Arbitration related lessons: Insights from the supreme courts around the world

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Summary

This article explores the insights into arbitration from the Supreme Courts around the world. It analyses the recurrent arbitration-related issues arising in the Supreme Courts' practice in fifteen jurisdictions from Europe, the Americas, Africa and Asia as reported in the contributions published in a special issue of b-Arbitra 2019/2 marking the 50th anniversary of the CEPANI. More specifically, the article investigates perspectives of the Supreme Courts on the issues of the agreement to arbitrate, impecuniosity, competence-competence, court intervention during arbitration, and court control of procedural fairness and public policy post-award. Further to the investigation, the article concludes that while a broad consensus exists among most jurisdictions on basic characteristics of the legal regime for arbitration, the approach to particular aspects of many arbitration-related issues examined in this article remains mostly jurisdiction-specific.

Samenvatting

Dit artikel verkent de inzichten in arbitrage van de hoogste gerechtshoven over de hele wereld. Het analyseert de terugkerende arbitragegerelateerde thema's die zich voordoen in de praktijk van de hoogste gerechtshoven in vijftien jurisdicties uit Europa, Noord- en Zuid-Amerika, Afrika en Azië, zoals gerapporteerd in de bijdragen gepubliceerd in een speciaal nummer van b-Arbitra 2019/2 ter gelegenheid van perspectieven van de hoogste gerechtshoven met betrekking tot de kwesties van de overeenkomst tot arbitrage, het onvermogen van de partijen, de kompetenz-kompetenz, de tussenkomst van de rechter tijdens de arbitrage, en de controle door de rechter van de procedurele rechtvaardigheid en de openbare orde na de arbitrale uitspraak. Naar aanleiding van het onderzoek wordt in het artikel geconcludeerd dat er in de meeste jurisdicties weliswaar een brede consensus bestaat over de basiskenmerken van arbitrage, maar dat de benadering van de meer specifieke aspecten die in dit artikel onderzocht werden, grotendeels jurisdictiespecifiek blijft. I. Introduction 1. This article results from the analysis of reports devoted to Supreme Courts and arbitration published in a special issue of b-Arbitra 2019/2 marking the 50th anniversary of the CEPANI . The reports forming the basis of this article comprehensively examine arbitration-related rulings of the Supreme Courts in fifteen selected jurisdictions from Europe, the Americas, Africa and Asia . While Supreme

Courts decide on arbitration matters only infrequently, they usually deal with issues of paramount importance .

1 The reported decisions have been reviewed to identify the most recurrent arbitration-related issues arising in the Supreme Courts' practice across the jurisdictions . These issues became the focus of this article . While many of the identified issues might seem well-known, the analysis of various Supreme Courts' rulings reveals the relativity and subtlety of approaches to them across the jurisdictions, which will be addressed in this article . More specifically, this article will discuss perspectives of the Supreme Courts on the following issues: agreement to arbitrate (II), impecuniosity (III), competence-competence (IV), court intervention during arbitration (V), and court control of procedural fairness and public policy post-award (VI) .

II. Arbitration agreement

2. In this section, some issues relating to the validity of an arbitration agreement will be analysed . After discussing briefly the possibility of agreeing on arbitration before or after a dispute has arisen, this article will focus on the requirement of an agreement 'in writing' and the interpretation that is given to this concept by Supreme Courts . Next, the Supreme Courts' case law with regard to the effect of an arbitration agreement on third parties will be examined.

A. Arbitration clause vs submission agreement

3. Further to Article II(1) of the New York Convention, each contracting State shall recognise an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship . Thus, the New York Convention does not make a distinction between arbitration clauses providing for the reference of future disputes to arbitration and submission agreements prescribing that existing disputes be arbitrated . Both have the same effect . In general, national laws equally do not distinguish between submission agreements and arbitration clauses . Nevertheless, some national laws contain specific requirements for submission agreements, for instance with regard to their content . 2 Moreover, some national laws allow only submission agreements in consumer cases . 3

However, Brazilian law makes a clear distinction between an arbitration clause and a submission agreement . Although arbitration clauses are valid, the existence of a submission agreement, or even the intervention of State courts, may be required for the arbitration procedure to be effectively instituted . This will be the case with regard to 'empty arbitration clauses', i .e . those that do not determine all the essential specificities of the procedure to be instituted . 4 Furthermore, arbitration clauses in adhesion contracts will only be effective if the adhering party takes the initiative to file an arbitration proceeding, or expressly agrees with its initiation . 5

B. Agreement in writing

1. Agreement signed by the parties or contained in an exchange of letters or telegrams

4. Article II(1) of the New York Convention requires that the agreements to arbitrate are drafted in writing . The term 'agreement in writing', according to the Convention, refers to an arbitral clause in

a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams . Thus, the New York Convention contains a strict definition of the term ‘agreement in writing’, apparently excluding tacit acceptance . In 2006, UNCITRAL, however, recommended that this provision be interpreted in a non-exhaustive manner . 6

The UNCITRAL Model Law contains two options with regard to the form of the arbitration agreement . Article 7, option 1, of the Model Law, requires the existence of an agreement in writing . 7 Further to Article 7, option 2, the validity of an arbitration agreement is not subject to any formal requirement . 5. Although most jurisdictions have upheld the necessity for an agreement to be in writing, this requirement is generally interpreted broadly . Only a few jurisdictions construe the ‘in writing’ requirement narrowly . Thus, the Brazilian Superior Court of Justice refused to enforce an award on the grounds that the parties had not entered into a valid arbitration agreement . In the court’s view, the lack of a written manifestation of intent by the defendant to accept the arbitration clause amounted to a breach of public policy . 8

Several jurisdictions adopt a lenient approach with regard to the requirement of an agreement in writing . The Austrian Supreme Court specified that arbitration agreements must not necessarily be signed by the parties . In case an arbitration agreement is concluded by an exchange of writings, no signature is necessary . 9 The same position was adopted by the French Supreme Court . 10 Furthermore, in Austria, the safe electronic signature is not required for e-mails to constitute an agreement in writing . 11

6. The Belgian Court of Cassation confirmed that the existence of an arbitration agreement can be proved by an exchange of telexes, demonstrating a clear intention of the parties to arbitrate . 12 The same court furthermore held that where a written agreement was concluded containing an arbitration clause, and the agreement was renewed without being signed by the parties, this did not imply that the arbitration agreement had come to an end . 13

In addition, Supreme Courts in several jurisdictions have accepted the socalled ‘half written form’ as sufficient for an arbitration agreement to be valid . In such cases, the arbitration agreement is contained in a document transmitted from one party to the other, which other party does not object to . 14 Thus, in Germany, arbitration agreements concluded orally but which are later confirmed by one party in a letter will fulfil the formal requirement . This can also be the case if the confirmation letter contains the first reference to the arbitration agreement and the other party does not object to the letter, provided that the letter sent is a true confirmation letter and not only an invoice or another kind of unilateral reference which does not make the arbitration agreement part of the contract . 15 Equally in the Netherlands, the tacit acceptance of a writing that includes an arbitration clause (e .g . a sales confirmation) amounts to the conclusion of the arbitration agreement . 16

7. Swiss courts do not accept wholly oral arbitration agreements . 17 Other jurisdictions do not contest the validity of such agreements, but those agreements do not fall under the protection of the arbitration law . 18 Finally, some jurisdictions do not have any requirements with regard to the form of the arbitration agreements and thus allow oral agreements . This is the case in Sweden19, Belgium and France . In Belgium, an oral arbitration agreement is valid, provided that it can be proved, e .g . by witness testimony . 20 Equally in France, an international arbitration agreement is not subject to any requirement as to its form . The validity of an arbitration clause is only subject to the condition that it is known and has been accepted, even implicitly, at the time of the conclusion of the contract by the party against whom it is invoked . 21 Thus, the existence of an arbitration clause may be derived on the basis of previous contractual usage between the parties . 22

2. Performance of an arbitration agreement

8. Courts in many jurisdictions have confirmed that even in the absence of a written agreement, the existence of an arbitration agreement may result from the performance of the arbitration agreement, notably when parties present themselves voluntarily, without objection, in front of the arbitrators and take part in the arbitral procedure . 23 Thus, the Brazilian Superior Court of Justice acknowledged that the acceptance by a party of an arbitration agreement can be derived from the participation, without any objection, of that party in the arbitration proceedings . 24 The same court followed a similar line of thought in another case holding that had the respondent agreed to take part in the arbitration, the court would have enforced the award, albeit in the absence of a written agreement . 25 In that case, there was no clear evidence that the respondent had agreed to arbitrate (there were telex exchanges containing the arbitral clause only amongst the brokers, not the parties) . The courts of England and Wales equally accept that an exchange of written submissions in which the existence of an arbitration agreement is alleged by one party and not denied by the other party, will be considered as an arbitration agreement . 26 The Swiss Federal Supreme Court ruled that where the party contests the validity of an arbitration agreement in a manner which is unconscionable or against good faith, such party is precluded or estopped from doing so and the arbitration agreement will be regarded as valid . 27

3. Arbitration agreement by reference

9. The validity of an arbitration agreement by reference has been confirmed by Supreme Courts in several jurisdictions. In Germany, a reference to general conditions contained in a contract is sufficient to fulfil the formal requirement of an arbitration agreement ‘in writing’, provided that the reference is such as to make the arbitration clause part of the contract . However, it must be sufficiently clear that the document containing the general conditions is part of the contract . 28 Depending on the applicable law, this might require that the general conditions be sent to the other party . 29 Similarly, the English court found that an arbitration agreement can be incorporated into a subcontract . 30

In Bomar, the French Court of Cassation held that in international arbitration, an arbitration agreement incorporated by reference to a document in which it appears (such as the general conditions of a model contract) can be valid, even in the absence of its mention in the main contract . This is the case when the party against which the arbitration agreement is used was aware of the content of the document at the time the contract was entered into and if this party, even though it remained silent, accepted the incorporation of that document into the contract . 31 The Supreme Court of the Netherlands held that a reference to general terms and conditions does not comply with Article 1021 of the Code of Civil Procedure if it refers only to a part that does not contain the arbitration clause rather than the entire general terms and conditions of the agreement . 32 The Supreme Court of the Netherlands additionally decided that the binding effect of general terms and conditions is questionable where no mention is made during negotiations of the general terms and conditions and reference to them is only made in a subsequent invoice . 33

C. Third parties

10. The requirement of an agreement does not exclude the possibility that an arbitration agreement concluded between two or more parties might also bind other parties . Third parties to an arbitration agreement have been held to be bound by such an agreement in a variety of ways . 34

1. Implicit consent

11. Several jurisdictions accept the possibility of extending the arbitration agreement to parties other than those expressly mentioned in the agreement, but that have implicitly accepted the applicability of the arbitration clause . Thus, the Swiss Federal Supreme Court found that an arbitration clause bound a party who, although it had not signed the clause, intervened in the performance of the distribution agreement and thus indicated that it had also accepted the arbitration clause contained therein . 35

Similarly, according to French law, the agreement to arbitrate should be extended to parties directly implicated in the performance of the contract or in any disputes arising out of the contract, provided that the circumstances permit the conclusion that they have accepted the arbitration clause, irrespective of whether they have signed it . This applies if it is established that the third parties' situation and activities imply that they knew about the existence and scope of the arbitration clause, even though they were not signatories to the contract . 36 The French Court of Cassation decided in this respect that when third parties participate in the negotiation, performance or termination of an agreement containing an arbitration clause, their behaviour can be interpreted as an implicit consent to be bound by the arbitration agreement . 37 This rule was also applied by the UK Supreme Court in Dallah . 38

2. Transfer of an arbitration agreement

12. In the case of a transfer of an arbitration clause, the French Court of Cassation held that the arbitral tribunal has jurisdiction over a non-party to an arbitration agreement . 39 Transfer involves third parties taking over the rights and obligations of the signatory40 or third-party assignees benefiting from the arbitration agreement . 41 Also, in a chain of contracts for the transfer of goods, the arbitration agreement is automatically assigned as an accessory to the parties' right of action which itself is accessory to the substantial right assigned with the contract . 42

Similarly, in Germany, non-signatories can rely on an arbitration agreement in cases of assignment, agency, succession, and insolvency . In these cases, the party that has signed the contract can be forced to arbitrate with the assignee, principal, successor, or insolvency receiver if the dispute falls within the scope of the arbitration agreement . 43 English case law equally confirms the possibility for a third party to take the place of a party to an arbitration . 44

3. Third-party beneficiaries

13. Under some systems of law, a third party may also enforce rights conferred under the terms of the contract in certain circumstances . This is the case in France . The French Court of Cassation held that where a contract conferring a benefit on a third party (stipulation pour autrui) contains an arbitration clause, the third party is obliged to refer any claim to arbitration . 45 The Italian courts have also confirmed that, in certain circumstances, once a third party decides to take the benefit of a

contract, it can be deemed bound by all the terms of the contract, including an arbitration agreement . 46

14. Conversely, the Belgian Court of Cassation found that a third party (victim of a traffic accident), to whom the law grants the right to bring proceedings directly against the insurer, was not bound by the agreement to arbitrate concluded between the insurer and the insured person . Although the insurer has the right to invoke all exceptions in order to refuse coverage against the third party, the insurer cannot invoke the agreement to arbitrate against the third party . The Court held that such an agreement is not part of the insurance coverage . Hence, it has no binding force towards the third party . 47

III. Impecuniosity

15. Even though arbitration agreements are binding upon the parties, not infrequently one side will be unable, or unwilling, to advance its share of the costs . The question arises whether that party is entitled to invoke the lack of funding in order to invalidate the agreement . This situation is generally described as a situation of 'impecuniosity', i .e . the lack of, or impossibility of obtaining money or funds . 48

Impecuniosity gives rise to a dilemma . On the one hand, the agreement between the parties to submit the dispute to arbitration must be performed . On the other hand, the strict observance of this rule might lead to a denial of justice . 49 It is therefore not surprising that this issue continues to be a hot topic in many jurisdictions . The case law shows that various techniques are used to address the issue of impecuniosity . Although state courts are generally reluctant to invalidate the agreement to arbitrate, they nevertheless seem to be willing to leave the agreement without application in cases in which impecuniosity would lead to a denial of justice .

A. Arbitration agreement incapable of being performed

16. According to Article II(1) of the New York Convention, each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration . The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this Article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed (Article II(3)) .

The expression 'null and void' refers to the arbitration agreement itself . An arbitration agreement is 'null and void' if it is 'devoid of legal effect', for example owing to mistake, duress or fraud . 50 An arbitration clause is 'inoperative' where it has 'ceased to have legal effect', as a result, for example, of a failure by the parties to comply with a time limit, or where parties have repudiated it, or by their conduct impliedly revoked the arbitration agreement . 51 An arbitration agreement is 'incapable of being performed' if it is impossible to perform it because of practical impediments . 52

17. Impecuniosity does not affect the validity of an arbitration agreement . It might at most make the arbitration agreement inoperative or incapable of being performed . 53

In a case brought before the German Federal Court of Justice, a construction contract, including an agreement to arbitrate, was concluded between the parties . The claimant sued before the state courts for damages . In defence of the claim, the respondents invoked the arbitration agreement . However, both the claimant and the respondent did not have sufficient financial means to conduct arbitral proceedings . The Federal Court of Justice decided that the respondent was barred from relying on an arbitration agreement in proceedings before the state court where the court had found the arbitration agreement was incapable of being performed due to the impecuniosity of the claimant . 54

The Court relied on Article 1032 of the German ZPO according to which a court before which an action is brought in a matter that is the subject of an arbitration agreement shall, if the respondent raises an objection prior to the beginning of the oral hearing on the substance of the dispute, reject the action as inadmissible unless the court finds that the arbitration agreement is null and void, inoperative or incapable of being performed .

B. Contractual breach

18. In other states, the consequences of impecuniosity are dealt with from a strictly contractual perspective .

According to Article 6:248, 2 of the Dutch Civil Code, a rule to be observed by parties as a result of their agreement is not applicable insofar as the application of such rule, given the circumstances, would be unacceptable to standards of reasonableness and fairness . The Supreme Court of the Netherlands held that the mere fact that arbitration is very expensive and that recourse to arbitrators for simple claims is not necessary was insufficient to conclude that it would be unacceptable to standards of reasonableness and fairness to have recourse to the arbitration clause . 55 Although in theory the arbitration clause may be disregarded for reasons of reasonableness and fairness, the Supreme Court has adopted a strict position .

The Supreme Court of the principality of Liechtenstein held that the impecuniosity of the party does not per se cause the ineffectiveness of an arbitration agreement . Indeed, the situation might change and later disputes, therefore, could still be brought before an arbitral tribunal . The impecuniosity of a party, combined with the other party's failure to offer to advance the impecunious party's share of the procedural costs, implies that the parties, for that specific dispute, are deemed to have waived the arbitration agreement and have opted for the competence of the state courts . 56

The Austrian Supreme Court decided that in the case of an unforeseen financial incapacity of a party, making it impossible for that party to bear the costs of arbitration, the parties have the right to terminate the arbitration agreement . 57

19. French courts generally emphasize the binding character of the arbitration agreement . 58 On the basis of the principle of competence-competence, which will be discussed in section IV, only the arbitral tribunal is competent to decide on its own jurisdiction . 59 The state court cannot take such a decision . If parties have chosen to submit the dispute to an arbitral tribunal, it is the arbitral tribunal that must take the necessary measures to guarantee the right of access to justice . 60 This was confirmed by the French Court of Cassation . The court held that the non-applicability of the arbitration agreement cannot be derived from the mere impossibility for a party to bear the costs of the arbitration procedure . 61

Hence, it is up to the arbitral tribunal to decide whether or not one of the parties is impecunious and to guarantee access to justice . A party may not turn to a state court in order to ask that the arbitration agreement should not be applied .

C. Access to court

20. Some Supreme Courts have invoked the right of access to justice to disregard the arbitration agreement . Thus, the arbitral agreement is attacked from the perspective of the public order of the state . 62

In this sense, the Portuguese Constitutional Court confirmed that the fundamental right of access to justice, as detailed in the constitution of Portugal, prevails over the enforcement of the arbitration agreement if the plaintiff is unable to bear legal costs due to a lack of economic resources . Compliance with the arbitration agreement would bring a denial of justice to a party that is in a bad economic situation . Therefore, the judicial authorities are competent to ensure that such a party has access to effective judicial protection even though this means denying the effectiveness of the freely agreed arbitration clause . 63

The Portuguese Supreme Court of Justice took a similar approach, thus emphasizing the importance of striking a balance between the binding effect of an arbitration clause on the one hand and the principle of access to justice on the other hand . 64 Although the Supreme Court concluded that the competence-competence principle should prevail and that the arbitral tribunal has the right to decide on its own competence over the impecunious party, the court nevertheless carefully analysed the applicant's financial status to ensure that access to justice was guaranteed .

21. The Belgian Court of Cassation took a similar approach in somewhat different circumstances . According to Article 1718 of the Belgian Judicial Code, parties that have a connection to Belgium cannot validly renounce recourse to an annulment procedure . If parties included an appeal possibility in their arbitration agreement, such appeal must be exhausted before initiating annulment proceedings . In the case that led to the decision of the Belgian Court of Cassation of 7 November 2019, both parties to the arbitration agreement were Belgian companies . In the arbitral award, the defendant was condemned to pay a principal amount of EUR 40 850 . The applicable arbitration rules provided for an appeal mechanism . Upon the defendant's appeal, the Appeal Committee of the designated arbitration institute requested a payment of EUR 15 207 . As the defendant refused to make the required payment, the appeal was deemed to be withdrawn . The defendant nevertheless initiated annulment proceedings which were declared admissible by the competent court . This decision was confirmed by the Court of Cassation . The Court ruled that if parties are de facto denied the right to an annulment procedure because clearly unreasonable financial conditions are applied to exhausting the legal remedies before the annulment procedure, parties may request annulment without previously exhausting the appeal procedure . 65

This decision is notable, not only because the court accepted that an arbitration agreement could be left unapplied, but also because it was not an impossibility for a party to pay the costs that was decisive for the non-application of the arbitration agreement . What mattered here was the fact that the financial conditions that were applied to exhausting the legal remedies before the annulment procedure were unreasonable in view of the value of the case .

This decision might have far-reaching implications if it can be relied on not only in a situation in which a party is denied access to annulment proceedings, but also where a party refuses to arbitrate

on the ground that the financial conditions to submit the case to an arbitral tribunal are unreasonable in view of the value of the case .

IV. Competence-competence

22. Virtually every national legal regime recognizes the principle that arbitral tribunals have the power to consider and at least provisionally decide jurisdictional disputes (competence-competence) . These include challenges to both the existence, validity, or legality of the parties' underlying contract and to the existence, validity, legality, or scope of their arbitration agreement . 66 This power is presumptively an inherent power of an arbitral tribunal derived from national arbitration legislation . The almost uniform acceptance of the jurisdictional competence of international arbitrators gives competence-competence the status of a general principle of international law, binding on national courts and arbitral tribunals (absent contrary agreement) . 67 This principle, however, merely confirms the arbitrators' authority to consider and render decisions on challenges to their own jurisdiction but does not address any specific aspects of such authority . As a consequence, legal systems demonstrate a wide diversity of legislative and judicial approaches to the allocation of jurisdictional competence, including particularly the timing and character of judicial consideration of jurisdictional issues and the deference to be accorded by national courts to any decision on a jurisdiction by the arbitrators . 68 Such diversity is relatively unusual in the field of international commercial arbitration because it contrasts with the broad consensus among many states on the approach to many other basic aspects of the legal regime for international arbitration .

The analysis of the decisions rendered by the highest courts in various jurisdictions illustrates a variation in approaches to at least two aspects of competence-competence .

A. Allocation of competence to decide jurisdictional disputes between arbitrators and national courts

23. In terms of the allocation of competence, a critically important issue is whether, when a jurisdictional objection is raised, a national court must (or may) initially decide on the issue, or whether an arbitral tribunal must (or may) do it, subject to subsequent (or no) judicial review . The highest courts in at least three jurisdictions have addressed this question .

24. In Tomolugen69, the Singapore Court of Appeal held that for the court proceedings to be stayed the defendant needed to establish at least a prima facie case that there is a valid arbitration agreement between the parties, that the dispute (or any part of it) falls within the scope of the arbitration agreement and the arbitration agreement is not null and void, inoperative or incapable of being performed . 70 Hwang and Chan observe that this prima facie standard reflects the 'negative effect' of the competence-competence principle, which is that arbitral tribunals should be the 'first judges of their jurisdiction' prior to any court or judicial authority . 71

25. The Brazilian Superior Court of Justice demonstrated a similar approach and confirmed in numerous cases the tribunal's precedence over the judge to decide on its own competence to examine questions relating to the existence, validity and effectiveness of the arbitration agreement, as well as the contract that includes the arbitration clause . 72 This approach has been reinforced further to the new Article 485(VII) of the Brazilian Civil Procedure Code, according to which 'a judge shall not rule on the merits when … the allegation of the existence of an arbitration agreement is accepted or when the arbitral tribunal acknowledges its jurisdiction' The Article confirms that where the arbitral tribunal asserts its own jurisdiction, the judge will have to dismiss the case .

Similarly, in France73 and Switzerland74 arbitrators are empowered to decide on their competence before the judges . That seems to be the general rule in England and Wales . 75 It is less clear how competence to decide jurisdictional objections is allocated under the UNCITRAL Model Law . 76

In Belgium, Article 1682 of the Judicial Code is silent on whether judges or arbitrators have priority to rule on the arbitrators' jurisdiction . 77 Courts interpreted this article as not giving such priority to arbitrators . 78 Thereby, if a parallel case is brought before a court, the court will independently assess whether it must decline jurisdiction under Article 1682 of the Judicial Code . Likewise, arbitrators do not seem to have priority to decide on their jurisdiction in Germany and courts may engage in a full review of the tribunal's jurisdiction even before the tribunal has considered this issue . 79

26. The Supreme Court of the United States also has generally reserved the decision on jurisdiction to the courts . In First Options, the Supreme Court observed that the answer to a question of whether the courts or the arbitrators have the power to decide if the parties agreed to arbitrate a given dispute was, in principle, a matter of what the parties agreed . 80 Courts should not assume that the parties agreed unless there is clear and unmistakable evidence that they did so – evidence that did not exist in the concrete case . 81 However, the Supreme Court's subsequent decisions on the allocation of competence applied the doctrine of the separability of the arbitration agreement82 to grant the arbitrators authority over challenges to the general legal validity of the contract containing the arbitration agreement, so long as the challenge is not directed specifically at the arbitration agreement . 83

27. The case of China is quite special . There, the Arbitration Law authorises the arbitral institution (rather than arbitrators) or court to decide on the tribunal's jurisdiction . 84 If one party applies for the decision on jurisdiction to the court while the other approaches for the same reason the arbitral institution, it is the court that will decide on the jurisdiction . The arbitral institution will stay the arbitral proceedings pending the court's ruling on the issue .

B. Review of the tribunal's decision on jurisdiction: level and availability

28. National law in the arbitral seat may affect a tribunal's procedural disposition of a jurisdictional dispute . 85 Under most arbitration legislation (and institutional rules), an arbitral tribunal is generally free to either decide the issue of jurisdiction as a preliminary issue, and issue an interim award confined to jurisdiction, or consider the question of jurisdiction together with the merits . 86 In other legal systems, national law may require or prefer early decision of jurisdictional issues . 87 In any case, under most legal systems, the parties are in principle free to agree upon the timing of a jurisdictional award . 88 In the absence of such agreement, the arbitral tribunal has broad discretion to determine the timing of a jurisdictional ruling . 89

If the arbitrators decide on jurisdiction as a preliminary issue, they usually issue an interim award upholding their jurisdiction or a final decision declining jurisdiction .The arbitral tribunal's jurisdictional decision will generally be subject to judicial review under applicable national law in the country where the award was made . 90 In addition, a party may also resist enforcement of the award in the national courts where the prevailing party seeks to enforce it . 91 If a tribunal reserves the jurisdictional decision until its final award (combining jurisdiction and merits in that award), then any positive (or negative) jurisdictional decision must be challenged in an annulment action . 92

29. National legal regimes differ in the level of judicial review of arbitral awards upholding the tribunal's jurisdiction . 93 In some countries, for example France, de novo judicial review is conducted on all factual and legal issues involved in a jurisdictional award . 94 In other countries, for example the United States, different levels of judicial review will apply to jurisdictional awards depending on the terms of the parties' arbitration agreement . 95 Notably, in Germany the arbitration law in force prior to 1998 allowed parties to exclude court review of the tribunal's decision on jurisdiction altogether . 96 However, the legislative materials show and the Supreme Court has confirmed that this possibility does not exist anymore and courts are not bound by the tribunal's decision in relation to its jurisdiction . 97

The highest courts in Singapore98, Switzerland99 and the UK100 demonstrate a preference for de novo review .

30. Notably, legal systems differ in enabling judicial review of arbitral awards denying as opposed to upholding the arbitrators' jurisdiction . For example, in Germany, the Federal Court of Justice denied a legal remedy against a decision of an arbitral tribunal denying its jurisdiction . 101 Thus, in Germany but also under Dutch102 and Hong Kong law103, and arguably under the Model Law104, a negative jurisdictional award is not subject to judicial review (save on procedural, public policy and other generally-applicable grounds) . 105 In contrast, under Swiss, Austrian, French and most other developed legal systems, a negative jurisdictional award is subject to the same degree of judicial review as a positive jurisdictional determination . 106 In Singapore, the International Arbitration Act was amended in 2012 (through the addition of section 10) to allow for the appeal of negative jurisdictional rulings made by arbitral tribunals . 107 Prior to this amendment, the Court of Appeal had held that an appeal could only be brought where the tribunal rules, as a preliminary question, that it has jurisdiction, and no appeal could be brought if the tribunal rules that it has no jurisdiction . 108

In Belgium109 and China110, different avenues of recourse to state courts are foreseen depending on whether arbitrators uphold or deny their jurisdiction . Born advocates for subjecting negative jurisdictional decisions by arbitral tribunals to the same degree of judicial review as positive jurisdictional determinations . 111 In international disputes, negative jurisdictional decisions mean that the parties are denied a neutral, efficient and presumptively commercially-expert forum and are forced to litigate in non-neutral national courts, often in parallel or multiplicitous proceedings, which are unlikely to produce enforceable decisions . Due to that, there is no reason to afford more limited judicial review to such decisions as compared to the level of review applicable to positive jurisdictional determinations . That approach is readily accomplished under most national arbitration statutes and can, in particular, be accommodated by Article 34(2)(a)(iv) of the Model Law . 112 Schaefer, the author of the article on the approach of German courts, calls for including in the 10th Book of the ZPO a legal remedy against a decision of the arbitral tribunal to decline its competence, as already provided by Austria in its 2013 arbitration law reform . 113

V. Court intervention during arbitration proceedings

A. Principle of non-intervention

31. In many of the contributions in b-Arbitra 2019/2, the importance of the principle of non-intervention was emphasized . 114

This general principle is recognised by the UNCITRAL Model Law . Further to Article 5 of the Model Law, in matters governed by the Model Law, no court shall intervene except where so provided in that Law . This provision constitutes an important safeguard against harmful court intervention . According to this provision, the court cannot assume any inherent, implied, or general competence to intervene in an arbitration . 115

32. This rule has been adopted in most of the examined national arbitration laws . For example, according to Section 1026 of the German ZPO, the German courts are only competent to deal with arbitration matters if such competence is expressly provided for . The rule underlying Section 1026 ZPO provides predictability . Schaefer emphasises that the foreign user should not be concerned about unexpected court intervention in arbitration through a mechanism that is not spelled out in the arbitration law, but is based on unwritten general, inherent or implied powers of the court . 116

Article 5 of the Model Law has equally been adopted by Hong Kong in the Arbitration Ordinance117 and by Singapore . 118 Hong Kong courts consistently take a pro-arbitration stance when analysing a case involving arbitration . In KB v S and others Madam Justice Mimmie Chan emphasised that under the Arbitration Ordinance, the court should interfere in the arbitration of the dispute only as expressly provided for in the Ordinance . 119

Similarly, in Singapore, the basic principle is that of non-interference by the courts with the arbitral process . Courts have established a policy of minimal intervention in arbitral proceedings . 120 This was confirmed by the Court of Appeal in Tjong Very, in which the court held that "the need to respect party autonomy (manifested by their contractual bargain) in deciding both the method of dispute resolution (and the procedural rules to be applied) as well as the substantive law to govern the contract, has been accepted as the cornerstone underlying judicial non-intervention in arbitration" . 121

The English Arbitration Act similarly provides that "in matters governed by this Part the court should not intervene except as provided by this Part" . 122 Courts are empowered to issue provisional remedies with respect to arbitral proceedings subject to strict limitations . Thus the English courts have a purely supportive function . 123 Further to Article 1449 of the French Code of Civil Procedure, the supporting judge can only intervene for measures relating to the taking of evidence or provisional or conservatory measures insofar as the arbitral tribunal has not yet been constituted .

33. Nevertheless, there are situations in which state court intervention is useful or even necessary . This contribution will focus now on a number of specific issues that were dealt with in b-Arbitra 2019/2, namely: interim measures ordered by the courts; the power of the courts to support foreign arbitration proceedings; anti-suit injunctions; and the possibility of appealing court decisions rendered during arbitration proceedings .

B. Interim measures ordered by the courts

1. Free choice model

34. Most arbitration laws recognise that arbitral tribunals and state courts have concurrent jurisdiction to order provisional or protective measures . 12 According to Article 9 of the Model Law, it is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, an interim measure of protection from a court and for a court to grant such measure . Further to Article 17 of the Model Law, arbitrators equally have jurisdiction to grant interim measures . Thus, the Model Law provides for concurrent jurisdiction of national courts and the

arbitral tribunal to grant interim measures . Parties are free to seek interim relief either from the arbitral tribunal or from the court .

These provisions have been adopted in Austria125, Belgium126, Germany127 and Hong Kong . 128 Concurrent jurisdiction equally exists in the Netherlands,129 Sweden130 and Switzerland . 131

35. As to the kind of measures that can be ordered, there is quite some diversity between the different jurisdictions . In Belgium, the courts are free to order any measure they deem appropriate, provided that urgency is proved . 132 The decision will be taken on the basis of 'apparent law' . However, in practice, courts will often decide on the basis of a balancing of interests . 133 Similarly, in the Netherlands, the courts have large freedom to order all the measures that are required in the interests of the parties, provided that the urgency of the measure is demonstrated . As in Belgium, the court will generally take its decision by balancing the interests of the parties . 134

In Germany, unlike in Belgium and the Netherlands, the measures that state courts can order are limited to those types of attachment measures or injunctions which are provided for in section 916 et seq . ZPO . 135

Danish law offers an interesting type of provisional measure . In Denmark, an arbitral tribunal can ask domestic courts to request a ruling from the European Court of Justice ('ECJ'), thus offering a solution to the problem of the refusal of the ECJ to consider questions submitted by arbitral tribunals . 136

2. Court-subsidiarity model

36. In France, there is no concurrent jurisdiction with regard to interim measures . When the arbitral tribunal has been seized, the courts can take only those interim measures that the arbitral tribunal could not take due, in particular, to the limits of its powers or the urgency of the matter . 137 As arbitrators cannot order conservatory attachments, such orders may be requested from the State courts . 138 Conversely, a référé provision is generally no longer admissible after the appointment of the arbitral tribunal . 139

This principle of subsidiarity of court intervention equally applies in England and Wales where, according to Section 44(5) of the Arbitration Act 1996, the court is only empowered to act where the tribunal itself cannot act effectively or cannot act at all, e .g . against non-parties to the arbitration or where the arbitral tribunal was not yet formed . 140 In Channel Tunnel, the House of Lords was reluctant to grant interim measures emphasising that although the court must make a tentative assessment of the merits in order to decide whether the plaintiff's claim is strong enough to merit protection, it is the duty of the court to respect the choice of tribunal that both parties have made, and not to take out of the hands of the arbitrators a power of decision that the parties have entrusted to them alone . 141 Hence the courts need to apply an effectiveness and urgency test to decide whether they can grant the requested interim measures or not . 142

37. In Singapore, although in principle the High Court has concurrent jurisdiction with the arbitral tribunal to order interim measures143, Article 12A(6) of the Singapore International Arbitration Act provides that the High Court shall make an order only if or to the extent that the arbitral tribunal has no power or is unable for the time being to act effectively . The Court of Appeal decided that 'the court will intervene only sparingly and in very narrow circumstances, such as where the arbitral tribunal cannot be constituted expediently enough, whether court's coercive enforcement powers are required or where the arbitral tribunal has no jurisdiction to grant the relief sought in the matter at hand' . 144 Thus, in practice, the court's assistance in arbitration proceedings can only be sought when arbitration is inappropriate, ineffective or incapable of securing the relief sought, for instance

where the interim measures sought are to be issued against third parties, where matters are urgent or where the court's coercive powers of enforcement are needed . 145 Although the Model Law has been adopted in Singapore, the practice there seems to be more in favor of the court-subsidiarity model, with a merely supportive role for the courts, as applied in France and the UK . 146

The court-subsidiarity model equally applies in Brazil . 147

C. Power of the courts to support foreign arbitration proceedings

38. In several jurisdictions, the question arose whether a national court may order interim measures regarding arbitration proceedings having their seat in another country English courts have the same power to grant provisional measures in cases involving arbitrations seated abroad as in cases where the seat is in England . 148 However, the court may refuse to exercise any such power if, in the opinion of the court, the fact that the seat of the arbitration is outside England and Wales or Northern Ireland, or that when designated or determined the seat is likely to be outside England and Wales or Northern Ireland, makes it inappropriate to do so . 149 In Company 1 v Company 2150, the court held that it had jurisdiction to decide upon the requested freezing order, but that it was not appropriate to exercise its jurisdiction . The parties had already initiated litigation in the British Virgin Islands (BVI) and there was no reason why the application could not have been made in the context of the BVI litigation . The connection with England was 'tenuous' since the only link of substance was the fact that Mr . A, although a US citizen, resided in England, and in any event, the Swiss court (as the court of the seat of arbitration) was more appropriate than the English court to grant interim relief .

In Singapore, the Court of Appeal first ruled that the courts did not have the power to grant interim measures in aid of foreign arbitrations . 151 Since this stance would hurt Singapore's reputation as an arbitration-friendly jurisdiction, the International Arbitration Act was amended in 2009 . Henceforth, the court may order interim measures in aid of foreign seated arbitration . 152 However, this would only be the case if the arbitral tribunal has no power or is unable for the time being to act effectively.

In Belgium, Article 1698 of the Judicial Code equally provides that the Court ruling in summary proceedings shall have the same power of issuing an interim or conservatory measure in relation to arbitration proceedings, as it has in relation to court proceedings, irrespective of whether they take place on Belgian territory or not . A similar rule exists in Sweden . 153

39. In Hong Kong, the court may only grant an interim measure in relation to arbitral proceedings having their seat outside Hong Kong, if the arbitral proceedings are capable of giving rise to an award that may be enforced in Hong Kong and the measure belongs to a type or description of interim measure that may be granted by the court in relation to Hong Kong arbitral proceedings . No substantive connection with Hong Kong is required . 154

In France, the courts usually do not have jurisdiction to order interim measures in a dispute involving only non-nationals . However, if relevant assets are located in France or the interim measures involve real estate located in France, the courts have jurisdiction to order interim remedies, even when the seat of arbitration is outside of France . 155 D. Anti-suit injunctions

40. Anti-suit injunctions may take different forms . A party may seek an injunction from a court to prevent or restrain another party from commencing court proceedings in breach of an arbitration agreement . A party may also seek an injunction from an arbitral tribunal to prevent or restrain another party from commencing or continuing proceedings in national courts in breach of an

arbitration agreement . Finally, a party may seek an injunction from a court to prevent or restrain a party from commencing or continuing arbitration proceedings . Several examples of such anti-suit injunctions can be found in the case-law of the Supreme Courts .

1. Court injunctions in order to prevent court proceedings

41. With regard to the first type of anti-suit injunctions, the ECJ held in West Tankers that an EU national court cannot make an order to restrain a person from commencing or continuing proceedings before the courts of another Member State on the ground that such proceedings would be contrary to an arbitration agreement . 156 The court held that the use of an anti-suit injunction would be contrary to the general principle that every court seized itself determines whether it has jurisdiction to resolve the dispute before it and would run counter to the trust which the Member States accord to one another's legal systems and judicial institutions . 157 This case law was confirmed in Gazprom, in which the ECJ noted that the court of a Member State may not issue a decision prohibiting the respondent from continuing, or initiating, civil or commercial proceedings in another Member State . 158

In Kamenogorsk, the UK Supreme Court decided that English courts have the power to issue an injunction to restrain foreign court proceedings outside Europe to enforce an arbitration agreement . This is also the case if no arbitration has been commenced and there was no intention to commence such arbitration . 159 Nevertheless, the UK Supreme Court emphasised that in cases where foreign proceedings are brought in breach of an arbitration clause or exclusive choice of court agreement, the appropriate course will be to leave it to the foreign court to recognise and enforce the parties' agreement on forum . However, since the foreign court had refused to do so on grounds that were untenable under English law, accepted as governing the arbitration agreement, the specific circumstances of the case allowed English courts to intervene . 160

42. Jurisdictions outside Europe, such as Singapore, evidently do not have the constraints imposed by EU law . In this respect, courts in Singapore are free to aid arbitration by preventing parallel proceedings anywhere in the world . 161

Attempts have also been made to make use of injunctions in order to stay recognition and enforcement procedures . In CIMC Raffles Offshore v Schahin Holding, the former party submitted an application for recognition of an arbitral award delivered in New York . Because arbitration proceedings were pending in London involving related contracts, the latter party challenged the application and requested the stay of the recognition procedure for a period of 18 months . The Brazilian Superior Court of Justice denied the motion for stay of the procedure and recognised the award . 162

2. Arbitral injunctions in order to prevent court proceedings

43. As regards the second type of injunctions, the ECJ does not object to anti-suit injunctions issued by an arbitral tribunal . In Gazprom, an anti-suit injunction was issued by an arbitral tribunal seated in Stockholm in respect of court proceedings pending in another EU Member State (Lithuania) . The ECJ decided that European law does not preclude a court of a Member State from recognising and enforcing, or from refusing to recognise and enforce, an arbitral award prohibiting a party from bringing certain claims before a court of that Member State . 163

In Switzerland, anti-suit injunctions have been granted in arbitration proceedings having their seat in Switzerland . 164

3. Court injunctions in order to prevent arbitral proceedings

44. In Ferro Atlântica S.L. v Zeus Mineração Ltda, an ICC arbitration was initiated by the respondent . The claimant filed an action for a provisional remedy before the courts of Bahia to stay arbitration based on the arbitration clause . The Court of Appeals of Bahia ruled that the arbitration could be stayed pending a decision as to the applicable regulation . However, the Superior Court of Justice granted an anti-anti-suit injunction and held that the intervention of state courts in ICC procedures would constitute an unjustified violation of the autonomy of the parties and, in accordance with the competence-competence principle, only the arbitral tribunal was competent to examine the validity of arbitration clauses . 165 The Superior Court of Justice confirmed this position in several other cases . 166

E. Appeal

45. In some of the analysed jurisdictions, decisions rendered by national courts in support of arbitration proceedings are not subject to appeal . For example, Article 1680 of the Belgian Judicial Code excludes the possibility of an appeal against decisions rendered by the national courts in matters of appointment, replacement and challenge of arbitrators as well as against evidentiary measures . This provision excludes the possibility of an appeal not only before the Court of Appeal, but also before the Court of Cassation . 167 Similarly, in Switzerland decisions by the state courts in support of arbitration normally do not come before the Swiss Federal Supreme Court . 168 Equally in Hong Kong, the decisions of the Court of First Instance of the High Court rendered in support of arbitration proceedings are generally not subject to appeal . 169 In Germany, some decisions rendered in support of the arbitral proceedings are not subject to appeal, while other decisions are . 170 Although the impossibility of appealing court decisions rendered in support of arbitration proceedings is favorable to arbitration in the sense that there is no further delay, the negative consequence of this is that the case-law in national jurisdictions might be very diverse .

46. In Austria, the Supreme Court is the first and final instance with jurisdiction over court proceedings in connection with arbitration proceedings . 171 This exclusive jurisdiction vested in the Supreme Court has the advantage that it provides the Supreme Court with experience in the arbitration specific issues . This enables the Supreme Court to set out a uniform approach with regard to court assistance in arbitration proceedings .

VI. Court control of procedural fairness and public policy post-award

47. The analysis of the reports published in b-Arbitra 2019/2 allowed the identification of the two grounds raised post-award (in setting aside and recognition and enforcement proceedings) that the Supreme Courts across the jurisdictions appear to have addressed the most: procedural unfairness and violation of public policy . This last chapter discusses each of these grounds in turn relying on the reported Supreme Courts' practice .

A. Procedural fairness

48. National laws can differ significantly in their treatment of the arbitration procedure . Under most arbitration statutes, the procedure is not regulated in any detail but is instead left almost entirely to the parties' agreement and the tribunal's discretion . 172 Nevertheless, legislation and judicial decisions in most developed jurisdictions require that arbitral proceedings seated on local territory satisfy a limited set of mandatory procedural requirements comprising the right to be heard and the right to equal treatment . 173 Article 18 of the Model Law is representative in this respect by providing: 'The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case' . These requirements apply during all phases of the arbitral proceedings . The same basic procedural guarantees are also contained in Articles 34(2)(a)(ii) and 36(1)(a)(ii) of the Model Law providing for annulment or non-recognition of an award if 'the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or was otherwise unable to present his case' . 174

Mandatory procedural protections have been examined in a wide range of cases . In general, arbitral awards have been annulled or denied recognition on grounds of a breach of procedural fairness175 only in rare and exceptional cases . 176 The burden of demonstrating procedural unfairness, sufficient to warrant the annulment of an award, is a significant one in most jurisdictions, which finds support in the analysis of the case law from the highest courts in Singapore and Hong Kong . 177

The article turns now to examine a number of recurrent procedural objections that arise in the annulment and recognition actions handled by the highest courts .

1. Equal treatment

49. Most national legal systems impose a mandatory duty on the arbitral tribunal to treat the parties equally . As mentioned above, that is the requirement under Article 18 of the Model Law . National arbitration legislation, whether based on the Model Law or not, many institutional rules and judicial decisions also impose mandatory guarantees of equality of treatment . 178 The guarantee of equal treatment is universally-applicable to all aspects of the arbitral procedure, from notice of the arbitration to the constitution of the tribunal, to conduct of the proceedings, to making of the award. 179 If a tribunal denies a party equal treatment, its award may be subject to annulment .

50. Equal treatment, however, does not mean the same treatment . In some circumstances, treating the parties identically will in fact be both unfair and unequal . 180 The core value reflected by equality of treatment is that both parties are guaranteed the same status before the tribunal . The tribunal applies the same procedural rules and grants the same procedural rights to both parties while ensuring that the parties are afforded non-discriminatory opportunities and treatment .

In line with the analysis above, the Supreme Court of Singapore has distinguished equality of treatment from identity of treatment and found no breach of natural justice where one party was not given the exact same amount of time as the other to prepare and file an expert report . 181 Similarly, in a 2017 case, the Austrian Supreme Court found that asymmetrical time-limits set by the tribunal for the parties to comment on a certain procedural issue did not amount to a denial of equal treatment because, in the specific case, the challenging party was afforded sufficient time for its comments . 182

2. Right to be heard

51. Like the principle of equality of treatment, virtually all legal systems guarantee the parties' opportunity to be heard . 183 As mentioned earlier, the Model Law provides in Article 18 that 'each party shall be given a full opportunity of presenting his case' . Other national arbitration legislation is similar to the Model Law184, although some statutes provide more specifically that parties shall be given a 'reasonable' opportunity to be heard . 185 National court decisions also uniformly recognise the fundamental importance of the parties' right to be heard, under both the Model Law and otherwise . 186 Institutional arbitration rules generally parallel the provisions of national law and judicial decisions . 187

2 .1 Evidence

52. Where an arbitral tribunal fails to permit a party to present its argument or evidence, or to respond to its counter-party's evidence or argument, the subsequent award is potentially subject to annulment . 188 Nonetheless, a tribunal is generally afforded substantial discretion in determining the need for and admissibility of evidence or argument on particular issues, which is reflected in national arbitration legislation . 189 Because of that, annulment applications based on evidentiary decisions by the arbitral tribunal rarely succeed . 190 For example, in one German case, a party requested that the award be set aside because the arbitrators' conduct had violated, among other things, the party's right to be heard . In particular, the applicant argued that the arbitral tribunal had not considered its application to hear a witness (an officer of the opposing party) during the arbitration . The Court of Appeal in Frankfurt rejected this argument referring to the arbitral tribunal's general power to determine issues of evidence . 191

Similarly, in the United States, an arbitrator's refusal to hear testimony is generally not a ground for refusing enforcement of an award as the arbitrators have the discretion to determine when testimony should be heard . 192 Also, the award's enforcement will not be refused on the basis of a claim that testimony was false or misleading where the arbitrators had a possibility to evaluate the testimony . 193 There appears to be only one US case in which a procedural decision of the arbitral tribunal in relation to evidence constituted the basis for the court to refuse the enforcement of an award . 194

2 .2 Disclosure

53. Consistent with the historically broad discretion of arbitrators with regard to procedural and evidence-taking matters, most national arbitration regimes afford tribunals ample inherent authority to order parties to the arbitration to make disclosure . 195 When parties seek to annul awards based on alleged unfairness in a tribunal's disclosure rulings, these challenges have virtually always been rejected . 196

This practice is illustrated by a case from Singapore . In China Machine197, the High Court rejected the plaintiff's argument that by imposing an Attorney Eyes-Only Order over the disclosure of disputed documents the tribunal breached natural justice that justified the setting aside of the award .

2 .3 Issues to address

54. Besides enjoying broad discretion in terms of evidence and disclosure-related decisions, tribunals are generally not required to address every issue raised by the parties . Rather, they can select and deal with issues that they consider essential . In Soh Beng Tee198, the Court of Appeal in Singapore acknowledged that in arbitration, parties have a right to be heard on every issue relevant to the resolution of a dispute . However, it would be 'unfair to the successful party if it were deprived of the fruits of its labour as a result of a dissatisfied party raising a multitude of arid technical challenges after an award had been made' . 199 Thereby, the Court held that the failure to refer to every point does not constitute a valid ground of challenge in all circumstances .

Similarly, in TMM Division200, the High Court in Singapore held that a tribunal has no duty to deal with every issue raised by each party but only with those that are essential . Provided that a decision on one argument suffices to resolve an essential issue, the tribunal does not need to consider all other arguments covered under that issue . The High Court encapsulated this view in SEF Construction by stating that '[n]atural justice requires that the parties should be heard; it does not require that they be given responses on all submissions made' . 201

55. A notable feature of Swiss setting-aside proceedings is that the arbitral tribunal is invited to comment on whether in rendering a decision it considered a particular argument or a piece of evidence . 202 Faced with a ground for setting-aside in connection with the violation of the right to be heard, the arbitral tribunal may be asked to confirm that it took a specific argument or piece of evidence into account . Even if the arbitration award does not expressly say so, the fact that the arbitral tribunal confirms that it took an element into account may allow the Swiss Federal Supreme Court to reject the argument that the right to be heard would have been violated and to dismiss the request for setting-aside . In Germany, there appears to be a presumption that even if certain issues are not explicitly mentioned in the reasoning of the award, they have been considered by the tribunal . 203

2 .4 Legal reasoning

56. The duty to act respecting the rules of due process is not simply a matter of ensuring equality between the parties and giving each the right to respond to the other party's position . It also arises where the arbitral tribunal bases its decision on an issue not specifically raised by the parties . 204 In particular, arbitrators should not adopt a new legal qualification of a fact or a claim without allowing parties to present their arguments in this respect . 205 If the arbitrators rest a decision on materials not advanced by the parties, without providing the parties an opportunity to be heard, their award is subject to annulment . 206

57. Some jurisdictions distinguish between factual and legal matters, citing the principle of jura novit curia and holding that an arbitral tribunal has greater freedom to rest a decision on legal rather than factual grounds not addressed by the parties . 207 That is the case, for example, in Switzerland, as the Swiss Federal Supreme Court considers that the principle iura novit curia is part of Swiss arbitration law . 208 Nevertheless, completely unexpected reasoning might amount to a violation of the right to be heard . 209 This scenario, however, is more an exception . So far, the Swiss Federal Supreme Court has annulled an award for a violation of the right to be heard in connection with legal reasoning in only two cases . 210

The approach of the Austrian Supreme Court is along the same lines . In one 2016 case, the Supreme Court held that the fact that the sole arbitrator had not explained the legal analysis forming the basis of the arbitral award did not amount to a violation of the parties' right to be heard . 211 The arbitral

tribunal has no obligation to communicate its legal analysis to the parties in advance and invite them to comment on it . Only if the tribunal departs from a legal analysis already indicated to the parties, preventing them in this way from making further submissions, would the tribunal effectively violate the parties' right to be heard . This is because in such cases, the departure would frustrate the legitimate expectations of the parties .

The approach in Germany, Sweden, Finland and France appears to be similar to the one taken in Switzerland and Austria . 212 In Belgium, likewise, a distinction seems to be made between factual and legal issues and the invoking in the award of case law or doctrine not raised by the parties is regarded as less controversial . 213

3. Requirement of the influence on the outcome of the case

58. National legislation in some states specifies that an award may be set aside on a procedural irregularity ground only if that irregularity had influenced the case's outcome . That happens, for example, in Singapore214, Germany215, Belgium216 and Sweden . 217 In one 2019 case, the Swedish Supreme Court considered the issue relating to an alleged procedural error that the Court of Appeal found that the tribunal had made and, therefore, partially set aside the award . 218 On the facts before it, the Supreme Court found, among other issues, that the error likely had influenced the outcome . Case law from other jurisdictions indicates the relevance of the effect on the result of arbitration for a procedural irregularity to be sufficient to set aside an award . 219

4. Waiver of due process rights

59. It is well-settled under almost all national laws that procedural protections provided by national or international law may be waived . 220 Article 1679 of the Belgian Judicial Code is representative, providing: 'A party that, knowingly and for no legitimate reason refrains from raising, in due time, an irregularity before the arbitral tribunal is deemed to have waived its right to assert such irregularity' . 221

National court decisions also uniformly conclude that except for a very limited number of cases222 objections to virtually all types of procedural irregularities may be waived by a failure to object when such irregularities occur . 223 Institutional arbitration rules contain similar provisions regarding waivers of procedural objections . 224 Arguably parties are allowed to waive certain rights because the scope of the right to be heard in international arbitration is not as wide as before state courts . 225

In line with the general approach, the Swiss Federal Supreme Court considers a complaint in connection with the right to be heard inadmissible if the issue was not raised timely before the arbitral tribunal . 226 Notably, the Court's expectations as to how clearly the parties should make their objection known are quite high . 227

B. Public policy

60. It is well-settled in most jurisdictions that an arbitral award may be annulled, or its recognition and enforcement may be refused, if it violates public policy . 228 The public policy exception is frequently invoked . 229 Article 34(2) (b)(ii) of the Model Law, modelled on Article V(2)(b) of the New

York Convention, provides for the annulment of an award that ‘is in conflict with the public policy of this State’ . This provision is replicated in many national arbitration regimes . 230 Article V(2)(b) of the Convention stipulates that recognition and enforcement of an award may be refused if it would be contrary to the public policy of the country, meaning the country where recognition and enforcement of the award is sought . 231 National arbitration legislation also permits the non-recognition of awards because they violate public policy . 232 The public policy exception gives rise to substantial complexities in both the annulment as well as recognition and enforcement contexts . In particular, the content of the public policy exception remains controversial in numerous respects . 233 Nevertheless, this exception has been applied relatively infrequently to annul or deny recognition of awards234 only in cases of direct and grave violations of the most fundamental and mandatory public policies and laws . 235

It is unclear whether public policy, for purposes of annulment of an award, is identical to public policy in recognition actions under the New York Convention . 236 While some authorities consider that the two concepts are identical237, Born believes that there is a substantial argument that public policy, for purposes of recognition under the New York Convention, should be even more circumscribed than that in an annulment action under national law . 238

1. Exceptional character

61. The analysis of the case-law of the highest courts in Singapore, Austria, Switzerland and Brazil demonstrate an exceptional character that these jurisdictions attribute to the public policy exception.

In Singapore239, the Court of Appeal has described the public policy ground as a concept that should be relied on only in instances where the upholding of an arbitral award would ‘shock the conscience’ or is ‘clearly injurious to the public good’ or ‘wholly offensive to the ordinary reasonable and fully informed member of the public’240, or where there are ‘egregious circumstances such as corruption, bribery or fraud, which would violate the most basic notions of morality and justice’ . 241 In PT Asuransi, the Court of Appeal held that errors of law and fact in an award by themselves do not violate the public policy of Singapore . 242

In another Singaporean case, Re An Arbitration243, in challenging the enforcement of an arbitration award made in China, the defendants argued, among other issues, that it would be contrary to public policy to allow the award to be enforced . This was because facts had been raised that would create the possibility that the award did not resolve the real dispute between the parties, and it would be unjust to the defendants to enforce the award . The High Court rejected the argument because it found no exceptional circumstances that would warrant the refusal to enforce the award .

62. In a 2016 case, the Austrian Supreme Court observed that its assessment of whether the arbitral tribunal had violated substantive ordre public cannot lead to any review of the award in fact and in law . 244 Even legally incorrect decisions must, in principle, be upheld provided the result of the arbitral award does not unacceptably violate the fundamental values of the Austrian legal system .

63. In Switzerland, a Swiss counsel sued former clients for a success fee and an arbitration award was rendered in the counsel’s favour . While the Swiss Federal Supreme Court criticised the awarded amount (which was about five times the standard fees), it found that this was not contrary to public policy and upheld the award . 245

64. In the Brazilian courts, there is a long-established position that a failure to apply or wrong application of the law by the arbitral tribunal does not lead to a violation of public policy . 246 The Superior Court of Justice rejects most public policy defences as an inappropriate attempt to re-litigate the case and intervenes only where fundamental principles of Brazilian law are threatened . One recent case, however, contradicts this practice .

In Abengoa247, the Superior Court of Justice refused recognition of two ICC awards issued in New York because they violated Brazilian public policy . The particular reasons for such refusal were the partiality of the chairman of the arbitral tribunal and breach of the principle of full compensation . The decision came as a surprise, considering that just two months earlier the same court had recognised an ICDR arbitral award involving allegations of lack of impartiality of arbitrators . In that case, the court held that such allegations had been dealt with during arbitration and, as such, it was not for the Superior Court of Justice to examine whether that decision was correct . 248

Abengoa demonstrates that public policy exception remains unpredictable and expansive . There is inevitably a risk that due to the nebulous nature of the concept one jurisdiction may set aside or refuse to recognize an award that other jurisdictions would regard as valid . 249 The case of China illustrates such a risk . There, public policy appears to be interpreted broadly to include 'traditional and societal sentiment' . 250 In Heavy Metal251, the Supreme People's Court denied enforcement of an award on the grounds that the performance of heavy metal music was against 'national sentiments', and accordingly contrary to the social and public interests . In this way, the court adopted what Redfern and Hunter regard as a 'troubling broad interpretation of the public policy exception to the enforcement of arbitral awards' . 252 The requirement that lower courts must obtain leave of the Supreme People's Court to refuse recognition or enforcement helps reduce the frequency of the use of an overly broad interpretation of public policy grounds to deny enforcement of awards in China . 253

2. Procedural public policy

65. Some national legal systems provide that a breach of procedural public policy (as distinguished from substantive public policy) may provide grounds for annulling an international arbitral award . 254 A few national court decisions have adopted comparable analyses . 255 Procedural public policy is believed to be breached in case of violation of fundamental and generally recognised procedural principles so that the decision appears absolutely incompatible with the values and legal order of a state ruled by laws . 256 The case-law from some highest courts provides examples of the awards' annulment on procedural public policy grounds . Thus, in Dutco257, the French Supreme Court annulled an interim award on the ground that the constitution of the arbitral tribunal was contrary to the principles of procedural public policy . In a 2016 case, the Austrian Supreme Court set aside the interim award in part relying on § 611, (2)(5) ZPO (breach of procedural ordre public) because the proceedings were conducted in a manner contrary to fundamental values of the Austrian legal system . 258 Similarly, in the context of recognition and enforcement proceedings, some national courts have invoked Article V(2)(b)'s public policy exception in cases involving very serious procedural unfairness or irregularities, which could, however, readily have been considered under Article V(1)(b) or (d) . 259

The concept of procedural public policy seems to overlap substantially with denial of due process, under provisions such as Article 34(2)(a)(ii) of the Model Law . Arbitration experts doubt that an autonomous body of procedural standards, extending beyond guarantees of an opportunity to be heard in Article 34(2)(a)(ii), is either necessary or constructive; it would provide little by way of

necessary protections, while adding a potentially expansive basis for overriding the parties' procedural autonomy . 260 Likewise, in the context of the New York Convention, the better course would be not to expand the scope of Article V(2)(b) but instead to limit it to substantive public policies . 261

66. An interesting question is the relationship between the principle of res judicata and procedural public policy . Hirsch is convinced that the principle of the force of res judicata (of an earlier award or court judgement on the same subject matter between the same parties) is part of procedural public policy . 262 The difficulty, according to Hirsch, lies in determining the scope of res judicata . He refers to three cases where the Swiss Federal Supreme Court had to deal with this issue . While in one case the Court annulled an award, finding that it had violated procedural public policy because the arbitral tribunal disregarded the force of res judicata of a prior court judgment263, this was not the case for the other two cases . 264 Nevertheless, it is doubtful that the application of rules of res judicata should be treated differently from other substantive issues decided by the arbitrators . 265 That is consistent with the drafting history of the Convention, in which proposals to include refusals to apply res judicata principles as an Article V exception to recognition were rejected . 266

3. Reasoning of an award

67. The exact reason why the Austrian Supreme Court partially set aside the interim award in the 2016 case mentioned in the previous section (VI .B .2) was the award's inadequate reasoning . 267 The Supreme Court stressed that the reasoning of the award is crucial to an assessment of whether the tribunal has dealt with the matter adequately . On the facts of the case, the Supreme Court held that the reasoning was contradictory since the arbitral tribunal rejected the claim for the rendering of accounts for being 'too broad', despite the fact that the contract contained the exact same 'broad' terms .

While some legal regimes provide for the annulment of awards that are internally contradictory or inconsistent268, courts (including the highest) in other jurisdictions have declined to follow this course in practice . 269 The rationale of the rules allowing the annulment of an award on the basis of its internal contradiction is that such awards are either not reasoned (since contradictory reasons are presumably the equivalent of no reasons) or they violate public policy (since they dictate inconsistent results) . 270

In contrast to annulment provisions in a number of national arbitration statutes, no provision of Article V of the New York Convention is directed towards formal defects, including lack of reasons . It is well-settled that the allegedly internally-contradictory character of an award is not a basis for non-recognition and national courts have refused to deny recognition on these grounds . 271 The approach resonates with the Convention's drafting history, which shows that proposals to include in Article V an exception for awards that were 'vague and indefinite' were specifically rejected . 272

68. In Belgium, the reasons for any adjudicative decision are a requirement of domestic but not international public policy . 273 This means that the requirement applies to arbitral tribunals sitting in Belgium or otherwise applying the Belgian lex arbitri . Pursuant to Article 1717, § 3(a)(iv) of the Judicial Code, in the absence of clear motivation, an arbitral award may be annulled . Also, further to Article 1721, § 1(a)(iv) of the Judicial Code, the enforcement of an arbitral award may be refused if the award is not reasoned but only where reasons are required by the rules of law applicable to the arbitral proceedings under which the award was rendered . The absence of reasons is not a basis for

the refusal to recognise a foreign arbitral award rendered in a country where the lex arbitri does not require such reasons . Courts in many jurisdictions follow this approach . 274

While there seems to be no case-law relating to the ground that an award rendered in Belgium lacks any reasons, applicants tend to invoke the argument that reasons given by the tribunal are internally contradictory and, hence, that this amounts to a lack of reasons . 275 This argumentation was inspired by the case-law of the Supreme Court . Under Article 1704, 2(a)(j) of the Old Judicial Code, the Supreme Court decided that a contradiction in the reasons of the award led to its annulment, regardless of whether the award was justified by other reasons; that decision drew strong criticism . 276 After the 2013 amendments, 'conflicting provisions' in an award are no longer a ground for the award's annulment under the Judicial Code . Moreover, the legislator's intent that a contradiction in the reasons does not justify annulment is made crystal clear in the Travaux Préparatoires . 277 VII.

Conclusion

69. This article has analysed recurrent arbitration-related issues arising in the Supreme Courts' practice around the world as reported in contributions published in b-Arbitra 2019/2 . In particular, the article addressed issues like the agreement to arbitrate, impecuniosity, competence-competence, court intervention during arbitration, as well as court control of procedural fairness and public policy in setting aside and recognition and enforcement proceedings . While indisputably a broad consensus exists among most states on the approach to basic aspects of the legal regime for international arbitration, the devil is in the detail . The analysis of the Supreme Courts' case-law across the jurisdictions has shown a diversity of approaches to a number of aspects of the discussed issues . Even the approach of one and the same Supreme Court in relation to what appears to be the same aspect may vary on different occasions . Thereby, the conclusion that can be drawn relying on the insights from the Supreme Courts' practice is that, despite the fact that broad lines of convergence across the jurisdictions can be identified, the approach to particular aspects of many arbitration-related issues examined in this article remains predominantly jurisdiction-specific.

Notes:

1 Jean-Francois Tossens and Annet van Hooft, Editorial, b-Arbitra 2019/2, 295-296.

2 This is the case in France with regard to domestic arbitration (Yves Derains and Laurence Kiffer, "National Report for France (2013 through 2020)" in Lise Bosman (ed.), ICCA International Handbook on Commercial Arbitration, ICCA & Kluwer Law International, 2020, Supplement No. 110, April 2020) and in the Netherlands (Gerard J. Meijer and Marike R.P. Paulsson, "National Report for The Netherlands (2012 through 2014)" in Lise Bosman (ed.), ICCA International Handbook on Commercial Arbitration, ICCA & Kluwer Law International, 2020, Supplement No. 109, February 2020).

3 This is the case in Germany (Stefan Michael Kroll, "National Report for Germany (2007 through 2020)" in Lise Bosman (ed.), ICCA International Handbook on Commercial Arbitration, ICCA & Kluwer Law International, 2020, Supplement No. 109, February 2020) and in Sweden (Annette Magnusson, "National Report for Sweden (2020)" in Lise Bosman (ed.), ICCA International Handbook on Commercial Arbitration, ICCA & Kluwer Law International, 2020, Supplement No. 110, April 2020).

4 Carlos Nehring Netto, “National Report for Brazil (2019)” in Lise Bosman (ed.), ICCA InternatioFnal Handbook on Commercial Arbitration, ICCA & Kluwer Law International, 2020, Supplement No. 106, July 2019. 5 Art. 4, § 2 Brazilian Arbitration Act; Jose Benedito dos Santos v MRV Serviços de Engenharia Ltda, REsp 1.189.050/SP,j. 1 May 2016, as referred to in Marcelo Roberto Ferro, “The Brazilian (friendly) experience”, b-Arbitra 2019/2, 552.

6 Recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958 (2006).

7 According to this provision, an agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means. The requirement that an arbitration agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference. Furthermore, an arbitration agreement is in writing if it is contained in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other. The reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract.

8 Superior Court of Justice, Plexus Cotton Limited v Santana Têxtil S/A, SEC 967/GB, j. 15 February 2006 as referred to in Ferro, supra n. 5, at 547 (2019). In the same sense, Kanematsu v Advanced Telecommunications System, related to the enforceability of an award issued in New York under the rules of the American Arbitration Association, in the absence of a clear evidence of explicit and manifest intention of the parties to arbitrate. The Superior Court of Justice refused to enforce the award because the contract between the parties containing an arbitration clause was unsigned (SEC 885/US).

9 OGH 23 June 2015, 18 OCg 1/15v.

10 Cass. Fr. Civ. 1ère, 11 May 2012, n°10-25.620; Cass. Fr. Civ. 1ère, 09 November 1993, Bomar Oil II, Rev. Arb. 1994.108, n. C. Kessedjian; JDI 1994.690, 1ère espèce, n. E. Loquin as referred to in Derains and Kiffer, supra n. 2.

11 Werner Melis, “National Report for Austria (2018 through 2020)” in Lise Bosman (ed.), ICCA International Handbook on Commercial Arbitration, ICCA & Kluwer Law International, 2020, Supplement No. 109, February 2020.

12 Cass. 27 October 1995, C.95.0007.F, Arr.Cass. 1995, 922-927, as discussed in Herman Verbist and Luc Demeyere, “Arbitrage en de Hoogste Belgische Gerechtshoven (1904-2019)”, b-Arbitra 2019/2, 371. The then applicable Art. 1677 of the Belgian Judicial Code (JC) required an agreement in writing.

13 Cass. 13 December 2001, C.99.0198.N, Arr.Cass. 2001, 2179-2182, as discussed in Verbist and Demeyere, n. 12, at 371.

14 Kroll, supra n. 3; BGH KTS 71, 37, Palandt § 147, Rn 8ff. 15 Ibid.; BGH 21 September 2005 – III ZB 18/05, SchiedsVZ 2005, 306. 16 Meijer and Paulsson, supra n. 2.

17 Tracomin SA v. Sudan Oil Seeds Co Ltd, BGE/ATF 111Ib, 255, 5 November 1985 as referred to in Paolo Michele Patocchi, “National Report for Switzerland (2018 through 2020)” in Lise Bosman (ed.),

ICCA International Handbook on Commercial Arbitration, ICCA & Kluwer Law International, 2020, Supplement No. 111, July 2020.

18 Karyl Nairn, "National Report for England and Wales (2019 through 2020)" in Lise Bosman (ed.), ICCA International Handbook on Commercial Arbitration, ICCA & Kluwer Law International, 2020, Supplement No. 110, April 2020; Neil Kaplan and Robert Morgan, "National Report for Hong Kong (2013 through 2018" in Lise Bosman (ed.), ICCA International Handbook on Commercial Arbitration, ICCA & Kluwer Law International, 2020, Supplement No. 98, March 2018.

19 Magnusson, supra n. 3.

20 Marc Dal, "National Report for Belgium (2019 through 2020)" in Lise Bosman (ed.), ICCA International Handbook on Commercial Arbitration, ICCA & Kluwer Law International, 2020, Supplement No. 110, April 2020).

21 Cass. Fr. Civ. 1ère, 1 June 1999, Société Tarom v. Société Khayat Travel and Tourism, Rev. Arb. 2000.493, n. Stern, 404, as referred to in Derains and Kiffer, supra n. 2.

22 Cass. Fr. Com., 21 February 2006, Navire Pella, Société Belmarine et autre v. Société Trident Marine Agency Inc. et autre, Rev. Arb. 2006.943, n. Gaillard; Cass. Fr. Civ. 1ère, 22 November 2005, Navire Lindos, Société Axa Corp. Solutions et autre v. Société Némésis Shopping Corp. et autre, Rev. Arb. 2006.437, n. Gachard, as referred to ibid.

23 E.g. Belgium. See Dal, supra n. 20.

24 Superior Court of Justice, SEC 856/GB, j. 18 May 2005, as referred to in Ferro, supra n. 5, at 547.

25 Oleaginosa Moreno Hermanos Sociedad Anonima Comercial Industrial Financiera Immobiliaria y Agropecuaria v Moinho Paulista Ltda (SEC 866/EX), as referred to in Ferro, supra n. 5, at 547.

26 Excomm Ltd. v. Ahmed Abdul-Qawi Bamaodah [1985] 1 Lloyd's Rep 403; Zambia Steel v. James Clark & Eaton Ltd [1986] 2 Lloyd's Rep 225, as referred to in Nairn, supra n. 18.

27 Compagnie de Navigation et Transports SA, vs. MSC Mediterranean Shipping Co, BGE/AFT 121, III, 38, 43, 16 January 1995, as referred to in Patocchi, supra n. 17.

28 BGH 21 September 2005 – III ZB 18/05, SchiedsVZ 2005, 306, as referred to in Kroll, supra n. 3.

29 BGH 31 October 2001 – VIII ZR 60/01, NJW 2002, 370, as referred to in Kroll, supra n. 3.

30 Barrier Ltd v. Redhall Marine Ltd [2016] EWHC 381, as referred to in Nairn, supra n. 18.

31 Cour de cassation 9 November 1993, Bulletin 1993 I N° 313 p. 218.

32 Hoge Raad 7 May 1993, Meulen v. Keijsers, NJ 1993, 655, as referred to in Meijer and Paulsson, supra n. 2.

33 Hoge Raad 5 June 1992, Lloyd v. AEG, NJ 1992, 565; Hoge Raad 1 July 1993, Bouma v. Caro, NJ 1993, 688, as referred to in Meijer and Paulsson, supra n. 2.

34 S. Halla, "Non-signatories in International Commercial Arbitration: Contesting the Myth of Consent", ICLR 59 (2018); Gary B. Born, International Commercial Arbitration 1418-1484, 2nd ed., Kluwer Law International, 2014.

35 Swiss Federal Supreme Court 17 April 2019, ATF 145 III 199. See also Swiss Federal Supreme Court, 16 October 2003, No 4P 115/2003, Sammlung der Bundesgerichtsentscheide, vol. 129, 2003,

727-738, as referred to in Laurent Hirsch, “Swiss Federal Supreme Court International Arbitration Case Law”, b-Arbitra 2019/2, 498.

36 Paris Court of Appeal, 17 December 1997.

37 Cass. Civ. 1, 7 November 2012, No. 11-25891; Cass, Civ 1, 27 March 2007, ABS, No. 04-20.842.

38 Dallah Real Estate and Tourism Holding Company v the Ministry of Religious Affairs, Government of Pakistan, 3 November 2010, [2010] UKSC 46, [2011] 1 AC 763.

39 Cass. Civ. 1, 8 February 2000, No. 95-14330.

40 Cass. Civ. 1, 8 February 2000, No. 95-14330.

41 Cass. Civ. 1, 5 January 1999, No. 96-20202.

42 Cass. Civ. 1, 17 November 2010, No. 09-12.442.

43 Bundesgerichtshof 27 November 2013, BGH, III ZR 371/12.

44 The Montedipe S.p.A.v. v. JTP-RO Jugotanker (The Jordan Nicolov) [1990] 2 Lloyd’s Rep 11; Baytur v. Finagro Holdings [1992] 1 QB 610, 618-9. Neil Andrews, The Thee Paths of Justice, Court Proceedings, Arbitration, and Mediation in England, Springer International Publishing, 2018, 228, 9.33.

45 Cour de cassation, 11 July 2006, Banque Populaire Loire et lyonnais v Société Sangar.

46 Corte di Cassazione, 18 March 1997, Assicurazioni Generali SpA v Tassinari, Judgment No. 2384.

47 Cass. 28 September 2000, C.98.0506.F as discussed in Verbist and Demeyere, n. 12, at 377-378.

48 J.P. Moyano, “Impecuniosity and Validity of Arbitration Agreements”, 34(4) Journal of International Arbitration 632 (2017).

49 Ibid.; F.N. Sanli, “Party Impecuniosity and International Arbitration: The Interplay between Failure to Pay the Advance Costs and Validity of Arbitration Agreement in International Arbitration”, 40(1) PPIL 573, 575 (2020).

50 Nigel Blackaby, Constantine Partasides, et al., Redfern and Hunter on International Arbitration 138, 6th ed., Oxford University Press, 2015 (hereinafter, Redfern and Hunter).

51 Ibid.

52 Ibid.

53 Moyano, supra n.48, at 634.

54 Bundesgerichtshof 14 september 2000, NJW 2000, 3720.

55 Hoge Raad der Nederlanden 21 maart 1997, NJ 1998, nr. 219.

56 Fürstlicher Oberster Gerichtshof Liechtenstein, 7 August 2008, 6(6) German Arbitration Journal 306-307 (2008).

57 öOGH 4 september 1936, SZ 18/151.

58 D. Kühner, “The Impact of Party Impecuniousity on Arbitration Agreements: The Example of France and Germany”, 31(6) Journal of International Arbitration 807 (2014).

59 Cour d'appel de Paris 7 april 2015, RG 15/00512; Cour d'appel de Paris 26 februari 2013, ASA Bull. 900 (2013).

60 Cour d'appel de Paris 26 februari 2013, ASA Bull. 900 (2013).

61 Cass. Fr. 13 juli 2016, Ch. Civ. 1, n° 15-19389.

62 Moyano, supra n.48, at 637.

63 Portuguese Constitutional Court, 30 May 2008, 311/2008, Diário da República, 2.a série, N.° 148, 1 August 2008.

64 Supreme Court of Justice of Portugal, 26 April 2016, Case No. 1212/14.5T8LSB.L1.S1.

65 Belgian Court of cassation, 7 November 2019, C.19.0048.N, b-Arbitra 2020, 137, note G. Croisant, JT 2020, 440, note Y. Herinckx, P&B 2020, 130, note M. De Ruysscher.

66 Born 2014, supra n. 34, at 1077.

67 Ibid., at 1217.

68 Ibid., at 1060, 1216.

69 Tomolugen Holdings Ltd and another v Silica Investors Ltd and other appeals, 2016, 1 SLR 373.

70 Ibid., at 63.

71 Michael Hwang and Yin Wai Chan, "Case Law of the Supreme Court of Singapore in the Field of Arbitration", b-Arbitra 2019/2, 637.

72 CC 146.939/PA, Partout LTDA vs. Juízo de Direito da 2ª Vara Cpivel e Empresarial de Belém/PA e Juízo Arbitral do Conselho Arbitral do Estado de São Paulo, j. 23 November 2016; Resp 1.302.900/MG, Samarco S.A. vs. Aristides Luiz Vitório, j. 9 October 2012; REsp 1.602.696/PI, Ambev S.A. vs. Cosme e Vieira LTDA, j. 9 August 2016; CC 139.519/RJ, Petrobras vs. Tribunal Regional da 2ª Região e Tribunal Arbitral da Corte Internacional de Arbitragem – ICC, j. 11 October 2017 and other cases referred to in Ferro, supra n. 5, at 549 fn 25.

73 Dominique Hascher, "La Cour de cassation francaise et l'arbitrage", b-Arbitra 2019/2, 444. See also Gary B. Born, International Arbitration: Cases and Materials 62, 2nd ed., Kluwer Law International, 2015 (noting that if claims which are allegedly subject to an arbitration agreement are brought in French courts prior to constitution of the arbitral tribunal, the judicial proceedings will be dismissed, except where the arbitration agreement is 'manifestly void or manifestly not applicable'; if claims which are allegedly subject to arbitration are brought in French courts after the arbitral tribunal is constituted, then the court is required to dismiss them pending a jurisdictional decision by the arbitrators).

74 Art. 186 of the Swiss Law on Private International Law (Swiss LPIL) generally permits arbitral tribunals to resolve jurisdictional challenges in the first instance. Where claims subject to an arbitration agreement are asserted in Swiss courts, further to Art. 7 of the Swiss LPIL the parties' arbitration agreement will be given effect by dismissing judicial proceedings. Judgment of 6 August 2012, DFT 4A_119/2012 (Swiss Fed. Trib.); Judgment of 29 April 1996, DFT 122 III 139 (Swiss Fed. Trib.); Judgment of 16 January 1995, DFT 121 III 38 (Swiss Fed. Trib.) referred to in Born, Cases and Materials, supra n. 73, at 60 fn. 464. Nevertheless, further to Art. 7 court proceedings will not be dismissed if the court finds, among other issues, that the arbitration agreement is null and void, inoperative or incapable of being performed. In determining the validity of the arbitration

agreement, the scope of its review will depend on the place of arbitration according to the current practice of the Federal Supreme Court: a prima facie examination if the place of arbitration is in Switzerland and full power of review if the place of arbitration is outside Switzerland or yet undetermined. Patocchi, supra n. 17.

75 English Arbitration Act (AA), 1996, § 30-31. However, English AA, § 32 makes it possible to obtain a speedy declaratory judgment from the court as to the tribunal's substantive jurisdiction during arbitration, if either all parties agree in writing or the tribunal consents and the court is satisfied that its decision could save substantial costs, the application was made without delay and that there is good reason why the court should decide the matter.

76 Further to Art. 8(1) of the Model Law, where a suit is brought 'in a matter which is the subject of an arbitration agreement', the national court 'shall … refer the parties to arbitration unless it finds that the agreement is null and void, inoperative, or incapable of being performed'. While the ordinary meaning of the language of Art. 8(1)suggests that the court's mission includes making a final determination whether the agreement is valid, courts in several Model Law jurisdictions have held that only a 'prima facie inquiry' into jurisdiction should be conducted by a court before referring parties to arbitration. It is uncertain which approach to the allocation of jurisdictional competence under the Model Law prevails. See, Gary B. Born, International Arbitration: Law and Practice, § 2.05 [B][3], 2nd ed., Kluwer Law International, 2015.

77 This article is identical to Article 1679 of the Old Belgian Judicial Code (JC).

78 See e.g., Belgian Supreme Court, 13 October 1978, RW 1978-1979, 2811 referred to in Maarten Draye and Erica Stein, "Commentary on Part VI of the Belgian Judicial Code, Chapter II: Article 1682" in Niuscha Bassiri and Maarten Draye (eds.), Arbitration in Belgium, Kluwer Law International, 2016, 94 fn 16.

79 Further to Sect. 1032(2) of the ZPO, prior to the constitution of the arbitral tribunal a party may apply to the courts for a determination of whether arbitration is admissible. Such action appears to be also possible if the tribunal has already been constituted but despite a challenge to its jurisdiction refuses to render a preliminary ruling on it. Also, if one party invokes the arbitration agreement in court actions on the merits, courts will always engage in a full review of the arbitration agreement, rather than establishing only a prima facie case that an arbitration agreement exists. Kroll, supra n. 3.

80 First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995).

81 Such 'clear and unmistakable' evidence can, for example, be found where the parties' contract designates rules of an arbitral institution that expressly give the arbitrators power to decide on their own jurisdiction (Shaw Group Inc. v. Triplefine International Corp., 322 F.3d 115, 122 (2d Cir. 2003)). In the absence of clear language in the contract, it is presumed that the court will decide jurisdictional disputes (Republic of Iraq v. ABB AG, 769 F. Supp. 2d 605, 610 (S.D.N.Y. 2011), aff 'd sub nom. Republic of Iraq v. BNP Paribas USA, 472 F. App'x 11 (2d Cir. 2012)). Catherine M. Amirfar, Natalie L. Reid, et al., "National Report for the United States of America (2018 through 2020)" in Lise Bosman (ed.), ICCA International Handbook on Commercial Arbitration, ICCA & Kluwer Law International, 2020, Supplement No. 110, April 2020.

82 The doctrine of separability provides that an arbitration agreement is separable from the underlying contract and that challenges to the validity of the underlying contract do not affect or impeach the validity of the contract's arbitration clause.

83 See, e.g., Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440 (U.S. S.Ct. 2006); Rent-A-Center, West, Inc. v. Jackson, 130 S.Ct. 2772, 2777-2778 (U.S. S.Ct. 2010); Granite Rock Co. v. Int'l Bhd of Teamsters, 130 S.Ct. 2857-2858 (U.S. S.Ct. 2010).

84 Chinese Arbitration Law, Art. 20. This rule entitling not the tribunal but the arbitral institution to rule on a challenge to the tribunal's jurisdiction can be explained by the fact that the current Chinese law allows only institutional but not ad hoc arbitration to be conducted in China. In practice, some Chinese arbitral institutions delegate their power to decide on jurisdictional challenges to the tribunal. Lu Song, "National Report for China (2014 through 2018)" in Lise Bosman (ed.), ICCA International Handbook on Commercial Arbitration, ICCA & Kluwer Law International, 2020, Supplement No. 98, March 2018.

85 Born 2014, supra n. 34, at 1241.

86 See e.g., Model Law, Art. 16(3); Belgian JC, Art. 1690, § 3; English AA, § 31(4).

87 See e.g., Swiss LPIL, Art. 186(3); German ZPO, § 1040(3); Slovenian Arbitration Law, Art. 19(3).

88 See e.g., English AA, § 31(4); B. Berger and F. Kellerhals, International and Domestic Arbitration in Switzerland, 2d ed., 2010, § 650.

89 See, e.g., AOOT Kalmneft v. Glencore Int'l AG [2001] CLC 1805 (Comm) (English High Ct.) (noting that arbitral tribunal's decision to reserve jurisdictional ruling until merits is matter for tribunal's discretion, subject to annulment only where no reasonable tribunal could reach such a decision).

90 As in the case of Art. 16(3) of the Model Law.

91 This might be subject to requirements that it first have challenged the jurisdictional ruling under the law of the arbitral seat (e.g., Art. 16(3) of the Model Law).

92 Further to Art. 34 of the Model Law or equivalent provisions of national law.

93 Born 2014, supra n. 34, at 1232.

94 Derains and Kiffer, supra n. 2; see also Nairn, supra n. 18 (discussing the situation in England and Wales and noting that in dealing with the challenge of an award as to the tribunal's jurisdiction, the courts engage in a re-hearing rather than review: they conduct a full analysis of the materials before them and substitute their own views for those of the tribunal).

95 In some cases, the same minimal judicial review will apply to jurisdictional awards as that applicable in the case of arbitral awards on the merits of the parties' dispute, and in other cases, de novo judicial review will apply. The essential holding of First Options is that a tribunal's jurisdictional award will be subject to minimal judicial review where (but only where) the parties have agreed to finally resolve jurisdictional issues by arbitration. Born 2014, supra n. 34, at 1232-1233.

96 In particular, parties could refer disputes as to the tribunal's jurisdiction to arbitration for a final determination via an accordingly worded arbitration clause. Kroll, supra n. 3.

97 Bundestagsdrucksache Nr. 13/5274, p. 44; BGH, 13.1.2005 – III ZR 265/03, SchiedsVZ 2005, 95 = NJW 2005, 1125 referred to ibid.

98 Hwang and Chan, supra n. 71, at 644-645 (noting that in Singapore, a tribunal's preliminary determination as to its jurisdiction is appealable to the High Court, with a further appeal to the Court of Appeal possible with the leave of the court; an application is heard by the court de novo).

99 Hirsch, supra n. 35, at 490 (observing that the Swiss Federal Supreme Court reviews freely, at least in connection with the legal analysis, whether an arbitral tribunal has or does not have jurisdiction). 100 In Dallah, supra n. 38, the UK Supreme Court held that Article V(1)(a) of the New York Convention poses no limit on the degree of review by English courts, which thus would be the same as at the stage of setting aside under s 67 of the 1996 Arbitration Act, allowing a full rehearing of the matter. 101 Judgment of 6 June 2002, 2003 SchiedsVZ 39 (German Bundesgerichtshof).

102 Netherlands Code of Civil Procedure (CCP), Art. 1052(5).

103 Hong Kong Arbitration Ordinance (AO), Sec. 34(4).

104 See discussion in Born 2014, supra n. 34, at 1098-1107.

105 Ibid., at 1236.

106 Swiss LPIL, Art. 190(2)(b); Austrian Code of Civil Procedure, Sec. 611(2)(1); French Code of Civil Procedure (CCP), Arts. 1492(1) & 1520(1); see also ibid., at 1236 and § 7.03[B], § 7.03[E][7], § 7.03[F].

107 Sec. 10(2) of the Singapore International Arbitration Act (IAA).

108 PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA, 2007, 1 SLR(R) 597, 45.

109 The first sentence of Article 1690, § 4 of the Judicial Code specifies that the tribunal's decision that it has jurisdiction 'may only be contested together with the award on the merits and in the course of the same proceedings'. This will have to be done in accordance with Articles 1717-1718 of the Judicial Code on setting aside of awards. The second sentence of Article 1690, § 4 states that the Court of First Instance 'may also rule on the merits of the arbitral tribunal's decision that it lacks jurisdiction'. Bassiri criticizes this second sentence for creating confusion and suggests that it should be deleted. See, Niuscha Bassiri, Commentary on Part VI of the Belgian Judicial Code, Chapter IV: Article 1690, in Niuscha Bassiri and Maarten Draye (eds.), Arbitration in Belgium,Kluwer Law International, 2016, 203.

110 In China, as mentioned in previous section IV.A, a party may challenge the tribunal's jurisdiction either at the relevant arbitral institution or court. If the challenge is brought to the arbitral institution and it finds that the tribunal has jurisdiction, under the current Chinese judicial practice, that decision can be challenged only during the course of setting aside or enforcement proceedings. If an arbitral institution rules that the tribunal does not have jurisdiction, the court can be approached for a ruling that the tribunal does have jurisdiction. However, no such cases appear to be known. See, Song, supra n. 84.

111 Born 2014, supra n. 34, at 1236-1237.

112 Ibid., at 1237.

113 Jan K. Schaefer, "Ensuring a Predictable Arbitration Framework – The German Courts' Take on Three Key Provisions of German Arbitration Law", b-Arbitra 2019/2, 467.

114 Hascher, supra n. 73, 446; Schaefer, supra n. 113 , 459; Jan Kleinheisterkamp and Shaurya Upadhyay, "The UK Supreme Court and International Commercial Arbitration", b-Arbitra 2019/2, 506; Chiann Bao, "Hong Kong Courts: International Arbitration law in the making", b-Arbitra 2019/2, 621; Hwang and Chan, supra n. 71, at 636.

115 Schaefer, supra n. 113, at 467.

116 Ibid., at 453; Jan K. Schaefer, “Court Assistance in Arbitration - Some Observations on the Critical Stand-by Function of the Courts”, 43 Pepperdine Law Review 521, 534 (2016).

117 Further to § 3(2)(b) of the AO, the court should interfere in the arbitration of a dispute only as expressly provided for in the Ordinance.

118 Further to Sec. 3 of the Singapore IAA, the Model Law, with the exception of Chapter VIII thereof, has the force of law in Singapore.

119 HCCT 13/2015, para 1, referred to in Bao, supra n. 114, at 621.

120 Hwang and Chan, supra n. 71, at 636; See e.g., Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd, 2007, 3 SLR(R) 86, 59-65.

121 Tjong Very Sumito and others v Antig Investments Pte Ltd, 2009, 4, SLR(R) 732, 28; Hwang and Chan, supra n. 71, at 635.

122 English AA, § 1(c).

123 This limited supportive role was confirmed in Lesotho Highlands, as referred to in Kleinheisterkamp & Upadhyay, supra n. 114, at 506.

124 Bernd D. Ehle, “Concurrent Jurisdiction: Arbitral Tribunal and Court Granting Interim Relief ” in Anita Alibekova and Robert Carrow, International Arbitration and Mediation - From the Professional’s Perspective, Yorkhill Law Publishing, 2007, 158.

125 Melis, supra n. 11.

126 Dirk De Meulemeester, “Voorlopige of bewarende maatregelen in arbitrage” in M. Piers (ed.), De nieuwe arbitragewet 2013. Essentiële bepalingen en hun praktische werking, Intersentia, 2013, 71.

127 Kroll, supra n. 3.

128 Bao, supra n.114, at 619.

129 Meijer and Paulsson, supra n. 2.

130 Magnusson, supra n. 3.

131 Ehle, supra n. 124, at 163.

132 Belgian JC, Art. 1698; Cass. 2 March 2012, C.11.0089.F.

133 J. Verlinden, “Beoordeling van de rechten van partijen en belangenafweging in kort geding”, TBH 2004, 262- 267; P. Lemmens, “Het onderzoek van de ogenschijnlijke rechten van de partijen door de rechter in kort geding en het toezicht door het Hof van Cassatie”, TBH 1991, 675. Cfr. Cass. 23 September 2011, C.10.0279.F.

134 Meijer and Paulsson, supra n. 2.

135 Kroll, supra n. 3; Ehle, supra n. 124, at 169.

136 Danish Arbitration Act 2005, Sec. 27. In 1982, the ECJ indeed refused to issue a preliminary ruling on the interpretation of EU law questions submitted by an arbitral tribunal. The ECJ found that, although there were a number of similarities between the activities of an arbitral tribunal and those of an ordinary court, those similarities are not sufficient to give the arbitrators the status of ‘a court or tribunal of a member state’ (ECJ 23 March 1982, Case 102/81, Nordsee Deutsche Hochseefischerei

GmbH v Reederei Mind Hochseefischerei Norstern AG & Co KG; Jacob Grierson, "The Court of Justice of the European Union and International Arbitration", b-Arbitra 2019/2, 311).

137 Derains and Kiffer, supra n. 2.

138 Cass. Civ. 2, 8 June 1995, SNTM Hyproc v. SNACH, Rev. Arb. 1996, 125, note Pellerin.

139 Cass. Civ. 1re, 14 March 1984, Rev. Arb. 1985, 69, 2e esp. note G. Couchez; Cass. Civ. 2, 18 June 1986, [1986] Rev. Arb. 565; Kate Brown, The Availability of Court-Ordered Interim and Conservatory Measures in Aid of International Arbitration in the United States of America and France - A Comparative Essay, [2003] IntTBLawRw 5, 135, 147; Derains and Kiffer, supra n. 2.

140 Nairn, supra n. 18.

141 Channel Group v Balfour Beatty Ltd. [1993] Adj.L.R. 01/21, 18, as referred to in Ehle, supra n. 124, at 161.

142 Cetelem SA v Roust Holdings Limited, Court of Appeal (Civil Division) on appeal from the High Court of Justice Commercial Court (Honorale Mr Justice Beatson), Cetelem SA, Claimant/Respondent and Roust Holdings Limited, Defendant/Appellant [2005] EWCA Civ. 618 of 24 May 2005, 1 ASA Bulletin (2006), 142-143 with Comments by Young and Shore, at 143-152, as referred to in Ehle, supra n. 124, at 162.

143 Maldives Airports Co Ltd and anor v. GMR Male International Airport Pte Ltd, [2013] SGCA 16, as referred to in Michael Hwang, Lawrence Boo, et al., "National Report for Singapore (2018)" in Lise Bosman (ed.), ICCA International Handbook on Commercial Arbitration, ICCA & Kluwer Law International, 2020, Supplement No. 99, June 2018.

144 NCC International AB v Alliance Concrete Singapore Pte Ltd [2008] SGCA 5, referred to in Hwang and Chan, supra n. 71, at 643-644.

145 Joseph Lee, "Court Subsidiary and Interim Measures in Commercial Arbitration: A Comparative Study of UK, Singapore and Taiwan", 6(2) Contemp. Asia Arb. J. (2013), 227, 239.

146 Ibid.

147 Netto, supra n. 4.

148 English AA, § 2(3): The powers conferred by sections 43 (securing the attendance of witnesses) and 44 (court powers exercisable in support of arbitral proceedings) apply even if the seat of the arbitration is outside England and Wales or Northern Ireland or no seat has been designated or determined.

149 Ibid.

150 [2017] EWHC 2319 (QB).

151 Swift-Fortune Ltd v Magnifica Marine SA, 2007, 1 SLR (R) 629, 59; Hwang and Chan, supra n. 71, at 643.

152 Hwang and Chan, supra n. 71, at 643.

153 Magnusson, supra n. 3.

154 Kaplan and Morgan, supra n. 18.

155 Brown, supra n. 139, at 148.

156 ECJ 10 February 2009, Case C-185/07, Allianz SpA v West Tankers, § 34, as referred to in Grierson, supra n. 136, at 314.

157 Ibid., at § 27-29, as referred to in Grierson, supra n. 136, at 315.

158 ECJ 13 May 2015, Case C-536/13 Gazprom OAO, § 33, as referred to in Grierson, supra n. 136, at 316.

159 Ust-Kamenogorsk Hydropower Plant JSC v AES Ust-Kamenogorsk Hydropower Plant LLP, [2013] UKSC 35, as referred to in Kleinheisterkamp and Upadhyay, supra n.114, at 514.

160 Ibid.

161 Lee, supra n. 145, 239.

162 SEC n° 9.880, j. 21 May 2014, referred to in Ferro, supra n. 5, at 556-557.

163 CJEU 13 May 2015, Case C-536/13, 'Gazprom' OAO, referred to in Grierson, supra n. 136, at 317.

164 Patocchi, supra n. 17; Matthias Scherer and Jahnel Werner, "Anti-suit and Anti-arbitration Injunctions in International Arbitration: A Swiss Perspective", 12 International Arbitration Law Review 66-73 (2009).

165 MC n° 17.868/BA, j. 22 October 2011, referred to in Ferro, supra n. 5, at 555-556.

166 See Ferro, supra n. 5, at 554-556.

167 Cass. 15 December 2000, C.00.0123.N, Arr.Cass. 2000, 695.

168 For example, in accordance with Art. 180, § 3 Swiss LPIL, decisions by state judges regarding challenges of arbitrators are unappealable.

169 Bao, supra n. 114, at 616.

170 German ZPO, § 1062.

171 Christian Aschauer and Matthias Neumayr, "The Role of the Austrian Supreme Court in Setting Aside and Challenge Proceedings", b-Arbitra 2019/2, 344.

172 Born, Law and Practice, supra n. 76, at § 6.01[D][1].

173 Ibid., at § 8.04[B].

174 See also Born 2014, supra n. 34, at 3503 (distinguishing between local (national) standards of procedural fairness, which are applicable in an annulment proceeding, and international standards of procedural fairness, which are applicable in recognition proceedings).

175 Procedural fairness, natural justice, and due process are terms used to describe the same principle in different countries.

176 Born 2014, supra n. 34, at 2184.

177 Hwang and Chan, supra n. 71, at 650-651 (noting that in Singapore, the threshold on the ground of breach of natural justice is a high one and referring to Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd, 2007, 3 SLR(R) 86, 29 to illustrate that point); a Hong Kong case Grand Pacific Holdings Ltd v Pacific China Holdings Ltd [2012] 4 HKLRD 1 (CA) (where the court observed that the

conduct complained of 'must be serious, even egregious', before the court would find that there was an error sufficiently serious so as to have undermined due process) referred to in Bao, supra n. 114, at 621.

178 See, e.g., English AA, § 33(1)(a); Belgian JC, Art. 1699; French CCP, Art. 1510; Scottish Arbitration Act (AA), 2010, Schedule 1, Rule 24(1)(b); Singapore IAA, 2012, Schedule 1, Art. 18; Hong Kong AO, 2013, § 46(2); German ZPO, Sect. 1042(1); 2010 UNCITRAL Rules, Art. 17(1); 2013 AAA Rules, Rule 32(a); 2012 Swiss Rules, Art. 15(1); 2018 HKIAC Rules, Art. 13(5); 2018 VIAC Rules, Art. 28(1); Judgment of 31 January 2012, DFT 4A_360 2012, § 4.1 (Swiss Federal Tribunal); Judgment of 20 July 2011, DFT 4A_162/2011, § 2.3.3 (Swiss Federal Tribunal).

179 UNCITRAL, 2012 Digest of Case Law on the Model Law on International Commercial Arbitration 98 (2012).

180 Born 2014, supra n. 34, at 2174.

181 Triulzi Cesare SRL v Xinyi Group (Glass) Co Ltd, 2015, 1 SLR 114, 112-113 discussed in Hwang and Chan, supra n. 71, at 651.

182 Case of 4 October 2017, 18 ONc 1/17 discussed in Aschauer and Neumayr, supra n. 171, at 344.

183 This principle is often referred to as a party's right to present its case, the right to 'contradictory proceedings', the 'principe de la contradiction' and the right to 'due process'. Born 2014, supra n. 34, at 3243.

184 See, e.g., Spanish Arbitration Act, Art. 24(1); Singapore IAA, 2012, Schedule 1, Art. 18; German ZPO, Sect. 1042(1); Belgian JC, Art. 1699.

185 See e.g., English AA, § 33(1)(a); Scottish AA, Schedule 1, Rule 24(2); Hong Kong AO, § 46(3)(b). Notably, Sec. 24 of the Swedish Arbitration Act (AA) 2019 requires that the tribunal affords the parties 'to the extent necessary, an opportunity to present their respective cases …' without specifying its kind, e.g., full or reasonable.

186 See Born 2014, supra n. 34, at 2176 fn 284 (referring to relevant cases).

187 See, e.g., 2010 UNCITRAL Rules, Art. 17(1); 2013 AAA Rules, Rule 32(a); 2020 LCIA Rules, Art. 14(1)(i); 2017 SCC Rules, Art. 23(2); 2018 VIAC Rules, Art. 28(1).

188 Born 2014, supra n. 34, at 3244 (giving examples of specific circumstances, in which awards may be annulled).

189 See, e.g., Model Law, Art. 19(2); English AA, § 34(1)-(2); German ZPO, Sect. 1042(4); Belgian JC, Art. 1700, § 3; Hong Kong AO, Sec. 47(3); Singapore IAA, 2012, Schedule 1, Art. 19(2).

190 Born 2014, supra n. 34, at 3239.

191 Court of Appeal in Frankfurt (OLG Frankfurt), Order dated 6 June 2018 – 26 Sch 3/18, Juris ECLI:DE:OLGHE:2018: 0606.26SCH3.18.00 discussed in Schaefer, supra n. 113, at 461-462.

192 Amirfar, Reid, et al, supra n. 81 (referring to Commercial Risk Reins. Co. Ltd. v. Sec. Ins. Co. of Hartford, 526 F. Supp. 2d 424, 428 (S.D.N.Y. 2007) and Urquhart v. Kurlan, 2017 U.S. Dist. LEXIS 28601, at *15 (N.D.Ill. 2017), among other cases). See also Mut. Redev. Houses, Inc. v. Local 32B-32J, 700 F. Supp. 774, 777 (S.D.N.Y. 1988) (where the court declined to set aside an award for an arbitrator's refusal to hear evidence).

193 Ibid. (referring to Nat'l Oil Corp. v. Libyan Sun Oil Co., 733 F. Supp. 800, 813-816 (D. Del. 1990) (summarized in Yearbook XVI (1991) p. 651)).

194 Ibid. (referring to Iran Aircraft Indus. v. Avco Corp., 980 F.2d 141, 146 (2d Cir. 1992) (summarized in Yearbook XVIII (1993) p. 596)). There are more cases where the award was set aside on this ground. See, e.g., Gulf Coast Indus. Workers Union v. Exxon Co., USA, 70 F.3d 847, 849-850 (5th Cir. 1995); Hoteles Condado Beach, La Concha & Convention Ctr. v. Union de Tronquistas Local 901, 763 F.2d 34, 39-40 (1st Cir. 1985); Tempo Shain Corp. v. Bertek, Inc., 120 F.3d 16, 19-21 (2d Cir. 1997).

195 Born, Law and Practice, supra n. 76, at § 9.01[A][3].

196 See, e.g., Doral Fin. Corp. v. García-Vélez, 2013 WL 3927685, at *4 (1st Cir.); Bain Cotton Co. v. Chestnutt Cotton Company, Docket No. 12-11138 (5th Cir. 2013); InterChem Asia 2000 PTE Ltd v. Oceana Petrochems. AG, 373 F.Supp.2d 340, 352 (S.D.N.Y. 2005); ABB Attorney Gen. v. Hochtief Airport GmbH [2006] EWHC 388 (Comm) (English High Ct.) and other cases referred to in Born 2014, supra n. 34, at 3242 fn 458.

197 China Machine New Energy Corp v Jaguar Energy Guatemala LLC and another, 2018, SGHC 101 discussed in Hwang and Chan, supra n. 71, at 651 (adding that this case is currently on appeal to the Court of Appeal).

198 Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd, 2007, 3 SLR(R) 86, 65(d).

199 Ibid., as cited in Hwang and Chan, supra n. 71, at 650.

200 TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd, 2013, 4 SLR 972.

201 SEF Construction Pte Ltd v Skoy Connected Pte Ltd, 2010, 1 SLR 733, 60 as cited in Hwang and Chan, supra n. 71, at 652.

202 Hirsch, supra n. 35, at 496.

203 OLG Hamburg 18 November 2003 – 6 Sch 6/02; id. 31.7.2003 – 6 Sch 2/02 referred to in Kroll, supra n. 3.

204 Redfern and Hunter, supra n. 50, at 329.

205 Caroline Verbruggen, "Commentary on Part VI of the Belgian Judicial Code, Chapter VII: Article 1717" in Niuscha Bassiri and Maarten Draye (eds.), Arbitration in Belgium, Kluwer Law International, 2016, 471) (adding that whether the arbitral tribunal merely substantiates an argument that was poorly presented by a party (which is normally accepted) or raises it sua sponte (which is not accepted) is not always easy to determine in practice).

206 See numerous cases referred to in Born 2014, supra n. 34, at 3249 fn 501. See also ibid., at 3250 (observing that this rule follows from the parties' general right to an opportunity to be heard and is related to the arbitrators' obligation not to exceed the scope of the parties' submissions).

207 See Antonias Dimolitsa, "The Equivocal Power of the Arbitrators to Introduce Ex Officio New Issues of Law", 27 ASA Bull. 2009 426; Teresa Giovannini, International Arbitration and Jura Novit Curia – Towards Harmonization, 9(3) Transnat'l Disp. Mgt (2012) referred to in Born 2014, supra n. 34, at 3251 fn. 508.

208 Hirsch, supra n. 35, at 492.

209 ATF 130 III 35.

210 ATF 130 III 35 and the judgment of the Swiss Federal Supreme Court of 9 August 2018 in case 4A_525/2017 referred to in Hirsch, supra n. 35, at 492.

211 OGH 23 February 2016, 18 OCg 3/15p discussed in Aschauer and Neumayr, supra n. 171, at 333-335.

212 Gisela Knuts, Jura Novit Curia and the Right to Be Heard – An Analysis of Recent Case Law, 28 Arb. Int'l 2012, 669, 671 (observing that the principle of jura novit curia is widely accepted in court litigation, in particular in civil law jurisdictions like Germany, Switzerland, Sweden and Finland); Derains and Kiffer, supra n. 2 (noting that although due process under French law requires that each party be entitled to comment on the facts of the case, the arbitral tribunal has no obligation to invite the parties to comment on the legal reasons on which its award is based).

213 Verbruggen, supra n. 205, at 471.

214 Sec. 24(b) of the Singapore IAA.

215 Sec. 1059(2)(1d) of the German ZPO. Interestingly, the ZPO distinguishes the situation of lack of proper notice of the appointment of an arbitrator or of the arbitral proceedings or otherwise existing inability to present the claim as per Sec. 1059(2)(1b) from incorrect composition of the tribunal or incorrect arbitration proceedings, not in line with the parties agreement or the arbitration law as per Sec. 1059(2)(1d) and imposes the requirement of the influence on the outcome of the case for an award to be set aside only in the latter case.

216 Art. 1717, § 3(a)(ii) of the Belgian JC. While the court may uphold the award where formal irregularities occurred with no impact on the decision-making process by the arbitrators, the determination of whether an irregularity had such impact will depend on the specific circumstances of each case. Verbruggen advocates for a pragmatic approach whereby only irregularities impacting the rights of defence of the applicant should be sanctioned. Verbruggen, supra n. 205, at 471-472.

217 Sec. 34(7) of the Swedish AA in both the 1999 and the updated 2019 version.

218 Case T 968-18, Swedish Supreme Court, 30 April 2019 discussed in Joel Dahlquist Cullborg, "The Role of the Swedish Supreme Court in International Arbitration", b-Arbitra 2019/2, 475-477.

219 See e.g., Chantiers de l'Atlantique SA v Gaztransport & Technigaz SAS [2011] EWHC 3383 where the Commercial Court in London held that the fraudulent testimony did not justify setting the award aside, because 'even if the true position had been disclosed to the tribunal, that would, in all probability, not have affected the result of the arbitration'; Generica, Ltd v. Pharm. Basics, Inc., 125 F.3d 1123 (1997) where the US Court of Appeals, Seventh Circuit confirmed the award after finding that by limiting the reliance on the testimony of a witness whose cross-examination the tribunal curtailed, the arbitrators eliminated the possibility of prejudice to the party claiming a due process violation; Grand Pacific Holdings Ltd. v. Pacific China Holdings Ltd. (in liq) (No 1) [2012] 4 HKLRD 1 (Court of Appeal).

220 Born 2014, supra n. 34, at 2186.

221 In addition, Art. 1717, § 5 of the Belgian JC expressly specifies that procedural irregularity grounds, among other listed grounds, will not lead to setting aside when they were not invoked in the course of the arbitral proceedings. Nevertheless, if such violation results from the fact that arbitrators decided on an issue without allowing parties to present their arguments on it, the rule will not apply. Verbruggen, supra n. 205, at 472.

222 Born 2014, supra n. 34, at 2188 (observing that agreements involving outright corruption and grossly abusive procedural arrangements should in principle not be valid, even where a party fails to object to them at the time and giving examples of some other exceptions).

223 See e.g., Dealer Computer Servs., Inc. v. Michael Motor Co., 485 F.Appx. 724 (5th Cir. 2012); Milan Nigeria Ltd v. Angeliki B Maritime Co. [2011] EWHC 892 (Comm) (English High Ct.); Judgment of 16 July 2002, 1 Sch 08/02 (Oberlandesgericht Stuttgart) and other cases referred to in Born, supra n. 34, at 2187 fn 348.

224 See, e.g., 2010 UNCITRAL Rules, Art. 32; 2017 SCC Rules, Art. 36; 2020 LCIA Rules, Art. 32.1; 2018 VIAC Rules, Art. 31.

225 Hirsch, supra n. 35, at 492 (referring in fn. 44 to ATF 142 III 360 where the Swiss Federal Supreme Court dismissed a challenge by an applicant which had no opportunity to file a reply following the answer, as the arbitral tribunal had stated that the parties had agreed that there would be only one exchange of briefs).

226 Ibid.

227 Judgment of the Swiss Federal Supreme Court of 29 April 2015 in case 4A_70/2015.

228 Born 2014, supra n. 34, at 3312; Born, Cases and Materials, supra n. 73, at 1250.

229 Born 2014, supra n. 34, at 3312, 3647; Born, Law and Practice, supra n. 76, at § 17.05[H].

230 See e.g., English AA, § 68(2)(g); Swiss LPIL, Art. 190(2)(e); Belgian JC, § 1717(3)(b)(ii); Netherlands CCP, Art. 1065(1)(e); Japanese Arbitration Law, Art. 44(1)(viii); French CCP, Art. 1520(5); Chinese Arbitration Law, Art. 58(6); Korean Arbitration Act, Art. 36(2)(2b). Even in the United States where no statutory public policy basis for annulment exists, courts have recognized the doctrine as 'a specific application of the more general doctrine, rooted in the common law, that a court may refuse to enforce contracts that violate law or public policy'. United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 42 (U.S. S.Ct. 1987).

231 Born 2014, supra n. 34, at 3647.

232 Art. 36(1)(b)(ii) of the Model Law is representative.

233 Born 2014, supra n. 34, at 3647.

234 Ibid.; Born, Law and Practice, supra n. 76, at § 16.03[B][7]; See also Hirsch, supra n. 35, at 492-493 (noting that the Swiss Federal Supreme Court has annulled an award as against public policy in only two instances in the last 30 years); Nairn, supra n. 18 (observing that there is no known case of the English court refusing to enforce a New York Convention award on the ground of public policy); Magnusson, supra n. 3 (noting that Robert G. v. Johnny L., N.J.A. C 45 (2002) is the only recorded case where the Swedish Supreme Court denied enforcement of the award on the basis of violation of public policy).

235 Born 2014, supra n. 34, at 3321-26, 3667-3668, 3670.

236 Ibid., at 3317-3318.

237 See, e.g., AJU v. AJT, [2011] SGCA 41, 37 (Singapore Ct. App.).

238 Born 2014, supra n. 34, at 3318.

239 Hwang and Chan, supra n. 71, at 653-654.

240 PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA, 2007, 1 SLR(R) 597, 59.

241 Sui Southern Gas Co Ltd v Habibullah Coastal Power Co (Pte) Ltd, 2010, 3 SLR 1, 48.

242 PT Asuransi Jasa Indonesia, supra n. 240, at 57.

243 Re An Arbitration Between Hainan Machinery Import and Export Corp and Donald & McArthy Pte Ltd, 1995, 3 SLR(R) 354 discussed in Hwang and Chan, supra n. 71, at 656-657.

244 OGH 23 February 2016, 18 OCg 3/15p discussed in Aschauer and Neumayr, supra n. 171, at 334.

245 Judgment of the Swiss Federal Supreme Court of 26 July 2018, in case 4A_125/2018 discussed in Hirsch, supra n. 35, at 493.

246 Ferro, supra n. 5, at 563 (referring to SCJ, SEC 802/EX, j. 15 August 2005 and SEC 866, j. 17 May 2006).

247 Abengoa v Ometto, SEC nº 9.412, j. 19 April 2017 discussed in Ferro, supra n. 5, at 559-564.

248 Pothole Killers LLC vs Eco Tech Engenharia Ltda., SEC n. 12.493/US, j. 15 February 2017.

249 Redfern and Hunter, supra n. 50, at 598.

250 Lanfang Fei, "Public policy as a bar to enforcement of international arbitral awards: A review of the Chinese approach", 26(2) Arb Intl 2010,301, 311 .

251 Reply of the Supreme People's Court in the matter regarding the request by Beijing First Intermediary People's Court to Refuse Enforcement of Arbitral Award [1997] Jing Ta 35 (Heavy Metal).

252 Redfern and Hunter, supra n. 50, at 645.

253 Notice Regarding the Local People's Court Handling Foreign-related Arbitral Awards and Foreign Arbitral Awards, Issued by the Supreme People's Court on 28 August 1995.

254 See, e.g., English AA, § 68(2)(g) ('the award or the way in which it was procured being contrary to public policy') (emphasis added); Netherlands CCP, Art. 1065(1)(e) ('the award, or the manner in which it was made, violates public policy or morals') (emphasis added).

255 See, e.g., Corporación Transnacional de Inversiones, SA de CV v. STET Int'l, SpA, (2000) 49 O.R.3d 414 (Ontario Ct. App.); Judgment of 29 October 2009, 26 Sch 12/09 (Oberlandesgericht Frankfurt); Judgment of 27 March 2008, Socomep v. Jouault, 2008 Rev. Arb. 342 (Paris Cour d'appel) referred to in Born 2014, supra n. 34, at 3332 fn 944; see also OLG Hamburg, 16.9.2004, 6 Sch 01/04 (finding a violation of procedural public policy where the award was rendered before expiry of deadline up to which party could comment on crucial witness statement, which deprived a party of the right to be heard).

256 Judgment of 13 April 2010, DFT 4A_490/2009, 2.1 (Swiss Federal Tribunal); interestingly, in Belgium the two grounds for annulment considered to belong to procedural public policy are the violation of the rights of defence and the absence of reasons of an arbitral award. Verbruggen, supra n. 205, at 481.

257 French Supreme Court, 7 January 1992, BKMI Industrienlagen GmbH & Siemens AG v. Dutco Construction, Yearbook Commercial Arbitration 1993, Vol. XVIII, 140-142.

258 OGH 28 September 2016, 18 OCg 3/16i discussed in Aschauer and Neumayr, supra n. 171, at 335-337.

259 See, e.g., Judgment of 27 August 2002, XXVIII Y.B. Comm. Arb. 814, 820 (Amsterdam Rechtbank) (2003); Karaha Bodas Co. LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, [2009] 12 HKCFAR 84 (H.K. Ct. Fin. App.); Judgment of 4 March 2003, XXXII Y.B. Comm. Arb. 571, 578 (Spanish Tribunal Supremo) (2007) and other cases referred to in Born 2014, supra n. 34, at 3683 fn. 1454.

260 See, e.g., Born 2014, supra n. 34, at 3332-3333.

261 Ibid, at 3688.

262 Hirsch, supra n. 35, at 493.

263 ATF 136 III 345.

264 See ATF 140 III 278 and 4A_633/2014 discussed in Hirsch, supra n. 35, at 493 fn 48.

265 Born 2014, supra n. 34, at 3680-3681.

266 UNCITRAL, Consideration of the Draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Item 4 of the Agenda), U.N. Doc. E/CONF.26/L.38 (1958).

267 OGH 28 September 2016, 18 OCg 3/16i discussed in Aschauer and Neumayr, supra n. 171, at 335-337.

268 See e.g., Finnish Arbitration Act, § 40(1)(3). Also, Article 1704(2)(j) of the Belgian JC, as amended in 1998, provided that an award could be annulled if it contained conflicting provisions. However, after the 2013 amendments this is no longer a ground for annulment.

269 See e.g., Judgment of 14 June 2000, XXVI Y.B. Comm. Arb. 270 (2001) (French Cour de cassation civ. le); St. Mary Home, Inc. v. Serv. Emps. Int'l Union, 116 F.3d 41 (2d Cir. 1997); Fairchild Corp. v. Alcoa, Inc., 2007 WL 2775141 (S.D.N.Y.); Claudia Pechstein v. International Skating Union and Deutsche Eisschnelllauf Gemeinschaft e.V., decision of the Swiss Federal Supreme Court No. 4A_612/2009, 10 February 2010; X. v. Ministère Y., decision of the Swiss Federal Supreme Court No. 4A_464/2009, 15 February 2010; Alejandro Valverde Belmonte v. Agence Mondiale Antidopage (AMA), Union Cycliste Internationale (UCI) and Real Federación Española de Ciclismo, decision of the Swiss Federal Supreme Court No. 4A_386/2010, 3 January 2011.

270 Born, Law and Practice, supra n. 76, at § 16.03[C][2].

271 See, e.g., Ministry of Defense of the Islamic Repub. of Iran v. Gould Inc., 969 F.2d 764, 772 (9th Cir. 1992); Judgment of 29 April 2009, CG Impianti v. Bmaab & Son Int'l Contracting Co., XXXV Y.B. Comm. Arb. 415 (Milan Corte d'Appello) (2010) and other cases referred to in Born 2014, supra n. 34, at 3713 fn.1613.

272 Report of the Committee on the Enforcement of International Arbitral Awards, U.N. Doc. E/2704, § 42 (1955); Report by the Secretary-General on the Recognition and Enforcement of Foreign Arbitral Awards, U.N. Doc. E/2822, 20 (Austria) (1956), 22 (Belgium), 23 (Germany), 24 (Japan), 25 (Switzerland), 26 (USSR).

273 Maud Piers, "Commentary on Part VI of the Belgian Judicial Code, Chapter VI: Article 1713" in Niuscha Bassiri and Maarten Draye (eds.), Arbitration in Belgium, Kluwer Law International, 2016, 437 (referring to Explanatory Memorandum, Doc 53 2743/001, 37, 40).

274 See, e.g., Judgment of 30 September 1999, XXXI Y.B. Comm. Arb. 640, 648 (2006) (Hanseatisches Oberlandesgericht Bremen); Bay Hotel & Resort Ltd v. Cavalier Constr. Co., [2001] UKPC 34 (Turks & Caicos Privy Council) and other cases referred to in Born, Cases and Materials, supra n. 73, at 1065-1066.

275 Verbruggen, supra n. 205, at 473.

276 Belgian Supreme Court, 13 January 2011, Rev.Arb. 2011, with note O. Caprasse & F. Henry.

277 Explanatory Memorandum, Doc 53 2743/001, 40-41.