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# **DUE PROCESS PARANOIA**

Markus Schifferl

- no uniform definition of due process
- generally accepted elements
  - fair and impartial treatment of the parties
  - opportunity for a party to present its case
  - opportunity to deal with the case of the opponent
  - no surprise decision
- intended as a shield to protect the parties
- often (mis)used as a sword to undermine efficiency
  - repeated requests for extension of deadlines
  - belated new claims, arguments or evidence

- tribunal grants unjustified requests out of excessive caution
  - fear that the award may be successfully challenged
  - fear that the award may not be enforced
  - liability of the arbitrator
- due process paranoia can result in ...
  - prolongation of the proceedings
  - additional costs for parties
  - frustration of arbitration users
- due process paranoia hurts arbitration
- no reason for due process paranoia (in most jurisdictions)

### 3. overestimated risk of negative consequence

- great reluctance to set aside arbitral awards
  - high bar for due process-violation
  - 1 out of 112 due process-challenges successful in England and Wales
  - 7% of challenges successful in Switzerland
- modern arbitration rules support arbitrators to be decisive
- modern arbitration rules promote / require efficiency
  - art 17.1 UNCITRAL Rules
  - artt 22.1 and 22.4 ICC Rules
  - artt 28.1 and 28.2 Vienna Rules
- duty to immediately object to perceived violation of due process

## 4. underestimated risk of reputation loss

- wanted procedural qualities in an arbitrator (2019 survey)
  - issuing an award within a reasonable period of time (70%)
  - being willing to make difficult decisions on procedural issues (68%)
  - possessing case and counsel management skills (68%)
- qualities that an arbitrator should therefore not have
  - laissez faire attitude to proceedings
  - weak in decisions
  - excessive caution / timidity / due process paranoia
- reputation damage resulting therefrom often underestimated

THEREFORE

- be bold !
- ... but not reckless !

**THANK YOU !**