CHAPTER 14

# The Alleged Failure of Arbitration to Address Due Process Concerns: Is Arbitration under Attack?

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Arbitration is a mechanism for settling disputes that has gained considerable success, first in international commercial disputes and later in investor-state disputes. More recently, both types of arbitration, but especially investment arbitration, have been exposed to harsh criticism.

Both types of arbitration are facing an erosion of their credibility, mainly based on doubts about the lack of efficiency in the proceedings, the impartiality and independence of the arbitrators and suspicions about the ability to accurately apply the law. To a large extent, these doubts are based on perceptions or misperceptions, rather than on factual circumstances. With reference to the main issues for which arbitration is being criticized, this chapter explores whether there is reason to fear that the institution of arbitration is not compatible with the principle of due process.

## §14.01 INTRODUCTION

Arbitration is a mechanism for settling disputes that has gained considerable success, first in international commercial disputes, and later in investor-state disputes. More recently, both types of arbitration, but especially investment arbitration, have been exposed to harsh criticism.

With reference to the main issues for which arbitration is being criticized, this chapter explores whether there is reason to fear that the institution of arbitration is not compatible with the principle of due process.

*Commercial* arbitration is criticized particularly for having lost of sight its original feature as a method for dispute settlement: its flexibility and closeness to the parties. Arbitration proceedings are often described as having become unnecessarily costly and

time-consuming, as well as overregulated.[1] In addition, arbitral tribunals are increasingly scared of being criticized for violating procedural rights of the parties, and indulge the parties in sometimes unreasonable requests that new claims or new evidence be admitted, that terms be extended, etc. – falling for what is often called 'due process paranoia' and unnecessarily inflating the duration and cost of the proceedings. As a reaction, arbitration institutions sometimes reform their rules, in the name of expedience, to an extent that may overreach and lead to the opposite extreme.

Furthermore, critical voices are increasingly being raised against one of the pillars of commercial arbitration, the principle of confidentiality. While calls for transparency in commercial arbitration do not achieve the intensity that can be registered in investment arbitration, significant developments in the practice of commercial arbitration are introducing some transparency.

Also, the sometimes possibly excessive enthusiasm professed by part of the arbitration community about the autonomy of arbitration and its independence from national laws and national courts seems to increasingly give rise to a mistrust towards the appropriateness of permitting arbitration for those disputes in which an accurate application of the law is deemed to be crucial. As a consequence of the suspect that arbitration might exceed in its autonomy, the scope of the disputes that may be arbitrated has been in several instances reduced. The scope of arbitrability is threatened also by the risk that court control may be restricted so as to prevent the courts from meaningfully verifying whether the award is compatible with fundamental principles.

As far as *investment* arbitration is concerned, loud criticism has been moved questioning its legitimacy and its ability to properly have regard to the public interests involved. Criticism against investment arbitration led to, among other things, a mandate by the United Nations Commission on International Trade Law (UNCITRAL) to its Working Group III to work on the possible reform of investor-state dispute settlement. As summarized in the note prepared by the UNCITRAL Secretariat for the first session held in the UNCITRAL Working Group III, the criticism regards these main points: (i) inconsistency in arbitral decisions, (ii) limited mechanisms to ensure the correctness of arbitral decisions, (iii) lack of predictability, (iv) appointment of arbitrators by parties ('party-appointment'), (v) the impact of party appointment on the impartiality and independence of arbitrators, (vi) lack of transparency, and (vii) increasing duration and costs of the procedure.[2] While not all the issues mentioned in this list may raise due process concerns, some may potentially be relevant to questions such as access to justice or fairness of the proceedings, which are usually considered to be part of the due process principle.

1. Queen Mary and White&Case 2015 Survey 'Improvements and Innovations in International Arbitration', available at http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2015_International_Arbitration_Survey.pdf.
2. Working Group III (Investor-State Dispute Settlement Reform), thirty-fourth session, Vienna, 27 November-1 December 2017, Possible reform of investor-State dispute settlement (ISDS) – Note by the Secretariat, A/CN.9/WG.III/WP.142, para. 20.

Criticism against investment arbitration has prompted certain developments in the legal framework. Nevertheless, recent investment treaties restrict arbitration considerably.[3] Furthermore, the European Union (EU) took the political decision to discontinue the choice of arbitration contained in the existing investment treaties entered into between Member States and took an active position against arbitration also as far as regards treaties with third states. [4]

The need to ensure an accurate application of EU law, furthermore, has led the Court of Justice of the European Union (CJEU) to exclude the arbitrability of investment disputes between EU Member States.[5] While it is possible to draw some parallels with analogous developments in commercial arbitration, the CJEU seemed to accept that commercial tribunals may solve disputes relating to EU law, as long as appropriate court control is possible. For investment arbitration, the CJEU denied arbitrability of disputes relating to EU law. The different treatment of commercial and investment arbitrability was explained, quite unconvincingly, with a distinction between the respective sources of the arbitral power.

The criticism against investment arbitration has not only a legal but also a political dimension. In this framework, it has been observed that the debate on the legitimacy of investment arbitration is not necessarily only about facts but also about perceptions.[6]

Hence, the ability of arbitration to comply with due process may sometimes be questioned more from a political perspective or from the point of view of perceptions, than on the basis of objective and technical legal arguments.

All the above has created a climate of suspicion against arbitration that can be summarized with an observation made by one of the grey eminences of arbitration, Yves Derain:[7] 'arbitration is under attack'.

This chapter explores to what extent the institution of arbitration as such is capable of safeguarding, as a dispute settlement mechanism, the principle of due process. To this aim, I will briefly address possible sources for determining the specific content of the principle of due process (in section 14.02), attempt to define the content of the principle (in section 14.03), discuss to what extent compliance with the legal framework applicable to arbitration may be deemed to be a necessary condition to meet the requirements of the principle of due process (in section 14.04), examine, in light of the criticism mentioned above, to what extent the legal framework applicable to arbitration may be deemed to be a sufficient condition to comply with the principle of due process (in section 14.05), and consider whether there is a basis to distinguish, in this context, between commercial and investment arbitration (in section 14.06).

3. For references, *see* UNCTAD, World Investor Report 2017 (WIR 2017), p. 120.
4. For references and comments, *see* Albert Jan van den Berg, 'Appeal Mechanism for ISDS Awards: Interaction with the New York and ICSID Conventions' (2019) 34 *ICSID Review,* 1-34, 8f.
5. Case C- 284/16 *Slovak Republic v. Achmea BV*.
6. Working Group III Note by the Secretariat, A/CN.9/WG.III/WP.142, cit., paras 42, 63; Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fifth session (New York, 23-27 April 2017), A/CN.9/935, paras 94-96.
7. At the 39th ICC Institute Annual Conference, 'Explaining why you lost – Reasoning in arbitration', 17 December 2019.

## §14.02 DUE PROCESS: SOURCES

Due process is a cornerstone for every adjudicative system, including arbitration. Each legal system has fundamental principles safeguarding the integrity and fairness of the process, often rooted in constitutional law. Also, in international law, due process is deemed to be one of the generally recognized principles.[8] In the field of transnational disputes, however, the notion of due process is elusive. An extensive comparative exercise, carried out by the International Institute for the Unification of Private Law (UNIDROIT) and the American Law Institute (ALI) and resulted in a soft law instrument on Transnational Civil Procedure, gives an idea of what procedural principles are generally recognized.[9] Among the principles emphasized in this instrument, are the necessity to respect each of the parties' right to be heard,[10] the principle of equality of arms,[11] and the requirement that the adjudicating body be independent and impartial.[12] It can be readily accepted that these principles are an integral part of the concept of due process.[13] However, these notions are quite vague. While it may be relatively easy, in case of evident violations in a specific case, to determine whether the principle of due process was breached, it is more difficult to define on general terms the exact content of the principle of due process.

For arbitration, the principle of due process is enshrined, among other sources, in Article 18 of the UNCITRAL Model Law of International Commercial Arbitration, [14] according to which 'the parties shall be treated with equality and each party shall be given a full opportunity of presenting its case'. Analogous requirements can be induced from the sources that permit to exercise judicial control on the decision rendered by an arbitral tribunal, and that will be discussed in section 14.03. Arbitral awards may be set aside or may be refused enforcement if certain fundamental principles were not respected during the process. Setting aside of arbitral awards is regulated by the national law of the country under the law of which the award was rendered; an instrument that successfully harmonized the arbitration law of eighty-five countries is the UNCITRAL Model Law.[15] This applies both to commercial arbitration and to investment arbitration that is carried out under the rules designed for commercial

8. *See* Charles T. Kotuby Jr. and Luke A. Sobota, *General Principles of Law and International Due Process,* Oxford University Press 2017, with extensive references.
9. The text of the Principles and the accompanying commentary, adopted by the American Law Institute (ALI) in May 2004 and by the International Institute for the Unification of Private Law (UNIDROIT) in April 2004, is available at https://www.unidroit.org/english/principles/civilprocedure/ali-unidroitprinciples-e.pdf.
10. Article 5 of the ALI/UNIDROIT Principles of Transnational Civil Procedure.
11. Article 3 of the ALI/UNIDROIT Principles of Transnational Civil Procedure.
12. Article 1 of the ALI/UNIDROIT Principles of Transnational Civil Procedure.
13. Kotuby, Sobota, *General Principles of Law and International Due Process,* cit., 157-202, identify the following principles as the main content of the principle of due process: notice and jurisdiction, impartiality and independence, procedural equality and right to be heard, condemnation of fraud and corruption, evidence and burden of proof, res judicata.
14. UNCITRAL, 1985 Model Law on International Commercial Arbitration, revised in 2006, http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf.
15. For an updated status, *see* http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html.

arbitration, such as the UNCITRAL Arbitration Rules, the Arbitration Rules of the Stockholm Chamber of Commerce (SCC) or of the International Chamber of Commerce (ICC). For investment arbitration that is carried out under the International Centre for Settlement of Investment Disputes (ICSID) Convention,[16] annulment of awards is regulated in Article 52 of the convention itself, without reference to national law.

Enforcement of awards is regulated by the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[17] The New York Convention applies to commercial awards, as well as to investment awards rendered under the procedural rules for commercial arbitration. For investment arbitration that is carried out under the ICSID Convention, enforcement of awards is regulated in the convention itself, which creates in Article 54 an obligation to enforce the award as if it was a final court decision rendered in that state.

All these sources determine the grounds upon which arbitral awards may be set aside or refused recognition and enforcement. These grounds are meant to prevent that awards are effective if they have been reached as a result of unfair proceedings. Hence, it is possible to consider them as a measure of the due process principle in arbitration.

In a broader context, a possible basis to define due process may be found in the sources of international obligations for states. States may be deemed to have violated their international obligations if they permit and give effect to a process that disregarded certain fundamental principles.[18]

An obligation to grant access to a justice system capable of safeguarding certain fundamental principles can be found in international treaties on human rights. The European Convention on Human Rights[19] states, in Article 6, that 'everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law'.

However, these criteria cannot necessarily be identified with the content of the principle of due process. As the European Court of Human Rights (ECtHR) has repeatedly affirmed, some of the guarantees contained in Article 6 can be waived,[20] as long as certain conditions are met – particularly, the waiver must be voluntary and clear.[21] An agreement to arbitrate fulfils the conditions for waiving the Article 6 requirements, at least when the agreement is freely entered into by the parties.[22] Some

16. Convention on the Settlement of Investment Disputes between States and Nationals of Other States (adopted 18 March 1965, entered into force 14 October 1966) UNTS 575 (ICSID Convention or Washington Convention).
17. Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958, entered into force 7 June 1959) UNTS 330 (New York Convention).
18. On this basis, the ECtHR assessed Swiss law on arbitration in *Mutu and Pechstein v. Switzerland*, Decision of 2 October 2018, Application No. 40575/10 and 67474/10, paras 62-67.
19. Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953), UNTS 213 (ECHR).
20. *Osmo Suovaniemi v. Finland*, Decision of 23 February 1999, Application No. 31737, p. 4. *Mutu and Pechstein v. Switzerland* para. 145; *Tabbane v. Switzerland*, Decision of 1 March 2016, Application No. 41069/12, paras 33-36.
21. *Tabbane v. Switzerland*, paras 26f. In *Mutu and Pechstein v. Switzerland*, paras 94ff., the ECtHR confirms the distinction between voluntary and compulsory arbitration. The guarantees set forth in Article 6 may be waived only in case of voluntary arbitration.
22. *Mutu and Pechstein v. Switzerland,* paras 95f.

of the guarantees contained in Article 6, however, cannot be waived, not even when arbitration has been chosen voluntarily by the parties.[23] It is fair to assume that these non-waivable guarantees constitute an important part of the principle of due process. Which guarantees are non-waivable, however, has not been specified by the ECtHR. Hence, the specific content of the principle of due process in arbitration escapes a clear definition on the basis of Article 6.

Requirements similar to those contained in Article 6 of the European Convention on Human Rights (ECHR) are to be found in the Universal Declaration of Human Rights,[24] which in Article 10 reads: 'Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal […].'

Similarly, in the field of criminal procedure, the International Covenant on Civil and Political Rights[25] requires, in Article 14, equality before the courts and tribunals and a fair and public hearing by a competent, independent and impartial tribunal established by law.

The above overview shows that the international sources set out the principle of due process in rather general terms. The legal sources specifically applicable to arbitration must, in principle, be assumed to comply with this general framework: The New York Convention and the ICSID Convention are treaties in force in, respectively, 168[26] and 154[27] states, and the UNCITRAL Model Law is a soft law instrument adopted by the UNCITRAL and used as a model for arbitration law in eighty-five states.[28] This large support must be taken as a consensus that these instruments' conditions for validity, recognition and enforcement of awards are acceptable from the point of view of the states' more general obligations of safeguarding due process. To what extent this assumption is sound will be discussed in section 14.05 below.

That the legal framework for arbitration is compatible with the principle of due process appears also from a recently issued instrument of soft law, the Hague Rules on Business and Human Rights Arbitration.[29] The Hague Rules emphasize that arbitration can assist in implementing the UN Guiding Principles on Business and Human Rights.[30]

23. *Osmo v. Finland,* p 4.
24. Universal Declaration of Human Rights (adopted by the UN General Assembly Resolution 217 A(III) of 10 December 1948).
25. International Covenant on Civil and Political Rights (adopted 16 December 1966 and entered into force 23 March 1976), UNTS 999.
26. For an updated status, *see* https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2.
27. For an updated status, *see* https://icsid.worldbank.org/en/Pages/icsiddocs/ICSID-Convention.aspx.
28. https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status.
29. Hague Rules on Business and Human Rights Arbitration, launched 12 December 2019, by the Centre for International Legal Cooperation and the Business and Human Rights Arbitration Working Group, chaired by former ICJ Judge Bruno Simma, available at https://www.cilc.nl/cms/wp-content/uploads/2019/12/The-Hague-Rules-on-Business-and-Human-Rights-Arbitration_CILC-digital-version.pdf.
30. Hague Rules on Business and Human Rights Arbitration, Preamble, Comment No. 2. The UN Guiding Principles are available at https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

The Hague Rules are based on the UNCITRAL Arbitration Rules,[31] and have identified six features of human rights disputes that may require improvement of the UNCITRAL Arbitration Rules:[32] (a) the particular characteristics of disputes related to the human rights impacts of business activities; (b) the possible need for special measures to address the circumstances of those affected by the human rights impacts of business activities; (c) the potential imbalance of power that may arise in disputes under these Rules; (d) the public interest in the resolution of such disputes, which may require, among other things, a high degree of transparency of the proceedings and an opportunity for participation by interested third persons and states; (e) the importance of having arbitrators with expertise appropriate for such disputes and bound by high standards of conduct; and (f) the possible need for the arbitral tribunal to create special mechanisms for the gathering of evidence and protection of witnesses.

As will be discussed in section 14.05, the Hague Rules make some additions to the UNCITRAL Arbitration Rules for the purpose of adjusting the regulation to the needs of human rights disputes. These additions reveal that, while human rights disputes may require a special attention to the mentioned areas, the structure and principles of the UNCITRAL Arbitration Rules are not deemed to be inadequate. The UNCITRAL Arbitration Rules, in turn, are a soft law instrument providing procedural rules for arbitration proceedings that are carried out under the legal framework applicable to arbitration – including the above-mentioned rules on court control. Hence, according to the Hague Rules, the legal framework of arbitration is capable of solving human rights disputes and does not create due process concerns.

## §14.03 DUE PROCESS: CONTENT

If, as discussed above, the rules on court control may be a useful framework to determine the content of the principle of due process, the main elements of the principle can be broadly summarized to be the principle that each party must be heard, the principle of equality of arms, the principle of independence and impartiality of the tribunal, the principle that the tribunal shall not exceed the power that the parties voluntarily conferred on it. This is a distillate of the main safeguards contained in the sources on validity and enforceability of awards, as will be briefly presented below.

The body who controls the validity or the enforceability of an award derives its jurisdiction from the applicable law. In case of challenge to the award's validity, the applicable law is the arbitration law prevailing in the place of arbitration. For investment arbitration that is carried out under the ICSID Convention, annulment of awards is regulated in Article 52 of the convention itself, without reference to national law.

31. The UNCITRAL Arbitration Rules are a model contractual regulation of arbitral procedure. They were first issued in 1976, and revised in 2010. In 2013, a new edition accompanied by the UNCITRAL Transparency Rules was published. *See* https://uncitral.un.org/en/texts/arbitration/contractualtexts/arbitration.
32. Hague Rules on Business and Human Rights Arbitration, Preamble, point 6.

In case of the award's enforcement, the applicable law is, in the 168 countries who ratified it, the New York Convention. For investment arbitration that is carried out under the ICSID Convention, enforcement of awards is regulated in Article 54 of the convention itself.

National arbitration law differs from country to country; therefore, the court's process in case of a challenge to the award's validity need to be analysed on the basis of the national law that is applicable in the specific case. For the sake of simplicity, however, we will assume here that the national arbitration law corresponds to the UNCITRAL Model Law, as it does, more or less literally, in the eighty-five countries that are considered to be 'Model Law countries'.

As the court's powers, to the extent that is relevant here, are equivalent in the New York Convention and in the Model Law,[33] the analysis can be made without distinguishing between court control carried out in connection with challenge to the award's validity and court control carried out in connection with enforcement of the award. It should be emphasized, however, that, if the law applicable in a specific case does not belong to a Model Law country, or if it implements the Model Law with some discrepancies from the original, it will be necessary to verify whether the law applicable to annulment has diverging regulation.

The criteria contained in the New York Convention and the Model Law largely correspond to the criteria contained in Article 52 of the ICSID Convention.

Thus, an award rendered by an arbitral tribunal whose jurisdiction did not rest on a valid and binding arbitration agreement is not valid[34] and not enforceable;[35] an award rendered as a result of a proceeding that did not give each of the parties the possibility to present its case is not valid[36] and not enforceable;[37] an award rendered in excess of the jurisdiction granted on the arbitral tribunal is not valid[38] and not enforceable;[39] an award rendered by an arbitral tribunal that was not constituted in accordance with the parties' agreement or the applicable law, or as a result of proceedings that did not comply with the parties' agreement or the applicable procedural rules, is not valid[40] and not enforceable;[41] an award rendered on a non-arbitrable subject matter is not

33. This correspondence is intentional, *see* Gary Born, *International Commercial Arbitration,* 2nd ed., Kluwer Law International 2014, pp. 3186, 3340; Giuditta Cordero-Moss, *International Commercial Contracts,* Cambridge University Press 2014, p. 224.
34. Article 34(2)(a)(i) of the Model Law; Article 52(1)(a) and (b) of the ICSID Convention.
35. Article 36(1)(a)(i) of the Model Law and Article V(1)(a) of the New York Convention; Articles 25 and 26 of the ICSID Convention.
36. Article 34(2)(a)(ii) of the Model Law; Article 52(1)(d) and (e) of the ICSID Convention.
37. Article 36(1)(a)(ii) of the Model Law and Article V(1)(b) of the New York Convention.
38. Article 34(2)(a)(iii) of the Model Law; Article 52(1)(b) of the ICSID Convention.
39. Article 36(1)(a)(iii) of the Model Law and Article V(1)(c) of the New York Convention.
40. Article 34(2)(a)(iv) of the Model Law; Article 52(1)(a) and (c) of the ICSID Convention.
41. Article 36(1)(a)(iv) of the Model Law and Article V(1)(d) of the New York Convention.

valid[42] and not enforceable;[43] an award infringing fundamental principles (public policy) is not valid[44] and not enforceable.[45]

In addition, in the New York Convention and in the UNCITRAL Model Law there is a rule on public policy, which covers not only the procedural public policy but also the substantive public policy. While the ICSID Convention does not mention public policy as a ground to annul an award, it has a specific rule on the necessity that the award be reasoned. Regarding enforcement, ICSID awards are subject to the same regime as final court decisions in the enforcement country. To the extent the enforcement country has a public policy exception, therefore, it will apply also to ICSID awards.

The applicable provisions make it clear that judicial control is not meant to be an appeal. Judicial control is not the same as a review of the award on the merits, neither in respect of the assessment of facts nor in respect of the application of law. The direct consequence of this limitation of judicial control is that an award is final and binding, even if it contains errors of fact or errors of law. This is the basis upon which the system of arbitration, as we know it today, rests: international conventions, national laws, courts of law, legal doctrine and practitioners support the aim that arbitration is to be an effective and efficient means of dispute resolution. To achieve this aim, they widely recognize that awards must be final and binding. Effectiveness and efficiency of arbitration are important principles of arbitration law, and at the origin of the widespread arbitration-friendly attitude that has characterized legislation and case law in the past decades.

The provisions regulating judicial control on arbitral awards represent the limit of tolerance that legal systems have in respect of arbitral awards. They can, therefore, to a large extent be deemed to concretize the due process principle in arbitration.

The next sections 14.04 and 14.05 will discuss to what extent these requirements contained in the New York Convention, the UNCITRAL Model Law and the ICSID Convention are necessary or sufficient basis to comply with due process.

## §14.04 COMPLIANCE WITH LEGAL FRAMEWORK AS A NECESSARY CONDITION OF DUE PROCESS?

An award rendered in a process that did not comply with the requirements deriving from the rules on judicial control is not necessarily invalid or unenforceable, and thus does not necessarily violate the principle of due process.

As will be discussed immediately below, this is due not only to the circumstance that court control may be waived but also to the fact that the guarantees contained in the legal framework are not necessarily absolute.

42. Article 34(2)(b)(i) of the Model Law; Article 52 (1)(b) of the ICSID Convention.
43. Article 36(1)(b)(i) of the Model Law and Article V(2)(a) of the New York Convention; Articles 25 and 26 of the ICSID Convention.
44. Article 34(2)(b)(ii) of the Model Law; Article 52(1)(d) of the ICSID Convention, with respect to procedural public policy.
45. Article 36(1)(b)(ii) of the Model Law and Article V(2)(b) of the New York Convention.

Some national laws, such as Belgian, French, Swedish and Swiss law, permit the parties to exclude in advance their right to challenge the validity of the arbitral award. By permitting to exclude challenge of the award, these legal systems give effect to awards that may or may not be in compliance with the requirements for validity of awards.

That waiver of challenge is compatible with Article 6 of the ECHR has been confirmed by the ECtHR.[46] The ECtHR evaluated Swiss arbitration law that permits to exclude court control on the award, and concluded that it did not violate Article 6 of the ECHR. The court considered that the possibility to exclude court control was justified by the intent to promote an efficient arbitration system in Switzerland. In the eyes of the ECtHR, the interest in promoting an efficient arbitral system outweighed the interests protected by Article 6 of the convention. Hence, it is not necessarily a violation of due process if an award does not meet general criteria for validity, such as those set out in the Swiss Private International Law Act, which broadly correspond to the criteria for invalidity laid down in the UNCITRAL Model Law.

Furthermore, courts retain a discretion in the exercise of their control on the award. This confirms that the court's function as a safeguard of procedural principles does not respond to an absolute duty. Under Article 34 of the UNCITRAL Model Law, courts may set aside an award on the basis of the listed annulment grounds, but are not obliged to do so. Likewise, Article 52(3) of the ICSID Convention gives the ad hoc committee the authority to annul an award on any of the grounds for annulment, but does not create an obligation to do so.

Likewise, under the New York Convention, courts may refuse recognition and enforcement of an award that presents the procedural or substantive flaws listed in Article V, but are not obliged to do so.[47]Thus, an award that does not meet the requirements for recognition and enforcement derived from Article V may nevertheless be recognized and enforced. It must be concluded that the award does not necessarily violate the principle of due process, even though it breaches some of the criteria set out in Article V.

Moreover, the New York Convention permits states to apply their own law instead of the provisions of the convention if domestic law is more favourable to the

46. *Tabbane v. Switzerland*, paras 33-36.

47. In a past debate on this topic, this position was also supported by a linguistic argument, *see* Jan Paulsson, 'Rediscovering the N.Y. Convention: Further Reflections on Chromalloy', 12 *Mealey's International Arbitration Report* 4, 1997, 20-34, 24f. According to this argument, the English text ('recognition and enforcement […] may only be refused if […]') could be seen as a basis for the courts' discretion, because of its use of the verb 'may'. In reality, the verb 'may' is coupled with 'only if', and is meant to express that the only allowed grounds for refusing recognition and enforcement are those listed in the provision. The text, in other words, says nothing about the court's discretion to recognize and enforce an award notwithstanding that there is a ground for refusal. This is confirmed by a look at other language versions (I can only express a considered opinion on the French and the Russian versions, and also the Spanish version seems to suggest the same). Although the court's discretion may not necessarily be based on the language of the provision, there are good reasons for asserting it. If a process was flawed by a violation which is not very serious or which did not affect the outcome of the decision, reasons of effectiveness suggest that the award be recognized and enforced.

recognition and enforcement of the award.[48] If a state has a more arbitration-friendly regulation than Article V, the award may be recognized and enforced on the basis of that state's law, and the New York Convention will not be deemed violated, although the criteria set out in Article V may have been breached. Hence, the requirements for recognition and enforcement of awards that are listed in Article V of the New York Convention cannot necessarily be equated with the principle of due process.

It can be concluded that the principle of due process is not automatically violated even though the requirements laid down in the sources applicable to arbitration are not met, as long as these sources permit to give effect to the award on alternative bases. However, in these situations, the presumption that the due process principle was not violated may be weaker.

## §14.05 COMPLIANCE WITH THE LEGAL FRAMEWORK AS A SUFFICIENT CONDITION FOR DUE PROCESS?

The next question is whether arbitration may be deemed to give institutional guarantees of due process at least as long as it is carried out within the borders of what the applicable sources require for the validity and enforceability of an award. In other words: is due process automatically deemed to be safeguarded if the requirements for validity and enforceability of the award are met?

Generally, it can be assumed that the structure created by the legal framework applicable to arbitration is sufficient to ensure the respect of due process. As was mentioned above, the large support of the New York Convention, the UNCITRAL Model Law and the ICSID Convention must be assumed to represent a consensus that states do not breach their obligations relating to due process when they give effect to an award that meets the requirements imposed by that legal framework. Where due process is infringed in the specific case, normally the system for review of the award by the courts or, in the case of ICSID awards, by ad hoc committees permits to remedy.

The system of award review is meant precisely to safeguard the integrity and fairness of the process. The idea is that, notwithstanding the principle of finality of the awards, which is fundamental in arbitration law, there must be a possibility to review the award to ensure that fundamental principles have not been infringed in the process that led to the award. The two conflicting principles of awards' finality and need to safeguard basic procedural rights have to be balanced against each other. The result of the balancing is the existing system of court control (or ad hoc control for ICSID awards): the award is final on the merits, but it can be subject to control as far as due process issues are concerned.

In light of the growing criticism against arbitration, however, it is appropriate to enquire whether it is legitimate to assume that the existing legal framework captures all issues related to due process, and whether it does so in an efficient way. Based on recent practice and doctrinal debate, it seems that there are several issues that may have relevance to due process, and where it is often argued that an improvement of the

48. New York Convention, Article VII.

legal framework, or at least a more assertive application of the existing rules, may have beneficial effects. The question is whether potential for improvement is equal to violation of due process.

### [A] Length of the Proceedings: Costs

One of the main criticisms moved against arbitration is that arbitral proceedings have become too complicated and time-consuming. [49] The hypertrophy of arbitration has also a financial dimension, as it implies costs that are sometimes extremely high, possibly not proportionate to the value in dispute. [50]

This may have relevance to the principle of due process. On the one hand, the high costs may be an insurmountable obstacle for impecunious parties, thus preventing their access to justice.

On the other hand, too lengthy proceedings may result in a justice system that is so inefficient, that in practice it denies justice. The former aspect will be analysed immediately below, the latter in the subsequent section.

As regards the issue of access to justice by indigent parties, criticism has been raised in the context both of commercial and of investment arbitration.

To a large extent, however, the existing legal framework seems to be capable of providing acceptable solutions.

In the field of commercial arbitration, an example is a French Supreme Court decision[51] setting aside an award that had disregarded the respondent's counterclaim.

The arbitral tribunal had ruled that the counterclaim was inadmissible on the ground that the respondent, who was subject to insolvency proceedings, was not able to pay the advance deposit on costs that, according to the applicable arbitration rules, had to be paid for the counterclaim to be admitted.

By way of general explanation, the advance deposit for arbitration costs is calculated as an aggregate of the dispute's value, and is divided between the parties. If one party does not pay its share, payment of that share may be effected by the other party. In this way, the proceedings may be instituted and continue. If the advance deposit is not paid, arbitration costs are not covered, and the proceedings do not go forward. The arbitration rules of some institutions permit to allocate payment of the

49. The choice of devoting various sessions of the UNCITRAL Working Group II to an instrument for the promotion of mediation, which resulted into the adoption of the United Nations Convention on International Settlement Agreements Resulting from Mediation, is a symptom of the declining hegemony of arbitration. The same Working Group is presently working on an instrument for expedite arbitration, precisely to meet the growing criticism against the excessive features of arbitration, *see* Report of the United Nations Commission on International Trade Law Fifty-first session (25 June-13 July 2018), A/73/17, para. 244. *See also* the Working Group II (Dispute Settlement) sixty-ninth session New York, 4-8 February 2019, Note by the Secretariat, A/CN.9/WG.II/WP.207.
50. Queen Mary and White&Case 2018 International Arbitration Survey: The Evolution of International Arbitration, available at http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF.
51. Cour de Cassation, 1e civ., 28 March 2013, No. 11-27.770 (*Pirelli*).

advance deposit between the parties in proportion to the respective claims or counterclaims.[52] If one party does not effect payment of its share, that party's claim is not admitted. In the case before the Cour de Cassation, the respondent did not have the possibility to pay its share of the deposit because of its insolvency situation.

The court found that the claim and the counterclaim were necessarily interlinked, and that not admitting the counterclaim, while rendering a decision on the claim, would have deprived the respondent of the possibility to have the counterclaim heard at a later stage. This annulment decision is an example of how the existing legal framework may safeguard the due process principle in the specific case.

While the arbitration rules that led to the annulled award may be applied in a way that leads to unacceptable results, it does not seem that there is a compelling need to modify them: the allocation of the deposit between the parties is in the discretion of the arbitration institute (in the case at hand, of the International Court of Arbitration of the ICC), and so is the decision to consider a claim inadmissible.

In many cases, the decisions on allocation and on admissibility will not create due process issues;[53] in the cases in which due process may be relevant, it can be expected that the discretion of the arbitration institute will be exercised so as not to infringe it; should, in a specific case, due process be infringed, court control will intervene.

As far as investment arbitration is concerned, it has been put forward that its excessive costs may prevent developing states from having access to justice. [54]

Admittedly, investment proceedings may achieve costs that can be prohibitive. However, it has convincingly been argued that it is not correct to evaluate the cost of arbitration in absolute terms: the costs should be evaluated in relation to alternative, comparable mechanisms of dispute resolution.

When compared to the alternatives, the cost of investment arbitration becomes less outstanding. In particular, it has been pointed out that between 80% to 90% of the costs of investment arbitrations are represented by attorney and expert fees.[55]These are costs that would arise irrespective of the type of dispute resolution mechanism that is applied.

It is, on the one hand, correct that arbitration proceedings may become exceedingly lengthy and thus the costs increase accordingly. This may in part be explained in terms of the already mentioned due process paranoia that will be commented on below.[56]

52. *See*, for example, Article 37(3) of the ICC Arbitration Rules and Article 51(3) of the SCC Rules.
53. The same Cour de Cassation, for example, confirmed an award under similar circumstances, because in this case the claims were not necessarily interlinked: Cour de Cassation 1e civ., 17 October 2018, No. 17-21411.
54. Working Group III Note by the Secretariat, A/CN.9/WG.III/WP.142, cit., paras 40, 41, 64.
55. Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fourth session (Vienna, 27 November-1 December 2017), A/CN.9/930, paras 36, 43, 62.
56. Report of Working Group III on the work of its thirty-fourth session, A/CN.9/930, cit., para. 45.

Other reasons for the length of arbitration proceedings, however, are specific to disputes involving states: [57] the circumstance that investment disputes are solved on the basis of treaties, and treaty law may be fragmented and may require more thorough investigation than national law; or the circumstance that states may be constrained by domestic laws and may need more time than private parties to act in legal proceedings.[58]

Another aspect that has been mentioned is that investment arbitration generally follows the public international law approach characteristic of disputes between states, according to which each party bears its own costs, as opposed to allocating costs between the parties according to the outcome of the dispute. This prevents states from absorbing their costs even in case they win and is deemed to be an important disadvantage for states with a small economy.[59]

The matters described above can be addressed by the sound use of the arbitral tribunal's or the arbitral institution's discretion.[60]

### [B] Length of the Proceedings: Efficiency

Both in commercial and in investment arbitration, there is an emerging criticism against what is being perceived as an excessive deference to procedural requests by one of the parties (what has become fashionable to call the due process paranoia).

It can first of all be mentioned that, in case the parties agree on procedural measures that increase the duration or the level of complication of the proceedings, the arbitral tribunal is bound to follow the parties' instructions. The parties may agree on extensive discovery, on the use of multiple experts, on extensions of terms, on the admission of late claims, etc. In these cases, the excessive length of the proceedings is due to the parties' own determination, not to the inefficiency of arbitration.[61]

Due process paranoia arises when procedural requests are made by one party, and often opposed to by the other party. The tribunal's indulgence is in this case not dictated by the desire to comply with the parties' agreement; it is rather dictated by the fear that the party whose request was rejected attacks the award claiming that the tribunal violated due process guarantees by not admitting a new claim, by not requesting discovery of documentation, by not allowing multiple experts, by not

57. Report of Working Group III on the work of its thirty-fourth session, A/CN.9/930, cit., paras 45-52.
58. Report of Working Group III on the work of its thirty-fifth session, A/CN.9/935, cit., para. 36.
59. Report of Working Group III on the work of its thirty-fourth session, A/CN.9/930, cit., paras 39-41 and 53. *See also* Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of thirty-sixth session (Vienna, 29 October-2 November 2018), A/CN.9/964, paras 110-123.
60. A consequence of the high costs of arbitration is the development of different schemes for third-party funding of litigation. While the topic is attracting considerable attention, it is not exclusive to arbitration, but regards all kinds of litigation. Therefore, it will not be discussed here.
61. For similar considerations *see* Diego P. Fernández Arroyo, 'Nothing Is for Free: The Prices to Pay for *Arbitrabilizing* Legal Disputes', Loïc Cadiet, Burkard Hess, Marta Requejo Isidro (eds.), *Privatizing Dispute Resolution,* Nomos 2019, 617-646, 624.

granting an extension of terms, etc. Indulging the party's procedural requests burdens the process, but only rarely may itself become a violation of the other party's due process rights. The arbitral tribunal may thus reason that avoiding the risk that the award be set aside or refused enforcement on the basis that a party's requests were rejected outweighs the disadvantages of indulging excessive procedural requests by one party. The consequence of this calculation is that a dissatisfaction may grow among the users of arbitration, who witness that insufficiently assertive case management by the arbitral tribunal renders the proceedings inefficient and unnecessarily expensive. In extreme cases, hypertrophic proceedings may affect the efficiency to an extent that due process is violated.

To the extent these causes for long and costly proceedings do not depend on the parties' agreement or, as was mentioned above, on the participation of a state in a dispute, it seems to be possible to meet the concerns encouraging a more assertive case management.

The fear that courts may, in the name of due process, set aside or refuse enforcement as a consequence of the arbitral tribunal's case management is exaggerated.[62] Rather than a structural due process problem, therefore, the paranoia seems to be curable by enhancing an informed and sound use of the arbitral tribunal's discretion.

Arbitration rules are increasingly emphasizing the tribunal's procedural discretion: in her seminal 2016 Queen Mary School of International Arbitration – Freshfield Lecture,[63] Lucy Reed pointed out, for example, a change in the UNCITRAL Arbitration Rules. While the 1976 version, in Article 15(1), used to provide that parties would be given a 'full' opportunity of presenting their case 'at any stage of the proceedings', the 2010 version provides, in Article 17(1), that the parties are given a 'reasonable' opportunity of presenting their case at 'an appropriate stage'.

Furthermore, the UNCITRAL Commission launched a work on the efficiency of arbitration, with the aim of enhancing efficiency without losing sight of the quality of the proceedings and thus of due process.[64] Currently, in this framework, the Working Group II is drafting rules for expedited arbitration in ad hoc proceedings.[65]

Regarding investment arbitration, already in 2006, the ICSID Rules were amended introducing measures to expedite the proceedings, and in 2016 the ICSID Secretariat initiated a consultation process to introduce further improvement of the rules.[66]

62. A comparative study analysing this subject matter in seventeen different countries is forthcoming: Dietmar Czernich, Franco Ferrari, Friedrich Rosenfeld (eds.), *Due Process in Arbitration*, forthcoming 2020, with general report by Friedrich Rosenfeld.
63. Lucy Reed, 'Ab(use) of Due Process: Sward vs Shield' (2017) 3 *Arbitration International*, 361-377.
64. Report of the Commission's fifty-first session, cit., para. 252.
65. Report of the Working Group II seventieth session (Vienna, 23-27 September 2019), A/CN.9/1003, para. 2.
66. For an overview and references, *see* https://icsid.worldbank.org/sp/amendments/Pages/Resources/A-Brief-History-of-Amendment-to-the-ICSID-Rules-and-Regulations.aspx, *See also* https://icsid.worldbank.org/en/Documents/about/List%20of%20Topics%20for%20Potential

Even in disputes relating to human rights, it seems that the existing mechanism is deemed to be capable of ensuring due process. Article 5 of the Hague Rules has added a provision to the existing UNCITRAL Arbitration Rules. However, this provision does not seem to create new powers for tribunals or to create mechanisms that are not already present in arbitration.

Thus, in case of inequality of arms between the parties, Article 5(2) of the Hague Rules states that the 'arbitral tribunal shall, without compromising its independence and impartiality, ensure that such party is given an effective opportunity to present its case in fair and efficient proceedings'. It is doubtful that this provision creates more than an obligation for the tribunal to exercise its discretion so as to permit a fair process, even when there is an unbalance between the parties in terms of resources, information, etc. The commentary to the Hague Rules concludes its explanation of this provision as follows: 'Thus, the tribunal should make efforts to ensure that an unrepresented party can present its case in a fair and efficient way, including by adopting more proactive and inquisitorial, as opposed to adversarial, procedures.'[67]

While it is commendable that the Hague Rules explicitly mention the inequality of arms and the intention to remedy it, they do not seem to add considerably to the discretion that arbitral tribunals already have under the UNCITRAL Arbitration Rules and under other arbitration rules.

The Hague Rules' suggestion that arbitral tribunals may take an active role already flows from the existing legal framework: as I have discussed elsewhere, arbitration law and courts give arbitral tribunals a considerable leeway in developing their own independent reasoning.[68] As long as the award does not exceed the scope of power that the parties conferred on the tribunal, as long as the parties were given the possibility to comment on the basis for the decision, and as long as the tribunal acts impartially, the tribunal has a considerable autonomy and may have an active role even under the existing legal framework, depending on the peculiarities of each domestic arbitration law. If the Hague Rules are intended to extend the tribunal's role beyond this autonomy, it is doubtful that they will be capable of having effect: the award is exposed to annulment or its enforcement may be refused on the basis of the applicable arbitration law and of the New York Convention, if these borders are overstepped. Likewise, disregard of these criteria would violate the due process principle.

Other additions made by the Hague Rules to the UNCITRAL Arbitration Rules are meant to highlight the need for culturally appropriate and rights-compatible process,[69]

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%20ICSID%20Rule%20Amendment-ENG.pdf, and Working Group III Thirty-fourth session, Submissions from International Intergovernmental Organisations, A/CN.9/WG.III/WP:143, paras 1-5.

67. Hague Rules on Business and Human Rights Arbitration Article 5, comment 2.

68. Giuditta Cordero-Moss, 'The Arbitral Tribunal's Power in Respect of the Parties' Pleadings as a Limit to Party Autonomy (On Jura Novit Curia and Related Issues)', Franco Ferrari (ed.), *Limits to Party Autonomy in International Commercial Arbitration,* Juris 2016, 289-330. For a comparative analysis of this issue in fourteen national jurisdictions, as well as in international law, *see* Giuditta Cordero-Moss and Franco Ferrari (eds.), *Jura Novit Curia in International Arbitration*, Juris 2018, with general report by Giuditta Cordero-Moss (463-487).

69. Hague Rules on Business and Human Rights Arbitration Articles 18, 19, 27 and 32.

without, however, introducing structural changes. Yet other additions are meant to implement mechanisms already present in other arbitration rules,[70] thus not adding new elements to the existing arbitration landscape.

In summary, the Hague Rules that were developed for the purpose of adapting the existing arbitration mechanism to human rights disputes have introduced provisions that highlight the advisability of using the tribunal's power in a way that ensures a balanced, culturally appropriate and rights-compatible process. While enhancing the visibility of these guidelines, these provisions do not bring significant structural changes to the legal framework for arbitration as is reflected in today's legal framework.

Based on the foregoing, it seems that concerns about the efficiency of proceedings to a large extent may be addressed by a sound case management within the existing legal framework.

### [C] Reasoning

In an eagerness to reinstate and enhance efficiency of arbitral proceedings, some institutional rules are pushing the line between legitimate case management and the principle of due process.

For example, under the SCC Rules for expedited arbitration, the award is to state reasons only if one of the parties requests so.[71] This means that, in SCC expedited processes, as a general rule, an award needs not stating reasons.

In a similar vein, for ordinary (non-expedited) arbitration proceedings, the UNCITRAL Model Law permits the parties to agree that the award shall not state any reasons.[72] As I have discussed elsewhere,[73] however, the reasons of the award may be necessary for the purpose of rendering court control meaningful.

Most rules for expedited arbitration have not gone as far as the SCC Rules, and awards are usually expected to state reasons even in expedited proceedings. The ICC Expedited Procedure Rules,[74] for example, do not permit to derogate from Article 32(2) of the Arbitration Rules, according to which awards must state the reasons upon which they are based. As a matter of fact, the ICC Notes to the Parties and Arbitral Tribunals state that: [75] 'Any award under the Expedited Procedure Provisions shall be reasoned. Arbitral tribunals may limit the factual and/or procedural sections of the award to what they consider to be necessary to the understanding of the award, and state the reasons of the award in as concise a fashion as possible.' In my experience as member of the ICC Court of Arbitration, the scrutiny of the draft awards rendered under the Expedited

70. Hague Rules on Business and Human Rights Arbitration, Articles 26 and 31, respectively, on summary dismissal and emergency arbitrator.
71. Article 42(1) of the 2017 Stockholm Rules for Expedited Arbitrations.
72. UNCITRAL Model Law Article 31(2).
73. Giuditta Cordero-Moss, 'Reasons in Arbitral Awards and Court Control', *Dossier XVIII: Explaining Why You Lost: Reasoning in Arbitration*, ICC Institute of World Business, forthcoming 2020.
74. *See* Article 4 of Appendix VI to the ICC Arbitration Rules.
75. ICC Notes to the parties and arbitral tribunals, cit., para. 117.

Procedures takes into consideration the need for an expedited processing, but is no less thorough in substance than for ordinary arbitration.

Regarding investment arbitration, under the ICSID Convention, lack of reasoning is a ground for annulment.

The UNCITRAL Working Group II on dispute resolution, which is currently working on matters relating to expedited arbitration, discussed at its sixty-ninth session in February 2019 whether it is desirable to eliminate the requirement that the award states the reasons for the decision.[76] The outcome of the discussion was not favourable to eliminating the requirement, but the simple fact that the matter was discussed shows that any measures are contemplated for the purpose of enhancing efficiency.

Given that the award's reasons are necessary or important to permit court control, how can this be reconciled with the systems that permit the parties to agree that the award shall not state any reasons, or even that assume that awards shall not have reasons unless one party requests so? Permitting the parties to exclude reasons may create considerable problems if the applicable arbitration law does not permit to exclude court control and may create difficulties in case of enforcement. As an award that does not state reasons prevents or at least hampers court control, it must be assumed that an award without reasons will not be deemed acceptable by a court. While there is no specific basis to assume that reasoning is a necessary requirement of due process, in the field of criminal decisions, the ECtHR has repeatedly affirmed that, while an unmotivated verdict in criminal cases in itself is not a violation of the principle of fair trial, the principle of fair trial is breached by a process that does not provide sufficient guarantees to rule out any risk of arbitrariness and enable the accused to understand the reasons for his conviction.[77]

Furthermore, the increased interest in transparency, that will be mentioned below, suggests that the general expectations towards arbitration are not going in the direction of releasing arbitral tribunals from any obligation to state the reasons for their decisions.

The intention, when permitting that an award does not state reasons, is to enhance arbitration and increase its effectiveness. The risk is that exactly the opposite result is obtained, i.e., that arbitration loses its credibility and, instead of being promoted, is restricted.

It can be expected that, to the extent the exercise of the power granted by arbitration rules violates due process, court control will put a remedy.

76. *See* the Report of Working Group II (Dispute Settlement) on the work of its sixty-ninth session (New York, 4-8 February 2019), A/CN.9/969, https://undocs.org/en/A/CN.9/969, at item No. 7.

77. *Taxquet v. Belgium*, Decision of 16 November 2010, Application No. 926/05, as well as *Agnelet v. France* and *Legillon v. France*, Decisions of 10 January 2013, Application Nos 61198/08 and 53406/10.

### [D] Transparency

Traditionally, arbitration is a confidential process to which only the involved parties are privy. Indeed, confidentiality is often mentioned as one of the advantages of arbitration as opposed to court litigation. The ECtHR considered the lack of public hearing to be a feature of arbitration that is unacceptable from the point of view of due process in a case where arbitration was deemed to be compulsory and not voluntary, and the dispute regarded disciplinary measures that carried a degree of stigma and was likely to affect the respondent's professional honour and reputation.[78] Under these circumstances, the ECtHR found that holding proceedings in public protects the parties against injustice being administered in secret. The ECtHR in the same decision made a distinction between voluntary and compulsory arbitration and affirmed that the guarantees set forth in Article 6 of the European Convention of Human Rights may be waived in voluntary arbitration. In particular, 'proceedings devoted exclusively to legal or highly technical questions may comply with the requirements of Article 6 even if there has been no public hearing'.[79]

However, transparency has increasingly been called for in arbitration, particularly, but not only, investment arbitration.

In investment arbitration, there is a clear public interest in the dispute and its outcome. The arbitral tribunal is called upon to evaluate the conduct of the state, and this may involve scrutinizing, *inter alia*, the state's policies, its balancing of conflicting policies, its management of public interests, etc. The award, furthermore, may have an impact on the state's regulations and future policies, with effects that go far beyond the legal relationship between the disputing parties. The public, therefore, has a clear interest in being informed about investment disputes, and stakeholders have an expectation to be able to present comments. Facing growing criticism for lack of legitimacy and accountability,[80] already in 2006, the ICSID Rules were amended, introducing transparency.[81] In 2013, the UNCITRAL adopted the Rules on Transparency in Treaty-Based Investor-State Arbitration.[82] A new provision was added in Article 1, paragraph 4 of the UNCITRAL Arbitration Rules (that had just been revised in 2010), to incorporate the Rules on Transparency for arbitration initiated pursuant to an investment treaty concluded on or after 1 April 2014. Furthermore, with the 2014 Mauritius Convention on Transparency,[83] parties to investment treaties concluded before 1 April 2014 express their consent to apply the Rules on Transparency also to disputes based on investment treaties concluded prior to 1 April 2014.

78. *Mutu and Pechstein v. Switzerland* para. 182.
79. *Mutu and Pechstein v. Switzerland* para. 177.
80. For references, *see* UNCTAD, Transparency in IIAS: A Sequel, UNCTAD Series on Issues in International Investment Agreements (2012), p. 36, and UNCTAD, World Investment Report 2015, p. 148.
81. https://icsid.worldbank.org/sp/amendments/Pages/Resources/A-Brief-History-of-Amendment-to-the-ICSID-Rules-and-Regulations.aspx.
82. http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-2013/UNCITRAL-Arbitration-Rules-2013-e.pdf.
83. https://uncitral.un.org/en/texts/arbitration/conventions/transparency.

For human rights disputes, the Hague Rules suggest a regulation that is largely based on the UNCITRAL Transparency Rules.

The calls for transparency that have recently turned around the world of investment arbitration seem to be affecting also commercial arbitration. [84] Commercial awards are being published to a larger extent than earlier, [85] institutions are being more transparent regarding the appointment and removal of arbitral tribunals,[86] and initiatives flourish to increase transparency in commercial arbitration.[87]

As long as confidentiality is the main rule for arbitral proceedings, however, transparency measures will require the parties' consent – either given specifically in each case or given by choosing arbitration rules containing transparency mechanisms. A possible way to enhance transparency is to change the statutory rules governing arbitration. Under Norwegian arbitration law,[88] for example, confidentiality is not the main rule, but assumes that a specific agreement on confidentiality was entered into between the parties in relation to the particular dispute.

### [E] Impartiality and Independence

The appointment mechanism of arbitral tribunals is heavily criticized, particularly in investment arbitration. The circumstance that arbitrators are appointed by the parties for the particular dispute is deemed to prejudice the legitimacy and accountability of

84. Calling for transparency in commercial arbitration, *see* Diego P. Fernández Arroyo, 'Nothing Is for Free', cit., 635ff. In 2016, the then Lord Chief Justice of England and Wales, Lord Thomas, held a lecture in which he pointed out that, since many commercial parties choose arbitration to solve their disputes and appeal from arbitral awards is very restricted, courts are not participating to the desirable extent to the development of the law: Lord Thomas of Cwmgiedd, Lord Chief Justice of England and Wales, Bailii Lecture: Developing Commercial Law Through the Courts: Rebalancing the Relationship Between the Courts and Arbitration (9 March 2016). The same criticism had been put forward, decades earlier, by the then Chief Justice of the Norwegian Supreme Court, Carsten Smith. «Voldgift – domstolenes konkurrent og hjelper», in *Tidsskrift for Rettsvitenskap,* 1993, p. 474ff. The Norwegian Arbitration Act of 2004 acted upon this criticism and assumes that confidentiality of the awards must be agreed to by the parties. In contrast, most arbitration laws still assume confidentiality as the main rule in arbitration.
85. Many arbitration institutions publish, in anonymized version, a selection of the awards rendered under their rules. For example, following an amendment to the ICC Notes to the parties and arbitral tribunals on the conduct of the arbitration under the ICC Arbitration Rules dated 1 January 2019, https://cdn.iccwbo.org/content/uploads/sites/3/2017/03/icc-note-to-parties-and-arbitral-tribunals-on-the-conduct-of-arbitration.pdf, section III.D, all awards rendered after 1 January 2019 may be published, unless one party objects. In addition, awards are collected in data bases such as the database Case Law on UNCITRAL Texts (CLOUT, https://www.uncitral.org/clout/) or the database on UNIDROIT Principles and CISG Unilex (http://www.unilex.info/).
86. *See*, for example, the publication by the Stockholm Arbitration Institute in 2017 of its policy for appointing arbitrators: https://sccinstitute.com/media/220131/scc-policy-appointment-of-arbitrators-2017.pdf. As from 2016, the ICC publishes information about arbitrators sitting in tribunals administrated under the ICC Rules: *see* the ICC Notes to the parties and arbitral tribunals, cit., section III.B.
87. *See*, for example, Arbitrator Intelligence, https://www.arbitratorintelligence.org/.
88. 2004 Norwegian Arbitration Act, § 5.

investment arbitration.[89] Arbitrators appointed by the parties are suspected of being biased[90] and of being inclined to decide in favour of the party who appointed them, for the purpose of being appointed again by the same party in new disputes.[91] The system of party appointment is criticized for preventing diversity by confirming pre-existing connections,[92] and for creating conflict of interests when professionals belonging to the same environment appoint each other or alternatively appear as counsel and as arbitrator (so-called double hatting).[93]

Indeed, there are noticeable examples of double hatting, and, in some cases, this is detrimental to the credibility of arbitration. Also, the method for selection, although significantly improved in the course of the past decade, can certainly be made more objective and professional.[94]

However, the system according to which the arbitral tribunal is appointed by the parties is the fundament of this dispute settlement mechanism. It permits to select arbitrators for their expertise and their understanding of the specific area of the dispute. Even the Hague Rules recognize, for human rights disputes, the importance of ensuring that the arbitral tribunal has the relevant expertise.[95] There may be few qualified experts in sophisticated areas, and it may be more important to ensure that the tribunal understands the law and the underlying issues, than to avoid appointing anyone who has involvement in similar disputes.

However, it is undoubtedly important to exercise a sound use of the discretion that characterizes the selection of arbitrators.

It must be pointed out that the existing legal framework governing arbitration reflects the importance of ensuring the independence and impartiality of the arbitral tribunal. It provides mechanisms to challenge arbitrators, and it permits to set aside or refuse enforcement of awards rendered by a tribunal that was not impartial or independent.[96] Also, arbitration rules give the parties the possibility to challenge arbitrators. Therefore, mechanisms are in place to ensure this fundamental element of the due process principle. When called upon to scrutinize the appointment mechanism

89. Jan Paulsson, 'Moral Hazard in International Dispute Resolution' (2010) 25 *ICSID Review* 339; Jan Albert Van den Berg, 'Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration', M H Arsanjani, J Cogan, R Sloane, S Wiessner (eds.), *Looking to the Future: Essays on International Law in Honor of W. Michael Reis- man*, Martinus Nijhoff 2011; for further references, *see* Diego P. Fernández Arroyo, 'Nothing Is for Free', cit., 627.
90. Report of Working Group III on the work of its thirty-fifth session, A/CN.9/935, cit., para. 54.
91. Report of Working Group III on the work of its thirty-fifth session, A/CN.9/935, cit., paras 56, 73.
92. Report of Working Group III on the work of its thirty-fifth session, A/CN.9/935, cit., para. 70.
93. Working Group III Note by the Secretariat, A/CN.9/WG.III/WP.142, cit., paras 40, 41, 64; Report of Working Group III on the work of its thirty-fifth session, A/CN.9/935, cit., para. 78. *See* Malcolm Langford, Daniel Behn and Runar Lie, 'The Ethics and Empirics of Double Hatting' (2017) *SSRN Electronic Journal*, 0.2139/ssrn.3008643.
94. For an anecdotal observation based on my experience *see* Giuditta Cordero-Moss, 'Interpretation of contracts in International Commercial Arbitration: Diversity on More Than One Level'(1-2014) *European Review of Private Law,* 13-36, 33f.
95. Hague Rules on Business and Human Rights Arbitration, Preamble, point 6(e).
96. Articles 34(2)(a)(iv) and 36(1)(a)(iv) of the Model Law of the Model Law; Article 52(1)(a) and (c) of the ICSID Convention; Article V(1)(d) of the New York Convention.

of the Court of Arbitration for Sport (CAS), the ECtHR found that it did not violate the principle of independence and impartiality laid down in Article 6 of the ECHR.[97]

What can be improved is the predictability and effectiveness of how this mechanism of challenge is applied. To this end, the International Bar Association (IBA) has developed the Guidelines on Conflicts of Interest in International Arbitration,[98] a soft law instrument that enjoys a widespread success.[99] Furthermore, rules on conflict of interest and codes of conduct are being developed,[100] including improvements to the ICSID Rules.[101]

As far as the method for the selection of arbitrators is concerned, the increased transparency measures will gradually lead to a more systematic information about arbitrators and their activity.

That the mechanism of party appointment as such is capable of meeting the requirements of due process seems to be confirmed by the Hague Rules that, for human rights disputes, suggest a system that largely corresponds to the system provided for by the UNCITRAL Arbitration Rules. The most important addition made by the Hague Rules is the introduction of a code of conduct, with which arbitrators have to comply. Otherwise, the Hague Rules emphasize 'the importance of impartiality, independence and expertise to the legitimacy of business and human rights arbitration under these Rules'.[102] Furthermore, they insert a requirement that arbitrators shall be of high moral character and exercise independent and impartial judgment,[103] and the requirement that the presiding arbitrator has demonstrated expertise in international dispute resolution and in areas relevant to the dispute.[104] While it is commendable to spell out these requirements, it does not seem to make a structural difference from the UNCITRAL Arbitration Rules, and the Hague Rules preserve the autonomy of the parties in the selection of their party-appointed arbitrators.[105]

### [F] Accuracy of the Application of the Law

As was mentioned above, one of the pillars of the institution of arbitration is that arbitral awards are final and are not subject to any form of appeal on the merits – be it on the evaluation of evidence and assessment of the facts, or on the application of the

97. *Mutu and Pechstein v. Switzerland*, paras 150ff.
98. https://www.ibanet.org/Document/Default.aspx?DocumentUid = e2fe5e72-eb14-4bba-b10d-d33dafee8918.
99. Although not all of its provisions are always deemed to reflect sound principles, *see* the English High Court case [2016] EWHC 422 (Comm) and the Austrian Supreme Court case 15 May 2019 Docket 18 ONc 1/19w.
100. For references, *see* Report of Working Group III on the work of its thirty-sixth session, A/CN.9/964, cit., paras 72, 76.
101. *See* https://icsid.worldbank.org/sp/amendments/Pages/Resources/A-Brief-History-of-Amendment-to-the-ICSID-Rules-and-Regulations.aspx. *See also* Report of Working Group III on the work of its thirty-sixth session, A/CN.9/964, cit., paras 84-90.
102. Hague Rules on Business and Human Rights Arbitration, Article 11, Comment No. 1.
103. Hague Rules on Business and Human Rights Arbitration, Article 11(1)(b).
104. Hague Rules on Business and Human Rights Arbitration, Article 11(1)(c).
105. Hague Rules on Business and Human Rights Arbitration, Article 11(1)(c).

law. The tribunal's autonomy in determining and applying the substantive law is a fundamental feature of arbitration. However, there is a growing mistrust against this autonomy.

In commercial arbitration, some domestic courts have recently denied the arbitrability of disputes on commercial agency contracts out of a fear that the important policies of agency law may not be accurately applied.[106] In investment arbitration, concerns are voiced about the ability of arbitrators to understand public interest issues,[107] about the consistency of awards, and about the lack of appeal. [108]

Quite apart from the observation that inconsistency in the application of the law is not a characteristic exclusive of arbitration, [109] it should be pointed out that the absence of an appeal mechanism does not mean that the fairness of proceedings cannot be reviewed.

As was mentioned above, the New York Convention and the Model Law are based on the assumption that courts may review awards in respect of due process, public policy and arbitrability. Likewise, the ICSID Convention opens for review of due process issues. Any further review would directly undermine the efficiency of arbitration: arbitration would be nothing but an additional, introductory phase to court proceedings if there was an appeal on the merits. That court control does not entail review of the award in the merits, therefore, is the result of a balancing between the need to safeguard due process and the interest in efficiency.

As I have explained elsewhere, [110] however, a word of caution is due regarding the ambitions to restrict court control for the purpose of enhancing arbitration.

Thirty years ago, the famous *Mitsubishi* decision[111] opened an era of arbitration friendliness, and permitted arbitrability of disputes relating to competition law – which until that time had been considered to involve too important and general interests to be arbitrable. The condition for extending the scope of arbitrability was that courts be permitted to give a 'second look' on the accurate application of the law – notably, in the occasion of court control and, in particular, through the rule on public policy. A similar opening was made by the CJEU with the *Eco Swiss* case.[112] This approach permits the courts to review the determination of whether important policies (such as, in these cases, competition law) are applicable, as well as their application – as long as the interests at issue are such that they qualify to fall into the realm of public policy, and for the only purpose of verifying whether these interests were seriously infringed. The

106. *See*, for references, *infra* n. 114-118.
107. Report of Working Group III on the work of its thirty-fifth session, A/CN.9/935, cit., paras 82-88; Report of Working Group III on the work of thirty-sixth session, A/CN.9/964, cit., paras 64-108.
108. Report of Working Group III on the work of its thirty-fifth session, A/CN.9/935, cit., paras 35, 38; Report of Working Group III on the work of thirty-sixth session, A/CN.9/964, cit., para. 30.
109. Report of Working Group III on the work of its thirty-fifth session, A/CN.9/935, cit., paras 36, 39; Report of Working Group III on the work of thirty-sixth session, A/CN.9/964, cit., para. 58.
110. Giuditta Cordero-Moss, 'Mitsubishi: Balancing Arbitrability and Court Control,' Horatia Muir Watt, Lucia Bíziková, Agatha Brandão de Oliveira and Diego Fernández Arroyo (eds.), *Global Private International Law, Adjudication without Frontiers*, Elgar 2019, 82-91.
111. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985).
112. Case C-126/97, *Eco Swiss China Time Ltd. v. Benneton Int'l NV*, 1999 E.C.R. I-3079.

large scope of arbitrability, therefore, is directly linked to the existence of judicial control on the awards, albeit restricted.

The legitimacy of arbitration is threatened by the fear that arbitration may become a mechanism by which the parties circumvent the application of important policies reflected in overriding mandatory rules such as competition law. By exercising their party autonomy, the parties may choose a governing law that permits them to avoid these rules. The fear is that arbitral tribunals, feeling bound by the parties' choice of law, lend themselves to the circumvention of important policies. Arbitral tribunals may in fact fear that, if they consider these policies notwithstanding the parties' agreement on a different law, they may exceed their power and thus render an invalid and unenforceable award.

As I have discussed elsewhere,[113] the fear that courts may, in the name of excess of power, set aside or refuse enforcement of an award as a consequence of the tribunal's independent selection or application of the law is ill-founded. While there are nuances particular to each legal system, most arbitration laws give the tribunal the power to make its own, independent legal reasoning. What the principle of due process requires in many systems, however, is that the tribunal informs the parties of its legal considerations, so that the parties are given the possibility to comment or present new evidence that becomes relevant in view of the tribunal's legal reasoning.[114]

There seems to be a growing awareness, in the arbitration community, of the necessity to ensure that the award gives due consideration to the law applicable to the merits.[115] Coupled with the courts' possibility to give a second look at awards to ensure that fundamental principles are not violated, this should be a sufficient basis to ensure the arbitration-friendly attitude opened by *Mitsubishi* – although the second look does not provide a perfect system.[116]On the contrary, ambitions to enhance the autonomy of arbitration and correspondingly restrict court control on awards may turn out to be counterproductive. Fears about the accuracy with which arbitral tribunals apply the law may affect the scope of arbitrability. Likewise, the scope of arbitrability is linked to the intensity of judicial control that will be discussed below.

### [G] The Intensity of Judicial Control

As was seen above, judicial control is restricted; for what is relevant here, it consists mainly in ensuring that the award does not infringe public policy (*ordre public*).

113. Cordero-Moss, 'The Arbitral Tribunal's Power in Respect of the Parties' Pleadings as a Limit to Party Autonomy', cit.; Giuditta Cordero-Moss, 'EU Overriding Mandatory Provisions and the Law Applicable to the Merits', Franco Ferrari (ed.), *The Impact of EU Law on International Commercial Arbitration*, Juris 2017, 317-349.
114. For a description of due process requirements in this context *see* Cordero-Moss and Ferrari, *Iura Novit Curia in International Arbitration*, cit.
115. Luca Radicati di Brozolo, 'Mandatory Rules and International Arbitration' (2012) 23 *American Review of International Arbitration* 49, 66ff.
116. Massimo Benedettelli, '"Communitarization" of International Arbitration: A New Spectre Haunting Europe?' (2011) 73(4) *Arbitration International* 583, 597; William Park, 'Private Adjudicators and the Public Interest: The Expanding Scope of International Arbitration,' (1986) 12 *Brook. J. Int'l L.*, 642.

Elsewhere, I have discussed the different theories regarding the intensity that court control may have in respect of the award's conformity with public policy, and have commented the dichotomy between minimalist and maximalist theory.[117] Briefly, the minimalist theory postulates that courts are bound by the evaluation the arbitral tribunal made of the award's compliance with public policy; according to the maximalist theory, courts may independently verify whether the award infringes public policy.

For commercial arbitration, the CJEU has so far tacitly recognized that a uniform interpretation of EU law may be ensured, thanks to the control that courts of Member States exercise on arbitral awards. For investment arbitration, in the *Achmea* case,[118] the CJEU took a different position that will be discussed below. The Bundesgerichtshof ('BGH'), in its referral of the *Achmea* case to the CJEU,[119] as well as the Advocate General (AG) in the opinion for the *Achmea* case,[120] endorsed the maximalist theory. The BGH and the AG assumed that the controlling court of the Member State shall be entitled to independently evaluate whether EU law has been properly applied in the award. This would mean that, since the controlling Member State court may submit requests for preliminary rulings, court control on awards would ensure uniformity of interpretation of EU law also in arbitration. This maximalist approach is in accordance with the above-mentioned *Mitsubishi* and *Eco Swiss* approaches. The minimalist approach, on the contrary, assumes that Member State courts shall owe deference to the arbitral tribunal's evaluation made in the award.[121] In a previous case, the AG had affirmed that the minimalist approach would deprive court control of its meaning and would not be compatible with EU law. This is because having to accept the arbitral tribunal's evaluation effectively means delegating the matter to the arbitral tribunal. As arbitral tribunals may not request preliminary rulings under Article 267 of the TFEU, the uniformity of the interpretation of EU law is not ensured.[122]

Notwithstanding that the AG had several times brought up the relationship between court control and the compatibility of (commercial) arbitration with EU law,[123] the CJEU had, prior to *Achmea*, never expressed an opinion on the matter. It had, however, tacitly accepted that (commercial) disputes relating to EU law may be arbitrable, as pointed out by the AG in the *Achmea* opinion.[124] The CJEU seems in *Achmea*, indirectly and as an obiter dictum, to endorse the AG's opinion that

117. Giuditta Cordero-Moss, 'Inherent Powers and Competition Law' (2017) 6.2 *European International Arbitration Review* 69-94; Cordero-Moss, 'Mitsubishi: Balancing Arbitrability and Court Control', cit.
118. Case C-284/16 (*Achmea*).
119. Bundesgerichtshof, 3 March 2016, I ZB 2/1.
120. Case C-284/16 (*Achmea*), Opinion of AG Wathelet., paras 251-260.
121. Radicati di Brozolo, 'Mandatory Rules and International Arbitration', cit.; *see also*, criticizing this approach, Christophe Seraglini and Jérôme Ortscheidt, *Droit de l'arbitrage interne et international,* Domat Montchrestien, 2013, para. 982.
122. Case C-567/14 *Genentech v. Hoechst and Sanofi-Aventis Deutschland*, Opinion of AG Wathelet.
123. In addition to the already mentioned opinions in the *Genentech* and the *Achmea* case that were both rendered by Whatelet, *see also* Case C-352/13 *CDC Hydrogen Peroxide v. Evonik Degussa and Others*, Opinion of AG Jääskinen.
124. Case C-284/16 (*Achmea*), AG Opinion para. 243.

commercial disputes regarding the interpretation of EU law may be subject to arbitration, as court control permits the court to review the interpretation of EU law made by the tribunal and, by requesting preliminary rulings, to ensure uniformity of the interpretation of EU law.[125]Thus, the CJEU endorses the maximalist theory.

However, as will be discussed in section 14.06 below, the CJEU has denied arbitrability of investment disputes based on intra-EU treaties, based on the lack of an effective method to control the uniform application of EU law.[126] The decision was based on an unconvincing distinction between commercial and investment arbitration, which gives reason to fear that the distinction may be abandoned, expanding the inarbitrability also to commercial disputes. Courts in EU states, such as Austria,[127] Belgium,[128] Germany[129] and England,[130] already denied the arbitrability[131] of disputes regarding contracts of commercial agency. EU agency law is deemed to be necessary for the achievement of the internal market. Hence, some courts have affirmed that disputes concerning commercial agency should be decided by courts of EU Member States: choosing a court outside the EU, or choosing arbitration, may endanger the effective enforcement of EU law.

In such a climate of mistrust against arbitration, it does not seem that arbitration can be promoted by insisting on a minimalist approach to court control – quite to the contrary. In the context of corruption and economic crime, the minimalist theory seems to have been abandoned in its country of origin, France.[132] As long as court control is not deprived of its significance – in other words, as long as the maximalist theory is embraced – it seems that arbitration does not raise issues of due process in this context.

## §14.06 CONCLUSION

The overview made in section 14.05 shows that, although much of the criticism has been voiced in relation to investment arbitration, the features that are being criticized are present both in commercial and in investment arbitration. It should also be

125. Case C-284/16 (*Achmea*), para. 54.
126. Case C-284/16 (*Achmea*).
127. OGH 1 March 2017, 5ob 72/16y, Ecolex 520 (2017).
128. Cour de Cassation, 16 November 2006, PAS. 2006, I, No. 11; Cour de Cassation, 14.1.2010, PAS. 2010, I, No. 12; Cour de Cassation, 3 November 2011 PAS. 2011, I, No. 1.
129. Bundesgerichtshof, 5 September 2012, *Neue juristische Wochenschrift* (2012).
130. *Accentuate Limited v. Asigra Inc.* [2009] EWHC (QB) 2655.
131. Or they deny the recognition of a contractual choice of forum in favour of a court not located within the EU. This responds to the same rationale, i.e., that matters relating to commercial agency shall be decided by courts located in the EU in order to ensure a uniform application of EU law. Therefore, it can be expected that the same courts would also deny arbitrability if the contract contained an arbitration clause.
132. *See*, in the areas of corruption and money laundering: Cour d'appel de Paris, 4 November 2014, nr. 13/10256; Cour d'appel de Paris, 25 November 2014, nr. 13/1333; Cour d'appel de Paris, 7 April 2015, nr. 14/00480; Cour d'appel de Paris, 14 April 2015, nr. 14/07043; Cour d'appel de Paris, 21 February 2017, nr. 15/01650; Cour d'appel de Paris, 16 January 2018, nr. 15/21703. *Contra*, *see* Cour d'appel de Paris, 20 January 2015, nr. 13/20318; Cour d'appel de Paris, 24 February 2015, nr. 13/23404. In the area of procedural fairness, *see* Cour d'appel de Paris, 8 November 11.2016, nr. 13/12002.

remembered that a considerable part of investment disputes is carried out under the rules applicable to commercial arbitration. Certainly, the specificities of investment disputes may require considerations that are not generally made in commercial disputes, in particular due to the public interests involved in investment arbitration. However, there does not seem to be a structural reason to distinguish between investment and commercial arbitration in the context of due process.[133]

This chapter examined some of the main issues for which arbitration is currently criticized and that can have relevance to the structural compatibility of arbitration with the principle of due process.

It argues that, with the possible exception of transparency, there does not seem to be a structural need to use different criteria for, respectively, commercial or investment arbitration, when evaluating whether the principle of due process has been respected.

Both types of arbitration are facing an erosion of their credibility, mainly based on doubts about the lack of efficiency in the proceedings, the impartiality and independence of the arbitrators and suspicions about the ability to accurately apply the law. To a large extent, these doubts are based on perceptions or misperceptions, rather than on factual circumstances.

To the extent that inefficient or abusive practices have developed, a proper application of the existing legal framework seems to be adequate to put a remedy. Much can be achieved by a sound exercise of the arbitral tribunal's discretion in the field of case management and in respect of an independent development of the tribunal's reasoning (without, however, exceeding the power conferred by the parties and without depriving the parties of the possibility to comment on the basis for the decision).

Considering the existing legal framework on court control can also contribute to contain the development of inefficiencies or abuses. Accepting that an effective court control, without being a review on the merits, is a necessary condition for arbitrability would be a significant step. It would lead to a higher degree of self-discipline, which, in turn, would meet much of the criticism to which arbitration is being exposed.

In other areas, an improvement of the regulation may be appropriate, such as ensuring transparency and developing codes of conduct.

Hence, there does not seem to be a sound foundation for the fears that the institution of arbitration is not capable of meeting the requirements of the due process principle.

There is, certainly, room for making the legal framework more efficient. But this can be achieved by improving specific areas of the existing legal framework, rather than by excluding arbitration as a method to solve disputes.

Restricting arbitrability in the name of a more effective implementation of due process is equivalent to throwing the baby out with the bathwater.

133. Affirming that legitimacy issues shall be taken into consideration both in investment and in commercial arbitration, *see also* Arroyo, 'Nothing If for Free', cit., 632 ff.