Anniversary Contributions

International Litigation & Arbitration

The Principle of Judicial Non-Interference in International Arbitral Proceedings

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1. Introduction

At the heart of the arbitral process are its procedures. It is often, and rightly, said that it is the procedural conduct of international arbitral proceedings, as much as any other factor, that leads parties to agree to arbitrate their disputes.

In particular, parties agree to arbitrate their international disputes with the objective of obtaining fair and neutral procedures which are flexible, efficient, and capable of being tailored to the needs of their particular dispute, without reference to the formalities and technicalities of procedural rules applicable in national courts. These objectives are principally pursued through

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1 See Gary Born, International Commercial Arbitration 64–90 (2d ed. 2009) (discussing parties’ objectives upon entering international arbitration agreements). Not all international arbitrations are necessarily designed to achieve every one of these objectives. For example, arbitrations may be conducted in one party’s home jurisdiction, pursuant to the domestic procedural rules of that jurisdiction. Nonetheless, in most instances, parties enter into international

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the substantial autonomy that parties enjoy, under international arbitration conventions and developed national arbitration legislation, to agree upon arbitral procedures, and the broad discretion that arbitrators are granted by the same sources to prescribe arbitral procedures (absent contrary agreement by the parties). The parties' procedural autonomy and the arbitrators' procedural discretion figure centrally in most discussions of the arbitral process.

In addition to addressing the content of the procedures that are used in international arbitrations, leading international arbitration conventions and national arbitration legislation also adopt a basic principle of judicial non-interference in the ongoing conduct of the arbitral proceedings. This principle of judicial non-interference in international arbitral proceedings is often overlooked. Nonetheless, the principle is fundamentally important to the efficacy of the international arbitral process, ensuring that an arbitration can proceed, pursuant to the agreement of the parties or under the direction of the tribunal, without the delays, second-guessing, and other problems associated with interlocutory judicial review of procedural decisions. This Article addresses both the background of the principle of judicial non-interference and its legal bases in the New York Convention (and other international arbitration conventions) and in national arbitration legislation.

commercial arbitration agreements with the objective of achieving all or most of these ends.


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One of the fundamental objectives of most international commercial arbitrations is procedural neutrality. International disputes almost inevitably involve parties from different home jurisdictions (i.e., a Kuwaiti company, with procedural experience and expectations rooted in Islamic law and culture, contracting with a French company, whose procedural experience and expectations will be based upon contemporary European civil law procedures). Naturally, some parties will be more “international” than others, and have greater or lesser expectations that the procedures of their own home jurisdiction will necessarily apply in future disputes. But one of the fundamental objectives of international arbitration is to ensure that (unless the parties agree otherwise) disputes will not be resolved in accordance with the procedures of one party’s— and not the other party’s—home jurisdiction, which may favor, explicitly or implicitly, one party over the other. The objective of procedural neutrality is an expression of the basic equality of the parties, lying at the heart of their efforts to achieve a neutral, objective means of international dispute resolution and guaranteed by leading international arbitration conventions and national arbitration legislation.

A closely related objective of international commercial arbitration is procedural fairness. Parties agree to international arbitration, among other things, in order to obtain fair and objective procedures guaranteeing both parties an equal opportunity to be heard. This objective is inherent in the adjudicative character of international arbitration, in which the arbitrators are obligated to decide the parties’ dispute impartially and objectively, based upon the law and the evidence presented by

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3 See, e.g., Dell Computer Corp. v. Union des Consommateurs, [2007] 2 S.C.R. 801, 2007 SCC 34, ¶ 51 (Can.) (“The neutrality of arbitration ... is one of the fundamental characteristics of this alternative dispute resolution mechanism... [A]rbitration is an institution without a forum and without a geographic basis.”).  
4 See Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. V(1)(b), June 10, 1958, 21 U.S.T. 2518, 330 U.N.T.S. 38 [hereinafter New York Convention] (permitting the refusal to recognize and enforce an arbitral award where the parties are not on equal footing because the party against whom the award is invoked was not given proper notice of the proceedings or was otherwise unable to present a case); Model Law on Int’l Commercial Arbitration art. 18 (1985) [hereinafter UNCITRAL, Model Law] (“The parties shall be treated with equality ...”).
the parties. This objective is implemented by the terms of both international arbitration conventions and national arbitration legislation, both of which guarantee the parties' procedural rights.

Beyond neutrality and fairness, parties agree to international arbitration with the objective of obtaining dispute resolution procedures that streamline the arbitral proceedings and allow a speedy, efficient, and expert result. This objective is facilitated by the minimal scope that is permitted for judicial review of arbitral awards and other decisions by the arbitrators—a legal regime under which the parties exchange the safeguards of appellate review for the benefits of speed, economy, and finality. This reflects businessmen and businesswomen's desires for certainty of results and efficiency of procedures, as well as skepticism about the possibilities of achieving "correct" or "perfect" results through multiple layers of appellate review in national courts.

International arbitration is also designed with the objective of avoiding the formalities and technicalities that are associated with many national litigation systems. Arbitration is chosen by international businessmen and businesswomen in order to provide commercially sensible and practical resolutions to cross-border commercial disputes. This permits—indeed, requires—dispensing with many of the procedural protections that are designed for domestic litigation involving individual litigants, and instead adopting procedures that will achieve commercially practicable results.

A closely related objective of international arbitration is the use of arbitral procedures that are flexible and tailored to the parties' needs.
particular dispute and mutual desires. This is well described in the United Nations Commission on International Trade Law ("UNCITRAL") Notes on Organizing Arbitral Proceedings:

This [procedural flexibility] is useful in that it enables the arbitral tribunal to take decisions on the organization of proceedings that take into account the circumstances of the case, the expectations of the parties and of the members of the arbitral tribunal, and the need for a just and cost-efficient resolution of the dispute.

Indeed, this procedural freedom and flexibility is one of the essential foundations of the arbitral process:

 Unlike the position in court, when both the parties and the tribunal are governed by fixed procedural rules which will be generally adversarial in character, in arbitrations the mutual functions of the parties' lawyers and the tribunal tend to be complementary and co-operative, at least on the surface. Although often coming from different cultures and legal philosophies, they must work, and to some extent live, together from the beginning to the end of each case, with intermittent hearings in hotels or other locations which may cover periods of weeks, interspersed with periods of correspondence. During this process they must largely fashion their own procedure. They must perform get to know and show respect for each other, and make

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8 See 1 BORN, supra note 1, at 414 (noting that parties get to select their procedural law by agreement); Emmanuel Gaillard & Philippe Pinsolle, Advocacy in International Commercial Arbitration: France, in THE ART OF ADVOCACY IN INTERNATIONAL ARBITRATION, supra note 2, at 133, 133 ("International arbitration ... gives the parties and their counsels the widest possible range of options."); GEORGIOUS PETROCHILOS, PROCEDURAL LAW IN INTERNATIONAL ARBITRATION para. 3.73 (2004) ("Modern law affords arbitrating parties and arbitral tribunals wide freedom to fashion the procedural rules of the proceedings."); Robert Pietrowski, Evidence in International Arbitration, 22 ARS. INT'L 373, 374 (2006) ("The procedure of most international tribunals is characterized by an absence of restrictive rules governing the form, submission and admissibility of evidence.").

allowances for different points of view, with both the lawyers and the tribunal constantly trying to ensure as much harmony as circumstances may permit.\(^\text{10}\)

The tailoring of procedures to a particular case may involve establishing an expedited “fast-track” arbitral procedure, or emphasizing particular types of evidence (e.g., technical, site inspection), or employing innovative evidence-taking procedures (e.g., witness-conferencing, meetings of experts). Alternatively, it may involve using relatively conventional litigation procedures, much like those in some national courts, to hear the parties’ submissions and evidence. In all cases, however, the parties’ autonomy and the tribunal’s discretion are intended to be used to adopt procedures designed to permit the most efficient, reliable, and sensible presentation of the parties’ evidence and arguments in a particular case.

3. PARTIES’ PROCEDURAL AUTONOMY IN INTERNATIONAL ARBITRATION

One of the most fundamental characteristics of international commercial arbitration is the parties’ freedom to agree upon the arbitral procedure. This principle is acknowledged in the New York Convention and other major international arbitration conventions. The principle is guaranteed by arbitration statutes in virtually all developed jurisdictions and it is contained in and facilitated by the rules of most leading arbitral institutions. The principle of the parties’ procedural autonomy is qualified only by the mandatory requirements of applicable national law and, under most developed arbitration statutes, even these requirements are ordinarily limited in scope.

3.1. Parties’ Procedural Autonomy under International Arbitration Conventions

Leading international arbitration conventions uniformly recognize and give effect to the parties’ autonomy to determine the arbitral procedures.\(^\text{11}\) Most importantly, the New York Convention

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\(^{10}\) Michael Kerr, *Concord and Conflict in International Arbitration*, 13 ARB. INT’L 121, 125 (1997).

\(^{11}\) The Geneva Protocol required that “the arbitral procedure, including the constitution of the arbitral tribunal, shall be governed by the will of the parties and by the law of the country in whose territory the arbitration takes place.”
gives effect to the central role of the parties' autonomy to fashion the arbitration procedure, and provides for the non-recognition of awards following proceedings that failed to adhere to the parties' agreed procedures. Thus, Article V(1)(d) of the Convention permits non-recognition of an arbitral award if "[t]he composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place." Article V(1)(d) is of vital importance because it recognizes, in explicit terms, the parties' autonomy to agree upon the arbitral procedures, including procedures different from those prescribed by the laws of the arbitral seat: where the parties have made such an agreement, Article V(1)(d) requires, in effect, that their agreement be followed, notwithstanding contrary procedural rules in the seat of the arbitration. As one commentator correctly puts it, "Article V(1)(d) simply makes party autonomy the sole determinant in matters procedural, the only limit to such autonomy at the enforcement stage being subparagraph (b) of the same paragraph, which reflects the principles of natural justice." Even more directly, and applicable outside the recognition context, Article II of the Convention requires courts of Contracting States to recognize valid arbitration agreements and refer the parties to arbitration pursuant to such agreements. This obligation extends to all material terms of an agreement to arbitrate—including the parties' agreement regarding arbitral seat, number of arbitrators, institutional rules, and arbitral procedures.

Properly understood, Article II thus requires Contracting States to give effect to agreements regarding arbitral procedures. As

Geneva Protocol on Arbitration Clauses art. 2, Sept. 24, 1923, 27 L.N.T.S. 157 (hereinafter Geneva Protocol). This provision was generally understood as requiring compliance with the procedural law of the arbitral seat. See 1 BORN, supra note 1, at 1253-54.

12 New York Convention, supra note 4, art. V(1)(d).

13 PETROCHILOS, supra note 8, para. 8.4.1; see also Gaillard & Pinsolle, supra note 8, at 133 (discussing parties' freedom to choose the venue, arbitrators, and applicable procedural rules); MATTIS KURKELA & HANNES SNELLMANN, DUE PROCESS IN INTERNATIONAL COMMERCIAL ARBITRATION 84-86 (2005) (discussing non-respect as a violation of due process). As discussed above, this contrasts with Article 2 of the Geneva Protocol and Article 3 of the Geneva Convention. See supra note 11 and accompanying text.

14 New York Convention, supra note 4, arts. II(1), II(3).

15 See 1 BORN, supra note 1, at 567-69.
discussed above, this obligation is subject to a limited exception where the parties’ procedural agreement violates mandatory national public policies guaranteeing an opportunity to be heard or equality of treatment. Although it is beyond the scope of this Essay, even in these limited cases, the Convention should be interpreted as imposing international limits on the extent to which mandatory national procedural requirements may override the parties’ procedural autonomy.16

Even more directly, but to the same effect, the European Convention provides in Article IV(1)(b)(iii) that parties shall be free “to lay down the procedure to be followed by the arbitrators.”17 The Inter-American Convention similarly provides in Articles 2 and 3 that the arbitration shall be conducted according to the “agreement of the parties.”18 These provisions affirm, in more direct and mandatory terms than the language of the New York Convention, the parties’ procedural autonomy in international arbitration.

3.2. Parties’ Procedural Autonomy under National Arbitration Legislation

Arbitration legislation in most major trading nations implements the provisions of the New York Convention (and parallel international arbitration conventions) by guaranteeing

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16 See id. In particular, the Convention imposes structural limits on the application of idiosyncratic or discriminatory local public policies (such as rules requiring that all arbitrators be local nationals, that local language be used in all arbitral proceedings, or that all arbitral proceedings be conducted on local territory).

17 European Convention on International Commercial Arbitration of 1961 art. IV(1)(b)(iii), Apr. 21, 1961, 484 U.N.T.S. 364 [hereinafter European Convention]. Article IV(4)(d) also provides that, where the parties have not agreed upon the arbitral procedure, the arbitral tribunal shall determine the arbitral rules. See 2 BORN, supra note 1, at 1758-60. Like Article V(1)(d) of the New York Convention, Article IX(1)(d) of the European Convention provides for the non-recognition of arbitral awards if the procedure followed by the tribunal departed from that agreed upon by the parties.

18 Article 2 of the Inter-American Convention provides that the arbitrators shall be appointed “in a manner agreed upon by the parties.” Inter-American Convention on International Commercial Arbitration art. 2, Jan. 30, 1975, O.A.S.T.S. No. 42 [hereinafter Inter-American Convention]. Article 3 provides that “[i]n the absence of an express agreement between the parties, the arbitration shall be conducted in accordance with the rules of procedure of the Inter-American Commercial Arbitration Commission.” Id. art. 3. 2 BORN, supra note 1, at 1758-60.
parties the freedom to agree mutually upon the procedural rules governing the conduct of the arbitration (subject only to limited mandatory restrictions of national law). The UNCITRAL Model Law provides, in Article 19(1), that "[s]ubject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings." More specifically, the parties' freedom to agree upon various matters relating to the presentation of their cases and the taking of evidence is expressly recognized in Articles 18, 19(1) and 24(1) of the Model Law.

Similarly, Article 182(1) of the Swiss Law on Private International Law provides that "[t]he parties may, directly or by reference to rules of arbitration, determine the arbitral procedure; they may also submit the arbitral procedure to a procedural law of their choice." Other arbitration legislation in developed jurisdictions is similar, including in England, France.

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19 See 2 BORN, supra note 1, at 1751-53; Thomas H. Webster, Party Control in International Arbitration, 19 ARB. INT'L 119, 119 (2003) ("Parties determine the applicable law and arbitration rules . . ."); Pierre Lalive, On the Neutrality of the Arbitrator and of the Place of Arbitration, in SWISS ESSAYS ON INTERNATIONAL ARBITRATION 23, 29 (1984) ("[M]odern law of international arbitration today leaves a wide autonomy to the parties with regard to procedure (subject only to universally recognized fundamental guarantees of fairness and equality).”).

20 UNCITRAL, MODEL LAW, supra note 4, art. 19(1). The drafting history of the Model Law confirms the parties' procedural autonomy in emphatic terms, "probably the most important principle on which the model law should be based is the freedom of the parties in order to facilitate the proper functioning of the international commercial arbitrations according to their expectations." Report of the Secretary-General on Possible Features of a Model Law on International Commercial Arbitration, 12 Y.B. on Int'l Trade L. 78, ¶17, U.N. Doc. A/CN.9/207 (1981) (emphasis added).

21 See UNCITRAL Arbitration Rules, G.A. Res. 31/98, arts. 18, 19(1), 24(1), U.N. Doc. A/RES/31/98 (Dec. 15, 1976) ("Each party shall have the burden of proving the facts relied on to support his claim or defence.").


23 See Arbitration Act, 1996, c. 23, § 1(b) (Eng.) ([T]he parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest"); id. § 33 (outlining the general duties of the tribunal in arbitral proceedings); id. § 34 (describing the treatment of procedural and evidentiary matters before an arbitral tribunal). See also ROBERT MERKIN,
and elsewhere. In the United States, the statutory text of the Federal

**Arbitration Act 1996** [§ 14.1–14.34 (3rd ed., 2005 & rev. 2007)] (noting that “[t]he parties are free to agree when arbitral proceedings are to be regarded as commenced”).

24 See Decree No. 81-500 of May 12, 1981, Journal Officiel de la Republique Francaise [J.O.] [Official Gazette of France], May 14, 1981, p. 1398, reprinted in Nouveau Code de Procedure Civile [N.C.P.C.] art. 1494, available at http://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006070716 &dateTexte=20090412 (“The arbitration agreement may, directly or by way of reference to a resolution by arbitration, lay down the procedure to be followed in the course of the arbitration proceeding; it may also bring the latter under the law applicable to procedural matters that it determines.”). See also Gaillard & Pinsolle, supra note 8, at 134 (“French law places no limitation upon the parties’ and the arbitrators’ freedom.”).

25 See Zivilprozeßordnung [ZPO] [Civil Procedure Statute] January 1, 1998, Bundesgesetzblatt, Teil I [BGBl. I], § 1042(G) (F.R.G.) (“Furthermore, subject to the mandatory provisions of this book the parties may choose the procedure themselves or by reference to institutional arbitral rules.”); see also Peter Schlosser, in 9 KOMMENTAR ZUR ZIVILPROZEßORDNUNG [Commentary on Civil Procedure Law] § 1042, ¶ 3 (Fortgeführt Von Friedrich Stein & Martin Jonas eds., 2002).

26 See Judicial Code, art. 1693(1) (Belg.) (“Without prejudice to the provisions of Article 1694, the parties may decide on the rules of the arbitral procedure . . . ”).

27 See Zivilprozeßordnung [ZPO] [Civil Procedure Statute] § 594(1) (Austria), translated in CHRISTOPHER JIERSCHER, THE AUSTRIAN ARBITRATION ACT 2006: TEXT AND NOTES (Kluwer Law Int’l ed. 2006) (“Subject to the mandatory provisions of this Section, the parties are free to determine on the rules of procedure. The parties may thereby refer other rules of procedure.”); Herbert Hausmaninger, in 2 KOMMENTAR ZU DEN ZIVILPROZEßGESETZE § 594, ¶ 2 (H. Fasching ed., 2007) (“This freedom of discretion is of central importance for arbitral proceedings in general and for international arbitral proceedings in particular.”).

28 Arbitration Law, Law No. 138 of 2003, art. 26, no. 1 (Japan), translated in Arbitration Law Fellow-Up Research Group Arbitration Law, http://www.kantei.go.jp/foreign/policy/sihou/arbitrationlaw.pdf (last visited Apr. 9, 2009) (“The parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the arbitral proceedings. Provided, it shall not violate the provisions of this Law relating to public policy.”).

29 International Arbitration Act, 2002, Ch. 143A, § 15A(6) (Sing.), reprinted in ITA REPORTER (Michael Huang ed.) (“The parties may make the arrangements . . . by agreeing to the application or adoption of rules of arbitration or by providing any other means by which a matter may be decided.”).

Arbitration Act ("FAA") is silent, but judicial decisions uniformly confirm the parties' freedom to agree upon the arbitral procedures (subject to very limited requirements of procedural fairness).\(^{31}\)

The parties' autonomy with regard to procedural matters has been affirmed in emphatic terms by the Paris Cour d'appel:

> It has been established that the arbitration in question . . . is an international arbitration governed by the intentions of the parties. In this case, the rules of domestic law have a purely subsidiary role and apply only in the absence of a specific agreement by the parties . . . the rules of the [ICC] Court of Arbitration, which constitute the law of the parties, must be applied to the exclusion of all other laws.\(^{32}\)

A U.S. court observed, to similar effect, that “[p]arties may choose to be governed by whatever rules they wish regarding how an arbitration itself will be conducted,”\(^{33}\) while another remarked, more colorfully, that between competent parties, even procedures such as “flipping a coin, or, for that matter, arm wrestling” are

\(^{31}\) See, e.g., UHC Mgmt. Co. v. Computer Scis. Corp., 148 F.3d 992, 995 (8th Cir. 1998) (noting that private agreements to arbitrate are usually enforced according to their terms); Glass Molders, Pottery, Plastics & Allied Workers Int'l Union v. Excelsior Foundry Co., 56 F.3d 844, 848 (7th Cir. 1995) (noting that if there is a conflict between federal arbitration rules and state law, the federal law applies); Security Ins. Co. of Hartford v. TIG Ins. Co., 360 F.3d 322, 325 (2d Cir. 2004) ("[T]he FAA requires arbitration proceed in the manner provided for in [the parties'] agreement.") (internal citations omitted) (emphasis in original); Baravati v. Josephthal, Lyon & Ross, Inc., 28 F.3d 704, 709 (7th Cir. 1994) ("Indeed, short of authorizing trial by battle or ordeal or, more doubtfully, by a panel of three monkeys, parties can stipulate to whatever procedures they want to govern the arbitration of their disputes . . . .") See also Volt Info. Scis., Inc. v. Bd. of Trustees, 489 U.S. 468, 479 (1989) (noting the FAA was designed to ensure that arbitration agreements that parties entered into were enforced); UNIF. ARBITRATION ACT, Prefatory Note, 7 U.L.A. 2 (2000) ("[A]rbitration is a consensual process in which autonomy of the parties who enter into arbitration agreements should be given primary consideration, so long as their agreements conform to notions of fundamental fairness. This approach provides parties with the opportunity in most instances to shape the arbitration process to their own particular needs.").


\(^{33}\) UHC Mgmt. Co., 148 F.3d at 997.
enforceable.\textsuperscript{34} For their part, English authorities have upheld \textit{sui generis} procedural mechanisms, such as selecting arbitrators by drawing names by lot.\textsuperscript{35}

In contrast, it is virtually impossible to identify contemporary authority that denies or even questions the principle of the parties' procedural autonomy in international commercial arbitrations. At the same time, however, as discussed below, the parties' autonomy in all developed jurisdictions is subject to the limitations of mandatory national public policies regarding procedural matters.\textsuperscript{36}

3.3. Arbitrators' Procedural Discretion in International Arbitration

Although leading international arbitration conventions and national law in most developed states permit parties to agree upon the arbitral procedures, subject only to minimal mandatory due process requirements, parties in practice often do not agree in advance on detailed procedural rules for their arbitration. Instead, arbitration agreements will ordinarily provide simply for arbitration pursuant to a set of institutional rules, which supply only a broad procedural framework. Filling in the considerable gaps in this framework will be left to the subsequent agreement of the parties or, if they cannot agree, the arbitral tribunal. The arbitrators' discretion to determine the arbitral procedure, in the absence of agreement between the parties on such matters, is another one of the foundations of the international arbitral process.

3.4. Arbitral Tribunal's Procedural Discretion under International Arbitration Conventions

Leading international arbitration conventions confirm the arbitral tribunal's power, in the absence of agreement by the parties, to determine the arbitral procedures. Most explicitly, Article IV(4)(d) of the European Convention provides that, where

\textsuperscript{34} Team Design v. Gottlieb, 104 S.W.3d 512, 518 (Tenn. Ct. App. 2002). Although vivid, it is not clear that entirely arbitrary or random procedures would be acceptable under most international and national law standards of due process and procedural fairness. In particular, random chance or physical endurance would likely not provide either party with an opportunity to be heard in an adjudicative process, as required under most national and international arbitration regimes. See 2 BORN, \textit{supra} note 1, at 1794–1873, for a general description of what procedures will be heard under international arbitration regimes.

\textsuperscript{35} \textit{In re Shaw \\& Sims}, [1851] 17 I.L.T.R. 160 (Ir.).

\textsuperscript{36} See \textit{infra} notes 44–53 and accompanying text.
the parties have not agreed upon arbitral procedures, the tribunal may “establish directly or by reference to the rules and statutes of a permanent arbitral institution the rules of procedure to be followed by the arbitrator(s) . . . .”

The Inter-American Convention also expressly recognizes the arbitral tribunal’s procedural authority, albeit indirectly, providing in Article 3 that “[i]n the absence of an express agreement between the parties, the arbitration shall be conducted in accordance with the rules of procedure of the Inter-American Commercial Arbitration Commission.” In turn, Article 15 of the Inter-American Commercial Arbitration Commission (”IACAC”) Rules grants the arbitrators broad procedural authority, subject only to basic requirements of equality and fairness.

The New York Convention refers less directly to the arbitral tribunal’s power to determine the arbitral procedures, but produces the same result. The Convention makes no direct reference to the tribunal’s authority to conduct the proceedings, only indirectly acknowledging such powers in Articles V(1)(b) and (d). At the same time, Article II(3) of the Convention requires giving effect to the parties’ agreement to arbitrate, an essential element of which is either express or implied authorization to the arbitrators to conduct the arbitral proceedings as they deem best (absent contrary agreement by the parties on specific matters).

Even where the tribunal’s procedural authority is not expressly recognized in applicable international conventions, there can be no doubt as to the internationally-recognized status of such authority. An inherent characteristic of the arbitral process is the tribunal’s adjudicative role and responsibility for establishing and implementing the procedures necessary to resolve the parties’

37 European Convention, supra note 17, art. IV(4)(d).
38 Inter-American Convention, supra note 18, art. 3.
39 INTER-AM. COMMERCIAL ARBITRATION COMM’N R., art. 12(a) (2002), available at http://www.adr.org/sp.asp?id=22093 (“Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case.”).
40 New York Convention, supra note 4, arts. V(1)(b), V(1)(d) (stating that both Article V(1)(b) and V(1)(d) of the New York Convention provide grounds for nonrecognition of an award that presuppose the tribunal’s power to determine arbitral procedures in the absence of agreement by the parties). See 2 BORN, supra note 1, at 2737-77.
41 See supra notes 1-2 and accompanying text; see also 2 BORN, supra note 1, at 1776-77.
dispute. The tribunal’s procedural authority is an implicit part of the parties’ agreement to arbitrate\(^{42}\) and is an indispensable precondition for an effective arbitral process. Accordingly, just as Article II of the New York Convention, and equivalent provisions of other international arbitration conventions, guarantee the parties’ procedural autonomy,\(^{43}\) these conventions also guarantee the tribunal’s authority over the arbitral procedures (absent contrary agreement). As discussed below, the tribunal’s authority is subject to restrictions, imposed by mandatory national laws regarding procedural matters, but these limitations are in practice seldom applicable.

4. ARBITRAL TRIBUNAL’S PROCEDURAL DISCRETION UNDER NATIONAL ARBITRATION LEGISLATION

Consistent with the New York Convention, most developed national legal systems provide the arbitral tribunal with substantial discretion to establish the arbitral procedures in the absence of agreement between the parties, subject only to general due process requirements. Article 19(2) of the UNCITRAL Model Law provides that, where the parties have not agreed upon the arbitral procedures, “the arbitral tribunal may . . . conduct the arbitration in such a manner as it considers appropriate.”\(^ {44}\) Article 24(1) of the Model Law is similar, providing that, “[s]ubject to any contrary agreement by the parties, the arbitral tribunal shall decide whether to hold an oral hearing for the presentation of evidence or for oral argument. . . .”\(^ {45}\) French, Swiss, and other civil law arbitration

\(^{42}\) Most institutional arbitration rules expressly provide the arbitral tribunal discretion to establish the arbitral procedures (absent agreement between the parties). See 2 Born, supra note 1, at 1758-65 (analyzing the arbitral tribunal’s procedural discretion under international arbitration conventions). This authority forms part of the parties’ arbitration agreement and is entitled to recognition under Article II of the Convention.

\(^{43}\) See supra note 11 and accompanying text.

\(^{44}\) UNCITRAL, MODEL LAW, supra note 4, art. 19(2). As discussed below, Article 19(2) limits the tribunal’s powers by reference to the “provisions of this Law,” which includes Article 18’s requirements that the parties be treated “with equality” and be given a “full opportunity of presenting [their] case[s].” See 2 Born, supra note 1, at 1760-62.

\(^{45}\) UNCITRAL MODEL LAW, supra note 4, art. 24(1). See 2 Born, supra note 1, at 1760-62.
In the United States, the FAA does not provide any basic principles of arbitral procedure or procedural framework that the arbitrators might consider or that the parties may deviate from; as such, the Act effectively leaves all issues of procedure entirely to

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46 See, e.g., Federal Statute on Private International Law Dec. 18, 1987, RS 291, art. 182(2) (Switz.) ("If the parties have not determined the procedure, the Arbitral Tribunal shall determine it to the extent necessary, either directly or by reference to a statute or to rules of arbitration."). Decree No. 81-500 of May 12, 1981, Journal Officiel de la Republique Francaise [J.O.] [Official Gazette of France], p. 1398, reprinted in N.C.P.C. arts. 1494, 1460 (Fr.) ("The arbitrators shall lay down the rules for the arbitration proceedings without being bound by the rules governing the courts of law, save where the parties have decided otherwise as stipulated in the arbitration agreement."); Zivilprozeßordnung [ZPO] § 1047 (F.R.G.) ("Subject to agreement by the parties, the arbitral tribunal shall decide whether to hold oral hearings or whether the proceedings shall be conducted on the basis of documents and other materials. Unless the parties have agreed that no hearings shall be held, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party"); Zivilprozeßordnung [ZPO] § 594 (Austria) ("[T]he parties are free to determine the rules of procedure .... Failing such an agreement, the arbitral tribunal ... conduct the arbitration in the manner that it considers appropriate."); Welboek van Burgerlijke Rechtsvordering [Netherlands Code of Civil Procedure], bk. 4, art. 1036 (Neth.), translated at Netherlands Arbitration Act Code of Civil Procedure, http://www.jus.uio.no/lm/netherlands.arbitration.act.1986/1036.html (last visited Apr. 9, 2009) ("Subject to the provisions of this Title, the arbitral proceedings shall be conducted in such manner as agreed between the parties or, to the extent that the parties have not agreed, as determined by the arbitral tribunal."); Houdende het gerechtelijk wetboek [Belgian Judicial Code], art. 1693(1). See also Oberster Gerichtshof [OGH] [Supreme Court] Jan. 25, 1992, 7 Ob 545/92, 1997 Y.B. Comm. Arb. 619 (Austria) ("The parties may determine the arbitral procedure in the arbitration agreement or in a separate written agreement. Lacking such agreement, the arbitrators decide on the procedure.").

47 See, e.g., Arbitration Law, art. 26(2) (Japan) ("Failing such agreement [between the parties], the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitral proceedings in such manner as it considers appropriate."); Arbitration Law (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 31, 1994, effective Sept. 1, 1995), art. 39 (P.R.C.), translated at Arbitration Law of the People's Republic of China, http://www.lawinfochina.com/law/display.asp?id=710 (last visited Apr. 9, 2009) ("An arbitration tribunal shall hold oral hearings to hear a case. Whereas the parties concerned agree not to hold oral hearings, the arbitration tribunal may give the award based on the arbitration application, claims and counter-claims and other documents"); International Arbitration Act, § 3(1) (Sing.); Hong Kong Arbitration Ordinance, No. 341, art. 34C(1) (1990), available at http://www.hklii.org/hk/legis/ord/341.

the parties and arbitrators. Although the FAA does not expressly address the subject, U.S. courts have uniformly held that arbitrators possess broad powers to determine arbitral procedures (absent agreement on such matters by the parties). As one U.S. court held:

Unless a mode of conducting the proceedings has been prescribed by the arbitration agreement or submission, or regulated by statute, arbitrators have a general discretion as to the mode of conducting the proceedings and are not bound by formal rules of procedure and evidence, and the standard of review of arbitration procedures is merely whether a party to an arbitration has been denied a fundamentally fair hearing.

49 The Revised Uniform Arbitration Act makes this explicit.

An arbitrator may conduct an arbitration in such manner as the arbitrator considers appropriate for a fair and expeditious disposition of the proceeding. The authority conferred upon the arbitrator includes the power to hold conferences with the parties to the arbitration proceeding before the hearing and, among other matters, determine the admissibility, relevance, materiality and weight of any evidence.

Particularly following the 1996 Arbitration Act, English law is to the same effect, as are other common law jurisdictions.

5. MANDATORY PROCEDURAL REQUIREMENTS IN INTERNATIONAL ARBITRATION

The parties' freedom to agree upon the arbitral procedures, and the tribunal's discretion to adopt such procedures (absent contrary agreement), are subject to the mandatory requirements of applicable national and international law. As discussed below, in most cases, particularly in developed legal regimes, applicable mandatory law imposes only very general, albeit important, guarantees of procedural fairness and regularity.

5.1. Mandatory Procedural Protections under International Arbitration Conventions

All leading international arbitration conventions indirectly recognize and give effect to mandatory requirements of procedural fairness and regularity of the arbitral proceedings. They do so by permitting arbitral awards to be denied recognition if basic requirements of procedural fairness have not been satisfied, while leaving room for non-discriminatory, non-idiosyncratic rules of

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52 Arbitration Act, 1996, c. 23, § 34(1) (Eng.) ("It shall be for the tribunal to decide all procedural and evidential matters, subject to the right of the parties to agree any matter."); ABB Attorney General v. Hochtief Airport GmbH, [2006] EWHC 388, ¶ 67 (Comm.) (Eng.) ("It is not a ground for intervention that the court considers that it might have done things differently."); Petroships Pte Ltd of Singapore v. Petec Trading & Inv. Corp. of Vietnam (The Petro Ranger) [2001] 2 EWHC 418, 419 (Q.B.) (Eng.) (award may be annulled under § 68(2)(a) only "where it can be said that what has happened is so far removed from what can reasonably be expected of the arbitral process, that the Court will take action").

53 See, e.g., Commercial Arbitration Act, R.S.C., c. 17, § 19(2) (1985) (Can.) ("Failing such agreement, the arbitral tribunal may, subject to the provisions of this Code, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence."); International Arbitration Act, 1974, c. V, art. 19(2) (Austl.) ("Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence."); Arbitration Act, 1996 S.R. No. 99, § 19(2) (N.Z.) ("Failing such agreement, the arbitral tribunal may, subject to the provisions of this Schedule, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality, and weight of any evidence.").

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mandatory national law aimed at ensuring procedural fairness and equality to operate.

Article V(1)(b) of the New York Convention is representative, permitting non-recognition of an award where “[t]he party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case.”54 Article V(2)(b) of the Convention is also potentially applicable in cases of serious procedural unfairness, permitting non-recognition of arbitral awards for violations of local public policy, including procedural public policies.55 The European and Inter-American Conventions feature similar provisions.56 The application of mandatory standards of procedural fairness under these various international instruments has been termed “international procedural public policy” by some commentators.57

Articles V(1)(b) and V(2)(b) of the New York Convention and parallel provisions of other conventions have been interpreted to afford the parties and arbitral tribunal substantial freedom to establish the arbitral procedures.58 Nonetheless, these provisions permit national courts to deny recognition to arbitral awards that are based upon fundamentally unfair, arbitrary, or unbalanced procedures, applying either a uniform international standard of procedural fairness under Article V(1)(b) or local procedural public policies and procedural protections guaranteed by mandatory national law under Article V(2)(b).59 Both of these provisions provide limited grounds on which either the parties’ procedural

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54 New York Convention, supra note 4, art. V(1)(b) (emphasis added).
55 Id. art. V(2)(b).
56 European Convention, supra note 17, art. IX(1)(b); Inter-American Convention, supra note 18, arts. 5(1)(b), 5(2)(b).
58 See supra notes 11–13 and accompanying text.
59 See 2 Born, supra note 1, at 2740–46 (outlining possible sources of standards for procedural fairness under the New York Convention).
agreements, or an arbitral tribunal’s procedural orders (absent agreement of the parties), can be overridden by national law for purposes of recognition proceedings.

The procedural standards applicable under Article V(1)(b) are not national, but instead impose a uniform international standard regarding procedural opportunities to be heard. This public policy applies uniformly in all Contracting States and does not permit individual states to deny recognition to awards based on local laws or public policy. These international standards of procedural fairness are related to, and informed by, standards of fair and equitable treatment that have developed in the context of international investment law.

The procedural public policy applicable under Article V(2)(b) is different in character from the standards applicable under Article V(1)(b); Article V(2)(b) establishes an exceptional escape device based on local public policy rather than uniform international standards, which does not affect the validity or enforceability of the award in other states. Thus, Article V(2)(b) permits a Contracting State to rely on its own national public policies to deny recognition to an award, just as it may invoke its own local procedural public policies to annul an international arbitral award made locally.

There have been suggestions that, for purposes both of non-recognition of an award under Article V(2)(b) and annulment of an award made locally, the relevant procedural public policy in international cases must, under the Convention, be international.

60 See id.
61 See id.
62 See id.; Case Concerning Elettronica Sicula S.P.A (ELSI) (U.S. v. Italy), 1989 I.C.J. 15, 76 (July 20) (contrasting procedural fairness required by international law with arbitrariness and noting that “[a]rbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law. This idea was expressed by the Court in the Asylum case, when it spoke of ‘arbitrary action’ being ‘substituted for the rule of law.’ It is a wilful [sic] disregard of due process of law . . . .” (citations omitted)); Treaty Concerning the Encouragement and Reciprocal Protection of Investment: Model Bilateral Investment Treaty, U.S.-[Country] art. 5(2)(a), Nov. 2004, http://www.ustr.gov/assets/Trade_Sectors/Investment/Model_BIT/asset_upload_file847_6897.pdf [hereinafter U.S. Model BIT] (“fair and equitable treatment includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world”).
63 See 2 BORN, supra note 1, at 2827-33, 2841-2851.
64 See, e.g., Schwebel & Lahne, supra note 57, at 209 (“increasingly recognizing that narrow, nationalistic grounds of public policy that might be properly
That position rests on the desirability of applying uniform, neutral international standards, particularly as to procedural matters of which basic concepts of fairness and equality are broadly similar in most states.

This argument is ultimately impossible to accept, however, at least as a matter of interpreting the Convention’s requirements. As discussed infra, it is relatively clear that both Article V(2)(b) and the Convention’s treatment of annulment contemplate the possibility of the application of local and national public policies. Requiring the application of uniform international procedural public policies would contradict the role reserved for the local public policies and mandatory laws of Contracting States under the Convention. Despite this, there is a substantial argument that Article II of the New York Convention and parallel provisions of other international arbitration conventions should not be interpreted as leaving Contracting States entirely free to impose local procedures on locally-seated international arbitrations.

Rather, the Convention is best interpreted as prescribing international limits on the procedural requirements that Contracting States may apply to international arbitral proceedings, either in a recognition proceeding under Article V(2)(b) or in an annulment or other proceeding in the arbitral seat. Specifically, the Convention should be interpreted as requiring that local procedural requirements be exceptions to the general principle of party autonomy that are tailored to safeguarding the equality of the parties and their opportunities to be heard, and as precluding Contracting States from imposing discriminatory or idiosyncratic local procedural rules on international arbitrations. Under this interpretation, a Contracting State could not deny any role for the parties’ procedural autonomy in international arbitrations, and domestic procedural rules would apply regardless of what the

applicable in domestic cases are inappropriate in international cases” (quoting Howard Holtzman, Commentary, in INTERNATIONAL ARBITRATION, 60 YEARS ON: A LOOK AT THE FUTURE 361, 364 (1984)); see also Pierre Mayer & Audley Sheppard, Final IIA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards, 19 ARB. IN’L 298, 251 n.10 (2003) (noting that most national legislation includes public policy exceptions, although some refers to international public policy).

65 See Mantilla-Serrano, supra note 37, at 189-90 (noting difficulties in applying transnational procedural public policy); 2 BORN, supra note 1, at 2554-60, 2830-38.

66 See 1 BORN, supra note 1, at 1258-70; 2 BORN, supra note 1, at 2556-60, 2620-23, 2627-46, 2728-40.
parties agreed. Thus, a Contracting State ought not be able to deny effect to any procedural agreement between the parties (for example, by imposing local litigation procedures on every arbitration conducted locally, regardless of the parties' agreement) to deny effect to any choice by the parties of a foreign arbitral institution's arbitration rules (for example, by denying effect to agreements selecting the UNCITRAL, ICC, or CIETAC Rules), or to deny effect to the parties' choice of a foreign arbitral seat (for example, by requiring that all arbitrations be conducted locally).

These results violate the basic premise of party autonomy underlying Articles II(3) and V(1)(d), as well as the Convention's objectives of facilitating the enforcement of agreements to arbitrate and the international arbitral process. Equally, in recognition actions, these results would convert the role of local public policy under Article V(2)(b) from providing an exceptional escape device to mandating affirmatively a comprehensive procedural code; again, that is contrary to the Convention's structure and treatment of the public policy exception generally. Rather, in both annulment actions and in recognition actions applying Article V(2)(b), the Convention should be interpreted as permitting Contracting States to apply, as an exceptional escape device, only non-discriminatory local procedural protections that are consistent with state practice under the Convention. This interpretation of the Convention, which mandates structural limitations on Contracting States' reliance on local public policies, parallels the similar limitations Articles II and V impose on the permissible grounds for a Contracting State to deny effect to the validity of an international arbitration agreement or to annul an international arbitral award.67

Finally, even if the Convention were interpreted as allowing Contracting States complete freedom to impose mandatory procedural requirements on international arbitrations that are seated locally, it is clear that other Contracting States are free to recognize arbitral awards that are annulled on the basis of idiosyncratic or discriminatory local procedural requirements. That is contemplated expressly by Article V(1)(d), which gives priority to the parties' procedural autonomy, and by Article VII, which leaves Contracting States free to recognize awards on more

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67 Id. at 2556–60, 2838–40.
liberal grounds than those under Article V. Indeed, other Contracting States are in principle required, by virtue of Articles II(3) and V(1)(b), to recognize arbitral awards that have been annulled in the arbitral seat on the basis of national laws that prescribe mandatory discriminatory or idiosyncratic procedural requirements.

5.2. Mandatory Procedural Protections under National Arbitration Legislation

Consistent with the New York Convention, most developed legal systems do not impose significant mandatory limitations on the freedom of the parties or the arbitral tribunal to conduct the arbitration. Rather, parties are free to agree to arbitral procedures that suit their interests within very deferential mandatory limits and arbitrators are empowered to prescribe arbitral procedures when the parties have made no agreement on the subject. Nevertheless, legislation and/or judicial decisions in most developed jurisdictions require that arbitral proceedings seated on local territory satisfy minimal standards of procedural fairness and equality. These standards are variously referred to as requiring “due process,” “natural justice,” “procedural regularity” or “fair and equitable treatment.”

The UNCITRAL Model Law is illustrative of this basic, mandatory requirement of procedural fairness. Article 18 of the Model Law requires that “[t]he parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.”

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68 See supra notes 12-13 and accompanying text; see also 2 BORN, supra note 1, at 2764-74.

69 See supra notes 14-16 and accompanying text; see also 2 BORN, supra note 1, at 2689-99.

70 See supra notes 11-36 and accompanying text.

71 As discussed above, most national arbitration legislation imposes mandatory procedural requirements on arbitrations with their seat on local territory. See UNCITRAL Notes on Organizing Arbitral Proceedings, supra note 9, ¶11; UNCITRAL, MODEL LAW arts. 1(2), 18; Federal Statute on Private International Law, RS 291 arts. 176(1), 182(3) (Switz.); Arbitration Act, 1996, c. 23, §§ 2(1), 33 (Eng.); Arbitration Law, Law No. 138 of 2003, arts. 3(1), 25 (Japan).

72 UNCITRAL, MODEL LAW art. 18 (emphasis added). See HOWARD M. HOLTZMANN & JOSÉPH E. NEUHAUS, A GUIDE TO THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION: LEGISLATIVE HISTORY AND COMMENTARY 550 (1989) (“Article 18 establishes the fundamental principles that in all arbitrations under the Law each party must be treated with equality and be given a full opportunity to present his case.”).
The Model Law also makes clear that this is a mandatory provision for locally-seated arbitrations, which overrides contrary agreement by the parties or actions by a tribunal.\footnote{UNCITRAL, MODEL LAW art. 19(1). The same guarantees are also contained in the (related) provisions of national law regarding the annulment and/or recognition of arbitral awards. Thus, Articles 34(2)(a)(ii) and 36(1)(a)(ii) of the Model Law provide for annulment or non-recognition of an award if “the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or was otherwise unable to present his case.” \textit{UNCITRAL, MODEL LAW} arts. 34(2)(a)(ii), 36(1)(a)(ii). See \textit{2 Born, supra} note 1, at 2573-95, 2736-46.} Similarly, Article 182(3) of the Swiss Law on Private International Law provides, again in mandatory terms, that, “[r]egardless of the procedure chosen [by the parties and/or tribunal], the Arbitral tribunal shall ensure equal treatment of the parties and the right of both parties to be heard in an adversarial proceeding.”\footnote{Federal Statute on Private International Law, RS 291 art. 182(3) (Switz.). See Schneider, \textit{supra} note 22, 184; Bernhard Berger & Franz Kellerhals, \textit{Internationale und interne Schiedsgerichtsbarkeit in der Schweiz} \textit{\#} 1003 (2006).} Other developed national arbitration regimes are similar in their approaches to mandatory procedural protections in arbitrations with their seats on local territory.\footnote{See, \textit{e.g.}, \textit{ZivilprozeBordnung} [ZPO] § 1042(1) (F.R.G.); Judicial Code, arts. 1693(1), 1694 (Belg.); Netherlands Code of Civil Procedure], bk. 4, arts. 1036, 1039(1)-(2) (Neth.); Decree No. 81-500 of May 12, 1981, Journal Officiel de la Réguplique Française [J.O.] [Official Gazette of France], p. 1398, \textit{reprinted} in N.C.P.C. arts. 1502(4), 1502(5) (Fr.); Arbitration Act, 1996, c. 23, § 33(1) (Eng.); International Arbitration Act, 2002, ch. 143A, §§ 3(1), 15A(1) (Sing.); \textit{UNCITRAL, MODEL LAW} art. 18; \textit{Japanese Arbitration Law, supra} note 28, art. 25 (“(1) The parties shall be treated with equality in the arbitral proceedings. (2) Each party shall be given a full opportunity of presenting its case in the arbitral proceedings.”).}

In the United States, the FAA has been interpreted as imposing similar mandatory requirements of basic procedural fairness, emphasizing equality of treatment, an adequate opportunity to be heard, and procedural regularity.\footnote{Section 10 of the FAA contains the grounds for vacating an arbitral award subject to the domestic FAA. \textit{Federal Arbitration Act, 9 U.S.C. § 10} (2006). As discussed \textit{infra}, section 10(3) permits annulment if “the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.”} Judicial decisions in other leading jurisdictions are broadly similar,\footnote{See, \textit{e.g.}, MORS v. Supermarket Sys., Cour d'appel [CA] [regional court of appeal] Paris, Apr. 18 1991, 1995 Rev. arb. 448; Immoplann v. Mercure, Cour Published by Penn Law: Legal Scholarship Repository, 2014} as are arbitral awards\footnote{See, \textit{e.g.}, MORS v. Supermarket Sys., Cour d'appel [CA] [regional court of appeal] Paris, Apr. 18 1991, 1995 Rev. arb. 448; Immoplann v. Mercure, Cour} and institutional rules.\footnote{See, \textit{e.g.}, ZivilprozeBordnung [ZPO] § 1042(1) (F.R.G.); Judicial Code, arts. 1693(1), 1694 (Belg.); Netherlands Code of Civil Procedure], bk. 4, arts. 1036, 1039(1)-(2) (Neth.); Decree No. 81-500 of May 12, 1981, Journal Officiel de la Réguplique Française [J.O.] [Official Gazette of France], p. 1398, \textit{reprinted} in N.C.P.C. arts. 1502(4), 1502(5) (Fr.); Arbitration Act, 1996, c. 23, § 33(1) (Eng.); International Arbitration Act, 2002, ch. 143A, §§ 3(1), 15A(1) (Sing.); \textit{UNCITRAL, MODEL LAW} art. 18; \textit{Japanese Arbitration Law, supra} note 28, art. 25 (“(1) The parties shall be treated with equality in the arbitral proceedings. (2) Each party shall be given a full opportunity of presenting its case in the arbitral proceedings.”).}
Every jurisdiction has its own particular national standard of “due process” or “natural justice” that must be applied to arbitrations with their seats within local territory. Both in verbal formulation and specific application, these standards differ from state to state.

For the most part, however, there are only limited differences among the national standards of due process that are applied to the international arbitral process in developed jurisdictions. That is in part because of the very deferential approach that is taken in most developed legal systems to the parties’ procedural autonomy in international arbitrations. It is also in part because of the steps towards “convergence” that have occurred with regard to litigation procedures in developed jurisdictions over the past decade.80

Thus, in most leading jurisdictions, mandatory national law imposes only very limited restrictions on the parties’ autonomy to agree upon arbitral procedures. In general, only agreement to egregiously unfair, unconscionable or wholly arbitrary procedures
will be held unenforceable. As one U.S. decision, which adopted a particularly robust view of the parties’ autonomy, put it:

Short of authorizing trial by battle or ordeal or, more doubtfully, by a panel of three monkeys, parties can stipulate to whatever procedures they want to govern the arbitration of their disputes; parties are as free to specify idiosyncratic terms of arbitration as they are to specify any other terms in their contract.81

Somewhat less expansively (and less colorfully), the 1996 English Arbitration Act declares: “the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest.”82

This provision is correctly described as giving effect to the principle of “party autonomy, that is to say that the parties should be free to agree how their disputes are resolved subject only to such safeguards as are necessary in the public interest.”83 A decision of the Swiss Federal Tribunal reflected the same deference to the parties’ procedural autonomy and the arbitrators’ discretion:

It should be underlined that procedural public policy will constitute only a simple exclusion provision, namely that it will merely have a protective function and will not generate any positive rules. This is because the legislature did not desire that procedural public policy should be extensively interpreted and that there should arise a code of arbitral procedure to which the procedure, as freely selected by the parties should be subjected.84

81 Baravati v. Josephthal, Lyon & Ross, Inc., 28 F.3d 704, 709 (7th Cir. 1994); Amalgamated Ass’n of St. Elec. Ry. & Motor Coach Emp. of Am., A.F.L. v. Conn., 112 A.2d 501, 503 (Conn. 1955) (“If an arbitration agreement specifies methods of procedure for the arbitration, the arbitrators will be bound to that procedure unless it is in violation of law or public policy.”); BERGER & KELLERHALS, supra note 74, ¶ 1018 (noting that parties cannot in general waive right to fair hearing and equal treatment, but can waive the minimum requirement of due process in circumscribed circumstances or after individual circumstances occur).

82 Arbitration Act, 1996 c. 23, § 1(b) (Eng.).


That is, the procedural protections that mandatory law or public policy impose do not include some general procedural code or regime ("will not generate any positive rules"), but are instead specific, tailored protections ("a simple exclusion provision") aimed at preventing a fundamentally unfair procedure from being agreed to by the parties or imposed by the arbitral tribunal.

There is an important distinction between the application of mandatory law limits to the parties’ procedural agreements and the application of mandatory law limits to the arbitral tribunal’s procedural directions. Although it is of course possible for parties’ procedural agreements to be unconscionably one-sided or unfair, national courts are very reluctant to reach such a conclusion in cases involving commercial parties. National courts are deferential, but less so, to procedural directions made by arbitral tribunals in the absence of the parties’ consent to those directions.

This distinction is appropriate. Although the parties’ arbitration agreement will ordinarily grant the arbitrators broad procedural discretion, this is not intended to be, and cannot be regarded as, unlimited. A tribunal’s imposition of unfair or arbitrary procedures, over a party’s objection, is very different from a party’s knowing and informed acceptance of such procedures, either for reasons of its own or in return for other benefits.

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85 See, e.g., id.; Bannati, 28 F.3d at 709 (recognizing parties’ broad authority to adopt procedural measures of their choice); Amalgamated Ass’n of St. Elec. Ry. & Motor Coach Employees of America, 112 A.2d at 501 ("If [an arbitration agreement] specifies methods of procedure for the arbitration, the arbitrators will be bound to that procedure unless it is in violation of law or public policy."); BERGER supra note 49, § 1018 (noting that parties cannot in general waive right to fair hearing and equal treatment, but can waive the minimum requirement of due process in circumscribed circumstances or after individual circumstances occur).

86 See, e.g., Gallagher v. Schernecker, 208 N.W.2d 437, 441 (Wis. 1973) ("Arbitrators have a good deal of discretion in cutting off repetitious or cumulative testimony but they have gone beyond the limit of discretion when they refuse to hear evidence pertinent and material to this dispute."); Paklito Investment Ltd. v. Klockner East Asia Ltd., 2 H.K.L.R. 39 (HC 1993) (I-K.) (denying enforcement of award because defendant was not given the opportunity to comment on the report produced by the expert appointed by the tribunal); POUCCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION § 1698 (E. Gailllard & J. Savage eds., 1999); MERKIN, supra note 23, ¶¶ 14.10, 14.12. See also infra notes 107-108 and accompanying text.

87 The same distinction is drawn in the annulment and recognition contexts. See infra notes 103-105 and accompanying text.
Although mandatory national procedural guarantees are in principle applicable to arbitrations seated in local territory, the application of national law to override the parties' agreement on arbitral procedures can violate guarantees for party autonomy in leading international conventions. As discussed above, only violations of non-discriminatory, non-idiosyncratic procedural norms tailored to safeguard the fairness of the arbitral process should be grounds for refusal to give effect to agreements on arbitral procedures. Finally, as discussed below, violations of mandatory procedural requirements should be redressable only at the end of the arbitral process through non-recognition of the arbitral award—in annulment or recognition proceedings—not by interlocutory judicial intervention in the ongoing arbitral process.

6. **PRINCIPLE OF JUDICIAL NON-INTERFERENCE IN INTERNATIONAL ARBITRATION**

There is a further principle which complements the foregoing principles of international arbitral procedure. Leading international arbitration conventions and national arbitration statutes recognize the principle of judicial non-interference in arbitral proceedings, albeit usually indirectly. The New York Convention reflects an indirect treatment of the issue, while other instruments are more explicit and direct.

This principle of judicial non-interference in international arbitral proceedings is no less—and arguably more—important than the foregoing rules of procedural autonomy, arbitrator discretion and procedural fairness. Nonetheless, the principle of judicial non-interference has received substantially less attention. Indeed, many works on international arbitration either entirely ignore the principle or give it no more than passing attention.

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88 See supra notes 65-67 and accompanying text. In annulment actions, the courts of the arbitral seat would be afforded greater scope to apply local mandatory rules and public policies as escape devices than in recognition actions, but international limits should nonetheless apply. Id. See also infra notes 97-102 and accompanying text.

89 See infra notes 93-97 and accompanying text.

90 As discussed above, the Geneva Convention and the Geneva Protocol confirm the parties' autonomy to agree upon arbitral procedures (as do the New York, European and Inter-American Conventions). See supra notes 12-15 and accompanying text. This rule may suggest, but does not necessarily require, a principle of judicial non-interference.

Nothing in the New York Convention expressly provides that national courts shall not entertain interlocutory procedural applications concerning the ongoing conduct of international arbitrations (e.g., to dispute a tribunal’s procedural timetable, disclosure orders, or evidentiary rulings). Nonetheless, Article II(3) of the Convention provides that national courts shall “refer the parties to arbitration” after ascertaining the existence of a valid arbitration agreement without making provision for any further judicial role in the arbitration proceedings. At the same time that neither Article II(3) nor any other part of the Convention provides for judicial involvement in establishing, monitoring or overseeing the procedures used in the arbitration, Article V of the Convention defines the role of national courts with exclusive reference to recognition and enforcement of arbitral awards.

As discussed above, Article II(3) is a mandatory provision, requiring that national courts either dismiss or stay claims that are subject to a valid arbitration agreement and refer the parties to arbitration. The only exception to this principle involves interlocutory judicial decisions on jurisdictional challenges to the arbitration agreement, which are contemplated by Article II of the Convention. The effect of this requirement—particularly as interpreted in light of the Convention’s purposes (i.e., to prescribe uniform international rules that facilitate the arbitral process) and structure (i.e., only providing for review of awards in Article V)—is to forbid the courts of Contracting States from supervising or

91 New York Convention, supra note 12, art. II(3). See 1 Born, supra note 1, at 1014–20, 1024–31; Albert Jan Van den Berg, Enforcement of the Arbitration Agreement, in The New York Arbitration Convention of 1958 131, 137 (Kluwer Law and Taxation 1981) (“it is a fundamental principle of arbitration, and especially international commercial arbitration, that an arbitrator adjudicates the entire case and that a national court does not interfere with his decision-making powers”; Article II(3) can therefore be said to have the effect of a partial incompetence of the court).

92 See 2 Born, supra note 1, at 2702–78.

93 Id.

94 Id.

95 The only other exceptions involve judicial assistance in constituting the arbitral tribunal, provisional relief in aid of arbitration and judicial assistance in the taking of evidence—all of which are supportive of the arbitral process and either contemplated by or consistent with the Convention. Id.

96 Id.
second-guessing the ongoing procedural conduct of arbitrations. Absent contrary agreement by the parties, Article II(3) requires that national courts simply “refer the parties to arbitration,” with any subsequent judicial involvement limited to annulment or recognition proceedings, and does not permit them to make or supervise procedural decisions in the course of an ongoing arbitration.\(^{97}\)

This is a fundamentally important consequence of the Convention that is not always appreciated. Article II(3) does not leave the principle of judicial non-interference in international arbitrations to national legislation. Rather, Article II(3) imposes this obligation directly on Contracting States, forbidding their courts from doing anything other than referring the parties to a valid arbitration agreement or to arbitration pending an award.

\section*{6.2. Principle of Judicial Non-Interference Under the Inter-American Convention}

The Inter-American Convention is even more specific in adopting a principle of judicial non-interference in the arbitral process than the New York Convention. As noted above, Article 3 of the Convention incorporates the IACAC Rules, including Article 15(1) thereof, which grants the tribunal authority “to conduct the arbitration in such manner as it considers appropriate.”\(^{98}\) These provisions, coupled with the absence of any provisions for general judicial supervision of ongoing arbitral proceedings, leave no room for interlocutory judicial intervention in the procedural conduct of the arbitration.

\section*{6.3. Principle of Judicial Non-Interference Under the European Convention}

The European Convention also affirms the principle of judicial non-interference in the arbitral proceeding. Article IV(1) provides

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\(^{97}\) See also Matthieu de Boisseson, Anti-Suit Injunctions Issued by National Courts: At the Seat of the Arbitration or Elsewhere, in ANTI-SUIT INJUNCTIONS IN INTERNATIONAL ARBITRATION 65, 68 (E. Gaillard ed., 2005) (citing the Arbitral Tribunal’s enforcement of the arbitration agreements with limited to no deference to local courts in a 2001 decision); Jose Carlos Fernandez Rozas, Anti-Suit Injunctions Issued by National Courts: Measures Addressed to the Parties or to the Arbitrators, in ANTI-SUIT INJUNCTIONS IN INTERNATIONAL ARBITRATION, supra, at 73, 81.

\(^{98}\) Inter-American Convention, supra note 19, art. 3; INTER-AM. COMMERCIAL ARBITRATION COMM’N R., supra note 39, art. 15(1).
that parties “shall be free to submit their disputes” to arbitration, and “to lay down the procedure to be followed by the arbitrators.”

Like the New York and Inter-American Conventions, nothing in the European Convention provides for judicial supervision of arbitral procedures; instead, it contemplates only national court involvement in relation to jurisdictional decisions, interim relief, and review of awards. This leaves no room for national courts to supervise or regulate the arbitrators’ procedural decisions.

6.4. Principle of Judicial Non-Interference under National Arbitration Legislation

Arbitration statutes and judicial decisions in most developed jurisdictions are even more emphatic than international arbitration conventions regarding the principle of judicial non-interference. Article 5 of the UNCITRAL Model Law provides “[i]n matters governed by this Law, no court shall intervene except where so provided in this Law.” The Model Law then sets forth limited circumstances involving judicial support for the arbitral process (e.g., resolving jurisdictional objections, assisting in constitution of the tribunal, granting provisional relief, considering applications to vacate awards), but does not permit judicial supervision of procedural decisions through interlocutory appeals or otherwise. In the words of one court asked to review interim decisions by a tribunal:

It is premature, in effect, at this stage of proceedings, to ask the Superior Court of Quebec to intervene on questions that

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99 European Convention, supra note 17, art. IV(a)(b)(iii).
100 Id. arts. VI(1)–(3).
101 Id. art. VI(4).
102 Id. art. IX.
103 UNCITRAL, MODEL LAW, supra note 4, art. 5 (emphasis added).
104 Id. arts. 8, 9, 11(3), 13, 14(1), 16(3), 17, 27, 34 and 36.
105 In drawing up the Model Law, the Working Group and the Secretariat provided non-exhaustive lists of matters not governed by the Model Law and therefore appropriate as matters on which a court may intervene under Article 5. Those lists included a number of procedural matters, such as the fixing of fees and costs and requests for deposits or security; consolidation of arbitral proceedings; enforcement by a court of interim measures of protection ordered by the arbitral tribunal. See HOWARD M. HOLZMANN & JOSEPH E. NEUHAUS, A GUIDE TO THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION: LEGISLATIVE HISTORY AND COMMENTARY 218 (1989).

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Arbitration legislation in other jurisdictions is similar in either excluding judicial supervision of arbitral procedures, or omitting any provision for interlocutory judicial review or supervision of arbitrators' procedural rulings. Similarly, one New Zealand...
decision rejected both an application to review an arbitrator’s interlocutory procedural directions and a request for a judicial order enforcing those directions, making clear the court’s “immediate reluctance to be used as a ‘cuckoo’ to be whistled out to exercise the coercive power of the State through its judicial arm, but without any ability to make an adjudication upon the matter.” An English court adopted the same view, holding that the English Arbitration Act “contemplates that once matters are referred to arbitration, it is the arbitral tribunal that will generally deal with issues of their jurisdiction and the procedure in the arbitration up to an award.”

In the United States, the statutory text of the FAA does not expressly provide for judicial non-interference in arbitral proceedings. Nonetheless, lower U.S. courts have repeatedly held that judicial intervention in pending arbitral proceedings (both international and domestic) is improper to correct procedural errors or evidentiary rulings. As one U.S. federal trial court


109 Weatherhead v. Deka New Zealand Ltd., [1997] 10 P.R.N.Z. 625, 631 (H.C. 1997) (The judge was “loath to add to an interminable procedural wrangle between these parties, but [was] not satisfied that it has been demonstrated that I have the authority or jurisdiction to intervene in the way which is sought.”).

110 Elektrim SA v. Vivendi Universal SA [2007] 2 Lloyd’s Rep. 8, ¶ 70 (Comm.) (Eng.). See also Weatherhead v. Deka, [1997] 10 P.R.N.Z. at 631 (holding that courts cannot normally intervene until an award has been made, whereafter, in appropriate cases, the award can be set aside and remitted to the arbitrators for rehearing).

111 See 2 BORN, supra note 1, at 1780 (describing lack of interlocutory judicial review of arbitral tribunal’s discovery rulings in U.S. courts); see, e.g., Aerojet-Gen. Corp. v. Am. Arbitration Ass’n, 478 F.2d 248, 251 (9th Cir. 1973) (“Judicial review prior to the rendition of a final arbitration award should be indulged, if at all, only in the most extreme cases.”); Compania Panamena Maritima San Gerassimo, S.A. v. J. E. Hurley Lumber Co., 244 F.2d 286, 288-89 (2d Cir. 1957) (stating that “[i]t should not be the function of the District Court, after having ordered an arbitration to proceed, to hold itself open as an appellate tribunal to rule upon any questions of evidence that may arise in the course of the arbitration” and noting that interlocutory judicial review of arbitrators’ evidentiary rulings “result only in a waste of time, the interruption of the arbitration proceeding, and encourages delaying tactics . . . .”); Krauss Bros. Lumber Co. v. Louis Bossert & Sons, Inc. 62 F.2d 1004, 1005 (2d Cir. 1933) (“The purpose of arbitration is essentially an escape from judicial trial . . . .”); Bancol y CIA. S. En C. v. Bancolombia S.A., 123 F. Supp. 2d 771, 772 (S.D.N.Y. 2000) (“The court’s authority to direct or oversee an arbitration is narrowly confined . . . . In particular, [the court] has little or no power to afford interlocutory review of procedural matters, let alone to determine at the outset what procedural rules are to be applied.”); Foremost Yarn Mills, Inc. v. Rose Mills, Inc., 25 F.R.D. 9, 11 (E.D.
declared, "[n]othing in the [FAA] contemplates interference by the court in an ongoing arbitration proceeding."112 Or, as another court put it, to permit judicial review of arbitrators’ interlocutory rulings would be "unthinkable."113

National court decisions in leading civil law jurisdictions are similar.114 The Paris Cour d'appel has affirmed the principle of judicial non-interference in emphatic terms, holding that:

The exercise of the prerogatives attached to the [arbitrators’ authority], which is legitimate and autonomous in its own right, must be guaranteed in a totally independent manner, as befits any judge, without any
interference with the organization which set up the arbitral tribunal and thus exhausted its powers, and without any intervention by the courts.\footnote{Chambre arbitrale de Paris v. République de Guinée, Paris Cour d’appel [CA] [regional court of appeal] Paris, Nov. 18, 1987, 1988 REV. ARB. 657. See also Tribunal de grande instance [T.G.I.] [court of original jurisdiction] Paris, Feb. 15, 1995, 1996 REV. ARB. 503.}

There are only isolated exceptions to the principle of judicial non-interference, typically in ill-considered lower court decisions.\footnote{See, \textit{e.g.}, Tuesday Indus. v. Condor Indus., 1978 (4) SA 379 (Prov. Divs.) at 383 (S. Afr.) (claiming power to review procedural ruling of tribunal, but not exercising it); Windward Agency, Inc. v. Cologne Life Reins. Co., 123 Fed. App’x 481, 483 (3d Cir. 2005) (noting that an agreement to arbitrate does not completely oust a court of jurisdiction; rather, the court retains continuing supervision of arbitration to ensure that arbitration is conducted within a reasonable time).}

The principle of judicial non-interference in international arbitral proceedings is vitally important. Judicial orders purporting to establish arbitral procedures would directly contradict the parties’ objectives in agreeing to arbitrate—including particularly their desire for less formal and more flexible procedures, their desire for a high degree of party control over such procedures, and their desire for “neutral” and expert arbitral procedures adopted by a tribunal of the parties’ choice, rather than a national court.\footnote{See 2 \textsc{BORN}, \textit{supra} note 1, at 1785-92 (discussing the importance of arbitral tribunals’ broad discretion over arbitral procedures).}

Interlocutory judicial review of an arbitral tribunal’s procedural decisions would frustrate all of these objectives, while also imposing substantial risks of delay and appellate second-guessing on the arbitral process.\footnote{Interlocutory appeals are either unavailable or strictly limited in many judicial systems, precisely because of the delays that such appeals cause to the litigation process. The same rationale applies to arbitration.}

These considerations go beyond matters of sound national legislative policy, reflecting the implied premises of an agreement to arbitrate international disputes. Absent express contractual provisions to the contrary, they are given effect by the New York Convention, which excludes interlocutory judicial involvement in procedural decisions in an ongoing international arbitration. As noted above, under Article II of the Convention (and similar provisions in other conventions), as well as under leading national arbitration regimes, the parties’ agreement excluding interlocutory
judicial interference in the arbitral process is binding on Contracting States and their courts.\textsuperscript{119}

7. CONCLUSION

The principle of judicial non-interference in international arbitral proceedings is a central pillar of contemporary international arbitration. Essential to the arbitral process is the freedom of parties, and arbitrators, to proceed with their chosen dispute resolution mechanism to a final award, which only then may be subject to judicial review. The existence of interlocutory challenges or appeals from arbitrators’ procedural decisions would have deeply damaging consequences for the arbitral process. To prevent these consequences, both the New York Convention and other international arbitration conventions and national arbitration statutes either expressly or implicitly adopt a principle of judicial non-interference in international arbitral proceedings. Although seldom remarked upon, this principle plays a central role in ensuring the efficacy of the arbitral process as a means of international dispute resolution.

\textsuperscript{119} See supra notes 14-15 and accompanying text (noting that Article II of the Convention requires courts of contracting states to refer parties to a valid arbitration agreement to arbitration pursuant to such agreement, if necessary, and must uphold the agreement’s arbitral rules and procedures).