

# Procedural Orders in Commercial Arbitrations

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*Procedural Order – Award – Judicial Review – Enforcement – Exequatur –  
Deliberation – Reasoning – Scrutiny*

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## Summary

Before rendering a final award, an arbitral tribunal will have had to make a number of decisions. Some are commonly referred to as procedural orders.

There are debates about what distinguishes them from awards and what falls under one or the other. This article examines this question based on arbitral practice.

It also analyses the legal framework of these procedural orders (effects, form, reasoning, deliberation, scrutiny, etc.).

Deciding disputes<sup>4</sup> arising from a legal relationship lies at the heart of an arbitral tribunal's mission.<sup>5</sup> Before being able to accomplish this mission by rendering a final award, arbitral tribunals will have made multiple decisions.

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<sup>4</sup> Without prejudice to the arbitral tribunal's role in helping the parties to settle their dispute.

<sup>5</sup> This mission is not necessarily reserved to arbitral tribunals; other paths may be followed to obtain a binding decision on 'legal disputes' outside the courts; depending on the applicable law, third binding decision (sometimes referred to as contractual arbitration) may offer such an alternative path; see O. Caprasse, "De la tierce décision obligatoire", *J.T.*, 1999, pp. 565 and f.

They can be diverse<sup>6</sup> as to their object and as to their form, from oral communications during the hearing to the award including procedural orders (“POs”). This paper presents what (I) these POs are and how (II) they are issued.

## I. WHAT

### A. Elements of definitions

To our knowledge, there is no arbitration statute containing a definition of PO. In fact, many arbitration statutes do not even mention POs, yet arbitral tribunals routinely issue POs. Some suggest that ‘procedural order’ is inappropriate terminology that should be replaced with: “*measures of administration of the arbitration*”.<sup>7</sup> We will continue to use the term PO since it remains the most used term in practice.

Arbitral tribunals may render POs in accordance with their power and duty to conduct the procedure efficiently.<sup>8</sup> This power may be expressly provided for in arbitration rules (see for instance article 32.1 of the AAA-ICDR Rules: “*In addition to making a final award, the arbitral tribunal may make interim, interlocutory, or partial awards, orders, decisions, and rulings*”<sup>9</sup>), or implied.

The extent of a tribunal’s powers to render Pos is debated. This leads us to contrast POs with awards as a PO is commonly defined in the negative as

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<sup>6</sup> B. Hanotiau, “Les différentes manières pour un arbitre de trancher les conflits qui lui sont soumis”, in *La sentence arbitrale – Actes du colloque du CEPANI 40 du 30 novembre 2006*, Bruylant, Brussels, 2006, p. 31.

<sup>7</sup> *Mesures d’administration de l’arbitrage*; see C. Seraglini and J. Ortscheidt, *Droit de l’arbitrage interne et international*, 2<sup>ème</sup> éd., L.G.D.J., Paris, 2019, pp. 414 and f. ; and references.

<sup>8</sup> See for instance sections 33.1 and 33.4 of the English Arbitration Act: “The tribunal shall (...) (b) adopt procedures suitable to the circumstances of the particular case”; and “It shall be for the tribunal to decide all procedural and evidential matters, subject to the right of the parties to agree any matter”.

<sup>9</sup> See also article 36 of the UNCITRAL Rules, which provides that arbitral tribunals may issue procedural orders to terminate the proceedings following a settlement agreement of the parties or if the proceedings become unnecessary or impossible; articles 37, 38 and 39 of the SCC Rules allow arbitral tribunals to issue procedural orders for the adoption of interim measures, the grant of security for costs, or to grant or dismiss a summary proceedings request.

an “*arbitral decision which is not an award*”.<sup>10</sup> In this sense, POs constitute the residual category of arbitral decisions.<sup>11</sup> International instruments or statutes do not contain a definition of awards. Yet, this is not an academic question. The nature of the decision has an important bearing on its regime (possibility to have it set aside or enforced/recognized by state courts (exequatur)).<sup>12</sup>

Different approaches exist to determine what an award is.<sup>13</sup>

In Switzerland, case law elucidates the different types of awards<sup>14</sup> that can be subject to revision or annulment proceedings, in contrast to POs, which are not subject to these proceedings.<sup>15</sup> The types of awards are: final awards (*Endentscheid*), partial awards (*Teilentcheid*) and preliminary or incidental awards (*Vor- oder Zwischenentscheide*).

In France, a general concept has been developed following the *Sardisud case*<sup>16</sup>; accordingly, awards are: “*The decisions of arbitrators that definitively resolve, in whole or in part, the dispute submitted to them, whether on the merits, on jurisdiction, or on a procedural ground that leads them to terminate the proceedings*”.<sup>17</sup> Although this definition may raise criticism,<sup>18</sup> it remains

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<sup>10</sup> A. Lombardía, “5. Considerations About Procedural Orders”, in C. González-Bueno (ed), *40 under 40 International Arbitration*, Dykinson, S.L., 2021, p. 89; G. Born, *International Commercial Arbitration*, 3rd ed., Kluwer Law International, 2021, Vol. II, §15.08[H], p. 2396.

<sup>11</sup> P. Merabti, *La notion de sentence arbitrale: Etude de droit de l'arbitrage commercial*, Université Panthéon-Sorbonne – Paris I, 2022, pp. 255-263; J. Jourdan-Marques, *Le contrôle étatique des sentences arbitrales internationales*, Préf. Th. Clay, LGDJ, 2017, n°103.

<sup>12</sup> The conditions related to the nature of the decisions that can be set aside or enforced by exequatur are not examined in detail here.

<sup>13</sup> On French law, from a comparative perspective, see P. Merabti, *op.cit.*, pp. 217-222.

<sup>14</sup> In Belgium, see O. Caprasse, “La sentence arbitrale”, *Act. Dr.*, 2003, pp. 673 and f.

<sup>15</sup> ATF 4A\_582/2009, 13 April 2010, pt 2.3.1.

<sup>16</sup> Paris, 25 March 1994, *Sté Sardisud c/ Sté Technip*, *Rev. arb.*, 1994, p.391, note Ch. Jarrosson.

<sup>17</sup> Free translation of “*les décisions des arbitres qui tranchent de manière définitive, en tout ou en partie, le litige qui leur a été soumis, que ce soit sur le fond, sur la compétence ou sur un moyen de procédure qui les conduit à mettre fin à l'instance*”.

<sup>18</sup> Critics of this definition concern the role of the will of the parties, the status of decisions on interim and conservatory measures, of the award by consent, or of decisions that reject a procedural ground that could have terminated the dispute if accepted; see M. De Boissésou, C. Fouchard and J. Madesclair, *Le droit français de l'arbitrage*, LGDJ, Paris, 2023, pp. 763-764; C. Seraglini and J. Ortscheidt, *op.cit.*, pp. 414 and f.; J. Jourdan-Marques, *Le contrôle étatique des sentences arbitrales internationales*, Préf. Th. Clay, LGDJ, 2017, n°53 and f.

the general guide in the French legal order.<sup>19</sup>

In France, the *Brasoil* decision<sup>20</sup> further set out that the qualification of the decision by the arbitral tribunal or the parties is not decisive.<sup>21</sup>

In the United Kingdom, the Arbitration Act 1996 did not contain a general definition of a PO. Neither does the 2025 Act.<sup>22</sup> The English Courts have developed a list of criteria,<sup>23</sup> recently recalled in *ZCCM v. Kansanshi*,<sup>24</sup> in *Betta Oceanway Company v. SC Tomini Trading SRL*<sup>25</sup> and in *In K v. S*<sup>26/27</sup>.

According to those criteria<sup>28</sup>:

- real weight is given to the substance;

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<sup>19</sup> See for instance recently: Paris, ord., 21 mai 2024, n° 23/06872, *Rinat, D. actu.* 14 juin 2024, obs. J. Jourdan-Marques ; 4 juin 2024, n° 23/09465, *SARL Perspectives, D. actu.* 10 oct. 2024, obs., J. Jourdan-Marques ; T. Clay, *Panorama Arbitrage et modes amiables de règlement des conflits décembre 2023 – décembre 2024, Recueil Dalloz*, 26 décembre 2024, n° 44, p. 2219.

<sup>20</sup> Paris Court of Appeals, July 1, 1999, *Brasoil, Rev. Arb.*, p. 834, note Ch. Jarosson.; confirmed by Cour de cassation, 11 December 2001, available on the Cour de cassation website <https://www.courdecassation.fr/>.

<sup>21</sup> On the relevance of the qualification of the decision in a comparative context, see G. Born, *International Commercial Arbitration*, 3rd ed., Kluwer Law International, 2021, Vol. III, §22.02[B][3], p. 3168.

<sup>22</sup> As of 24 February 2025, the Bill has received Royal assent.

<sup>23</sup> See: *Cargill Srl Milan v. P Kadinopoulos SA*, 1992, 1 Lloyd's Rep 1; *The Trade Fortitude*, 1992, 1 Lloyd's Rep 169; *The Smaro*, 1999, 1 Lloyd's Rep 225; *Michael Wilson & Partners Ltd v. Emmott*, 2008, EWCA, Lloyd's Rep 162; *Brake v. Patley Wood Farm LLP*, 2014, EWHC, 4192 (Ch); *Enterprise Insurance Company PLC v. U-Drive Solutions Ltd*, 2016, EWHC 1301; *Uttam Galva Steels Ltd v. Guvnor Singapore Pte Ltd*, 2018, EWHC 1098, 2 Lloyd's Rep 152.

<sup>24</sup> *ZCCM Investment Holdings PLC v. Kansanshi Holdings PLC & Kansanshi Mining PLC*, 2019, EWHC, 1285 (Comm.); C. Tevendale, R. Metsch, *Procedural Orders or Challengeable Awards? The English High Court Clarifies Its Position*, 1 November 2019, Kluwer Arbitration Blog.

<sup>25</sup> *Betta Oceanway Company v. SC Tomini Trading SRL*, 2023, EWHC 2707 (Comm.); A. Gilbert, *When is a procedural order an award? Court applies ZCCM test following section 68 challenge*, 23 November 2023, LexisNexis.

<sup>26</sup> *K v. S*, 2019, EWHC, 2386 (Comm.).

<sup>27</sup> On the evolution of the importance of the different criteria, see C. Tevendale, R. Metsch, *Procedural Orders or Challengeable Awards? The English High Court Clarifies Its Position*, 1 November 2019, Kluwer Arbitration Blog.; D. Bagshaw, *Arbitration Award or procedural decision: spot the difference?* 22 July 2019, Howard Kennedy Blog.

<sup>28</sup> See C. Tevendale, R. Metsch, *Procedural Orders or Challengeable Awards? The English High Court Clarifies Its Position*, 1 November 2019, Kluwer Arbitration Blog.; D. Bagshaw, *Arbitration Award or procedural decision: spot the difference?* 22 July 2019, Howard Kennedy Blog.

- a decision is more likely to be an award if it finally disposes of the matter;
- the nature of the issues considered in the decision is significant, as substantive rights and liabilities of parties are likely to be dealt with in the form of an award. A decision dealing purely with procedural issues is less likely to be an award;
- the tribunal’s description of the decision is relevant – but is not conclusive;
- the perception of a reasonable recipient of the tribunal’s decision is relevant. That reasonable recipient is likely to take into account the objective attributes of the decision, including 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 the formal requirements for an award under any applicable rule. The reasonable recipient must be considered to have all the information the parties and tribunal would have had when the decision was made, including the background and context of the proceedings. This may include whether the tribunal intended to make an award.

In *K v S*, the court considered that the most important of these factors was the final determination of a substantive point.

This brief overview of the approach in three jurisdictions illustrates that there is a variety of solutions and highlights the inherent difficulty in precisely defining an award – and consequently a PO. We will propose an analysis of how to navigate this in practice.

## **B. Cases for awards, for POs or for both**

In the section below, we provide a non-exhaustive list of disputes that can be decided by awards; by POs; or that can be decided by both. We examine which types of disputes can be decided by an award or a PO.

Another possible scenario is to include in an award an accessory decision, as opposed to rendering a separate PO.

We focus on the applicable principles to decide a specific dispute by an award or a PO.

When both options are available, an arbitral tribunal will have to choose on the basis of the criteria examined in the second part of this paper.

### E.1. Cases for awards

In principle, when a substantive issue is decided, even in a partial decision, it is by an award, whatever the qualification given to the decision. In other words, it is generally accepted that deciding substantive issues, such as liability or evaluation of damages,<sup>29</sup> cannot be done by POs.

The same goes for decisions on jurisdiction.<sup>30</sup>

Decisions which lead to the termination of proceedings on procedural grounds are also determined by awards. In fact, any decision on procedural grounds that *could* lead to the termination of the proceedings should also be determined by an award.<sup>31</sup> Indeed, the way a question is decided should not have a bearing on the nature of the decision.

Deciding upon the applicable law constitutes another example of disputes to be decided by an award.<sup>32</sup>

### E.2. Cases for POs

Certain issues are routinely decided by POs. This is most commonly the case for administrative aspects of a dispute, such as bifurcation, scheduling, deadline extensions, logistic and/or administrative questions before the hearing.<sup>33</sup>

The decision whether to stay proceedings should also be made by POs.<sup>34</sup>

Section 34 of the English Arbitration Act is titled “*Procedural and evidential matters*”.<sup>35</sup> Subsection 2 contains a list of issues that, in our view,

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<sup>29</sup> G. Born, *International Commercial Arbitration*, 3rd ed., Kluwer Law International, 2021, Vol. III, §23.01[B], p. 3263.

<sup>30</sup> T. Clay, *Panorama Arbitrage et modes amiables de règlement des conflits décembre 2023-décembre 2024*, Recueil Dalloz, 26 décembre 2024, n° 44, p. 2219 ; M. De Boissésou, C. Fouchard and J. Madesclair, *op.cit.*, pp. 763-764.

<sup>31</sup> C. Seraglini and J. Ortscheidt, *op.cit.*, p. 417 : “...on se trouve en présence d’une sentence chaque fois que l’arbitre a tranché un litige sur une question de procédure ‘tendant à mettre fin à l’instance’”.

<sup>32</sup> Some consider that this could be done by PO when the parties agree on having it decided by PO, see B. Hanotiau, *op.cit.*, p. 31.

<sup>33</sup> A. Lombardía, *op.cit.*, p. 89; the author further cites confidentiality, admission of evidence; in our view, depending on the circumstances, these two examples could be dealt with in awards.

<sup>34</sup> See *contra* in France Paris, 7 July 1987, *Rev. Arb.*, 1988, p. 649 and note E. Mezger; in that case, it has been decided that such a decision could be qualified as an award.

<sup>35</sup> 1996 English Arbitration Act, Section 34; as of the date of writing, a new Bill is discussed (introduced on 18 July 2024); no amendments are discussed for section 34.

are typically reserved for POs, with the exception of Subsection 2, (f) and (g), which could also belong to the ‘award category’:

*“(1) It shall be for the tribunal to decide all procedural and evidential matters, subject to the right of the parties to agree any matter.*

*(2) Procedural and evidential matters include*

*(a) when and where any part of the proceedings is to be held;*

*(b) the language or languages to be used in the proceedings and whether translations of any relevant documents are to be supplied;*

*(c) whether any and if so what form of written statements of claim and defence are to be used, when these should be supplied and the extent to which such statements can be later amended;*

*(d) whether any and if so which documents or classes of documents should be disclosed between and produced by the parties and at what stage;*

*(e) whether any and if so, what questions should be put to and answered by the respective parties and when and in what form this should be done;*

*(f) whether to apply strict rules of evidence (or any other rules) as to the admissibility, relevance or weight of any material (oral, written or other) sought to be tendered on any matters of fact or opinion, and the time, manner and form in which such material should be exchanged and presented;*

*(g) whether and to what extent the tribunal should itself take the initiative in ascertaining the facts and the law;*

*(h) whether and to what extent there should be oral or written evidence or submissions.*

### **E.3. Cases for awards or POs**

In certain instances, it is generally accepted that a decision be rendered either by a PO or an award.

Interim and conservatory measures constitute an emblematic example, with the specific sub-category of emergency arbitrations.

The form of decision on ‘ordinary’ interim measures is commonly not defined whereas the form of emergency arbitration decisions is often determined by institutional rules: POs under the ICC Rules,<sup>36</sup> PO or award under the CEPANI Rules<sup>37</sup> (depending on what the arbitrator considers most appropriate<sup>38</sup>).

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<sup>36</sup> Art. 29 (2).

<sup>37</sup> The Belgian center for arbitration and mediation.

<sup>38</sup> Art. 27 (10).

NAI Rules are specific as they provide – for emergency as well as ‘ordinary’ interim measures – that: “*Without prejudice to any provision of applicable mandatory arbitration law, the decision on the interim measures may be taken in the form of an order by the arbitral tribunal or in the form of an award*”.<sup>39</sup>

Decisions on document production are generally made through POs. In exceptional circumstances, however, the parties (or one of them<sup>40</sup>) may request that the production of document(s) be rendered in an award. This may occur when said production is at the heart of the dispute or when the party requesting the document wants to increase the enforceability of the decision.

Security for costs is another example where both POs and awards are used.<sup>41</sup>

Disputes on advance on costs in institutional arbitrations are another instance where POs and awards are both used. Institutions set the amount of advance on costs and, generally, request payment in equal shares from the parties. If one of them fails to pay, most rules,<sup>42</sup> allow the other party to substitute payment of the failing party so that the arbitration can proceed. These rules contain no specific entitlement to reimbursement of the substituted payment prior to the final decision of the arbitral tribunal on the allocation of costs. The question therefore arises whether the power of arbitral tribunals to allocate the costs in their final award<sup>43</sup> includes the power, during the proceedings, to order the defaulting party to reimburse its share to the substitute party, and if so, under what form (PO or award<sup>44</sup>).

Three trends emerge in practice. Some tribunals conclude that they have jurisdiction to order, *inter partes*, reimbursement of the advances on costs on the basis of the contractual nature of said obligation.<sup>45</sup> They tend to issue partial

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<sup>39</sup> Art. 40.3.

<sup>40</sup> It is then for the tribunal to decide.

<sup>41</sup> See T. Clay, *op.cit.*, p. 2219.

<sup>42</sup> See article 37 (5) of the ICC Rules and article 38 (3) of the CEPANI Rules.

<sup>43</sup> See article 38 (3) of the ICC Rules and article 39 (2), (3) of the CEPANI Rules.

<sup>44</sup> See N. Darwazeh and S. Greenberg, “No One’s Credit Is as Good as Cash: Awards and Orders for the Payment of the ICC Advance on Costs”, *Journal of International Arbitration*, Kluwer Law International, 2014, Vol. 31/5, pp. 557–547.

<sup>45</sup> On the nature of the obligation to pay the advances on costs see X. FAVRE-BULLE, “Les conséquences du non-paiement de la provision pour frais de l’arbitrage par une partie – Un tribunal arbitral peut-il condamner un défendeur au paiement de sa part de l’avance de frais ?”, *ASA Bulletin*, Kluwer Law International, 2001, vol. 19, Issue 2, pp. 227-245.

awards (rather than POs).<sup>46</sup> Others consider that advances on costs belong to administrative issues under the exclusive competence of the institution, and are of a provisional nature, the advances being readjusted by the institution until their final determination and allocation by the arbitral tribunal.<sup>47</sup> These tribunals consider that their powers are limited to interim measures to guarantee immediate payment of the fees (subject to the conditions applicable for such measures (e.g. risk of irreparable harm and urgency)<sup>48</sup>). When they make use of this competence, they generally do it by POs.<sup>49</sup> According to a third trend, arbitral tribunals' powers are limited to the allocation of the arbitration costs in the final award, once determined by the institution. According to this approach, parties are not considered as jointly and severally liable for the payment of the advance on costs so that the defaulting party could not be condemned to reimburse its share to the other party.<sup>50</sup>

Another illustration of a possible choice between POs and awards is found in the instruction of the case: if the appointment of an expert is commonly ordered by PO, sometimes it is decided by award.

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<sup>46</sup> T. Williams, A. Durrani, et al., "The Advance on Costs in Arbitration: Reimbursement of Substituted Payment", *Journal of International Arbitration*, 2021, Vol. 38, Issue 3, pp. 349 – 352; S. Nataf, "L'obligation de contribuer au paiement de la provision pour frais de l'arbitrage et l'accès à la justice (arbitrale ou étatique), note sous Paris, Pôle 1 – Ch. 1, 23 juin 2020", *Rev. arb.*, 2020, pp. 1108 – 1120; J. Rouche, "Le paiement par le défendeur de sa part de provision sur les frais d'arbitrage: simple faculté ou obligation contractuelle ?", *Rev. arb.*, 2002, pp. 841 – 855, and references; C. Jarrosson, "Le principe de loyauté procédurale, parade astucieuse au défaut de versement de la provision pour frais d'arbitrage, note sous Cass. civ. 1re, 9 février 2022", *Rev. arb.*, 2022, pp. 312 – 317, and references; Preliminary Award of 2 September 1996 – ICC Case No. 7289; Award of 10 August 1998 – ICC Case No. 9667; Partial Award of 27 March 2001 – ICC Case No. 10526; Partial Award of 2005 and Final Award of 2006 – ICC Case No. 13139; Partial Award No. 2 of 2008 – ICC Case n°14871; Interim Award of 12 November 2010 – ICC Case No. 17050. See also ICC Case No. 16812 (2011), ICC Case No. 15506 (2009), ICC Case No. 15072 (2008), ICC Case No. 13290 (2008).

<sup>47</sup> T. Williams, A. Durrani, et al., "The Advance on Costs in Arbitration: Reimbursement of Substituted Payment", *Journal of International Arbitration*, 2021, Vol. 38, Issue 3, pp. 352 – 354. See for instance, ICC Case No. 12491 (2004) applying the 1998 ICC Rules.

<sup>48</sup> X. FAVRE-BULLE, *op.cit.*, pp. 227-245, Nos. 3 and 7; Award of 26 March 2002 in ICC Case No. 11405.

<sup>49</sup> X. FAVRE-BULLE, *op.cit.*, pp. 227-245.

<sup>50</sup> *Ibidem*; M. W. Bühler, "Note – Sentence Partielle du 1er juin 2004 dans l'affaire CCI No 12491/KGA/EC", *ASA Bulletin*, 2006, vol. 24, Issue 2, pp. 294-296; Interim Award on Jurisdiction and on Reimbursement of Advance on Costs in VIAC Case No. SCH-5120 (2010).

### C. POs' Effects

*Revocable.* Subject to what is set out below, POs are revocable. Arbitral tribunals may amend, correct or revoke their POs depending on the circumstances,<sup>51</sup> and the parties are allowed to file a motion for reconsideration.<sup>52</sup>

As pointed out in the CIArb guidelines 2016, “*It is good practice for arbitrators to state expressly in each procedural order that it may be revised at any time during the subsequent proceeding*”.<sup>53</sup> This power may be stated expressly in the terms of reference and is often reiterated in each PO.

POs are consequently exempt from the interpretation, correction or clarification recourses usually available in relation to awards.<sup>54</sup>

*Revocable-Nuances.* The fact that POs are revocable should not open a door to inconsistency. Consequently, while POs can be amended or even revoked, there must be a reason for it.

Moreover, POs' 'revocable' status may need further examination when the parties agree on its content (see 'consultation' below).

Furthermore, in cases where POs are used for matters not purely administrative, they may enjoy greater effect, as is the case when interim measures are issued through POs. Provisional by nature, which is the reason why some deny the possibility to enforce them through *exequatur*, these POs enjoy a *res judicata sic rebus standibus* effect.<sup>55</sup> Obtaining their amendment or revocation, request evidence of a change of circumstances.

*Enforcement.* All decisions of arbitral tribunals, including POs, are binding on the parties.<sup>56</sup>

In practice, they are often complied with voluntarily.

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<sup>51</sup> CIArb International Arbitration Professional Practice Guideline No. 6 on Managing Arbitrations and Procedural Orders (2016), Public Source Materials, Kluwer Law International, p. 14; A. Lombardía, “5. Considerations About Procedural Orders”, in C. González-Bueno (ed), *40 under 40 International Arbitration*, Dykinson, S.L., 2021, p. 98.

<sup>52</sup> A. Lombardía, *op.cit.*, pp. 92-93.

<sup>53</sup> CIArb International Arbitration Professional Practice Guideline No. 6 on Managing Arbitrations and Procedural Orders (2016), Public Source Materials, Kluwer Law International, p. 14.

<sup>54</sup> A. Lombardía, *op.cit.*, p. 93.

<sup>55</sup> O. Caprasse and N. Lauber-Thommesen, “Management of Construction Arbitrations”, in D. De Meulemeester (dir.), *Construction and Arbitration: The Essential Building Blocks*, Wolters Kluwer, Malines, 2024, p. 190 (para. 88).

<sup>56</sup> A. Lombardía, *op.cit.*, pp. 99-100.

In the absence of compliance, arbitral tribunals' power to ensure the enforcement of their POs follow from the arbitration agreement, the *lex arbitri*, the arbitration rules and/or the terms of reference. In the absence of any express provision, arbitral tribunals will have to determine the scope of their power to sanction a party's disruptive behavior.<sup>57</sup>

In any case, it is good practice for arbitral tribunals to first warn the non-compliant party that the tribunal is considering imposing sanctions to ensure the effectiveness of a certain PO. Such warning "*may prove sufficient and it may assist to refute any later arguments that the imposing of the sanction was arbitrary and/or justified*".<sup>58</sup>

Arbitral tribunals may also issue a peremptory order requiring the non-compliant party to execute the earlier procedural order within a specified time limit. Failure to comply with the peremptory order may, depending on the case at hand, trigger, *inter alia*,<sup>59</sup> (i) exclusion of the evidence from the record, (ii) authorization to proceed and decide without the undisclosed document, (iii) drawing of adverse inferences provided that there is a causal link between the non-compliance and the assessment of a substantive issue,<sup>60</sup> (iv) cost sanctions and, if permitted by the *lex arbitri* and/or arbitration rules, civil penalties (v).<sup>61</sup>

The question further arises whether POs may be enforced, as arbitral awards, with the assistance and under the control of state courts. A detailed analysis of this question goes beyond the scope of the present paper. Suffices to write here that if there is a general trend to reject formal exequatur for POs, some consider that interlocutory decisions on disputed issues by application of legal rules to the factual record – in particular decisions on requests for interim measures, stay of proceedings and disclosure – should be enforceable as awards are.<sup>62</sup>

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<sup>57</sup> CIArb International Arbitration Professional Practice Guideline No. 6 on Managing Arbitrations and Procedural Orders (2016), Public Source Materials, Kluwer Law International, p. 14.

<sup>58</sup> *Ibidem*, p. 15.

<sup>59</sup> *Ibidem*, pp. 14-16.

<sup>60</sup> On this causal link, see: O. Caprasse and N. Lauber-Thommesen, *op.cit.*, p. 199 (para. 108).

<sup>61</sup> For instance, in France, article 1468(1) of the French Code of Civil Procedure, and in Belgium, articles 1700(4) and 1713(7) of the Belgian Judicial Code, provide that arbitrators have the power to attach penalties to orders on interim measures; conversely, article 25(3) of the Swedish Act prohibits the imposition of "conditional fines"; where civil penalties are permissible, they may require the issuance of a genuine partial award to ensure enforcement; see: O. Caprasse and N. Lauber-Thommesen, *op.cit.*, p. 199, paras. 109-110.

<sup>62</sup> On this debate, see G. Born, *op.cit.*, p. 3180.

In addition, under certain legal systems, especially those in line with the UNCITRAL Model Law, interim measures are enforceable as awards. Furthermore, some legal systems provide that interim measures can be enforced through exequatur whatever their form (PO or award).<sup>63</sup>

## II. HOW

### A. Pros and Cons

Different factors must be taken into account by arbitral tribunals when they have the choice between rendering an award or a PO to decide a dispute.

First, the parties enjoy party autonomy, and accordingly arbitral tribunals shall give consideration to their common preference. Absent joint preference, they will have to evaluate the importance and merit of the arguments in support of their respective positions; positions that may reflect strategic choices applicable to a case,<sup>64</sup> including in relation to the enforcement of the decision.

Second, arbitrators must evaluate whether the circumstances of the case require a more expeditious approach.<sup>65</sup>

Third, arbitrators must try to anticipate the likelihood of non-compliance with their decision; taking into account the tribunal's limited powers to ensure compliance, the possible need for enforcement abroad, etc.<sup>66</sup>

When the arbitrators' focus is to ensure enforcement, issuing an award may be preferred. This will always be balanced with the additional time required for rendering an award, considering the necessary formalities (such as the signature by all the arbitrators<sup>67</sup>), the need for articulate reasoning<sup>68</sup> and scrutiny by an arbitration institution when applicable.<sup>69</sup>

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<sup>63</sup> This is the case in Belgium: Doc. parl. *Ch. rep.*, Doc. n°53-2743/001, Projet de loi modifiant la sixième partie du Code judiciaire relative à l'arbitrage, 11 avril 2013, p. 26; Article 1696 of the Belgian Judicial Code.

<sup>64</sup> R. Trittman, *op.cit.*, pp. 263-264.

<sup>65</sup> *Ibidem*, pp. 263-264.

<sup>66</sup> O. Caprasse and N. Lauber-Thommesen, *op.cit.*, p. 198.

<sup>67</sup> Comp. below on signature of POs.

<sup>68</sup> Comp. below on reasoning of POs.

<sup>69</sup> Comp. below on scrutiny of POs.

Partial awards may be subject to set aside proceedings, which can be time-consuming and disturb the smooth conduct of the arbitration. This is another factor commonly contemplated by arbitral tribunals.

## B. ‘Consultation’ with the parties

Before rendering a decision on a procedural issue, arbitral tribunals examine the parties’ respective positions. This could be done in a rather informal and swift manner for minor issues (such as in the case of disagreement on the type of court reporting to be used). Some situations require more elaborate consideration and analysis (such as for requests for exclusion of a document from the file). Some issues are increasingly dealt with according to standardized tools (such as *Redfern Schedules* for document production requests). In some cases, extensive submissions are exchanged, and a hearing is held<sup>70</sup> (such as for interim measures or on issues that might heavily impact the proceedings, (such as for decisions on bifurcation).

At the beginning of the proceedings, tribunals commonly state the applicable procedural rules in procedural order n°1. Tribunals consult with the parties on the content of this order.

Sometimes, they go further, asking for the agreement of the parties and stating said agreement in the PO, though tribunals should be cautious in this regard. The question has been raised, indeed, as to whether this could not lead to an agreement on the proceedings by the parties. In a judgment dated 17 February 2011, the Court of Appeals of Frankfurt/Main (*Oberlandesgericht – OLG*)<sup>71</sup> annulled an award on the ground of article 1059 (2) (No. 1, d) of the German Code of Civil Procedure (*Zivilprozessordnung – ZPO*), (proceedings not conducted in accordance with the agreement of the parties).

In this case, the arbitral tribunal and the parties participated in a case management conference on evidentiary rules. Following this conference, the arbitral tribunal circulated a draft “Procedural Order No. 10”, asking for the parties’ comments and approval. The tribunal then amended Procedural Order No. 10 and issued it formally. The PO stated, *inter alia*, that all sources of

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<sup>70</sup> These hearings are often held remotely; G. Born, *op.cit.*, pp. 2395-2396; “ICC Checklist for a Protocol on Virtual Hearings and Suggested Clauses for Cyber-Protocols and Procedural Orders Dealing with the Organisation of Virtual Hearings 2021”, Public Source Materials, Kluwer Law International, pp. 1-8; N. Bassiri, “Chapter 5: Conducting Remote Hearings: Issues of Planning, Preparation and Sample Procedural Orders”, in M. Scherer, Niuscha Bassiri, et al. (eds), *International Arbitration and the COVID-19 Revolution*, Kluwer Law International, 2020, pp. 105-120.

<sup>71</sup> OLG Frankfurt/Main, 17<sup>th</sup> February 2011, 26 Sch 13/10, BeckRS, 2011, 21515.

information made available to the experts commissioned by a party, whether oral or documentary, were to be filed by the party submitting it to the proceedings. The introductory phrase to this section mentioned that it represented an agreement of the parties. Later, Claimant submitted two expert reports without attaching all documents used by the expert. Respondent requested the arbitral tribunal to order claimant to submit missing documents. The arbitral tribunal dismissed the request on the basis of the PO and on the tribunal's alleged discretion in conducting and organizing the proceedings.

The Court of Appeals of Frankfurt/Main set aside the award, considering that Procedural Order No. 10 constituted a procedural agreement of the parties (having regard to the fact that it had been negotiated in detail by them), and that it was binding upon the arbitral tribunal, which had breached said agreement. The Court further found that the observance of the parties' agreement could have led to a different outcome.<sup>72</sup>

The German Federal Supreme Court confirmed the decision, while specifying that this reasoning was not to be generalized under German arbitration law as it could not be detached from the peculiar circumstances of the case.<sup>73</sup>

### C. Deliberation

Unlike awards, POs are not subject to a variety of procedural and formal requirements.<sup>74</sup> However, decisions made by POs must comply with the core procedural principles applicable in all arbitral proceedings: equality and due process.<sup>75</sup>

Moreover, each decision – substantive or procedural – requires deliberations among the arbitrators. These deliberations must respect the principles of collegiality, majority and secrecy.<sup>76</sup> Decisions must be collegial in the sense that all members of the arbitral tribunal must be able to participate

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<sup>72</sup> OLG Frankfurt/Main, 17<sup>th</sup> February 2011, paras. 17-18, 56-64.

<sup>73</sup> On this case, see G. Wagner and M. Bülow, "Procedural Orders by Arbitral Tribunals: In the Stays of Party Agreements?", in J. Risse, G. Pickrahn, et al. (eds), *German Arbitration Journal*, Kluwer Law International, Verlag C.H. Beck oHG 2013, 2011, vol.1, pp. 8-9. See also: P. Bert, "Arbitrator's Nightmare: When Procedural Orders Backfire – Flex-n-Gate v. GEA" published on 20 November 2012 on the Kluwer Arbitration Blog.

<sup>74</sup> G. Born, *op.cit.*, p. 3173.

<sup>75</sup> A. Lombardía, *op.cit.*, pp. 95-96; M. De Boissésou, C. Fouchard and J. Madesclair, *op.cit.*, pp. 784-788.

<sup>76</sup> A. Lombardía, *op.cit.*, p. 96; M. De Boissésou, C. Fouchard and J. Madesclair, *op.cit.*, pp. 784-788.

in the discussions leading to the adoption of the decision. This collegiality is a duty and a right of the arbitrators as well as a right of the parties.<sup>77</sup> When consensus cannot be reached, the decision is adopted by majority.<sup>78</sup> The secrecy of the deliberations, applicable during the entire arbitral proceedings, also applies to deliberations leading to POs.<sup>79</sup>

The parties may also agree that the authority to decide on procedural matters be delegated to the president of the arbitral tribunal alone.<sup>80</sup> This possibility is endorsed in article 29 of the UNCITRAL Model Law<sup>81</sup> (hence in many national arbitration laws based on the Model Law<sup>82</sup>). Such an agreement can also be indirect, through reference to arbitration rules such as article 41(2) of the NAI Rules.<sup>83</sup>

It must further be noted that urgency may require swift decisions in a timeframe that renders impossible prior exchange between the arbitrators. Terms of reference or procedural order n°1 generally anticipate this challenge as follows.<sup>84</sup>

*“The President of the Arbitral Tribunal may rule alone on motions of an urgent nature, subject to making the effort to first consult the other members*

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<sup>77</sup> A. Lombardía, *op.cit.*, p. 96; G. Born, *op.cit.*, p. 2473; M. De Boissésou, C. Fouchard and J. Madesclair, *op.cit.*, 789-792.

<sup>78</sup> A. Lombardía, *op.cit.*, p. 96; M. De Boissésou, C. Fouchard and J. Madesclair, *op.cit.*, pp. 792-793.

<sup>79</sup> A. Lombardía, *op.cit.*, p. 97; M. De Boissésou, C. Fouchard and J. Madesclair, *op.cit.*, pp. 793-794.

<sup>80</sup> J. M. Waincymer, *Procedure and Evidence in International Arbitration*, Kluwer Law International, 2012, pp. 438-440.

<sup>81</sup> Article 29 UNCITRAL Model Law: *“In arbitral proceedings with more than one arbitrator, any decision of the arbitral tribunal shall be made, unless otherwise agreed by the parties, by a majority of all its members. However, questions of procedure may be decided by a presiding arbitrator, if so authorized by the parties or all members of the arbitral tribunal”*.

<sup>82</sup> See for instance : Article 1711, §2 of the Belgian Judicial Code: *“Les questions de procédure peuvent être tranchées par le président du tribunal arbitral, si ce dernier y est autorisé par les parties”*.

<sup>83</sup> Article 41(2) of the NAI Rules: *“The Arbitral Tribunal may decide that the chairperson alone may make procedural rulings”*.

<sup>84</sup> CIArb International Arbitration Professional Practice Guideline No. 6 on Managing Arbitrations and Procedural Orders (2016), Public Source Materials, Kluwer Law International, p. 5; O. Caprasse, *“Some little clauses’ to include in terms of reference or procedural orders”*, in D. De Meulemeester, M. Berlingin, et al. (eds), *Liber Amicorum CEPANI (1969-2019): 50 Years of Solutions*, Kluwer Law International, 2019, p. 57; J. M. Waincymer, *Procedure and Evidence in International Arbitration*, Kluwer Law International, 2012, pp. 438-439.

*of the Arbitral Tribunal and, in any event, to informing them immediately of any ruling that has been made”.*

#### **D. Form**

Unlike awards, POs are not subject to legal or regulatory formal requirements (such as recourse to written documents, mandatory information, communication requirements, etc.). POs may, indeed, take various forms (emails, oral decisions during a video conference or a case management conference, and, of course, standalone written documents<sup>85</sup>).

In practice, arbitral tribunals tend to follow basic formalism for POs: they are commonly recorded in writing, state that they are POs in a title, are numbered consecutively throughout the proceedings, signed, dated and drafted with clear and unambiguous language (this often implies the use of informative headings and numbered paragraphs<sup>86</sup>).

It is further common that the president of the arbitral tribunal signs them on behalf of the tribunal.<sup>87</sup> Express language in relation thereto may be included in the terms of reference or in procedural order no. 1.

#### **E. Reasoning**

As a matter of principle, POs do not need to be reasoned. They can, but must not, expose any findings of facts or law underlying the decision.<sup>88</sup>

In practice, however, they do include brief reasoning. CIArb guidelines point out in this regard that “*to decide between competing arguments, the arbitrators may consider it appropriate to include succinct reasons in the procedural order to demonstrate that they have given full consideration to the parties’ respective submissions*”.<sup>89</sup>

This will certainly be the case with POs deciding on interim measures when the measures would likely have to be enforced by a state court.

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<sup>85</sup> A. Lombardía, *op.cit.*, p. 92.

<sup>86</sup> CIArb International Arbitration Professional Practice Guideline No. 6 on Managing Arbitrations and Procedural Orders (2016), Public Source Materials, Kluwer Law International, pp. 13-14.

<sup>87</sup> *Ibidem*, p. 5.

<sup>88</sup> A. Lombardía, *op.cit.*, pp. 90-93.

<sup>89</sup> CIArb International Arbitration Professional Practice Guideline No. 6 on Managing Arbitrations and Procedural Orders (2016), p. 13.

## **F. Scrutiny**

When a scrutiny process is provided for in arbitration rules, it is typically only applicable to awards. The absence of scrutiny for POs is one of the elements to take into account when opting for a PO instead of an award when both options are available.

This does not mean that POs are never scrutinized. For instance, POs rendered by ICC emergency arbitrators are subject to informal scrutiny by the secretariat which conducts it on an urgent basis.

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