Kluwer Arbitration Blog

Due Process Paranoia: When the Safeguard Metamorphoses into the Threat

Arijit Sanyal (Skywards Law) · Sunday, January 26th, 2025 · HK45

Due process provisions meant to serve as a shield against arbitrary or unequal treatment may at times be transformed into swords by abusive parties to achieve precisely the consequences that such provisions are meant to shield against. This has typically materialized by due process paranoia of the tribunals that would incentivise recalcitrant parties to file repeated and often unmeritorious applications with an agenda—to overwhelm the tribunal to at least grant some of the requests, and to have an edge over the other party [Reed, p. 375]. The tribunal's inflated perception of due process (i.e., due process paranoia) thus has the potential to violate standards of equal treatment. Due process paranoia is frequently divorced from the reality, as courts generally back a tribunal's case management powers. As such, enforcement courts have rejected challenges to instances where tribunals reject an unmeritorious request; disallow a delayed claim; or refuse to change the mode of pleadings from written to oral etc. (discussed here).

In practice, awards will not be set aside merely because a party is disgruntled with the outcome [see, for example, *BLC and Ors. v BLB and Anor. [2014] SGCA 40* ¶ 53]. However a heightened sense of due process (paranoia) leads tribunals to prioritise due process over essential aspects of international arbitration. Most notably, such actions have gradually undermined efficiency in international arbitration (discussed here). In practice, efficiency cannot give in to due process as they jointly sustain international arbitration [Menon, p. 7]. Moreover, the impact of due process paranoia has far reaching effects on the exact principle tribunals are supposed to shield—due process by enabling parties to mask their dilatory tactics behind due process requests and in some cases increases the likelihood of unconscious bias [Reed, p. 376]. Consequentially, due process paranoia increases the possibility of the award being set aside.

This article discusses in more detail how the due process paranoia has negative impact on and even undermines key principles of international arbitration: efficiency, and paradoxically, due process itself, derailing arbitral proceedings and possibly leading to the award being set aside. The article then proposes guidelines for tribunals and institutions (as the case may be) to refer to so that they would not fall into the trap of due process paranoia.

Due Process Paranoia's Effect on Efficiency and Due Process

Due process paranoia facilitates accommodation of eleventh-hour and unmeritorious requests

which is not only costly to efficiency of the arbitration proceedings, but more importantly, is likely to result in unequal opportunities to one party [Reed, p. 376]. Isolated instances of unequal opportunities will not in itself raise concerns. However, repeated acceptance of meritless requests that gives leverage to the beneficiary severely undermines equal treatment and may manifest into unconscious bias.

The aforesaid concerns can be appreciated through the Singapore Court of Appeals' judgment in *China Machine New Energy Corp v Jaguar Energy* (***"Jaguar Energy"***). The judgment in *Jaguar Energy* singles out meritless due process requests and challenges as the facilitator of "defensive procedural decision making" (due process paranoia or a stepping stone to it). Although courts of first and second instances ultimately rejected the set-aside application on the basis that the applicant "has not proved that the award was made in breach of the rules of natural justice" (*Jaguar Energy* ¶173), *Jaguar Energy* demonstrates how enforcement courts are likely to view meritless challenges to awards as a tactic that "cheapens due process" (*Jaguar Energy* ¶ 3).

Repeated requests behind the garb of due process concerns lead arbitral tribunals to develop an overly cautious approach at the cost of efficiency (*Jaguar Energy* ¶ 3). While tribunals are likely to be cautious about the fate of their award, enforcement courts will seldom entertain meritless requests from disgruntled parties and set aside awards on that basis. Rather, enforcement courts have backed the arbitral tribunal's case management powers across jurisdictions. This is evidenced from the Singapore High Court's decision in *Anwar Siraj and anor. v Ting Kang Chung* **(*"Anwar Siraj"*)**, where the court held that arbitral tribunal was "**master of his own procedure and has a wide discretionary power to conduct the arbitration proceedings in the way he sees fit, so long as what he is doing is not manifestly unfair or contrary to natural justice"** (*Anwar Siraj* ¶ 41). While rejecting the challenge in *Anwar Siraj*, the court further held that enforcement courts will only act against an award if one could reasonably conclude that the arbitrator did not act fairly or did something that should not have been the part of the procedure (*Anwar Siraj* ¶¶ 41, 43).

However, by disregarding settled principles, arbitral tribunals unconsciously enable abuse of due process, which lowers the efficiency of international arbitration. Further, it leads to the possibility of unequal treatment and unconscious bias towards one of the parties that may lead to a successful challenge as discussed in the following section.

Paranoia Leading to a Challenge

With one of the parties obtaining a significant advantage over the other, there is likelihood for an eventual award in the said proceedings to be successfully challenged [Ferrari & Rosenfeldt, pp. 11, 32]. For instance, the Dutch Court of Appeals' decision in *Rice Trading (Guyana) Ltd. v Nidera* (***"Nidera"***) upheld the setting aside of an award where new evidence was admitted belatedly, and the respondent was denied an opportunity to respond to the newly admitted evidence after the oral hearings (*see* discussion here at ¶ 33). Similarly, an award has been set aside by the Hong Kong Court of First Instance in *A v B*, where the tribunal had allowed time-barred claims, without granting sufficient reasons for rejecting the defence against it. In the court's view:

> 34 […] The Limitation Defence is a material point and issue could have rendered the Award materially different, **and the failure to consider it, or to explain the**

> **dismissal of the Limitation Defence, results in unfairness to A, as well as a real risk of injustice and prejudice to its case**. […].

While unequal treatment in the aforesaid judgments did not arise out of due process paranoia, *Nidera* and *A v B* suggest that courts will generally assess presence of unequal treatment irrespective of whether it could constitute an actual bias or due process paranoia in which case there will be real risk for the award to be set aside. As due process paranoia compounds over time, it is most likely to cause detriment to one of the parties and give rise to unequal treatment. Thus, the very measures taken by the arbitral tribunals to uphold due process may sow the seeds for the award to be set aside.

Countering Due Process Paranoia

Due process paranoia may prevent tribunals from balancing due process with efficiency because, in effect, tribunals end up prioritising the latter at the cost of the former. As Professor George Bermann points out, the best way to reconcile it is by determining the weightage given to these "competing considerations" [Bermann, pp. 346-47]. Moreover, arbitral tribunals driven by due process paranoia may paradoxically fail to protect the very standard they had set out to safeguard—due process.

In institutional arbitrations, arbitral institutions can play a greater role by providing a guidance to the tribunals on treatment of applications. This may be done through supplementary rules or practice guidelines on navigating the nature of applications, and its patterns to ensure the procedure are not misused [Orlowski, p. 55]. However, institutions must ensure that they do not end up taking sides [Orlowski, p. 55].

Institutions may consider creating illustrative guidelines of competing considerations to demonstrate what instances are likely to violate due process. This would allow arbitrators to assess the nature of request against the settled benchmarks of violation of (i) equal treatment and (ii) public policy, apart from the preliminary assessment by case management teams.

To illustrate, if allowing an application would violate equal treatment on a superficial level—without impacting due process interests, tribunals could consider granting them. This could be done in cases where a party could not file a document before the tribunal due to valid reasons like—delayed discovery, emergence of new material facts, etc. However, tribunals should be mindful of the patterns of the requesting party, and should disallow them if repeated actions jointly pose a risk towards equal treatment.

Further, tribunals should be extremely cautious where allowing an application will not just undermine due process standards but will violate public policy considerations of the seat of arbitration. For instance, tribunals should decline admitting a time-barred claim where the applicant (a) had knowledge of the claim from the outset and (b) laws of limitation of the seat is clear on disallowing time-barred claims.

Conclusion

Parties opt for arbitration with the expectation of a fair and efficient resolution. However, potential challenges to arbitral awards on the ground of due process violations led some tribunals to take excessive caution when it comes to issues potentially involving due process. Such due process paranoia renders such expectations futile. As a result, there is a growing perception that arbitration is time-consuming and lacks "effective sanctions" [Beale & Goh, p. 6] against tactics that weaken due process safeguards in place. If tribunals continue to be overly cautious about due process concerns, it could erode the legacy of international arbitration by compromising due process, efficiency, and other factors that initially led the parties to choose arbitration over litigation and other dispute resolution mechanisms. As arbitral tribunals are largely the masters of their own process, the ball lies in their court. Hence, instead of letting paranoia guide them, tribunals should be guided by the practice of enforcement courts, who have traditionally backed the case management powers of arbitral tribunals. Moreover, institutions could also develop systematic guidance for tribunals to uphold fairness and efficiency of arbitration proceedings within the boundaries of public policy and equal treatment of the parties.

To make sure you do not miss out on regular updates from the Kluwer Arbitration Blog, please subscribe here. To submit a proposal for a blog post, please consult our Editorial Guidelines.

This entry was posted on Sunday, January 26th, 2025 at 8:02 am and is filed under Arbitration Proceedings, Due process, Efficiency, Fair hearing, International arbitration
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.