

Recibido: 17 octubre 2106  
Aceptado: 30 noviembre 2016

*Arbitraje*, vol. IX, n° 3, 2016, pp. 661–676

***The Use and Abuse of “Due Process” in  
International Arbitration*** \*

Bernardo M. CREMADES \*\*

*Summary:* I. Background of Due process. II. “Due process” in international arbitration. III. Content and requirements of arbitral due process. IV. The need for strong Arbitral Tribunals. V. Proof in international arbitration. VI. The breach of “due process”. VII. Abuse of “due process”. VIII. “Due process” and judicial control. IX. “Due process”, shield or sword?.

*Abstract: The Use and Abuse of “Due Process” in International Arbitration*

*The demands of due process are present in relation to any decision made by an arbitrator during the processing of arbitral proceedings. However, relatively frequently lawyers representing the parties raise questions of due process in a threatening way, suggesting that if the arbitrator does not accept their procedural proposals the result would be a breach of due process. The lawyers do not fail to draw attention to the consequences for the enforcement of the decisions of a breach of due process. Therefore, it is of great interest to analyze and distinguish when it is justified to raise questions of due process, and when they are an abuse which the arbitrator should reject for the benefit of orderly and effective arbitral management.*

*Keywords:* INTERNATIONAL ARBITRATION – DUE PROCESS – ABUSE – JUDICIAL CONTROL.

*Resumen:* El uso y abuso del debido proceso en el arbitraje internacional

Las solicitudes de debido proceso están presentes en relación con cualquier decisión adoptada por un árbitro a lo largo del proceso arbitral. Sin embargo, con relativa frecuencia los abogados que representan a las partes interponen este tipo de solicitudes de mane-

\* Alexander Lecture pronunciada Londres el 16 noviembre 2016 en el marco del *Chartered Institute of Arbitrators*.

\*\* Socio Fundador de Cremades y Asociados.

ra amenazadora, sugiriendo que si el árbitro no acepta sus propuestas de procedimiento, incumpliría las reglas que regulan esta institución. Los abogados no dejan de llamar la atención sobre las consecuencias para la ejecución de las decisiones de incumplimiento del debido proceso. Por lo tanto, es de gran interés analizar y distinguir cuando está justificado plantear cuestiones de debido proceso y cuando nos hallamos ante reclamaciones de carácter abusivo, que el árbitro debe rechazar en favor de una gestión arbitral ordenada y efectiva.

*Palabras clave:* ARBITRAJE INTERNACIONAL — DEBIDO PROCESO — ABUSO — CONTROL JUDICIAL.

## I. Background of Due process

The reference in Article 38.1 (c) of the Statute of the International Court of Justice to “the general principles of law recognized by civilized nations” has given rise to a rich evolution of international law and, most particularly, economic international law. Bin Cheng made an important contribution with his book “General Principles of Law as applied by international Courts and Tribunals”<sup>1</sup>. The seminal chapter on the principle “*auditur et altera pars*” should particularly be taken into account in all arbitral proceedings.

The demands of due process are present in relation to any decision made by an arbitrator during the processing of arbitral proceedings. However, relatively frequently lawyers representing the parties raise questions of due process in a threatening way, suggesting that if the arbitrator does not accept their procedural proposals the result would be a breach of due process. The lawyers do not fail to draw attention to the consequences for the enforcement of the decisions of a breach of due process.

Therefore, it is of great interest to analyze and distinguish when it is justified to raise questions of due process, and when they are an abuse which the arbitrator should reject for the benefit of orderly and effective arbitral management. The origin of “due process of law” The requirements of due process are the reflection in arbitral proceedings of constitutional demands. Amendment 14 of the Constitution of the United States of America informs us that “no State shall deprive any person of life, liberty or property, without due process of law”<sup>2</sup>.<sup>2</sup> In

---

<sup>1</sup> Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, Cambridge, 2006.

<sup>2</sup> Amendment XIV, section 1, of the Constitution of the United States of America: “All persons born or naturalized in the United States, and subject to the jurisdiction thereof,

England the term “due process” first appears in the Magna Carta, 1354 version, during the reign of Edward III<sup>3</sup>.

In the history of Castile and Aragon the action of amparo or appeal for legal protection developed as a procedural guarantee in addition to the ordinary guarantees for citizens. The *Liber Iudiciorum* (Fernando III, 1241) stated that “you shall be king, if you abide by law, but if you do not abide by law, you shall not be king”<sup>4</sup>. The *Tercera Partida* (title 23, Law 13) spoke of “*recurso omissio medio*”<sup>5</sup>. The legislation of Castile was reflected in the American territories. The colonial amparo (Andrés Lira) took shape in the Viceroyalty of New Spain<sup>6</sup>. The so-called “*recurso de obediencia pero no se cumple*” [“appeal of obedience without compliance”] appears in the code of the laws of the Indies (law 22, title 1, second book). Behind this concept is the origin of the legal possibility of respecting an order, but where the order is not complied with because the person who ought to enforce it legally deems that it is not lawful<sup>7</sup>.

In the Kingdom of Aragon the confrontation between the Crown and the different administrative levels gave rise to the so-called “Justice of Aragon”, which, with the so-called “process of manifestation”, had authority even over the king to avoid abuse of persons. The kings of Aragon took an oath before the Justice<sup>8</sup> with the formula described by Antonio Pérez: “we who are equal to you and all together more

---

are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws”.

<sup>3</sup> The phrase “due process of law” appeared in a statutory rendition of Carta Magna in 1354 during the reign of Edward III of England as follows: “no man of what state or condition he be, shall be put out of his lands or tenements nor taken, nor disinherited, nor put to death, without he be brought to answer by due process of law...” (28 Edw. 3, c 3).

<sup>4</sup> J. González González, *Reinado y diplomas de Fernando III*, Córdoba, Monte de Piedad y Caja de Ahorros de Córdoba, 1986, doc. 670, pp. 212 ss.

<sup>5</sup> “Las Siete Partidas del Rey D. Alfonso X el Sabio” (King of Castille and Leon 1221–1284), Imprenta Real, Madrid 1807.

<sup>6</sup> A. Lira González, *El amparo colonial y el juicio de amparo mexicano: antecedentes novohispanos del juicio de amparo*, México, Fondo de Cultura Económica, 1972.

<sup>7</sup> Vid. A. García Gallo, “La ley como fuente del Derecho en Indias en el siglo XVI”, *Estudios de Historia del Derecho Indiano*, Madrid, 1972, pp. 169 ss.

<sup>8</sup> G. Fatas Cabeza, *Heráldica aragonesa. Aragón y sus pueblos*, Zaragoza, 1990, p. 20.

than you, make you king of Aragon, if you swear to comply with the laws and, if not, we do not"<sup>9</sup>.

We can see, therefore, how "due process" emerges in the Anglo-Saxon world. At the same time, the appeal for legal protection is established in the kingdoms of Castile and Aragon, precisely to avoid the abuse of persons, even by the king himself.

Today, in the Universal Declaration of Human Rights, Paris, 10 December 1948, it is stated (Article 10) that "everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations..."<sup>10</sup>. The European Convention for the Protection of Human Rights (4 November 1950) also states (Article 6) that "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law"<sup>11</sup>.

Our constitutions also contain fundamental rules guaranteeing due process. Article 24.1 of the Spanish Constitution speaks of "effective legal protection", the text of which is used in the Spanish Constitutional Court's case law to speak of effective arbitral protection. Article 24.1 continues that under no circumstances shall a person be deprived of their right of defence<sup>12</sup>.

## II. "Due process" in international arbitration

The requirement of due process as a constitutional guarantee is something that has been developing in Anglo-Saxon and continental laws as a fundamental right of the citizen. In arbitral proceedings, the

---

<sup>9</sup> Antonio Pérez, "Relaciones de Antonio Pérez secretario de Estado que fue del Rey de España", 1598. *Vid.* R. Giesey, *If not, not. The oath of the aragonese and the legendary laws of Sobrarbe*, Princeton University Press, 1968.

<sup>10</sup> Universal Declaration on Human Rights, United Nations General Assembly, Paris, December 10, 1948. Art. 10: "everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him".

<sup>11</sup> European Convention on Human Rights, drafted in 1950 by the Council of Europe, entered into force on September 3, 1953. Art. 6, "Right to a fair trial: 1) in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law".

<sup>12</sup> Art. 24 CE Española, 1978: "1) todas las personas tienen derecho a obtener la tutela efectiva de los jueces y tribunales en el ejercicio de sus derechos e intereses legítimos, sin que, en ningún caso, pueda producirse indefensión".

basic rule consists of submitting to the principles of equality, fair hearing and the right of contradiction. The parties should be treated equally and each one should be given sufficient opportunity to present their case.

Due process in international arbitration requires the arbitrators to conduct the proceedings and, consequently, draft their awards in such a way that their awards are enforceable. And this means that they should make their best efforts to ensure that their awards are not subject to annulment in the place of the arbitration and that they are also enforceable where the person entitled to enforce them wishes to do so.

In their decision making, arbitrators should first ask themselves in accordance with which applicable law the content of the due process should be assessed. Naturally, their starting point must be the wishes of the parties in dispute. Furthermore, the arbitrators should take into account conventional and customary international law.

The world of international arbitration currently enjoys a great array of international treaties, notably the 1958 New York Convention and the 1965 Washington Convention with regard to arbitration to protect investment. I believe that both Treaties should be a starting point when analyzing the meaning of due process requirements.

Moreover, we currently enjoy the benefits of an important customary international economic law. The difficulty inherent in other sectors of international law to delimit custom and usage is simplified in the world of arbitration by the "*opinio iuris*" of the legal rules repeatedly endorsed in arbitral awards.

### **III. Content and requirements of arbitral due process**

When something should be considered as a requirement of due process in arbitration has a high discretionary content. It is the arbitrator who should, in view of the circumstances, decide whether a decision can be required or, on the contrary, prohibited depending on his or her understanding of due process. Suffice to recall the old Russian proverb "do not fear the law, but the judge". In order to ascertain what the content of due process is in arbitration entails analyzing the different stages of the arbitral proceedings. In that respect, a magnificent book by Kurkela–Turunen (*Due process in International Com-*

*mercial Arbitration*)<sup>13</sup> analyses the stages of arbitral proceedings presenting questions for arbitrators of due process in the following six general areas:

1. when interpreting the arbitral agreement as the basis for accepting or denying their own jurisdiction. It is well known that the arbitral agreement has a positive effectiveness, permitting the development of arbitral proceedings, and a negative effectiveness, excluding the ordinary courts from hearing matters covered by the arbitral agreement. Precisely that exclusive nature is why the interpretation of the agreement, when accepting or denying their own jurisdiction, raises problems of legal certainty. Their decision-making activity must remain within the limits of the agreement without incurring in *ultra* or *infra petita*;

2. jurisdictional aspects not directly related to the arbitral agreement. This is the case, for example, of the arbitrability of the subject-matter of the lawsuit, the participation of parties who have not formally signed the arbitral agreement, possible *res judicata* or *lis pendens*, or the exception of *forum non conveniens*. The admission or refusal of the participation of *amicus curiae* may also raise questions of due process. It is frequent in this context to raise the appropriateness of the bifurcation of the proceedings. This is a decision that should be made depending on the circumstances of each case because, what is sometimes appropriate for the effectiveness of the proceedings, can on other occasions simply cause delay;

3. the constitution of the arbitral tribunal itself. The correct appointment of the arbitrators forms an essential part of the arbitration. Their impartiality and independence, and their duty to disclose any circumstance that might call into question their performance of their duties is fundamental in all arbitral proceedings. The arbitrators should avoid direct communication with either of the parties and should ensure that the tribunal secretary, if one is appointed, should comply with their duty to help the arbitrators and not influence decision-making;

4. with regard to the facts upon which the parties' claims are based and the evidence to be filed, the arbitrators should first decide who

---

<sup>13</sup> M.S. Kurkela & S. Turunen, *Due Process in International Commercial Arbitration*, 2<sup>a</sup> ed., Oxford University Press, 2010.

has the burden of proof and then establish the limits for one party to request the other party to adduce certain documentation;

5. the tribunal should guarantee the performance of the arbitral agreement in good faith. One of the arbitrators' most important tasks is to indicate the facts relevant for the decision, based on the clear idea amongst litigants that cases are won or lost based on the presentation of the facts. There is a current trend in international arbitration to file numerous documents, which trend Michael Schneider has rightly branded as the "paper tsunami" of arbitration<sup>14</sup>. Arbitrators are responsible for fixing certain limits in order to be able to clarify which facts are relevant or irrelevant in the decision to be made; and

6. arbitrators should give each party a reasonable opportunity to present its case. This is required by Article V 1.b of the New York Convention which states that recognition and enforcement of an arbitral award may be refused if a party "was otherwise unable to present his case". This is where arbitrators should exercise their authority, subject to the essential principles of hearing, contradiction and equality. The tribunal should conduct the proceedings promptly and minimize potential costs guiding the parties through procedural orders or instructions to establish clearly the relevant facts. The procedural time schedule should be realistic because, as Gabrielle Kaufmann-Kohler rightly observes, best is the enemy of good<sup>15</sup>. Arbitrators are under the obligation to combine discretionally what may seem like two poles apart. As Dominique Hascher puts it, between legal certainty and speedy proceedings<sup>16</sup>. Johnny Veeder speaks of the necessary balance between the arbitrator's reasonable activity and his

---

<sup>14</sup> M. Schneider, "The Paper Tsunami in International Arbitration: Problems, Risks for The Arbitrator's Decision Making and Possible Solutions", in *Written Evidence and Discovery in International Arbitration*, Dossiers of the ICC Institute of World Business Law, Paris, 2009, pp. 365 ss.

<sup>15</sup> G. Kaufmann-Kohler, "Beyond Gadgetry – Substantive New Concept to Improve Arbitral Efficiency", *J. World Investment & Trade*, 5, Feb. 2004: "The calendar must be realistic: "Le mieux est l'ennemi du bien".

<sup>16</sup> D. Hascher, "Principales et Pratiques de Procédure dans l'Arbitrage Commercial International", *Recueil des Cours*, t. 279, 1999, p. 108: "l'arbitrage doit se dérouler dans des conditions de sécurité juridique et de célérité afin d'assurer la validité de la sentence et de diminuer les coûts que les parties doivent assumer. Les arbitres font fréquemment référence à ces exigences quand il leur faut décider de l'opportunité de se prononcer par voie de sentence partielle ou organiser l'administration de la preuve".

efficiency: “due process” is essentially a moral question, not a legal concept<sup>17</sup>.

In short, the content of due process can be summed up in two fundamental procedural points: access to justice and reasonableness of the proceedings.

#### IV. The need for strong Arbitral Tribunals

Philippe Pinsolle presented an interesting paper at the ICCA meeting on the Island of Mauritius in May 2016<sup>18</sup>. He focused on the danger of arbitration vis-à-vis what he referred to as a “weak Arbitral Tribunal”. In his opinion, a tribunal fearful of the aggressiveness of the parties’ lawyers constitutes a great danger for the effective development of the arbitral proceedings. In his opinion, domestic laws on arbitration and arbitral institution rules confer sufficient powers on arbitrators to perform their duties. National judges and tribunals in arbitration-friendly countries protect them in the exercise of their powers. His work is an interesting exercise of comparative law on the subject. In his opinion, the key points are as follows: the possible annulment of the proceedings if the ground for annulment is not first raised before the Arbitral Tribunal itself; disregarding submissions filed in breach of the procedural calendar; refusing to allow additional written submissions; refusing to accept late written evidence; refusing to hear witness evidence; calling by the Arbitral Tribunal of a witness on its own motion or relying on statements given by witnesses not called by the parties; not allowing or limiting cross-examination; refusing or limiting irrelevant expert evidence; rejecting untimely requests for the submission of documents; and failure to answer each argument raised by the parties. The key issue is to ascertain whether the tribunal should avoid being considered as a “weak Arbitral Tribunal” in such circumstances.

---

<sup>17</sup> J. Veeder, “Due Process, the Balancing of Fairness and Efficiency”, *IBA Arbitration Day*, Dubai 2009.

<sup>18</sup> Ph. Pinsolle, “The Need for Strong Arbitral Tribunals”, Mauritius, 2016, ICCA Plenary.



## V. Proof in international arbitration

In his decision-making the arbitrator has sufficient reasons to doubt in adopting a strong or weak position. Proof in international arbitration frequently requires such doubt of the arbitrator.

National procedural laws do not apply in international arbitration. The arbitrators decide procedural questions. Hence, the standard procedure agreed with the parties in procedural order number 1, sets out the guidelines for the conduct in the arbitral proceedings. Frequently, it should deal with the fusion of the legal cultures of the common and the civil lawyer. The subject-matter of the proceedings is different: in civil law, the judge determines and applies the law, whereas, in the Anglo-Saxon system, the judge organizes the fair combat between the parties. The Anglo-Saxon lawyer tends to attach greater importance to the hearing, the lawyer bears in mind his historic function of addressing the jury, the members of which sometimes did not know how to read; hence, the tedious and reiterated trend of reading texts that the arbitral tribunal should already know. For the continental lawyer, however, the written stage is the important part. UNCITRAL's work has permitted that, in practice, the use of both legal cultures has become balanced in international arbitral proceedings. However, well-founded doubts arise with regard to questions of documentary, witness or expert evidence.

In civil law, the parties file their documented statements, whereas, in Anglo-Saxon law, the documents are requested after the parties have exchanged their pleadings.

The continental lawyer is reluctantly becoming accustomed to the importance of discovery of documents and depositions of witnesses. It can be said that the civil lawyer affirms, requests and proves, whereas the Anglo-Saxon lawyer affirms and hopes to prove. Hence, the difficult mixture in international arbitration: the claim and the defence should be complete and documented and subsequently the documents to which access could not be gained when drafting the statements are sought. Fishing expeditions are not allowed; the request for documents should be made explaining why and for which purpose they are sought; the arbitrators know the facts as a result of having read the written statements and are in a position to control the reasonableness and length of the other party's requests for documentation. The arbitrator plays the role of moderator, but lacks the power of the State judge; he can, however, request of his own accord

certain documents which he deems essential. The parties' reluctance or refusal can give rise to inferring the consequences that the arbitrator deems appropriate in his assessment of the documentary evidence.

The difference between the witness in international arbitration and the witness in proceedings before a national judge is clear: in arbitration the person who has in some way been involved in the facts, usually a client or an employee, appears as a witness; he is not neutral because, since he has been involved, he has an interest in the dispute. Hence the controversy surrounding the possibility of preparing witnesses, which is something that, in principle, is repugnant to the continental lawyer's professional ethics. The filing of witness declarations with the pleadings, in order to avoid surprising the other party, has become an essential element of witness evidence; the lawyer helps to draft those declarations, so that they are more convincing for the arbitrators, but without inventing facts, but rather to help the witness to recall them. Should cross-examination be limited to written testimony or should it deal with any relevant fact? Does formal truth prevail over material truth?

The arbitrator should avoid abuses of cross-examination, such as trying to corner the witness or surprising him about facts in respect of which he is not prepared.

The civil law judge appoints the expert, whereas in common law the parties present their experts. In international arbitration it can be said that the Anglo-Saxon system prevails, but with preliminary written reports. Frequently the arbitrator himself appoints an expert to present an independent opinion from those offered by the parties' experts. One speaks of the rigidity of legal proceedings and the flexibility of arbitration. However, flexibility does not mean the chaotic weakness of the arbitrators in conducting the proceedings. It should not be forgotten that the purpose of all evidence is to convince the person who has to judge what the parties affirm and seek. The arbitrators should assess in each case the relevance of the evidence presented, and in their discretion should decide the usefulness of the evidence for their own conviction.

## **VI. The breach of "due process"**

When a breach of due process has been committed, the arbitral award may be annulled or not enforced, where appropriate. However,

this should only occur in cases in which “the most basic notion of morality and justice” is violated<sup>19</sup>.

When that occurs, normally the sanctions are not directly imposed on the arbitrator who breached his duty, but rather, as W. Park affirms, the party that wins the arbitration pays the price of the arbitrator’s defective conduct because that party and only that party suffers the consequences of the annulment or non-enforcement of the judgment which accepted its claims but was subsequently annulled or not enforced<sup>20</sup>.

Rarely is the arbitrator subject to actions of responsibility for failing to perform his duties. The Spanish Constitutional Court has found that arbitration is a jurisdictional equivalent and, therefore, the arbitrator enjoys certain immunity in performing his jurisdictional activity. It is true that the arbitrator originally performs his duties under an arbitral agreement and, therefore, is required to fulfil his contractual obligations vis-à-vis the parties. Nowadays, judicial decisions holding the arbitrator liable when he has breached his purely contractual obligations (for instance, accepting the appointment without disclosing a conflict of interest with a consequent annulment of the award) are becoming widespread.

## VII. Abuse of “due process”

In many arbitral situations, “due process” has today become a real threat to the arbitral tribunal. When, in a party’s submissions or at the arbitral hearing, one of the lawyers lets the expression “due process” slip, the tribunal usually understands it as a threat that, if the arbitrator does not agree to their petition, the award will subsequently be annulled.

In this day and age, we are living in times of significant conflict. Arbitration has ceased to be a method for resolving disputes between gentlemen to become a vast industry where it would seem that aggressiveness is a virtue for the lawyer defending the party’s interests. Challenges to arbitrators are used as a strategic weapon, and claims for compensation against arbitrators or arbitral institutions, as well as criminal prosecutions of arbitrators for declaring jurisdiction at the

---

<sup>19</sup> *Vid. Parsons & Whittemore Overseas Co. Inc. v Société General de l’Industrie du Papier Rakta and Bank of America, Yearb. Comm. Arb.*, vol. 1, 1976, p. 215.

<sup>20</sup> W. Park, *The Procedural Soft Law on International Law, Non-Governmental Instruments*, Leiden Kluwer International, 2006, pp. 146–147.

initial stage of arbitral proceedings, are ever–more frequent in the life of international arbitration.

The arbitrators who perform their duties against the State in the place of the arbitration are sometimes subjected to inadmissible pressure. The use of public opinion as a weapon of pressure against the arbitral tribunal is unacceptable. It is general practice of many law firms to have an important communications department, generating news items which are not always to the benefit of the necessary neutrality of arbitrators' activity.

Arbitrators are criticised excessively, and are made responsible for the defects of the large industry of arbitration. However, nothing is mentioned about the excessive length of the time limits fixed by the lawyers in the procedural timetable. The parties have a legitimate right to the proceedings being taking place efficiently and rapidly.

The parties' interests occasionally interfere with the interests and profesional obligations of the persons representing them. With an adequate exchange of written communications, the arbitrators can know what is asked of them without the need for excessively long and inefficient hearings. At many of these hearings dozens and dozens of lawyers meet around the tribunal's table, but their presence is not justified over the weeks that the hearing might last. The excessive presentation of witnesses is often unnecessary, and there is the proliferation of experts who sometimes do nothing but confuse the tribunal. These are subjects which would have to be analyzed at leisure. The Anglo–Saxon technique of cross–examination may be very useful in search of the material truth of the facts, but cross–examinations are frequently theatrical representations for the display of the lawyer in question; sometimes, in that exercise, one gets the impression that the lawyer forgets that his task is to convince the tribunal rather than to be thinking of the transcription of his interventions, frequently intended for his client.

I understand that all these excesses can constitute a real breach of "due process" for which only the professionals representing the parties should be held responsible. The documentary "tsunami" to which Michael Schneider referred, only confuses arbitrators. A vast part of the documentation, not to mention the repetition of authorities filed, is totally unnecessary. The arbitrator has to put a gargantuan amount of effort into doing what the parties' representatives ought to have done: present crystal clear and concisely documented conclusions.

As a result, arbitration costs have rocketed. When the proceedings end, the tribunal asks the parties for the costs that they have incurred, and these can really be scandalous. All this raises the problem of whether, in fact, as a result of these macro arbitral proceedings, we are making it impossible for the parties to the arbitral agreement to access justice. Thus, the excessive cost of arbitration can constitute a real ground of denial of justice. To that end, the solution of the financial sector has been the third party funder, which actually permits access to arbitral justice but, in turn, increases the cost of the proceedings.

### VIII. “Due process” and judicial control

In Latin America there is lively debate around the judicial control of arbitral awards. The excessive resort to the appeal of amparo on the basis of a violation of constitutional rights in the arbitration has led to abuses that only serve to delay arbitral proceedings in the courts. Too often the nullity of arbitral awards is sought for breaches of public policy, which is understood as including any constitutional violation. In many jurisdictions the concept of public policy used by judges and courts in the revision of arbitral awards is not well defined.

Latin American scholarship is divided between the procedural lawyers who insist excessively on the need for a detailed constitutional control, and the supporters of the flexibility and efficiency of arbitration. The issue even raises questions of professional ethics. Some praise the lawyers that use all available appeals and means for the benefit of their client. They do not think that an unreasonable abuse of the right of defence might constitute an ethical breach that could be subject to a disciplinary sanction. For many, the lawyer should use all procedural means within their reach in defence of the interests of their client.

When it is said that arbitral tribunals should be strong the seat of the arbitration should not be overlooked, for here lies the eventual judicial control by local judges. Many Latin American countries guarantee the protection of fundamental rights through the appeal of amparo in prejudice, as correctly points out Francisco Gonzalez de Cossío, to the fundamental right of judicial security and certainty. The appeal of amparo is permitted to lessen fundamental rights such as

the freedom to agree to arbitration for the resolution of conflicts and the legal security of those involved in the arbitral process<sup>21</sup>.

### IX. “Due process”, shield or sword?

Embedded in the origins of due process requirements is the protection of the right of defence. Today, there is added to this function that of an aggressive sword through the use of the magic words “due process” to force the tribunal to accept certain procedural claims. The criticism against arbitrators at the same time as the silence in respect of the abuses by lawyers in arbitral proceedings is noteworthy. Recently, we have had the opportunity to listen to the President of the International Bar Association, Mr. David W. Rivkin, who has criticized the current defects of arbitral proceedings as if they were the result of the dubious work of the arbitrators. In his speech delivered in Hong Kong on 27 October 2015 he states, *inter alia*, that “with regard to the hearing itself, every arbitrator should undertake to give his undivided attention, instead of replying to e-mails, doing sudoku puzzles or getting involved in any other distracting activity”<sup>22</sup>. I do not know Mr. Rivkin’s experience in arbitral matters but, from reading his speech, he gives the impression of Don Quixote de la Mancha, fighting against ferocious giants which were in fact only windmills. The great finding of the President of IBA is the need to draw up a new contract whereby arbitrators are more exactly committed to the parties who directly or indirectly appoint them. Perhaps he should focus more on the performance of the lawyers in order to obtain better results in arbitral proceedings.

International arbitration is currently in the crossfire of international politics. First were the Bolivarian states, which initiated forceful criticism of investment arbitration<sup>23</sup>. Later, the European Union signed the Treaty of Lisbon in which it tried to eliminate the powers of the member states of the Union with regard to arbitration to protect investment, in favour of the European Commission<sup>24</sup>. Thus, in-

---

<sup>21</sup> F. Gonzalez de Cossio, “Procesos constitucionales y procesos arbitrales: ¿agua y aceite?”, *Revista Ecuatoriana de Arbitraje*, num. 6, 2014, page 229 et seq.

<sup>22</sup> D.W. Rivkin, “A new Contract between Arbitrators and Parties”, *HKLAC Arbitration Week Keynote Address*, October 27, 2015.

<sup>23</sup> Bolivia notified its withdrawal from the ICSID convention on May 2, 2007. Two years later, Ecuador followed the same steps. Venezuela withdrew from ICSID in July 2012.

<sup>24</sup> The Treaty of Lisbon was signed in Lisbon on December 13, 2007. Art. 207,1: “the common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in

vestment protection arbitration was exposed to the politicization of the political parties within the framework of the European Parliament. When the treaty on the protection of investment between the European Union and the United States of America (TTIP) is discussed, the left-wing parties take arbitration to protect investment as a rallying point in their political fights<sup>25</sup>. In the United States, the New York Times' fierce criticism is undoubtedly justified by the abuse of class actions in arbitration to protect the consumer, which, in practice, gives rise to real situations of a lack of proper defence<sup>26</sup>. In Europe the criminal use of arbitration in the Tapie case has logically discredited commercial arbitration<sup>27</sup>.

We find ourselves in these circumstances at the present time. Undoubtedly, like all institutions, international arbitration should accept certain constructive criticism to improve this dispute-resolution method. With regard to arbitral proceedings, it is beneficial to emphasise the need for a correct use of due process, and to identify the abuses to be avoided that are occurring. However, it is not acceptable to single out the arbitrators for criticism, overlooking the real abuses committed by many professionals participating in international arbitration. Let he who is without sin cast the first stone.

### Bibliografía

BIN CHENG, *General Principles of Law as Applied by International Courts and Tribunals*, Cambridge, 2006.

FATAS CABEZA, G.: *Heráldica aragonesa. Aragón y sus pueblos*, Zaragoza, 1990.

GARCIA GALLO, A.: "La ley como fuente del Derecho en Indias en el siglo XVI", *Estudios de Historia del Derecho Indiano*, Madrid, 1972, pp. 169 ss.

---

goods and services, and the commercial aspects of intellectual property, foreign direct investments, the achievement of uniformity in measures of liberalisation, expert policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external actions".

<sup>25</sup> *Vid.* E. Warren, "The Trans-Pacific Partnership Clause Everyone Should Oppose", *The Washington Post*, February 25, 2015.

<sup>26</sup> J. Silver-Greenberg and R. Gebeloff, *The New York Times*: "Arbitration Everywhere, Stacking the Deck of Justice", Oct. 31, 2015; "Rule on Arbitration Would Restore Right to the Banks", May 5, 2016; "Court Rules Companies Cannot Impose Illegal Arbitration Clauses", May 26, 2016; "Start-ups Embrace Arbitration to Settle Workplace Disputes", May 14, 2016; "Bill Seeks to Limit Use of Arbitration to Avoid Courts", Feb. 4, 2016.

<sup>27</sup> D. Thomson, "Tapie Award Overturned in France", *Global Arb. Rev.*, Feb. 18, 2015.

- GIESEY, R.: *If not, not. The oath of the aragonese and the legendary laws of Sobrarbe*, Princeton University Press, 1968.
- GONZÁLEZ DE COSSIO, F.: "Procesos constitucionales y procesos arbitrales: ¿agua y aceite?", *Revista Ecuatoriana de Arbitraje*, n° 6, 2014, pp. 229 ss.
- GONZÁLEZ GONZÁLEZ, J.: *Reinado y diplomas de Fernando III*, Córdoba, Monte de Piedad y Caja de Ahorros de Córdoba, 1983.
- HASCHER, D.: "Principales et Pratiques de Procédure dans l'Arbitrage Commercial International", *Recueil des Cours*, t. 279, 1999.
- KAUFMANN-KOHLER, G.: "Beyond Gadgetry – Substantive New Concept to Improve Arbitral Efficiency", *J. World Investment & Trade*, Feb. 2004.
- KURKELA, M.S. & TURUNEN, S.: *Due Process in International Commercial Arbitration*, 2ª ed., Oxford University Press, 2010.
- LIRA GONZÁLEZ, A.: *El amparo colonial y el juicio de amparo mexicano: antecedentes novohispanos del juicio de amparo*, México, Fondo de Cultura Económica, 1972.
- PARK, W.: *The Procedural Soft Law on International Law, Non-Governmental Instruments*, Leiden, Kluwer International, 2006.
- PÉREZ, Antonio: *Relaciones de Antonio Pérez secretario de Estado que fue del Rey de España*, 1598.
- PINSOLLE, Ph.: "The Need for Strong Arbitral Tribunals", Mauritius, 2016, ICCA Plenary.
- RIVKIN, D.W.: "A New Contract between Arbitrators and Parties", *HKAC Arbitration Week Keynote Address*, October 27, 2015.
- SCHNEIDER, M. "The Paper Tsunami in International Arbitration: Problems, Risks for The arbitrator's Decision Making and Possible Solutions", in *Written Evidence and Discovery in International Arbitration*, Dossiers of the ICC Institute of World Business Law, París, 2009, pp. 365 ss.
- SILVER-GREENBERG, J. and GEBELOFF, R.: "Arbitration Everywhere, Stacking the Deck of Justice", *The New York Times*, Oct. 31, 2015;
- : "Bill Seeks to Limit Use of Arbitration to Avoid Courts", *The New York Times*, Feb. 4, 2016.
- : "Court Rules Companies Cannot Impose Illegal Arbitration Clauses", *The New York Times*, May 26, 2016.
- : "Rule on Arbitration Would Restore Right to the Banks", *The New York Times*, May 5, 2016.
- : "Start-ups Embrace Arbitration to Settle Workplace Disputes", *The New York Times*, May 14, 2016;
- THOMSON, D.: "Tapie Award Overturned in France", *Global Arb. Rev.*, Feb. 18, 2015.
- VEEDER, J.: "Due Process, the Balancing of Fairness and Efficiency", *IBA Arbitration Day*, Dubai 2009.
- WARREN, E.: "The Trans-Pacific Partnership Clause Everyone Should Oppose", *The Washington Post*, February 25, 2015.