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THE SECRET BEHIND THE SURVIVAL OF ARBITRATION: SELF-REGULATING MECHANISM ([1])

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ABSTRACT

This Article explores the role of development of a self-regulating mechanism in arbitration on the survival of arbitration against difficulties in its history. It focuses on two major challenges in the history of arbitration, namely the interventionist attitude by States towards arbitration and the COVID-19 pandemic. It indicates that arbitration has liberalized itself from the control of States to a great extent through its development towards becoming a largely self-regulating system, thereby gaining its first victory. Besides, arbitration could not remain immune to the pandemic's effect. Such mechanism has played a crucial role in the survival of arbitration as a dispute resolution method under pandemic circumstances. The difficulties in the way of communication among arbitration community because of the quarantine applied by the countries with varying degrees of strictness to deal with COVID-19 have been quickly addressed by arbitral institutions, one pillar in the self-regulating mechanism in arbitration, in various forms, namely promoting electronic filings and hearings, amending rules, producing guidelines and measures, which have overall kept arbitration alive and efficient against the circumstances presented by the pandemic.

Keywords: Arbitration, Self-Regulating System, Control and Supervision of National Laws and Courts, COVID-19 Pandemic, Arbitration Institutions

ÖZET

Bu makale, tahkimin tarih boyunca karşılaştığı başlıca güçlüklere karşı ayakta kalmasında, öz düzenleyici bir yapı gelişiminin rolünü incelemektedir. Devletlerin müdahaleci yaklaşımları ve COVID-19 salgını olmak üzere, tahkimin karşılaştığı iki güçlük ele alınmaktadır. Tahkim,

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öz düzenleyici bir sistem olmaya doğru gelişmesiyle birlikte devlet denetiminden büyük oranda özgürleşmiştir, böylelikle de ilk zaferini kazanmıştır. Bunun yanında, tahkim, salgının etkilerine kapalı kalamamış ve söz konusu sistem, tahkimin salgın koşullarında ayakta kalmasında önemli rol oynamıştır. Salgınla mücadele kapsamında devletlerce uygulanan karantina tedbirleri sebebiyle yaşanan iletişim güçlükleri, gelişen öz düzenleyici mekanizmanın önemli bir ayağı olan tahkim kurumlarınca atılan ve tahkimi salgın koşullarında etkin ve canlı tutan elektronik başvurunun ve duruşmanın teşviki, kuralların güncellenmesi ve kılavuzların ve tedbirlerin üretilmesi gibi çeşitli adımlarla aşılmıştır.

Anahtar Kelimeler: Tahkim, Öz Düzenleyici Sistem, Milli Hukuk ve Mahkemelerin Kontrol ve Denetimi, COVID-19 Salgını, Tahkim Kurumları

INTRODUCTION

The coronavirus disease of 2019 (COVID-19) has affected many people. In 2020, a joint statement by International Labour Organization (ILO), Food and Agriculture Organization of United Nations (FAO), International Fund for Agricultural Development (IFAD) and World Health Organization (WHO) about the effects of COVID-19 on human life declared that it posed '*an unprecedented challenge to public health, food systems and the world of work.*'[3] Arbitration world could not remain immune to the influences of such a challenge, which has caused widespread economic and social disruption. However, it has luckily survived well against the pandemic, just as it has done against another major challenge, i.e., the biases and specificities of national laws and courts. This article argues that the development of international arbitration towards becoming a substantially self-regulating dispute resolution mechanism has eased its struggle for survival against these major challenges. It initially overviews the development of international arbitration and discusses that getting into an autonomous character to a great extent has underpinned its survival against the intervention by courts and national laws. Then, it points out how arbitration institutions, one significant pillar of the largely self-regulating mechanism in arbitration, have eased the adaptation to the circumstances created by the pandemic. Finally, the article attracts attention to the current state of international arbitration in the light of recent research findings.

I. SURVIVAL AGAINST THE HOSTILITY OF STATES: TOWARDS A SELF-REGULATING MECHANISM

The origin of arbitration dates back to the Middle Ages, and since then, it is possible to identify three distinct periods in its development: '*the Middle Ages to about the eighteenth century; the eighteenth century to soon after the Second World War; and the 1950s to the present*

[3] World Health Organization (WHO), 'Impact of COVID-19 on people's livelihoods, their health and our food systems- Joint statement by ILO, FAO, IFAD and WHO' (13 October 2020) <https://www.who.int/news/item/13-10-2020-impact-of-covid-19-on-people's-livelihoods-their-health-and-our-food-systems> accessed 9 June 2022.

day.'[4] Within this timeframe, there are milestones, which have overall boosted the efficiency of arbitration, but, more importantly, have leaded the arbitration to get into a largely autonomous character and have allowed the survival of arbitration against the intervention of courts and national laws.

Until the 18th century, arbitration was barely regulated by national laws; then, it was freely structured by the business community.[5] Merchants established their tribunals, which were '*independent of any national legal system*' and consisted of their representatives who were familiar with the types of disputes that arose.[6]

There were two methods of informal dispute resolution: Merchant guilds and the courts of trade fairs of medieval Europe.[7] Following the emergence of the merchant class and the guilds in the High Medieval Period, merchants, who were organized into trade associations and guilds, frequently had recourse to arbitration for the settlement of disputes arising from commercial activities across borders,[8] rather than seeking resolution through the court systems in their own countries, which were 'undeveloped, procedurally backward and cumbersome.'[9] Membership in a chartered guild necessitated pledging loyalty to its laws thereby bringing disputes with other members before the guilds before litigating the matter elsewhere.[10] In addition, merchants were itinerants and merchandised their goods in all the continental markets and fairs then.[11] Then, their disputes were settled efficiently through tribunals presided by consuls traveling with them, or fair constables, mayors, or market masters.[12]

Whatever the method for the resolution of disputes was applied, the law to be applied by the arbitrators was comprised of '*relevant established custom, created out of the merchant's own needs and views, as the legal rules and standards according to which rights and obligations of the parties were determined, often shunning the legal technicalities and substance of local law*.'[13] In this respect, each case was exclusively viewed '*in the light of practical expediency*

[4] Julian D M Lew, 'Achieving the Dream: Autonomous Arbitration' (2006) 22(2) Arbitration International 179, 182; Martin Domke, Gabriel M. Wilner and Larry E. Edmonson, *Part I. The Nature of Commercial Arbitration, Chapter 2. A Brief History of Arbitration in Domke on Commercial Arbitration* (Westlaw, Database updated November 2017).
[5] Lew (n 2) 182.
[6] Richard Garnett, 'International Arbitration Law: Progress towards Harmonisation' (2002) 3(2) Melbourne Journal of International Law 400, 401.
[7] Earl S Wolaver, 'The Historical Background of Commercial Arbitration' (1934) 83(2) University of Pennsylvania Law Review 132, 133.
[8] Robert Briner and Virginia Hamilton, 'History and General Purpose of the Convention-The Creation of an International Standard to Ensure the Effectiveness of Arbitration Agreements and Foreign Arbitral Awards' in Emmanuel Gaillard and Domenico Di Pietro (eds), *Enforcement of Arbitration Agreements and International Arbitral Awards-The New York Convention in Practice* (CMP Publishing Ltd. 2008) 3.
[9] Garnett (n 4) 401.
[10] Wolaver (n 5) 133-134.
[11] Ibid 136.
[12] Ibid.
[13] Lew (n 2) 183. See also Garnett (n 4) 401.

and was decided in accord with the ethical or economic norms of some particular group.'[14] Besides, a moral force was in operation rather than a legal one; that is to say, when parties did not comply with the arbitral decision resolving a dispute, disciplinary sanctions were imposed upon them, and they fell into disrepute in the business community of which they were members.[15] Consequently, preliminary forms of arbitration existed without control by domestic judicial mechanisms and laws.[16]

However, the rise of state sovereignty in the 18th century gradually developed a conflict between the courts and arbitration by the beginning of the 20th century.[17] Sovereign states controlled arbitration through their national laws,[18] which were mostly hostile toward arbitration.[19] This was clear as some laws did not recognize arbitration agreement in a way reflecting trade practice by permitting parties to agree on arbitration only for existing disputes while not recognizing agreements for future disputes between the parties to be determined through arbitration.[20] Even in countries where a favourable attitude towards arbitration was emerging, the decision whether or not to stay proceeding where arbitration clause existed was left to the discretion of courts.[21] Additionally, national laws provided national courts with the express power to review arbitral awards.[22] English Arbitration Act of 1698, one example within this context, stated that *'Any arbitration or umpirage procured by corruption or undue means shall be judged and esteemed void and of none effect.'*[23]

The hostile attitude towards arbitration manifested itself in many court decisions.[24] For instance, in Tobey v. County of Bristol, the US Supreme Court stated that

> '*At all events, it cannot be correctly said, that public policy, in our age, generally favours or encourages arbitrations, which are to be final and conclusive, to an extent beyond that which belongs to the ordinary operations of the common law. It is certainly the policy of common law, not to compel men to submit their rights and interests to arbitration, or to enforce agreements to for such a purpose.'*[25]

Such judicial control was based on a wide range of bias, such as (i) general acceptance of that '*every activity which occurred within a jurisdiction should be within the purview of the state law and court*', (ii) concerns about the erosion of the authority and respect for the national courts' jurisdiction by an alternative mechanism, and (iii) judicial jealousy because of the

[14] Wolaver (n 5) 132.
[15] Briner and Hamilton (n 6) 3.
[16] Lew (n 2) 182.
[17] J Martin H Hunter, 'Arbitration Procedure in England: past, present and future' (1985) 1(1) Arbitration International 82, 84; Ibid 183.
[18] Lew (n 2) 183.
[19] Bihter Kaytaz Eker, *Harmonising Role of the New York Convention* (1st edn Seckin 2020) 19-21.
[20] Albert Jan Van den Berg (1981), *The New York Convention of 1958* (Kluwer Law and Taxation Publishers 1981) 6.
[21] Hunter (n 15) 84-85.
[22] Ibid 84; Lew (n 2) 183.
[23] Hunter (n 15) 84.
[24] Lew (n 2) 183.
[25] 23 Fed. Cas. 1313 No. 14,065 (Circuit Court, D. Massachusetts May Term 1845) 1322.

fact that arbitration settled disputes more effectively.[26] All of these caused uncertainty and impracticalities for the business community.

Despite the firm national legal and political systems by the early 20th century, arbitration was frequently preferred over court adjudication, due to its key features, namely time and cost efficiency, the impartiality and expertise of the arbitrator, party autonomy, and confidentiality of proceedings.[27] Moreover, it became increasingly important as a reliable means of dispute resolution in the face of the reality of '*the great distrust towards the former enemy's court*' in the aftermath of World War I.[28]

The abovementioned circumstances necessitated legal force to guarantee the enforcement of arbitration clauses and the enforcement of arbitral awards. They ended up with the Geneva Protocol on Arbitral Clauses of 1923[29] and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927.[30] These agreements were the first signals of change as they addressed the hurdles of that time by promoting international validity and enforceability of arbitral clauses and arbitration agreements and securing international enforceability of arbitral awards.

Nonetheless, international trade was boosted by the Western world to restore the economy of post-World War II, which was accompanied by an increase in the settlement of disputes stemming from international transactions by arbitration.[31] This unveiled the shortcomings of the Geneva Treaties, such as the 'diversity-of-citizenship clause', which restricted the application of the treaties only to disputes between parties, each of whom was subject to the jurisdiction of different Contracting States; [32] the exposure of both the validity of the arbitration clause/agreement and the enforcement of arbitral awards to local differences in

[26] Lew (n 2) 183.
[27] Kaytaz Eker (n 17) 21.
[28] Ibid 22; Hans Van Houtte, 'Parallel Proceedings Before State Courts and Arbitration Tribunals: Is there a Transnational lis alibi pendens-exception in Arbitration or Jurisdiction Conventions?' in Pierre A. Karrer (ed), *Arbitral Tribunals or State Courts Who Must Defer to Whom?* (ASA Special Series No.15 2001) 40.
[29] Protocol on Arbitration Clauses (signed on 24 September 1923, entered into force on 28 July 1924) League of Nations Treaty Series Vol 27 UN DOC E/AC.42/2 16 February 1955.
[30] Convention on Execution of Foreign Arbitral Awards of 1927 (signed on 26 September 1927, entered into force 25 July 1929) League of Nations Treaty Series No 2096. See also Briner and Hamilton (n 6) 3; Leonard V Quigley, 'Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards' (1961) 70(7) The Yale Law Journal 1049, 1049; Van den Berg (n 18) 6; Hefin Rees, 'Where has International Commercial Arbitration Come From?' (2010) <http://hefinrees.wordpress.com/2010/06/11/where-has-international-commercial-arbitration-come-from/> accessed 22 March 2020.
[31] Kaytaz Eker (n 17) 25.
[32] Arthur Nussbaum, 'Treaties on Commercial Arbitration-A Test of International Private-Law Legislation' (1942) 56(2) Harvard Law Review 219, 234.

national legislations and practices[33] and the requirement of the finality of the award, which called for double exequatur.[34]

The New York Convention (NYC) came up in 1958 to '*apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought*', as well as of '*arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought*.' [35] It was a milestone for international arbitration as it was '*the beginning of internationalism in arbitration*'.[36] It has changed the regime that was established under the Geneva Treaties. With the New York Convention, it has been recognized that arbitration agreements are to be recognized except in cases where they are '*null and void, inoperative or incapable of being performed*.' [37] Likewise, arbitral awards are to be enforced if the prevailing party indicates existence of an arbitration agreement and the ensuing award.[38] National courts may refuse enforcement merely on exceptional grounds listed exhaustively under Article V of the Convention.[39] The number of States which acceded to the NYC has reached to 171 States.[40] Such a high rate of accession is a clear success in a world where there is no global convention for the enforcement of judicial decisions.[41]

The NYC was followed by some other developments, such as the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention), the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules, UNCITRAL Model Law on International Commercial Arbitration, and the emergence of new international arbitration institutions. They have paved the way for international arbitration to become largely self-regulating mechanism.

The ICSID Convention, which entered into force on 14 October 1966 and has been ratified by 158 States by now, has brought '*an autonomous and self-contained dispute resolution*

[33] Van Houtte (n 26) 40, 41; Reinmar Wolff (ed), *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 Commentary* (C.H., Beck, Hart, Nomos 2012) 12.
[34] Dirk Otto, 'Article IV' in Herbert Kronke and others (eds), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Kluwer Law International 2010) 145.
[35] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (signed on 10 June 1958, entered into force on 7 June 1959) 21 UST 2517, 330 UNTS 38 (hereinafter 'The New York Convention') Article I (1).
[36] Lew (n 2) 189.
[37] The New York Convention (n 33) Article II (3).
[38] Ibid Article III.
[39] Ibid Article V.
[40] UNCITRAL, 'Status: Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)' <https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2> accessed 4 December 2022.
[41] Gerold Herrmann, 'The 1958 New York Convention: Its Objectives and Its Future' in Albert Jan Van den Berg (ed), *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention* (Kluwer Law International 1999) 18. See also Michael Mustill, 'Arbitration: History and Background' (1989) 6(2) Journal of International Arbitration 43, 49 (describing the NYC as '*the most effective instance of international legislation in the entire history of commercial law*').

system' for investment disputes between governments and foreign investors.[42] Due to such nature of the system, '*neither the procedure nor the awards rendered thereunder are subject to challenge in the national courts of contracting states.*'[43] In particular, the Convention rules that '*[t]he award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention*',[44] which amounts to restricting the role of national courts to recognition and enforcement of awards.[45]

The UNCITRAL Arbitration Rules were launched in 1976 to provide '*a comprehensive set of procedural rules upon which parties may agree for the conduct of arbitral proceedings arising out of their commercial relationship*' in either ad hoc arbitration or administered arbitration.[46] The Rules, which were believed to be admissible in countries with divergent judicial systems,[47] covered the arbitral process extensively, including '*a model arbitration clause*', procedural rules in relation to the composition of arbitral tribunals and '*the conduct of arbitral proceedings'* and rules regarding *'the form, effect and interpretation of the award.'*[48] The UNCITRAL revised the Rules, which were acknowledged as a very successful text and were applied worldwide for a diverse range of disputes, '*including disputes between private commercial parties, investor-State disputes, State-to-State disputes and commercial disputes administered by arbitral institutions*',[49] in 2010 to match up to new practices in international trade and to reflect changes in arbitral practice, without touching '*the original structure of the text, its spirit or drafting style*'.[50] Accordingly, the 2010 revised version has additionally included provisions regarding multiple-party arbitration and joinder, liability and objection to qualifications, impartiality or independence of experts appointed by the arbitral tribunal, and promoted the procedural efficiency by containing various new features, such as amended procedures for the replacement of an arbitrator, the requirement for the rationality of costs and exhaustive provisions dealing with interim measures.[51] The Rules

[42] Convention on the Settlement of Investment Disputes between States and Nationals of Other States (opened for signature 18 March 1965, entered into force 14 October 1966), 575 UNTS 515; reproduced in 4 ILM 532 (1965) (hereinafter 'ICSID Convention'); International Centre for Settlement of Investment Disputes (ICSID), 'Database of ICSID Member States' <https://icsid.worldbank.org/about/member-states/database-of-member-states> accessed 4 December 2022; William K II Slate, 'International Arbitration: Do Institutions Make a Difference' (1996) 31(1) Wake Forest Law Review 41, 46.

[43] Slate (n 40) 46.

[44] ICSID Convention, Article 53(1).

[45] Slate (n 40) 46. See also Ibid Articles 50-53.

[46] UNCITRAL Arbitration Rules <https://uncitral.un.org/en/texts/arbitration/contractualtexts/arbitration> accessed 11 July 2022.

[47] Recommendations to Assist Arbitral Institutions and Other Interested Bodies with regard to Arbitrations under the UNCITRAL Arbitration Rules Adopted at the Fifteenth Session of the Commission, Yearbook of the United Nations Commission on International Trade Law, 1982, Vol. XIII 420.

[48] UNCITRAL Arbitration Rules (n 44).

[49] UNGA Res 65/22 (10 January 2011).

[50] UNCITRAL Arbitration Rules (n 44).

[51] UNCITRAL Arbitration Rules (as revised in 2010) (15 August 2010) Articles 10, 16, 29(2), 14, 40(2), 26.

also incorporated the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration in 2013[52] and the UNCITRAL Expedited Arbitration Rules in 2021.[53]

The UNCITRAL Model Law came in 1985, with two main aims: to provide principles that could be adopted by states which have no legislation or seek to reform their arbitration laws; and, '*to provide a harmonised arbitration law to avoid the then existing patchwork of domestic legislation based on an out-of-date attitude to arbitration.*'[54] The Model Law covers the entire arbitral process, namely arbitration agreement, composition and jurisdiction of the arbitral tribunal, conduct of arbitral proceedings, making of the award, termination of proceedings, the extent of court intervention, recourse against an award, and recognition and enforcement of arbitral awards.[55] It diminishes the supervisory role of national courts over international arbitrations and strengthens the party autonomy by providing parties with freedom to craft the arbitration system suitable to their needs.[56] It was revised in 2006 to update the form required for arbitration agreement to correspond with international means of contracting and to establish a legal regime enabling arbitral tribunal to grant interim measures.[57] Up until today, 85 States in a total of 118 jurisdictions have reformed their arbitration legislations based on the UNCITRAL Model Law, and the reform in 22 of them has grounded on the amended version.[58] Even some non-Model Law countries, such as Switzerland, Sweden and France, have reformed their legislations in line with the Model Law. [59] The common theme for these modern arbitration laws is that they have all strengthened the autonomy of international arbitration by (i) acknowledging the party autonomy and not leaving the conduct of arbitration process to the procedures of national law, (ii) recognizing the sole authority of the arbitral tribunal for all aspects of arbitration,

[52] UNGA Res 68/109 (18 December 2013).
[53] UNGA Res 76/108 (17 December 2021).
[54] Lew (n 2) 190; Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law, UNGA Res 40/72 (11 December 1985).
[55] UNCITRAL Model Law on International Commercial Arbitration, UN Doc A/40/17, annex I (adopted on 21 June 1985).
[56] Lew (n 2) 190.
[57] Revised articles of the Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law, and the recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, 10 June 1958, UNGA Res 61/33 (4 December 2006).
[58] Countries legislations of which are based on the text of the UNCITRAL Model Law on International Commercial Arbitration with amendments as adopted in 2006 are Australia(2010), Bahrain(2015), Barbados(2007), Belgium(2013), Bhutan(2013), Brunai Darussalam(2009), Costa Rica(2011), Fiji(2017), Georgia(2009), Ireland(2010), Jamaica(2017), Lithuania(2012), Mauritius(2008), Mongolia(2017), New Zealand(2007), Peru(2008), Republic of Korea(2016), Rwanda(2008), Slovenia(2008), South Africa(2018), Turkmenistan(2016), Uzbekistan (2021). See UNCITRAL, 'Status: UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006' <https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status> accessed 12 June 2022.
[59] French New Code of Civil Procedure, Decree of 12 May 1981; Swiss PILA; The Swedish Arbitration Act.

except validity of arbitration agreement and due process, and (iii) allowing the interference of national courts with the arbitration process in exceptional cases.[60]

Other implications of internationalism in arbitration are the emergence of numerous new arbitration institutions and the amendment of rules of existing arbitration institutions.[61] One study shows that '*only ten percent of the institutions around today existed*' until 1940 and '*[s]eventy percent of the institutions have been created in the last thirty years; fifty percent in the last twenty and twenty percent in the last ten years.*'[62] Many institutions have launched their own rules,[63] and all now reflect arbitration as a stand-alone mechanism.[64] To be more specific, neither refers to any national procedural law but instead gives power to the tribunal to conduct the arbitration in a manner as it considers appropriate as long as it treats the parties equally and ensures their right to be heard.[65]

The movement from national to international factors via these developments[66] let the arbitration survive against the intervention of courts and national laws and triggered development of an arbitration culture around the world. The widely self-regulating mechanism set by them has secured international arbitration as an acceptable means of dispute resolution by changing the focus from '*the control and supervision by national laws and courts, to freedom to arbitrate and non-intervention*' in line with the modern thinking of the business world.[67] The control by national laws and courts has become '*subordinate to the intentions of the parties and arbitrators' authority.*'[68]

Nonetheless, one must remember that the degree of the development of an arbitration culture varies in jurisdictions depending on how quickly these rules are absorbed into their legal framework, which directly affects the approach of legal actors to arbitration. Türkiye is one of countries reflecting the role of development of a substantially self-regulating mechanism in arbitration on the survival of arbitration against the biases and specificities of national laws and courts. That impact is manifest in the development of legal framework on arbitration in Türkiye. History of arbitration in Türkiye dates back to 1927, with the

[60] Lew (n 2) 194, 195.
[61] Ibid 185, 188.
[62] Guy Pendell, 'The Rise and Rise of the Arbitration Institutions' (Kluwer Arbitration Blog, 30 November 2011) <http://arbitrationblog.kluwerarbitration.com/2011/11/30/the-rise-and-rise-of-the-arbitration-institution/> accessed 5 July 2022. Despite a compilation of all existing arbitration institutions is not possible, one may rely on the list of members of International Federation of Commercial Arbitration Institutions (IFCAI), which has been in operation since 1985 with the prospect of lasting relations between commercial arbitration institutions while supporting the understanding regarding arbitration and conciliation. See International Federation of Commercial Arbitration Institutions (IFCAI), 'IFCAI Members 2022' <https://www.ifcai-arbitration.org/ifcai-members/> accessed 5 July 2022.
[63] Pendell (n 60).
[64] Lew (n 2) 194. See also, Slate (n 40) 47-52.
[65] Lew (n 2) 194.
[66] Ibid 185.
[67] Ibid 185, 192.
[68] Ibid 185.

appearance of the Code of Civil Procedure (CCP), Law No. 1086.[69] However, this law, which only governed arbitrations seated in Türkiye with no foreign element, referred neither to international arbitrations nor to recognition and enforcement of foreign arbitral awards. In the last quarter of the 20th century, not only the rise in the volume of arbitrations involving Turkish parties but also the desire to attract international arbitration to Türkiye triggered the change of policy in Türkiye in favour of arbitration. The concept of 'international arbitration' in Türkiye has developed mostly based on the constituents of the self-regulating mechanism in arbitration, development of which has been in progress since 1950s.

First, the recognition and enforcement of foreign arbitral awards was covered under the Turkish Private International Law, No. 2675 of 22 May 1982,[70] which was later amended by Law No. 5718 of 27 November 2007 (TPIL).[71] This was followed with the accession of Türkiye to the NYC.[72] As TPIL stated that '*provisions of international agreements to which the Turkish Republic is a party are reserved*',[73] the priority in relation to the recognition and enforcement of foreign arbitral awards is given to the provisions of the NYC and the TPIL applies only in cases where the NYC is inapplicable then. While approving the NYC, Türkiye has made two reservations, according to which the NYC applies only to the recognition and enforcement of arbitral awards that are rendered in the territory of another Contracting State regarding disputes resulting from legal relationships that are considered as commercial under Turkish law.[74] Even though both the TPIL and the NYC provides similar grounds for refusal of the recognition and enforcement, it is the NYC that applies to the recognition and enforcement of foreign arbitral awards frequently in practice due to its wide acceptance around the world.[75]

Besides, being aware of an increase in the use of arbitration in disputes relating to investments, Türkiye became a party to the ICSID Convention in 1988[76], and soon after reformed both the Constitution[77] and the Law regarding Principles to be Adhered to Upon Resorting to Arbitration in Disputes Arising from Concession Stipulations and Agreements

[69] Law No. 1086 promulgated in Official Gazette dated July 2, 3, 4, 1927, No. 622, 623, 624.
[70] For an English Translation of Law No. 2675 see Tugrul Ansay and Eric C Schneider, 'The New Private International Law in Turkey' (1990) 37(1) Netherlands International Law Review 139, 152-161.
[71] Turkish Private International Law, Law No. 5718 of 27 November 2007, published in the Official Gazette dated 12 December 2007.
[72] Official Gazette dated 25 September 1991, No. 21002.
[73] Turkish Private International Law, Law No. 5718 of 27 November 2007 (n 69) Article 1(2).
[74] Law Approving the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Law No. 3731 of 8 May 1991, published in the Official Gazette dated 21 May 1991, Article 2.
[75] Cemal Şanlı, *Uluslararası Ticari Akitlerin Hazırlanması ve Uyuşmazlıkların Çözüm Yolları* (7th edn Beta 2019) 522-523.
[76] Law No. 3460 of 27 May 1988, published in the Official Gazette dated 6 December 1988, No. 19830.
[77] For the amendments of Article 125 and Article 155 of the Constitution, Law No. 4446 of 13 August 1999, published in the Official Gazette dated 13 August 1999, No. 23786.

Regarding Public Services, Law No. 4501.[78] Hence, resolution of disputes arising out of concession agreements for foreign investments in public services through arbitration has become acceptable.

In line with both the international conventions to which Türkiye is a signatory and legislative reforms, International Arbitration Law, Law No. 4686[79] (IAL) was enacted by being mainly modelled on the UNCITRAL Model Law while some of its provisions were inspired by the provisions of Chapter 12 of the Swiss Federal Act on Private International Law of 1987 and the Rules of Arbitration of the International Chamber of Commerce (ICC).[80] The IAL established the legal regime for international arbitration,[81] taking the expectations of parties to international contracts '*for a more efficient form of dispute resolution with less state intervention*' into consideration.[82] Interference by national courts has been minimized by various means, including providing parties with procedural flexibility based on principle of the party autonomy, whole or partial waiver of the right to recourse to a national court for setting aside of the arbitral award and limited grounds for setting aside without allowing to a review of merits of the award.[83]

Apparently, arbitration is no longer an exception but a norm in international commercial disputes, with the development of the legal framework on arbitration in Türkiye under the effect of the substantially self-regulating mechanism in arbitration.[84] However, the slow pace of the development of the legal framework regarding arbitration in Türkiye in comparison with the developed legal systems has resulted in a developing arbitration culture in Türkiye, which is evident in judicial decisions.[85] Turkish Court of Cassation may review both decisions of the court of first instance granting or refusing the enforcement of foreign arbitral awards and decisions of the court of first instance about annulment of awards resulting from international arbitration cases in Türkiye,[86] and one epitome of the rigorous process of developing an arbitration culture is divergence of approaches to arbitration among chambers in the Turkish Court of Cassation.[87] Because there is not a

[78] Law regarding Principles to be Adhered to Upon Resorting to Arbitration in Disputes Arising from Concession Stipulations and Agreements Regarding Public Services, Law No. 4501 of 21 January 2000, published in the Official Gazette dated 22 January 2000, No. 23941.

[79] International Arbitration Law, Law No. 4686 of 21 June 2001, published in the Official Gazette dated 5 July 2001, No. 24453.

[80] Ali Yesilirmak, 'Chapter 1: Legal Framework' in Ali Yesilirmak and Ismail G Esin (eds), *Arbitration in Turkey* (Kluwer Law International 2015) 3.

[81] International Arbitration Law, Law No. 4686 of 21 June 2001 (n 77) Article 1 and Article 2.

[82] Nazan Candaner Elver, 'Turkish International Arbitration Law and Restrictions on its Application' (2004) 21(5) Journal of International Arbitration 453, 454.

[83] International Arbitration Law, Law No. 4686 of 21 June 2001 (n 77) Chapter 4 and Chapter 5.

[84] Yesilirmak (78) 2.

[85] Ibid.

[86] Vahit Doğan, *Milletlerarası Ticaret Hukuku* (1st edn Savaş 2020) 1214-1215, 1268; Ziya Akıncı, *Milletlerarası Tahkim* (4th edn Vedat Kitapçılık 2016) 320.

[87] For the contradictory decisions in relation to charges, public policy and provisional attachment, Zeynep Derya Tarman, 'Yabancı Mahkeme ve Hakem Kararlarının Türkiye'de Tenfizinde Karşılaşılan Sorunlara İlişkin Bazı

specific chamber for arbitration disputes in the Turkish Court of Cassation, the predictability is adversely affected in the face of the fact that each chamber deals with appeal differently.[88] Assignment of one specific chamber in the Court of Cassation for arbitral issues would be a positive step for the predictability,[89] but more importantly, for the maturity of arbitration culture.

II. A MORE RECENT CHALLENGE: ARBITRATION IN THE SHADOW OF COVID-19

Having survived the biases and specificities of national laws and courts, international arbitration has recently faced another challenge: the COVID-19 pandemic. Having recognized the magnitude of the disease, countries began to declare travel bans and lockdowns of varying levels. With the enforcement of these measures, not only filings and submissions but also the physical presence of participants in arbitration proceedings increasingly became difficult.[90] The pandemic required a switch to virtual arrangements for arbitration to work effectively, and arbitral institutions responded to such need in time.

The international arbitration community was already familiar with the process of virtual hearings in the pre-pandemic period as procedural rules of various arbitration institutions were revised in the light of technological developments.[91] For instance, the London Court of International Arbitration (LCIA) amended its Rules before the pandemic. It provided under the second sentence of Article 19 that '*a hearing may take place by video or telephone conference or in person (or combination of all three).*'[92] However, it was a real challenge for the community to manage all stages of arbitral process online.[93]

The new circumstances and demands presented by the pandemic have put so much pressure on arbitration institutions, which are increasingly taking an active role in developing international arbitration in addition to their core activity, i.e., effective case

Tespitler' (2017) 37(2) Public and Private International Law Bulletin, 798, 806-807, 816-817; Doğan (n 84) 1229-1230; Şanlı (n 73) 517.

[88] Ersin Erdoğan and Belkıs Vural Çelenk, 'The Culture of Dispute Resolution in Turkey and the Istanbul Arbitration Centre' (2016) 7(12) Law & Justice Review, 157, 166.

[89] Tarman (n85) 818.

[90] Atike Eda Manav Özdemir and Belkıs Vural Çelenk, 'Tahkimde Çevrimiçi Duruşmalar ve Çevrimiçi Duruşmaların Hukuki Dinlenilme Hakkı ve Tarafların Eşitliği İlkeleri Bağlamında Değerlendirilmesi' (2022) 42(1) Public and Private International Law Bulletin <https://dergipark.org.tr/tr/pub/ppil/article/905042#article_cite> accessed 22 July 2022.

[91] Emad Hussein, 'The COVID-19 Pandemic and Arbitration in the UAE: A Tale of Challenges and Opportunities' (2020) 7(2) SOAS Law Journal 102, 117.

[92] London Court of International Arbitration (LCIA), 'LCIA Arbitration Rules (2014)' (effective 1 October 2014) <https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2014.aspx#Article%2019> accessed 16 June 2022, Article 19.2.

[93] Hussein (n 68) 117. See also Maxi Scherer, 'Remote Hearings in International Arbitration: An Analytical Framework' (2020) 37(4) Journal of International Arbitration 407, 412.

administration.[94] Initially, a group of institutions published a joint message, seeking to promote the '*stability and foreseeability in a highly unstable environment*' presented by the pandemic and to ensure that '*pending cases may continue and that parties may have their cases heard without undue delay.*'[95] The Statement invited the arbitral tribunals and parties to use '*the full extent of (…) respective institutional rules and any case management techniques that may permit arbitrations to substantially progress without undue delay despite such impediments.*'[96] This was followed by concrete steps taken by arbitration institutions, such as amendment of operations and rules and launching guidelines and measures.

The first significant step in responding to the need for a switch to virtual arrangements was the amendment of operations of arbitration institutions. Most arbitration institutions have allowed filings and submissions electronically,[97] either by email or through their online filing systems.[98] Moreover, the Arbitration Institute of the Stockholm Chamber of Commerce (SCC), which launched the SCC Platform in September 2019 to provide secure and efficient communication and file sharing between the SCC, the parties and the tribunal, started to offer this service also in *ad hoc* arbitrations in May 2020 for free of charge during the pandemic.[99] Besides, operations of hearings have been adjusted to the new circumstances. The new normal for hearings has become virtual hearings. For instance, three leading international arbitration centres, namely Maxwell Chambers, the International Dispute Resolution Centre and the Arbitration Place, launched 'International Arbitration Centres Alliances' and offered global hybrid hearings that '*employ a combination of on-site, remote, and virtual attendance methods to ensure that all parties can participate fully and*

[94] Mohamed Abdel Raouf, 'Emergence of New Arbitral Centres in Asia and Africa: Competition, Cooperation and Contribution to the Rule of Law' in Stavros Brekoulakis, Julian D M Lew and Loukas Mistelis (eds), *The Evolution and Future of International Arbitration* (Kluwer Law International 2016) 325.

[95] Arbitral Institutions COVID-19 Joint Statement <https://iccwbo.org/content/uploads/sites/3/2020/04/covid19-joint-statement.pdf> accessed 16 June 2022.

[96] Ibid.

[97] Mark Shope, 'The International Arbitral Institution Response to COVID-19 and Opportunities for Online Dispute Resolution' (2020) 13(1) Contemp. Asia Arb. J. 67, 77.

[98] E.g. International Centre for Dispute Resolution (ICDR), 'International Dispute Resolution Procedures (including Mediation and Arbitration Rules)' (amended and effective 1 March 2021) <https://www.icdr.org/sites/default/files/document_repository/ICDR_Rules_1.pdf?utm_source=icdr-website&utm_medium=rules-page&utm_campaign=rules-intl-update-1mar> accessed 22 June 2022, International Arbitration Rules, Article 2; London Court of International Arbitration (LCIA), 'LCIA Online Filing' <https://onlinefiling.lcia.org/> accessed 22 June 2022; Australian Centre for International Commercial Arbitration (ACICA), 'Welcome to ACICA E-Filing System' <https://acica.org.au/acica-e-filing/> accessed 23 June 2022.

[99] Arbitration Institute of the Stockholm Chamber of Commerce, 'SCC Platform-Simplifying Secure Communication From Request to Award' <https://sccinstitute.com/case-management/#:~:text=The%20SCC%20Platform%20provides%20participants,counsel%20and%20arbitrators%20throughout%20the> accessed 22 June 2022. See also Arbitration Institute of the Stockholm Chamber of Commerce, 'Ad Hoc Platform-Powered by the SCC' <https://sccinstitute.com/case-management/ad-hoc-platform/> accessed 22 June 2022.

easily, no matter where in the world they are located.'[100] Some arbitration institutions even have provided services for remote hearings. For example, the Hong Kong International Arbitration Centre (HKIAC) and the International Centre for Settlement of Investment Disputes (ICSID) launched virtual hearing services that may be used for arbitrations, regardless of whether the specific arbitration is administered by the institution.[101]

In addition, having recognized the increasing use of technology, many arbitration institutions have amended their rules to reflect the need of arbitration users during the pandemic. For instance, the ICC amended its Rules in 2021 and clarified that an arbitral tribunal may decide on whether to conduct a hearing '*by physical attendance or remotely by videoconference, telephone or other appropriate means of communication*' after consulting the parties and on the basis of the relevant facts and the circumstances of the case.[102] Likewise, updates to the LCIA Arbitration Rules reflect some changes in good practice by expanding the provisions regarding the use of virtual hearings and recognizing the urgency of electronic communication with the LCIA and in arbitration.[103]

Finally, leading arbitral institutions issued guidelines and measures to assist arbitration users. For instance,

- ICC released Guidance Note on Possible Measures Aimed at Mitigating the Effects of COVID-19 Pandemic, (i) outlining the procedural tools available to parties, counsel and tribunals to mitigate the pandemic related delays, and (ii) providing guidance regarding the organisation of virtual hearing.[104]
- Istanbul Arbitration Centre (ISTAC) announced Online Hearing Rules and Procedures, and provided a road map for conducting online hearings through 10 articles.[105]

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[100] International Arbitration Centres Alliances, 'What are Hybrid Hearings?' <https://www.iacaglobal.com/hybrid-hearings> accessed 17 June 2022.

[101] Hong Kong International Arbitration Centre (HKIAC), 'Flexible, Effective and Seamless: HKIAC Virtual Hearings' <https://www.hkiac.org/our-services/facilities/virtual-hearings> accessed 17 June 2022. See also International Centre for Settlement of Investment Disputes (ICSID), 'Hearing Facilities' <https://icsid.worldbank.org/services/hearing-facilities> accessed 17 June 2022.

[102] International Chamber of Commerce (ICC), 'ICC Arbitration Rules 2017 & 2021-Compared Version' <https://iccwbo.org/content/uploads/sites/3/2020/12/icc-2021-2017-arbitration-rules-compared-version.pdf> accessed 23 June 2022 Article 26(1).

[103] London Court of International Arbitration (LCIA), 'Updates to the LCIA Arbitration Rules and the LCIA Mediation Rules (2020)' <https://lcia.org/lcia-rules-update-2020.aspx> accessed 24 June 2022 Articles 4, 9.7, 13, 14.3, 16.3, 19.2 and 26.

[104] ICC International Court of Arbitration, 'ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic' (9 April 2020) <https://iccwbo.org/content/uploads/sites/3/2020/04/guidance-note-possible-measures-mitigating-effects-covid-19-english.pdf> accessed 17 June 2022.

[105] Istanbul Arbitration Centre (ISTAC), 'ISTAC Online Hearing Rules and Procedures' <https://istac.org.tr/en/dispute-resolution/arbitration/istac-online-hearing-rules-and-procedures/> accessed 17 June 2022.

- Aiming '*to ensure participants experience a seamless and effective virtual hearing*', HKIAC provided guidelines for fully or partially virtual hearings.[106]

- Vienna Arbitration Centre (VIAC) released a Checklist for Remote Hearings, which provided '*guidance for arbitrators and the parties in determining whether the conduct of a remote hearing is reasonable and appropriate in the specific circumstances of a case.*'[107]

- The China International Economic and Trade Arbitration Commission (CIETAC) produced the Guidelines on Proceeding with Arbitration Actively and Properly during the COVID-19 Pandemic (Trial)[108] for the users of arbitration to assist them to deal with disputes during the time of the pandemic. Having noted fundamental principles, i.e., responsibility for arbitral tribunal to proceed with arbitration efficiently and fairly and participation of the parties or their representatives in arbitral proceedings in good faith, the Guidelines included specific measures on online case filing, service of documents, procedural orders, pre-hearing conferences and oral hearings.[109]

Hence, arbitration has remained resilient against difficulties created by the pandemic mainly due to various levels of efforts by arbitral institutions, such as the amendment of operations and procedural rules and the launch of guidelines and measures, which have led to a transition process in which face-to-face hearings have been replaced with virtual hearings.

III. CURRENT STATE OF INTERNATIONAL ARBITRATION

Data released from various research in the last decade show that the development of arbitration towards becoming largely self-regulating mechanism has played a crucial role not only in boosting the use of arbitration but also in adapting to the extraordinary circumstances of the pandemic.

Researches show that users of arbitration have generally welcomed the developments for the change to the regime of international arbitration since the 1950s, which have served for the survival of arbitration against the biases and specificities of national laws and courts, and have pointed them out as determining factor in their selection of arbitration as a

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[106] Hong Kong International Arbitration Centre (HKIAC), 'HKIAC Guidelines for Virtual Hearings' <https://www.hkiac.org/sites/default/files/ck_filebrowser/HKIAC%20Guidelines%20for%20Virtual%20Hearings_3.pdf> accessed 17 June 2022.

[107] Vienna International Arbitration Centre, 'The Vienna Protocol – A Practical Checklist for Remote Hearings, (June 2020)' <https://www.viac.eu/images/documents/The_Vienna_Protocol_-_A_Practical_Checklist_for_Remote_Hearings_FINAL.pdf> accessed 17 June 2022.

[108] China International Economic and Trade Arbitration Commission (CIETAC), 'CIETAC launches Guidelines on Proceeding with Arbitration Actively and Properly during the COVID-19 Pandemic (Trial)', (28 April 2020) <http://www.cietac.org/index.php?m=Article&a=show&id=16919&l=en> accessed 17 June 2022.

[109] Ibid.

dispute resolution method. 2015 Report by the International Bar Association (IBA) Arbitration Subcommittee, revealing the increase in the use of arbitration in all regions, pointed out, *inter alia*, legislative reforms and enforceability under the NYC as factors which were significant for the growth of international arbitration.[110] Surveys conducted by Queen Mary University of London (QMUL) in the last decade also revealed data in a similar vein. Accordingly, 2018 Survey indicated that international arbitration was the preferred dispute resolution mechanism for 97% of the respondents, either as a stand-alone method (48%) or in conjunction with ADR (49%) while only 4% of respondents chose commercial litigation.[111] More significantly, according to the survey, '*enforceability of awards*' (64%) was seen as the most significant strength of arbitration, followed by '*avoiding specific legal systems/national courts*' (60%),[112] which was almost identical to the findings of the 2015 Survey for the question about the most valuable characteristics of international arbitration.[113] The 2021 Survey, under which the respondents were asked their preferred method of resolving international disputes for post-COVID-19, reflected the ongoing popularity of arbitration and disclosed that '*the factors that influenced their choices remained largely the same.*'[114]

Besides, 2021 Survey indicated that using technology became the new normal and users of arbitration adapted to the new circumstances presented by the pandemic by taking advantage of arbitration institutions which quickly took an action to reflect the need of users of arbitration for a switch to virtual arrangements. In particular, according to the survey, changing circumstances resulting from the pandemic forced the users of arbitration to explore alternatives to in-person hearings, and use of virtual hearing rooms increased.[115] In contrast to the 2018 Survey, according to which 64% of the respondents said they had 'never' used virtual hearing rooms and 14% of the participants expressed that they had used them 'rarely',[116] respondents of 2021 Survey reported intensive use of virtual hearing rooms. Accordingly, 35% of the respondents used virtual hearing rooms 'sometimes', and 33%

[110] International Bar Association Arbitration 40 Subcommittee, 'The Current State and Future of International Arbitration: Regional Perspectives' <https://cvdvn.files.wordpress.com/2018/10/int-arbitration-report-2015.pdf> accessed 6 June 2022.
[111] Queen Mary University of London and White & Case partnership, '2018 International Arbitration Survey: The Evolution of International Arbitration' <http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF> accessed 13 December 2021, 5.
[112] Ibid 7.
[113] Queen Mary University of London and White & Case partnership, '2015 International Arbitration Survey: Improvements and Innovations in International Arbitration', <http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2015_International_Arbitration_Survey.pdf> accessed 27 December 2021, 6.
[114] Queen Mary University of London and White & Case partnership, '2021 International Arbitration Survey: Adapting Arbitration to a Changing World' <https://arbitration.qmul.ac.uk/media/arbitration/docs/LON0320037-QMUL-International-Arbitration-Survey-2021_19_WEB.pdf> accessed 21 June 2022, 5.
[115] Ibid 21.
[116] Queen Mary University of London and White & Case partnership, '2018 International Arbitration Survey' (n 109) 32.

reported using it 'frequently' while 5% used virtual hearing rooms 'always'.[117] Besides highlighting the explosion in the use of virtual hearings, the Survey disclosed that the most preferred arbitral institutions were well-known institutions, such as ICC, Singapore International Arbitration Centre (SIAC), HKIAC, LCIA, and CIETAC, showing an awareness of the pandemic in various levels.[118] Despite the respondents did not list 'administrative/logistical support for virtual hearings' as one of the distinguishing features in the determination of their preferred arbitration institutions, they indirectly recognized the significance of such support by voting it as a '*top-ranked choice*' (38%) in considering adjustments that would render arbitral institutions other than the most preferred ones more attractive.[119] This implies the significant role of the arbitration institutions in addressing the need for adaptation under pandemic circumstances.

CONCLUSION

Arbitration, having grown globally, has faced various challenges throughout time and has survived them all. The first biggest struggle before arbitration was against the intervention of courts and national laws. The arbitration community, which has just been relieved from this difficulty, has faced another one, COVID-19 pandemic, which has brought unprecedented challenges in terms of every aspect of life. This paper alleges that arbitration has survived these major challenges due to its largely self-regulating mechanism development of which has been in progress since 1950s. Having overviewed the journey of arbitration till today by dividing the history in different period of times in terms of the historical development of arbitration, it revealed that the hostile attitude towards arbitration, setting the basis for the first challenge, resulted from States' desire to control activities in their jurisdiction in the wake of the rise of state sovereignty in the 18th century, and it took three hundred years to be overcome through the development of arbitration towards becoming substantially self-regulating dispute resolution mechanism, acknowledging principles of party autonomy and of limited grounds for the recognition and enforcement of arbitral awards. Due to such development, arbitration has also managed the recent challenge, i.e., the COVID-19 pandemic, relatively easily. Arbitration institutions, one significant pillar of the mechanism in arbitration, have provided vital support to arbitration in the face of extraordinary circumstances that the pandemic entailed by adjusting their operations, updating rules and producing guidelines and measures for virtual hearings.

The future of international arbitration would probably not be hassle-free. However, today, one may safely say that international arbitration can survive any challenges due to its largely self-regulating mechanism, which embodies all the necessary tools to devise a solution to any difficulties.

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[117] Queen Mary University of London and White & Case partnership, '2021 International Arbitration Survey' (n 112) 21.
[118] Ibid 10.
[119] Ibid 11-12.

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