



Practice Guideline 5: Guidelines for Arbitrators regarding Documents-Only Arbitrations

1. Introduction and legal provisions

1.1 This Guideline is intended to provide advice for arbitrators where a 'documents only' procedure is adopted by agreement between the parties or by the exercise of the arbitrator's discretion. Most consumer arbitration rules require a documents-only procedure.

1.2 The standard rule around the major arbitration centres gives the tribunal the power to determine the procedure to be adopted where and to the extent that the parties have not reached a contrary agreement: Article 1509(2) of the French CPC, Article 182(2) of the Swiss LDIP and Article 1694 of the Belgian Code judiciaire.

1.3 However, Article 24(1) of the UNCITRAL Model Law, reflected in section 24(1) of the Swedish Act, and section 1047 of the ZPO, Article 182(3) of the Swiss LDIP, Article 1039(3) of the Dutch Burgerlijke Rechtsvordering and Article 1694(2) of the Belgian Code judiciaire differ from the English and French law position in that the tribunal is required to hold a hearing if requested by a party unless there has been a prior agreement to the contrary. The Model Law approach is reflected in Article 25(6) of the ICC Rules (2010 version), Article 19(1) of the LCIA Rules and Article 17(3) of the UNCITRAL Rules.

1.4 Section 34(2)(h) of the English Arbitration Act 1996 gives the arbitrator the power, in the absence of agreement between the parties, to decide 'whether and to what extent there should be oral or written evidence or submissions'. The arbitrator therefore has the power to dispense with a hearing of oral evidence or submissions if he considers them to be unnecessary. Article 1509 of the French CPC is just silent on this subject and as a result creates no requirement to grant an oral hearing at the request of only one party.

1.5 Article 16(1) of the ICDR Rules of the American Arbitration Association gives the tribunal a very broad discretion as to how to conduct proceedings which would suggest that the tribunal can dispense with a hearing unless the parties otherwise agree. It has to be said,

though, that Article 20 strongly contemplates a hearing being held. This, though, seems to be subject to the overall Article 16 discretion.

2. When a documents-only procedure is appropriate

2.1 A documents-only procedure is most clearly appropriate where all the evidence relevant to the dispute is contained in documents, including expert reports, and there is no need for oral testimony from witnesses. However it can also be appropriate where the dispute involves simple issues of fact and opinion.

2.2 It is wise to obtain the parties' agreement to the procedure to be adopted. In the event of a disagreement, the arbitrator should be careful to ensure that an oral hearing is provided if the law of the seat requires this in the situation.

3. Recommended procedure

3.1 Initial directions

3.1.1 Clear directions should be issued at the outset so that both parties are absolutely clear as to what is required of them. The arbitrator must direct the parties that anything sent to him should be copied at the same time to the other party. The parties' agreement to waive their right to a hearing (where applicable) should be referred to in the directions.

3.2 Submissions and documents

3.2.1 Normally the parties should be required to make their initial submissions sequentially. Where both parties are fully aware of the other party's case simultaneous exchange may be appropriate. If the initial exchange of submissions is done simultaneously, it may be appropriate to have a further exchange of submissions so that each party may answer points raised by the other not anticipated in its initial submission.

3.2.2 The parties should be advised to set out their whole case in their initial submissions and to attach copies of all the documents on which they rely. As it is essential that the parties' submissions and evidence cover all relevant matters to be considered, the parties should be allowed as much time as they reasonably need for their submissions.

3.2.3 Where witness statements and/or experts' reports are necessary they should be attached to the parties' submissions or exchanged later as appropriate. It may save time and costs if the parties, instead of each appointing their own experts, agree to the appointment of a single expert either jointly by themselves or by the arbitrator. In that case his report should be requested after the parties have exchanged their submissions and documentary evidence and any statements of witnesses of fact so that the expert may know exactly the problem he has to address.

3.3 Examination of submissions and evidence

3.3.1 The arbitrator should retain the right to call a meeting with parties or to raise questions with the parties in writing should he consider it appropriate. If a meeting is called it should be made clear that this will not be a hearing at which the parties can examine each other or their witnesses, but that the arbitrator himself will ask the questions.

3.4 Inspection

3.4.1 If an inspection of the subject-matter of the dispute is necessary this should be carried out in the presence of both parties. Exceptionally if one of the parties does not wish to attend or refuses to do so and the arbitrator needs someone to guide him as to what he should be looking at, it may be carried out in the presence of the one party only. It should be made absolutely clear that the visit is for inspection only and that no evidence or submissions will be entertained from either party.

3.5 The Award

3.5.1 The arbitrator should ensure that he has covered all the issues raised by the parties in his award and has fully understood their respective submissions and evidence. Where the dispute is relatively complex it may be advisable for the arbitrator to check with the parties in advance that he has correctly defined the issues, and/or the undisputed facts, but he should not give them any opportunity to question his findings on the disputed facts.

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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