IV. LEGAL EFFECT OF PROCEDURAL ORDERS IN ARBITRATION PRACTICE: IMPLICATIONS ON PROCEDURE AND OUTCOME

- Anchit Jasuja and Preksha Mehndiratta[*]

ABSTRACT

Under most domestic laws and arbitral institutional rules, arbitral tribunals have been given the responsibility of making procedural decisions relevant to the arbitration process. These decisions are usually given by the arbitral tribunal in the form of a procedural order, which, unlike an award, are not challengeable in the courts. Traditionally procedural orders were seen as non-consequential minor procedural decisions having no major impact on the outcome of the arbitration. However, this traditional sense of procedural orders has undergone a major shift over the past decade due to courts viewing certain procedural orders as binding documents with major consequences for the outcome and procedure of the arbitration process. Combined with new tools such as the power of contempt of arbitral tribunals in jurisdictions such as India and the proliferation of imposition of costs on non-compliant parties, arbitral tribunals have acquired the teeth to make the non-compliance of a procedural order consequential for the non-compliant party. In light of the shift from the traditional sense of procedural orders, this article looks at the different forms of procedural orders through the lens of the legal effect they produce to enable stakeholders in an arbitration proceeding to apprehend the consequences of procedural instruments.

[*] Preksha Mehndiratta is a fourth year student of B.Sc. LL.B. (Hons.), and Anchit Jasuja is a fourth year student of B.S.W. LL.B. (Hons.) at Gujarat National Law University, Gandhinagar.

I. INTRODUCTION

The procedural flexibility of an arbitral tribunal is one of the fundamental characteristics of international arbitration. Parties can choose to shape the procedure as per their agreements and in absence of any party agreement, arbitral tribunals can determine procedure on a case-by-case basis, unlike courts, which are bound by predetermined domestic procedural laws. The use of procedural orders is one of the most effective methods available with an arbitral tribunal to shape and guide the arbitration process. Arbitral tribunals can choose procedural orders to decide on any procedural matters, from minor procedural issues to set the flow of the arbitration process.[1]

Procedural orders were considered to be valuable tools for streamlining the arbitration process but were not seen as having a significant effect on the outcome of the arbitral proceedings. However, this changed when the Frankfurt Court of Appeal in *Flex-n-Gate v. GEA*[2] ("Flex-n-Gate") held that in certain cases, the non-compliance of the award with a previous procedural order was enough to set aside the award. The decision of the court changed the way the legal effect of a procedural order was seen in arbitration proceedings and resulted in authors suggesting methods of escaping the "Frankfurt Trap."[3] After a slew of decisions by different courts, each

---

[1] Rolf Trittmann, *When Should Arbitrators Issue Interim or Partial Awards and or Procedural Orders?*, 20 J. INT'L ARB. 255, 259 (2003).

[2] Oberlandesgericht[Court of Appeal] Feb. 17, 2008, 26 Sch 13/10*available at* https://uk.practicallaw.thomsonreuters.com/Link/Document/Blob/I5b54f0f41ef511e38578f7ccc38dcbee.pdf?targetType=PLC-multimedia&originationContext=document&transitionType=DocumentImage&uniqueId=08d2fe7d-722a-49ff-9e25-d4f384661190&contextData=(sc.Default). [hereinafter*Flex-n-Gate*].

[3] Gerhard Wagner & Maximilian Bülau, *Procedural Orders by Arbitral Tribunals: In the Stays of Party Agreements?*, 11 GER. ARB. J. 6, 11 (2013).

contradicting the other, the legal effect that a procedural order produces for the parties and the arbitral tribunal has remained largely uncertain.

This paper analyzes the legal effect of procedural orders upon the parties and the arbitral tribunal, the approach taken by different courts in different jurisdictions to decide the legal effect of each type of procedural order and discusses the effect of non-compliance of a procedural order by a party.

II. DIFFERENTIATING LEGAL CONSEQUENCES OF A PROCEDURAL ORDER

A. Difference between a Procedural Order and an Award

A procedural order is issued by an arbitral tribunal to give out directions regulating the conduct of parties in arbitration and broadly involves a decision meant to manage the arbitration proceedings.[4] Formally, they have no bearing on deciding the dispute between the parties, but are only used to determine the procedure of the arbitration process.

Courts have characterized the procedural order to be treated as an award in substance, only when it resolves the claims and decides the rights of parties in finality,[5] rendering it capable of being enforced as an award under the New York Convention.[6] This is consistent with the approach of not enforcing a procedural order as an award if that procedural order does not

---

[4] KolawoleMayomi&BusolaBayo-Ojo, *Is it a Mere Procedural Order?*,Mondaq (Oct. 10, 2018), https://www.mondaq.com/nigeria/arbitration-dispute-resolution/744358/is-it-a-mere-arbitral-procedural-order.

[5] Publicis Communication v. Publicis S.A. True North Communications Inc., 206 F.3d 725 (7th Cir. 2000).

ultimately resolve the dispute between parties due to its "interlocutory and procedural nature."[7] Therefore, courts look at the nature of the procedural order to determine whether it is enforceable as an award or not, especially when 'award' remains undefined in key instruments such as the New York Convention and The United Nations Commission on International Trade Law ("UNCITRAL") Model Law on International Commercial Arbitration.[8]

This approach of 'substance over form' was used by the Swiss Federal Tribunal when an arbitral tribunal rejected a challenge to the appointed arbitrator for lack of impartiality through a procedural order.[9] In the challenge against the award, the Swiss Federal Tribunal held that irrespective of the label of the decision, the procedural order qualified as an interim award because it determined jurisdiction and composition of the arbitral tribunal.

English courts have observed that decisions of arbitral tribunals which determine the substantive rights and liabilities of parties would add most weight to the decision being construed as an award.[10] Furthermore, the courts also consider other factors such as the clarity in the description of the decision of the tribunal,[11] the formality of the language employed, the degree

---

[6] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958, 330 U.N.T.S. 3.

[7] Resort Condominiums International Inc. v. Ray Bolwell and Resort Condominiums Pty. Ltd. *(Qld.)* [1995] XX Y.B. Com. Arb. 628 (Austl.).

[8] UNCITRAL MODEL LAW, G.A. Res. 40/72, 40 U.N. G.A.O.R. Supp. (No. 17), U.N. Doc. A/40/17 (June 21, 1985), revised in 2006, G.A. Res. 61/33, U.N. Doc. A/61/33 (Dec. 4, 2006), available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html [hereinafter UNCITRAL Model Law].

[9] TribunaleFederale [TF] [Federal Supreme Court] Apr. 30, 2018, Decision 4A_136/2018 (Switz.).

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

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

of the detail of the reasoning in the decision, and the intention of the tribunal while deciding whether a decision is an award or a procedural order.[12]

Thus, the arbitral tribunal is given the authority to conduct the proceedings "in such manner as it considers appropriate,"[13] there seems to be a consensus among courts that it is the content and not the nomenclature of a decision that determines the nature of an arbitral decision.[14]

B. Difference between a Procedural Order and a Party Agreement

In the absence of an agreement between the parties as to the procedure to be adopted in the arbitration proceedings, the UNCITRAL Model law allows the tribunal to set its procedure.[15] To allow parties to set the procedure of the arbitral tribunal, the UNCITRAL Model Law does not differentiate between an *ex-ante* agreement or a *post-ante* agreement.[16] This can be seen in the draft commentary of the model law where the drafters rejected a proposal to limit the party autonomy to decide procedure only in *ex-ante* agreements.[17] Thus, the UNCITRAL Model Law allows a high degree of party autonomy in deciding the procedure of the arbitration which cannot be deviated from by the arbitral tribunal even if the implementation of the agreement becomes impracticable.[18]

---

[12] *Id.*
[13] UNCITRAL MODEL LAW, art. 19(2)(1).
[14] Courd'appel [CA] [Regional Court of Appeal] Braspetro Oil Services (Brasoil) v. Great Man-Made River Project, July 1, 1999, 18(2) ASA BULL. 2/2000, 376 (Fr.).
[15] UNCITRAL Model Law, art. 19.
[16] Wagner &Bülau, *supra* note 3 at 11.
[17] HOWARD M. HOLTZMANN& JOSEPH E. NEUHAUS, A GUIDE TO THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION: LEGISLATIVE HISTORY AND COMMENTARY 565 (Wolters Kluwer 1995).
[18] Wagner &Bülau, *supra* note 3 at 11.

This discussion of procedural agreements becomes important when differentiating a procedural order and a party agreement. While procedural orders can be made unilaterally by the arbitral tribunal, such procedural orders are generally avoided in favour of procedural orders which are agreed to by the parties to the arbitration. Most commentators suggest building party consensus on procedural orders to smoothen the arbitration process.[19] However, this may lead to a situation where an agreement between parties is reached in the disguise of a procedural order. For example, in *Flex-n-Gate*, a procedural order was circulated among the parties for comments and approval. Once comments were submitted, the procedural order was modified and approved by the parties. The German court held that since the procedural order had been agreed to by the parties, it constituted a party agreement that could not be deviated from by the arbitral tribunal. However, the Svea Court of appeal in *URETEK Worldwide Oy v. Doan Technology Pty Ltd.*[20] held that even if a procedural order reflects the contents of a telephonic conference between the parties, the procedural order does not become a party agreement and remains an administrative decision by the tribunal. Thus, procedural orders which have been agreed upon by the parties are not universally seen by courts as party agreements and can be viewed as administrative decisions depending upon the level of involvement of the parties.

---

[19] 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).

[20] Hovrätt [HovR] [Court of Appeal] Dec. 16, 2015, Case No. T.975-15 (Swed.).

Arbitral institutional rules also provide for a 'terms of reference' which is seen as a special form of consensual procedural order.[21] These terms of reference provide a procedural framework for the arbitration proceedings and have to be signed by both, the arbitrators and the parties after which it is passed by the arbitral tribunal. Most notably, the International Chamber of Commerce ("ICC") Arbitration Rules 2017 provides the arbitral tribunal with the power to make the terms of reference after receiving representations from the parties[22] and authorize the arbitral tribunal to establish the procedural timeline of the case according to the terms of reference.[23] Some authors argue that because the arbitral tribunal is required to sign off on the terms of reference, it is a multilateral agreement between the parties and the arbitral tribunal.[24] Thus, if a deviation from the terms of reference is made by the arbitral tribunal, it is not a case of the arbitral tribunal misinterpreting a party agreement, rather it is a case of the arbitral tribunal violating its own contractual obligations towards the parties which would open the door for a suit for damages to be filed against the arbitrators for breach of the terms of reference.[25]

[21] Wagner &Bülau, *supra* note 3 at 6.
[22] INTERNATIONAL CHAMBER OF COMMERCE, ARBITRATION RULES (2017), art. 23 [hereinafter *ICC Arbitration Rules 2017*].
[23] ICC Arbitration Rules 2017, art. 24.
[24] Richard Kreindler& Timothy J. Kautz, *Agreed Deadlines and the Setting Aside of Arbitral Awards*, 15 ASA BULL. 576, 593 (1997).
[25] *Id.*

III. BINDING NATURE OF PROCEDURAL ORDER ON THE ARBITRAL TRIBUNAL

A. Unilateral Procedural Order

The procedural orders which are passed by the tribunal without an agreement between the parties on the tribunal's own volition can be referred to as unilateral procedural orders. Unlike consensual procedural orders, there seems to be no explicit obligation on an arbitral tribunal to conform to such procedural orders. Arbitrators have wide discretion in deciding the procedure of the arbitration with the only limitations being the conformity of the procedural orders to natural justice, due process, and party agreements.[26] This procedural flexibility with the arbitral tribunals is one of the cornerstones of the arbitration process as it allows the arbitral tribunal to effectively deal with different situations without being bound by strict procedural rules.[27] To allow for such procedural efficiency, institutional rules such as Article 22(1) of the ICC Arbitration Rules allow the tribunal to *"*make every effort to conduct the arbitration expeditiously and cost-effectively having regard to the complexity and value of the dispute.*"*[28] Despite the procedural flexibility that arbitral tribunals have, there are still situations where an award of the arbitral tribunal may be set aside due to non-compliance of the arbitral tribunal to a previous unilateral procedural order.

---

[26] William W. Park, *The 2002 Freshfields Lecture - Arbitration's Protean Nature: The Value of Rules and the Risks of Discretion*, 19 ARB. INT'L. 279, 281 (2003).
[27] Adams Rajab Makmot-Kibwanga, *Arbitral Discretion and Procedural Autonomy*, GRIN, https://www.grin.com/document/454738 (last visited May28, 2021).
[28] ICC Arbitration Rules 2017, art. 22(1).

Such a situation arose in the case of *Neuro Vive Pharmaceutical AB v. Ciclo Mulsion AG*[29] where the arbitral tribunal had passed a procedural order which contained a finding on the parties' intention behind a provision regarding the payment of royalties. The procedural order further mentioned that the finding of the tribunal on the intention of the parties was final and not subject to change except by an advanced notice to the parties. The arbitral tribunal did not issue any such notice but still adopted a different finding on the intention of the parties in the final award. The Swedish Supreme Court called this a 'procedural irregularity' and set aside the award, reasoning that the non-compliance of the arbitral tribunal to its procedural order constituted the arbitral tribunal violating its own procedure.[30] Under Section 68 of the English Arbitration Act,[31] this criterion of procedural irregularity is clothed as 'serious irregularity' and is a ground for challenging arbitral awards.[32]

On the other hand, when the procedural framework of the arbitration has been set by a party agreement, the court would not see deviance from a previous unilateral procedural order as a 'procedural irregularity' due to the principle of deference to the arbitrator's interpretation of the party agreement such as in case of deviation from the arbitral timetable.[33] In such

---

[29] HögstaDomstolen [HD] [Supreme Court] Apr. 30, 2019, Case No. T 796-18 https://www.arbitration.sccinstitute.com/views/pages/getfile.ashx?portalId=89&docId=3784013&propId=1578 (Swed.).

[30] Joel DahlquistCullborg, The Role of the Swedish Supreme Court in International Arbitration, 2019 BELG. REV. ARB. 469, 476.

[31] Arbitration Act 1996, § 68 (Eng.).

[32] FabricioFortese&LottaHemmi, *Procedural Fairness and Efficiency in International Arbitration*, 3 GRONINGEN J. INT'L L. 110, 122 (2015).

[33] Klaus Peter Berger & J. Ole Jensen, *Due Process Paranoia and the Procedural Judgment Rule: A Safe Harbour for Procedural Management Decisions by International Arbitrators*, 32 ARB. INT'L 415, 423 (2016).

circumstances, the arbitral tribunals generally deviate from previous procedural orders unless the request for deviance from the procedural timetable is a clear dilatory tactic.[34]

In this regard, an arbitral tribunal goes ahead to call this discretion in procedural matters as an inherent power of the tribunal.[35] Even though the extent of discretion to deviate from procedural timetables in procedural orders is generally not questioned by courts due to such decisions being characterized as case management decisions,[36] still courts have sometimes called for arbitral tribunals to strictly stick to previous procedural orders in the interest of efficiency.[37] To enable this efficiency, courts do not generally set aside awards for deviance from procedural orders during the arbitration process.[38]

B. Consensual Procedural Order

Considering that in international commercial arbitration, procedural orders are rarely made with a top-down approach,[39] the decision in *Flex-n-Gate* has the effect of viewing virtually all procedural orders 'approved' by parties as party agreements. This construction of procedural orders as party agreements virtually extinguishes the procedural discretion that is guaranteed to arbitral tribunals by some institutional rules. The court in *Flex-n-Gate* also

---

[34] JULIAN D.M. LEW ET. AL., COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION¶ 21-64 (Wolters Kluwer 2003).
[35] LAURENCE CRAIG ET. AL., INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION 274-276 (Oceana Publications, 2nd ed. 1990).
[36] Pacific China Holdings Ltd (In Liquidation) v. Grand Pacific Holdings Ltd. [2012] 4 H.K.L.R.D. 1 (H.K.).
[37] M/s. Centrotrade Minerals and Metals Inc. v. Hindustan Copper Ltd., Unreported Judgement (2020).
[38] Berger & Jensen, *supra* note 33 at 434.
[39] Wagner &Bülau, *supra* note 3 at 11.

had before it, the issue of the bindingness of terms of reference and was drawn up under Article 23 of the ICC Arbitration Rules.[40] The court held that any deviation from the terms of reference also constitutes a deviation from a party agreement. To substantiate its analysis, the court pointed out that the draft terms of reference, just like the procedural order, had been circulated to the parties for inviting modification proposals that were incorporated in the final terms of reference. Due to this exercise of shaping the terms of reference and the fact that the terms of reference are signed by the parties, the terms of reference constitute a valid party agreement that cannot be deviated from by the arbitral tribunal.

Since the terms of reference are signed by the parties, there is likely an intention by the parties to create a legally binding agreement when signing on the terms of reference. Deciding on the bindingness of the terms of reference, the Swiss Federal Tribunal held that the deviation of the arbitrator from the terms of reference for accepting a memorial submitted after the deadline as per the terms of reference was not a ground to set aside the award.[41] However, it has to be noted that the court did not comment on the validity of such a deviation, but rather relied on the principle of limited judicial interference in the interpretation of a party agreement by the arbitral tribunal.

Unlike the Swiss Federal Tribunal, the French Court of Cassation in *SOFIDIF*[42] went into a discussion on the terms of reference of an ICC

[40] ICC Arbitration Rules 2017, art. 23.
[41] TribunaleFederale [TF] [Federal Supreme Court] Mar. 24, 1997 15 ASA BULL. 316 (Switz.).
[42] Cour de cassation [Cass.] [Supreme Court for Judicial Matters] 1e civ. Mar. 8, 1988, Bull, Civ. I, No. 64 (Fr.).

arbitration. The terms of reference provided for bifurcation of the case into issues of jurisdiction and merits, but the arbitral tribunal in a later procedural order deviated from this bifurcation. The court found that the latter procedural order did not violate the terms of reference since the terms of reference did not explicitly prohibit the arbitral tribunal from deciding others issues when rendering a partial award on the issue of jurisdiction. Thus, the court preferred an interpretation of the party agreement which would result in the arbitral award not being set aside. It seems implicit from such decisions that a substantial deviation from the terms of reference may result in the award being set aside.

There are limited situations where an arbitral tribunal may exercise discretion even if a party agreement exists which has laid down the procedure. Under Article 17(2) of the UNCITRAL Arbitration Rules, the arbitral tribunal is allowed to modify the time prescribed for inviting the views of the parties allowing the arbitral tribunal to apply its discretion in place of the party agreement.[43] Similarly, under Article 22.1 of the London Court of International Arbitration Rules 2014, the arbitral tribunal has similar powers.[44] While these powers were subject to a contrary agreement of the parties in the previous rules, the present rules do not allow the parties to exclude this discretionary power of the arbitral tribunal by a party agreement.[45] In cases where the arbitration rules provide for discretionary powers of the arbitral tribunal to supersede a party agreement, arbitral

[43] General Assembly Resolution 31/98, *UNCITRAL Arbitration Rules*, A/RES/31/98 (15 Dec. 1976).
[44] LONDON COURT OF INTERNATIONAL ARBITRATION, LCIA ARBITRATION 22.1 (2014).
[45] Fortese & Hemmi, *supra* note 33 at 120.

tribunals can exercise such discretion and even ignore party agreements.[46] This recent phenomenon has been described as shifting the balance of power from parties to the tribunal.[47]

Still, in exceptional circumstances, the arbitral tribunal may exercise discretionary power completely in contravention to the party agreement within a procedural order. However, it has been argued that such discretionary power should only be exercised when the arbitration agreement allows for discretionary powers of the arbitrator.[48] The seminal decision on such an exercise of discretionary power is *Larsen v. The Hawaiian Kingdom*,[49] where the arbitral tribunal denied issuing an interlocutory order for the framing of an issue that was agreed upon by both parties. Relying on Article 32 of the UNCITRAL Rules, the arbitral tribunal reasoned that the power to decide the procedure under the rules lies with the tribunal.[50] The justification behind such an order was that the parties always have the right to withdraw the case from the arbitral tribunal constituted under institutional rules.

When an English Court in *Pacol Ltd. v. Joint Stock Co. Rossakhar*[51] had to decide an application to set aside an award similar to the order in *Larsen*, the court concluded that deviating from the party agreement in such a case would make the award liable to be set aside. Courts have emphasized

---

[46] *Cf.* DAVID D. CARON & LEE M. CAPLAN, THE UNCITRAL ARBITRATION RULES: A COMMENTARY 48 (Oxford Univ. Press, 2nd ed. 2013).
[47] MAXI SCHERER ET. AL., ARBITRATING UNDER THE 2014 LCIA RULES. A USER'S GUIDE 245 (Wolters Kluwer 2015).
[48] GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 1755 (Wolters Kluwer 2nd ed. 2009).
[49] Lance Paul Larsen v. The Hawaiian Kingdom, 1999-01 (PCA Case Repository 2001).
[50] JEFFREY WAINCYMER, PROCEDURE AND EVIDENCE IN INTERNATIONAL ARBITRATION 445 (Wolters Kluwer 2012).

that the discretionary power of the arbitral tribunal does not allow it to depart from the terms of an explicit procedural agreement.[52] Still, in certain exceptional circumstances, if the institutional arbitration rules acknowledge discretion of the tribunal in procedural matters, then the tribunal may be justified in deviating from a procedural agreement disguised as a procedural order, especially when the agreement has become inappropriate or would lead to an absurd result.[53]

IV. EFFECTS OF NON-COMPLIANCE OF PROCEDURAL ORDERS

A. Power to enforce procedural orders

There are several methods through which arbitral tribunals may tackle non-compliance with procedural orders. In cases of unreasonable procedural behaviour which includes non-compliance with the procedural orders, the arbitral tribunal can choose to impose costs on any party based on its observations.[54] Provisions such as Guideline 26 of the International Bar Association Guidelines on Party Representation in International Arbitration[55] and Rule 29 of the Judicial Arbitration and Mediation Services[56] give arbitral tribunals the discretionary power to take into account the party's actionable misconduct when apportioning the costs of the arbitration at the end of

---

[51] [1999] 2 All ER 778 (Comm) (Eng.).
[52] Berger & Jensen, *supra* note 33 at 424.
[53] GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 1755 (Wolters Kluwer 2nd ed. 2009); JEFFREY WAINCYMER, PROCEDURE AND EVIDENCE IN INTERNATIONAL ARBITRATION 386 (Wolters Kluwer 2012).
[54] JASON FRY ET. AL., THE SECRETARIAT'S GUIDE TO ICC ARBITRATION ¶ 1488 (International Chamber of Commerce 2012).
[55] INTERNATIONAL BAR ASSOCIATION, IBA GUIDELINES ON PARTY REPRESENTATION IN INTERNATIONAL ARBITRATION 26 (2013).
[56] JUDICIAL ARBITRATION AND MEDIATION SERVICES, JAMS COMPREHENSIVE ARBITRATION RULES & PROCEDURE 29 (2014).

proceedings. Peremptory orders are also employed as a tool by the arbitral tribunal against non-compliant parties to show cause for failure to comply with existing procedural orders.[57] The English Arbitration Act goes a step further and Section 42 even provides a party with the option to apply in court for the enforcement of a peremptory order.[58]

Additionally, the penal provision for contempt of an arbitral tribunal may also be invoked in the relevant jurisdiction. For instance, Section 27(5) of the Indian Arbitration and Conciliation Act 1996 states that:

> [P]ersons 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 like disadvantages, penalties and punishments by order of the Court on the representation of the arbitral tribunal as they would incur for the like offences in suits tried before the Court.[59]

The Supreme Court in *Alka Chandewar v. Shamshul Ishrar Khan*[60] held that the scope of Section 27(5) includes non-compliance of any order given by an arbitral tribunal to be referred to an appropriate court for proceeding against such non-compliance under the Contempt of Courts Act, 1971.[61]

More notably, Article 25 of UNCITRAL Model Law states that if a party commits procedural defaults such as a failure to produce documentary evidence or to appear at hearings, then the arbitral tribunal may make the

---

[57] Mayomi&Bayo-Ojo, *supra* note 4.
[58] Arbitration Act 1996, § 42 (Eng.).
[59] Arbitration & Conciliation Act, § 27(5), No. 26 of 1996, Act of Parliament, 1996.
[60] 2007 (13) SCC 220.
[61] Contempt of Courts Act, No. 70 of 1971, Act of Parliament, 1971.

award based on the evidence before it and give no weight to any other evidence.[62] The Chartered Institute of Arbitrators Guide on Managing Arbitration and Procedural Orders, 2015 contemplates that if a party fails to comply with a procedural order or frustrates the proceedings, then, in some instances the arbitral tribunal may have to exercise its power to impose sanctions on the uncooperative party for the proceedings to end in a timely and orderly manner.[63] However, such a power should only be used after issuing warnings and explaining the reasons for the same.[64]

Perhaps the most significant way in which non-compliance of procedural order can have a bearing on the party is an adverse award against the party. There have been cases where courts have held that it was well within the scope of the discretion of the arbitral tribunal if it refuses to hear a new claim when a party tries to amend its statement of claim without corroborating evidence[65] or refuses to consider a counterclaim submitted only a week before the arbitration hearing[66] or excludes additional legal authorities submitted by a party after the cut-off date, because of it being a 'case management decision.'[67]

Thus, courts consider it a key principle to give substantial reverence to the arbitral tribunal's procedural decisions.[68] This principle affords the arbitral tribunal wide discretion to determine a suitable procedure and ensure

[62] UNCITRAL Model Law, art. 25.
[63] CHARTERED INSTITUTE OF ARBITRATORS, MANAGING ARBITRATIONS AND PROCEDURAL ORDERS 14 (2015).
[64] *Id.*
[65] Grosso v. Barney, 2003 WL 22657305.
[66] Peters Fabrics Inc v. Jantzen Inc., 582 F. Supp 1287, 1292.
[67] Berger & Jensen, *supra* note 33 at 423.
[68] On Call Internet Services Ltd v. Telus Communications Co., [2013] BCAA 366 (Can.).

fair, expeditious, economical and final determination of the dispute[69] due to which enforcing a procedural order on a non-compliant party is the prerogative of the arbitral tribunal.

B. Limits to consequences for non-compliance

There exist certain limitations on the power of the arbitral tribunal to act on non-compliance with a procedural order. These limitations are in the form of the obligations on arbitral tribunals to observe a minimum standard of due process.[70] This requirement of due process has become an international standard in itself as Article V(1)(b) of the New York Convention[71] and Article 18 of the UNCITRAL Model Law, provides that an award may be set aside if such due process rights are denied to the party. Unlike the public policy exception to the enforcement for foreign awards, which varies from one state to another, the due process rights are universal and must be followed irrespective of the jurisdiction.

It is worth mentioning that the right of the party to present its case can go only so far that an opportunity of fair hearing is accorded to it and not be extended to how the case is heard. This interpretation was adopted by the Supreme Court of Indian in *Vijay Karia*[72] in interpreting Section 48 of the Arbitration and Conciliation Act which allows for the challenges of a foreign award if a party "was otherwise unable to present his case."[73]The analytical commentary on Article 18 of UNCITRAL Model Law clarifies that the

[69] Brandeis (Brokers) Ltd v. Black, [2001] 2 All ER (Comm) (Eng.).
[70] NIGEL BLACKABY ET. AL, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 798 (Oxford Univ. Press, 5th ed. 2009).
[71] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Jun. 10, 1958, 330 U.N.T.S. 3.
[72] Vijay Karia v. Prysmian Cavi E Sistemi SRL, 2020 SCC OnLine SC 177.

meaning of "full opportunity to present his case" cannot be stretched to mean that an arbitral tribunal "must sacrifice all efficiency to accommodate unreasonable demands by a party"[74] because otherwise dilatory tactics can be employed by a party to obstruct proceedings through methods such as unwarranted objections or new evidence on the eve of the award.

Even then, it is difficult to reach a middle ground when due process rights of the parties might be at odds with procedural efficiency. In a situation where deviance from a procedural order is requested by a party, the arbitral tribunal may either allow such deviance which may prolong the arbitration process, or deny such deviance which could result in a compromise of the parties' right to present his case. Since the parties' right to be heard is not absolute and does not include unreasonable and dilatory procedural requests,[75] therefore, a balance needs to be created for effective use of procedural orders between the time and cost-efficiency of proceedings borne by the parties and the role of the arbitrator as guardians of due process.

V. CONCLUSION

The procedural order has now become consequential to the entire arbitration process. The traditional approach of immunity to the procedural orders from judicial interference and interpretation is fading away.

Either way, the scrutiny and consequences of procedural orders have increased the responsibility of the arbitral tribunal to handle emerging issues

---

[73] Arbitration & Conciliation Act, § 27(5), No. 26 of 1996, Act of Parliament, 1996.
[74] U.N. Secretary General, Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration, UN Doc A/CN.9/264, 46 (Mar. 25, 1985).
[75] FRANZ T. SCHWARZ & CHRISTIAN W. KONRAD, THE VIENNA RULES: A COMMENTARY ON INTERNATIONAL ARBITRATION IN AUSTRIA ¶20-70 (Wolters Kluwer 2009).

wisely. Arbitrators should communicate the intention behind a procedural order as clearly as possible along with the consequences arising from the non-compliance of that order. Further, to avoid procedural orders being construed as party agreements by courts, the arbitral tribunal and parties must be cautious and explicitly mention which procedural orders are agreed upon by the parties and are intended to have the effect of a party agreement.[76]

In an arbitration process, it is the primary responsibility of the arbitral tribunal to ensure that the procedural orders do not pave the way for the "dark side of arbitral discretion"[77] by deviating from any pre-determined procedural limits and at the same time be wary of unnecessary procedural requests while honouring the party agreement. It is ultimately the responsibility of the courts to carefully balance judicial non-interference and procedural discipline of the parties and the arbitral tribunal in a quest to ensure both, efficiency and procedural justice.

[76] Wagner &Bülau, *supra* note 3 at 15.
[77] Park, *supra* note 26 at 286.