

ESTABLISHING THE FACTS OF THE CASE

Article 29

(1) If the arbitral tribunal considers it necessary, it may on its own initiative collect evidence, question parties or witnesses, request the parties to submit evidence, and call experts. Article 43 shall apply if costs are incurred through the taking of evidence and in particular, through the appointment of experts.

(2) The arbitration shall proceed notwithstanding the failure of any party to participate.

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1. Establishing the Facts of the Case at the Arbitral Tribunal's Discretion (Para 1)

1.1. Introduction; Purpose of the Provision

Article 29 (1) regulates the taking of evidence by the arbitral tribunal. The arbitral tribunal's discretion in determining the procedure applicable to the taking of evidence in order to establish the relevant facts of the case is a fundamental principle of the Vienna Rules. 1

The arbitral tribunal is not bound by the requests of the parties when establishing the facts of the case but may on its own initiative collect the evidence it deems necessary for the decision.

- 2 The scope of the discretionary powers of the arbitral tribunal as set out in the previous version of the Vienna Rules (Art 20 (5) Vienna Rules 2006) was, in principle, maintained. Minor adjustments were made to the wording; instead of the Austrian law terms "*Urkunden*" and "*Augenscheinsgegenstände*" for documentary evidence, the general term "evidence" is used to underline that the arbitral tribunal's discretion extends to all forms of evidence.

1.2. The Arbitral Tribunal's Discretion in Establishing the Facts of the Case

- 3 Article 29 (1) provides for the arbitral tribunal's maximum discretion when establishing the facts of the case relevant to its decision. Article 29 (1) specifies the general discretionary powers of the arbitral tribunal provided in Art 28 (1) for the conduct of the proceedings (cf. *Haugeneder/Netal*, Art 28, mn 10 *et seq.*). According to Art 29 (1), the arbitral tribunal is empowered to decide on the admissibility of evidence as well as on the specific forms of taking evidence. The arbitral tribunal may also take evidence *ex officio*, if it considers this to be necessary to establish the facts of the case. Accordingly, the arbitral tribunal is not bound by the requests of the parties when establishing the facts of the case. The arbitral tribunal is free to conduct the evidentiary proceedings in a manner it deems appropriate to establish all relevant facts of the case. Pursuant to Art 29 (1) the arbitral tribunal is free to evaluate the collected evidence.
- 4 The Vienna Rules deliberately avoid specifying the methods to be used in the taking of evidence as they may be found in either Common Law or civil law countries. In this respect, the arbitral tribunal is enabled to meet the different expectations of the parties coming from different legal backgrounds. The Vienna Rules in principle allow all the procedural techniques commonly used in international arbitration, such as document production or written witness statements.
- 5 The IBA Rules on the Taking of Evidence in International Commercial Arbitration offer helpful guidance to the arbitral tribunal to determine the rules of evidence. However, the IBA Rules have no binding effect on the parties if their applicability has not been agreed upon.

1.2.1. Party, Witness and Expert Examination

- 6 The Vienna Rules contain no special provisions regarding the examination of witnesses. It is up to the arbitral tribunal to distinguish between the examination of a person as a party or as a witness and to determine the specific rules applicable to witness examination. The presence of witnesses at oral hearings is often restricted, while the parties are allowed to attend the entire oral hearing.

7 It is common practice in international arbitration for the parties to produce written witness statements. Written witness statements often replace the examination of the party that nominated the witness ("direct examination"). In those cases witnesses will primarily be questioned by the opponent ("cross-examination") and by the arbitral tribunal at the hearing. In the case of contradictory witness statements it may be reasonable to examine the parties together and to ascertain those points on which they agree or disagree ("witness conferencing").

8 The principle of the right to be heard requires that the opposing party should be provided with an opportunity to question a witness if the witness statement contains facts relevant to the case. In exercising its discretionary power the arbitral tribunal may order the examination of a witness even without a request of a party.

9 Experts may either be appointed by the arbitral tribunal or nominated by the parties (on expert proceedings, cf. *Klötzel/Pörnbacher*, Art 23, mn 5 and 6).

10 The arbitral tribunal cannot compel a witness to make a statement and to appear at the oral hearing. Parties, witnesses and experts may only be questioned by the arbitral tribunal if they appear voluntarily. Compulsory attendance or coercive penalties in the case of a refusal of a witness are not permissible. The arbitral tribunal is required to apply for assistance from state courts if it needs to question a witness who does not appear for his testimony.¹

1.2.2. Documentary Evidence

11 The arbitral tribunal may order the parties to submit evidence even without a specific request of a party. However, the arbitral tribunal has no coercive power to enforce the production of evidence. If a party refuses to comply with the arbitral tribunal's order to produce evidence, the arbitral tribunal may draw appropriate inferences from the party's refusal to submit the evidence.²

12 It is good practice in international arbitration to deal with the requests of the parties for the production of documents in a structured procedure ("document production"). Documents or categories of documents requested by the opponent have to be clearly identified and the requesting party must explain why the requested documents are relevant to the outcome of the proceedings. The arbitral tribunal decides on the disclosure of documents if the opponent does not produce the documents voluntarily. Procedures relating to document production

¹ Cf. Section 602 ZPO.

² *Schwarz/Konrad*, Vienna Rules Art 20, mn 20-192.

often follow the IBA Rules on the Taking of Evidence in International Commercial Arbitration.³

- 13 Document production may be material to the outcome of the proceedings if the document is in the possession of only one party and is relevant to the establishment of the facts of the case. Separate proceedings, as is typical in Common Law systems, will, however, not always be reasonable. In many cases it will be sufficient for the parties to submit requests for the production of evidence together with their briefs.

1.2.3. Limits to the Arbitral Tribunal's Discretion

- 14 The arbitral tribunal's discretion with regard to the taking of evidence is limited by the applicable mandatory law. The principles of fair treatment of the parties and the right to be heard constitute mandatory law, which must be considered at every stage of the evidentiary proceedings (cf. *Haugeneder/Netal*, Art 28, mn 13 *et seq.*). The parties must be granted the opportunity to submit evidence and to offer means of evidence, to participate in the taking of evidence and to comment on the results of the taking of evidence. All submissions, documents and other communications produced to the arbitral tribunal by one party must be communicated to the other party.⁴ Witnesses or experts may only be examined if the parties are given the opportunity to participate in the examination.
- 15 If Austrian law is applicable to the arbitration proceedings, Section 599 (1) of the Austrian Code of Civil Procedure (*ZPO*) provides that the arbitral tribunal is free to evaluate the evidence. Thus, the arbitral tribunal shall not determine rigid rules for the evaluation of evidence (for example, that documents must always have higher probative value than witness statements).
- 16 The parties may agree on a procedure for the taking of evidence. Pursuant to Art 28 (1) agreements of the parties prevail over the arbitral tribunal's discretion (cf. *Haugeneder/Netal*, Art 28, mn 3 *et seq.*). However, the parties are bound to observe the mandatory principles of the law applicable to the proceedings. In particular, the parties cannot agree on procedures that contravene the principle of fair treatment and the right to be heard. In cases in which agreements of the parties violate mandatory law, the arbitral tribunal is not bound to implement them. In practice, the parties rarely agree on a procedure for the taking of evidence prior to the actual arbitration. Instead, most agreements concerning the conduct of proceedings are concluded after consultation with the arbitral tribunal when determining the procedural timetable. Therefore, this problem seldom arises.

³ Cf. Art 3 IBA Rules.

⁴ Cf. the mandatory provision of Section 599 *ZPO*.

1.3. Costs

The arbitral tribunal may only initiate the taking of evidence (for example, by appointing an expert) if the anticipated costs are covered. If the costs of the taking of evidence are not covered, the arbitral tribunal must take appropriate steps and may ask for an additional advance on costs pursuant to Art 43 (cf. *Peters*, Art 43, mn 8 *et seq.*).

2. Failure of a Party to Participate in the Arbitration (Para 2)

2.1. Introduction; Purpose of the Provision

Article 29 (2) provides that should a party fail to participate in the arbitration, the arbitration will proceed nonetheless. Failure of a party to participate does not release the arbitral tribunal from its obligation to conduct the proceedings in accordance with the general procedure of the Vienna Rules.

This is in line with the purpose of the provision contained in Art 20 (6) of the Vienna Rules 2006. However, the wording has been changed and now makes clear that where a party fails to participate, not only the oral hearing will be held with the opposing party only but the entire arbitration will continue with the participating party alone until its termination. This was the practice already prior to the adoption of the Vienna Rules 2013.

2.2. Continuation of the Proceedings

Should a party fail to participate in the proceedings, the arbitral tribunal must continue with the proceedings nonetheless. In most cases, it is on the respondent's side that parties do not participate in the proceedings. However, Art 29 (2) also applies to any party on the claimant's side that fails to participate. In a situation where the claimant stops participating in the proceedings after having submitted the Statement of Claim and paid the advance on costs, it may be in the interest of the respondent that the dispute is decided in a final award in order to avoid being exposed to the risk that the same claim is brought again at a later date.

Should both sides stop participating in the arbitration, the arbitral tribunal may terminate the arbitration pursuant to Art 34 (3.3). This provision requires the arbitral tribunal to first invite the parties in writing to continue the proceedings and to advise them of the consequences of termination of the arbitration.

2.3. Observance of the Right to be Heard

- 21 Article 29 (2) can only be applied if the Statement of Claim was duly served in accordance with Art 12 (2) (cf. *Gantenberg/Kühn*, Art 12, mn 22). In other words, it is necessary that the arbitration has been properly initiated against the party that does not actively participate in the proceedings. Art 29 (2) does not apply if service of the Statement of Claim is not possible. In such a case the proceedings are terminated by withdrawal of the claim or by a declaration of the Secretary General in accordance with Art 34 (4) (cf. *Rechberger/Pitkowitz*, Art 7, mn 19).
- 22 Once the file has been transmitted to the arbitral tribunal, it is for the arbitral tribunal to ensure that the right to be heard is observed. All submissions, documents and other communications shall be served on the non-participating party. The non-participating party shall be kept informed about each procedural step and shall have every opportunity to participate in the proceedings. Accordingly, the procedural timetable has to take into account the (possible) participation of all parties.
- 23 If a party only participates in the proceedings at a later stage, the arbitral tribunal will decide at its discretion whether it allows late submissions of facts or evidence or requests for the taking of evidence that were not made in a timely manner.

2.4. Arbitral Award

- 24 The Vienna Rules do not permit default awards. The arbitral tribunal is obliged to establish the facts relevant to its decision in the course of evidentiary proceedings.
- 25 The arbitral tribunal shall conduct the arbitration in such a manner that the non-participating party will have the opportunity to participate in the arbitration until the end of the proceedings.
- 26 Even if a party fails to participate, the arbitral award must meet the general standards set for arbitral awards under the Vienna Rules 2013. Reasons for the arbitral award must be given.

A party's failure to participate or its late participation may be taken into consideration by the arbitral tribunal in its decision on costs.