Rule of Law and International Commercial Arbitration

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 DOI: 10.5771/1435-439X-2024-4-486

Abstract

This article explores how the rule of law is secured and strengthened in international commercial arbitration. It first focusses on the archetypical paradigm of the rule of law in state courts, discussing key principles such as access to justice, independent and impartial decision-making, equal treatment of parties, the right to be heard, and public trials. These principles ensure fairness, transparency, and public confidence in the judicial system. The article then examines whether international commercial arbitration meets these core requirements. It concludes that arbitration adequately protects the rule of law given its specific characteristics (including the fact that it is rooted in private autonomy and positioned outside the direct *imperium* of the state). Finally, it shows that international commercial arbitration is not only consistent with the core principles of the rule of law but enhances and strengthens the rule of law for cross-border disputes in a way the state court system cannot.

Keywords: Rule of Law, Access to Justice, Non-public Trial, Impartiality of Arbitrators, Independence of Arbitrators, Duty to Apply the Law

A. Introduction

The rule of law is a millennia-old maxim with roots extending back to ancient texts like the Codex Hammurabi and the Magna Charta. Its contours have been shaped by influential thinkers including Aristotle, Cicero, Hobbes, Locke, and Montesquieu. This foundational principle underpins the very basis of the modern state, including its judiciary. It ensures the supremacy of law, access to justice, equality before the law, fairness and impartiality in proceedings, transparency, legal certainty and predictability. And it has found its way into modern constitutions and procedural codes worldwide.

The rule of law has been developed and implemented to establish essential checks and within the structure of state governance, with a particular focus on the role of the judiciary system – given that this is the primary arena where the individual directly confronts state power in the administration of justice. Decision makers must be bound by the law of the people, by the people, and for the people – and they must issue decisions quickly on that basis alone and only after having given all parties a fair and equal opportunity to present their case (see Section B.).

When parties opt out of the justice system of the state and agree to arbitrate their commercial disputes, they choose an alternative dispute resolution mechanism that could otherwise have been handled by state courts. This raises the question to what extent the principles of the rule of law that govern state court proceedings

must also apply in commercial arbitration proceedings. The normative framework of international commercial arbitration adequately secures the core features of the rule of law given its characteristics (including the fact that it is rooted in private autonomy and positioned outside the direct *imperium* of the state) (see Section C.).

In fact, international commercial arbitration does more than mimic the state court system in ensuring the rule of law. Particularly for complex cross-border disputes, international commercial arbitration enhances and strengthens the rule of law in ways the state court system usually cannot (see Section D.).

B. The Archetypical Paradigm of the Rule of Law as Materialized in State Court Proceedings

This section focuses on the application of the rule of law in state court proceedings as the place where the rule of law has archetypically materialized. There, the rule of law is closely tied to the right to due process, designed to protect individuals from arbitrary or unfair treatment by the state and other entities.[1] This goal, in turn, gives rise to the key principles outlined below.

I. Access to Justice

Access to justice is a cornerstone of the rule of law. It guarantees that individuals and legal entities can pursue and defend their rights, seek redress for wrongs, challenge arbitrary decisions, and hold other agents accountable through legal mechanisms.[2] To ensure that individuals and legal entities can seek and obtain a resolution of their disputes through legal mechanisms, legal institutions (including courts and tribunals) must be readily available.

The concept goes beyond a mere right to a "day in court." It includes the feasibility to approach and use the available legal institutions.[3] For this, legal costs must not be an insurmountable barrier.[4] If the costs of lawyers, courts, and other expenses are too high, individuals and entities with limited funds will be priced out

1 *Woolf*, Arbitration: The International Journal of Arbitration, Mediation and Dispute Management 1994/3, p. 208; *Grabenwarter/Ganglbauer*, in: Czernich/Deixler-Huebner/Schauer (eds.), para. 1.3; *Bingham*, p. 47; *Menon*, p. 4; *Allsop*, in: Menaker (ed.), p. 770; Preamble of the Universal Declaration of Human Rights: "Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law, (...)".

2 *Konecny*, in: Fasching/Konecny (eds.), Einleitung, paras. 58 *et seqq*; *Ballon/Fucik/Lovrek*, in: Fasching/Konecny (eds.), § 1 JN, para. 6; *Bingham,* pp. 47 *et seqq*; *Schabas*, pp. 284 *et seq*.

3 *Lord Neuberger*, ICC Dispute Resolution Bulletin 2023/3, p. 13; *De Oliveira*, in: De Oliveria/Hourani (eds.), pp. 12 *et seq*.

4 *De Oliveira*, in: De Oliveria/Hourani (eds.), pp. 12 *et seq*; *Cardoso*, AI 2020/1, pp. 123 *et seqq*.

of their access to justice.[5] Thus, there must also be a system in place that ensures equal access to the judicial process, even in case of impecuniosity (e.g. through legal aid).[6]

Timely decisions are another crucial element. As the saying goes: justice delayed is justice denied.[7] This is particularly so in commercial matters. Efficient legal institutions are necessary to avoid situations in which rights are compromised or undermined by protracted proceedings.

II. Independent and Impartial Decisionmaker

The rule of law demands that decisionmakers are independent and impartial. Independence generally refers to the absence of external influences or relationships that could compromise a decisionmaker's ability to make decisions objectively, including with regard to the separation of powers within a state.[8] Impartiality, on the other hand, relates to the decisionmaker's unbiased approach toward both the parties and the issues at hand.[9]

The impartiality and independence of decision-makers are foundational pillars of the rule of law, ensuring that justice is delivered without bias or undue influence. Decisionmakers must keep free from extraneous influences, self-interest, or preconceived opinions. Their decision-making must not be tainted by improper and extraneous influences of any kind, including the exercise of power, political considerations, or personal favouritism.[10] In short, decisions must be based exclusively on the established facts and a *lege artis* application of the relevant legal norms.[11]

Such neutrality is a basic requirement in establishing public trust in the judicial system, trust that any case brought to court and any party involved will be heard and treated fairly.[12] For this it is also essential that decisionmakers are not only in fact free of bias but that they avoid even the appearance of partiality – as even the perception of bias can undermine public confidence in the integrity of the justice

5 *Woolf*, Arbitration: The International Journal of Arbitration, Mediation and Dispute Management 1994/3, p. 211.
6 *Bydlinski*, in: Fasching/Konecny (eds.), Vor §§ 63 ff ZPO, paras. 1 *et seqq*; *Schabas*, p. 285.
7 *América Móvil S.A.B. de C.V. v. Republic of Colombia*, ICSID Case No. ARB(AF)/16/5, Award (7 May 2021), para. 350.
8 *Ballon*, in: Fasching/Konecny (eds.), § 5 JN, paras. 9 *et seqq*; *Schabas*, pp. 294 *et seq*.
9 ECtHR, No. 17056/06, *Micallef v. Malta*, judgment of 15 October 2009, para. 93; *Schabas*, p. 295; *Binder*, p. 217; *Ballon*, in: Fasching/Konecny (eds.), § 19 JN, para. 5.
10 The principle of judicial independence is essentially founded on the concept of separation of powers, which aims to prevent any one branch of government from dominating the process of justice. By dividing the powers between the executive, legislative, and judicial branches, the rule of law provides that no institution can act with uncontrollable power. Specifically, independent adjudication serves as a safeguard against potential abuses of power by the executive, ensuring that laws are enforced and interpreted without favouritism or manipulation; see also *Schabas*, pp. 294 *et seq*; *Ballon*, in: Fasching/Konecny (eds.), § 19 JN, para. 5.
11 *Konecny*, in: Fasching/Konecny (eds.), Einleitung, para. 63; *Bingham,* pp. 60 *et seqq*.
12 *Schabas*, p. 72.

system.[13] As the famous adage emphasizes: justice not only must be done, it must be seen to be done.[14]

III. Equal Treatment of Parties and Right to Be Heard

The principle of equal treatment guarantees that all parties involved in proceedings are afforded equal rights and opportunities, regardless of their status, wealth, or influence.

All parties must have an equal opportunity to be heard and to present their case. This requires that all parties know about any legal proceedings involving their rights. It also requires that they get to know the other side's case and evidence in a timely fashion, and that they have an adequate opportunity to contest the other side's case by presenting their own evidence as well as factual and legal arguments.[15]

This element of the rule of law cultivates trust in the judicial system, reinforcing the notion that justice is blind and that the law is applied uniformly to everyone.[16]

IV. Public Trial

As a rule, public trials are considered an essential element of the rule of law in commercial matters before state courts – serving as a safeguard for transparency and accountability in legal proceedings.[17]

Public trials allow society to witness the administration of justice firsthand, providing visibility into how legal decisions are made and how laws are applied. The public can scrutinize the actions of judges, lawyers, and other participants in the judiciary system, ensuring that legal proceedings adhere to established rules (including those guaranteeing impartiality, fairness, and equality).[18]

13 *Ballon*, in: Fasching/Konecny (eds.), § 19 JN, paras. 5 *et seqq*; *Kurkela/Turunen*, pp. 111 *et seq*.

14 ECtHR, No. 17056/06, *Micallef v. Malta*, judgment of 15 October 2009, para. 93; *Schabas*, p. 295; international bodies, including the United Nations Human Rights Committee, have thus repeatedly affirmed that this right is non-negotiable and must be universally applied, emphasizing its centrality to the fair administration of justice. States are obligated to establish and maintain robust safeguards to ensure that decision-makers remain free from external influence and pressures that could compromise their objectivity; see also *Grabenwarter/Ganglbauer*, in: Czernich/Deixler-Huebner/Schauer (eds.), paras. 1.29 and 1.33.

15 *Trenker*, in: Kodek/Oberhammer (eds.), § 177 ZPO, paras. 3 *et seqq*; *De Oliveria*, in: Hosking/Lahlou/Rojas Elgueta (eds.), p. 45; *Schabas*, pp. 287 *et seq*.

16 *Bingham,* pp. 73 *et seqq*.

17 *Trenker*, in: Kodek/Oberhammer (eds.), § 171 ZPO, para. 1 *et seqq*; *Schabas*, pp. 288 *et seq*.

18 ECtHR, No. 58675/00, *Martinie v. France (GC)*, judgment of 12 April 2006, para. 39: „The Court reiterates that the public character of proceedings before the judicial bodies referred to in Article 6 § 1 protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts, superior and inferior, can be maintained. By rendering the administration of justice visible, publicity contributes to the achievement of the aim of Article 6 § 1, namely a fair trial, the

Without open proceedings, the justice system risks becoming opaque, giving rise to concerns about potential bias, manipulation, injustice, and susceptibility to corruption.[19] The judiciary system also risks becoming disconnected from the public it is meant to serve.

V. In sum, the Rule of Law Governing Commercial Matters before State Courts Rests Upon Indispensable Core Principles

The principles of access to justice, independent and impartial adjudication, equal treatment of parties, the right to be heard, and the requirement for public trials are fundamental cornerstones of the rule of law governing commercial matters before state courts. These principles do not only safeguard individual rights, but they also maintain the integrity, transparency, and legitimacy of the entire legal system. They form a protective framework, ensuring that justice is administered fairly, consistently, and in a manner that instils public confidence.[20]

This is why the fundamental principles of the rule of law in civil proceedings are safeguarded on multiple layers of the legal system: by statutory laws, by constitutions, by public international law (including Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, Article 47 of the Charter of Fundamental Rights of the European Union), and even by customary international law.[21]

C. International Commercial Arbitration Satisfies the Core Requirements of the Rule of Law

As opposed to other forms of alternative dispute resolution, such as investment arbitration, international commercial arbitration does not complete the scope within which the rule of law operates. It does not ensure access to justice for parties that would otherwise not have a realistic avenue to pursue and defend their rights. Rather, every single case that can be brought in an international commercial arbitration, could also be brought before state courts. As such, international commercial

guarantee of which is one of the fundamental principles of any democratic society, within the meaning of the Convention."

19 *Sengstschmid*, in: Fasching/Konecny (eds.), § 171 ZPO paras. 1 *et seqq*; *Torggler/Mohs/Schäfer/Wong*, para. 67.

20 *Allsop*, in: Menaker (ed.), p. 770; *Schabas*, p. 71; *De Oliveira*, in: De Oliveria/Hourani (eds.), pp. 12 *et seq*: "The development of the right to access to justice consolidated the view that such a right is fundamental to promote democracy and fairness. A society cannot be just if its members are not able to seek remedies for the violation of their rights. In this sense, it is also relevant to mention that access to justice is part of sustainable development."

21 *Kodek*, in: Liebscher/Oberhammer/Rechberger (eds.), paras. 1/4 *et seqq; Kurkela/Turunen*, pp. 5 *et seqq.*

arbitration functions as an alternative avenue to the resolution of commercial disputes that could in principle also be resolved by a state judge.[22]

This brings into focus the question of whether and to what extent the principles of the rule of law that govern state court proceedings apply with the same force in international commercial arbitration proceedings. This Section C will demonstrate how the normative framework of international commercial arbitration secures the core features of the rule of law for international commercial arbitration proceedings. The subsequent Section D will show that international commercial arbitration is able to not just match but enhance and fortify the rule of law beyond what state courts are able to do.

I. The Normative Framework of International Commercial Arbitration Ensures that the Rule of Law Is Respected

International commercial arbitration operates within a normative framework that is based on principles and maxims designed to ensure that the core requirements of the rule of law are met.

An important feature of this normative framework is the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration,[23] which has had a strong impact on arbitration laws around the world.[24] The UNCITRAL Model Law – and the arbitration laws based on it – prominently reflect the goal to uphold the rule of law and to ensure due process in international arbitration.

Among others, the Model Law expressly mandates that parties must be treated equally and must have a full opportunity to present their cases.[25] It also ensures that arbitrators are impartial and independent, and it provides mechanisms for challenging arbitrators if these requirements are not met.[26] In addition, it obligates tribunals to hold an oral hearing if so requested by one of the parties (unless there is a prior party agreement to the contrary).[27]

What is more, the UNCITRAL Model law ensures that the rule of law is taken seriously by expressly identifying violations of procedural public policy (including

22 *Lord Neuberger*, ICC Dispute Resolution Bulletin 2023/3, pp. 13 *et seq*; *Grabenwarter/Ganglbauer*, in: Czernich/Deixler-Huebner/Schauer (eds.), para. 1.1.

23 *Blackaby/Partasides/Redfern/Hunter*, paras. 1.218 *et seqq*; *Binder*, p. 13: "The 1985 Model Law covers all stages of the arbitral process from the arbitration agreement, the composition and jurisdiction of the arbitral tribunal and the extent of court intervention through to the setting aside, recognition and enforcement of arbitral awards. Its approach reflects the worldwide consensus on the key aspects of international arbitration practice, (...)".

24 The UNCITRAL Model Law has been adopted or has influenced legislation across 126 jurisdictions (https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status, (25/10/2024)), reflecting a strong commitment to harmonizing arbitration practices with the fundamental tenets of justice, fairness, and the rule of law. See *Menon*, p. 6; *Torggler/Mohs/Schäfer/Wong*, para. 258.

25 Art. 18 UNCITRAL Model Law; *Binder*, pp. 331 *et seq*.

26 Art. 12 UNCITRAL Model Law; *Binder*, pp. 217 *et seqq*.

27 Art. 24 UNCITRAL Model Law; *Binder*, pp. 372 *et seqq*.

the independence and impartiality of the arbitrators, fair and equal treatment of the parties, and the right to be heard) as reasons to challenge an award or deny its recognition and enforcement.[28] The New York Convention of 1958, which ensures almost global enforceability of arbitral awards, does the same in connection with the recognition and enforcement of awards.[29]

In addition to the established normative framework, the arbitration community actively promotes the rule of law through internationally recognized best practices and standards, such as the International Bar Association's (IBA) Guidelines on Conflicts of Interest in International Arbitration.[30]

The sub-sections below discuss how the normative framework of and accepted best practices in international commercial arbitration work to secure compliance with the core elements of the rule of law.

1. Access to Justice in International Commercial Arbitration

As discussed, access to justice guarantees that everyone, irrespective of economic status, can pursue and defend their rights in legal proceedings.

Arbitration costs, which include fees for arbitral institutions, arbitrators, and attorney fees (often calculated based on steep hourly rates), can be high.[31] And they may be prohibitively high for parties with limited financial resources. In addition, there is no legal aid in international commercial arbitration. There is thus the risk that impecunious parties are unable to achieve justice because of their wallet rather than the merits of their case.[32]

Attorney fees usually form the lion's share of arbitration-related costs. Thus, even if parties with limited financial resources could get arbitral proceedings going, they may remain unrepresented, which, in turn, may severely undermine their ability to participate fully in arbitration proceedings.[33] In such a situation, an impecunious party may feel compelled to settle prematurely or at unfavourable terms to avoid escalating costs.

28 Articles 34 *et seqq* UNCITRAL Model Law; *Binder*, p. 332 and pp. 443 *et seqq*.

29 *Lord Neuberger*, ICC Dispute Resolution Bulletin 2023/3, p. 11; *Blackaby/Partasides/Redfern/Hunter*, para. 1.03.

30 *Voser/Petti*, ASA Bulletin 2015/1, pp. 7 *et seq*; *Hausmaninger*, in: Fasching/Konecny (eds.), § 594 ZPO, para. 61/3.

31 *Hausmaninger*, in: Fasching/Konecny (eds.), Vor §§ 577 ff ZPO, para. 4; *Menon*, p. 18; *Blackaby/Partasides/Redfern/Hunter*, paras. 1.123 *et seqq*.

32 Ontario Ct. App., *Heller v. Uber Techs. Inc.*, 2019 ONCA 1, para. 94: "The mediation and arbitration processes require US$14,500 in up-front administrative fees. This amount is close to Mr. Heller's annual income and does not include the potential costs of travel, accommodation, legal representation or lost wages. The costs are disproportionate to the size of an arbitration award that could reasonably have been foreseen when the contract was entered into."; *Born*, § 5.06[D][4][c] and § 21.03[A][2][f].

33 *Fabbri*, in: Lee/Levy (eds.), p. 73; *Carter*, American Review of International Arbitration 2013/3-4, p. 475.

In sum, there is a more pronounced risk of inequitable results, favouring the party with greater financial leverage.[34] This raises the question of how access to justice is upheld in international commercial arbitration.[35]

At its fringes, disparities in financial resources (and the resulting disparities in the quality of legal representation) are a problem that also exists before state courts – which is not *per se* considered to amount to a violation of the rule of law.[36] At its core, international commercial arbitration has found ways to deal with this issue in the absence of state-funded legal aid. Both the market and the legal system have reacted to achieve this.[37]

First, the market has reacted by service providers offering third-party funding to enable impecunious parties to use the arbitral process.[38] Success fee arrangements with counsel advocating the case have a similar effect.[39] Both are widely used in international commercial arbitration – at least for claims that are likely to succeed.[40]

Second, a more fundamental fairness issue arises when arbitration agreements are enforced even if one party cannot afford the process and cannot negotiate third-party funding or a success fee arrangement.[41] For such situations, there is broad consensus that the arbitration agreement cannot be enforced.[42] Rather, the impecunious party may seek recourse in state courts, despite the existence of an arbitration agreement.[43] This approach opens up the avenue for the impecunious party to pursue and defend its claims before state courts and, thus, to benefit from the various tools that exist there to ensure access to justice (including legal aid).[44]

The legal framework for international commercial arbitration thus ensures that access to justice is preserved, even for parties with limited financial resources.

34 *Born*, § 23.08[A], [B] and [C].
35 *Cardoso*, AI 2020/1, pp. 140 *et seqq; Kurkela/Turunen*, p. 64*; Born*, § 5.06[D][4][c]; *Croisant*, Belgian Review of Arbitration 2020/1, pp. 33 and 46.
36 *Born*, § 23.08[A]; *Kurkela/Turunen*, pp. 65 *et seq*.
37 *Croisant*, Belgian Review of Arbitration 2020/1, pp. 46 *et seqq*; *Born*, § 21.03[A][2][f].
38 *Stoyanov/Owczarek*, BCDR International Arbitration Review 2015/1, pp. 171 *et seqq*; *Born*, § 21.03[A][2][f].
39 *Born*, § 21.03[A][2][d].
40 *Born*, § 5.06 [D][4][c] and § 23.08[A].
41 *Croisant*, Belgian Review of Arbitration 2020/1, p. 46.
42 *Croisant*, Belgian Review of Arbitration 2020/1, p. 35; see, e.g., Lord Denning's statement that "a denial of justice" would accrue from compelling a plaintiff to arbitrate, which he cannot afford, when he is ready to proceed in a court to which he has access with legal aid (*Born*, § 5.06[D][4][c]). This view is in keeping with the German Federal Court of Justice, who has made clear that a court should not enforce an arbitration agreement when to do so would amount to a party's inability to pursue its rights in arbitration (BGH, III ZR 33/00, paras. 14 *et seqq*).
43 *Born*, § 5.06[D][4][c].
44 *Born*, § 5.06[D][4][c], specifically Fn. 1396.

2. Procedural Public Policy Protects the Rule of Law in International Commercial Arbitration

The normative framework of international commercial arbitration contains mechanisms that ensure that core elements of the rule of law are taken seriously, including the independence and impartiality of the arbitrators, the right to be heard, and the right to fair and equal treatment. These elements of procedural public policy are universally enshrined in the UNCITRAL Model Law, arbitration laws worldwide, and the New York Convention.[45] They contain strong safeguards that operate through grounds for challenging an award and preventing its enforcement.[46]

Arbitrators and parties alike want to ensure the finality and effectiveness of the award. As a result, the core principles of due process and procedural public policy are omnipresent in international commercial arbitrations. They are pervasively referred to and considered when devising the procedural rules for a particular arbitration and when deciding on procedural issues that have to be resolved in the course of arbitral proceedings.[47]

That way, the pillars of procedural public policy and due process are firmly and prominently established in international commercial arbitration – even without a detailed mandatory procedural straitjacket as it exists before state courts.[48] As discussed in more detail below, this feature affords international commercial arbitration greater flexibility in how individual proceedings are structured, without endangering the rule of law.[49]

3. Impartiality and Independence of Arbitrators

The impartiality and independence of arbitrators are core pillars of international commercial arbitration.[50] As with the core elements of the procedural public policy

45 *Allsop*, in: Menaker (ed.), p. 792.

46 *Park*, No. 17-25 Boston University School of Law, Public Law Research Paper, 2017, p. 13 *et seqq*; *Brunert*, North Carolina Law Review Volume 1992/1, pp. 102 *et seq*.

47 *Allsop*, in: Menaker (ed.), p. 770; *Schabas*, p. 71; *De Oliveira*, in: De Oliveria/Hourani (eds.), pp. 12 *et seq*: "The development of the right to access to justice consolidated the view that such a right is fundamental to promote democracy and fairness. A society cannot be just if its members are not able to seek remedies for the violation of their rights. In this sense, it is also relevant to mention that access to justice is part of sustainable development."

48 The decision on what the procedural rules governing an individual arbitration look like is guided by arbitration-specific built-in safeguards that are largely based not on rigid legal rules but on the significant control the parties have over the process: from selecting arbitrators to tailoring the procedural rules for their arbitration. See *Born*, § 19.04[B][3].

49 *Born*, § 11.05[B][2][a].

50 *Voser/Petti*, ASA Bulletin 2015/1, p. 7; *Blackaby/Partasides/Redfern/Hunter*, para. 4.75; The Supreme Court of Canada highlighted a general principle concerning the independence and impartiality of arbitrators when it pointed out that "[t]he independence and impartiality of arbitrators is guaranteed not by their remoteness, security of tenure, financial security or administrative security, but by training, experience and mutual acceptability.", see *C.U.P.E. v. Ontario (Minister of Labour)* [2003] 1 SCR 539.

discussed above, this principle is enshrined in arbitration laws around the globe, the UNCITRAL Model Law, and the New York Convention.[51] It is also highlighted in universally accepted best practices as reflected in the IBA Guidelines on Conflicts of Interest in International Arbitration.

This feature of the rule of law is also secured in the same effective way: by violations of this principle constituting a reason for challenging the award or refusing its acknowledgement and enforcement.[52] As a consequence, the neutrality of the arbitral process is preserved, and parties are provided with the assurance that their decision makers are free from improper influence.

And the IBA Guidelines are widely relied upon by courts and arbitral institutions when addressing challenges to arbitrators.[53] They provide a framework for identifying potential conflicts of interest that might undermine an arbitrator's independence or impartiality. By offering detailed guidance on issues such as repeat appointments, personal relationships with parties, and financial interests, the guidelines help ensuring greater transparency and consistency concerning the standards applicable in international commercial arbitration.[54]

The IBA Guidelines (and developed arbitration laws) also impose broad disclosure obligations. Before and after their appointment, arbitrators must disclose any potential conflict of interest that may raise doubts about their ability to remain neutral, so that the disclosed circumstances can be assessed promptly, maintaining the integrity of the arbitral process.[55]

The practice of international commercial arbitration functions as a further safeguard. Arbitrators have a strong interest in maintaining an unblemished reputation for independence and impartiality. The arbitral community is small and well-connected, and a reputation for partiality can significantly harm an arbitrator's career, leading to fewer future appointments.[56] Arbitrators whose impartiality is called into question may also find that their views carry less weight in the tribunal's deliberations, further incentivizing adherence to professional standards.[57]

51 *Hausmaninger*, in: Fasching/Konecny (eds.), § 588 ZPO, paras. 18 *et seqq*; *Born*, § 26.05[B], § 26.05[C][3] and § 26.05[C][6]; *Waincymer*, AI 2010/4, pp. 597-598, Fn. 1.

52 *Del Rosal Carmona*, in: Fach Gomez/Lopez-Rodriguez (eds.), pp. 137 *et seqq*; *Plavec*, in: Kodek/Oberhammer (eds.), § 598 ZPO, paras. 32 *et seqq*; *Born*, § 26.05[B], § 26.05[C][3] [f] and § 26.05[C][6].

53 *Voser/Petti*, ASA Bulletin 2015/1, pp. 7 *et seq*; *Hausmaninger*, in: Fasching/Konecny (eds.), § 588 ZPO, para. 30.

54 *Hausmaninger*, in: Fasching/Konecny (eds.), § 588 ZPO, paras. 30 *et seqq*; *Born*, § 12.05[J][5].

55 *Hausmaninger*, in: Fasching/Konecny (eds.), § 588 ZPO, paras. 39 *et seqq*; *Blackaby/Partasides/Redfern/Hunter*, paras. 4.79 *et seqq*.

56 *Born*, § 12.05[6]; see also *Shah*, in: Menaker (ed.), p. 441: "(...) if an arbitrator acts inconsistently with fundamental rights, he or she is likely to become unpopular and develop an unfavourable reputation (...)".

57 *Blackaby/Partasides/Redfern/Hunter*, para. 4.76; *Brower/Rosenberg*, p. 15: "No party will want to appoint an individual who is unlikely to enjoy respect for intellectual integrity within a tribunal."

Finally, one characteristic of international commercial arbitration is particularly significant in connection with this feature of the rule of law: unlike state court proceedings, parties often play a direct role in selecting arbitrators in arbitration. In most larger disputes, each party nominates one arbitrator, with the two party-nominated arbitrators jointly selecting the chair. This reality of party-nominated arbitrators must not, however, undermine the fundamental maxim of impartiality and independence.[58]

It is legitimate for parties to international arbitration proceedings to nominate an arbitrator that has a firm grasp of those aspects of the case (e.g. industry knowledge, legal expertise, or cultural background) that are particularly relevant to this party's case.[59] It is also legitimate for a party to expect that the arbitrator it nominated will make sure that the evidence and arguments of that party are properly considered in the deliberations of the arbitral tribunal. A party-nominated arbitrator must not, however, function as an advocate for that party or unduly favour or push that party's case in any way. Rather, the very same requirements of impartiality and independence that apply to sole arbitrators or chairs remain relevant.[60]

The uniform application of these standards and principles ensures that the reality of party-nominated arbitrators does not undermine the rule of law.[61] As a consequence, it allows international commercial arbitration to enjoy the benefits that come with decisionmakers that are chosen by the parties. By allowing parties to have a say in the appointment process, arbitration ensures that all the expertise and knowledge needed for high-quality decisions are represented in the tribunal and that both sides' arguments are properly understood and taken seriously, thus promoting acceptance of the tribunal's decision.[62]

4. The Right to a Non-Public Oral Hearing

Oral hearings in international commercial arbitrations are not public. This is in stark contrast to the public trial mandated for state court proceedings. However, for

58 *Brower/Rosenberg*, p. 14.
59 *Brower/Rosenberg*, pp. 17 *et seqq*.
60 *Del Rosal Carmona*, in: Fach Gomez/Lopez-Rodriguez (eds.), p. 150: "(...) the general consensus is that, absent specific agreement of the parties, all arbitrators should be subject to the same standard of impartiality and independence. Such is the approach taken by the arbitral rules of the major institutions and arbitration laws, as well as the majority of scholars and courts."; *De Oliveira*, in: De Oliveria/Hourani (eds.), pp. 12 *et seq*; *Born*, § 12.03[B][2] and § 12.05[B][2].
61 *Born*, § 12.03[B][2] and § 12.05[B][2]; see also *Menon*, p. 15, who argues that disputing parties themselves base the legitimacy of arbitration on the "(...) public confidence in the processes of decision-making that springs from the fairness of those processes in general, due to their adherence to the rule of law (...)", and not on the "(...) confidence that stems from [their] ability (...) to control those processes (...)", namely the possibility for them to appoint their own arbitrators.
62 *Brower/Rosenberg*, p. 18: "(...) the parties will tend to have greater faith in an arbitral process in which they themselves are invested, not just as disputants, but as the creators of the tribunal that will judge them."

the reasons discussed below, this deviation does not undermine the rule of law in international commercial arbitration.[63]

This is because arbitral tribunals operate independently from the state judicial system, they are not part of the state's institutional apparatus, and the actions of arbitral tribunals do not constitute actions by the state. Specifically, arbitral tribunals are not part of one of the branches or powers of the state and they lack *imperium*.[64] They also do not assume the broader function of developing and shaping the law for the benefit of the legal system and society as a whole as does the judiciary.[65]

Rather, arbitral tribunals are creatures of private law resting on a contractual agreement of the parties. And they are tasked with rendering a decision that – although compliant with the applicable law – is focussed on fairness and equity in the individual case.

This difference matters. The public trial as a core feature of the rule of law before state courts has historically been devised as a safeguard to prevent undue interference in judicial outcomes by other branches of state power. Public hearings uphold transparency, allowing the public to observe the administration of justice and deterring undue influence behind "closed doors".[66] Despite this concern, the right to public trials is not absolute, even before state courts.[67]

Given that the origin and essence of arbitration is placed outside the state, the above-described safeguards are less essential.[68] Rather, the particularly strong desire and need for confidential proceedings in commercial matters (including to protect highly sensitive business data and information) trump the need for publicity.[69] This constellation of interests opens up the possibility for parties to an arbitration agreement to opt out not only of the state judiciary system but also of the need for a public trial.[70]

63 *Hausmaninger*, in: Fasching/Konecny (eds.), § 598 ZPO, para. 2; *Cirlig*, in: De Oliveria/Hourani (eds.), pp. 83 *et seqq*: "First, by voluntarily signing an arbitration agreement parties waive the right to a state court and the right to a public hearing, under Article 6(1) of the ECHR, but the guarantees of a fair trial are not affected. Their right to a fair hearing, the right to be heard, the equality of arms and the right to an independent and impartial tribunal will continue to be applicable in arbitration proceedings."

64 *Ballon/Fucik/Lovrek*, in: Fasching/Konecny (eds.), § 1 JN, para. 34; *Grabenwarter/Ganglbauer*, in: Czernich/Deixler-Huebner/Schauer (eds.), para. 1.8.

65 This is reflected *inter alia* in the limitation that they are excluded from referring matters to the European courts to have disputed legal issues clarified for the broader legal community (*Kodek*, in: Liebscher/Oberhammer/Rechberger (eds.), para. 1.7).

66 *Kozlowska-Rautiainen*, in: Calissendorff/Schöldström (eds.), p. 142: "From the perspective of the ECHR, a public hearing provides an element of public scrutiny intended to protect a party from administration of justice taking place behind closed doors."

67 *Sengstschmid*, in: Fasching/Konecny (eds.), § 171 ZPO, paras. 57 *et seqq*.

68 *Rutledge*, Arbitration and the Constitution, p. 145.

69 *Kozlowska-Rautiainen*, in: Calissendorff/Schöldström (eds.), p. 159: "In voluntary arbitration it is a legitimate expectation that a hearing is private. The right to a private hearing becomes part of parties' agreement where arbitration rules providing for the privacy of the hearing are chosen to govern the arbitration."

70 *Hausmaninger*, in: Fasching/Konecny (eds.), § 598 ZPO, para. 2; *Brunert*, North Carolina Law Review Volume 1992/1, pp. 114 *et seqq*.

In short, the absence of public hearings in international commercial arbitration is not a flaw but a feature that aligns with the values of privacy, efficiency, and party autonomy that underpin the arbitration process. The European Court of Human Rights (ECtHR) has confirmed that this general waiver of a public trial in arbitration proceedings does not violate the rule of law.[71]

As in state court proceedings,[72] parties are free to waive their right to an oral hearing altogether. Such a deliberate choice also does not constitute a violation of the rule of law. However, given that the right to a hearing remains a fundamental procedural right, safeguarding parties' right to be heard, such a waiver requires the agreement of both parties. As long as one party requests an oral hearing, the arbitral tribunal must provide for one in the procedural calendar.[73] Refusing to hold a hearing when one party requests it is a violation of due process.[74]

5. Application of Governing Law in International Commercial Arbitration

For the rule of law to work, the law of the people, by the people, and for the people must be taken seriously. The rule of law requires decisions to be made in accordance with established legal principles and procedures, ensuring fairness, transparency, and impartiality. If the law is not taken seriously, and if it is not reliably and consistently applied, the rule of "law" is by definition undermined.[75] As there is generally no *de novo review* of an arbitral award, the question arises how international commercial arbitration safeguards this tenet of the rule of law.[76]

It does so, first, by ensuring that violations of public policy form a ground for setting aside an award and for refusing its recognition and enforcement.[77] This

71 *Kozlowska-Rautiainen*, in: Calissendorff/Schöldström (eds.), pp. 142 *et seqq*.

72 For instance, in some cases, the court may determine that an oral hearing is unnecessary, such as when there are no issues of credibility or contested facts, and the case can be decided fairly based on written submissions (ECtHR, No. 73053/01, *Jussila v. Finland*, judgment of 23.11.2006, paras. 40 *et seqq*).The ECtHR has ruled that, in exceptional circumstances, proceedings may be resolved without a hearing if the case raises no significant questions of fact or law that cannot be adequately addressed through the written materials alone (ECtHR, No. 28394/95, *Döry v. Sweden*, judgment of 23.05.2000).

73 This general principle if reflected, for example, in Article 25(5) of the ICC Rules, which provides that: "[t]he arbitral tribunal may decide the case solely on the documents submitted by the parties unless any of the parties requests a hearing."; see also *De Oliveria*, in: Hosking/Lahlou/Rojas Elgueta (eds.), p. 45; *Hausmaninger*, in: Fasching/Konecny (eds.), § 598 ZPO, paras. 23 *et seqq*.

74 *Plavec*, in: Kodek/Oberhammer (eds.), § 598 ZPO, para. 4; for example, the Austrian Supreme Court set aside an arbitral award where an arbitrator disregarded a party's explicit request for an oral hearing, relying instead solely on written submissions. The Court found this to be a violation of the right to be heard, enshrined in Section 589 of the Austrian Code of Civil Procedure (Austrian Supreme Court, 7Ob111/10i, judgment of 30 June 2010).

75 *Park*, No. 17-25 Boston University School of Law, Public Law Research Paper, 2017, p. 4.

76 *Menon*, pp. 17 *et seq*.

77 *Burckhardt/Meier*, in: Arroyo (ed.), Article 187 PILS, paras. 76 *et seqq*; *Born*, § 26.05[A], § 26.05[B] and § 26.05[C][9].

means that grave violations of the applicable law that also amount to violations of the most fundamental principles underlying the legal system (at the seat of arbitration or its place of recognition and enforcement) will invalidate the award or render it ineffective.[78]

Some jurisdictions go further and provide a limited right of appeal on questions of law, such as the English Arbitration Act. Section 69 of the English Arbitration Act permits an appeal on questions of English law, but only under certain conditions: the tribunal's decision on the legal question must be *"obviously wrong"*, or the question must be of *"general public importance"* and the decision *"open to serious doubt"*, making it *"just and proper in all the circumstances for the court to address the matter"*. Parties are free to waive the right of an appeal on a question of law.[79]

In addition, it is universally accepted in international commercial arbitration that arbitrators are bound to respect and apply the (rules of) law agreed upon by parties, and any intentional disregard of this obligation undermines the integrity of the arbitration process.[80] A deliberate deviation from the applicable law chosen by parties by an arbitrator may amount to a ground for challenging the award if it results in a public policy violation,[81] if it is considered a violation of the principles of party autonomy and fairness,[82] if it is perceived as exceeding the arbitrator's authority (which may also be the case for decisions that are rendered *ex aequo et bono* without an explicit mandate of parties), or if it results in a violation of EU competition law.

It is true that within these generous boundaries, an error in the application of the applicable law will generally not invalidate the award. This, however, does not undermine the rule of law in international commercial arbitration for several reasons.

First, it is a deliberate choice of parties that opt out of state court proceedings to have their disputes resolved by arbitration that the finality of the award is considered of paramount importance (as long as the outer boundaries set out above are respected). This deliberate choice in the interest of obtaining legal certainty quickly

78 *Born*, § 26.05; *Kurkela/Turunen*, pp. 73 *et seqq.*

79 *Blackaby/Partasides/Redfern/Hunter*, para. 10.75.

80 *Burckhardt/Meier*, in: Arroyo (ed.), Article 187 PILS, para. 11: "Article 187 PILS expresses this widely accepted maxim by stipulating that the tribunal first and foremost applies the law chosen by the parties. This not only reflects international custom (...)"; *Hausmaninger*, in: Fasching/Konecny (eds.), § 603 ZPO, para. 66.

81 *Hausmaninger*, in: Fasching/Konecny (eds.), § 603 ZPO, para. 78. See also *Burckhardt/Meier*, in: Arroyo (ed.), Article 187 PILS, para. 77: "A tribunal can violate Art. 187 PILS, inter alia, by not respecting the parties' choice of law, (...), by deciding the dispute by applying rules of law instead of deciding ex aequo et bono or vice versa, or finally, by wrongly applying the law governing the merits. In general, such violations by themselves do not constitute a violation of public policy (...) and thus are not sufficient grounds to set an award aside."

82 *Cirlig*, in: De Oliveria/Hourani (eds.), pp. 86 *et seqq*; *Blackaby/Partasides/Redfern/Hunter*, paras. 2.133 *et seqq* and para. 10.86; *Schmalz,* in: Nacimiento/Kröll/et al. (eds.), § 1051, paras. 56 and 63.

amounts to a calculated waiver of the right to have all the t's crossed and i's dotted in applying the governing law.[83]

Second, the framework of international commercial arbitration ensures that the risk of decisions that are legally "wrong" is minimized. As a rule, parties (or the appointing authority chosen by parties) can choose the arbitrators that decide their case. They will only entrust arbitrators with their cases who have a proven track record of rendering high-quality decisions and who they trust to fully grasp the factual and legal issues at stake.

Arbitrators in international settings commonly reference – and are expected by parties to reference – widely accepted principles of international law, such as good faith and fair dealing, as well as commercial common sense.[84] This allows arbitrators to decide cases in line with parties' legitimate expectations and to serve individual justice. This also harmonizes outcomes across jurisdictions, ensuring decisions are both legally sound, fair, and commercially viable.[85] Moreover, arbitration often revolves around detailed contracts, leaving little room for the application of national laws. The interpretation of these contracts, too, is increasingly guided by broader notions of good faith and fairness, which are key to maintaining balanced business relationships.[86]

In sum, parties trust "their" arbitrators to render a decision that reflects deep understanding of the relevant industry, intimate familiarity with both the applicable law and the relevant trade practices, and an awareness of the requirements of fairness and individual justice in deciding the specific dispute at hand. The fact that the resulting decision may not mimic, down to its minute details, what the courts of the jurisdiction of the applicable law may have decided, is not a defect of an arbitral award, but an added value.[87]

83 *Park*, No. 17-25 Boston University School of Law, Public Law Research Paper, 2017, Fn. 3.

84 *Born*, § 13.05[A], § 13.05[B] and § 19.06[C], especially subsection [4]: "(...) the law governing international commercial transactions should be presumed to take into account the expectations shared by rational business-persons (including principles of good faith, fair dealing, estoppel, force majeure and the like (...)".

85 *Born*, § 19.06[C][3].

86 *Burckhardt/Meier*, in: Arroyo (ed.), Article 187 PILS, para. 2: "In international commercial arbitration, disputes mostly arise out of complex long-term contracts and the decision of the tribunal often depends more on the agreement and relationship between the parties than on the law applicable to the merits."

87 The flexibility afforded to arbitrators in international commercial arbitration is also evident in their freedom to determine the applicable law when not chosen by parties. If parties have so stipulated in the arbitration agreement, arbitrators can even decide ex aequo et bono, based solely on equity and fairness, without reference to any specific legal rules. This discretion, unavailable to many state judges, allows arbitrators to prioritize justice and reasonableness within the commercial context. However, even in such cases, arbitrators often provide detailed reasoning, ensuring parties' intentions prevail.

II. The European Constitutional Framework Confirms that the Level of Protection of the Rule of Law by International Commercial Arbitration is Adequate

The acceptance of arbitration by both the ECtHR and the European Court of Justice (ECJ) as a legitimate alternative to state court proceedings confirms its compatibility with the core principles of the rule of law.[88]

The ECtHR has dealt with arbitration primarily through the lens of Article 6 of the European Convention on Human Rights and Fundamental Freedoms (ECHR), which guarantees the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal. The jurisprudence of the ECtHR confirms that Article 6 does not prevent parties from choosing arbitration, and that this choice does not undermine the rule of law.[89]

The normative framework of international commercial arbitration discussed above guarantees that parties continue to enjoy their rights to equal treatment, fair proceedings, and impartial and independent tribunal.[90] The ECtHR also accepts that parties' conscious choice to waive their right to a public hearing in arbitration proceedings does not violate the rule of law.[91] Finally, the ECtHR has also confirmed that the annulment proceedings before state courts are sufficient to safeguard those core elements of the rule of law that are non-negotiable even for international

88 *Cirlig*, in: De Oliveria/Hourani (eds.), pp. 83 *et seqq*.

89 ECtHR, No. 1643/06, *Suda v. the Czech Republic*, judgment of 28 October 2010, para. 48; ECtHR, Nos. 40575/10 and 67474/10, *Mutu and Pechstein v. Switzerland*, judgment of 2 October 2018, para. 94.

90 If arbitration is mandated by law, the arbitral proceedings must comply with all the guarantees mandated under Article 6, including fairness, impartiality, and the right to a public hearing (ECtHR, No 1643/06, *Suda v. the Czech Republic*, judgment of 28 October 2010, para. 48; ECtHR, Nos. 40575/10 and 67474/10, *Mutu and Pechstein v. Switzerland*, judgment of 2 October 2018, para. 94; ECtHR, Nos. 30226/10 and 4 others, *Ali Rıza and Others v. Turkey*, judgment of 28 October 2010, paras. 174 and 181).
The ECtHR places particular emphasis on the importance of judicial independence and impartiality, which are fundamental components of Article 6. If a party raises concerns about these issues during arbitration, the arbitration process must ensure compliance with Article 6, even in cases of voluntary arbitral proceedings (ECtHR, Nos. 40575/10 and 67474/10, *Mutu and Pechstein v. Switzerland*, judgment of 2 October 2018, paras. 121 *et seqq*; Beg S.p.a. v. Italy, 2021, paras. 136-143.). However, if a party fails to challenge the impartiality or independence of arbitrators in a timely manner, this is not considered a violation of Article 6 (ECtHR, No. 31737/96, *Suovaniemi and Others v. Finland*, judgment of 23 February 1999).

91 ECtHR, Nos. 40575/10 and 67474/10, *Mutu and Pechstein v. Switzerland*, judgment of 2 October 2018, paras. 94 *et seqq*. A party that agrees to arbitrate effectively waives its right to a public hearing, and the absence of a public hearing in arbitration does not render the process unfair or unreasonable. The ECtHR has clarified that such a waiver is limited to the arbitration itself and does not extend to subsequent court proceedings supporting the arbitration, such as those recognizing or enforcing an arbitral award.

arbitration proceedings.[92] To date, no successful challenge has been made against voluntary arbitration proceedings before the ECtHR.[93]

The rule of law is also a fundamental principle of the European Union, enshrined in Article 2 of the Treaty on European Union.[94] Both the ECtHR and the ECJ make sure that this principle is upheld.[95] The European Commission is committed to safeguarding the rule of law within the Union by commencing infringement proceedings against a member state that violates its obligations under Article 2 of the TEU.[96]

The European Commission has not launched any infringement proceedings against member states based on their arbitration laws, confirming that international arbitrations are not viewed as incompatible with EU legal principles. The ECJ has also implicitly confirmed that arbitration proceedings comply with the rule of law by (accepting them and only) holding that arbitral tribunals must apply EU competition law in their decisions.[97]

D. International Commercial Arbitration Enhances and Strengthens the Rule of Law

As discussed in Section C, the normative framework for international commercial arbitration ensures adequate respect for the rule of law. Considering that international arbitration has its roots in party autonomy and so outside the authority and powers of the state, the safeguards established for international commercial arbitration are on par with those typical for the state court system. Section D shows that international commercial arbitration does more than mimic the state court

92 The ECtHR has confirmed that in supporting proceedings state courts must rectify any breaches of minimum requirements from the arbitration, as failure to do so could expose the respondent state to liability under the ECHR (ECtHR, No. 415/07, *Klausecker v. Germany*, judgment of 6 January 2015, para. 74; ECtHR, No. 2935/07, *Kolgu v. Turkey*, judgment of 27 August 2013, paras. 44 *et seq*). In essence, there is no direct route from an arbitral tribunal to the ECtHR; only after a state court has been made aware of and failed to address a procedural violation in the arbitration can the issue be brought before the ECtHR.

93 *Kodek*, in: Liebscher/Oberhammer/Rechberger (eds.), paras. 1/33.

94 The European Commission defines the rule of law as a system where all public authorities act within legal constraints, in accordance with democratic values, fundamental rights, and under the scrutiny of independent courts. Core principles include legality, legal certainty, the prohibition of arbitrary executive power, judicial protection by independent courts, respect for fundamental rights, the separation of powers, and equality before the law (*European Commission*, Communication from the Commission to the European Parliament, the Council, European Economic and Social Committee and the Committee of the Regions, COM(2020) 580 final).

95 *European Commission*, Communication from the Commission to the European Parliament, the European Council, and the Council, COM(2019) 163 final.

96 For example, Poland has faced several such proceedings for judicial reforms that compromised the independence of its courts, which is a fundamental breach of EU law.

97 ECJ, Case C-126/97, *Eco Swiss China Time Ltd v. Benetton International NV*, ECLI:EU:C:1999:269; ECJ, Case C567/14, *Genentech Inc. v. Hoechst GmbH and Sanofi-Aventis Deutschland GmbH*, ECLI:EU:C:2016:526.

system in ensuring the rule of law. Particularly for complex cross-border disputes, international commercial arbitration enhances and strengthens the rule of law in ways the state court system usually cannot. These are discussed in more detail below.

I. Unified Jurisdiction in Cross-Border Disputes

In cross-border disputes, the sheer fact that multiple jurisdictions are involved may create significant challenges in state court proceedings. Parties may face conflicting decisions on jurisdiction by different courts, a denial of jurisdiction by all relevant courts, or a simultaneous assumption of jurisdiction by multiple courts resulting in conflicting or parallel judgments. If it is possible at all, clarifying these issues may take years, resulting in prolonged legal uncertainty, delay in obtaining a final decision on the merits, and considerably increased costs. All this threatens to weaken or even undermine the rule of law.

Arbitration offers a simple way to avoid such jurisdictional disputes and uncertainties. A well-drafted arbitration clause captures all disputes arising out of or in relation to the contractual arrangement(s) underlying the parties' commercial dispute. The arbitral tribunal will function as the sole competent decision maker for the resolution of all inter-connected global disputes of the parties. This creates a "one-stop shop" in which disputes are heard with finality and without having to suffer expensive and time-consuming litigation in multiple forums.[98]

That way, international commercial arbitration strengthens the rule of law by saving time and resources and guaranteeing a faster and more efficient way of resolving international disputes.

II. Global Enforceability of Arbitral Awards

One of the most severe challenges in connection with cross-border disputes is the issue of enforcing decisions internationally, because, as a rule, the judgments of the courts in one state have no legal force in another.[99]

For court decisions, this issue has been tackled within regional harmonization zones like the European Union by putting in place mechanisms that ensure the smooth recognition and enforcement of decisions among member states.[100] In addition, bilateral and multilateral treaties have been concluded that are targeted at making the recognition and enforcement of court decisions across borders easier.[101]

98 *Loghin*, Revista Română de Arbitraj 2021/2, p. 109: "One of the consequences of employing a pro-arbitration approach to interpreting the arbitration agreement is the adoption of the 'one- stop shop' presumption. This means that all potential disputes arising under the contract are intended to be resolved in only one forum, i.e. arbitration."

99 *Michaels*, in: Wolfrum (ed.), MPEPIL, para. 1.

100 *Rivkin*, AI 2013/29, p. 339.

101 *Michaels*, in: Wolfrum (ed.), MPEPIL, paras. 13 *et seqq*; The 1971 Hague Judgments Convention; 2005 Hague Choice of Court Convention; Bustamante Code of 1928;

These, however, have not resulted in a unified approach and have left many gaps in the recognition and enforcement of judgments across borders.[102]

As a result, outside such regional harmonization zones, and certainly on a global scale, the enforcement of court decisions often becomes extremely cumbersome. A favourable judgment rendered in one country may encounter serious impediments to enforcement in another, producing fragmentary legal results and potentially undermining effective access to justice and, thus, the rule of law.[103]

The relative ease of enforcing arbitral awards is a significant competitive advantage of international commercial arbitration over state court proceedings. This international, and in fact global, enforceability of arbitral awards is guaranteed by the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1985, one of the most successful international treaties of all time, ratified by more than 170 countries worldwide.[104] This convention creates a more homogeneous and reliable enforcement regime, thereby strengthening the rule of law for commercial cross-border disputes.[105]

This is not to say that the global enforcement regime for international commercial arbitration is perfect. In applying the New York Convention, domestic courts in some jurisdictions may abuse exceptions provided for in the Convention, e.g. by claiming that an award violates their public policy or that the arbitration agreement was not validly concluded.[106] This, however, is a relatively rare occurrence. Compared to the global regime that exists for state court decisions, arbitration clearly provides the more effective mechanism for producing enforceable results in cross-border disputes.

III. Application of National Law in an International Context

In most legal systems, the norms governing commercial transactions (as codified in civil and commercial codes or developed by courts) have been shaped on a domestic or national scale. Many statutory provisions and court-developed doctrines do not contemplate their application in highly complex multi-jurisdictional disputes

1995 Protocol on the Enforcement of Judgments Letters Rogatory, and Judicial Notices issued by the Courts of the Member States of the Arab Gulf Co-operation Council.

102 *Rivkin*, AI 2013/3, p. 338.

103 *Rivkin*, AI 2013/3, p. 339.

104 https://www.newyorkconvention.org/contracting-states (25/10/2024).

105 *Rivkin*, AI 2013/3, pp. 337 *et seq*; *Santos Silva*, in: Pereira da Fonseca/Lentz de Moura Vicente/et al. (eds.), p. 280: "Since the Convention aims to unify the States' rules on recognition and enforcement, it is only natural that its starting point is the imposition that there is no significant discrimination of foreign awards towards domestic ones."

106 E.g. *Moses*, in: Fach Gomez/Lopez-Rodriguez (eds.), p. 178: "These have, in effect, been decisions on the merits, disguised as violations of public policy. By disregarding a basic understanding that the New York Convention does not permit awards to be refused enforcement on the grounds of the arbitrator's mistake of fact or law, India has acquired a reputation as an arbitration—unfriendly jurisdiction."

in which legal cultures may clash and business practices may be of paramount importance when parties plan their activities.

It takes considerable skill, experience, and expertise to apply these norms in a transnational setting and in the context of highly specific industries and the related party expectations. Some jurisdictions may have specialized courts or benches whose judges are attuned to dealing with this amalgam of norms, interests, and legitimate party expectations. But many do not. And even if they do, the judges may not be intimately familiar with the industry or sector in which the factual and legal issues of the dispute are rooted.[107]

In such situations, state court judges, even though doing everything by the book, may not serve the rule of law in the most meaningful way. They may not be sufficiently skilled in applying purely national norms in complex international disputes, *i.e.* outside of their natural habitat.[108]

Here, again, international commercial arbitration can offer a considerable advantage, fostering and strengthening the rule of law. The parties have a direct say in choosing (the appointing authority selecting) the arbitrators that will decide their disputes. It is a core competence of reputable and experienced arbitrators to apply national norms in the context of complex international business disputes. And the parties can ensure that the arbitrators that decide their dispute are also familiar with the specific industries and legal cultures involved.[109]

The result will be a decision that has a higher likelihood of making legal, factual, and business sense – satisfying the black-letter law while also serving individual fairness and justice.[110] That way, international commercial arbitration serves the rule of law in a more meaningful and substantive way than is often the case before state courts.

107 *Born*, § 25.04[A][8][a] and § 25.05[A][1][a] and [3]; *Gómez*, Developing Expertise to Deal with "Experts" in International Arbitration, available at: https://arbitrationblog.kluwerarbitration.com/2016/10/17/developing-expertise-to-deal-with-experts-in-international-arbitration/(25/10/2024).

108 *Waincymer,* p. 3: "Even where judges are highly competent, they are unlikely to have significant experience with international disputes. A rigorous understanding of conflicts of law principles and an ability to effectively apply foreign law and to accommodate the wishes of the parties is an important element of international adjudicatory expertise that may not have been prevalent within national courts, even in highly developed systems."

109 *Renner*, Journal of International Arbitration 2009/4, p. 554: "It may well be that arbitral tribunals still predominantly apply legal rules derived from domestic and international law, but increasingly these rules are integrated into a system of norms that develops its very own normative meta-structure. The relation of different types of norms as well as the resolution of potential conflicts between them is then no longer a matter of either domestic or international law but of the self-generated constitutional norms of international arbitration."

110 *Born*, § 12.01[A]: "(...) Experience shows that the surest, most reliable way (...) of selecting the optimal decision-maker for a particular dispute, is to permit the parties themselves – who have the greatest incentive to make an appropriate selection and the most information on which to base such a choice – to choose the arbitrators (...)."

IV. A Global Procedural Framework for Commercial Disputes

Resolving international commercial disputes involving parties from different legal cultures may require subjecting one party to a foreign and unfamiliar procedural setting.

For example, a New York party that must litigate its dispute before Swiss state courts may find itself deprived of virtually all the procedural tools it considers essential to make its case. It may not have access to document production, interrogatories, depositions, proper cross examination of witnesses or a jury at trial. Conversely, a Swiss party that must litigate in New York may face a protracted and costly pre-trial phase and a judge that does not seem interested in establishing the facts of the case.

Some of these procedural differences a party may be able to adjust to once a dispute has arisen, others it cannot. To name just one example, a document production phase may expose the Swiss party much more than the New York party. The latter will have put in place a so-called "document retention policy" (routinely purging its servers of all documents and correspondence that have not been hand-picked to be kept long-term) while the Swiss party may have to hand over gigabytes of unfiltered data. The New York party may also resort to extensive concepts of privilege (including attorney-client privilege and work-product privilege) that the Swiss party is not accustomed to.[111]

Differences like these can distort the level playing field in international disputes in a way that is entirely unrelated to the strength of a party's case on the merits – thereby weakening the efficacy of the rule of law.[112]

International commercial arbitration has addressed this issue. Over decades it has developed best practices for a truly global procedural framework for the resolution of cross-border disputes. These best practices are codified in widely acknowledged soft law instruments like the IBA Rules on the Taking of Evidence in International Arbitration (addressing among others the evidentiary issues of document production, witness testimony, and expert evidence).[113] They allow parties to litigate their international commercial disputes globally on a familiar and highly efficient procedural basis.[114] Moreover, this widely accepted framework remains flexible,

111 *Rubinstein/Guerrina*, Journal of International Arbitration 2001/6, pp. 590 *et seqq*; *Marghitola*, pp. 11 *et seqq*.

112 *Rubinstein/Guerrina*, Journal of International Arbitration 2001/6, p. 590: "(...) ex post determination of privilege issues creates ambiguity and uncertainty that can be dangerous both for parties and their counsel (...)"; *Marghitola*, p.11: "(...) Principles and rules on document production are entirely different in common law and civil law systems. (...) For arbitration practitioners, the understanding of both civil law and common law concepts is of paramount importance (...)".

113 *Lew/Mistelis/Kröll*, paras. 22-8; *Born*, § 15.07[D][3] and § 16.02[B][5].

114 *Blackaby/Partasides/Redfern/Hunter*, para. 5.68.

allowing parties and arbitral tribunals to tailor the procedural rules to the specific circumstances and requirements of each individual dispute as needed.[115]

This harmonized and efficient, yet flexible, procedural framework that can be tailored to the needs of cross-border disputes, is one of the key reasons why international commercial arbitration now reigns supreme as the preferred dispute resolution mechanism among those who do business internationally. More than anything else, this has contributed to arbitration becoming "*the natural judge*" of the business community.[116] And this is yet another avenue through which international commercial arbitration provides a procedural framework and basis for the resolution of cross-border disputes that strengthens the rule of law.

V. Justice Served in a Timely Manner

A central feature of the rule of law and access to justice is the time required to resolve disputes. Protracted litigation and undue delay have an adverse effect on individuals and enterprises: they entail superfluous cost, missed business opportunities, and impaired confidence in the legal system.[117]

As the EU Justice Scorecard 2024 shows, first instance proceedings before state courts, even within the European Union, may take anywhere between 100 days (in Lithuania) and 700 days (in Greece) on average.[118] Complex cases will take much longer, and usually significant further time will be added for appeal proceedings in the superior instance(s).

Even though the duration of proceedings varies, speed and efficiency remain a hallmark of international arbitration, with leading arbitral institutions pushing hard (including with considerable financial incentives) for arbitrators to render a final decision as soon as reasonably possible. On average the final resolution of mid-sized disputes in arbitration procedures may take anywhere from one to one-and-a-half years.[119] No time for appeal proceedings will be added. And – if the seat is chosen wisely by the parties – any setting aside proceedings will be dealt with directly by a specialized bench at the Supreme Court within a few weeks.

115 *Torggler/Mohs/Schäfer/Wong*, para. 1059; *Schwarz*, in: Liebscher/Oberhammer/Rechberger (eds.), paras. 8/337 and 8/393.

116 *Hanotiau*, Journal of International Arbitration 2011/2, p. 103.

117 *Kalicki*, Controlling Time and Costs in Arbitration: A Progress Report (Part 1 of 2), available at: https://arbitrationblog.kluwerarbitration.com/2011/11/21/controlling-time-and-costs-in-arbitration-a-progress-report-part-1-of-2/ (25/10/2024).

118 EU Justice Scoreboard 2024, see Figures 6 and 7, available at: https://commission.europa.eu/document/download/84aa3726-82d7-4401-98c1-fee04a7d2dd6_en?filename=2024%20EU%20Justice%20Scoreboard.pdf (25/10/2024).

119 In particularly complex cases and cases with unwilling parties, the average time for the resolution of disputes in arbitration may increase significantly. According to the statistics of the International Chamber of Commerce in 2023, the average time for the arbitration procedure lasted about 27 months (ICC Dispute Resolution 2023 Statistics, p. 15, available at: https://iccwbo.org/wp-content/uploads/sites/3/2024/06/2023-Statistics_ICC_Dispute-Resolution_991.pdf (25/10/2024)).

Arbitration's relative speed and efficiency are a direct consequence of the widely accepted best practices in international commercial arbitration to structure arbitral proceedings in a way that cuts out unnecessary fluff and limits procedural steps to those that add value and progress the resolution of the dispute. In addition, experienced arbitrators are skilled in using the flexibility of the procedural framework for fine-tuning it to a specific arbitration in a way that maximizes procedural efficiency.[120]

In addition, all leading arbitral institutions now offer expedited and/or emergency proceedings that allow the parties to fast-track the arbitration proceedings even more, if they so choose.[121]

In sum, although the arbitration proceedings may experience delays, by and large, it remains the quicker path to justice for complex cross-border disputes, compared to multi-instance state court proceedings. As a rule, arbitration enhances access to justice in ways consistent with the imperatives of the modern business world.

VI. Enhanced Flexibility and Navigating Crises

As discussed, the procedural framework of international commercial arbitration rests on a small number of immovable pillars (ensuring due process) while otherwise retaining flexibility and malleability. This is in stark contrast to the detailed and mandatory straitjacket that codes of civil procedure impose on state court proceedings. Flexibility as a core feature of international arbitration allows arbitration to elegantly and nimbly adjust to the circumstances and requirements of each individual case in a way that ensures fundamental procedural rights and, thus, protects the rule of law.

This characteristic of arbitration is a pervasive benefit that is, ideally, operative in all proceedings. Its value becomes particularly evident, however, when circumstances change drastically, suddenly, and on a large scale – as is the case in times of major crises. In such situations, international commercial arbitration can adjust much more easily to allow the continued resolution of commercial disputes – adjusting to the changed circumstances as necessary in creative and innovative ways while preserving procedural public policy. This way, international commercial arbitration becomes a powerful vehicle through which the rule of law can still function when the mandatory, and comparatively sluggish, state court system may be forced to grind to a halt.[122]

The COVID-19 pandemic was a powerful example of this ability of international commercial arbitration to continue serving the rule of law when the state court system is not able to anymore. The inability for a group of people to meet in closed rooms alone was enough to petrify and paralyze significant parts of the state court

120 *Mistelis*, in: Schultz/Ortino (eds.), p. 374.
121 *Tarjuelo*, DRI 2017/2, pp. 105 *et seqq*; *Pettibone*, Indian Journal of Arbitration Law 2021/1, pp. 175 *et seqq*.
122 *Dezalay/Garth*, in: Schultz/Ortino (eds.), pp. 785 *et seqq*.

system. Not so international commercial arbitration. The lack of a need for public trials and the flexibility and adjustability of international arbitration allowed it to embrace technological solutions, including remote hearings and e-filing platforms, swiftly to unblock proceedings.[123]

VII. Enhancing the Rule of Law Before State Courts Through Competition

Due to the court fees being usually calculated based on the amount in dispute, it is lucrative for state court systems to attract large commercial disputes. It has not gone unnoticed that the lion's share of sizeable international commercial disputes is decided by arbitral tribunals rather than state court judges. This is because, among others, users appreciate the efficient way in which international arbitration resolves disputes of that calibre, the ability to use English (or any other chosen language) as the language of the proceedings, and the many ways in which arbitral proceedings avoid unnecessary cost and delay.[124]

This reality has sparked competition between arbitration and state courts, which – in turn – has led to efforts by the state court system to improve its efficiency and enhance its attractiveness for businesses and entrepreneurs, particularly in cross-border cases. These efforts include accepting English as an alternative language in commercial cases, considering the idea of using written witness statements as a means to streamline proceedings and the evidentiary efficiency of hearings, or setting up international commercial courts.[125]

This is healthy competition for state courts in an area in which there would be none without arbitration. This competition pushes the state court system to strive to develop and improve – and become more user oriented. That way, international commercial arbitration has a wholesome indirect effect on strengthening the rule of law before state courts.

123 *Abdel Wahab*, in: Scherer/Bassiri/Abdel Wahab (eds.), p. 2*:* "(...) While the judicial systems in many jurisdictions had come to a halt in the first weeks during which the pandemic struck, arbitration lived up to individual, institutional and organizational expectations through a swift and smooth transition into the virtual environment (...)".

124 *Eidenmueller*, Oxford Legal Studies Research Paper No. 3/2020, p. 20: "Competition between state courts and arbitral tribunals currently exists primarily with respect to high-stakes B2B disputes. The amount in dispute in these cases will usually exceed 100,000 or even 1,000,000 Euros. A significant portion of the total dispute resolution volume in this market segment goes to arbitration. State courts and arbitral institutions are in stiff competition to maintain or increase their respective market shares."

125 *Antonopoulou*, Journal of International Dispute Settlement, 2023/3, p. 329: "(...) the 'arbitralization' of public courts and justice. In order to attract parties with a preference for arbitration, some international commercial courts have adopted some of arbitration's most valued features (...)"; *Schwedt*, SchiedsVZ 2023/6, pp. 351 *et seq*.

E. Conclusion: The Rule of Law is Upheld and Promoted by International Arbitration

The normative framework of international commercial arbitration is designed to robustly protect the rule of law, and to enhance and strengthen it for complex cross-border disputes beyond what the state court system can do.

Within this normative framework, the core principles of the rule of law and due process are not broken down into detailed mandatory rules like the ones contained in codes of civil procedure for state court proceedings. Rather, even though the normative framework of international commercial arbitration firmly rests on the pillars of these core principles of the rule of law, it leaves considerable room for flexibility in how to devise the specific procedural rules for individual proceedings.

This feature is part of the beauty of international commercial arbitration. It has allowed arbitration to develop and continuously develop a sophisticated procedural framework and powerful best practices for how to conduct complex international disputes across legal cultures in a way that is efficient and fair. At the same time, it allows proceedings to be finetuned, on that basis, to perfectly serve the needs and requirements of the specific proceedings at hand.

This feature thus places significant responsibility on the shoulders of the participants of the arbitral process, particularly on arbitral tribunals. They cannot simply apply pre-determined procedural rules mechanically. They are tasked with constantly weighing and balancing the fundamental principles underlying the rule of law and due process in a way that is fair and just and takes seriously the special characteristics of international arbitration and the particularities of the individual case.

This requires knowledge, skill, experience – and a measure of wisdom.

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