INTERNATIONAL ARBITRATION PRACTICE GUIDELINE

Documents-Only Arbitration Procedures

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Introduction

1. This Guideline sets out the current best practice in international commercial arbitration on documents-only procedures. It provides guidance on:
   i. factors that arbitrators should take into account in determining whether an arbitration or certain issues within an arbitration are suitable for documents-only procedures (Article 1); and
   ii. the manner in which to conduct such procedures (Articles 2 and 3).
2. In this Guideline, references to 'documents-only procedures' should be understood as encompassing (1) arbitral proceedings conducted entirely on the basis of written submissions and (2) issues within an arbitration dealt with by way of written submissions only.

Preamble

1. Documents-only procedures arise, most frequently, as a result of the parties' arbitration agreement and/or the incorporation of specific rules providing for such a procedure. These include industry-specific arbitration rules designed for a particular sector, such as commodity, domain name and/or intellectual property rights disputes, small-claims schemes for consumer disputes, among others. In addition, in large and complex arbitrations which require the resolution of multiple issues, discrete issues may be dealt with by way of documents alone.
2. Although arbitrators have a very broad discretion to give directions for a procedure which best suits the particular circumstances of a case, they may not be able to impose documents-only procedures on the parties. This is because most national laws and arbitration rules specifically provide that each party has the right to request a hearing, unless they had waived that right.[1] Accordingly, if the arbitrators consider that a dispute or certain issues within a dispute are suitable for resolution on documents alone, rather than imposing it on the parties, it is good

practice to invite the parties to agree to proceed on that basis.[2]

3. This Guideline examines the matters that arbitrators need to take into account when considering whether to give directions for documents-only procedures and summarises the various steps they should follow in the conduct of such procedures.

Article 1 — General principles

1. **Where an arbitration agreement contains provisions for a documents-only procedure, these provisions should be complied with.**
2. **If an arbitration agreement does not provide for a documents-only procedure but the parties agree to adopt such a procedure, for all or some of the issues in an arbitration, arbitrators should proceed on that basis, subject to the applicable arbitration rules and/or any mandatory provisions of the law of the place of arbitration (*lex arbitri*).**
3. **If a party requests a documents-only procedure and/or the arbitrators, on their own motion, consider that all or some of the issues in an arbitration are suitable for such a procedure, arbitrators should consult the parties and seek their agreement to that procedure before proceeding on a documents-only basis.**
4. **When a documents-only procedure is being used, arbitrators should give clear directions to the parties as to the various steps that need to be followed so as to enable the arbitrators to decide the issues subject to that procedure on documents alone.**
5. **In any event, arbitrators should ensure that each party is given a fair opportunity to present its case in relation to the issues subject to a documents-only procedure.**

Commentary on Article 1

Paragraphs 1-3

Organising the appropriate procedure

a) Parties are free to agree on the appropriate procedure and arbitrators should respect the parties' agreement, provided that it is not contrary to any overriding mandatory laws and/or principles of public policy at the place of arbitration. In the absence of parties' agreement or where the arbitrators consider that the agreed procedure is inappropriate, they have a broad discretion to organise the procedure as they consider appropriate.[3]

b) If all of the parties agree to the procedure the arbitrators suggest, the arbitrators should record the parties' agreement in a procedural order and proceed accordingly. If one of the parties does not agree to the arbitrators' suggestion, the arbitrators should proceed in accordance with the terms of the parties' initial agreement to arbitrate. If such a course of action requires them to adopt unreasonable adjudicatory standards, they should consider whether it would be more appropriate to resign,[4] taking into consideration all surrounding circumstances and the stage of the proceedings. Resigning may have adverse consequences for the arbitrators' personal liability depending on the terms of the arbitration agreement, the terms of their appointment and/or the *lex arbitri*.

Factors to consider

c) Documents-only procedures are particularly effective at speeding up the process and reducing costs. Such procedures may be suitable for resolving disputes where, for example: (1) the evidence is limited and/or contained in contemporaneous documents; (2) there are limited areas of factual and/or technical issues in dispute; (3) the issues can be decided without oral testimony from factual and/or expert witnesses; (4) the issues do not involve complex and/or technical matters that may merit a

hearing and/or are limited to the construction of a document or documents; and (5) where a party fails to participate in the arbitral proceedings,[5] if the arbitrators do not consider it necessary to hold a hearing to clarify certain aspects of the case.

d) Accordingly, the factors to take into account when determining whether some or all of the issues are suitable for resolution by a documents-only procedure, to the extent that this information is available, include (1) the nature of the dispute; (2) the complexity of the issues; (3) the amount at stake; (4) the nature of the evidence and arguments to be adduced and by whom; (5) any time and costs savings; and (6) whether it is an effective and efficient way of resolving all, or some, of the issues in dispute in the arbitration.

Paragraph 4

Arbitrators' directions

a) A decision to adopt a documents-only procedure should be accompanied by detailed directions as to the actions each party has to take and by what dates, in order to provide the arbitrators with the submissions and evidence necessary to enable them to decide the issues subject to that procedure by documents only. It is generally good practice to circulate draft directions and to request the parties' comments on them in writing by a specified date.

b) If the arbitrators consider that a documents-only procedure is appropriate, they should include draft directions to this effect and specifically seek the agreement of all parties to that aspect of the procedural order. If all parties so agree then the arbitrators should record the agreement and the fact that the parties have waived their right to a hearing in respect of a set of issues or specific issues in the arbitration. Ideally, the arbitrators should also define in their procedural order the issues on which the parties have agreed to waive any right to a hearing.

c) If a party declines to waive a right to a hearing, the arbitrators may nevertheless focus the scope of the hearing in advance by means of a procedural order identifying the crucial issues to be addressed during the hearing. Such an order can serve to reduce the time and expense of a hearing.

Document production

d) The arbitrators' directions should also deal with matters of disclosure, detailing the scope and extent of documents to be produced, as well as the timing and manner in which they should be produced. Where, as is normally the case, a documents-only procedure is intended to encourage speed and to reduce costs, arbitrators may direct the parties to include with their submissions all of the evidence on which they intend to rely in support of their submissions. Alternatively, if several rounds of document production are deemed necessary, the arbitrators' directions should include a timetable for the exchange of documents.

Site visit or inspection of the subject matter of a dispute

e) Notwithstanding the fact that it has been agreed that the arbitration, or certain issues within it, will be conducted on documents-only basis, arbitrators may consider that it would be appropriate to conduct an inspection of, for example, a site, a property, a machinery and/or goods. If so, they should give directions to this effect and indicate how it is to be organised, who is to be present and what will occur during the inspection.

Paragraph 5

Fair opportunity to present their case

When conducting a documents-only procedure, as in any arbitral proceedings, arbitrators should act consistently with their duty to treat

parties equally and give each a fair opportunity to present its case. Accordingly, the arbitrators should allow each party reasonable time to prepare its submissions. Each party should also be given a fair opportunity to respond to the submissions made by the opposing party, subject to any overriding mandatory rules and/or prevailing practice at the place of arbitration.

Article 2 — Conduct of documents-only proceedings

1. **Arbitrators should be satisfied that the parties have been given a fair opportunity to file submissions and evidence sufficient to enable the arbitrators to decide all or some of the issues in dispute on documents only.**
2. **If during the course of a documents-only procedure, a party who has not waived its right to a hearing, requests a hearing, arbitrators should grant the request subject to the applicable arbitration rules and/or the *lex arbitri*.**
3. **If during the course of a documents-only procedure, a party who has waived its right to a hearing, requests a hearing, arbitrators should re-consider, whether, in light of the submissions made and the evidence submitted, it would be preferable to hold a hearing but only order it if all parties agree to have a hearing.**
4. **If none of the parties have requested a hearing and/or the parties have agreed to a documents-only procedure but the arbitrators nevertheless consider, on their own motion, in light of the submissions made and the evidence submitted, that it would be preferable to hold a hearing, they may order that procedure only if all the parties agree.**

Commentary on Article 2

Paragraph 1

Arbitrators' examination of submissions and evidence

Upon receipt of the parties' submissions and evidence, arbitrators should review whether they are sufficient to enable them to decide the dispute or certain issues on documents only. If the arbitrators consider that a submission and/or evidence is inadequate, they should invite the party or parties to make further submissions and/or to provide further evidence in writing to address the specific issues within a reasonable time.

Paragraphs 2-3

Later requests to hold a hearing

Notwithstanding that the parties have previously agreed to waive their rights to a hearing, if during the course of a documents-only procedure, one or more of the parties requests a hearing, the arbitrators should consider whether there is some change in the nature of the issues in dispute, the circumstances, and/or evidence that needs to be adduced that leads them to conclude that it would be preferable to have a hearing. If so, the arbitrators should then raise the issue with all the parties and seek their agreement to a hearing.

Paragraph 4

Arbitrators' proposition to hold a hearing

In cases where none of the parties have requested a hearing and/or the parties have agreed to a documents-only procedure but the arbitrators nevertheless consider that it would be preferable to have a hearing, the arbitrators should explain their reasoning to the parties and seek their agreement to a hearing. If, however, any of the parties does not agree with the arbitrators' suggestion, the arbitrators should proceed on the basis of the documents-only procedure previously agreed upon.

Article 3 — Closing the proceedings and making an award

After all written submissions and evidence have been exchanged, or the time for the last exchange has expired, if the arbitrators are satisfied that the parties have been given a fair opportunity to file submissions and evidence sufficient to enable the arbitrators to decide issues on a documents-only basis, they should declare the proceedings closed and inform the parties when they intend to make an award.

Commentary on Article 3

When drafting an award relating to a documents-only procedure, arbitrators should record the parties' agreement to that procedure or any order made for it where that is permissible, and the procedural steps which were followed in order to minimise the risk of the award being challenged. For guidance on the requirements as to form and content of arbitral awards, please refer to the *Guideline on Drafting Arbitral Awards Part I — General*.[6]

Conclusion

Documents-only procedures can provide a fast and cost-effective means of resolving certain disputes since they can avoid the delay and expense associated with scheduling and holding hearings. Even though the use of documents-only procedures is not that common in international arbitrations, it is increasingly common to use such a procedure for certain industry-specific disputes and/or distinct issues because it can speed up the process and reduce costs.

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

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Endnotes

1. See e.g., Article 19(1) LCIA Rules (2014); Article 25(6) ICC Rules (2012); Rule 24(1) SIAC Rules (2016); Article 17(3) UNCITRAL Rules (2010/2013); Article 24(1) UNCITRAL Model Law on International Commercial Arbitration (1985, amended in 2006). But see Section 34(2)(h) of the English Arbitration Act 1996 pursuant to which the arbitrators have the power, unless otherwise agreed, to decide whether there should be a hearing.
2. Paula Hodges, 'Drive for Efficiency and the Risks for Procedural Neutrality – Another Tale of the Hare and the Tortoise?' (2012) 6(2) Dispute Resolution International, p. 188; and Jeffrey Waincymer, *Procedure and Evidence in International Arbitration* (Kluwer Law International 2012), p. 718.
3. For further guidance, see CIArb Guideline on Managing Arbitral Proceedings (Forthcoming).
4. Gary B. Born, *International Commercial Arbitration* (2nd ed, Kluwer Law International 2014), pp. 2140-2142; and Bruce Harris, Rowan Planterose and Jonathan Tecks, *Arbitration Act 1996: Commentary* (5th ed, Wiley-Blackwell 2014), p. 179.
5. For further guidance, see CIArb Guideline on Party Non-Participation (2016).
6. See CIArb Guideline on Drafting Arbitral Awards Part I — General (2016).