ML in Law

Combating Dilatory Tactics in International Arbitration and the Impact of Due Process Paranoia on Efficiency

May 2019

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Abstract

Combating dilatory tactics in International Arbitration and the impact of due process paranoia on efficiency.

Efficiency in international arbitration has been highly criticized, as recent surveys reveal that users of arbitration perceive increased cost and reduced speed as the main disadvantages of international arbitration. This thesis analyses the cause of these delays in arbitral proceedings, where all parts of the arbitral chain are at fault, parties, arbitrators and institutions.

The perceived reluctance by tribunals to act decisively in certain situations for fear of the award being challenged, frequently called ‘due process paranoia’, is considered to be the main factor of arbitrators’ inhibition to conduct proceedings efficiently. Institutions have contributed greatly to solve the problem of lack of efficiency with a regulatory framework that provides the parties and the arbitrators with various tools to conduct the proceedings in an efficient and cost-effective way. However, the inhibition to make efficient use of those rules and act decisively in situations where the parties employ dilatory tactics is a remaining barrier of efficient arbitral proceedings.

An analysis of case law from various jurisdictions, where the courts’ approach to the procedural discretion of arbitrators is analyzed, reveals that due process paranoia is unjustified, as courts show great respect to arbitrators’ procedural choices and are reluctant to interfere with such decisions, unless extreme circumstances apply. Although, due process should not be sacrificed at the altar of efficiency, arbitrators should be less hesitant to make decisive procedural decisions and make better use of the efficient framework the arbitral institutions have provided, and thereby safeguarding the right of the parties to obtain a conclusion of their dispute in a reasonable time.
Útdráttur

Ráðstafanir gagn aðgerðum sem eru til þess fallnar að tefja málsmeðferð í alþjóðlegri gerðarmeðferð og áhrif vænisýki gerðarmanna í tengslum við vefengingu gerðardómsúrlausna á grundvelli reglna um réttláta málsmeðferð á skilvirkni.

Skilvirkni málsmeðferðar í alþjóðlegri gerðarmeðferð hefur sætt mikilli gagnrýni eins og sjá má í nýlegum könnunum meðal notenda alþjóðlegar gerðarmeðferðar, en þeir meta sívaxandi kostnað og taflir þegar kemur að málsmeðferð meðal helstu ókosta gerðarmeðferðar. Ritgerð þessi greinir ástaður tafa í alþjóðlegri gerðarmeðferð, þar sem við alla þátttakendur er að sakast, þ.e. aðila máls, gerðarmenn og gerðardómsstofnanir.

Vænisýki gerðarmanna í tengslum við vefengingu gerðardómsúrlausna á grundvelli reglna um réttláta málsmeðferð þykir eiga stóran hlut í þeirri hindrun gerðarmanna í að stjórna málsmeðferðinni á skilvirkan hátt. Alþjóðlegar gerðardómsstofnanir hafa lagt mikið af mörkum við að leysa þetta vandamál og efla skilvirkni með regluverki sem gerir aðilum og gerðarmönnum kleift að tryggja sem skilvirkasta gerðarmeðferð, en fullnægjandi notkun gerðarmanna á því regluverki og viðeigandi ákvarðanatöku þegar aðilar reyna að tefja málsmeðferð virðist þó enn hindrun í skilvirkni gerðarmeðferða.

Greining á dómafordænum frá ýmsum lógsögum, þar sem viðhorf dómstóla til málsmeðferðarálkvarðana gerðarmanna er kannað, leiðir til þeirrar niðurstöðu að dómstólar beri ríka virðingu fyrir slíkum ákvarðanum og umrædd vænisýki er því tilhæfulaus. Réttlátir málsmeðferð ætti ekki að fórna á altarí skilvirkinnar, en gerðarmenn ættu að vera öhrreðdir að taka afgéandi ákvarðanir til að tryggja skilvirkja málsmeðferð í alþjóðlegum gerðarmeðferðum og nýta betur það skilvirkja regluverk sem alþjóðlegar gerðardómsstofnanir hafa mótað og þar með tryggja aðilum rétt til úrlausnar sinna mála innan skynsamlegra tímanarka.
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“Efficiency without accuracy proves an empty prize”.

WILLIAM W. PARK
1. Introduction

International arbitration has long historic roots, but its wide success is mostly due to the acceptance of the New York Convention on the recognition and enforcement of foreign arbitral awards. In the early stages of international arbitration, in the beginning of the last century, states were reluctant to accept arbitration, and viewed it as partly handing over their sovereignty to a tribunal. The ratification of the New York Convention in 1958 was therefore a fundamental part to arbitration gaining its broad success, where the importance of arbitration was recognized. Today, a total of 159 states are parties to the convention and arbitration is now the preferred method when resolving international commercial disputes. The effort of the United Nations Commission on International Trade Law (hereafter ‘UNCITRAL’) also had a great impact on arbitration as they, in a way, standardized international arbitration legislation by introducing the UNCITRAL Arbitration Rules, as well as the UNCITRAL Model Law (hereafter ‘Model Law’). The Model Law has now been incorporated by 80 jurisdictions worldwide, either in near full capacity, or the jurisdiction’s arbitration law is built on the Model Law, while the aforementioned rules are regularly used in ad hoc proceedings.

Party autonomy has been referred to as the cornerstone of arbitration, as arbitration is based on the parties’ consent to arbitrate. Party’s autonomy does not only afford the parties the option to decide if they should arbitrate, but also how to arbitrate, i.e. they have wide discretion
powers to decide on numerous procedural aspects such as number of arbitrators and the rules applicable to the arbitral procedure. The emphasis that is put on party autonomy in arbitration might imply that the parties and the tribunal are free to resolve the dispute in their own universe, apart from any rules or context. That however is not the case, as the resolution of a dispute through international arbitration is indeed only possible due to that fact that it is supported by a complex matrix of legal rules and international conventions. This concurrence between party autonomy and the sphere of legal rules is one of the reasons for the success of arbitration and why it works as well as it does.

Arbitration is often said to be a cheaper and quicker option than litigation, and a decisive reason why parties choose international arbitration is how fast and cost effective it can be and they have the possibility to shape the legal framework of the procedure. Due to the autonomy of the parties, the arbitrators can be selected to fit the needs of a particular dispute, unlike judges in national courts. Moreover, arbitral proceedings are unique and are separate from any system, which means that there is no backlog of cases that forms over time that need to be resolved before. In some countries, there is a backlog of cases that significantly delays the procedure and means that years can pass before a party even obtains a hearing date, whereas if the parties refer its dispute to an arbitral tribunal, they are able to constitute a tribunal with a relatively short notice and should in most cases be able to present its case within a reasonable period of time. This means that the dispute can be resolved in a final and binding manner and more efficiently than when compared to litigation before domestic courts.

The discussion in the arbitral community has however taken some turn and in recent years, it has been steering towards the opposite as some describe arbitration as the slower, more expensive option. Neither side is particularly wrong, litigation can be very expensive and time consuming, but arbitration tends to be as well. Indeed, international arbitration has been criticized by some in the recent decade for having become inefficient and very expensive. It

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11 Born (n 4) 2131.
12 Blackaby and others (n 6) 3.
15 Born (n 4) 11.
is impossible to generalize in either way, but the arbitration community certainly does have justifiable concerns of efficiency, as a recent research reveals that cost and efficiency are considered to be among the five worst characteristics of international arbitration. The arbitration community is fully aware of this problem, as arbitral institutions have endeavored to find solutions to this criticism, and various scholars have written of the subject. As the aforementioned criticism reveals, the cost associated with arbitration has been increasing and the efficiency of arbitral proceedings diminishing. With that in mind, the aim of this thesis is to analyze the cause of this development, and additionally address the two following questions:

1. Is due process paranoia warranted?

   The discussion on due process paranoia has been dominating the efficiency discussion for the past few years. This thesis aims to analyses the concept, and whether this fear is warranted.

2. What are the best ways to combat dilatory tactics and enhance efficiency in international arbitral proceedings?

   This thesis aims to study what has been done to fight this development of decreasing efficiency and what can be done in the near future to promote efficiency in international arbitration.

Before these questions will be addressed, it is necessary to establish what the framework of international arbitration proceedings entails, as will be studied in the first three chapters. Chapter 4 and 5 address efficiency in international arbitration and what has been done to deal with the problem of decreasing efficiency, while chapter 6 addresses the impact and duties the arbitrations and the arbitral institutions have on the arbitral proceedings. Chapters 7 and 8 addresses the cause of delays, where due process paranoia will be analyzed and the courts approach to the procedural discretion of the tribunal. Chapter 9 will then address a conclusion on possible ways to combat dilatory tactics and enhance efficiency of the arbitral proceedings.

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2. Users Experience

International arbitration proceedings are often very expensive. That is especially true when the dispute at hand is complex with connection to numerous jurisdictions. Such disputes often entail longer and even multiple submissions, extensive amounts of evidentiary exhibits, more witnesses and longer hearings. The amount of time these proceedings take might in some cases be partly due to the intention of the parties, as they sometimes require very detailed and thorough proceedings in complex international disputes.\(^{19}\) That however does not change the fact that efficiency is an important quality to users of arbitration, as revealed by the Queen Mary International Arbitration Survey of both 2015 and 2018 (hereafter the 2015 or 2018 QMUL Survey).\(^{20}\) Moreover, procedural efficiency can impact the trust the parties put in the arbitral tribunal, as the parties are deemed to grow frustrated if dilatory tactics of the opposing party have the possibility of delaying the proceedings.

Arbitration is a predominant way of resolving cross-border disputes, the QMUL Survey supports this clear preference as 97% of respondents to the survey answered that international arbitration was their “preferred method of dispute resolution”, compared to 90% in 2015.\(^{21}\) In the same survey, respondents were asked of the characteristics of arbitration, to be exact “what are the three most valuable characteristics in international arbitration?”\(^{22}\)

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\(^{19}\) Born (n 4) 12.
\(^{21}\) ‘2018 International Arbitration Survey Report’ (n 5) fig 1; ‘2015 International Arbitration Survey Report’ (n 20) fig 1.
\(^{22}\) ‘2018 International Arbitration Survey Report’ (n 5) fig 3.
What are the three most valuable characteristics of international arbitration?

<table>
<thead>
<tr>
<th>Percentage of respondents</th>
</tr>
</thead>
<tbody>
<tr>
<td>Enforceability of awards</td>
</tr>
<tr>
<td>Avoiding specific legal systems/national courts</td>
</tr>
<tr>
<td>Flexibility</td>
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<tr>
<td>Ability of parties to select arbitrators</td>
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<tr>
<td>Confidentiality and privacy</td>
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<tr>
<td>Neutrality</td>
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<tr>
<td>Finality</td>
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<td>Speed</td>
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<tr>
<td>Cost</td>
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<tr>
<td>Other</td>
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</tbody>
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*Figure 1: Three most valuable characteristics of international arbitration*  

The answers are consistent with the writings of various scholars that have spoken of the advantages of arbitration, as they have commonly named the enforceability of the award, the party autonomy, neutrality and confidentiality. For comparison, respondents were asked about the disadvantages of arbitration or “what are the three worst characteristics of international arbitration?”

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23 ‘2018 International Arbitration Survey Report’ (n 5) fig 3.
24 Blackaby and others (n 6) 30; Lew, Mistelis and Kröll (n 14) 50; Born (n 13) 7.
The disadvantages that the respondents named are also consistent with the discussion of the arbitral community, worries of rising cost and decreasing efficiency of arbitral proceedings. Cost has been named as the worst characteristic of arbitration, but here it must be taken into account that in international arbitration, the parties must pay a fee to the arbitrators which is something that is not done in litigation before national courts. When arbitral proceedings are supervised by an institution, the institution also takes an administrative fee, and when the parties have referred their dispute to an international arbitration institution, they must pay an advance on costs, as well as a registration fee to the institution. The cost of the proceedings can therefore come as quite a shock to the parties, right at the beginning of the proceedings, when they have not even started presenting their case. Despite that, the cost is very likely to be lower than before national courts, whereas the parties may have to relitigate the case before domestic courts and appellate courts, and pay legal fees associated with that.27

The problem of increasing costs and inefficiency is something the arbitral institutions are well aware of, as is quite clear by looking at the amendments the institutions have made to their

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26 ‘2018 International Arbitration Survey Report’ (n 5) fig. 4.
27 Born (n 4) 12.
rules, which have most regarded promoting efficiency of proceedings. This will be further analyzed in chapter 5.

That said, it is important to remember that the ultimate goal of international arbitration is not to solve a dispute as quickly as possible, which could be done by a coin toss. On the contrary, as Redfern and Hunter put it “the aim of international arbitration is to arrive at a fair and reasoned decision on a dispute, based on a proper evaluation of the relevant contract, the facts and the law.”

3. Legal Framework and General Principles

In order to examine how to improve efficiency in international arbitration, it is first necessary to analyze the matrix of legal rules and general principles applicable to the arbitral procedure. This section therefore provides an overview of the procedural framework as it studies the consent of the parties through the arbitration agreement (3.1), the law of the seat, or lex arbitri (3.2), the mandatory procedural requirements applicable to the procedure (3.3), and the national court’s assistance to ensure a successful arbitral procedure (3.4).

3.1 The Arbitration Agreement

Arbitration is a creature of consent, based on an agreement between two parties to refer their dispute to an arbitral tribunal, leading to a binding and final resolution thereof.29 Party autonomy is a prevailing principle.30 The arbitration agreement therefore takes first priority, subject to certain exceptions and the agreement to arbitrate has been said to be the foundation stone of international arbitration.31

The consent of the parties is fundamental for the function of a dispute resolution process outside of the traditional court system.32 There are generally two types of arbitration agreements, an arbitration clause, and a submission agreement.33 An arbitration clause is a dispute resolution clause inserted into an agreement, that covers future disputes that might arise under or in

28 Blackaby and others (n 6) 37.  
29 Born (n 13) 2.  
30 See for example Articles 11(2); 19(1); 20(1) and 22(1) of the UNCITRAL Model Law.  
31 Blackaby and others (n 6) 2.01.  
32 Born (n 13) 2.  
33 Blackaby and others (n 6) 15.
connection with the agreement. Such clauses are commonly embedded into terms and conditions of commercial contracts, as well as other business deals, and are more common than submission agreements.\textsuperscript{34} Such arbitration clauses are meant to apply in the event of disputes in the future. However, even if the parties did not incorporate an arbitration clause into their principle agreement at the outset but want to refer the dispute to arbitration after it has arisen, they can still agree to refer the dispute to arbitration. These kinds of agreements are referred to as submission agreements. Submission agreements tend to be a lot longer and more detailed than arbitration clauses, as it is necessary to define the dispute at hand, as well as certain formalities regarding the arbitration process. In other words, as the dispute has already arisen the parties have more visibility as to what their needs during the arbitral process might be and are able to tailor the process to fit the dispute at hand.\textsuperscript{35} However, when incorporating arbitration clauses into agreements, the parties do not know if and when a dispute might arise and on what occasion and therefore the inclusion of a simple arbitration clause is often considered sufficient, perhaps stipulating the arbitral institution that the dispute will be referred and applicable arbitration rules.

The parties have freedom to decide upon the contents of the arbitration agreement, but the international conventions, the Model Law, and arbitration law of numerous jurisdiction, require that the arbitration agreement shall be “in writing”.\textsuperscript{36} The reason for this requirement is the exclusion of the jurisdiction of national courts, which entails that the judicial review, that is a fundamental right protected by most constitutions and the European Human Rights Convention, is substituted by the right to have a dispute settled by arbitration. As this substitution of the judicial review is a serious step to take, it is therefore of great importance that the agreement to do so is clearly established.\textsuperscript{37} Although Article II(2) of the New York Convention requires a written agreement between the parties, recommended interpretation of that requirement includes more modern ways of agreements.\textsuperscript{38} The UNCITRAL has also broadened the requirement, as Article 7 of the Model law entails that the agreement is considered to fulfil the writing requirement if it is “contained in a document signed be the parties or in an exchange of

\textsuperscript{34} Born (n 4) 84.
\textsuperscript{35} Blackaby and others (n 6) 2.02.
\textsuperscript{36} Ibid 74.
\textsuperscript{37} Ibid 2.14.
letters, telex, telegrams or other means of telecommunication”. The Model Law is therefore in accordance with current practice, as is reflected by multiple national legislation and court decisions.

In addition to the consent of the parties and the written requirement, an arbitration agreement must include certain elements in order for the procedure to be viable. The parties must decide whether the arbitral tribunal will be “ad hoc” or institutional, which is one of the most important decisions the parties take regarding the arbitral proceedings. Ad hoc arbitration is an independent arbitration established to solve a specific dispute, whereas institutional arbitration entails that the proceedings are conducted under the administration of an institution in accordance with their rules. If the parties choose ad hoc proceedings, they commonly include the UNCITRAL Arbitration Rules as the governing rules, but where parties have chosen an institution, they generally stipulate the particular arbitration rules of that institution. This decision can have a great impact on the efficiency of the proceedings as will be further studied in chapter 6. Where the agreement determines the seat of arbitration, it leads to the application of *lex arbitri*. Furthermore, the New York Convention as well as the Model Law require that the parties have a ‘defined legal relationship’, *i.e.* there must be a contractual relationship between the parties in order to arbitrate.

When determining if a dispute can be settled by arbitration, or if it belongs to the domain of national courts, the word ‘arbitrability’ is commonly used to describe that deliberation. Due to the fact that arbitration is a private dispute resolution factor that includes public consequences, some subject matters are reserved exclusively for national courts, and are therefore non-arbitrable. It is in the hands of each state to decide upon which kinds of disputes cannot be solved by arbitration, but generally these disputes are in the public domain. Each state decides and establishes with its laws which matters may not be referred to arbitration, and as it is important to be aware of the concept of arbitrability when drafting an arbitration

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40 Blackaby and others (n 6) 2.16.
41 Lew, Mistelis and Kröll (n 14) 119.
42 Blackaby and others (n 6) 98.
44 Blackaby and others (n 6) 79.
45 ibid 110.
46 ibid 80.
agreement, most commercial disputes are considered arbitrable under the legislation of nearly all jurisdictions.\textsuperscript{47}

3.1.1. The procedural freedom of \textit{how} to arbitrate

One of the most fundamental aspects of international arbitration is the parties’ autonomy to not only determine if they arbitrate, but \textit{how} they arbitrate, \textit{i.e.} the parties have the freedom to agree upon the procedure of the arbitration.\textsuperscript{48} This autonomy, and flexibility of the whole arbitral process has been viewed as one of the central differences between arbitral proceedings and litigation before domestic courts.\textsuperscript{49} This principle is confirmed and guaranteed by the New York Convention, as well as other international arbitration conventions.\textsuperscript{50} Most arbitral institutions also have this principle enshrined in their institutional rules.\textsuperscript{51}

Article 19(1) of the Model Law provides the parties with this freedom as the article states that the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.\textsuperscript{52} Additionally, the New York Convention ensures that the parties’ procedural autonomy is respected, as Article V(1)(d) of the Convention provides for the non-recognition of awards if the procedures that the parties agree upon have not been adhered to.\textsuperscript{53} This article of the New York Convention guarantees that the parties exercise of the freedom to agree upon the arbitral procedure will be upheld, even their agreement on arbitral procedures that differ from certain rules of the arbitral seat, and as one commentator put it: “Article V(1)(d) simply makes party autonomy the sole determinant in matters procedural, the only limit to such autonomy at the enforcement stage being subparagraph V(1)(b), which reflects the principles of natural justice”.\textsuperscript{54} Arbitration laws in most jurisdiction also recognize this freedom of the parties to agree upon the procedural rules governing the proceedings, subject to certain mandatory restrictions of national law, as will be further introduced in section 3.3.\textsuperscript{55} Even in

\textsuperscript{47} ibid 124.  
\textsuperscript{48} Born (n 4) 2130.  
\textsuperscript{49} Blackaby and others (n 6) para 1.114.  
\textsuperscript{50} Born (n 4) 2131.  
\textsuperscript{51} ibid.  
\textsuperscript{53} Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958.  
\textsuperscript{54} Born (n 4) 2131.  
\textsuperscript{55} ibid.
jurisdictions where the arbitral legislation does not entail an express reference to the parties’ autonomy, national courts have confirmed such authority.\(^{56}\)

In practice, it is however not so common that the parties use this freedom to determine the arbitral procedure down to the last detail.\(^ {57}\) An arbitration agreement between parties is unlikely to entail any specifications regarding the procedural framework, only broad references. Whether it is the fact that the parties did not think of the possibility that it would be of great importance to decide on these issues beforehand, or perhaps did not want to, it is not common to see arbitration agreements that have explicitly outlined the procedural factors.\(^ {58}\) These decisions should although be utilized in a greater capacity, as the pre-arbitral choices made by the parties can have a great impact on the efficiency of the proceedings.\(^ {59}\) The parties should consider these pre-arbitral choices at the outset of the proceedings and use this opportunity that the party autonomy provides them to contribute to efficient and cost-effective proceedings.

One factor of the parties’ procedural autonomy is the opportunity to select institutional rules to govern the proceedings. When parties agree upon a certain set of institutional rules, they give their consent that the procedural provisions of those particular rules shall apply, including provisions that empower the arbitral institution to make certain procedural decisions (for instance selecting the seat of arbitration).\(^ {60}\) But even if the parties have chosen a set of pre-existing arbitration rules to govern the proceedings (such as the UNCITRAL Arbitration Rules, the ICC Rules of Arbitration or the LCIA Arbitration Rules), they do not always contain detailed procedural aspects. As the ICC Task Force on Controlling Time and Costs in International Arbitration stated in its report:

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\text{One of the salient characteristics of arbitration as a dispute resolution mechanism is that the rules of arbitration themselves present a framework for arbitral proceedings but rarely set out detailed procedures for the conduct of the arbitration.}^{61}\]

\(^{56}\) ibid 2133.  
\(^{57}\) Berger and Jensen (n 16) 5.  
\(^{58}\) ibid.  
\(^{60}\) Born (n 4) 2136.  
\(^{61}\) ibid 2134.
Therefore, even though the institutional rules have some mandatory provisions, parties generally have the permission to adopt and agree on procedures not stipulated in the rules. The UNCITRAL Arbitration Rules are representative in this respect, where they confirm the parties’ autonomy, as Article 1(1) provides that if the parties have agreed on the UNCITRAL Arbitration Rules, then the dispute shall be settled in accordance with the rules subject to modifications the parties agree upon.

Where the parties have not agreed on procedures, or where the applicable rules do not provide for such procedures, it is left up to the tribunal to decide the applicable procedure, as it is provided with wide procedural discretion to conduct the proceedings in any way it sees fit, subject to the mandatory provisions of *lex arbitri* that will be studied in section 3.3. This is provided for by an example, Article 19 of the Model law, as it provides the parties with the freedom to agree upon the procedure, in addition, it states: “failing such agreement, the arbitral tribunal may, subject to the provisions of this law, conduct the arbitration in such manner as it considers appropriate." The tribunal’s discretion is also ensured in the UNCITRAL Arbitration Rules, where Article 17(1) states:

Subject to these Rules, the arbitral tribunal may conduct the arbitration in such a manner it considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings, each party is given a reasonable opportunity of presenting its case. The arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties’ dispute.

According to Born, the text of this article suggests;

the possibility that the arbitral tribunal, in conducting the arbitral proceedings, need not give effect to the parties’ procedural agreement if doing so would conflict with its obligations to treat the parties with equality, to afford each party a reasonable opportunity to present its case and conduct the arbitration fairly and efficiently.

Read together, Article 1(1) of the UNCITRAL Arbitration rules and Article 17(1) confirm both the parties’ procedural autonomy as well as the tribunal’s procedural authority, although the

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62 ibid.
64 Berger and Jensen (n 16) 5.
67 Born (n 4) 2139.
latter is limited to the parties’ agreement. The parties’ procedural autonomy is also ensured by most national arbitration law but the tribunals power in this matter is crucial, as the parties are less likely to be able to agree on procedural matters after a dispute has arisen, or did not agree on procedural issues beforehand, with the arbitration agreement. The Tribunal will therefore most likely need to exercise this power and take procedural decisions regularly throughout the proceedings.\(^{68}\)

### 3.2 Lex arbitri

The *lex arbitri* generally plays a fundamental part in arbitral proceedings. Arbitral awards that do not comply with the law of the seat run the risk of being annulled or its enforcement may be successfully resisted.\(^{69}\) When selecting the place of arbitration, or the seat of arbitration, the parties are therefore selecting the *lex arbitri* that will govern the procedural model of the arbitration.\(^{70}\) If the parties do not select a seat in their arbitration agreement, but stipulate the arbitral rules that shall govern, the rules usually entail a mechanism for establishing the seat.\(^{71}\) For an example of this, if the parties decide that the UNCITRAL rules shall govern the proceedings without designating a seat, the rules leave the selection of the seat to the tribunal,\(^{72}\) and where the parties decide on an institutional arbitration under the ICC rules, the seat of arbitration shall be fixed by the Court.\(^{73}\)

While jurisdictions may have different arbitration laws, they commonly display similar features.\(^{74}\) Many jurisdictions have largely built its arbitration law on the UNCITRAL Model law, and in 2019, 80 jurisdictions have incorporated the model law in its arbitral legislation, nearly in total or through a legislation partially based on it.\(^{75}\) *Lex arbitri* lays out the arbitrators’ power, their rights and duties by determining the arbitrability under its rules, as well as the procedural framework of arbitral proceedings.\(^{76}\) In most cases, the *lex arbitri* does not entail a detailed description as to the powers of the tribunal, as where the parties select arbitral rules,

\(^{68}\) Berger and Jensen (n 16) 6.

\(^{69}\) Born (n 13) 114; Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. V.

\(^{70}\) Waincymer (n 43) 170.

\(^{71}\) Born (n 13) 121.

\(^{72}\) United Nations Commission on International Trade Law, *UNCITRAL Arbitration Rules (with New Article 1, Paragraph 4, as Adopted in 2013)* (n 7) art. 18(1).

\(^{73}\) 2017 ICC Arbitration rules art. 18(1).

\(^{74}\) Waincymer (n 43) 68.

\(^{75}\) ‘UNCITRAL Model Law on International Commercial Arbitration (1985) - Status Map’ (n 8).

\(^{76}\) Waincymer (n 43) 68.
the rules and therefore the provisions declaring the powers of the tribunal take precedence over conflicting measure in the lex arbitri (other than mandatory requirements). The lex arbitri will often especially express that the tribunal is bound by the parties’ procedural agreement, with the exception of certain mandatory requirements that will be further studied in the following section. In instances where no such agreement exists, each lex arbitri provides the tribunal with the procedural discretion to select appropriate methods. 77

The national arbitration laws, or the lex arbitri, govern a wide range of factors that concern the procedural conduct of the arbitration, both ‘internal’ procedures, that refer to the conduct of the proceedings, and ‘external’ factors that relate to the relationship between arbitration and the court system, which includes issues such as judicial assistance related to the constitution of the tribunal and the enforcement of the award, as will be further introduced in chapter 3.4. 78 The internal issues of arbitral proceedings may regard factors such as the timetable of the arbitration, procedural steps that are required, evidentiary rules, conduct of hearings and the parties’ opportunity to be heard, parties’ right to agree on procedural issues, publication of the award and arbitrator’s remedial powers. 79 These procedural aspects differ between jurisdictions, but most jurisdictions do not regulate the internal procedures in any detail, but leave it to the parties to agree on such aspects in the arbitration agreement, or the tribunal to practice its wide discretionary powers and decide on an appropriate procedure. 80

3.3 Mandatory Procedural Requirements

The principle to have disputes heard before an impartial and independent court is ensured by constitutions in most modern-day societies. It is also embedded in article 6(1) of the European Human Rights Convention (hereafter ‘EHRC’). 81 The right to a fair trial is fundamental to the rule of law and entails the right to have a case heard by an independent and impartial judge, in a reasonable amount of time. 82 The agreement to arbitrate has the effect that a dispute between the parties of a particular agreement is not decided by the courts, but settled in private by

77 ibid.
78 Born (n 4) 1531.
79 ibid 1532.
80 ibid 1533.
81 European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 Nov. 1950) art. 6(1)
82 Waincymer (n 43) 56.
arbitrators appointed by the parties in accordance with rules chosen or adopted by the parties. Therefore, arbitration entails that the judicial review is replaced by this right to have a dispute settled by a private tribunal, leading to a final and binding award, including that an earlier and final adjudication of a tribunal is conclusive in subsequent proceedings involving the same matter, and the same parties, what is also referred to as the doctrine of *res judicata.*

National courts must respect this contractual freedom, that an arbitral tribunal has the competence to resolve a dispute that is subject to an agreement to arbitrate. If a party to such an agreement requests that the dispute will be settled by the courts, the courts must decline such a request, refer the dispute to arbitration and/or dismiss it. The courts although do have a supportive role when it comes to the arbitral procedures (which will be further introduced in the following section), where one factor of that supportive role is the enforcement of awards, *i.e.* the courts are available to parties when it comes to enforcing the arbitral award. It is therefore natural that countries make certain requirements on the arbitral process in order for the award to qualify for enforcement from the national courts.

Party autonomy is a prevailing factor, or the cornerstone of international arbitration, and one might therefore assume that the parties can choose and structure the procedural model that they wish for. Even though party autonomy is a prevailing principle in arbitration, the procedural freedom of the parties is not without constraints. Just as the *lex arbitri* in most jurisdictions provide parties with a broad right to agree upon procedures of the arbitration that depart from its rules regarding some aspects, they also limit the parties’ autonomy with certain mandatory procedural requirements. It is important to establish what is meant by mandatory requirements and which laws matter in that context.

The freedom to agree on how to arbitrate, and the tribunal’s power to fill in the gaps where the parties did not agree, are both subject to mandatory requirements of national and international law. A mandatory norm, or a mandatory requirement, as defined by Waincymer is “one that must be applied regardless of the wishes of the parties and/or the arbitrator.” An example of such mandatory requirement is that parties should be provided with the opportunity to present their case (3.3.3).

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84 ibid.
85 Lew, Mistelis and Kröll (n 14) 525.
86 Waincymer (n 43) 70.
The mandatory procedural laws of the seat of arbitration apply, as the *lex arbitri* derives from the seat and applies to the arbitral procedure, therefore any mandatory requirements that the *lex arbitri* poses on party autonomy should be applied as a limit of the tribunal’s competence.\(^87\) The mandatory requirements are however not only derived from national law, as they are also guaranteed by The New York Convention,\(^88\) that acknowledges these requirements by denying recognition of an award if procedural fairness has not been safeguarded during the proceedings.

One of the requirements is that the arbitral procedure falls under the legal standard of ‘due process’. Therefore, regardless of the procedure the parties have chosen, the tribunal has a duty to guarantee principles that, according to Professor Lew, are the ‘*magna carta of arbitration*’, and consist of; due process and a fair hearing and the independence and impartiality of the arbitrators.\(^89\) The UNCITRAL Model law entails the mandatory requirements of procedural fairness that applies to arbitral procedures in most if not all jurisdictions,\(^90\) where Article 18 states that: “the parties shall be treated with equality and each party shall be given a full opportunity of presenting his case”.\(^91\)

3.3.1. Due process requirements

The next important factor to study is what exactly these mandatory requirements demand. As Waincymer wrote: “Mandatory procedural norms will rarely be mechanical in nature but will instead involve questions of degree in relation to matters such as due process. Hence it will often be debatable as to how they should apply.”\(^92\)

The principle of a fair hearing is not only guaranteed by the European Convention on Human Rights, but also by most arbitration laws and the New York Convention, where Article (V)(b) states that recognition and enforcement of an award may be refused if “the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case”.\(^93\) These fundamental rights have been incorporated into national arbitration laws as well as institution rules, such as the

\(^87\) Lew, Mistelis and Kröll (n 14) 527.
\(^88\) Born (n 4) 2154.
\(^89\) Lew, Mistelis and Kröll (n 14) 95.
\(^90\) Niels Schiersing (n 84) 6.
\(^92\) Waincymer (n 43) 184.
\(^93\) Convention on the Recognition and Enforcement of Foreign Arbitral Awards v V.
UNCITRAL Arbitration rules, the ICC Arbitration Rules, the LCIA Arbitration Rules and many more.⁹⁴

The principle of fair trial will effectively imply that all parties shall be treated with equality and each party shall be given an opportunity to present his case, which entails that:

- each party gets an opportunity to present his case and to respond to the opponent’s case
- appropriate time should be given for written submissions and oral arguments
- the parties are given equal and fair treatment by the tribunal⁹⁵

3.3.2. Equal treatment

While every party to an arbitral proceeding would agree that parties should get equal treatment, it varies how the parties interpret what such treatment entails.⁹⁶ Most arbitration laws entail the requirement that parties in arbitral proceedings are to be treated equally. The Model Law is a good example regarding this requirement but as referred to above, 80 jurisdictions have built its arbitration law on the Model Law, in part or fully, and it is therefore a basis for many national arbitration legislations around the world. Article 18 of the Model Law entails this mandatory requirement that parties are to be treated equally.⁹⁷ Many institutional rules also provide for this requirement.⁹⁸ The fundamental requirement of equal treatment is in its essence a requirement of non-discrimination between the parties. Consequently, they must be subject to the same set of procedural rules and provided with the same rights and opportunities and equal treatment from the tribunal.⁹⁹

This requirement needs to be considered with the whole framework of the proceedings in mind, as it is nearly impossible to give parties perfectly identical equal treatment, with regards to the timeframe and the opportunity to present one’s case.¹⁰⁰ This is demonstrated clearly by the fact that claimant and respondent are unable to get equal amount of time to prepare their cases, as claimant will inevitably have longer time to prepare its case before bringing its claim with the notice of arbitration whereas the respondent will receive a limited timeframe to answer the claim. In this context it is important to consider that equal treatment does not necessarily mean

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⁹⁴ see the following chapter.
⁹⁵ Lew, Mistelis and Kröll (n 14) 95.
⁹⁶ Waincymer (n 43) 16.
⁹⁸ Born (n 4) 2172.
⁹⁹ ibid 2173.
¹⁰⁰ ibid 2174.
‘same’ treatment, as circumstances may arise that make it impossible to grant parties the exact same treatment, although equality may be fully upheld while doing so, as the equal treatment principle revolves around the core value that no party should be favored before the tribunal and both parties be treated with fairness and respect.\textsuperscript{101}

3.3.3. Opportunity to be heard – The ability to present its case

As Professor Schreuer said: “The principle that both sides must be heard on all issues affecting their legal position is one of the most basic concepts of fairness in adversarial proceedings.”\textsuperscript{102} Similar to the right of equal treatment, the right to be heard and the right to present its case, are guaranteed by most if not all legal systems. These rights are guaranteed by Article V(1)(b) of the New York Convention, as an enforcement of an award can be refused if a party was not able to present its case.\textsuperscript{103} Article 18 of the UNCITRAL Model Law entails the right to be heard and states that “each party shall be given a full opportunity of presenting his case”.\textsuperscript{104} The UNCITRAL Arbitration Rules (UAR) also contain this requirement, but in a different wording than the Model Law, where Article 17(1) of the UAR states:

Subject to these Rules, the arbitral tribunal may conduct the arbitration in such a manner as it considers appropriate, provided the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting his case.

The Model Law therefore entails the requirement of a ‘full opportunity’, whereas the UNCITRAL Arbitration Rules require a ‘reasonable opportunity’. The UNCITRAL Arbitration Rules were amended in the summer of 2010, as the 1976 rules (the 2010 predecessor) stated: “… the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case”.\textsuperscript{105} The rules were therefore changed, where ‘any stage’ was rephrased to an ‘appropriate stage’, and ‘full

\textsuperscript{101} ibid.
\textsuperscript{103} Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

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opportunity’ to a ‘reasonable opportunity’. The explanation to this is that UNCITRAL believed that the wording could have negative impacts on the proceedings, as the UNCITRAL working group stated:

It was felt that the words ‘at any stage’ … might be relied on by a party who wished to prolong the proceedings or to make unnecessary submissions. It was therefore suggested that the provision be rephrased to eliminate this possibility.

It appears that UNCITRAL therefore had full intentions on securing a set of rules that would avoid obstructions and dilatory prolonging of the proceedings. Niels Schiersing wrote about this difference in wording of the Model Law and UNCITRAL Arbitration Rules and brought up the interesting question if this linguistic difference means that the parties’ right to be given the opportunity of presenting their case in the UNCITRAL Arbitration Rules differs from and is inferior to the right in the Model Law. In his article, Niels examined what lies behind the article in the Model Law, by studying the explanatory statements along the provision, where the drafters had stated:

Opportunity of presenting one’s case does not entitle a party to obstruct the proceedings by dilatory practices and tactics, e.g. by presenting objections, amendments or evidence only on the eve of the award even though they could have been presented earlier.

In plain interpretation, a ‘full opportunity’ could easily be interpreted beyond a reasonable opportunity, but it is clear that the intention of the drafters was not in that direction. Therefore, the wording a ‘full opportunity’ was certainly not intended to provide parties with the option of using it as dilatory tactics, the drafters had efficiency in mind as well as the right to be heard.

Furthermore, with regards to the intention of the drafters, a reasonable opportunity can perhaps be seen as a full opportunity as long as the emphasis is on it being a form of opportunity. Additionally, with regards to the aforementioned Article 6(1) of the EHRC, it must be noted that the due process requirements of that article also entails an efficiency duty, as it states that every person has the right to a fair trial within a reasonable time. The requirement of a full opportunity should therefore also be read with that article in mind, as if there is no restriction

107 ibid.
108 Niels Schiersing (n 84) 6.
109 ibid 7.
110 Waincymer (n 43) 185.
on the opportunity the parties are provided with, they are deprived of their right to a conclusion of their matter within a reasonable time.

When comparing the arbitration rules of different arbitral institutions on the right to be heard their provisions are very similar, as they resemble the wording of the UNCITRAL Arbitration Rules. The ICC, and SCC both use the wording “reasonable opportunity to present its case”,\textsuperscript{111} as well as the LCIA, which rules state that parties shall have a “reasonable opportunity of putting its case”.\textsuperscript{112} It is therefore interesting to consider whether the drafters of the Model Law should perhaps adopt similar considerations with Article 18, whereas the wording ‘full opportunity’ might have negative impacts on the proceedings and be relied on by parties to delay or derail the proceedings. Even though the history behind the article, the intention of the drafters, is quite clear, the wording ‘reasonable’ instead of ‘full’ could prevent interpretation on behalf of parties and arbitrators that goes beyond a reasonable opportunity.

The mandatory procedural protections which have been outlined here above, are fundamental to the parties and the arbitral procedure. Unless these rights are safeguarded, the process does not meet the expectations of the parties nor the fundamental requirement that everyone should have the opportunity to present its case. But at the same time, these fundamental requirements need to be reconciled with other important factors of the arbitral process, including efficiency and party autonomy.\textsuperscript{113} The mandatory requirement for a parties’ right to be heard may delay the process and can also open the door to judicial interference. Therefore, court decisions and arbitral awards that have addressed these issues tend to struggle with reconciling due process with efficiency and party autonomy.\textsuperscript{114}

3.4. Assistance of the National Courts

The presence of an efficient and dependable judicial system is a necessary factor in order for arbitral proceedings to run smoothly. The National Courts function as a support system for arbitration, and in fact complement arbitration rather than compete with it, as many may think.\textsuperscript{115} The courts’ assistance can be categorized into three stages, the first stage involves the

\begin{itemize}
\item \textsuperscript{111} 2017 ICC Arbitration rules; 2017 Arbitration Rules 2017.
\item \textsuperscript{112} 2014 LCIA Arbitration Rules.
\item \textsuperscript{113} Born (n 4) 2170.
\item \textsuperscript{114} ibid.
\item \textsuperscript{115} Jean-Pierre Ancel, ‘Measures Against Dilatory Tactics: The Cooperation Between Arbitrators and the Courts’ in Berg, Permanent Court of Arbitration and International Council for Commercial Arbitration (n 18) 410.
\end{itemize}
assistance of the courts before the tribunal has been established, the second stage entails the assistance while the proceedings are being conducted and the third stage the assistance after the award has been rendered.

The first stage involves for instance assistance in the constitution of the tribunal, due to the fact that the arbitration agreement must be enforced. At the beginning of arbitration, parties may attempt to avoid the arbitration by employing dilatory tactics, such as refusing to appoint an arbitrator. In those cases, the courts have the power to step in and designate an arbitrator quickly and efficiently at the request of a party, in order for the proceedings to continue.\textsuperscript{116} This first stage assistance may also involve dismissing a case where a party wishes to bring a dispute to the courts, but a valid arbitration agreement concludes that the dispute should be referred to arbitration.

The second stage entails assistance while the arbitral proceedings are being conducted, and the parties are in a need of a certain remedy. The courts have the option of using their coercive powers and take temporary or provisional measures. Such measures might be connected to evidentiary issues, or stopping fraudulent activity, ordering seizing of funds or property, ensuring a sale of decomposable goods and more.\textsuperscript{117}

The third stage involves the assistance of the courts after the award has been rendered. The role of the courts that stage revolves around the enforcement of the award, as the parties can request the assistance of the courts with enforcement. Such a recourse is made possible under the New York Convention. It is also possible that a party might resist the enforcement of the award and request that the courts annul the award, or refuse to enforce it, where the court needs to review the arbitral procedure and decide on the enforcement.

The courts support to the arbitration process is fundamental when it comes to efficiency, as the intervention provides the parties or the arbitration in whole, an opportunity to solve a crisis, caused in most cases by a party that is attempting to avoid the enforcement of the arbitration agreement.\textsuperscript{118} Moreover, the intervention of the courts takes into account the nature of arbitration, first its contractual nature, where the courts only intervene to ensure that the intent of the parties is respected, and secondly its jurisdictional nature, where the courts never rule on

\textsuperscript{116} ibid 411.
\textsuperscript{117} Weiss, Klisch and Profaizer (n 16) 410.
\textsuperscript{118} Jean-Pierre Ancel, ‘Measures Against Dilatory Tactics: The Cooperation Between Arbitrators and the Courts’ in Berg, Permanent Court of Arbitration and International Council for Commercial Arbitration (n 18) 411.
the merits of the parties’ dispute.\textsuperscript{119} The legal ground for the courts to intervene regards the enforcement of the arbitration agreement, as the agreement must be enforced.\textsuperscript{120} The courts therefore have an important role when it comes to the prevention of dilatory tactics. They have at their disposal tools that allow them to respond to dilatory tactics in a more efficient manner than arbitral tribunals as they, unlike tribunals, have the possibility of using coercive powers in such situations.\textsuperscript{121}

The courts however need to be cautious towards requests that are perhaps only instituted to delay the proceedings, and if the courts do not react to those requests by rejecting them, they have in fact become themselves a part of the problem and an accessory to the tactic.\textsuperscript{122} The general attitude of courts towards the procedure and dilatory tactics will be further studied in chapter 8 but is well described in the South Africa Supreme Court decision in Amalgamated Clothing & Textile Workers v. Veldspun Ltd., which stated:

\begin{quote}
The Courts should in no way discourage parties from resorting to arbitration. They should deprecate conduct by a party to an arbitration who does not do all in his power to implement the decision of the arbitrator promptly and in good faith.\textsuperscript{123}
\end{quote}

4. Efficiency in arbitral proceedings

Efficiency in the context of arbitral proceedings includes a number of elements. According to some scholars,\textsuperscript{124} efficient proceedings should include as low transaction costs as achievable, and the resolution of the dispute should not take too long.\textsuperscript{125} Such definitions vary between scholars, but many tend to refer to efficiency with only respect to time and cost, without any considerations of quality. Efficiency however should not be considered as a matter of only time and cost, but a relationship between three elements, time, cost and quality,\textsuperscript{126} as the goal of arbitral proceedings is not only to reach a conclusion quickly and cheaply, it also needs to be done fairly, with quality. Moreover, where efficiency of arbitral proceedings includes a

\begin{footnotes}
\item[119] ibid 410.
\item[120] ibid 411.
\item[121] ibid 410.
\item[122] ibid 413.
\item[123] Patrick M. M. Lane ‘Dilatory Tactics: Arbitral Discretion’in ibid 425.
\item[125] Waincymer (n 43) 20.
\item[126] Kirby (n 18) 690.
\end{footnotes}
relationship of time, cost and quality, ensuring a good relationship between those factors relies fundamentally on several aspects; an enforceable arbitration agreement and a procedure that respects party autonomy as well as due process principles; the possibility of requesting the courts’ cooperation for technical assistance such as for constitution of tribunals and its assistance to ensure enforcement of the award.\textsuperscript{127}

During the past decades, the relevance of these factors has undergone quite a transformation in international arbitration. Time and cost used to be one of the most appealing factors of arbitration - the factors that made arbitration a feasible alternative to national courts – but are now amongst its main disadvantages.\textsuperscript{128} Cost is now ranked one of the worst features of international arbitration, and speed among five worst features.\textsuperscript{129} Scholars have recognized this problem, and users of arbitration have written of it.\textsuperscript{130} As Mcilwrath and Schroeder wrote:

… when businesses pay for private adjudication, they rightly expect speed and efficiency from the process, just as they expect these qualities from other service providers. And that is where business expectations too often run into harsh conflict with international arbitration.\textsuperscript{131}

Despite these issues being at the top of mind of users of international arbitration, the popularity of international arbitration has not decreased, as the respondents of the QMUL Surveys clearly demonstrated when asked of their preferred method of dispute resolution, as the number of respondents choosing arbitration as their main dispute resolution method has only been increasing between years.\textsuperscript{132} Arbitral institutions certainly are aware of this threat that lack of efficiency poses, and have introduced into their arbitration rules various countermeasures to tackle the problem. These measures include amendments to the institution’s rules, expedited proceedings, reports and guidelines and incentives for arbitrators to act efficiently, and will be further introduced in the following section.

\begin{flushright}
\textsuperscript{128} Berger and Jensen (n 16) 2. 
\textsuperscript{129} ‘2018 International Arbitration Survey Report’ (n 5).  
\textsuperscript{132} ‘2018 International Arbitration Survey Report’ (n 5) fig 1.
\end{flushright}
5. Need for speed – What has been done to increase efficiency?

5.1. Arbitration institutions and their approach

As users turned its attention towards the increased need for efficiency and reduced cost in international arbitration, the arbitration institutions started answering their call. As the institutions are essentially competing for the pool of users, the institutions presumably wanted to ensure that they offered a solution to solve this lack of efficiency. That can be seen by the various measures the most frequently used arbitral institutions have incorporated during the past few years. Below, the five most preferred arbitral institutions procedural innovations will be introduced, as well as their approach on efficiency, with a special emphasis on the ICC’s effort, as the ICC was the most preferred arbitral institution in 2018, as well as being considered a leading institution when it comes to development in international arbitration.

5.1.1 ICC International Court of Arbitration

The ICC adopted its current 2017 ICC Rules of International Arbitration in March 2017. The rules have been revised two times in the past 20 years where the main amendments have all been aiming at increasing efficiency in their arbitral proceedings.

The Court of the ICC has taken a very proactive approach in enhancing efficiency of its arbitral proceedings. They established a special task force to address the concerns of increasing cost and lack of efficiency, The ICC Task Force on Reducing Time and Costs in Arbitration that issued a detailed report in 2007 including numerous techniques to streamline the arbitral proceedings, enhance efficiency as well as reduce cost. The task force intended the report to encourage the parties “to create a new dynamic at the outset of an arbitration, whereby the parties can review the suggested techniques and agree upon appropriate procedures”, and where the parties would not agree, the tribunal could still decide upon such procedures if they would see fit.

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133 according to the 2018 QMUL Survey.

134 ibid 13.

135 Laurent Lévy & Michael Polkinghorne, Expedited Procedures in International Arbitration (ICC International Chamber of Commerce 2017) 133.


137 ibid 1.
In 2012 ICC introduced new and revised rules that especially addressed the concerns of the lack of efficiency in international arbitration. The 2012 rules introduced several factors, including the ICC Emergency Arbitrator Procedure, which offered a short-term solution for parties that do not have the possibility to wait for the constitution of a tribunal.\textsuperscript{138} Along with that, ICC published a new ‘Note to Parties on the Conduct of the Arbitration under the ICC Rules of Arbitration’ (hereafter the ICC Note). ICC publishes this note and revises it regularly, it provides parties and tribunals with practical information on the arbitral procedure.\textsuperscript{139} The ICC Note, since 2017, now includes guidance on expeditious and efficient conduct of the arbitration, as well as detailed guidance on “application for expeditious determination of manifestly unmeritorious claims or defenses“ as the ICC announced when publishing the Note.\textsuperscript{140} Immediate disposition of a manifestly unmeritorious claim or defense can be a useful tool to enhance efficiency and save cost of the proceedings.

The ICC had evaluated whether the 2012 Rules should have included expedited provisions for the users conducting ‘small claim’ proceedings, but instead, the Court decided to adopt two new provisions intended to assist those with small claims.\textsuperscript{141} Article 22 was therefore revised that required the tribunal to make every effort to conduct the proceedings as efficiently and cost-effectively as possible, with the complexity of the dispute in mind.\textsuperscript{142} Additionally, Article 24 was revised that made the Case Management Conference a duty on the early stages of the proceedings, where parties should be consulted on procedural measures that could be adopted with a special reference to the techniques the ICC had laid out in Appendix IV of their rules.\textsuperscript{143}

Furthermore, the arbitrators accepting an appointment under the ICC rules are required to sign a statement of acceptance, where they confirm their availability, that they can devote the time necessary as efficiently and expeditiously as possible. In the statement, it is also ensured that the arbitrators understand that it is important to complete the arbitration as promptly as reasonably practicable and that the ICC Court will consider the duration and conduct of the proceedings.

\begin{thebibliography}{9}
\bibitem{138}2017 ICC Arbitration rules.
\bibitem{139}Polkinghorne (n 135) 134.
\bibitem{142}ibid 124.
\bibitem{143}2017 ICC Arbitration rules art. 24.
\end{thebibliography}
proceedings when fixing the arbitrators fees. Additionally, they must declare the number of currently pending cases in which they are involved in. Such procedures have not been common in arbitration, but may turn out to increase efficiency, as arbitrator’s unavailability is a common factor contributing to delays in arbitration.

In January 2016, the ICC Court issued a release, announcing two major decisions to promote efficiency and transparency of arbitral proceedings conducted under the ICC Rules of Arbitration. The announcement entailed that there would be “cost consequences that derive from unjustified delays in submitting draft arbitration awards to the Court.” If a draft award will be submitted beyond the timeframe provided by the rules, the Court may lower the arbitrators’ fees, unless the Court is convinced that the delay was beyond the arbitrators’ control. The Court furthermore announced that this also opened the possibility to increase the fees in cases where the tribunal had conducted the proceedings expeditiously.

The ICC revised its rules again in 2017 offering an expedited, efficient and cost-effective arbitral procedure under its ‘Expedited Procedure Provisions’.

Following the introduction of the new rules, the ICC introduced for the first time that an expedited procedure would be mandatory when the amount in dispute would not exceed USD $2 million, and such procedure would be handled by a sole arbitrator. The expedited proceedings would be subject to all proceedings that fulfilled the criteria unless specifically excluded by the parties. Expedited proceedings, also known as fast-track arbitration, aim at reducing the time and cost of arbitral proceedings without the proceedings losing its quality. The key factors to such proceedings are strict time limits, certain limitation of procedural steps, and the rules provide that the tribunal must render its final award within six months from the date of the case management

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145 ICC International Court of Arbitration, ‘More Efficiency, Transparency and Diversity in ICC Arbitration’ (n 140).
147 ibid.
148 Equivalent to the current 2017 ICC Arbitration rules art. 30.
conference.\textsuperscript{150} The rules therefore procedurally empower the tribunal to expedite matters. When parties agree to arbitrate under the ICC rules, they are effectively agreeing that the provisions on expedited procedure takes precedence over any contrary terms in the arbitration agreement, that is if the parties have not specifically agreed to opt out the expedited provisions.\textsuperscript{151} The expedited procedure itself involves a sole arbitrator instead of three, where the parties have a specific time limit set by the secretariat to appoint the arbitrator. Parties are forbidden to make new claims from the constitution of the tribunal, unless the arbitrator has authorized so, and the case management conference shall be held within 15 days from the date that the tribunal received the files of the case. A special provision was incorporated to ensure the importance of the tribunal’s procedural discretion to limit document production, the length of written submissions, that is however to be done in consultation with the parties.\textsuperscript{152} Additionally, in consultation with the parties, the arbitrator may decide to base his decision in the matter only on documents submitted by the parties which can save a considerable amount of time from the proceedings as hearings are often time demanding.\textsuperscript{153} The expedited procedure was not the only part of the 2017 rules that aimed at increasing efficiency, as time limits for certain stages of the procedure was shortened and the rules now require the ‘Terms of Reference’ to be signed and submitted to the ICC within one month instead of the two months as was provided for in the 1998 rules.\textsuperscript{154}

Furthermore, the ICC 2019 version of the aforementioned ICC Note includes some innovations, as it adds optional tools for the arbitrator selection process. The parties can now request help from the Secretariat to aid in the nomination process by contacting possible arbitrators to check on their experience and availability.\textsuperscript{155} As the unavailability of arbitrators commonly contributes to delays in the arbitral process (as will be further discussed in section 7), this procedure aims at providing a solution to that problem and is likely to do so, as the experienced staff of the secretariat is perhaps in many cases better equipped to examine the experience and availability of arbitrators than the parties. The service provided by the Secretariat (The ICC

\begin{footnotesize}
\begin{enumerate}
\item[150] 2017 ICC Arbitration rules.
\item[151] ibid art. 30.
\item[152] ibid app. VI art. 3.
\item[153] ibid.
\item[154] ibid.
\end{enumerate}
\end{footnotesize}
Court’s Secretariat) is therefore an important addition to their institutional rules, but in addition to this service they provide, their case management approach is very active. Each case gets assigned a case management team of the Secretariat that follows the progress and takes every possible step provided for by the rules, to ensure that the constitution of the tribunal is proper, that the tribunals are responsive, they monitor correspondence of the parties and arbitrators, respond to questions the parties or arbitrators may have, and analyses draft awards when submitted.156

Additionally, the ICC is considered a forerunner in shifting costs to discourage parties from derailing arbitral proceedings.157 Article 38 of the ICC Arbitration Rules provides that “in making decisions as to costs, the arbitral tribunal may take into account such circumstances as it considers relevant, including the extent to which each party has conducted the arbitration in an expeditious and cost-effective manner”.158 The ICC Commission on Arbitration and ADR issued a report in 2016, on decision on costs, where it reviewed how arbitrators can exercise their discretion in allocating cost between the parties in international arbitration.159 The report describes how allocation of costs can be a useful tool to increase efficiency of proceedings. The report findings indicated that a majority of tribunals took the parties’ procedural behavior into account when deciding on costs, not only standing alone, but also to “justify departing from the principle of awarding costs to the successful party”.160 Almost all tribunals that had rendered an award under the 2012 rules took into effect whether the parties had conducted the arbitration in an expeditious manner. Examples of conduct that the tribunal found to affect the procedure so it led to cost-shifting included “uncooperative behavior that resulted in unnecessary delays”, “refusal to participate in drafting terms of reference and procedural arrangements”, “failure to abide by major time limits”, “abandoning of claims very late in the proceedings”, “withholding of evidence needed by another party”, and “bad or ill-timed submissions”.161 Such approach

158 2017 ICC Arbitration rules art. 38(5).
160 ibid.
161 ibid.
can have an impact on the dilatory tactics of parties, as parties might be reluctant to employ dilatory tactics if it is clear that such conduct will result in cost-shifting.

5.1.2. London Court of International Arbitration

The LCIA Arbitration Rules presently in force were adopted in October 2014 and that was LCIA’s first revision of its rules since 1998. The main amendments in 2014 focused on enhancing the efficiency of the LCIA arbitral proceedings. The rules provided for the option of consolidating related arbitrations, and provisions for the appointment of emergency arbitrators. The emergency arbitrator procedure allows parties to seek the appointment of a temporary sole arbitrator, whose role is confined to deciding a request for urgent interim relief pending the formation of the tribunal that will determine the merits of the dispute.162 The rules also shortened the timeframe for certain procedures. Additionally, the LCIA acknowledged that the formation of the arbitral tribunal was a factor of the procedure that had the potential of taking too much time out of the proceedings. Subsequently, in an effort to expedite the tribunal formation procedure, the LCIA introduced provisions focusing especially on the formation of the arbitral tribunal. The rules allow parties to apply for an expedited appointment of an emergency arbitrator or replacement arbitrator, and put a requirement on the arbitral candidates to sign a statement that they can “devote sufficient time, diligence and industry to ensure the expeditious and efficient conduct of the arbitration”.163 If the arbitrators’ participation in the process is not reasonably efficient and industrious, the LCIA may revoke the arbitrator’s appointment.

5.1.3 The Singapore International Arbitration Centre

The SIAC rules currently in force were released in July 2016. The SIAC has revised its rules every three years since 2007. The revision of the 2016 rules allow the parties to apply for an expedited procedure where the dispute does not exceed SGD 6 million (approx. USD $4.5 million). This expedited procedure provides for a sole arbitrator, abbreviated time limits, as well as the option for an award based on documentary evidence only.164 Furthermore SIAC introduced a mechanism of allowing an early dismissal of claims of defense on the grounds that the claims/defenses lack legal basis, or they are manifestly outside the jurisdiction of the

163 2014 LCIA Arbitration Rules.
164 2016 SIAC Arbitration Rules.
Tribunal. The rules were meant to respond to the users need for enhanced efficiency and reduced cost as they also shortened the timeframe for the emergency arbitrator procedure.¹⁶⁵

5.1.4 Hong Kong International Arbitration Centre

The Hong Kong International Arbitration Centre released its current rules in 2018. The rules have been revised 4 times in the last 20 years. The 2018 revisions were a response to the latest trends in international arbitration, feedback from users and their own experience of their arbitral proceedings. The 2018 rules recognize the use of technology to manage proceedings, and encourages users to do so, as there are provisions in the rules recognizing the uploading of documents in a secured online system as a valid means of service. When HKIAC introduced its 2013 rules, it introduced provisions for multi-party disputes on joinder, consolidation and single arbitration. In the 2018 rules, those provisions were further expanded, where they now allow a party to initiate a single arbitration under multiple agreements, even though the agreements are between different parties. Furthermore, HKIAC introduced provisions to allow the same tribunal to run multiple arbitrations concurrently with common timetables, consecutive hearings, and separate awards, provided that a common question of law or fact arises in all the proceedings. This new mechanism is intended to enhance efficiency and reduce cost in multiple proceedings, where consolidation is not possible or desirable.¹⁶⁶

5.1.5 The Arbitration Institute of the Stockholm Chamber of Commerce

The current SCC Arbitration Rules entered into force on January 1, 2017. SCC has revised its rules 4 times in the past 20 years and was the first of the five institutions mentioned above to introduce rules for expedited proceedings, as they were introduced in 1995. The rules were recommended for minor disputes and included provisions that a sole arbitrator was to determine the dispute, written pleadings were limited to three submissions, hearings should only be held if a party requests so and the arbitrator finds it necessary and the award should be rendered within three months.¹⁶⁷ The 2017 amendments were motivated by users demands to make expedited proceedings more efficient. The main amendments regarded limited submissions, as timeframes were shortened, rules on hearings were changed, and now the main rule is that the

arbitration shall be in writing, and hearings shall only be held if a party requests so and the arbitrator considers it appropriate. Prior to the 2017 revisions, arbitrators conducting proceedings under the SCC rules had complained that parties’ expectations of the proceedings did not match the rule framework.\footnote{Anja Havedal Ipp, ‘Expedited Arbitration at the SCC: One Year with the 2017 Rules’ (Kluwer Arbitration Blog, 2 April 2018) <http://arbitrationblog.kluwerarbitration.com/2018/04/02/expedited-arbitration-scc-one-year-2017-rules-2/> accessed 28 April 2019.} The SCC decided to respond to these comments with several changes, where the arbitrators were provided with a “greater mandate to limit the proceedings and reject parties’ requests for further submissions or longer hearings”.\footnote{Ibid.} The revised rules therefore should help the arbitrator to conduct the proceedings efficiently, even where the parties are unable to agree on procedural aspects. The expedited procedure rules of the SCC only apply where the parties have agreed upon it, unlike the expedited rules that have been mentioned here above. A year after the introduction of the revised rules, the SCC announced that “the duration of expedited proceedings has significantly decreased”.\footnote{‘Efficiency vs. Due Process Paranoia’ (Arbitration Institute of the Stockholm Chamber of Commerce, 23 January 2019) <https://sccinstitute.com/about-the-scc/news/2019/efficiency-vs-due-process-paranoia/> accessed 20 April 2019.}

5.1.6 How are users responding?

White & Case issued research in 2016, ‘Arbitral institutions respond to parties’ needs’, where data was collected from 10 arbitral institutions. The research compared data from 2014 and 2015 and revealed a steady increase in use of expedited proceedings between the years. LCIA received 10 expedited procedure requests in 2014, as compared to 30 requests in 2015. SIAC received 44 requests in 2014 as compared to 69 requests in 2015. SCC administered 49 cases under their expedited rules in 2014 and 50 cases in 2015.\footnote{White & Case, ‘Arbitral Institutions Respond to Parties’ Need’ (10 April 2017) <https://www.whitecase.com/news/arbitral-institutions-respond-parties-needs> accessed 11 February 2019.} Furthermore, the ICC has revealed that in 2018, there were 115 requests to ‘opt in’ the expedited procedure of their rules of arbitration, not including several cases that automatically came within the scope of the expedited procedure.\footnote{ICC International Court of Arbitration, ‘More Efficiency, Transparency and Diversity in ICC Arbitration’ (n 140).}

The White & Case Research also revealed that continuous improvements are needed to further promote efficiency and reduce cost in international arbitration. Despite the work that arbitral institutions have been doing concerning expedited rules, the time it takes to render an award is still considerably long. For LCIA the average time from the commencement of the proceedings

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and to the rendering of an award from 2013-2015 was 20 months. For ICC, the average in 2015 was 25 months. For SIAC the average from 2013-2016 was 13.8 months, for HKIAC the average from 2014-2015 was 12.3 months and for SCC, the average in 2015 was 6-12 months.\footnote{White & Case (n 171).}

In order for arbitration to guard its position as the preferred method for international commercial dispute resolution, it is therefore essential that the arbitral community keeps seeking solutions on how to tackle the problems that users perceive at as disadvantages of arbitration, and possibly disadvantages that encourage them to seek another method. In 2019, there are over 10 years since the institutions started to address this problem, but as years go by, surveys still rank efficiency as one of the main disadvantages of arbitration.

5.2. Other measures

A wide variety of associations work to improve the international arbitration process, the arbitral community. In addition to the arbitral institutions, these associations might include organizations such as ICCA, a worldwide non-governmental organization dedicated to promoting arbitration, agencies such as UNCITRAL (3.2.2), universities such as Queen Mary University of London – School of International Arbitration, that is a center of research on international arbitration, professional associations such as IBA, that conducts research, provides publications and shares information on international arbitration (3.2.3), and law firms, such as Debevoise & Plimpton, that issued a protocol to promote efficiency (3.2.2).

5.2.1 UNCITRAL

The UNCITRAL Arbitration Rules were reviewed in 2010, with the aim of modernizing the rules without them losing their character. UNCITRAL stated that the review “should seek to modernize the Rules and to promote greater efficiency in arbitral proceedings”.\footnote{UNGA (n 107) 3.} In the review, some focus was put on dilatory tactics on behalf of parties, and ways to tackle that problem, and an attempt was made to improve the efficiency of the initial phase of the proceedings,\footnote{For instance Art. 4(3), 7(2), 13(4) and 14(2).} for instance with a revised Article 4(3) that provided that the constitution of the tribunal should not be hindered with respect to respondent’s failure to communicate a response to the notice of...
arbitration. Furthermore, an amendment was made on article 17(1), as the wording full opportunity to present its case, was replaced with the language “reasonable opportunity […] at an appropriate state of the proceedings”, (as was further studied in chapter 3.3.3) and thereby avoiding an interpretation that leads to delays of the procedure.\footnote{Niels Schiersing (n 84) 7.}

5.2.2 Guidelines

Best practice rules for arbitration services have been increasing with the aim to enhance efficiency and create more certainty and foreseeability with regards to the procedural decisions of the process. The guidelines have received some criticism, critics that point out that soft law instruments such as guidelines can minimize independent legal thinking of the arbitrators throughout the process and endangering procedural flexibility at the same time.\footnote{Michael E Schneider, ‘To Promote the Transformation of Errors into “Best Practices”’ [2014] Austrian Yearbook on International Arbitration 2014, 564.} For those critics, the hallmark of arbitration, procedural flexibility and the arbitral discretion is of the utmost importance and guidelines or best practices that provide for a procedural structure limit that flexibility.\footnote{Berger and Jensen (n 16) 423.}

Law firms are just as institutions aware of the problem of decreasing efficiency and want to serve their clients, users of arbitration and contribute to enhancing efficiency. Debevoise & Plimpton LLP issued a Protocol to Promote Efficiency in International Arbitration, in 2010, and a revised version in 2018. The aim of the protocol, as they stated, was to “reiterate our commitment to explore with our clients how, in each case, the participants can take advantage of international arbitration’s inherent flexibility to promote efficiency without compromising fairness or our client’s chances of success”.\footnote{Debevoise & Plimpton, ‘Debevoise Efficiency Protocol (2018)’ (2018) <https://www.debevoise.com/~media/files/insights/publications/2018/01/Debevoise_efficiency_protocol_2018.pdf?fbclid=IwAR1d_HP5TFKxOa3GBKR7Cj9wD-B3N2jt7komTHqnghdD57fORPJPzY1jTE> accessed 28 April 2019.} The protocol contains guidelines as to how the law firm will commit to promote efficiency throughout each step of the arbitral proceedings such as requesting for an early procedural conference, limiting and focusing document requests, settlement considerations and more.\footnote{ibid.}
5.2.3 The IBA Guidelines on Party Representation in International Arbitration 2013

International Bar Association developed guidelines in 2013 that “are inspired by the principle that party representatives should act with integrity and honesty and should not engage in activities designed to produce unnecessary delay or expense, including tactics aimed at obstructing the arbitration proceedings.” The guidelines may be adopted by the parties and the arbitral tribunal may apply them within their discretion, in consultation with the parties. The guidelines, as their name may indicate, do therefore not replace mandatory law or applicable rules that are relevant in each case. The guidelines refer to a ‘misconduct’ on behalf of a party as a breach of the provisions listed in the guidelines or “any other conduct that the Arbitral Tribunal determines to be contrary to the duties of a party representative.” The guidelines refer to conduct that could be construed as dilatory tactics on behalf of party representatives, and other tactic that is likely to obstruct the proceedings, such as ‘ex parte communications’ with an arbitrator, submitting false evidence or present document requests with the aim of delaying the proceedings and suppressing evidence. The guidelines also include possible remedies for the misconduct, such as admonishing the party representative, drawing appropriate inferences and considering the misconduct when deciding on costs, if appropriate.

6. Involvement of Arbitration Institutions and Arbitrators

6.1 Arbitration Institutions

There are primarily two forms of arbitral proceedings, ad hoc arbitration, and arbitration conducted under the management of an arbitral institution. It can have a great impact on the proceedings, specifically the efficiency, which form the parties decide on. Nowadays, institutional arbitration is the more preferred option over ad hoc arbitration. Research shows that a majority of users of international arbitration prefer an institution to administer the proceedings. The QMUL Survey of 2015 revealed that 79% of the proceedings that respondents of the survey had partaken in over the last five years were administered by an institution. Ad hoc arbitration is preferred by some, due to the advantage that the parties have the possibility

182 ibid 3.
183 ibid 3–12.
184 ibid 16.
185 ‘2015 International Arbitration Survey Report’ (n 20) 17.
to tailor the proceedings to fit their particular dispute. There is however a disadvantage of ad hoc arbitration when it comes to procedural aspects, as it is easier for parties to delay the proceedings than when a case is administered under institutional arbitration. The party could for an example start delaying the proceedings right at the appointment stage and refuse to appoint an arbitrator. The institutional rules have provisions in its rules that deal with these circumstances for it not to cause a delay. Consequently, without an institutional support, the other party would have to seek support from the courts for an appointment, which could take a considerably longer amount of time.

Institutional arbitration offers pre-established rules and a predictable procedural framework. The institutional rules contain a procedural framework that has been ‘tried and tested’ and is therefore said to provide convenience, security and administrative effectiveness. Additionally, the institutions also provide administrative and logistical support. The institutions ensure that the tribunal is appointed, that advance payments are paid regarding the arbitrators’ fees, that parties and the tribunal keep time limits in mind during the proceedings, and that the procedure runs as smoothly as possible. The arbitral institutions therefore offer a way of ensuring the efficiency of the proceedings, up to a certain point. Furthermore, according to Born, the institutions have the possibility of making arbitration “more reliable and expeditious.”

It does therefore not come as a surprise that institutional arbitration is more commonly preferred amongst users of international arbitration. But as institutional arbitration has firmly established itself as a leading platform for arbitral proceedings, users have also put a lot of faith in the development of international arbitration through the institutions, as the 2018 QMUL Survey reveals, 80% of respondents believed arbitral institutions to be “best placed to influence the future of international arbitration”. Furthermore, as respondents were asked what they took into account when choosing a particular institution, the second most selected reason for preferring a certain institution was its high level of administration, including efficiency.

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186 2017 ICC Arbitration rules art. 12; 2014 LCIA Arbitration Rules art. 5.
187 Blackaby and others (n 6) 43.
189 Blackaby and others (n 6) 35.
190 Waincymer (n 43) 211.
191 Born (n 4) 148.
192 ‘2018 International Arbitration Survey Report’ (n 5) 3.
193 ibid 14.
In a keynote speech the Honorable Chief Justice Sundaresh Menon gave at the SIAC Congress, he identified three factors that explain this occupation of influence that the arbitral institutions have in the international arbitration community, that will be shortly introduced here. The first factor is the formation of the legal network in international arbitration. The institutions and organizations, the professionals and scholars form an “epistemic community”, not bound by a nation or a membership to an organization, but by their interest and shared expertise in this common activity, arbitration. The development of the system and norms goes through a dialogue between the players of the system. Therefore, when one institution has introduced a new procedural innovation and that innovation has been well received by users and scholars, other institutions have followed the example. The second factor that the Honorable Chief Justice named is that the arbitral institutions are players competing for the pool of users, to get a share of the international arbitration market. Therefore, to stay ahead, the arbitral institutions have a great incentive to respond to the needs of users and therefore try to stay as innovative as possible. The third factor is that the institutions are able to test their innovative ideas in a close proximity due to their role in administering arbitral proceedings. They are therefore able to ‘try-and-test’ their ideas, observe the impact on ongoing cases and gather feedback from the users and the arbitrators as the case moves along.

Subsequently, institutions can promote efficiency of arbitral proceedings by monitoring the arbitral proceedings, assisting when needed and ensuring that the procedure runs smoothly. They ensure that the tribunal is responsive, they can monitor the communications between parties and the tribunal, follow the financial aspects of the proceedings and answer questions that the parties or the tribunal might have. Such assistance and monitoring can although only stay within the boundaries granted by the institutional rules, as well as the parties’ agreement. Furthermore, to maintain the integrity of the proceedings, institutions must be careful not to take sides, as their neutrality is an important factor, as the 2010 QMUL survey revealed, where respondents indicated that one of the most important factors that they consider when choosing

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194 ‘The Special Role and Responsibility of Arbitral Institutions in Charting the Future of International Arbitration, Keynote Address, SIAC Congress’ (n 155).
195 ibid 7.
196 ibid 8.
197 Horvath and Wilske (n 16) 55.
an arbitral institution is their neutrality.¹⁹⁸ This even applies in situations where one party may be demonstrating guerrilla tactics in order to delay or obstruct the proceedings.¹⁹⁹

Arbitral institutions are therefore vital to bringing reform in the practice of international arbitration and have unquestionably brought on fundamental changes as they have taken substantial actions to react to the requirement of users that more efficiency is needed in the arbitral process.

6.2 Arbitrators

Arbitrators have the obligation to respect due process principles, and as was established in section 3.3, most jurisdiction ensure the arbitrators wide discretionary procedural powers, subject to the parties’ agreement and these due process principles.²⁰⁰ Redfern and Hunter describe due process as “the duty to act judicially”²⁰¹, while Born describes the duty “to resolve the parties’ dispute in an adjudicatory manner”.²⁰² Due process principles in general entail the mandatory norms spoken of in section 3.3 above and are binding on all parties of the arbitral proceedings, and cannot be waived by an agreement of the parties. Despite that, due process rights cannot be so unlimited that they negatively affect the efficiency of the proceedings. Arbitrators do have the role of allowing parties to fully present their case, to ensure due process, but at the same time ensure fair and efficient arbitration.²⁰³ Article 17(1) of the UNCITRAL Arbitration Rules requires arbitrators to “conduct the proceedings so as to avoid unnecessary delay and expense and provide a fair and efficient process for resolving the parties’ dispute”.²⁰⁴ Similar to that, the ICC Arbitration Rules also emphasize the arbitrator’s role to promote efficiency as Article 22(1) of the rules states: “The arbitral tribunal and the parties shall make every effort to conduct the arbitration in an expeditious and cost-effective manner.”²⁰⁵ Article 22(2) then provides the tribunal with procedural discretion to adopt measures to ensure the efficiency of the proceedings, as it states: “In order to ensure effective case management the

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¹⁹⁹ Horvath and Wilske (n 16) 56.
²⁰⁰ Waincymer (n 43) 80.
²⁰¹ Blackaby and others (n 6) 335.
²⁰² Born (n 4) 1593.
²⁰⁴ United Nations Commission on International Trade Law, UNCITRAL Arbitration Rules (with New Article 1, Paragraph 4, as Adopted in 2013) (n 7) art. 17(1).
²⁰⁵ 2017 ICC Arbitration rules art. 22(1).
arbitral tribunal … may adopt such procedural measures as it considers appropriate.” Although the latter subsection entails the wording ‘may adopt’, it should be read in light of Article 22(1), that the arbitral tribunal ‘shall make every effort’, thus while the arbitrator has the powers to adopt measures that ensure effective case management – he is indeed required to make every effort to do so.\(^{206}\)

However, to draw the line between due process and efficiency in a proper way is not an easy task. Redfern and Hunter wrote that “it is sometimes difficult to operate these principles in a manner consistent with minimizing the duration of the hearing. Nevertheless, an experienced presiding arbitrator can normally find a way of combining firmness with fairness.”\(^{207}\) The arbitrator will most likely find himself quite often in the situation of having to decide on a number of procedural decisions, as it is rare that parties have agree on all procedural aspects of the proceedings. But while the arbitrators have broad procedural capacity with residual discretion, parties do not always agree on how the arbitrators should exercise them.\(^{208}\) That specifically applies to circumstances where parties may attempt to delay the proceedings with excessive submissions, requests for extensions and last-minute admissions. The tribunal is in a way the most effective tool against such dilatory tactics, as they can exercise their discretionary powers to limit such attempts on behalf of the parties.\(^{209}\) The arbitrators tend to develop a reputation based on their ability to ensure that the procedure is under control, thus, they have a personal enticement to prevent dilatory tactics from derailing the proceedings.\(^{210}\)

Additionally, the arbitrator has the duty to be independent and impartial, which is a fundamental requirement of international arbitration.\(^{211}\) The requirement entails that the arbitrator should be free of any bias due to preconceived notions regarding the dispute and does not in any way favor one party over another. That includes having no financial interest connected to the case or its outcome, or any interests connected to the parties such as client referral or employment of any kind.\(^{212}\) The independence and impartiality requirement is commonly found in institutional arbitration rules, as well as the UNCITRAL Arbitration rules.\(^{213}\) To comply with

\(^{206}\) David Earnest and others (n 60) 4.
\(^{207}\) Blackaby and others (n 6) 359.
\(^{208}\) Waincymer (n 43) 48.
\(^{210}\) Horvath (n 203).
\(^{212}\) ibid 141.
the requirements the rules set forth, the arbitrator is obliged to disclose all facts and circumstances that may give rise to doubt his impartiality and independence. If an arbitrator ignores the duty of disclosure, he risks a challenge to his impartiality and independence during the proceedings, or perhaps after the award has been published, if previously unknown circumstances regarding his impartiality become known to a party, a party may attempt to challenge the award.\textsuperscript{214} The 2014 IBA Guidelines on Conflict of Interest are commonly used as ‘best practices’ regarding issues of independence and impartiality of arbitrators. The guidelines are not mandatory, only if the parties agree that they shall be applicable in the arbitration, they are however international best practices and in view of its widespread acceptance, they are perceived to be transforming into \textit{lex mercatoria}.\textsuperscript{215}

7. Delays in the arbitral procedure

Delays are a common complaint of parties in international arbitral proceedings.\textsuperscript{216} Where efficiency may have been one of the deciding factors in resorting to arbitration, it is understandable that the users grow frustrated if the proceedings do not meet their expectations. On the other hand, some users do not complain over a delay in the proceedings, they employ it themselves, as it might be in their best interest at certain stages of the proceedings. As the discussion in the arbitral community on efficiency of arbitral proceedings has developed, and perhaps as the rule amendments that institutions have introduced, user’s perception of delays in arbitral proceedings has taken some changes. When respondents of the 2010 QMUL Survey were asked to rank three stages of arbitration that contribute to delay, the results indicated that respondents believed that delays were mainly within the control of the parties.\textsuperscript{217} When asked the same question in the 2015 and 2018 surveys, the survey reveals that this opinion has come to change, as they believed that the fault was mostly due to the issue of ‘\textit{due process paranoia}’, and that arbitrators were responsible in most instances of severe delay.\textsuperscript{218} However, as this section will demonstrate, the delays can be found with every ‘player’ of the arbitral proceedings,

\textsuperscript{214} Born (n 13) 330.
\textsuperscript{216} ‘2018 International Arbitration Survey Report’ (n 5).
\textsuperscript{217} ‘2010 International Arbitration Survey: Choices in International Arbitration’ (n 198) 32.
\textsuperscript{218} ‘2015 International Arbitration Survey Report’ (n 20) 25; ‘2018 International Arbitration Survey Report’ (n 5) 24.
with the parties and their counsel, in the form of dilatory tactics and excessive submissions (7.1), the arbitrators in the form of unavailability or favoring one party over the other or where the arbitrators are possessed with the so called ‘due process paranoia’ (7.2).

It is not unlikely that institutional administration also contributes to causing delays in arbitral proceedings. Such delay might include a backlog in case administration with the institution, or for instance when parties are not notified of changes in the procedural schedule, and monetary issues. However, due to the fact that users have not perceived their involvement as a major factor when it comes to delay in the proceedings, their administrative delay is believed to be minimal and will not be studied any further in this thesis.

7.1 The parties and their counsel

It is a known problem in arbitration, that parties adopt dilatory tactics to stall proceedings, particularly when a party has concluded that its case is weak. Dilatory tactics are a common form of so called guerrilla tactics in international arbitration, also referred to as arbitral terrorism. Guerrilla tactics refer to guerrilla warfare, the art of irregular warfare, where a small group of combatants use military tactics such as ambushing, sabotaging, petty warfare and more to harass the enemy. Such tactics threaten the sanctified method of dispute resolution and are counterproductive to its purpose, as they go against the obligation to arbitrate in good faith, which parties adhere to when they enter an arbitration agreement, a contract which entails the good faith requirement. Guerrilla tactics can be categorized into three stages, extreme tactics, which violate applicable law, ethically borderline practices which tend to be more discreet, and rough riding that does not cross any ethical misconduct lines. The last stage, rough riding, entails the most common dilatory tactics, and such guerrilla tactics are very hard to prevent or anticipate.

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219 Kirby (n 18) 3.
221 Mohanty and Raina (n 157) 102.
222 Horvath (n 203) 223.
223 ibid 224.
224 ibid 225.
225 ibid 224.
Parties or counsel who use dilatory tactics are usually trying to postpone certain topics or simply confuse the tribunal regarding the merits of the case.\textsuperscript{226} Dilatory tactics can involve everything from a party refusing to proceed with the arbitration despite a clear and binding arbitration agreement, to delays such as stalling to file submissions, bringing in new reports or evidence late and cancelling hearings and meetings.\textsuperscript{227} Other examples on these dilatory tactics are when parties refuse to pay the advance on costs, file repeated challenges against arbitrators, file excessive amounts of documents, refuse to turn in submissions on agreed deadlines, neglect orders from the tribunal, appoint new counsel late in the process, or make inappropriate and pointless procedural requests with the purpose to delay.\textsuperscript{228}

A challenge to an arbitrator may be regarded as dilatory tactics, and the reason behind many challenges could be an attempt to delay proceedings.\textsuperscript{229} Although a challenge to an arbitrator is a part of the fundamental right of parties to an arbitration, challenges may be misused to derail proceedings.\textsuperscript{230} It varies how arbitral rules address what should be done when a challenge arises. The SCC and the ICSID Rules contain provisions that suspend the proceedings while a challenge to an arbitrator is pending, but other institutional rules, such as the ICC rules, are silent on the matter. That is presumably due to the fact that the rules are meant to reduce the disruption a challenge might cause to the procedure. As arbitral proceedings tend to contain periods where the parties are preparing their submissions, there is little action on behalf of the tribunal, and there might be no need to suspend the proceedings. A challenge might be handled in that particular time without disrupting the procedural calendar, whereas a suspension might delay the proceedings.\textsuperscript{231} However if a challenge would arise in a phase where the tribunal is active, a suspension is necessary while the challenge is pending in order to ensure that the tribunals’ decisions are enforceable. When such a suspension occurs, the procedural calendar will inevitably not be upheld, and the challenge is thereby delaying the proceedings.

Challenges to arbitrator as a form of dilatory tactic was not a common event but have been increasing in the recent years.\textsuperscript{232} Challenges are regarded as dilatory tactics when they are unjustifiable, and their sole purpose is to obstruct the proceedings. Such unfounded challenges

\textsuperscript{226} ibid 231.

\textsuperscript{227} Horvath and Wilske (n 16) 9.

\textsuperscript{228} ibid 10.


\textsuperscript{230} Horvath (n 203) 233.

\textsuperscript{231} Baker and Greenwood (n 229) 108.

\textsuperscript{232} Blackaby and others (n 6) 64.
against arbitrators or experts that are not agreeing to a party’s line of argument are commonly used dilatory tactics on behalf of parties. They may even arise late in the proceedings or perhaps filed right before a deadline of some kind, with the sole purpose to delay the proceedings.\footnote{Horvath and Wilske (n 16) 10.} One way to deal with this problem is an early and full disclosure on behalf of the arbitrator, as well as a detailed vetting of the appointed expert in the case.

7.2. Arbitrators

The arbitrator has a duty to conduct arbitral proceedings fairly and efficiently, and render an enforceable award.\footnote{Horvath (n 203) 224.} That duty does not only apply to the proceedings from the point when the arbitrator has been appointed, it also lays ethical obligations on the arbitrator at the appointment stage, before the proceedings have even begun.\footnote{Waincymer (n 43) 88.} A very important element of efficiency in arbitral proceedings is the availability of the arbitrator. Unlike judges who are appointed, arbitrators tend to conduct versatile practices, combining the arbitration work with other jobs, and for those who are fully focused on arbitration possibly have several ongoing cases at once, whose timeframes are not coordinated.\footnote{ibid.} One commentator wrote that in circumstances where an arbitrator considers himself to not have enough time on his hands for a case, he should refuse the appointment.\footnote{Mohammed Bedjaoui, ‘Arbitrator: One Man-Three Roles - Some Independent Comments on the Ethical and Legal Obligations of an Arbitrator, The’ (1988) 5 Journal of International Arbitration 7, 15.} According to Martin da Silva, it is common nowadays that arbitrators are overscheduled and therefore unprepared.\footnote{Joao da Silva, O Mar and al Rodrigues Martins, ‘An Answer to Criticisms Against the Lack of Efficiency in Arbitration: Measures to Reduce Time and Costs’ (2017) 14 Revista Brasileira de Arbitragem 23, 27.} Furthermore, a study of the Corporate Counsel International Arbitration Group found that availability of the arbitrator was a major factor when it comes to inefficiency of arbitral proceedings.\footnote{ibid.} The ICC decided to provide an effort in solving this problem and announced that from 2016, they would begin announcing the names of the arbitrators sitting in ICC cases, thereby providing parties with more information on the case-load and availability of potential arbitrators.\footnote{ICC International Court of Arbitration, ‘ICC Court Announces New Policies to Foster Transparency and Ensure Greater Efficiency’ <https://iccwbo.org/media-wall/news-speeches/icc-court-announces-new-policies-to-foster-transparency-and-ensure-greater-efficiency/> accessed 11 April 2019.}
A common issue of delays that are within the arbitrators’ sphere of control is the time it takes to render an award.\textsuperscript{241} The parties may have included in their arbitration agreement a certain deadline for the tribunal to render an award, where it is clear in such cases what would constitute as a delay of the award. The parties may also have declared no specific date, where it is up to the applicable arbitration rules to provide the framework or otherwise the tribunal itself, if the applicable rules do not provide such a criteria. As with issues regarding efficiency, timeliness does depend on the circumstances in each case, therefore when speaking of a delay to render an award, one must take other aspects of the proceedings into consideration. If the parties have for instance put a time limit on the arbitration, of for example 18 months, but have delayed the proceedings themselves, repeatedly asked for extensions of deadlines and the case has gone on for perhaps 17 months, it is unreasonable to expect the tribunal to render an award in a month in order to respect the parties’ deadline.\textsuperscript{242}

The ICC took perhaps a necessary step when introducing the deadline for rendering an award and announcing that timeliness of rendering the award would factor in when it comes to the arbitrator’s fees. Despite that feature not being clearly entailed in its rules, it is something that is very likely to encourage the arbitrators to stick within the timeframe given and will perhaps be adopted by more institutions in the near future.

As the international arbitration community grows at a fast pace, various practitioners from different legal cultures enter the field, the risk of ‘arbitrator misconduct’ becomes unavoidable.\textsuperscript{243} While the standard for impartiality and independence may vary slightly throughout different jurisdictions or legal regimes, it is widely recognized that this duty is continuous, and arbitrators have the duty to remain impartial and independent throughout the arbitration. Despite that requirement, it is possible that arbitrators themselves become partisan, or use guerrilla tactics in favor of one party. This issue is frequently discussed in connection with the party-appointed arbitrators, a contentious topic in international arbitration.\textsuperscript{244} The biased arbitrator, although very rare, does seem to exist in arbitration. An example what the

\textsuperscript{242} ICC International Court of Arbitration, ‘ICC Court Announces New Policies to Foster Transparency and Ensure Greater Efficiency’ (n 146).
\textsuperscript{244} Gunther J. Horvath ‘Guerrilla Tactics in Arbitration, an Ethical Battle: Is There Need for a Universal Code of Ethics?’ in ibid.
biased arbitrator could conduct in favor of one party is cross-examining a witness in an inappropriate way, and leading witnesses that are beneficial to the party that appointed him, as well as having inappropriate communication with that party. The biased arbitrator might also delay the case by not cooperating with the rest of the tribunal, ignoring their communications or stalling when it comes to deliberations by being unprepared.\textsuperscript{245} Such conduct should be dealt with by the presiding arbitrator, who is perceived neutral in these situations. A biased arbitrator might lose credibility with the chairman by conducting such tactics in the arbitration, as well as possibly resulting in a negative inference on the party that appointed him, as the chairman might draw such opinions as a result of his actions.\textsuperscript{246} Another possibility and a much more serious mode of guerrilla tactics by a dishonest arbitrator is when the arbitrator resigns to prevent a final award against the appointing party. This can be especially problematic when it happens late in the process, perhaps right before deliberations. The question arises if a new arbitrator should be appointed to replace him, which would result in repeat proceedings, or at least some part of the proceedings would have to be repeated.\textsuperscript{247} Such a process is very costly, and the party that concocted this tactic might benefit from it. Some precedents point to that a truncated tribunal should not render a final award, but it is generally accepted in situations where a biased arbitrator and the guerrilla party need to be prevented from frustrating the proceedings.\textsuperscript{248} Some rules provide that a truncated tribunal may proceed and decide an award in such circumstances, the ICC Rules for instance provide that the ICC Court may decide to allow a truncated tribunal to render an award, but only if the circumstance arises under the closing of the proceedings.\textsuperscript{249}

Additional example of an arbitrator that might be tempted to delay the proceedings is when the arbitrators’ fees increases as the process gets longer. While most arbitrations are conducted by institutional rules that set the arbitrators’ fee in accordance with a pre-arranged schedule, some arbitrators do get paid more money as the process gets prolonged. That is obviously an unfortunate arrangement that does not encourage the arbitrator to conduct an efficient proceeding.\textsuperscript{250}

The most common form of delay, and the topic of the following sections, is the tribunals lack of efficient case management, due to the problem that users identify as ‘due process paranoia’.

\textsuperscript{245} ibid.
\textsuperscript{246} ibid.
\textsuperscript{247} Lew, Mistelis and Kröll (n 14) 302.
\textsuperscript{248} Horvath and Wilske (n 16) 89.
\textsuperscript{249} 2017 ICC Arbitration rules art. 15(5).
\textsuperscript{250} Horvath (n 203) 235.
which has been the topic of many efficiency discussions in the arbitration community, as it is thought to be one of the root causes for the arbitrators inability to streamline the arbitral proceedings.251

8. The remaining problem

As the previous sections display, all parts of the arbitral chain cause delays in the arbitral procedure. And just as they are all partly at fault, they all need to contribute to promote efficiency. parties, arbitrators and institutions need to work together towards a solution.

It is visible that the arbitral institutions have contributed greatly in building solutions to promote efficiency in arbitral proceedings, by forming a framework of institutional rules that provides the opportunity of efficient proceedings without them losing its quality. Although, notwithstanding the efficient framework that the institutions now provide, lack of efficiency is still at the top of users’ minds. And while the users themselves are often to blame for either not utilizing their procedural discretion to ensure efficiency or employing dilatory tactics, it is in the end the arbitrator that conducts the proceedings, that has the procedural discretion to do so as he sees fits and has a duty to do so efficiently. No matter how efficient the rule framework is, it is up to the tribunal to make good use of that framework, to conduct efficient proceedings and control it in such a way that dilatory tactics or unnecessary procedural obstructions will not have the opportunity of delaying the proceedings.

Users, and scholars have identified the due process paranoia as the root cause for the arbitrator’s inhibition to conduct the arbitral proceedings efficiently.252 The following section therefore aims to identify the problem of due process paranoia (8.1), due process considerations when balancing the mandatory requirements and efficiency (8.1.1) (8.1.2), and if due process paranoia is warranted (8.2).

8.1. Due process paranoia

When a party makes a procedural request, arbitrators are sometimes faced with the question if it is a legitimate exercise of that party’s procedural right, or if it is a dilatory tactic on behalf of

251 Berger and Jensen (n 16) 4.
252 ‘2018 International Arbitration Survey Report’ (n 5); Berger and Jensen (n 16); Michael Polkinghorne and Benjamin Ainsley Gill, ‘Due Process Paranoia: Need We Be Cruel to Be Kind’ (2017) 34 Journal of International Arbitration 935.
the party. Indeed, due process grants the parties an extensive right to be heard and to present their respective cases. The very premise that the parties can agree to exclude the jurisdiction of national courts is this access to a fair trial before independent and impartial arbitrators. The manner in which the arbitrators choose to handle the procedural requests stemming from one of the parties during the arbitral procedure might be considered by the other party as infringing upon that party’s right to due process. When faced with this question, the fear that the final award may face a challenge due to a breach of due process lingers over. This fear has been referred to as ‘due process paranoia’ and often leads to unnecessary delays in the proceedings, due to the fact that arbitrators are too lenient in granting extensions and accommodating other procedural requests that prolong the process. Such circumstances do not benefit the parties nor the procedure.

For arbitrators, the root of this concern revolves around ensuring the enforceability of the award. Just as the arbitrator has a duty to conduct the proceedings in a fair and efficient manner, he has the duty to ensure that the award he renders is enforceable. This duty can be found in many rules, for an example Article 41 of the ICC Rules, that provides that the “arbitral tribunal … shall make every effort to make sure that the award is enforceable.” If the mandatory requirements of due process are not respected during arbitral proceedings, the award can be refused enforcement, or annulled. This is ensured by both Article V(1)(b) of the New York Convention as well as Article 34(2)(a)(ii) of the UNCITRAL Model Law.

Due process paranoia has been a popular topic of debate in the arbitration community in the recent years. The 2015 QMUL Survey revealed that it was a growing concern in international arbitration, and defined it as: “a perceived reluctance by tribunals to act decisively in certain situations for fear of the award being challenged on the basis of a party not having had the chance to present its case fully.” In its 2018 survey, respondents believed that due process paranoia continued to cause problems for arbitral proceedings, and prevents them from being more efficient. Additionally, as due process considerations tend to linger at the top of
arbitrators minds, the arbitrator often asks counsel to declare at the end of the hearing that they are satisfied with the way the proceedings have been conducted and that each party has had a full opportunity to present their respective cases.

However, in some cases, procedural requests can be relatively easy to solve, as they can be either clearly legitimate requests or obvious guerrilla tactics that are purely put forth to delay the proceedings.\textsuperscript{260} This black and white situation however does not apply in every case, and in many instances, arbitrators find themselves facing the difficult task to rule on a decision, where it is not so apparent what lies behind the request.\textsuperscript{261} When faced with such a situation, the decision revolves around two aspects of the arbitral procedure: the duty to conduct the arbitral proceedings in an efficient manner, and to guard due process and the legitimacy of the proceedings.\textsuperscript{262} In these circumstances, arbitrators sometimes tend to favor due process, as it is a natural inclination to protect due process requirements, one that is less likely to impact the enforcement of the final award. It is of course important to be engaged in safeguarding due process, as it is an inherent part of any justice system and vital to the arbitral process. However, it is important that the arbitrator avoids an over-emphasis on them, as it is the main cause that obstructs arbitrators from conducting efficient proceedings, when faced with fragile requests on behalf of the parties, even in circumstances where due process concerns are not justified.\textsuperscript{263} It is a frequently used maxim that an arbitration is only as good as the arbitrator, and in light of the due process considerations above, it is a particularly relevant saying, as with regards to efficiency and enforceability of the proceedings, it is highly important that the arbitrator is experienced and able to take charge in conducting the proceedings while giving considerable thought to mandatory requirements without and over-emphasis on them.

Respondents of the 2015 QMUL survey expressed their concerns of this problem of due process paranoia and described situations where “deadlines were repeatedly extended, fresh evidence was admitted late in the process, or other disruptive behavior by counsel was condoned due to what was perceived to be a concern by the tribunal that the award would otherwise be vulnerable to challenge”.\textsuperscript{264} The interviewers showed sympathy towards this situation but expressed that in their view, the lack of speed and increased cost were rooted in due process paranoia of the

\textsuperscript{260} Berger and Jensen (n 16) 3.
\textsuperscript{261} ibid.
\textsuperscript{262} ibid 4.
\textsuperscript{263} ibid.
\textsuperscript{264} ‘2015 International Arbitration Survey Report’ (n 20) 8.
arbitrators. Furthermore, arbitrators also identified this as problematic and some even admitted that it had influenced their decisions during an arbitral proceedings when sitting as an arbitrator. It is understandable that arbitrators worry about protecting due process requirements, but has that worry gone too far by developing into a paranoia?

8.1.1. Equality vs. efficiency

It is a mandatory due process norm to treat parties equally, and most lex arbitri will enshrine this duty. The ICC amended its rules in 2012, and instead of using the word equal, article 22(2) now states: “In all cases, the arbitral tribunal shall act fairly and impartially.” According to Waincymer, this change was presumably due to the wording fairly being less capable of abuse by parties demanding exact equality throughout the proceedings. That said, equal is yet considered included in the wording fairly. There are numerous situations that may require interpretation of the equality requirement, for instance with regards to number of witnesses that each party is allowed, as well as time periods for submissions and extensions.

Equality should be integrated with other due process requirements, as an equality without the right to be heard or present its case would not meet any due process norms. While the ICC reform, revising the wording from equal to fair, presumably simplifies the interpretation of the equality requirement, equality is a norm that should not be very complicated to apply by sensible arbitrators. For instance, it does not have to be an unequal treatment that the tribunal asks one party’s witness more questions than the other. Likewise, it does not have to be unequal to award one party an extension and not the other, depending on the circumstances in each given case. Each situation needs to be analyzed in relation to the circumstances applicable, with the whole context of the proceedings in mind, as well as analyzing substance over form. A good example of this would be the time limits in arbitral proceedings, as they often come up with relation to equality. A rigid interpretation of equal treatment would perhaps submit that parties should have the exact same amount of time to prepare its submissions and simultaneously file them. That however would not be fair or efficient in many cases.

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265 ibid.
266 ibid.
267 Polkinghorne and Gill (n 252) 938.
268 2017 ICC Arbitration rules art. 22(4).
269 Waincymer (n 43) 81.
270 ibid 82.
271 ibid 83.
272 Niels Schiersing (n 84) 4.
273 Waincymer (n 43) 83.
mentioned in section 3.3.2, such rigid application of the equality requirement would also suggest that respondent would be in an unequal position right at the beginning of the proceedings, as claimant can take as long as he wants to prepare his case before bringing the claim.

In the ICSID arbitral proceedings of Abaclat v. Argentina, respondent requested an extension to file its rejoinder, claiming that it should get the same time that claimant received for filing its reply to the memorial. The Tribunal rejected the request and stated that such a request was not justified, and the equality requirement did not entail the right to an exact same amount of days for submissions.274

In the case of Glamis Gold v. United States of America, similar circumstances arose, where the Tribunal issued a procedural order stating that:

A general delay in the proceedings, which as a consequence in theory provides more time to the Claimant for the preparation of its memorial, does not require the granting of an equally long extended period of time to the Respondent for the preparation of its counter-memorial.275

On the other hand, an arbitrator preoccupied with due process concerns, might be tempted to allow requests based on such a rigid interpretation, as it would be inclined to lean towards due process rather than limiting such delays to ensure the efficiency of the proceedings.

8.1.2 Reconciling due process and efficiency

As established in section 3.3.3, most civilized jurisdiction require in its arbitration law that each party must be given the opportunity to present its case. The opportunity to present its case also entails the right to be notified of the opposing parties’ case in a timely manner. There are a number of procedural requests that a tribunal may face that relates to the parties right to present their respective cases, where the tribunal will perhaps find itself in a situation where the right decision is not immediately apparent. Such requests may include extensions of a deadline, submissions of documents or evidence after a deadline has passed, last minute claims and requests for rescheduling of hearings.276 According to users, in these situations, arbitrators tend

274 Abaclat et al v Argentina, ICSID Case No ARB/07/5, Decision on Disqualification (Feb 4, 2014)39.
275 Glamis Gold, Ltd v United States of America, NAFTA/UNCITRAL, Procedural Order No 8 (Jan 31, 2006).
276 Waincymer (n 43) 86.
to incline towards allowing vast amount of these requests on account of due process concerns, and thereby delaying the proceedings.\footnote{277 \textit{‘2018 International Arbitration Survey Report’} (n 5) 32.}

A party presenting a procedural request, might assert that the right to be heard, or possibly his ‘full opportunity’ to present his case, as Article 18 of the Model Law states, includes the right to present any number of witnesses as the party wishes, and anything less would not constitute a full opportunity.\footnote{278 Niels Schiersing (n 84) 8.} Such assertions should be easily avoidable by the tribunal as a superfluous witnesses is not justifiable on due process grounds.\footnote{279 Waincymer (n 43) 185.} However, an arbitrator concerned with the enforceability of the award might be hesitant to reject requests for additional witnesses to safeguard the parties’ right to present its case. Subsequently, in complex proceedings, a party may need to present a good number of witnesses, but such procedural decisions should be taken in the light of the circumstances applicable, where the tribunal should not be afraid to limit the number of witnesses or submissions if it deems such submissions unnecessary. The right to fully present its case is not an entitlement to disregard reasonable procedure and deadlines.\footnote{280 Niels Schiersing (n 84) 8.}

In the ICSID case of Bureau Veritas v. Paraguay, respondent requested that a hearing would be postponed based on the fact that respondent (Paraguay) had recently gone through a significant governmental and political change, after more than 60 years of government control by one political party. Additionally, its request was based on the grounds that the counsel of the party had been retained only days before the hearing and that the respondent needed more time to study the complex issues of the dispute. The Tribunal rejected this request and decided that it should proceed with the hearing. It explained that:

\begin{quote}
The decision was motivated by the need to strike a balance between the constraints of the parties and the obligation to conduct the proceedings in a reasonable speed and bring them to an end within an expedient and efficient period of time. The tribunal reiterated that the requirements of due process had been complied with, that both parties had been complied with, that both parties had been fully involved in the process, including in the setting of the timetable and agenda for the hearing on jurisdiction. The Tribunal expressed its understanding as to the challenges facing the new government, but nevertheless considered that the interests of the sound administration of justice would justify a continuation of the hearing.\footnote{281 BIVAC v Paraguay, ICSID Case No ARB/07/9, Decision on Jurisdiction (May 29, 2009)43.}
\end{quote}
Another decision worth noticing is the case of Karaha Bodas v. Perusahaan, where the tribunal had rejected a parties’ request for submitting additional documents where the tribunal held that this submission was made too late in the process, where the party had a full opportunity of presenting it earlier. The party challenged the award to the court, that dismissed the challenge, stating that:

A fundamentally fair hearing is one that meets the minimal requirement of fairness—adequate notice, a hearing on the evidence, and an impartial decision by the arbitrator. The parties must have an opportunity to be heard at a meaningful time and in a meaningful manner.282

When having examined interpretative notes referred to in section 3.3.3, opinions of renowned scholars and case law regarding the right to present its case, the mandatory requirement can reasonably best be described as a party must be provided with a meaningful opportunity of presenting its case, with a special emphasis on it being an opportunity.283 The requirement does not entail the right to present every and any evidence that the party may wish. Furthermore, it is imperative to remember that the mandatory requirement of due process was not built to guard parties from their procedural or strategic mishaps. This right to be heard is not absolute and does not entail unreasonable procedural requests that have the sole purpose of stalling the proceedings. It is up to the arbitrator to evaluate these requests, keeping in mind that due process rights are not a reason to abandon efficiency of the proceedings. 284

8.2. Is due process paranoia warranted?

As due process obligations are fundamental to any judiciary process, they should naturally also be applied with a careful consideration to other aspects of the proceedings as the tribunal does not only have the duty to render an enforceable award, it also has a duty to conduct the proceeding in an efficient manner. Some lex arbitri even entail the efficiency duty as a mandatory norm, therefore binding on the arbitrator.285 Article 17 of the UNCITRAL Arbitration Rules entails this requirement as it provides that the tribunal shall “provide a fair and efficient process for resolving the parties’ dispute”.286 Furthermore, as mentioned in section

283 Niels Schiersing (n 84).
284 Berger and Jensen (n 16) 8.
285 Waincymer (n 43) 81.
286 United Nations Commission on International Trade Law, UNCITRAL Arbitration Rules (with New Article 1, Paragraph 4, as Adopted in 2013) (n 7) art. 17(3).
3.3, when discussing how to reconcile due process and efficiency, it is important to keep in mind, that efficiency is also a mandatory norm inherent to the due process notion. Article 6 of the EHRC which provides for the right to a fair trial also encompasses an efficiency requirement, that everyone has a right to a fair trial within a *reasonable time*.

Since the arbitrator’s ‘paranoia’ does revolve around the enforcement of the award, alas the interpretation of the courts, it is important to analyse how the courts have addressed it, as it is their approach that in fact determines if the paranoia is justified or not. Polkinghorne and Gill argue that arbitrators may believe domestic courts to have a “different, stricter understanding of due process.” In the following section, case law examples from five jurisdictions will be analyzed and how the national courts of these jurisdictions have addressed requests for annulment of awards. The five jurisdictions chosen are arbitration seats from three different continents and are amongst the 13 most preferred seats.

8.2.1. France

France, the home of the ICC, is considered an arbitration friendly jurisdiction. It is not amongst the jurisdictions that have adopted the Model Law or based its arbitration law on it, and therefore, the mandatory due process requirements of the French arbitration act do not resemble those of the Model Law. Article 1510 provides: “Irrespective of the procedure adopted, the arbitral tribunal shall ensure that the parties are treated equally and shall uphold the principle of due process.”

The due process requirements of the French arbitration act therefore do not contain any specification as to the level of treatment required under the act, a ‘full opportunity’ to present ones case or a ‘reasonable’ approach.

**S.A. Ridalis v. S.A.R.L. Bureau de recherche**

Respondent challenged a final award on the grounds that the tribunal had disregarded its written submission due to the fact it was filed in breach of the procedural calendar. Respondent argued that this late submission had been due to unavoidable circumstances. The Court dismissed the challenge and stated that “the conduct of the arbitral proceedings within reasonable timeframe

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287 Polkinghorne and Gill (n 252) 938.


must not lead the arbitrator to extend time limits to the detriment of the efficiency of the proceedings, and that the arbitrator must put an end to the number of the exchanges between the parties”. 290

Chaudronnerie v. Adjor

Claimant challenged an award to the Paris Court of Appeal, arguing that the tribunal had disregarded its right to be heard by refusing to allow an additional reply to respondent’s defense. The Court dismissed the challenge, holding that the parties had agreed upon a procedural timetable where only one written submission was allowed, and no replies to final submissions were provided for by the timetable. Additionally, this timetable had been discussed and amended by the parties, but no agreement had formed on a reply to final submissions. Subsequently, the arbitrator was within his rights to limit submissions in a way that the procedural timetable was upheld, and such a decision did not breach the due process rights of the parties. 291

The Republic of Iraq v. Thyssenkrupp

The Paris Court of Appeal set aside an award on the grounds that the tribunal had breached due process requirements, or to be exact, the equality of arms. The case regarded arbitral proceedings between Iraq and two German companies. The Republic of Iraq challenged the award for an annulment, as the tribunal supposedly had rendered the award based on evidence from claimant only. 292 The arbitration was commenced seven months after the beginning of the Iraq war, which had effectively prevented the Iraqi Republic from forming a defense in the proceedings as well as accessing evidence. The tribunal had granted the republic of Iraq extensions to submit evidence, but ultimately found that its inability to access evidence would not hinder an effective defense in the matter. The court agreed with the Republic of Iraq and found this to be a breach of due process. The court held this decision of the tribunal to breach equality, although it did acknowledge that the tribunal had the duty to conduct the proceedings efficiently, and that this failure to attain the evidence should not deprive claimant the right to adjudication, it found that the tribunal should have adjusted the proceedings to guarantee equality. 293

291 Dubois et Vanderwalle Sarl v Boots Frites BV, CA Paris, 22 sept 1995 n° 94/4957, Rev Arb 100.
292 The Republic of Iraq v ThyssenKrupp and MAN, CA Paris, 8 nov 2016 n°15/02556.
293 ibid.
The approach the French courts have taken is respective of the procedural discretion of the tribunal, where it should be allowed to ensure the efficiency of the proceedings. The tribunal has full discretion to stay within the boundaries of the procedural calendar, and disregard documents submitted after a cut-off date, or deny the parties additional submissions if such submissions do not conform to the procedural timetable and submissions agreed upon. However, in extreme circumstances, such as in the matter of the Republic of Iraq, the courts will interfere, where the tribunal did not respect the fact that claimant was unable to present its case due to extreme circumstances out of its hands. The Republic of Iraq was unable to attain any evidence due to the extreme circumstances. Although the requests for extension did affect the efficiency of the proceedings, as the proceedings were delayed on several occasions, these requests for extension were not dilatory tactics on behalf of a party, as extreme circumstances applied. In such cases, despite the inherent need to promote efficiency of arbitral proceedings, due process should not be sacrificed on the altar of efficiency. The tribunal must ensure that the parties receive an opportunity to present its case, at the least evaluate whether the opportunity to attain the evidence would present itself in the near future, or if it would perhaps never arrive. The tribunal in the aforementioned case did not, as it granted the republic extensions on three occasions, but decided thereafter to determine the case based on evidence from the opposing party only, and therefore this decision was not safeguarding the fairness of the proceedings.

8.2.2 Hong Kong

The Arbitration Ordinance, the arbitration law of Hong Kong, is largely based on the UNCITRAL Model Law, and Hong Kong is therefore considered a Model Law jurisdiction. The Arbitration Ordinance does however not contain the due process requirements of Article 18 of the Model Law, where Article 18 of the Arbitration Ordinance was amended and now requires that the parties must be treated equally, the tribunal is required to be independent and to act fairly and impartially “as between the parties, giving them a reasonable opportunity to present their cases and to deal with the cases of their opponents.”. Hong Kong therefore decided to approach the due process requirements in a similar way as the arbitral institutions have done, as well as the UNCITRAL Arbitration Rules, encompassing the need for a

294 John Sutton and David St, ‘Hong Kong Enacts the UNCITRAL Model Law’ (1990) 6 Arbitration International 358, 3.

‘reasonable’ opportunity, where such wording was considered to limit rigid interpretation on the parties’ right to present its case.

**Kenworth Engineering v. Nishimatsu Construction Ltd.**

Claimant challenged an award and argued that the award should be set aside on the grounds that claimant had been denied due process, as its right to be heard had been disregarded. The Tribunal had denied claimant a request for oral hearing, and Claimant held that the oral hearing would undeniably have changed the decision of the tribunal as there were underlying issues that were disputed and ought to have been addressed. The Court did not set the award aside and found that the arbitrators were within their right to deny an oral hearing in the matter as they had the discretion to deem it unnecessary to reach a conclusion.296

**Pacific China Holdings v. Grand Pacific Holding**

The Hong Kong Court of Appeals overturned a decision made by the lower court to set aside an award. The respondent originally challenged the award on the basis of Article 34(2)(a)(ii) of the UNCITRAL Model Law which entails that the parties’ right to present their respective cases, as the tribunal had disregarded submissions by the challenging party.297 In its ruling, the court set forth a detailed analysis on the arbitral tribunal’s procedure, and how it had limited submissions, where it denied respondent the right to present additional submissions that were in breach of the procedural timetable. The Court then went on to consider the Model Law, and the grounds for setting aside an award under Article 34 or the equivalent, Article V of the New York Convention, and found that to justify setting aside an award, as “the conduct of the Tribunal must be sufficiently serious to offend our most basic notions of morality and justice”. The Court did not find the tribunals conduct “sufficiently serious or egregious so that one could say a party has been denied due process”.298

The two cases referred to above establish that the national courts in Hong Kong are hesitant to interfere with procedural decisions of the tribunal. In the matter of Kenworth Engineering, the tribunal even went so far to deny a party an oral hearing, and the court found the decision within the procedural discretion of the tribunal when it determined the dispute based on the parties’

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296 *Kenworth Engineering v Nishimatsu Construction Ltd* [2004] Hong Kong Court of Appeal 593.
298 *Grand Pacific Holdings Ltd v Pacific China Holdings Ltd* [2012] 4 HKLRD 1.
submission. The court’s interpretation in that matter points to a wide interpretation of the requirement of a “reasonable opportunity”.

8.2.3. Singapore

Singapore’s arbitral legislation is based largely on the UNCITRAL Model Law, excluding minor modifications. The due process requirements of the Singapore International Arbitration Act are identical to the ones set out in the Model Law, thereby requiring that parties shall be given a ‘full opportunity’ of presenting its case. 299

**China Machine v. Jaguar Energy**

Respondent challenged an award to the Supreme Court of Singapore, arguing that its right to present its case had been breached. The tribunal had disregarded an expert report that was filed in breach of the procedural calendar of the proceedings, that the parties had both agreed to adhere. The court held that the tribunal was within its procedural discretion by limiting submissions after a certain time limit during the proceedings, and no due process rights had therefore been violated. Subsequently, the court dismissed respondents challenge. 300

**Triulzi Cesare SRL v. Xinyi Group**

Respondent challenged an award on the grounds that its right to present its case had been disregarded. Respondent had requested an additional submission of a witness statement which the tribunal had rejected, as the timeframe for such admissions had passed, according to the procedural calendar the parties had agreed upon. The court dismissed the challenge and held that the tribunal was within its rights when it limited submissions to ensure the efficiency of the proceedings, as respondent could have presented the witness statement at an earlier point of the proceedings. Furthermore, the court stated that an opportunity to present one’s case did not constitute as the right to “present everything it wants to present”. 301

The examples above confirm that courts in Singapore show a great deal of respect to procedural decisions of the tribunal and that the tribunal has the discretion to respect procedural timelines pre-established and agreed upon by both the parties and tribunal. Even though the *lex arbitri*

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301 *Triulzi Cesare SRL v Xinyi Group Co Ltd* (2014) SGHC 220.
entails a ‘full opportunity’ requirement, the courts have not interpreted the requirement as such as the parties should be provided an opportunity beyond reason.

8.2.4. Sweden

Sweden has not based its arbitration act on the Model Law, although its provisions bear some resemblance to the provisions of the Model Law. However, the mandatory due process requirements entailed in the Swedish Arbitration Act differ from the Model Law, as Article 24 entails that the arbitrators “shall afford the parties, to the extent necessary, an opportunity to present their respective cases”.302

Svea Court of Appeal’s judgement of 24 February 2012

A party challenged an award and claimed that it had been denied the opportunity to present its case, where the sole arbitrator had refused to hold a hearing. The Court dismissed the challenge and found the arbitrator practicing its procedural discretion in accordance with the applicable rules, the expedited procedure rules of the SCC, which provided that the tribunal should grant the parties an oral hearing if it deemed it necessary, which in this case it did not.303

Svea Court of Appeal’s judgement of 8 November 2004

Respondent sought to set aside the award, where it claimed that its due process rights had been violated as it was unable to present its case. The tribunal had refused to accept additional submissions, as respondent had admitted the submissions after the cut-off date provided for by the procedural calendar. The Court dismissed the request, as it did not find the procedural decision of the tribunal to breach any due process requirements, the tribunal was within its right to preserve the timetable in order to enhance efficiency of the proceedings. A clear limitation on the opportunity to present or submit evidence does not strip the parties the opportunity to present their case, it simply provides a clear structure for the sake of efficiency.304

Sweden is considered an arbitration friendly jurisdiction, and the courts show the procedural discretion of the tribunal much respect. The arbitrator is provided with the discretion to limit

303 RH 2012 T 6238-10.
304 RH 2004 T 5112-03.
submissions in order to promote efficiency, evaluating how far ‘to the extent necessary’ of the Swedish Arbitration Act reaches, which in the cases above has been evaluated reasonably.

8.2.5. United States

The arbitration law of the United States is the Federal Arbitration Act (FAA), first enacted in 1925. The FAA distinguishes between domestic and international arbitration. Section 1 of the act applies to domestic arbitration while section 2 and 3 governs international arbitration. The FAA is not based on the UNCITRAL Model Law and largely predates it. The act is the oldest ‘still valid’ arbitration act in the world and has been interpreted and rewritten through case law, where the true contents of the statute are therefore buried in federal decisional law. The statute does not contain any clear due process requirements as to the arbitral discretion, and the requirements therefore have been formed through case law and public policy, where such decisions have revolved around the requirement to conduct the hearings in a fair and impartial manner. The standard according to the case law provides that courts often consider the fairness requirement, and have set the standard high as to what is considered a breach of that requirements.

Landmark Ventures v. InSightec

A party challenged an award and argued that the tribunal had disregarded its right to present its case, where the tribunal had denied the party a second extension to the deadline to submit expert reports. The court dismissed the challenge, holding that the tribunal was entitled to deny the party to submit the reports, such treatment was not considered unfair.

Parsons & Whittmore v. Societe Generale

Claimant challenged an award on the grounds that it was denied the opportunity to present its case due to the fact that the tribunal had denied extension of hearings where the particular hearing date did not suit its key witness. The claimant was therefore unable to present the testimony of the key witness and argued that it was therefore unable to present its case.

306 ibid.
308 Landmark Ventures Inc v InSightec Ltd 63 F. Supp. 3d 343 (S.D.N.Y. 2014).
Court found no breach of due process under Article V(1)(b) of the New York Convention, and found the tribunal within its procedural discretion to deny claimant an extension of hearings.

**Tempo Shain Corp. v. Bertek Inc.**

Respondent sought to vacate an award on the grounds that the tribunal had acted with “fundamental unfairness” as it refused to grant an extension on a hearing schedule in order for a key witness to testify. The key witness became unavailable due to his wife’s cancer, and respondent had argued that he was willing and able to testify, but unavailable at the particular time of the hearing. The tribunal decided that the witnesses testimony was unnecessary and concluded the hearings. The Court found this to breach due process and agreed with respondent that the tribunal had acted in fundamental unfairness when refusing the request for an extension. The award was therefore vacated.  

Circumstances in this particular case and the aforementioned case were very similar, a key witness in both cases was unable to attend a hearing and thereby present a testimony, however the reasons behind their unavailability differed, as the court showed sympathy towards the fact that a key witness was unable to attend due to a sickness of a family member, whereas a witness could not attend due to scheduling issues did not suffice as a satisfactory reason for an extension, with a focus on the fairness of the proceedings, not exceeding a reasonable interpretation of the right to present its case.

8.2.6. The Courts seem to generally support arbitral discretion

An analysis of the case law above demonstrates that courts from various jurisdictions are reluctant to interfere with procedural management decisions of the arbitrator. The courts have shown support to procedural decisions of the tribunal where it:

- denies requests for extension in order to comply with the procedural timetable, where it should grant an extension only if the party was reasonably unable to comply with it
- disregards submissions after the cut-off date has passed
- refuses to hear a new claim introduced at the ‘last minute’
- refuses a re-scheduling of a hearing at the ‘last minute’

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309 Tempo Shain Corp v Bertek Inc 120 F.3d 16, 96 (2d Cir. 1997).
Furthermore, The IBA Arbitration Committee issued a thorough report in 2018, on the annulment of arbitral awards by state courts with respect to the conduct of the arbitral proceedings (hereafter ‘IBA Report’). The research covered 13 jurisdictions, who attract the majority of international arbitration users worldwide.  

The IBA report analyses a good number of case law from the 13 jurisdictions and confirms the general support for procedural discretion of the tribunal, where the report states that it is “rare for an award to be set aside for procedural reasons only”.

Berger and Jensen have defined this support of the courts as the ‘procedural judgement rule’. The rule entails that the courts recognize the wide discretionary powers of the arbitrator, and respect it, as well as recognizing the importance of efficiency in the arbitral proceedings. The court will not doubt the tribunals procedural discretion, if its decision is reasonable under the particular circumstances. The fact that courts consider if a certain approach of the tribunal could have been done differently has not been a reason for intervention, it is only when the court reaches a conclusion that things must have been done differently that the court refuses enforcement or annuls the award. The courts also recognize the need to conduct proceedings efficiently, and thereby that the due process requirements also encompass an efficiency requirement, as everyone is entitled to a fair hearing within a reasonable time, as Article 6 of the ECHR provides.

That is however not to say that the ‘procedural judgement rule’ is without limitation. As most cases here above demonstrate, the courts show the procedural authority of the arbitrator a great deal of respect, but in extreme circumstances, where the tribunal has conducted the proceedings unfairly towards a party, as in the Republic of Iraq v. ThyssenKrupp, where it clearly hinders the parties’ right to present its case or defend its cause, the court will interfere and annul or deny enforcement of such an award.

There is no clear-cut line that indicates where exactly procedural decisions breach due process, if it were so, the problem of ‘due process paranoia’ would not exist. Due process paranoia keeps the arbitrator from limiting submissions and refusing repeated extensions out of the fear of reaching the limit of due process, resulting in an annulled award. However, the above examples of case law, as well as the analysis in the IBA Report, demonstrate that courts only intervene

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310 International Bar Association (n 288) 2.
311 International Bar Association (n 288).
312 Berger and Jensen (n 16) 35.
when arbitrators have gone to quite a distance to reach that limit, where extreme circumstances apply, and it is not a question if they could have done things differently, they should have. As the Hong Kong Court of Appeal stated in the case of Pacific China Holdings v. Grand Pacific Holdings, “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”.313

Just as arbitrators have a procedural discretion to determine the admissibility of certain submissions and the need for extensions, judges of national courts have a wide discretion in determining evidence production. The Icelandic Act on Civil Procedure for instance provides that if a judge finds it obvious that a certain issue, which one party wishes to prove, does not matter, or that it does not serve any purpose to prove it, the judge may deny that party to provide the evidence.314 Moreover, such discretion is also provided to judges in France, Denmark and Sweden. The Swedish Code of Judicial Procedure provides for a similar rule as the Icelandic Code, but additionally provides that the court may also reject an item of evidence if it can be presented in another way with considerably less trouble or costs.315 National courts across various jurisdictions are therefore also provided with wide discretion in determining on submissions, and the courts’ exercise of such discretion – an application of express legal provisions - has not been considered to raise similar due process concerns as the procedural discretion does in arbitral proceedings. The same mandatory provisions of due process apply to most, if not all, national court proceedings, the parties’ right to be heard should be guaranteed, as well as their equality, but the judge’s discretion to limit unnecessary submissions has not been held to breach these due process requirements. Perhaps, to limit due process concerns in arbitral proceedings, there is a need for a more transparent wording of the arbitral discretion, where the tribunals powers to limit submissions are more expressly stated in a similar way that the judge’s discretion is. Furthermore, it must be kept in mind the saying ‘justice delayed is justice denied’, and that due process also encompasses an efficiency requirement, as Article 6 of the ECHR includes that everyone is entitled to a fair hearing within a reasonable time.

313 Grand Pacific Holdings Ltd. v. Pacific China Holdings Ltd. (n 298) 38.
314 Lög um meðferð einkamála nr. 91/1991 art. 46.3.
315 Den svenska rättegångsbalken SFS 1942:740 ch. 35
8.3. Considerations regarding efficiency and party autonomy

As the need for efficiency in arbitral proceedings developed during the past decade, the institutions responded and introduced several procedural innovations to enhance efficiency, as studied in section 5. One of the main advantages of arbitration is its flexibility, the ability the parties have to tailor the procedure to their own requirements. However, as the need for efficiency grew, the institutional rules expanded and the extent of the procedural provisions they entail. The institutions for instance introduced mandatory expedited proceedings, an innovation that was well received by users but brings up some considerations regarding the flexibility of arbitral proceedings and the party autonomy that is perceived as the cornerstone of arbitration.

When an arbitral procedure is conducted under ‘expedited provisions’ of some institutional rules, certain restrictions apply to the parties’ autonomy, for an example the choice of the number of arbitrators. The parties have the authority to agree on what applicable procedures will govern the proceedings, and therefore some argue that this freedom, since it is the ‘cornerstone of arbitration’, should not be restrained.316 It is however important to keep in mind that it is in fact the party autonomy that led to the constitution of ‘expedited arbitration’, as institutions incorporated the provisions explicitly to respond to the needs of users that were pushing for greater efficiency in arbitral proceedings.317

The ICC Expedited provisions include the requirement that a sole arbitrator is to be appointed under the expedited procedure, not a three-member tribunal.318 Furthermore, the ICC Court has the discretion to appoint a sole arbitrator, despite any contrary provision of the arbitration agreement. This is a provision that one could argue deprives parties of their party autonomy in the proceedings, but what must be considered here, is that the parties agreed to arbitrate under the expedited provisions, and therefore agreed that the provisions would govern notwithstanding contrary provisions in the arbitration agreement of the parties. Subsequently it would not be a breach of party autonomy since the parties agreed that these exact provisions would apply with all its consequences.319 Despite that, this could cause some concern for parties that are interested in arbitrating under the expedited provisions, but wish to have a three member

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316 Polkinghorne (n 135) 137.
317 Anja Havedal Ipp (n 168).
318 2017 ICC Arbitration rules app. VI, art. 2.
319 Polkinghorne (n 135) 140.
tribunal, especially since the ICC Court announced when the rules were introduced that “the ICC Court will normally appoint a sole arbitrator”, implying that the discretion to do so will be exercised in most cases.320

Other institutes have taken different approaches. For example, the HKIAC gives priority to party autonomy where parties can arbitrate under the expedited procedure, but if their arbitration agreement has provided for a three-member tribunal, the tribunal will consist of three arbitrators as per the agreement, and other provisions of the expedited rules will still apply to the procedure.321

Moreover, the SIAC rules use to resemble the ICC rules, before the latest amendment of 2016, as if the dispute amount was below a certain limit or the parties have decide on expedited rules, the case was referred to a sole arbitrator, unless the SIAC President decided otherwise. In the case of AQZ v. ARA, the Singapore High Court decided for the first time on a challenge to an award where the procedure was construed under the expedited procedure of the SIAC rules. The parties had not agreed on an expedited procedure, as their contract stated that three arbitrators should decide on the dispute. The disputed amount and the dispute in whole fell under the criteria for the expedited rules, therefore the arbitration was conducted under the expedited procedure, which claimant contested.322 Claimant challenged the award on several grounds, as he challenged the sole arbitrator’s jurisdiction in the matter, as well as the composition of the tribunal not being in accordance with the agreement of the parties, pursuant to Article 34(2)(a) of the Model Law. The Court rejected the challenge and held that by agreeing to arbitrate under the SIAC rules, the reference to an expedited procedure in those rules could and did override the agreement of the parties to have three arbitrators settle the dispute.323

However, just as arbitral law varies between jurisdictions, court’s interpretation of enforcement of arbitral awards also differs. The Shanghai No. 1 Intermediate Court rendered a judgement in the matter of Noble Resources v. Shanghai Good Credit, where respondent challenged the award under the New York Convention on the grounds that it was not in accordance with the agreement of the parties pursuant to article V(1)(d) of the Convention. It was expressly stated in the arbitration agreement of the parties that that tribunal should be composed of three arbitrators.

321 2018 HKIAC Arbitration Rules art. 42.2(a).
322 AQZ v ARA [2015] SGHC 49.
323 ibid.
arbitrators, but a sole arbitrator was appointed under the SIAC rules, against the parties’ objections. The Court found that the expedited procedure was not contradictory to the agreement of the parties, as the amount in dispute was within the applicable criteria, but regarding the composition of the tribunal, the court found that the 2013 SIAC rules did not exclude the adoption of three arbitrators, as was provided for in the parties’ agreement, since the rules gave the president of the SIAC power to determine the number of arbitrators. Therefore, the Court found that the president should have given consideration to the parties’ agreement and that the appointment of a sole arbitrator would go against an express requirement of the parties’ agreement to arbitrator and as a result the award could not be enforced.324

When SIAC amended its rules in 2016, this issue was therefore addressed, to avoid similar circumstances as those above, and the rules now state clearly that “by agreeing to arbitration under these Rules, the parties agree that, where arbitral proceedings are conducted in accordance with the Expedited Procedure under this Rule 5, the rules and procedures set forth in Rule 5.2 shall apply even in cases where the arbitration agreement contains contrary terms.”325

It is therefore important that parties that intend to arbitrate under expedited procedure, keep in mind the restrictions that certain institutions impose on their procedural autonomy, furthermore, if the parties intend to avoid expedited proceedings, they must expressly provide for such a requirement in the arbitration agreement. The institutions should also be conscious of the different interpretation of each jurisdiction, as when it is likely that a jurisdiction will interpret the parties will over the expedited provisions, institutions should be careful disregarding the parties’ choice in order to ensure the enforceability of the award in that particular jurisdiction.326

9. Promoting efficiency in arbitral proceedings

Arbitration was initially meant to be an alternative solution to the delays in the national court systems, but arbitration is now showing the same symptoms of the delay it was originally meant to cure. As various measures have been taken during the last few years to enhance efficiency in

324 Noble Resources International Pte Ltd v Shanghai Good Credit International Trade Co (2016) Hu 01 Xie Wai Ren No. 1.
325 2016 SIAC Arbitration Rules art. 5.
326 Polkinghorne (n 135) 151.
arbitration, the most recent QMUL Survey indicates that it remains as one of the top disadvantages of arbitration. All stages of arbitration can play a role in promoting efficiency, parties, counsel, arbitrators, arbitral institutions and national courts. First, parties could exercise their autonomy more diligently by expressly providing for detailed procedural measures in their arbitration agreement when the dispute has not arisen, secondly, procedural measures subsequently should be tailored to the dispute at hand when it arises and thirdly, the procedure needs to be efficiently managed and conducted by the tribunal, as it responsible for the procedure when efficiency is possibly no longer a common interest of the parties. The following section aims to touch upon these three stages, with various ways all well equipped to promote efficiency.

9.1. Reaching efficiency through the agreement to arbitrate

Parties may be uninspired to debate procedural details of arbitration when negotiating a contract, their undivided attention might be committed to their successful business relationship and such details may seem unnecessary at that stage. But as it is the users themselves that are disapproving of the efficiency in arbitration, they should also be conscious of the fact that they themselves have the option of securing a commitment to efficient proceedings with the arbitration agreement, while the parties are both focused on the successful contract they are about to sign. When the dispute has arisen, such joint effort may be futile as the parties’ interests are not aligned and the parties are unlikely to cooperate in order to reach the goal of efficient proceedings.

By giving great thought to procedural measures at the outset of the proceedings, the parties increase the chances of securing an efficient arbitration. The parties could for instance choose the rules governing the proceedings with the aim of enhancing efficiency, using the procedural discretion to incorporate measures that are equipped to enhance efficiency, such as agreeing on a sole arbitrator, agreeing on a time limit on the proceedings or to arbitrate under a set of expedited rules of an arbitral institution, or limiting document production and hearings. Additionally, the parties are also in a position to impact efficiency when it comes to the

327 ‘2018 International Arbitration Survey Report’ (n 5) 5.
329 ibid.
appointment of the tribunal, by appointing experienced arbitrators that have a proven track record of efficient case management techniques.

9.2 Arbitrators efficiency

The arbitrator has the possibility of ensuring efficiency of the proceedings by perhaps taking the important step of refusing appointment, if he evaluates it so that he will not have enough time on his hands to conduct the proceedings in an efficient manner, and that his unavailability might contribute to delaying the proceedings. Karl-Heinz Böckstiegel wrote that arbitrators should more frequently refuse appointments due to a ‘realistic time calculation’, as he stated that; “I have frequently seen colleagues accepting appointments and then, once the procedure got started, having to point out that they had almost no or very little time available for procedural meetings, time-consuming file examination and hearings in the near and more distant future”. In some cases, the best step to ensure the efficiency of proceedings is perhaps to do nothing at all, and refuse an appointment due to scheduling difficulties. In order to solve this problem, many institutions have required the arbitrators to make their availability known before they are appointed, which may limit the instances where an arbitrator accepts an appointment he should refuse due to scheduling issues.

After the dispute has arisen, and the tribunal has been appointed, the parties might be unlikely to agree on procedural factors. Subsequently, the arbitrator has the possibility, in cooperation with the parties, to tailor the procedure to fit the needs of the particular dispute at hand. As that exact possibility is perceived as one of the advantages of arbitration as compared litigation, arbitrators should be encouraged to make good use of it as it can ensure an efficient conduct of the proceedings. Before the arbitrator or tribunal begins to establish such procedures, it must be examined if the parties have exercised their procedural autonomy regarding certain aspects of the proceedings, whether the applicable rules provide any mandatory framework and whether the parties have any special considerations regarding the case management.331

331 ibid 4.
The case management conference or the first organizational meeting might be the first time where the parties interact with the tribunal. That meeting is therefore an opportunity for the tribunal to express its clear commitment to efficient procedures. The tribunal could also use the opportunity to announce that any wasteful practices on behalf of the parties will be assessed when valuating cost. To circumvent excessive or last-minute document production requests, the time-table that the tribunal will establish should include all procedural steps that are likely to happen during the proceedings or can be foreseen at the time when it is established. That might include requests for interim measures (if foreseen that such requests will be submitted by the parties), document disclosure, witness statements etc. It is although important that this procedural plan leaves some room for flexibility of the procedure, as it is common as the case develops, and parties become aware of the submissions of the opposing party, they will need additional submissions to respond. However, by laying out clear rules from the beginning, but leaving some space for flexibility, the arbitrator has the opportunity to establish an approach that the tribunal will stand firm against dilatory tactics or other attempts on behalf of the parties to manipulate or derail the proceedings. By doing so, the arbitrator ensures procedural certainty and avoids that later on in the process, a party can claim a misconception when the arbitrator attempts to limit excessive document production or a late admission of evidence.\(^{332}\) Such express signals may possibly include that no evidence should be submitted after a certain deadline (a ‘cut-off date’), requests for extensions will only be considered in exceptional circumstances, and that witness testimony will be limited to the issues the parties have raised in their memorandums or reports.\(^{333}\) If a party submits evidence after a specific deadline of the procedural timeline, the arbitrator has the discretion to refuse to accept such evidence, as it goes against the procedural timetable agreed upon, moreover, the case law in section 8.2 established that the courts have respected such decisions and found it not to breach due process requirements.

Such case management techniques might also be equipped to decrease the due process paranoia, as when the arbitrator has established a clear case management approach, the parties are perhaps less likely to conduct procedural maneuvers to derail the proceedings. When dealing with guerrilla tactics or dilatory tactics, the most effective way may be to try to prevent such conduct at the outset of the proceedings by outlining a code of conduct between the parties where clear

\(^{332}\) Berger and Jensen (n 16) 423.  
\(^{333}\) Karl-Heinz Böckstiegel (n 330) 7.
rules are established regarding what kind of conduct will not be tolerated during the proceedings. Furthermore, such code of conduct might also include consequences if such behavior arises. It is necessary that both tribunals and parties are aware of the threat that guerrilla tactics and dilatory tactics have on arbitral proceedings. Parties that want to circumvent this kind of conduct might also consider agreeing that the IBA Guidelines on Party Representatives applies to their proceedings. Although, despite whether such a code of conduct or an agreement has been reached between the parties, the tribunal has wide discretionary powers to address and react to guerrilla or dilatory tactics and needs to be unafraid of exercising it, but it is perhaps the problem of due process paranoia that obstructs him from doing so. When parties become aware of the fact that the arbitrator is susceptible to procedural maneuvers, such circumstances invite further dilatory tactics to the proceedings, as parties take advantage of the situation to derail the proceedings. The importance of the arbitrator exercising his discretion to ensure efficiency and circumvents any dilatory tactics is therefore fundamental.

9.2.1 Efficiency in document production

A part of a successful and effective case management is a reasonable approach on document production. Arbitration has been criticized for becoming more and more ‘document heavy’, which eventually contributes to having an impact on the efficiency of the proceedings. When it comes to document production, arbitrators need to keep in mind the complexity of the case, the cost implications of the proceedings, and how their decision will impact these factors. Although the arbitrator needs to ensure that the parties’ right to be heard is safeguarded, and the award is enforceable, it is his duty to avoid complications that increase the length and costs of the proceedings. Excessive document production requests can be exercised by a party as a dilatory tactic, which can be quite common, resulting in complications of the proceedings. It is therefore fundamental that the arbitrator adopts a reasonable approach on how to manage the proceedings when it comes to what evidence he should accept and how to conduct the

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335 ‘IBA Party Representation Guidelines’ (n 181).
338 ibid.
339 Horvath and Wilske (n 16) 230.
1.5. The evidentiary process. Consequently, the IBA Rules on the Taking of Evidence in International Arbitration were amended in 2010, where a special emphasis was put on the need for efficiency in document production. The rules impose duties on both parties and arbitrators to conduct the document production efficiently.

However, parties are in many instances likely to do the opposite and request excessive document production, which needs to be limited, or perhaps, to refuse to comply with document production requests from the other party or the tribunal. To address such situations arbitrators could use the ‘adverse inferences doctrine’ more frequently and assertively. The adverse inferences doctrine is entailed in Article 9(5) of the IBA Rules on the Taking of Evidence and states: “If a party fails without satisfactory explanation to produce any document requested in a request to produce to which it has not objected in due time or fails to produce any document ordered to be produced by the arbitral tribunal, the arbitral tribunal may infer that such document would be adverse to the interests of that party”.

This doctrine has recently gained more support, as the Paris Court of Appeal issued a decision enforcing a final award that was based in part on the aforementioned rule of adverse inference. A party challenged an arbitral award arguing that the arbitrator should not have relied on the IBA Rules without conferring the parties, and that by drawing an adverse inference as a result of non-production of documents the tribunal had disregarded mandatory due process rights. The court disagreed, referring to the first procedural order, where the arbitrator had mentioned the IBA Rules and was therefore allowed to use them to reach a conclusion in the case, and that the rule did not disregard due process norms.

9.2.2. Rendering of the award

The arbitrator has the duty to avoid delay during the entire proceedings, including the time it takes to render the award. It is however not uncommon that delays occur during that stage. In order to solve this problem, the ICC introduced sanctions, or possible cost consequences if the arbitrators did not respect the timeframe for rendering an award, however, such consequences

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340 For example articles 2.2(e) and 3.12(c) of the ‘IBA Evidence Rules’.
341 ibid art. 3(10); United Nations Commission on International Trade Law, ‘UNCITRAL Arbitration Rules’ (n 106) art. 27.
342 ‘IBA Evidence Rules’ (n 340) art. 9(5).
do not exist under arbitral other arbitral rules. Neither the UNCITRAL Model Law nor the *lex arbitri* of most jurisdictions provide for any consequences of a delayed rendering of an award. With regards to recent development in arbitration, increasing criticism on the efficiency of proceedings, this could perhaps push parties further in the direction of institutional arbitration, as it might be considered the more efficient option. There are however examples of *lex arbitri* that have introduced deadlines for rendering an award in its arbitration acts, for instance in Turkey, where Article 10(B) of the Arbitration Act states: “Unless otherwise agreed by the parties, the award must be made by the arbitrator or arbitral tribunal on the merits of the case within one year of the appointment of the arbitrator if there is a sole arbitrator, and within one year of the issuance of the first minutes of the first hearing of the tribunal if there is more than one arbitrator...” Turkey has therefore gone quite far to ensure efficiency in its arbitral legislation and although parties can of course agree to extend the time limit, the provision should be taken seriously by the tribunal, as Article 15(A) declares that if the award is not rendered within the ‘*arbitration term*’, the award may be set aside.

Other arbitral institutions might consider following the ICC and introduce cost consequences to a late rendering of an award. Arbitrators should also be readier to accept higher accountability constraints with regard to their remuneration, as the experienced and efficient arbitrator has nothing to fear when it comes to such delay accountability constraints. Such cost consequences should be more favored than the approach Turkey has taken with its arbitration law and the rendering of the award, which in the authors opinion can be considered quite forceful.

9.3. Indemnity costs as a tool to promote efficiency

As mentioned in section 5.1, some arbitral institutions encourage arbitrators to take the conduct of the parties during the proceedings into account when deciding on costs. Therefore, when deciding on costs, tribunals view the conclusion of the dispute, but also the parties’ procedural conduct during the proceedings. The allocation of costs can be a useful tool to increase and encourage efficiency, as parties may be hesitant to employ dilatory tactics when the arbitrator

344 ICC International Court of Arbitration, ‘ICC Court Announces New Policies to Foster Transparency and Ensure Greater Efficiency’ (n 146).
346 ibid.
347 Mohanty and Raina (n 157) 107.
has been clear that such tactics will be taken into consideration when allocating cost, or a permission or duty to do so is expressed in the applicable rules, such as Article 38 of the ICC Arbitration rules.\textsuperscript{348}

Furthermore, there are examples where national courts have provided for indemnity costs or sanctions due to dilatory attempts on behalf of parties, in challenge proceedings. In the case of the Hong Kong Court of Appeal in the matter of Pacific China Holdings v. Grand Pacific Holdings, the court reinstated the award set aside by the lower court, but also issued a separate decision on costs where it ordered the respondent to pay claimant’s costs from the proceedings of the court below it, as well as the costs incurred due to the appeal. The court held that if a party turned unsuccessful in challenging an award, it should pay the costs associated with the challenge proceedings, unless special circumstances applied. The court furthermore did not find the fact that the challenge was based on reasonable arguments to fall under special circumstances, and therefore decided that the challenging party should bear the cost of the proceedings.\textsuperscript{349} This approach is however not taken by courts in all jurisdictions, many take a more conservative approach to decisions on cost, as different rules apply in various jurisdictions on decisions on costs before national courts. Courts in both Australia and England have taken a more conservative approach, where the costs are awarded on a party-and-party basis and costs on indemnity basis are only applied in special circumstances.\textsuperscript{350} Courts in the United States have however moved closer towards the Hong Kong approach, where a court in one case for instance stated that “challenges to commercial arbitral awards bear a high risk of sanctions as they undermine the integrity of the arbitral process”.\textsuperscript{351} In the author’s opinion, it would be advised that countries adopt an approach similar to the approach of the Hong Kong Courts, where indemnity costs are awarded in cases of unsuccessful challenges of arbitral awards. That would perhaps result in less applications of court review of awards, which would certainly aid in increasing efficiency of arbitral proceedings.

\textsuperscript{348} ibid 108.  
\textsuperscript{349} Grand Pacific Holdings Ltd. v. Pacific China Holdings Ltd. (n 298).  
\textsuperscript{350} Mohanty and Raina (n 157) 121.  
\textsuperscript{351} ibid 122.
9.4. The institutional approach and the regulatory framework

The rules of arbitral institutions, most if not all ensure the arbitrator with the widest discretionary powers to conduct the proceedings as he sees fit, given that he safeguards due process requirements. But the rules do more than that. They direct arbitrators towards more efficiency. The LCIA Rules for instance provide that the tribunal has a “duty to adopt procedures suitable to the circumstances of the arbitration, avoiding unnecessary delay and expense, so as to provide a fair, efficient and expeditious means for the final resolution of the parties’ dispute”.352 As the institutions have tried and tested their rules throughout the years, they have responded to the needs of users, and adopted rules that support a fair and efficient procedural framework. Their recent procedural innovations, such as the early case management conference, expedited proceedings, emergency arbitrators, etc., ensure that an applicable framework provides the parties with the opportunity of an efficient arbitration, and the tribunal with the regulatory framework to conduct the proceedings as efficiently as possible. Users have stated that their second most preferred factor in evaluating what institution they should choose is the level of administration, including efficiency.353 It is therefore no surprise that the institutions have endeavored to find solutions that increase procedural efficiency in cases they manage. The institutions have worked hard to offer rules that ensure best practices of international arbitral proceedings. Moreover, recent research reveals that users have responded well to these new procedural innovations of the institutions and shows a good increase in number of users looking to use the expedited procedures they have offered.354

Despite the effort that the institutions have contributed to promote efficiency and in particular strengthened the regulatory framework,355 users still perceive lack of efficiency as a major disadvantage of arbitration.356 The existing institutional rules provide for good and extensive options for sanctions to dilatory tactics and other delay in the arbitral procedure, however, it seems as though the problem is the lack of use of these sanctions, rather than the availability of them. The main cause for this problem is identified as due process paranoia. The analysis conducted in this thesis has revealed that the issue of due process paranoia is not warranted but finding an appropriate solution to that problem is easier said than done.

353 ‘2018 International Arbitration Survey Report’ (n 5) 6.
354 White & Case (n 171).
355 see section 5.1.
10. Conclusion

International arbitration has gained wide popularity worldwide for various reasons. Arbitration provides parties with an alternative to often inefficient, inflexible and expensive litigation before national courts. The advantages of arbitration have long been perceived to be the opposite of such proceedings, as arbitral proceedings are flexible and efficient, but the discussion on the latter has come to change, as efficiency, or the lack of it, is now perceived as a major disadvantage of arbitration. As this thesis has demonstrated, it is impossible to blame only the parties and their representatives, or to hold only the arbitrators accountable for the causes of this inefficiency, all those involved in arbitral proceedings can contribute to their share. Parties are not actively utilizing their pre-arbitral choices to ensure efficiency, and in addition some employ dilatory tactics, while arbitrators can be overly susceptible to such tactic due to their due process paranoia. Then again, if the parties are tempted to abuse that situation, a vicious cycle of delays might occur.

In addition to the respective roles that each stakeholder can contribute to enhancing efficiency, greater success is reached through cooperation. Arbitral institutions make good use of that cooperation by collaborating with users and the arbitral community in whole and include leading specialists when revising their rules. Consequently, the feedback from users and arbitrators also impact the rule amendments. Although, greater collaboration can always be reached, and despite institutions being in competition with each other, collaboration between them could promote efficiency further, as they could for instance share internal procedures and case management regarding efficiency.

Additionally, users themselves cannot reprimand the arbitral community for being inefficient, not admitting that they are a part of the problem. Users that intend to make full use of arbitration as an efficient dispute resolution need to be willing and able to contribute to promoting efficiency through the arbitration agreement. The parties need to actively utilize their pre-arbitral choices as doing so can have a great impact on the proceedings. However, no matter how efficient the regulatory framework is, or how committed the parties are at the beginning to conduct the proceedings efficiently, circumstances where a firm case management of the arbitrator is needed, are unavoidable. As all the factors provided in the previous section may aid in promoting efficiency, if a party employs dilatory tactics, and abuses the fact that the arbitrator is over-concerned with due process requirements, it becomes a question of who in fact is leading the process, the arbitrator or the party who attempts to derail the proceedings.
It is an important factor to keep in mind that arbitration is a creature of consent, party autonomy is a prevailing factor, but even though arbitration’s existence relies on the choice of the parties and their autonomy, it is undeniable that tribunals have fundamental discretionary powers to ensure the integrity and the efficiency of the arbitral proceedings. Users seek more efficiency when it comes to arbitral proceedings and bearing in mind the risk for delays in the proceedings that either arbitrators, or parties themselves initiate, due process paranoia or the inability of some tribunals to conduct arbitral proceedings efficiently poses a real threat to international arbitration.

The research conducted in this thesis on due process paranoia, the courts approach to the procedural discretion of the arbitrator, reveals that due process paranoia is unjustified and that arbitrators should be confident in exercising their discretion more efficiently. Despite the numerous case law that support this contention, the issue remains a barrier to efficiency in arbitral proceedings. It is of great importance that an active discussion is upheld in the arbitration community regarding the gorge that remains between the perceived consequences arbitrators draw from procedural decisions and the actual approach courts have to such decisions. In the authors opinion, an active discussion on the need for a change of the procedural approach of arbitrators would be beneficial.

Even so, an active discussion on the matter might not suffice. Perhaps the regulatory framework of international arbitration will come to change in the near future to ensure more efficient arbitral proceedings. As the institutions have responded to the needs of users and provided a detailed framework that offers the opportunity of efficient proceedings, the lex arbitri might be the next logical step of regulatory changes in order to promote efficiency.

In the authors opinion, wording that invites due process concerns into the proceedings should be avoided at all cost. The wording of the Model Law, that the parties should be provided with a ‘full opportunity’, might be relied on by a party who wished to delay the proceedings or make unnecessary submissions. Most arbitral institutions have implemented the wording ‘reasonable opportunity’, and when the working group amended the UNCITRAL Arbitration Rules with efficiency considerations in mind, a reasonable opportunity was preferred in order to prevent a rigid interpretation on the requirement and avoid due process concerns. Jurisdictions that are even considered ‘Model Law jurisdictions’, such as Hong Kong, have amended the mandatory due process requirement and now entail the requirement of a reasonable opportunity instead of the provision of the Model Law that provides for a ‘full opportunity’.
Moreover, the case law referred to in this thesis, as well as the IBA research conducted on the matter, point to an interpretation of this particular due process requirement in line with the wording incorporated in the UNCITRAL Arbitration Rules and the rules of the various arbitral institutions. The right of the parties to present its case is not unlimited, the requirement can best be described as a ‘reasonable opportunity’ to present its case, and wording that invites an interpretation beyond reason into the proceedings should be avoided. This wording of the Model Law is therefore, in the authors opinion obsolete, and it is time to consider amending the UNCITRAL Model Law and revise the ‘full opportunity’ requirement. Additionally, as the Model Law is the exemplary of arbitration law in many jurisdictions, an amendment to the Model Law would perhaps urge states to consider further revisions of its lex arbitri to enhance the efficiency of arbitral proceedings.

Additionally, the author would like to comment on the lex arbitri of her own jurisdiction, the Icelandic Act on Contractual Arbitration. Article 7 of the act states that “the arbitral tribunal shall always afford the parties the opportunity to present their respective cases”, and while this particular wording does not include such decisive statements such as the parties should be provided with the ‘full opportunity’ of presenting its case, this wording could still be relied on by a party who wished to prolong the proceedings, as it does state that the tribunal “shall always afford the parties the opportunity…” An amendment of this article that would be better suited at reconciling due process concerns might include wording such as: “The arbitral tribunal shall afford the parties the reasonable opportunity”.

Balancing due process and efficiency is highly important. Due process requirements should not be sacrificed at the altar of efficiency, as they are crucial to every judicial system. While there might be some tension between those two factors and achieving the right result, the flexibility of international arbitration provides for the possibility of obtaining a reasonable balance. Party-autonomy being the cornerstone of the arbitration system, such a system performs best if the parties are all driving in the same direction. While those circumstances certainly apply while a dispute has not arisen, parties are quick to part ways once the dispute emanates. The parties need to utilize their pre-arbitral choices to a greater extent while they are likely to reach such agreements and when the parties do not agree on the procedural conduct, the arbitrator’s focus when administering the proceedings should be on the ultimate goal of the proceedings, not a singular request produced by a party in the heat of the battle. The arbitrator needs to conduct

357 Lög um sammingsbundna gerðardóma, nr. 53 1989 art. 7.1. Emphasis added.
the proceedings reasonably under the circumstances, *i.e.* ensuring a fair and efficient proceedings, and should do so confidently, as the tribunals wide discretionary power to do so has been firmly confirmed.
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