# An Arbitrator's Perspective: Between Equal Treatment and the Good Administration of Transnational Justice in Online Arbitration

*Diego P. Fernández Arroyo and Bruno Sousa Rodrigues*

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## *A. Introduction*

Online arbitration is here to stay. The expression is deployed here to refer to the ever-increasing digitalization of arbitration proceedings. One cannot but note that the pandemic has accelerated the deployment of information technology in the conduct of proceedings, making this the norm.[1] What was once the preserve of geeks and tech aficionados, is now a common topic of conversation even among the most senior members of the arbitral community. Indeed, it is difficult to find a single arbitration practitioner who has not been faced with online hearings and generalised use of electronic submissions.

1 Yves Derains talks about 'the role of electroshock' played by the pandemic over arbitration proceedings, in 'Une nouvelle approche de la procedure arbitrale internationale' (2021) 3 *Revue de l'arbitrage* 629 (645).

Lawyers acting for parties and arbitrators alike have managed to transition satisfactorily to the world of online proceedings. This has generated great optimism on the part of many, who now see the dawn of a new era in dispute resolution. The standard account is that we face an opportunity to reduce arbitration's carbon footprint and costs in general. Anyone who demonstrates less than great enthusiasm for this new (virtual) reality risks being regarded as odd or anachronistic.

The many benefits of online arbitration, especially in the context of the Covid crisis, are beyond question. Several of the elements of online arbitration will certainly survive – in a balanced way – even if one day the pandemic is (hopefully) put behind us.[2] Even so, one must guard against online euphoria, because the conduct of arbitral proceedings in this setting throws up a number of challenges and difficulties. Most notably, online arbitral proceedings can complicate the relationship between two foundational values governing any system of dispute resolution, i.e. that of equal treatment and that requiring a good administration of justice. Indeed, the benefits of cost reduction and expediency, usually associated with the transition to online proceedings, may also come at the cost of an increased concern for parties' equality of arms. As has been the case in other circumstances, the expansion of arbitration over greener pastures has always come with a price tag on it.[3]

This chapter will proceed as follows. First, it will discuss the limits to the principle of equal treatment in arbitration. It will then explore how the concept of good administration of justice is to be understood in the context of transnational arbitration. Lastly, it will explore a number of issues in the relationship between the good administration of transnational justice and equal treatment in the context of online arbitral proceedings. A final section will set out this chapter's conclusions.

## *B. The Limits of Equal Treatment in Arbitration*

Due process and fair trial are terms that tend to be correlated, if not conflated. Normative instruments of various pedigrees usually proclaim their centrality to the administration of justice, and literature on due process

2 See Fellas, 'International Arbitration in the Midst of COVID-19: One Year Later' (2021) *New York Law Journal*.

3 See Fernández Arroyo, 'Nothing is for Free: The Prices to Pay for Arbitralizing Legal Disputes' in Cadiet, Hess and Isidro (eds), *Privatizing Dispute Resolution* (2019), 615.

in arbitration[4] will most often refer to the sources of these principles by reference to article 18 of the UNCITRAL Model Law[5] and article 10 of the Universal Declaration of Human Rights.[6] Evidently, the many arbitration rules in existence will also pay tribute to the notion of fair trial, as can be seen in Article 17 para. 1 of the 2010 UNCITRAL Rules[7] and Article 22 para. 4 of the 2021 ICC Rules[8].

All the instruments mentioned seemingly converge in associating fair trial with equality of the parties. In the literature, when fair trial is dressed in its guise of equal treatment it is often presented as a synonym of the right to be heard (*audiatur et altera pars* or *audi alteram partem*). In all circumstances, it is claimed that '[a]djudicators must be vigilant to maintain equality between the litigants over the entire span of the adjudicatory process because it is a key component of fair hearing.'[9] Adopted by most mu-

4 For recent scholarship on the matter, see Cordero-Moss, 'The Alleged Failure of Arbitration to Address Due Process Concerns: Is Arbitration under Attack?' in Calissendorff and Patrik (eds), *Stockholm Arbitration Yearbook* (2021), 251; Ferrari, Rosenfeld and Czernich (eds), *Due Process as a Limit to Discretion in International Arbitration* (2020); Reed, 'Ab(use) of due process: sword vs. shield' (2017) 33(3) *Arbitration International*, 361.

5 The provision reads as follows: 'The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.' See Art. 18 UNCITRAL Model Law on International Commercial Arbitration, 2006.

6 The text of the provision is the following: 'Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.' See Art. 10, Universal Declaration of Human Rights. Similar provisions are adopted, with more detail, in the International Covenant on Civil and Political Rights (Art. 14) and the European Convention on Human Rights (Art. 6).

7 The provision reads as follows: '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 an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case. The arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute.' See Art. 17 para. 1 2010 UNCITRAL Arbitration Rules.

8 This is the text of the provision: 'In all cases, the arbitral tribunal shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case.' See Art. 22 para. 4 2021 ICC Rules of Arbitration.

9 Kotuby and Sobota, General Principles of Law and International Due Process (2017), 177.

nicipal legal systems, procedural equality is considered a general principle of law with long-standing recognition before international jurisdictions.[10]

Indeed, the evanescent concepts of due process and fair trial are deeply connected to a broader egalitarian agenda, even if expressed in a narrower procedural sense. In this regard, the principle of equal treatment establishes within the procedure a measure of equality between the contenders, which should be manifested in equidistant behaviour on the part of the adjudicator. The question that obviously arises in relation to this notion of egalitarian fair trial will inevitably have to do with the age-old paradox opposing formal to substantive equality.

'Treating likes alike' is a running theme in philosophy and legal theory going as far back as Aristotle's Nicomachean Ethics.[11] Conversely, substantive equality, an idea with a similarly long career in the history of thought, has been expressed in numerous forms and is most famously echoed by Ulpian's maxim 'to each one's own.'[12] More recently, the dichotomy in question has given rise to a theory of justice, in which equality as fairness gains new contours under a veil of ignorance, which includes the accommodation of a principle of difference protecting the worst off in any given context.[13]

The battle over the notions of formal and substantive equality has been fought time and time again in society and the situation in arbitral procedure is no different. Are parties to be treated on strictly equal terms or ought the adjudicator to treat them in way to accommodate some level of inequality proportional to their corresponding unfavourable circumstances? This seemingly unsolvable philosophical question is at stake at every turn in the conduct of arbitral proceedings and arbitrators must not shy away from providing a solution to the problem. Still, as would be expected in the realm of practical reason, the administration of equality within arbitral proceedings will have to do with more mundane issues than the transcendental questions addressed by philosophers and theoreticians. In this regard, the compass used by the arbitrator navigating these troubled waters will be the afterlife of the arbitral award.

It is clear that under all normative instruments governing arbitration, whether national, international, or transnational, the validity of the award

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10 See Cheng, General Principles of Law as Applied by International Courts and Tribunals (1953), 290 ff..

11 See Aristotle, *Nicomachean Ethics*, V.3. 1131a10–b15; Politics, III.9.1280 a8–15, III. 12. 1282b18–23.

12 See Ulpian, *Inst*. 1,1,3-4.

13 See Rawls, *A Theory of Justice* (2005).

is conditional on procedural equality. This is evident in the New York Convention of 1958, when it states that enforcement may be refused if 'the party against whom the award is invoked was not given proper notice of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case.'[14] Similarly, the 2006 Model Law states that 'parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.'[15] The principle is also applicable in the context of investor-State dispute settlement (ISDS), and it is clear that awards may be annulled under the ICSID Convention when '[there] has been a serious departure from a fundamental rule of procedure.'[16] Clearly, the equal treatment of the parties is a fundamental rule of procedure as ad hoc committees have consistently stated.[17]

Consequently, arbitrators, institutions and parties are very aware of the impact of unequal treatment on the enforceability and validity of arbitral awards. That said, one also knows that some jurisdictions do allow parties, at least those in international commercial disputes, to greatly reduce the scope of court control over arbitral awards subject to certain requirements. Take the example of Swiss law, which provides as follows in Article 192 para. 1 of the Federal Private International Law Act (PILA):

If none of the parties has their domicile, habitual residence or seat in Switzerland, they may, by a declaration in the arbitration agreement or by subsequent agreement, wholly or partly exclude all appeals against arbitral awards; they may limit such proceedings to one or several of the grounds listed in Article 190 paragraph 2; […][18]

Article 190 para. 2, referred to in the above-quoted provision, reproduces the grounds for setting aside an award established under the New

14 See Art. V para. 1(b) of United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958).

15 See Art. 18 of UNCITRAL Model Law on International Commercial Arbitration (2006).

16 See Art. 52 para. 1(d) of Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1965), Article 52(1)(d). As is well known, around two thirds of investment arbitration is conducted under the aegis of the ICSID.

17 ICSID, Updated Background Paper on Annulment for the Administrative Council of ICSID, 5 May 2016, para. 99, note 186.

18 The term 'express' (declaration), present in the original version, was excluded in the reform of 2021. See Jarrosson, Besson and Rigozzi, 'La réforme du droit suisse de l'arbitrage international' (2021) 1 *Revue de l'arbitrage*, 11 (42-43). Nevertheless, according to these authors, this modification should not change the approach to 'indirect' waivers, consistently rejected by the Swiss Federal Tribunal.

York Convention of 1958. With that in mind, a combined reading of Article 192 para. 1 and 190 para. 2 of the PILA shows us that, under Swiss law, foreign parties are in a position to exclude court control over an arbitral award in relation to, *inter alia*, equal treatment. Similar provisions exist under other legal systems,[19] suggesting that in transnational contexts the principle of equal treatment might be important but dispensable.

The possibility of waiving court control over arbitral awards has given rise to a relevant ruling of the European Court of Human Rights (ECtHR). In *Tabbane v. Switzerland*, the court had the opportunity to assess the compatibility of Article 192 of the PILA with Article 6 of the European Charter on Human Rights (ECHR).[20]

A certain Mr. Tabanne and his sons entered into an option agreement with Colgate Palmolive. The contract in question contained an arbitration clause providing for ICC arbitration and expressly entrusted the tribunal with the power to select the seat of those proceedings. In addition, the same arbitration clause established that the 'decision of the arbitration shall be final and binding and neither party shall have any right to appeal such decision to any court of law.'[21]

A dispute arose, and Colgate initiated arbitration proceedings. The arbitral tribunal was duly constituted and, pursuant to the arbitration clause, Geneva was selected as the seat of arbitration. During the course of proceedings, Mr. Tabbane and his sons applied for an expert financial report, which was denied by the arbitral tribunal on the grounds that their opponent had produced financial documents that could be used by Mr. Tabbane and his son to conduct their own financial analysis.

The arbitral tribunal eventually rendered its decision, which was favourable to Colgate Palmolive. Mr. Tabanne and his sons then applied to the Swiss Federal Tribunal to have the award set aside arguing, *inter*

19 See Gaillard, 'Aspects philosophiques du droit de l'arbitrage international' (2007), 329 *Recueil des cours* 119. This is the case of Belgium, French, Swedish, Spanish, Tunisian, Peruvian and Colombian law. In all of these, except for French law, the absence of a connection with the seat of the arbitration is required. In France, Article 1522 of the Code of Civil Procedure allows waiver of the right to apply for annulment even if there is a link with France. However, when enforcement of the award is sought in France a similar control exists in the form of the exequatur.

20 See ECHR, Application no. 41069/12, 23.3.2016, *Noureddine Tabbane v. Switzerland*, ECLI:CE:ECHR:2016:0301DEC004106912.

21 The arbitration clause is fully quoted in the judgment. See ECHR, Application no. 41069/12, 23.3.2016, *Noureddine Tabbane v. Switzerland*, ECLI:CE:ECHR:2016:0301DEC004106912, para. 5.

*alia*, that their right to be heard had been violated.[22] The Swiss Federal Tribunal, however, considered that the arbitration clause contained a waiver in the terms of Article 192 of the PILA, for which reason the application was considered inadmissible.

The case was brought before the ECtHR, which then had to consider whether Mr. Tabbanne and his sons had their right to access justice curtailed by the Swiss Federal Tribunal and whether the arbitral tribunal's refusal to produce expert evidence violated their right to be heard. No violation was found.

The decision is telling insofar as the court entrusted with the guardianship of human rights in Europe considered that the grounds for annulment of foreign arbitral awards, which includes equal treatment, do not necessarily trump other considerations such as the enhanced expediency of arbitration and the policy of *favor arbitrandum* implemented by the Swiss legislator.[23] In fact, the ECtHR noted that a waiver of court control was within the bounds of the freedom of contract and party autonomy, for no party was obliged to agree to such provisions unless they so wished.[24]

The same case also provides some insights into the more precise limits of equal treatment in arbitration. In this regard, while the ECtHR recognised the precedence of domestic law over evidentiary matters, it did not shy away from evaluating whether the arbitral tribunal's refusal to produce supplementary expert evidence amounted to unequal treatment of the parties.

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22 See Tribunal fédéral, Ière Cour de droit civil 4.1.2012 - 4A_238/2011 -, (2012) 30(2) *ASA Bulletin* 369.

23 This was expressed in the following terms: '*En ce qui concerne la présente affaire, la Cour note que l'article 192 LDIP reflète un choix de politique législative qui répond au souhait du législateur suisse d'augmenter l'attractivité et l'efficacité de l'arbitrage international en Suisse, en évitant que la sentence soit soumise au double contrôle de l'autorité de recours et du juge de l'exequatur, et de décharger le Tribunal fédéral (paragraphe 13 ci-dessus).*' See ECHR, Application no. 41069/12, 23.3.2016, Noureddine Tabbane v. Switzerland, ECLI:CE:ECHR:2016:0301DEC004106912, para. 33.

24 The ECHR affirmed the following: '*De plus, il convient de noter qu'une partie, n'ayant ni domicile, ni résidence habituelle, ni établissement en Suisse, n'est nullement obligée d'exclure tout recours; bien au contraire, elle peut librement choisir de saisir cette possibilité qu'offre la loi suisse en renonçant valablement à tout recours à un tribunal ordinaire. La Cour estime que ce moyen offert aux parties qui n'ont pas de liens avec la Suisse est proportionné au but de renforcer l'attractivité de la Suisse en matière d'arbitrage international et de renforcer le principe de la liberté contractuelle des parties.*' See Tribunal fédéral, Ière Cour de droit civil 4.1.2012 - 4A_238/2011 -, (2012) 30(2) ASA Bulletin 369, para. 34.

In this regard, it was noted that the right to be heard was to be understood within the boundaries of a 'reasonable' opportunity to present the case and produce evidence. The ECtHR did not consider that the arbitral tribunal's refusal to produce expert evidence could be qualified as arbitrary or unreasonable, nor did it find any disadvantage imposed on the applicant as a result of the arbitral tribunal's decision. In essence, the ECtHR's ruling suggests that, under the ECHR, a violation of equal treatment requires the existence of arbitrariness creating a situation of clear disadvantage to one of the parties.[25]

This approach to the limits to equal treatment has been echoed in recent literature, with some authors suggesting a two-pronged test very close to the reasoning followed by the ECtHR.[26] In this test, the first step would be to assess the rationale (or lack of it) for the treatment in question, while the second step would be to assess whether the treatment of the parties creates a substantial disadvantage for one of them. This proposed test implies that there must be a causal link between the treatment and the disadvantage in question. Furthermore, it should be noted that the classification of the disadvantage as 'substantial' implies that minor harm with no repercussion on the outcome of the case does not impact

25 The reasoning of the ECtHR was expressed as follows: '*L'égalité des armes implique l'obligation d'offrir à chaque partie une possibilité raisonnable de présenter sa cause – y compris ses preuves – dans des conditions qui ne la placent pas dans une situation de net désavantage par rapport à son adversaire (Dombo Beheer B.V. c. Pays-Bas, 27 octobre 1993, § 33, série A no 274). Même à supposer que les garanties de l'article 6 soient applicables au cas d'espèce, il convient de rappeler que la Convention ne réglemente pas le régime des preuves en tant que tel (Mantovanelli c. France, 18 mars 1997, § 34, Recueil 1997-II). L'admissibilité des preuves et leur appréciation relèvent en principe du droit interne et des juridictions nationales (García Ruiz c. Espagne [GC], no 30544/96, § 28, CEDH 1999-I). Un refus d'ordonner une expertise n'est pas en soi inéquitable; il convient de l'examiner au vu de la procédure dans son ensemble (H. c. France, 24octobre 1989, §§ 61 et 70, série A no 162-A). Dans le présent cas, le tribunal arbitral a considéré que la société Colgate avait déjà produit des preuves financières d'un expert, et qu'il suffisait de permettre à l'expert privé du requérant d'obtenir l'accès aux mêmes documents comptables que ceux utilisés par l'expert de la demanderesse. Cette motivation ne paraît ni déraisonnable ni arbitraire. Compte tenu du fait que le requérant a eu accès aux documents litigieux, il n'apparaît pas non plus qu'il ait été placé dans une situation de net désavantage par rapport à la société Colgate*.' See paras. 38-39 ECHR, Application no. 41069/12, 23.3.2016, Noureddine Tabbane v. Switzerland, ECLI:CE:ECHR:2016:0301DEC004106912.

26 See, for example, Scherer, Prasad and Prokic, 'The Principle of Equal Treatment in International Arbitration' (2018) SSRN <https://ssrn.com/abstract=3377237>, 26 ff..

procedural equality. All in all, this appears to offer appropriate guidance for exploring the boundaries of equal treatment in arbitration.

### C. Good Administration of Justice in Transnational Arbitration

Arbitration, of course, very frequently takes place at the crossroads of domestic and international law, often blurring the boundaries between private and public international law. Whilst still controversial, the characterization of arbitration as a transnational legal order has proved resonant.[27] In this regard, even if arbitration is heavily reliant on party autonomy, it must be noted that the autonomy of the parties will not be absolute.[28] The limits to that autonomy is found in the applicable mandatory rules and public policy. Transnational public policy, in particular, provides a set of legal norms arising at the crossroads of public and private international law which will constrain the autonomy of parties to an arbitration agreement.[29] It is posited here that the good administration of justice is one such norm pertaining to transnational public policy.

The idea of good administration of justice is a cornerstone of many domestic judicial systems, although it is most often put into operation by judges across civil law jurisdictions. In France, for instance, the Constitutional Council has repeatedly recognized the good administration of justice as an 'objective' of constitutional status.[30] The notion itself may not be so common in common law jurisdictions, but it appears strongly correlated to the power vested in common law judges to impose penalties for contempt of court.[31] Indeed, this power to respond to contempt probably arises from the idea that the judicial function requires an orderly adminis-

27 See Gaillard, 'Aspects philosophiques du droit de l'arbitrage international' (2007), 329 *Recueil des cours* 119.

28 Giuditta Cordero-Moss, 'Limitations on party autonomy in international commercial arbitration', 372 *Recueil des cours* (2014) 129.

29 For a discussion on the limits of party autonomy in relation to the procedural powers of arbitrators, see Fernández Arroyo, 'Arbitrator's Procedural Powers: The Last Frontier of Party Autonomy?' in Ferrari (ed), *Limits to Party Autonomy in International Commercial Arbitration* (2016), 199.

30 For example, Conseil Constitutionnel 21.3.2019 - 2019-778 DC, para. 22; Conseil Constitutionnel 9.7.2014 - 2014-406 QPC, para. 7; and Conseil Constitutionnel 17.12.2010 - 2010-80 QPC, paras. 6 and 8.

31 For a discussion of a comparative approach to contempt, see Chesterman, 'Contempt: in the common law, but not in the civil law' (1997) 46(3) *International and Comparative Law Quarterly* 521.

tration of proceedings - in other words, good administration of justice. One might wonder, however, whether this notion can be transposed beyond the confines of domestic law, especially to transnational situations.[32]

Direct formulation of the notion is somewhat scarce in international and transnational normative instruments. An exception may be the Charter of Fundamental Rights of the European Union, which expressly provides for a right to good administration of justice. This right encompasses, *inter alia*, the 'right to have his or her affairs handled impartially, fairly and within a reasonable time.'[33] The case law of the European Union Court of Justice (EUCJ) contains plentiful references to the good administration of justice. Indeed, it might be regarded as one of the essential principles in the decision-making of the EUCJ.

The UNIDROIT Principles of Transnational Civil Procedure are also evocative of the idea of good administration of transnational justice, referring, however, to the 'prompt rendition of justice.' The principle in question encompasses, on the one hand, a duty imposed on the courts to settle disputes within a reasonable time and, on the other hand, a duty imposed on the parties to cooperate.[34] In its comments on the provision, the working group in charge of the matter noted that '[i]n all legal systems the court has a responsibility to move the adjudication forward' and that '[p]rompt rendition of justice is a matter of access to justice', even if it should also be 'balanced against a party's right of a reasonable opportunity to organize and present its case.'[35]

Addressing this in more detail, the ASADIP Principles on Transnational Access to Justice (TRANSJUS) enumerate the principles that 'in proceedings pursuant to transnational litigation, judges and other State authorities

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32 For a theoretical framework on transnationality, see Jessup, *Transnational Law* (1956).

33 See the first two paragraphs of Article 41 of the Charter of Fundamental Rights of the European Union, which read as follows: '1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union. 2. This right includes: (a) the right of every person to be heard, before any individual measure which would affect him or her adversely is taken; (b) the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy; (c) the obligation of the administration to give reasons for its decisions.'

34 See Geoffrey Hazard, Rolf Stürner and Antonio Gidi, 'Draft Rules of Transnational Civil Procedure (with commentary)' (2005) UNIDROIT Study LXXVI – Doc. 13, Principle 7.

35 Id., 17

should seek to ensure, in a reasonable manner, adherence to.' These are the principles of: maximum respect for the human right of access to justice, favouring amicable solutions, jurisdictional equivalence, transposition of procedural guarantees to the transnational context, international judicial cooperation, transnational judicial activism, procedural expeditiousness, procedural adjustment, and protection of collective rights.[36]

References to the good administration of justice also abound in international case law. As early as 1956, in the UNESCO advisory opinion, the International Court of Justice (ICJ) stated in passing that 'the principle of equality of the parties follows from the requirements of good administration of justice.'[37]

In the 2007 judgment rendered in the case *Bosnia and Herzegovina v. Serbia and Montenegro*, the ICJ ruled that a piece of evidence brought at a late stage of the proceedings was inadmissible as contrary to the interest of the good administration of justice.[38]

More recently, in the 2013 case Construction of a Road along the San Juan River (*Costa Rica v. Nicaragua*), Judge Cançado Trindade issued a separate opinion dealing at length with the 'sound' administration of justice (as the concept of *bonne administration de la justice* was translated into English). In this opinion, Judge Cançado Trindade argued that 'the ICJ has

36 See www.asadip.org/v2/wp-content/uploads/2018/08/ASADIP-TRANSJUS-EN-FINAL18.pdf

37 See Judgments of the Administrative Tribunal of the ILO upon Complaints Made Against UNESCO, Advisory Opinion, 23 October 1956, ICJ Reports (1956), 77, at 13.

38 The ICJ noted the following: 'By a letter of 14 March 2006, the Registrar informed Bosnia and Herzegovina that, given that Article 56, paragraph 4, of the Rules of Court did not require or authorize the submission to the Court of the full text of a document to which reference was made during the oral proceedings pursuant to that provision and since it was difficult for the other Party and the Court to come to terms, at the late stage of the proceedings, with such an immense mass of documents, which in any case were in the public domain and could thus be consulted if necessary, the Court had decided that it was in the interests of the good administration of justice that the CD-ROM be withdrawn. By a letter dated 16 March 2006, the Agent of Bosnia and Herzegovina withdrew the CD-ROM which it had submitted on 7 March 2006.' See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina v. Serbia and Montenegro*), Judgment, 26 February 2007, ICJ Reports (2007), 43 (60, para. 54).

the 'inherent power' to take *motu proprio* the measures necessary to secure the sound administration of justice.'[39]

One also finds references to the good administration of justice in ISDS, especially in connection to the arbitrators' 'inherent powers.' A procedural order issued in *ICRS v. Jordan* offers a case in point. In this arbitration, the respondent applied to the tribunal for a stay of proceedings on the grounds of an alleged *lis pendens* with an ICC arbitration. This application was made on the grounds of Article 44 of the ICSID Convention, Article 19 of ICSID Rules and the tribunal's inherent powers. Whilst rejecting the request for the stay, the arbitral tribunal considered that it is 'common knowledge that the purpose of an inherent jurisdiction is to enable a Tribunal to conduct its proceedings in an effective and efficient manner for the good administration of justice.'[40]

Considering the foregoing, it is not unreasonable to assert that the good administration of justice is an emerging principle of law commanding transnational authority across the divide between municipal and international normative regimes. It is also observed that the content of this principle remains very closely bound up with the notion of the inherent powers of adjudicators to move proceedings forward.[41] Fundamentally, the good administration of transnational justice is posited here as a norm of transnational public policy directed at both adjudicators and parties, requiring that they behave in a fair, loyal and efficient manner for the duration of proceedings.

Efficiency may be the most visible feature of the three elements referred to above. In arbitration, this dimension of the good administration of transnational justice has been regulated extensively. Most sets of arbitration rules, chosen by the parties themselves, impose a duty on the arbitra-

39 See *Construction of a Road in Costa Rica along the San Juan River* (*Nicaragua v Costa Rica)*, Joinder of Proceedings, Order, 17 April 2013, ICJ Reports (2013), p. 189 (195, para. 18) (Separate Opinion of Judge Cançado Trindade).

40 See *International Company for Railway Systems (ICRS) v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/09/13, Procedural Order no. 2 (9 July 2010), para. 16.

41 For more general discussion of the inherent powers of international courts and arbitral tribunals, see Sylvain Bollée, 'Les pouvoirs inhérents des arbitres internationaux" (2021) 418 *Recueil des cours* 21; Ferrari and Rosenfeld (eds), *Inherent Powers of Arbitrators* (2019); Brown, 'Inherent Powers of International Courts and Tribunals' (2005) 76(1) *British Yearbook of International Law* 195.

tor to administer proceedings effectively, expediently, and economically.[42] Furthermore, arbitration rules will not only impose on the tribunal the duty to police time and costs but will have special provisions on expedited arbitral proceedings.[43] UNCITRAL, in its transnational legislative activity, has reached an advanced stage in the codification of expedited rules for arbitration proceedings. It is asserted that these special rules will be implemented to 'balance […] the efficiency of the arbitral proceedings and […] the rights of the parties to due process and fair treatment.'[44]

As important as efficiency may be, it has been stated above that the good administration of justice also requires fairness and loyalty. On the one hand, fairness is intrinsically connected to the equality of the parties. A fair trial is one in which the parties are afforded procedural equality within the limits discussed above. On the other hand, procedural loyalty is an emanation of the general principle of good faith, which requires cooperative behaviour during the proceedings from parties and adjudicators.[45] One must note that the balance between fairness and procedural loyalty precludes abusive procedural behaviour, requiring the adjudicator to take an active role in penalising procedural misconduct by the parties.

In performing this duty, arbitrators should not fall prey to due process paranoia. In this regard, it has been noted that due process claims are increasingly weaponised with strategic procedural intentions. From a shield ensuring the fairness of proceedings, such claims are put forth as a sword to disrupt the orderly conduct of proceedings.[46] The phenomenon has been observed for some time now and has considerably impacted the development of arbitration's normative framework. Lucy Reed has pointedly observed that the UNCITRAL arbitration regime has evolved in a way so as to curb what she termed 'abuse of due process.'[47]

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42 See, for example, Art. 22 para. 4 of the ICC Rules of Arbitration (2021), Art. 23 para. 2 of the SCC Arbitration Rules (2017), Art. 14 para. 1 (ii) of the LCIA Arbitration Rules (2020).

43 See Appendix VI of the 2021 ICC Rules of Arbitration (2021).

44 See UNCITRAL, Draft Explanatory Note to the UNCITRAL Expedited Arbitration Rules, 15 April 2021, A/CN.9/WG.II/WP.219, 2, para. 1.

45 See Sheppard, 'The Lawyer's Duty to Arbitrate in Good Faith and with Civility' (2021) 37(2) *Arbitration International* 535; Veeder, 'The 2001 Goff Lecture: The Lawyer's Duty to Arbitrate in Good Faith' (2002) 18(4) *Arbitration International* 431.

46 Reed, 'Ab(use) of due process: sword vs. shield' (2017) 33(3) *Arbitration International*, 361 (374-376).

47 Reed, 'Ab(use) of due process: sword vs. Shield' (2017) 33(3) *Arbitration International*, 361 (366-372).

Take the example of Article 15 para. 1 of the 1976 UNCITRAL Rules. This provision granted arbitrators a discretionary power in the conduct of proceedings, yet it made the exercise of this power conditional on the equality of the parties and to a very broad right to be heard. Accordingly, under the 1976 UNCITRAL Rules, arbitrators were required to afford parties equal treatment and offer them 'at any stage of the proceedings' a 'full opportunity' of presenting their case.

It is not difficult to see how such a rule might be abused. Indeed, less than 9 years later, UNCITRAL made a slight change in its normative approach to the matter. Whilst the discretionary power of arbitrators was to be exercised within the bounds of equal treatment, the right to be heard, even if established at the level of 'full opportunity' to present the case, was not necessarily to be afforded 'at any stage' of proceedings. Indeed, Article 18 of the 1985 UNCITRAL Model law, through the omission of the expression 'at any stage', included a temporal limitation to the right to be heard in order to avoid dilatory tactics.[48]

Some 25 years later dilatory tactics would reach the level of 'guerrilla tactics.'[49] This would lead UNCITRAL to substantially change the scope of arbitrator's discretion over the conduct of proceedings. In particular,

48 Commenting on the drafting history of the provision, Holtzmann and Neuhaus, noted the following: 'The terms of Article 18 were modelled on Article 15(1) of the UNCITRAL Arbitration Rules. The Commission Report provides no authoritative guidelines to interpreting the terms 'treated with equality' and 'full opportunity of presenting his case'; nor do the reports of the Working Group. It is submitted that this may be because the delegates considered that the terms were so well understood in all legal systems that comment was unnecessary and that detailed definitions might limit the flexible and broad approach needed to assure fairness in the wide variety of circumstances that might be encountered in international arbitration. It is also submitted that the terms "equality" and 'full opportunity' are to be interpreted reasonably in regulating the procedural aspects of the arbitration. While, on the one hand, the arbitral tribunal must provide reasonable opportunities to each party, this does not mean that it must sacrifice all efficiency in order to accommodate unreasonable procedural demands by a party. For example, as the Secretariat noted, the provision does not entitle a party to obstruct the proceedings by dilatory tactics, such as by offering objections, amendments, or evidence on the eve of the award. An early draft that would have required that each of the parties be given a full opportunity to present his case "at any stage of the proceedings" was rejected precisely because it was feared that it might be relied upon to prolong the proceedings unnecessarily.' See Holtzmann and Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (1989).

49 For an overview of the issue, see Horvath and Wilske, *Guerrilla Tactics in International Arbitration* (2013).

Article 17 para.1 of the 2010 UNCITRAL Rules now grants arbitrators a considerable margin of discretion over the right to be heard. Arbitrators are to afford parties at the 'appropriate stage of proceedings' a 'reasonable opportunity' to present their case. In addition, the same provision highlights that the tribunal 'shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute.'

This points us to the potential trade-off between equal treatment and the good administration of justice. If one party, at any and every stage of proceedings, behaves disruptively, ought its opponent to be afforded a corresponding right to disruption? The answer could not be other than no.

It must be borne in mind that it is within the prerogatives of the tribunal to police the boundaries between 'routine procedure' and 'due process', so as to avoid overuse of claims of due process violation and unequal treatment.[50] For the sake of the good administration of transnational justice, it is the arbitrators' duty to control all and any abuses of procedural rights. Indeed, it would seem that 'due process paranoia is unwarranted.'[51]

### *D. Good Administration of Online Transnational Arbitration: the View from the Tribunal*

It is not disputed that the deployment of information technology in arbitration promotes gains in cost and time. Nevertheless, the move from analogical to digital arbitral proceedings (with various hybrid combinations in between) put an extra burden on arbitrators in navigating through their obligation to conduct proceedings fairly, loyally, and efficiently. The shift to digital requires skilful and sensible arbitrators, because the age of online arbitral proceedings introduces unforeseen constraints on legal cognition and considerable technical obstacles for the good administration of transnational justice.

From a cognitive perspective, online arbitral proceedings considerably reduce the opportunity for non-verbal acquisition of information. The most evident instance of this is the widespread adoption of online hearings. Hearings are the occasion to assess not just the argument put forth

50 Reed, 'Ab(use) of due process: sword vs. shield' (2017) 33(3) *Arbitration International*, 361 (372-373).

51 See Ferrari, Rosenfeld and Czernich, 'General Report' in Ferrari, Rosenfeld and Czernich (eds), *Due Process as a Limit to Discretion in International Commercial Arbitration* (2020) 38.

by counsel, but the level of conviction and doubt of the various procedural actors at play (counsel, parties, witnesses, and experts). Certainly, not all is lost in an online hearing, for one may still capture nuances in intonation or the general behaviour of a given witness. Still, considerable noise is introduced with the use of information technology, concealing information that could emerge from the heat of a face-to-face exchange.

Arbitrators must also be attentive to the phenomenon of screen fatigue, which results from the long hours sitting in front of a computer. Many of us has experienced it: the longer we sit continually in front of a screen, the more our attention span and our ability to retain information both decline. This phenomenon is again of particular importance in remote hearings, because the allocation of time to each segment of the hearing must accommodate enough resting time for cognitive recuperation.

In addition, it is important to note that the relationship between the members of the arbitral tribunal is significantly impacted by the absence of in-person interaction. Whilst it is true that communication between tribunal members is ordinarily via email, it is also undeniable that the complete absence of face-to-face exchanges can potentially take the edge off the tribunal's deliberative process. Moreover, in a tribunal where the members are not acquainted with each other in advance, physical interaction is also an opportunity to build trust between arbitrators - an indispensable element for the inner workings of the tribunal.

From a technical perspective, there are multifarious issues that may affect the good administration of transnational justice. For instance, procedural issues as mundane as the signing of the arbitral award are bound to throw up questions as the adoption of e-signatures increases.[52] Similarly, data protection issues will inevitably grow with the widespread use of cloud computing in arbitral proceedings. The specific discussion on data protection lies beyond the scope of this study, but it has given rise to an ever-growing body of literature.[53]

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52 See Schäfer, 'E-Signature of Arbitral Awards', in Scherer, Bassiri et al. (eds), *International Arbitration and the COVID-19 Revolution* (2020), 151.

53 See Richman, 'Compliance and Data Protection' in Scherer, Richman and Gerbay (eds), *Arbitrating under the 2020 LCIA Rules: A User's Guide* (2021), 435; Ramani, 'One size doesn't fit all: the General Data protection Regulation vis-à-vis international commercial arbitration' (2020) 37(3) *Arbitration International* 613; de Bruet and Landbrecht, 'Cloud computing and US-style discovery: new challenges for European companies' (2016) 32 (2) *Arbitration International* 297;Malinvaud, "Will Electronic Evidence and e-discovery Change The Face of Arbitration?" in Giovannini and Mourre (eds), *Written Evidence and Discovery in International Arbitration: New Issues and Tendencies* (2009), 373.

Remote and hybrid hearings are a special source of concern for the arbitral tribunal. Indeed, arbitrators need to oversee the correct functioning of all its many technical aspects. In particular, the tribunal must be sensitive to possible connectivity problems faced by the parties, especially in the context of asymmetric access to technology. These situations may create a particularly delicate situation to deal with, for the party facing adverse conditions may easily feel unfairly treated. In the face of technical difficulties, the tribunal might find it prudent to adjourn the hearing or to repeat certain procedural acts with a view to ensuring that all those involved are afforded a reasonable opportunity to present their case.

From the tribunal's perspective, the conduct of online proceedings and remote hearings means that tribunal secretaries have an important role to play. Indeed, the tribunal secretary may be entrusted with technical oversight of the proceedings and hearings, while members of the tribunal devote their full attention to settling the dispute.

That said, arbitrators must be watchful for tactical manoeuvres from the parties, as IT issues can easily be weaponised to the detriment of good administration of transnational justice. It is advisable for the arbitral tribunal to draft its procedural orders with extra care and with heightened attention to detail in order to protect proceedings from undue disruption. Procedural orders must establish with precision the appropriate steps to be taken by parties, counsel, witnesses, and experts throughout the online proceedings in general and remote hearings in particular. For instance, in relation to remote hearings, it is prudent to ask the parties to designate a contact person to be in charge of informing the tribunal of any technical difficulties, which then allows the tribunal to react promptly by taking steps to solve the problem or suspending the hearing.

Interesting instances of how online proceedings may lead to questions as to equal treatment before domestic courts are offered by several cases in different jurisdictions. One such example is *Sino Dragon v. Noble Resources*.[54] This case is particularly insightful when it comes to the use of videoconferencing in UNCITRAL arbitration and how technical difficulties may give rise to due process claims.

The Australian International Arbitration Act gives effects to the UNCITRAL Model Law, adopting it with slight modifications. Most notably, section 18C of the act provides that '[f]or the purposes of Article 18 of the Model Law, a party to arbitral proceedings is taken to have been

54 See FCA, 13.7.2016 - NSD 1333 of 2016 -, Sino Dragon Trading Ltd v Noble Resources international Pte Ltd, [2016] FCA 1131.

given a full opportunity to present the party's case if the party is given a reasonable opportunity to present the party's case.'

In the case in question, Sino Dragon, a company incorporated in Hong Kong, and Noble Resources, a Singaporean corporation, were parties to arbitration proceedings conducted under the 2010 UNCITRAL Arbitration Rules. The constitution of the tribunal had been challenged on numerous counts by Sino Dragon, but to no avail. Following a hybrid hearing on 7 December 2015, an award was rendered on 12 May 2016 in favour of Noble Resources.

In July that year, upon application by Noble Resources, the award was recognized and leave to enforce was granted by the Hong Kong High Court. Although no appeal had been filed against that decision, in August 2016, Sino Dragon sought to have the award set aside in Australia. The grounds advanced in support of this application were many, but one argument is of particular interest to the present study. The applicant contended that the conduct of proceedings produced a 'partial exclusion of witness[es] through technical faults causing confusion and hampering effective examination or mistranslation of evidence.'[55]

In essence, the argument advanced before the Federal Court of Australia was that the malfunctioning of the video link used to hear two witnesses in a hearing resulted in the production of incomplete evidence, a situation further aggravated by translation errors allegedly caused by these technical difficulties.[56] This situation, it was argued, consisted of a violation of procedural fairness and equal treatment. The iteration of procedural facts leading to the application is of considerable interest.

During the arbitration in question, Noble Resources informed Sino Dragon that it intended to cross-examine two of its witnesses. At the pre-hearing conference, a discussion was entertained on whether the two witnesses were to take part in the hearing via videocall or whether they should appear in person. Noble Resources argued it would be placed at a 'forensic disadvantage' if Sino Dragon's witnesses were heard via videocall, especially if they were to give evidence with the aid of an interpreter. Sino Dragon rebuffed this argument and requested the arbitral tribunal to hear its witnesses by videocall. The arbitral tribunal then deferred to Sino Dragon's request, but it highlighted that any malfunctioning of the videocall would be at Sino Dragon's risk.

55 Id., at 34, para. 127
56 Id., at 35, paras. 128-129.

After the pre-hearing conference call, an e-mail was sent by the arbitral tribunal with the annotated agenda of this meeting. This agenda contained a clear statement from the tribunal attributing to Sino Dragon the obligation of setting up the videocall to hear its witnesses. In addition, sometime later, Noble Resources requested its opponent to ensure that, during the hearing, the two witnesses had before them a copy of the disputed contract, copies of Sino Dragon's Statement of Response, Rejoinder and a series of communications exchanged between Sino Dragon and Noble Resources.

Sino Dragon duly set up the videocall, but its witnesses only had before them some of the material requested by Noble Resources. This fact in itself created difficulties during the cross-examination – especially for Noble Resources' counsel.[57] The problems, however, kept mounting up, because the platform used for the videocall became somehow inoperative. Ultimately, the witnesses were cross-examined using an iPad and a telephone. The iPad was connected to WeChat as the source of the video feed and the telephone was used as the source of the audio feed.[58] Furthermore, at some point in the hearing, the arbitral tribunal realized that both witnesses were simultaneously present at the same room during cross-examination. Obviously, full details of this situation were recorded by the tribunal in its award.[59]

The Federal Court of Australia noted that Sino Dragon made no objection to the conduct of the proceedings during the arbitration, nor did it seek adjournment of the hearing when the technical difficulties arose. In fact, the Australian Court understood that Sino Dragon not only acquiesced to the procedure adopted, but that it also produced some of the difficulties through its acts and omissions. As a consequence, the court failed to see how the situation described above could be classified as a breach of equal treatment. Instead, the court was of the view that 'the mode of evidence by telephone or video conference, although less than ideal compared with a witness being physically present, does not in and of itself produce "real unfairness" or "real practical injustice"',[60] stressing that 'article 18 and the review powers under article 34 of the UNCITRAL Model Law are not intended to apply to unfairness caused by a party's own conduct including forensic or strategic decisions.'[61]

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57 Id., at 38, para. 147.
58 Id., at 41, para. 152.
59 For the relevant parts of the award, id., 39-41.
60 Id., at 48, para. 154.
61 Id., at 52, para. 178.

What can be learned from this case for the good administration of transnational justice in online arbitration? The first lesson arises from the fact that the procedural incidents narrated above provide a vivid illustration of all the troubles that an arbitrator may confront in the context of hybrid hearings. More importantly, however, the case offers an excellent vantage point from which to contemplate the centrality of procedural loyalty for the good administration of transnational justice. Even if of limited positive authority, the decision of the Federal Court of Australia demonstrates that contradictory behaviour from a given party will not be excused under an (abusive) due process claim.

### *E. Conclusion*

It is no easy task to ensure a good administration of transnational justice in online arbitral proceedings, especially in times of due process paranoia. Whilst equal treatment is not at odds with efficiency, much of the good administration of transnational justice depends on procedural loyalty of the parties. It is in the interest of justice that parties cooperate and do not abuse their procedural rights. However, the world is imperfect and procedural abuses do take place. Online arbitral proceedings multiply the opportunities for these abuses, as parties acting in bad faith may feel compelled to weaponise technology and its dysfunctions for their strategic gains. What is the role of arbitrators in protecting the good administration of transnational justice against such procedural misconduct? The answer is a simple one. An active, diligent and - why not? - coercive role, insofar as procedural misconduct often gives an undue advantage to the party who hijacks the proceedings in the service of their own interest.

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