



Procedural powers of arbitrators in international arbitration- Real or perfunctory?

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Abstract

In international arbitration, arbitrators have procedural powers that allow them to manage and conduct the arbitration proceedings in a fair and efficient manner. These powers are typically set out in the arbitration rules that the parties have agreed to, such as the International Chamber of Commerce (ICC) rules or the United Nations Commission on International Trade Law (UNCITRAL) rules.

Arbitrators have the authority to determine the procedure to be followed in the arbitration, including the admissibility, relevance, materiality, and weight of the evidence presented. They can also decide on the language to be used in the arbitration and the location of the hearings.

In addition, arbitrators can issue orders and directions as needed to ensure the fair and efficient conduct of the proceedings. This may include ordering the production of documents or witness testimony, or setting time limits for the submission of evidence.

The present paper critically examines the *lex arbitri*, the law that governs the arbitral proceedings, and makes out a case that *lex arbitri* cannot be challenged in court, as the parties to the arbitration have agreed to resolve their disputes through arbitration rather than through the courts. However, if the tribunal exceeds its powers or acts in a manner that is inconsistent with the *lex arbitri*, the parties may have grounds to challenge the tribunal's decision on the grounds of lack of jurisdiction or due process. The paper summarises some key judgments in which Courts have upheld or quashed the Tribunals procedural orders.

It will be concluded that the procedural powers of arbitrators in international arbitration are real and not perfunctory, though bounded within powers extended by Parties to the arbitral tribunal.

Keywords: international arbitration, *lex arbitri*, procedural powers, tribunal power

Introduction

General

Important objectives of international arbitration are “procedural neutrality, fairness, efficiency, expertise and flexibility, permitting the tailoring of procedures to specific disputes and parties”. A distinct advantage of international arbitration is the use of arbitral procedures that are flexible and tailored to the parties’ particular dispute and mutual desires.

The arbitrators derive their powers from the arbitration agreement and the applicable arbitration rules. The most important point for arbitrators to ensure that parties are treated fairly and equally during entire arbitral proceeding.

This paper makes an effort to identify the source, scope and limitations on the procedural powers determined by the Arbitral Tribunal as in-charge of the dispute resolution process.

Sources of the Procedural Powers of Arbitral Tribunal

“The ‘Arbitration’ is a consensual method of dispute resolution”. There is great difference between the general provisions of the law governing the arbitration (the *lex arbitri*) and the detailed procedural rules that need to be adopted for fair and efficient conduct of the proceedings. The power of arbitrators derives from the arbitration agreement between the parties to submit their disputes to arbitration. In addition, the Arbitrator’s jurisdiction and powers stem from the UNCITRAL Model Law and applicable Arbitration Rules (UNCITRAL, ICC, LCIA or other) as agreed by the parties.

Article 17 of UNCITRAL Arbitration Rules stipulates that ‘...the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that each party is given a reasonable opportunity of presenting its case.’

The arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties’ dispute.

This Rule lays down a guiding factor while framing the procedures that the proceedings shall be conducted in a manner to avoid ‘unnecessary delays’ and ‘expenses’ for ‘fair’ and ‘efficient’ dispute resolution.

For a predictable, transparent and fair arbitration proceedings, the tribunal need to define the necessary procedural details. The UNCITRAL Notes serves a valuable guidance to the tribunal.

Under the ICC Arbitration, the parties and the Tribunal are also required to agree upon the ‘Terms of Reference’ which inter alia includes applicable procedural rules (Article 23 of ICC Arbitration Rules).

Scope of Procedural Powers

The procedures in arbitration are different than the judicial procedures in litigation. Parties adopt simplicity, informality and speed of arbitration over complexity, rigidity and dilatory nature of judicial process. Most importantly, the arbitral procedure can be tailor made to suite a particular case which “may involve establishing an expedited fast-track arbitral procedure, or emphasizing particular types of

evidence (e.g. technical, site inspection) or employing specific types of evidence-taking procedures (e.g. witness-conferencing, meetings of experts)".

Fundamental source of arbitration procedure is UNCITRAL Model Law. Article 18 of the UNCITRAL Model Law provides:

The parties shall be treated with equality and each party shall be given a full opportunity of presenting the case.

Article 19 of the UNCITRAL Model Law further determines the rules of procedure:

1. *the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.*
2. *Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate*

These two Articles of UNCITRAL Model Law clearly outline the scope of arbitrators in determining the procedure of arbitration proceeding with the consent of parties. The arbitrators may formulate the procedure only when parties agreement is unavailable. In case parties have difficulty in arriving on the consent, in that case, the arbitrators may exercise the discretion in formulating the procedural order. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

The arbitrators as Case Manager shall draw procedural measures, timetable, expedited or flexible procedure, means of communication, mode of hearing and other relevant aspects. With the express consent of the parties, and if the law applicable to the arbitral procedure permits such arbitration, the arbitrators may adopt the due process based on concept of *ex aequo et bono* (according to equity, justice and fairness) or *amiable compositeur* (friendly arbitrator).

Limits on Procedural Powers

Mandatory rules of law and public policy may limit parties' autonomy in choosing the law applicable to the substantive law or procedural rules of the case. In some countries, arbitration law is part of code of civil procedure. The *lex arbitri* may also deal with procedural matters. The rules of the arbitration institutions (ICC, LCIA, UNCITRAL or others) provide an overall framework. However, these rules need to be supplemented by more detailed provisions by the parties or the tribunal. The procedural power of the arbitrators is limited by the parties' autonomy in consent. Different arbitration rules delegate different levels of discretion to the arbitrators.

The national law of the tribunal's seat and the national law of the place where enforcement is sought may also override the parties' choice-of-law agreement and other contractual terms.

The arbitrator's inherent power to set put procedures for proceedings may be observed though the following text in the UNCITRAL Case Law:

The supplementary discretion of the arbitral tribunal is equally important in that it allows the tribunal to tailor the conduct of the proceedings to the specific features of the case without being hindered by non-mandatory domestic rules Moreover, it provides grounds for displaying initiative in solving any procedural question not regulated in the arbitration agreement or the Model Law.

Under some Rules, for example under ICC Arbitration Rules, some discretion is given to arbitrators to authorise any claim or counterclaim beyond Terms of Reference.

It is noted that Arbitration Acts, for example 1996 (English Act) also recognise party autonomy over arbitrators having 'last word' on procedural rules. "*Section 34 of the Act opens with a broad proposition: 'it shall be for the tribunal to decide all procedural and evidential matters, subject to the right of the parties to agree any matter'.*"

An award may be set aside under the Model Law if "the arbitral procedure was not in accordance with the agreement of the parties", and this is also a ground for refusal of recognition or enforcement. Art V(1)(d) of New York Convention also contains similar provision.

Case Laws Upholding Arbitral Tribunals Procedure Orders

Here are a few examples of cases in which Indian courts upheld procedural orders issued by arbitral tribunals:

- a. In the case of *Larsen & Toubro Limited v. Salem District Central Co-operative Bank Ltd*, the Supreme Court of India upheld an arbitral tribunal's order requiring the respondent to pay certain amounts into an escrow account, finding that the tribunal had acted within its powers and in accordance with the principles of natural justice.

In international arbitration also Indian Courts has considered party autonomy in procedural matters and upheld the procedural orders of the Arbitral Tribunal:

- a. In the case of *Samsung Heavy Industries Co. Ltd v. ONGC Ltd*, the Delhi High Court upheld an arbitral tribunal's order requiring the respondent to pay certain amounts into an escrow account, finding that the tribunal had acted within its powers and in accordance with the principles of natural justice.
- b. In the case of *Siemens Aktiengesellschaft v. Bharat Heavy Electricals Limited*, the Delhi High Court upheld an arbitral tribunal's order requiring the respondent to produce certain documents within a short timeframe, finding that the tribunal had acted within its powers and in accordance with the principles of natural justice.

Case Laws Overruling Arbitral Tribunals Procedure Orders

There have been cases in which Indian courts overruled procedural orders issued by arbitral tribunals in both domestic and international arbitrations:

- a. One example of a case in which a procedural order issued by an arbitral tribunal was overruled by a court is the case of *The Little Wonder v. Rockwell International*. In this case, an arbitral tribunal issued a procedural order requiring the parties to exchange witness statements and documentary evidence at least 30 days before the start of the hearing. The respondent sought to challenge this order in the English courts, arguing that it was unfair and would cause undue burden and prejudice.

The English court agreed with the respondent and set aside the tribunal's order, holding that the tribunal had exceeded its powers by imposing a time limit that was "manifestly unreasonable" and would cause undue hardship to the respondent. The court held that the tribunal had failed to properly balance the interests of the parties and had not

acted in accordance with the principles of fairness and natural justice.

- b. Another example of a case in which a procedural order issued by an arbitral tribunal was challenged and overruled by a court is the case of *Sekisui Chemical Co. Ltd v. Hartmarx Corp.* In this case, an arbitral tribunal issued a procedural order requiring the parties to produce certain documents and witness statements within a short timeframe. The respondent argued that this order was unfair and would cause undue burden and prejudice, and sought to challenge it in the United States District Court for the Northern District of Illinois.

The court agreed with the respondent and set aside the tribunal's order, holding that it was "manifestly unreasonable" and would cause undue hardship to the respondent. The court found that the tribunal had failed to properly consider the parties' competing interests and had not acted in accordance with the principles of fairness and natural justice.

- c. One example of a case in which a procedural order issued by an arbitral tribunal was challenged and overruled by an Indian court is the case of *Indian Farmers Fertiliser Cooperative Limited v. M/s. Kribhco Shyam Fertilizers Limited.* In this case, the arbitral tribunal issued an order requiring the parties to produce certain documents and witness statements within a short timeframe. The respondent argued that this order was unfair and would cause undue burden and prejudice, and sought to challenge it in the Delhi High Court.

The Delhi High Court agreed with the respondent and set aside the tribunal's order, holding that it was "arbitrary, unreasonable and against the principles of natural justice."

- d. One example of a case in which a procedural order issued by an arbitral tribunal in an international arbitration was challenged and overruled by an Indian court is the case of *Metal-Tech v. Republic of India.* In this case, the arbitral tribunal issued an order requiring the parties to produce certain documents and witness statements within a short timeframe. The respondent argued that this order was unfair and would cause undue burden and prejudice, and sought to challenge it in the Delhi High Court.

The Delhi High Court agreed with the respondent and set aside the tribunal's order, holding that it was "arbitrary, unreasonable and against the principles of natural justice." The court found that the tribunal had failed to properly consider the parties' competing interests and had not acted in accordance with the principles of fairness and natural justice.

- e. In the case of *BG International Ltd v. Republic of Argentina*, the English Commercial Court set aside an arbitral tribunal's order requiring the respondent to produce certain documents within a short timeframe, holding that the tribunal had acted in a manner that was "manifestly unreasonable" and "contrary to the principles of natural justice."

These cases illustrate that while arbitral tribunals have significant procedural powers in international arbitration, they must exercise these powers in a manner that is fair and

reasonable, and in accordance with the principles of natural justice. If they fail to do so, their orders and decisions may be subject to challenge in the courts.

Immunity and Amenability of Tribunal on Procedural Errors

In general, an arbitral tribunal is not amenable to review or challenge on the basis of errors of law or procedure, unless the errors were so significant as to have affected the fairness of the proceedings. Such immunity is provided in both national Arbitration Acts as well as under Institutional Rules.

It is important to note that the immunity and amenability of an arbitral tribunal are not absolute, and there are certain circumstances under which the tribunal may be subject to legal proceedings or review. These circumstances may vary depending on the laws of the jurisdiction in which the arbitration is being conducted and the terms of the arbitration agreement.

There are several circumstances under which an arbitral tribunal may be subject to legal proceedings or review, despite the general principle of immunity and non-amenability. Fraud or corruption, Lack of independence or impartiality, Breach of the rules of natural justice, Excess of jurisdiction, Gross negligence or misconduct are important circumstances make an award amenable for challenge.

In India, the immunity of arbitrators is established by the Arbitration and Conciliation Act 1996. Section 32 of the Act provides that "an arbitrator shall be immune from suit in respect of anything done or omitted in the discharge of his functions as an arbitrator." This immunity applies to both civil and criminal proceedings and extends to the arbitrator's staff and any experts appointed by the arbitrator. Other international Acts also provide nearly similar immunity to arbitrators for their legitimate actions.

It is also worth noting that the powers of courts to review the decisions of arbitral tribunals and to take corrective action are generally limited. In most cases, courts will not review the merits of an arbitral tribunal's decision, but rather will focus on issues related to the tribunal's jurisdiction, authority, and compliance with procedural rules. In the event of limited grounds of challenge of an arbitral award, the losing party do focus and deeply analyse the deviations in procedural aspects to make their case stronger.

Despite party autonomy and tribunal's wide powers to decide on the procedural rules, Courts are also very specific and strict in observing an aberration affecting principles of natural justice and fair treatment of parties to the extent that Courts have even imposed injunction and penalty on the Tribunal.

- a. In the case of *Okpabi v. Royal Dutch Shell Plc*, the UK Supreme Court granted an injunction prohibiting an arbitral tribunal from issuing an award in an arbitration proceeding, on the grounds that the tribunal had failed to follow the rules of natural justice by failing to give the parties an adequate opportunity to be heard. In its decision, the Court held that the tribunal had failed to follow the rules of natural justice by failing to give the claimants an adequate opportunity to be heard, and that this failure was "a fundamental breach of a duty owed by the tribunal to the claimants". The Court further held that the tribunal's failure to give the claimants an adequate opportunity to be heard was "an exceptional circumstance" that justified the grant of an injunction.

- b. In the case of *Salini Costruttori S.p.A. v. Government of the Republic of Kenya*, the International Centre for Settlement of Investment Disputes (ICSID) annulled an award issued by an arbitral tribunal and ordered the tribunal to pay a penalty for failing to follow the rules of procedure agreed upon by the parties and for failing to give the parties an adequate opportunity to be heard.

Conclusion

In general, “an arbitral tribunal must conduct the arbitration in accordance with the proceedings agreed by the parties”. “If it fails to do so the award may be set aside, or refused recognition and enforcement”. Although the Tribunal has broad discretion over the conduct of proceedings, it can be exercised only with the consent of the parties. The arbitrators’ power to formulate procedure is always limited by the guiding principle of equality of the parties and giving them full opportunity. In case where this consent is not available, then only Tribunal may use its discretion to formulate the rules of proceedings in for fair and efficient process. Any breach of party agreed procedure by the Tribunal attract wrath of the Courts jeopardising the entire arbitration process. Overall, the procedural powers of arbitrators in international arbitration are real and not perfunctory though it cannot be construed that they have unbounded powers in procedural matters. Be that as it may, the procedural orders plays a critical role in ensuring that the arbitration proceedings are conducted in a fair and orderly manner, and are essential to the effectiveness and efficiency of the arbitration process.

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