

Kluwer Arbitration Blog

Judicial Support against Due Process Paranoia in International Arbitration

Jasmine Feng, Benjamin Teo (Debevoise & Plimpton) · Tuesday, June 16th, 2020

Due process is an essential aspect of international arbitration or, indeed, any contentious proceeding. Due process rules act as a shield for parties against unfairness. They ensure that the exercise of a tribunal's jurisdiction is constrained, such that all parties are given a reasonable opportunity to present their cases.

There has been a notable increase in the number of parties who have sought to invoke due process as a sword.¹⁾ It has become increasingly commonplace for parties to abuse their due process rights or seek to abuse the concept of due process by engaging in dilatory or guerilla tactics, such as by advancing numerous or late procedural applications or raising due process objections, while threatening the tribunal with annulment of their award in the event of non-compliance.²⁾

Due Process Paranoia

The abuse of due process has led to the phenomena of [due process paranoia](#), defined in the [2015 Queen Mary International Arbitration Survey](#) as *"a perceived 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 has been described as having three observable elements (see [earlier Kluwer blog post by Remy Gerbay](#)): (i) a tribunal making case management decisions that are overly deferential to due process considerations, protecting one party's interests over the other (usually the respondent's), (ii) the tribunal's belief that a cautious stance is necessary to guard against the risk that the award may otherwise be set aside and/or refused enforcement, and (iii) the erroneous character of the tribunal's inflated perception that this level of caution is warranted.

One view expressed by [Berger and Jensen](#)³⁾ is that due process paranoia *"not only originates from the arbitrators' interest that their awards will not be set aside or denied enforcement - an unwelcome smudge on their track-record - but is sometimes also induced by the applicable rules,"* and would *"lead the arbitrator to grant*

unreasonable procedural requests, thus prolonging the proceedings unnecessarily.” As such, arbitrators face a very real stake in ensuring that their awards are annulment-proof – otherwise, they risk the creation of a record that they have violated a party’s due process rights. Pursuant to several institutional rules,⁴⁾ draft awards are subject to either formal or informal scrutiny. Tribunals are under the duty to (or are expected to) make every reasonable effort to ensure the enforceability of the award.

Tribunals are empowered to balance due process rights against the expedient conduct of the arbitration. Due process paranoia affects their ability to identify and resolve genuine due process issues, and leads to the following consequences. First, abusive procedural demands often cause delays and increase the costs of the arbitration as tribunals labour to accommodate the party’s demands. Second, this causes further wasted time and costs in set aside applications and advancing spurious arguments in resisting enforcement of the arbitral award. This drains the resources of not only the parties and the tribunal, but national courts as well. Lastly, and more broadly, such due process paranoia adversely affects the integrity of arbitral proceedings and the system of international arbitration as a whole: such inefficiency undercuts the efficiency, fairness and enforceability which are the key underpinnings of the arbitral system.

Judicial Attitudes

The threat posed to arbitration by such due process paranoia has been recently noted, both by the Malaysian High Court in *Allianz General Insurance Company Malaysia Berhad v Virginia Surety Company Labuan Branch* Originating Summons No. WA-24NCC(ARB)-13-03/2018 (see earlier Kluwer Blog post by Tse Wei Lim), as well as by the Singapore Court of Appeal in *China Machine New Energy Corp v Jaguar Energy Guatemala* [2020] SGCA.

In *Allianz*, the Malaysian High Court dismissed a due process challenge against an arbitral award, and also emphasized that “[n]atural justice does not demand that a party is entitled to receive responses to all submissions and arguments presented for only the right to be heard is fundamental.”

In *China Machine*, the Singapore Court of Appeal dismissed China Machine New Energy Corp’s (“**CMNC**”) appeal against an earlier High Court decision (see earlier Kluwer Blog post by Maximilian Clasmeier) declining to set aside an arbitral award on the basis of breach of natural justice. CMNC alleged that the tribunal’s case management decisions (a) allowing the respondent’s rolling production of documents, (b) not granting CMNC a further extension of time to file a responsive expert report (the “**Report**”) or admitting the Report, (c) not admitting CMNC’s supplementary expert report, and (d) allowing the respondent’s disclosure of documents in a disorganized manner were in breach of natural justice.

The Court of Appeal noted that (a) the tribunal was entitled to assume that CMNC’s pleaded case considered the rolling production as fair in exchange for an extension of the filing of the Report, (b) there was no prejudice against CMNC as the tribunal

undertook a careful analysis of the findings in the Report in its award, (c) it was not unfair or unreasonable for the tribunal to exclude the supplementary expert report (given that CMNC sought to admit it two weeks before the evidentiary hearing), and (d) CMNC did not seek relief from the tribunal on the basis of the respondent's disorganized production - the tribunal could not have acted unfairly viz. a complaint it was not aware of. CMNC therefore had failed to discharge its burden of demonstrating that the tribunal's conduct of the proceedings fell outside the realm of what a reasonable and fair minded tribunal might have done.

The Court of Appeal's judgment is notable for its strong language in expressing its dissatisfaction with CMNC's conduct (as above) as well as with due process arguments generally. The Court noted that such challenges were often used as grounds to *"improperly attack the award"*, and that this *"undermines and cheapens the real importance of due process"*, which could *"erode the legitimacy of arbitration as a whole and its critical role as a mode of binding dispute resolution."*

Importantly, alongside its restatement of the applicable standards to such challenges, the Court also set out the expected conduct from the party bringing any such due process challenges. In view of the grave nature of the allegation of a breach of natural justice, the Court set out that there can be *"no room for equivocality in such matters"*. A party is not entitled to complain that its hopes for a fair trial had been irretrievably damaged by the tribunal, *"reserve"* its position, and then only challenge the award if such award is made against it. Instead, a party intending to challenge any award by the tribunal would need to inform the tribunal *"at the appropriate time"*. A party failing to do so would do so *"at its own peril"*. This is an important stance for the Court to have taken, as part of the strategy of such abusive actions are to hold the threat of due process challenges over the tribunal, hedging that: (i) the tribunal would cave to that party's demands; or (ii) the party would be able to use these objections to attempt to challenge any adverse award. The Singapore Court of Appeal has laid down that such equivocation is unacceptable in these circumstances and has empowered tribunals to have more confidence in their dealings with such tactics.

These court decisions should reassure tribunals in both Singapore and Malaysia-seated arbitrations. They can take heart at the high bar required to challenge awards on the grounds of due process violations before the courts. Of course, this should not be any surprise given that case law has repeatedly borne out the difficulty in successfully challenging an award on due process grounds. (See, e.g. the non-exhaustive list in the [earlier Kluwer blog post by Remy Gerbay](#).) However, given the prominence of Singapore court awards in the realm of arbitration law,⁵⁾ it is likely that this judgment will be at the very least considered in conjunction with other case law, if not explicitly followed by courts in other jurisdictions.

Conclusion

The emerging judicial support of tribunals in the face of challenges to awards is a beacon of hope to tribunals and practitioners alike. It should embolden tribunals and remind practitioners to avoid the temptation to wield due process challenges as an

appeal by another name.

Tribunals are empowered with the discretion to manage the conduct of arbitrations under both national arbitration statutes and institutional rules. These often give tribunals broad case management and procedural discretion. This guidance from the courts in Singapore and Malaysia should embolden tribunals in resisting abusive procedural demands from parties.

Practitioners, on the other hand, would do well to keep in mind the courts' growing intolerance to such challenges. The Singapore Court of Appeal held that frivolous natural justice claims risked damaging arbitration's reputation as a valid and efficient dispute resolution mechanism. Further, the strong words of the Singaporean and Malaysian courts suggest that any such claims are unlikely to succeed, generate unnecessary costs for clients, as well as potentially lead to adverse costs orders. Practitioners should therefore be increasingly wary of considering such due process complaints as a weapon in their arsenal. Further, counsel who do find a valid reason for a due process complaint should ensure that they raise such concerns at the valid point - at the time that the reason for such complaints arises.

On the whole, judicial support of tribunals against such due process arguments is to be welcomed. This maintains the reputation of arbitration as an efficient dispute resolution mechanism, and prevents wasted costs and time by tribunals, counsel and clients.

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References

- ↑¹ See, L Reed, *Ab(use) of due process: sword vs shield*, *Arbitration International*, Volume 33, Issue 3, September 2017, Pages 361–377.
- Ibid. See also K P Berger, J O Jensen, *Due process paranoia and the procedural judgment rule: a safe harbour for procedural management decisions by international arbitrators*, *Arbitration International*, Volume 32, Issue 3, September 2016, Pages 415–435. See also Singapore Court of Appeal Decision in *China Machine New Energy Corp v Jaguar Energy Guatemala* [2020] SGCA.
- ↑² K P Berger, J O Jensen, *Due process paranoia and the procedural judgment rule: a safe harbour for procedural management decisions by international arbitrators*, *Arbitration International*, Volume 32, Issue 3, September 2016, Pages 415–435.
- ↑³ Article 42 of the ICC Rules 2017, Article 32.2 of the LCIA Rules 2014 and Article 41.2 of the SIAC Rules 2016.
- ↑⁴ See, e.g. the cases of: (i) *J (Lebanon) v K (Kuwait)* [2019] EWHC 899 (Comm), considering the position on choice of law of arbitration agreements in *BCY v BCZ* (High Court of Singapore) [2016] 2 Lloyd’s Law Rep 583; and (ii) *Autoridad del Canal de Panama v Sacyr SA et al* [2017] 2 Lloyd’s Rep 351, which adopted the Singapore Court of Appeal’s approach in *Tomolugen Holdings Ltd v Silica Investors Ltd* [2015] SGCA 57 to interpretation of arbitration agreements.
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