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Guideline 15: Guideline on Peremptory and “Unless” Orders

1. Introduction

1.1 One of the purposes of the Arbitration Act 1996 (the Act) was to deal with the perennial problem of ensuring, so far as possible, that parties comply with procedural orders made by the arbitral tribunal. Broadly speaking it does this by providing that, once there has been an initial breach of a procedural order without sufficient cause, the tribunal may make a “peremptory order” to the same effect prescribing an appropriate time for compliance and that, if that order is not complied with, then the tribunal may apply certain prescribed types of sanction or an application may be made to the court.

1.2 The following general points should be noted:

1.2.1 The main provisions of the Act dealing with peremptory orders are Section 41(5)–(7) and Section 42. These provisions are not mandatory and so parties are free to contract out of them or to provide their own machinery for ensuring compliance with orders of the tribunal and sanctions for breach of them.

1.2.2 The typical sanctions for breach of a procedural order made by arbitrators are those set out in Section 41(7) such as directing that the party in default shall not be entitled to rely upon any allegation or material which was the subject of the order. This is a useful tool to enable arbitrators to police compliance with their procedural orders. But there is a potential tension between the duty of an arbitrator to ensure that a dispute is resolved without unnecessary delay and his duty under Section 33(1) to give each party a reasonable opportunity of putting its case. The success or otherwise of the arbitrator in dealing with dilatory or recalcitrant parties will be judged by the success with which he has reconciled the two, sometimes conflicting, objectives.

1.2.3 Section 41 also deals with two other topics, namely (a) inordinate and inexcusable delay on the part of the claimant in pursuing its claim (Section 41(3)); and (b) the power of a tribunal to proceed following the failure of the respondent to attend an oral hearing or to submit written evidence or submissions (Section 41(4)). The latter topic has been discussed in a previous guideline; see “Proceeding and Making Awards in Default of Party Participation” (2001) 67 Arbitration 115.

2. The Meaning Of “Peremptory Order”

2.1 The expression is defined by Section 82 as follows: “Peremptory order” means an order made under Section 41(5) or made in exercise of any corresponding power conferred by the parties”. Section 41(5) in turn provides: “If without showing sufficient cause a party fails to comply with any order or directions of the tribunal, the tribunal may make a peremptory order to the same effect, prescribing such time for compliance with it as the tribunal considers appropriate.”

2.2 The subsection gives rise to the following main points:

2.2.1 A “peremptory order” cannot be made initially at the time of the first procedural order of the tribunal dealing with a particular procedural step. Section 41(5) contemplates three stages; namely (i) an order or direction made by the tribunal; (ii) a failure by a party to comply with that order or direction “without showing sufficient cause” and (c) that then, and only then, should the tribunal make a peremptory order.

2.2.2 Before one can say that a party “fails to comply”, there has to be an initial order which both (a) incorporated an appropriate deadline and (b) was drafted in such a way that “fail” can be objectively assessed. Partial failures can give rise to difficulty. There

seems no reason in principle why “fails to comply” should not embrace a partial failure. But partial failure (e.g. a failure to disclose 5 out of 10 documents specified by the tribunal) may have to be distinguished from a low standard of compliance (e.g. a general list of documents which fails to disclose all relevant documents).

2.2.3 The failure to comply must be without “sufficient cause”. The burden is on the party who fails to comply to show sufficient cause. This may require an arbitrator to give an opportunity to the party in apparent default to explain the reasons for its non-compliance. It may in some cases be necessary to allow the other party to respond. Section 33(1)(a) requires the arbitrator to act fairly in such a situation.

2.2.4 Once the stage has been reached when a peremptory order might be made it should be borne in mind that the tribunal has a discretion whether or not to make such an order. The word used in the subsection is “may” not “shall”. Generally a peremptory order should be made only where it will assist in the prompt resolution of the dispute.

2.2.5 A peremptory order must be made “to the same effect” as the original order. It should track the earlier order precisely. It should not introduce anything new.

2.2.6 It should prescribe a time for compliance and that time should be reasonable given the practicalities which are relevant to the particular step which has to be taken.

2.2.7 It is wise to state expressly somewhere in the order (e.g. in the heading) that it is a peremptory order. Alternatively the order should state that it has been made under Section 41(5).

3. “Unless” Orders

3.1 The practice with regard to peremptory orders granted in the High Court is for the order to provide that, unless it is obeyed within a given time, one or more specified consequences will follow automatically. An order in this form is known as an “unless order”.

3.2 In the context of arbitration an “unless” order can be regarded as simply one form of peremptory order. There is, however, a distinction between an order which provides that, unless it be obeyed, a particular consequence “shall” follow and one which provides that a particular consequence “may” follow so that, if the order be not complied with, the arbitrator must consider again whether the proposed sanction, or some modification of it, is appropriate.

3.3 The second type of “unless order” is authorised by Section 41 (5), whereas the first is not. It is therefore recommended that, wherever possible, a peremptory order should state what sanction may apply in case of non-compliance but that the question of whether to impose that sanction or perhaps an amended version of the sanction, should be finally determined after non-compliance with the peremptory order has occurred.

3.4 A procedure of issuing an “unless” order in this form has the advantages: (a) that the arbitrator, before issuing the peremptory order, can consider whether it can achieve a useful purpose and can indicate, on a provisional basis, what sanction is appropriate and not inconsistent with his duty under Section 33(1) and (b) that the defaulting party cannot later say that it had not been warned of the possible consequence of non-compliance.

4. Sanctions

4.1 The Act provides separately for the sanctions which may be applied: (a) for breach of a peremptory order to provide security for costs; Section 41(6); and (b) for breach of other kinds of peremptory order: Section 41(7). It also provides that, unless otherwise agreed by the parties, the court may make an order requiring a party to comply with a peremptory order made by the tribunal: Section 42.

4.2 Orders for security for costs

4.2.1 The only sanction prescribed by the Act, where a claimant has failed to comply with a peremptory order of the tribunal to provide security for costs, is that: "the tribunal may make an award dismissing his claim". This topic is dealt with in the Guideline on "Making Orders Relating to the Costs of the Arbitration". The following points should be noted:

4.2.2 The sanction is not a procedural stay of the arbitration but "an award dismissing his (the claimant's) claim". The disadvantage of a stay is that it would leave the arbitration dormant but alive so that years later it could be revived by the provision of security. The Departmental Advisory Committee (DAC) preferred the sanction of an award which can be challenged (e.g. if a party seeks to continue the proceedings); see DAC Report of February 1996, para.198. There is, however, nothing to prevent a tribunal granting an informal and temporary stay before the stage of dismissal arises, as by extending the time for the next stage of the arbitration.

4.2.3 Dismissal of a claim is of course a drastic measure not to be imposed lightly. It is, however, the consequence of any order for security that if the security be not provided then in the end the claim may have to be struck out. That potential consequence should have been fully taken into account before the original order was made.

4.2.4 The procedure laid down by the Act provides for the enforcement of an order for security in defined stages. First there should be an initial order which specifies an appropriate deadline for the provision of the security which is being ordered. Secondly, there must be a failure to comply with that order and the party in default must have failed to show sufficient cause for its default. Thirdly, the tribunal must have made a peremptory order "to the same effect" as the original order but prescribing a later appropriate date for compliance. Fourthly there must have been a failure by the claimant to comply with the peremptory order.

4.2.5 Once that stage has been reached, the tribunal has a discretion to make an award dismissing the claim. In practice, while the tribunal may properly allow extra time for compliance, there will come in the end a stage where the only order which is fair and which does not infringe the purpose of the original order is that of dismissal of the claimant's claim. It should be borne in mind that until a stay is ordered or the claim is dismissed the respondent may incur costs and these may be irrecoverable.

4.3 Sanctions for breach of other kinds of peremptory order

4.3.1 The sanctions available for breach of other kinds of peremptory order do not include a drastic remedy such as dismissal of a claim. An arbitrator has no power to issue the equivalent of a default judgment. Section 41(7) enables the tribunal to do any of the following:

"(a) direct that the party in default shall not be entitled to rely upon any allegation or material which was the subject matter of the order;
(b) draw such adverse inferences from the act of non-compliance as the circumstances justify;
(c) proceed to an award on the basis of such materials as have been properly provided to it;
(d) make such order as it thinks fit as to the payment of costs of the arbitration incurred in consequence of the non-compliance."

4.3.2 Proportionality and relevance are the keys to a proper application of these powers. Thus, a failure to disclose documents relating to a particular part of a case or to give further information as to that part of the case may be satisfactorily met by an "unless order" which provides that, unless the documents are supplied or the information is given, the party in default may be disentitled to rely on that part of its case. The order should not otherwise affect the overall conduct of the case. Such orders can properly be made where the burden of establishing the particular allegation rests on the party which is in default. The order should be carefully drafted so as to preclude the party in default from relying on matters in respect of which it has failed to give proper discovery or to supply sufficient information without going further than is necessary to protect the party not in default.

4.3.3 A common situation where a peremptory order may be required is where there has been a failure to serve defence submissions. The sanction here, which can be incorporated in an “unless” order, is that, unless the submissions are served by an appropriate date, the tribunal may proceed to an award on the basis of such materials as have been provided to it. However, one particular problem that arises quite regularly is that the claimant has not in fact produced with its claim submissions all the evidence on which it wishes to rely. If, following the respondent’s failure to comply with the peremptory order, the claimant asks to be allowed to put in further evidence while expecting the tribunal to disallow the respondent from responding, the tribunal will have to require the claimant to elect either that the tribunal will proceed on the original materials or else that the respondent must be allowed a further opportunity to serve its defence submissions.

4.3.4 The sanction to “draw such adverse inferences from the act of non-compliance as the circumstances justify” does not require the making of an “unless order”. Nor should the tribunal attempt to specify in advance what inferences may be drawn. If there has been a breach of a peremptory order, the tribunal can consider what inferences to draw from non-compliance at the stage of making its award. The tribunal should warn the party in default that, when it comes to considering its award, it may draw inferences from non-compliance with the order.

4.3.5 The sanction of a special costs order is expressly authorised by Section (7)(d). It should be noted, however, that the costs must have been incurred “in consequence of the non-compliance”. The weapon of a costs order should not properly be used as a penalty. It is sometimes difficult to quantify what extra costs have been incurred as a result of non-compliance with a procedural order.

5. Modification of Peremptory and “Unless” Orders

5.1 Whether a peremptory order specifies the sanction which will apply in the event of non-compliance or not, it is common that arbitrators are asked to modify or revoke the order after it has been made and the application may be made before or after the time for compliance has expired. Such applications require careful treatment.

5.2 The commonest form of application is one for an extension of time for compliance. Here the arbitrator has to balance the competing demands of avoiding unnecessary delay and of giving the defaulting party a reasonable opportunity of putting its case. It is difficult to lay down hard and fast rules. One factor is whether the party in default is intentionally playing for time in the hope of forcing an adjournment of a hearing. Another is whether the party not in default will be prejudiced by allowing the defaulting party some extra time to comply with the peremptory order. If the application is made before the time for compliance has expired, the arbitrator may be more inclined to grant an extension than if it has already expired. But it is not an arbitrator’s function to enforce discipline for its own sake and the arbitrator in a doubtful case may not wish to incur the risk of endangering the award by arguably committing a breach of his duty under Section 33(1). On the other hand, if an extension will cause prejudice to the innocent party he will be more ready to refuse an extension.

5.3 It is far less common that an arbitrator is asked to revoke a peremptory order. While it cannot be said that an arbitrator has no jurisdiction to do this, it would be a unusual course to take and such order should be made only in exceptional circumstances.

6. Powers of the Court to Enforce Peremptory Orders – Section 42

6.1 The DAC considered that the court should have the power to enforce peremptory orders made by an arbitral tribunal. In its view “there may well be circumstances where, in the interests of justice, the fact that the court has sanctions which in the nature of things cannot be given to arbitrators (e.g. committal to prison for contempt) will assist the proper functioning of the arbitral process”.

6.2 There are limits on a court’s powers to enforce peremptory orders:

(1) the parties must not have “otherwise agreed”;

(2) the court can only act if the application is made by the tribunal or by one party with the permission of the tribunal or the parties have agreed that the powers of the court under Section 42 shall be available;

(3) the court is not to act "unless it is satisfied that the applicant has exhausted any available arbitral process in respect of failure to comply with the tribunal's order";

(4) no order is to be made unless the court is satisfied that the person to whom the tribunal's order was directed has failed to comply with it within the time prescribed in the order or, if no time was prescribed, within a reasonable time.

6.3 It is rare that a party needs to have resort to Section 42. There are, however, some cases where a party may wish to take advantage of the fact that in some respects the court's powers to compel compliance with its orders are wider than those of an arbitrator. For example, an arbitrator may have given directions under Section 38(4) for the preservation of property which is the subject of the proceedings and due to non-compliance a peremptory order may have been made. An arbitrator has no power directly to enforce such an order whereas the court has the power to enforce its orders by committal for contempt or by sequestration of the defaulting party's assets.

6.4 It is recommended that, save in the most exceptional circumstances, the tribunal should not itself apply to the court under Section 42(2)(a). It is normally preferable to wait until the aggrieved party seeks permission to apply to the court under Section 42(2)(b), when the tribunal should invite the defaulting party to comment before deciding whether or not to give its permission.