



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 Section 41 of the Arbitration Act 1996 provides:

“(1)The parties are free to agree on the powers of the tribunal in case of a party’s failure to do something necessary for the proper and expeditious conduct of the arbitration.

(2)Unless otherwise agreed by the parties, the following provisions apply.

(3)If the tribunal is satisfied that there has been inordinate and inexcusable delay on the part of the claimant in pursuing his claim and that the delay—

(a)gives rise, or is likely to give rise, to a substantial risk that it is not possible to have a fair resolution of the issues in that claim, or

(b) has caused, or is likely to cause, serious prejudice to the respondent,

the tribunal may make an award dismissing the claim.

(4)If without showing sufficient cause a party—

(a)fails to attend or be represented at an oral hearing of which due notice was given, or

(b)where matters are to be dealt with in writing, fails after due notice to submit written evidence or make written submissions,

the tribunal may continue the proceedings in the absence of that party or, as the case may be, without any written evidence or submissions on his behalf, and may make an award on the basis of the evidence before it.

1.5 Although the ICC Rules are silent on this subject, Article 30 of the UNCITRAL Rules operates in a broadly similar way to section 41. It reads:

“1. If, within the period of time fixed by these Rules or the arbitral tribunal, without showing sufficient cause:

(a) The claimant has failed to communicate its statement of claim, the arbitral tribunal shall issue an order for the termination of the arbitral proceedings, unless there are remaining matters that may need to be decided and the arbitral tribunal considers it appropriate to do so;

(b) The respondent has failed to communicate its response to the notice of arbitration or its statement of defence, the arbitral tribunal shall order that the proceedings continue, without treating such failure in itself as an admission of the claimant’s allegations; the provisions of this subparagraph also apply to a claimant’s failure to submit a defence to a counterclaim or to a claim for the purpose of a set-off.

2. If a party, duly notified under these Rules, fails to appear at a hearing, without showing sufficient cause for such failure, the arbitral tribunal may proceed with the arbitration.

3. If a party, duly invited by the arbitral tribunal to produce documents, exhibits or other evidence, fails to do so within the established period of time, without showing sufficient cause for such failure, the arbitral tribunal may make the award on the evidence before it.”

2 Claimant default

2.1 Claimant default is relatively straightforward to deal with. Under Section 41(3) of the 1996 Act, if there has been inordinate and inexcusable delay on the part of the claimant in pursuing his claim and that the delay—

(a) gives rise, or is likely to give rise, to a substantial risk that it is not possible to have a fair resolution of the issues in that claim, or

(b) has caused, or is likely to cause, serious prejudice to the respondent,

the tribunal may make an award dismissing the claim.

2.2 So, the arbitrator assesses 1) whether the claimant's delay is both inordinate and inexcusable and 2) whether either this has or will create a substantial risk that a fair resolution of the issues will not be possible or the respondent has or is likely to suffer serious prejudice. If the answers to the test under 1) and one of the two tests under 2) are positive, the arbitrator may but does not have to dismiss the claim.

2.3 Article 30 of the UNCITRAL Rules requires the arbitrator to terminate the proceedings in the event of a failure to communicate its statement of claim within the time fixed either by applicable rules or the arbitrator. The only exception to this is where the parties have otherwise agreed or the Claimant has shown "sufficient cause".

2.4 Where a counter-claim has clearly been intimated, the respondent can effectively become the claimant for the purposes of the arbitration and proceed with the counter-claim in that way.

2.5 If the arbitrator decides under section 41 to terminate the proceedings, he or she should issue a reasoned award which ought to include provisions on costs.

3. Limited and specific refusal or failure to participate

3.1 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

4.1 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

5.1 The following points 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.

The guidelines are inevitably something of a permanent work in progress. We would welcome it if you could send any suggestions for updating, improvements and corrections to nmcnamee@ciarb.org. Thank you in advance.

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