

Due process paranoia and the procedural judgment rule: a safe harbour for procedural management decisions by international arbitrators

Klaus Peter Berger* and J. Ole Jensen[†]

ABSTRACT

Faced with a party's procedural request, international arbitrators sometimes need to decide a delicate question: is this a legitimate exercise of the party's procedural rights, or an unreasonable move, leading to an unnecessary delay of the proceedings? When answering this question, the fear that the eventual award might be challenged due to a violation of the parties' due process rights lingers as the proverbial Sword of Damocles. Often, such 'due process paranoia' will lead the arbitrator to grant unreasonable procedural requests, thus prolonging the proceedings unnecessarily. This neither benefits the parties nor the attractiveness of international arbitration as a dispute resolution mechanism. The present contribution attempts to ameliorate this situation. It reviews the state courts' approach to dealing with arbitrators' exercise of their procedural management discretion to reveal that 'due process paranoia' is unfounded. Rather, the review brings to light what may be termed the 'Procedural Judgment Rule', a safe harbour for arbitrators' exercise of their procedural discretion. The contribution encourages international arbitrators to embrace this discretion by conducting proactive proceedings. It offers methods to efficiently deal with delicate procedural management situations in order to avoid 'due process paranoia' altogether.

KEY REFERENCE

- UNCITRAL Model Law on International Commercial Arbitration

1. INTRODUCTION

Throughout the past decades, the relevance of 'time and costs' in international arbitration has undergone a paradoxical shift. What was once the great appeal of international

* Professor of Law and Director of the Center for Transnational Law (CENTRAL) at the University of Cologne School of Law and President of the German Institution of Arbitration (DIS). E-mail: kp.berger@uni-koeln.de. The present contribution was inspired by the Vienna Arbitration Days 2016: The Road to Predictability in International Arbitration and the 31st Annual ICC SIA QMC Joint Symposium of Arbitrators: Powers and Duties of Arbitrators. Thanks are due to the organizers and participants of these conferences.

[†] Research Fellow and PhD candidate with Professor Berger. E-mail: ole.jensen@uni-koeln.de.

arbitration and what made it the most viable alternative to litigation before state courts—swift proceedings at low costs—is currently reverting to its main disadvantage. Vexed with the loss of time and money involved in going through an international arbitration,¹ formerly faithful users of the process are increasingly exploring alternative avenues to resolve their international business disputes.² While arbitral institutions have realized the potential threat of this development and have started to put countermeasures into place,³ other actors in the arbitral process should follow suit.

One particularly important area for improvement is the arbitrators' efficient management of the case. In fact, the inhibition of some tribunals to conduct the arbitration efficiently has been identified as one of the root causes for prolonged proceedings and increasing costs.⁴ That time- and cost-efficient procedural management are crucial for the arbitral process,⁵ and that arbitrators need to act as 'case managers' is, of course, not a new revelation.⁶ However, the modern quest for efficiency in the conduct of arbitration has assumed a new quality, with an ever-increasing emphasis on the need for proactive and 'strong' arbitrators.⁷

- 1 cf Queen Mary University and PriceWaterhouseCooper, '2006 International Arbitration Survey: Corporate Attitudes and Practices' 7 <<http://www.arbitration.qmul.ac.uk/docs/123295.pdf>> accessed 19 June 2016; Michael McIlwrath and Roland Schroeder, 'The View from an International Arbitration Customer: In Dire Need of Early Resolution' (2008) 74 Arb 3, 6–7; Paul Hobeck, Volker Mahnken and Max Koebeke, 'Time for Woolf Reforms in International Construction Arbitration' (2008) 11 Int'l Arb L Rev 84, 87–8; Ema Vidak-Gojkovic, Lucy Greenwood and Michael McIlwrath, 'Puppies or Kittens? How To Better Match Arbitrators to Party Expectations' in Christian Klausegger and others (eds), *Austrian Yearbook on International Arbitration 2016* (Manz 2016) 61.
- 2 Klaus Peter Berger and J Ole Jensen, 'It Takes Pressure to Form Diamonds: The Changing Landscape of Dispute Resolution and Its Implications for International Arbitration' <<http://kluwerarbitrationblog.com/2016/05/23/>> accessed 19 June 2016.
- 3 These measures include updates to the institutions' arbitral rules intended to further the efficiency of the process, providing reports and guidelines on saving time and costs as well as incentivizing arbitrators to conduct the arbitration efficiently. See, eg ICC Commission on Arbitration, *Techniques for Controlling Time and Costs in Arbitration* (ICC 2007); Jason Fry, Simon Greenberg and Francesca Mazza, *The Secretariat's Guide to ICC Arbitration* (ICC 2012) vii; Maxi Scherer, Lisa Richman and Remy Gerbay, *Arbitrating Under the 2014 LCIA Rules. A User's Guide* (Kluwer 2015) 15–6; cf Klaus Peter Berger, *Private Dispute Resolution in International Business: Negotiation, Mediation, Arbitration* (Kluwer 2015) para 16–34.
- 4 ICC Commission Report, *Reducing Time and Costs in International Arbitration* (2nd edn, ICC 2012) 5; Leon Kopecký and Victoria Pernt, 'A Bid for Strong Arbitrators' <<http://kluwerarbitrationblog.com/2016/04/15/>> accessed 19 June 2016.
- 5 See, eg Harold S Crowter and Anthony GV Tobin, 'Ensuring That Arbitration Remains a Preferred Option for International Dispute Resolution: Some Practical Considerations' (2002) 19 J Int'l Arb 301, 311; Ugo Draetta, *Behind the Scenes in International Arbitration* (Juris 2011) 64–7; Jeffrey Waincymmer, *Procedure and Evidence in International Arbitration* (Kluwer 2012) 384–95; Jennifer Kirby, 'Efficiency in International Arbitration: Whose Duty Is It?' (2015) 32 J Int'l Arb 689, 694; Vidak-Gojkovic, Greenwood and McIlwrath (n 1) 64; Kopecký and Pernt (n 4).
- 6 J Gillis Wetter, 'The Conduct of the Arbitration' (1985) 2 J Int'l Arb 7, 35; Isak I Dore, *Theory and Practice of Multiparty Commercial Arbitration with Special Reference to the UNCITRAL Framework* (Kluwer 1990) 111; Klaus Peter Berger, *International Economic Arbitration* (Kluwer 1993) 11; Gerald Aksent, 'On Being a Pro-Active International Arbitrator' in Robert Briner and others (eds), *Law of International Business and Dispute Settlement in the 21st Century: Liber Amicorum Karl-Heinz Böckstiegel* (Heymanns 2001) 13.
- 7 Alan Redfern, 'The Changing World of Arbitration' in David D Caron and others (eds), *Practising Virtue: Inside International Arbitration* (OUP 2015) 50 describes this quest as 'the particular responsibility of the "third generation of arbitrators" as they strive to be effective "Managers"'; also cf Aksent (n 6) 13; Kopecký and Pernt (n 4).

This increased responsibility of international arbitrators for the efficient management of arbitral proceedings relates to two types of procedural management decisions: decisions to plan and structure the proceedings *ex ante*, for example, in the 'PO1', the Terms of Reference or the like; and *ad hoc* decisions to be made during the proceeding, when arbitrators are faced with procedural requests or actions from the parties.⁸ This contribution is concerned mainly with the latter type of interim procedural management decisions.⁹ The way in which such procedural management decisions should be handled in practice has been the subject of much debate during the past years. Some fear the 'dark side of [arbitral] discretion' and warn against 'arbitrators mak[ing] up the rules as they go along, divorced from any precise procedural canons set in advance'.¹⁰ The best practice rules that have 'flooded' the market for arbitration services in the past decade were drafted as a means to alleviate these concerns and to increase legal certainty and foreseeability in specific procedural management situations.¹¹ Critics of this development respond that soft law instruments prevent independent legal thinking of arbitrators when faced with the need to make procedural decisions, thereby eliminating procedural flexibility, which has always been regarded as one of the hallmarks of the arbitral process.¹² For them, arbitral discretion and the procedural flexibility that it entails are highly valuable assets of the arbitral process, allowing arbitrators to respond flexibly to situations and scenarios that cannot be anticipated by *ex ante* planning at the outset of the proceedings.

Regardless of how much 'para-regulation' is healthy for the arbitral process, there will always be 'rule-free zones' in which the arbitral tribunal must respond to *ad hoc* procedural moves by the parties. It is in these types of situations that arbitrators are faced with the difficult task to determine the motives of the parties for confronting them with such procedural manoeuvres or requests. In some scenarios, this task is relatively easy to complete because the parties' procedural moves are either clearly legitimate exercises of their procedural rights, or 'guerrilla tactics', obviously motivated solely by the desire to obstruct the arbitral process.¹³ However, most cases are not that clear-cut. There are

- 8 For the important additional distinction between such procedural management decisions and the arbitrators' substantive decisions, see Section 3.1.
- 9 Though, as will be discussed, proper planning at the outset of the arbitration will help to limit the amount of delicate *ad hoc* decisions an arbitral tribunal may be faced with, see Section 4.
- 10 William W Park, 'The 2002 Freshfields Lecture — Arbitration's Protean Nature: The Value of Rules and the Risks of Discretion' (2003) 19 *Arb Int'l* 279, 286.
- 11 Daniele Favalli, 'An Overview of Existing Para-Regulatory Texts ("PRTs"): Analysis, Facts and Figures' in Daniele Favalli (ed), *The Sense and Non-sense of Guidelines, Rules and other Para-Regulatory Texts in International Arbitration* (Juris 2015) 14–5.
- 12 Michael E Schneider, 'The Essential Guidelines for the Preparation of Guidelines, Directives, Notes, Protocols and Other Methods Intended to Help International Arbitration Practitioners to Avoid the Need for Independent Thinking and to Promote the Transformation of Errors into "Best Practices"' in Laurent Lévy and Yves Derains (eds), *Liber amicorum en l'honneur de Serge Lazareff* (Éditions Pedone 2011) 564–5; see also Berger (n 3) paras 16–43; Ugo Draetta, 'The Transnational Procedural Rules for Arbitration and the Risks of Overregulation and Bureaucratization' (2015) 33 *ASA Bull* 327, 333–41; Tom Jones, "'Killing Me Softly": Is International Arbitration Being Stifled by Soft Law?' <<http://globalarbitrationreview.com/news/article/34785/killing-softly-international-arbitration-stifled-soft-law/>> accessed 19 June 2016.
- 13 See Stephan Wilske, 'Arbitration Guerrillas at the Gate: Preserving the Civility of Arbitral Proceedings When the Going Gets (Extremely) Tough' in Christian Klausegger and others (eds), *Austrian Yearbook*

instances in which arbitrators find themselves in a 'grey zone' in which the true motives of the parties are not so easily discernible and the 'right' decision is not immediately apparent.¹⁴ In these situations, their procedural management decisions revolve around two crucial aspects of the arbitral process: the tribunal's quest for streamlined proceedings caused by the users' increasing demand for time- and cost-efficiency on one side; and the arbitrators' role as guardians of due process and guarantors of the legitimacy of arbitration on the other.¹⁵ Many arbitrators show a natural inclination to decide this perceived conflict in favour of due process.¹⁶ This is not surprising since an instinct to protect the parties' due process rights is, and should be, a vital part of any successful arbitrator's DNA. However, it is also important not to blindly follow this instinct in any given case. An over-emphasis on due process is the root cause for arbitrators' inhibitions to conduct streamlined proceedings when faced with delicate procedural requests from the parties, even in scenarios in which due process concerns are unjustified. Procedural management that is dominated by such inhibitions can prove detrimental to both the parties in the specific arbitration and the arbitration process as a whole. Indeed, it would certainly not help in this age of increased pressure,¹⁷ if arbitration were to become famous as a process in which the parties can delay the proceedings indeterminably, if only they push hard enough.

The present contribution examines to what extent the conflict between the quest for streamlined proceedings and due process is imaginary rather than real. It then provides techniques for international arbitral tribunals operating in the 'grey zone' to handle delicate procedural requests from the parties and achieve streamlined proceedings without sacrificing the fairness and legitimacy of the process.

2. PARTY AUTONOMY AND DUE PROCESS FROM THE ARBITRATOR'S PERSPECTIVE

So what exactly is there to prevent arbitrators from conducting streamlined proceedings? It is a natural consequence of party autonomy that the proceedings 'belong' to the parties and that it is their arbitration, not the arbitrators'.¹⁸ After all, it is also 'their' dispute and they have agreed to resolve it in an international arbitration rather than before state courts. The fundamental notion of party autonomy, which lies at the root of the parties' right to choose, applies not only to the question of *whether* the parties want arbitration, but also to the question of *how* it should be conducted.

on International Arbitration 2011 (Manz 2011) 315; as well as generally Günther J Horvath and Stephan Wilske (eds), *Guerrilla Tactics in International Arbitration* (Kluwer 2013).

14 Park (n 10) 286 describes these situations as 'the nitty-gritty procedural questions where the real demons lurk'.

15 cf L Yves Fortier, 'The Minimum Requirements of Due Process in Taking Measures against Dilatory Tactics: Arbitral Discretion in International Commercial Arbitration - "A Few Plain Rules and a Few Strong Instincts"' in Albert Jan van den Berg (ed), *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention* (Kluwer 1999) 397.

16 Yves Derains, 'Mesures Dilatoires en Matière d'Arbitrage et Moyens de s'y Opposer' in Karl-Heinz Böckstiegel and Ottoarndt Glossner (eds), *Festschrift für Arthur Bülow zum 80. Geburtstag* (Heymanns 1981) 46; Berger (n 6) 399.

17 Berger and Jensen (n 2).

18 Joshua Karton, *The Culture of International Arbitration and the Evolution of Contract Law* (OUP 2013) 43, states that 'every arbitrator interviewed for this book characterized arbitrations as "belonging" to the parties in some sense'.

It is this broad scope of party autonomy which has led to the truism that arbitration allows the parties to tailor the proceedings according to the specificities of their case. This flexibility of the arbitral process has always been regarded as one of the essential differences between arbitration and state court litigation.¹⁹ Contrary to proceedings before domestic courts, there is no straightjacket of mandatory procedural rules, but far-reaching autonomy of the parties. However, more often than not, the parties' freedom to tailor the proceedings results in nothing more than a rough-cut overcoat. An *ad hoc* arbitration clause with no further procedural specifications or an institutional standard clause that points to a broad procedural framework. Even the multitude of best practice instruments remain silent on many specific details of procedural management.

This void is filled by broad procedural discretion afforded to the arbitral tribunal. Absent a specific party agreement, virtually all national arbitration laws provide the tribunal with the discretion to conduct the proceedings in any way they see fit, subject only to the parties' due process rights.²⁰ This discretion has been dubbed 'one of the foundational elements of the international arbitral process'.²¹ As the parties will usually not find any common procedural ground after the dispute has arisen and will never have anticipated all procedural scenarios in advance, the arbitrators must exercise their procedural discretion regularly during the course of the proceedings. Not infrequently, they are faced with requests or actions that would lead to a deviation from the timetable set for the arbitration. In arbitral practice, examples of such conduct include:

- i. requests for the extension of a deadline,
- ii. submission of an unsolicited but 'unavoidable' brief,
- iii. submissions of document(s) after a cut-off date,
- iv. the last minute introduction of a new claim, and
- v. requests for rescheduling of a hearing 'at the eleventh hour'.

Such requests place international arbitrators in a true dilemma. On one hand, they must ensure the time and cost efficient conduct of the proceedings. On the other, such requests touch upon the core of the parties' due process rights. Will ignoring an unsolicited submission cause the party to argue a violation of its right to be heard? Does the dismissal of a new claim late in the arbitration infringe upon the party's right to present its case? According to the *Queen Mary/White & Case 2015*

19 Julian DM Lew, Lukas A Mistelis and Stefan M Kröll, *Comparative International Commercial Arbitration* (Kluwer 2003) para 1–14; Karl-Heinz Böckstiegel, 'Case Management by Arbitrators: Experiences and Suggestions' in Gerald Aksens and others (eds), *Global Reflections on International Law, Commerce and Dispute Resolution: Liber Amicorum in Honour of Robert Briner* (ICC 2005) 118; Vladimir Pavić, 'Disciplinary Powers of the Tribunal', *Austrian Yearbook on International Arbitration 2014* (Manz 2014) 168; Nigel Blackaby and others, *Redfern and Hunter on International Arbitration* (6th edn, OUP 2015) para 1.114.

20 See, eg art 19 (2) UNICTRAL Model Law; art 1036 (1) Dutch Code of Civil Procedure; s 34 (1) English Arbitration Act 1996; art 1509 French Code of Civil Procedure; s 1042 (4) German Code of Civil Procedure; art 182 (2) Swiss Statute on Private International Law.

21 Gary B Born, *International Commercial Arbitration* (2nd edn, Kluwer 2014) 2145.

International Arbitration Survey (2015 Survey), such questions weigh heavy on arbitrators' minds.²² The perceived ever-present danger that the award could eventually be set aside or refused enforcement for violation of a party's due process rights is the arbitrators' Sword of Damocles. This fear results in what one participant in the *2015 Survey* has referred to as 'due process paranoia':

'Due process paranoia' describes a reluctance by tribunals to act decisively in certain situations for fear of the arbitral award being challenged on the basis of a party not having had the chance to present its case fully.²³

Due process paranoia not only originates from the arbitrators' interest that their awards will not be set aside or denied enforcement—an unwelcome smudge on their track-record—but is sometimes also induced by the applicable rules. Article 41 ICC Rules 2012 provides that 'the arbitral tribunal . . . shall make every effort to make sure that the award is enforceable'. Other rules are to the same effect.²⁴ In fact, it is often said that it is an implied part of any arbitrator's mandate to render an enforceable award.²⁵ Some arbitrators understand this as an obligation to safeguard due process by making *every effort* to let the parties present their case in *any way* they want.²⁶ In the hands of these arbitrators, arbitral discretion and the powers it entails appear more like a toothless tiger than a key tool for the efficient conduct of the proceedings. Indeed, such a generic and overzealous understanding increases the arbitrators' reluctance to conduct the arbitration proactively and endangers streamlined proceedings. After all, dealing with additional submissions, extending deadlines or postponing hearings affects all three: time, costs, and the quality of the arbitration. In light of such overly careful procedural management leading to an inhibition to scotch dilatory procedural moves, it is not surprising that the 'lack of effective sanctions' was regarded by 46% of the interviewees of the *2015 Survey* as a major disadvantage of the arbitral process, immediately following 'costs' (60%).²⁷ These numbers indicate that the arbitrators' fear of state courts' reactions to their procedural management decisions poses a real threat to the efficiency of international arbitration.

22 Queen Mary University and White & Case, '2015 International Arbitration Survey: Improvements and Innovations in International Arbitration' 10 <<http://www.arbitration.qmul.ac.uk/research/2015/index.html>> accessed 19 June 2016.

23 *ibid.*

24 See, eg art 32.2 LCIA Rules 2014; art 37.2 SIAC Rules 2013.

25 Günther J Horvath, 'The Duty of the Tribunal to Render an Enforceable Award' (2001) 18 J Int'l Arb 135, 136; William W Park, 'Arbitration in Autumn' (2011) 2 J Int'l Disp Sett 287, 292; Martin Hunter and Alan Philip, 'The Duties of an Arbitrator' in Lawrence W Newman and Richard D Hill (eds), *Leading Arbitrator's Guide to International Arbitration* (3rd edn, Juris 2014) 485; Born (n 21) 1993.

26 For reasons why this might go too far, see Pierre A Karrer, 'Must an Arbitral Tribunal Really Ensure That Its Award Is Enforceable?' in Gerald Aksen and others (eds), *Global Reflections on International Law, Commerce and Dispute Resolution: Liber Amicorum in Honour of Robert Briner* (ICC 2005) 429; Christopher Boog and Benjamin Moss, 'The Lazy Myth of the Arbitral Tribunal's Duty to Render an Enforceable Award' <<http://kluwerarbitrationblog.com/2013/01/28/>> accessed 19 June 2016.

27 Queen Mary University and White & Case (n 22) 7.

3. IS DUE PROCESS PARANOIA JUSTIFIED? THE STATE COURTS' PERSPECTIVE

The decisive question, then, appears to be whether arbitrators have a reason to fear the Sword of Damocles. There is a remarkable gorge between the perceived consequences some arbitrators draw from their obligation to safeguard the parties' rights, ie granting a multitude of procedural request in order to preserve due process at all costs, and the courts' actual approach to setting aside awards on the basis of the exercise of arbitrators' procedural discretion. Indeed, the perception of these arbitrators that state courts will question their exercise of discretion and readily annul the award is misguided. The theoretical underpinnings of due process paranoia (Section 3.1), the courts' general approach to dealing with arbitrators' procedural management decisions (Section 3.2) as well as case law regarding specific situations in the 'grey zone' (Section 3.3) all confirm that due process paranoia is unjustified and should be avoided.

3.1 The theoretical underpinnings of due process paranoia

There are three grounds for annulment or non-enforcement usually underlying an arbitrator's inhibitions: violation of the parties' right to present their case, violation of the parties' right to be treated equally (together referred to as the parties' 'due process rights'),²⁸ and violation of any agreements between the parties. The main cause for due process paranoia is a potential challenge of the award on the first ground, ie for violation of the parties' right to present their case.

Underlying this fear is Article 34 (2) (a) (ii) of the UNCITRAL Model Law (ML) and similar provisions of domestic arbitration laws, which provide that an award may be set aside if a party was 'unable to present its case'.²⁹ Article 18 ML embodies the core rule of due process by specifying that 'each party shall be given a full opportunity of presenting its case'. The operative word in this regard is '*full*'. An arbitrator stricken with due process paranoia may understand it to mean that a party must receive *all and any* opportunity it requires to bring its claim or defend it. However, from the outset, the term 'full' in Article 18 ML was not understood to mean that an arbitral tribunal 'must sacrifice all efficiency in order to accommodate unreasonable demands by a party'.³⁰ The right to a

'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.³¹

Indeed, an earlier draft of the ML, which provided for a full opportunity to present the case 'at any stage of the proceedings', was rejected because it was feared that the

28 cf Blackaby and others (n 19) para 10.53.

29 Regarding a refusal to enforce an award art V (1) (b) of the New York Convention (NYC) is to the same effect.

30 Howard M Holtzmann and Joseph E Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Kluwer 1989) 551.

31 Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration, 25 March 1985, UN Doc A/CN.9/264, 46.

provision might be relied upon by recalcitrant parties to prolong the proceedings unnecessarily.³² It is clear from this drafting history that the term ‘full’ opportunity must be understood restrictively to mean that a ‘reasonable’ opportunity to present one’s case suffices.³³ This is supported by many arbitration rules, which only provide for a ‘reasonable’ opportunity to present one’s case,³⁴ and the English Arbitration Act 1996, which adopts the same approach in s 33 (1) (a).³⁵ It is generally accepted that under this provision ‘it must be down to the tribunal and only the tribunal to determine what is ‘reasonable’ in all the circumstances’.³⁶ Thus, the parties’ right to be heard is not absolute and does not cover unreasonable, dilatory procedural requests.³⁷ The parties’ due process rights do not require arbitrators to abandon all efficiency.

Having said that, reference to efficiency may never serve as a pretext for ignoring the parties’ due process rights in cases in which their protection and obedience is clearly warranted. Indeed, ‘[t]oo much efficiency may mean too little time to hear evidence’.³⁸ The tribunal must always respect the parties’ explicit agreements on procedural matters and must always carefully consider their arguments and evidence. While these duties concern the arbitrators’ substantive decision-making, procedural management decisions concern a different part of the arbitrators’ mandate. By definition, they pertain to the proper conduct and organization of the proceedings. Due process paranoia arises in regard to such procedural management decisions.³⁹ Thus, it is only these decisions that the present contribution is concerned with.

In summary, the parties’ due process rights underlying arbitrators’ inhibitions are a necessary consequence of the nature of arbitration as a private court procedure. The role of arbitrators as private judges is not limited to that of decision-makers. Rather, they are also guardians of the parties’ fundamental rights. It is of crucial importance that all arbitrators understand and cherish this part of their mission. However, it is also important to understand that these rights are not ends in themselves. They must be seen in the context of the entire arbitral process and should be exercised by the parties in the spirit of efficiency. They cannot result in rendering arbitral discretion nothing more than an empty shell. Indeed, they were never intended to endow the parties with opportunities to obstruct the efficient resolution of the

32 Holtzmann and Neuhaus (n 30) 552.

33 Blackaby and others (n 19) para 6.14.

34 Indeed, the UNCITRAL Arbitration Rules were changed to this more restrictive language in 2010. art 17 (1) UNCITRAL Arbitration Rules now only requires that ‘each party is given a *reasonable* opportunity of presenting its case’ (emphasis added). Other arbitration rules are to the same effect: art 35 (1) CIETAC Rules 2015; art 13.1 HKIAC Rules 2013; art 22 (4) ICC Rules 2012; art 14.4 (i) LCIA Rules 2014; art 19 (2) SCC Rules 2010.

35 s 33 (1) (a) English Arbitration Act 1996: ‘The tribunal shall act fairly and impartially as between the parties, giving each party a *reasonable opportunity* of putting his case and dealing with that of his opponent’ (emphasis added).

36 Robert Merkin and Louis Flannery, *Arbitration Act 1996* (5th edn, Informa Law 2014) 129.

37 cf Franz T Schwarz and Christian W Konrad, *The Vienna Rules: A Commentary on International Arbitration in Austria* (Kluwer 2009) paras 20–070: ‘The right to be heard is not a *cart blanche* for parties to offer ever expanding factual allegations or legal arguments. Thus, it is recognized that the right to be heard has important limitations that allow the arbitrator to conduct the proceedings efficiently’.

38 Park (n 25) 293.

39 Such as those concerning the procedural situations enumerated above (Section 2 (i)–(v)).

dispute. Rather, they were meant to protect reasonable, non-dilatory procedural requests. While this emphasis on efficiency might seem counter-intuitive to some arbitrators, it should not be misunderstood as a limitation of due process and party autonomy. Rather, quite to the contrary, it should be understood as their realization. Only by weighing a party's procedural request against the efficient resolution of the dispute can the other party's rights and both parties' initial agreement to efficiently resolve their dispute in arbitration be respected. It is this understanding of the parties' procedural rights that should guide the arbitrator in the exercise of his discretion to conduct the proceedings.

3.2 State courts' general approach to procedural management decisions

While the purpose of the parties' due process rights thus paints a clear picture, whether and to what extent due process paranoia is justified effectively depends on the attitude of the courts as the ultimate guardians of due process—be it in setting aside proceedings at the seat of the arbitration or in court actions to have the award recognized and enforced in fora where the award-debtor has assets. After all, it is the courts' review of their procedural decisions that is dreaded by arbitrators suffering from due process paranoia.⁴⁰

For these arbitrators, it might come as a surprise that a thorough analysis of relevant case law reveals that state courts across many different jurisdictions rarely interfere with arbitrators' procedural management decisions. Rather, courts consider it the 'key overriding principle' that they must give substantial deference to the arbitrators' procedural decisions.⁴¹ Courts therefore afford the arbitral tribunal 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'.⁴² Accordingly, they consider themselves not to be entitled 'to interfere with a case management decision, which was fully within the discretion of the tribunal'.⁴³ This is illustrated particularly well by a decision of the Hong Kong Court of Appeal, which held that

40 Another reason for arbitrators to grant unreasonable procedural requests may be that they do not want to upset the party that has appointed them. While equally objectionable, such a motivation would not fall within the category of 'due process paranoia'.

41 *On Call Internet Services Ltd v Telus Communications Co* [2013] BCAA 366, para 18 (Court of Appeal for British Columbia 2013). Also cf *Killam v Brander-Smith* [1997] BCJ No 456 paras 15, 29 (British Columbia Supreme Court 1997) applauding the arbitrator that he had 'refused to allow the arbitration to be turned into a "circus"' and noting that 'the Courts . . . have shown great reluctance to interfere with Arbitral Decisions'.

42 *Brandeis (Brokers) Ltd v Black* [2001] 2 All ER (Comm) 980, para 56 (English High Court 2001); also cf *Margulead Ltd v Exide Technologies* [2004] EWHC 1019, para 33 (English High Court 2004): 'He [ie the arbitrator] regulated procedural matters in a way which accorded to Margulead [ie the challenging party] a reasonable opportunity of putting its case in the context of what was essentially a fair arbitral hearing'; *Judgment of 11 November 1982* (1983) BGHZ 85, 288, 292 (German Bundesgerichtshof 1982) refusing to set aside an award on grounds of a procedural management decision by the arbitral tribunal, since 'absent a contrary party agreement, the tribunal has full discretion to conduct the proceedings' (authors' translation).

43 *Pacific China Holdings Ltd (In Liquidation) v Grand Pacific Holdings Ltd* [2012] 4 HKLRD 1, para 68 (Hong Kong Court of Appeal 2012).

full opportunity [of presenting one's case] cannot mean that a party is entitled to present any case it pleases, at any time it pleases, no matter how long the presentation should take. . . . In the case of a late application, any opportunity afforded to one party must be balanced against the opportunity to the other. . . . A party who has had a reasonable opportunity to present its case would rarely be able to establish that he has been denied due process.⁴⁴

Indeed, the courts recognize the negative consequences due process paranoia may have on the arbitral process when holding that 'the right of each party to be heard does not mean that the Tribunal must "sacrifice all efficiency in order to accommodate unreasonable procedural demands by a party"'.⁴⁵ Domestic courts are thus well aware of the arbitrators' need to strike the delicate balance between due process and efficiency. As a result, they accept an arbitral tribunal's unreviewable decision-making prerogative when it comes to the determination of individual procedural situations. This deference to the arbitrator's discretion means that '[i]t is not ground for intervention that the court considers that it might have done things differently'.⁴⁶ Only if the court considers that things *must* have been done differently in order to safeguard the parties' rights, will it intervene. This, however, rarely happens in practice. In the experience of one accomplished practitioner, 'there has never been a single ICC case where the award was set aside because the time given to counsel had been limited, or the number of exchanges of briefs restricted'.⁴⁷

As pointed out above,⁴⁸ these procedural management decisions need to be distinguished from decisions that ignore the parties' explicit procedural agreement, their arguments, or the evidence presented. Courts emphasize that the tribunal's discretion to conduct the proceedings does not justify ignoring the parties' explicit procedural agreement.⁴⁹ Likewise will a failure to properly consider the parties' arguments and to provide them with a chance to comment on the other party's case lead to the annulment of the award due to a violation of the parties' right to be heard.⁵⁰ In these

44 *ibid*, paras 95, 96, 105.

45 *Triulzi Cesare SRL v XinyiGroup (Glass) Co Ltd* [2014] SGHC 220, para 151 (Singapore High Court 2014) citing Holtzmann and Neuhaus (n 30) 551.

46 *ABB AG v Hochtief Airport GmbH and Athens International Airport S.A.* [2006] EWHC 388 (Comm) para 67 (English High Court 2006).

47 Serge Lazareff, 'International Arbitration: Towards a Common Procedural Approach' in Stefan N Frommel and Barry AK Rider (eds), *Conflicting Legal Cultures in Commercial Arbitration: Old Issues and New Trends* (Kluwer 1999) 35.

48 See Section 3.1.

49 *Decision of 7 February 2011* [2013] SchiedsVZ 49, 56 (OLG Frankfurt 2011); *Cat Charter LLC v Schurtenberger* 646 F 3d 836, 843: 'arbitrators may exceed their power . . . if they fail to comply with mutually agreed-upon contractual provisions in an agreement to arbitrate' (US Court of Appeals, 11th Cir 2011).

50 *Decision of 9 February 2009*, 4A_400/2008 (2009) 27 ASA Bulletin 495 (Swiss Federal Tribunal 2009) setting aside an award because the tribunal had relied on a 'totally unexpected' legal argument, which neither party had made and the tribunal had not discussed with the parties; *Overseas Mining Investments Ltd v Commercial Caribbean Niquel SA*, Case No 10-23321, 29 June 2011 (French Cour de Cassation 2011) setting aside an award because the tribunal had based the award on a legal theory neither of the parties had argued; cf *Pacol Ltd v Joint Stock Co Rossakhar* [1999] 2 All ER 778 (Comm) (English High Court 1999) setting aside an award because the arbitral tribunal had denied liability, although the parties had jointly agreed that liability should be assumed, thus violating the parties' agreement and robbing the

cases, the tribunal's award amounts to a surprise decision, which almost always warrants the setting aside of the award due to a violation of the parties' due process rights. Conversely, procedural management decisions do not—they enjoy the courts' general deference and will usually not be second-guessed.

3.3 Case law regarding five scenarios in the 'grey zone'

This general deference to case management decisions by international arbitrators is also reflected in the courts' approach to dealing with specific procedural scenarios, such as those enumerated above.⁵¹

3.3.1 Requests for extension of a deadline

Sometimes parties request the extension of a deadline previously set in the procedural timetable. This puts the arbitrator in the difficult position of having to decide between sticking to the procedural timetable while risking that the party might argue a violation of its right to be heard and granting the request with the consequence of prolonged proceedings. Unless they qualify the request for extension as a clear dilatory tactic, most arbitrators tend to grant it.⁵² Pertinent case law, however, provides that courts usually do not interfere if it is not entirely unreasonable to stick to the previously set timetable. One award was confirmed in which the tribunal had denied to extend a deadline for submission of an expert witness statement, since an extension would have conflicted with the procedural timetable.⁵³ In another case, the award was confirmed although the tribunal had refused to extend a time limit for respondent's submission, holding that it had received a reasonable opportunity to prepare its brief.⁵⁴ Thus, there is no reason for tribunals to be lenient on unreasonable requests for the extension of a deadline. Only if a party was reasonably unable to comply with the procedural timetable should the deadline be extended.

3.3.2 Submission of an unsolicited, but 'unavoidable' brief

Similar issues arise when parties submit a brief without being invited to do so by the arbitral tribunal, introducing completely new arguments or a new piece of evidence just before the oral hearing. The decision whether to admit such a brief into the record becomes particularly difficult if it is of material relevance to the outcome of the case. Nevertheless, ignoring the unsolicited brief will not lead to the annulment of the award. This is evidenced by the confirmation of an award in which the tribunal ignored a brief which claimant had submitted only three days prior to the hearing.⁵⁵

claimant of a 'reasonable opportunity of making [the issue of liability] the subject of their submissions or the subject of evidence'.

51 See Section 2.

52 Lew, Mistelis and Kröll (n 19) para 21–64; Michael McIlwrath and John Savage, *International Arbitration and Mediation: A Practical Guide* (Kluwer 2010) para 5–137; Blackaby and others (n 19) 1.156.

53 *Triulzi Cesare SRL v XinyiGroup (Glass) Co Ltd* [2014] SGHC 220, para 136 (Singapore High Court 2014) holding that 'the Tribunal had, within its case management discretion, acted fairly and was entitled to conclude that proper case management of the Arbitration required the April hearing to go ahead'.

54 *Judgment of 6 August 2008*, (2009) XXXIV YB Comm Arb 522, 523 (OLG Dresden 2008).

55 *Judgment of 28 November 2008*, (2009) XXXIV YB Comm Arb 536, 541 (OLG Hamm 2008).

3.3.3 *Submission of document(s) after a cut-off date*

The issue becomes even more acute if parties submit new documents after a cut-off date. The danger some arbitrators see in excluding such evidence is that the submitting party might argue that it was unable to present its case. In light of the far-reaching discretion afforded to arbitrators in the taking of evidence, such fears prove unfounded. In a case in which one party had submitted additional legal authorities after a cut-off date, the tribunal's decision to exclude these authorities was considered a 'case management decision, which was fully within the discretion of the Tribunal to make'.⁵⁶ The same is true if evidence is requested too late from the other party, since 'the right to be heard . . . is not violated when evidence was not requested in a timely manner'.⁵⁷ Similarly, evidence submitted too late may be rejected if the submitting party does not furnish proof that the evidence 'for justifiable reasons could not have been submitted earlier'.⁵⁸

Awards that were set aside in this scenario only concerned egregious cases in which the tribunal relied on evidence it had previously excluded as out-of-time and had not allowed the other party to address⁵⁹ or in which one party was not given any opportunity to reply to parts of the other party's submissions.⁶⁰ Such conduct is immediately striking as unreasonable and therefore not covered by the courts' general approach to defer to the arbitrators' exercise of their procedural discretion.

3.3.4 *Last minute introduction of new claims*

Another situation the tribunal may find itself faced with is the last-minute introduction of a new claim. If it admits the claim without giving the other party sufficient opportunity to respond to this new claim there is an issue with the other party's right to be heard. If it denies the claim, the introducing party might argue a violation of its right to present its case. However, also in this scenario, courts will afford substantial deference to the arbitrator's decision on the admission or exclusion of new claims. One court has held that the 'arbitrators were well within the proper scope of their discretion in refusing to hear the new claim', when a party tried to amend its Statement of Claim without corroborating evidence⁶¹ or that the arbitrator was 'within the proper scope of its discretion in refusing to consider a counterclaim submitted only one week before the arbitration hearing'.⁶² Even in a case where the tribunal had decided on a claim it allegedly should not have, did the court hold that 'courts defer to arbitral determinations in all but the most unusual circumstances'.⁶³

56 *Pacific China Holdings Ltd (In Liquidation) v Grand Pacific Holdings Ltd* [2012] 4 HKLRD 1, para 68 (Hong Kong Court of Appeal 2012).

57 *Judgment of 28 February 2013*, 4A_576/2012, para 4.2.2 (Swiss Federal Tribunal 2013). Also cf *Judgment of 20 July 2011*, 4A_162/2011, para 2.1.2 (Swiss Federal Tribunal 2011) in which it was held that the right to present one's case only exists if evidence is offered 'in a timely manner'.

58 *Judgment of 30 September 1999*, (2006) XXXI YB Comm Arb 640, 647–8 (OLG Bremen 1999).

59 *Société MORS v Société Supermarket Systems* 1995 Rev arb 887 (Paris Cour d'appel 1991).

60 *Société Fichtner GmbH & Co KG v Lksur SA*, Case No 08/16276 of 17 December 2009 (Paris Cour d'appel 2009) reported in Jennifer Kirby and Denis Bensaude, 'A View From Paris — March 2010' (2010) 25 Mealey's Int'l Arb Rep 1, 10–1.

61 *Grosso v Barney* 2003 WL 22657305, para 7 (US District Court ED Pa 2003).

62 *Peters Fabrics Inc v Jantzen Inc* 582 F Supp 1287, 1292 (US District Court SDNY 1984).

63 *Carte Blanche (Singapore) v Carte Blanche International* 888 F 2d 260, 267 (US Court of Appeals, 2nd Cir 1989).

3.3.5 Requests for re-scheduling of a hearing 'at the eleventh hour'

Finally, the most prevalent scenario in case law is a procedural management decision in regard to a party's request to postpone an oral hearing immediately before the hearing was scheduled. In this scenario, problems regarding a party's right to be heard may arise if the tribunal refuses to re-schedule the hearing and the requesting party does not have sufficient time to prepare for it. However, case law proves that as long as there is any reasonable ground for the tribunal's decision on postponement the courts defer to the arbitrators' discretion and confirm the award.

In a case where the key witness had a long-standing prior commitment and still the tribunal refused to postpone the hearing without giving any grounds, the court held that the tribunal may legitimately 'have decided that the proceedings had already been protracted so long as to violate the policy of expeditious handling of such disputes'.⁶⁴ In another case, the tribunal had considered a postponement unnecessary in the circumstances of the case and the court held that there was 'nothing . . . which establishes or even suggests that . . . the arbiters' decision to deny the two continuances rose to the level of misconduct'.⁶⁵

Other cases involve changes of counsel immediately prior to the hearing. In a case where this happened nine days before the hearing, the court held that 'the appellant has not done everything within its power to retain new counsel to represent it at the oral hearing' and thus confirmed the award.⁶⁶ In another case the tribunal had refused to postpone a hearing after respondent's lead counsel had become unavailable for personal reasons. The court confirmed the award, holding that 'the test is whether the decision to refuse an adjournment was "so far removed from what could reasonably be expected of the arbitral process that it must be rectified"' and that 'an adjournment would have caused an unnecessary wastage of costs'.⁶⁷

This reasonableness test was also applied in a case where the tribunal had refused to postpone the hearing, after one party had asked for a continuance only four days before the hearing but had been silent for nine months prior to that. The court held that '[w]here there is a reasonable basis for the arbitrator's decision not to grant a postponement, courts are reluctant to interfere with the arbitration award on the ground of misconduct'.⁶⁸

Still, there are instances in which courts have annulled awards due to a scheduling decision by the arbitral tribunal. These decisions also turn on the question of the reasonableness to refuse postponement of the hearing. In one case, the court considered it unreasonable that the tribunal had refused to postpone a hearing even though such

64 *Schmidt v Finberg* 942 F 2d 1571, 1574 (US Court of Appeals, 11th Cir 1991).

65 *Dealer Computer Services, Inc v Dale Spradley Motors, Inc* 2012 WL 72284, para 3ff (US District Court, ED Mich 2012).

66 *Judgment of 24 November 1988* reported by Jens Bredow [1989] EWiR 311, 312 (German Bundesgerichtshof 1988, authors' translation).

67 *ASM Shipping Ltd of India v TTMI Ltd of England* [2005] EWHC 2238 (Comm), para 38 (English High Court 2005). Also cf *Judgment of 31 March 2005*, 3 Ob 35/05a (Austrian Oberster Gerichtshof 2005) in which an award was confirmed although one party was forced to change counsel immediately before the hearing. The court held that the party 'was in no way prevented from asserting any remedies' (authors' translation).

68 *PT Reasuransi Umum Indonesia v Evanston Ins Co*, XIX YB Comm Arb 788, 790 (US District Court, SDNY 1992).

a postponement would have allowed one party to adduce crucial proof for its case. The court held that ‘the arbitrators’ conclusions clearly were less informed without the [crucial proof] in the record. So much so, that the arbitration award must be vacated’.⁶⁹ Similarly, an award was annulled after the arbitrator had refused to postpone the hearing when the ‘crucial’ witness became ill. The court held that the arbitrator ‘should have been required to exercise his discretion in favor of [the party relying on the witness]’.⁷⁰ In a different case, an award was denied enforcement because the arbitrator had rejected one party’s request to postpone the oral hearing as it did not have sufficient funds to afford legal representation and required more time to retain counsel. The court considered that the arbitrator’s decision was ‘against the requirement that [each party] be given a “reasonable opportunity” to be present at the arbitration, with its advisers’.⁷¹ This reasonable opportunity to be present at the hearing was also the reason to refuse enforcement of an award that was rendered although due to an earthquake one party did not have enough time to prepare for the hearing. The court held that ‘[i]t is commonly known that the earthquake of 1980 caused so many . . . inconveniences . . . that the population was not able for a long time to attend to everyday business’.⁷² Thus, awards are only set aside due to a postponement decisions, if this effectively robs a party of any reasonable opportunity to present its case, eg in a situation of ‘procedural force majeure’.

3.4 Result: the ‘Procedural Judgment Rule’

This review of relevant case law reveals that in terms of procedural management decisions due process paranoia is unjustified. Regardless of how arbitrators decide a delicate case management situation, ie whether they give in to pressure from the parties or whether they retain a firm hand, the reviewing state court will, but in the most unusual of circumstances, defer to their procedural discretion and not vacate the award. From the reviewed case law derives the general rule that state courts do not interfere with international arbitrators’ procedural management decisions. By reference to the discretion afforded to directors in running a corporation,⁷³ this rule may be referred to as the *Procedural Judgment Rule*. Under the Procedural Judgment Rule, a court will not second-guess an arbitrator’s exercise of his procedural judgment, if his decision is grounded in a *bona fide* assessment of the case and is reasonable under the circumstances. The Rule creates a safe harbour for international arbitrators’ procedural management decisions that courts will not penetrate.

69 *Naing International Enterprises, Ltd v Ellsworth Associates, Inc* 961 F Supp 1, 5 (US District Court, DC 1997).

70 *Allendale Nursing Home Inc v Local 1115 Joint Board* 377 F Supp 1208, 1214 (US District Court, SDNY 1974).

71 *Coromandel Land Trust Ltd v MilkT Invs Ltd*, 28 May 2009, CIV-2009-419-000232, para 40 (High Court of Hamilton 2009).

72 *Bauer & Graubmann OHG v Fratelli Cerrone Alfredo e Raffaele*, (1985) X YB Comm Arb 460, 461 (Naples Court of Appeal 1982).

73 In corporate law, the *business judgment rule* protects directors of a company from liability for business decisions if they ‘were made in good faith, with due care and within the directors’ or officers’ authority’, Bryan A Garner and Henry Campbell Black (eds), *Black’s Law Dictionary* (10th edn, Thomson Reuters 2014) 240.

This result is qualified in two regards. First, the Procedural Judgment Rule only applies to procedural management decisions as indicated above.⁷⁴ It does not protect an arbitral tribunal's decision to disregard the parties' procedural agreements, substantive arguments or evidence it had previously admitted. Second, in exceptional cases courts will also interfere where a line is crossed and a tribunal's procedural management decision amounts to a violation of the parties' due process rights. The decisive question underlying most of the reviewed cases is whether the arbitrators' procedural decision was 'reasonable' in the circumstances of the case. While under the Procedural Judgment Rule it is first and foremost for the arbitrators to determine what is 'reasonable', in reviewing this decision the courts adopt their own *reasonableness test*. The relevant circumstance they consider in this test is whether in light of the arbitrators' prerogative to conduct the proceedings there was a serious violation of a party's right resulting in a blatant case of refusal of due process by the tribunal, which amounts to a clear misuse of its procedural discretion. The above cases indicate that the threshold for there to be such a severe infringement is high. Only evident violations will be strong enough to surmount the interest in efficient proceedings and carve out an exception to the Procedural Judgment Rule.

In conclusion, overcoming due process paranoia by exercising procedural discretion usually does not lead to an annulment or denial of enforcement of the award. As long as the exercise of discretion is reasonable and based on objective grounds, courts adhere to the Procedural Judgment Rule and provide a safe harbour for procedural decision-making by international arbitrators.

4. THE 'COURAGEOUS TRIBUNAL': MAKING EFFICIENT USE OF PROCEDURAL DISCRETION

The Procedural Judgment Rule implies that international arbitrators have no reason to fear domestic courts' *ex post* review of their procedural management decisions. However, to accommodate the users' wish for streamlined proceedings, the mere awareness of the safe harbour that the Procedural Judgment Rule provides is not enough. Rather, international arbitrators must also make efficient use of the procedural discretion it entails. The last part of the present contribution thus focuses on techniques to streamline the proceedings while at the same time preserving the parties' due process rights.

Streamlining the proceedings requires a balancing between the predictability and flexibility of the process. In this balancing process the arbitral tribunal may consider four core principles that serve as a general framework for any procedural management decision: transparency, proactivity, interactivity, and proportionality. What these principles entail and how they may be implemented into the arbitral process to tackle individual problems in the arbitration shall be addressed in the following.⁷⁵

74 See Section 3.1 and Section 2 (i)–(v).

75 These techniques have been discussed and developed at the *Vienna Arbitration Days 2016: The Road to Predictability in International Arbitration*. A detailed report on this discussion is forthcoming as Klaus Peter Berger and Innhwa Kwon, 'Streamlining of the Proceedings and Early Evaluation' in *Austrian Yearbook on International Arbitration 2017* (Manz 2017, forthcoming).

4.1 Transparency

Efficiency requires cooperation which in turn requires mutual trust between the parties and their counsel on one side and the members of the arbitral tribunal on the other. In order to create such mutual trust, *early transparency* of the process is of key importance. Such trust fosters the parties' active participation, enabling the tribunal to tailor the proceedings in a way that suits their needs. In particular, creating such transparency early in the process reduces the likelihood of surprises during the proceedings. In an atmosphere where the rules of the game are clear and unequivocal from the outset—also and in particular with respect to the tribunal's general attitude towards dilatory or unreasonable conduct of the parties—the exercise of the tribunal's procedural discretion in response to such conduct will most likely be met with less resistance from the parties than in arbitrations in which it remains unclear how the tribunal will make use of its discretion.⁷⁶

The crucial basis for the practical implementation of this principle is an unequivocal statement in the case-management conference. The tribunal should make it very clear to the parties early in the process that it intends to adopt a hands-on approach in the conduct of the proceedings, eg with respect to duplicative advocacy or delaying tactics. This statement should then be transcribed into clear rules in the PO1 or Terms of Reference.

Another important tool for achieving early transparency and trust between all stakeholders is to encourage party representatives to attend the case management conference. Indeed, a basic prerequisite for streamlining the proceedings is the parties' willingness to accept the intrinsic value of streamlined proceedings from the very outset—later they may be more swayed by the particular procedural situation and what the best move to win will be. In accordance with the policy underlying Article 24 (4) sentence 3 ICC Rules 2012, it makes sense for the arbitral tribunal to ensure that party representatives, eg managers and/or in-house counsel, are present at the first and at any subsequent interim case management conferences. This puts the arbitral tribunal in a position to explain the value of streamlined proceedings, and the ways and means to achieve them, directly to the party representatives, rather than having to rely on counsel conveying this message to their clients.

The attendance of party representatives at the case management conference might even trigger a healthy educational process within the company concerned. In-house lawyers of this company (provided they are sufficiently familiar with alternative dispute resolution) would have to explain to their non-lawyer management the essential characteristics and intrinsic values of the arbitral process as a viable alternative to court litigation. Such a process may result in greater acceptance of arbitration by these managers and might, in the end, even enhance chances that they accept arbitration not only as the preferred dispute resolution method, but also as a tool to achieve a settlement of their dispute.⁷⁷

76 Böckstiegel (n 19) 118–9; Klaus Reichert, 'The Organizational Meeting' in Lawrence W Newman and Richard D Hill (eds), *Leading Arbitrator's Guide to International Arbitration* (3rd edn, Juris 2014) 415.

77 On the arbitral tribunal's role in promoting settlements see Hilmar Raeschke-Kessler, 'Making Arbitration More Efficient: Settlement Initiatives by the Arbitral Tribunal' [2002] *Int'l Bus L* 158; Christian Bühring-Uhle, Gabriele Scherer and Lars Kirchhoff, 'The Arbitrator as Mediator' in Christopher R Drahozal and Richard W Naimark (eds), *Towards a Science of International Arbitration: Collected Empirical Research*

4.2 Proactivity

After setting the stage in a transparent manner, streamlining the proceedings requires a *proactive* tribunal. Proactivity refers to the arbitrator's task of 'taking charge and staying in charge of the arbitral process'.⁷⁸

4.2.1 Taking charge of the process

A basic prerequisite for taking charge is that, from the outset of the proceedings, all members of the tribunal are familiar with the case file. This enables them to swiftly and competently react to any procedural questions or requests from the parties, rather than letting the case run its course without a certain direction. Even more so, it makes sense to actively seek the parties' input on the relevant issues of the case in order to be able to accordingly tailor the process. For this, an 'early evaluation' of the case together with the parties has proved useful. Article 2 (3) of the International Bar Association's Rules on the Taking of Evidence in International Arbitration (IBA Rules) provides for two separate techniques for such an early evaluation:

The Arbitral Tribunal is encouraged to identify to the Parties, as soon as it considers it to be appropriate, any issues:

- (a) that the Arbitral Tribunal may regard as relevant to the case and material to its outcome; and/or
- (b) for which a preliminary determination may be appropriate.⁷⁹

Such measures help to address the concern by some users that relatively straightforward disputes sometimes turn into large and complicated proceedings because rather than addressing the key issues of the case head-on, the arbitral tribunal has let the dispute develop into an unstructured exchange of arguments.⁸⁰ If the tribunal, together with the parties, examines the issues more fully at the outset of the proceedings, everybody will focus on these issues more readily, thus leading to a 'narrower, quicker and hence cheaper process'.⁸¹

4.2.2 Staying in charge of the process

Staying in charge of the process will require the tribunal to make use of the procedural management tools which it has at its disposal.⁸² While most arbitral rules only re-state the broad procedural discretion afforded to arbitrators under national

(Kluwer 2005); Bernd Ehle, 'The Arbitrator as a Settlement Facilitator' in Olivier Caprasse (ed), *Walking a Thin Line: What an Arbitrator Can Do, Must Do or Must Not Do* (Bruylant 2010); Klaus Peter Berger, 'Promoting Settlements in Arbitration: Is the "German Approach" Really Incompatible with the Role of the Arbitrator?' (2016) 9 NY Disp Res L 46.

78 Aksen (n 6) 13.

79 Similar provisions are found in art 19.2 LCIA Rules 2014 and art 20 (3) ICDR Rules 2014.

80 McIlwrath and Schroeder (n 1) 8; cf Queen Mary University and White & Case, '2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process' 13 <<http://www.arbitration.qmul.ac.uk/docs/164483.pdf>> accessed 19 June 2016; Christopher Newmark, 'Controlling Time and Costs in Arbitration' in Lawrence W Newman and Richard D Hill (eds), *Leading Arbitrator's Guide to International Arbitration* (3rd edn, Juris 2014) 493–4.

81 Newmark (n 80) 495.

82 Kopecký and Pernt (n 4).

laws,⁸³ some rules contain specific mechanisms to deal with delicate procedural situations and achieve streamlined proceedings. Some interviewees of the *2015 Survey* have complained, however, that these tools are often not used effectively. It was suggested that rather than there being a 'lack of effective sanctions during the arbitral process', the issue is more a 'lack of effective use of sanctions' by the arbitrators.⁸⁴

Indeed, there are some rules that are meant to provide for efficient case management, even at the expense of limiting the parties' right to agree on specific issues of procedure. For example, Article 17 (2) sentence 2 UNCITRAL Arbitration Rules 2010 provides that the arbitral tribunal 'may, at any time, after inviting the parties to express their views, extend or abridge any period of time prescribed under these Rules or agreed by the parties'. Thus, in the limited aspect of timing issues, the arbitral tribunal is not bound by the parties' agreement but may, having heard the parties' positions, exercise its own discretion over the parties' agreement.⁸⁵ Similarly, Article 22.1 (ii) LCIA Rules 2014 allows the tribunal to act even upon its own initiative, ie in the absence of a request from a party. Article 22.1 (b) of the previous version of the LCIA Rules had contained a similar provision. While under the 1998 version, the power of the tribunal was always subject to contrary agreement by the parties in writing, under the 2014 version, the parties may no longer contract out of the powers granted to the tribunal under the article. This change is characterized as 'shift[ing] the balance of power' from the parties to the tribunal.⁸⁶ This shift is ultimately based on the agreement of the parties to arbitrate under the LCIA Rules, which is why the leading commentary on the Rules states that, in light of the change from the 1998 to the 2014 Rules, 'parties will want to consider this carefully before agreeing to the LCIA Rules'.⁸⁷

A number of other arbitration laws and rules provide similar case management tools.⁸⁸ Arbitral tribunals are encouraged to actively look for these tools in the applicable law and should, in the interest of furthering the efficiency of the proceedings, not hesitate to make use of them. At the same time, the absence of such specific tools usually does not mean that international arbitrators cannot conduct the arbitration proactively. Rather, all of their procedural management decisions are protected under the Procedural Judgment Rule.⁸⁹ Insofar, a main purpose of specific tools in arbitral rules is to make the parties aware of the arbitrators' inherent procedural management powers.

Another essential and much-discussed technique for conducting the arbitration proactively and thus ensuring efficient case management is the use of cost sanctions which the tribunal can impose on a party in case of unreasonable procedural behaviour.⁹⁰ Such unreasonable behaviour may relate to excessive reliance on legal

83 cf n 19.

84 Queen Mary University and White & Case (n 22) 10 (emphasis added).

85 cf David D Caron and Lee Caplan, *The UNCITRAL Arbitration Rules: A Commentary* (2nd edn, OUP 2013) 48.

86 Scherer, Richman and Gerbay (n 3) 245.

87 *ibid* 246.

88 See, eg art 1036 (3) and art 1029 (5) Dutch Code of Civil Procedure; s 24.2 DIS Arbitration Rules 1998.

89 See Section 3.4.

90 cf Lew, Mistelis and Kröll (n 19) para 24–82; ICC Commission on Arbitration (n 3) 85; Wilske (n 13) 327–8; Fry, Greenberg and Mazza (n 3) para 3–1488; Born (n 21) 3098–9 with reference to arbitral awards in which this approach was followed.

arguments, excessive cross-examination or procedural moves which can clearly be qualified as dilatory tactics. The 2015 ICC Arbitration Commission Report on *Decisions on Costs in Arbitration* is designed specifically to assist arbitrators in using the allocation of costs between the parties as a means to ‘effectively control time and costs’ and to assist them in ‘creating fair, well-managed proceedings matching users’ expectations’.⁹¹ In this context, the *Report* emphasizes the benefits of cost decisions and sanctions as a means for effective case management.⁹² This ties in with the findings of the second edition of the Commission’s Report on *Techniques for Controlling Time and Cost in Arbitration* in which the Commission emphasized the value of ‘informing the parties at the outset of the arbitration (eg at the case management conference) that [the tribunal] intends to take into account the manner in which each party has conducted the proceedings and to sanction any unreasonable behavior when deciding on costs’.⁹³ Such costs decisions may be taken in the final award or in interim awards as a means of ‘sanctioning improper behavior, including where it is not efficient or reasonable’.⁹⁴

The IBA Rules provide for similar techniques to ensure the efficiency of the proceedings. Article 9 (7) IBA Rules provides that:

If the Arbitral Tribunal determines that a Party has failed to conduct itself in good faith in the taking of evidence, the Arbitral Tribunal may . . . take such failure into account in its assignment of the costs of the arbitration.

Thus, informing the parties in the case management conference that the tribunal reserves the right to take adverse cost decisions in order to sanction unreasonable procedural behaviour will deter them from dilatory tactics or at least not unduly burden the other party, which has acted economically, with the costs incurred in dealing with the first party’s dilatory tactics.

4.3 Interactivity

Ensuring that the proceedings remain streamlined and focused on the key issues throughout the arbitration requires continued *interactivity* between the tribunal and the parties or their counsel. A particularly important area in which there may be room for improvement is that tribunals sometimes do not pay enough attention to the parties’ requests for relief or to certain factual or legal issues presented by the parties during the written phase of the arbitration.⁹⁵ One way of ensuring such continued interactivity is by scheduling interim case review meetings throughout the proceedings in order to give the parties a continued opportunity to re-evaluate the crucial aspects of the case.⁹⁶ If this approach is adopted, however, it should be

91 ICC Commission Report, ‘Decisions on Costs in International Arbitration’ [2015] ICC Disp Res Bull 1, 3, para 7.

92 *ibid* 6, para 28.

93 ICC Commission Report (n 4) 15, para 82.

94 ICC Commission Report (n 91) 7, para 29.

95 Newmark (n 80) 493–5.

96 An example for an early oral meeting is the ‘Kaplan Opening’, see Neil Kaplan, ‘If It Ain’t Broke, Don’t Change It’ [2014] *SchiedsVZ* 278, 279–80.

ensured that the parties, eager not to lose tactical advantages, do not convert these meetings into a ‘real’ full-fledged hearing. This would result in prolonged rather than streamlined proceedings.

The importance of interactivity also applies to the interaction within the tribunal.⁹⁷ In this regard, a continuing dialogue between all members of the tribunal is essential. A practical implementation would be the ‘*Reed Retreat*’, ie the early inclusion of a fixed date into the timetable of the arbitration at which the arbitrators meet in person and discuss the legal and factual issues at stake, perhaps with a view to prepare questions for the parties to be answered in the next round of briefs or at the oral hearing.⁹⁸ In any case, a continuing dialogue throughout the arbitration will not only be beneficial for the final deliberations, ‘but also for shaping the process to be the most appropriate for the case’.⁹⁹

4.4 Proportionality

Regarding all of these different case management techniques one final word of caution is in order. While these techniques are highly beneficial to the efficient streamlining of the proceedings, they are all subject to the principle of *proportionality*. The principle of proportionality requires that the tribunal remains flexible when considering how the proceedings should best be conducted. In light of diverging sizes and complexities of different cases as well as the particular nature of the legal and factual issues at stake, there is no ‘one size fits all’ approach. Rather, when considering specific case management techniques, the tribunal should always ensure ‘appropriate proportionality [of its case management measures] to the complexity and value of the case’.¹⁰⁰

5. CONCLUSION

The *2015 Survey* has revealed the strong wish of many participants in the arbitral process that arbitrators should be willing to decisively manage proceedings. This demand is neither new, nor surprising, nor unrealistic. It is not new because it is consistent with the finding of a previous survey that arbitrators with a proactive case management style are preferred to those with a reactive style.¹⁰¹ It is not surprising because a hands-on approach helps to save time and costs—currently the major concern of the users of arbitration. It is not unrealistic because in regard to their procedural management decisions arbitrators are protected by the Procedural Judgment Rule, leaving them no reason to succumb to due process paranoia.

97 Böckstiegel (n 19) 117–8; Vidak-Gojkovic, Greenwood and McIlwrath (n 1) 65.

98 Lucy Reed, ‘The 2013 Hong Kong International Arbitration Centre Kaplan Lecture: Arbitral Decision-Making: Art, Science or Sport?’ (2013) 30 *J Int'l Arb* 85, 96.

99 David W Rivkin, ‘Form of Deliberations’ in Bernhard Berger and Michael E Schneider (eds), *Inside the Black Box: How Arbitral Tribunals Operate and Reach Their Decisions* (Juris 2014) 21; cf Berger (n 3) para 27–7.

100 Fry, Greenberg and Mazza (n 3) para 3–796; cf Reichert (n 76) 405.

101 Queen Mary University and White & Case, ‘2010 International Arbitration Survey: Choices in International Arbitration’ 26 <<http://www.arbitration.qmul.ac.uk/docs/123290.pdf>> accessed 19 June 2016.

A party-driven system such as arbitration functions best if the parties are driving in the same direction.¹⁰² While they are doing just that when deciding to arbitrate any future disputes, they often quickly part ways once a dispute has ensued. In so far, an arbitrator's focus in conducting the proceedings should not be on what a party requests in the heat of combat, but what is reasonable under the circumstances, ie what promotes the efficient resolution of both parties' dispute.¹⁰³ After all, this is what the parties had in mind at the outset of the proceedings. An arbitrator who exercises his procedural discretion under the Procedural Judgment Rule acts precisely in this spirit as he steers the proceedings in the interest of *all parties* while at the same time safeguarding their due process rights. Therefore, the true test of an arbitrator's procedural skills and judgment is to deal with delicate procedural situations not with an unjustified reluctance to act decisively and a primal fear to violate due process, but with 'the requisite mix of fairness and firmness'.¹⁰⁴

102 Veit Öhlberger and Jarred Pinkston, 'Iura Novit Curia and the Non-Passive Arbitrator: A Question of Efficiency, Cultural Blindness and Misplaced Concerns About Impartiality' in Christian Klausegger and others (eds), *Austrian Yearbook on International Arbitration 2016* (Manz 2016) 115.

103 *ibid*; Giacomo Rojas Elgueta, 'The Parties' "Double Personality" and the Role of the Arbitral Tribunal' <<http://kluwerarbitrationblog.com/2016/05/17/>> accessed 19 June 2016.

104 Merkin and Flannery (n 36) 132.