foster the proactive consultation between parties and the tribunal in matters relating to evidence. This objective clearly emerges from the title of their Article 2 ("Consultation on Evidentiary Issues") which – in addition to the references concerning the production of documents, as well as witness and expert testimony – invites the parties and the tribunal to «consult each other with a view to agreeing on an efficient, economical and fair process for the taking of evidence» (Article 2(1)). Irrespective of the fact that the IBA Rules might be adopted either as guidelines or as binding procedural rules, it is thus evident that the aforesaid proactive consultation may conveniently occur during the case management conferences. ([414])

Hence, the IBA Rules have the merit of having attempted to develop a hybrid system which is intended not to favor neither the civil nor the common law tradition in arbitration proceedings. ([415]) However, scholars and practitioners have questioned whether a hybrid solution of this kind – which provides only general and basic principles – can effectively produce satisfactory results for both legal systems.

More precisely, the main critics are grounded on the principle that, while promoting a compromise approach, the IBA Rules do not contemplate specific and well-defined standards, thus leaving a broad discretion to the

---

[413] According to their Preamble, «[t]he Rules are not intended to limit the flexibility that is inherent in, and an advantage of, international arbitration, and Parties and Arbitral Tribunals are free to adapt them to the particular circumstances of each arbitration» (see Preamble of the IBA Rules on the Taking of Evidence 2020, paragraph 2).

[414] See paragraph 2.1. of this chapter. In the same vein, the tribunal is also encouraged to make the parties aware of any issues that it regards as «relevant to the case and material to its outcome» (Article 2(3) IBA Rules on the Taking of Evidence 2020).

[415] However, critics on an alleged "excessive common law orientation" have been raised both in doctrine and in practice, as it will be discussed in more detail in the following paragraph of this work.

arbitral tribunal in deciding over evidentiary issues. For these reasons, some authors believe that the current regulatory gaps could (and should) be filled through the development of more specific and updated instruments of soft law. ([416])

3.2. (*following*) *Looking for a renewed and harmonized regulation?*

The analysis conducted so far has outlined the strengths of the IBA Rules, which are deemed to provide a useful guideline for the efficient conduct of international arbitrations. However, it has been questioned if the IBA Rules are effectively suitable to satisfy the parties' expectations and, most importantly, whether they constitute a sufficient compromise solution for the needs of international arbitration, by accomplishing the objective of "optimal evidentiary rules".

While no doubts exist on the fact that the IBA Rules constitute a remarkable procedural option – being characterized by their non-binding but still influential nature – it is also believed that the actual legal framework leaves fertile ground for further regulation, which shall not be left to uncertainty and unpredictability.

To begin with, critics are grounded on the fact that some contentious evidentiary issues, on which legal families widely differ, are not expressly

---

[416] Among the others, see KUBALCZYK A. M., *Evidentiary Rules in International Arbitration – A Comparative Analysis of Approaches and the Need for Regulation*, above-cited, p. 106 («the IBA Rules, being a step forward towards harmonisation […] still miss important elements in order to provide a satisfactory solution»); WANG H. Z., *Aternative Evidence Rules for Arbitration*, above-cited, p. 14 («the vacuum that traditionally surrounds the practice of evidence rules in arbitration hearings is wrong and should be corrected»); WAINCYMER J., *Procedure and Evidence in International Arbitration*, above-cited, p. 756 («[t]he very fact that there is an ongoing debate suggests that the procedural and evidentiary behavior is not uniformly ideal and that further analysis should occur»); TRITTMANN R. and KASOLOWSKY B., *Taking Evidence in Arbitration Proceedings between Common Law and Civil Law Traditions – the Development of a European Hybrid Standard for Arbitration Proceedings*, above-cited, p. 333 («whilst the IBA Rules are useful in capturing various procedural solutions, they provide a menu of procedural options rather than defining one particular standard approach. As a result, the hybrid procedural rules that have developed as a matter of arbitration practice will generally fit within the broad principles set out in the IBA Rules, but the standard arbitration procedures are […] generally more specific than the IBA Rules»).

regulated by the IBA rules, or, in some circumstances, are merely mentioned therein.

Such a gap involves, for instance, the admissibility and weight of evidence, as the IBA Rules do not introduce much guidance on how these matters shall be assessed, thus leaving the solution of this procedural issue to the sole discretion of the arbitral tribunal. ([417]) Due to the existing different restrictions on this matter – which have already been discussed in more detail in chapter 2, paragraph 2 of this work – conflicts between parties from different legal traditions are likely to raise, provided that, depending on the specific circumstances of each case, the vast discretion left to the arbitral tribunal could not be regarded as "fair" by the parties. Although these matters are critical for the fair conduct of arbitral proceedings, the IBA Rules do not expressly refer neither to the burden nor to the standard of proof that a party shall bear, with the result that the arbitral tribunal is left with no guidance on how to deal with these issues. ([418])

Similar concerns also relate to legal privilege and confidentiality in international arbitration. According to Article 9.2(b) of the IBA Rules on Evidence, the arbitral tribunal shall exclude, in whole or in part – upon request of a party or on its own motion – the production of documents, statements or testimony on the ground of a «legal impediment or privilege under the legal or ethical rules determined by the arbitral tribunal to be applicable».

However, the Rules do not provide a specific clarification on how the principle of legal privilege shall be interpreted and applied in arbitration. In practice, it is not uncommon for the parties to claim such an expectation (of legal impediment or privilege), mainly resulting in time-consuming discussions during the proceeding on what shall be meant as "privileged".

---

[417] Article 9(1) of the IBA Rules («[t]he Arbitral Tribunal shall determine the admissibility, relevance, materiality and weight of evidence»).

[418] KUBALCZYK A. M., *Evidentiary Rules in International Arbitration – A Comparative Analysis of Approaches and the Need for Regulation*, above-cited, p. 104 ff.

([419]) Therefore, even if arbitral tribunals are aware of the imbalances linked to the lack of a uniform standard on this topic, there is still no internationally agreed consensus in arbitration on how to grant it. In this sense, the IBA Rules are thus deemed to have missed the opportunity to develop a more detailed set of applicable rules concerning issues of privilege. ([420])

On the same vein, with due regard to the private nature of arbitration proceedings, also confidentiality constitutes a relevant issue. In sum, as confidentiality refers to the obligation to use information which have been disclosed in the proceeding appropriately, and for the (sole) aim of the dispute resolution, it is clear that lacking any regulation of this topic – neither contemplated in the IBA Rules – it remains uncertain whether the appointed arbitral tribunal will admit the applicability of the confidential duty to the specific case. ([421]) It follows that parties who seek to be granted protection in this field – which might compete with the principle of transparency of the awards – ([422]) will have to conclude a specific agreement, as to impose the

[419] For instance, common law systems seem to extend legal privilege also to communications with in-house counsels, whereas civil law systems tend to be less inclined to the broad application of this principle, although the approach on the matter varies from State to State.

[420] See Cleary Gottlieb Alert Memorandum, *2020 Revision of the IBA Rules on the Taking of Evidence in International Arbitration,* 17 February 2021, p. 9, according to which an «opportunity may have been missed to further hone the Rules concerning Admissibility and Assessment of Evidence in the context of legal impediment or privilege as well as the drawing of adverse inferences». For example, in the aforesaid memorandum it has been suggested that Article 9.4(c) should be amended in order to require a "legitimate" expectation attributable to parties and their counsels who seek to invoke legal impediment or privilege. For a deeper analysis on this topic, among the others, see BERGER, K.P.B., *Evidentiary Privilege: Best Practice Standards versus/and Arbitral Discretion*, in *Arbitration International*, 2006, vol. 22, no. 4.

[421] As already discussed in chapter 2, some consider confidentiality as an inner element of arbitration, whereas, in practice, arbitral tribunals have required specific provisions on confidentiality for it to apply. This latter principle was held in *Esso Australia Resources Ltd v. Plowman* (1995), High Court of Australia, where the Court stated that a general duty of confidentiality is not *per se* implied in arbitration proceedings, as well as in *United States v. Panhandle Eastern Corp* (1988), U.S. Federal District Court, where the Court held that confidentiality is not inner to arbitration unless parties have agreed on that.

[422] For a deeper analysis of this topic, see BLAVI F., *A case in favour of publicly available awards in international commercial arbitration: transparency v. confidentiality*, in *International Business Law Journal*, 2016; KUMAR S. and PRATAP SINGH R., *Transparency and Confidentiality in International Commercial Arbitration*, in *The International Journal of Arbitration, Mediation and Dispute Management*, 2020, vol. 86, no. 4.

duty of confidentiality upon arbitrators and, more importantly, upon all the other subjects involved in the proceeding. ([423])

From a different perspective, some scholars have also criticized the alleged excessive common law orientation of the examined rules. In this context, it has been questioned whether the IBA Rules on document production efficiently promote the speed and effectiveness of the arbitration proceedings, given that they seem to allow not only limited requests of documents – aimed at proving the existence of the current allegations – but also wider productions of evidence, in relation to matters on which future allegations might be based. ([424])

In doing so, the IBA Rules do not promote the expansive U.S. and English-style discovery, nonetheless they consider "some level of document production" to be appropriate. For these reasons, critics have been raised against the applicability of a "wide discovery", as intended in common law systems, due to its alleged power to jeopardize the promoted balance between fairness and efficiency of the proceeding. Indeed, unlike most of the civil law proceedings, discovery in international arbitration provides parties the opportunity to trace a higher number of documents that might be crucial for the presentation of their own cases. In order to minimize costs and maximize parties' potential benefits, the development of a careful planning in relation to document disclosure is therefore needed. Furthermore, the possibility to

---

[423] Along the same line, some other examples of regulatory gaps concern, for instance, preventive discussions with witnesses on prospective testimony, electronic evidence and cybersecurity. Issues concerning prospective testimony have already been discussed in chapter 2. Instead, in the field of electronic evidence it is worth noting that the revised 2020 version of the IBA Rules on Evidence was also aimed at addressing new, technology-driven challenges and developments in the taking of evidence in international arbitration (Cleary Gottlieb Alert Memorandum, *2020 Revision of the IBA Rules on the Taking of Evidence in International Arbitration*, above-mentioned, p. 1). However, except for some guidelines regarding remote evidentiary hearings and cybersecurity, the latest version of the IBA Rules rarely mentions and lacks to regulate the taking and presentation of electronic evidence. With regard to some emerging trends, and considering the sensitivity of the information disclosed by the parties, cybersecurity constitutes a pivotal issue when arbitrations – or some of their phases – are conducted remotely.

[424] Article 9(6) of the IBA Rules on Evidence («[i]f a Party fails without satisfactory explanation to produce any Document requested in a Request to Produce to which it has not objected in due time or fails to produce any Document ordered to be produced by the Arbitral Tribunal, the Arbitral Tribunal may infer that such document would be adverse to the interests of that Party»).

request the production of internal documents, even when limited to a «narrow and specific requested category», ([425]) is of crucial delicacy, especially for those enterprises whose national laws confer privilege protection.

As a reaction to the alleged excessive common law orientation of the IBA Rules on Evidence, some scholars have promoted the adoption of a set of rules designed on an inquisitorial approach, which is typical of civil law traditions. A practical result of such critics can be found in the so-called Prague Rules (2018), which, however, have not achieved the same success as the IBA Rules. More specifically, by fostering freedom rather than focusing on compromise options, the Prague Rules have not promoted the development of a hybrid solution, and therefore are not deemed to be suitable to lessen the unpredictability of arbitral decisions. ([426])

In conclusion, the level of harmonization provided by the IBA Rules on Evidence is to some extent remarkable, as the success gained by such rules over the years shows. Although these rules might be very helpful in guiding the arbitral tribunal over the evidentiary phase of the proceeding, it is also evident that they do not cover all of the procedural challenges that might occur during arbitration, thus leaving space for potential conflicts between the parties in dispute.

---

[425] Article 3(3)(a) IBA Rules on Evidence.

[426] In any case, the Prague Rules on the Efficient Conduct of Proceedings in International Arbitration (2018) constitute an interesting attempt to challenge the IBA Rules. The development of this new *soft law,* which has recently raised a vivid technical debate, generally fosters the continuous cooperation between parties and the arbitral tribunal. More specifically, the Prague Rules focus on mechanisms for the taking of evidence aimed at returning the arbitral procedure to the parties – instead of lawyers – thus relying on the prestige of their consent, with the endorsement of an emphasized version of the (fundamental) principle of autonomy. In short, the arbitral procedure shall be guided by parties' freedom in deciding which shall be the most suitable set of rules applicable to the specific dispute, along with the arbitrators' broad power to direct the taking of evidence as to exercise a «proactive role» in the proceeding (see Art. 3 of the Prague Rules). For a deeper analysis on the differences between the IBA Rules and the Prague Rules, among the others, see AMARAL, G. R., *Prague Rules v. IBA Rules and the Taking of Evidence in International Arbitration: Tilting at Windmills*, Kluwer Arbitration Blog 2018, available at: http://arbitrationblog.kluwerarbitration.com/2018/07/05/ [accessed 5 March 2024]; ROMBACH A. and SHALBANAVA H., *The Prague Rules: A New Era of Procedure in Arbitration or Much Ado about Nothing?*, in *SchiedsVZ*, 2019, vol. 17, issue 2, p. 53 ff.; RANGACHARI R. and DUGGAL K., *Different but similar?: Comparing the IBA Rules on the taking of evidence with the Prague Rules*, in *Arbitration International*, 2021, vol. 37, issue 3, p. 631 ff.

In this sense, the vast discretion conferred upon the tribunal to fill those regulatory gaps is deemed not to represent an effective tool in order to foster procedural fairness and efficiency of the procedure. Accordingly, even if the IBA Rules constitute a notable step forward for the tribunal's management of evidentiary issues, in some circumstances the adoption of more precise rules would be welcomed for the benefit and the spread of international arbitration.

In practice, this objective could be achieved either by amending the existing IBA Rules on Evidence, as to include the matters that actually are not sufficiently regulated therein, or by creating a new set of defaulting rules, which would cover the most questionable issues that are missing – or too generically designed – in the actual version of the IBA Rules on Evidence.

A detailed description of concrete alternative solutions to the actual IBA Rules is far beyond the scope of this work. However, what clearly emerges from the foregoing analysis is that the implementation of evidentiary rules in the form of soft law constitutes a successful option. ([427]) Starting from this assumption, the international arbitration community should contribute to the further development of a hybrid-framework that shall help users from civil law and common law traditions to be granted their expectations in the way the proceeding will be conducted. ([428])

---

[427] Indeed, it has been argued that «by utilizing soft law as guidance, arbitrators significantly lower the risk of their awards being unenforceable» (WILLIAMS, E., FAS, H. and HANNAH, T., *Due process paranoia and its role in the future of international commercial arbitration*, above-cited, p. 50)

[428] The adoption of globally recognized standards does not exclude the possibility for them to apply also in national arbitration proceedings. In other words, even if commercial parties from the same legal tradition are likely to agree on the set of rules applicable to arbitration (which are commonly their domestic ones), nonetheless users might favorably convene on the adoption of hybrid standards, developed at the international level, whenever they are deemed to grant more speediness and efficiency also to domestic arbitration.

4. *Empowering the finality of the awards through "strong" arbitral tribunals*

Arbitrators are empowered to make case management decisions for the conduct of the arbitral proceeding, specifically in relation to the evidentiary hearing, by employing their procedural discretion to balance fairness and efficiency. ([429])

The exercise of the tribunal's discretionary powers, however, demands «a mixture of firmness, diplomacy and careful preparation». ([430]) It is thus within the capacity of arbitrators to set an environment which minimizes the occurrence of abusive behaviors *ex ante*, along with their ability to manage unreasonable procedural requests and complaints without threatening the finality of the award.

In terms of "proactive measures", it has already been outlined how active case management may discourage the parties from assuming strategic due process complaints. ([431]) In particular, the tribunal should take charge of the proceeding from the outset, meaning that all of the judging members shall be familiar with the main issues of the case. ([432]) This instrument related to the adoption of an active approach, which is particularly effective in international disputes involving parties from different legal cultures, enables

---

[429] See HOLTZMANN H. M., *How to Prevent Delay and Disruption of Arbitration: Lessons of the 1990 ICCA Stockholm Congress*, in *Preventing Delay and Disruptions in Arbitration and Effective Proceedings in Construction Cases: International Congress Proceedings*, Kluwer Law International, 1991, p. 21 ff.; FORTESE F. and HEMMI L., *Procedural Fairness and Efficiency in International Arbitration*, above-cited, p. 117.

[430] BORN, G., *International Commercial Arbitration*, above-cited, p. 2463. See also GELINAS P., *Evidence Through Witnesses*, in *Arbitration and Oral Evidence*, (eds.) L. Lévy & V. Veeder, Kluwer Law International, 2005, p. 39, stating that «failure to control the proceedings can be disastrous for the arbitral process».

[431] BATES AND TORRES-FOWLER, R. Z. *Abuse of Due Process in International Arbitration: Is Due Process Paranoia Irrational?*, above-cited, p. 261. In this context, it has been stated that «[t]he natural way of preventing due process complaints arising in the first place is by ensuring arbitrators are more proactive with case management timelines» (SAHA S. and SMRITI S., *Resurrecting the debate on 'due process paranoia' in Centrotrade: Paranoia or Judiciousness?*, in *Arbitration International*, 2020, vol. 36, p. 527).

[432] The arbitrators' role in «taking charge and staying in charge of the arbitral process» is discussed in AKSEN G., *On Being a Pro-Active International Arbitrator*, in *Law of International Business and Dispute Settlement in the 21 Century*: *Liber Amicorum Karl-Heinz Böckstiegel, Heymanns*, (eds.) R. Briner, L.Y. Fortier, K.P. Berger & J. Bredow, p. 13.

the arbitrators to immediately clarify the most remarkable facts, rather than passively receiving information about what the parties strategically decide to present to the tribunal. ([433])

As sometimes even relatively smooth disputes may turn into more complicated procedures – due to the unstructured exchange of arguments between the parties – such measures might help identifying the key issues of a given case. ([434]) Therefore, serving as a pivotal tool in narrowing the content and reducing the costs of the entire proceeding, early case management consultations between the tribunal and the parties on key issues of the disputes will help focusing on those topics which concretely matter more readily, thus fostering the authority of the tribunal, ([435]) as well as the fairness and efficiency of arbitration at once. ([436])

From a slightly different perspective, the tribunal's ability to manage unreasonable procedural requests and complaints falls under the scope of what can be deemed as "reactive measures". ([437]) Acting reactively, arbitrators and parties (with their counsels) shall promptly deter and oppose the counter party's attempts to adopt abusive procedural strategies. ([438]) Such measures would thus help warning the parties that the tribunal will strongly and firmly react against unreasonable attempts to obstruct the fair and efficient conduct of the proceeding, ([439]) also providing a crucial tool for the

---

[433] HOLTZMANN H. M., *Fact-Finding by the Iran–United States Claims Tribunal*, in *Fact-Finding Before International Tribunals*, (ed.) R . Lillich, 1991, p. 132; Kaplan N., *Winter of Discontent*, above-cited, p. 379, where the author argues that «[t]ribunals must be rigorous in identifying bad points that can be decided early in the proceedings and get rid of them quickly».

[434] MCLLWRATH, M. and SCHROEDER, R., *The View from an International Arbitration Consumer: In Dire Need of Early Resolution*, 2008, in *International In-house Counsel Journal*, vol. 2, no. 8, p. 8.

[435] «The authority of the decision-maker […] lies at the heart of the decision-making process» (ALLSOP, J., *The Authority of the Arbitrator*, in *Arbitration International*, 2014, vol. 30, issue 4, p. 639).

[436] BERGER, K.P.B. AND JENSEN, J.O., *Due process paranoia and the procedural judgment rule: a safe harbour for procedural management decisions by international arbitrators*, above-cited, p. 431.

[437] MENON, S., *Dispelling Due Process Paranoia: Fairness, Efficiency and the Rule of Law*, above-cited, p. 21.

[438] Among the others, see REED, L., *Ab(use) of Due Process: Sword vs Shield*, above-cited.

[439] «The arbitrator or tribunal or institution that builds a reputation for lack of tolerance for delay and waste […] will truly be providing equality and fairness as well as the promptness demanded always by commerce» (ALLSOP J., *The Authority of the Arbitrator*, above-cited, p. 658).

tribunal, which shall properly record its intervention in this circumstance, in cases of a challenge against the award. ([440])

Although useful tools already exist as to deal with delicate procedural situations, evidence shows that such instruments remain mostly unused by the arbitral tribunals. Hence, the issue is not to be found in the absence of effective sanctioning measures, but it rather regards the lack of a concrete use of such sanctions by the arbitrators. ([441])

The vast number of case management tools that are provided both by arbitration laws and rules shall be looked at by the arbitrators without hesitation, with a view to strengthen the procedural solidity of the proceeding along with its efficiency. Moreover, it is believed that even when the exiting legal framework does not provide specific tools, nonetheless the arbitrators are required to stay in charge of the process by exercising their inherent procedural management powers, which are to be adapted to the needs of each specific case. Put simply, arbitrators shall be "courageous enough" to make use of their procedural discretion. ([442])

When discussing techniques for conducting the arbitration proactively, some authors have shed a light towards the adoption of costs sanctions which can be applied by the tribunal to punish a party's abusive conduct. ([443]) Practical examples of such unreasonable procedural behaviors

---

[440] BATES AND TORRES-FOWLER, R. Z. *Abuse of Due Process in International Arbitration: Is Due Process Paranoia Irrational?*, above-cited, p. 259.

[441] See Queen Mary University and White & Case, *2015 International Arbitration Survey: Improvements and Innovations in International Arbitration*, available at: https://arbitration.qmul.ac.uk/media/arbitration/docs/2015_International_Arbitration_Survey.pdf [accessed 6 March 2024], p. 10, where the lack of effective sanctions during the arbitral process is seen as the second worst characteristic of arbitration.

[442] See Queen Mary University and White & Case, *2018 International Arbitration Survey: The Evolution of International Arbitration*, p. 27, available at: https://arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF [accessed 6 March 2024] according to which «arbitrators need to adopt a bolder approach to conducting the proceedings and, if need be, apply monetary sanctions for the various dilatory tactics employed by counsel».

[443] This topic is expressly covered by some arbitration rules, which are designed to guide the tribunal's conduct when it has to make decisions on costs. For instance, see Article 38(5) of the ICC Rules 2021 («In making decisions as to costs, the arbitral tribunal may take into account such circumstances as it considers relevant, including the extent to which each party has conducted the arbitration in an expeditious and cost-effective manner») and Article 28(4) of the LCIA Rules 2020 («The Arbitral Tribunal may also take into account the conduct of the parties and that of their

can be found in the submission of excessive document requests and cross-examination, exaggerated claims, and more in general the adoption of dilatory tactics. ([444])

In this sense, the deterring effects that might be produced by the adoption of costs sanctions make these measures a useful tool for effective case management. Accordingly, the tribunal shall warn the parties that adverse costs decisions will be taken in the event of unreasonable procedural behaviors, thus promptly deterring them from the adoption of dilatory tactics.

In light of the above, it is undisputable that the arbitrators' decision to allow procedural requests asking for excessive time or apparently unreasonable procedural steps – which is mainly grounded on their fear of being accused of having breached one of the party's due process rights – violates the counter party's right to be treated equally and to be granted the fairness of the procedure.

Therefore, arbitrators who intend to conduct the proceeding in a fair and efficient manner shall only focus on what is under their control, rather than concentrating on what falls beyond their sphere of supervision – this being the potential chance that a national court will decide upon the unenforceability of the award. ([445]) This objective can be reached by a careful and shared planning at the outset of arbitration of what principles and rules will govern the specific proceeding.

On the other hand, it is believed that the arbitrators' confidence that their awards – unless unreasonably and illegitimately undertaken – will likely be supported by the supervising national courts will enhance their authority,

---

authorised representatives in the arbitration, including any cooperation in facilitating the proceedings as to time and cost and any non-cooperation resulting in undue delay and unnecessary expense»). See also WILSKE, S., *Arbitration Guerrillas at the Gate: Preserving the Civility of Arbitral Proceedings When the Going Gets (Extremely) Tough*, above-mentioned, p. 327.

[444] See ICC Arbitration Commission, *Report on Techniques for Controlling Time and Costs in Arbitration* (2018), above-mentioned, p. 15.

[445] See METSCH, R. AND GERBAY, R, *Prospect Theory and due process paranoia: what behavioural models say about arbitrators' assessment of risk and uncertainty*, above-cited, p. 238, arguing that «the effects of lack of firmness by the tribunal may resonate», as overly cautious decisions might create a precedent upon which further complaints of insufficient opportunity to be heard will likely be grounded.

as their decisions on "what is fair or not" will likely be strengthened by the support of the legal culture and practice of most of the national judicial authorities. Accordingly, the development of international relationships between arbitral tribunals, institutions and national courts will result in «the maturing of an international legal order based on good faith, equality and fairness». ([446])

4.1. *The interaction between State courts and arbitral tribunals in the taking of evidence*

Once the arbitral tribunal has been constituted, arbitration is generally conducted without any need to refer to national courts.

When making their evidentiary assessment, arbitrators are indeed empowered to sanction a non-collaborative party for its failure to produce evidence by imposing costs or by drawing an adverse inference. This might happen, for instance, in cases where a party refuses to produce documents that are deemed to be relevant to prove a fact, without satisfactory explanation. In such a circumstance, the tribunal is thus allowed to infer that those documents would establish a fact adverse to the recalcitrant party's case. ([447])

---

[446] ALLSOP, J., *The Authority of the Arbitrator*, above-cited, p. 659.

[447] Scholars have identified some specific circumstances in which adverse inferences may be justified, in particular: «(1) An adverse inference should be corroborated by all available evidence held by the party requesting that the adverse inference be drawn. (2) In order to justify an adverse inference the requested evidence must have been accessible to the non-producing party. (3) The inference must be reasonable and consistent with the facts in the record and logically related to the likely nature of the evidence withheld. (4) The party seeking the adverse inference must provide *prima facie* evidence of the facts supporting its claim. (5) An adverse inference is not permissible if the party alleged to have failed to produce was not made aware of its duty to produce that evidence» (SHARPE J. K., *Drawing Adverse Inferences from the Non-Production of Evidence*, in *Arbitration International*, 2006, vol. 22, n. 4, 549, 555). In this respect, some authors have argued that, in certain cases, adverse inferences may constitute a ground to set aside or to refuse the enforcement of the award. CARON D. D. and CAPLAN L. M., *The UNCITRAL Arbitration Rules: A Commentary*, 2nd ed., Oxford University Press, 2013, p. 570 ff.; PIETROWSKI R., *Evidence in International Arbitration*, in *Arbitration International*, 2006, vol. 22(3), p. 384. By contrast, some other scholars have excluded a link between drawing adverse inferences and a potential denial of justice, provided that adverse

However, there might be some cases in which the assistance of a domestic court is necessary to ensure the proper conduct of the arbitration. The need for such an external assistance primarily emerges from the fact that arbitral tribunals do not have the same coercive powers of judicial courts, provided that arbitrators act as private actors. ([448]) The court assistance during the evidentiary phase might thus become necessary in certain situations, ([449]) for example in cases where evidence is in control of third parties that are extraneous to the proceeding – hence, it is not accessible to the non-producing party – as well as when the witness whose presence is required is not connected with the parties to the proceeding.

In this respect, Article 27 of the UNCITRAL Model Law expressly states that «the arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent court of this State assistance in taking evidence». First, it is to be noted that this article generally refers to the court assistance during the evidentiary phase, without specifically circumscribing certain types of evidence about which the intervention of a domestic court

---

inferences do not *per se* violate the parties' procedural rights. In this context, however, it is believed that, «as a best practice, an arbitral tribunal should warn the party before it draws adverse inferences», so that the party against which an adverse inference has been drawn cannot complain that it is surprised by the conduct of the tribunal (MARGHITOLA, R. *Document Production in International Arbitration,* above-cited, p. 214).

[448] Accordingly, «given the consensual nature of arbitration, arbitrators' hands are tied and orders can be made only against parties to the arbitration and in respect of evidence that is in their possession or control» (MASSER, A., RAIMANOVÀ L., PAULEY K. and PLACHY P., *Special Mechanisms for Obtaining Evidence*, in *The Guide To Evidence in International Arbitration* (eds.) Amy Kläsener, Martin Magál, Joseph Neuhaus, 2021, p. 190).

[449] It must be noted that, in general terms, court assistance can be exercised either with the adoption of "interim measures" or "specific measures" of taking of evidence. A definition of interim measure can be found in Article 17(2) of the UNCITRAL Model Law, which states that «an interim measure is any temporary measure, whether in the form of an award or in another form, by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to […] (d) Preserve evidence that may be relevant and material to the resolution of the dispute». The objective of such interim measures is therefore to grant temporary protection as to safeguard the parties' rights from potential prejudices during the proceeding. For a deeper analysis of the provisional measures in international arbitration, among the others, see BORN, G. *International Arbitration: Law and Practice*, Kluwer Law International, 3rd ed., 2021, ch. 11; BLACKABY N., PARTASIDES C., REDFERN A., HUNTER M., *Redfern and Hunter on International Arbitration*, above-cited, p. 421 ff.. Along with the interim measures, court assistance can be exercised by the adoption of specific measures which mainly involve the testimony and the production of documents which are not in possession of the requested party. Contrary to the interim measures, such latter instruments are aimed at establishing the relevant facts of the case. See RAESS L., *Court Assistance in the Taking of Evidence in International Arbitration*, 2020, p. 89 ff.

could be justified. Second, Article 27 is aimed at deterring potential procedural abuses of the measure in comment, as parties are allowed to make requests for court assistance only with the approval of the arbitral tribunal. The express provision that the parties' request must be subject to the tribunal's approval is prove of the fact that, when deciding upon this matter, arbitrators must void any possible dilatory tactics, as well as they must prevent potential conflicts related to the application of national provisions of civil procedure to the taking of evidence.

Moreover, the arbitral tribunal itself is legitimated to resort to court assistance in cases where it considers certain evidence to be relevant or determinative for the resolution of the dispute, especially when a certain evidence could not be entered to the proceeding through different means. The fact that the arbitral tribunal might ask for a domestic court's intervention during this phase of the proceeding does not lessen the arbitrators' power to take and to assess evidence for the aim of the proceeding, provided that only the tribunal is entitled to manage the arbitration. This assumption is consistent with the fact that, in such circumstances, domestic courts are only required to assist the arbitrators for the correct acquisition of evidence, in compliance with the procedural rules of the respective Member State, ([450]) as

[450] Several mechanisms aimed at obtaining court assistance in the taking of evidence also exist in non-Model Law jurisdictions. For instance, Article 184(2) of the Swiss Statute on Private International Law regulates the court assistance in a way that is similar to the provision of Article 27 UNCITRAL Model Law (Article 184(2): «if the assistance of state judicial authorities is required for the taking of evidence, the arbitral tribunal, or a party with the consent of the arbitral tribunal, may request the assistance of the state court at the seat of the arbitration»). Similarly, Article 1469 of the French Code of Civil Procedure allows a party to apply to the domestic court in order to obtain evidence held by a third party (Article 1469: «si une partie à l'instance arbitrale entend faire état d'un acte authentique ou sous seing privé auquel elle n'a pas été partie ou d'une pièce détenue par un tiers, elle peut, sur invitation du tribunal arbitral, faire assigner ce tiers devant le président du tribunal judiciaire aux fins d'obtenir la délivrance d'une expédition ou la production de l'acte ou de la pièce»). Interestingly, a different mechanism for court assistance can be found in common law jurisdiction, where arbitral tribunals are allowed to subpoena a person within the jurisdiction either to appear to give oral evidence or to disclose relevant documents in its possession. For instance, such a mechanism is provided by under Section 7 of Title 9 of the US Code, according to which the tribunal may issue a subpoena to a witness to appear before it for testimony.

this mechanism does never allow the judicial authorities to interfere in the merits of the arbitration. ([451])

In the same vein, the IBA Rules on Evidence provide specific requirements as to when and how domestic courts can assist the tribunal during the evidentiary phase. In particular, they establish that court intervention can be asked only in cases where documentary or witness evidence is in control of third parties. ([452])

With regard to documentary evidence, Article 3(9) of the IBA Rules imposes strict requirements that must be met in order for a party to raise a legitimate request towards a domestic court. ([453]) The requesting party shall indeed submit such a demand to the arbitral tribunal, which shall decide on the request and shall take such steps as it considers appropriate, in its discretion, as to determine whether the requested documents are relevant to the case and material to its outcome.

Comparing the content of Article 27 UNCILTRAL Model Law with Article 3(9) of the IBA Rules, it is possible to note that the latter imposes stricter requirements as to obtain documents from third parties. Indeed, parties are allowed to make requests for court assistance only if they are unable to obtain the document themselves. Moreover, the request must meet

---

[451] In this sense, it has been argued that «the relationship between national courts and arbitral tribunals swings between forced cohabitation and true partnership» (BLACKABY N., PARTASIDES C., REDFERN A., HUNTER M., *Redfern and Hunter on International Arbitration*, above-cited, p. 415).

[452] The IBA Rules on the Taking of Evidence do not contain provisions regarding the intervention of domestic courts in relation to expert witnesses or inspections.

[453] It must be noted that, instead of mentioning the "court assistance", the IBA Rules generally make reference to the possibility to "take whatever steps are legally available to obtain the requested documents", without specifically listing such legally available instruments. In this regard, scholars have interpreted the wording of the IBA Rules as allowing the possibility to seek assistance from domestic courts, among the other possible measures aimed at the same result. See O'MALLEY NATHAN D., *Rules of Evidence in International Arbitration: An Annotated Guide*, 2nd ed., Routledge, 2019, p. 93; ZUBERBUḤLER T., HOFMANN D., OETIKER C. and ROHNER T.*, Art. 3 IBA Rules,* in *IBA Rules of Evidence: Commentary on the IBA Rules on the Taking of Evidence in International Arbitration*, 2012.

the requirements of Article 3(3) of the IBA Rules ([454]) and none of the reasons for objection set forth in Article 9(2) shall exist. ([455])

As an alternative to the parties' demand, the arbitral tribunal itself is allowed to request for court intervention under Article 3(10) of the IBA Rules – as well as provided by Article 27 UNCILTRAL Model Law – whenever it considers appropriate to obtain documents from "any person or organization". Due to the fact that the exercise of such a power by the tribunal could potentially violate the principle of equal treatment, the IBA Rules expressly provide that arbitrators must first grant the parties the right to be heard, being the tribunal allowed to decide only afterwards whether court assistance is necessary in that specific occasion. ([456])

Finally, regarding witness evidence, the provision contained in Article 4(9) of the IBA Rules is very similar to the content regulating document production. In contrast with the content of the aforementioned Article 3(10), it is worth noting that in this case the Rules do not expressly provide for the arbitral tribunal itself to seek for court assistance when dealing with witness

---

[454] Under Article 3(3) of the IBA Rules: «a Request to Produce shall contain: (a) (i) a description of each requested Document sufficient to identify it, or (ii) a description in sufficient detail (including subject matter) of a narrow and specific requested category of Documents that are reasonably believed to exist; in the case of Documents maintained in electronic form, the requesting Party may, or the Arbitral Tribunal may order that it shall be required to, identify specific files, search terms, individuals or other means of searching for such Documents in an efficient and economical manner; (b) a statement as to how the Documents requested are relevant to the case and material to its outcome; and (c) (i) a statement that the Documents requested are not in the possession, custody or control of the requesting Party or a statement of the reasons why it would be unreasonably burdensome for the requesting Party to produce such Documents, and (ii) a statement of the reasons why the requesting Party assumes the Documents requested are in the possession, custody or control of another Party».

[455] Under Article 9(2) of the IBA Rules: «the Arbitral Tribunal shall, at the request of a Party or on its own motion, exclude from evidence or production any Document, statement, oral testimony or inspection, in whole or in part, for any of the following reasons: (a) lack of sufficient relevance to the case or materiality to its outcome; (b) legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable (see Article 9.4 below); (c) unreasonable burden to produce the requested evidence; (d) loss or destruction of the Document that has been shown with reasonable likelihood to have occurred; (e) grounds of commercial or technical confidentiality that the Arbitral Tribunal determines to be compelling; (f) grounds of special political or institutional sensitivity (including evidence that has been classified as secret by a government or a public international institution) that the Arbitral Tribunal determines to be compelling; or (g) considerations of procedural economy, proportionality, fairness or equality of the Parties that the Arbitral Tribunal determines to be compelling».

[456] O'MALLEY NATHAN D., *Rules of Evidence in International Arbitration: An Annotated Guide*, above-cited, p. 125.

evidence. However, as there is no specific indication that the drafters of the IBA Rules really wanted to limit the arbitral tribunal's powers in this regard, some authors have supported the idea that the content of Article 4(10) of the IBA Rules should be interpreted broadly, as also to allow the arbitrators to order, on their own initiative, the examination of witnesses by state courts even in this circumstance. ([457])

4.2. (*following*) *Is court assistance compatible with the arbitration agreement and the right of equal treatment?*

The risk that resorting to the taking of evidence before a domestic court might operate as a waiver of the arbitration agreement has been debated over time.

It is indeed understandable that the party against which the court assistance operates might complain about the adoption of such a measure in the proceeding. One of the main reasons at the basis of the adversary party's complaint involve the fact that, when choosing to arbitrate the dispute, parties deliberately exclude the possibility for the case to be discussed, and for the facts to be assessed, before State courts. Accordingly, any intervention of the judicial authority could be deemed as an attempt to circumvent the arbitration agreement, as it would lessen the arbitrators' exclusive power to manage the proceeding. ([458])

Moreover, as the taking of evidence before domestic courts follows the national provisions on procedure of the Member State where the court is seated, one could argue that such a request for assistance would amount to

---

[457] RAESS L., *Court Assistance in the Taking of Evidence in International Arbitration*, above-cited, p. 98.

[458] DUPEYRON C., *Shall National Courts Assist Arbitral Tribunals in Gathe ring Evidence?,* in *International Arbitration and the Rule of Law: Contribution and Conformity*, (ed.) Andrea Menaker, ICCA Congress Series, no. 19, Kluwer Law International, 2017, 467.

the imposition of a specific legal culture with regard to matters of evidence, in contrast with the need to balance the opposing interests of the parties, especially when the participants come from different legal traditions. ([459])

Although these arguments are grounded on reasonable basis, some counterarguments can be presented in support of the opposite orientation.

The first issue that must be considered is whether, in essence, the request to resort to court assistance can be considered as a circumvention of the arbitration agreement. In this respect, no doubts shall be raised on the fact that the parties' decision to arbitrate the dispute amounts to their will not to settle the case before a State court and, most importantly, it implies that the proceeding shall be governed by those rules expressly referred to in the arbitration agreement.

At the same time, the provisions governing the proceeding – as contained in the parties' agreement, *leges arbitri* and institutional arbitration rules – generally oblige parties and the tribunal to act "in good faith". ([460]) Accordingly, whenever a party, without satisfactory explanation, does not act in good faith – for instance, as it refuses to produce relevant evidence – the court intervention would find its legitimacy directly in the breach of the arbitration agreement. In other terms, it is the same decision of a party not to comply with the arbitration agreement, thus violating the principle of good

---

[459] However, in this respect it has been argued that «even if court assistance must be sought in countries with broad discovery/disclosure rights in their domestic civil procedure rules, the parties can define and limit the scope of the taking of evidence in the case management conference. Hence, the fear that state courts will impose a foreign legal culture is in most cases unfounded». (RAESS L., *Court Assistance in the Taking of Evidence in International Arbitration*, above-cited, p. 102).

[460] See, for instance, Article 2A(1) of the UNCITRAL Model Law («in the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of *good faith*»); Article 9(8) of the IBA Rules on Evidence («if the Arbitral Tribunal determines that a Party has failed to conduct itself in good faith in the taking of evidence, the Arbitral Tribunal may, in addition to any other measures available under these Rules, take such failure into account in its assignment of the costs of the arbitration, including costs arising out of or in connection with the taking of evidence»); Article 14.5 LCIA Rules («without prejudice to the generality of the Arbitral Tribunal's discretion, after giving the parties a reasonable opportunity to state their views, the Arbitral Tribunal may, subject to the LCIA Rules, make any procedural order it considers appropriate with regard to the *fair*, efficient and expeditious conduct of the arbitration»); Article 22(4) ICC Rules («in all cases, the arbitral tribunal shall act *fairly* and impartially and ensure that each party has a reasonable opportunity to present its case»).

faith, that authorizes the tribunal, as well as the opposing party, to ask for assistance from domestic courts.

Consequently, whether parties are interested to avoid an extensive interpretation of the arbitration agreement, they need to convene the specific conditions upon which court assistance might be asked, either when drafting the arbitration agreement or during the aforementioned case management conference, being them also allowed to entirely exclude the possibility to resort to such a measure. ([461])

Once it has been stated that court intervention is not *per se* incompatible with the arbitration agreement, it is believed that such a measure is also in compliance with the parties' right to be treated equally. In this respect, as to prevent abusive conducts, the arbitral tribunal can sanction the party which has caused unjustified costs and time delays through its request for court assistance in violation of the arbitration agreement, for instance by allocating the costs of the proceeding to that requesting party in the arbitral award. Moreover, attempts of a party to adopt such dilatory tactics could be detected by domestic courts themselves, which might well refuse to grant assistance to a party on their own initiative in such circumstances.

In conclusion, in order to grant that parties are treated equally, it has been seen that the arbitral tribunal itself should resort to court assistance only in those cases where evidence which is relevant for the case could have not been taken to the proceeding trough the adoption of a different mechanism.

It is thus evident that resorting to domestic courts, instead of lessening the powers of the arbitrators, can help reinforcing arbitral tribunals and their legal authority. As above discussed, the arbitral tribunal has generally enough power to contrast the conduct of the non-producing party, for example, by

---

[461] Accordingly, for example, Article 26(9) of the UNCITRAL Arbitration Rules (2021) states that «a request for interim measures addressed by any party to a judicial authority *shall not be deemed incompatible with the agreement to arbitrate*, or as a *waiver of that agreement*» (emphasis added). See also DUPEYRON C., *Shall National Courts Assist Arbitral Tribunals in Gathe ring Evidence?*, above-cited, p. 470.

drawing an adverse inference against that party who deliberately decides not to produce evidence without a valid reason. However, evidence shows that, in some circumstances, court intervention might result useful in order for the tribunal to correctly fulfill its mandate. Provided that fact finding activities are crucial for the final decision of a dispute, indeed, such a measure proves to be needed whenever facts could not be taken and proven in arbitration in lack of the judicial intervention, with the result of compromising the parties' procedural right to present their case.

5. *Conclusive remarks on the need to lessen unwarranted due process concerns for the future of international commercial disputes*

Among the dispute resolution methods dealing with cross-border commercial disputes, evidence shows that international commercial arbitration represents the most preferred one. ([462])

Contrary to the judicial court proceedings, the private nature of arbitration confers to its users a certain control over the procedure, by excluding, in essence, the application of those stricter procedural rules

---

[462] See Queen Mary University of London School of Law and White & Case, *2018 International Arbitration Survey: The Evolution of International Arbitration*, Charts 1 and 2, available at: arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey—The-Evolution-of-International-Arbitration-(2).PDF [accessed 13 April 2024]; Singapore Management University, School of Law, Singapore International Dispute Resolution Academy (SIDRA), *SIDRA International Dispute Resolution Survey: 2020 Final Report*, Exhibit 4.1., available at: https://sidra.smu.edu.sg/sidra-international-dispute-resolution-survey-final-report-2020 [accessed 13 April 2024]. It is worth noting that the phenomenon of international commercial courts, as an integral component of the national judiciary systems, constitutes a relatively new one. However, some authors have already expressed a certain reluctance on the ability of such courts to better serve the needs of international commerce if compared to the international commercial arbitration system. In particular, it has been outlined that international commercial courts «remain state courts and the proceedings before them are ultimately state court proceedings conducted in most cases in accordance with national rules» and therefore, «[t]hey will therefore at least be perceived to be influenced by national traits» (RUCKTESCHLER D. and STOOSS T., *International Commercial Courts: A Superior Alternative to Arbitration?*, in *Journal of Arbitration*, 2019, vol. 36, no. 4, p. 448). On the same topic, see also ANTONOPOULOU G., *The 'Arbitralization' of Courts: The Role of International Commercial Arbitration in the Establishment and the Procedural Design of International Commercial Courts*, in *Journal of International Dispute Settlement*, 2023, vol. 14, no. 3

prescribed at the national judicial level. ([463]) However, as a flipside to the adoption of a private and faster dispute resolution mechanism, the international arbitration community is required to safeguard the integrity and fairness of the international commerce.

It is well known that the States' delegation of jurisdictional powers to the arbitral tribunals – according to which arbitral awards are conferred final and binding effects – requires some necessary procedural guarantees to be applied also in arbitration. ([464]) In this sense, steps have been taken with the aim to foster fundamental procedural guarantees of due process in this area, especially when the taking of evidence is at stake. ([465])

In order to obtain the recognition and enforcement of their awards, arbitrators must thus ensure that the proceeding undertaken before them meets certain procedural standards. It is also well known that the parties' voluntary decision to resort to the arbitral tribunal prevents them from starting a similar procedure before a domestic court. This constitutes another remarkable element according to which pivotal importance must be recognized towards due process requirements in arbitration. In this respect, as the arbitration agreement limits access to the national courts (and thus "access to justice"), the arbitral proceeding must necessarily safeguard the protection of those undeniable parties' procedural rights.

After having clarified that due process rights constitute a foundational element of arbitration, the current analysis has been primarily aimed at assessing to what extent such procedural guarantees may limit the arbitrators'

---

[463] In this field, however, some authors have expressed their concerns about the arbitration process becoming too "judicialized", by the adoption of complex procedural rules inspired by court-like formalities, resulting in the increase of costs and delays. For a deeper analysis of this topic, see BERMANN G. A., *The Future of International Commercial Arbitration, in The Cambridge Companion to International Arbitration*, (ed.) C. L. Lim, Cambridge University Press, 2021, p. 138 ff.

[464] KURKELA, M. S. AND TURUNEN S., *Due Process in International Commercial Arbitration*, above-cited, p. 201.

[465] ALLSOP J.L.B. AC, *Keynote Address: International Arbitration and Conformity with International Standards of Due Process and the Rule of Law*, p. 796.

discretion and may thus potentially interfere with the flexibility and speediness of the proceeding.

From the comparative analysis of the relevant case-law, it has emerged that due process and efficiency should be understood as complementary goals, instead of mutually exclusive ones.

Most scholars and practitioners have supported the idea that it is perfectly possible to grant certain procedural standards of due process by running, at the same time, arbitration proceedings efficiently. ([466]) This assumption founds its ground on three main elements, that have already been scrutinized: first, domestic legislation and arbitration rules confer wide discretion to the arbitrators when procedural decisions are at stake; second, domestic courts generally show a high level of deference towards arbitral tribunals' decisions; third, arbitrators can resort to a wide range of case management techniques, that may help them accomplishing their task in a satisfactory way.

In particular, when considering the review of national courts' approaches towards arbitral decisions, relevant case law is full of comforting examples from the judiciary. Domestic courts have indeed shown a certain attitude in disregarding challenges grounded on merely formal procedural violations, thus requiring the challenging party to prove that it has concretely suffered a substantive prejudice – which has caused a concrete breach of its due process rights – in order for the award to be vacated.

In doing so, the judiciary recognizes the remarkable importance that arbitral discretion plays in arbitration, as courts' intervention has mainly been

---

[466] PORNBACHER K. AND DOLGORUKOW A., *Reconciling due process and efficiency in International Arbitration*, above-cited, p. 50 ff. See also FERRARI F., ROSENFELD F., CZERNICH D., *Due Process as a Limit to Discretion in International Commercial Arbitration*, above-cited, p. 39, stating that «one should respect due process as a fundamental guarantee of arbitration that can and must be upheld while at the same time ensuring the efficiency of the proceedings». Moreover, this principle also applies in investment arbitration, as arbitrators are called to «ensure that, in concrete, each party has once the right to present its case but – at the same time – they have a duty to avoid wastes of money and time», also considering that, with regard to investment arbitration, the increase of costs of the proceeding deriving from potential delays is sustained by public money (ZARRA G., *Parallel proceedings in investment arbitration*, above-cited, p. 44).

limited to serious and outcome-determinative circumstances, in particular where the arbitrators' conduct is found to have concretely prevented a party from effectively presenting its case. Such a wide judicial support, lacking any specific legislative regulation in this field, has thus helped the development of a "safe harbor" for arbitrators when making procedural decisions. ([467])

In this sense, some authors have supported the idea that a "Procedural Judgement Rule" – similar to the one applicable towards companies' directors – shall apply to arbitrators dealing with procedural management decisions. ([468]) According to this rule, courts shall not second guess the arbitrators' conduct in the proceeding, as long as their procedural decisions: (1) are based on an accurate assessment of the case, made in good faith by the arbitrators themselves *ex ante*, and (2) are thus "reasonable", according to the judgement intervened *ex post*.

In light of the above, the assumption that due process constitutes an obstacle to the efficient delivery of justice – amounting to the misjudgment that arbitrators would have to sacrifice due process for the sake of efficiency, and vice versa – turns to be unfounded. Such a misconception is also reinforced by the unjustified belief that domestic courts might have a different understanding of due process, resulting in the rise of a "due process paranoia" among practitioners in international arbitration.

However, according to the outcomes of the current analysis, such a paranoia has been proven to have no foundation. Indeed, the vacatur of an arbitral award would potentially intervene only in cases where the arbitral tribunals' conduct amounts to a misuse of its procedural discretion, which has caused a concrete prejudice to the opposing party.

---

[467] POLKINGHORNE M. and GILL B. A., *Due Process Paranoia: Need We Be Cruel to Be Kind*, in *Journal of International Arbitration*, 2017, vol. 34, issue 6, p. 939.

[468] This rule refers to the discretion recognized upon directors when running a corporation and has been coined by BERGER, K.P.B. AND JENSEN, J.O., *Due process paranoia and the procedural judgment rule: a safe harbour for procedural management decisions by international arbitrators*, above-cited, p. 428.

From a different perspective, when assessing the extension of the procedural safeguards related to due process, what apparently seems to be an obstacle (namely, defining the scope of the arbitrators' procedural discretion) turns to be the solution. In particular, as long as the arbitral tribunal exercises its discretion in a reasonable manner, by attempting to balance both due process and efficiency concerns, courts will recognize the aforesaid safe harbor to international arbitrators, which will exclude the possibility for the award to be annulled or denied enforcement. ([469])

Finally, the question on whether arbitrators have reasons for due process paranoia can thus be answered.

In light of the case law and scholarship reviewed in this work, due process paranoia shows to be completely unwarranted. It follows that arbitral tribunals should have the confidence to act decisively in safeguarding the parties' right to be heard and to be treated equally in adversarial proceedings, without being excessively cautious and fearful of having their award vacated due to a potential violation of due process. As outlined in this work, several techniques already exist as to help arbitrators taking charge of the proceeding, by promoting an environment where abusive behaviors are prevented from the outset, and thus fostering a framework where unreasonable procedural requests and complaints have no power to threat the finality of the award.

Most importantly, it emerges that all the participants to international commercial arbitration – including parties and their counsels – shall promote a "fairness framework", ([470]) by ensuring that procedural standards are respected during the proceeding, instead of raising challenges before national courts, for the first time, only after the conclusion of the arbitral process.

---

[469] In this sense, it has been stated that «avoid[ing] "paranoid thinking" and find the exact balance is not easy, but it is part of the art of the arbitration» (FUMAGALLI L., *The right to be heard: what does it really mean? Information to heal the "due process paranoia",* in *CAS Bulletin*, 2019, p. 23).

[470] In the opinion of some authors «all stakeholders are at least partially to blame, although arbitrators probably have the greatest scope for improvement» (POLKINGHORNE M. and GILL B. A., *Due Process Paranoia: Need We Be Cruel to Be Kind*, above-cited, p. 939).

In conclusion, there is no doubt that arbitration will continue to play a pivotal role in the transnational dispute resolution framework in the years to come. It is thus for the benefit of future arbitrations that the aforesaid procedural paranoia – which only erodes the efficiency of the proceeding, without providing any worthy guarantee to the parties – must be avoided, in order to preserve the legitimacy of arbitration as an effective and alternative dispute resolution mechanism.

BIBLIOGRAPHY

MONOGRAPHS

BANTEKAS I., *An Introduction to International Arbitration*, Cambridge University Press, 2015, 13.

BENEDETTELLI M., *Human Rights as a litigation tool in international arbitration: reflecting on the ECHR experience*, in *Arbitration International*, 2015, Oxford University Press.

BERGER B. AND KELLERHALS F., *International and Domestic Arbitration in Switzerland*, 3rd edition, 2015.

BINDER P., *International Commercial Arbitration and Mediation in UNCITRAL Model Law Jurisdictions*, 4th edition, Wolters Kluwer, 2019, 330.

BORN, G., *International Commercial Arbitration*, 3rd edition, Wolters Kluwer, 2021.

BORN, G., *International Arbitration: Law and Practice*, Kluwer Law International, 3rd ed., 2021.

BLACKABY N., PARTASIDES C., REDFERN A., HUNTER M., *Redfern and Hunter on International Arbitration*, Oxford University Press, 2015.

BROWN, C. *Inherent Powers in International Adjudication* in *The Oxford Handbook of International Adjudication*, (eds.) C. Romano, K. Alter, Y. Shany, 2013.

CARON D. D. and CAPLAN L. M., *The UNCITRAL Arbitration Rules: A Commentary*, 2nd ed., Oxford University Press, 2013.

CROFT C. *et al.*, *A Guide to the UNCITRAL Arbitration Rules*, Cambridge University Press, 2013.

EMANUELE, F. and MOLFA, M., *Evidence in International Arbitration. The Italian Perspective and Beyond*, Thomson Reuters, 2016.

FERRARI, F. and CORDERO-MOSS G., *Iura Novit Curia in International Commercial Arbitration*, 2018.

FERRARI F., ROSENFELD F., CZERNICH D., *Due Process as a Limit to Discretion in International Commercial Arbitration*, Wolters Kluwer, 2020.

FERRARI F. and ROSENFELD F., *International Commercial Arbitration: A Comparative Introduction*, Edward Elgar Publishing, 2021.

GEISINGER E. and MAZURANIC A., *Challenge and revision of the award*, in *International Arbitration in Switzerland: A Handbook for Practitioners*, (eds.) E. Geisinger *et al.*, 2nd edition, Wolters Kluwer, 2013.

GEISINGER E. and DUCRET P., *The Arbitral Procedure*, in *International Arbitration in Switzerland: A Handbook for Practitioners*, (eds.) E. Geisinger *et al.*, 2nd edition, Wolters Kluwer, 2013.

GERBAY R., *The Functions of Arbitral Institutions,* Kluwer Law International, 2016.

GHARAVI H., *The International Effectiveness of the Annulment of An Arbitral Award*, 2002, 31.

HANEFELD, I. AND DEJONG, A. *Inherent Powers to Streamline the Proceedings* in *Inherent powers of arbitrators*, (eds.) F. Ferrari and F. Rosenfeld, 2019.

HART H. L. A., *The Concept of Law*, 3rd edition, Oxford University Press, 2012.

HYDER ALI A. et al., *The International Arbitration Rulebook: A Guide to Arbitral Regimes*, (eds.) Hyder Ali A. et al., 2019.

HOLTZMANN H. M. and NEUHAUS J. E., *A guide to the UNCITRAL model law on international commercial arbitration: legislative history and commentary*, Kluwer Law and Taxation Publishers, 1995.

HORVATH J.G. AND WILSKE S. (eds.), *Guerrilla Tactics in International Arbitration*, 2013.

KAPLAN N., *Winter of Discontent*, in *Journal of International Arbitration*, 2017, vol. 34, issue 3, 373-386.

KARTON, J. *The Culture of International Arbitration and the Evolution of Contract Law*, 2013.

KAUFMANN-KOHLER G. AND RIGOZZI, A. *International Arbitration: Law and Practice in Switzerland*, Oxford University Press, 2015.

KURKELA M. S. and TURUNEN S., *Due Process in International Commercial Arbitration*, 2nd edition, Oxford University Press, 2010.

LA CHINA, S. *L'arbitrato, Il sistema e l'esperienza*, Giuffrè, 2011.

LAZAREFF, S. *L'arbitre singe ou comment assassiner l'arbitrage*, in *Global Reflections on International Law, Commerce and Dispute Resolution: Liber Amicorum in honour of Robert Briner*, ICC Publishing, 2005.

LEW, J.D.M., MISTELIS, L.A. AND KRÖLL, M.S., *Comparative International Commercial Arbitration*, 2003.

MACASSEY L., *International Commercial Arbitration: Its Origin, Development and Importance*, in *Transactions of the Grotius Society*, Cambridge University Press, 1938, Vol. 24.

MANDUJANO RUBÌN J. L., *Due process in arbitration*, in *Journal of Positive Psychology and Wellbeing*, 2022, Vol. 6, n. 2.

MARSMAN, A. AND MARNIX, L. *International Arbitration in the Netherlands: With a Commentary on the NAI and PCA Arbitration Rules*, Kluwer Law International, 2021.

MONTINERI C., *The UNCITRAL Arbitration Rules and their use in ad hoc arbitration*, in Cordero-Moss (ed.), *International Commercial Arbitration*, Cambridge Press University, 2013.

MUSTILL, *Is it a bird?*, in *Liber amicorum Claude Reymond: autour de l'arbitrage*, Reymond-Bernardini (ed.), 2004.

O' MALLEY, N., *Rules of Evidence in International Arbitration: An annotated Guide*, 2nd edition, 2019.

PALOMBINO F., *Il trattamento giusto ed equo degli investimenti stranieri*, il Mulino, 2012.

PARK W. W., *The Procedural Soft Law of International Arbitration: Non-Governmental Instruments*, in *Persuasive Problems in International Arbitration*, (eds.) Julian D.M. Lew-Loukas Mistellis, Kluwer Law International, 2006.

PARK, W.W., *Arbitration of International Business Disputes: Studies in Law and Practice*, 2nd ed., Oxford University Press, 2012.

PARK W. W., *Arbitration and Fine Dining: Two Faces of Efficiency*, in *The Powers and Duties of an Arbitrator: Liber Amicorum Pierre A. Karrer,* (eds.) Patricia Shaughnessy and Sherlin Tung, Kluwer Law International, 2017.

PAULSSON J., *The idea of arbitration*, Oxford Univeristy Press, 2013.

PAULSSON J. and PETROCHILOS G., U*NCITRAL Arbitration*, Kluwer Law International, 2018.

PETROCHILOS G., *Procedural Law in International Arbitration*, Oxford, 2004.

PUNZI C., *Disegno sistematico dell'arbitrato*, Padova, CEDAM, 2012.

RAESS L., *Court Assistance in the Taking of Evidence in International Arbitration*, 2020.

RAGNO F., *Il giusto processo nell'arbitrato commerciale internazionale: gli orientamenti della giurisprudenza italiana*, in Attila Tanzi-Alessandra Sardu (ed.), *L'arbitrato amministrato: profili interni e internazionali*, Editoriale Scientifica, 2021.

RICCI G. F., *Il lodo rituale di fronte ai terzi*, in *Rivista di diritto processuale*, 1989.

ROGERS C., *Ethics of International Arbitration*, Oxford University Press, 2014.

SALVANESCHI, L. *Dell'arbitrato, Art. 806-840. Commentario del Codice di Procedura Civile,* Zanichelli, 2014.

SHROFF P., *Due Process in International Arbitration: Balancing Procedural Fairness and Efficiency*, in *International Arbitration and the Rule of Law: Contribution and Conformity*, (ed.) Menaker A., ICCA Congress Series, Kluwer Law International, 2017.

TAVENDER E.D.D., *Considerations of Fairness in the Context of International Commercial Arbitration*, in *Alberta Law Review*, 1996.

VAN DEN BERG A.J., *New York Convention of 1958,* Wolters Kluwer, 1981, 301.

VERBIST H., SCHÄFER E. and IMHOOS C., *ICC Arbitration in Practice,* 2nd edition, Wolters Kluwer, 2005.

VERBIST H.*, Challenges on Grounds of Due Process Pursuant to Article (V)(1)(B) of the New York Convention,* in *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in*

Practice, (eds.) Emmanuel Gaillard, Domenico Di Pietro and Nanou Leleu-Knobil, 2008, 697-728.

WAINCYMER J., *Procedure and Evidence in International Arbitration*, Wolters Kluwer, 2012.

ZARRA G., *Parallel proceedings in investment arbitration*, Giappichelli Editore, 2016.

ZUCCONI GALLI FONSECA E., *Il processo arbitrale (con il focus sull'istruttoria)*, Napoli, 2018.

ARTICLES

AKSEN G., *On Being a Pro-Active International Arbitrator*, in *Law of International Business and Dispute Settlement in the 21 Century*: *Liber Amicorum Karl-Heinz Böckstiegel, Heymanns*, (eds.) R. Briner, L.Y. Fortier, K.P. Berger & J. Bredow.

ALLSOP J., *The Authority of the Arbitrator*, in *Arbitration International*, 2014, vol. 30, issue 4, 639-660.

ALLSOP J.L.B. AC, *Keynote Address: International Arbitration and Conformity with International Standards of Due Process and the Rule of Law*, in *International Arbitration and the Rule of Law: Contribution and Conformity*, (ed.) Menaker A., ICCA Congress Series, Kluwer Law International, 2017, 786.

AMARAL, G. R., *Prague Rules v. IBA Rules and the Taking of Evidence in International Arbitration: Tilting at Windmills*, Kluwer Arbitration Blog 2018, available at: http://arbitrationblog.kluwerarbitration.com/2018/07/05/ [accessed 5 March 2024]

ANTONOPOULOU G., *The 'Arbitralization' of Courts: The Role of International Commercial Arbitration in the Establishment and the Procedural Design of International Commercial Courts*, in *Journal of International Dispute Settlement*, 2023, vol. 14, no. 3, 328-349.

ARBISMAN J., GENEST A., GIAKOUMAKIS E., *Due Process and Procedural Irregularities*, in *Global Arbitration Review*, 2023.

ARROYO M., *Article 190 PILS*, in *Arbitration in Switzerland: The Practitioner's Guide*, (ed.) Manuel Arroyo, 2nd edition, Kluwer Law International, 2018.

BARRACLOUGH A. and WAINCYMER J., *Mandatory Rules of Law in International Commercial Arbitration*, in *Melbourne Journal of International Law*, 2005, 6, n. 2, 215-216.

BATES JR, A. AND TORRES-FOWLER, R. Z., *Abuse of Due Process in International Arbitration: Is Due Process Paranoia Irrational?*, in *American Journal of Construction Arbitration & ADR*, 2017.

BENEDETTELLI, M. V., *Human rights as a litigation tool in international arbitration: reflecting on the ECHR experience*, in *Abitration International*, 2015, vol. 31.

BENEDETTELLI, M. V., *The European Convention on Human Rights and Arbitration: The EU Law Perspective*, in *The Impact of EU Law on International Commercial Arbitration*, (ed.) Franco Ferrari, 2017.

BENEDETTELLI, M. AND TORSELLO, M., *Italy*, in *The Guide to Challenging and Enforcing Arbitration Awards*, (eds.) J. William Rowley, Emmanuel Gaillard and Gordon E. Kaiser, 2019.

BERGER, K.P.B., *Evidentiary Privilege: Best Practice Standards versus/and Arbitral Discretion*, in *Arbitration International*, 2006, vol. 22, no. 4, 501-520.

BERGER K.P., *The Need for Speed in International Arbitration: Supplementary Rules for Expedited Proceedings of German Institutions of Arbitration (DIS)*, in *Journal of International Arbitration* 2008, vol. 25, issue 5, p. 595-612.

BERGER, K.P.B. AND JENSEN, J.O., *Due process paranoia and the procedural judgment rule: a safe harbour for procedural management decisions by international arbitrators*, in *Arbitration International*, 2016.

BERMANN G. A., *International Arbitration and Private International Law*, in *Recueil des Courts*, 2015, 41, 381.

BERMANN G. A., *The Future of International Commercial Arbitration, in The Cambridge Companion to International Arbitration*, (ed.) C. L. Lim, Cambridge University Press, 202, 138-175.

BERNARDINI P., *The Role of the International Arbitrator*, in *Arbitration International*, 2004, vol. 20, no. 2, p. 113-122.

BLAVI F., *The Role of Public Policy in International Commercial Arbitration*, in *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management*, 2016, 82, 1, 2.

BLAVI F., *A case in favour of publicly available awards in international commercial arbitration: transparency v. confidentiality*, in *International Business Law Journal*, 2016, no. 1, 83-92.

BÖCKSTIEGEL K. H., *Case Management by Arbitrators: Experiences and Suggestions*, in *Global Reflections on International Law, Commerce and Dispute Resolution: Liber Amicorum in Honour of Robert Briner*, (ed.) Gerald Aksen, 2005.

BROWER, C. N., *The Anatomy of Fact-Finding before International Tribunals: An Analysis and a Proposal Concerning the Evaluation of Evidence*, in *Fact-Finding before International Tribunals: Eleventh Sokol Colloquim*, (ed.) Richard B. Lillich, 1992.

BROWN D., *What Steps Should Arbitrators Take to Limit the Cost of Arbitration?*, in *Journal of International Arbitration*, 2014, vol. 31, no. 34, 499-506.

BUXTON, R. *The Rules of Evidence as Applied to Arbitration*, in *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management*, 1992, vol. 58, issue 4, 229 ff.

CARBONE S. M., *Per una interpretazione internazionalmente orientata della disciplina italiana dell'arbitrato: prospettive di sviluppo*, in *Rivista dell'Arbitrato*, 2015.

CARPI F., *Profili del contraddittorio nell'arbitrato*, in *Rivista dell'Arbitrato*, 2002.

CARPI F., *L'indipendenza e l'imparzialità dell'arbitro. La sua responsabilità*, in *Rivista dell'Arbitrato*, 2002.

CHAN D. and GOH G., *Hearing*, in *Handbook of Evidence in International Commercial Arbitration: Key Issues and Concepts*, (eds.) Franco Ferrari and Friedrich Rosenfeld, 2022, 247-284.

COLESANTI V., *Principio del contraddittorio e procedimenti speciali*, in *Rivista di diritto processuale*, 1975.

CONSOLO C., *L'equo processo arbitrale nel quadro dell'art. 6, § 1, della Convenzione europea dei diritti dell'uomo*, in *Rivista di diritto civile*, 1994.

DESIERTO D. A., *Rawlsian Fairness and International Arbitration*, in *University of Pennsylvania Journal of International Law*, 2015, vol. 36(4).

DIAMOND S. S., *Psychological Aspects of Dispute Resolution Issues in International Arbitration*, in *ICCA Congress Series Vol. 11*, (ed.) Albert Jan van den Berg, 2003, Kluwer Law International, 328-342.

DUPEYRON C., *Shall National Courts Assist Arbitral Tribunals in Gathe ring Evidence?,* in *International Arbitration and the Rule of Law: Contribution and Conformity*, (ed.) Andrea Menaker, ICCA Congress Series, no. 19, Kluwer Law International, 2017.

JANA A. and ARMER A. et al., *Article (V) (1) (b)*, in *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention*, (eds.) H. Kronke and P. Nacimiento et al., Wolters Kluwer, 2010.

JAPARIDZE, N., *Fair Enough? Reconciling the Pursuit of Fairness and Justice with Preserving the Nature of International Commercial Arbitration*, in *Hofstra Law Review*, vol. 36, issue 4.

FAZZALARI E., *Ancora sull'imparzialità dell'arbitro*, in *Rivista dell'Arbitrato*, 1998.

FORTESE, F. AND HEMMI, L. *Procedural Fairness and Efficiency in International Arbitration*, in *Groningen Journal of International Law*, 2015.

FORTIER, L. Y., *The Minimum Requirements of Due Process in Taking Measures against Dilatory Tactics: Arbitral Discretion in International Commercial Arbitration - "A Few Plain Rules and a Few Strong Instincts"'* in *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention*, (ed.) Albert Jan van den Berg, 1999.

FERRARI F. AND ROSENFELD F., *The Interplay Between the Post-award and the Pre-award Regimes with Respect to a Tribunal's Treatment of Evidentiary Issues*, in *Handbook of Evidence in International Commercial Arbitration*, (eds.) Franco Ferrari and Friedrich Rosenfeld, 2022.

FUMAGALLI L., *The right to be heard: what does it really mean? Information to heal the "due process paranoia",* in *CAS Bulletin*, 2019, 13-23.

GABRIEL S. AND SCHREGENBERGER A., *The new Swiss approach to the right to be heard – balancing challenging fairness and efficiency concerns*, in *Indian Journal of Arbitration Law*, vol. 8, issue, 2, 2020.

GAILLARD E. and DE LAPASSE, P., *Commentaires Analytique du Dècret du 13 Janvier 11 Portant Rèforme du Droit Francais de l'Arbitrage*, in *Paris Journal of International Arbitration*, 2011.

GAJA, G., *Article 1*, in *Commentario alla Convenzione Europea per la tutela dei diritti dell'uomo e delle libertà fondamentali*, (eds.) Sergio Bartole, Benedetto Conforti and Guido Raimondi, 2001.

GARCIA DE ENTERRIA J., *The Role of Public Policy in International Commercial Arbitration*, in *Law and Policy in International Business*, 1989-1999, 21.

GEISINGER E. AND MAZURANIC, A. *Challenge and Revision of the Award in International Arbitration in Switzerland: A Handbook for Practitioners*, (eds.) Elliott Geisinger, Nathalie Voser and Angelina M. Petti, 2nd ed., Kluwer Law & Business, 2013.

GELINAS P., *Evidence Through Witnesses*, in *Arbitration and Oral Evidence*, (eds.) L. Lévy & V. Veeder, Kluwer Law International, 2005.

GIRSBERGER D. AND VOSER N., *International Arbitration in Switzerland*, 2nd ed., 2012.

GOMEZ-ACEBO, A., *Party-Appointed Arbitrators in International Commercial Arbitration*, Kluwer Law International, 2016.

HALPRIN, P. A., *Resisting Guerrilla Tactics in International Arbitration,* in *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management*, 2019.

HAZARD G. AND DONDI A., *Responsibilities of Judges and Advocates in Civil and Common Law: Some Lingering Misconceptions Concerning Civil Lawsuits*, in *Cornell International Law Journal*, 2006.

HOHLER, S. *Country Report: Switzerland*, in *Due Process as a Limit to Discretion in International Commercial Arbitration*, (eds.) Franco Ferrari and Friedrich Rosenfeld, Wolters Kluwer, 2020, p. 379 ff.

HOLTZMANN H. M., *How to Prevent Delay and Disruption of Arbitration: Lessons of the 1990 ICCA Stockholm Congress*, in *Preventing Delay and Disruptions in Arbitration and Effective Proceedings in Construction Cases: International Congress Proceedings*, Kluwer Law International, 1991.

HOLTZMANN H. M., *Fact-Finding by the Iran–United States Claims Tribunal*, in *Fact-Finding Before International Tribunals*, (ed.) R . Lillich, 1991.

HORVATH G., *The Duty of the Tribunal to Render an Enforceable Award,* in *Journal of International Arbitration*, 2001, 18, 135.

HURNI, C., *How Arbitration-Friendly is the Swiss Federal Supreme Court?*, in *New Developments in International Commercial Arbitration*, (eds.) Christoph Müller and Antonio Rigozzi, 2012.

KAPLAN N., *If It Ain't Broke, Don't Change It*, in *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management*, 2014, vol. 80, issue 2, 172-175.

KARRER P.A., *Must An Arbitral Tribunal Really Ensure That Its Award Is Enforceable?*, in *Global Reflections on International Law, Commerce and Dispute Resolution*, *Liber Amicorum in Honour of Robert Briner*, (eds.) G. Aksen et al., 2005, 429-431.

KAUFMANN-KOHLER, G., *Soft Law in International Arbitration: Codification and Normativity*, in *Journal of International Dispute Settlement*, 2010.

KIRBY J., *Efficiency in International Arbitration: Whose Duty Is It?*, in *Journal of International Arbitration*, 2015, vol. 32, no. 6, 689-696.

KNIGGE, M. AND RIBBERS, P., *Waiver of the Right to Set-Aside Proceedings in Light of Article 6 echr: Party-Autonomy on Top?*, in *Journal of International Arbitration*, 2017, p. 775 ff..

KNOLL, J. *Article 182 PILS*, in *Arbitration in Switzerland: The Practitioner's Guide*, (ed.) Manuel Arroyo, 2nd edition, Kluwer Law International, 2018.

KNOX, J. H., *Horizontal Human Rights Law*, in *American Journal of International Law*, 2007.

KUBALCZYK A. M., *Evidentiary Rules in International Arbitration – A Comparative Analysis of Approaches and the Need for Regulation*, in *Groningen Journal of International Law*, 2015, vol. 31, issue 1, 85-109.

KUMAR S. and PRATAP SINGH R., *Transparency and Confidentiality in International Commercial Arbitration*, in *The International Journal of Arbitration, Mediation and Dispute Management*, 2020, vol. 86, no. 4, 463-481.

KUNZ, C. A., *Waiver of Right to Challenge an International Arbitral Award is not Incompatible with ECHR: Tabbane v Switzerland*, in *European International Arbitration Review*, 2016, p. 125.

KUNZ, C. *Enforcement of Arbitral Awards under the New York Convention in Switzerland*, 2016, in *ASA Bulletin*, vol. 34, issue 4, p. 836-864.

JAPARIDZE, N., *Fair Enough? Reconciling the Pursuit of Fairness and Justice with Preserving the Nature of International Commercial Arbitration*, in *Hofstra Law Review*, 2008, vol. 36, issue 4.

LAMM C. B. and HELLBECK E. R. , *The Enforcement of Awards,* in *Litigating International Investment Disputes: A Practitioner's Guide*, (ed.) Chiara Giorgetti, Brill Nijhoff, 2014.

LARSON C., *Substantive Fairness in International Commercial Arbitration: Achievable through an Arbitral Appeals Process?*, in *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management*, 2018, vol. 84, issue 2, pp. 104-127.

LEANDRO, A., *Arbitration, Multi-tier Waiver of the Access to Courts and the European Convention on Human Rights: Some Remarks on the Tabbane Decision*, in *Dialoghi con Ugo Villani*, (eds.) Triggiani et al., 2017, p. 321 ff.

LEI C., *Will Virtual Hearings Remain in Post-pandemic International Arbitration?*, in *International Journal for the Semiotics of Law - Revue internationale de Sémiotique juridique*, 2023.

LEW J.D.M. AND VALKOVA S., *Cultures and the Taking of Evidence*, in *Handbook of Evidence in International Commercial Arbitration*, 2022.

LIM, J., *Country Report: Singapore*, in *Due Process as a Limit to Discretion in International Commercial Arbitration*, (eds.) Franco Ferrari, Friedrich Rosenfeld, Dietmar Czernich, Wolters Kluwer, 2020.

LOCATELLI F., *Arbitrato e principio del contraddittorio, ovvero dell'esistenza di un principio di collaborazione tra giudicanti e parti anche nel procedimento arbitrale*, in *Rivista dell'Arbitrato*, 2015.

MADYOON, N. *Virtual Hearings in International Arbitration: Challenges, Solutions, and Threats to Enforcement*, in *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management*, 2021, Vol. 87, Issue 4, 597-611.

MAK Y., *Do Virtual Hearings Without Parties' Agreement Contravene Due Process? The View from Singapore*, in *Kluwer Arbitration Blog*, 20 June 2020, available at: https://arbitrationblog.kluwerarbitration.com/2020/06/20/do-virtual-hearings-without-parties-agreement-contravene-due-process-the-view-from-singapore/ [accessed 26 October 2023].

MARGHITOLA, R. *Document Production in International Arbitration*, 2015.
MASSER, A., RAIMANOVÀ L., PAULEY K. and PLACHY P., *Special Mechanisms for Obtaining Evidence*, in *The Guide To Evidence in International Arbitration* (eds.) Amy Kläsener, Martin Magál, Joseph Neuhaus, 2021.

MC DONALD, N. *More Harm Than Good? Human Rights Considerations in International Commercial Arbitration*, in *Journal of International Arbitration*, 2003, vol. 20.

MENON, S., *Dispelling Due Process Paranoia: Fairness, Efficiency and the Rule of Law*, in *Asian International Arbitration Journal*, 2021.

METSCH, R. AND GERBAY, R, *Prospect Theory and due process paranoia: what behavioural models say about arbitrators' assessment of risk and uncertainty*, in *Arbitration International*, 2020, vol. 36, 233-252.

MISTELIS L., *Keeping the Unruly Horse in Control or Public Policy as A Bar to Enforcement of Foreign Arbitral Awards*, in *International Law Forum du Droit International*, 2000, 2.

MOLINEAUX C., *Appplicable Law in Arbitration: The Coming Convergence of Civil and Anglo-Saxon Law via Unidroit and Lex Mercatoria*, in *The Journal of World Investment and Trade*, 2000.

NAIMARK R.W. and KEER S. E., *International Private Commercial Arbitration: Expectations and Perceptions of Attorneys and Business People*, in *International Business Lawyer*, 2002, vol. 30, no. 5.

NAIMARK R. W. and KEER, S. E., *What Do Parties Really Want from International Commercial Arbitration?*, in Dispute Resolution Journal, 2002, vol. 57, no. 4.

NAIMARK R. W. AND KEER S. E., *International Private Commercial Arbitration: Expectations and Perceptions of Attorneys and Business People*, in *International Business Lawyer*, 2002, 47-58.

NINO, M., *Il Rapporto tra Arbitrato e Diritto al Giusto Processo nella Convenzione Europea dei Diritti dell'Uomo: Quali Risultati e Quali Prospettive?*, in *Ordine Internazionale e Diritti Umani*, 2019.

OLDENSTAM, R. *Chapter 8: Due Process Paranoia or Prudence?*, in *Stockholm Arbitration Yearbook 2019*, (eds.) Axel Calissendorff and Patrik Schöldstrom, 121-128.

ORTOLANI P., *Article 34: Application for Setting Aside*, in *UNCITRAL Model Law on International Commercial Arbitration: A Commentary*, (eds.) Bantekaset I. al., 2020.

OTTO D. and ELWAN O., *Article (V) (2) (a)*, in *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention*, 2010.

PARADISE A. G., *Arbitration of Patent Infringement Disputes: Encouraging the Use of Arbitration Through Evidence Rules Reform,* in *Fordham Law Review*, 1995, vol. 64, issue 1, 247-279.

PARK, W.W. *Arbitration in Autumn*, in *Journal of International Dispute Settlement*, Volume 2, Issue 2, 2011.

PARK W., *The Procedural Soft Law of International Arbitration*, in *Pervasive Problems in International Arbitration,* 2006, 141-154.

PARTASIDES C. AND PREWETT, B., *Chapter 5: Rediscovering the Lost Promise of International Arbitration*, in *Expedited Procedures in International Arbitration, Dossiers of the ICC Institute of World Business Law*, (eds.) Laurent Levy and Michael Polkinghorne, 2017.

Pietrowski R., *Evidence in International Arbitration*, in *Arbitration International*, 2006, vol. 22(3).

PLATT, R., *The Appeal of Appeal mechanisms in international arbitration: Fairness over finality?*, in *Journal of International Arbitration*, 2013, vol. 30, issue 5, 531-560.

PLATTE M., *An Arbitrator's Duty to Render Enforceable Awards, 2003, in Journal of International Arbitration*, vol. 20, issue 3, 307-313.

PAUCIULO D., *Imparzialità degli arbitri secondo la Corte Europea dei Diritti dell'Uomo nel caso Beg S.p.A. c. Italia*, in *Rivista di Diritto del Commercio Internazionale*, 2021, 4, 1083-1109.

PAVÌC, V. *Disciplinary Powers of the Tribunal*, in *Austrian Yearbook on International Arbitration,* (eds.) C. Klausegger et al., 2014.

PAVIĆ, V. and a ĐORĐEVIĆ, M., *Virtual Arbitration Hearings: The New Normal?*, in *Annals*, 69, vol. 3, 2021.

POLKINGHORNE M. and GILL B. A., *Due Process Paranoia: Need We Be Cruel to Be Kind*, in *Journal of International Arbitration*, 2017, vol. 34, issue 6, 935-946.

POPOVA I. C. AND PICKARD D., *Country Report: The United States of America*, in *Due Process as a Limit to Discretion in International Commercial Arbitration*, (eds.) Franco Ferrari, Friedrich Rosenfeld, Dietmar Czernich, Wolters Kluwer, 2020.

PORNBACHER K. and DOLGORUKOW A., *Reconciling due process and efficiency in International Arbitration*, in *Belgrade Law Review*, 2013, no. 3.
POTESTÀ, M., *La rinuncia preventiva all'impugnabilità del lodo arbitrale è compatibile con la Convenzione europea dei diritti dell'uomo? Il Tribunale federale svizzero si pronuncia sulla questione*, in *Rivista dell'arbitrato*, 1/2013, 171-185.

PULLE A.I, *Securing Natural Justice in Arbitration Proceedings*, in *Asia Pacific Law Review*, 2012.

RAESS, L. *Court Assistance in the Taking of Evidence: Switzerland's Way Forward*, in *Swiss Revies of International and European Law*, 2020, vol. 30, no. 1, 27-43.

RAGNO, F. *Country Report: Italy*, in *Due Process as a Limit to Discretion in International Commercial Arbitration*, (eds.) Franco Ferrari, Friedrich Rosenfeld, Dietmar Czernich, Wolters Kluwer, 2020.

RANGACHARI R. and Duggal K., *Different but similar?: Comparing the IBA Rules on the taking of evidence with the Prague Rules*, in *Arbitration International*, 2021, vol. 37, issue 3, 631-651.

REED L., *The 2013 Hong Kong International Arbitration Centre Kaplan Lecture – Arbitral Decision-Making: Art, Science or Sport?*, in Journal of International Arbitration, 2013, vol. 30, issue 2, p. 95 ff.

REED, L., *Ab(use) of Due Process: Sword vs Shield*, in *Arbitration International*, 2017.

REICHERT K., *The Organizational Meeting*, in *Leading Arbitrators' Guide to International Arbitration*, (eds. Lawrence W. Newman and Richard D. Hill, 2014, 3rd edition.

RIVKIN D. W., *Form of Deliberation*, in *Inside the Black Box: How Arbitral Tribunals Operate and Reach Their Decisions*, (eds.) B. Berger and M. E. Schneider, 2014.

RIVKIN D.W. AND ROWE S. J., *The Role of the Tribunal in Controlling Arbitral Costs*, in *The International Journal of Arbitration, Mediation and Dispute Management*, 2015, vol. 81, no. 2, pp. 116-130.

ROMBACH A. and SHALBANAVA H., *The Prague Rules: A New Era of Procedure in Arbitration or Much Ado about Nothing?*, in *SchiedsVZ*, 2019, vol. 17, issue 2, 53-60.

ROWLEY, J.W. *Guerrilla Tactics and Developing Issues*, in *Guerrilla Tactics in International Arbitration*, (eds.) Günther J Horvath G. J.and Stephan Wilske, 2013.

RUCKTESCHLER D. and STOOSS T., *International Commercial Courts: A Superior Alternative to Arbitration?*, in *Journal of Arbitration*, 2019, vol. 36, no. 4, pp. 431-449.

SAHA S. and SMRITI S., *Resurrecting the debate on 'due process paranoia' in Centrotrade: Paranoia or Judiciousness?*, in *Arbitration International*, 2020, vol. 36, pp. 521-528.

SALOMON, C. AND FRIEDRICH, S., *Obtaining and Submitting Evidence in International Arbitration in the United States*, in *American Review of International Arbitration*, 2013.

SALVANESCHI, L. *Procedimento arbitrale: via libera agli arbitri sui termini perentori*, in *Il Corriere Giuridico*, 10/2016.

SAMUEL A., *Arbitration, Alternative Dispute Resolution Generally and the European Convention of Human Rights*, in *Journal of International Arbitration*, 2004, vol. 21, issue 5, pp. 413-437.

SARDU A., *Arbitrato volontario e giusto processo nella giurisprudenza CEDU*, in *Rivista di diritto internazionale privato e processuale*, 3/2018, p. 709.

SCHLAEPFER, A.V., *The Burden of Proof in International Arbitration*, in *Legitimacy: Myths, Realities, Challenges*, (ed.) Albert Jan van den Berg, ICCA Congress Series No. 18, 2015.

SCHWARTZ E. A. and DERAINS Y., *Guide to the ICC Rules of Arbitration,* 2nd ed., Kluwer Law International, 2005.

SHENTON, D.W., *An introduction to the IBA Rules of Evidence*, in *Arbitration International*, 1985, Vol. 1, No. 2.

SEATZU, F. and VARGIU, P., *Three Views of a Secret: Missed Opportunities in the ECHR's Recent Case-Law on International Commercial Arbitration*, in *The Italian Review of International and Comparative Law*, 2021.

SCHERER M. and SILBERMAN L., *Limits to Party Autonomy at the Post-Award Stage*, in *Limits to Party Autonomy in International Commercial Arbitration*, (ed.) F. Ferrari, 2016.

SCHERER M. ET AL., *"First" Worldwide, Austrian Supreme Court Confirms Arbitral Tribunal's Power to Hold Remote Hearings over One Party's Objection and Rejects Due Process Concerns*, in *Kluwer Arbitration Blog,* 24 October 2020, available at: https://arbitrationblog.kluwerarbitration.com/2020/10/24/in-a-first-worldwide-austrian-supreme-court-confirms-arbitral-tribunals-power-to-hold-remote-hearings-over-one-partys-objection-and-rejects-due-process-concerns/ [accessed 26 October 2023]

SCHERER, M., *Remote Hearings in International Arbitration: An Analytical Framework*, in *Journal of International Arbitration* 2020, p. 414.

SCHWEBEL S.M. and LAHNE S.G., *Public Policy and Arbitral Procedure*, in *ICCA Congress Series no*. 3, 206.

SHARMA, S., *Due Process 'Paranoia': Turning Away from Judicial Attitudes and Looking for Answers Within*, in *International Journal of Arbitration, Mediation and Dispute Management*, 2018.

SHARPE J. K., *Drawing Adverse Inferences from the Non-Production of Evidence*, in *Arbitration International*, 2006, vol. 22, n. 4.

STIPANOWICH T. J., *Arbitration: The "New Litigation"*, in *University of Illinois Law Review*, 2010.

SUSSMAN E., *The Arbitrator Survey: Practices, Preferences and Changes on the Horizon,* in The American Review of International Arbitration, 2015, vol. 26, no. 4, 517-538.

THIRGOOD R., *Appeals in Arbitration: "To Be or Not to Be"*, in *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management*, vol. 87, issue 3, 2021, 423-440.

TODUA O., ZENKOVA M. and SYSOEV A., *Article V(1)(b)*, in *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention*, 2010, no. 1.

TRITTMANN R. and KASOLOWSKY, B., *Taking Evidence in Arbitration Proceedings Between Common Law and Civil Law Traditions: The Development of a European Hybrid Standard for Arbitration Proceedings*, in *UNSW Law Journal*, 2008, vol. 31(1).

VAN DE VELDEN J. B. AND ZIRAR A. K., *Country Report: the Netherlands*, in *Due Process as a Limit to Discretion in International Commercial Arbitration*, (eds.) Franco Ferrari, Friedrich Rosenfeld, Dietmar Czernich, Wolters Kluwer, 2020.

VAN DEN BERG A.J., *New York Convention of 1958: Refusal of Enforcement*, in *ICC International Court of Arbitration Bulletin* 2007, no. 2, 18, 8-9.

VERBIST H., *Challanges on Grounds of Due Process Pursuant to Article V(1)(b) of the New York Convention*, in *Enforcement of Arbitration Agreements and International Arbitral Awards*, (eds.) Emmanuel Gillard and Domenico di Pietro, 2008.

WANG H. Z., *Aternative Evidence Rules for Arbitration*, in *Nevada Law Journal*, 2023, 1-30.

WILLIAMS, E., FAS, H. AND HANNAH, T., *Due process paranoia and its role in the future of international commercial arbitration*, in *The Arbitrator & Mediator*, 2018.

WILSKE, S., *Arbitration Guerrillas at the Gate: Preserving the Civility of Arbitral Proceedings When the Going Gets (Extremely) Tough*, in *Austrian Yearbook on International Arbitration*, (eds.) Christian Klausegger et. al., 2011.

WILSKE, S., *Work Ethics of the International Arbitrator, or: The Distinction Between Rendering a Service to the Parties and Being the Parties' Slave*, in

The Powers and Duties of an Arbitrator: Liber Amicorum Pierre A Karrer, (eds.) Patricia Shaughnessy and Sherlin Tung, 2017.

CASE-LAW

Austria

Austria C v. Vladimir Z, (2005) Austrian Supreme Court, in *Yearbook Commercial Arbitration*, (eds.) A.J. Van Den Berg, 2006, vol. XXXI, p. 583, para 7

Canada

Food Services of America Inc. (c.o.b. Amerifresh) v. Pan Pacific Specialties Ltd., (1997) British Columbia Supreme Court, case no. 1921

Karaha Bodas Company L.L.C. v. Perusahaan Petrambangan Minyak Dan Gas Bumi Negara and P.T. PLN, (2007) Alberta Court of Queen's Bench
Louis Dreyfus S.A.S. v. Holding Tusculum B.V. (2008) Superior Court of Canada, 5903

Holding Tusculum BV v. Louis Dreyfus SAS, (2008) Quèbec Superior Court, 5904

Jacob Securities Inc. v. Typhoon Capital BV (2016), Ontario Superior Court of Justice, case 604

Hachette Distribution Services (Canada) inc. v. 2295822 Canada inc. (2018), Superior Court of Quebec, case no. 500-11-046917-148

England and Wales

England and Wales High Court (Comm.) (1999), *Minmetals Germany GmbH v. Ferco Steel Ltd*

England and Wales High Court (Comm.) (1999), *Omnium de Traitement et de Valorisation SA v. Hilmarton*

England and Wales Court of Appeal (Civ.) (2003), *Warborough Inv. Ltd. v. S. Robinson & Sons (Holdings) Ltd*., case no. 751 [57]

Queen's Bench Division (UK), Commercial Court (2004) *Vee Networks Limited v Econet Wireless International Ltd*

England and Wales High Court (2004), *St. George's Investment Co v. Gemini Consulting Ltd*, case no. 2353

England and Wales, House of Lords (2005), *Lesotho Highlands Development Authority v. Impregilo SpA*

Arduina v. Celtic Resources Holdings PLC, England and Wales High Court (Comm.), (2006), case no. 3155

England and Wales Court of Appeal (Civ.) (2006), *Kanoria and others v. Guinness*, case no. 222

England and Wales High Court (2008), *Gater Assets Ltd. V. Nak Naftogaz Ukrainy*, *Double K Oil Products 1996 Ltd v. Neste Oil OYJ* [2009] England and Wales High Court (Comm.) no. 3380

Supreme Court of the United Kingdom (2010) *Dallah Real Estate and Tourism Holding Co v. The Ministry of Religious Affairs, Govt of Pakistan*, case no. 46

Queen's Bench Division (UK), Commercial Court (2012) *Terna Bahrain Holding Company WLL v Bin Kamil Al Shamsi and Others*

England and Wales High Court (Comm.) (2012), *Abuja International Hotels Ltd v. Meridien SAS*, case no. 87

England and Wales High Court (Comm.) (2014), *Interprods Ltd v. De LaRue International Ltd*, case no. 68

England and Wales High Court (Comm.) (2014), *Sonatrach v. Statoil Natural Gas*, case no. 875

England and Wales High Court (Technology and Construction) (2015), *Secretary of State for the Home Department v. Raytheon Systems Ltd*, case no. 311

England and Wales High Court (Comm.) (2017), *UMS Holdings and others v. Great Station Properties and others*

High Court of Justice, Queen's Bench Division (UK), Commercial Court (2018) *Navigator Spirit SA v Five Oceans Salvage SA*

England and Wales High Court (Comm.) (2018), *Eastern European Engineering Ltd v. Vijay Construction (Proprietary) Ltd*, case no. 2713

England and Wales High Court (Comm.) (2018), *Grindrod Shipping PTE Ltd v. Hyundai Merchant Marine Co. Ltd*, no. 1284

England and Wales High Court (Comm.) (2018), *X v. Y*, case no. 741

England and Wales High Court (Comm.) (2018), *Reliance Industries Ltd and another v. The Union of India*, case no. 822

England and Wales High Court (Technology and Construction) (2018), *A v. B*, case no. 3366

France

French Court of Cassation, 24 March 1998, *Excelsior Film TV v. Soc. UGC-PH*, no. 95-17.285

Paris Court of Appeal (1999), *Braspetro Oil Services Co. v. The Management and Implementation Authority of the Great Man-Made River Project*

Paris Court of Appeal (2003), *M. Marillier et Mlle Ecoiffier v. S.A. SECAG*, case no. 02/12724

Paris Court of Appeal (2009) *Compagnie Generali Iard v. Société Consortium d'Assurance de Participation "CAP"*, case no. 08/2658

Paris Court of Appeal (2013), *République de Guinée équatoriale,* case no. 12/01370

Germany

German Federal Court of Justice, *SpA Ghezzi v. Jacob Boss Söhne*, 14 April 1988, in *Yearbook Commercial Arbitration*, 1990

Bavarian Highest Regional Court, 16 March 2000, 4 Z Sch 50/99

Bavarian Highest Regional Court, Judgment of 20 November 2003, in *Yearbook Commercial Arbitration*, XXIX, 2004

Werner Schneider as liquidator of Walter Bau A.G. v. The Kingdom of Thailand, Higher Regional Court of Berlin, case no. III ZB 40/12, 30 January 2013, in *Yearbook Commercial Arbitration*, 2011, vol. XXXVIII

India

SJP Motors v. TVS Motors Company Ltd (2008) High Court of Kerala, case 19

Ireland

Dublin High Court, *Ryan v. Kevin O'Leary (Clonmel) Ltd*, [2018] IEHC 660

Italy

Court of Appeal of Florence, *XV,* Judgement of 3 June 1988, in *Yearbook Commercial Arb*itration, 1990

Court of Appeal of Firenze, 5 October 2007, in *De Jure*

Court of Appeal of Milano, 10 June 2019

Court of Appeal of Milano, 12 July 2019

Court of Appeal of L'Aquila, 18 May 2020, in *De Jure*

Court of Appeal of Trieste, 7 August 2023

Supreme Court of Cassation, 15 October 1954, n. 3732, in *Il Foro Italiano*, 1955, Vol. 78, no. 1

Supreme Court of Cassation, 17 March 1960, n. 540, in *Il Foro Italiano*, 1961, Vol. 84, no. 1

Supreme Court of Cassation, 1 February 2005, n. 1988, in *De Jure*

Supreme Court of Cassation, 8 April 1998, n. 3632

Supreme Court of Cassation, 16 May 2000, n. 6288

Supreme Court of Cassation, 23 June 2000 n. 8540

Supreme Court of Cassation, 2 February 2001, n. 1496

Supreme Court of Cassation, 12 April 2001, n. 5498

Supreme Court of Cassation, 27 October 2004, n. 20828, in *Il Foro Italiano*, vol. 128 n. 6

Supreme Court of Cassation, 30 May 2006, n. 12873

Supreme Court of Cassation, 21 Jan. 2007, n. 2021, in *De Jure*

Supreme Court of Cassation, 19 January 2011, n. 3917

Supreme Court of Cassation, 24 July 2013, n. 17990

Supreme Court of Cassation, 11 December 2013, n. 27734

Supreme Court of Cassation, 8 January 2014, n. 131, in *De Jure*

Supreme Court of Cassation, 26 May 2015, n. 10809

Supreme Court of Cassation, 16 November 2015, n. 23402, in *De Jure*

Supreme Court of Cassation, 21 January 2016, n. 1099

Supreme Court of Cassation, 23 February 2016, n. 3481

Supreme Court of Cassation, 23 February 2016, n. 3481, in *De Jure*

Supreme Court of Cassation, 4 April 2018, n.8333, in *De Jure*

Supreme Court of Cassation, 21 February 2019, n. 5243, in *De Jure*

Supreme Court of Cassation, 7 September 2020, n.18600, in *De Jure*

Supreme Court of Cassation, 30 December 2021 n. 41955

Supreme Court of Cassation, 1 June 2023, n. 15521

Supreme Court of Cassation, 28 March 2023, n. 8760

Supreme Court of Cassation, 21 January 2016, n. 1099

Supreme Court of Cassation, 6 May 2015, n. 10809

Japan

Brunswick Bowling & Billiards Corp. v. ShangHai ZhongLu Industrial Co. Ltd and Another (2011) Court of First Instance of the High Court of Hong Kong, case 2456/2008

Grand Pacific Holdings Ltd v. Pacific China Holdings Ltd (in liq.) (2012), High Court of Hong Kong, case 15/2010

The Netherlands

Dutch Supreme Court, *De Jong Technisch Handelsbureau v. Quaade-Holm*, 8 November 1963

Dutch Supreme Court, *Nordström v. Van Nievelt Goudriaan & Co*., 18 February 1994

Dutch Supreme Court, *International Military Services v. Modsaf*, 17 January 2003

Court of Appeal of the Hague, 21 December 2006

Dutch Supreme Court, *Kers v. Rijpma*, 22 December 2006

Dutch Supreme Court, *Spaanderman v. Anova Food*, 25 May 2007

Court of Appeal of Amsterdam, 23 November 2010

Dutch Supreme Court, *Vastint Holding v. Scensson c.s*., 24 December 2010

Court of Appeal of the Hague, 28 October 2010

District Court of Amsterdam, 26 July 2012

District Court of Rotterdam, 31 July 2013

Court of Appeal of the Hague, 10 May 2016

Court of Appeal of the Hague, 27 January 2017

Court of Appeal of the Hague, *Attero Zuid v. Omgevingsdienst Brabant Noord*, 27 June 2017

Dutch Supreme Court, *Ecuador v. Chevron*, 12 April 2019, n. 54

New Zeland

Trustees of Rotoaira Forest Trust v. Attorney-Gen. (1999) High Court (Commercial List) Auckland, case 658

Russia

Yukos Capital SARL (Luxembourg) v. OAO Tomskneft VNK (2010), Federal Arbitrazh Court, District of Tomsk, case A67-1438/2010

Singapore

Singapore Court of Appeal, (2007) *Soh Beng Tee & Co. v. Fairmount Dev. Pte*, case 100/2006

Singapore Court of Appeal, (2011) *CRW Joint Operation v. PT Perusahaan Gas Negara (Persero) TBK*, SGCA 3

Singapore Court of Appeal, (2012) *Kempinski Hotels SA v. PT Prima International Development*

Singapore Court of Appeal, (2012) *Kempinski Hotels SA v. PT Prima International Development*

Singapore High Court, (2013) *Beijing Sinozonto Mining Investment Co Ltd v. Goldenray Consortium Pte Ltd.*, in *Yearbook Commercial Arbitration*, 2014

Singapore High Court, (2014) *ADG v. ADI*

Singapore High Court, (2015) *AMZ v. AXX*, case 283

Singapore Court of Appeal, (2018) *Swissbourgh Diamond Mines (Pty) Ltd v. Lesotho*, SGCA 81

Singapore Court of Appeal, (2021) *CBS v. CBP*

Spain

Spain Supreme Court, *Unìon Generale de Cinèma SA v. XYZ Desarrollos SA*, 11 April 2000

Switzerland

Swiss Federal Supreme Court, 22 February 1999, *B AS et C AS v. A SpA*

Swiss Federal Supreme Court, 10 September 2001, 127 III 576

Swiss Federal Supreme Court, 130 III 35 (2003), *Tvornica*

Swiss Federal Supreme Court, 31 October 2003, 4P.149/2003

Swiss Federal Supreme Court, 14 July 2003, 4P.114/2003

Swiss Federal Supreme Court 133 III 235 (2005), *Cañas*

Swiss Federal Supreme Court, 28 March 2007, 4A_2/2007

Swiss Federal Supreme Court, 18 March 2010, 4A_584/2009

Swiss Federal Tribunal (*Bundesgericht*), 4 October 2010, 4A_124/2010, *X v. Y*

Swiss Federal Supreme Court (2010) *X AG v. Y AS*, in *Yearbook Commercial Arbitration*, 2011, vol. XXXVI

Swiss Federal Supreme Court, 17 March 2011, 4A_600/2010

Swiss Federal Supreme Court, 18 October 2011, 4A_214/2011

Swiss Federal Supreme Court, 20 July 2011, 4A_162/2011

Swiss Federal Supreme Court, 4 January 2012, 4A-238/2011, *X v. Z. S. A.*

Swiss Federal Supreme Court, 31 January 2012, 4A_360/2011

Swiss Federal Supreme Court, 23 January 2012, 4A_526/2011 and 4A_528/2011

Swiss Federal Supreme Court, 26 July 2013, 5A_68/2013

Swiss Federal Supreme Court, 5 August 2013, 4A_274/2013

Swiss Federal Supreme Court , 19 June 2014, para. 3.2.2 4A_597/2013

Swiss Federal Supreme Court, 26 April 2016, 142 III 360

Swiss Federal Supreme Court, July 25, 2017, case n. 4A_80/2017

Swiss Supreme Court, 4A_424/2018, *Errani*

Swiss Federal Supreme Court, 29 January 2019, 4A_424/2018

Swiss Federal Supreme Court, 11 April 2019, 4A_54/2019

United States of America

U.S. Court of Appeals (2nd Cir.) (1977) *Tempo Shain Corp. v. Bertek, Inc*.

U.S. Supreme Court, case no. 86-651 (1987) *United Paperworkers v. Misco, Inc.*

U.S. Court of Appeals (5th Circ.) (1987), *Bernstein Seawall & Kove v. Bosarge*

U.S. District Court, S.D. New York (1974) *Allendale Nursing Home, Inc. v. Local*

U.S. District Court, case no. CV 88-1406 (1988), *Geotech Lizenz AG v. Evergreen Sys Inc*

U.S. District Court for the District of Columbia (1991) *Berlacher v. PaineWebber Inc.*

Appellate Division of the Supreme Court of the State of New York, First Department (1991), *Grinnell Hous. Dev. Fund Corp. v. Local*

U.S. Court of Appeals (11th Circ.) (1991), *Schmidt v. Finberg*

U.S. Court of Appeals (4th Cir.) (1994), *Remmey v. PaineWebber, Inc*.

U.S. District Court of New York, case no. 93 Civ. 5865 (PKL) (1994), *Spector v. Torenberg*

U.S. Court of Appeals, (5th Cir.) (1995), *Gulf Coast Indus. Workers Union v. Exxon Co., U.S.A*
U.S. District Court for the Southern District of Texas (1997), *Trans Chem. Ltd. v. China Nat. Mach. Imp. & Exp. Corp*.

U.S. Court of Appeals (7th Cir.), case 96-4004 (1997) *Generica Ltd. v. Pharm. Basics, Inc.*

U.S. District Court of Colorado, 17 June 1997, *Mangistaumunaigaz Oil Production Association v. United World Trade, Inc.*, in *Yearbook Commercial Arbitration*, 1999

U.S. Court of Appeals (10th Circ.), (1999) *Kennecott Utah Copper Corp. v. Becker*

U.S. Courts of Appeals (7th Circ.), *Publics Communication v. True North Communications*, 14 March 2000, 206 F. 3rd 725

U.S. District Court (2001), *Consorcio Rive, S.A. de C.V. v. Briggs of Cancun, Inc.* Eastern District of Louisiana, case no. A. 99–2204

U.S. District Court, S.D. Texas, Houston Division (2002), *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara,* case no. CIV.A.H 01-0634

U.S. Court of Appeals (5th Circ.) (2003),*Consorcio Rive S.A. de C.V. v. Briggs of Cancun, Inc*., case no. 99-2204

U.S. District Court, Southern District of New York, 25 March 2005 and 10 May (2005), *Chemical Overseas Holdings, Inc., et al. v. Republica Oriental del Uruguay*, in *Yearbook Commercial Arbitration*

U.S. Court of Appeals (7th Circ.) (2005), *Lefkovitz v. Wagner*

U.S. District Court, S.D. Texas (2008), *Sungard Energy Sys. v. Gas Transmission N.W. Corp*.

U.S. District Court for the Western District of Texas (2009) *China National Building Material Investment v. BNK Internationa,* case no. A-09-CA-488-SS

U.S. Court of Appeals (9th Circ.), case no. 07-55938 (2010), *U.S.Life Ins. Co. v. Superior Nat'l Ins. Co.*

U.S. District Court of Pennsylvania, case no. 13-276 (2015), *Calbex Mineral Ltd. V. ACC Resources Co.*

U.S. District Court for the Southern District of New York, case no. 18Civ. 11112 (2019), *Eaton Partners, LLC v. Azimuth Capital Management IV, LTD*
U.S. Court of Appeals (2nd Circ.) case no. 13-3357-cv (2013), *Yukos Capital S.A.R.L. v. OAO Samaraneftegaz*

European Court of Human Rights (ECHR)

Albert and Le Compte v. Belgium, judgement of 10 February 1983, applications no. 7299/75 and 7496/76

Deweer v. Belgium, judgement of 27 February 1980, application no. 6903/75

De Wilde Ooms and Versyp, judgement 18 June 1971, applications no. 2832/66, 2835/66 and 2899/66

Golder v. United Kingdom, judgement of 21 February 1975, application no. 4451/70
X v. Germany, judgement of 5 July 1977, application no. 7705/76

Suovaniemi and others v. Finland, judgement of 23 February 1999, application no. 31737/96

Tabbane v. Switzerland, judgement 24 March 2016, application no. 41069/12