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Fair Play in International Commercial Arbitration

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***Abstract*: Despite the fact that guarantees of a fair trial have always been recognized as an inherent part of international arbitral procedures, this has been regarded primarily through the prism of civil procedure rather than as a question of public law and human rights. The confidential character of arbitration and the relative rarity of annulment procedures before the courts of the seat of arbitration on the grounds of unequal treatment, as well as before human rights bodies such as the European Court of Human Rights, have further exacerbated this situation. Furthermore, it has always been difficult to combine contractual independence and the benefits of arbitration with claims of equal treatment and fair trial. This article establishes the existence of a set of general rules regarding the meaning and substance of equal treatment that are compatible with its commercial (and civil procedural) and human rights dimensions. Article 18 of the UNCITRAL Model Law on International Commercial Arbitration, as repeatedly interpreted and amended by local laws and judgements, arbitral statutes, and decisions by the European Court of Human Rights, provides the foundation for this finding.**

***Keywords*: private international law, fair trial, rights in private sphere, equal treatment, set aside proceedings, international commercial arbitration.**

1. Introduction

Relatively recently, significant connections between trade, commerce, and investment and human rights have been identified. Although the majority of the literature has, for good reason, concentrated on the influence of international trade and foreign investment on socio-economic rights, this study focuses on the impact of international commerce and foreign investment on non-economic rights.[1], little attention has been paid to the interaction between private law and civil and political rights. Long ago, it was believed that arbitration did not require fair trial guarantees because commercial actors were protective of their privacy and arbitral processes did not give rise to such worries. The absence of a public record of the proceedings due to their confidential nature gave the erroneous impression that the parties had somehow waived their right to a fair trial. Nonetheless, as a result of the development of arbitration not only in the international business world but also in a large array of domestic processes, from commercial to employment conflicts, the legal landscape has undergone significant transformation. Article 18 of the UN Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration accords a significant place to the right to a fair trial[2], as seen by the following provision:

Each party shall be afforded a full opportunity to present his case and shall be treated equally.

Given that arbitration is a permissible exception to the authority of civil and commercial courts, which are naturally bound by guarantees of a fair trial, it is vital that arbitral tribunals adhere to the same standards. What theoretical legal foundation exists for subjecting both regular courts and arbitral tribunals to the same legal framework governing fair trials? Despite the independence and 'international' nature of international arbitration, two arguments have generally been advanced to demonstrate that arbitral proceedings are merely a subset of the law and legal system of the seat of arbitration and, by extension, that the arbitrator is a dispensing organ of that law:

Both objectivist[3] and subjectivist[4] views hold that arbitral tribunals apply the law of the seat of arbitration in the same manner as its domestic courts, and that the freedom to choose substantive and procedural rules, which is otherwise an inherent characteristic of arbitration, is always subject to its

[1] See Dupuy, P-M, Francioni, F and Petersmann, E-U (eds), Human Rights in International Investment Law and Arbitration (Oxford University Press 2009) CrossRefGoogle Scholar; Alston, P and Reisch, N (eds), Taxation, Inequality and Human Rights (Oxford University Press 2019) CrossRef Google Scholar; Hestermeyer, H, Human Rights and the WTO: The Case of Patents and Access to Medicines (Oxford University Press 2008) CrossRef Google Scholar.

[2] The Model Law was negotiated and drafted at intergovernmental level just like a treaty, but it is not a treaty nor does it have binding force. The objective of UNCITRAL was that it be adopted by as many States as possible, subject to domestic legal particularities, with a view to global uniformity. Countries adopting and consistently implementing the Model Law are considered arbitration friendly, even if they are not major arbitration seats. See Bantekas, I, 'Article 2A' in Bantekas, I, Ortolani, P et al., UNCITRAL Model Law on International Commercial Arbitration: Commentary (Cambridge University Press 2020) 38–49CrossRefGoogle Scholar.

[3] As chiefly expressed by FA Mann, 'The UNCITRAL Model Law: Lex Facit Arbitrum' (1986) 2 ArbIntl 241; as endorsed, among others, by Park, WW, 'The Lex Loci Arbitri in International Commercial Arbitration' (1983) 32 ICLQ 21, 22CrossRefGoogle Scholar. The opposite view of detached arbitrations generally finds little support, but see Paulsson, J, 'Arbitration Unbound: Award Detached from the Law of its Country of Origin' (1981) 30 ICLQ 358CrossRefGoogle Scholar.

[4] Goode, R, 'The Role of the Lex Loci Arbitri in International Commercial Arbitration' (2001) 17 ArbIntl 19Google Scholar.

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compatibility with the *lex arbitri*. In this regard, *lex arbitri* corresponds to *lex fori* in civil proceedings[5]. The ability to pick and enforce substantive and procedural rules is only possible because the legislation of the seat of arbitration is permissive with regard to the rules chosen or rejected. The human rights laws of the seat of arbitration, including integrated treaties and obligations arising from them, are binding on arbitral tribunals since they are an intrinsic part of the *lex arbitri* and cannot be waived by the parties or the tribunals' inherent or other powers.

Again, by implication, departures from the human rights laws of the seat of arbitration are admissible only insofar as the norm itself permits (ie it is a permissive rule). This may be the outcome of a domestic or international court's ruling, or it may be the consequence of a statute. It is also obvious that the mandatory/peremptory rules of the seat of arbitration are binding on the parties and tribunals because arbitration agreements cannot circumvent mandatory EU law. The English High Court affirmed this result in connection to the EU Commercial Agents Directive[6]. In Accentuate Ltd v. Asigra Inc.[7], the English High Court ruled that the parties could not bypass the indemnification and compensation provisions of the Directive, and that any award that violated these mandatory provisions would be denied based on public policy considerations.

After examining the legal basis for why mandatory fair trial obligations trump contractual autonomy, it should be emphasized that, from the perspective of a fair trial, fairness seeks to protect the interests of the parties and the administration of justice[8]. In addition to 'equality' and the 'right to submit one's case,' as stated in Article 18, other provisions of the Model Law outline additional rights or guarantees for a fair trial. According to established case law, processes must be evaluated as a whole in order to determine their fairness[9], although a major divergence in one aspect of the proceedings (such as the right of the parties to submit their case) is sufficient to constitute a violation. For the purposes of arbitration, it is important to highlight that the European Court of Human Rights (ECtHR) has established a line of precedent according to which domestic (long-established) judicial practice may depart from Article 6(1) ECHR within specific limitations[10]. Arbitral proceedings are equivalent to well-established judicial practice.

Although the concept of equality in Article 18 of the Model Law is founded on the same principles as its counterpart in general human rights law, it incorporates the notions of nondiscrimination and arbitrariness. Article 6 of the European Convention on Human Rights (ECHR) is principally concerned with the right to a fair trial in criminal proceedings, although, as will be seen, it also extends to civil and commercial proceedings[11]. Therefore, while the full spectrum of fair trial guarantees in domestic and international law applies (or should apply) to arbitral procedures, the permissive framework of arbitration allows for a degree of exceptionalism.

Arbitral proceedings are contract-based, but judicial processes are not; hence, significant deviations from recognized fair trial criteria are permitted. The legislation not only authorizes but actively promotes arbitration on the assumption that the parties (with the exception of consumer arbitration) are aware of the advantages and disadvantages of arbitration vs litigation. However, the rule addresses potential faults in the fairness of trials by limiting the types of disputes that can be arbitrated (so-called arbitrability). Within this context, the law recognizes the need for quicker commercial justice at the expense of certain fair trial guarantees that, assuming one is dealing with mature commercial participants, do not favor one party disproportionately over another and whose application is not arbitrary.

In addition, the law recognizes that arbitration is a kind of business justice with inherent protections that are specific to arbitration. Appeals are not permitted in arbitral proceedings, not only because the parties desire a speedy resolution of their dispute, but also because the 'harm' caused by the lack of an appeal right is more than compensated for by the ability to choose one's arbitrators and by the applicable law and procedure. The opposite is true in legal proceedings. Similarly, the right to present one's position is not excessively hampered when a tribunal requires exclusively paper-based proceedings in circumstances in which the parties want a speedy resolution and the tribunal deems that suggested witnesses have no probative value.

The limits of the exceptionality of arbitral procedures are reached when a party is unfairly and disproportionately disadvantaged, either by the tribunal's conduct or the application of procedural rules. Former arguments by some national courts that Article 6(1) ECHR is inapplicable to consensual arbitration proceedings are no longer justifiable[12]. The peculiar and voluntary nature of commercial arbitration does not lead to the fragmentation of *lex arbitri* , which, as previously explained, encompasses the seat's human rights treaty obligations.

It should be emphasized that this article does not address party equality under private international law, whether general or specific, because it is rarely relevant to international

[5] See Hirsch, A, 'The Place of Arbitration and the Lex Arbitri' (1979) 34 Arbitration Journal 43Google Scholar; Gaillard, E, Legal Theory of International Arbitration (Kluwer 2010) 19–20CrossRefGoogle Scholar.

[6] Council Directive 86/653/EEC on the coordination of the laws of the member States relating to self-employed commercial agents.

[7] Accentuate Ltd v Asigra Inc [2009] EWHC 2655 (QB).

[8] Nideröst-Huber v Switzerland (1998) 25 EHRR 709, para 30.

[9] Ankerl v Switzerland (2001) 32 EHRR 1, para 38; Centro Europa 7 S.r.l. and Di Stefano v Italy, (2012) ECHR 974, para 197.

[10] Kerojärvi v Finland (2001) 32 EHRR 8, para 42; Gorou v Greece (no. 2) [GC], (2009) ECHR 488, para 32.

[11] As a result, the ECtHR has held 'that contracting States have greater latitude when dealing with civil cases concerning civil rights and obligations than they have when dealing with criminal cases' Dombo Beheer B.V. v the Netherlands, (1994) 18 EHRR 213, para 32; Levages Prestations Services v France (1996) ECHR 1530, para 46; see also Ambrose, C, 'Arbitration and the Human Rights Act' [2000] Lloyd's Maritime and Commercial Law Quarterly 468Google Scholar; Jarrosson, C, 'L'Arbitrage et la Convention Européene des Droits de l'Homme' (1989) 4 Revue de l'Arbitrage 573Google Scholar; Samuel, A, 'Arbitration, Alternative Dispute Resolution Generally and the European Convention on Human Rights' (2004) 21 JOIA 413Google Scholar. See also Kurkela, MS and Turunen, S, Due Process in International Commercial Arbitration (2nd edn, Oxford University Press 2010) Google Scholar.

[12] See eg Ferrara v AG 1824, judgment by the Brussels Court of Appeals in 2002, which, however, stressed that arbitrators have a duty to ensure that fair trial guarantees are met.

arbitration processes[13]. As with EU consumer directives, the same holds true for consumer arbitration, as many of the applicable regulations are either lex specialis or regionally developed. In such instances, the expansive party liberty generally associated with international commercial arbitration is substantially constrained in favor of the disadvantaged party. Lastly, this article does not take into consideration advancements in equal treatment in the context of investment arbitration, despite the fact that the concepts there are basically identical to those discussed in this article.

2. Sources of Equal Treatment in Arbitration Cases

This article distinguishes, from a methodological standpoint, between equality and the right to submit one's position. However, these are not functionally distinct rights. Both are included in the right to a fair trial and the right to equal arms. This implies that parties in civil and arbitral processes must be given equal opportunity, including the right to present their case to the best of their ability[14]. What is the precise origin of this right in arbitration proceedings? One could point to arbitration-specific instruments, such as Article 18 of the Model Law and similar provisions in domestic arbitral statutes (both Model Law-adherent and others), but the fair trial guarantees enshrined in such instruments derive from general human rights treaties and civil procedure laws and statutes[15]. It is beyond the scope of this brief paper to present a comprehensive overview of civil procedural statutes, but it is undeniable that their fair trial provisions have been impacted by international human rights law and the case law of international human rights tribunals. Consequently, this article heavily relies on the case law of the ECtHR. This is justifiable for numerous reasons. First, the Court's case law regarding the right to a fair trial is the most comprehensive among its international peers. Second, it mostly reflects international customary law and broad legal ideas[16]. Thirdly, it is part of the *lex arbitri* of the 47 member states of the Council of Europe, which make up the majority of the world's arbitration forums, and it may also be an integral part of the controlling law of the parties' contract (for Council of Europe member States). Fourthly, the ECtHR has explicitly incorporated arbitration processes into its guarantees of a fair trial[17]. Lastly, the ECtHR has a well-established concept about the margin of appreciation member states are authorized to apply when carrying out their commitments under the convention.

Despite the fact that general human rights law and domestic civil procedure statutes provide the general framework for fair trial guarantees in arbitral proceedings by establishing general principles, their specific application to arbitral proceedings helps to define their precise scope and exceptional deviations. Therefore, arbitration-specific instruments (formal, informal, or contract-based) and domestic court decisions provide deeper insight into the spectrum of acceptable deviations, primarily because concerns regarding equal treatment will result in set aside proceedings at the seat of arbitration. Article 34(1) and (2) of the Model Law establishes what is without question a fundamental principle of civil procedure:

1. Recourse to a court against an arbitral award is limited to a motion for annulment.
2. An arbitral award may be annuled … only if:

(a) the party making the application provides proof that:

(ii) The party making the request was not provided adequate notice of the arbitrator's appointment or the arbitral procedures, or was otherwise unable to submit his case.

Although the Model Law identifies other fair trial guarantees, Articles 34(2)(ii) and 22 permit injured parties to seek annulment (set aside) of awards that offend party equality. Given the unique nature of arbitral proceedings, it is important that the right to equality, as developed in the jurisprudence of the ECtHR, be read against seminal commercial arbitration instruments, and in particular the Model Law, in a manner that renders them consistent and complementary, in accordance with Article 2A of the Model Law.

3. Fair Trial and Equality in the Model Law Travaux Préparatoires

Article 18 of the Model Law defines a broad principle of law, but its travaux préparatoires provide little, if any, evidence of its connections with fair trial rights as a principle of international human rights law, as opposed to a fundamental basis of civil procedure. Nonetheless, Article 2A of the Model Law emphasizes that states shall interpret the Model Law in light of its international character and with the objective of attaining uniformity on the basis of basic principles and good faith. Article 18 must be interpreted in accordance with the member states' human rights commitments and general legal standards, including guarantees of a fair trial. In the original formulations of the 1985 edition of the Model Law, the origins of fundamental procedural rights were not always apparent[18]. In the initial rounds of drafting, Article 15(1) of the UNCITRAL Arbitration Rules served as the foundation. In October 1982, the two procedural fairness provisions were included in Article 19(1). (9b)[19]. This remained the case at the

[13] On this see generally Fawcett, JJ, Shúilleabháin, MN and Shah, S, Human Rights and Private International Law (Oxford University Press 2016) Google Scholar.

[14] Dombo Beheer B.V. v the Netherlands (n 12) para 33.

[15] See the discussion above on art 2A of the Model Law, which fully justifies an interpretation of art 18 in accordance with international fair trial standards emanating from human rights treaties and case law. The legal nature of the Model Law entails that in construing questions arising from its application recourse may be had to sources and principles that are external to it, such as treaties, general principles, lex mercatoria and domestic law. See Gebauer, M, 'Uniform Law, General Principles and Autonomous Interpretation' (2005) UnifLRev 683Google Scholar.

[16] The literature on the application of equality and fair trials to civil proceedings is sparse. However, available works stipulate that procedural equality is a general principle of law. See OJ Settem, Applications of the Fair Hearing Norm in ECHR Art 6(1) to Civil Proceedings (Springer 2015) 96–121.

[17] See eg Klausecker v Germany [2015] EHRR SE8, paras 69–77; Deweer v Belgium (1979–80) 2 EHRR 439, para 49; Tabbane v Switzerland (2016) ECHR 109, para 27; Lithgow and Others v UK, (1986) 8 EHRR 329, para 201,

[18] See, for example, Report of the Working Group on International Contract Practices on the Work of its Sixth Session, UN Doc A/CN.9/245 (22 September 1983), where no reference is made.

[19] Note by the Secretariat: Model Law on International Commercial Arbitration: Draft Articles 1–24, UN Doc A/CN.9/WG.II/WP.37 (1982) 54, fn 34. It should be noted that the UNCITRAL Arbitration Rules, originally

fourth session, but it was noted that the right to state one's case should not apply "at any stage" of the proceedings, as stipulated at the time in draft Article 19(1)(b), as this would let parties to extend proceedings or make needless representations[20]. It was also proposed that the need to disclose to the opposing party all information provided to the tribunal in draft Article 20(2) could maybe also be included in Article 19(1)'s equality clause (b)[21]. At its sixth session, the Working Group presented a two-paragraph article 19 draft. The second paragraph restricted a tribunal's ability to establish procedural rules unless authorized by the parties, stressing that such authority was subject to the parties' right to equal treatment and their right to submit their case[22]. In following meetings, this formulation was approved verbatim.

During the ninth session, procedural fairness generated comparatively few comments compared to other issues. Norway proposed that infringement of the right to state one's case should result in actions to set aside the award. Norway and the International Bar Association argued that the phrase 'full opportunity' should be changed to 'sufficient opportunity' or that the phrase 'and properly' should be inserted after 'full opportunity'[23]. The lack of comments implies that procedural fairness was not a top priority and that neither UNCITRAL nor participating states fully comprehended the relationship between the right to a fair trial and its application to arbitral procedures. The final version of the Model Law of 1985 maintained a separate language on procedural fairness, differentiating this fundamental issue from the remainder of Article 19.

When the current version of Article 18 was still a draft of Article 19(3), party equality was only one of three distinct, yet interrelated issues, namely: a) the parties' freedom to determine arbitral procedure; b) the tribunal's authority to determine such procedure where the parties had not done so; and c) the tribunal's authority to further determine admissibility, relevance, and materiality of evidence. The official UNCITRAL Commentary refers to draft Article 19 as the "Magna Carta of Arbitral Procedure" to emphasize its significance. It is expressly stated that it cannot be deviated from, even by the parties themselves. 28 In addition, it reaffirms the essential character of 'fairness' as set forth in draft Article 19(3) and clarifies that it applies to other related Model Law provisions requiring procedural fairness. Although the official commentary does not provide an exhaustive analysis, it does make an important point, namely that the right to present one's case "does not entitle a party to obstruct the proceedings by dilatory tactics, such as submitting objections, amendments, or evidence on the eve of the award."

Paragraph 3 was ultimately eliminated and placed separately in Article 18 The first two paragraphs of Article 19 were left unchanged. This was intended to distinguish between the rather distinct issues of party autonomy to establish procedural rules and procedural fairness, while highlighting the importance of procedural fairness by emphasizing that it is not subordinate to party sovereignty to determine procedural rules. In the draft of Article 19(3), the phrase "in either case" was inserted at the start of the sentence. These were eliminated from the final version of Article 18 Article 18 did not change during the 2006 revision of the Model Law. While UNCITRAL is not opposed to human rights influences, it should not be believed that experts in commercial law have a clear grasp or appreciation of human rights' function. This may help explain why the travaux lacked an explicit mention of fair trial rights. Nonetheless, the scope and content of the standards mirror the broad principles of fair trial proceedings in civil procedural law, which have been substantially molded by regional or international human rights treaties.

4. Limitations to Party Sovereignty: Fair Trial Guarantees

The parties' authority over arbitration procedures is not absolute. Arbitral processes are legal actions, even if arbitral tribunals are not necessarily viewed as 'founded by law,'[24] and arbitral proceedings are therefore subject to fair trial guarantees as indicated above. As has been previously emphasized, the human rights obligations of the seat (and maybe those of the nation of enforcement) must be taken into account during the proceedings[25]. Human rights obligations of the seat are a component of its *lex arbitri* , and the tribunal would be in breach of its obligation to issue an enforceable judgement if it ignored the human rights commitments of the seat and the intended country of enforcement. Although one cannot force arbitrators to be apprised of the increasing jurisprudence of the ECtHR and other human rights courts and tribunals, arbitral institutions and counsel must verify that the parties' procedures comply with core fair trial requirements, and often do so.

In practice, courts have a narrow interpretation of the right to fair and equitable treatment in arbitral proceedings. In Lufuno Mphaphuli & Associates (PTY) Ltd. v. Nigel Athol Andrews

adopted in 1976, were meant to serve as a detailed set of procedural rules for arbitral tribunals that were not operating under institutional rules.

[20] Report of Working Group II, UN Doc A/CN.9/232 (1982), para 104.

[21] ibid, para 110.

[22] Note by the Secretariat: Model Law on International Commercial Arbitration: Revised Draft Articles I to XXII, UN Doc A/CN.9/WG. II/WP.40 (14 December 1982), Draft art XV.

[23] Analytical Compilation of Comments by Governments and International Organisations on the Draft of a Model Law on International Commercial Arbitration, Report by the Secretary-General, UN Doc A/CN.9/263 (19 March 1985) 33.

[24] See Case 102/81 Nordsee Deutsche Hochseefischerei GmbH v Reederei Mond Hochseefischerei Nordstern AG and others [1982] ECR 1095; Case C–394/11 Belov v CHEZ Elektro Balgaria and Others, CJEU judgment (31 January 2013), para 38; Case C–125/04 Denuit and Cordenier v Transorient - Mosaïque Voyages et Culture SA [2005] ECR I-00923, para 13; C–555/13 Merck Canada v Accord Healthcare Ltd and Others, CJEU judgment (13 February 2014), para 17, whereby the CJEU does not generally view arbitral tribunals as established by law, but this largely concerns the capacity of arbitral tribunals to request preliminary rulings.

[25] Transado - Transportes Fluviais do Sado v Portugal, App No 35943/02, Eur Ct HR judgment (16 December 2003); see equally Nordsee Deutsche Hochseefischerei GmbH v Reederei Mond Hochseefischerei Nordstern AG and others, Case 102/81 [1982] ECR 1095, where the CJEU held that the application of EU law cannot be limited by contractual exceptions or carve outs; equally, Société Licensing Projets and others v Société Pirelli & C SpA and others, Paris Appeals Court judgment (17 November 2011). See also art 396(2) of the Swiss CCP, which allows a limited review of domestic arbitral awards where the claimant alleges a violation of the ECHR.

Bopanang Construction CC, the South African Constitutional Court was asked to set aside an award due to three "secret" meetings between the arbitrator and the respondent during the course of the arbitration, as well as the fact that not all correspondence between the respondent and arbitrator was provided to the appellant. The appellant relied on Article 34 of the Constitution of the Republic of South Africa, which ensures a right to a public hearing in disputes. The Court determined that arbitral tribunals are not directly protected because hearings are not open to the public and arbitrators are not necessarily impartial, at least in the same sense as judges. The Court also relied on Article 18 of the Model Law and Section 33 of the English Arbitration Act, which it deemed to entrench a constitutional norm, albeit with the understanding that fairness is context-dependent.

In the specific setting of the case, it was noted that the arbitrator was a quantity surveyor and that the parties' agreement stipulated an informal procedure. In addition, the Court argued that the 'secret' meetings did not prevent the parties from presenting their case fairly and rejected the contention that the appellant's lack of access to the correspondence constituted a gross irregularity, as each party had the opportunity to persuade the arbitrator that his preliminary conclusions were incorrect[26]. Although other national courts may reach different decisions about the appellant's irregularity arguments, the judgment emphasizes the uniqueness of procedural equality in arbitration, which may be waived by informal means. This line of reasoning was taken even further by the Court of Appeal of Katowice, which determined that an arbitrator's lack of impartiality breaches Article 18 of the Model Law only if it results in unequal treatment of the parties.

Due process and a fair hearing, as well as the tribunal's independence and impartiality, are unanimously acknowledged as relevant in arbitral procedures[27]. Due process is a wide idea that encompasses numerous procedural components. Its most prominent embodiment is party equality, which is guaranteed by Article 6 ECHR. According to this provision, the tribunal must treat all plaintiffs equally and without distinction or discrimination, even if the parties' agreement states differently[28]. In essence, what is permitted for one side should also be permitted for the other. The parties cannot waive the rights stated in Article 18 because they are fundamental (and binding). This is true both in terms of the tribunal's mandate (concerning its treatment of the parties) and the parties' right to question the legitimacy of arbitral proceedings on the basis of unfair treatment.

Despite the fact that a small number of national courts have erroneously assumed that the latter right can be waived[29], it should be borne in mind that: a) fundamental human rights rules can never be subject to derogation; b) Article 4 of the Model Law expressly states that parties may only waive non-mandatory requirements; and c) there is always a risk that a purported waiver could be the result of coercion, fear, or intimidation, which is why such However, the underlying standards stated in Article 18 are not intended to shelter parties from bad decisions made during the arbitral procedure.

Guarantees of a fair trial should not only apply to the proceedings themselves, but also to the preliminary evaluation of the legitimacy of the submission agreement, as an unfair submission agreement could compromise the equal treatment of the parties. Therefore, if the arbitration agreement creates a type of inequality that unfairly disadvantages one party, the court or tribunal must declare that portion of the agreement invalid and void. Some courts have demonstrated a propensity to bend the idea of equal treatment in an unreasonable manner by adopting quantitative measures to measure equality. In a Polish case, Iwona G. v. A. Starosta and Shareholders of Joint Stock Firm B, the arbitration agreement stipulated that the tribunal would be composed of a super-arbitrator appointed by arbitrators nominated by each company shareholder. Since the claimant could only pick one of the seven arbitrators, he alleged that his interests were not represented equitably. According to the Bialystok Court of Appeals, this violated the principle of party equality.

A. Non-Applicability of Fair Trial Guarantees

In the absence of statutory (i.e., non-permissive) rules or sub-rules regarding equal treatment, fair trial guarantees may not apply in arbitral procedures. Several examples have been discussed in earlier sections. Any activity that does not compromise equality or procedural fairness between two informed and mature commercial parties appears to be legal. The law presupposes a priori that persons entitled to engage into an arbitration agreement have adequate business acumen and are aware of both the benefits and drawbacks of arbitration compared to litigation. Consequently, modest imbalances that are not arbitrary, do not result in inequity, and fulfill the aims of commercial justice will be maintained.

A clear illustration is the differences in power between the parties. Although it is prudent to bridge power disparities between parties in court proceedings, it is inconceivable, for instance, that the more powerful party (other than in consumer arbitration, which is outside the scope of this article) should bear the legal or other expenses of the weaker (i.e., the party with fewer resources) party solely on the basis of their financial disparity[30]. The German Federal Supreme Court has

[26] Lufuno Mphaphuli & Associates (PTY) Ltd. v Nigel Athol Andrews Bopanang Construction CC, [2009] ZACC 6, CLOUT Case 1691.

[27] See Bantekas, I, Introduction to International Arbitration (Cambridge University Press 2015) 123–6CrossRefGoogle Scholar.

[28] This is clearly a foundational principle from which no derogation, even by the parties' consent, is permitted. See Soh Beng Tee & Co. Pte. Ltd. v Fairmount Development Pte. Ltd. [2007] 3 SLR (4) 86, CLOUT Case 743; Noble China Inc. v Lei Kat Cheong [1998] CanLII 14708 (ON SC).

[29] Methanex Motunui Ltd. v Spellman [2004] 3 NZLR 454.

[30] Exceptionally, the Portuguese Supreme Court in Wall Street Institute de Portugal – Centro des Ingles SA WSI – Consultadoria e Marketing and others v Centro des Ingles Santa Barbara LDA, judgment no 311/2008 (30 May 2008), held that where a party to arbitral proceedings had become indigent it was entitled to legal aid and so could have recourse to litigation instead of arbitration. The Court's rationale was that the interest sacrificed by the rejection of the arbitration clause was purely procedural and doing so protected the substantive interest of the right to a fair trial. This approach is very unusual and

approached this issue contractually, holding that if a party to an agreement containing an arbitration clause is genuinely unable to finance the costs associated with arbitration, then the arbitration agreement is unenforceable and the indigent party may seek to resolve the dispute through the courts and receive legal aid[31]. Clearly, this contractual line of reasoning relates to procedural guarantees only indirectly and should not be relied upon as a general rule to impart such guarantees.

A second instance involves exclusion clauses in business contracts that aim to waive the parties' rights to suit in conventional courts. It is now well-established that such exclusion clauses do not inherently compromise fair trial guarantees[32]. Free and open consent is of utmost importance because agreements requiring arbitration have not always been deemed consistent with the right to a fair trial[33]. Other examples are provided in the subsequent sections.

5. Equality of Arms

The starting point for determining "equality" outside the context of Article 18 of the Model Law is Article 6(1) ECHR[34], which states that "in the determination of his civil rights and obligations... everyone is entitled to a fair... hearing by a tribunal..." The principle of fairness applies throughout the entirety of processes, not just oral hearings or proceedings on the merits[35]. Courts and arbitral tribunals must afford all parties a chance to adequately explain their cases and present their claims. In addition, it mandates that courts and tribunals treat the parties fairly, i.e., without bias or arbitrariness, when making their decisions.

In a sports-related dispute, for instance, the panel finally relied on an illegally obtained video tape that proved crucial. The Swiss Federal Supreme Court determined that the admissibility of otherwise illegal evidence did not violate a fundamental tenet of Swiss procedural law. Further, it was said that tribunals, like courts, have the jurisdiction to conduct a case-by-case evaluation of whether illegally obtained material should be included.

According to this source, the concept of 'equality' in Article 18 as it applies to adversarial arbitral procedures is best expressed by the principle of equality of arms. This principle stipulates that in adversarial processes, the opportunity offered to both (or all) sides must be equitably balanced. The 'fairness' demanded by Article 6(1) ECHR pertains to 'procedural' rather than 'substantive' fairness (which relates to inherent powers of courts and tribunals). In order to ensure the procedural fairness promised by the right to a fair trial in civil and arbitral processes, the parties and their submissions must be treated equally in adversarial proceedings, even if one party eventually triumphs. Sensibly, the ECtHR does not view a single instance of procedural injustice as tainting the entire process[36]. However, this norm should be used with caution in arbitration.

In addition, equality of arms mandates that the parties have access to all admissible evidence and a fair opportunity to remark on and study it, including with regard to its veracity[37]. Article 24(3) of the Model Law requires that any statements, papers, and other information provided to the arbitral tribunal by one party be conveyed to the other party, as well as any expert report or evidentiary document upon which the arbitral tribunal may rely in reaching its judgment[38]. These lays even more stress on the need for well-reasoned awards since it enables the courts to determine whether and to what extent a tribunal was biased in its consideration of the evidence and the parties' ability to submit such evidence.

Although the tribunal is not required to assign probative value to every piece of evidence presented by the parties, it must permit them to present it if it is essential to proving their case[39]. The concept of equality of arms dictates that the parties must be given an equal opportunity to comment on all admissible documents, even those introduced by the tribunal on its own initiative[40]. However, there is no requirement to send to the other party papers that are either inadmissible or have not been presented to the court[41]. Withholding evidence from one party is only permitted for grounds of extreme confidentiality, public safety, or the protection of witnesses.

The ECtHR has emphasized that courts and tribunals are free

is generally rejected. See art 380 of the Swiss CCP, which excludes the possibility of legal aid from domestic arbitral proceedings. The Swiss Federal Supreme Court in case no 4A_178/2014, judgment (29 July 2014) confirmed that the same exclusion applies also to international arbitrations; equally D.L.T. Holdings Inc. v Grow Biz International, decided by Canada's Prince Edward Island's Supreme Court, [2001] 199 Nfld. & Prince-Edward-Island Reports 135, CLOUT Case 501. The Court held that disparities between the parties in financial bargaining power did not offend public policy.

[31] CLOUT Case 404, III ZR 33/00 1(4 September 2000).

[32] In Sumukan Limited v Commonwealth Secretariat [2007] EWCA Civ 243, the English Court of Appeal held that an agreement in an arbitration clause to exclude appeal to a court on a point of law under section 69 of the Arbitration Act 1996 (the exclusion agreement) did not breach the right to a fair trial as guaranteed under art 6 of the ECHR. Equally, as far back as the early 1960s, in Osmo Suovaniemi and Others v Finland, App No 31737/1996, Decision (23 February 1999) and X v Germany, App No 1197/1961, Decision (5 March 1962), the EurCtHR and the Commission stressed that waivers in favor of exclusive arbitration are consistent with the right to a fair trial.

[33] Bramelid and Malstrom v Sweden (1983) 5 EHRR 249. Conversely, the Maltese Constitutional Court has held that mandatory arbitration proceedings under Maltese law (including the appointment of arbitrators by the chairman of the Malta Arbitration Centre) did not breach either the Constitution of Malta (art 39(2)) or the right to fair trial under art 6(1) of the ECHR. Untours Insurance Agency Ltd and Emanuel Gauci v Victor Micallef and Others, App No 81/2011/1, Maltese Constitutional Court judgment (25 January 2013).

[34] The same principle is found also in other international instruments, such as arts 14 and 16 ICCPR; art 10 UDHR; arts 3, 7 and 26 of the African Charter on Human and Peoples' Rights (ACHPR); arts 3, 8–10 American Convention of Human Rights (ACHR).

[35] Stran Greek Refineries and Stratis Andreadakis v Greece (1994) 19 EHRR 293, para 49.

[36] Miroļubovs and Others v Latvia, App No 798/05 ECtHR judgment (15 September 2009) para 103.

[37] Krčmář and Others v the Czech Republic, App No 35376/97, ECtHR judgment (2 May 2000) para 42; Immeubles Groupe Kosser v France, App No 38748/97, ECtHR judgment (9 March 1999) para 26.

[38] See Attorney-General v Tozer (No 3), High Court, Auckland, New Zealand, (2 September 2003), whereby an award was set aside because a document submitted to the tribunal by one party was excluded from its file to the other party.

[39] Clinique des Acacias and Others v France, App No 65399/01, ECtHR judgment (13 October 2005) para 37.

[40] Pellegrini v Italy, (2002) 35 EHRR 2, para 45); K.S. v Finland, App No 29346/95, ECtHR judgment (31 May 2001) para 22; Nideröst-Huber v Switzerland (n 9) para 29.

[41] Yvon v France (2005) 40 EHRR 4, para 38.

to establish their own rules of evidence[42] and determine admission of evidence, regardless of whether their power derives from contract or statute[43]. Courts and tribunals have the authority to decide the probative value of evidence and administer the burden of proof, provided that the parties are aware of the relevant norms beforehand[44]. This is compatible with arbitral practice, in which rules of procedure and evidence are determined by agreement between the parties. In a case decided by the Singapore Court of Appeals, it was determined that an interim award based on facts not mentioned in the parties' pleadings did not breach the right to equal treatment because the applicant received adequate notice of the claim at issue and ample time to respond to it. Therefore, it suffered no prejudice as a result of the absence of the matter in the pleadings.

Aside from evidence-related issues, the ECtHR has found a violation of the equality of arms principle when: a) an action was brought by one party without informing the other[45]; b) of several key witnesses put forward by the parties, only one was heard[46]; c) one party enjoyed a significant advantage with regard to particular information, putting its opponent at a severe disadvantage[47]. Although the European Court of Human Rights has concluded that the absence of legal help in circumstances featuring a large discrepancy in financial resources between the parties may hinder the weaker party's ability to present its case, there is no general right to legal aid in arbitral proceedings[48].

Although we have already explained that procedural fairness encompassed by the right to a fair trial does not have a substantive component, the ECtHR has identified a few limited circumstances in which the tribunal's dispositive function may be subject to review, particularly when the tribunal's errors are manifest and violate Convention-protected rights and liberties[49].

Similarly, to the practice of national courts, where it is extremely rare for the courts of the seat to set aside awards due to errors of law or substance, the ECtHR has only done so in rare situations of evident mistake of judgment that renders the verdict arbitrary or patently irrational[50]. The ECtHR came to the same decision regardless of whether the ruling constituted a denial of justice[51] or the court's rationale was seen to be "grossly arbitrary."

The European Court of Human Rights has emphasized that courts are not required to follow precedent because doing so impedes the evolutionary and dynamic development of the law[52] and limits the kompetenz-kompetenz capacity of courts and tribunals. Exceptionally, divergences in case law (and the litigants' legitimate expectations) may constitute a violation of Article 6(1) ECHR when the divergences are profound and long-standing and the State in question has sufficient judicial mechanisms to resolve such divergences, but these mechanisms have not been followed to the detriment of the complainant[53]. Given the lack of precedence in the field of international business arbitration and the fact that the parties determine the applicable law, it is evident that such an exception cannot apply[54]. The judgement would be legitimate even if the tribunal disregarded established law, therefore erred in its interpretation of the law, unless, of course, this was the result of bias against one of the parties.

The courts of the seat have seen infractions of Article 18 through various lenses. While the rights entrenched in Article 18 of the Model Law are referred to as human rights in human rights treaties, they are also referred to as 'freedoms,' 'civil liberties,' 'natural justice guarantees,' and 'due process guarantees' in domestic law. Other terms may also be applicable, but they all pertain to an individual's legal or arbitral rights.

In AMZ v. AXX[55], the Singapore High Court was presented with a motion to set aside including, among other things, a Model Law Article 18 breach. During the arbitral proceedings, the plaintiff alleged the existence of three severe contract violations, but the tribunal only found one and denied the existence of a fundamental breach. The plaintiff sought to set aside the award, inter alia, on the grounds that the tribunal had violated natural justice under Model Law Articles 34(2)(a)(ii) and 18 because he was unable to present his case and/or the arbitrator was biased against him, and that this breach caused genuine prejudice.

The Court determined that there are two natural justice rules. The first criterion stipulates that the tribunal must seem and act unbiased. The Court elaborated on numerous points of Audi alteram partem, the second rule of natural justice[56]. Initially, tribunals must afford parties the opportunity to be heard on all issues[57]. Second, tribunals are unable to ignore a submission without giving it judicial consideration. Third, tribunals are not required to refer every decisional issue to the parties for arguments. A tribunal's judgment is only unjust if a reasonable litigant in the position of the party appealing the award could not have anticipated the tribunal's actual rationale in the award.

[42] Mantovanelli v France, (1997) 24 EHRR 370, para 34.

[43] Moreira de Azevedo v Portugal (1991) 13 EHRR 721, paras 83–84; García Ruiz v Spain [GC], (1999) 31 EHRR 589, para 28.

[44] Centro Europa 7 S.r.l. and Di Stefano v Italy (n 10) para 19.

[45] Beer v Austria, App No 30429/96, ECtHR judgment (6 February 2001) para 19.

[46] Dombo Beheer B.V. v the Netherlands (n 12) paras 34–35. This may be remedied by providing a reasoned explanation, showing that the refusal was not arbitrary. See Wierzbicki v Poland (2004) 38 EHRR 38, para 45.

[47] Yvon v France (n 53) para 37.

[48] Steel and Morris v the United Kingdom, (2005) 41 EHRR 22, para 72. See also Wall Street Institute de Portugal - Centro des Ingles SA WSI – Consultadoria e Marketing and others v Centro des Ingles Santa Barbara LDA (n 41).

[49] García Ruiz v Spain (n 56) para 28; Perez v France (2005) 40 EHRR 39, para 82.

[50] Dulaurans v France (2001) 55 EHRR 45, para 38; Khamidov v Russia [2007] ECHR 928, para 170.

[51] Anđelković v Serbia, App No 1401/08, ECtHR judgment (9 April 2013) para 24.

[52] Şahin and Şahin v Turkey [GC], App No 13279/05, ECtHR judgment (20 October 2011) para 58; Lupeni Greek Catholic Parish and Others v Romania [GC], [2016] ECHR 1061, para 116.

[53] Beian v Romania (no. 1), App No 30658/05, ECtHR judgment (6 December 2007), paras 37 and 39; Lupeni Greek Catholic Parish and Others v Romania, ibid, paras 116–135.

[54] But see exceptionally, section 69 of the English Arbitration Act, which allows appeals on points of law.

[55] AMZ v AXX [2015] SGHC 283, CLOUT Case 1660.

[56] ibid, paras 91–94.

[57] ibid, para 95.

Lastly, tribunals are permitted to reach a determination that is not addressed by the parties' submissions, so long as their conclusion is supported by evidence and does not represent a significant deviation from the parties' positions.

Using these criteria, the Court determined that the Audi alteram partem rule had not been violated because the tribunal had considered the plaintiff's claims. It was determined that the tribunal had weighed certain of the plaintiff's claims when it was not required to do so in order to reach its verdict. In addition, the Court emphasized that it was not the tribunal's responsibility to instruct plaintiffs on how to effectively structure their own arguments. Consequently, the Court rejected the plaintiff's initial argument in its entirety.

6. Full Opportunity to Present One's Case

A. The General Rule

The main norm in arbitration hearings is that parties must be able to adequately state their position[58]. The case law on fair trials demonstrates unequivocally that parties in civil proceedings have the right to present the evidence they deem pertinent to their argument. Although there is significant latitude in arbitral processes regarding the inherent authority of the tribunal to disregard anything it deems irrelevant or frivolous, this authority may only be viewed as effective if the parties' opinions are 'heard'[59]. The European Court of Human Rights has interpreted the right to effective hearing as requiring the tribunal to undertake the procedures through a thorough investigation of the parties' submissions, including arguments, claims, and counterclaims.

In the majority of cases in which a violation of the right to present one's case is asserted; claimants typically assert that their evidence was not given sufficient weight or that the tribunal prohibited them from making lengthy arguments on a topic they believed to be crucial to their case. In a New Zealand case involving an award for the value of land, the plaintiff sought to set aside the award on the basis of a violation of natural justice, alleging a lack of chance to be heard regarding the arbitrators' methodology for determining the value of the land. Article 18 of the Model Law and Article 18 of the Arbitration Act of New Zealand were cited by the New Zealand High Court.

To establish 'surprise' as a procedural irregularity constituting a violation of natural justice, the plaintiff was required to demonstrate: (a) that a reasonable litigant in the plaintiff's position would not have anticipated the arbitral tribunal's reasoning of the type set forth in the award; and (b) that with adequate notice it would have been possible to persuade the arbitral tribunal to reach a different result. The Court observed that, without evidence to the contrary, it is reasonable to presume that some procedural prejudice had actually occurred once a party could demonstrate "substantial surprise."

In a similar case in which the tribunal unilaterally set a hearing date and denied pleas for adjournment, it was determined that the party was not allowed a reasonable opportunity to submit its case[60]. The same held true in a Swiss case in which the tribunal based its judgement on a statute that was "manifestly non-applicable" to the circumstances of the arbitration and so could not have been foreseen by the parties.

As is the case with written pleadings, the institutional norms of arbitral institutions do not provide specific regulations for oral hearings. In fact, the parties are able to forego oral hearings if they believe that a process based solely on papers is sufficient to present their evidence. This possibility is also reflected in Article 24(1) of the Model Law, which states that, unless the parties have agreed that no oral hearings shall be held for the presentation of evidence or oral argument, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if a party so requests.

In re TA G v. H Company, the Swiss Federal Supreme Court ruled that the parties' right to be heard does not include a right to be heard orally, so long as this rule is consistently enforced and is not fundamentally averse to the parties' intentions[61]. The same Court has decided, however, that the right to be heard involves a minimum obligation to investigate all issues important to the conclusion of the case, as weighed against the tribunal's discretion to analyze the available evidence as it sees fit.

The parties' requirement for adaptability, cost-effectiveness, and expediency necessitates that the hearing procedure not adhere to the hearing rules of civil law or common law states. In practice, oral sessions are brief, and arbitrators are obligated to ensure that counsel for the parties do not unduly extend the process by reviewing irrelevant or already discussed evidence or by simply taking their time with witnesses[62]. Regardless of how the tribunal chooses to carry out this obligation, it must not prejudice between the parties. If the tribunal can only allot a certain number of days to oral proceedings, it must design a case management strategy to ensure efficient and timely completion. Almost certainly, it will conduct a pre-hearing conference with the parties for this reason, where, after hearing their perspectives, it will issue an order regarding the sequence of activities and the procedures to be followed.

Several of the concerns will have been presented to the tribunal via the parties' memorials. This may be the situation with regard to witness and expert testimony, in which case the tribunal may determine that there is no compelling cause for them to be presented again. Exceptionally, if the parties cast doubt on the veracity or honesty of these statements or the

[58] H v Belgium, (1987) 10 EHRR 339, para 53.

[59] Donadze v Georgia, App No 74644/01, ECtHR judgment (7 March 2006) para 35.

[60] Coromandel Land Trust Ltd. v Milkt Investment Ltd, High Court, Hamilton, NZ (28 May 2009).

[61] Re TA G v H Company, (1997) ASA Bull 316; equally, in CLOUT Case 659, the Oberlandesgericht Naumburg held that the refusal of a tribunal to hold an oral hearing does not violate the right to be heard. It further held that the principle of oral hearing contained in art 128 ZPO did not apply in arbitral proceedings to the same extent as in court proceedings. Thus, in arbitral proceedings the right of the parties to be heard is respected if the parties have at least the possibility to file a statement of defense. In the case at hand the tribunal's determination to conduct a documents-only process was known to the claimant, who failed to object.

[62] Case 4A_669/2012 Swiss Federal Supreme Court judgment (17 April 2012).

people who made them, the court will tolerate some cross-examination, but will place limits on counsel's activity in this regard. Similarly, as part of its case management duty, the tribunal will likely require parties to submit prehearing briefs summarizing and exposing the oral evidence upon which they intend to rely.

In adversarial civil litigation proceedings, the sequence of presentations and responses or objections by one party to the claims of the other typically adheres to the established protocols. Article 8(3) of the International Bar Association (IBA) Rules on the Taking of Evidence, which follows customary procedure, specifies the following possible order:

a) Typically, the claimant will submit its witnesses' testimony first, followed by the defendant's witnesses' testimony;
b) After direct evidence, any other party may cross-examine the witness in the order specified by the arbitral panel. The party who initially presented the witness shall have the option to ask follow-up questions regarding issues raised by the other parties;
c) The claimant will then typically submit the testimony of its party-appointed experts, followed by the defendant's party-appointed experts. The party who initially presented the party-appointed expert shall have the chance to ask additional questions regarding the issues raised by the opposing parties;
d) If the arbitration is divided into distinct topics or phases (such as jurisdiction, preliminary determinations, liability, and damages), the parties or the arbitral tribunal may schedule the testimony for each issue or phase separately;
e) On the request of a party or on its own initiative, the arbitral tribunal may change this order of proceeding, including the organization of testimony by particular issues or such that witnesses are questioned simultaneously and in confrontation with each other (witness conferencing);
f) At any point, the arbitral tribunal may pose questions to a witness.

Due to the fact that arbitral processes are similar to legal proceedings in that they result in a binding award, witnesses are required to tell the truth[63]. In the majority of jurisdictions, there is no legal barrier to taking sworn testimony in arbitral proceedings, in which case a false witness may be punished under the civil and criminal laws of the seat. Moreover, because the tribunal must finally be persuaded of the claims and counterclaims, it may request oral testimony from anybody it deems relevant to the resolution of the dispute. In this instance, however, both sides may also challenge the tribunal's witness.

Aside from issues regarding the fairness of the trial, the *lex arbitri* in industrialized nations is often quite permissive of procedural restrictions imposed by the parties. Occasionally, though, the boundary is ambiguous. It is acknowledged, either directly or tacitly, for instance, that applications by the parties for expedited or fast-track arbitral proceedings are compatible with the right to a fair trial. In contrast, a tribunal fails to fulfill its obligation of due process when it proceeds on the basis of a summary decision, in which case it decides not to hear the parties or evaluate their evidence by eliminating what it deems to be redundant (even if the parties have agreed to this).

7. Conclusion

If there is one thing arbitrators must understand about human rights, it is that they are an inherent aspect of the *lex arbitri*. In governments that have recognized substantial international human rights commitments, such as those under the ECHR, there is a long tradition of fair trial guarantees being applicable to both litigation and arbitration. Therefore, arbitrators must always consult with arbitral institutions, as well as the parties themselves, when necessary, with the potential human rights implications of the proceedings at hand. Foreign arbitrators will not be conversant with the human rights laws of the seat, nor are they required to be.

They may discover that procedural human rights guarantees are more extensive than anticipated. If they fail to comply with the relevant criteria, not only does their award risk being nullified by the courts of the seat, but it may also result in tort liability. Equally, arbitral institutions would do well to teach their case managers on fair trial law, establish thorough instructions for all those involved in arbitral procedures, and, if unsure about a particular topic, consult an available institution expert. Clearly, the reputational and financial danger to arbitral organizations and individual arbitrators significantly outweighs the cost of obtaining solid legal counsel from human rights specialists.

Despite the independence of international arbitration, the powers of the tribunal and the substantive and procedural law applicable are subject to the necessary regulations of the seat[64]. Equality in all its dimensions is an inherent component of the mandatory regulations of the seat. Consent-based deviations are acceptable, but only if the departure does not materially affect one of the parties. In this setting, both national and international courts and tribunals have had the chance to broaden the breadth and scope of acceptable deviations from the equal treatment rule, proving the existence of a transnational judicial dialogue[65] on this subject. The general principle articulated in Article 18 of the Model Law is manifest in the pronouncements of international tribunals, such as the European Court of Human Rights (ECtHR), as well as domestic courts, awards by arbitral tribunals (given the absence of extensive annulment proceedings based on unequal treatment), and the instruments of arbitral institutions worldwide.

[63] Art 8(4) IBA Rules.

[64] One of the few scholarly works on this is Brekoulakis, S, Public Policy and Mandatory Laws in International Arbitration (Oxford University Press 2019)Google Scholar.

[65] See Krotoszynski, RJ, '"I'd Like to Teach the World to Sing (In Perfect Harmony)": International Judicial Dialogue and the Muses – Reflections on the Perils and the Promise of International Judicial Dialogue' (2006) 104 MichLRev 1321Google Scholar; Moremen, PM, 'National Court Decisions as State Practice: A Transnational Judicial Dialogue?' (2006) 32 North Carolina Journal of International Law and Commercial Regulation 259, Google Scholar.