

## INTERNATIONAL ARBITRATION PRACTICE GUIDELINE

### **Party Non-Participation**

Chartered Institute of Arbitrators

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## **Party Non-Participation**



## Party Non-Participation

### *Introduction*

1. This Guideline sets out the current best practice in international commercial arbitration on party non-participation. It provides guidance on:
  - i. how to conduct proceedings when faced with a party who does not participate (Article 1);
  - ii. factors that arbitrators should take into account when a claimant does not participate (Article 2);
  - iii. factors that arbitrators should take into account when a respondent does not participate (Article 3);
  - iv. non-participation at a scheduled hearing (Article 4).
2. In this Guideline, references to ‘party non-participation’ should be understood to encompass both a situation where a party never takes any steps in arbitration and a situation where it has initially participated but ceases to do so later.

### *Preamble*

1. There is a general assumption that when parties agree to arbitration, if a dispute arises between them, they will cooperate and actively participate in the proceedings.<sup>1</sup> However, there are cases where a party chooses not to participate either from the outset or at a later stage. In these circumstances, arbitrators need to deal with the party’s non-participation and advance the proceedings without undue delay.
2. Even though it is rare for a claimant, having commenced the arbitration, to fail to proceed with its claim, it does occasionally happen. The more common situation is for a respondent to fail to participate in the proceedings from the outset. Sometimes it may also occur that the respondent initially participates in the proceedings but withdraws at a later stage, for example, by failing to produce written submissions or by refusing to participate in a hearing.
3. Given that arbitrators should endeavour to make a valid and enforceable

award, they need to be particularly careful in the conduct of the proceedings when dealing with a non-participating party in order to minimise the risk that their award is challenged. Accordingly, arbitrators should ensure that the non-participating party has received proper notice of the request for arbitration and of any subsequent steps in the arbitration, has had a fair opportunity to present its case and has been informed of the consequences of its non-participation.

4. Most arbitration laws and rules contain provisions dealing with party non-participation. Even without express provisions, and provided that there is no prohibition under the arbitration agreement, including the applicable arbitration rules, and/or the law of the place of arbitration (*lex arbitri*), it is widely accepted that arbitrators have an inherent power to continue the proceedings when faced with such a situation so that the arbitration process is not stopped or frustrated by a party's non-participation. However, most laws and rules give little or no guidance as to how arbitrators should proceed with the arbitration in such circumstances.
5. This Guideline summarises the most common types of non-participation and examines the relevant factors that arbitrators should take into account when deciding whether to continue, to postpone or to terminate the arbitration proceedings.

#### **Article 1 — General principles**

- 1. When faced with a non-participating party, before proceeding with the arbitration, arbitrators should satisfy themselves, to the extent that they are able to do so, on the limited information available, that the claimant has a *prima facie* case and that all parties were properly notified of the proceedings. Arbitrators should also satisfy themselves that the non-participating party has no acceptable excuse for its non-participation.**

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2. Arbitrators should consider and ascertain, if necessary, whether they have jurisdiction to determine the matters referred to arbitration, even though no challenge has been raised by either party.
3. Arbitrators should ensure that all parties, including the non-participating party, have been given a fair opportunity to present their case. The failure of a party to appear or to present its case should not be treated as an admission of the participating party's assertions.
4. Arbitrators should inform, and as necessary ask the participating party to notify, the non-participating party of what is occurring in the proceedings and should record in writing all procedural steps and efforts to include that party in the proceedings.
5. Before making any award, arbitrators should give a notice of their intention to make such an award to all parties. In the event that they proceed to make a final award, they should make sure that any efforts to include the non-participating in the proceedings are recited in that award.

*Commentary on Article 1*

*Paragraph 1*

*Arbitrators' discretion to decide what constitutes non-participation*

- a) When faced with a party who has chosen not to participate from the outset, arbitrators should satisfy themselves that the request for arbitration has been properly communicated to the non-participating party and that a fair opportunity is given to that party to explain its failure to participate. Similarly, where a party ceases to participate at some later stage, arbitrators should ensure a request to resume participation has been properly communicated to that party in the absence of an adequate excuse.

- b) Arbitrators have a wide discretion to decide whether a party is not participating. They should consider any reasons advanced as to why a party cannot appear or present its case in order to establish whether the conduct is justifiable and therefore excused in light of all of the circumstances of the case. It is good practice for arbitrators to set a time limit for the non-participating party to submit a justification for the non-participation, making clear that any justifications submitted after the time limit has elapsed may not be considered.<sup>2</sup>
- c) An excuse is likely to be acceptable if the non-participation or delay is caused by unforeseeable circumstances that are beyond the control of the party concerned. If this is the case, arbitrators may extend any applicable time limits in order to allow the party to re-engage in the proceedings. Conversely, where a party completely ignores the arbitrators or the excuse offered is not acceptable, arbitrators may conclude that a situation of non-participation exists.

*Paragraph 2*

*Arbitrators' jurisdiction*

Where a party is not present, it is good practice for arbitrators to consider jurisdictional issues even if no challenge has been raised by one or other of the parties. For a general guidance on 'How to deal with jurisdictional challenges' and 'Arbitrators' examination of jurisdiction in the absence of a challenge' please refer to the *Guideline on Jurisdictional Challenges*.<sup>3</sup>

*Paragraph 3*

*Fair opportunity to present their case*

- a) The fact that a party is not participating does not automatically validate the arguments of the participating party. Arbitrators should take care to be even handed and give a fair opportunity to all parties to present their

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case. They should not make an award in favour of the participating party without first considering the merits of the dispute.

- b) Arbitrators should make an impartial and independent assessment of all arguments and evidence presented by the participating party in order to satisfy themselves that the claims of the participating party are well-founded in fact and in law. Arbitrators should not simply accept the contentions of the participating party without enquiry. They should include reference to any contentions, however raised, by the non-participating party but they should not advocate for the non-participating party by arguing its case. If the burden of proving any of the contentions rests on the non-participating party, it may be appropriate to decide that the point could not succeed because of the absence of evidence from the non-participating party. If, however, the contention goes to some feature of the case being advanced by the participating party, it may be appropriate to put the point to the participating party to seek its answer and refer to that answer in any subsequent reasoned award.

*Paragraph 4*

*Communication with a non-participating party*

- a) Arbitrators should ensure that the non-participating party is given a fair opportunity to enter in the arbitration in order to present its case and to comment on the arguments and evidence submitted by the opposing party. For these purposes, arbitrators should copy all parties including the non-participating party in all correspondence and send them and also instruct the participating party to send them, copies of all notices, procedural orders, directions and submissions, to avoid challenges on the grounds that the non-participating party was not given proper notice. If arbitrators consider it appropriate, they may extend any deadlines in order to give a further opportunity to the non-participating party to participate.

- b) Arbitrators should be satisfied that all communications have been sent to the non-participating party in due time. They may require the participating party to produce evidence of delivery of the notice of arbitration and, any other documents, to the non-participating party. The addresses of the parties for communication are usually identified in the contract and most national laws and arbitration rules contain specific provisions as to how notifications should be effected. In the absence of any provisions, communications should be sent to the party's habitual residence, place of business, email or any other means of communication that provides a record of transmission, or, if none of these can be found after making reasonably enquiry, then at the last known place of business or residence of the non-participating party.
- c) Arbitrators should always avoid any *ex parte* communications, including telephone conversations with either party, in order to minimise the risk of an award being challenged. However, in the case of non-participation the risk of a challenge is higher. If any such communication takes place, immediately afterwards, the arbitrators should produce, or instruct the production of, a written record of the communication and copy it to the other party or parties. Similarly, if a hearing is held in the absence of a party, arbitrators may require the production of a transcript of the hearing and for it to be sent to all the parties as soon as available.<sup>4</sup>

*Paragraph 5*

*Making awards when faced with a party non-participation*

It is good practice to give a non-participating party reasonable notice that arbitrators may be making an award in their absence unless they participate within a specified period. For further guidance please refer to the *Guideline on Drafting Arbitral Awards Part I — General*.<sup>5</sup>

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**Article 2 — Failure of the claimant to proceed with its case**

If a claimant, without providing an acceptable excuse, fails to proceed with its case within the period provided for in the arbitration rules or set by the arbitrators, and no counterclaim is filed, arbitrators may, and depending on the applicable law or rules may be required to, make an order for the termination of the arbitral proceedings.

*Commentary on Article 2*

- a) Some arbitration rules require arbitrators to terminate the arbitration in case a claimant fails to proceed with its case within the period provided for in the arbitration rules or set by the arbitrators. If, however, there is no such mandatory requirement, arbitrators should determine how to proceed in such circumstances. They may decide to keep the arbitration pending, awaiting possible further action by the claimant. In that case arbitrators may give directions for an extension of time for making any required submission and, if appropriate, spell out the consequences for failing to comply. It is good practice to write to the claimant, copying the other party or parties, requesting information as to whether it intends to continue with the arbitration and set a reasonable time for response with a clear statement as to the consequences of failing to respond.<sup>6</sup> If failure is not remedied within the additional time provided, arbitrators may terminate the proceedings before further costs are incurred, provided that there are no counterclaims or any matters that need to be decided.
- b) Before issuing a termination order they should notify all parties of their intention to terminate the proceedings and allow them to comment on the matter. The termination order should refer to the reminders and notices that the arbitrators have sent to the claimant as well as to the claimant's failure to respond. It may also contain an order for the

payment of the costs of the arbitration by the claimant. An order that simply declares that the arbitration has been terminated does not preclude the claimant from commencing fresh proceedings at a future date since it does not constitute a final determination of the claims raised, subject to the provisions of the arbitration agreement including any arbitration rules and/or the *lex arbitri*.

- c) Alternatively, arbitrators may proceed to make a final award which would amount to a final determination of the issues in dispute to avoid the claim being revived at a later date in a new set of proceedings. However, arbitrators should only do that if there is sufficient information to make such a determination.

*Filing of a counterclaim*

- d) Where a counterclaim has been submitted, the proceedings should continue in the normal way with the respondent taking the role of a claimant for the purposes of the counterclaim. This may result in the original claimant reviving its interest in the original claim and seeking leave to make late submissions, if so permitted by the arbitrators.

*Multi-party arbitrations*

- e) In arbitrations with more than one claimant, arbitrators may decide to continue the proceedings in relation to the claimant(s) that are proceeding with their case and to terminate the proceedings only in relation to the claimant(s) who failed to proceed as directed by the arbitrators.

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**Article 3 — Failure of the respondent to submit  
a statement of defence or to participate**

**If a respondent, without providing an acceptable excuse, fails to submit a statement of defence within the period provided for in the arbitration rules or set by the arbitrators, or fails to participate in the proceedings, arbitrators may, and depending on the applicable law or rules may be required to, continue the proceedings, subject to the General principles in Article 1 above.**

*Commentary on Article 3*

Even though the most common situation is that a respondent fails to appear and participate from the outset of an arbitration, there may be situations where a respondent participates in the proceedings initially and then withdraws at a later stage, for example when it has to submit its statement of defence according to the timetable agreed by the parties or determined by the arbitrators. If a respondent does not submit its statement of defence within the specified time period, arbitrators may, or be required to, continue with the proceedings. Before continuing, however, arbitrators should write to the respondent, copying the other party or parties, and request an explanation for the delay in submitting the statement of defence and information as to whether the respondent intends to participate. It is good practice to allow the non-participating party to substantiate its position before proceeding to the next stage of the proceedings. It is also good practice to warn the non-participating party of the consequences of their non-participation.

**Article 4 — Non-participation at a scheduled hearing**

If a party fails to appear at a scheduled hearing, the arbitrators may decide to continue with the hearing in its absence or call a temporary adjournment while enquiries are made regarding the non-attendance.

*Commentary on Article 4*

*Failure to attend a scheduled hearing*

- a) When a party, which has been duly notified of the date, time and place of a hearing, fails to attend, arbitrators should decide whether it is appropriate to continue with the hearing on an *ex parte* basis or to reschedule the hearing if, for example, the excuse proffered for the failure is acceptable. Subject to the provisions of the arbitration agreement including any arbitration rules and/or the *lex arbitri*, arbitrators may issue a peremptory order against the party who failed to attend the hearing and require it to provide an explanation for its non-attendance within a specified time and/or appear at a rescheduled hearing with an adjourned date.<sup>7</sup>
- b) If both parties fail to attend a hearing, arbitrators should in most circumstances reschedule the hearing. If the parties fail to attend again, arbitrators may consider terminating the proceedings.

*Multi-party arbitrations*

- c) In multi-party arbitrations, if one or several claimants, or one or several respondents, do not attend at the hearing, arbitrators may continue with the hearing in the absence of a party or parties or alternatively reschedule it depending on whether any excuses proffered for the non-attendance are acceptable.

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*Conclusion*

Even though arbitration is consensual and voluntary, there may be instances where a party fails to attend or participate in the proceedings. Party non-participation raises particular difficulties for the arbitrators and the participating party to ensure that the non-participating party cannot later complain of lack of due process, while at the same time dealing with the arbitration in a timely manner without undue delay. This Guideline seeks to highlight best practice so as to assist arbitrators in dealing with a non-participating party in an effective and efficient manner.

**NOTE**

The Practice and Standards Committee (PSC) keeps these guidelines under constant review. Any comments and suggestions for updates and improvements can be sent by email to [psc@ciarb.org](mailto:psc@ciarb.org)

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*Endnotes*

1. Julian D. M. Lew and others, *Comparative International Commercial Arbitration* (Kluwer Law International 2003), p. 544.
2. Karl-Heinz Böckstiegel and others (eds), *Arbitration in Germany: The Model Law in Practice* (2nd ed, Kluwer Law International 2015), p. 291.
3. See CIArb Guideline on Jurisdictional Challenges (2015).
4. Judith Butchers and Philip Kimbrough, ‘The Arbitral Tribunal’s Role in Default Proceedings’ (2006) 22(2) *Arbitration International*, p. 240.
5. See CIArb Guideline on Drafting Arbitral Awards Part I — General (2016).
6. Niuscha Bassiri and Maarten Draye (eds), *Arbitration in Belgium* (Kluwer Law International 2016), p. 366.
7. See e.g., Section 41(5) English Arbitration Act 1996.