Kluwer Arbitration Blog

# Global Perspectives on Due Process in International Arbitration: A Short Summary of the 36th Annual ITA Workshop in Austin, Texas

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This year's 36th Annual ITA Workshop (held in Austin, Texas on June 19-21, 2024) did exactly what it said on the tin: It provided the audience with truly "Global Perspectives on Due Process in International Arbitration." Co-chaired by Christian Leathley, Anne Véronique Schlaepfer, and Prof. Thomas J. Stipanowich, the ITA Annual Workshop looked at due process in international arbitration from various angles, transcending the boundaries of legal systems and legal cultures and covering both commercial and investor-state arbitration.

Kickstarted by an afternoon of Young ITA events (among them a mock trial session and a debate) and a workshop dinner at a rainy Lake Austin, the Annual Workshop was opened by Tom Sikora, outgoing Chair of the ITA Advisory Board, who welcomed the participants to Austin's Omni Hotel.

**Defining the Parameters**

The first panel moderated by Prof. Thomas J. Stipanowich and comprising Laura C. Abrahamson, Sara K. Aranjo, Prof. Jack J. Coe Jr., and Prof. Loukas Mistelis invited the audience to participate in a poll that asked what the audience understood by "due process," with most voters answering "fairness." A series of follow-up polls revealed that most participants considered arbitrators to be the most important safeguard of due process, far ahead of state courts. Not less surprising, four of five audience members thought that arbitrators make unnecessary accommodations to parties for fear of due process challenges, suggesting that there might indeed be some "due process paranoia."

**Violation or No Violation**

The second panel moderated by Christian Leathley was just as interactive as the first. Panelists Jeffrey G. Benz, Elena Gutiérrez, Dr. Elina Mereminskaya, and Noradèle Radjai presented a selection of recent cases from different jurisdictions and asked the audience whether they would, in the respective situation, assume a due process violation or not. In most cases, the audience's

responses corresponded to the conclusions reached by the respective domestic courts in challenge or set-aside proceedings, and it became clear that across different jurisdictions, state courts exercise restraint in assuming due process violations that lead to the set-aside of an award.

However, there were some surprising results. In the case of a presiding arbitrator who had failed to disclose prior arbitrator appointments and previous advisory work for one of the parties and who had engaged in *ex parte* communication with one party's counsel, 97% of the audience voted in favor of a due process violation. In the underlying case of *Newcastle United FC v Premier League FA*, however, the UK High Court refused to remove the arbitrator under Section 24 of the English Arbitration Act 1996.

Another controversial case that was discussed was the decision of an arbitral tribunal to deny one party the opportunity to cross-examine the other party's witnesses on a particular point because it did not consider the cross-examination necessary. While the UK High Court considered this a serious irregularity in *Compania Sud Americana de Vapores SA v Nippon Yusen Kaisha*, it did not set the award aside as the cross-examination would not have altered the tribunal's conclusion. It was suggested that this decision significantly restricts the ability of arbitral tribunals to get involved with and put limits on the extent of cross-examination.

**Due Process and the Right to be Heard**

The third panel, consisting of Rachael D. Kent, James Lloyd Loftis, Dr. Anke Meier, and Prof. Christophe Seraglini and moderated by Anne Véronique Schlaepfer, discussed the balancing act that arbitrators face in ensuring the right to be heard. While equal treatment is a fundamental principle in international arbitration, Kent noted that fair and equal are not necessarily the same thing and that there are cases in which one of the parties might need more words and time to get its points across than the other party. Prof. Seraglini and Dr. Meier both praised the benefits of addressing potential procedural issues, e.g., in relation to document production or the extent of cross-examination, at an early stage in short virtual hearings or procedural conferences. On the issue of late submissions, it was suggested that there does not appear to be any precedent in which the rejection of late new claims or arguments has been found to be a violation of due process, whereas the admission of such claims or arguments has been considered a violation in some cases.

**Due Process and Evidence**

After a workshop lunch conversation with Jan Paulsson who was interviewed by Elizabeth Silbert, the fourth panel, moderated by Natalie L. Reid and composed of Prof. Massimo Benedettelli, Dr. Laurent Lévy, and John M. Townsend, discussed potential due process concerns arising from documentary, witness, and expert testimony presented in arbitrations. The panel looked at various practical issues such as the admissibility of whistleblower evidence or the leakage of confidential information to the other party. It was suggested that arbitral tribunals are often more concerned with the relevance and materiality of evidence and are reluctant to treat evidence as inadmissible due to the way in which it was obtained. As a notable exception, the *Methanex v. United States* case in which the tribunal excluded evidence illegally obtained through trespassing was mentioned. Of course, no evidence discussion would be complete without a look at AI, and the panel pointed to the risks of manipulated photo and video evidence through "deep fakes" and the increased use of

AI tools such as HeyGen.

**Due Process and the Reasoned Award**

AI also played a major role for the fifth panel of the day which was chaired by Prof. Irene Ten Cate and discussed how the drafting of awards is shaped by due process concerns. While there might be a limited use case for improving the language of awards, panelists John P. Bowman, Klaus Reichert, SC, Edna Sussman, and Claus von Wobeser agreed that drafting an arbitral award is more than just a job for the computer, but rather an exercise in reasoning and explaining to the parties why they have lost or won. While a reasoned award need not be long, depending on the seat of the arbitration, the panel observed that arbitral awards tend to get longer, raising the question whether this is due to the volume of the parties' written submissions or whether the reasoning and explaining sometimes go a little too far.

**Closing the Circle**

The volume of written submissions was also important to Paulsson, Sikora, and Luke Sobota who formed the last panel of the day and were tasked with summarizing the key takeaways from a full conference day. While all panelists agreed that briefs are getting too long, they had different views on the value of post-hearing briefs versus closing statements. The panel reiterated the benefits of case management conferences at various stages of the proceedings to ensure that procedural efficiency is not sacrificed to vague and often unjustified due process concerns. Ending on a high note, the panelists concluded that due process will most often not get in the way of a diligent arbitrator. Unless arbitrators commit an egregious due process violation, their arbitral awards will likely not get annulled by state courts.

The last point raises the question whether the audience in the first panel was right to suggest that arbitrators are the most important guarantors of due process. Repeating the survey in a room full of judges would arguably produce a different result. Presumably it is a matter of perspective. Since judges have the final say on due process and arbitrators only find out in retrospect whether they have got it right, this raises some follow-up questions that could potentially be explored in another ITA conference: How can arbitrators foster the trust of judges, and ultimately states, in their conduct of the arbitral proceedings and their administration of justice? Can more nuanced institutional rules and guidelines allay concerns about conflicts of interest and other due process concerns? How can the arbitration community make its voice(s) heard when state courts are seized with issues with potentially far-reaching consequences for the conduct of arbitral proceedings? The bottom line is that as long as judges remain the final arbiters of due process and decide on the fate of arbitral awards, a healthy dose of "due process paranoia" might not be a bad thing after all.

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