

Global Arbitration Review

The Guide to Challenging and Enforcing Arbitration Awards

General Editor
J William Rowley QC

Editors
Emmanuel Gaillard, Gordon E Kaiser and Benjamin Siino

Second Edition

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Publisher's Note

Global Arbitration Review is delighted to publish this new edition of *The Guide to Challenging and Enforcing Arbitration Awards*.

For those new to Global Arbitration Review, we are the online home for international arbitration specialists, telling them everything they need to know about all the developments that matter. We provide daily news and analysis, and more in-depth books and reviews. We also organise conferences and build work-flow tools. Visit us at www.globalarbitrationreview.com.

As the unofficial 'official journal' of international arbitration, sometimes we spot gaps in the literature earlier than others. Recently, as J William Rowley QC observes in his excellent preface, it became obvious that the time spent on post-award matters had increased vastly compared with, say, 10 years ago, and it was high time someone published a reference work focused on this phase.

The Guide to Challenging and Enforcing Arbitration Awards is that book. It is a practical know-how text covering both sides of the coin – challenging and enforcing – first at thematic level, and then country by country. We are delighted to have worked with so many leading firms and individuals to produce it.

If you find it useful, you may also like the other books in the GAR Guides series. They cover energy, construction, M&A and mining disputes – and soon evidence and investor-state disputes – in the same unique, practical way. We also have books on advocacy in international arbitration and the assessment of damages.

My thanks to the original group of editors for their vision and energy in pursuing this project and to our authors and my colleagues in production for achieving such a polished work.

Alas, as we were about to go to press, we were stunned by the unexpected demise of one of those editors, Emmanuel Gaillard. This news was as big a shock as I can recall. Emmanuel was one of three or four names who define international arbitration in the modern era. It was a delight to know him, and a source of huge satisfaction that he respected GAR, and it is hard to imagine professional life without him. Our sympathies go to his family and beloved colleagues, who I have no doubt will keep at least some of the magic alive.

David Samuels

London

April 2021

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Preface

During the past two decades, the explosive and continuous growth in cross-border trade and investments that began after World War II has jet-propelled the growth of international arbitration. Today, arbitration (whether *ad hoc* or institutional) is the universal first choice over transnational litigation for the resolution of cross-border business disputes.

Why parties choose arbitration for international disputes

During the same period, forests have been destroyed to print the thousands of papers, pamphlets, scholarly treatises and texts that have analysed every aspect of arbitration as a dispute resolution tool. The eight or 10 reasons usually given for why arbitration is the best way to resolve cross-border disputes have remained pretty constant, but their comparative rankings have changed somewhat. At present, two reasons probably outweigh all others.

The first must be the widespread disinclination of those doing business internationally to entrust the resolution of prospective disputes to the national court systems of their foreign counterparties. This unwillingness to trust foreign courts (whether based on knowledge or simply uncertainty as to whether the counterparty's court system is worthy – in other words, efficient, experienced and impartial – leaves international arbitration as the only realistic alternative, assuming the parties have equal bargaining power.

The second is that, unlike court judgments, arbitral awards benefit from a series of international treaties that provide robust and effective means of enforcement. Unquestionably, the most important of these is the 1958 New York Convention, which enables the straightforward enforcement of arbitral awards in 166 countries (at the time of writing). When enforcement against a sovereign state is at issue, the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1966 requires that ICSID awards are to be treated as final judgments of the courts of the relevant contracting state, of which there are currently 163.

Awards used to be honoured

International corporate counsel who responded to the 2008 Queen Mary/PricewaterhouseCoopers Survey on Corporate Attitudes and Practices in Relation to Investment Arbitration (the 2008 Queen Mary Survey) reported positive outcomes on the use of international arbitration to resolve disputes. A very high percentage (84 per cent) indicated that, in more than 76 per cent of arbitration proceedings, the non-prevailing party voluntarily complied with the arbitral award. Where enforcement was required, 57 per cent said that it took less than a year for awards to be recognised and enforced, 44 per cent received the full value of the award and 84 per cent received more than three-quarters of the award. Of those who experienced problems in enforcement, most described them as complications rather than insurmountable difficulties. The survey results amounted to a stunning endorsement of international arbitration for the resolution of cross-border disputes.

Is the situation changing?

As an arbitrator, my job is done with the delivery of a timely and enforceable award. When the award is issued, my attention invariably turns to other cases, rather than to whether the award produces results. The question of enforcing the award (or challenging it) is for others. This has meant that, until relatively recently, I have not given much thought to whether the recipient of an award would be as sanguine today about its enforceability and payment as those who responded to the 2008 Queen Mary Survey.

My interest in the question of whether international business disputes are still being resolved effectively by the delivery of an award perked up a few years ago. This was a result of the frequency of media reports – pretty well daily – of awards being challenged (either on appeal or by applications to vacate) and of prevailing parties being required to bring enforcement proceedings (often in multiple jurisdictions).

Increasing press reports of awards under attack

During 2020, *Global Arbitration Review's* daily news reports contained hundreds of headlines that suggest that a repeat of the 2008 Queen Mary Survey today could well lead to a significantly different view as to the state of voluntary compliance with awards or the need to seek enforcement. Indeed, in the first three months of 2021, there has not been a day when the news reports have not headlined the attack on, survival of, or a successful or failed attempt to enforce an arbitral award.

A sprinkling of recent headlines on the subject are illustrative:

- Uganda fails to knock out rail-claim award
- Iranian state entity fails to overturn billion-euro award
- US Supreme Court rejects Petrobras bribery appeal
- Spanish court sets high bar for award scrutiny
- Swiss award against Glencore upheld on third attempt
- Tajik state airline escapes Lithuanian award
- Dutch court refuses to stay Yukos awards
- Undisclosed expert ties prove fatal to ICSID award
- Brazilian airline's award enforced in Cayman Islands
- ICC arbitrators targeted in Kenyan mobile dispute

Regrettably, no source of reliable data is available as yet to test the question of whether challenges to awards are on the increase or the ease of enforcement has changed materially since 2008. However, given the importance of the subject (without effective enforcement, there really is no effective resolution) and my anecdote-based perception of increasing concerns, in summer 2017, I raised the possibility of doing a book on the subject with David Samuels (Global Arbitration Review's publisher). Ultimately, we became convinced that a practical, 'know-how' text that covered both sides of the coin – challenges and enforcement – would be a useful addition to the bookshelves of those who more frequently than in the past may have to deal with challenges to, and enforcement of, international arbitration awards. Being well equipped (and up to date) on how to deal with a client's post-award options is essential for counsel in today's increasingly disputatious environment.

David and I were obviously delighted when Emmanuel Gaillard and Gordon Kaiser agreed to become partners in the project. It was a dreadful shock to learn of Emmanuel's sudden death in early April. Emmanuel was an arbitration visionary. He was one of the first to recognise the revolutionary changes that were taking place in the world of international arbitration in the 1990s and the early years of the new century. From a tiny group defined principally by academic antiquity, we had become a thriving, multicultural global community, drawn from the youngest associate to the foremost practitioner. Emmanuel will be remembered for the enormous contribution he made to that remarkable evolution.

Editorial approach

As editors, we have not approached our work with a particular view on whether parties are currently making inappropriate use of mechanisms to challenge or resist the enforcement of awards. Any consideration of that question should be made against an understanding that not every tribunal delivers a flawless award. As Pierre Lalive said almost 40 years ago:

an arbitral award is not always worthy of being respected and enforced; in consequence, appeals against awards [where permitted] or the refusal of enforcement can, in certain cases, be justified both in the general interest and in that of a better quality of arbitration.

Nevertheless, the 2008 Queen Mary Survey, and the statistics kept by a number of the leading arbitral institutions, suggest that the great majority of awards come to conclusions that should normally be upheld and enforced.

Structure of the guide

This guide begins with a particularly welcome and inciteful foreword by Alan Redfern, recognised worldwide as one of the most thoughtful and experienced practitioners in our field. The guide is then structured to include, in Part I, coverage of general issues that will always need to be considered by parties, wherever situate, when faced with the need to enforce or to challenge an award. In this second edition, the 14 chapters in Part I deal with subjects that include initial strategic considerations in relation to prospective proceedings; how best to achieve an enforceable award; challenges generally and a variety of specific types of challenges; enforcement generally and enforcement against sovereigns; enforcement of interim measures; how to prevent asset stripping; grounds to refuse enforcement; and the special case of ICSID awards.

Part II of the guide is designed to provide answers to more specific questions that practitioners will need to consider when reaching decisions concerning the use (or avoidance) of a particular national jurisdiction – whether this concerns the choice of that jurisdiction as a seat of an arbitration, as a physical venue for the hearing, as a place for enforcement, or as a place in which to challenge an award. This edition includes reports on 26 national jurisdictions. The author, or authors, of each chapter have been asked to address the same 51 questions. All relate to essential, practical information about the local approach and requirements relating to challenging or seeking to enforce awards. Obviously, the answers to a common set of questions will provide readers with a straightforward way in which to assess the comparative advantages and disadvantages of competing jurisdictions.

With this approach, we have tried to produce a coherent and comprehensive coverage of many of the most obvious, recurring or new issues that are now faced by parties who find that they will need to take steps to enforce these awards or, conversely, find themselves with an award that ought not to have been made and should not be enforced.

Quality control and future editions

Having taken on the task, my aim as general editor has been to achieve a substantive quality consistent with *The Guide to Challenging and Enforcing Arbitration Awards* being seen as an essential desktop reference work in our field. To ensure content of high quality, I agreed to go forward only if we could attract as contributors those colleagues who were some of the internationally recognised leaders in the field. Emmanuel, Gordon and I feel blessed to have been able to enlist the support of such an extraordinarily capable list of contributors.

In future editions, we hope to fill in important omissions. In Part I, these could include chapters on successful cross-border asset tracing, the new role played by funders at the enforcement stage, and the special skill sets required by successful enforcement counsel. In Part II, we plan to expand the geographical reach even further.

Without the tireless efforts of the Global Arbitration Review team at Law Business Research, this work never would have been completed within the very tight schedule we allowed ourselves; David Samuels and I are greatly indebted to them. Finally, I am enormously grateful to Doris Hutton Smith (my long-suffering PA), who has managed endless correspondence with our contributors with skill, grace and patience.

I hope that all my friends and colleagues who have helped with this project have saved us from error – but it is I alone who should be charged with the responsibility for such errors as may appear.

Although it should go without saying, this second edition of this publication will obviously benefit from the thoughts and suggestions of our readers on how we might be able to improve the next edition, for which we will be extremely grateful.

J William Rowley QC

London

April 2021

Part I

Issues relating to Challenging and Enforcing
Arbitration Awards

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Due Process and Procedural Irregularities: Challenges

Simon Sloane and Emily Wyse Jackson¹

Introduction

The integrity of any dispute resolution mechanism depends on the observance of due process or procedural fairness.² Less obvious, particularly in the context of international arbitration, is what that concept entails and where its boundaries lie. At what point does an unfavourable procedural decision become a violation of a party's procedural rights?

The answer to this question is not just of theoretical interest. Two key characteristics of international arbitration are the flexibility afforded to parties (marshalled by the tribunal) to tailor the procedure and the robust framework that exists for the enforcement of awards rendered. The concept of due process affects both of them: a tribunal's procedural discretion is largely unfettered save for the requirement to observe due process, and a failure to do so is one of only a few widely recognised grounds for setting aside an award or refusing to enforce it.

1 Simon Sloane is a partner and Emily Wyse Jackson is a senior associate at Fieldfisher LLP. The authors would like to thank Yana Dorking for her valuable assistance in preparing this chapter.

2 G Born, *International Commercial Arbitration* (Third Edition), Kluwer Law International, 2021, p. 2300: 'Care must be exercised with regard to the terminology used concerning matters of procedural fairness in international arbitration, to avoid unnecessarily implying that domestic procedural standards apply to the international arbitral process. Thus, some authorities refer to "due process" – a term which is often used, with particular legal meanings, in domestic legal systems – in international arbitration. The better approach is to avoid phrases which coincide with domestic procedural rules, instead referring neutrally to "procedural fairness".'

Legal basis for due process

There is no single definition of ‘due process’ in international arbitration and the term itself is not used in the leading arbitral instruments. Rather, ‘due process’ encapsulates a number of key principles of procedural fairness recognised both in international rules and conventions and in the domestic law of developed legal systems.

A good starting point is the UNCITRAL Model Law³ (the Model Law), which provides (at Article 18) that ‘the parties shall be treated with equality and each party shall be given a full opportunity of presenting its case’.

The Model Law forms the basis of the domestic arbitration law of more than 115 jurisdictions,⁴ including Australia, Canada, the Dubai International Financial Centre and Singapore, and has been described as ‘representative of the mandatory requirements of procedural fairness which apply to international arbitrations in most jurisdictions’.⁵ Some Model Law jurisdictions, such as New Zealand, have also cited the rules of natural justice as providing a legal basis for due process. For example, as was set out in the first edition of this chapter, the New Zealand High Court has affirmed that ‘[a]rbitrators must observe the requirements of natural justice’ and provided a comprehensive summary on what those rules require in the arbitration context.⁶

The various leading arbitration jurisdictions that have not based their domestic arbitration framework on the Model Law have adopted similar requirements.⁷ For example, the English Arbitration Act 1996 (AA) mandates that a tribunal shall ‘act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent’ (Section 33); while the French Code of Civil Procedure states that ‘[i]rrespective of the procedure adopted, the arbitral tribunal shall ensure that the parties are treated equally and shall uphold the principle of due process’ (Article 1510).⁸

In addition, the duty for arbitrators to act fairly and even-handedly finds expression in most major institutional rules: see Article 22(4) of the 2021 ICC Rules;⁹ Article 14.1 of the 2020 LCIA Rules¹⁰ and Article 17.1 of the 2013 UNCITRAL Rules.¹¹

3 1985 UNCITRAL Model Law on International Commercial Arbitration (as amended in 2006).

4 ‘Status: UNCITRAL Model Law on International Commercial Arbitration (1985)’, https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status.

5 G Born, *op.cit.*, p. 2300.

6 See *Trustees of Rotoaina Trust v Attorney General* [1998] NZLR 452 (New Zealand High Court) at 463.

7 See G Born, *op.cit.*, Chapter 15; F Ferrari, F J Rosenfeld, et al. (eds), *Due Process as a Limit to Discretion in International Commercial Arbitration*, Kluwer Law International 2020, pp. 4 to 6.

8 Original language: ‘Quelle que soit la procédure choisie, le tribunal arbitral garantit l’égalité des parties et respecte le principe de la contradiction.’

9 ‘In all cases, the arbitral tribunal shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case.’

10 ‘[T]he Arbitral Tribunal’s general duties at all times during the arbitration shall include: (i) a duty to act fairly and impartially as between all parties, giving each a reasonable opportunity of putting its case and dealing with that of its opponent(s).’

11 ‘[T]he arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case.’

Content and requirements of arbitral due process

Although the precise articulation of the requirement of due process varies in different institutional rules and domestic arbitration statutes, at its core is a party's right to be treated fairly and to have a reasonable opportunity to present its case and to deal with that of its opponent.

What constitutes 'fair' and 'equal' treatment and a 'reasonable opportunity' to present one's case will depend on the circumstances.¹² In particular, 'equal treatment' does not necessarily mean treating the parties identically.¹³

Without attempting an exhaustive exposition of the requirements of due process, we have identified below a few recurrent themes in due process-based challenges.

Right to a hearing

In Model Law jurisdictions, tribunals are required to conduct a hearing if requested by a party (Model Law, Article 24(1)). A refusal in such cases can deprive a party of its right to be heard.

However, the lack of an oral hearing will not always result in a due process breach. Even when the Model Law provisions apply, a tribunal is not necessarily required to conduct an oral hearing if neither party has requested one.¹⁴ Section 34(2)(h) of the English AA grants discretion to a tribunal to determine 'whether and to what extent there should be oral or written evidence or submissions'.

A topical issue in the light of the covid-19 pandemic is whether due process is breached by a tribunal's order, against the wishes of a party, that a hearing take place remotely rather than in person. In most circumstances, a remote hearing will offer, in all material respects, the same opportunity to be heard as a physical one.¹⁵ Due process challenges on this basis have typically failed, therefore.

For example, in July 2020, the Austrian Supreme Court dismissed an annulment application based on a tribunal's decision not to postpone a scheduled hearing in the light of the covid-19 outbreak (as had been requested by the respondent) but to proceed

12 See *Trustees of Rotoaira Trust v. Attorney General* [1998] NZLR 452 [New Zealand High Court] at 463: 'The detailed demands of natural justice in a given case turn on a proper construction of the particular agreement to arbitrate, the nature of the dispute, and any inferences properly to be drawn from the appointment of arbitrators known to have special expertise'; *CBS v. CBP* [2021] SGCA 4, Civil Appeal No. 30 of 2020 [Singapore Court of Appeal], para. 68: 'The fundamental nature of the rules of natural justice means that they must not be sacrificed in the name of efficacy and due weight must be afforded to those rules. It is self-evident that this balance is not amenable to prescriptive rules and each case will turn on its precise facts and circumstances.'

13 Y Derains and E A Schwartz, *A Guide to the ICC Rules of Arbitration* (Second Edition), Kluwer Law International 2005, p. 229 ('in some cases, treating the parties in precisely the same manner may lead to unfair results, at least if "equality" is viewed in the abstract').

14 See *PT Asuransi Jasa Indonesia (Persero) v. Dexia Bank SA* [2006] SGCA 41.

15 *Município de Mariana and others v. BHP Group (formerly BHP BILLITON)* [2020] EWHC 928 (TCC) [High Court of England and Wales], para. 24. While acknowledging that whether or not a fair resolution by way of a remote hearing is possible is case-specific, the Court held that there is to be 'rigorous examination of the possibility of a remote hearing and of the ways in which such a hearing could be achieved consistent with justice before the court should accept that a just determination cannot be achieved in such a hearing'.

remotely instead.¹⁶ The Court noted that videoconferencing technology, which is now widely endorsed by state courts, can ensure effective access to justice and enable the parties to exercise their right to be heard, whereas insisting on an in-person hearing during the pandemic would stall the proceedings.¹⁷ Similarly, in December 2020, the ICSID Administrative Council refused an application by Spain to disqualify a tribunal on the basis that its decision to hold a virtual hearing in the midst of the pandemic lacked impartiality and the ‘high moral character’ required under the ICSID Convention. The Council observed that ‘[t]he Tribunal itself is best placed to assess and balance these risks and considerations [of ensuring due process and the expediency of the proceedings]’.¹⁸

Denial of opportunity to present argument or evidence

If a party is barred without good reason from putting forward evidence or making arguments on a relevant issue, this is likely to cause a due process violation. However, examples of successful challenges based on evidentiary rulings are rare.¹⁹ Issues such as extensions of time, the ability to introduce additional evidence and document disclosure ‘typically and almost inevitably are matters that fall within the discretion of the tribunal, which, after all, is primarily charged with deciding the matter fairly’.²⁰ Tribunals have considerable discretion to determine whether evidence is necessary and admissible,²¹ having regard to the relevant laws of the seat and rules of the institution, as applicable.

In *China Machine v. Jaguar Energy*, the Singapore Court of Appeal rejected an argument that the imposition of an ‘attorneys’ eyes only’ regime for document disclosure breached natural justice by limiting a party’s ability to inspect documents produced by the other side.²² The Court noted that the tribunal was ‘clearly conscious of the need to strike a *balance* between the competing interests of the parties’ and had deliberately built a safeguard into the process by allowing the affected party to apply to the tribunal for direct access to certain documents where necessary.²³ By contrast, in its 2021 decision in *CBS v. CBP*, the same Court held that an arbitrator’s refusal to hear any witness evidence, despite

16 Case No. 18 ONc 3/20s (Austrian Supreme Court), discussed in M Scherer, F Schwarz, H Ortner and J Ole Jensen, *In a ‘First’ Worldwide, Austrian Supreme Court Confirms Arbitral Tribunal’s Power to Hold Remote Hearings Over One Party’s Objection and Rejects Due Process Concerns*, Kluwer Arbitration Blog, 24 October 2020.

17 *id.*

18 *Landesbank Baden-Württemberg and others v. Kingdom of Spain* (ICSID Case No. ARB/15/45), Decision of the Chair of the ICSID Administrative Council on the Second Proposal to Disqualify All Members of the Tribunal, 15 December 2020, para. 137.

19 G Born, *op.cit.*, Chapter 25, p. 3453.

20 *China Machine New Energy Corp. v. (1) Jaguar Energy Guatemala LLC, (2) AEI Guatemala Jaguar Ltd* [2020] SGCA 12, Civil Appeal No. 94 of 2018, para. 4.

21 See, e.g., *K v. S* [2019] EWHC 2386 (Comm). The court refused to annul an award based on a tribunal’s decision to exclude expert evidence where it considered that matters raised in the expert’s report had not been pleaded. The applicant had had ample opportunity to justify its request, to which the tribunal had given due consideration. The court noted that it had been relevant to the tribunal’s decision that it considered that to allow the report into evidence could in fact deprive the opposing party of a reasonable opportunity to put its case (*ibid.*, at [40]).

22 *China Machine New Energy Corp. v. (1) Jaguar Energy Guatemala LLC, (2) AEI Guatemala Jaguar Ltd* [2020] SGCA 12, Civil Appeal No. 94 of 2018, paras. 19, 109 to 115.

23 *ibid.*, para. 113 (emphasis in original).

one party contending that witness evidence was necessary in relation to a key issue in the case, breached the requirements of natural justice. Significantly in that case, the applicable arbitration rules obliged a tribunal to hold a hearing for oral witness evidence at a party's request (subject to certain limits).²⁴

Due process does not entitle parties to unlimited rounds of submissions²⁵ or to ignore the timetable prescribed by the tribunal. As articulated by the Swiss Federal Tribunal, '[a]n entitlement to evidence exists only to the extent that the evidential submission took place timely and in compliance with formal requirements'.²⁶

It may constitute a breach of due process if a tribunal ignores evidence or arguments that have been duly submitted, or makes its decision on arguments or evidence that have not been ventilated in the proceedings. In other words, a party's right to be heard includes a right:

to have reasonable and fair notice: (A) from the opposing party of the case it must meet on each issue of fact or law [that forms] an essential link in the chain of reasoning leading to the relief it seeks . . . ; and (B) from the tribunal of any other issue which the tribunal adopts as an essential link in the chain of reasoning leading to its decision on the matters before it

and

*to have the tribunal make some attempt bona fide to understand, engage with and apply its mind to its case on [each of those issues]*²⁷

For example, in *Fleetwood Wanderers Limited v. AFC Fylde Limited*, the English High Court found that an arbitrator breached due process by failing to notify the parties of, or allow them to make submissions on, communications he had with a third party on a relevant issue.²⁸ In *Kazakhstan v. World Wide Minerals Ltd*, a breach of due process was found where damages were awarded without either party having advanced submissions as to quantum

24 *CBS v. CBP* [2021] SGCA 4, Civil Appeal No. 30 of 2020. The Court acknowledged that 'tribunals have the power to limit the oral examination of witnesses as part of their general case management powers' (para. 61). However, in the circumstances, and having regard to the applicable arbitral rules (SCMA), the arbitrator's insistence that the party show that its evidence had 'substantive value' before deciding whether or not to allow it constituted a 'material breach' of natural justice (para. 71).

25 See, e.g., Decision of 1 August 2018 (Tokyo High Court), reported in 金融商事判例 (Kinyū Shōji Hanrei) Vol. 1551, 13, cited in F Ferrari, F J Rosenfeld, et al. (eds), *op.cit.*, p. 21. See also *CBS v. CBP* [2021] SGCA 4, Civil Appeal No. 30 of 2020, para. 50: a 'full' opportunity to be heard does not mean an 'unlimited' opportunity, and 'considerations of reasonableness, efficiency and fairness' must be balanced against the right afforded.

26 *X._____ v. Jamaican Football Federation and FIFA*, 4A_162/2011 (Swiss Federal Supreme Court), para. 2.3.2, cited in G Born, *op.cit.*, p. 3452.

27 *CDX and another v. CDZ and another* [2020] SGHC 257 [Singapore High Court], para. 34.

28 *Fleetwood Wanderers Limited (t/a Fleetwood Town Football Club) v. AFC Fylde Limited* [2018] EWHC 3318 (Comm). The High Court of England and Wales concluded that, had the parties been afforded the opportunity to make representations on these communications, it was possible that the arbitrator might have reached a different conclusion.

on the basis (which ultimately transpired) that the claimant was only partially successful on liability.²⁹ However, this type of argument will not succeed if the relevant argument or evidence was ‘in play’ but the party elected not to deal with it.³⁰

Relatedly, the taking of witness evidence is not a uniform process across the international arbitration landscape, with different practices permitted in different jurisdictions. The ICC Commission Report (published in November 2020) on the accuracy of fact witness memory in international arbitration³¹ raises valid concerns regarding witness statement preparation and how this process should be considered by practitioners. It rightly does not seek to prescribe how tribunals should deal with the matter. However, by proposing possible approaches tribunals might take, the ICC may have signposted another door into Alice’s Wonderland through which ‘due process’ challenges can be dragged by proverbial ‘white rabbits’.

Failure to act impartially

It has been said that, as well as the right to be heard, the right to ‘a disinterested and unbiased tribunal’ forms one of the ‘two pillars of natural justice’.³² It follows that an award may be challenged if an arbitrator fails to act fairly and impartially as between the parties.

However, the standard of proof for such an allegation is high and courts will be slow to conclude that an unfavourable procedural decision is indicative of bias against a party.³³ For example, in *BSG v Vale*, the applicant argued before the English High Court that an LCIA tribunal’s decision not to allow into evidence the 2,000-page transcript of parallel ICSID proceedings, three months after the hearing in the LCIA proceedings had closed, amounted to apparent bias. This argument was given short shrift by the Court, which found that it was ‘plainly within the discretion of the Tribunal’ to decide whether to admit the evidence and that ‘new and dramatic evidence was needed to be put before the Arbitrators in order for them to be persuaded to take the exceptional step of admitting further evidence and opening up the arbitration’. On the facts, the Court was ‘satisfied that there was no apparent bias, no procedural irregularity under s. 68 and, in any event, no substantial injustice’.³⁴

29 *The Republic of Kazakhstan v. (1) World Wide Minerals Limited, (2) Paul A Carroll QC* [2020] EWHC 3068 (Comm). By contrast, a claim brought on similar grounds to those in the *Kazakhstan* case was rejected by the Singapore High Court in *CDX and another v. CDZ and another* [2020] SGHC 257. The Court found as a fact that (contrary to the applicants’ submission) the claimants had advanced a claim for damages in the alternative to their primary claim for rescission and the applicants (the respondents in the arbitration) had recognised that this was an issue before the arbitrator (*ibid.*, paras. 36, 37, 112 to 129).

30 *CDX and another v. CDZ and another* [2020] SGHC 257, para. 113.

31 ICC Commission, *The Accuracy of Fact Witness Memory in International Arbitration*, ICC publication DRS 890 ENG, November 2020: <https://iccwbo.org/content/uploads/sites/3/2020/11/icc-arbitration-adr-commission-report-on-accuracy-fact-witness-memory-international-arbitration-english-version.pdf>.

32 *CDX and another v. CDZ and another* [2020] SGHC 257, para. 34(a).

33 See F Ferrari, F J Rosenfeld, et al. (eds), *op.cit.*, p. 38.

34 *BSG Resources Limited v Vale S.A., Filip De Ly, David A.R. Williams, Michael Hwang* [2019] EWHC 3347 (Comm), paras. 12 and 19 to 20.

Conclusion

As is apparent from the case law examples above, not every procedural decision made by a tribunal involves issues of due process and not every procedural irregularity by a tribunal will be a breach of due process; on the contrary, most will not. The right to due process is a protection from egregious and injudicious conduct by an arbitral tribunal. It is not intended to protect a party from its own failures and strategic choices,³⁵ nor to confer an entitlement to have every aspect of the procedure determined according to its preference.

Notably, some commentators have observed a move over time to narrow the language in which this right is expressed, with the intention not of diminishing parties' rights but of minimising tactical abuse of more open language, as discussed above. For example, although Article 15(1) of the 1976 UNCITRAL Rules stated that parties should be afforded 'a full opportunity' to present their case 'at any stage of the proceedings', Article 17(1) of the 2013 revision provides for 'a reasonable opportunity' to present one's case at 'an appropriate stage of the proceedings'.³⁶

If due process has been breached, a party may (1) apply to the courts of the jurisdiction where the arbitration was seated to have the award set aside or annulled, or (2) challenge the award in the courts of a jurisdiction in which enforcement is sought. However, as discussed in the following sections, the threshold for succeeding on such challenges is generally high and they should be treated with great caution.

Setting aside an award for breach of due process

Lack of due process is typically one of the limited grounds specified in domestic arbitration legislation as a basis for setting aside an award. However, as confirmed by a 2018 report on the practice of 13 major arbitration jurisdictions,³⁷ courts are largely supportive of arbitration and will be reluctant to set aside an award for purely procedural reasons.³⁸

In England and Wales, for example, in the court years 2015–2017 and 2017 to March 2018, only one of 112 challenges on this basis was successful,³⁹ and in 2018–2019 again 'very few' such challenges succeeded.⁴⁰ Interestingly, the number of these challenges brought in 2018–2019 in England and Wales dropped by nearly 75 per cent, causing one judge to express his 'hope that parties were hearing the message that the hurdle for these applications is high'.⁴¹ In France, the proportion of successful challenges is higher than in England but still low: between 2016 and 2018, only one in four annulment claims succeeded.⁴²

35 See *Re Corporacion Transnacional de Inversiones S.A. de C.V. et al. v. STET Internacional S.p.A. et al.* [Canadian Superior Court of Justice], 22 September 1999.

36 See L Reed, 'Ab(use) of due process: sword vs shield', in William W Park (ed), *Arbitration International*, Oxford University Press 2017, Volume 33, Issue 3, p. 370.

37 International Bar Association, *Annulment of arbitral awards by state court: Review of national case law with respect to the conduct of the arbitral process*, October 2018.

38 See generally F Ferrari, F J Rosenfeld, et al. (eds), *op.cit.*, Chapter 1.

39 England and Wales Commercial Court Users' Group: Meeting Report – March 2018.

40 England and Wales Commercial Court Users' Group: 20 November 2019.

41 *id.*

42 G Meijer in Goldman (ed.), *Annulment and Enforcement of Arbitral Awards from a Comparative Law Perspective*, Wolters Kluwer 2018, p. 118.

In Model Law jurisdictions, an award may be set aside if ‘the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case’.⁴³ Some Model Law jurisdictions provide for additional due process-related grounds for setting aside an award. For example, the Singapore International Arbitration Act also allows an award to be set aside when ‘a breach of the rules of natural justice occurred in connection with the making of the award by which the rights of any party have been prejudiced’.⁴⁴

In England and Wales, Section 68 of the AA provides that an award may be set aside on the ground of ‘serious irregularity affecting the tribunal, the proceedings or the award’ that ‘has caused or will cause substantial injustice to the applicant’. A 1996 report on the (then) Arbitration Bill explained that this provision was ‘designed as a long stop, only available in extreme cases where the tribunal has gone so wrong in its conduct of the arbitration that justice calls out for it to be corrected’.⁴⁵

If this high threshold is met, the court may (1) remit the award back to the tribunal for reconsideration, (2) set aside the award or (3) declare the award ineffective, in each case in whole or in part. The primary remedy is remission, which must be ordered unless the court considers it would be inappropriate to do so (e.g., in cases of tribunal bias). An interesting issue in this regard is whether it is appropriate for the parties to incur further costs – and the tribunal to be further compensated – for time spent by the tribunal remedying its own breach.⁴⁶

Section 68 of the AA sets out a ‘closed list’⁴⁷ of qualifying ‘irregularities’, including failure by the tribunal to comply with its duty under Section 33 to act fairly and impartially and to allow each party a reasonable opportunity to present its case, as well as failure by the tribunal to deal with all the issues that were put to it. The term ‘substantial injustice’ is not defined in the AA but this element of the test was ‘designed to eliminate technical and unmeritorious challenges’.⁴⁸ Although an applicant does not need to show that the outcome of the proceedings ‘would necessarily or even probably have been different’,⁴⁹ it must show that, had the breach not occurred, ‘the Tribunal might well have reached a different conclusion from that which it reached’.⁵⁰

43 1985 UNCITRAL Model Law on International Commercial Arbitration (as amended in 2006), Article 34(2)(a)(ii).

44 International Arbitration Act of Singapore (2002 Rev Ed, with amendments as at 1 June 2012), Chapter 143A, Article 24(b).

45 ‘The 1996 DAC [Departmental Advisory Committee on Arbitration] Report on the English Arbitration Bill’, *Arbitration International*, Volume 15, Issue 4, 1 December 1999, [1996 DAC Report], para. 280.

46 See R-J Temmink, *Who should pay for serious irregularities in international arbitration?*, *Lexology*, 4 May 2018.

47 1996 DAC Report, op.cit., para. 282; *Lesotho Highlands Development Authority v Impregilo SpA* [2006] 1 A.C. 221, at 236.

48 *Lesotho Highlands Development Authority v Impregilo SpA* [2006] 1 A.C. 221, at 236.

49 *The Republic of Kazakhstan v. (1) World Wide Minerals Limited, (2) Paul A Carroll QC* [2020] EWHC 3068 (Comm), para. 23, quoting from *Terna Bahrain Holding Company WLL v. Al Shamsi* [2012] EWHC 3283 (Comm) [2013] 1 Lloyd’s Rep 86 at para. 85.

50 *The Republic of Kazakhstan v. (1) World Wide Minerals Limited, (2) Paul A Carroll QC* [2020] EWHC 3068 (Comm), para. 56.

Other jurisdictions, such as Switzerland,⁵¹ require an applicant to prove that the breach of process identified was outcome-determinative. In Singapore, the test is whether the ‘rights of any party have been prejudiced’, which the courts have interpreted as requiring that the breach denied the applicant the benefit of arguments or evidence that had ‘a real as opposed to a fanciful chance of making a difference to [the arbitrator’s] deliberations’.⁵²

An important requirement in many jurisdictions is that any breach of due process is raised promptly by the wronged party and, where possible, the tribunal is given the opportunity to cure the breach. In England and Wales, this principle is reflected in Section 70 (which obliges a party first to exhaust any arbitral processes of review or appeal or any powers of the tribunal to amend or supplement the award) and Section 73 (which provides that a right to challenge may be lost if the wronged party does not make an objection on first becoming aware of the irregularity) of the AA. The rationale behind these requirements is to ensure parties do not hold back their objections to the post-award stage, to try to obtain a tactical advantage if the award turns out not to be favourable.⁵³ As the Singapore Court of Appeal has observed, ‘to countenance such hedging would be fundamentally unfair to the process itself, to the tribunal and to the other party’.⁵⁴

Challenging enforcement for breach of due process

The New York Convention (the Convention),⁵⁵ which provides a framework for the recognition and enforcement of foreign arbitral awards in the 166 contracting states (at the time of writing), allows for a due process challenge to be brought at the enforcement stage. It provides (at Article V(1)(b)) that ‘[r]ecognition or enforcement of the award may be refused’ if the award debtor ‘was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case’. An equivalent provision is found in Article 36(1)(a)(ii) of the Model Law.

In most cases, a party with a due process complaint will be able to seek to set aside the award in the courts of the seat (and then resist enforcement under Article V(1)(e) of the Convention). However, the Convention drafters acknowledged that this would not always be the case (e.g., if the jurisdiction of the seat has no mechanism for annulment), and it was for that reason that Article V(1)(b) was necessary.⁵⁶ In the England and Wales High Court decision in *Malicorp v. Egypt*, enforcement was refused on both grounds: not only had the award been set aside at the seat, but the tribunal’s decision to award damages on a basis for which the claimant had never argued ‘must have been a complete surprise to Egypt’ and constituted a ‘serious breach of natural justice’.⁵⁷

51 4A_424/2018 (Swiss Federal Supreme Court) 29 January 2019.

52 *LW Infrastructure Pte Ltd v. Lim Chin San Contractors Pte Ltd and another appeal* [2013] 1 SLR 125, para. 54, quoted in *CBS v. CBP* [2021] SGCA 4, Civil Appeal No. 30 of 2020, para. 84.

53 F Ferrari, F J Rosenfeld, et al. (eds), op.cit., pp. 13 to 17.

54 *China Machine New Energy Corp. v. (1) Jaguar Energy Guatemala LLC, (2) AEI Guatemala Jaguar Ltd* [2020] SGCA 12, Civil Appeal No. 94 of 2018, para. 170.

55 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

56 M Paulsson, *The 1958 New York Convention in Action*, Kluwer Law International 2016, p. 183.

57 *Malicorp Ltd v. (1) Government of the Republic of the Arab Republic of Egypt, (2) Egyptian Holding Company for Aviation, (3) Egyptian Airports Company* [2015] EWHC 361 (Comm), paras. 41 to 42.

Domestic courts applying Article V(1)(b) of the Convention have observed that the use of the word ‘may’ in its text confers a discretion as to whether or not to refuse recognition and enforcement on this basis, thus allowing for the application of tests similar to those applied in the set-aside context. For example, the Supreme Court of Hong Kong has noted that one ‘could envisage circumstances where the court might exercise its discretion [to enforce the award], having found the ground established, if the Court were to conclude, having seen the new material which the defendant wished to put forward, that it would not affect the outcome of the dispute’.⁵⁸

One example of a successful challenge to enforcement based on due process is the December 2020 decision of the Paris Court of Appeal in *Al Misnad v. SEQG*.⁵⁹ The Court refused under Article 1520 of the French Civil Procedure Code to enforce a US\$26 million award on the basis that the tribunal’s decision to determine the seat of the arbitration outside Qatar and to substitute *ad hoc* for institutional proceedings without consulting the parties or allowing them to make submissions on the issue was a breach of due process, including on the basis of impartiality. A striking feature of the case was the conviction of the three-member tribunal by a criminal court in Doha for participating in a scheme to cause intentional harm to the respondent (an uncle of the Emir of Qatar), a move that has been described as ‘unprecedented’⁶⁰ and widely condemned by the international arbitration community.

As discussed in relation to the set-aside stage, courts are generally alive to the distinction between a merely unwelcome procedural decision and a due process violation. For example, in *Gold Reserve Inc v. Bolivarian Republic of Venezuela*,⁶¹ the England and Wales High Court dismissed Venezuela’s attempt to resist enforcement on the basis that it had been unable to present its case in an ICSID Additional Facility proceeding because the division of hearing time was unequal, in circumstances where Venezuela had itself requested a condensed hearing and chosen not to cross-examine the claimant’s witnesses.

Conclusion

As was noted in the first edition of this chapter, an unfortunate trend in arbitration practice has seen parties attempting to use (or abuse) the essential safeguard of due process for tactical reasons. The spectre of annulment or non-enforcement of an award for want of due process is raised by parties hoping to influence tribunals’ procedural decision-making in their favour (by triggering what is often referred to as ‘due process paranoia’), to delay or disrupt the proceedings or even to frustrate enforcement of the award. If this type of manoeuvring is permitted to succeed, the costs of proceedings soar, timelines extend and confidence in the system is diminished.

58 *China Nanhai Oil Joint Service Corporation Shenzhen Branch v. Gee Tai Holdings Co. Ltd* [High Court of Hong Kong] 1992 No. MP 2411, in A J van den Berg, *Yearbook Commercial Arbitration* (Volume XX), Kluwer Law International, 1995 at pp. 671 to 680, quoted in M Paulsson, *op.cit.*, p. 161.

59 *Al Misnad v. Societe d’entreprise et de Gestion-Qatar Wll* [2020] No. RG 18/01504 [Paris Court of Appeal].

60 ICC President Alexis Mourre, quoted in ‘Conviction of arbitrators in Qatar – Mourre writes to Emir’, *Global Arbitration Review*, 31 December 2018: <https://globalarbitrationreview.com/criminal-proceedings/conviction-of-arbitrators-in-qatar-mourre-writes-emir>.

61 *Gold Reserve Inc. v. Bolivarian Republic of Venezuela* [2016] EWHC 153 (Comm).

Encouragingly, however, courts have generally proved unwilling to indulge such tactics. In most major arbitration jurisdictions, courts are respectful of tribunals' procedural discretion and step in to police its exercise only when a true threat to the integrity of the process is detected.⁶² As one leading commentator has observed: 'The courts have this (mostly) under control. If some tribunals still risk mismanaging proceedings because of "due process paranoia", they are ignoring the ample reassurance and practical advice to be had.'⁶³

Of particular current relevance, it is now clear that remote evidential hearings are an acceptable procedural option and, in many cases, can provide significant savings in both time and cost (not to mention reduced environmental impact) without any obvious effect on a tribunal's ability properly to assess the evidence or arguments presented. It is to be hoped that the appetite for virtual hearings does not dwindle as the covid-19 pandemic recedes.

62 See F Ferrari , F J Rosenfeld, et al. (eds), *op.cit.*, pp. 38 to 39.

63 L Ferguson Reed, 'Ab(use) of due process: sword vs shield', in William W Park (ed), *Arbitration International*, Oxford University Press 2017, Volume 33, Issue 3, p. 374.

Appendix 1

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Enforcement used to be an irrelevance in international arbitration. Most losing parties simply paid. Not so any more. The time spent on post-award matters has increased vastly.

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