# Kluwer Arbitration Blog

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To mark the 50th anniversary of the CEPANI, we are pleased to present you with this special issue of *b*-Arbitra, devoted to Supreme Courts and Arbitration.

We are grateful to the eminent specialists who have agreed to deliver, for their respective jurisdictions, comprehensive reports of the Supreme Courts' rulings in arbitration matters. Their overviews cover 15 selected jurisdictions from four continents: for Europe, the review covers the Court of Human Rights (by Jean-Paul Costa), the European Court of Justice of the European Union (by Jacob Grierson) and 7 national jurisdictions, *i.e*. Austria (by Christian Aschauer and Matthias Neumayr), Belgium (by Herman Verbist and Luc Demeyere), France (by Dominique Hascher), Germany (by Jan K Schaefer), Sweden (by Joel Dahlquist Cullborg), Switzerland (by Laurent Hirsch) and the United Kingdom (by Jan Kleinheisterkamp & Shaurya Upadhyay); from the Americas, we have contributions for the United States (by Erica Stein and David L Attanasio) and for Brazil (by Marcelo Roberto Ferro); for Africa, we have a contribution from Veronique Goncalves on OHADA Arbitration; Asia is represented by contributions on mainland China (by Kun Fan) and Hong Kong (by Chiann Bao) and on Singapore (by Michael Hwang and Yin Wai Chan).

This overview offers, through the highest courts' eyes, a unique and up to date comparative account of many essential concepts of the law and practice of international arbitration. As several authors have pointed out, if Supreme Courts' decisions in arbitration matters are generally scarce (in Belgium 62 decisions have been identified over more than a century), they also deal with issues of critical importance. Even the most experienced international arbitration practitioner will acquire, through this rich study, a new insight into presumably well-known issues and will discover less classic debates. You may, for instance, have never come across the question of whether arbitrators should be treated as employees. You will be pleased to know the answer that was given to such a question by the UK Supreme Court in its *Jivraj v Hashwani* decision. You will also acquire a better grasp of the relativity and of the subtleties of more traditional concepts. The US Supreme Court approach to the recognition of the validity, and to the enforcement, of the arbitration agreement is an interesting example. The views as to who should decide whether an arbitral tribunal has jurisdiction to hear the case are not always as straightforward as we might imagine from our continental European perspective.

This review is also a powerful reminder of the fact that international arbitration would not have flourished to the extent that we have been enjoying in recent decades without the support of these Supreme Courts Such support is equally as important as the support to be expected from national legislation. We are for instance helpfully reminded by Dr Hascher that until the *Gosset* decision of 1963, arbitration had been virtually extinct in France for the past 120 years due to the very strict conditions imposed on it by the *Prunier* decision of 1843. In 50 years the jurisprudence of the French Supreme Court has evolved from one where arbitration was almost non-existent to one that recognises an international arbitral order as producing decisions of international justice, not belonging to any particular jurisdiction and potentially enforceable even when annulled by a court at the place of arbitration, such as the French Supreme Court decided in the *Putrabali* case in 2007.

Needless to say, the success of arbitration has been and remains heavily dependent on the court system's support. And such support does not consist and shall never consist in the mere application of the law, even when such law is a modern arbitration law inspired by the UNCITRAL Model Law. As Erica Stein and David L Attanasio rightly put it, "*the problem in its (the Court) decision-making is that not every future problem looks just like the past. But the solution to these problems will depend crucially on the relative emphasis placed on the different policies,…*" This is the word: policy. We must be aware that in arbitration matters as in most matters, legal solutions are the product of a policy, as much as of a statutory rule.

The following reports confirm that arbitration has been the beneficiary over recent decades, throughout the world, of a widely pro-arbitration policy of the Supreme Courts Such policy still prevails today. Yet, as we are aware, the arbitration-friendly environment that has become familiar to us is facing today new challenges. Flashing alerts have not been ignored by our contributors. It is sometimes fashionable nowadays to convey a negative image of arbitration, perceived as a justice for the privileged. An extensive application of statutory provisions restricting the right to resort to arbitration (such as Article 2061 of the French civil code), even in commercial matters, occasionally receives political support. In France, the administrative jurisdiction has made an adverse intrusion into arbitration law, on behalf of the interest of the State, of which the French Supreme Court would allegedly be insufficiently protective. There are persistent suspicions that arbitration may not always incorporate all the guarantees of an equitable and fair trial. These suspicions have in particular been echoed in sport arbitration cases. In the *Mutu and Pechstein v Switzerland* decision of October 2018, the European Court of Human Rights has sanctioned a TAS (*Tribunal Arbitral du Sport de Lausanne*) decision for a violation of Article 6, § 1 of the European Convention. If, as J P Costa puts it, the European Court has granted the TAS a "*certificate of compatibility*" with the Convention, the Court has also affirmed its right to cast a critical look on the functioning of the arbitral tribunal, and its composition. Depending on the underlying policy, such reinforced control can either be a reasonable safeguard of essential principles or turn into an intrusion into the functioning of arbitral tribunals that would constitute a handicap to the attractiveness and reliability of arbitration. But the most frontal attack against arbitration in recent years has probably come from the *Achmea* decision of the European Court of Justice that literally prohibits the Member States from resorting to investment arbitration in matters ruled by the European treaty.

As a conclusion, this overview of the Supreme Courts and Arbitration is not just a remarkable compilation of helpful information. It also casts light on the challenges with which the arbitration world of today is confronted and on the importance of the courts and their policies in addressing such challenges. It is a strong call to the arbitration community for constant vigilance and for enhanced creativity in finding the right answers to criticism and in safeguarding the image of arbitration.

The first 50 years of the CEPANI have been marked by a steady development of arbitration-friendly support from the Courts. We must act and think proactively to ensure that such a conclusion remains valid for the next 50 years In the meantime, we wish you excellent and stimulating reading.

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