

# A Clockwork Arbitrator: avoiding due process paranoia

Michael Lee, Nakul Dewan SA and Sunita Advani

In this fourth edition of *Arbitration Classics*, Sunita Advani interviews distinguished arbitrators Michael Lee and Nakul Dewan SA on the multifaceted topic of due process in international arbitrations.

## 1. What is the importance of due process in international arbitration?

Michael:

Due process is indeed very important. It is the cornerstone of the rule of law, and goes to the heart of arbitration. Article 18 of the Model Law states that parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.

If there is an absence of due process, this would amount to grounds to set aside the award or resist enforcement of the award under the New York Convention. Recognition of the award may be refused if the party to whom the award was made against was not given proper notice of arbitration procedures or allowed to present its case. It is the tribunal's duty to ensure that the award is enforceable.

Nakul:

I entirely agree with Michael and the views he has set out. Due process is a facet of the principles of natural justice and is fundamental to the rule of law. Within that is the doctrine *audi alteram partem*, i.e. the right to be heard, which is critical to the process of an arbitration. It is important to ensure that any arbitration procedure complies with due process requirements because a failure to do so allows the court to set the award aside or deem it unenforceable.

## 2. What procedural safeguards do you employ to ensure that due process is met in an arbitration, and at what stage of the arbitration do you employ them?

Michael:

From the tribunal's point of view, it is very important that there is an early meeting with parties to ensure that parties are on the same page as far as the procedure in the arbitration is concerned.

At the commencement, there should be a full procedural order which sets out the framework for the arbitration because it is important that both sides understand what that process is. This is especially important where you have parties coming from multiple jurisdictions with litigation procedures which are different.

Submissions of case are invariably provided for in the procedural order, but it is important to set out what constitutes the statement of case. For example, should it just be pleadings or a full memorial, and if it is a full memorial, whether witness statements and documents (including legal authorities) are to be produced. It is important to set these considerations out and get this right at the beginning of the arbitration, even if it might lead to a very full procedural order.

Nakul:

Right at the beginning. From a counsel's perspective, an arbitration clause typically only sets out the governing law, the seat and the institutional rules. A lot of the finer procedural details are not set out and it is important not just for the tribunal but also for counsel to agree on these procedural details at the commencement of the arbitration process.

One important aspect, apart from what Michael has highlighted, relates to the taking of evidence. The IBA Rules on Taking of Evidence ("IBA Rules") set out guidelines on the basis of which evidence has to be filed including the standard for disclosure applications. To ensure that a fair procedure is adopted, parties and counsel from different states should be brought on the same page at the commencement of the proceedings, if the IBA Rules are going to serve as a guidepost to evidentiary procedure.

## 3. Do you think that courts have understood the due process challenges faced by arbitrators, and have taken this into account in their rulings on set aside applications?

Michael:

Courts globally, or at least those which are supporters of arbitration,

do understand the due process challenges faced by arbitrators. They adopt a pragmatic, and not formalistic, approach to due process challenges, especially in England, Singapore, Malaysia and Hong Kong.

The case of *China Machine New Energy Corp v Jaguar Energy Guatemala LLC and another* [2020] SGCA 12 (“China Machine”) is very helpful to tribunals in setting out some of the examples of due process challenges which are not untypical of issues which arise from procedural challenges generally. This includes extensions of time for filing of submissions, whether late submissions should be allowed, and applications for adjournment of hearings. The courts in Singapore adopt a pragmatic approach to dealing with those challenges and in the China Machine case, the court dismissed all the challenges.

The issues which arose in China Machine had come before a very experienced tribunal led by Professor Doug Jones, who has now been appointed to the SICCA. The issues were typical procedural issues which can arise in an international arbitration.

I personally have not had any due process challenges in the Singapore courts from my awards, though I did have three or four such challenges to my awards in England, all of which were dismissed.

Nakul:

I have the benefit of coming after Michael and I agree with his views above.

From the perspective of Singapore and India, the answer is yes to both. The courts in both countries have understood the due process challenges which tribunals face. Very often, the defendants start adopting guerrilla tactics in order to try to create an arbitral record to show that due process requirements have not been

met. Tribunals who have to grapple with that should explain how they balanced the rights of parties in the award. That would allow the court to understand how the Tribunal went about ensuring that the due process requirements were met in the arbitration. I also think that it is better for counsel to ensure that the case is set out properly, run within the scope of the proceedings that the tribunal is administering and not alter or put a spoke in the wheel with compliance of due process requirements.

#### (1) Approach of the Singapore Courts

Singapore courts are alive to the constraints that arbitral tribunals face in relation to recalcitrant parties and/or counsel who misuse due process to challenge awards and parties have been cautioned against such challenges.

In particular, in *AKN v ALC*, the part of the award relating to the loss of profits claim was set aside as it was made in breach of natural justice. The secured creditors and liquidator were not afforded the opportunity to address the case on loss of opportunity, either when it was raised or at all. The claim was for consequential damages and the submission by counsel on damages was a last minute one, resulting in a hearing that was not fair.

There is a similar decision in *CBP v CBS* rendered by Justice Ang Cheng Hock in respect of a documents-only arbitration. He set aside an Award on the basis that the tribunal’s power to gate a witness must be subject to ensuring that there is a fair hearing.

#### (2) Approach of the Indian Courts

Recent judgments of the Indian courts show that they are non-interventionist and committed to enforcing Awards under the New York Convention.

In particular, in a recent case that I

was involved in, namely *Vijay Karia v Prysmian Cavi E Sistemi SRL* 2020 SCC OnLine SC 177 the court the Court set out the following standard:

“A good working test for determining whether a party has been unable to present his case is to see whether factors outside the party’s control have combined to deny the party a fair hearing. Thus where no opportunity was given to deal with an argument which goes to the root of the case or findings based on evidence which go behind the back of the party and which results in a denial of justice to the prejudice of the party; or additional or new evidence is taken which forms the basis of the award on which a party has been given no opportunity or rebuttal, would, on the facts of a given case, render a foreign award liable to be set aside on the ground that a party has been unable to present his case. This must, of course, be with the caveat that such breach be clearly made out on the facts of a given case, and that awards must always be read supportively with an inclination to uphold rather than destroy, given the minimal interference possible with foreign awards under Section 48.”

In setting out this standard, the Court referred to on both English law and Singapore and cited, among others, the following seminal cases: *Soh Beng Tee & Co. v Fairmount Development Pte Ltd* (2007) SGCA 28, *JVL Agro Industries Ltd v Agritrade International Pte Ltd* (2016) SGHC 126 and *TMM Division Maritime SA v Pacific Richfield Marine Pte Ltd* (2013) SGHC 186.

#### 4. Do you think there is a role for national law in facilitating due process in arbitrations, and if so, what would that entail?

Michael:

I don’t see any role for statutory legislation, as there is sufficient statutory legislation. Singapore has

the International Arbitration Act, embodying the Model Law, and Model Law countries have the Model Law. You can't really distill due process any more than Singapore's International Arbitration Act and the Model Law have set out, and it is for the courts to apply these if they need to.

Nakul:

Due process is individual to each and every case, and the statutory legislation has a broad framework. Art 18 of the Model Law (providing for equal opportunity for both parties to present their case) has been adopted by both India and Singapore. That is a sufficient guideline for an arbitral tribunal to ensure that it complies with due process requirements. If you make it more specific, this could be problematic because it would over-regulate the conduct of an arbitral proceeding and disallow the discretion which an arbitrator has to be able to tailor due process requirements to suit each and every individual case.

**5. What are your thoughts on the China Machine judgment (including the due process issues arising therein such as document disclosure and Attorneys' Eyes Orders), and on the standards of due process in arbitration vis-à-vis national courts?**

Michael:

The China Machine judgment is absolutely spot on and well worth reading for any tribunal faced with due process questions. It goes into the procedural issues in the particular case on which the appeal was centered, and gives general guidance on due process issues.

In particular, the court held that in determining whether a party had been denied his right to a fair hearing by the tribunal's conduct of the proceedings, the proper approach a court should

take 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. It also stated that this inquiry will necessarily be a fact-sensitive one, and much will depend on the precise circumstances of each case (at [98]).

The court further stated that it should accord a margin of deference to the tribunal in its exercise of procedural discretion. This deference is accorded in recognition of the fact that (i) the tribunal possesses a wide discretion to determine the arbitral procedure, and (ii) that discretion is exercised within a highly specific and fact-intensive contextual milieu, the finer points of which the court may not be privy to (at [103]).

You ask about due process issues which may arise at the document disclosure stage of the arbitration. That is often the most difficult part of the arbitral process from the tribunal's viewpoint, short of the hearing itself. At that stage, the tribunal should have a reasonable amount of knowledge of the case, but not as much knowledge they will have had at the end of the case. The tribunal must place a fair degree of trust in counsel. If counsel asserts that there are no responsive documents, it is difficult to go behind that. My general approach is to tell counsel that at this stage of the arbitration, I am unlikely to know as much about the case as counsel, and that I must rely to a large extent on counsel's statements as to what documents may be relevant and material. However, if it should become apparent during the course of the hearing that there were documents that were not produced which should have been produced, then adverse inferences may be drawn and there may be costs consequences.

As far as Attorneys' Eyes Only orders

are concerned, those are not that frequent, but they are made where commercial confidentiality is pleaded as a reason by one party to redact documents or refuse production. By raising the question of production to attorneys only, a party is in effect accepting that the documents could be relevant or material, but it is a question for the tribunal to decide whether commercial confidentiality is a real issue. It was in the China Machine case, which is why the Court of Appeal upheld the Attorneys' Eyes Only order.

Nakul:

I would like to supplement Michael's views with my perspective on what counsel could have done differently. What weighed on the court's mind was the fact that both the High Court and the Court of Appeal found that no case of prejudice had been made to the appellant by the Attorneys' Eyes Only order. If I were counsel for the appellant, I would have attempted to establish the prejudice in greater factual detail if there was such prejudice. My hunch is that counsel took a chance in the hope that the court would set aside the award, and this did not materialise.

**6. What are chess clock arbitrations, and are such arbitrations useful from a due process perspective?**

Michael:

It depends on what you mean by a chess clock arbitration. Some tribunals in Europe conduct chess clock arbitrations like the United States' Supreme Court. By that I mean that counsel would be given a strict amount of time to present a party's case and exactly on the dot at the end of that time, counsel will have no more say. My view is that that goes too far in most cases.

However, if you mean a system by which each party has the same amount of time (or an agreed or allocated

amount of time) for the presentation of its case, then that is very common. When I get to the stage of discussing the format of the hearing, I will ask counsel if they agree to equal amounts of time, which is usually agreed. However, sometimes counsel will say that he/she has more witnesses than the other side, so that a balancing act has to be performed by the tribunal in allocating time. As far as keeping time is concerned, that can be done by a tribunal secretary, if there is one. I generally ask counsel to delegate someone in each team to keep an account of time, and do a tally at the beginning and end of each day of the arbitration so that counsel and the tribunal know how time has been used.

Nakul:

I think chess clock arbitrations work in the way Michael has described, but what is critical is the cooperation between counsel and arbitrator. For one, arbitrators need to be fully read up and know the issues which are relevant to the case because both oral submissions and evidence would have to focus on just those relevant material issues. Tribunals have to monitor witnesses who are being cross-examined so that they do not deviate in their answers and go off on a frolic of their own because that makes it hard for counsel to complete the cross-examination within the allotted time. If you have this level of co-operation between the arbitral tribunal and counsel, then the chess clock procedure works very well.

7. **How important is due process in relation to other facts which have led counsel and parties choosing arbitration as their preferred mode of dispute resolution? Do parties understand the concept of due process in an arbitration, and are there any myths about due process which are untrue?**

Nakul:

Due process is an extremely important part of the arbitral process because it can be a ground to set aside an award. Most parties do not understand this concept because when they enter into arbitration agreements, neither do they read the Model Law nor do they look at the fact that the award is final and binding on its substantive merits without an opportunity for appeal. Hence, when they enter the realm of an arbitration, more often than not, they have to be educated on the actual procedure of an arbitration and the necessity for ensuring compliance with due process.

You need to bear in mind that parties are in a warring situation with each other and very often it is necessary for counsel to tell them that unless they agree to tell them that a fair hearing takes place, their award can be set aside.

Michael:

It is very important for counsel to explain to their client what due process involves at an early stage of the proceedings, ideally when first instructed. It is particularly important for counsel to explain to clients the need to preserve documents.

8. **The COVID-19 outbreak has resulted in arbitrations being postponed, or their format altered from an in-person hearing to a documents-only arbitration or a virtual arbitration. What are your views on the due process concerns arising from these changes, and how have you addressed such concerns in your arbitration?**

Michael:

Unfortunately, there are areas where guerilla tactics can be employed by counsel, thereby compromising

due process. This is particularly in relation to hearings in which parties say that they need an opportunity to cross-examine witnesses who are not available for videoconferencing, or they require a physical hearing.

I think it is too early in the process to give any sort of lead on that, but I think that tribunals have got to be robust when deciding whether a hearing should go ahead in a virtual setting or should be postponed. This will involve balancing the need to proceed with the arbitration expeditiously and the need to give a party a full opportunity to present its case. Most of the major institutions, including the SIAC, are offering virtual hearings in conjunction with IT providers. In general, I would expect courts, such as those in Singapore, to uphold tribunals' decisions in this respect.

Nakul:

There is a greater recognition in the international arbitration community that videoconferencing would be the new norm for conducting arbitrations. Hopefully, COVID-19 will be a situation which will resolve itself. From a counsel's perspective, while I would much rather proceed with the hearing, I would not always object to a three to four-month delay if there are justifiable grounds to have proceeded with an in-person arbitration as opposed to having a virtual hearing.

*The views and opinions expressed in this article are those of the authors and do not necessarily reflect the position of other members of Twenty Essex.*



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Michael is an experienced international commercial arbitrator practising principally from Singapore and London.

Before joining the English Bar he was a solicitor and a partner in a major international law firm, Norton Rose, where he managed the Paris office and the firm's international arbitration group. Michael has over 30 years' experience of practising commercial litigation in the English High Court and international arbitration, as well as coordinating and overseeing overseas litigation.

[Read his online bio >](#)



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Nakul practises from Singapore, Delhi and London. He accepts appointments both as counsel, for international arbitration and international litigation, and as arbitrator.

He specialises in disputes and international law advice relating to banking and finance, construction and engineering, corporate (joint venture/ shareholder/partnership disputes), international commercial law (including media and telecommunications), mining, energy and natural resources.

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