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PROCEDURAL ORDERS IN INTERNATIONAL COMMERCIAL ARBITRATION

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Abstract

Arbitrators often make a number of decisions on the administration of the arbitration during the course of the proceedings. Procedural decisions should be documented in writing, often in the form of procedural orders, in order to eliminate any ambiguity, emphasise the significance of compliance, and set them apart from awards. Procedural orders should always be written with the words "Procedural Order" in the title, be numbered in order, commencing with "Procedural Order No. 1," and be signed and dated. Procedural order, which, in contrary to an award, cannot be contested in court. Procedural orders have historically been thought of as modest non-conclusive procedural choices that won't significantly affect the arbitration's conclusion. The courts' perception that some procedural orders are binding documents with significant implications for the result and conduct of the arbitration process has caused a significant shift in the way that procedural orders are traditionally understood during the past years. In this paper an attempt has been made to understand what procedural orders are, difference between Arbitral awards and Procedural orders, difference between procedural order and party agreement and amendment of procedural orders.

Introduction

One of the cornerstones of international arbitration is the independence and adaptability of the parties. Arbitrators are responsible for ensuring that a well-organized approach is used during arbitration procedures because there are no established guidelines for how proceedings must be conducted. Arbitral tribunals have been entrusted with the authority to decide on procedural issues that are pertinent to the arbitration procedure under the majority of domestic legislation and arbitral institutional norms. Typically, the arbitral tribunal would make these judgments in the form of a procedural order, which, unlike an award, cannot be contested in court. One of the instruments available to arbitrators to efficiently manage proceedings and guarantee that parties follow the predetermined timeframe is procedural orders. Unlike courts, which are constrained by predefined local procedural regulations, arbitral tribunals in international arbitration are free to decide procedure on a case-by-case basis. One of the best method an arbitral tribunal has to shape and direct the arbitration process is the application of procedural orders. Procedure orders cover topics including the due date for pleadings, the kinds of papers that must be submitted, and the schedule of hearings, if any. The purpose of procedural orders is not to address substantive concerns. however, when they become more than administrative tools, they may become appealable.

Difference between procedural order and party agreement

A substantive agreement between the parties to an ICA is called an arbitration agreement.[1]

[1] Ar. Göraeyda Dursun, "A Critical Examination of the Role of Party Autonomy in International Commercial Arbitration and an Assessment of Its Role and Extent" (2012) accessed 10 August, 2015.

The agreement is crucial to arbitration procedures; therefore, many different things have been said to be essential to it. First, it shows that each party has the freedom to resolve their differences outside of court, through arbitration. Odoe defines an arbitration agreement as a legally-binding commitment made by two or more contracting parties to resolve all current and/or future disputes through international commercial arbitration as opposed to going through the national courts.[2] The UNCITRAL Model Law permits the tribunal to establish its own method where the parties have not reached an agreement about the procedure to be used in the arbitration procedures.[3] The UNCITRAL Model Law does not distinguish between an ex-ante agreement and a post-ante agreement in order to provide parties the freedom to determine the arbitration tribunal's procedure.[4] Even if the agreement's execution becomes impossible, the arbitral tribunal cannot vary from the UNCITRAL Model Law's significant level of party autonomy in determining the arbitration's process.[5] When distinguishing between a procedural order and a party agreement, description of procedural agreements becomes crucial. Although the arbitral tribunal has the authority to issue procedural orders unilaterally, this practise is typically eschewed in favour of procedural orders that have the consent of the parties to the dispute. The majority of observers advise achieving party agreement on procedural rules to speed up the arbitration procedure.[6] However, this can result in a circumstance where a deal is negotiated between parties under the cover of a procedural order. For instance, in the case of Flex-n-Gate, a procedural order was sent around to the parties for approval and comments. The procedural order was amended and authorised by the parties after comments were received. The German court determined that because the parties had consented to the procedural order, it formed a party agreement that the arbitral tribunal could not stray from. In URETEK Worldwide Oy v. Doan Technology Pty Ltd.,[7] the Svea Court of Appeals decided that even though a procedural order reflects the details of a telephone conversation between the parties, it does not turn into a party agreement and instead remains a tribunal administrative decision. Accordingly, depending on the extent of the parties' involvement, procedural orders that have been agreed upon by the parties may not always be considered by courts as party agreements and instead may be viewed as administrative decisions. A "terms of

[2] Michael Pryles, 'Limits to Party Autonomy in Arbitral Procedure', (2007), 24, Journal of International Arbitration, Issue 3, pp. 327-339, https://kluwerlawonline.com/journalarticle/Journal+of+International+Arbitration/24.3/JOIA2007023

[3] UNCITRAL Model Law, art. 19.

[4] Gerhard Wagner & Maximilian Bülau, Procedural Orders by Arbitral Tribunals : In the Stays of Party

[5] 11 Ar. Gör. ªeyda Dursun, "A Critical Examination of the Role of Party Autonomy in International Commercial Arbitration and an Assessment of Its Role and Extent" (2012) accessed 22 October, 2022.

[6] Nigel Blackaby Et. Al, Redfern and Hunter on International Arbitration 370 (Oxford Univ. Press, 5th ed. 2009); Gary B. Born, International Arbitration: Cases and Materials 754 (Wolters Kluwer 2011); Emmanuel Gaillard & John Savage, Fouchard Gaillard Goldman on International Commercial Arbitration 663 (Wolters Kluwer 1999); Jeffrey Waincymer, Procedure and Evidence in International Arbitration 445 (Wolters Kluwer 2012).

[7] Hovrätt [HovR] [Court of Appeal] Dec. 16, 2015, Case No. T.975-15 (Swed.). 67 (URETEK case) See www.arbitration.sccinstitute.com/dokument/Court-Decisions/2690167/Judgment-in-the-Court-of-Appeal-16-December-2015-Case-No-T-975-15?pageid=79572 (unofficial English translation).

reference," which is regarded as a unique kind of consensual procedural order, is another provision of arbitrarily formulated institutional regulations.[8] The parties and the arbitrators must both sign these terms of reference before the arbitral tribunal approves them. They serve as the procedural structure for the arbitration procedures.

Difference between procedural orders and award

Procedural order of the arbitral Tribunal outlining the procedure and conduct of the arbitration proceedings that it intends to follow. Procedural orders and directions help to move the arbitration forward by addressing issues such as the exchange of written evidence, the production of documents, and the hearing arrangements. They do not have the status of awards, and they may be challenged after the final award is made.[9] Formally, they have no bearing on the resolution of the parties' dispute but are only used to determine the procedure of the arbitration process.

Given the importance of the distinction, it may come as a surprise that there is no internationally accepted definition of the term "award." Arbitration laws and institutional rules may specify the formal requirements for an award, but they do not address the substantive requirements of an award. One widely agreed-upon point is that the term "award" should be reserved for decisions that finally resolve a substantive issue, rather than decisions made in relation to procedural or evidential matters. awards, which deal with substantive issues, and procedural orders and directions, which deal with the administration of the arbitration. An arbitral award differs significantly from other decisions made by an arbitral tribunal during an arbitration. A decision with the status of an award can be challenged or appealed to a national court and enforced in accordance with the relevant international conventions. A decision with the status of a procedural order, on the other hand, cannot.

The English High Court recently issued two decisions that clarify its approach to determining whether an arbitral tribunal's decision is an award or a procedural order. The Court identified a list of factors that it will consider when reaching a decision on this issue in ZCCM Investment Holdings PLC v Kansanshi Holdings PLC & Anor[10] a few months ago. In the recent case of K v S[11] along with the ZCCM case, the Court used these factors to determine whether a tribunal ruling should be considered an award or not.

A tribunal may record a decision on an issue raised in arbitration as a 'award',1) or as a 'procedural order,' and the distinction is significant because an award and a procedural order have different procedural and substantive implications. Procedural orders, for example, are not covered by the New York Convention's enforcement provisions or the annulment and (non-)enforcement safeguards embedded in national arbitration laws, including the Act. The status of a specific ruling - ultimately a decision made by a domestic court in relation

[8] Gerhard Wagner & Maximilian Bülau, Procedural Orders by Arbitral Tribunals : In the Stays of Party

[9] Redfern and Hunteron International Arbitration, Sixth Edition, p 503.

[10] ZCCM Investment Holdings PLC v Kansanshi Holdings PLC & Anor (ZCCM case), (2019), EWHC 1285 (Comm).

[11] K v. S (2019), EWHC 2386 (Comm).

to an action on the decision - can thus have significant consequences for the arbitration parties. Despite the significance of the issue, the term "award" is not defined in the Act (nor is it in other leading instruments such as the New York Convention and the UNCITRAL Model Law).

Nonetheless, whether a decision is a procedural order or an award is usually obvious. For example, it is undisputed that a tribunal's final decision on the substantive claims in arbitration is usually recorded in a 'award,' and that a decision setting the date of the hearing is usually recorded in a 'procedural order.' However, this determination is not always straightforward. Questions about the legality of a decision may arise as a result of ambiguity in the tribunal's terminology (for example, referring to 'rulings' and 'decisions' rather than 'awards' and 'procedural orders'). This happened in the ZCCM case, when the tribunal issued a decision that was vaguely described as a 'Ruling on Claimant's Application' (the Ruling). The issue can also arise when the decision's designated status is clearly stated but a party contest that designation. This happened in K v S, where the tribunal's decision was recorded as Procedural Order 5 (PO5), but one of the parties claimed that the decision was in fact an award. In both cases, the Court had to decide how to classify the Tribunal's decision.

The facts of the Cases are beyond the scope of this post, but it is sufficient to note that in both cases, the applicant challenged a tribunal's decision under Section 68 of the Act. According to Section 68(1), a party may apply to the Court to challenge "an award in the proceedings based on serious irregularity affecting the tribunal, the proceedings, or the award" (emphasis added). In each case, the Court was thus required to address the "threshold" issue of whether the arbitral ruling could be considered an "award" first (and in both cases, the Court eventually found on the facts that the relevant decisions could not).

The Court in ZCCM reviewed the relevant authorities and outlined the following factors relevant to determining whether a tribunal decision is an award:[12]

- The substance, not just the form, of the decision is given real weight;
- a decision is more likely to be an award if it finally resolves the issues submitted to arbitration, rendering the tribunal functus officio entirely or in relation to the specific issue or claim;
- the decision's nature is significant, as substantive rights and liabilities of parties are likely to be addressed in the form of an award. A decision that is solely concerned with procedural issues is less likely to result in an award;
- the tribunal's description of the decision is useful but not conclusive;
- it is relevant to consider the perception of a reasonable recipient of the tribunal's decision;
- that a reasonable recipient is likely to consider the objective attributes of the

[12] Procedural Orders or Challengeable Awards? The English High Court Clarifies Its Position
Craig Tevendale, Rutger Metsch (Herbert Smith Freehills LLP)/November 1, 2019, see http://arbitrationblog.kluwerarbitration.com/2019/11/01/procedural-orders-or-challengeable-awards-the-english-high-court-clarifies-its-position/ last visited 23rd October, 2022.

decision, such as the tribunal's own description of the decision, the formality of the language and the level of detail in the reasoning, and whether the decision complies with any applicable rules' formal requirements for an award; and

- the reasonable recipient must be deemed to have all of the information that the parties and tribunal would have had at the time the decision was made, including the background and context of the proceedings. This could include whether or not the tribunal intended to issue an award.

Amendment of Procedural Orders

The Arbitration Act makes a distinction between rulings or orders and awards. A decision is used to make choices that do not affect the case's merits, whereas an award is used to decide substantive problems. Decisions fall within the category of procedural orders. This indicates that they are not final and enforceable at this time. The arbitral panel has a lot of leeway in deciding how the arbitration will be conducted. The arbitral tribunal can thus alter most procedural orders, while some are irrevocable. However, it has been disputed in a number of instances whether a procedural order may reflect an understanding between the parties and, as a result, that the arbitral tribunal cannot change such an order without going beyond its authority or making another procedural mistake that might lead to the award being set aside. In the cases of URETEK Worldwide Oy v. Doan Technology Pty Ltd[13] and Cypress Oilfield Holdings Limited v. China Petrochemical International Company Limited[14], the Svea Court of Appeal in Stockholm provided clarification on these concerns.

In the Cypress case, the claimant asserted that the arbitral tribunal lacked the authority to revisit earlier procedural rulings relating to document production, deadlines for submitting new evidence, and the exclusion of evidence. In its initial procedural order, the arbitral panel had explicitly stated that it might be changed. As per the court, a procedural ruling is not always a decision of the arbitral tribunal's mandate because it is not always a record of the parties' agreement. The arbitral tribunal was allowed to reconsider its prior procedural rulings, according to the court, and it did so without going beyond its authority or making a procedural error.

In the URETEK case the procedural orders dealt with the deadline for fresh submissions and evidence as well as the calling of witnesses to the hearing. The initial procedural order had a clause stating that it might be revised, augmented, and that other directives or procedural orders could change how the arbitration would be conducted. According to the court, "a 'procedural order' does not, in most instances, represent an agreement between the parties but simply an administrative decision issued by the arbitral tribunal." It continued, "It is apparent that each individual administrative judgement cannot always be regarded as a determination of the arbitral tribunal's'mandate' regardless of whether or not it is issued after the parties have agreed on the subject. In this regard, the

[13] URETEK case (n7).

[14] China Petrochemical International Company Limited v. Cypress Oilfield Holdings Limited, SCC Case No. V 047/2012.

court cited Gary B. Born in International Commercial Arbitration.[15]

The arbitral tribunal's purpose had not been decided upon by the procedural rules, the court said, and the revisions to these procedural orders did not amount to an excess of mandate.

In arbitration law, the idea of party autonomy is essential. This concept states that the arbitral tribunal must abide by the parties' agreement upon the procedures to be followed throughout the arbitration. As a result, if the arbitral tribunal disregards such a contract between the parties, it might be considered an excess of mandate or another procedural mistake, which could lead to the award being set aside. A procedural order given by the arbitral tribunal is not always a reflection of an agreement between parties, as is seen from URETEK and Cypress. As a result, the arbitral tribunal's mandate is not necessarily determined by procedural orders. Additionally, this may be the case if a procedural order was made after consulting the parties.

Consequences of Non-compliance of Procedural Orders

Penalties for noncompliance in most cases, the parties will make every effort to comply with the arbitrators' procedural orders, but there may be instances where a party intentionally causes delays by failing to comply repeatedly and/or frustrates the proceedings. In such cases, arbitrators may consider whether they have the authority to impose sanctions on the obstinate party in order to encourage it to follow the procedural order and allow the proceedings to proceed in an orderly and timely manner. Arbitrators must therefore exercise caution in determining whether the arbitration agreement, including any arbitration rules and/or the lex arbitri, contains express provisions relating to such powers. Arbitrators should consider whether they have an inherent power to sanction a party's disruptive procedural behaviour if there are no express provisions granting the arbitrators the power to do so and if there is no prohibition under the arbitration agreement, including the applicable arbitration rules and/or the lex arbitri. Before imposing any sanction, arbitrators should issue a warning that they are considering imposing specific sanctions, as this may be sufficient and may help to refute any subsequent arguments that the sanction was imposed arbitrarily and/or unjustifiably. To avoid the appearance of bias or lack of independence, it is necessary to provide reasons explaining why a sanction was appropriate.

Arbitral tribunals can deal with noncompliance with procedural orders in a variety of ways. In cases of unreasonable procedural behaviour, such as noncompliance with procedural orders, the arbitral tribunal may impose costs on any party based on its findings.[16] Provisions such as Guideline 26 of the International Bar Association Guidelines on Party Representation in International Arbitration[17] and Rule 29 of the Judicial Arbitration and

[15] Volume 2, 2nd edition, 2014, pages 229 and 230.

[16] Jason Fry Et. Al., The Secretariat's Guide to ICC Arbitration ¶ 1488 (International Chamber of Commerce 2012).

[17] International Bar Association, IBA Guidelines on Party Representation in International Arbitration 26 (2013).

Mediation Services[18] give arbitral tribunals the discretionary power to take actionable misconduct into account when allocating arbitration costs at the end of proceedings. The arbitral tribunal may also use peremptory orders against non-compliant parties to demonstrate cause for failure to comply with existing procedural orders.[19] Furthermore, in the relevant jurisdiction, the penal provision for contempt of an arbitral tribunal may be invoked. For example, Section 27(5) of the Indian Arbitration and Conciliation Act, 1996 states that: Persons failing to act in accordance with such process, or making any other default, or refusing to give their evidence, or guilty of any contempt to the arbitral tribunal during the conduct of arbitral proceedings, shall be subject to the same disadvantages, penalties, and punishments by order of the Court on the representation of the arbitral tribunal as they would incur for failing to act in accordance with such process, or making any other default.[20] In Alka Chandewar v. Shamshul Ishrar Khan[21], the Supreme Court held that the scope of Section 27(5) includes non-compliance with any order given by an arbitral tribunal, which must be referred to an appropriate court for prosecution under the Contempt of Courts Act, 1971[22].

Conclusion

The procedural order is now binding on the entire arbitration process. The conventional approach of judicial interference and interpretation of procedural orders is fading. In any case, the scrutiny and consequences of procedural orders have increased the arbitral tribunal's responsibility to handle emerging trends wisely. Arbitrators should communicate the intent behind a procedural order as clearly as possible, as well as the repercussions of failure to comply with that order. One widely agreed-upon point is that the term "award" should be reserved for decisions that finally resolve a substantive issue, rather than decisions made in relation to procedural or evidential matters. But even so, it is not always simple to make that difference, especially when the decision concerns a procedural or evidential issue that may have a decisive impact on the outcome of the dispute. Furthermore, it appears from the two judgments, Cypress and URETEK, that the action could have comprised procedural errors if the provision in the procedural orders that the arbitral tribunal reserved the right to amend the orders had not been included. To avoid challenges on the basis that a procedural order has been amended, arbitrators should include an express provision in the first procedural order stating that the arbitral tribunal has the authority to alter decisions and orders pertaining to the arbitration procedure.

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[18] Judicial Arbitration and Mediation Services, Jams Comprehensive Arbitration Rules & Procedure 29 (2014).

[19] Kolawole Mayomi& Busola Bayo-Ojo, Is it a Mere Procedural Order?, Mondaq (Oct. 10, 2018), see: https://www.mondaq.com/nigeria/arbitration-dispute-resolution/744358/is-it-a-mere-arbitral-procedural-order, Last visited 23rd october,2022. Last visited 23rd October,2022.

[20] Arbitration & Conciliation Act, § 27(5), No. 26 of 1996, Act of Parliament, 1996

[21] (2007) 13 SCC 220

[22] contempt of Courts Act, No. 70 of 1971, Act of Parliament, 1971.