

Procedural Orders or Challengeable Awards? The English High Court Clarifies Its Position

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The English High Court (the **Court**) has recently issued two judgments clarifying its approach to determining whether a decision by an arbitral tribunal is an award or a procedural order. A few months ago in *ZCCM Investment Holdings PLC v Kansanshi Holdings PLC & Anor (ZCCM)*, the Court identified a list of factors that it will take into account when reaching a conclusion on this issue. The Court then applied these factors in the recent case of *K v S* (together with the *ZCCM* case, the **Cases**) to decide whether a ruling by the tribunal should be considered an award or not.

This distinction between orders and awards is key, given that a party can apply to set aside an award (but not a procedural order) under the English Arbitration Act (the **Act**) on grounds set out in s.67 (*substantive jurisdiction*), s.68 (*serious irregularity*), and s.69 (*appeal on a point of law*). The Court's reasoning in the *Cases* will therefore be relevant to arbitrators and practitioners aiming to ensure clarity in relation to the status of any ruling issued.

Uncertainty regarding the status of arbitral decisions

A tribunal may record a decision on an issue raised in the arbitration either in the form of an ‘award’,^[fn]Which may be further categorised in various types of award, including ‘partial awards’, ‘interim awards’, ‘final awards’, and ‘consent awards’.^[/fn] or as a ‘procedural order’, and the distinction is important because an award and a procedural order lead to different procedural and substantive implications. For example, procedural orders do not fall within the scope of the enforcement provisions in the New York Convention and the annulment and (non-)enforcement safeguards embedded in national arbitration laws, including the Act. The status of a particular ruling – ultimately a decision made by a domestic court in relation to an action on the decision – can therefore have significant consequences for the parties to the arbitration. Despite the importance of the question, the term ‘award’ is not defined in the Act (nor is it in other leading instruments such as the New York Convention and the UNCITRAL Model Law).

Nonetheless, it will usually be quite clear whether a decision is a procedural order or an award. For example, it is uncontroversial that a tribunal’s final decision on the substantive claims in the arbitration is usually recorded in an ‘award’ and that a decision fixing the date of the hearing is usually recorded in a ‘procedural order’. However, sometimes this determination will be less straightforward. Questions regarding the legal status of a decision may arise because of ambiguity in the terminology used by the tribunal (by referring to, for example, ‘rulings’ and ‘decisions’ rather than ‘awards’ and ‘procedural orders’). This occurred in the *ZCCM* case, where the tribunal issued a decision that was somewhat ambiguously described as a ‘Ruling on Claimant’s Application’ (the **Ruling**). The issue can also arise where the designated status of the decision is clearly stated, but a party contests that designation. This occurred in *K v S*, where the decision by the tribunal was recorded as Procedural Order 5 (**PO5**), but one of the parties submitted that the decision was in substance actually an award. In both cases, the Court had to decide the proper categorisation of the Tribunal’s decision.

The Court’s reasoning in the Cases: the ZCCM factors

The facts of the Cases are outside of the scope of this post and, for present purposes, it is sufficient to note that in both cases the applicant challenged a tribunal’s decision under s.68 of the Act. S.68(1) provides that a party may apply to the Court to challenge “*an award in the proceedings on the grounds of serious*

irregularity affecting the tribunal, the proceedings or the award" (emphasis added). In each case, the Court was therefore required first to deal with the "threshold" issue of whether the arbitral ruling could be considered an 'award' (and in both cases, the Court eventually found on the facts that the relevant decisions could not).

The Court in *ZCCM* reviewed the applicable authorities and outlined the following factors relevant to the determination of whether a decision by a tribunal is an award:

- real weight is given to the substance, and not merely the form, of the decision;
- a decision is more likely to be an award if it finally disposes of the matters submitted to arbitration, rendering the tribunal *functus officio* either entirely, or in relation to the particular issue or claim;
- 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 rules; and
- 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.

These factors may, however, not all bear equal weight in the Court's determination. In the *K v S* case, the Court commented that the *ZCCM* factor that should be accorded most weight was the question of whether there was a final determination of a substantive point in the arbitration.

Awards made to order

The Cases offer a welcome clarification of the English courts' approach to the distinction between awards and procedural orders. As noted above, the Act does not provide a definition of the term 'award': whilst it does address in s.52 the requirements of an award in relation to form, it is silent on any substantive requirements. The principles governing these substantive requirements have, instead, been developed through case law. The *ZCCM* case provides a helpful overview of the factors considered relevant by the Court and, together with the *K v S* case, demonstrates which factors will be accorded the most weight.

Applying these factors is, however, not an exact science. The Court recognised in *ZCCM* that the question arises in "*a wide variety of circumstances*", and that there is no hard rule that prescribes whether a ruling is an award or a procedural order. Nonetheless, there are certain steps which arbitrators and counsel can take to reduce any uncertainty to the extent possible. The Court's judgment indicates that the tribunal's description of the decision, the formality of the language, the level of detail of the tribunal's reasoning, and whether the decision complies with the formalities of an award are factors to be taken in to account. An arbitral Tribunal should therefore always consider the intended form of any decision they are producing, make that form clear on the face of the document, and avoid using any language that creates doubt as to the nature of the decision. Practitioners can limit any 'classification risk' by explicitly raising the issue with the tribunal at the time of the relevant application to the tribunal, and by making submissions on the nature of the decision they are seeking.

Whilst such actions by the tribunal and the parties cannot guarantee that a decision will be recognised as having the intended form by a court – because the key factor is an objective assessment as to whether a decision finally disposes of a substantive issue or claim – considering the *ZCCM* factors during the arbitration will minimise the chance of a surprising outcome in this regard. Given the general absence of an authoritative definition of 'award' in international instruments and in domestic legislation, this issue is not confined to London-seated arbitrations, and the practical approach set out above is also likely to be of interest for arbitrations seated in other jurisdictions.