



**The CIArb's international arbitration  
Practice Guidelines -  
Documents only arbitration, party  
non-participation and awards in  
default of appearance**

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## ORDER OF SUBJECTS

- ▶ Party Non-participation and awards in default of appearance
- ▶ Documents Only Arbitrations

# FULLY FUNCTIONING ARBITRATION HEARINGS



# EMPTY-CHAIR ARBITRATIONS



## TYPES OF DEFAULT

- i. At an early stage- no response to notice of arbitration, non payment of fees
- ii. Mid arbitration-failure to serve pleadings, witness statements, non compliance with directions
- iii. Hearing Stage- non attendance or unacceptable excuses

## RELEVANT CLAUSES

- ▶ UNCITRAL MODEL LAW
- ▶ HKIAC
- ▶ SIAC
- ▶ ICC

## Article 25 UNCITRAL Model Law (incorporated via S.53 Cap.609)

*Unless otherwise agreed by the parties, if, without showing sufficient cause,*

- a) The claimant fails to communicate his statement of claim in accordance with article 23(1), the arbitral tribunal shall terminate the proceedings;*
- b) The respondent fails to communicate his statement of defence in accordance with article 23(1), the arbitral tribunal shall continue the proceedings without treating such failure in itself as an admission of the claimant's allegations;*
- c) Any party fails to appear at a hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make the award on the evidence before it.*

## Rule 26 HKIAC Rules (2013 Edition)

### *Hearings*

- 1) When a hearing is to be held, the arbitral tribunal, giving reasonable notice, shall summon on the parties to appear before it on the day and at the place fixed by it.*
- 2) If any of the parties, although duly summoned, fails to appear without valid excuse, the arbitral tribunal shall have the power to proceed with the hearing.*

## RULE SIAC RULES (2016)

### *Additional Powers of the Tribunal*

*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:-*

*(ℓ) ..... Proceed with the arbitration notwithstanding the failure or refusal of any part to comply with these Rules or with the Tribunal's orders or directions or any partial Award or to attend any meeting or hearing, and to impose such sanctions as the Tribunal deems appropriate in relation to such failure or refusal.*

# ICC RULES (2012)

## Article 26 - Default

*26.1If, within the period of time set by the arbitral tribunal, the Claimant has failed to communicate its Statement of Claim without showing sufficient cause for such failure, the arbitral tribunal shall issue an order for the termination of the arbitration unless the Respondent has brought a counterclaim and wishes the arbitration to continue, in which case the tribunal may proceed with the arbitration in respect of the counterclaim.*

*26.2If, within the period of time set by the arbitral tribunal, the Respondent has failed to communication its Statement of Defence without showing sufficient cause for such failure, the arbitral tribunal may proceed with the arbitration.*

*26.3If one of the parties, duly notified under these Rules, fails to present its case in accordance with these Rules including as directed by the arbitral tribunal, without showing sufficient cause for such failure, the arbitral tribunal may proceed with the arbitration and make an award on the basis of the evidence before it.*

## COMMON FEATURES

- ▶ Notification of hearing;
- ▶ Failure or refusal by a party to comply;
- ▶ No valid excuse proffered; and
- ▶ The Arbitral Tribunal can proceed to make an award.

## DUTIES OF THE ARBITRATOR: COMMON LAW

Megaw J in Montrose Canned Foods Ltd v Eric Wells (Merchants) Ltd [1965] 1 Lloyd's Rep 597 at 602:-

*"In my judgment, it is incumbent upon arbitrators to take steps to ensure, so far as is reasonably possible, before they make an award, that each of the parties to the dispute before them know the case which has been put against them, and has had the opportunity to put forward that party's own case. ... it was the duty of the arbitrators as a matter of natural justice, before they proceeded to make an award on the basis of the arguments and submissions of one side only, to make sure that the buyers did not wish to put their case before the arbitrators."*

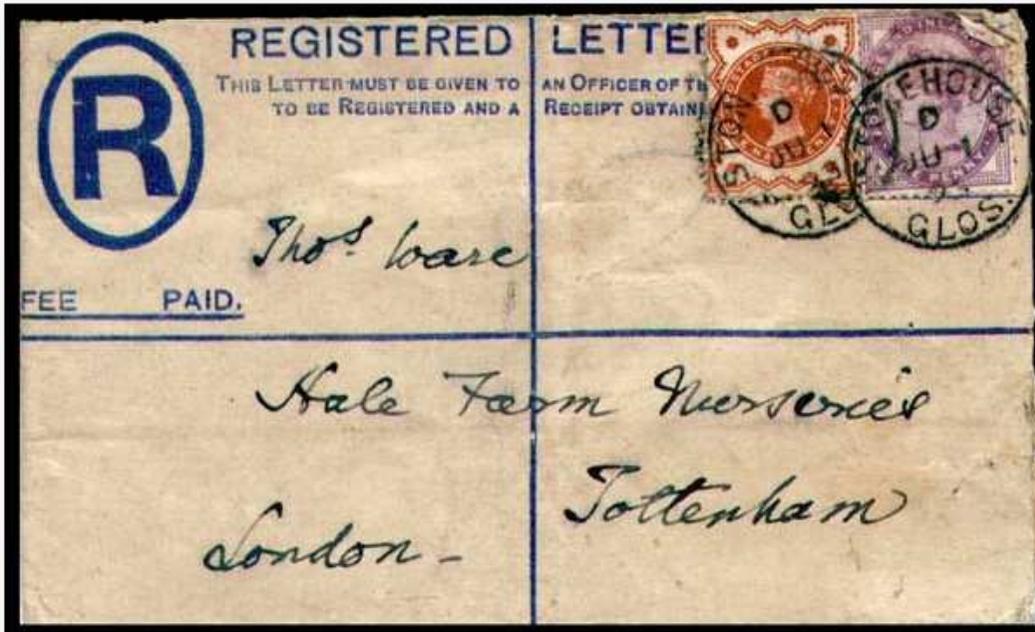
## Common Law: What an arbitrator should do if it decides to proceed in the absence of one party?

- ▶ They are not bound to accept the evidence of the party attending and may find, even if it is uncontroverted, that it falls short of establishing the case to be proved: Russell on Arbitration (24<sup>th</sup> ed) at §4-094 (p.164).
- ▶ In other words, “*the party who is taking part must prove its case to the satisfaction of the arbitral tribunal*”: Redfern and Hunter on International Arbitration (6<sup>th</sup> ed) at §6.197 (p.411).
- ▶ “[t]he task of an arbitral tribunal is not to ‘rubber stamp claims that are presented to it; rather, it must make a determination of these claims, so the tribunal must take upon itself the burden of testing the assertions made by the active party, and it must call for such evidence and legal argument as it may require for this purpose’”: Redfern and Hunter on International Arbitration (6<sup>th</sup> ed) at §9.30 (p.512).

# CIARB GUIDELINES

## Article 1 : General Principles

*“Arbitrators should satisfy themselves (on 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.”*



# COMPANY SEARCH-LOCATE OFFICERS



# FAILURE OF CLAIMANT TO PROCEED WITH ITS CASE

## Article 2: Failure of 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.”*

## RESPONDENT'S FAILURE TO PARTICIPATE PRE-HEARING

Article 3: Failure 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.”*

# PARTY NON-PARTICIPATION AT HEARING

## 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.”*

# DOCUMENTS ONLY ARBITRATIONS

## General: Common Law

- ▶ The tribunal has no power to impose a documents-only procedure on the parties without the parties' consent: *Taigo Ltd v China Master Shipping Ltd* (unrep, HCCT 22/2010, 17 June 2010) at §6 per Saunders J.
  
- ▶ But where a party agrees to the tribunal proceeding on a documents-only basis, he will generally have no right subsequently to complain at the lack of an opportunity to expand the written record by making oral submissions: *Bulk Ship Union SA v Clipper Bulk Shipping Ltd (The Pearl C)* [2012] EWHC 2595; *Taigo Ltd v China Master Shipping Ltd* (unrep, HCCT 22/2010, 17 June 2010) at §6 per Saunders J.

# DOCUMENTS ONLY PROCEDURES: CIARB GUIDELINES

## Article 1 - General Principles

- ▶ Where an arbitration agreement contains provisions for a documents-only procedure, these provisions should be complied with.
- ▶ 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*).
- ▶ 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.

# DOCUMENTS ONLY PROCEDURES: CIARB GUIDELINES

## Article 1 (cont)

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.

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.

## CONCLUSION

- ▶ Common Theme to both Non Participation and Documents Only Proceedings-
- ▶ Clear communication by the arbitrator will help avoid some of the pitfalls that confront an arbitrator when faced with a defaulting party or in a documents-only-arbitration.