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Due process paranoia and its role in the future of international commercial arbitration

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Abstract

Due process is an undeniably important element of international commercial arbitration. However, the right of a party to have its case heard can be interpreted in extreme terms by overly cautious arbitrators who are concerned about their awards being overturned or deemed unenforceable by state courts. This paper discusses the increasing phenomenon of ‘due process paranoia’ within the context of international commercial arbitration and, by reviewing the limited circumstances in which it may be violated, critically evaluates whether it should be a concern in practice.

Principles of arbitration and the phenomenon of due process paranoia

The attractiveness of international commercial arbitration is inextricably tied to its efficiency and fairness. Recently, arbitration has earned a reputation as a ‘one stop shop’ for resolution of disputes between foreign parties. However, from an arbitrator’s perspective, balancing efficiency and fairness, and managing parties’ expectations in this context, is not a straightforward task.

Indeed, the White & Case 2015 International Arbitration Survey highlighted, as an issue requiring special attention, ‘a reluctance by tribunals to act decisively in certain situations for fear of the arbitral award being challenged on the basis of a party not having had the chance to present its case fully’,⁴ which one contributor dubbed ‘due process paranoia’. The White & Case 2018 Survey recently confirmed that the phenomenon continues to be a widespread source of concern.⁵

Further, the 2016 International Dispute Resolution Survey by Queen Mary University of London and the School of International Arbitration found that the phrase (along with synonyms ‘split the baby’ and

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⁴ Paul Friedland and Professor Loukas Mistelis, ‘2015 International Arbitration Survey: Improvements and Innovations in International Arbitration’ (Report, White & Case, 6 Oct 2015) 10.

⁵ Paul Friedland and Professor Stavros Brekoulakis, ‘2018 International Arbitration Survey: The Evolution of International Arbitration’ (Report, White & Case, 9 May 2018) 27.

'broken wings syndrome') was used repeatedly by interviewees to describe arbitrators' fear of being challenged and concern about procuring the next appointment.⁶

Due process paranoia is now recognised as the perceived overcautiousness of certain arbitrators who, instead of opting for compromise, repeatedly accede to parties' demands in the pursuit of running an unimpeachably fair arbitration. This caution stems from a fear of the parties later crying foul and manifests in prolonged proceedings, stifling the very goals of arbitration. The phenomenon is particularly concerning where it is the desired result of recalcitrant parties who adopt dilatory tactics at the expense of the very purpose of arbitration (and probably the arbitrator's sanity).

This article considers what amounts to a violation of due process, to what extent the procedural judgment rule provides a safe harbour for arbitrators, and the circumstances in which violations of due process will lead to a successful appeal against an arbitral award. Further, the author critically evaluates whether due process paranoia is truly a problem faced by international commercial arbitration in practice, and, if so, how it should be solved.

What causes due process paranoia?

On one side, arbitrators are faced with the need for the efficient and cost-effective resolution of the dispute, and, on the other, they may fear that any refusal to submit to parties' procedural demands will open the award to challenge on the basis of violation of due process rights.⁷

The overriding objective and commercial appeal of arbitration is the '*quick, cost effective and fair*' resolution of disputes.⁸ Parties who elect to arbitrate expect a much faster and cheaper resolution than if they chose to litigate.

However, parties value their procedural rights in arbitration just as highly as in court proceedings, and will often take a strong stance where they believe those rights have been disturbed. An arbitrator who is found to have denied due process faces the risk of his or her award being set aside, or denied enforcement. This can present a source of professional embarrassment and damage his or her reputation, leading to a decrease in appointments – a risk some arbitrators are not willing to take.

The pressure is not only internal; the rules themselves demand that arbitrators ensure their awards are irreproachable, for example:

- (a) the International Chamber of Commerce (ICC) Rules of Arbitration 2017 direct that the arbitral tribunal '*shall make every effort to make sure that the award is enforceable*' (Article 41);
- (b) the London Court of International Arbitration (LCIA) Rules 2014 require that the arbitral tribunal '*shall act at all times in good faith, respecting the spirit of the arbitration agreement, and shall make every reasonable effort to ensure that any award is legally recognised and enforceable at the arbitral seat*' (Article 32.2); and
- (c) the Singapore International Arbitration Centre Rules 2016 provide that the arbitral tribunal '*shall act in the spirit of these rules and shall make every reasonable effort to ensure the fair, expeditious and economical conclusion of the arbitration and the enforceability of any award*' (Article 41.2).

⁶ Queen Mary University of London and the School of International Arbitration, 'International Dispute Resolution Survey: Pre-empting and Resolving Technology, Media and Telecoms Disputes' (Report, Pinsent Masons LLP, Nov 2016) 32.

⁷ Klaus Berger and J Jensen, 'Due process paranoia and the procedural judgment rule: a safe harbour for procedural management decisions by international arbitrators' (2016) 32(3) *Arbitration International* 415, 419-420.

⁸ Australian Centre for International Commercial Arbitration (ACICA) Arbitration Rules 2016 art 3.1.

As a result of these internal and external pressures, arbitrators can take an overzealous approach to due process in practice. Examples of such conduct include:⁹

- (a) acceding to repeated requests for extensions of time;
- (b) allowing multiple interim measures of protection of a party, including orders for asset preservation, evidence preservation, or security for costs;
- (c) accepting multiple amendments to written submissions;
- (d) agreeing to the belated introduction of additional claims or new evidence; and
- (e) granting requests to reschedule oral hearings at the eleventh hour.

What amounts to a violation of due process?

In the context of international commercial arbitration, the arbitrator's discretion to conduct the proceedings in any way they see fit, subject only to the parties' due process rights¹⁰ is one of the '*foundational elements of the international arbitration process*'.¹¹ In reality, the parties' due process rights amount only to the guarantee that proceedings will be fair, and that parties will be given an opportunity to be heard. It is broadly analogous to legal concepts such as natural justice and procedural fairness. Extrajudicially, the Hon James Allsop AO has said:¹²

'Whether one refers to natural justice, procedural fairness, due process, the right or opportunity to be heard, the principle of contradiction (le principe de la contradiction) or the right to equal treatment, the underlying conception of fairness is the same.'

Article 18 of the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration (**UNCITRAL Model Law**) therefore reflects the 'golden rule' of arbitration (that is, fairness),¹³ and states:

'The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.'

It is widely accepted that the term 'full' is to be understood as 'reasonable'.¹⁴ In Australia the *International Arbitration Act 1974* (Cth) (**IA Act**) specifically qualifies Article 18 of the Model Law by providing:¹⁵

'For the purpose of Article 18 of the Model Law, a party to arbitral proceedings is taken to have been given a full opportunity to present the party's case if the party is given a reasonable opportunity to present the party's case.'

Thus, the right to be heard is not absolute and does not cover unreasonable, dilatory procedural requests.¹⁶ Article 21.2 of the ACICA Rules 2016 can be said to further soften the fairness requirement by providing that:

⁹ Remy Gerbay, 'Due Process Paranoia' (6 Jun 2016) Kluwer Arbitration Blog <<http://arbitrationblog.kluwerarbitration.com/2016/06/06/due-process-paranoia/>>.

¹⁰ UNCITRAL Model Law art 19(2).

¹¹ Gary B Born, *International Commercial Arbitration* (Kluwer, 2nd ed, 2014) 2145.

¹² The Hon James Allsop AO, 'Authority of the Arbitrator' (2013) Clayton Utz University of Sydney International Arbitration Lecture.

¹³ *Amasya Enterprises Pty Ltd v Asta Developments (Aust) Pty Ltd* [2016] VSC 326 [27].

¹⁴ Nigel Blackaby et. al., *Redfern and Hunter on International Arbitration* (Oxford University Press, 6th ed, 2015) 6.14.

¹⁵ *International Arbitration Act 1974* (Cth) section 18C.

'... the arbitral tribunal shall adopt suitable procedures for the conduct of the arbitration in order to avoid unnecessary delay or expense, having regard to the complexity of the issues and the amount in dispute, and provided that such procedures ensure equal treatment of the parties and afford the parties a reasonable opportunity to present their case.'

To what extent does the procedural judgment rule provide a safe harbour for arbitrators?

Arbitrators' procedural management decisions are those pertaining to the *'proper conduct and organisation of the proceedings'* and are distinguished from substantive decision-making duties and powers.¹⁷

Klaus Peter Berger and J. Ole Jensen argue that, when determining issues of due process, an arbitrator is protected by what the authors label the 'procedural judgment rule'. This rule is analogous to the 'business judgment rule' applicable to decisions made by directors of companies.¹⁸ In Australia, for example, the business judgment rule provides protection for directors who make a business decision in good faith for a proper purpose, on an informed basis and on a rational belief that the decision is in the best interests of the company.¹⁹ Similarly, Berger and Jensen suggest that the procedural judgment rule would protect an arbitrator's procedural management decision when it is based on a genuine assessment of the case and the decision is reasonable in the circumstances.²⁰

As the authors surmise, a *'safe harbour for arbitrators' exercise of their procedural discretion* can be found in state courts' approach to reviewing arbitrators' management of procedural issues.²¹

In what circumstances do violations of due process lead to successful appeals against arbitral awards?

In practice, there is a high threshold for setting aside arbitral awards. Article 34(2)(a)(i) of the UNCITRAL Model Law provides that an arbitrator's award may be set aside if a party was *unable* to present its case. Article V(1)(b) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (**New York Convention**) is worded in identical terms.

Equally, section 8(5) of the IA Act provides that Australian courts may refuse to enforce a foreign arbitral award if the party against whom enforcement is sought proves to the court's satisfaction that the party was *unable* to present his or her case.

The recent case of *Hui v Esposito Holdings Pty Ltd*²² sets out the relevant test in stringent terms:²³

¹⁶ Above n 7, 422.

¹⁷ *Ibid*, 422.

¹⁸ *Ibid*, 428.

¹⁹ *Corporations Act 2001* (Cth) s 181.

²⁰ Above n 7.

²¹ Above n 7, 428.

²² (2017) 345 ALR 287.

²³ *Ibid* [183]-[185].

'In order to justify the setting aside or remittal of an award, real unfairness or real practical injustice must have resulted by the denial of the relevant opportunity to a party to present its case... Real unfairness or real practical injustice can be demonstrated by showing that there was a realistic rather than fanciful possibility that the award may not have been made or may have differed in a material respect favourable to the party said to have been denied the opportunity... The onus rests on the party seeking to set aside the award or remit the matter and no reverse onus applies.'

Analysis of relevant case law reveals that courts are reluctant to interfere with international arbitrators' procedural management decisions. Considering it is a 'key overriding principle' that arbitrators are afforded the 'widest discretion' by law when making procedural management decisions, the courts will only interfere to safeguard the parties' rights where there is a clear breach of procedural fairness. The courts insist that the tribunal's ultimate discretion in conducting proceedings does not justify an arbitrator failing to provide each party with a reasonable opportunity to present its case and deal with that of its opponent.²⁴ In practice, arbitrators have been found to have violated due process (and therefore their awards were set aside) where:

(a) in Australia:²⁵

- (1) the claimant claimed it was entitled to the balance of monies it said were due and payable under a contract;
- (2) the arbitrator held a number of directions hearings and delivered three sets of reasons and rendered two partial awards; the first declared that the respondents were obliged to make certain payments under the contracts, and the second dismissed a respondent's application that he be withdrawn;
- (3) there were real issues as to:
 - (A) who had contractual liability, and whether it sounded in liquidated or unliquidated damages; and
 - (B) the availability of any set-off for any breach of certain provisions, particularly where there was insurance cover; and
- (4) the arbitrator decided these substantive questions without hearing the respondents' arguments (and also exceeded the bounds of the preliminary hearing); and

(b) in Hong Kong:²⁶

- (1) arbitration proceedings were commenced by two claimants;
- (2) the respondent expressly confirmed during the hearing that its arguments on a certain point were directed against one claimant only;
- (3) the unaddressed claimant consequently made no further submissions on that point; and
- (4) in its award the tribunal made a ruling on that issue against the unaddressed claimant, and consequently ordered it to make a payment to the respondent;

(c) in Dubai:²⁷

- (1) the claimant made an error in the respondent's name in both the request for arbitration and statement of claim;
- (2) the respondent was not notified and was unaware of the arbitration proceedings;

²⁴ Fabricio Fortese and Lotta Hemmi, 'Procedural fairness and efficiency in international arbitration' (2015) 3(1) *Groningen Journal of International Law* 110, 112.

²⁵ *Hui v Esposito Holdings Pty Ltd* (2017) 345 ALR 287.

²⁶ *China Property Development (Holdings) Ltd v Mandecly Ltd* HCCT 53/2010.

²⁷ Ashraf El-Motei, 'Dubai Court of Appeal rejects a DIAC award due to arbitrator's breach of due process' (5 May 2016) Kluwer Arbitration Blog <<http://arbitrationblog.kluwerarbitration.com/2016/05/05/dubai-court-of-appeal-rejects-a-diac-award-due-to-arbitrators-breach-of-due-process/>>.

- (3) when the respondent was eventually notified, it requested time to appoint a lawyer and submit its statement of defence;
- (4) the request was rejected by the arbitrator because it was submitted 'without an official power of attorney' (a fact contested by the respondent); and
- (5) the arbitrator ordered the respondent to pay the claimant damages and legal fees for breach of contract, plus interest and costs.

In all of these cases, the awards (or infected parts of the awards) were judicially set aside.

Is due process paranoia truly justified?

It is difficult to quantify the success of arbitration in resolving disputes and the rate at which awards are enforced, due to the scarcity of reliable data on the topic.²⁸ However, a 2008 PricewaterhouseCoopers (PWC) study found that, of the cases studied, only 11% of arbitrations ended in proceedings for enforcement and recognition and a mere 8% involved an apparent settlement or award but were followed by litigation.²⁹ A more recent 2013 report by PWC confirmed that arbitration remains a popular mechanism for dispute resolution: 52% of respondents chose international arbitration as their first choice for resolving cross border disputes.³⁰ These statistics clearly evidence both the attractiveness of arbitration and the disinclination of parties to challenge arbitrators' awards.

The 2018 White & Case Survey lends its voice to the chorus calling into question the legitimacy of due process paranoia. Counsel and arbitrators who were surveyed 'vigorously contested' the concept, arguing that arbitrators should be confident enough that the courts at the seat would support arbitration. The report canvasses the widespread belief that the popularity of 'arbitration-friendly' jurisdictions stems partly from the fact that local courts readily defer to arbitrators' procedural management decisions in arbitration. The authors hypothesise that, if this is indeed the case, then the paranoia may arise more often in relation to jurisdictions where the local judiciary's support for arbitration is not so assured.³¹

There is extensive judicial commentary on the topic, which further reinforces the courts' hesitancy to question arbitrators' procedural management decisions. For example, the majority of the Federal Court in key authority, *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd*,³² notes that an arbitrator's decision will not be impeachable unless 'there is unfairness, true practical injustice'.³³ In that case, the evidence revealed no breach of due process, because the appellant received a scrupulously fair hearing in a hard fought commercial dispute. The Court found that the appellant's complaints concerned the evaluation of factual material only.

A Ugandan arbitral award was found to be enforceable in *Uganda Telecom Ltd v Hi-Tech Telecom Pty Ltd*,³⁴ wherein Foster J reflected on the right to a 'reasonable' opportunity to present one's case under the IA Act. His Honour acknowledged, 'The whole rationale of the Act... is to enforce such awards wherever

²⁸ Laina Chan, 'International Disputes, the Execution of Foreign Arbitral Awards in the Asia Pacific and Two Case Studies' (2015) 28(2) *New York International Law Review* 1,1.

²⁹ Gerry Lagerberg and Professor Loukas Mistelis, 'International Arbitration: Corporate Attitudes and Practices' (Report, PWC, 2008) 2.

³⁰ Gerry Lagerberg and Professor Loukas Mistelis, '2013 International Arbitration Survey' (Report, PWC, 2013) 6.

³¹ Above n 5.

³² (2014) 311 ALR 387.

³³ *Ibid* [108].

³⁴ (2011) 277 ALR 415.

possible... in order to support certainty and finality in international dispute resolution'.³⁵ The Federal Court agreed that the arbitral award was not infected by any issues of due process.

In *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC*,³⁶ Warren CJ emphasised that *'in all but the most unusual cases, applications to enforce foreign arbitral awards should involve only a summary procedure'*.³⁷ Her Honour stated that in order for section 8(5) of the IA Act to warrant a court's refusal to enforce an arbitral award, the court must be satisfied that the award *'is tainted by either fraud or vitiating error on the part of the arbitral tribunal.'*³⁸ This case is one of only a few in the Australian canon in which an arbitral award was not enforced. In that case, the Victorian Court of Appeal refused the enforcement of a Mongolian tribunal's arbitral award of \$USD 6 million against IMC Aviation Solutions, due to the extraordinary circumstances of the arbitration (i.e. the fact that IMC was not a party to the arbitration agreement).

International courts have also demonstrated a strong pro-enforcement stance. For example, when the Hong Kong Court of First Instance took the extraordinary measure of setting aside an ICC award in *Grand Pacific Holdings Ltd v Pacific China Holdings Ltd*,³⁹ the Court of Appeal did not hesitate to overrule its inferior court, and reinstate the award.⁴⁰ The Court of Appeal found that there was no violation of due process, and went even further, noting that, the *'court may refuse to set aside an award notwithstanding such violation if the court was satisfied that the outcome could not have been different'*.⁴¹

How do we solve the problem?

International groups such as the Chartered Institute of Arbitrators, the International Bar Associations, the ICC, the International Law Office, UNCITRAL and the American Arbitration Association, have all provided 'soft law' including guidelines and standards to ensure greater procedural uniformity, certainty and predictability amongst differing parties.⁴²

Best practices, such as the Chartered Institute of Arbitrators practice guidelines for managing arbitrations and procedural orders, provide guidance on:⁴³

- (a) *'organising procedural and/or administrative aspects of an arbitration, including techniques which can be used to manage the proceedings'*;
- (b) *'issuing procedural orders'*; and
- (c) *'dealing with parties' failure to comply with procedural orders'*.

This helps arbitrators to manage the expectations of parties in a manner whereby due process and procedural fairness are balanced against the arbitrator's duty to ensure an efficient, expeditious and economical resolution to the parties' dispute. However, it is difficult to determine statistically the success that soft law provides in arbitration matters.

³⁵ Ibid [126].

³⁶ (2011) 38 VR 303.

³⁷ Ibid [3].

³⁸ Ibid [53].

³⁹ [2011] 4 HKLRD 188.

⁴⁰ *Pacific China Holdings Ltd v. Grand Pacific Holdings Ltd* [2012] 4 HKLRD 1.

⁴¹ Ibid [101].

⁴² Above n 24, 114.

⁴³ Chartered Institute of Arbitrators, International Arbitration Practice Guideline arts 1-3.

After reviewing the case law, it is clear that the application of unified procedures throughout arbitration enhances the unlikelihood of the courts setting aside arbitral awards. This has been emphasised by the national and international judicial commentary canvassed above. Therefore, by utilising soft law as guidance, arbitrators significantly lower the risk of their awards being unenforceable.

This article confirms that due process paranoia experienced by arbitrators is unjustified in modern arbitration. The courts, by continuing to apply a high threshold towards overturning arbitral awards, have levied their support towards the procedural management decisions made by arbitrators. However, we continue to see circumstances where arbitrators are willing to sacrifice the expedited and cost effective nature of arbitration to ensure they do not infringe on a party's right to due process. But if there is no justification for the due process paranoia how can it be resolved?

The answer lies in the foundations of arbitration. Tribunals, by utilising the four core principles of transparency, proactivity, interactivity and proportionality can establish a general framework for procedural management rules and help streamline proceedings while preserving parties' due process rights.⁴⁴ These principles can be enforced through the multitude of rules (hard law), practice directions and procedures (soft law) provided by arbitral bodies.

At first instance, transparency should be utilised as an educational tool to provide parties who are unfamiliar with the arbitration process with guidance and understanding of the procedure. Such transparency can be implemented early in the process through a case management conference. Article 24 of the ICC Rules 2017 allows an arbitrator to clearly explain the procedure that he or she intends to adopt in conducting proceedings. Furthermore, it affords each party the opportunity to raise any grievance they may have with the arbitrator's chosen method. This not only contributes to a more streamlined proceeding, but also limits the potential for parties to appeal an award on due process grounds. Failure by the tribunal to be transparent throughout a proceeding can lead to a breach of natural justice which may result in an award being set aside. In *Fraport v Philippines*,⁴⁵ the tribunal's failure to disclose what they considered to be essential issues on the matter, caused a party to be denied due process, as it was not given the opportunity to make submissions on those essential issues. This was found to be a breach of natural justice and the award was annulled.

Once tribunals have established a transparent approach to the proceedings, it becomes a matter of enforceability to ensure parties abide by the allotted timeframes and procedure agreed. The tribunal must therefore be proactive in the continuing management of the proceedings, and reactive to parties being counterintuitive. There are specific rules whereby arbitrators can efficiently manage cases while limiting parties' rights. For example, Article 17(2) of the UNCITRAL Arbitration Rules 2013 and Article 22.1(ii) of the LCIA Arbitration Rules 2014, not only allow the tribunal to act on their own discretion, but can also limit a party's time in presenting their case.

The 2018 White & Case survey revealed that interviewees believed that arbitrators '*need to adopt a bolder approach to conducting proceedings and, if need be, apply monetary sanctions for dilatory tactics*'.⁴⁶ Therefore, by utilising the procedural management rules at their disposal, arbitrators can ensure that proceedings remain streamlined to address the key issues in the arbitration.

Although there are numerous beneficial case management approaches available to arbitrators, the need for proportionality still remains a necessity. The principle of proportionality '*requires that an arbitrator or*

⁴⁴ Above n 7, 429.

⁴⁵ *Fraport AG Frankfurt Airport Services Worldwide v The Republic of the Philippines* (ICSID Case No ARB/03/25).

⁴⁶ Above n 5.

tribunal remain flexible when considering how the proceeding should best be conducted.⁴⁷ By remaining flexible and responsive and considering the position of each party, an arbitrator can reduce the possibility of having an award set aside.

⁴⁷ Above n 7, 434.