ARTICLE · 10 OCTOBER 2018

Is It A Mere Arbitral Procedural Order?

Party autonomy and flexibility are one of the bedrocks of international arbitration. With no set rules on how proceedings are conducted ...

Introduction

Party autonomy and flexibility are one of the bedrocks of international arbitration. With no set rules on how proceedings are conducted, it is left to arbitrators to ensure that a well-organised approach is taken during arbitration proceedings. Procedural orders are one of the tools available to arbitrators to effectively manage proceedings and ensure that parties adhere to the agreed timeline. Procedural orders address issues such as the time table for pleadings, types of documents to be tendered and schedule of hearings, if any. Procedural orders are not designed to deal with substantive issues. However, they may become appealable when they become more than administrative tools. This article highlights the function of procedural orders and situations that may give rise to avoidable complexity.

Nature and Usefulness of Procedural Orders

Ordinarily, a procedural order does not address issues of fact or law. It is an administrative decision made by the arbitral tribunal which can be amended at any point during the proceedings. This extensive right to decide on matters of administration arises from the lex arbitri [2] and the understanding reached between the parties. [3] Procedural orders not only save time and costs but spur arbitrators to be as efficient as possible.

The arbitration laws of most countries leave the conduct of proceedings to the discretion of the tribunal as long as parties receive fair treatment. For example, Section 14 of the Nigerian Arbitration and Conciliation Act 1988 states that in any arbitral proceedings, the arbitral tribunal shall ensure that the parties are accorded equal treatment and that each party is given full opportunity of presenting his case. [4] A detailed analysis of the definition of full opportunity is beyond the scope of this article. Nevertheless, this provision can be a menace for the arbitral tribunal who have to balance both time and costs and ensuring that parties can exercise their legitimate procedural rights. Occasionally, parties may exploit this due process right

by making different demands which delay the arbitration. Although there is a timetable, this is often not strictly followed in reality as parties may make requests such as an extension of time to file their pleadings, submission of additional pleadings after the deadline, submission of an entirely different claim after pleadings have closed or even requests to change the oral hearing date despite all the planning that would have gone on at the preliminary meetings to ensure all parties are available.

Challenging Procedural Orders

As the making of procedural orders to accede to parties' requests is at the discretion of the tribunal, arbitrators may fear that not granting certain administrative requests may infringe on a party's due process rights and this may render an award unenforceable. Nigeria is a signatory to the New York Convention [5] and Article V of the convention on setting aside is incorporated into section 52 of the Arbitration and Conciliation Act 1988. Under section 52 2 (a) (iii), an award may be refused recognition and enforcement if a party was otherwise not able to present his case. An arbitrator's duty is to issue an enforceable award and the need to balance party's procedural requests with time, costs and a streamlined arbitration is somewhat difficult. However, looking at a spectrum of cases across various jurisdictions, courts seldom get involved when it comes to procedural decisions made by arbitrators. [6]

Still, there are a handful of cases that suggest that procedural orders may be subject to setting aside proceedings. Usually, procedural orders are not subject to challenges except they reflect a decision on the tribunal's mandate. Furthermore, they are as mentioned earlier, managerial decisions formulated by the tribunal and do not usually indicate an agreement between the parties. The German case of Flex-n-Gate v GEA [7] is a cautionary tale in this regard. In this case, at the commencement of the quantum stage, the parties were invited to make comments on the draft procedural order sent by the tribunal. The final version reflected the parties' input. Under the procedural order, the parties were to make known the documents they had given to their own experts. The tribunal's expert was also to carry out its calculations, independent of those made by the parties' experts. The preamble of the procedural order expressly stated that it was made with the agreement of the parties. The claimant neither complied with all the document disclosures nor did the tribunal's expert carry out its independent calculations as stipulated in the procedural order. Nevertheless, an award was rendered in favour of the claimant.

The award was set aside by the Frankfurt Court of Appeals and a further application for review to the Federal Supreme Court of Germany was rejected on procedural grounds thereby leaving the Court of Appeal judgment as final. The reasoning of the Court of Appeal was based on party autonomy. The procedural order had been discussed and agreed with the parties and it now became a binding contract which the tribunal could no longer, at its discretion, deviate from. [8] The Flex-n-Gate decision serves as a potential warning to tribunals when drafting hybrid procedural orders i.e. with the parties' agreement and discretion to expressly reserve their right to alter or deviate from the order.

In the case of URETEK Worldwide Oy v Doan Technology Pty Ltd [9], the Svea Court of Appeal eschewed the major reason the claimant argued for the award to be set aside. One of the arguments put forward by the claimant was that the contents of a telephone conference to discuss procedural issues were subsequently reflected in the procedural order. Therefore, the tribunal could not amend the procedural order at their discretion as it was a determination of the mandate of the arbitral tribunal. The tribunal had allowed the submission of evidence after the cut-off date contained in the procedural order. The Svea Court of Appeal held that this was not an excessive mandate or procedural error but was simply an administrative decision which was well within the Swedish Arbitration Act.

In the United Kingdom, the courts tend to keep their intrusion in the arbitral process to a minimum and the courts have refused to expand challenges of arbitral procedural orders. In the case of Enterprise Insurance Company Plc v U Drive Solutions

Gibraltar) Limited [10], the court declined jurisdiction on the challenge to a procedural order. The court held that a procedural order, even if it has features of an award such as detailed reasoning, cannot be regarded as an award for the purposes of sections 68 and 69 of the English Arbitration Act 1996. [11] An award which is a final determination of a particular order or claim should be distinguished from an order which addresses the procedural mechanisms to be adopted. It is worthy of note that in this case, even though both parties consented to the challenge, the courts still declined jurisdiction. This case is clear indication that English courts will not intervene in situations that do not specifically fall under the English Arbitration Act.

Non-compliance with Procedural Orders

Generally, arbitrators tend to consider parties' conduct when making order as to costs. This conduct includes the party's compliance with the terms of procedural orders. Furthermore, parties who delay proceedings and thereby significantly impact the costs of the arbitration by making unreasonable procedural requests such as filing of additional documents long after pleadings have closed can be implicitly sanctioned when an order as to costs is made. [12]

Arbitrators are not obligated to extend time limits for the filing of submissions. A party which does not comply with the procedural time table may lose the opportunity to fully present its case. The earlier stated section 14 of the Nigerian Arbitration and Conciliation Act which is derived from Article 18 of the 1985 UNCITRAL Model Law states that parties shall be given full opportunity to present their case. However, this 'full opportunity' has been interpreted as 'reasonable opportunity' in various jurisdictions and courts will not interfere based on a party's failure to comply with procedural orders. [13] A right to be heard is usually balanced against speed and efficiency of the arbitral process.

Peremptory orders are also a tool which can be utilised by the tribunal to ensure compliance with procedural orders. Although the Nigerian Arbitration and Conciliation Act makes no provision for peremptory orders, the power to make such orders can be found in section 41 of the Lagos State Arbitration Law 2009. [14] A peremptory order is made against a recalcitrant party who cannot show good cause for failure to comply with existing orders. The tribunal will usually set a new time limit for compliance. Under the Lagos State Arbitration Law, the tribunal may (i) direct that the party in default shall not be entitled to rely upon any allegation or material which was the subject matter of the order, (ii) draw such adverse inferences from the act of non-compliance as the circumstances justify, (iii) proceed to an award on the basis of such materials as have been properly provided to it or (iv) make such award as it thinks fit as to the payment of costs of the arbitration by the party in default having regard to the non-compliance.

Under the English Arbitration Act, in addition to the four options mentioned in the previous paragraph open to the tribunal, the tribunal or a party may also apply to the court for the enforcement of a peremptory order under section 42 of the Act. It is worthy of note that this is a last resort as the court shall not act unless it is satisfied that the applicant has exhausted any available arbitral remedies in respect of failure to comply with the tribunal's order.

Conclusion

Arbitral tribunals need to ensure they are proactive in making procedural management decisions. They need to stay in charge of the process and ensure that the discretion afforded to them is effectively utilised. However, some caution should be exercised when drafting procedural orders to ensure that such orders do not implicitly address issues of jurisdiction. Where parties have made an input; the tribunal's discretion to amend should be expressly stated. Procedural orders are designed to make arbitrations not only fair but also efficient.

Footnotes

1 Kolawole Mayomi, Partner and Busola Bayo-Ojo, Associate, Dispute Resolution Department, SPA Ajibade & Co., Lagos, Nigeria.

2 The lex loci arbitri is the Latin term for "law of the place where arbitration is to take place" in the conflict of laws.

3 Rolf Trittman 'When Should Arbitrators Issue Interim or Partial Awards and or Procedural Orders?' 2003 20 Journal of International Arbitration 3, 255 265.

4 This provision is retained in section 30 of the proposed bill for an act to amend the Arbitration and Conciliation Act, CAP A18 2004 and other matters connected thereto.

5 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 th June 1958; entered into force, 7 th June 1959. 330 U.N.T.S. 38 1959 .

6 Klaus Peter Berger and J. Ole Jensen "Due process paranoia and the procedural judgment rule: a safe harbour for procedural management decisions by international arbitrators" 2016 32 Arbitration International 415 435. See Interprods Limited v De La Rue International Limited 2014 EWHC 68 Comm) and Pacific China Holdings Ltd In Liquidation) v Grand Pacific Holdings Ltd 2012 4 HKLRD.

7 Federal Supreme Court, Germany File III/ZB/11.

8 Peter Bert "Arbitrator's Nightmare: When Procedural Orders Backfire- Flex-n-Gate v. GEA" Dispute Resolution Germany http://www.disputeresolutiongermany.com/2013/02/update-arbitrators-nightmare-when-procedural-orders- backfire/#more-4241 .

9 2015 Case No. T.975 15.

10 2016 EWHC 1301.

11 The Arbitration Act 1996 (c 23 is an Act of Parliament which regulates arbitration proceedings within the jurisdiction of England, Wales and Northern Ireland.

12 See UNCITRAL Notes on Organizing Arbitral Proceeding © 2016, United Nations < https://www.uncitral.org/pdf/english/texts/arbitration/arb-notes/arb-notes-e.pdf>

13 See Methanex Corporation v. United States of America, Decision of the Tribunal on Petitions from Third Persons to Intervene as "amici curiae", 15th January 2001 Judgment of Case No. 121, Oberlandesgericht, Dresdeb, 6th August 2008. Claimant v. Defendant 2009 XXXIV ICCA Yearbook Commercial Arbitration.