



Chartered
Institute of
Arbitrators

CIArb

Guideline 4: Guideline for Arbitrators on Proceeding and Making Awards in Default of Party Participation

1. Introduction

1.1 A tribunal may be faced with a party who fails or refuses to participate in the proceedings. This guideline gives general advice as to the manner in which arbitral tribunals may exercise their powers to proceed in the face of default.

1.2 Methods for dealing with default are often outlined in legislation at the seat of arbitration and arbitration rules, to which reference should be made.

1.3 The Arbitration Act 1996 contains specific provisions for circumstances of default in Section 41.

2. Comparative view

2.1 Where the UNCITRAL Model Law has been adopted such as in Hong Kong, Singapore and Australia, Article 25 covers this subject specifically and in very similar terms to section 41. It provides:

“Unless otherwise agreed by the parties, if, without showing sufficient cause,.....

(b) the respondent fails to communicate his statement of defence in accordance with article 23

(1), the arbitral tribunal shall continue the proceedings without treating such failure in itself as an admission of the claimant’s allegations;

(c) any party fails to appear at a hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make the award on the evidence before it.”

2.2 This position is reflected in the German ZPO 1048, Article 1695 of the Belgian Code Judiciaire, Article 1040(2) of the Dutch Burgerlijke Rechtsvordering and the Swedish Act’s section 24(3). The law is effectively the same in the US, Switzerland and France even though their legislation is silent on the subject.

3. Limited and specific refusal or failure to participate

In these circumstances:

(1) The tribunal should satisfy itself that the dispute comes within the provisions of the arbitration clause or agreement. Care should be taken to ensure that the dispute arises from the contract in question and that the appointing party has complied with any requirements set out in the arbitration clause.

(2) The tribunal should ensure that all parties are fully informed of the proposed proceedings and any deadlines or time limits that may be applicable. In the event of default, the tribunal should state how it proposes to proceed.

(3) The tribunal should keep a record of all communications with the defaulting party.

(4) A tribunal should take care not to be seen to favour a defaulting party and should do no more than is reasonable to ensure that the defaulting party is aware of the tribunal’s timetable and time limits.

4. Failure to participate in the arbitration

Where one of the parties cannot be contacted or fails to reply to any of the correspondence sent,

(1) the tribunal should inform the claimant that the correspondence in the matter has been returned and

(2) the tribunal should ensure that all notices, procedural directions and any communications are sent to the registered address or last known place of business or residence of the defaulting party.

5. Factors relevant in the face of any type of default

The following are applicable in all instances of default:

(1) If a party fails to participate in the proceedings, having been given reasonable notice of the proceedings and having been given ample opportunity to present its case, the tribunal may proceed in the absence of the defaulting party.

(2) If a defending party fails to participate in the proceedings, the tribunal must satisfy itself that the claimant has a case by testing the evidence presented to it.

(3) There is no obligation on the tribunal to hold a hearing if it is felt that the documentation provided is sufficient to determine the issues before it. If a participating party so requests or the documentation is unclear, a hearing may well be necessary.

(4) When giving reasons for its award, the tribunal should attempt so far as possible to mention the main contentions that have been raised by the defaulting party in correspondence or otherwise. If the burden of proving any of these contentions rests on the defaulting party it will usually be sufficient to say that the point could not succeed in the absence of evidence from the defaulting party. If, however, the contention goes to some feature of the case being advanced by the participating party, it may be appropriate to go further and to consider the point to some extent e.g. by putting the point to the participating party, ascertaining its answer and referring to that answer (if it appears well-founded) in the tribunal's reasons.

(5) There is no formal obligation on the tribunal to forewarn the defaulting party of its proposed decision on the matter. It would, though, be a sensible precaution to indicate to a defaulting party that the tribunal proposed to proceed to an award on the merits.