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Dispelling due process paranoia: Fairness, efficiency and the rule of law

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I. Introduction

1. Good afternoon. Let me first thank John for that generous introduction and also the Australian chapter of the Chartered Institute of Arbitrators for inviting me to deliver this year's Annual Lecture. When I accepted the invitation just eight months ago, I had anticipated the prospect of being in Sydney speaking to you in person; but how the world has changed in the intervening months since then. Nonetheless, it is gratifying that this year's Lecture has remained possible, thanks to the power of technology and the efforts of the Institute. For that, let me express my deep gratitude to the Institute.

2. In a fairly recent article,¹ Professor William Park drew an unusual analogy between arbitration and fine dining. In the world of fine dining, he said, a chef or restaurateur has a number of aspirations, not all of them easily

* I am deeply grateful to my law clerks, Joanne Leong and Melissa Ng, and my colleagues, Assistant Registrars Elton Tan and Kenneth Wang, for all their assistance in the research for and preparation of this address.

¹ William W. Park, "Arbitration and Fine Dining", Boston University School of Law Public Law & Legal Theory Paper No. 17-25, in *Festschrift für Pierre Karrer* (2017): <scholarship.law.bu.edu/cgi/viewcontent.cgi?article=1793&context=faculty_scholarship>.

reconcilable. A diner must not be kept waiting too long for his meal. The food must, of course, live up to expectations. The wine list should reflect quality and refinement, and yet offer value and choice. The service must be scrupulous but unobtrusive; the décor elegant but unpretentious. Finally, the bill must be palatable, reasonable and transparent. On these factors hang the reputation of the restaurant, the satisfaction of the diner, and his memory of an evening well-spent. All of that can be tarnished if the balance is off-kilter in any way; for instance, if the quality of the food comes at the cost of delays in service or an inflated bill.

3. If a successful meal depends on fine balancing, so too does a successful arbitration. The qualities of an optimal arbitration readily come to mind: speed, affordability, efficiency, accessibility, respect for due process and the achievement of a just and accurate result. An arbitration that embodies these qualities holds the promise not only of promoting justice and offering closure for the parties, but also of burnishing the reputation of the arbitrator and indeed that of arbitration as an institution. But achieving that balance is an enduring challenge in a world of limited resources and unlimited wants. My lecture today focuses on an aspect of that challenge which has assumed particular relevance and prominence in recent years, especially as misgivings over rising costs and delays in arbitration continue to mount.

II. The phenomenon of “due process paranoia”

4. In 2015, the Queen Mary University of London International Arbitration Survey reported that there was “growing concern in international arbitration” over a “perceived reluctance by 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”.² An interviewee coined the term “due process paranoia”, and that expression has since passed into common usage in the arbitration community.³

5. According to the survey, due process paranoia was “repeatedly raised in responses, including in nearly all the personal interviews”. It manifested itself in the excessive willingness of tribunals to condone disruptive behaviour by counsel, such as repeated requests for extensions of deadlines and late admission of fresh evidence. This evidently stemmed from the fear that the award might otherwise be vulnerable to challenge. Even arbitrators described the phenomenon as “both problematic and commonplace”, with many candidly

² Queen Mary University of London School of Law and White & Case, “2015 International Arbitration Survey: Improvements and Innovations in International Arbitration” (“2015 QMUL Survey”) at p2: <arbitration.qmul.ac.uk/media/arbitration/docs/2015_International_Arbitration_Survey.pdf>.

³ See, for instance, Lucy Reed, 2016 Queen Mary School of International Arbitration – Freshfields Lecture, “Ab(use) of due process: sword vs shield” (27 October 2016) (“Reed”); Klaus Peter Berger and J. Ole Jensen, “Due process paranoia and the procedural judgment rule: a safe harbour for procedural management decisions by international arbitrators”, *Arbitration International*, 2016, 32, 415–435 (“Berger and Jensen”); Albert Bates Jr and R. Zachary Torres-Fowler, “Abuse of Due Process in International Arbitration: Is Due Process Paranoia Irrational?”, *The American Journal of Construction Arbitration & ADR*, Vol. 1, No. 2, December 2017 (“Bates and Torres-Fowler”): <pepperlaw.com/resource/35386/7G2>; and Remy Gerbay, *Kluwer Arbitration Blog*, “Due Process Paranoia” (6 June 2016) (“Gerbay”): <arbitrationblog.kluwerarbitration.com/2016/06/06/due-process-paranoia/?doing_wp_cron=1590399532.8879950046539306640625>.

admitting that it influenced their decisions as arbitrators.⁴ In the most recent 2018 edition of the survey, it was reported that due process paranoia “continued to be a source of concern for many”, and contributed significantly to a perceived lack of boldness on the part of arbitrators in their conduct of proceedings and use of sanctions to curb abuse.⁵

6. Today, there is a groundswell of opinion in the arbitration community that due process paranoia poses a “real threat”⁶ to international arbitration. The consequences are as serious as they are predictable.

(a) First, where abusive procedural requests and threats that “vaguely allude to due process concerns”⁷ result in arbitrators being over-eager to give in to such requests and therefore to extend deadlines, allow late submissions or postpone hearings, the proceedings will likely be delayed and additional costs incurred, to the particular detriment of the innocent party.⁸

⁴ 2015 QMUL Survey at p10.

⁵ Queen Mary University of London School of Law and White & Case, “2018 International Arbitration Survey: The Evolution of International Arbitration” at p27: <[arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-\(2\).PDF](http://arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF)>.

⁶ Berger and Jensen at p420.

⁷ Bates and Torres-Fowler at p247.

⁸ Reed at p376; Berger and Jensen at p420.

(b) Second, as Professor Lucy Reed has observed, when an arbitrator is confronted by relentless due process complaints, she might fall victim to unconscious bias: either in favour of the complaining party, the arbitrator's willpower having been eroded by the incessant abuse; or against the complaining party, out of a sense of growing frustration with it.⁹

(c) Third, repeated concessions to abusive requests will ultimately "undermine and cheapen due process in international arbitration". They distort the meaning and significance of due process and harm the "integrity of the proceedings".¹⁰ Constantine Partasides QC and Ben Prewett have also observed that if due process paranoia is left to fester, its effects can be even more lasting and insidious, because repeated concessions build up an "inefficient norm against which future complaints of insufficient opportunity to be heard are judged".¹¹

7. These warnings should be heeded. I would add that the persistence of due process paranoia reinforces the erroneous conception that the goals of due process and efficiency are inherently opposed. As I will explain, if due process

⁹ Reed at p376.

¹⁰ Reed at p376.

¹¹ Constantine Partasides QC and Ben Prewett, "Chapter 5: Rediscovering the Lost Promise of International Arbitration" in Laurent Levy and Michael Polkinghorne eds, *Expedited Procedures in International Arbitration*, Dossiers of the ICC Institute of World Business Law, vol 16 (Kluwer Law International; ICC, 2017) ("Partasides and Prewett") at p111.

paranoia is not redressed, it will perpetuate a certain understanding of due process that is not only conceptually flawed, but also inconsistent with the prevailing practices of reviewing and enforcing courts around the major arbitration jurisdictions of the world.

8. What explains the emergence and perhaps even the intensification of due process paranoia in international arbitration? Some suggest that it is attributable to the way in which the current system of international arbitration creates “strong incentives” for arbitrators to always err in favour of due process at the expense of efficiency and expediency. Two common perceptions in arbitral practice are said to underpin due process paranoia: first, that arbitrators “almost uniformly view increased costs and delays as preferable to the increased risk of an unenforceable award”; and second, that arbitrators are commonly appointed by reputation and therefore leery of the potential reputational harm that might follow from an unenforceable award.¹²

9. My lecture will centre on two broad theses that I believe can be offered in response to these perceptions. First, arbitrators should not be unduly concerned about the perceived risk of the unenforceability of any award they make stemming from their robust management of the proceedings and their rejection of abusive requests. That is because due process paranoia seems to

¹² Bates and Torres-Fowler at p251.

be borne out of a fundamental misunderstanding as to what due process requires as well as the true nature of the relationship between due process and efficiency. I digress to note that although I speak of due process generally, my particular focus is on case management decisions, because these decisions ultimately determine how efficiently proceedings are conducted. Second, arbitrators must recognise that speed and efficiency in the conduct of proceedings is as much a central expectation of the parties as is adherence to the strictures of due process. As has been said, arbitrators must “jettison the notion that greater disrepute will follow if their awards were to be refused enforcement based on an inflated sense of due process.”¹³ And beyond individual reputation, what lies in the balance between due process and efficiency is nothing less than the legitimacy of international arbitration, its continued relevance, and perhaps even its identity.

III. The parallel aspirations of due process and efficiency

10. I begin with the perceived tension between due process and efficiency. As a starting point, one observes that the expression “due process paranoia” is far from neutral; it assumes without explanation that such fears are misconceived. We have, of course, no means of ascertaining why the unknown

¹³ Sameer Sharma, “Due Process ‘Paranoia’: Turning Away from Judicial Attitudes and Looking for Answers Within” (2018) *The International Journal of Arbitration, Mediation and Dispute Management*, Vol 84, Issue 4, pp314-325 at p318.

originator of the expression regarded these fears as mere paranoia, but I suggest that the conclusion is correct to the extent that there is in fact no unbridgeable gap between due process and efficiency as reflected in the law and practice of arbitration.

11. I will advance this argument on three levels: first, as a matter of *principle*, by locating due process and efficiency within the rule of law framework; second, from a *conceptual and definitional* point-of-view, examining the meaning of the right to be heard as presented in national laws and institutional rules and as elaborated by the courts; and third, as a matter of *practice*, reviewing the success rates of challenges against procedural decisions of arbitrators.

A. *Due process, efficiency and the rule of law*

12. In a lecture I delivered at the SIAC Virtual Congress last month, I spoke about the extent to which international arbitration can claim to support the values and purposes of the rule of law.¹⁴ Due process, with all its facets – such as the impartial and independent adjudication of disputes, the right to offer arguments and evidence in support of one’s case, knowledge of and the opportunity to respond to competing arguments and evidence, and so on – is, of course, an integral value of the rule of law. At the same time, the pursuit of efficiency, which

¹⁴ Sundaresh Menon CJ, SIAC Virtual Congress 2020, “Arbitration’s Blade: International Arbitration and the Rule of Law” (2 September 2020) (“Arbitration’s Blade”): <[supremecourt.gov.sg/docs/default-source/default-document-library/siac---arbitration's-blade---international-arbitration-and-the-rule-of-law-\(as-delivered\).pdf](https://supremecourt.gov.sg/docs/default-source/default-document-library/siac---arbitration's-blade---international-arbitration-and-the-rule-of-law-(as-delivered).pdf)>.

focuses on the speed and affordability of proceedings as well as the proportionality of the procedures adopted to the nature and size of the dispute,¹⁵ is no less a core dimension of the rule of law.

13. I suggest that the common membership of due process and efficiency within the rule of law framework means that both values are, in principle, aligned rather than opposed. That becomes clear when we recognise that both values are engaged in the common enterprise of achieving the various purposes of the rule of law. In the SIAC lecture, I argued that it is not sufficient to acknowledge the rule of law as an important social good, and suggested that we must understand *why* this is so, if we are to make value judgments about *when* it might be sensible or acceptable to pursue other competing objectives even at the cost of a rule of law value.¹⁶ To that end, I proposed that the rule of law is directed toward at least two central goals.

14. The first, which I regard as the rule of law's overarching mission, is the pursuit of legitimacy. As long as the majority of a democratic society accepts an institution's or system's decision-making processes, it will be able to transcend any differences and disagreements over particular decisions of that institution

¹⁵ Sundaresh Menon CJ, Negotiation and Conflict Management Group (NCMG) ADR Conference 2019, "Technology and the Changing Face of Justice" (14 November 2019) at para 57: <supremecourt.gov.sg/docs/default-source/default-document-library/ncmg---keynote-lecture.pdf>.

¹⁶ Arbitration's Blade at para 9.

or system. In the context of a system of dispute resolution, our acceptance of and support for that system is founded on its general adherence to the values and principles that constitute the rule of law.¹⁷

15. The second, subsidiary, aim of the rule of law is the promotion of sound and accurate outcomes in disputes, meaning outcomes that are based on generally correct findings of fact and applications of law. That is because the norms of procedural fairness required by the rule of law – such as the requirement of an impartial adjudicator, and that both sides be given an equal opportunity to be heard – are often also instrumental to ensuring correct outcomes.¹⁸

16. I suggest that due process and efficiency are equally essential to achieving both these purposes of the rule of law, and that neither of these values will be sufficient without the other.

17. Beginning with the pursuit of accurate outcomes, a disproportionate fixation on securing due process at the expense of efficiency would compromise arbitration's ability to reach a substantively just and correct outcome. It would detract from the ability of the tribunal and the parties to focus on the merits of parties' cases, upon which the dispute turns. It would also increase costs and

¹⁷ Arbitration's Blade at paras 11-12.

¹⁸ Arbitration's Blade at para 13.

delay, to the advantage of the party with deeper pockets rather than the more just cause. Put another way, “fairness also requires some degree of efficiency, since justice too long delayed becomes justice denied”.¹⁹ At the same time, however, a disproportionate emphasis on efficiency at the expense of due process would compromise the tribunal’s ability to achieve substantive justice. As the counterpoint to the earlier aphorism goes, “justice hurried is justice buried”. Principles such as the right of a party to submit arguments and evidence in his own cause, and the equal opportunity to be heard, help to steer the dispute resolution process toward a just and accurate outcome.

18. When we consider the overarching aspiration of legitimacy, the contributions of both due process and efficiency require little explanation. Both of these values are indispensable to securing public confidence in and acceptance of international arbitration as a system of dispute resolution; in other words, its legitimacy. Just as the public will naturally reject and distrust a process that fails to meet the requirements of due process, so will it be slow to place its confidence in the ability of a slow, laborious and costly process to serve its needs. This is especially the case in the commercial context.

¹⁹ Fabricio Fortese and Lotta Hemmi, “Procedural Fairness and Efficiency in International Arbitration”, *GroJIL* 3(1) (2015), 110-124 at p116: <grojil.files.wordpress.com/2015/05/grojil_vol3-issue1_fortese_hemmi_.pdf>.

B. *Understanding due process*

19. But has the law developed in such a way as to create divisions between, rather than to harmonise, these values? I do not think so. On the contrary, I suggest that the law *has* in fact developed in a manner that is sensitive to their underlying coherence, and this has been accomplished through a careful calibration of the concept of due process in international arbitration. Due process has been conceptualised so that it refrains from absolutism, need not be pursued at all costs, and in fact contains a window through which considerations of efficiency can properly feature in the evaluation by courts and tribunals as to whether a party's right to be heard has been sufficiently respected. This reduces the possibility of conflict between the goals of due process and efficiency.

i. The yardstick of reasonableness

20. Let me elaborate using the analysis applied by the Singapore Court of Appeal in the recent *Jaguar* appeal.²⁰ In *Jaguar*, the owners of a power generation plant commenced arbitration against a contractor for the cost of completing the plant. The owners succeeded in the arbitration and the contractor applied to set aside the award on various grounds. On appeal, the contractor's case narrowed to an allegation that the tribunal had deprived it of the opportunity

²⁰ *China Machine New Energy Corp v Jaguar Energy Guatemala LLC and another* [2020] SGCA 12 ("*Jaguar*").

to respond to the owners' claim by reason of the tribunal's mismanagement of the proceedings.

21. Observing that there was a need to guard against the cynical and improper use of due process arguments to attack arbitral awards, and to offer guidance to tribunals as to the sort of concerns that might actually undermine awards,²¹ the Court of Appeal took the opportunity to consider the proper interpretation of Article 18 of the Model Law. In its current form, Article 18 mandates that parties be treated with equality and that "each party shall be given a full opportunity of presenting his case". The Court of Appeal studied the drafting history of Article 18 and noted two points of significance.

22. First, an initial draft of Article 18 stipulated that "*at any stage of the proceedings* each party [should be] given a full opportunity of presenting his case".²² It was subsequently decided that the phrase "at any stage of the proceedings" should be omitted due to the concern that those words "might be relied upon by a party who wished to prolong the proceedings or to make unnecessary submissions".²³

²¹ Jaguar at [3]–[4].

²² Emphasis added.

²³ At [94(a)], citing *Report of the Working Group on International Contract Practices on the Work of its Fourth Session* (A/CN.9/232, 10 November 1982) at para 104; *Report of the Working Group on International Contract Practices on the Work of its Sixth Session* (A/CN.9/245, 22 September 1983) at para 73).

23. Second, having reviewed the draft text of the Model Law, Norway had suggested that the reference in Article 18 to a “full” opportunity might provide “a basis for delaying tactics”, and proposed that “full” be replaced with “adequate”.²⁴ While the word “full” was ultimately retained, the Working Group emphasised in its Analytical Commentary that Article 18, together with other provisions in the Model Law, made it “clear that [the phrase] ‘full opportunity of presenting one’s case’ does not entitle a party to obstruct the proceedings by dilatory tactics and, for example, present any objections, amendments, or evidence only on the eve of the award”.²⁵ As Professor Reed has also pointed out, both of these concerns have been explicitly addressed in the evolution of the UNCITRAL Arbitration Rules from its original form in 1976 to its current version since 2010.²⁶

24. All of this demonstrates that far from being an absolute and unqualified right, the right to present one’s case is carefully circumscribed so as to prevent abuse and promote speed and efficiency in the conduct of proceedings. The

²⁴ At [94(b)], citing *Analytical Compilation of comments by Governments and international organisations on the draft text of a model law on international commercial arbitration* (A/CN.9/263, 19 March 1985), Art 19(3) at para 7.

²⁵ At [95], citing *Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration* (A/CN.9/264, 25 March 1985), Art 19 at para 8.

²⁶ The words “any stage” and “full opportunity” in the original Article 15(1) of the 1976 Rules (see Art 15(1) of UNCITRAL Arbitration Rules, Resolution 31/98 adopted by the General Assembly on 15 December 1976: <uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/arb-rules.pdf>) have been replaced with “appropriate stage” and “reasonable opportunity” respectively in Article 17(1) of the 2010 Rules (see Art 17(1) of UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration and Arbitration Rules (as revised in 2010, with new article 1, paragraph 4, as adopted in 2013), Resolution adopted by the General Assembly on 16 December 2013: <uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/uncitral-arbitration-rules-2013-e.pdf>).

Court of Appeal concluded that the right is “impliedly limited by considerations of *reasonableness* and fairness”,²⁷ such that “the proper approach a court should take [in determining whether a party has been denied his right to a fair hearing by the tribunal’s conduct of the proceedings] is to ask itself if what the tribunal did (or decided not to do) falls within the range of what a *reasonable* and fair-minded tribunal in those circumstances might have done”.²⁸ It agreed with the eloquent summation of the issue in *Redfern and Hunter*.²⁹

At first sight, the word ‘full’ can be misleading: it conjures visions of a party having an entitlement to present as much argument and evidence as it sees fit. But, in this context, the word ‘full’ must be given a sensible meaning, and in practice it seems unlikely that a national court would set aside an award where the tribunal took a clearly reasonable and proportionate approach to limiting the scope of the evidence that a party wished to present. ... [This] should encourage arbitral tribunals to *balance opportunity with efficiency* in determining appropriate arbitral procedures.³⁰

25. A brief survey of the case law of other jurisdictions reveals that the reasonableness of the tribunal’s decision on matters of procedure is in fact the yardstick applied by many courts in determining whether that decision violated a party’s right to be heard. For instance, in the UK, the High Court held in *Terna*

²⁷ Emphasis added.

²⁸ Emphasis added; *Jaguar* at [97]–[98].

²⁹ *Jaguar* at [97(g)], citing *Redfern and Hunter on International Arbitration* (Oxford University Press, 6th Ed, 2015) at para 6.14.

³⁰ Emphasis added.

*Bahrain*³¹ that curial intervention would “only be appropriate where the tribunal has gone so wrong in the conduct of the arbitration, and where its conduct is so far removed from what could *reasonably be expected* from the arbitral process, that justice calls out for it to be corrected.”³² In the US, the District Court for the District of Massachusetts held in *AGM Marine*³³ that it would “not intervene in an arbitrator’s decision not to postpone a hearing if any *reasonable basis* for it exists.”³⁴ Courts in New Zealand,³⁵ Spain³⁶ and China³⁷ among others all appear to have adopted a similar approach.

³¹ *Terna Bahrain Holding Co v Ali Marzook Ali Bin Kamil Al Shamsi et al* [2012] EWHC 3283 (Comm).

³² Emphasis added. Similarly, in *ASM Shipping Ltd of India v TTMI Ltd of England* [2005] EWHC 2238 (Comm), the court held that “the test is whether the decision ... was ‘so far removed from *what could reasonably be expected* of the arbitral process that it must be rectified” [emphasis added].

³³ *ALS & Assocs v AGM Marine Constructors Inc*, 557 F Supp 2d 180 (D Mass 2008).

³⁴ Emphasis added. The same approach was taken in *PT Reasuransi Umum Indonesia v Evanston Ins Co*, XIX YB Comm Arb 788, 790 (US District Court, SDNY 1992), where the District Court for the Southern District of New York held that “[w]here there is a *reasonable basis* for the arbitrator’s decision ... courts are reluctant to interfere with the arbitration award on the ground of misconduct.”

³⁵ In the oft-cited decision of *Trustees of Rotoaira Forest Trust v Attorney-General* [1999] 2 NZLR 452, the New Zealand High Court articulated the approach in the following terms: “[E]ach party [must] be given *reasonable opportunity* to present evidence and argument in support of its own case, test its opponent’s case in cross-examination, and rebut adverse evidence and argument”.

³⁶ In the arbitration leading up to the commencement of Case 62/2015 (15 September 2015) before the Madrid High Court, the tribunal decided to admit a new claim after the deadline established in the procedural schedule. The court declined to set aside the award, holding that arbitration is sufficiently flexible to allow an arbitrator to make decisions about evidence broadly, and that it was reasonable for the arbitrator to admit the new claim and supporting evidence: see International Bar Association, “Annulment of arbitral awards by state court: Review of national case law with respect to the conduct of the arbitral process” (October 2018) (“IBA Report”) at p134: <<https://www.ibanet.org/Document/Default.aspx?DocumentUid=B4B532BB-90E1-40AB-AB3D-F730C19984FB>>.

³⁷ In the arbitration that was the subject of *Shenyang Xinying Nets Industrial Co Ltd v Poway Ltd* (2015), Si Zhong Min (Shan Te Zi No 284), the tribunal dismissed the applicant’s request for a postponement of the hearing after the defendant amended its pleadings 15 days before the hearing, supposedly leaving the applicant insufficient time to prepare its evidence. The Beijing Intermediate People’s Court held that the tribunal had given the applicant a reasonable opportunity to present and argue his case, noting that he had been able to present relevant facts and submissions during and after the hearing. In any case, it was for the tribunal to decide whether to postpone the hearing: see IBA Report at p16.

ii. Efficiency within the matrix of reasonableness

26. I suggest that the test of reasonableness provides a window through which considerations of proportionality and efficiency may legitimately feature in the determination of whether a party has been afforded due process; and in this manner, it plays a central role in harmonising the goals of due process and efficiency. I make three connected points.

27. The starting point is that arbitrators have a broad procedural discretion in matters not agreed upon by the parties. This discretion is protected in virtually all national legislation and institutional rules.³⁸ To take just one example, Article 19(2) of the Model Law permits the tribunal to “conduct the arbitration in such a manner as it considers appropriate”. The breadth of this discretion has been consistently recognised by the courts. For instance, Justice Tay Yong Kwang while in the Singapore High Court noted that an arbitrator is “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”.³⁹ And another of my colleagues, Justice Vinodh Coomaraswamy, has observed that the “wide and flexible discretion” of tribunals is made possible only by the “party-mandated flexibility [in arbitration]

³⁸ Jeffrey Waincymer, *Procedure and Evidence in International Arbitration* (Wolters Kluwer, 2012) at para 2.9.2.

³⁹ *Anwar Siraj v Ting Kang Chung* [2003] 2 SLR(R) 286 (“*Anwar Siraj*”) at [41].

to adapt the procedure to the dispute”, and is therefore not simply an incidental feature of arbitration but rather “one of [its] hallmarks and main attractions”.⁴⁰

28. My second point is that the broad procedural discretion afforded to arbitrators is not to be exercised in a vacuum but must instead be directed at the discharge of arbitrators’ duties, including the duty to act with *efficiency*. This is illustrated, for instance, in Article 14.5 of the LCIA Rules, which vests in the tribunal the “widest discretion *to discharge [the] general duties*”⁴¹ of the tribunal. One such duty, prescribed in Article 14.4, is “to adopt procedures suitable to the circumstances of the arbitration, avoiding unnecessary delay and expense, so as to provide a *fair, efficient and expeditious means* for the final resolution of the parties’ dispute”⁴² – in other words, the duty of efficiency. Similarly, Article 22(1) of the ICC Rules prescribes a duty of the tribunal to “make every effort to conduct the arbitration in an *expeditious and cost-effective* manner, having regard to the complexity and value of the dispute”.⁴³ To that end, Article 22(2) permits the tribunal to “adopt such procedural measures as it considers appropriate”. In short, the procedural latitude afforded to arbitrators is intended to facilitate their

⁴⁰ *ADG and another v ADI and another matter* [2014] 3 SLR 481 (“ADG”) at [111].

⁴¹ Emphasis added.

⁴² Emphasis added.

⁴³ Emphasis added.

duty to conduct the proceedings in as efficient a manner as is reasonably possible.

29. I suggest that when these two points are taken together, they inform our understanding of *why* the test of reasonableness was adopted for the purpose of assessing due process allegations, and *how* the test is to be applied.

30. In asking whether the tribunal's conduct or decision was reasonable – rather than whether it would have done the same – the court recognises that the *tribunal* has an important discretion in matters of procedure. This necessarily means, in the words of Justice Colman in *Vee Networks*,⁴⁴ that the “test is not what would have happened had the matter been litigated. To apply such a test would be to ignore the fact that parties have agreed to arbitrate, not litigate.” It is out of this recognition that the *tribunal* has a broad procedural discretion, flowing fundamentally from the parties' agreement, that the courts have adopted the test of reasonableness.

31. Turning to the question of how courts apply the test of reasonableness, this is generally done by asking whether the tribunal acted or decided reasonably *in light of the tribunal's duties*, including its duty of *efficiency*. In other words, the tribunal's duty of efficiency provides partial direction to how the test

⁴⁴ *Vee Networks v Econet Wireless International Limited* [2004] EWHC 2909 (Comm) at [90].

of reasonableness is to be applied. In light of the duty of efficiency, it is not only legitimate but indeed obligatory for the tribunal to make procedural decisions with due regard to the interest of an efficient arbitration. If the tribunal makes such a decision after also having had sufficient regard to the interest of the parties in due process, it can hardly be said to have acted unreasonably.

32. It is worth reiterating that *both* due process and efficiency are key expectations of parties. The carefully calibrated approach to assessing due process allegations that I have just described is not in any way intended to diminish the importance of due process, but instead recognises that the efficiency of arbitration diminishes with every concession to an unreasonable procedural request in a manner contrary to the parties' expectations. The approach to due process must therefore be capable of safeguarding arbitration from such abuse. For this reason, it has been said that the conferment of due process rights was "never intended to endow the parties with opportunities to obstruct the efficient resolution of the dispute", but was instead "meant to *protect* reasonable, non-dilatory procedural requests. [The] emphasis on efficiency [in the analysis of due process] should not be misunderstood as a limitation of due process and party autonomy. Rather, quite to the contrary, it should be understood as their realisation."⁴⁵

⁴⁵ Emphasis added; Berger and Jensen at pp422–423.

iii. Proportionality within the matrix of reasonableness

33. A final point I make as I close this part of the discussion is that an important dimension of the court's assessment of reasonableness is, and ought to be, that of proportionality. I alluded to proportionality earlier as an element of the value of efficiency within the rule of law framework,⁴⁶ and it therefore ought to find its way into the assessment of reasonableness which, as I have explained, contains a window to considerations of efficiency.

34. Proportionality in this context means that it is practical and rational for the degree of rigour and exactitude in the examination of a claim to correspond to the relative value, complexity and significance of the claim. For instance, if a tribunal is faced with a suite of claims, one of which in comparison to the other claims is of lower value; is factually or legally more straightforward; or will have fewer implications on the overall dispute or the parties' interests, then it might well be legitimate for the tribunal to devote less time and resources to that claim. It may, for example, permit fewer rounds of submissions or allocate less time for arguments and cross-examination on that claim. Proportionality would be relevant not only to claims within a dispute but also as between different types of disputes. It is appropriate that more time and resources are devoted to the

⁴⁶ See para 12 above.

arbitration of a multimillion dollar dispute arising from a complex infrastructure project, as compared to a quarrel between neighbours over unwanted noise.

35. In short, given the reality of limited time and resources, it is *reasonable* for the tribunal to apply considerations of proportionality when making procedural decisions. The importance of proportionality is reflected, for example, in Article 22(1) of the ICC Rules, which requires the tribunal to “make every effort to conduct the arbitration in an expeditious and cost-effective manner, *having regard to the complexity and value of the dispute*”.⁴⁷ And Appendix IV of the Rules, which outlines case management techniques for controlling time and cost, expressly recognises that “[i]n cases of low complexity and low value, it is particularly important to ensure that time and costs are *proportionate* to what is at stake in the dispute”.⁴⁸

C. Challenges to awards on due process grounds

36. Having examined due process and efficiency as values within the rule of law framework and as concepts within the law of arbitration, I turn to consider whether, as a matter of practice, the results of challenges to arbitral awards on due process grounds reflect any real dilemma or tension between them.

⁴⁷ Emphasis added.

⁴⁸ Emphasis added.

i. Empirical studies

37. In essence, empirical studies on challenges to arbitral awards on due process grounds have almost uniformly concluded that it is exceptional for courts to set aside arbitral awards on this basis.⁴⁹ It has been said that there is a “remarkable gorge” between the perceived risks to enforceability following from contested case management decisions and the actual practice of the courts when assessing those decisions.⁵⁰

(a) A study conducted in 2016 found that national courts across different jurisdictions rarely interfered with arbitrators’ procedural and management decisions, taking the consistent view that tribunals have the “widest discretion permitted by law to determine the procedure to be adopted, and to ensure the just, expeditious, economical and final determination of the dispute”.⁵¹

(b) Another study conducted in 2016 surveyed more than 110 decisions of the English courts citing s 33 of the UK Arbitration Act (which establishes the general duty of the tribunal to give each party “a reasonable opportunity of putting his case and dealing with that of his

⁴⁹ See, for instance, Herman Verbist, “Challenges on Grounds of Due Process Pursuant to Article (V)(1)(B) of the New York Convention”, in *Enforcement of Arbitration Agreements and International Arbitral Awards: the New York Convention in Practice* 679, 692 (Emmanuel Gaillard & Domenico Di Pietro eds, 2008); see also Reed at p372.

⁵⁰ Berger and Jensen at p421.

⁵¹ Berger and Jensen at p423, citing *Brandeis (Brokers) Ltd v Black* [2001] 2 All ER (Comm) 980 at [56].

opponent”) since the enactment of the Act two decades earlier. It found no decision in which an award had been set aside “because of an overly robust case management decision on the part of the tribunal”.⁵²

(c) In Sweden, it has been observed that despite procedural irregularity being the most frequently invoked ground for challenges to arbitral awards before the Swedish Courts of Appeal, no award made in Stockholm in “modern time[s]” has been set aside on this basis.⁵³

(d) Perhaps the most recent, and certainly one of the most comprehensive, studies on the issue was conducted by the International Bar Association, which released its report in October 2018. The IBA examined the decisions of 13 major jurisdictions – including the UK, the US, Brazil, China, France, Germany, Hong Kong, and Singapore – and confirmed an earlier finding that it was “rare for an award to be set aside for procedural reasons only”. The report concluded that fears of annulment could therefore safely be regarded as “largely exaggerated”.⁵⁴

⁵² Such as the rejection of applications for an extension of time, the rejection of new defences or fresh evidence, or the refusal to reschedule a hearing: Gerbay; cited also in Partasides and Prewett at p111.

⁵³ Robin Oldenstam, “Chapter 8: Due Process Paranoia or Prudence?” at p122 in Axel Calissendorff and Patrik Scholdstrom eds, *Stockholm Arbitration Yearbook 2019*, Stockholm Arbitration Yearbook Series, Vol 1 (Kluwer Law International, 2019).

⁵⁴ IBA Report at p2.

ii. Two illustrative decisions

38. In order to provide a flavour of the courts' approach toward due process challenges arising from procedural decisions of the tribunal, let me briefly discuss two decisions.⁵⁵

39. I begin with *Pacific China Holdings*,⁵⁶ a decision of the Hong Kong Court of Appeal. An agreed procedural timetable for the arbitration required the parties to exchange pre-hearing submissions containing their best cases on fact and law. Shortly before the deadline, the appellant sought leave to amend its pleadings so as to introduce an allegation that a loan agreement at issue in the case was void and unenforceable as a matter of Taiwanese law. The tribunal granted leave and directed that the appellant's pre-hearing submissions were to deal with that issue, but also directed that the respondent was not required to do so in its pre-hearing submissions. Instead, the respondent was permitted to make supplemental submissions on the issue some 10 days later.

40. The appellant complained that these directions gave the respondent an unfair advantage, namely, the opportunity to tailor its argument and expert evidence to meet the appellant's best case. The Court of Appeal disagreed, finding that the tribunal had fairly taken the view that the respondent was

⁵⁵ For further examples, see *ADG and Triulzi Cesare SRL v XinyiGroup (Glass) Co Ltd* [2015] 1 SLR 114.

⁵⁶ *Pacific China Holdings Ltd (In Liquidation) v Grand Pacific Holdings Ltd* [2012] 4 HKLRD 1.

prejudiced by the lateness of the application, and the appellant would therefore only be granted leave to amend on these terms. The court noted that “[e]xcept in the most egregious cases, the wide discretion of arbitrators and the flexibility of the arbitral process have been confirmed by national courts which quite regularly reject the procedural arguments of disappointed parties”.⁵⁷

41. The second decision is that of the Singapore Court of Appeal in *Jaguar*, which I mentioned earlier. Following the breakdown of the relationship between the owners of a power plant and its contractor, the latter’s employment under the contract was terminated and the owners then commenced an expedited arbitration under the ICC Rules seeking damages. During the document disclosure phase, the owners sought leave to disclose certain exhibits on an Attorneys’ Eyes Only (“AEO”) basis, citing a concern that the contractor might misuse the information they contained. Over the contractor’s objections, the tribunal held that disclosure on an AEO basis would strike the right balance between, on the one hand, ensuring that the parties had an adequate opportunity to present their cases, and on the other hand, minimising rising tensions between the parties and providing assurance that sensitive information would not be used for improper purposes, the possibility of which the tribunal

⁵⁷ Citing Laurence Craig, William Park and Jan Paulsson, *International Chamber of Commerce Arbitration* (Oxford University Press, 3rd Ed, 2000) at para 16.04.

regarded as a “serious concern”.⁵⁸ The tribunal established a two-stage process for the disclosure of documents. In the first stage, the material would be disclosed to the contractor’s external counsel but not to its employees. In the second stage, the contractor could apply to the tribunal for its employees to be given access in order to give instructions to counsel, but those employees had to be identified and were to provide an undertaking of confidentiality.

42. The contractor argued that the AEO order hindered its ability to respond to the claim. Applying the test of a reasonable and fair-minded tribunal that I discussed earlier, the Court of Appeal held that the tribunal was “clearly conscious of the need to”,⁵⁹ and was in fact “doing the best it could in the circumstances[,] to strike a fair balance between the parties’ interests”.⁶⁰ The two-stage process crafted by the tribunal represented a compromise between those competing interests and “fell well within the bounds of what a reasonable and fair-minded tribunal might have done”.⁶¹

43. That was only one of the contractor’s complaints against the tribunal’s management of the proceedings. The contractor also argued that it had been deprived of sufficient time to prepare its response because the tribunal failed to

⁵⁸ *Jaguar* at [23].

⁵⁹ Emphasis added; *Jaguar* at [113].

⁶⁰ *Jaguar* at [119].

⁶¹ *Jaguar* at [113].

put a stop to the owners' ongoing production of certain documents. That, however, had to be seen in the context of the fact that the arbitration was proceeding in tandem with the completion of the work by the replacement contractor engaged by the owners. In these circumstances, it was inevitable that documents and evidence pertaining to the cost of completion would continue to be generated even while the arbitration was underway.⁶² More importantly, the contractor had agreed that such production of documents could be permitted, on condition that it be given an extension of time to file its responsive report. That extension had been granted by the tribunal.⁶³ Against this background, the Court of Appeal held that the tribunal's approach, which was adopted after "balancing [the owners'] interest in presenting material relevant to its claim, and [the contractor's] interest in having a reasonable opportunity to meet [the claim]", was "entirely reasonable".⁶⁴

44. The Court of Appeal also rejected the contractor's further complaint that the tribunal had refused it a second extension of time to file its responsive expert report. The court pointed out that it was not "unreasonable for a tribunal to hold parties to timelines previously set, particularly where those timelines had been agreed".⁶⁵ Equally importantly, parties had agreed to an *expedited* arbitration,

⁶² *Jaguar* at [15(c)], [36], [38(b)] and [41].

⁶³ *Jaguar* at [131].

⁶⁴ *Jaguar* at [132].

⁶⁵ *Jaguar* at [137].

and that would “inevitably have a bearing on the expectations that parties [would] reasonably and fairly have as to the extent of the procedural accommodation that [might] be afforded to them.”⁶⁶

45. The contractor next attacked the tribunal’s direction that the owners had not been required to respond to the contractor’s responsive report, which the contractor had gone ahead to file, out of time, after having failed to obtain from the tribunal an extension of time to do so. This part of the complaint bears some similarity to that in *Pacific China Holdings*, and the ensuing analysis of the court was also similar to that of the Hong Kong Court of Appeal. The Singapore Court of Appeal observed that the tribunal’s direction was given after balancing “[the contractor’s] interest in putting additional material forward and [the owners’] interest in having a reasonable opportunity of responding to that material”. In light of the close proximity to the main evidentiary hearing, it was fair and reasonable for the tribunal to “give an indication ... that it did not (and indeed could not) expect [the owners] to respond to the material”.⁶⁷

46. In addition to relying on these complaints individually, the contractor submitted that its objections also had a cumulative effect, with the result that the prospects of a fair arbitration had been irretrievably lost. The difficulty with this

⁶⁶ *Jaguar* at [143].

⁶⁷ *Jaguar* at [151].

submission was that the contractor had never made *that* point to the tribunal in the course of the proceedings, but had instead consistently expressed its intention to press on with the main evidentiary hearing until its conclusion.⁶⁸ In fact, the contractor had never applied for the hearing to be adjourned. Quite apart from the fact that a tribunal cannot fairly be criticised for failing to consider points not put to it,⁶⁹ the Court of Appeal emphasised that the contractor should have brought home its concern that proceeding with the main evidentiary hearing in those circumstances would have been futile because it would be on terms that denied the contractor a fair and reasonable opportunity of preparing its case, such that the process would be fatally flawed. It might be worth noting the words of the Court of Appeal:⁷⁰

An assertion that the tribunal has acted in material breach of natural justice is a very serious charge, not just for the imputation that such an allegation makes as to the *bona fides* and professionalism of the tribunal, but also for the grave consequences it might have for the validity of the award. For this reason, there can be no room for equivocality in such matters. An aggrieved party cannot complain after the fact that its hopes for a fair trial had been irretrievably dashed, and yet conduct itself before the tribunal ‘in real time’ on the footing that it remains content to proceed with the arbitration and obtain an award, only to then challenge it after realising that the award has been made against it. ... [S]uch tactics simply cannot be countenanced.

⁶⁸ *Jaguar* at [165].

⁶⁹ *Jaguar* at [167].

⁷⁰ Original emphasis omitted; *Jaguar* at [168].

47. I have described the appeals in *Pacific China Holdings* and *Jaguar* at some length in order to illustrate the courts' approach toward such challenges.

I want to extract three features of that approach from the analysis:

(a) First, the courts recognise that contested decisions on procedure and case management are often multi-dimensional rather than linear in nature, and therefore require the tribunal to conduct a balancing exercise. This balance will typically require the tribunal to have due regard to its duties, the parties' competing interests, and the nature of the chosen procedure (for instance, an expedited arbitration).

(b) Second, the courts are generally mindful that it is the exercise of the *tribunal's* procedural discretion that is at issue, and will therefore tend to focus not on the correctness of the ultimate decision – in the sense of whether the court itself would have managed the proceedings the same way – but rather on the factors that went into the balancing exercise, and especially on whether the requirements of due process were sufficiently considered and whether the decision reached after weighing those factors was within the range of reasonable and permissible decisions that a reasonable tribunal could have reached.

(c) Third and finally, the courts are alert to the possibility of abuse and guard against this by requiring that wherever possible, the

complaining party must have raised its concerns or objections with the tribunal in the first instance. This is entirely appropriate for at least three reasons. First, it coheres with the fact that the tribunal is master of its own procedure.⁷¹ Second, it is simply unfair to the tribunal for its conduct or decision to be critiqued when in truth it was never made aware of the complaining party's dissatisfaction so as to be able to consider and address it if appropriate. And finally, as the Court of Appeal in *Jaguar* noted, it is abusive for a party to hedge its due process objections by presenting itself as perfectly happy to carry on with the arbitration, and then taking the point only after an adverse outcome.

48. It is, of course, possible that procedural decisions can result in a breach of due process, even if this is not common. One such example is the decision of the Paris Court of Appeal in November 2016 to set aside an award following an arbitration between the Government of Iraq and two German companies.⁷² The Paris Court of Appeal agreed with Iraq that there had been a violation of the principles of equality of arms and due process. The arbitration had been commenced just seven months after the beginning of the invasion of Iraq in 2003, which had resulted in the destruction of Iraq's administrative structure and

⁷¹ See para 27 above.

⁷² Paris Court of Appeal, November 8, 2016, *Gouvernement de la République d'Irak v Sociétés ThyssenKrupp et MAN*, 13/12002.

the displacement of its administrative personnel. Consequently, Iraq no longer had access to relevant files and its witnesses could not be located. The court considered that the tribunal should have adapted its duty of efficiency in the conduct of the proceedings to have due regard to these exceptional circumstances, rather than granting Iraq an extension of only up to three months to file its submissions, and then going ahead to issue an award based solely on the evidence put forward by the German companies.⁷³

iii. Conclusion

49. To conclude this survey of the courts' general approach to the review of due process objections in the context of case management, the conclusion to be drawn is that successful challenges against awards on case management grounds are rare. This suggests that the sensible pursuit of efficiency on the part of arbitrators is not at all incompatible with their obligation to ensure that the parties have had a reasonable opportunity to be heard. Certainly, there is no *necessary* conflict between the two objectives. Respect for due process and efficiency are perfectly capable of co-existing.

IV. Navigating due process abuse

⁷³ For a detailed explanation of the decision, see Elie Kleiman and Yann Dehaut-Delville, International Law Office, "Paris Court of Appeal rules on Iraq war's impact on due process in arbitral proceedings" (16 March 2017): <internationallawoffice.com/Newsletters/Arbitration-ADR/France/Freshfields-Bruckhaus-Deringer-LLP/Paris-Court-of-Appeal-rules-on-Iraq-wars-impact-on-due-process-in-arbitral-proceedings>.

50. This understanding of due process supports, rather than excludes, considerations of efficiency and this should in theory be sufficient to dispel due process paranoia on the part of arbitrators. But it has been noted that despite the rarity of successful challenges, arbitrators tend nevertheless to “err on the side of due process” when faced with a seeming conflict between these values. This is said to be so because there remains “enough variability and unpredictability” as to how courts approach due process challenges so as to “create a persistent, albeit minimal, risk of set[ting] aside or non-enforcement on due process grounds”.⁷⁴ I offer two responses to this observation.

51. First, it is important that arbitrators guard against unjustified diffidence in this context. When an arbitrator gives in to an abusive or unreasonable request, she not only prejudices the innocent party but also abdicates her responsibility to conduct the proceedings efficiently in line with her duty to all the parties. Rather than fixating on the theoretical risk of unenforceability, the arbitrator’s attention should be directed firmly to the task at hand, and that is the fair but efficient conduct of proceedings.

52. Second, it is within the ability of arbitrators to manage abusive requests and complaints without unduly compromising the enforceability of their awards. They can do this by adopting measures and safeguards to minimise their

⁷⁴ Bates and Torres-Fowler at pp248 and 254.

occurrence and contain their impact on the proceedings. Such safeguards can be both reactive and prophylactic in nature.

53. In terms of reactive measures, arbitrators and counsel should recognise and promptly denounce attempts at due process abuse when made.⁷⁵ Such a response would serve the dual purpose of warning the attempting party that the tribunal is alive to the nature of the party's conduct and categorically rejects it, and also getting the tribunal's response on the record thus providing crucial context in the event of a challenge to the award.⁷⁶ This does not call for a lengthy explanation on the part of the tribunal, as long as it explains clearly why it considered its rejection of the request to be fair and reasonable in the circumstances. That is likely to assist the court and perhaps also give pause to the complaining party.

54. Acting prophylactically, arbitrators should set the appropriate tone at the outset of the arbitration and establish an environment that minimises the likelihood of abusive behaviour in the first place. Professor Klaus Peter Berger and Dr J. Ole Jensen recommend that arbitrators use their procedural discretion to shape the arbitration in accordance with a few core principles that will promote

⁷⁵ Reed at p376.

⁷⁶ Bates and Torres-Fowler at p259.

the efficient conduct of the arbitration while minimising unreasonable procedural requests.⁷⁷

(a) The first of these is *transparency*. From the commencement of the arbitration, the tribunal should make its expectations known: namely, that it firmly sets its face against dilatory or unreasonable conduct, fully expects parties to play their part in bringing the proceedings to a swift end, and will adopt a hands-on approach to case management.⁷⁸

(b) The second principle is *proactivity*. A lack of active case management may encourage or provide opportunities to parties to make strategic due process complaints.⁷⁹ The tribunal should therefore take charge of proceedings from the outset, actively seek the input of the parties, utilise the procedural management tools at their disposal, and apply cost sanctions in the event of unreasonable procedural behaviour.⁸⁰

⁷⁷ Berger and Jensen.

⁷⁸ Berger and Jensen also suggest (at p430) that it may be helpful for tribunals to encourage party representatives to attend case management conferences, so as to afford the tribunal an opportunity to explain the value of streamlined proceedings. That may “trigger a healthy educational process” for party representatives, which fosters “greater acceptance of arbitration” and, in turn, enhances the legitimacy of arbitration.

⁷⁹ Bates and Torres-Fowler at p261.

⁸⁰ For instance, Article 38(3) of the ICC Rules (and Article 28.4 of the LCIA Rules) empowers the tribunal to take into account “the extent to which each party has conducted the arbitration in an expeditious and cost-effective manner” when making decisions on costs.

(c) The third principle is that of *interactivity*. This emphasises continued communication between the tribunal and the parties. Regular case management conferences enable the tribunal to monitor the proceedings closely, prevent unexpected last-minute requests, and foster a culture of initiative, diligence and honesty.

55. In short, arbitrators who are committed to the fair and efficient conduct of proceedings should focus their efforts not on what lies *beyond* their control – such as the off chance that a court might supplant its judgment for that of the tribunal’s – but on what actually lies *within* their grasp, and that is careful planning at the outset of the arbitration and the application of measures and safeguards to minimise the likelihood of due process abuse.

V. Due process paranoia and the complexity problem

56. I earlier said that what lies in the proper balance between due process and efficiency is the legitimacy, continued relevance, and even the identity of arbitration. Let me bring my remarks to a close by explaining this view.

57. In a fascinating article published last year,⁸¹ Professor Jörg Risse suggested that just like climate change, the “[I]aw and the science of law may

⁸¹ Jörg Risse, “An inconvenient truth: the complexity problem and limits to justice”, (2019) *Arbitration International*, Vol 35, Issue 3, pp291-307 (“Risse”).

also have their own inconvenient truth”.⁸² That “inconvenient truth” is the rapidly increasing factual complexity of disputes; and its consequence is that we may have reached “the limits of justice and litigability” in our current approach to dispute resolution.⁸³ Professor Risse gave the example of an actual arbitration involving an offshore windfarm project, in which the parties’ submissions amounted to more than 10,000 pages, excluding the hundreds of exhibits involved. Assuming a reading speed of six minutes per page, the arbitrator would have required 1,000 working hours – or about six months of full-time work – simply to read the submissions once over.⁸⁴ Professor Risse’s point was that dispute resolution increasingly suffers from a “complexity problem”, meaning that there is a growing number of cases so rich in facts that the proper adjudication of the dispute using conventional means is a “fiction”,⁸⁵ given the inherent cognitive limits of arbitrators and constraints on time and resources.⁸⁶

58. The solution, Professor Risse argued, lies in bold and innovative solutions that will not be without their own shortcomings, but which may

⁸² Risse at p291.

⁸³ Risse at p292.

⁸⁴ Another example provided by Professor Risse was that of a power plant dispute in which the claimant alleged more than 120,000 distinctive disruptive events that impacted the project schedule and the performance of works (this did not include additional claims based on employer’s instructions and variation order requests, or the counterclaims for delay-related penalties and damages and rectification of thousands of defects). Assuming the arbitrator could review, evaluate and decide eight of these 120,000 events per day, the arbitrator would require 60 years of work to resolve the dispute (assuming a year of 250 working days): see Risse at p293.

⁸⁵ Risse at p293.

⁸⁶ Risse at p297.

nevertheless be preferable to the status quo. These include downsizing the dispute by setting strict page limits for submissions and restricting the number of expert reports;⁸⁷ allowing arbitrators to be assisted by associates or tribunal-appointed experts;⁸⁸ establishing firm procedural calendars that prohibit additional submissions save in exceptional circumstances;⁸⁹ prohibiting or limiting document production;⁹⁰ determining preliminary issues early;⁹¹ and permitting arbitrators to facilitate settlement between the parties.⁹² In this regard, the recent Prague Rules on the efficient conduct of proceedings in international arbitration may be helpful.⁹³ We might add to this list the summary determination of disputes or parts of disputes, which is a procedure that remains uncommon in international arbitration despite judicial recognition that their use falls within the procedural discretion of arbitrators.⁹⁴

59. I believe that the complexity problem that Professor Risse speaks of *is* a real problem confronting international arbitration and is in fact becoming

⁸⁷ Risse at p299.

⁸⁸ Risse at pp299–300.

⁸⁹ Risse at pp300–301.

⁹⁰ Risse at pp301–302.

⁹¹ Risse at p302.

⁹² Risse at pp305–306.

⁹³ Rules on the Efficient Conduct of Proceedings in International Arbitration (Prague Rules): <praguerules.com/upload/medialibrary/9dc/9dc31ba7799e26473d92961d929648c9.pdf>.

⁹⁴ *Travis Coal Restructured Holdings LLC v Essar Global Fund Limited* [2014] EWHC 2510; *Sherrock Brothers, Inc v DaimlerChrysler Motors Co, LLC*, 260 Fed Appx 497 (3rd Cir, 7 January 2008); *Global Int'l Reinsurance Co Ltd v TIG Insurance Co*, 640 F Supp 2d 519 (SDNY, 2009). For a detailed account and discussion of the use of summary disposition in international arbitration, see Partasides and Prewett.

endemic to the wider adversarial model of dispute resolution. It is reflected in rising costs and delays and complaints about the inefficiency and inaccessibility of the justice system. I suggest that these challenges are part of the lasting legacy of a model of justice that was conceived in a different and now distant era, for a different kind of environment, and which must be transformed through innovation and technology. I have spoken on these themes on a separate occasion,⁹⁵ but the central point for our consideration today is that unjustified or unreasonable concerns about due process cannot be allowed to stand in the way of the required transformation of dispute resolution. This is for two reasons.

60. First, if an arbitrator is unable to process the masses of submissions and evidence before her, with the consequence that she is not in a position to make a full and fair assessment of the parties' cases, that in itself threatens the right to be heard. Despite the best efforts of the arbitrator, the arguments and evidence in an overly voluminous submission will not have entered the inquiry and will therefore effectively remain unheard.⁹⁶

61. Second, due process paranoia as a blanket reaction to unfamiliar processes is simply unwarranted because these processes *can* and indeed *are* often capable of meeting the requirements of due process. A timely example is

⁹⁵ See NCMG Lecture for further discussion.

⁹⁶ Risse at p299.

the use of video conferencing in the conduct of hearings and the taking of evidence. There are certainly limitations to the technology and pitfalls to avoid, but there is, by and large, an emerging consensus that hearings can be conducted safely and fairly if suitable safeguards are put in place.⁹⁷ And it is virtually a truism today that if courts and tribunals had not readily adopted the technology over the past few months, the consequences for the administration of justice around the world would have been dire.

62. This also means that we should not mistake the trappings of conventional procedures, such as document production or oral examination, as uncompromisingly essential elements of due process. In particular, when judges are faced with a due process challenge arising out of a procedure they are unacquainted with or that has no cognate in court procedure, judges must avoid the fallacy of regarding the foreign as necessarily flawed.⁹⁸

VI. Conclusion: The solution to complexity

⁹⁷ See Sundaresh Menon CJ, Judicial Integrity Network in ASEAN webinar on “Justice in Times of COVID-19” (28 May 2020) at paras 14–15 and 17: <supremecourt.gov.sg/docs/default-source/default-document-library/undp-webinar703e7e87220c43348bacbed546e2c70a.pdf>.

⁹⁸ See also Toby Landau, Clayton Utz and University of Sydney International Arbitration Lecture 2009, “The day before tomorrow: Future developments in international arbitration” (21 October 2009): <claytonutz.com/internal/archive/ialecture/content/previous/2009/speech_2009>.

63. In closing, let me situate the problems of complexity and due process paranoia within the dimensions of the rule of law, and explain why, in my view, due process paranoia poses such a threat to international arbitration.

64. In my lecture at the SIAC Virtual Congress, I came to the conclusion that international arbitration, in the form of its most common and preferred features and practices, can claim to support an *attenuated* model of the rule of law.⁹⁹ That attenuation is largely due to arbitration's decision and choice to forgo some rule of law values in its pursuit of other objectives. That emerges, for example, from arbitration's choice of confidentiality over transparency;¹⁰⁰ its preference for party appointment of arbitrators despite the risks to the actual or apparent objectivity of the arbitrators so appointed;¹⁰¹ its foundations in consent which limit its ability to manage disputes involving interests beyond those of the consenting parties, giving rise to the risk of inconsistent findings on overlapping issues;¹⁰² and its restriction of avenues for correction of error, prioritising finality over the greater assurance of accuracy of outcomes.¹⁰³ But the attenuation is also attributable to arbitration's continuing struggle to control mounting costs

⁹⁹ Arbitration's Blade at para 51.

¹⁰⁰ Arbitration's Blade at paras 25-33.

¹⁰¹ Arbitration's Blade at paras 34-38.

¹⁰² Arbitration's Blade at paras 17-24.

¹⁰³ Arbitration's Blade at paras 39-42.

and delays, which are inimical to the goals of speed and affordability and hence the rule of law value of accessibility.¹⁰⁴

65. At the same time, I recognised in that lecture that international arbitration *has* made a serious and concerted effort to ensure that due process, as a core value of the rule of law, is sufficiently protected – for instance, by enshrining the right to be heard within the New York Convention, the Model Law, national legislation and institutional rules.¹⁰⁵

66. If adherence to the strictures of due process is, in this sense, arbitration's primary claim to the rule of law – and through the rule of law, to its legitimacy as an institution – then it is perfectly understandable why arbitration holds firmly to that ideal. But that does not, and cannot, entail a parochial and exaggerated approach to the preservation of due process in the management of proceedings – in other words, due process paranoia – in the course of which the values of speed, affordability, efficiency, practicability and finality are abandoned or at least seriously compromised. If that approach is taken, two serious consequences will follow. The first will be the growing isolation of international arbitration from those other rule of law values, with the result that arbitration will find it increasingly difficult to lay claim to its pursuit of the goals of legitimacy and

¹⁰⁴ Arbitration's Blade at paras 43-49 and 60.

¹⁰⁵ Arbitration's Blade at para 15.

the achievement of just and accurate outcomes, due to the loss of confidence of its users¹⁰⁶ and its unintended favouring of parties who have deeper pockets over those that have just causes.¹⁰⁷ The second is that the right to be heard will ironically be undermined, rather than fortified, by due process paranoia. That is because due process paranoia layers procedural complexity on top of already complex disputes, compounding the complexity problem and thereby worsening the prospects of arbitrators being able to fully absorb and properly assess the merits of parties' cases. That of course also diminishes the chances of achieving just and accurate outcomes.

67. The corollary is that if arbitration wishes to safeguard due process and its legitimacy as an institution, then it must assiduously avoid due process paranoia. In an age where the problems of complexity and scarcity often strain against each other, the preservation of due process and the legitimacy of systems of dispute resolution require not greater complexity but more simplicity; not rigidity but flexibility; and not conventionalism but innovation. A process that unjustifiably enlarges and complicates disputes, thereby increasing the stakes and making disputes more intractable, is not a process of sensible dispute resolution but instead its very antithesis.

¹⁰⁶ See para 18 above.

¹⁰⁷ See para 17 above.

68. The courts must also share in arbitration's enterprise to counter the complexity problem, recognising that simpler procedures are not necessarily less fair or robust, and that swifter adjudication does not logically entail reduced scrutiny or a diminished opportunity to present one's case. Above all, courts must bear in mind that the tribunal's exercise of procedural discretion occurs not within a vacuum but rather the reality of limited time and resources, and it is in fact a reasonable and fair-minded tribunal that recognises those constraints as well as its own cognitive limits.

69. At the SIAC Virtual Congress, I suggested that arbitration's defining advantage is its unparalleled ability to adapt its procedures to meet the specific needs of disputes, navigate the evolving conditions of international commerce, and integrate the best features of diverse methods and traditions of dispute resolution. I referred to this as the virtue of agility, which in the present age of unparalleled change is important enough to take its place alongside other values such as efficiency, accessibility, stability and so on within the pantheon of rule of law values.¹⁰⁸

70. Due process paranoia, which is inimical to arbitration's identity as perhaps the most versatile and adaptable method of dispute resolution, cannot be allowed to erode arbitration's agility. I suggest that that would not only rob

¹⁰⁸ Arbitration's Blade at para 67.

arbitration of one its greatest virtues, but also perhaps its most potent response to the complexity problem.

71. Thank you all very much.
