Kluwer Arbitration Blog

Due Process Paranoia

Remy Gerbay (Hughes Hubbard LLP) · Monday, June 6th, 2016

A few months ago, Queen Mary University of London and White & Case released their third International Arbitration Survey entitled "Improvements and Innovations in International Arbitration". One of the many interesting findings of this survey is the apparent growing concern of some users of arbitration with what can be termed "due process paranoia".

Due process paranoia is defined by the survey as a *"a perceived reluctance by* [arbitral] *tribunals to act decisively in certain situations for fear of the award being challenged on the basis of a party not having had the chance to present its case fully"*. This phenomenon which is increasingly attracting attention.

What is due process paranoia?

At the heart of the notion of due process paranoia there seems to be the combination of three components. First, one or more case management decisions by an arbitral tribunal that appear overly attentive to due process considerations. These decisions are often, but not always, made to protect the interests of the respondent in the arbitration. The second component is a belief on the part of the tribunal that such a cautious stance is rendered necessary by the risk that the tribunal's award may otherwise be set aside and/or refused enforcement (the "Enforcement Risk"). Finally, the third element (without which there would be no paranoia but, instead, only sensible risk-averseness) is the erroneous character of the tribunal's belief that this level of caution is warranted –erroneous belief which is caused by an inflated perception of the Enforcement Risk.

In practice, overly cautious case management decisions may include:

- Granting repeated extensions of time at the request of one party;
- Accepting multiple amendments to a party's written submissions;
- Agreeing to the belated introduction of a party's new defences/claims, or of fresh evidence; or
- Acceding to last minute requests to reschedule oral hearings etc.

This may also include granting overly generous orders for disclosure, or acceding to requests by a party to file submissions that are entirely superfluous.

Why are arbitrators paranoid sometimes?

In practice there are various reasons why arbitrators may err on the side of excessive caution when making case management decisions. First, unless time is of the essence (as is the case eg. where

one party is said to be dissipating its assets), arbitrators will often find that a delay or an increase in arbitration costs will, on balance, be preferable to the risk of rendering an unenforceable award. This is because setting aside an award, or finding that it is not enforceable, would require the parties to re-litigate their dispute (thus incurring considerably longer delays and higher costs). Even if enforcement of the award is not refused, an overly robust stance taken by a tribunal may push a disgruntled party to challenge the arbitrator for a lack of impartiality. Whether or not it is ultimately successful, a challenge is likely to cause delay and increase costs more than an overly cautious decision would. Finally, because enforcement / set aside proceedings are often in the public domain, they may negatively affect the market reputation of the arbitrators, thereby hurting their prospects of future appointments.

But why is due process paranoia a problem? Is there such a thing as 'too much due process'?

Obviously, the main problems with due process paranoia are excessive costs and delays. By not being robust enough for fear of seeing an award set aside or refused enforcement, some arbitrators may contribute to the excessive costs and duration of arbitration proceedings. And it is fair to say that excessive costs and delays in arbitration are well-documented concerns of the users of the system (see earlier Kluwer blogs by Jean Kalicki or Roger Alford). This in turn contributes quite possibly to the feelings of frustration on the part of some users of arbitration. Interviewees of the 2015 Queen Mary – White & Case survey felt that "… *in practice, the risk of successful challenges to arbitral awards was 'insufficient to justify tribunals' overly cautious behaviour; consequently, arbitrators should be willing to decisively manage proceedings'*".

In other words, the concern is that every time a tribunal opts for caution instead of procedural economy/efficiency in circumstances where the tribunal could, in actual fact, afford to be robust (because the Enforcement Risk is lower than is believed to be by the arbitrators), the tribunal makes what is a 'wasteful', 'uneconomical', decision.

And that is where the crux of the problem of due process paranoia lies. It is in respect of those decisions which are 'needlessly' cautious; those decisions which, from the point of view of procedural efficiency, are 'sub-optimal'.

Facilitating realistic assessments of the Enforcement Risk as a solution

The solution to due process paranoia therefore lies in better access to information. In other words, the solution has to be found in more accurate / realistic assessments of the Enforcement Risk in each and every case. This requires carefully studying the actual impact of robust case management decisions on the enforceability of arbitral awards.

Despite the harmonizing effect of the NY Convention or the UNCITRAL Model Law, the situation varies quite dramatically from one jurisdiction to another, as some jurisdictions are less liberal than others. When a tribunal seated in, say, England is assessing whether a particular case management decision risks being viewed as too robust down the line, it needs to take into consideration what the position is, not only under English law (the law of the seat), but also at the likely place(s) of enforcement. It would be illusory, however, to think that a tribunal always has the time and resources to conduct a meticulous enquiry into the law of all jurisdictions where the award may possibly be enforced.

In an ideal world, therefore, it would be useful for reliable data (on the actual Enforcement Risk of case management decisions) to be readily available for any and all jurisdictions. Obviously such an

enquiry is beyond the scope of this blog. Below, we give an indication of the position in our jurisdiction, England & Wales.

The position in England – Arbitrators shouldn't fear being overly robust

England is known to be a relatively pro-arbitration jurisdiction. The risk of the English courts setting aside an award on the basis that an arbitrator has taken an overly robust case management decision is low. But what, precisely, is safe and what is not? What is the exact position?

Leaving aside the issue of enforcement to focus on set aside proceedings, in England, the key statutory provisions relating to the question of whether an arbitrator has been excessively robust in respect of a case management decision are found at s.68 and s.33 of the Arbitration Act (1996). In short, s.68 provides that an award may be set aside if a serious irregularity has been committed, and if that irregularity has caused substantial injustice. It also provides that a serious irregularity has been committed when the tribunal has breached its general duty which is provided for at s. 33 to conduct the arbitral proceedings "*fairly and impartially as between the parties giving each party a reasonable opportunity of putting his case and dealing with that of his opponent*". From the point of view of English law, therefore, an arbitrator attempting to decide whether to press on or whether to exercise caution would start his analysis by looking at the likelihood of his decision being found by the English courts to breach the general duty of s.33.

A systematic review of all relevant English case law sheds an interesting light on the subject. Out of the 110+ decisions citing s.33 that have been reported since the enactment of the English Arbitration Act (1996) two decades ago, we have not been able to find a single decision in which the English courts set aside an award because of an overly robust case management decision.

To be clear, there is no shortage of decisions under s.68 where awards have been set aside as a result of a breach of the arbitrator's general duty of s.33. However, the relevant breach of the general duty of s.33 was never the result of an overly robust case management decision. Rather, the most common reason for setting aside an award for breach of s.33 is because, in their awards, arbitrators relied on matters which were not before the parties. Another common scenario is when arbitrators act 'without warning' to the parties, in particular when they depart from the procedure previously set.

We have not been able to find <u>any</u> decision where an award was set aside because the tribunal had been overly robust, e.g. by rejecting one or more applications for an extension of time, refusing amendments to some written submissions, rejecting new defences or fresh evidence, or declining to reschedule a hearing. To the contrary, a number of English decisions have unambiguously rejected set aside applications which were based on robust case management (see below).

Naturally, the precise circumstances in which any given case management decision is made matters a great deal, as the courts will look at the entire background of the case (Abuja International Hotels Ltd v Meridien SAS [2012] EWHC 87 (Comm)). In this context we should be careful not to over-generalise. Nonetheless, the following types of case management decisions have been considered not to justify setting aside an award:

- refusal 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));
- refusal to hold 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);
- refusing to make an order that employees of a party appear as witnesses at the hearing (Double K Oil Products 1996 Ltd v Neste Oil Oyj [2009] EWHC 3380 (Comm));
- refusing to order a party's surveyor to disclose the documents requested by the other party's surveyor (Bromley Park Garden Estate Ltd v Mallen [2009] EWHC 609 (Ch));
- refusing to allow oral representations in place of written counter-submissions (Bromley Park Garden Estate Ltd v Mallen [2009] EWHC 609 (Ch));
- directing that neither party could make submissions on the substance of a quantum expert's report (Price v Carter (t/a Ian Carter Building Contractors) [2010] EWHC 1451 (TCC) (QBD (TCC)));
- allowing late reference by the claimant to a particular statute as the basis of its claim, but then refusing further submissions on the same statute by the respondent. (The arbitrator then relied on that statute in the award when it was clear from earlier pleadings that the Claimant's case was already being pleaded on the basis of that statute, even though it was not expressly named) (Milan Nigeria Ltd v Angeliki B Maritime Co [2011] EWHC 892 (Comm));
- even striking out a claim altogether when a claimant had caused an inordinate delay (of 5 years) in the discovery stage of the proceedings was not deemed to justify setting aside an award (TAG Wealth Management v West [2008] EWHC 1466 (Comm)).

The above decisions are perhaps not surprising. First, not just any breach of s. 33 will suffice to set aside an award. It is necessary for that breach to cause a substantial injustice to the applicant. This will be the case, for example, where the outcome would have been different had the irregularity not occurred. In addition, s. 33 does not just require a tribunal to act fairly and impartially, it also requires the tribunal to *"adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense … "* (emphasis added).

Be that as it may, the threshold in England & Wales is incredibly high. Arbitrators with a tendency for occasional due process paranoia may therefore take comfort in the above findings. They may also take comfort in the fact that many modern sets of institutional rules now impose a duty on arbitrators to proceed expeditiously and in a cost effective manner. These institutional provisions form part of the parties' arbitration agreement, thereby giving even more support to arbitrators wishing to act robustly.

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