

INTERNATIONAL ARBITRATION PRACTICE GUIDELINE

Managing Arbitrations and Procedural Orders

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Managing Arbitrations and Procedural Orders

Introduction

This Guideline sets out the current best practice in international commercial arbitration as to how to establish and manage the procedure according to the specific requirements of each arbitration. It includes guidance on:

- i. organising procedural and/or administrative aspects of an arbitration, including techniques which can be used to manage the proceedings (Articles 1 and 2);
- ii. issuing procedural orders (Article 3, paragraph 1);
- iii. dealing with parties' failure to comply with procedural orders (Article 3, paragraph 2).

This Guideline should be read in conjunction with the *CIArb Protocol for E-disclosure in Arbitration* (Appendix I). The Protocol encourages early consideration of disclosure of documents in electronic form and includes a regime designed for parties to agree on the scope and the extent of e-disclosure. Parties may adopt the Protocol in whole or in part or arbitrators may use it as guidance as to the directions required to manage the conduct of e-disclosure, taking into account the particular circumstances of each arbitration.

Preamble

One of the main attractions of international arbitration is the flexibility of the process which can be tailor-made according to the parties' specific needs and the particular circumstances of each dispute. Most arbitration laws and rules reflect this flexibility and do not prescribe how the procedure should be managed. Instead they mostly confirm that, absent an agreement between the parties to the contrary, arbitrators have a broad discretion to design the procedure to suit each arbitration, subject to ensuring that all parties are treated even-handedly and given a fair opportunity to present their case. Nevertheless, arbitrators should take great care to establish whether there are any other applicable mandatory provisions and comply with them.

Once the arbitral tribunal is constituted, it is common practice for the arbitrators and the parties to discuss the administrative and procedural matters that will need to be addressed during the course of the arbitration with the aim of agreeing so far as possible what has to be done by whom and when for the efficient and cost-effective conduct of

the proceedings. To the extent that it is not possible for the parties alone to agree the procedure and/or the timetable, the arbitrators will have to decide the issue(s) after consultation with the parties. Arbitrators usually record what has been agreed and/or directed in procedural orders but, in some jurisdictions, there may be specific requirements as to form and content with which the arbitrators have to comply with.¹

Arbitrators play a pivotal role in shaping and organising the proceedings so that they are conducted in an efficient and cost-effective manner. In this context, they set the tone for the arbitration by establishing an atmosphere of civility and cooperation and encourage the parties to adopt bespoke procedures that save time and costs. Throughout the course of the arbitration, arbitrators should actively monitor the proceedings to ensure that they progress smoothly and according to the agreed procedure and timetable.

This Guideline summarises the various case management techniques that arbitrators may use with the aim of conducting the proceedings in an efficient, expeditious and economical manner. It also addresses the practice of issuing procedural orders and looks at the most common disciplinary measures that arbitrators may use to impose sanctions against parties who repeatedly fail to comply with their directions.

Article 1 – General Principles

1.1 Where the arbitration agreement, including any applicable rules and/or the *lex arbitri* contain, or the parties otherwise agree, provisions in respect of procedural matters, arbitrators should comply with the specified provisions or agreement.

1.2 In the absence of an agreement and/or specific provisions in respect of the procedural aspects of the arbitration, arbitrators should organise the procedure as they think appropriate in light of all the circumstances of the arbitration, subject always to consulting with the parties and inviting them to comment on the proposed procedure or make alternative suggestions.

1.3 Arbitrators should, at the outset, set the tone for the arbitration by explaining the procedure to be followed so that all of the parties have a common understanding of the process.

1.4 The adopted procedure should be designed to resolve the arbitral proceed-

ings without undue delay or expense.

Commentary on Article 1

Articles 1.1-1.2

Determination of the procedure

To begin, the arbitrators may take the initiative and make suggestions as to the proposed procedural directions for the conduct of the arbitration and ask the parties for their comments. If the parties have reached an agreement as to the procedure to be followed, 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 and/or would cause the proceedings to be conducted in a manner which is inefficient and unnecessarily costly. In these circumstances, arbitrators should consider encouraging the parties to adopt a more suitable procedure and, if appropriate, make a procedural order to that effect.

In exercising their discretion, arbitrators should take into account (1) the arbitration agreement; (2) any applicable arbitration rules; (3) the applicable law(s) including the *lex arbitri* and/or the substantive law applicable to the contract (*lex causae*);² (4) the nature and complexity of the dispute; (5) any specific practice in a particular industry in which the dispute arises; (6) the particular wishes and needs of the parties; (7) the legal traditions of each party's jurisdiction; (8) any agreement between the parties as to the procedure; (9) the sums at stake; and (10) any other relevant circumstances of the case. In any event, arbitrators should ensure that the procedure chosen is efficient and cost-effective (see Article 1.4 below) and in compliance with the prevailing requirements of due process.

Article 1.3

Setting ground rules

At the outset of the arbitration, arbitrators can helpfully set the tone by fostering an atmosphere of cooperation and courteousness. They may explain their views as to how the arbitration should be conducted, what styles of advocacy are acceptable, how evidence should be submitted and the extent to which requests for extensions of time limits may be permitted. To reduce the risk of disruptive behaviour and to make it easier to deal with any such behaviour if it arises, arbitrators may also explain the consequences of non-compliance with procedural orders. They may remind the parties that any disrupt-

tive conduct may be taken into account when allocating the costs of the arbitration and that, in extreme cases, they may impose sanctions (see Article 3.2 below).

Article 1.4

Avoiding unnecessary delay and cost

Arbitrators should be mindful of their duty to conduct the proceedings in a manner so as to avoid unnecessary delay and cost. The efficiency and fairness can be enhanced when the arbitrators effectively managed the proceedings. The principal tool to fulfil this duty is the arbitrators' ability to give directions linked to an agreed timetable for each step of the arbitration so that the parties always know what they have to do and by when.

Article 2 — Case management conference

2.1 Shortly after the constitution of the tribunal, arbitrators should discuss amongst themselves their initial views as to how they propose to conduct arrangements between themselves for the efficient management of the arbitration.

2.2 Once they have held an initial discussion between themselves, the arbitrators should convene a case management conference with the parties to discuss the procedural steps to be taken in the proceedings and to agree a timetable.

2.3 Arbitrators should keep under review during the course of the arbitration whether a further conference is necessary to discuss any additional and/or outstanding organisational and procedural issues as and when appropriate.

Commentary on Article 2

Article 2.1

Initial discussion between the arbitrators

Once the arbitrators have been appointed and prior to any case management conference with the parties, it is good practice for the arbitrators to discuss between themselves their initial views on how to approach the arbitration. The arbitrators should also consider making arrangements among themselves that ensure that all members of the tribunal will be fully engaged in the proceedings. For these purposes, the arbitrators may consider allocating specific duties between the members of a three-member tribunal, including identifying one of the arbitrators to take responsibility for the day-to-day manage-

ment of the arbitration and monitoring its progress. It is widely accepted that the presiding arbitrator will undertake these tasks, however, the co-arbitrators may be allocated specific administrative duties, such as acknowledging receipt of communications and/or submissions. Another way to accomplish this would be for a division of responsibilities of different issues between the arbitrators.

Arbitrators may also discuss the process for issuing procedural decisions in the course of the arbitration. Various national laws and arbitration rules allow the presiding arbitrator, with the agreement of the co-arbitrators and the parties, to decide procedural matters alone and sign procedural orders on behalf of the tribunal.³ If this is the case, the arbitrators should discuss when and for what types of decisions the presiding arbitrator can issue such procedural orders. The presiding arbitrator is frequently given authority to make decisions dealing with purely administrative questions and/or urgent procedural issues but usually subject to review and possible revision by the whole tribunal, and subject to discussions with the two co-arbitrators where possible.

Arbitrators should also discuss and agree what matters to include in a draft agenda for a case management conference with the parties. The presiding arbitrator may prepare a first draft and circulate it amongst the arbitrators for comments before sending it to the parties for their comments, before the agenda is agreed.

Matters to address

It is good practice to prepare and circulate an agenda in advance. The agenda normally deals with both administrative and procedural matters related to the conduct of the arbitral proceedings. Matters that are typically covered include:

(1) Applicable arbitration rules, law(s) and place of arbitration

Confirmation of the applicable law(s) and rules as well as the place of the arbitration.

(2) Language(s) of the arbitration, translation and interpretation

Confirmation of the language(s) of the arbitration proceedings and/or need and responsibility for arranging translation and an interpreter.

(3) Constitution of the arbitral tribunal and/or challenges to jurisdiction

Confirmation that the arbitrators have been properly appointed and have jurisdiction over the dispute and/or clarifying whether there are any challenges to the arbitrators' jurisdiction that parties intend to make. If a party intends to raise a challenge, it is good

practice to discuss and agree a timetable for the exchange of submissions on jurisdiction. For further guidance on ‘How to deal with jurisdictional challenges’ please refer to the *Guideline on Jurisdictional Challenges*.⁴

(4) Arbitrators’ fees and expenses, including advance deposits

Confirmation of the arbitrators’ fees and expenses and agreeing on any interim payments.⁵

(5) Expedited or simplified procedure

Arbitrators should discuss with the parties the suitability for the case at hand of the various measures and techniques, including expedited or fast-track arbitration, that can be used to manage the procedure and consequently control the costs in order to achieve a speedy and cost-effective resolution of the case. The arbitrators should then determine if any such measures or techniques should be adopted.

(6) Procedural powers of the arbitrators

Confirmation of whether the parties have entered into any agreement limiting and/or expanding any powers given to the arbitrators, including where permissible, reserving the presiding arbitrator’s power to decide procedural matters alone and sign procedural orders on behalf of the tribunal.

(7) Appointment of an arbitral secretary

Most arbitration laws and arbitration rules do not provide for a formal process of appointment of arbitral secretaries. However, in larger and/or more complex arbitrations, it is increasingly common practice to appoint an arbitral secretary to facilitate the efficient management of the procedural aspects of the arbitration.

Before deciding whether to appoint an arbitral secretary, arbitrators should take into account (1) the number of parties to the arbitration; (2) the nature and complexity of the case; (3) the likely volume of documentary evidence, submissions, witness statements and expert reports; (4) whether the use of secretary will contribute to the overall efficiency of proceedings; and (5) any other relevant matters.

In the absence of a formal process for appointment of an arbitral secretary, arbitrators should (1) inform the parties of their intention to appoint such a person; (2) provide them with sufficient information regarding the experience and background of the proposed candidate as well as the intended duties that the arbitral secretary will perform and the proposed costs; and (3) give each party an opportunity to comment on the pro-

posed appointment.

In any event, arbitrators should exercise close supervision of the tasks which an arbitral secretary performs throughout the course of the arbitral proceedings. Arbitrators may consider it necessary that arbitral secretaries attend the deliberations but strictly only to observe and take notes. Arbitrators should take great care not to delegate their duty to decide any issue, procedural or substantive, to an arbitral secretary, as such delegation may provide grounds for a challenge to the tribunal and/or a challenge to the award. Therefore, it is considered best practice to avoid involving an arbitral secretary in anything that could be characterised as expressing a view on the substance of any issues which the arbitrators have to decide.⁶

(8) Interim measures

Confirmation of whether any of the parties intends to make an application for an interim measure and, if so, agree a timetable for the exchange of submissions.⁷ For further guidance on the arbitrators' power to grant interim measures please refer to the *Guideline on Applications for Interim Measures*.

(9) Routing of communications

A Communication Protocol should be established to ensure effective management of information exchanges between the parties (and their representatives), the arbitrators and any arbitral secretary, and any arbitral institution. For these purposes, a circulation list should be prepared detailing the postal addresses, email addresses, telephone and facsimile numbers of the parties (and their representatives), the arbitrators and any arbitral secretary, and any arbitral institution's offices managing the arbitration.

Arbitrators should confirm whether email, post or facsimile is to be used for pleadings, statements, reports and bundles. They should also make it clear what type of documents, if any, they wish to receive in hard copy. Additionally, the parties should be asked to designate an address, either electronic or postal, for service of pleadings, statements, reports and bundles. They should also be asked to confirm that they agree that all communications for procedural and administrative matters may be communicated by email to the address designated in the Communication Protocol.

In any event, arbitrators should encourage parties to use the most efficient and expeditious means of communication, including the latest technology, and to limit their communication to matters which are directly relevant to the arbitration. Arbitrators should be mindful of private communications with the parties. Therefore, it is considered best

practice to conduct all communications in a transparent manner, by copying in all communications to all the parties.

(10) Determination of issues and early resolution

Arbitrators should invite the parties to confirm the issues on which they agree and the issues on which they disagree with a view to identifying the issues in dispute. Arbitrators may also suggest that some issues in dispute be dealt with on a documents-only basis, subject to the arbitration agreement, including any arbitration rules and/or the *lex arbitri*.⁸

(11) Bifurcation of the proceedings

Arbitrators should discuss with the parties whether it is appropriate to bifurcate or otherwise deal with discrete issues in sequential phases in the arbitration. This may include, for example, separating (1) preliminary issues such as jurisdiction or applicable substantive law from the issues on the merits;⁹ (2) separating the liability and quantum; or (3) grouping separate issues in sequential phases of the arbitration.

Arbitrators should, however, be wary that parties may use a request for bifurcation as a tactic to delay and obstruct the arbitration. Before deciding to bifurcate, arbitrators should consider the particular circumstances of the case and should consider the following factors: (1) whether the issues to be bifurcated are significantly different from one another or substantially the same; (2) whether the documentary and testimonial evidence on the issues is separable or overlaps; (3) whether the bifurcation would increase costs with multiple phases or, alternatively, reduces them; (4) whether the bifurcation may help expedite the proceedings or lengthen them; (5) whether bifurcation may result in a prejudice or unfair advantage, or have the potential to benefit both parties equally; and (6) any other relevant considerations.

(12) Statements of case

Arbitrators should also discuss and agree with the parties the form, content and timing of the exchange of the parties' written submissions¹⁰ detailing their case. It is good practice for arbitrators to give detailed directions in relation to these matters and specify any requirements as to the timing, number, scope and length of the written submissions. When setting the procedure for the exchange of written submissions, the arbitrators should take care to establish whether there are any requirements or limitations imposed by the applicable arbitration rules or *lex arbitri* relating to these matters.

In any event, the arbitrators should require that the submissions include a list of exhibits

clearly identifying each exhibit, including date, originator and recipient, and the list should be regularly updated by the parties as the hearings take place. The arbitrators should also, to the extent feasible, direct the parties to provide their written submissions and exhibits in a format that is electronically searchable.

(13) Disclosure (including e-disclosure)

Arbitrators should encourage the parties to agree on the scope of the documentary disclosure between themselves and only seek the arbitrators' intervention when absolutely necessary. As to disclosable documents stored in an electronic form, further guidance on how to conduct e-disclosure can be found in the *CI Arb Protocol for E-disclosure in International Arbitration*.

(14) Arbitrators' power to raise legal issues on their own motion

Most arbitration laws and/or rules do not expressly address whether arbitrators can make independent enquiries and/or ascertain the law on their own motion beyond what has been submitted by the parties.¹¹ In some jurisdictions, arbitrators may apply legal issues not discussed by the parties and, in certain cases, they are obliged to raise such issues even if the parties have not addressed them in their submissions.¹² In other jurisdictions, raising legal issues which have not been submitted by the parties is considered a violation of due process and may lead to the annulment and/or refusal of enforcement of the arbitrators' award.¹³ In light of these differences, it is prudent for arbitrators to discuss the matter with the parties and clarify the scope and the extent of their powers. If deemed necessary and/or appropriate, a provision relating to this may be included in the Procedural Order No. 1 or Terms of Reference.¹⁴

(15) Witness statements

Confirmation as to whether witness evidence will be initially presented by way of written witness statements and/or through direct questioning at the hearing.¹⁵ If written witness statements are to be submitted, it is good practice to confirm whether they will stand as evidence in chief. The usual practice is for all witnesses who give written statements to attend any scheduled hearing for cross-examination, unless it is decided that their attendance is not required by the opposing party and the arbitrators. It is also good practice to clarify what would be the consequences of a witness not attending a scheduled hearing.

(16) Expert reports

Confirmation as to whether expert evidence is required and, if so, how and when such

evidence will be adduced. For further guidance on the appointment and use of party-appointed and tribunal-appointed experts please refer to the *Guideline on Party-Appointed and Tribunal-Appointed Experts*.¹⁶

(17) Site inspection

A site inspection may be necessary for arbitrators and/or experts. Any site inspection should be undertaken in the presence of both parties. Exceptionally, if one of the parties does not wish to attend or refuses to do so and the arbitrators need someone to guide them as to what they 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.

(18) Hearing

Arbitrators should discuss with the parties whether it is appropriate to hold a hearing and, if they decide it is, they will need to seek the parties' views and reach an agreement on the date(s), the length and the place of the hearing. If no agreement is reached, the arbitrators need to determine each of these issues. Matters to consider include the number of fact witnesses and expert witnesses that the parties intend to call, where they are situated and how they intend to give evidence.

When considering date(s) for a hearing, the arbitrators have to take into account any time limit (contained in the arbitration agreement or arbitration rules) for issuing the arbitral award. When agreeing on the date(s), it is good practice to schedule some extra dates for deliberations immediately after the hearing. In any event, the arbitrators have to take into account any time limit (contained in the arbitration agreement or arbitration rules) for issuing the arbitral award.

The length of a hearing will depend on the complexity of the issues arising in the case, amount of witness evidence and documents expected to be adduced. Arbitrators should encourage parties to have a single hearing rather than separate hearings and to limit the duration of the hearing.

Factors to consider in relation to determining the place of the hearing include the place where the evidence is, including witnesses and experts, and any need for inspection or site visits; availability of a hearing venue and costs; travel and accommodation costs; visa requirements and any time limits for application; and any other relevant matters.

(19) Costs and interest

Arbitrators should also invite parties to discuss costs issues, including the information that will be required to support any future application for costs and interest as well as the timing and sequence of any submissions on the costs. Even though at an early stage it may be difficult to have a clear picture as to the course of the arbitration and the costs that will be incurred, such a discussion can nevertheless be helpful in arbitrations involving parties and/or counsel from different jurisdictions who have different expectations as to how costs will be dealt with.¹⁷

(20) Arbitral awards

Arbitrators may consider discussing with the parties the extent to which they wish to have a final award that contains a full description of all procedural events and the contentions of the parties, or a more limited award that focuses primarily on the outcome and provides a brief statement of the tribunal's reasons for reaching it.

(21) Any other business¹⁸

Any other matters that the arbitrators or the parties may wish to address, including, for example, making a request for the consolidation of related cases, identifying whether there may be need for joinder of additional parties or other matters relevant to the particular circumstances of the case.

Article 2.2

Case management conference

A case management conference (CMC) may be conducted face-to-face, by telephone or videoconference. Arbitrators should convene such a conference with the parties with a view to (1) agreeing on the specific rules for the conduct of the proceedings and (2) setting a procedural timetable. Arbitrators may provide the parties with a draft agenda in advance of the conference and invite comments from the parties.

The timing of the CMC depends on the nature of the dispute, the extent of the information available and the urgency related to the case. In some jurisdictions, such a conference may be mandatory and there may be a specific time frame within which arbitrators have to convene such a conference.¹⁹ In any event, it is good practice to arrange for such a conference as early in the arbitration as possible after the arbitrators' appointment.

There may be cases when a CMC is not necessary, in particular when the participants

have a good idea as to how the proceedings will be conducted, when the participants have similar expectations as to the arbitral procedure, or when the case is relatively simple and the costs for holding such a conference would not be proportionate in light of the sums at stake. In such cases, after correspondence with the parties exploring the administrative and procedural matters that arise, arbitrators should record in a procedural order what has been agreed and/or directed.

Procedural timetable

Arbitrators should, in consultation with the parties, set a timetable detailing the key dates for the subsequent procedural steps to be taken by the parties. The deadlines set out should be achievable and realistic. They should take into account the arbitration agreement, including any arbitration rules and/or the *lex arbitri*.

Arbitrators should make it clear that the parties will be expected to comply with the procedural timetable. They should explain what modifications of the procedural timetable may be allowed in case of any change in circumstances but that requests to extend a set time limit may be granted only where there are good reasons to do so and, if they have the power to award costs, that such requests may result in adverse costs consequences for the party requesting the modification. Arbitrators should also remind the parties that non-compliance with the timetable may lead to sanctions including adverse costs consequences for the non-compliant party (see Article 3.2 below).

Shortly after the case management meeting, arbitrators should issue a procedural order recording all the arrangements which have been agreed and/or directed, including the time within which each step is to be completed.

Article 2.3

Review of the progress

Arbitrators should regularly review how the arbitration is progressing to make sure that it proceeds according to the agreed timetable. In large and complex arbitrations in which many procedural issues arise, a series of meetings or conference calls as the case progresses may be necessary to amend and/or update the procedural decisions.

Pre-hearing conference

Arbitrators should also consider whether to convene a pre-hearing conference to discuss progress and any outstanding and/or additional matters expected to arise which need to be decided before the hearing. At this stage, the exchange of written submissions and

evidence should have been completed. Such a conference may be conducted by telephone or videoconference to save time and costs.

The matters likely to arise will usually relate to the logistics and the daily schedule of the hearing itself. These include the sitting times, i.e. start and end of each day, time allocations for opening and closing statements, order and procedure for witness and expert examination, practical matters relating to the attendance of witnesses and experts; as well as arrangements for recording (portions of) the hearing and interpreters, if needed, and any other technology that the parties have agreed to use; and post-hearing briefs, if any.

Article 3 — Issuing procedural orders and sanctions for non-compliance

3.1 Decisions on procedural and/or administrative matters in relation to the conduct of the arbitration should be made in the form of procedural orders.

3.2 Arbitrators should inform the parties of any potential consequences of non-compliance with their procedural orders.

Commentary on Article 3

Article 3.1

Procedural orders

During the proceedings, arbitrators will usually make various decisions relating to the management of the arbitration. Procedural decisions should be recorded in writing, usually in the form of procedural orders, to avoid any doubt and to emphasise the importance of compliance with them and to distinguish them from awards. It is good practice to (1) include ‘Procedural Order’ in the title; (2) number each order sequentially, starting with ‘Procedural Order No. 1’; and (3) sign and date procedural orders.

Procedural orders do not require reasons. However, where the parties are unable to agree on a specific procedural matter and the arbitrators are called upon to decide between competing arguments, the arbitrators may consider it appropriate to include succinct reasons in the procedural order to demonstrate that they have given full consideration to the parties’ respective submissions.

Procedural orders should be written in clear and unambiguous language. The order should be in a format and layout which aids the communication of the arbitrators’ directions including informative headings and numbered paragraphs. Where a procedural

order refers to a matter which was discussed and determined in a previous procedural order, arbitrators should make reference to the earlier order and make it clear whether any earlier direction is amended or replaced.

Provisional nature of procedural orders

Procedural orders may be revisited or modified, if necessary in view of all of the circumstances of the case. It is good practice for arbitrators to state expressly in each procedural order that it may be revised at any time during the subsequent proceedings after consultation with the parties.

Article 3.2

Sanctions for non-compliance

In most cases the parties will endeavour to comply with the arbitrators' procedural orders but there may be instances where a party deliberately causes delays by repeatedly failing to comply and/or frustrates the proceedings. In such cases, arbitrators may consider whether they have powers to impose sanctions on the recalcitrant party so as to encourage it to adhere to the procedural order so that the proceedings progress in an orderly and timely manner.

Arbitrators should therefore take care to establish whether the arbitration agreement, including any arbitration rules and/or the *lex arbitri* contain express provisions in relation to such powers. If there are no express provisions granting the arbitrators the powers to sanction a party's disruptive procedural behaviour, and provided that there is no prohibition under the arbitration agreement including the applicable arbitration rules and/or the *lex arbitri*, arbitrators should consider whether they have an inherent power to do so.

Before imposing any sanction, arbitrators should issue a warning that they are considering imposing particular sanctions as this may prove sufficient and it may assist to refute any later arguments that the imposing of the sanction was arbitrary and/or unjustified. It is therefore necessary to provide reasons explaining why a sanction was appropriate to avoid an appearance of bias or lack of independence.

Peremptory orders

Some arbitration laws expressly provide that the arbitrators have powers to issue peremptory orders.²⁰ In the absence of express provisions granting the arbitrators such powers, and provided that there is no prohibition under the arbitration agreement including

the applicable arbitration rules and/or the *lex arbitri*, arbitrators may conclude that it is within their inherent powers to do so.

A peremptory order is an order issued by arbitrators against a party who failed to comply with an existing order without good cause. It requires the same steps to be taken as the earlier order and it is intended to be a final attempt to compel the party in default to comply with the arbitrators' procedural order.

Such an order will direct the party in default to comply with the earlier procedural order within a new specified time limit. In addition, such an order will explicitly specify the consequences of non-compliance with the new time limit. When a peremptory order is not complied with within the specified timeframe, arbitrators may apply the prescribed sanctions detailed in the peremptory order. These would depend on the type of default and include (1) excluding anything which was to be provided pursuant to the original order; (2) proceeding to an award on the basis of only such materials which have been properly provided; (3) drawing adverse inferences; (4) making such order as the arbitrators think fit as to the payment of costs of the arbitration incurred in consequence of the non-compliance. Alternatively, in extreme cases, depending on the local law, arbitrators may apply to the court to assist with the enforcement of their order.

Different types of sanctions, which the arbitrators may use include, but are not limited to: imposing cost sanctions; excluding evidence; drawing adverse inferences; any other measure which they consider necessary and/or appropriate in the circumstances of the case before them.

Cost sanctions

When allocating costs, arbitrators may take into account, among other things, the conduct of the parties.²¹ In particular, they may sanction a party whose unreasonable or dilatory behaviour has delayed and/or added expense to the proceedings with an adverse costs award. To avoid challenges it is good practice to have warned the parties at the outset that such behaviour is considered unacceptable. Such an award should also include reasons explaining why a party is being sanctioned.

Excluding evidence from the record

Arbitrators have a broad discretion to determine the admissibility, materiality and weight of evidence submitted by each party and when faced with late submission they need to consider whether to permit that late evidence to be adduced. Evidence submitted late, without justification, may be excluded from the record but before doing so arbitra-

tors need to consider carefully (1) whether the evidence is admissible, material and relevant; (2) whether there is good cause for the delay; (3) whether excluding the evidence will cause more prejudice than admitting it; (4) whether allowing the evidence will cause substantial delay to the proceedings; and (5) any other relevant circumstances of the case.

Alternatively, arbitrators may consider that costs sanction would be more appropriate in which case they will accept the evidence even if it has been filed late and take into account the late submission and the parties' behaviour in relation to this matter when allocating costs.

Drawing adverse inferences

Arbitrators may draw adverse inferences against a party who refuses to disclose evidence they have been ordered to disclose without satisfactory explanation. Before drawing such adverse inferences, arbitrators need to satisfy themselves that (1) the evidence is admissible, relevant and material; (2) the evidence is in the control of the recalcitrant party; (3) the recalcitrant party was given sufficient time and opportunity to produce it; (4) the inference is not contradicted by other evidence and is consistent with the evidence submitted by the opposing party; (5) there is no satisfactory explanation as to the party's failure to produce a requested evidence; and (6) any other relevant circumstances of the case. Arbitrators may decline to draw adverse inferences when it is likely that the opposing party has access to evidence corroborative of the inference sought but has failed to produce that evidence or adequately explain its own non-production.

Conclusion

Arbitrators have a broad discretion to organise the conduct of the proceedings, subject to the arbitration agreement, including the arbitration rules and/or the *lex arbitri*, and any agreement between the parties. To assist arbitrators in issuing procedural orders and managing the proceedings, this Guideline summarises matters that typically arise and techniques that can be used to conduct the arbitration in an efficient and cost-effective 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.

Endnotes

1. See e.g., ICC Arbitration Rules 2017, Article 23 requires that ‘particulars of the applicable procedural rules and, if such is the case, reference to the power conferred upon the arbitral tribunal to act as amiable compositeur or to decide ex aequo et bono’ are included in the Terms of Reference.
2. Certain issues may be a matter of substance in one jurisdiction and a matter of procedure in another jurisdiction. See, for example, Christopher Boog, ‘The Laws Governing Interim Measures’ in Franco Ferrari and Stephan Kröll (eds), *Conflict of Laws in International Arbitration* (Sellier 2011), pp. 409-458.
3. See e.g., SIAC Rules (2016) in section 19.5 ‘Unless otherwise agreed by the parties, the presiding arbitrator may make procedural rulings alone, subject to revision by the Tribunal.’ And LCIA Rules (2014) in Article 14.6 ‘In the case of an Arbitral Tribunal other than a sole arbitrator, the presiding arbitrator, with the prior agreement of its other members and all parties, may make procedural orders alone.’ UNCITRAL Art. 33(2) ‘In the case of questions of procedure, when there is no majority or when the arbitral tribunal so authorises, the presiding arbitrator may decide alone, subject to revision, if any, by the arbitral tribunal.’
4. *CIArb Guideline on Jurisdictional Challenges*.
5. See *CIArb Guideline on Terms of Appointment including Remuneration*.
6. *P v Q and Others* [2017] EWHC 148 (Comm) and [2017] EWHC 194 (Comm).
7. See *CIArb Guideline on Applications for Interim Measures* and *CIArb Guideline on Applications for Security for Costs*.
8. For further guidance on how to conduct documents-only procedures, see *CIArb Guideline on Documents-only Procedures*.
9. See *CIArb Guideline on Jurisdictional Challenges*.
10. These are also known as memorials or briefs.
11. A notable exception is the English Arbitration Act 1996, Article 34(1) and (2)(g) which state “It shall be for the tribunal to decide all procedural and evidential matters, subject to the right of the parties to agree any matter. Procedural and evidential matters include [...] whether and to what extent the tribunal should itself take the initiative in ascertaining the facts and the law.” See also, 2014

LCIA Arbitration Rules, Article 22.1 “(iii) to conduct such enquiries as may appear to the Arbitral Tribunal to be necessary or expedient, including whether and to what extent the Arbitral Tribunal should itself take the initiative in identifying relevant issues and ascertaining relevant facts and the law(s) or rules of law applicable to the Arbitration Agreement, the arbitration and the merits of the parties' dispute;” 2016 SIAC Arbitration Rules, Rules 27 “Unless otherwise agreed by the parties, in addition to the other powers specified in these Rules, and except as prohibited by the mandatory rules of law applicable to the arbitration, the Tribunal shall have the power to [...] (m) decide, where appropriate, any issue not expressly or impliedly raised in the submissions of a party provided such issue has been clearly brought to the notice of the other party and that other party has been given adequate opportunity to respond;”

12. See e.g., *A v B*, 4A_554/2014 (Judgment of April 15, 2015), Swiss Federal Court had often reaffirmed that “in Switzerland, the right to be heard concerns particularly factual findings. The parties’ right to be invited to express their position on legal issues is recognized only to a limited extent. Generally, according to the principle *jura novit curia*, state or arbitral tribunals are free to assess the legal relevance of factual findings and they may adjudicate based on different legal grounds from those submitted by the parties.” See also, Finland and Belgium where arbitrators may apply legal issues *ex officio* without the need to seek the parties’ comments.
13. See e.g., *France - Gouvernement de la République arabe d’Égypte v. Société Malicorp Ltd, Overseas Mining Investments Ltd v. Commercial Caribbean Niquel, Engel Austria GmbH v. Don Trade*.
14. James H. Carter has suggested the following wording: ‘The arbitral tribunal is to resolve all issues of fact and law that shall arise from the claims and counter-claims and pleadings as duly submitted by the parties, including, but not limited to, the following issues, as well as any additional issues of fact or law which the arbitral tribunal, in its own discretion, may deem necessary to decide upon for the purpose of rendering any arbitral award in the present arbitration. See Carter, James H.; after Waincymer, J., *International Arbitration and the Duty to Know the Law*, Journal of International Arbitration, The Hague, London, New York 2011, Vol. 28, Issue 3, footnote No. 25, p. 209.]’ Alternative wording has been suggested by Professor Kauffman-Kohler “The parties shall establish the content of the law applicable to the merits. The arbitral tribunal shall have the power, but

not the obligation, to conduct its own research to establish such content. If it makes use of such power, the tribunal shall give the parties an opportunity to comment on the results of the tribunal's research. If the content of the applicable law is not established with respect to a specific issue, the arbitral tribunal is empowered to apply to such issue any rule of law it deems appropriate." See Gabrielle Kaufmann-Kohler, *The Arbitrator and the Law: Does He/She know it? And a few more questions*, 21 *Arbitration International* 631 at 635 (2005); Gabrielle Kaufmann-Kohler, *The Governing Law: Fact or Law? – A Transnational Rule on Establishing its Contents*, *Best Practices in International Arbitration*, ASA Special Series No 26 (July 2006), p 79-85

15. For further guidance on witnesses of fact, see IBA Rules on the Taking of Evidence in International Arbitration, Article 4.
16. See *CIArb Guideline on Party-appointed and Tribunal-appointed Experts*.
17. For further details, see *CIArb Guideline on Drafting Arbitral Awards Part II — Interest* and *CIArb Guideline on Drafting Arbitral Awards Part III — Costs*.
18. For further guidance on 'Matters for potential consideration by the parties and the arbitral tribunal at the case management conference', please see *CIArb Arbitration Rules 2015*, Appendix II, pp. 44-51.
19. See Article 208(1) Civil Procedure Code (UAE Federal Law No. 11 of 1992), which requires that a preliminary meeting is held within 30 days of the appointment of the tribunal.
20. See e.g., sections 41(5)-(7) and 42 English Arbitration Act 1996; section 53.3 Hong Kong Arbitration Ordinance; section 12.6 Singapore Arbitration Act 'All orders or directions made or given by an arbitral tribunal in the course of an arbitration shall, by leave of the High Court or a Judge thereof, be enforceable in the same manner as if they were orders made by a court and, where leave is so given, judgment may be entered in terms of the order or direction.'
21. See *Guideline on Drafting Arbitral Awards Part III – Costs*.

Appendix I

INTERNATIONAL ARBITRATION PROTOCOL

**Protocol for E-Disclosure in International
Arbitration**

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E-Disclosure in International Arbitration

Preamble

Purpose of the CI Arb Protocol for E-Disclosure in International Arbitration

This Protocol is for use in cases in which some disclosable documents are in electronic form. It has been prepared with the intention that parties to an arbitration may adopt it in order to determine how e-disclosure issues should be dealt with. It is intended:

- i. to encourage early consideration of disclosure of documents in electronic form (“e-disclosure”);
- ii. to focus the parties and the Tribunal on e-disclosure issues including the scope and conduct of e-disclosure); and
- iii. to address any other issues related to e-disclosure.

Article 1 – Early consideration

1.1 In any arbitration in which issues relating to e-disclosure are likely to arise the parties should confer at the earliest opportunity regarding the preservation and disclosure of electronically stored documents and seek to agree the scope and methods of production.

1.2 The Tribunal shall bring to the parties’ attention the question of whether e-disclosure may arise in the circumstances of the dispute(s) at the earliest opportunity and in any event no later than the first management conference.

1.3 The matters for early consideration include:

- i. whether documents in electronic form are likely to be the subject of a request for disclosure (if any) during the course of the proceedings, and if so;
- ii. what types of electronic documents are within each party’s power or control, and what are the computer systems, electronic devices, storage systems and media on which they are held;
- iii. what (if any) steps may be appropriate for the retention and preservation of electronic documents, having regard to a party’s electronic document management system and data retention policy and practice, provided that it is unreasonable to expect a party to take every conceivable step to preserve every potentially relevant electronic document;

- iv. what rules, if any, apply to the scope and extent of disclosure of electronic documents in the arbitration, whether under the agreed arbitration rules, the applicable arbitral law, any agreed rules of evidence (for example, the IBA Rules on the Taking of Evidence in International Arbitration), this Protocol or otherwise;
- v. whether the parties have made an agreement to limit the scope and extent of electronic disclosure of documents;
- vi. whether the parties wish to make an agreement to limit the scope and extent of electronic disclosure of documents;
- vii. what tools and techniques may be considered useful to reduce the burden and cost of e-disclosure (if any), including:
 - a) limiting disclosure of documents or certain categories of documents to particular date ranges or to particular custodians of documents;
 - b) the use of agreed search terms;
 - c) the use of agreed software tools;
 - d) the use of data sampling; and
 - e) the format and methods of e-disclosure;
- viii. whether any special arrangements may be agreed with regard to data privacy obligations, privilege or waiver of privilege; and
- ix. whether any party and/or the Tribunal may benefit from professional guidance on IT issues relating to e-disclosure having regard to the requirements of the case.

Article 2 – Request for disclosure of electronic documents

Any request for the disclosure of electronic documents shall contain:

- i. search terms indicating, for example, the file location, date range, individuals and key words designed to identify specific categories of relevant documents in a cost-effective manner;
- ii. a description of how the documents requested are relevant and material to the outcome of the case;
- iii. a statement that the documents are not in the possession or control of the party requesting the documents; and
- iv. a statement of the reason why the documents are assumed to be in the possession or control of the other party.

Article 3 – Order or direction for disclosure of electronic documents

3.1. In making any order or direction for e-disclosure, or for the retention and preservation of electronic documents, the Tribunal shall have regard to the appropriate scope and extent of disclosure of electronic documents in the arbitration, whether under the agreed arbitration rules, the applicable arbitral law, any agreed rules of evidence (for example, the IBA Rules on the Taking of Evidence in International Arbitration) and this Protocol. The Tribunal shall have due regard to any agreement between the parties to limit the scope and extent of disclosure of documents.

In making any order or direction for e-disclosure the Tribunal shall have regard to considerations of:

- i. reasonableness and proportionality;
- ii. fairness and equality of treatment of the parties;
- iii. availability from other sources; and
- iv. ensuring that each party has a reasonable opportunity to present its case

by reference to the cost and burden of complying with the same. This shall include balancing considerations of the amount and nature of the dispute and the likely relevance and materiality of the documents requested against the cost and burden of giving e-disclosure.

3.2. The primary source of disclosure of electronic documents should be reasonably accessible data; namely, active data, near-line data or offline data on disks. In the absence of particular justification, it will normally not be appropriate to order the restoration of back-up tapes; erased, damaged or fragmented data; archived data or data routinely deleted in the normal course of business operations. A party making such a request shall be required to demonstrate that the relevance and materiality outweigh the costs and burdens of retrieving and producing the same.

Article 4 – Production of electronic documents

4.1 Production of electronic documents ordered to be disclosed shall normally be made in the format in which the information is ordinarily maintained or in a reasonably usable form. The requesting party may request that the electronic documents be produced in some other form. In the absence of agreement between the parties the Tribunal

shall decide whether production of electronic documents ordered to be disclosed should be in native format or otherwise.

4.2 A party requesting disclosure of metadata in respect of electronic documents shall be required to demonstrate that the relevance and materiality of the requested metadata outweigh the costs and burdens of producing the same, unless the documents will otherwise be produced in a form that includes the requested metadata.

Article 5 – Procedure and costs

5.1 The Tribunal shall consider the appropriate allocation of costs in making an order or direction for e-disclosure.

5.2 The Tribunal shall establish a clear and efficient procedure for the disclosure of electronic documents, including an appropriate timetable for the submission of and compliance with requests for e-disclosure.

5.3 The Tribunal shall require that a producing party give advance notice to the requesting party of the electronic tools and processes that it intends to use in complying with any order for disclosure of electronic documents.

5.4 The Tribunal may, after discussing with the parties, obtain technical guidance on e-disclosure issues. Such discussion shall include the question of who is to be instructed to provide technical guidance and the costs expected to be incurred. The costs of this shall be included in the costs of the arbitration.

5.5 In the event that a party fails to provide disclosure of electronic documents ordered to be disclosed or fails to comply with this Protocol after its use has been agreed by the parties and the Tribunal or ordered by the Tribunal, the Tribunal shall be entitled to draw such inferences as it considers appropriate when determining the substance of the dispute or any award of costs or other relief.

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