

Kluwer Arbitration Blog

Is the Departure from a Procedural Order by an Arbitral Tribunal Considered to Be a Procedural Error?

Patricia Živkovič (University of Aberdeen) · Tuesday, August 18th, 2020

In a recent judgement, the [Swedish Supreme Court](#) rejected an appeal against the decision of the first instance which set aside an arbitral award in part due to a procedural error of the arbitral tribunal. The particularity of this case stems from the fact that the procedural error derived from an earlier procedural order of the tribunal and the fact that the parties were not allowed the opportunity to fully argue their case after the tribunal decided to deviate from its earlier ruling of which the parties were not informed. This serves as a reminder of the importance of observing due process and allowing parties the opportunity to make full submissions on each aspect of the case. It also underlines the need to discuss the legal nature of procedural orders in the arbitration community and the need to define the line between the parties' right to be heard and the tribunal's discretion in conducting the proceedings.

The Background of the Case and the Courts' Decisions

On 25 May 2016, a partial award ("Partial Award") was rendered by an SCC arbitral tribunal in the proceedings involving the issue of royalty payments for pharmaceutical licence between CicloMulsion AG ("CicloMulsion") and NeuroVive Pharmaceutical AB ("NeuroVive"). The Partial Award was challenged by both parties, and the first instance judgement of the Court of Appeal was appealed before the Swedish Supreme Court by NeuroVive ([Judgment of the Supreme Court, 30 April 2019, Case No. T 796-18](#), hereinafter: "Supreme Court Judgement"). The Supreme Court focused on the argument made by CicloMulsion about the existence of a procedural error, which affected the outcome of the case and to which CicloMulsion had not contributed.

The procedural error invoked by CicloMulsion consisted of the arbitral tribunal's departure from the procedural order no. 10 ("Procedural Order") made during the proceedings and issued two years before rendering the Partial Award. The Procedural Order, *inter alia*, provided the tribunal's position on the payment of the royalties, according to which "*CicloMulsion's right to the royalties in relation to a certain country was not conditioned by a launch of the pharmaceutical in the country*" (Supreme Court Judgement, para. 5). Moreover, the tribunal prescribed its commitment to this conclusion by declaring it final and stating "*that the arbitral tribunal would not deviate from the position in relation to the intention of the parties without informing the parties in advance and providing them with an opportunity to comment on the issue*" (Supreme Court Judgement, para. 6).

The argumentation concerning this point of the Procedural Order was reopened by one of the parties during the arbitration proceedings – NeuroVive. The other party – CicloMulsion – had an opportunity to reply by submitting its position on the issue. However, the arbitral tribunal has never informed the parties that it decided to change its conclusion made in the Procedural Order, i.e. *to condition* the right to the payment of the royalties on the launch in the respective country. The deviation from the Procedural Order without informing the parties and issuing the Partial Award based on this change of stances constituted for CicloMulsion a procedural error in the proceedings and the ground for the annulment of the Partial Award.

Hence, the issue before the Court of Appeal and the Supreme Court was whether this deviation constitutes a procedural error. According to the Swedish Arbitration Act 1999:116, as read before 1 March 2019, Section 34, paragraph 1, item 6, “[a]n award [...] shall [...] be wholly or partially set aside upon motion of a party [...] if, without fault of the party, there otherwise occurred an irregularity in the course of the proceedings which probably influenced the outcome of the case.” The Supreme Court confirmed that both courts analysed two prerequisites set by the law and

- 1) that the procedural irregularity occurred without fault of the party and
- 2) that it probably influenced the outcome of the case.

It also briefly analysed an interesting question of whether the tribunal’s departure from the Procedural Order was a procedural error in the first place. Both courts decided to annul in part the Partial Award.

Comment

Procedural errors are built around the parties’ expectations regarding the tribunal’s conduct of the proceedings within a procedural legal framework. The procedural legal framework is usually formed of the due process standard, procedural rules introduced by the parties’ drafting and/or choice of the arbitration rules, and the arbitration law of the seat. As a counterbalance to the parties’ expectations stands the restrictiveness in defining procedural errors that was emphasized by the Supreme Court in this case (*see* Supreme Court Judgement, paras. 13 and 20) and well-established attitude in court practice that arbitral tribunals have the discretion to conduct the proceedings as they see fit, as long as it conforms to the procedural legal framework. When deciding whether there was a procedural error, the Supreme Court was satisfied with a mere fact that the procedural rule existed, and that the tribunal has not respected it (Supreme Court Judgement, para. 23).

However, the peculiarity of this case is that the procedural rule to which the tribunal subjected its substantive finding was created by the tribunal itself. The tribunal reserved the right to revisit the position on the royalties, but also guaranteed that the parties will have an opportunity to make their submission on the issue. Neither of the courts negated the fact that the parties had an opportunity and made submissions on the matter. What was missing from this procedural puzzle is the tribunal’s notice to the parties that it had changed the opinion on a substantive matter, *i.e.* the decision regarding the right on the royalties.

Furthermore, it is important to emphasize that had the parties respected the procedural order of the tribunal, neither of them would have made any submissions on this issue after that point in the

proceedings. However, the parties decided to continue its discussion and made further submissions. This was not sufficient for the Supreme Court to conclude that this procedural rule was respected. Quite the opposite, the Supreme Court pointed out that the error means that important principles of legal security have been disregarded and that the investigation supports the conclusion that if CicloMulsion would have known that the issue would be re-examined by the arbitral tribunal, it would have further argued its case (Supreme Court Judgement, para. 26). Based on these two points, the Supreme Court presumed that the error has affected the outcome.

Hence, the issue was not whether the parties had an opportunity to argue at all, but rather whether they had an opportunity to argue *further* after they found out that the tribunal reopened the issue. The claim that “[...] *the conduct of the proceedings has meant that the arbitral tribunal has determined a question which, with respect to the development of the proceedings, could with good reasons be presumed to have been finally determined*” (Supreme Court Judgement, para. 25), however, puts into question the nature of the procedural order as it assigns the finality feature to it. Yet, in international arbitral practice, the finality of a decision is a characteristic of an arbitral award, not of a procedural order. That being said, it is fair to say that the tribunal’s Partial Award certainly took the parties by surprise, but whether the lack of opportunity for a party to argue *further* has constituted a procedural error and whether this error probably influenced the outcome of the case is another matter.

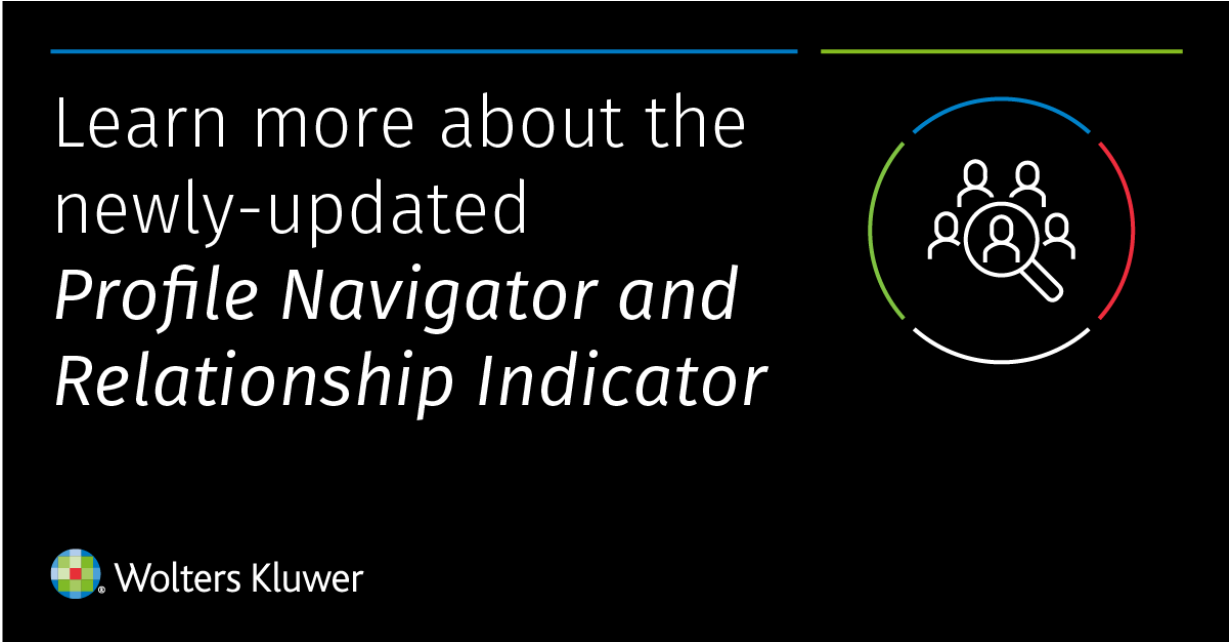
The Supreme Court discussed at length what the relevant applicable standard is, and concluded that “[a] *presumption that an error has affected the outcome may be justified by the fact that certain errors are of the kind that it is difficult to show that they have affected the outcome of the case, and at the same time they entail that it may be seriously questionable whether the proceeding has been acceptable or not*” (Supreme Court Judgement, para. 19). The court applied this rule and stated that in the case at hand the procedural error meant that CicloMulsion had been deprived of the opportunity to fully argue its case in relation to this issue (Supreme Court Judgement, para. 25). However, this was not the only circumstance considered by the Supreme Court. The court also gave due consideration to the fact that CicloMulsion, from the time when the Procedural Order was issued until being informed by the arbitral tribunal, has been entitled to assume that the issue in question would not be reassessed by the arbitral tribunal (Supreme Court Judgement, para. 25); and this is the part that raises doubts regarding the existing and future decisions of courts on a similar matter. Namely, the picture becomes clearer if this question is revisited with an assumption that the tribunal had informed the parties, and then refused to receive any *further* submissions on the matter besides those already submitted by the parties when they disregarded the Procedural Order instructions. If the Supreme Court would come to the same conclusion in that case and partially annul the award, then the reasoning stands the posed test. However, if the court would decide differently, it would mean that the reasoning was based merely on the fact that the parties were not informed about the internal deliberations by the arbitral tribunal on substantive matters and any trial to provide the procedural order with an effect of finality would severely question the international arbitral practice.

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