EXCLUSION OF ARBITRAL PROCEDURE FROM THE SCOPE OF PUBLIC POLICY SCRUTINY AS A MEASURE TO CURB DUE PROCESS PARANOIA: A PROPOSAL UNDER THE UNCITRAL MODEL LAW

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"Due process paranoia" is a recent buzz phrase in arbitration circles. It refers to the mental state of arbitrators who harbour an exaggerated concern or suspicion that they may be condemned by national courts for failing to comply with the due process requirements. It may result in the prolongation of arbitration proceedings and the escalation of costs, two of the major vices plaguing arbitration today. To curb this form of paranoia, this article will suggest that arbitral procedure, as opposed to the substance of the award, should be excluded from the scope of public policy scrutiny in the context of annulment under the UNCITRAL Model Law on International Commercial Arbitration. Though it is at odds with a conventional interpretation of the Model Law, this reading will remove a breeding ground for "due process paranoia" without causing unwelcome side effects.

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I. INTRODUCTION[1]

The UNCITRAL Model Law on International Commercial Arbitration[2] (hereafter "Model Law") sets forth a number of grounds for setting aside arbitral awards (Article 34(2)) including the breach of public policy (sub-paragraph (b)(ii)).[3] On a conventional interpretation, the public policy scrutiny under this provision extends to arbitral procedure as well as the substance of awards.

This article will suggest that arbitral procedure should be excluded from the scope of public policy scrutiny in the context of annulment under the Model Law. The aim of this suggestion is to curb so-called "due process paranoia." As discussed below, the public policy scrutiny of arbitral procedure is a breeding ground for "due process paranoia" and its removal will not cause any unwelcome side effects under the Model Law.

II. DUE PROCESS PARANOIA

"Due process paranoia" is a recent buzz phrase in arbitration circles.[4] Generally, paranoia refers to the mental state of someone who harbours an excessive or irrational suspiciousness and distrustfulness of others.[5] In the

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1. The *Michigan State International Law Review* editors request the reader please note that while the *Michigan State International Law Review* uses The Bluebook: A Uniform Style of Citation for published articles, some citations within this article do not adhere to The Bluebook and follow international citation conventions requested by the author.

2. For the text, see the website of UNCITRAL at https://uncitral.un.org (last visited April 30, 2021). The UNCITRAL stands for the United Nations Commission on International Trade Law. There are two versions to the Model Law: the original 1985 version and the amended 2006 version. The discussion in this article is version agnostic.

3. In the context of the recognition or enforcement of an award, similar grounds for refusal are laid down in Article 36(1)(b)(ii) of the Model Law and Article V(2)(b) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 [hereinafter New York Convention] (For the text, see the website of UNCITRAL, *supra* note 2).

4. This phrase spread after it was used in WHITE & CASE ET AL., 2015 INTERNATIONAL ARBITRATION SURVEY: IMPROVEMENTS AND INNOVATIONS IN INTERNATIONAL ARBITRATION 2, 10 (2015), http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2015_International_Arbitration_Survey.pdf [hereinafter WHITE & CASE ET AL. 2015].

5. *See Paranoia*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/paranoia (last visited Feb. 1, 2021).

context of arbitration, due process paranoia refers to the mental state of arbitrators who harbour an exaggerated concern or suspicion that they may be condemned by national courts for failing to comply with the due process requirements. This form of paranoia is often triggered by the introduction of a new argument or evidence at the eleventh hour, the last minute request for the rescheduling of a hearing, or a request for the extension of a cut-off date.

III. CAUSE AND EFFECT OF PARANOIA

In deciding on such requests, the arbitrators may have discretion under the applicable law. Where the applicable law is based on the Model Law, the pertinent provisions are as follows: Article 18: "[E]ach party shall be given a full opportunity[6] of presenting his case." Article 19(2): "[T]ribunal may . . . conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility . . . of any evidence." Article 23(2): "[E]ither party may amend or supplement his claim or defence during the course of the arbitral proceedings, unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it." Article 25(c): "[If] any party fails to appear at a hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make the award on the evidence before it."

Though the arbitrators have such procedural discretion, they have a strong incentive to avoid rendering an award which is vulnerable to challenge on procedural grounds. A successful challenge may tarnish their reputation. It is a serious matter for them because, unlike judges who are sitting on duties, arbitrators are hired by parties.

Consequently, there is a tendency that arbitrators become reluctant to act decisively in the conduct of arbitral proceedings. This is a finding of an empirical survey in 2015 collating the views of arbitration stakeholders.[7] A more recent report in the same series of survey published

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6. The phrase "full opportunity" is generally interpreted as meaning "reasonable opportunity." *See, e.g.*, U.N. Secretary-General, *Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration*, art. 19 n.8, U.N. Doc A/CN.9/264 (Mar. 25, 1985) (stating that 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").

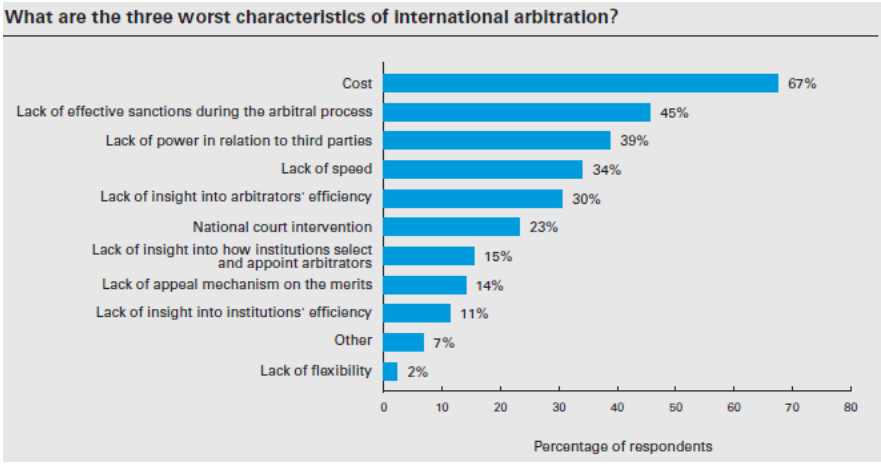
7. WHITE & CASE et al. 2015, *supra* note 4, at 2, 10.

in 2018 also notes that due process paranoia "continues to be one of the main issues that users believe is preventing arbitral proceedings from being more efficient."[8] A later report in 2019, focusing on construction arbitration, again notes that due process paranoia "was regarded as the significant factor discouraging arbitrators from taking a more robust approach to case management."[9]

8. WHITE & CASE ET AL., 2018 International Arbitration Survey: The Evolution of International Arbitration 3, 24 (2018), https://www.whitecase.com/publications/insight/2018-international-arbitration-survey-evolution-international-arbitration [hereinafter WHITE & CASE ET AL. 2018].

9. PINSENT MASONS ET AL., 2019 International Arbitration Survey—Driving Efficiency in International Construction Disputes, 6, 24 (2019), https://www.pinsentmasons.com/thinking/special-reports/international-arbitration-survey.

IV. WHY PARANOIA IS PROBLEMATIC



While due process is a positive concept, due process paranoia is problematic because it may result in the prolongation of proceedings and the escalation of costs.[10] As shown in the chart above,[11] the high cost, lack of speed, and absence of effective sanctions during the proceedings are among the worst characteristics of arbitration in the opinion of stakeholders.

The parties to an arbitration agreement have opted out of the open-court litigation in favour of the supposedly faster and cheaper method of the dispute resolution, which is closed to the public. It is, therefore, arguable that the parties to an arbitration agreement have accepted that the guarantee of due process in their chosen method of dispute resolution is not as extensive as in litigation.

10. It must, however, be acknowledged that due process paranoia is not the only cause for delay and high costs in arbitration. Unlike judges, arbitrators contractually agree to provide a dispute resolution service. In order to obtain customer satisfaction, they would naturally be more inclined than would judges to provide the parties with opportunities to thoroughly present their case, conscious also of the finality of their decision.

11. WHITE & CASE et al. 2018, *supra* note 8, at 8.

V. COURTS' DEFERENCE TO ARBITRATORS

In the course of debate over due process paranoia, one article surveyed the case law of major seats of arbitration and found that due process paranoia was unfounded in "many different jurisdictions" because the courts would generally take deferential attitude towards arbitrators' conduct of proceedings.[12] It also observed that the courts generally abided by what the article dubs "procedural judgment rule," which would direct the courts to see whether arbitrators' procedural decision was "reasonable" in the circumstances.[13]

This finding will be comforting to the arbitrators operating in such jurisdictions. In terms of conceptual analysis, however, it is only stating the obvious: due process paranoia is a paranoia. For paranoia is by definition unfounded. Moreover, the "procedural judgment rule" will not be so helpful because a test based on the ambiguous notion of "reasonableness" would not allay the apprehension from which due process paranoia arises.

What ought to be done is rather to look at the specific rules for reviewing arbitral awards in the specific jurisdictions where review may be conducted in any given case. This paper will focus on the review in the context of annulment under the Model Law as the latter has been adopted in many jurisdictions. Arbitral awards are also reviewed in the phase of recognition and enforcement and the review in that context is likely to be conducted under the New York Convention, of which most major countries are contracting States.[14] It is, however, not the main focus of this article, since due process paranoia would be more directly caused by the perception of how the local courts at the seat of arbitration would conduct the review.

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12. Klaus Peter Berger & J. Ole Jensen, *Due Process Paranoia and the Procedural Judgment Rule: A Safe Harbour for Procedural Management Decisions by International Arbitrators*, 32 ARB. INT'L 415, 415 (2016); *Id.* at 423.

13. *Id.* at 428.

14. *See Status: Convention on the Recognition and Enforcement of Foreign Arbitral Award (New York, 1958)*, https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2 (last visited Feb. 1, 2021).

VI. DUE-PROCESS RELATED GROUNDS

The Model Law sets forth grounds for setting aside awards in Article 34(2), of which many are related to due process. They include the omission of proper notice (sub-paragraph (a)(ii)), inability to present one's case (sub-paragraph (a)(ii)), deciding on matters beyond the scope of submission (sub-paragraph (a)(iii)), the lack of conformity of the composition of tribunal or procedure with the parties' agreement or the Model Law (sub-paragraph (a)(iv)), and the breach of public policy (sub-paragraph (b)(ii)).[15]

The opening words of Article 34(2), which state an arbitral award "*may* be set aside,"[16] indicate that the reviewing court has discretion not to annul the award even if there is a ground for doing so. Moreover, when evaluating the conformity of the procedure with the Model Law under sub-paragraph (a)(iv), the court will have to take into account the procedural discretion which the Model Law confers on the arbitral tribunal. Thus, as noted earlier in this article, the tribunal has discretion whether to allow a party to amend his claim or defense in light of the delay in making the amendment.[17] The court consequently has leeway to show deference to the arbitral decision or discretion on the conduct of proceedings. It follows that there is an ample room for something like the "procedural judgment rule" to operate. As just noted above, however, that itself will not be sufficient to alleviate arbitrators' apprehension. Rather, the very existence of the leeway is a source of anxiety and suspicion of arbitrators.

VII. PUBLIC POLICY

What will be effective to allay the concerns of arbitrators is to eliminate an unnecessary margin of appreciation from the reviewing court's power. To do so, this article will now turn to the notion of public policy. As noted above, the Model Law provides that if "the award is in conflict with the public policy," it may be set aside (Article 34(2)(b)(ii)). The proposition of this article is that the public policy scrutiny should be confined to the

15. In the context of the recognition or enforcement of an award, similar grounds for refusal are laid down in Article V of the New York Convention, *supra* note 3.

16. Emphasis is added on the word "may."

17. *See also* Arts. 18, 19(2), 25(c), which are also noted earlier in this article.

substance of the award, thus excluding the arbitral procedure from the review.

A. UNCITRAL Report

It must be acknowledged that this proposition is somewhat controversial. A conventional interpretation is that the public policy scrutiny extends to procedure as well as the substance of awards. Thus, commenting on the draft of the Model Law, the UNCITRAL Report says:

> It was understood that the term "public policy," which was used in the 1958 New York Convention and many other treaties, covered fundamental principles of law and justice in substantive as well as procedural respects. Thus, instances such as corruption, bribery or fraud and similar serious cases would constitute a ground for setting aside. It was noted, in that connection, that the wording "the award is in conflict with the public policy of this State" was not to be interpreted as excluding instances or events relating to the manner in which an award was arrived at.[18]

This passage indicates the legislative intent behind the Model Law.[19] It is not, however, fruitful to dwell on it since what is more important is to explore the most rational interpretation in the present-day environment.

B. Need to Curb Paranoia

The public policy scrutiny of arbitral procedure is a breeding ground for due process paranoia due to the insularity and opaqueness of the concept "public policy."

The meaning of "public policy" is different from one State to another. The Model Law indeed speaks of "the public policy *of this State*"[20] (Article 34(2)(b)(ii)). It is prone to raise suspicions in the mind of foreign

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18. Report of the United Nations Commission on International Trade Law on the Work of Its Eighteenth Session U.N. Doc. A/40/17 para. 297 (1985).

19. There is an indication that the public policy scrutiny under the New York Convention, too, was intended to cover arbitral procedure as well as the substance of an award; UN Economic and Social Council, "Report of the Committee on the Enforcement of International Arbitral Awards", ¶ 37, U.N. Doc. E/AC.42/4/Rev.1 (1955).

20. Emphasis is added on the word "this."

arbitrators that it may be something insularly unique to the State in question.

Because of the opaqueness of the concept, an old English judge opined that "[p]ublic policy . . . is 'a very unruly horse, and when once you get astride it you never know where it will carry you.'"[21] Though Lord Denning later stated, "[w]ith a good man in the saddle, the unruly horse can be kept in control,"[22] it is beside the point in the present discussion. For what matters is not whether the court is actually a good man in the saddle, but rather whether the court could be trusted by arbitrators as a good man in the saddle. It follows that the exclusion of arbitral procedure from the public policy scrutiny would enhance the legal certainty and transparency and would be effective to curb due process paranoia.

C. Overlap with Other Due-Process Related Grounds

Is there, then, any price for excluding arbitral procedure from the public policy scrutiny? This question could be answered in the negative. The exclusion would not entail sacrificing due process because if an arbitral tribunal takes any procedural step repugnant to the public policy, it would usually fall foul of other due-process related grounds for annulment under Article 34(2).

If, for example, an arbitral tribunal has infringed the principle of equal treatment which is guaranteed under Article 18 of the Model Law, it would fall foul of a ground for annulment which may be invoked where the procedure was not in accordance with the Model Law (Article 34(2)(a)(iv)). Similarly, if an arbitral tribunal is tainted with corruption with a result that its impartiality and independence are undermined, it would fall foul of another ground for annulment which may be invoked where the composition of tribunal was not in accordance with the Model Law (Article 34(2)(a)(iv)), given that a tribunal is supposed to be impartial and independent under Article 12 of the Model Law. Likewise, if an arbitral tribunal has been defrauded into accepting forged materials as evidence, it would fall foul of another ground for annulment which may be invoked where the party filing the motion, referring in this context to

21. Richardson v. Mellish, (1824) 2 Bing. 229, 252.

22. Enderby Town Football Club Ltd. v. Football Ass'n Ltd. [1971] Ch. 591, 606 (AC).

the innocent party who has lost the case owing to the forged evidence, was unable to present its case (Article 34(2) (a)(ii)).

The overlap with these specific grounds for annulment begs the question whether there is any need for a residual due-process related ground for annulment. Should there be any, it would in any event be outweighed by the need to curb due process paranoia.

D. *Sua Sponte* Scrutiny of Procedure

It must be acknowledged that while the public policy violation may be ascertained by the courts *sua sponte* (of its own accord), the other due-process related grounds may only be invoked if the party filing the motion furnishes proof. This is indicated by the introductory clause of the respective sub-paragraphs (a) and (b) of Article 34(2).[23] There is certainly a good reason for scrutinizing the substance of an award *sua sponte*. It is, however, doubtful whether the *sua sponte* scrutiny of arbitral procedure is meaningful, possible, necessary or appropriate.

Firstly, the meaningfulness of *sua sponte* scrutiny is doubtful because the scrutiny of procedure is only commenced upon the filing of an annulment application by one of the parties. And that party will gladly assist the court in scrutinising the procedure.

Secondly, the possibility of *sua sponte* scrutiny is doubtful because the scrutiny of arbitral procedure would be difficult without the parties' cooperation. How could the court establish the inequality of treatment, corruption, or fraud in the absence of the parties' pleading and proof?

Thirdly, the necessity of *sua sponte* scrutiny of arbitral procedure is doubtful because the due process requirements purport first and foremost to protect private interests. Moreover, though this may sound controversial, the due process requirements are arguably not meant to protect the public interest in the context of arbitration. Unlike a national court which is a permanent body, an arbitral tribunal is constituted on a

23. This distinction is said to be of particular importance in German arbitration law due to the fact that the three-month limitation period is not applicable where a court invokes the ground *ex officio*. This is cited as a reason why a majority of German courts and scholars take the view that various aspects of procedure are covered by the "public policy" ground. See Stefan Michael Kroll & Peter Kraft, *Part II: Commentary on the German Arbitration Law, in* Patricia Nacimiento, Stefan Michael Kroll, et al. (eds) ARBITRATION IN GERMANY: THE MODEL LAW IN PRACTICE 398 (2d ed. 2015).

case-by-case basis. One tribunal's breach of due process would not have much bearing on how other tribunals will conduct the proceedings.

Finally, the appropriateness of *sua sponte* scrutiny of arbitral procedure is sometimes doubtful. If, for example, a tribunal rules against the party from whom it has received a bribe, it is questionable whether the award should be annulled due to corruption.

VIII. CONCLUSION

This article has argued that the review under Article 34(2)(b)(ii) of the UNCITRAL Model Law should be confined to the substance of an award, thus excluding the arbitral procedure from the public policy scrutiny.[24] This proposition is supported by both the need for, and the permissibility of, the exclusion.

The need for the exclusion derives from the widely recognised phenomenon of due process paranoia. There is now a heightened awareness of it as being a cause of delay and high costs in arbitration. This point ought to be emphasized in the present-day climate of arbitration. Arbitration was once commended for expeditiousness and inexpensiveness. Arbitration today is plagued by delays and high costs. The public policy scrutiny of arbitral procedure breeds due process paranoia because of the insularity and opaqueness of concept "public policy."

The exclusion of arbitral procedure from the public policy scrutiny would be permissible because the other due-process related grounds for annulment under the Model Law would cover most, if not all, instances where arbitral procedure may be considered to have violated public policy. Furthermore, it is doubtful whether the *sua sponte* scrutiny of arbitral procedure is meaningful, possible, necessary or appropriate.

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24. *Cf.* Shubham Jain, *"Public Policy" as the Root Cause of Due Process Paranoia: An Examination of the Statutes and Court Decisions in India*, 6 INDIAN J. ARB. L. 145, 153 (2018). Jain acknowledges that due process paranoia is bred by public policy scrutiny. He argues that to curb due process paranoia, courts should allow the invocation of public policy ground only when enforcement will lead to gross violation of fundamental procedural rights. *Id.* He does not, however, go so far as suggesting that arbitral procedure should be excluded from the scope of public policy scrutiny, accepting that the latter is a useful and necessary tool to address due process violation. *Id.*

The present author has previously put forward the same proposition elsewhere[25] in the context of the Japanese Arbitration Act.[26] The Japanese Act is largely based on the original 1985 version of the Model Law with a few differences. It allows annulment where "the content of the award" is in conflict with the public policy (Article 44(1)(viii)), whereas the Model Law simply states that "the award" is in conflict with the public policy (Article 34(2)(b)(ii)). To that extent, it should be easier under the Japanese Act to argue for the proposition that arbitral procedure should be excluded from the public policy scrutiny.[27] This article has sought to demonstrate that it is possible to maintain the same proposition under the Model Law without such a textual feature as exists in the Japanese Act. It is hoped that the suggestion made here will be of value to the large number of jurisdictions where the Model Law has been adopted as a basis for their arbitration law.

25. Koji Takahashi, *Country Report: Japan*, *in* DUE PROCESS AS A LIMIT TO ARBITRAL DISCRETION 251, 261 (Franco Ferrari, Friedrich Rosenfeld, & Dietmar Czernich eds., 2020).

26. Japanese Arbitration Act, Law No. 138 of 2003.

27. Notwithstanding that, the Japanese case law currently takes the opposite position and the scholarly opinion is divided.