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PERSPECTIVES

WHEN LOGIC FAILS: DUE PROCESS PARANOIA

BY **FRANCOIS LASSALLE**

> BVI INTERNATIONAL ARBITRATION CENTRE

An increasing number of arbitration users and practitioners are criticising the unreasonable increase of procedural complaints related to due process observance – because it has given rise to excessive costs and extended the duration of arbitration proceedings.

If you are a lawyer in a corporate environment, be it a general counsel or one of the hard working legal minds pushing the corporate agenda, few things really matter. You aim to work through corporate disputes as efficiently as possible, stick to budgetary requirements, create as much certainty as possible for corporate management and manage risks to your business.

Private practice lawyers did not always understand the tensions in-house lawyers face on a daily basis. This is changing and the age of the law firm ‘black box’ has disaggregated over the last 20 years, with the rise of alternative pricing methods such as fixed rates, blended rates, success fees and more scrutiny from clients with regular updates on caseloads and strategies.

Still, tensions can occur when arbitral proceedings become confrontational, and the balance between efficiency, party autonomy and due process can often get blurry. This may arise when the perspective of arbitrators and the parties on the outcome of the dispute clash, or when certain parties play a game to gain advantage over the other party, or simply to

delay proceedings or intimidate the tribunal. There are also cultural differences in document production between common law and civil law jurisdictions that can lead to issues with the proceedings.

One size does not fit all, but the underlying problem remains and has given rise to a new conundrum in arbitration: 'due process paranoia'. Due process paranoia defies logic. In isolation, most if not all practitioners will agree that an efficient process and ensuring a tight procedural agenda are key to a successful arbitration. In reality, arbitration can become caught in a whirlpool of seemingly

illogical decisions leading to inefficiencies, to the detriment of the users of arbitration.

This article will examine different aspects of due process paranoia, starting with a definition. The focus will be on why it has become a rampant problem in the trade and what could be done to curtail it spreading further.

What exactly is due process paranoia?

In practice, due process paranoia is when a tribunal is being overly cautious when making case management decisions. Although not common, it is

A stylized illustration in a comic book style. A hand in a white shirt cuff points its index finger towards a red button with a silver rim. Above the button, the word "PANIC" is written in large, bold, yellow, slanted letters. The background is a blue field with a white dot pattern.

generally accepted that arbitrators are hesitant to say no when parties make procedural requests that impede efficiency. The result? Frustration with the arbitration process for at least one of the parties. This is because due process paranoia sometimes leads arbitrators to allow parties additional time, plan for unnecessarily long hearings, accept multiple amendments to parties' written submissions, and agree to the late introduction of defences or claims, or last minute requests to reschedule video witness statements and oral hearings. It all goes against the standards of efficiency enshrined in most arbitral rules and, in all fairness, it also goes against what reason would dictate.

At first, due process paranoia was received with disbelief. Practitioners most certainly did not identify any incentive in playing the system, nor did they understand why difference in legal systems may affect process. Still, the belief by arbitral tribunals that the violation of parties' due process rights may lead to dreadful consequences, in particular when it comes to enforcement of awards and appeals, materialised the issue. However, research has shown that awards are very rarely denied enforcement or set aside because a tribunal has denied parties the right to an equal, unbiased and reasonable opportunity to present their cases. Similarly, in most jurisdictions, courts normally give way to arbitrators' discretion when reviewing procedural decisions and enforcing awards.

What is difficult here is the subjectivity that relates to what could be considered unreasonable. When receiving a party's procedural request, arbitrators often need to play a balancing act with a delicate question: is this a legitimate exercise of a party's procedural rights or an unreasonable move? This is the critical crossroads where sometimes sub-optimal decisions are made. Sub-optimal does not equate to wrong, i.e., due process paranoia does not jeopardise arbitration as a fair and final method of resolving disputes, but because granting unreasonable procedural requests – thus prolonging the proceedings unnecessarily – neither benefits the parties nor the attractiveness of international arbitration as a dispute resolution mechanism.

Why are arbitral tribunals so focused on due process considerations?

Research has shown that due process paranoia is unfounded, so it is critical for clients to encourage their counsel and international arbitrators to embrace their procedural discretion by conducting more proactive proceedings that will deal delicately with difficult procedural management situations. In order to do so, understanding the blockers and the enablers is critical.

The tribunal belief that a cautious stance is necessary to avoid the resulting award to be set aside or refused enforcement is the main blocker. Some tribunals may think there is a real risk while others may just follow some form of game theory,

like in Blaise Pascal's wager. The argument here is that a delay and resulting increase in arbitration costs is better than to risk rendering an award unenforceable. In the same way, Blaise Pascal was arguing it was more logical and beneficial to believe in god, just in case he existed. Another blocker is the perceived risk by a tribunal of being challenged for lack of impartiality over tough procedural management decisions. Such a challenge, successful or not, would likely cause delays and increase costs, more than an excessively restrained decision would. Finally, a slightly more subjective reason is that enforcement and 'set aside' proceedings are, more often than not, in the public domain. As a result, the market reputation of an arbitrator may be affected negatively, thereby compromising their prospects of future appointments – a further incentive to lean on the cautious side.

Now, it is important to remember that due process paranoia is only an issue when tribunals' procedural decisions are unnecessarily careful. In many cases, the complexity of the business world in which we operate, and the resulting disputes involved, requires flexibility with regard to the duration of hearings, amendments of written submissions and late changes to claims or defences. What is the solution? There are various enablers that can help the arbitral

community shape arbitrations to follow optimal procedural paths.

For instance, arbitral institutions, when involved, should be proactive and very mindful of the due process paranoia syndrome with a view of providing guidance and advice, and even practice

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notes to tribunals. It may only be about sharing the International Bar Association (IBA) or Prague rules, depending on the parties to a case and the dominant law governing the case. With experience, institutions can also provide an accurate and realistic assessment of the process management challenges in each and every case.

Parties to an arbitration and the tribunal should discuss due process paranoia or, rather, their preference for case management and procedural decisions to be efficient, in the preliminary stage of the arbitration. This can be done before the parties proceed to a hearing, before the taking of

any evidence or after taking only limited evidence. It should become a standing agenda item once a tribunal has been established or even before it has been established under the auspices of an arbitral institution.

Users of arbitration should remember that most, if not all, modern sets of institutional rules now enforce a duty on arbitrators to proceed expeditiously and in a cost-effective manner. For instance, the BVI International Arbitration Rules, based on the UNCITRAL model law, provide the following: “Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case. The arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties’ dispute”.

Such institutional provisions form part of the arbitration agreement. They give tribunals and

institutions a strong legal backing for those who wish to make tough procedural decisions.

In conclusion, it is our view that logic does not have to fail. Parties should be able to rely on the entire arbitral ecosystem, from model laws such as UNCITRAL or the New York Convention, to institutional rules and the experience of tribunals to expect their case will be handled efficiently. Academic research shows that the due diligence paranoia belief is unfounded, that awards rarely, if at all, are denied enforcement or set aside because of tough procedural decisions so there is no rational reason that the reputation of the system has to suffer. Users of international arbitration should expect better, and we should all work to deliver better, consistently. 



Francois Lassalle

Chief Executive Officer

BVI International Arbitration Centre

T: +1 (284) 393 8000

E: lassallef@bviac.org