

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 Where the UNCITRAL Model Law has been adopted such as in Hong Kong (section 53 of the 2010 Ordinance), Singapore and Australia, Article 25 covers this subject specifically and in very similar terms to section 41 of the English Arbitration Act 1996. Article 25 provides:

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

(a) the claimant fails to communicate his statement of claim in accordance with article 23(1), the arbitral tribunal shall terminate the proceedings;

(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.

1.4 This position is reflected in the section 41 of the English Arbitration Act 1996, German ZPO §1048, Article 1695 of the Belgian Code Judiciaire, Article 1040(2) of the Dutch Burgerlijke Rechtsvordering and section 24(3) of the Swedish Lag om Skiljemän (Arbitration Act). The law is effectively the same in the US, Switzerland and France even though their

legislation is silent on the subject. In the last two countries, this power is derived from the arbitrator's general power to determine the procedure in the absence of any agreement to the contrary by the parties: LDIP Article 182 and CPC, Article 1509.

1.5 Although the ICC Rules are silent on this subject, Article 30 of the UNCITRAL Rules (reflected also in the German ZPO § 1048) operates in a broadly similar way to Article 25 of the Model Law. 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.”

1.6 Article 23 of the ICDR Rules of the American Arbitration Association deals specifically with this subject. If the statement of defence is not filed within the time-limits laid down by the tribunal without “sufficient cause”, the tribunal can proceed without it. Equally, the tribunal can conduct any hearing if a party duly notified fails to appear, again without showing sufficient cause for the failure. Finally, if a party invited to produce evidence or take any other step does not do so, again without a

showing of “sufficient cause”, the tribunal is entitled to make an award on the material available to it.

2 Claimant default

2.1 Claimant default is relatively straightforward to deal with. Both the UNCITRAL Model Law and Rules require 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”.

2.2 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.

2.3 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 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 the various provisions discussed here 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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