Società Italiana di Diritto Internazionale e di Diritto dell'Unione Europea

Segreteria SIDI
c/o ISGI CNR, Via dei Taurini, 19
00185 Roma (Italia)
Tel 390649937673 info@sidi-isil.org

TESI DI DOTTORATO IN DISCIPLINE GIURIDICHE INTERNAZIONALISTICHE ED EUROPEE

INDIRIZZO E-MAIL: eterrizzi@luiss.it

NOME E COGNOME: Elena Terrizzi

UNIVERSITÁ: LUISS Guido Carli

TUTOR DELLA TESI DI DOTTORATO: Prof. Pietro Pustorino

CICLO DI DOTTORATO E ANNO DI INIZIO: XXXVII - 2021

TITOLO DELLA TESI: Due Process and Rules of Evidence in International Comemrcial Arbitration

ABSTRACT

The dissertation examines whether and how due process guarantees – which are known to govern the judicial proceedings – can comply with the private and flexible nature of international commercial arbitration. Indeed, by striking a balance between the scope of such procedural guarantees and the exercise of arbitral discretion, the discussion will show that the parties' rights to be heard and to be treated equally – which constitute the essence of due process – are not unrelated to the hallmarks of arbitration – these being speediness, flexibility and efficiency. Rather, such procedural guarantees are deemed to strengthen the growth and acceptance of arbitration as an alternative method of dispute resolution, as long as they are tailored to the proceeding and reasonably applied. As a consequence, the research will assess why the phenomenon of "due process paranoia" has spread over time – thus jeopardizing the efficiency of arbitration – and how to overcome it.

Chapter I will examine the fragmented legal framework of due process at the international level, by attempting to define its core elements. In particular, the analysis will focus on the influence that the parties' procedural guarantees exercise towards the arbitral discretion in conducting the proceeding, especially when evidentiary issues are at stake. Indeed, as the taking and presentation of evidence to the arbitral tribunal represent a paramount phase of the proceeding – upon which the final outcomes of most arbitrations is strongly based – the work primarily focuses on the interplay between

due process guarantees and evidentiary issues. In doing so, it will be thus questioned how the arbitral discretion and the parties' due process rights can coexist, as to successfully strengthen the finality of the arbitral proceeding. Moreover, due to the increased use of technological tools, which are nowadays adopted for the resolution of transnational disputes, the discussion will highlight the importance that remote hearings have earned over time. Along with the benefits of such a technological development, however, the analysis will also focus on the concerns that virtual hearings bring in relation to due process: namely, the concrete compatibility of remote hearings along with the arbitrators' duty to safeguard the parties' rights to be heard and to be treated equally.

The applicability of the European Convention on Human Rights' ("ECHR") principles to the arbitral venue will then be considered, especially by examining the recent case law on the relationship between international commercial arbitration and the protection of human rights. In particular, by referring to the due process rights provided for in Article 6 of the ECHR, the discussion will analyse the European Court of Human Rights' approach towards the parties' voluntary waiver of procedural guarantees, which represents one of the maximum expressions of the principle of parties' autonomy.

Lacking any tailored set of procedural rules designed for arbitration, the analysis will then focus on the recent arbitral trend to adopt overly cautious decisions related to due process, which is deemed to jeopardize the very essence of arbitration itself. Indeed, the aforesaid phenomenon of "due process paranoia" constitutes a growing issue in international commercial arbitration, as certain arbitral conducts – which are mainly influenced by the fear of having the final award set aside – are deemed to weaken the stability and legitimacy of arbitration, by lessening its speediness and efficiency, along with causing an avoidable increase of its costs.

After showing that the arbitrators' procedural conduct might be excessively driven by the fear of a potential challenge to be raised against the final award, this first part of the research lays the foundation to the main question of the following discussion: whether arbitrators have reasons for the "due process paranoia" and how to dispel it for the benefit of future arbitrations.

Chapter II examines the current approach undertaken in selected civil-law (Italy, the Netherlands and Switzerland) and common-law (the United Kingdom, Singapore and the United States of America) jurisdictions towards due process in international commercial arbitration. This chapter is thus aimed at assessing how the arbitral tribunals generally deal with the evidentiary requests presented by the parties, provided that, in lack of any specific set of provisions, the very basic rules of evidence are those arising from the definition of due process that generally operates at the international level. The discussion outlines the fact that, within few limitations stated by provisions arising from the parties' agreement – and from mandatory obligations – arbitrators may thus be called to take unpredictable decisions on the taking of evidence during the proceeding, which – provided that evidentiary issues play a remarkable role for the correct conduct of the proceeding – may constitute a ground for challenging the arbitral decision at the post-award stage.

Accordingly, as international transactions involve parties from different legal and cultural background, the discussion introduces a comparative analysis between common law and civil traditions, by highlighting some of the most striking differences in the field of the collection and

presentation of evidence before arbitral tribunals. In this field, through the analysis of the approaches adopted by several jurisdictions towards due process violations, it clearly emerges that minor breaches of procedural rights cannot prejudice the validity of arbitral awards. More specifically, national courts commonly show a certain deference towards arbitral discretion, thus preventing parties' abusive conducts – which are grounded on alleged procedural violations – from causing the set aside of an award, and therefore fostering the finality of arbitration.

Hence, according to the case law analyzed in this field, it is possible to glimpse a certain degree of convergence among the attitude of domestic courts from different jurisdictions towards arbitral decisions. Therefore, this chapter will draw some conclusions on the fact that, in practice, arbitrators have no reasonable grounds to be influenced by any "due process paranoia".

Chapter III will support the idea that due process and efficiency shall thus be considered as complementary – rather than opposing – goals. By highlighting the distinction between procedural (objective) and substantive (subjective) fairness, some conclusions will be drawn on how arbitrators should deal with due process concerns during the proceeding. In the attempt to foster a balance between procedural fairness and efficiency, reference will be made to some instruments that the arbitral tribunal shall undertake, from the outset of arbitration, as to better safeguard the finality of the arbitral award. More precisely, such procedural tools include the implementation of early case-management techniques, the development of renewed rules of evidence to be adopted as instruments of soft-law, and, finally, the need to empower the finality of the awards through "strong" arbitral tribunals.

Supporting the idea that evidentiary rules are necessary for the fair and efficient conduct of arbitral proceedings, the research will examine how such procedural rules should be designed and applied to the arbitral venue, without compromising the flexibility of the procedure. In this field, since legal traditions vary significantly, one of the major issues is constituted by the concrete difficulty in choosing a set of procedural rules which could satisfy both parties' expectations, without particularly favoring any of the conflicting approaches. The analysis will thus focus on the content of the existing IBA Rules on the Taking of Evidence, which actually constitute a useful guideline for the efficient conduct of international arbitrations. The exam will then question whether it is time to look for a renewed and harmonized regulation to better govern evidentiary issues, especially those triggered by the parties' different jurisdictional background.

In conclusion, according to the relevant case law and scholarship outlined in this work, the research will prove that the "due process paranoia" has no reasonable nor legal basis. Indeed, evidence shows that domestic courts are quite reluctant to set aside and/or to refuse recognition and enforcement of foreign arbitral awards. It follows that arbitral tribunals should have the confidence to act decisively in safeguarding the parties' right to be heard and to be treated equally: accordingly, arbitrators should not be excessively cautious and fearful of having their award vacated due to a potential violation of due process. To this end, the procedural techniques suggested in Chapter III are deemed to increase the arbitrators' confidence in taking charge of the proceeding, as well as to lessen the aforesaid paranoia. The implementation of such procedural tools is hence believed to better grant the efficiency of the proceeding, by strengthening the legitimacy and finality of arbitration.