

INTERNATIONAL ARBITRATION PRACTICE GUIDELINE

**Terms of Appointment including
Remuneration**

Chartered Institute of Arbitrators

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Introduction

1. In arbitrations administered by an arbitral institution, the institution will have its own practices and procedures for managing the arbitration including the arbitrators' terms of appointment and remuneration. However, in arbitrations where the terms of appointment are not managed by an arbitral institution, arbitrators will need to address these issues themselves. Notwithstanding that an arbitration agreement provides for an *ad hoc* arbitration, many arbitral institutions will, for a fee, undertake the management of the administrative aspects of the arbitration, including arranging the terms of appointment, if the parties agree to the institution fulfilling that role.¹
2. This Guideline sets out the current best practice relating to agreeing terms of appointment and remuneration in international commercial arbitrations which are not administered by an institution including:
 - i. when to raise the issue of the arbitrators' terms of appointment;
 - ii. how to record them; and
 - iii. what provisions to include.

Preamble

1. In *ad hoc* arbitrations it is widely accepted that once an arbitrator accepts an invitation to act, this creates a contractual relationship between the parties and the arbitrator.² Even if the parties and the arbitrator do not enter into a written contract, there is nevertheless a contractual relationship. Recording the terms of the appointment in writing is good practice to reduce the chances of misunderstandings and to avoid unwanted complications if a dispute arises.
2. In international arbitrations, there will often be three arbitrators, with each party appointing one arbitrator and the party-appointed arbitrators selecting a presiding arbitrator. There is no universally accepted standard form or content required for terms of appointment. This

Guideline summarises the key issues arbitrators should consider when discussing their terms of appointment and identifies the terms most commonly included.

Article 1 — General principles

- 1. Arbitrators should seek to agree with the parties the basis of their appointment before or immediately after accepting an appointment, bearing in mind the terms of the arbitration agreement, including any arbitration rules and the law of the place of arbitration (*lex arbitri*).**
- 2. The terms of appointment should be recorded in writing and should address the nature of the appointment, arrangements for the arbitrators' remuneration and any other material terms agreed with the parties.**
- 3. Once agreed, the terms of appointment may be amended only if all the parties and the arbitrators agree to the amendment.**

Commentary on Article 1

Paragraph 1

Early discussion of terms of appointment

- a) Before accepting an appointment, arbitrators should determine, based on the information available to them, whether (1) they are free of conflicts; (2) they comply with any requirements as to experience and qualifications; and (3) they are able to devote sufficient time to deal with the arbitration.³ At the same time the arbitrator should consider, taking into account the *lex arbitri* and/or local practice, when is the appropriate time to inform the parties of the terms of appointment including proposed remuneration.
- b) The timing is important because in some jurisdictions a discussion of these issues prior to the constitution of the tribunal may be considered to

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give rise to an appearance of bias and/or lack of independence which could lead to a later challenge to the appointment.⁴ In these jurisdictions, once the tribunal is constituted, the practice is for the presiding arbitrator to assume responsibility for discussing the terms of appointment for all of the arbitrators with all of the parties after consultation with the other members of the tribunal.

- c) In other jurisdictions it is common practice, before the appointment is accepted, for a prospective arbitrator to discuss with the party appointing them the terms of appointment including proposed remuneration and reach agreement with that party on those terms. In these jurisdictions a party-appointed arbitrator may typically agree terms of appointment with the appointing party without consulting with the other party or the other arbitrators. In that case it is good practice to disclose the agreed terms to the other arbitrators as well as the other party at the earliest opportunity. Ideally the terms of appointment for all three arbitrators, which may be different for each arbitrator, should later be recorded in one document agreed with all parties once the tribunal has been constituted (see Article 1.2 below).
- d) In light of the above, before proposing any terms, arbitrators should take care to establish whether the *lex arbitri* and/or local practice provide that the discussion of the terms of their appointment is subject to any specific requirements or limitations.

Recalcitrant party or parties

- e) In an attempt to frustrate an arbitration a party may seek to obstruct or delay the appointment of the tribunal by refusing to appoint an arbitrator or to participate in the appointment process, including to agree the arbitrators' terms of appointment. Many arbitration rules and national laws allow for an arbitral institution or the local court to remedy the situation.

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Paragraph 2

Recording the terms of appointment

- a) It is advisable to have a written record of the terms of appointment to avoid later misunderstandings and disputes. Depending on the arbitrators' preferences and the circumstances of the case, the terms of appointment may be recorded in a contract document, a retainer letter or in an exchange of written communications. Alternatively, once the tribunal is constituted, the arbitrators may confirm their terms of appointment in a procedural order, terms of reference or a similar document.

Content of the terms of appointment

- b) There is no prescribed form that arbitrators should follow when drafting their terms of appointment. However, before preparing terms of appointment, arbitrators should check the governing rules and laws for any express requirements or limitations that they need to take account of and ensure that these are reflected in the terms of appointment.
- c) The terms of appointment will typically include (1) a brief description of the dispute to be resolved; (2) a confirmation of the arbitrator's jurisdiction; (3) a reference to the arbitration agreement pursuant to which the arbitrator has been appointed; (4) a declaration of independence and impartiality; (5) a statement of availability; and (6) the basis of remuneration and arrangements for payment of fees and expenses including any interim payments on account (see Article 2 below).
- d) Additional terms may be included to specifically deal with matters such as, for example, confidentiality, immunity from suits, the right to appoint experts and/or assistants, document retention/destruction, and/or any other matter the arbitrators consider appropriate in the particular circumstances of the case.

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Paragraph 3

Modification of the terms of appointment

As it is not possible at the start of the arbitration to anticipate exactly how the arbitration will proceed, it is advisable to expressly state that the terms of appointment may be modified in the event of a change of circumstances that justifies an amendment. When a variation of terms is sought, it should be raised promptly and will require the express agreement of all parties as well as the arbitrators.⁵ It is good practice to record any amendments in writing.

Article 2 — Terms of remuneration

The terms of remuneration should address the following:

- i. method by which the arbitrators' fees will be calculated;**
- ii. any commitment or cancellation fees;**
- iii. reimbursement of expenses reasonably incurred;**
- iv. value added or other taxes;**
- v. payment terms, including any arrangements for advance deposits on account;**
- vi. final account for fees and expenses;**
- vii. specific arrangements for remuneration and reimbursement of fees and expenses in the case of an early termination or settlement; and**
- viii. any other relevant matters.**

Commentary on Article 2

i) Methods for calculating remuneration

- a) Arbitrators engaged to resolve a dispute are entitled to be remunerated for the services they render in the course of the arbitration. The terms of appointment should therefore specify the method to be used to calculate that remuneration and the rate for their fees. The most commonly used

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methods for calculating the arbitrators' remuneration are (1) time spent, where a fee is calculated on the basis of an agreed hourly or daily rate for work done; (2) fixed fee, where a fee is fixed in advance regardless of the actual work undertaken; and (3) *ad valorem*, where a fee is calculated as a proportion of the amount in dispute. When considering the method and rate to apply, the arbitrators may look for guidance from information published by arbitral institutions. In any event, regardless of the chosen method to determine the remuneration, the fees should be reasonable in all of the circumstances of the case.

- b) In a three-member tribunal, each member should be compensated by the same method. However, when arbitrators are remunerated by reference to the time spent, they may charge different rates depending on their experience and responsibilities.
- c) If the arbitration is expected to continue for more than twelve months, the arbitrators should, depending on the adopted method for calculation of the arbitrators' remuneration, consider whether it is appropriate to include an indexation mechanism or other provision for a periodic adjustment of fees.

Factors to consider when setting the arbitrators' fees

- d) In setting their fees, arbitrators should consider (1) the complexity of the dispute, including the novelty and difficulty of the issues likely to be presented; (2) any specialist expertise of the arbitrators; (3) the number of parties; (4) the arbitrators' experience and role within the tribunal; (5) the amount of time and nature of the work likely to be required; and (6) any other relevant circumstances of the case.

ii) Commitment or cancellation fees

- a) The purpose of commitment and cancellation fees is to compensate arbitrators for time reserved but not used in the event that meetings or

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hearings are cancelled or adjourned, including preparation time in connection with such meetings or hearings.⁶ As the practice of charging cancellation or commitment fees is common in some jurisdictions but unknown or prohibited in others,⁷ arbitrators should first consider the extent to which these fees are permitted under the terms of the arbitration agreement, including any arbitration rules and/or the *lex arbitri*. If they are permissible, arbitrators who wish to charge them should include an express provision to this effect in their terms of appointment.

- b) A commitment fee, also known as a booking fee, is payable at the time a booking is made. It is a non-refundable payment on account of the estimated fees for each arbitrator for the period booked. If the booked period is used, the commitment fee is applied to the actual fees incurred for the booking.
- c) A cancellation fee is a fee payable if a hearing is cancelled or adjourned. The amount of a cancellation fee will usually be fixed by reference to (1) the arbitrators' agreed rate of compensation; (2) the amount of time reserved; and (3) the length of notice the arbitrators are given of the need for cancellation or adjournment: the shorter the notice, the higher the fee. If the period of notice is long enough to afford the arbitrator a reasonable opportunity to arrange other replacement work for the reserved time, there is no justification for a cancellation fee.

iii) Reimbursement of arbitrators' expenses

In addition to fees, arbitrators are also entitled to the reimbursement of any reasonable out-of-pocket expenses incurred in connection with the arbitration. It is therefore good practice to include in the terms of appointment a provision expressly authorising arbitrators to recover such expenses, including but not limited to travel, accommodation and subsistence costs in relation to meetings and hearings as well as office

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expenses, such as photocopying, printing and courier costs. The terms of appointment may also address the cost of a tribunal secretary and/or the fees of a legal adviser or an expert appointed by the arbitrators if anticipated at the time the terms of appointment are concluded.⁸ All disbursements should be charged to the parties at cost and, upon request, supported by receipts or evidence of the expenses.

iv) Value added or other taxes on arbitrators' fees and expenses

Services rendered by arbitrators may be subject to value added tax, withholding tax or other charges under any local law applicable to them. Different tax regimes may apply to different members of the tribunal. Therefore each arbitrator should ensure that the terms of appointment include specific provisions for the addition of local taxes or other charges appropriate to their own fees and disbursements.

v) Payment terms

- a) There is no universally accepted practice in relation to the terms on which arbitrators should be remunerated but there may be local practices and/or rules governing this issue. Arbitrators should therefore take care to establish what the local practice may be. In some jurisdictions, for example, in *ad hoc* proceedings, arbitrators may receive the full payment of fees from the parties at the early stage(s) of the proceedings. However, a more widely accepted practice is the arbitrators to receive interim payments on account in which case it is prudent to include provisions allowing interim invoicing for fees and expenses and indications as to when they may be invoiced and the time within which they are payable.
- b) Arbitrators may also include an express provision that the parties are jointly and severally liable to the arbitrators for their fees and expenses to assist recovery of any sums unpaid.

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Arrangements for advance deposits on account

- c) Most arbitration rules and laws provide allow arrangements for advance deposits on account. If any such a regime applies, the terms of appointment should be drafted to comply with it (see Article 1.2 above). If there is no such regime, arbitrators should consider including express provisions in their terms of appointment for advance deposits on account of fees and expenses.
- d) In any case, the terms of appointment should specify the steps the parties need to follow in order to make an advance deposits including the details of the bank account where the deposit is to be lodged, for example an account controlled by the presiding arbitrator. It is also important to determine the amount each party will be expected to advance and the circumstances in which the arbitrators may require a further increased deposit.
- e) As it is often unclear at the beginning of an arbitration the course the arbitration will actually take, it is usually sufficient for the arbitrators to ask for an initial deposit on account to take the arbitration through the initial stages of the proceedings. When this approach is taken if the advance deposit proves to be insufficient, arbitrators may request additional deposits at any time during the proceedings. A further deposit on account should be requested before the earlier deposit has been exhausted. The request for deposits on account may be recorded in a procedural order.

Consequences of failure to provide advance deposits

- f) When requesting an advance deposit, arbitrators should also make clear to the parties the consequences of any delay and/or failure to make the deposit. Some arbitration rules and laws provide that arbitrators may suspend work and eventually terminate the arbitration if a party does not comply with a request for payment within a specified or reasonable time.

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In the absence of express provisions in the applicable laws and rules, it is good practice to include express provisions to this effect in the terms of appointment, for example, by reserving the right to suspend work until an advance deposit and/or overdue invoice has been satisfied.

Keeping track of the fees accruing and deposit account

- g) It is normal for one arbitrator, usually the presiding arbitrator, to take responsibility for managing the deposit account. Throughout an arbitration the arbitrators should closely monitor the level to which their fees are accruing in relation to the balance on any deposit account so as to ensure sure that there are sufficient funds to cover the arbitrators' fees and expenses and that appropriate notice is given to the parties of any need to make additional deposits. If agreed as discussed regarding Article 2(v) above, the arbitrators may periodically issue interim invoices for fees and expenses as the arbitration progresses. They may withdraw deposit funds to pay those invoices in accordance with the payment terms. This will facilitate determining the sufficiency of remaining funds to cover future fees and expenses and the need to require a further increased deposit.
- h) Arbitrators are also encouraged to include an express provision to determine who is entitled to any interest accruing on the sum(s) deposited in the account in which the fees and expenses are paid.

vi) Final account

- a) At the end of an arbitration before issuing the final award, the arbitrators may wish to prepare a final account in respect of all costs and expenses payable by the parties, taking into account all deposits received and interest accrued there on. Any accrued interest income earned from the deposit should be added to the final accounting and paid in accordance with what was agreed in the terms of appointment. If at the time of the

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final account any unbilled fees and expenses exist, the arbitrators should issue an invoice for these immediately. If there are any unpaid invoices, arbitrators should issue a request for payment before issuing the award.

- b) If appropriate, the arbitrators may warn the parties that they intend to withhold the final award until all outstanding invoices have been paid. Many national laws and rules provide that the arbitrators may withhold the final award until the fees and expenses are paid in full. However, arbitrators should not withhold the final award pending payments of fees and expenses unless they have the right to do so. Accordingly, it is always prudent to provide for this in the terms of appointment.

vii) Specific arrangements in the event of an early termination or settlement

Arrangements for payment of arbitrators' fees and expenses

- a) A case may settle during the course of the arbitration proceedings. If it does, the parties may simply implement the settlement agreement and revoke the arbitrators' mandate. It is therefore prudent to include in the terms of appointment a specific provision requiring the parties to inform the arbitrators if there is a settlement and to include in any settlement agreement provisions for paying outstanding arbitrators' fees and expenses.

Arrangements for reimbursement of fees and expenses

- b) In the event of early termination of the arbitral proceedings (i.e. prior to an arbitral award or settlement), the arbitrators may be required to reimburse any sums in excess of the arbitrators' fees and expenses. It is therefore prudent to include a specific provision requiring the arbitrators to promptly reimburse any excess sums to the party or parties.

Conclusion

In *ad hoc* arbitrations it is critically important to agree at the outset of the arbitral proceedings the terms of appointment including remuneration. To assist arbitrators in formulating and drafting their terms of appointment, this Guideline summarises issues that arbitrators should consider and topics that should be addressed.

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. Most major arbitral institutions offer such services, see e.g., CIArb, ICC, LCIA, SIAC, HKIAC, SCC, among others.
2. Jean-François Poudret and Sébastien Besson, *Comparative Law of International Arbitration* (Sweet & Maxwell 2007), p. 367 (“An arbitrator exercises a mandate based on a contract of private law. This approach seems to be anchored in all legal systems.”); Emmanuel Gaillard and John Savage, *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International 1999), p. 598; Julian D. M. Lew and others, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) para 12-4; Jeffrey Waincymer, *Procedure and Evidence in International Arbitration* (Kluwer Law International 2012), pp. 54-64; and Roger Enock and Alexandra Melia, ‘Ad Hoc Arbitrations’ in Julian D. M. Lew and others (eds), *Arbitration in England, with chapters on Scotland and Ireland* (Kluwer Law International 2013), paras 6.36-6.37.
3. See CIArb Guideline on Interviews for Prospective Arbitrators.
4. This is, for example, the case in Arab states of the MENA region where, unlike prevailing practices in common law jurisdictions, the parties do not conclude a fee agreement with each or even all arbitrators in *ad hoc* arbitration proceedings.
5. Gavan Griffith and Rodrigo Pintos Lopez, ‘Renegotiating Arbitrators’ Terms of Remuneration’ (2002) 19(6) *Journal of International Arbitration*, p.581 and p. 586.
6. John Yukio Gotanda, ‘Setting Arbitrators’ Fees: An International Survey’ in Christopher Drazohal and others (eds), *Towards a Science in International Arbitration: Collected Empirical Research* (Kluwer Law International 2005), p. 789; and Nigel Blackaby and

others, *Redfern and Hunter on International Arbitration* (6th ed., OUP 2015), paras 4.212-4.214.

7. Gotanda, n 6, 798 (“The practice of charging cancellation or commitment fees is most commonly employed in the United Kingdom. It also appears to be used regularly in Canada, the Middle East and Oceania. Currently, cancellation and commitment fees are not widely used in the European continent and the United States.”)
8. See CI Arb Guideline on Experts including Tribunal-Appointed Experts.