Are arbitral seats striking the right balance between arbitrator autonomy and court supervision?

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CHAPTER 32

Are Arbitral Seats Striking the Right Balance Between Arbitrator Autonomy and Court Supervision?

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The relationship between arbitrator autonomy and court supervision, or in other words the relationship between arbitrators and the courts, is a broad topic which raises essential questions of legitimacy. This relationship is not without tension. While on the one hand, the whole point of arbitration is not to be in court,[1] with courts in many jurisdictions upholding parties' right to arbitrate and in some jurisdictions even adopting 'pro-arbitration' policies,[2] the fundamental right to access the courts[3] implies that the ultimate arbiters of jurisdiction are the national courts.

The courts thus play a crucial role at different stages of the arbitration, potentially at the outset of an arbitration where questions of jurisdiction, including the validity of an arbitration agreement, may arise and also at the end of an arbitration, whether in

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1. J. Lew, *Applicable Law in International Commercial Arbitration*, Oceana/Sijthoff 1978 ('Lew, Applicable Law'), p. 82 ('By submitting to arbitration, the parties remove their contractual disputes from the jurisdiction of any one country.')
2. *See, e.g.*, the United States' Federal Arbitration Act 1925 which stipulates the fundamental principle that arbitration agreements must be considered valid, irrevocable and enforceable (except on legal or equitable grounds for the revocation of the contract): Section 2: 'A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.'
3. *See, e.g.*, Article 6(1) of the European Convention on Human Rights (signed 4 November 1950) which guarantees 'a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.'

annulment, enforcement or potentially revocation proceedings. In addition, in particular in *ad hoc* arbitration, the supporting role of the courts is an important safeguard for arbitration to function effectively, including by providing a default mechanism for the appointment of arbitrators.

The precise scope and impact of the supervisory role of the courts depends on the applicability and interpretation of treaties, national law, institutional rules and relevant provisions of the arbitration agreement. It is obvious that a modest contribution to a *liber amicorum* cannot do justice to this panoply of rules and regulations and range of modalities. The focus of this contribution will therefore be on arbitrator autonomy and court supervision in the context of recent cases concerning the review by courts of tribunals' jurisdictional decisions.

Specifically, it will address the concept of de novo review which, for the purpose of this contribution, entails a court reviewing the question of jurisdiction anew, rather than merely reviewing the decision of the tribunal on jurisdiction as such. Or, in other words, the court will review jurisdiction from scratch, rather than through the prism of the arbitral decision.

The question, however, is how to define 'from scratch'? Does it mean that the court will consider new arguments and new evidence, thus allowing a party to change and improve on its initial case? Is there a difference in approach with respect to positive and negative decisions on jurisdiction? How does this concept interact with procedural limitations in national law such as the obligation to raise certain arguments and defences at the earliest opportunity? In other words, how do courts balance the right to a court review on jurisdiction with due process considerations? Are these thrown overboard, or do they limit the scope of subsequent review?

The observations in this contribution are intentionally presented with a bird's eye view. Precisely because the scope and modalities of review are so dependent on the specific legal matrix of each case, it is difficult to perform an 'apples and apples' comparison. In addition, as I will address in my concluding remarks, the variety and disparity of court decisions is compounded by the increasing importance of national law, not merely arbitration law, but the rules and practice of civil procedure.

Then again, there are enough cases from a wide range of jurisdictions addressing similar concepts and scenarios to make a high-level review worthwhile. One of the key benefits of court decisions as a source of research material is that there is plenty of material available. As Julian stated in his foreword to his PhD thesis, 'the most glaring problem' when he embarked on his study of the law applicable in international arbitration was the non-availability of primary source material, i.e., awards.[4] One of the reasons his study was so valuable was because he reviewed a large number of unpublished awards, containing a wealth of information. The topic of publication of awards is not uncontroversial and it remains to be seen how representative any selection of arbitral awards is. While there is generally greater access to court decisions, it remains difficult, at least partly due to the multitude of different languages

4. Lew, Applicable Law, p. ix.

involved, to ensure that any selection of court decisions is genuinely representative and that decisions are properly analysed.[5]

The recent spate of set-aside decisions, frequently involving investment arbitration disputes, has yielded a wealth of insight in the challenging question of the boundary between arbitrator autonomy, and the rights and obligations of arbitrators to determine jurisdiction, and the rights and obligations of the courts to review such arbitral decisions.

In discussing some of these cases, one needs to be conscious of the specificities of each case and in particular the basis for review. For example, the standards imposed by section 67 of the English Arbitration Act 1996 (EAA),[6] Article 1065 Dutch Code of Civil procedure[7] and Article 34 of the UNCITRAL Model Law 1985 (as amended) (UML)[8] insofar as they relate to the jurisdictional view are far from identical. These standards are not set in stone and are subject to development and discussion. For instance, the Law Commission of England & Wales is currently undertaking a review of the EAA and will consider, as part of the potential areas of review, the court's powers exercisable in support of arbitration proceedings and the procedure for challenging a jurisdiction award.

Nevertheless, while there are differences in the bases for review, the scepticism expressed until some years ago is no longer mainstream. Moreover, what this contribution seeks to do is to distil the essence of the level of review by the courts, and to try

5. The challenges interpreting decisions correctly is illustrated by some of the decisions to be reviewed hereafter in this contribution. For example, the Dutch decision, to be discussed, is difficult to understand without a reasonable grounding not only in Dutch law of civil procedure, but also a decent grasp of the intricacies of the rules and limitations applicable to appeal and appeal in cassation procedures.
6. Section 67 EAA provides: '(1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court—(a) challenging any award of the arbitral tribunal as to its substantive jurisdiction; or (b) for an order declaring an award made by the tribunal on the merits to be of no effect, in whole or in part, because the tribunal did not have substantive jurisdiction.'
7. Article 1065 Dutch Code of Civil Procedure provides: '1. A reversal of the award can take place only on one or more of the following grounds: (a) absence of a valid arbitration agreement; (b) the arbitral tribunal was constituted in violation of the rules applicable thereto; (c) the arbitral tribunal has not complied with its mandate; (d) the award is not signed or does not contain reasons in accordance with the provisions of Article 1057; (e) the award, or the manner in which it was made, violates public policy or good morals.'
8. Article 34 UML provides: '(2) An arbitral award may be set aside by the court specified in article 6 only if: (a) the party making the application furnishes proof that: (i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or (ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or (b) the court finds that: (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or (ii) the award is in conflict with the public policy of this State.'

to further a discussion as to what the appropriate level of review is or should be. As this overview will show, there is tension between the notion of a full review (which is necessary to do justice to the fundamental nature of the courts' supervisory powers, and at the same time the recognition that the decision of arbitrators and the arbitral procedure cannot or should not be without consequences) and the notion that where a party has waived or relinquished a procedural right,[9] set-aside proceedings should not be providing the parties with a second bite of the cherry. In other words, due process dictates that there comes a point when enough is enough.

In addition, while terminology is sometimes consistent but has a different connotation, there are also examples of terminology suggesting differences that are in fact not there. What I will seek to distinguish in this limited overview of some recent cases is to what extent review is undertaken through the prism of the arbitral decision, or from scratch.

I will start this *tour d'horizon* in my native country, the Netherlands. On 5 November 2021 the Dutch Supreme Court issued a long-awaited decision in *The Russian Federation v. Yukos Universal Limited (and others)*, ('*Yukos*').[10]

After the bankruptcy of Yukos Oil Company, its shareholders initiated arbitration proceedings against the Russian Federation pursuant to Article 26 of the Energy Charter Treaty (ECT), alleging that the Russian Federation had expropriated their investments in Yukos and had failed to protect those investments. An UNCITRAL Tribunal seated in The Hague issued three awards in favour of the shareholders awarding more than USD 50 billion. The Russian Federation commenced set-aside proceedings, *inter alia,* on the basis that the Tribunal lacked jurisdiction.

The District Court set aside the awards in 2016 on the ground that there was no binding arbitration agreement. The court considered, *inter alia*, that the Russian Federation had not ratified the ECT and that Article 45 of the ECT, which provides that a State that has signed the ECT will provisionally apply the Treaty, could not be invoked as a basis for jurisdiction in light of the so-called limitation clause stipulating that provisional application only applies 'to the extent that such provisional application is not inconsistent with its constitution, laws or regulations'.

The Court of Appeal came to a different conclusion and considered among other things that the shareholders were entitled in the set-aside proceedings, and for the first

9. For instance, section 67(1) EAA provides that '… [a] party may lose the right to object (see section 73) and the right to apply is subject to the restrictions in section 70(2) and (3)'. Among other things, section 73 provides that if a party takes part in the arbitration without making any objection that the tribunal lacks jurisdiction, that party '… may not raise that objection later, before the tribunal or the court, unless [that party] shows that, at the time [it] took part or continued to take part in the proceedings, [it] did not know and could not with reasonable diligence have discovered the grounds for the objection'. Similarly, section 70(2) and (3) set out supplementary provisions that apply to applications challenging the tribunal's award on jurisdiction. Article 4 UML similarly deals with waivers of the right to object. This contribution seeks to further the discussion regarding the interplay between such provisions and the concept of de novo review.

10. *The Russian Federation v. Veteran Petroleum Limited, Yukos Universal Limited and Hulley Enterprises Limited*, Supreme Court of the Netherlands, 20/01595, ECLI:NL:HR:2021:1879, 5 November 2021, https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2021:1879 (English translation provided by the court).

time on appeal, to invoke an interpretation of the limitation clause not previously invoked in the arbitration proceedings.

The Supreme Court stressed that while a tribunal is entitled to evaluate jurisdiction, that evaluation is not final. The final word rests with the courts and such review 'should be made without restraint' that is typically applicable in set-aside proceedings '… and is not limited to the question of whether the arbitrators assumed jurisdiction on the correct grounds'.[11] Moreover, while it is unclear whether the Supreme Court's level of review would have been different had the tribunal declined jurisdiction, the Supreme Court made clear that:

> The public interest in effective arbitration implies that the court should not annul the arbitral decision on the sole ground that the arbitral tribunal gave incorrect reasons for its decision that it had jurisdiction to hear the dispute. Therefore, the court is free to decide, on grounds other than those relied on by the arbitral tribunal, that it rightly considered itself competent to take cognisance of the dispute. After all, a different view would mean that a court that finds that the grounds relied on by the arbitral tribunal were insufficient to establish its jurisdiction, but notes that the arbitral tribunal did have jurisdiction on other grounds, would nevertheless have to annul the arbitral award. The consequence of this would be that, even though there is a valid arbitration agreement, the dispute would have to be decided by the ordinary court, unless the parties agree otherwise (former art. 1067 CCP). This would not be consistent with the parties' clear intention to submit their dispute to arbitration rather than to the court system.[12]

Consequently, the Supreme Court considered in considerable detail the scope and meaning of the limitation clause, by reference to the relevant provisions of Vienna Convention on the Law of Treaties and various principles of public international law. It also considered at length whether the requirements of Article 1 ECT had been met and whether the shareholders qualified as 'investors' having made 'investments' pursuant to this provision.

Three issues are worth noting at this stage. First, because of the limitations of cassation proceedings before the Supreme Court, pursuant to which one cannot complain in cassation about the incorrect application of foreign law, the Supreme Court held that it could not revisit the considerations of the Court of Appeal insofar as that court had determined that according to Russian law (which was relevant pursuant to Article 45 ECT) this type of claim is arbitrable.[13]

In addition, the Supreme Court rejected Russia's request to seek a preliminary ruling from the Court of Justice of the European Union (CJEU) on the basis that the Court of Appeal's interpretation of the ECT was inconsistent with the interpretation of Commission, the Council and European Union (EU) Member States, and thus not '*acte claire*' or '*acte éclairé*',[14] requiring the Supreme Court to seek a preliminary ruling.

11. Yukos, para. 5.2.7.
12. *Ibid.*, para. 5.2.7.
13. *Ibid.*, para. 5.2.17.
14. *Acte claire* is a doctrine that permits national courts of last instance to refrain from requesting a preliminary ruling under Article 267(3) Treaty on the Functioning of the European Union (TFEU) from the CJEU when the point of EU law at issue is indubitably obvious.

While beyond the scope of this contribution, the Supreme Court's ambivalent way in which it addressed the potential applicability of EU law by positing that given the difference of opinion the matter was not '*acte claire*', is striking. Despite not considering the point obvious, the Supreme Court refrained from seeking a preliminary ruling holding that the complaints against the Court of Appeal's judgement failed on other grounds.[15]

The reference to this nuanced doctrine is notable because it presupposes that there is a matter of EU law at stake, and as the Advocate General to the Supreme Court had carefully analysed, this was far from clear in the present case. What is even more notable for present purposes, however, is that this aspect of the decision and the reference to the complex doctrine of EU law and its incorporation in the system of civil procedure adds another layer of complication, compounded by the very technical aspects of appeal and appeal in cassation.

Third, the Yukos decision is noteworthy because it did not only involve an application to set aside the original awards, but in appeal in the annulment proceedings, the Russian Federation also argued that the arbitral awards were contrary to public policy due to fraud committed by the shareholders in the arbitration, consisting of submitting false statements and withholding documents, and failing to produce documents in the arbitration. Dutch arbitration law contains a specific remedy, revocation, for situations in which an award has been procured by means of fraud or withholding documents fraudulently. While not strictly speaking part of the section of the decision in which the jurisdictional arguments were considered, the Supreme Court's considerations as to the scope of the right to invoke revocation (which is generally a separate procedure, with different time limits and under the then applicable arbitration law a remedy to be submitted to a different, higher, court) are nevertheless of interest for the discussion of the scope of review proceedings as the wording is broad and the considerations likely applicable more generally.

The Supreme Court noted that the grounds for annulment must be included in the initial summons and that:

> former art. 1064 (5) CCP does not in itself preclude further elaboration, on appeal, of grounds put forward in the initial summons, and if necessary correction of an omission, in response to a defence raised in the further course of the proceedings, or as a result of the decision of the court of first instance. However, the possibility to elaborate, on appeal, on grounds already submitted in the summons, or to make new factual submissions, is not unlimited. This possibility is limited inter alia by the ordinary rules applicable to appeal proceedings, such as art. 130 CCP. In addition, this possibility is limited by specific provisions that prescribe when a certain ground for annulment must be invoked for the first time, on penalty of forfeiting the right to rely on it later. If such a provision is at issue, the court will have to assess in each individual case whether a new factual or legal submission introduced in the course of the annulment proceedings would conflict with the purport of such a provision, partly in view of the requirements of due process.[16]

15. Yukos, para. 5.2.10.
16. *Ibid.*, para. 5.1.14.

Moreover, the Supreme Court's decision in Yukos is interesting for a number of reasons but perhaps most relevant for the purposes of this contribution is the extent to which the Supreme Court did consider issues of jurisdiction afresh, allowing new jurisdictional arguments to be raised and justifying this on policy grounds including the desire to consider favourably a putative agreement to arbitrate.

The next step in this tour around the world is Canada, where another Yukos decision, this one involving a tribunal seated in Toronto, Ontario, also considering an ECT claim, has led to a number of interesting decisions.[17] As with the Dutch Yukos decisions, the various court instances (including different judges dealing with the matter at different points in time) came to different conclusions.

The Russian Federation brought an application under Article 16(3) UML to set aside an interim award on the ground that it had not consented to arbitrate. In its 2018 first decision in this case, the Ontario Superior Court of Justice (Commercial List) held that in reviewing the matter, it was not confined to the record adduced before the Tribunal.[18] The court considered that its role was not to undertake a mere review of the tribunal's decision, and consequently permitted Russia to file new evidence.

In its 2019 decision, however, the Ontario Superior Court of Justice came to a different conclusion in its review of the preliminary jurisdiction decision and considered that this review was not the same as a hearing de novo.[19] Consequently, it considered that allowing new evidence would undermine the principle of competence-competence.[20]

This decision was overruled by the Ontario Divisional Court of the Ontario Superior Court of Justice, which considered that Article 16(3) UML requires the court to 'decide the matter' and not just to 'review' the tribunal's decision.[21] Moreover, the court held that:

17. *The Russian Federation v. Luxtona Limited*, 2021 ONSC 4604, 30 June 2021 ('*Luxtona*').
18. Decision of the Ontario Superior Court of Justice, 2018 ONSC 2419, 13 April 2018.
19. Endorsement of the Ontario Superior Court of Justice, 2019 ONSC 7558, 20 December 2019. Penny J issued judgement having been assigned the case from Dunphy J (who had heard the initial motion to strike out evidence in 2018 ONSC 2419) due to a change in judicial assignments. [8].
20. 'The Court of Appeal also very clearly described what the court is doing on a jurisdictional challenge under the Model Law as a "review." On a true jurisdictional challenge, it is a review on correctness, without any deference, in which the court must come to its own conclusion on whether the tribunal had jurisdiction, but a "review" nevertheless. This is a profoundly different approach from that propounded by the cases from the London Commercial Court, which generally describe the court's role on a challenge under s. 67 of the UK Arbitration Act as a trial *de novo*.' [58] and 'If parties can adduce fresh evidence at will, both parties to the jurisdictional challenge will have an incentive, knowing what the tribunal's decision now is, to file new evidence providing further support for their position and why the tribunal was right or wrong in its determination. This, it seems to me, will result in such evidence being routinely filed and the court routinely conducting a trial de novo on jurisdiction. This will have the further result that the record put before the court will routinely be materially different than that put before the tribunal. The tribunal, in that scenario, will not have, as Article 16(1) requires, the ability to "rule on its own jurisdiction including any objections with respect to the existence or validity of the arbitral agreement" [my emphasis].' [61].
21. *Luxtona,* 2021 ONSC 4604, 30 June 2021.

> the parties are not restricted to the record they placed before the tribunal on the jurisdictional issue. I so conclude because of the language of the *Model Law* and the consensus in the international jurisprudence on this point. Ontario administrative law favours a deferential review of arbitral decisions, but this approach is not invariable, and the Supreme Court of Canada has been clear that the presumptive deferential review can be displaced when the legislature shows a contrary intention by the words chosen to describe the court's role. Further, it is desirable that there be a measure of consistency in the approach taken to these issues across jurisdictions, and this goal is reflected in language in the ICAA adopted by the legislature to implement the *Model Law*. The international consensus on this issue strongly supports the conclusion that the application below is a hearing de novo and not a review of the tribunal's decision. Therefore, for the reasons that follow, I conclude that the application judge erred on this point and that the parties are entitled to adduce evidence on the application as of right. [10]

The court relied on, and quoted, the English Supreme Court in *Dallah v. Pakistan* [2010] UKSC 46[22] that the court's role was '"to reassess the issue [*of jurisdiction*] itself" and not "to review the tribunal's decision'. [30]

The English approach was confirmed in *GPF GP S.A.R.L v. Republic of Poland* [2018] EWHC 409 (*GPF*), which involved a London seated Swedish Chamber of Commerce arbitration brought on the basis of the Bilateral Investment Treaty (BIT) between Poland and Belgium and Luxembourg. The investors applied to set aside the Tribunal's award on jurisdiction under section 67 EAA, arguing that the Tribunal erred in finding that it did not have jurisdiction over all its claims. The High Court set aside parts of the award considering that it was entitled to a full review of jurisdiction. The court noted:

> In such circumstances it is for the Court under section 67 to consider whether jurisdiction does or does not exist, unfettered by the reasoning of the arbitrators or indeed the precise manner in which arguments were advanced before the arbitrators. Ultimately jurisdiction either is, or is not, conferred on the true construction of the arbitration agreement, and that ought not to be fettered by how arguments were advanced below, subject always to the discretion of the court as to the admission of evidence before it … [70]
>
> An issue has arisen between the parties as to the nature of a section 67 hearing, and what arguments may be advanced, and evidence adduced, by the applicant on such a hearing which I address at Section F below. Suffice it to say at this point that I am satisfied that it is well established that the hearing is in the nature of a rehearing, and to the extent that Griffin advances any particular arguments not argued before the Tribunal, or adduces any new evidence, I am satisfied that Griffin may do so, and to the extent that permission is required to do so, I am

22. 'In my view the text of the Model Law, adopted in Ontario law, prescribes a de novo hearing in a court application "to decide the matter" of the tribunal's jurisdiction. Mexico v. Cargill does not say otherwise. Dallah is strong authority to the contrary, and although the Court of Appeal decision in Mexico v. Cargill does not rule on this point, it does generally approve the reasoning in Dallah. The strong international consensus on this point favours the Dallah approach, and the Model Law itself encourages "uniformity" on such points. The onus is on the challenging party to set aside a tribunal's preliminary ruling on jurisdiction. But because the court is hearing the jurisdictional issue de novo, the parties are entitled as of right to adduce evidence, including expert evidence, relevant to the jurisdictional issue.' [38]

> satisfied that this is an appropriate case for permission to be granted, the Respondent not having adduced any evidence of prejudice in dealing with the same, and indeed having itself addressed such matters at length in its submissions and evidence. [7]

Consequently, the court confirmed that it would undertake a full rehearing, including potentially a review of new arguments and evidence albeit that it stressed that producing evidence would be subject to the generally applicable rules of civil procedure and to the extent required, subject to permission.[23]

Similarly in Singapore a decision in a Singapore seated BIT dispute was initially treated differently in the lower court, but ultimately led to an outcome similar to the English decisions. In *Sanum Investments Ltd v. The Government of the Lao People's Republic* [2016] SGCA 57 ('*Sanum*'), a jurisdictional objection that the BIT should not apply to Macau and the claim in question thus did not fall within the remit of the arbitration clause, was expanded in the context of court review, with Lao trying to adduce two diplomatic letters which had not been before the Tribunal.

The High Court, while emphasising that a party should not have full unconditional power to adduce fresh evidence at will, admitted the new evidence applying

23. *The* court stated: 'the fact that a section 67 application is a re-hearing does not mean that the court cannot control the evidence adduced on a section 67 application – it clearly can …' [71]. Further, the High Court in its recent judgement in *Gold Pool JV Limited v. The Republic of Kazakhstan* [2021] EWHC 3422 applied the conclusions in GPF, noting: 'The nature of a s.67 claim, and the approach to be adopted by the court, requires no substantial elaboration on this occasion. *It involves and requires a rehearing* de novo *by the court in which the arbitrators' conclusions have no legal or evidential weight. I agree with the explanation of the position in* GPF GP Sàrl v Republic of Poland *[2018] EWHC 409 (Comm), per Bryan J at [64] to [70]*. It has been said that nonetheless the arbitrators' conclusions and reasons may be of interest rather more often than it has been explained why that might be so. For example, in *Dallah Real Estate v. Pakistan* [2010] UKSC 46 at [160], Lord Saville (no less) said that "The findings of fact made by the arbitrators and their view of the law can in no sense bind the court, though of course the court may find it useful to see how the arbitrators dealt with the question" without explaining why a court might find it useful to look at conclusions that have neither legal nor evidential weight before it.' [7] and at [8-9]: 'In *Republic of Korea v. Dayyani et al*, [2019] EWHC 3580 (Comm) at [26], Butcher J said that "A challenge under section 67 proceeds by way of a de novo rehearing of the jurisdiction issue(s). The award of the arbitrators has no automatic legal or evidential weight. Nevertheless, and given that the arbitral tribunal has considered the same issues, the court will examine the award with care and interest. If and to the extent the reasoning is persuasive, then there is no reason why the court should not be persuaded by it." *That idea needs to be applied with a degree of caution however as the court's task is to decide the case as presented to it by a party on the rehearing, as Bryan J explained in* GPF v. Poland *at [70]*. It should generally be for the parties to decide for themselves to what extent they each may wish to adopt any reasoning of the arbitrators as an argument of their own in court. *In short, a s.67 claim does not operate by way of a review of the arbitrators' decision.* In the present case, in fact the arbitrators formulated the applicable legal rule accurately in the award and both parties accept as much. The arbitrators stated the rule in these terms: "… States may agree to continue a pre-existing treaty relationship following the emergence of one of them as a new State and such agreement may be either explicit or tacit and may lack the ordinary formalities associated with the conclusion of a new treaty. … whether this represents the formation of a new legal agreement between the States concerned, or constitutes an agreement confirming succession to an earlier agreement represent[s] fine shades of nuance, but in either view the existence of an agreement is paramount."' (emphasis added)

standards previously developed in relation to the submission of evidence in court proceedings and overturned the award on jurisdiction.

The Court of Appeal confirmed that the court was entitled to conduct a de novo review of the Tribunal's decision and upheld the High Court's decision, rejecting the view that the court should apply a restrained approach by according deference to the Tribunal's findings. Nevertheless, the Court of Appeal, citing a different court case, warned that this 'does not mean that all that transpired before the Tribunal should be disregarded, necessitating a full re-hearing of all the evidence … it simply means that the court is at liberty to consider the material before it, unfettered by any principle limiting its fact-finding abilities'. [43]

Consequently, while the court endorsed the concept of de novo review and reversed the decision by the Tribunal on the basis of evidence, it somehow distinguished this from a full rehearing.

Finally, the perspective from Switzerland. In *Recofi SA v. Vietnam* 4A_616/2015[24] ('*Recofi*'), the Swiss courts reviewed a Geneva seated UNCITRAL award in a BIT case in which the Tribunal declined jurisdiction on the basis that the underlying sales contracts did not constitute an investment.

The Federal Tribunal emphasised that while it would review the Tribunal's jurisdictional decision, it would not do so on its own motion but rather on the basis of the arguments made by the appellant:

> The Federal Tribunal reviews the findings of facts only within prescribed limits, even when it examines an argument based on the lack of jurisdiction of the arbitral tribunal … . The Court must make its decision on the basis of the facts found in the award under appeal (see Art. 105(1) LTF), it may not rectify or supplement ex officio the factual findings of the arbitrators, even if the facts were established in a blatantly inaccurate manner or in violation of the law (see Art. 77(2) LTF, ruling out the applicability of Art. 105(2) LTF). However, there is the possibility that may review the factual findings on which the award under appeal is based if one of the grievances mentioned in Art. 190(2) PILA is raised against such factual findings or if some new facts or evidence are exceptionally taken into account in the framework of the civil law appeal procedure (Judgment 4A_342/20158 of April 26, 2016, at 3). [3.1.2]

Consequently, while the ability to review new facts or evidence is not entirely excluded, the court's emphasis is on the exceptional nature of such review. However, this does not necessitate a starkly different approach as there has also been some suggestion by the Federal Tribunal in a separate case that it will freely examine questions which determine the jurisdiction, or lack of jurisdiction of the tribunal.[25]

Here ends our whirlwind tour of the world. At a superficial level, this range of cases from a variety of jurisdictions, shows a general consensus that courts will not limit themselves to reviewing jurisdictional decisions through the prism of the arbitral award and effectively adopt de novo review as the standard. Beyond this general

24. *Recofi S.A. v. Vietnam*, Federal Supreme Court of Switzerland, 20 September 2016, 4A_616/2015.
25. *See*, *e.g.*, *Clorox Spain S.L. v. Bolivarian Republic of Venezuela*, Decision of the Swiss Federal Tribunal, 25 March 2020, 4A_306/2019, [3.4.1].

observation, however, the most striking feature of these cases is that the implementation of review is far from straightforward, and very much dictated by rules and doctrine of domestic civil procedure. It is also striking that a number of cases show significant variety of perspective at the different levels of courts involved in particular case, suggesting that the matter is not as clear-cut as this whirlwind tour suggests.

In some cases, such as the Dutch Yukos decision, policy considerations play a role, in particular the desire to consider favourably a putative agreement to arbitrate. Other decisions, however, while endorsing the concept of de novo review (such as the Singaporean decision) may or may not necessarily conduct the same depth of review or conduct such review in the same way.

Moreover, a feature of all the decisions is the sometimes cryptic or offhand reference to systemic limitations that may serve to mitigate the supposedly full review. These limitations require not only an understanding of arbitration law, but much more so an understanding of the rules of evidence and civil procedure applicable in the courts hearing the request for annulment proceedings. For example, while the English GPF decision confirms the right to submit arguments, the right to submit new evidence is generally subject to permission and the discretion of the court. The Swiss Recofi decision refers to the requirement to show exceptional circumstances and refers to the framework of the civil law appeal procedure, while the Dutch Yukos case reads like a manual of cassation procedure, including a treatise on the nature of foreign law being neither fact nor law.

This leads us back to Julian Lew, who started his arbitration career with a magnificent treatise on the applicable law in international commercial arbitration. In his doctoral thesis, Julian addressed the practice of arbitrators and parties in determining the applicable law. This research was conducted on the basis of awards, not merely court decisions. In his thesis, he explores and advocates party autonomy in arbitration.

The overview of court decisions in this contribution demonstrates that arbitrator autonomy is not unlimited, at least not in the sense that arbitrators are allowed to be the final arbiter of their jurisdiction. Equally, however, the extent of court review of the jurisdiction of the tribunal is not without limit either but rather is carefully balanced with due process considerations. I suggest that in principle, this is entirely understandable and in fact desirable. Arbitrators are no Baron Münchhausen, who was able to pull himself – and his horse – out of a swamp by his own hair and equally, court proceedings should not always provide parties with a second bite at the cherry.

More problematic is that perhaps inevitably, while there is a general consensus regarding de novo review (at least superficially), the application of such concept is not uniform and leads to divergence across, and within jurisdictions, thereby exemplifying the need to consult national law. Nonetheless, we should take to heart the considerations of the Ontario Divisional Court of the Ontario Superior Court of Justice in Luxtona, which referred to the Model Law's encouragement of uniformity.