



Effective Measures Of Preventing Due Process Paranoia In International Arbitration

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ABSTRACT

In the contemporary world, people increasingly prefer alternative dispute resolution options to litigation in order to get more flexible process with quicker and cheaper results. One of the most recognizable forms of alternative dispute resolution is arbitration. The main benefits of arbitration are its neutrality of place, finality of process, flexibility, confidentiality, party autonomy, cost and time effectiveness, and finally its universally recognised process. However, lately arbitration has been criticizing for repeatedly extensions of deadlines by tribunals, recognitions of late evidences, acceptance of multiple amendments to a party's written submissions and reschedule hearings by agreeing to last minute requests. This phenomenon is also known as due process paranoia. This article will emphasize the main reasons for due process from both respondents and arbitrators' point of view. Moreover, the methods of improving the efficiency of arbitral proceedings and reducing cost and delay will be critically reviewed.

KEYWORDS

Alternative dispute resolution, arbitration, arbitral tribunal, Med-Arb, Arb-Med, due process, due process paranoia, sanction, monetary sanction, execution, enforcement, enforcement risks

INTRODUCTION

The 2018 International Arbitration Survey by Queen Mary, University of London and White & Case on "The Evolution of International Arbitration" (the Survey) revealed some drawbacks of the arbitration institutions, in

particular, participants of arbitration believed that "due process paranoia" prevented arbitrators from conducting proceedings more efficiently. "Due process paranoia" described as 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. It can be seen by repeatedly extension of deadlines by tribunals, recognition of late evidences, acceptance of multiple amendments to a party's written submissions, disregard to devastating manners of the counsels regarding deliberately delays of the processes and reschedule hearings by agreeing to last minute requests in order to avoid awards being challenged. As practice shows, these steps may lead to unnecessary delays and increased costs.

In the Survey, a considerable number of people believed that one of the reasons for “due process paranoia” is a lack of effective use of sanctioning powers during arbitral proceedings. They were convinced that arbitrators do not use sanctions effectively towards the parties even there are legal grounds¹. Remy Gerbay divides “due process paranoia” into three components. In first component, it was indicated that this phenomenon related to case management considerations and arbitral tribunal pays too much attention to due process, considering protection of interests of defendants. The second element is related to enforcement risks as tribunal might be careful conducting procedure otherwise its award may be refused enforcement. The last component which is a main reason for “due process paranoia” is a fallacious perception by arbitral tribunal that this excessive carefulness is justifiable².

However, a number of arbitrators and counsels argue these approaches explaining that arbitrators should be fairly assured while conducting proceedings in order to get support from the courts at the seat. They also indicated that during an arbitration process, arbitrators take into consideration a jurisdiction where enforcement takes place, as in some jurisdictions endorsement of arbitration may not be so certain by the local judiciary³. In addition, arbitrators might consider that in the long term being cautious is not so detrimental as in the future it prevents parties from challenging awards or litigating, which will take way more time and will cost much higher.

As stated above a jurisdiction where an enforcement takes places is an important factor. Article 41 of the International Chamber of Commerce Arbitration Rules states that the arbitral tribunal shall make every effort to make sure that an award is enforceable⁴. In spite of the effective influence of the New York Convention, the situation with enforcement is different in each jurisdiction. Some of the jurisdiction are more arbitration-friendly while others are less liberal. Arbitrators should not be too cautious when it comes to England though. England is well known for it is arbitration friendly environment. The ratio when the English courts set aside awards with excessively robust conducts is low⁵. The Arbitration Act 1996, in particular, section 68 and section 33 regulates the issues of whether an arbitrator has been overly robust while conducting the case and making an award. For

¹ 2018 International Arbitration Survey: The Evolution of International Arbitration, p.27

² Remy Gerbay, *Due Process Paranoia* (Kluwer Arbitration Blog, MoloLamken LLP, June 6, 2016/2) available online at <http://arbitrationblog.kluwerarbitration.com/2016/06/06/due-process-paranoia/>

³ 2018 International Arbitration Survey: The Evolution of International Arbitration, p.27

⁴ ICC Arbitration Rules 2012, Article 41

⁵ Remy Gerbay, *Due Process Paranoia* (Kluwer Arbitration Blog, MoloLamken LLP, June 6, 2016/2)

instance, section 33(1) of the Act states that “the tribunal shall act fairly and impartially as between the parties, giving each party a reasonable opportunity, and adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense”⁶ and section 68 provides circumstances when party to arbitral proceeding can challenge an award on the ground of serious irregularities such as tribunal’s failure to comply with s.33, exceeding its powers and irregularity in the conduct of the proceedings⁷. This means that the arbitrator should consider and analyze the above sections while conducting an arbitral procedure.

Moreover, since the enactment of the Act, when over a hundred decisions citing section 33 were reported, there was not a single decision where awards were set aside by the English court because of the excessively robust case management by the tribunal⁸ which entails, for example, by rejecting extension of deadlines, not recognizing late evidences, refusing to accept multiple amendments to a party’s written submissions, rejecting to reschedule hearings to last-minute requests. On the contrary, applications based on excessively robust case conducts have been rejected by several English decisions. Decline to adjourn a hearing (*Konkola Copper Mines Plc v U&M Mining Zambia Ltd* [2014] EWHC 2374 (Comm); *Goel v Amega Ltd* [2010] EWHC 2454 (TCC) (QBD (TCC)) rejection to conduct an oral hearing (*O’Donoghue v Enterprise Inns Plc*

[2008] EWHC 2273 (Ch)); proceeding with a telephone hearing in the absence of party which was made aware of the hearing (*Interprods Ltd v De La Rue International Ltd* [2014] EWHC 68 (Comm)); refusal to grant a stay (*J Jarvis & Sons Ltd v Blue Circle Dartford Estates Ltd* [2007] EWHC 1262 (TCC)⁹. Refusal of recognition or enforcement of a New York Convention award by English courts was also reviewed and of the 26 judgements, courts only refused in 6 instances to enforce a New York Convention award. This indicates that in England court judgements not recognizing or enforcing a New York Convention award is a relatively rare occurrence, regardless of the grounds¹⁰.

Evidently, being overly cautious can lead to ineffective results. As we know, one of the main concerns in arbitration are excessive cost and delay. Each time arbitrators choose being cautious instead of conducting a case efficiently where it is possible and reasonable, it leads to uneconomical consequences. In fact, as it has been pointed out the ratio of successfully challenged arbitral awards does not indicate effectiveness of cautious behaviour of arbitrators, hence, it implies that arbitrators should conduct cases more robustly¹¹. The above interpretations signify the excessively cautious attitude of arbitrators which does not contribute to effective arbitral proceedings but only causes unnecessary delays and increased costs.

⁶ Arbitration Act 1996, Section 33(1a)

⁷ Arbitration Act 1996, Section 68(2)

⁸ Badar Al Raisi, Remy Gerbay, *Due Process Paranoia (Part 2): Assessing the Enforcement Risk under the English Arbitration Act*, (Kluwer Arbitration Blog, February 20, 2017) available online at <http://arbitrationblog.kluwerarbitration.com/2017/02/20/due-process-paranoia-part-2-assessing-the-enforcement-risk-under-the-english-arbitration-act/>

⁹ Remy Gerbay, *Due Process Paranoia* (Kluwer Arbitration Blog, MoloLamken LLP, June 6, 2016/2)

¹⁰ Badar Al Raisi, Remy Gerbay, *Due Process Paranoia (Part 2): Assessing the Enforcement Risk under the English Arbitration Act*, (Kluwer Arbitration Blog, February 20, 2017)

¹¹ Remy Gerbay, *Due Process Paranoia* (Kluwer Arbitration Blog, MoloLamken LLP, June 6, 2016/2)

Over the past decades, the relevance of “time and cost” in international arbitration has been through inconsistent changes. What once was the main attractiveness of international arbitration and what made it the most worthwhile alternative to litigation in state courts as it was fast litigation at low cost, is now appears its one of the main drawbacks¹². What kind of measures could be taken to make arbitral proceedings more effective in terms of cost and time? Below we will consider and discuss effective ways of improving arbitral proceedings and make them cost and time effective.

Primarily, it is necessary to determine effective measures of preventing due process paranoia as we concluded, one of the main reasons for paranoia is an unjustifiable perception of the circumstances. First, arbitrators should consider realistic and accurate approach to the enforcement risks, in particular, to have better access to information¹³. It means that that arbitrators should study cases including on the enforceability and recognition and accordingly manage their management. Obviously, it is not easily manageable and almost impossible to study each jurisdiction, legislation and its policy towards the enforcement procedure but having access to better information leads to effective results.

Further, question arises regarding arbitrator’s powers. It is clear that, in order to properly conduct and control the case more robustly, arbitrators need possess sharp and clear powers. Attempting to properly interpret authority of arbitrators the International Law Association’s Committee on International Commercial Arbitration issued a Report that clarifies implied and inherent powers¹⁴. Arbitration agreement, and applicable rules set implied powers given to the arbitrators. At the same time, powers that are stem from the essence of arbitration and arbitrator’s duties are called inherent powers. These competences give arbitrators fully execute their mandate in due course. Moreover, annex to the London Court of International Arbitration Rules (General Guidelines for the Parties’ Legal Representatives)¹⁵ promotes the proper conduct of the parties’ legal representatives and regulates arbitrator’s authority when dealing with misconduct of the parties’ lawyers. By expanding implied powers, the LCIA tries to minimise situations in which arbitrators would base their decisions on the ‘grey area’ of inherent powers. These efforts to clarify and codify arbitrators’ authority encourages to create more certainty, producing instructions that further emphasizes an understanding of a proper international standard¹⁶.

¹² Klaus Peter Berger and J. Ole Jensen, *Due process paranoia and the procedural judgment rule: a safe harbour for procedural management decisions by international arbitrators*, (Arbitration International, 2016, 32, 415–435) available online at <https://academic.oup.com/arbitration/article-abstract/32/3/415/1741430>

¹³ Remy Gerbay, *Due Process Paranoia* (Kluwer Arbitration Blog, MoloLamken LLP, June 6, 2016/2)

¹⁴Conference Report Washington DC 2010, (International Law Association Committee on International Commercial Arbitration), available online at <https://www.ila-hq.org/index.php/committees>

¹⁵ LCIA Arbitration Rules (2014), General Guidelines for the Parties’ Legal Representatives, available online at

https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2014.aspx#Article%2032

¹⁶ Leon Kofpecký, Victoria Pernt (Schoenherr), *A Bid for Strong Arbitrators*, (Kluwer Arbitration Blog, April 15, 2016) available online at http://arbitrationblog.kluwerarbitration.com/2016/04/15/a-bid-for-strong-arbitrators/?doing_wp_cron=1589147785.267244100.5706787109375

In turn, Professor of Law Klaus Peter Berger describes two types of procedural management resolutions on the effective conduct of arbitral cases by international arbitrators. First one is *ex ante* and the second one is *ad hoc* decision which is usually made during the proceedings, when parties ask arbitrators for procedural requests. In addition, he claims that eventually the dispute belongs to the parties and when they preferred arbitration to state courts, they also took into account the right to choose methods of the arbitral proceeding and how it should be conducted. And their autonomy referring their case to arbitration does not end after choosing arbitration, it also includes a choice of methods of managing their case by arbitrators¹⁷. These flexibilities of the arbitral proceedings have always been considered as one of the main distinctions between arbitration and state court litigation¹⁸.

Occasionally, not all cases are well-defined. In some instances, it is quite difficult to define the real intentions of the parties and in such cases, making right decisions becomes challenging. In this context, arbitrator's risk management decisions should be based on two essential features of the arbitral procedure: the arbitrator's pursuit for efficient proceedings caused by the parties request for time and cost

efficiency on the one hand; and the arbitrator's role as keeper of due process and guarantor of the legality of arbitration on the other hand¹⁹. In case parties have not agreed on procedures supposed to be followed by the arbitrators in conducting the proceedings or there is a void between the parties and their arbitral agreement, this gap can be eliminated by extensive procedural discretion given to the arbitrators. In the absence of an agreement, any arbitration law provides arbitrators with the discretion to conduct the proceedings in any way they see fit, following to the parties' due process rights²⁰. This discretion has been entitled as one of the fundamental elements of the international arbitral process²¹.

Article 34(2) of the UNCITRAL Model Law indicates that if parties could not present their case then an award may be set aside²². At the same time Article 18 of the Model Law identifies an essential regulation of due process by clarifying that "each party shall be given a full opportunity of presenting its case"²³. It is worth to point out that the principal definition in this context is "full". Arbitrators affected with due process paranoia may grasp it that parties must get all opportunities to present or defend their claim. However, the term "full" does not mean that arbitrators must sacrifice all efficiency in order to accommodate unreasonable demands of

¹⁷ Klaus Peter Berger and J. Ole Jensen, *Due process paranoia and the procedural judgment rule: a safe harbour for procedural management decisions by international arbitrators*, (Arbitration International, 2016, 32, 415–435)

¹⁸ Nigel Blackaby and others, *Redfern and Hunter on International Arbitration* (6th edn, OUP 2015) para 1.114.

¹⁹ L Yves Fortier, *The Minimum Requirements of Due Process in Taking Measures against Dilatory Tactics: Arbitral Discretion in International Commercial Arbitration* (A Few Plain Rules and a Few Strong Instincts in Albert Jan van den Berg edn, *Improving the Efficiency of Arbitration Agreements and Awards*: 40

Years of Application of the New York Convention (Kluwer 1999) 397.

²⁰ UNCITRAL Model Law on International Commercial Arbitration 1985, with amendments as adopted in 2006, Article 19(2)

²¹ Gary B Born, *International Commercial Arbitration* (2nd edn, Kluwer 2014).

²² UNCITRAL Model Law on International Commercial Arbitration 1985, with amendments as adopted in 2006, Article 34(2)

²³ UNCITRAL Model Law on International Commercial Arbitration 1985, with amendments as adopted in 2006, Article 18

the parties. By coordinating a procedural request of a party with an efficient resolution of the dispute, the rights of the other party and parties' mutual consent to the effective resolution of their dispute in arbitration can be respected. Arbitrators should be guided by these understandings and exercise their judgement while managing a process²⁴.

One of the reasonable ways of making arbitral proceedings more effective is using hybrid methods of dispute resolution options. For instance, Med-Arb or Arb-Med. First one is a hybrid process where parties first go to mediation and in case, they cannot reach a settlement they may invite the mediator as an arbitrator to conduct the case and make an award. The main benefit of this method is certainty of the process and if parties cannot settle their disputes by mediation, they can use arbitration and the same person will act as both mediator and arbitrator which apparently will cost less and save time²⁵. However, some people argue that Med-Arb process is not sufficient as it seems. By the time dispute arose parties have often already attempted and failed to make an agreement or resolve their differences²⁶.

The second option is Arb-Med. In this case, arbitration takes place first and then mediation. There will be a sealed arbitration

award that is not revealed to the parties unless they fail to reach an agreement in mediation that will follow arbitration. The same person will lead first arbitration then mediation processes²⁷. Because the arb-mediator makes an award prior to mediation, the parties may feel more confident to share confidential information including their weaknesses regarding to the dispute during the mediation process. In addition, an award cannot be considered or accused of bias as it was made before mediation and only with the evidence which parties provided during the arbitral process²⁸.

Moreover, some may consider both arbitration and mediation in parallel. Certainly, these procedures will be conducted by different person, but it may save time if all these procedures will be held with proper time-management techniques and reasonable approach as it requires to coordinate both mediation and arbitration at the same time. In order to conduct effective arbitral process, arbitrator should also control and help parties to properly finalize their timetable settings. Once agreed, it must be followed by both parties strictly and should not be any compromises regarding the timetable even there is a potential settlement on the horizon²⁹.

²⁴ Klaus Peter Berger and J. Ole Jensen, *Due process paranoia and the procedural judgment rule: a safe harbour for procedural management decisions by international arbitrators*, (Arbitration International, 2016, 32, 415–435)

²⁵ Susan Blake, Julie Browne & Stuart Sime, *A Practical Approach To Alternative Dispute Resolution* (5th edn Oxford University Press, 2018 p.297)

²⁶ Paul Starr, 'International Arbitration: Is Time Really on Our Side?', *Asian Dispute Review*, (© Hong Kong International Arbitration Centre (HKIAC); Hong Kong International Arbitration Centre (HKIAC) 2016, Volume 18 Issue 2) pp. 64 – 72

²⁷ Susan Blake, Julie Browne & Stuart Sime, *A Practical Approach To Alternative Dispute Resolution* (5th edn Oxford University Press, 2018 p.297)

²⁸ Allan Barsky, "MED-ARB": *Behind the Closed Doors of a Hybrid Process* (Family Court Review, Vol. 51 No. 4, October 2013 637–650)

²⁹ Paul Starr, 'International Arbitration: Is Time Really on Our Side?', *Asian Dispute Review*, (© Hong Kong International Arbitration Centre (HKIAC); Hong Kong International Arbitration Centre (HKIAC) 2016, Volume 18 Issue 2) pp. 64 – 72

One more concern that prevents conducting an arbitral process more efficiently is allowing too many rounds of submissions (that are mostly too lengthy and makes difficult to concentrate on key issues) by arbitrators which sometimes leads to unnecessary delays. It is claimed that such kind of submissions should be limited by arbitrators on a case by case basis in accordance with its essence³⁰.

It is undeniable that lawyers (counsels) play huge role in leading and resolving disputes defending their client's interests. However, sometimes they can be excessively aggressive and inflexible and thereby steal their client's prospect for a settlement. This kind of behaviour may lead to unnecessary delays during the process and last longer than expected, not considering the fact that it may also hinder further relations of the parties. Thus, lawyers need to take into account above factors and act appropriately in order to effectively resolve disputes.

Imposing monetary sanctions is also effective solution while conducting arbitral process. In the Survey, many of the respondents supported expanding arbitrators' controls regarding to sanctions and using them sufficiently while conducting the proceedings up to applying monetary sanctions. They are convinced that it is necessary to use strict rules and measures by arbitrators to effectively conduct the proceedings by applying monetary sanctions for the parties or their counsel's various dilatory tactics³¹.

Recognition and enforcement of an arbitral award is also an important issue to consider in order to reach a desired result. Despite the New York Convention with its 163 members, in some jurisdictions, there is still difficulties and obstacles with the recognition and enforcement of arbitral awards. Consequently, there is a need for developing operative and rational mechanisms to make enforcement procedures more efficient by making laws more arbitration-friendly especially in less developed jurisdictions.

One of the most effective methods of reducing the cost and increasing the time-efficiency in the arbitration is an active use of modern technologies in the conduct of arbitral processes. This procedure will save money and time, especially in international arbitration as it excludes in-person meetings of the parties and arbitrators which means there is no need for traveling to specific location. Surely, in most cases it depends on two factors: first, the ability of the participants to the process to conduct a case via modern IT; the second one is being familiar with such options, and both these factors might be a reason for the lesser use of modern technologies. Meanwhile, many favour the greater use in the future of "hearing room technologies," "cloud-based storage," "videoconferencing," "AI" and "virtual hearing rooms"³².

Ultimately, the efficiency of the process within the scope of time and cost, depends on the users. All authority regulations to make arbitral process more effective might not be successful when parties' approach and their intentions

³⁰ 2018 International Arbitration Survey: The Evolution of International Arbitration, p.28

³¹ 2018 International Arbitration Survey: The Evolution of International Arbitration, p.29

³² 2018 International Arbitration Survey: The Evolution of International Arbitration, p.29

will not be proper, clear and certain. Whereas, arbitration is considered more expensive than other adjudicative and non-adjudicative forms of alternative dispute resolution, uncertainty and improper approach by the parties may lead to unnecessary delays and be even more expensive. Therefore, parties are encouraged to develop reasonable and practical approach to achieve faster and better results that will suit both parties to the arbitral proceeding.

Finally, in order to achieve an arbitration-friendly environment in a society, it is necessary to improve legislation and increase legal awareness and legal culture of people through legal information and cognitive law activities.

CONCLUSION

In conclusion, a general understanding of arbitration and its main benefits and drawbacks was explained with substantially studying and analyzing the International Arbitration Survey by Queen Mary, University of London and White & Case on “The Evolution of International Arbitration”. The main reasons for due process paranoia were emphasized from both respondents and arbitrators’ point of view. Briefly has been studied governments’ support and their policies towards arbitration. Further, the methods of improving the efficiency of arbitral proceedings and reducing cost and delay were critically reviewed and made several propositions. Overall, it is concluded that in order to make arbitral processes cost effective and timely justice, it is necessary to: consider realistic and thorough approach to the enforcement risks by arbitrators; have better access to information; possess sharp and clear powers by tribunal; use hybrid methods of dispute resolution options including Med-Arb and Arb-Med; make proper

approach to the arbitral process by parties and their counsels; impose monetary sanctions in case of necessity; use efficiently modern technologies in the conduct of arbitral processes; make an arbitration-friendly law environment; increase legal awareness and legal culture of people. We are convinced that actively practising these measures promotes improving the efficiency of arbitral proceedings and reduce cost and delay.

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