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Chapter 8: Due Process Paranoia or Prudence?

Robin Oldenstam

In recent years, many users of international arbitration have voiced frustration over what has become popularly known as 'due process paranoia'. The perception has been that arbitrators, due to an exaggerated fear of their awards being challenged, lack decisiveness in certain procedural situations. This, in turn, is perceived to contribute to increased time and cost of international arbitrations.

Overall, the debate on due process paranoia has been healthy, as some arbitrators may well be overly cautious. At the same time, the debate has been almost singularly focused on the perception of users that arbitrators are 'paranoid' about due process and should be more firm in order to promote efficiency. Given this focus, it has often failed to question the general applicability and correctness of the diagnosis as such and to appreciate fully the delicate balancing act underlying many procedural decisions. Although important, procedural decision-making is not only about efficiency. It should also be guided by broadly framed considerations of fairness and long-term risk management. Taking such broader considerations into account, what may sometimes be perceived as an overly cautious and inefficient procedural decision in the short-term, may in fact be the result of an arbitrator acting with prudence, potentially saving more time and cost in the long term.

§8.01 BACKGROUND

Are arbitral tribunals paranoid about due process? Such was at least the diagnosis of the 2015 International Arbitration Survey by Queen Mary University of London. According to that survey, the phenomenon popularly referred to as 'due process ● paranoia' was a growing concern among many users of arbitration. (1) This malady manifests itself as a reluctance by arbitrators to act decisively in various procedural situations, due to an exaggerated fear of their award being challenged on the basis of a party not having been given the chance to present its case fully. Arbitrators supposedly suffering from such paranoid tendencies will be overly generous in allowing, for example, requests for document production, late introduction of additional evidence and claims, as well as unsolicited filings of submissions. In so doing, arbitrators are seen to contribute to the increased cost and delay of arbitral proceedings. In a nutshell, users complaining over due process paranoia believe that arbitrators are not being sufficiently firm in managing the arbitral process, but are too often making wasteful and uneconomic procedural decisions due to overly cautious and incorrect risk assessments. (2)

The Queen Mary survey triggered a considerable amount of debate at arbitration conferences, (3) and in various arbitration journals and blogs. (4) As part of that debate, some practitioners commented on the absence of statistical data supporting the proposition that arbitral awards were actually being set aside due to tribunals having acted overly robust in their procedural decision-making. (5) This appears to be true at least for the majority of arbitration-friendly jurisdictions, including – among others – popular seats in Europe such as London, Paris, and Stockholm. (6) For instance, there has not been a single award made in Stockholm in modern time, which has been set aside based on an alleged procedural irregularity in a tribunal's conduct of the arbitral proceedings. (7) This is so despite it being the most frequently invoked basis by parties challenging arbitral awards before the Swedish Courts of Appeal. (8)

Another issue attracting comments from arbitration practitioners has been the legal definition of due process itself and the actual scope within which parties could invoke an infringement of their rights in relation to procedural management decisions by arbitral tribunals. From a strict legal perspective, this scope has been analysed and described as only encompassing the most clear and severe misuses of the tribunal's ● procedural discretion, resulting in a serious violation of a party's rights. That may be a considerably higher threshold for infringement of due process than what some arbitrators may initially perceive, effectively creating a 'safe harbour' for the vast majority of procedural decisions. (9)

Although the debate continues, the general consensus so far appears to be that any due process paranoia harboured by arbitrators is largely unfounded as a matter of both statistical fact and law. Consequently, the conclusion has been that arbitrators could afford to be much less cautious and much more firm in managing the arbitral process. However, taking a broader perspective on procedural decision-making, there may be reasons to question that conclusion.

§8.02 PERSPECTIVES

Overall, the discussion about the perceived due process paranoia of arbitrators has been healthy. It has shed light on a phenomenon that could cause unnecessary cost and delay.

The attractiveness of arbitration, as an efficient way of resolving international commercial disputes, will suffer if tribunals are seen to be making overly cautious, and thus economically wasteful, procedural decisions due to incorrect risk assessments. This is especially so given the mounting criticism in recent years from many users of arbitration over the time and cost of bringing a claim. Hopefully, the discussion regarding due process paranoia has bolstered confidence in those arbitrators who may have had a tendency to be overly cautious and persuaded them to take a more robust and proactive approach to case management.

However, at times the debate appears to have focused almost exclusively on the perception of users, that arbitrators are 'paranoid' about due process and need to be much more firm in order to promote efficiency as to time and cost. Given this focus, it has often failed to question the general applicability and correctness of the diagnosis as such and to appreciate fully the delicate balancing act involved in procedural decision-making. In reality, what users may sometimes perceive as overly cautious decisions caused by 'due process paranoia', may in fact be the result of tribunals acting with due sensitivity and prudence. The potential for such misconceptions is likely exacerbated by the fact that many procedural decisions are made without providing much in the way of detailed reasoning, (10) leaving parties greater room to speculate as to the true, underlying reasoning of the arbitrators.

Everyone can agree that untimely procedural requests should not be entertained when they appear as nothing but ill-disguised attempts to ambush the other party or to delay, or even derail, the proceedings. The problem of course is that many requests involving, for instance, late filings of additional submissions or evidence, are not obviously made in bad faith (even though the opposing party will almost invariably ● argue the contrary). P 124 The party making the request may genuinely believe that the tardiness of the filing is excusable given the circumstances and that being allowed to make it is essential to its case. At any rate, many procedural requests fall within a grey area, where arbitrators may be rightfully reluctant simply to dismiss them on formal grounds, but feel an obligation to consider them on their merits. In doing so, the arbitrators must balance, among other factors, the potential for adding time and costs to the proceedings against the interest of the requesting party in being given a reasonable opportunity to present its case.

With regard to the first factor, most arbitrators will be acutely aware of their duty to manage their cases effectively, to safeguard agreed procedural timetables, and ultimately to render final awards within the deadlines set by applicable institutional rules or otherwise. This duty is not only generally expressed in many national arbitration laws, (11) but also in most institutional rules, such as Article 22.1 of the ICC rules, which calls for arbitrators to 'make every effort to conduct the arbitration in an expeditious and cost-effective manner'. (12) This duty of the arbitrators is also increasingly being monitored and financially sanctioned by leading arbitral institutions, (13) as those institutions respond to growing concerns over time and cost from users. Last, but not least, most arbitrators understand that their reputation in the market is likely to suffer if they appear to mismanage cases and allow them to become unjustifiably protracted. If nothing else, sheer self-interest should, thus, guide them to avoid unnecessary cost and delay. All in all, there are plenty of reasons for arbitrators to tip the scales in favour of efficiency and timeliness.

However, if too much emphasis is put on procedural efficiency and timeliness, arbitral tribunals run the risk of acting unfairly. Whatever effort has been put into agreeing to timetables, including procedural cut-off dates and the like, there will always be situations that have not been fully anticipated or which may otherwise warrant an exception. To that end, arbitral tribunals will almost invariably reserve the right to exercise their discretion and accept deviations from the agreed timetables, e.g., regarding the late filing of additional submissions or evidence. This right to exercise discretion is also recognized by the rules of most leading institutions, (14) as is the fundamental and overriding duty of the arbitral tribunal to give each party an equal and reasonable opportunity to present its case. The primacy of this latter duty is often ● P 125 expressed by absolute wordings such as 'In all cases ...', (15) indicating that the fair opportunity for each party to present its case may ultimately trump most other considerations, including efficiency as to time and cost.

Consequently, even if procedural efficiency and timeliness are undoubtedly of very real and growing importance, they must always be balanced against other considerations, including procedural fairness. To most arbitrators, such considerations rightfully go well beyond the bare minimum that may be legally required to avoid annulment of the award. What constitutes sufficient procedural fairness in a practical situation is also unlikely to turn on any strict, legal definition of due process rights. Ultimately, it may simply rest on an ambition by the arbitrator to have the losing party feel that, at least, it had its 'day in court'. For a seasoned arbitrator this ambition likely has less to do with any deep-felt sympathy for the losing party and more to do with a broad, long-term sense of risk management. As such, it may include taking account of some or all of the following factors.

First, one of the fundamental advantages of arbitration is that it provides a 'one stop shop' with no right of appeal. In commercial relations, getting disputes sorted out sooner rather than later may often be critically important, so as to enable the parties to move

on and instead focus on growing their businesses. However, given that there will be no second chance to argue the merits of the case before a higher authority, it is all the more important that arbitral tribunals do not curtail or prevent a party from presenting its full case without good reason.

Second, a losing party will almost inevitably feel some level of dissatisfaction with the outcome. This substantive dissatisfaction is probably more likely to result in a challenge of the award if that party also feels procedurally dissatisfied. If the losing party is left believing that it might have prevailed, had it only been allowed to present its full case, such party will likely find it much harder to accept the final award. Consequently, for arbitral tribunals wishing to limit the risk of a subsequent challenge, it will be rational to make reasonable efforts at least to leave the losing party procedurally, if not substantively, satisfied. In light of this, once arbitrators begin to get a sense of where a case might be heading, some may tend to become a bit more generous on matters of procedure towards the potentially losing party.

Third, denying a party's procedural request leaves a mark in the record. Even if the denial was objectively warranted, it could still provide a potential basis on which that party may later attempt to build a case for procedural irregularity. All things being equal, most arbitrators would likely prefer to avoid that. Instead, at the close of the proceedings, many arbitral tribunals would ideally like both parties to confirm for the record that they are fully satisfied with the tribunal's handling of the dispute. In so doing, the arbitrators are trying to protect the integrity of the upcoming award and make it harder for the losing party to subsequently challenge it.

P 126 Fourth, most arbitrators will know that challenges of awards – at least in arbitration-friendly jurisdictions – are typically an uphill struggle, with very few resulting in whole or even partial set aside. For instance, based on data covering the ● last fifteen years, the statistical likelihood for a challenge of an award to be successful before the Swedish Courts of Appeal is only around 5%. (16) The same is also largely true as regards attempts to resist having foreign awards recognized and enforced under the 1958 New York Convention. The New York Convention only allows for a relatively narrow set of objections to be made, all of which will rely on circumstances typically falling on the party resisting enforcement to prove. (17) However, despite the relatively small statistical risk for set-aside or non-enforcement of an arbitral award, it is still rational for an arbitral tribunal not to make procedural decisions that may unnecessarily increase that risk. In this sense, making cautious procedural decisions may be compared to paying an insurance premium against an unlikely, but extremely damaging, event. (18) If the award were to be set aside or its enforcement refused, the entire arbitration would have been for nothing. Although statistically a low risk, the potential consequences if the event materializes are so dire that they cannot be disregarded, but need to be taken into account by the arbitrators.

In this context, it may also be worth remembering that the statistics supporting the low risk of awards being set aside or refused enforcement are likely the product of the current environment, where most arbitrators generally prefer to err on the side of caution. A very different environment, where those same arbitrators had been considerably less cautious, may well have led to more awards being successfully challenged or refused enforcement and may, thus, have impacted on those statistics. In other words, the statistics may potentially say more about the prevailing cautiousness of arbitrators than of the actual risk for an award to be set aside due to overly firm procedural decision-making.

P 127 Fifth, even if arbitrators were to rely on the fact that most challenges and objections to enforcement of awards are ultimately unlikely to be successful, it anyway makes sense to try to avoid them altogether. Depending on the jurisdiction, challenge or enforcement proceedings (where enforcement is being disputed) before the local courts may well take many months or even years. Meanwhile, the integrity of the arbitral award and its enforceability will remain uncertain and the party defending the award will be incurring additional, substantial legal costs. Depending on, amongst other things, the jurisdiction where the proceedings are taking place as well as the jurisdiction(s) where a potential cost order may have to be enforced, such legal costs ● may not be recoverable from the other party regardless of the outcome. (19) Consequently, even if the party defending the award ultimately prevails, it may still end up losing a lot of time and cost, which might have been avoided had the losing party not been provided with a reason for attempting an attack on the award in the first place.

Sixth, the risk of setting aside an award or refusing enforcement may vary between different jurisdictions. In less arbitration-friendly jurisdictions, this risk may be more significant. Consequently, depending on the seat of the arbitration as well as on the potential jurisdiction(s) for enforcement of the upcoming award, an increased degree of procedural caution from the arbitrators may well be warranted. Arbitrators will typically take this into consideration. Most institutional rules will also oblige arbitrators to try their best to render enforceable awards. By way of example, Article 2(2) of the SCC Rules calls for arbitrators to 'make every reasonable effort to ensure that any award is legally enforceable'. (20)

Seventh, at least in my own humble experience, complaints about 'due process paranoia' often (although admittedly not always) come from parties that found the length and cost

of an arbitral proceeding frustrating, but who ultimately won. (21) In such cases most, if not all, of the negative consequences of cautious decision-making by the arbitrators may be compensated by awarding the winning party its legal costs. This may be a further reason for some arbitrators to err on the side of procedural generosity and allow, rather than disallow, e.g., the late filing of additional evidence or of an additional submission by the (ultimately) losing party. Even if the (ultimately) winning party may feel dissatisfied with the added time and cost caused by what it perceives to be an overly generous procedural decision, it may at least be compensated for the cost element in the final award. Furthermore and as mentioned above, the very decision which was felt to be overly generous may in fact end up saving the winning party from incurring even greater cost and delay in the future by avoiding a potential challenge to the award. In other words, what may appear as being an unnecessarily generous and wasteful decision in the short term, may potentially turn out to be a time- and cost-saving measure in the long term.

The seven factors listed above are mere examples of circumstances that may speak in favour of procedural cautiousness. They are by no means exhaustive, and there may be various other circumstances guiding the arbitrators in the same direction. At the same time, none of the foregoing factors are decisive in and of themselves, as they will always need to be weighed carefully against other considerations – not least considerations of efficiency and timeliness – in order for an arbitral tribunal to come to a final decision.

P 128 The direction in which the scales may tip will, as always, depend on ● the circumstances of the specific case. It will also very much depend on the personal inclinations of the individuals comprising the arbitral tribunal. Procedural decision-making is ultimately a human process, with no two arbitrators having an identical mind-set. Personal character and individual experience are likely to influence, amongst other, procedural preferences and the perception of risk. The same is true for the parties and their counsel. When subsequently appraising a tribunal's decision on a matter of procedure, one party may well see the decision as being too soft, while the other party may see it as being just right or even too firm. It may all depend on the individual perspective, experience and preferences of the person making the appraisal. Those same individual factors may also lead parties and their counsel to attribute a particular procedural decision to differing considerations on the part of the arbitrators, ranging all the way from due process paranoia to prudence.

§8.03 CONCLUSION

The work of an international arbitrator is challenging at the best of times, often involving a delicate balance of various conflicting interests. Currently, a lot of effort is focused on efficiency, as the arbitration community responds to increasing pressure from users to bring down time and cost. The debate regarding due process paranoia may be seen as part of that general trend, shining light on what is perceived by many users of international arbitration as an exaggerated fear of challenges among arbitrators, causing a lack of decisiveness in certain matters of procedure, which in turn contributes to increased cost and delay of arbitrations.

The increased focus on time and cost, including the debate over due process paranoia, is principally healthy and likely vital to the long-term survival of arbitration as a favoured mechanism for solving international commercial disputes. However, it is important that this focus is tempered by other considerations. Procedural decision-making is not only about getting to a final award in the most timely and cost-efficient fashion. The process must also be guided by broadly framed considerations of fairness and long-term risk management. Ideally, it should ultimately allow particularly the losing party to feel that it has, at the very least, had a reasonable opportunity to present its case. This calls for arbitrators to be neither overly firm, nor overly cautious.

The delicate balancing act performed and the full underlying reasoning of arbitral tribunals in reaching a particular procedural decision are not always apparent to the parties. Particularly, parties may not always appreciate the broad, long-term risk management that may have been guiding the arbitrators. Procedural decision-making is also inherently subjective and highly fact-driven. A given decision may therefore be perceived very differently depending on individual experience and perspective. Those same experiences and perspectives may also lead parties to attribute a particular procedural decision to differing considerations by the tribunal, sometimes potentially mistaking prudence for paranoia.

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References

- 1) Queen Mary University of London, *International Arbitration Survey: Improvements and Innovations in International Arbitration*, <http://www.arbitration.qmul.ac.uk/research/2015/> (accessed 31 Oct. 2018).
- 2) Anjali Dwivedi et al., *The Sword of Due Process in Arbitration*, Arbit Ratio (22 Nov. 2016).

- 3) For example, Lucy Reed, *(Ab)Use of Due Process: Sword or Shield*, Freshfields arbitration lecture (2016), and Philippe Pinsolle, *The Need for Strong Arbitral Tribunals*, ICCA Plenary, Mauritius (2016). In more recent times, due process paranoia has, amongst other, been debated at GAR Live in Atlanta and in Stockholm.
- 4) See, e.g., Francesca Albert, *Curing 'due process paranoia'*, <http://arbitrationblog.practicallaw.com/curing-due-process-paranoia/> (accessed 31 Oct. 2018).
- 5) See, e.g., Rémy Gerbay, *Due Process Paranoia*, <http://arbitrationblog.kluwerarbitration.com/2016/06/06/due-process-paranoia/> (accessed 31 Oct. 2018).
- 6) *Id.*
- 7) The Swedish Arbitration Act (1999), Art. 34(1) item 6, deals with procedural irregularities and provides, in relevant parts, that 'An award [...] shall, following an application, be wholly or partially set aside upon motion of a party: [...] if, without fault of the party, there otherwise occurred an irregularity in the course of the proceedings which probably influenced the outcome of the case.'
- 8) Johan Munck et al., *Mål om klander av skiljedom i hovrätterna*, Svensk Juristtidning, p. 141, (2015).
- 9) Klaus Peter Berger et al., *Due Process Paranoia and the Procedural Judgment Rule: A Safe Harbour for Procedural Management Decisions by International Arbitrators*, 32 *Arbitration International*, pp. 415–435 (2016).
- 10) For example, the granting of requests for document production sometimes comes with no more reasoning from the tribunal than a simple 'granted' in the final column of a Redfern Schedule.
- 11) See, e.g., the Swedish Arbitration Act (1999), Art. 21 and the English Arbitration Act (1996), Art. 33(1)(b).
- 12) See, e.g., the ICC Rules of Arbitration (2017), Art. 22(1), the SCC Arbitration Rules (2017), Arts 2(1) and 23(2), the LCIA Arbitration Rules (2014), Art. 14.4(ii) and the ICDR Arbitration Rules (2014), Art. 30(1).
- 13) See, e.g., the SCC Arbitration Rules, Art. 49(3) stating that: 'In finally determining the Costs of the Arbitration, the Board shall have regard to the extent to which the Arbitral Tribunal has acted in an efficient and expeditious manner.' See also ICC's, *Note to parties and arbitral tribunals on the conduct of the arbitration under the ICC rules of arbitration*, para. 88, <https://cdn.iccwbo.org/content/uploads/sites/3/2017/03/icc-note-to-parties-and-arbitral-tribunals-on...> (accessed 31 Oct. 2017), stating that, 'Where the draft award is submitted after the time referred to in paragraph 84 above, the Court may lower the fees as set out below.'
- 14) See, e.g., the ICC Rules of Arbitration, Arts 31(2) and 39(2), the SCC Arbitration Rules, Arts 28(5) and 43 and the LCIA Arbitration Rules, Art. 22.1(ii) and 22.5.
- 15) See, e.g., the ICC Rules of Arbitration, Art. 22(4) and the SCC Arbitration Rules, Art. 23(2).
- 16) For the first ten-year period from 1 Jan. 2004, see Johan Munck et al., *Mål om klander av skiljedom i hovrätterna*, Svensk Juristtidning p. 141 (2015). The author has then added his own review of all challenged cases before the Svea Court of Appeal in Stockholm from 2014 until today. The most common basis for setting aside awards has been that the arbitrators have acted *ultra petita* or that an arbitrator has been found to have been conflicted.
- 17) The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), Art. 5 (1958).
- 18) The size of this 'premium' will, amongst other, depend on its ultimate impact on the timing of the final award. If a party's procedural request can largely be accommodated within an existing schedule or at least without jeopardizing the time for rendering the final award, it is probably more likely to be granted by a tribunal.
- 19) In some jurisdictions, the cost follows the event rule does not apply or is limited in the ordinary courts. Even if full costs are awarded, the judgement may not be enforceable in any jurisdiction where the losing party has assets, as the recognition and enforcement of foreign court judgements is much more limited than the corresponding recognition and enforcement of foreign arbitral awards under the 1958 New York Convention.
- 20) See also, e.g., the ICC Rules of Arbitration, Art. 42.
- 21) This experience comes largely from a number of conferences, where certain in-house counsels have been very vocal in complaining about due process paranoia, but in doing so has referred exclusively to cases in which the companies they represented ultimately won.

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