CHAPTER 16

When Enough Is Enough: The Arbitral Tribunal's Power to Stay or Terminate Proceedings due to Party Non-compliance with Procedural Obligations

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Parties to arbitration often 'cry foul' and complain about alleged procedural violations by the opposing side. If there is a breach, tribunals may usually choose from a range of potential mechanisms to enforce compliance. In limited cases, this may include the stay or termination of the arbitration. This chapter will analyse both situations in which arbitration laws and arbitration rules expressly provide for the stay and termination of proceedings in reaction to a procedural breach, as well as situations in which such a measure is deemed possible even without an express rule to this effect. In this regard, a particular focus of the chapter will be on the consequences related to the failure by a claimant to provide security for costs.

§16.01 INTRODUCTION

Parties have a great number of procedural obligations – starting with the obligation to pay the advance on costs and including, e.g., the obligation to produce documents if ordered and, potentially,[1] to keep the arbitration confidential. Parties often comply

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1. Cf. with regard to the existence or not of confidentiality obligations in arbitration Gary Born, *International Commercial Arbitration* § 20.02-20.04 (3rd ed. Kluwer Law International 2021); *Redfern and Hunter on International Arbitration*, paras 2.183 et seq. (Nigel Blackaby, Constantine Partasides, et al. eds, 7th ed. Oxford Univ. Press 2023); Michael Hwang & Katie Chung, *Defining*

with all of their procedural obligations. However, in many cases, one party alleges that the other party failed to comply with its obligations. And sometimes, things might get even more heated, and both parties accuse each other of breaching their respective obligations.

In case a party breaches its procedural obligations, the tribunal may react in different ways, depending on the obligation and on the breach in question. Generally, the applicable rules provide for a range of proportionate reactions, including the allocation of additional costs to the non-complying party, the drawing of adverse inferences and the issuance of interim orders forcing compliance. In the case of other breaches, the tribunal might, however, want to consider more drastic measures such as the stay and eventual termination of the arbitration. This has been discussed in particular in relation to failures by a claimant to provide security for costs despite a respective order by the tribunal. Arguably, such steps should only be taken in exceptional circumstances, given that a termination essentially means that the claimant's claims will not be heard. That said, there are certain situations in which 'enough is enough' and a stay or termination may be appropriate.

This chapter will first explore in §16.02 the express rules in arbitration laws and arbitration rules allowing a tribunal to stay or terminate proceedings due to party non-compliance with procedural obligations. Section §16.03 will analyse to which extent a tribunal may stay or terminate proceedings in reaction to party non-compliance, even in the absence of express language in the applicable arbitration laws and arbitration rules. To this end, the analysis will focus on the failure by a claimant to provide security for costs but will also look at further potential cases. Section §16.04 will assess the critical question of whether the termination of proceedings results in a rejection of the claimant's claims with prejudice and, concomitantly, the form of the tribunal's decision on termination. Section §16.05 will provide guidance on how the tribunal should exercise its discretion to stay or terminate proceedings in case it has such discretion. Thereafter, §16.06 will assess a further and separate potential argument for the termination of arbitration in case of party non-compliance with procedural obligations – namely, the idea that the non-compliance constitutes a breach of the arbitration agreement allowing the termination of the arbitration agreement. Finally, §16.07 will provide a brief conclusion.

§16.02 EXPRESS PROVISIONS ON THE STAY OR TERMINATION OF PROCEEDINGS DUE TO PARTY NON-COMPLIANCE WITH PROCEDURAL OBLIGATIONS

Arbitration laws and arbitration rules typically provide for the stay or termination of proceedings in case of specific types of party non-compliance with procedural obligations. For a start, the parties' failure to pay the advance on costs will lead to a stay and

the Indefinable: Practical Problems of Confidentiality in Arbitration, 26 J. Intl Arb. 609, 628 et seq. (2009) DOI: 10.54648/joia2009034; Serge Lazareff, *Confidentiality and Arbitration: Theoretical and Philosophical Reflections*, ICC ICArb. Bull. Special Supplement: Confidentiality in Arbitration: Commentaries on Rules, Statutes, Case Law and Practice 81, 85 et seq. (2009).

eventually a termination of the arbitration (*see* §16.02[A]). Moreover, a claimant's default may also be a reason for a tribunal to terminate the arbitration (*see* §16.02[B]). Finally, an increasing number of arbitration rules expressly regulate the stay and termination of proceedings in case a claimant fails to provide security for costs despite a respective order from the tribunal (*see* §16.02[C]).

[A] Failure to Pay the Advance on Costs

Arbitration rules typically oblige parties to pay an advance on costs, consisting of the fees and expenses of the tribunal and, in the case of institutional arbitration, the administrative fees of the institution.[2] Principally, the advance needs to be paid at the beginning of the proceedings, but further advance payments may be requested over the course of the arbitration if the initial deposit proves insufficient.[3] In all instances, the aim is that payment of the costs of the arbitration is ensured and that neither the tribunal nor the institution needs to pursue claims against a party to obtain payment for services rendered.[4]

Parties are usually required to pay the advance in equal shares.[5] In practice, parties, however, do not always comply with this obligation. For instance, respondents that raise a jurisdictional objection occasionally refuse to pay the advance on costs, arguing that they are not bound to the arbitration agreement and the arbitration rules, and are thus not obliged to pay the advance.[6] Moreover, claimants occasionally also fail to pay advances.

Arbitration rules typically provide that if a party is unable or unwilling to pay its share of the advance on costs, the other party may pay the defaulting party's share.[7] In case neither party makes the outstanding advance payments despite respective requests, arbitration rules most commonly provide that the proceedings may first be

2. Arif Hyder Ali et al., *The International Arbitration Rulebook: A Guide to Arbitral Regimes* 458 (Kluwer Law International 2019); ICC Rules (2021), Art. 37; SIAC Rules (2016), Rule 34; LCIA Rules (2020), Art. 24; HKIAC Rules (2018), Art. 41; SCC Rules (2023), Art. 51; UNCITRAL Rules (2010), Art. 43.
3. Cf. ICC Rules (2021), Art. 37.5; LCIA Rules (2020), Art. 24.1; HKIAC Rules (2018), Art. 41.3; Swiss Arbitration Rules (2021), Art. 41.3; SIAC Rules (2016), Rule 34.4.
4. Cf. Michael Bühler & Marco Stacher, *Chapter 18, Part IV: Costs in International Arbitration*, in *Arbitration in Switzerland: The Practitioner's Guide*, para. 17 (Manuel Arroyo ed., 2nd ed. Kluwer Law International 2018); Reinmar Wolff, *Chapter 18, Part XII: Rights and Duties of Arbitrators*, in *Arbitration in Switzerland: The Practitioner's Guide*, para. 28 (Manuel Arroyo ed., 2nd ed. Kluwer Law International 2018).
5. ICC Rules (2021), Art. 37.2; HKIAC Rules (2018), Art. 41.1; SIAC Rules (2016), Rule 34.2; Swiss Arbitration Rules (2021), Art. 41.1.
6. Cf. Venus V. Wong & Alfred Siwy, *The Arbitrator and the Arbitration Procedure, Recalcitrant Parties and the Tribunal's Power to Order Cost Advance Payments*, 8 Austrian Y.B. Int'l Arb 201 (2014).
7. Cf. ICC Rules (2021), Art. 37.5; LCIA Rules (2020), Art. 24.6; HKIAC Rules (2018), Art. 41.5; ICDR Rules (2021), Art. 39.4; DIS Arbitration Rules (2018), Art. 35.4; SIAC Rules (2016), Rule 34.5; Swiss Arbitration Rules (2021), Art. 41.4.

stayed and eventually terminated.[8] This only makes sense. Having the payment to the arbitrators and the institution secured by way of an advance payment is a key requirement for an arbitration to take place. Without the advance, neither the arbitrators nor the institution can reasonably be required to progress their work. Accordingly, if the advance is not paid, the arbitration should first be stayed so that the parties have another opportunity to pay in the funds without the tribunal and the institution performing further work in the interim. And if the parties still fail to pay, the arbitration should be terminated. Incidentally, this is no feature exclusive to arbitration. In many jurisdictions, court proceedings will also not advance in case of non-payment of an advance on costs.[9]

The question of who makes the decision to stay or terminate is answered differently by different arbitration rules. Some rules give this responsibility to the institution,[10] sometimes requiring that the institution consult with the tribunal.[11] Other rules provide for the tribunal to make the decision (at least once it has been constituted).[12] The Stockholm Chamber of Commerce (SCC) falls into the latter category, but only since the 2023 version of the SCC Rules;[13] previously, the SCC Rules gave the respective responsibility to the SCC Board.[14] Yet other rules provide for a mixture of the two approaches, meaning, e.g., that the decision to stay is reserved for the tribunal and the decision to terminate lies with the institution.[15] Curiously, under the 2020 version of the LCIA Rules, both the London Court of International Arbitration (LCIA) and the tribunal may separately decide to treat a claim or counterclaim as withdrawn.[16]

The different approaches as to competence for staying and terminating the arbitration reflect that the advance typically secures payment of the costs of both the institution and the tribunal. As such, both the institution and the tribunal have an interest in having a say on the matter. Thus, it is perhaps unsurprising that different arbitration rules provide for different solutions. Irrespective thereof, the above clearly demonstrates that it is generally recognised that an arbitration should be stayed and eventually terminated if the advance on costs is not paid.

8. Cf. SIAC Rules (2016), Rule 34.6; LCIA Rules (2020), Art. 24.5 and 24.8; Swiss Arbitration Rules (2021), Art. 41.4; HKIAC Rules (2018), Art. 41.4; ICC Rules (2021), Art. 37.6; ICDR Rules (2021), Art. 39(5); ICSID Administrative and Financial Regulations (2022), Regulation 16(2); UNCITRAL Rules (2010), Art. 43(4).
9. Cf. only German Court Fees Law (*Gerichtskostengesetz*), section 12(1); Swiss Code of Civil Procedure (*Zivilprozessordnung*), Art. 101(3).
10. Cf. ICSID Administrative and Financial Regulations (2022), Regulation 16(2).
11. Cf. ICC Rules (2021), Art. 37.6; SIAC Rules (2016), Rule 34.6.
12. Cf. Swiss Arbitration Rules (2021), Art. 41.4; HKIAC Rules (2018), Art. 41.4; ICDR Rules (2021), Art. 39(5).
13. SCC Rules (2023), Art. 51.5.
14. SCC Rules (2017), Art. 51.5.
15. Cf. DIS Arbitration Rules (2018), Arts 35.5 and 42.5. Cf. also SIAC Rules (2016), Rule 34.6, which addresses both the suspension of the proceedings by the tribunal as well as the suspension of the administration of the case by the institution.
16. LCIA Rules (2020), Art. 24.8. Cf. further Rémy Gerbay, *Chapter 21: Costs and Advance Payment for Costs*, in *Arbitrating under the 2020 LCIA Rules: A User's Guide* para. 53 (Maxi Scherer et al. eds, Kluwer Law International 2021).

[B] Default by the Claimant

When parties agree to arbitration, they usually presume that, if a dispute arises, they will each actively participate in future arbitration proceedings.[17] In practice, this expectation is, however, not always met, resulting in a default proceeding.[18] In particular, parties may abstain from participating in an arbitration because of a lack of confidence or a lack of financial means to pay for legal fees.

For present purposes, the situation of a default by the claimant is of interest. While this will happen only rarely, such cases do exist, usually because the claimant runs out of funds in the course of the proceedings. If the claimant fails to file the statement of claim, arbitration laws and arbitration rules typically provide for the termination of the arbitration. For example, Article 25 lit. a of the UNCITRAL Model Law (2006) states that, unless otherwise agreed by the parties, the tribunal shall terminate the proceedings if the claimant fails to submit the statement of claim without showing sufficient cause.[19] Similar rules also exist in jurisdictions that have not as such adopted the Model Law,[20] as well as in various arbitration rules.[21] Typically, these rules do not provide for the discretion of the tribunal but instead use mandatory language requiring the termination of the proceedings (without first foreseeing a suspension period).

Conversely, in other cases of default by a claimant (such as failure to file submissions after the statement of claim or failure to appear at the hearing), arbitration laws and rules usually do not expressly provide for termination of the proceedings.[22] On the contrary, they often state that, in the case of such default, the tribunal may continue with the arbitration and render an award.[23] That said, arbitration laws and arbitration rules often contain general clauses on the termination of proceedings which may become relevant here. For example, Article 32(2) lit. c of the UNCITRAL Model Law (2006) provides that the tribunal shall issue an order for the termination of the proceedings if it finds that the continuation of the proceedings has become unnecessary

17. Chartered Institute of Arbitrators, Guidelines on Party Non-participation, Preamble, para. 1 (2015).
18. Cf. generally with regard to default proceedings Julio César Betancourt, *What Are the Arbitral Tribunal's Powers in Default Proceedings?* 36 J. Intl Arb. 485-502 (2019) DOI: 10.54648/joia2019024.
19. This rule has been adopted from the UNCITRAL Model Law e.g. in Germany (German Code of Civil Procedure, section 1048(1)), Austria (Austrian Code of Civil Procedure, section 600(1)) and Qatar (Qatari Law No. 2 of 2017 Promulgating the Civil and Commercial Arbitration Law, Art. 25(1)).
20. Cf. Dutch Code of Civil Procedure, section 1043a para. 1.
21. Cf. Swiss Arbitration Rules (2021), Art. 30.1; HKIAC Rules (2018), Art. 26.1; SIAC Rules (2016), Rule 20.8.
22. Cf. however section 41.3 of the English Arbitration Act (1996) as a rule that potentially allows a tribunal to dismiss a claim in case of any 'inordinate and inexcusable delay on the part of the claimant in pursuing his claim'.
23. Cf. UNCITRAL Model Law (2006), Art. 25 lit. c; Swedish Arbitration Act (1999), section 24(3); Swiss Arbitration Rules (2021), Art. 30.2; HKIAC Rules (2018), Art. 26.3; ICDR Rules (2021), Art. 29.2.

or impossible. Such rules naturally exist in Model Law jurisdictions[24] but have also been included in the arbitration laws of other jurisdictions.[25] Moreover, various arbitration rules contain similar provisions.[26]

Arguably, these rules may become relevant if a claimant defaults after the submission of the statement of claim and the respondent itself has no interest in an award, e.g., if it is clear that the claimant has abandoned the claims and will not resubmit them. In such a situation, the respondent may want to save costs and inform the tribunal that it does not seek an award. If that happens, and the claimant does not suddenly 'reappear' and insist on an award, the tribunal may arguably conclude that it is unnecessary to continue the proceedings and terminate the arbitration on this basis.[27] Conversely, if the respondent insists on an award, the continuation of proceedings is still necessary, and the tribunal cannot terminate proceedings. Instead, it must proceed to an award.

[C] Failure to Provide Security for Costs

A failure of a claimant to provide security for the costs of the respondent (so-called *cautio judicatum solvi*) may also give rise to a stay or termination of arbitral proceedings.

An order for security for costs is a specific type of interim measure.[28] In general terms, such an order requires a claimant to effectively guarantee the payment of a potential future costs award in favour of the respondent –[29] and thus seeks to provide the respondent with comfort that it will be 'made whole' in case it ultimately prevails in the arbitration. Typically, security will be provided in the form of a bank guarantee or by depositing funds with a trustee.[30] Deciding whether to issue an order for security for costs can be a complex endeavour, and the decision will typically depend on a variety of factors, including the claimant's financial ability to satisfy an adverse cost award (and the extent to which such ability has changed since the conclusion of the

24. German Code of Civil Procedure, section 1056(2) no. 3; Costa Rican Law 8937 on International Commercial Arbitration, Art. 32(2) lit. c; Qatari Law No. 2 of 2017 Promulgating the Civil and Commercial Arbitration Law, Art. 31(9) lit. c.
25. Cf. Moroccan Code of Civil Procedure, Art. 327-19(3); Portuguese Arbitration Act, Art. 44(2) lit. c.
26. HKIAC Rules (2018), Art. 37.2 lit. b; Swiss Arbitration Rules (2021), Art. 36.2; UNCITRAL Rules (2010), Art. 36.2; KLRCA Arbitration Rules (2017), Art. 36(2).
27. Cf. *Münchener Kommentar zur ZPO* § 1048 ZPO, para. 16 (6th ed. C.H. Beck 2022) (Germany); Beck'scher Online Kommentar § 1048 ZPO, para. 9.1 (47th ed C.H. Beck 2022) (Germany).
28. Julian D.M. Lew, Loukas A. Mistelis & Stefan M. Kröll, *Comparative International Commercial Arbitration* paras 23-52 to 23-54 (Kluwer Law International 2003); *Unnamed ICC Case,* Procedural Order No. 3, 2015, 2 ICC Disp. Res. Bull. 109, para. 24 (2020); *ABC AG v. Mr. X,* Procedural Order of 27 November 2002, 23 ASA Bulletin 108, para. 4.1 (2005).Cf. also VIAC Arbitration Rules (2021), Art. 33(6).
29. Pierre A. Karrer & Marcus Desax, *Security for Costs in International Arbitration: Why, When, and What If …*, in *Law of International Business and Dispute Settlement in the 21st Century: Liber Amicorum Karl-Heinz Böckstiegel* 339, 340 (Robert Briner et al. eds., 2001); Noah Rubins, *In God We Trust All Others Pay Cash*, 11 ARIA 307, 311 (2000).
30. Cf. Chartered Institute of Arbitrators, Guidelines on Applications for Security for Costs, Commentary on Art. 5, para. 3(a) (2016).

arbitration agreement),[31] the prospects of success of the claims,[32] and fairness considerations.[33] Critically, an order for security for costs may hinder a claimant's access to justice.[34] Accordingly, security for costs should only be ordered in rare circumstances,[35] although according to an article published in last year's edition of this yearbook: '[s]ecurity for costs should remain the exception, but not a unicorn.'[36]

Security for costs is a feature known in the litigation systems of many jurisdictions.[37] Conversely, most arbitration laws and arbitration rules do not expressly address the issue of security for costs. That said, some do address it – and there has been a growing trend in recent years to explicitly regulate the issue, including the issue of the stay or termination of the arbitration in case of a party's failure to provide security.

English law has had a leading role in the development of arbitral practice on the issue of security for costs.[38] Thus, it is unsurprising that the English Arbitration Act (1996) contains a provision on security for costs, expressly allowing the tribunal to dismiss claims in case of a failure to provide security for costs.[39] Similarly, the Hong Kong Arbitration Ordinance provides for the stay or dismissal of claims in case security for costs is not provided.[40] In arbitration rules, provisions regulating security for costs,

31. Chartered Institute of Arbitrators, Guidelines on Applications for Security for Costs, Art. 3 (2016); Marco Stacher, *Swiss Rules of International Arbitration: Commentary* Art. 41, para. 26 (Tobias Zuberbühler et al. eds, 2nd ed. Juris Publishing 2013); *Unnamed ICC Case*, Procedural Order No. 3, 2015, in: 2 ICC Disp. Res. Bull. 109, para. 36 (2020); *ICC Case No. 12542/EC*, 19 December 2003, 23 ASA Bulletin 685 para. 43 (2005).
32. Chartered Institute of Arbitrators, Guidelines on Applications for Security for Costs, Art. 2 (2016).
33. Chartered Institute of Arbitrators, Guidelines on Applications for Security for Costs, Art. 4 (2016).
34. Cf. *Fouchard Gaillard Goldman on International Commercial Arbitration* 687 (Emmanuel Gaillard & John Savage eds, Kluwer Law International 1999); Simon Bachmann, *The Impact of Third-Party Funding on Security for Costs Requests in International Arbitration Proceedings in Switzerland*, 38 ASA Bull. 842, 849 (2020).
35. *Unnamed ICC Case,* Procedural Order No. 3, 2015, 2 ICC Disp. Res. Bull. 109, paras 29-30 (2020); *ICC Case No. 13620,* Procedural Order of May 2006, ICC ICArb. Bull. Special Supplement: Procedural Decisions in ICC Arbitration 65, para. 2.5 (2014); *ABC AG v. Mr. X,* Procedural Order of 27 November 2002, 23 ASA Bull. 108, para. 4.1 (2005); Julian D.M. Lew, Loukas A. Mistelis & Stefan M. Kröll, *Comparative International Commercial Arbitration* para. 23-54 (Kluwer Law International 2003).
36. Jan Heiner Nedden & Inga Witte, *Chapter 4: The Exception in Theory, a Unicorn in Practice? Revisiting Security for Costs from a Practitioner's Perspective*, 4 Stockholm Arbitration Yearbook 39, 40 (Kluwer Law International 2022).
37. Jeffrey Waincymer, *Procedure and Evidence in Arbitration* 643 (Kluwer Law International 2012); Weixia Gu, *Security for Costs in International Commercial Arbitration*, 22 J. Intl Arb. 167, 168 (2005) DOI: 10.54648/joia2005012. Cf. for specific references to Indian, English and Swiss law Parties Not Indicated, Procedural Order No. 4, 2009, 28 ASA Bull. 59, paras 161-168 (2010).
38. Weixia Gu, *Security for Costs in International Commercial Arbitration*, 22 J. Intl Arb. 167, 173 (2005) DOI: 10.54648/joia2005012.
39. English Arbitration Act (1996), section 41.6 ('If a claimant fails to comply with a peremptory order of the tribunal to provide security for costs, the tribunal may make an award dismissing his claim.').
40. Hong Kong Arbitration Ordinance (2011), section 56(4): 'An arbitral tribunal may make an award dismissing a claim or stay a claim if it has made an order under subsection (1)(a) but the order has not been complied with within the period specified under subsection (3)(a) or extended under subsection (3)(b).'

including the stay or termination of the arbitration, are contained, e.g., in the LCIA Rules (2020),[41] the SCC Rules (2023),[42] the VIAC Arbitration Rules (2021),[43] and the ICSID Arbitration Rules (2022).[44]

That said, there are still various arbitration rules that do not expressly regulate security for costs at all[45] or that – while mentioning the possibility of an order for security for costs – do not expressly empower the tribunal to stay or terminate the arbitration in case security is not provided.[46] How to handle non-compliance with a security for costs order in case there are no express rules will be addressed immediately below.[47]

§16.03 THE STAY OR TERMINATION OF PROCEEDINGS DUE TO PARTY NON-COMPLIANCE WITH PROCEDURAL OBLIGATIONS IN THE ABSENCE OF EXPRESS RULES

In certain situations, a stay and eventual termination of the arbitration may also be possible in the absence of express rules. In that regard, the most important case to be discussed is, again, non-compliance with an order for security for costs (*see* §16.03[A]). However, there may also be further cases in which a stay and eventual termination may be possible (*see* §16.03[B]).

[A] Failure to Provide Security for Costs

As explained above, the issue of security for costs is being increasingly regulated in arbitration laws and arbitration rules. However, in the clear majority of cases, neither the *lex arbitri* nor the agreed arbitration rules address security for costs. Even in such cases, it is however recognised that a tribunal has the power to order a claimant to provide security for costs, based on the tribunal's power to issue interim measures.[48]

41. LCIA Arbitration Rules (2020), Art. 25.2 ('In the event that a claiming, counterclaiming or cross-claiming party does not comply with any order to provide security, the Arbitral Tribunal may stay that party's claims, counterclaims or cross-claims or dismiss them by an award.').
42. SCC Arbitration Rules (2023), Art. 38(3) ('If a party fails to comply with an order to provide security for costs, the Arbitral Tribunal may stay or terminate the proceedings in whole or in part.').
43. VIAC Arbitration Rules (2021), Art. 33(7) ('If a party fails to comply with an order by the arbitral tribunal for security for costs, the arbitral tribunal may, upon request, suspend in whole or in part, or terminate the proceedings (Article 34 paragraph 2.4).').
44. ICSID Arbitration Rules (2022), Art. 53(6) ('If a party fails to comply with an order to provide security for costs, the Tribunal may suspend the proceeding. If the proceeding is suspended for more than 90 days, the Tribunal may, after consulting with the parties, order the discontinuance of the proceeding.').
45. Cf. ICC Rules (2021); UNCITRAL Rules (2010); Swiss Rules (2021); DIS Rules (2018); KLRCA Arbitration Rules (2017).
46. Cf. HKIAC Rules (2018), Art. 24; SIAC Rules (2016), Rule 27 lit. j.
47. *See* §16.03[A].
48. Jan Heiner Nedden & Inga Witte, *Chapter 4: The Exception in Theory, a Unicorn in Practice? Revisiting Security for Costs from a Practitioner's Perspective*, 4 Stockholm Arbitration Yearbook,

This naturally raises the question: What happens if the claimant fails to provide security?

The traditional way of enforcing an interim measure – turning to the courts for assistance –[49] does not seem helpful in such circumstances. If a respondent seeks security for costs, it does so because it expects that the claimant will not be able to meet an adverse cost award.[50] If the respondent were forced to turn to the courts to enforce a security for costs order, it would need to incur further costs for such enforcement proceedings, always facing the high risk that such costs would not be reimbursed either. From a practical point of view, it would thus make much more sense to understand compliance with a security for costs order as a prerequisite for the proceedings to continue.[51] Under this approach, the claimant is practically forced to provide security if it wants to proceed with its claims, and the respondent is protected against incurring non-secured costs.[52] Accordingly, in domestic litigation, failure to provide security for costs typically leads to the dismissal of the claim.[53]

However, one may well wonder whether, in the absence of an express rule, such an approach is admissible in arbitration. After all, the tribunal is generally under a duty to render an (enforceable) award,[54] and it is questionable whether the tribunal can forego this obligation simply on the basis that it would be more practical to do so in order to give effect to a security for costs order.

In analysing this question, one should differentiate between a stay of proceedings on the one hand and their termination on the other. Insofar as the former is concerned, tribunals may, as part of their general power to conduct the proceedings,[55] order the

39-40 (Kluwer Law International 2022); Weixia Gu, *Security for Costs in International Commercial Arbitration*, 22 J. Intl Ar. 167, 184 (2005) DOI: 10.54648/joia2005012. Cf. further United Nations Commission on International Trade Law, Report of the 47th Session of the Working Group on Arbitration and Conciliation: doc. A/CN.9/641, para. 48. Some have also suggested that it may be the tribunal's general procedural powers that allow it to issue security for costs orders, cf. Pierre A. Karrer & Marcus Desax, *Security for Costs in International Arbitration: Why, When, and What If …*, in *Law of International Business and Dispute Settlement in the 21st Century: Liber Amicorum Karl-Heinz Böckstiegel* 339, 344 (Robert Briner et al. eds, 2001).

49. Cf. UNCITRAL Model Law (2006), Art. 17H.
50. Cf. Jonas von Goeler, *Third-Party Funding in International Arbitration and its Impact on Procedure* 333 (Kluwer Law International, 2016); Weixia Gu, *Security for Costs in International Commercial Arbitration*, 22 J. Intl Arb. 167, 168 (2005) DOI: 10.54648/joia2005012.
51. Cf. Noah Rubins, *In God We Trust, All Others Pay Cash: Security for Costs in International Commercial Arbitration*, 11 ARIA 307, 366 (2000); Alan Redfern & Sam O'Leary, *Why It Is Time for International Arbitration to Embrace Security For Costs*, 32 Arb. Intl 397, 412-413 (2016) DOI: 10.1093/arbint/aiw030.
52. Alan Redfern & Sam O'Leary, *Why It Is Time For International Arbitration to Embrace Security For Costs*, 32 Arb. Intl 397, 413 (2016) DOI: 10.1093/arbint/aiw030.
53. Cf. Swiss Code of Civil Procedure, Art. 101(3); German Code of Civil Procedure, section 113; Austrian Code of Civil Procedure, section 60(3).
54. Günther J. Horvath, *The Duty of the Tribunal to Render an Enforceable Award*, 18(2) J. Intl Arb. 135 (2001) DOI: 10.54648/317806. Cf. also Gary Born, *International Commercial Arbitration* § 13.03[A] (3rd ed. Kluwer Law International 2021).
55. Cf. UNCITRAL Rules (2010), Art. 17.1; LCIA Rules (2020), Art. 14.1 and 14.2; SCC Rules (2023), Art. 23.1; Swiss Arbitration Rules (2021), Art. 19.1; German Code of Civil Procedure, section 1042(4); Qatari Law No. 2 of 2017 Promulgating the Civil and Commercial Arbitration Law, Art. 19(2).

stay of the proceedings after having weighed both parties' interests.[56] When engaging in such an evaluation, the respondent's interest in not incurring further non-secured costs may well outweigh the claimant's interest in a continuation of proceedings.[57]

The situation is however different when it comes to the termination of proceedings. As explained above,[58] arbitration laws and arbitration rules address a variety of situations in which proceedings may or must be terminated – but failure to provide security for costs is often not included as a ground for termination. Moreover, there is also no general open-ended ground for termination which would cover a failure to provide security for costs. In particular, the continuation of proceedings does not become unnecessary or impossible within the meaning of Article 32(2) lit. c of the UNCITRAL Model Law (2006) (or similar rules) just because security has not been provided.

Nonetheless, there seems to be a general consensus that, even in the absence of an express rule, the tribunal may ultimately terminate proceedings in case of a failure to provide security for costs.[59] In this respect, the reasoning of the International Centre for Settlement of Investment Disputes (ICSID) annulment committee in the case of *RSM v. Saint Lucia*[60] is illustrative. This reasoning was given at a time when the 2006 version of the ICSID Arbitration Rules applied. This version of the ICSID Arbitration Rules did not expressly regulate security for costs.

According to the *RSM* annulment committee, the decision to discontinue proceedings for lack of security for costs is a logical consequence of an earlier decision to stay the proceedings. Thus, in the view of the committee, the power to discontinue proceedings derives from the tribunal's general power to conduct the proceedings.[61] In other words, if it is clear that a stay will never be lifted because the claimant cannot provide security, there is no alternative but to eventually terminate the proceedings. Otherwise, the case would remain in suspension indefinitely which would be contrary to the tribunal's function to manage proceedings in a fair manner.[62]

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56. Cf. Joachim Knoll, *Chapter 2, Part II: Commentary on Chapter 12 PILS*, in *Arbitration in Switzerland – The Practitioner's Guide*, Art. 182, para. 61 (Manuel Arroyo ed., 2nd ed. Kluwer Law International 2018); Swiss Federal Tribunal, Case No. 4P.64/2004/kra, 2 June 2004, para. 3.2.
57. Cf. with regard to the tribunal's exercise of its discretion to stay proceedings below §16.05.
58. *See* §16.02.
59. Cf. *Unnamed Case*, Procedural Order No. 4, 2009, 28 ASA Bull. 59 (2010); Bernhard Berger & Franz Kellerhals, *International and Domestic Arbitration in Switzerland* para. 1605 (Stämpfli Verlag 2015) (Switzerland); Micha Bühler & Marco Stacher, *Chapter 18, Part IV: Costs in International Arbitration*, in *Arbitration in Switzerland: The Practitioner's Guide* para. 60 (Manuel Arroyo ed., 2nd ed. Kluwer Law International 2018) (Switzerland); Marco Stacher *Swiss Rules of International Arbitration: Commentary* Art. 41, para. 29 (Tobias Zuberbühler et al. eds, 2nd ed. Juris Publishing 2013) (Switzerland); Karl Pörnbacher & Sophie Thiel, *Kostensicherheit in Schiedsverfahren*, 8 SchiedsVZ 14, 15 (2010) (Germany).
60. *RSM Production Corporation v. Saint Lucia*, ICSID Case No. ARB/12/10, Decision on Annulment, 29 April 2019.
61. *RSM Production Corporation v. Saint Lucia*, ICSID Case No. ARB/12/10, Decision on Annulment, 29 April 2019, paras 189-191, with reference to the tribunal's general power to conduct proceedings in ICSID Convention, Art. 44 sentence 2.
62. *RSM Production Corporation v. Saint Lucia*, ICSID Case No. ARB/12/10, Decision on Annulment, 29 April 2019, paras 190-191.

This reasoning is convincing – and can arguably be applied outside the ICSID context as well. Arbitration rules[63] and arbitration laws[64] typically grant the tribunal a general power to conduct proceedings, including the power to stay proceedings. By extension, tribunals also have the power to terminate proceedings where it would otherwise impose a never-ending series of stays.

[B] Other Cases Allowing for Stay or Termination of the Proceedings?

In the course of their research, the authors have not encountered other cases in which it has been argued that the breach of a procedural obligation results in the tribunal having the unwritten procedural power to stay and eventually terminate the arbitration. This is perhaps unsurprising, given the tribunal's principal duty to render a substantive decision, and considering further that the tribunal may typically address party non-compliance in other ways. For example, if a claimant submits evidence belatedly and in contradiction to the procedural calendar established by the tribunal, the tribunal may potentially strike such evidence from the record –[65] or at least take the claimant's conduct into account when rendering its cost decision.[66] Conversely, no one seems to argue that, instead, the tribunal should punish the claimant even further by terminating the arbitration.

As such, something more than a mere breach of procedural obligations is needed to assume that the tribunal may stay or terminate the arbitration. Considering the situations described above in which arbitration laws, arbitration rules or arbitral practice allow for stay and termination, the breach of the procedural obligation must have one of two effects. As a first option, the breach must make it practically impossible to continue with the arbitration. This is the case if the advance on costs is not fully paid in because the tribunal cannot be required to work without payment of its fees being secured.

As a second option, the breach must be one of the claimant, and it must be the case that the respondent cannot reasonably be required to pursue other means to remedy such breach. This is the case if no statement of claim is filed, as the respondent cannot reasonably be required to seek to force the claimant to submit a statement of claim, e.g., by asking for a respective order from the tribunal. Otherwise, the respondent would essentially be forced to work against its own interests. Further, this is also the case if the claimant fails to provide security for costs. Given that a security order is an interim measure, the respondent could theoretically turn to the courts to

63. ICC Rules (2021), Art. 19; SIAC Rules (2016), Rule 19.1; LCIA Rules (2020), Art. 14.2; Swiss Arbitration Rules (2021), Art. 19.1; HKIAC (2018), Art. 13.1; DIS Rules (2018), Art. 21.3.
64. UNCITRAL Model Law (2006), Art. 19(2); Belgian Judicial Code, Art. 1700(2); German Code of Civil Procedure, section 1042(4); English Arbitration Act (1996), section 34.1; French Code of Civil Procedure, Art. 1509(2); Costa Rican Law 8937 on International Commercial Arbitration, Art. 19(2).
65. Cf. Jeffrey Waincymer, *Procedure and Evidence in Arbitration* 822-824 (Kluwer Law International 2012).
66. Cf. ICC Rules (2021), Art. 38(5); LCIA Rules (2020), Art. 28.4; Swiss Arbitration Rules (2021), Art. 40; DIS Arbitration Rules (2018), Art. 33.3.

have it enforced. However, as explained above, this cannot be reasonably required of the respondent, as it would mean that the respondent would have to incur further unsecured costs in domestic enforcement proceedings.

In light of these considerations, not many cases come to mind in which an arbitration should potentially be stayed and eventually terminated in response to a procedural violation. However, the authors could conceive of one possible scenario, namely the failure by a claimant to disclose the identity of a third-party funder. Under an increasing number of arbitration rules, parties are required to disclose the existence and identity of third-party funders.[67] Moreover, even in the absence of such rules, tribunals have ordered claimants to disclose the identity of third-party funders.[68] The idea is to provide arbitrators with all the information needed to allow them to disclose any relationship with third-party funders so as to make sure that there are no unknown circumstances which could potentially give rise to a conflict of interest.[69] Ultimately, the goal is to preserve the integrity of the proceedings.

Assuming that, in a given case, it was clear that the claimant is using a third-party funder, but it refuses to disclose the funder's identity, it could be argued that the tribunal should stay and eventually terminate the arbitration. While the tribunal could theoretically issue a disclosure order in the form of an interim measure, which the respondent could then take to the courts for enforcement (e.g., through the imposition of penalty payments), this can arguably not be reasonably required of the respondent. Essentially, the respondent would have to do the claimant's work and thus advance the claimant's position, which would be fundamentally unfair. Moreover, in case the arbitration was to continue without the disclosure, there would be a real risk to the integrity of the proceedings, as an unwillingness to disclose the funder could by itself indicate that there may be a conflict.

Admittedly, this constellation will be rather rare, and it will require very clear indications that the claimant is indeed using a third-party funder before a tribunal could even consider staying or terminating the arbitration. It remains to be seen whether such a case will ever arise.

67. ICC Rules (2021), Art. 11(7); ICSID Arbitration Rules (2022), Rule 14; VIAC Arbitration Rules (2021), Art. 13a; HKIAC Rules (2018), Art. 44.
68. *Muhammet Çap & Sehil Inşaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan*, ICSID Case No. ARB/12/6, Procedural Order No. 3, 12 June 2015, para. 13; *South American Silver Limited v. Plurinational State of Bolivia*, PCA Case No. 2013-15, Procedural Order No. 10, 11 January 2016, para. 85 lit. b; *Bacilio Amorrortu v. Republic of Peru*, PCA Case No. 2020-11, Procedural Order No. 2 dated 19 October 2020, para. 12. Cf. also SIAC Investment Rules, Rule 24 lit. l, which expressly allows the tribunal to order the disclosure of the existence and identity of third-party funders.
69. Marlena Harutyunyan, *The Revised ICSID Rules: A Further Step Towards Transparency and Efficiency*, 40(3) ASA Bull. 529, 531 (2022) DOI: 10.54648/asab2022045; *Muhammet Çap & Sehil Inşaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan*, ICSID Case No. ARB/12/6, Procedural Order No. 3, 12 June 2015, para. 9; Jonas von Goeler, *Third-Party Funding in International Arbitration and its Impact on Procedure* 276 et seq. (Kluwer Law International, 2016). Cf. also ICC Rules (2021), Art. 11(7), which expressly alludes to this purpose.

§16.04 THE TRIBUNAL'S POWER TO TERMINATE PROCEEDINGS WITH PREJUDICE AND THE FORM OF THE TRIBUNAL'S DECISION

If a tribunal considers terminating proceedings, it will also have to consider the effect of such a decision on the claimant's claims. Specifically, the tribunal will need to decide whether to simply terminate the proceedings without making any substantive determination on the claimant's claims or to dismiss the claimant's claims with prejudice. This decision will have a profound impact. If the proceedings are simply terminated, the claimant may reintroduce its claims in a new arbitration. This may lead the respondent to complain about not having obtained a final dismissal of claims and of facing the risk of an abusive repeat introduction of claims.[70] Conversely, if the claims are dismissed with prejudice, the claimant will no longer be able to pursue them. This may also be problematic, in particular, if the claimant was merely facing a procedural obstacle, such as a lack of funds to provide security for costs. Such an obstacle may be temporary, but in the case of a dismissal with prejudice, the claimant would never again be able to pursue its claims, even if the obstacle later falls away.[71]

Accordingly, the effect of the tribunal's decision will be of huge practical importance for the parties. In addition, it will also have an impact on the form of the tribunal's termination decision, i.e., whether the tribunal issues an award or an order. In the following, the effect of the termination and the form of the termination decision will be analysed for the particular situations addressed above.

[A] Failure to Pay the Advance on Costs

In case of a failure to pay the advance on costs, the termination of proceedings will not entail dismissal of the claimant's claims with prejudice. Indeed, some institutional rules state expressly that the claims may be reintroduced in subsequent proceedings.[72] But even if this is not stated expressly in the applicable arbitration rules, it is generally accepted to be the case.[73] And indeed, this only makes sense: The advance on costs must be deemed a prerequisite for the tribunal to make any substantive decisions. Thus, the tribunal cannot substantively dismiss claims without full payment of the advance on costs.

70. Cf. Weixia Gu, *Security for Costs in International Commercial Arbitration*, 22 J. Intl Arb. 167, 200 (2005) DOI: 10.54648/joia2005012.
71. Cf. Karl Pörnbacher & Sophie Thiel, *Kostensicherheit in Schiedsverfahren*, 8 SchiedsVZ 14, 15 (2010).
72. LCIA Rules (2020), Art. 24.8; ICC Rules (2021), Art. 37.6; SIAC Rules (2016), Rule 34.6 lit. b; ICDR Rules (2021), Art. 39.3.
73. Cf. Thomas Rohner & Michael Lazopoulos, *Respondent's Refusal to Pay its Share of the Advance on Costs*, 29 ASA Bull. 549 (2011) DOI: 10.54648/asab2011063; Jan Paulsson & Georgios Petrochilos, *UNCITRAL Arbitration Rules* section IV, Art. 43 [Deposit of costs], para. 11 (Kluwer Law International 2017). Cf. further Jakob Ragnwaldh, Fredrik Andersson & Celeste E. Salinas Quero, *A Guide to the SCC Arbitration Rules* 161 (Kluwer Law International 2019) (with regard to the SCC Rules); Tobias Zuberbühler, *Chapter 3, Part II: Commentary on the Swiss Rules* in *Arbitration in Switzerland: The Practitioner's Guide* Art. 41, para. 18 (Manuel Arroyo ed., 2nd ed. Kluwer Law International 2018) (with regard to the Swiss Rules).

Of course, there may be situations where this may have undesired consequences. In particular, if an arbitration has progressed substantially, but one party is unable or unwilling to pay its share of a late increase of the advance on costs, there is a real risk that the efforts made in the arbitration up to that point will be for naught. Here, the only chance to achieve a substantive decision will be for the other party to pay both parties' shares of the increased advance – a possibility which is usually expressly foreseen in arbitration rules.[74] Subsequently, the case will progress normally to an award.

Insofar as the form of the termination decision is concerned, much will depend on the applicable arbitration rules. As mentioned above,[75] a considerable number of arbitration rules provide for a termination decision by the arbitral institution. If it is, however, for the tribunal to terminate the proceedings, the decision to terminate will usually be taken in an order and not in an award.[76] This accords with the nature of such a decision as a without-prejudice decision. Contrary to awards, orders do not contain a definitive decision on a substantive issue in dispute (but rather merely address procedural issues).[77] As such, an order is generally the appropriate form for a decision to terminate without prejudice.

[B] Default of the Claimant

In case of a default by the claimant leading to a termination of the arbitration, the claimant's claims will usually also not be dismissed with prejudice. Arbitration laws and arbitration rules generally provide that, in case of a failure by the claimant to submit the statement of claim, the tribunal shall issue an order for the termination of the arbitration.[78] In light of what was said immediately above about the nature of orders, the termination thus cannot entail a substantive decision. Accordingly, if the claimant fails to submit the statement of claim, its claims are generally not dismissed with prejudice.[79]

In case of a default by the claimant subsequent to the filing of the statement of claim, and as explained above,[80] it may be possible to terminate the arbitration on the basis that the continuation of the proceedings has become unnecessary. Here too, the decision is typically rendered via an order,[81] meaning that the termination cannot entail a substantive decision. Thus, the claimant's claims can again not be deemed to be

74. ICC Rules (2021), Art. 37.5; LCIA Rules (2020), Art. 24.6; HKIAC Rules (2018), Art. 41.5; ICDR Rules (2021), Art. 39.4.
75. *See* §16.02[A].
76. Cf. Swiss Arbitration Rules (2021), Art. 41.4; HKIAC Rules (2018), Art. 41.4; ICDR Rules (2021), Art. 39.5; UNCITRAL Rules (2010), Art. 43.4.
77. Gary Born, *International Commercial Arbitration* § 22.02[B][3] (3rd ed. Kluwer Law International 2021); *Redfern and Hunter on International Arbitration*, para. 9.08 (Nigel Blackaby et al. eds, 7th ed. Oxford Univ. Press 2023).
78. Cf. UNCITRAL Rules (2010), Art. 30(1) lit. a; German Code of Civil Procedure, section 1056(2) No. 1 lit. a; SIAC Rules (2016), Rule 20.8.
79. Cf. Chartered Institute of Arbitrators, Guidelines on Party Non-Participation, Commentary on Art. 2, para. (b) (2015).
80. *See* §16.02[B].
81. UNCITRAL Model Law (2006), Art. 32(2) lit. c.

dismissed with prejudice. However, everything will – as usual – depend on the specific legal framework, and the result may well be different if there are any specific provisions regulating the legal consequences of a default in a different manner.[82]

[C] Failure to Provide Security for Costs

A failure to provide security for costs may raise complex questions when it comes to deciding whether the claimant's claims are to be dismissed with prejudice or not. In that vein, one needs to again differentiate between cases in which the termination of the arbitration due to a failure to provide security is expressly regulated and cases in which an express rule is missing.

[1] Express Rules on the Termination of Proceedings

As mentioned above,[83] some arbitration laws expressly regulate the termination of proceedings in response to a failure to provide security for costs. In particular, both the English Arbitration Act (1996) and the Hong Kong Arbitration Ordinance contain express provisions allowing arbitrators to 'make an award dismissing' the claimant's claims.[84] The reference to an award and to the claimant's claims being dismissed is generally understood to mean that the claimant's claims are being dismissed with prejudice.[85] Under both provisions, such an award may, however, only be rendered if the tribunal has set a time limit within which security must be provided.[86] In the case of the English Arbitration Act (1996), the tribunal must set such time limit in a separate 'peremptory order' issued after the claimant has failed to provide security in response to the initial order.[87] In the case of the Hong Kong Arbitration Ordinance, the time limit must be contained in the initial order for security for costs.[88]

Similarly, the LCIA Rules (2020) also allow the tribunal to dismiss the claimant's claims 'by an award'.[89] In light of the reference to an 'award' and considering the rules of the English Arbitration Act (1996), which certainly inspired the LCIA, this too must

82. Such as e.g. English Arbitration Act 1996, section 41.3.
83. *See* §16.02[C].
84. English Arbitration Act (1996), section 41.6 ('If a claimant fails to comply with a peremptory order of the tribunal to provide security for costs, the tribunal may make an award dismissing his claim.'); Hong Kong Arbitration Ordinance (2011), section 56(4) ('An arbitral tribunal may make an award dismissing a claim or stay a claim if it has made an order under subsection (1)(a) but the order has not been complied with within the period specified under subsection (3)(a) or extended under subsection (3)(b).').
85. *Swallowfalls Limited v. Monaco Yachting & Technologies S.A.M. and another* [2015] EWHC 2013 (Comm); SCC Case No. 2020/f, Final Award, 7 April 2021, XLVI ICCA Y.B. Comm. Arb. 163, paras 77-85 (2021).
86. English Arbitration Act (1996), sections 41.5 and 41.6; Hong Kong Arbitration Ordinance (2011), section 56(4).
87. English Arbitration Act (1996), section 41.5.
88. Hong Kong Arbitration Ordinance (2011), section 56(3)(a).
89. LCIA Arbitration Rules (2020), Art. 25.2 ('In the event that a claiming, counterclaiming or cross-claiming party does not comply with any order to provide security, the Arbitral Tribunal may stay that party's claims, counterclaims or cross-claims or dismiss them by an award.').

be understood to mean that the dismissal of the claims is with prejudice. The situation is, however, somewhat different for the SCC Rules (2023) which provide more flexibility.[90] Pursuant to the SCC Rules (2023), '[a]ny decision to stay or to terminate the proceedings in whole or in part shall take the form of an order or an award.'[91] Commentators have noted that this rule allows the tribunal to take into account the circumstances of the case, including the *lex arbitri*, when deciding whether to issue an order or an award.[92] In line with this logic, a sole arbitrator in a recent arbitration seated in London and conducted under the SCC Expedited Rules (2017) relied entirely on the provisions of the English Arbitration Act (1996) (and their interpretation by English courts) to justify the dismissal of the claimant's claims with prejudice,[93] without invoking the power to decide on the termination in the form of an award stemming from the SCC Expedited Rules.[94]

Finally, something else applies under the VIAC Arbitration Rules (2021) and the ICSID Arbitration Rules (2022). The VIAC Arbitration Rules (2021) expressly state that if a party fails to comply with an order for security for costs, the tribunal terminates the proceedings by way of an order.[95] As explained above, this entails that the claims are not dismissed with prejudice. Moreover, under the ICSID Arbitration Rules (2022), the tribunal 'may […] order the discontinuance of the proceeding' if a party fails to comply with an order to provide security. The fact that there is an express rule on the termination of proceedings which, however, only allows an 'order', speaks of the purely procedural act of 'discontinuance', and does not refer to the dismissal of claims also seems to indicate that, under the ICSID Arbitration Rules (2022), tribunals are not authorised to dismiss claims with prejudice.[96] It will, however, be interesting to see how tribunals and annulment committees will interpret this provision.

[2] No Express Rules on the Termination of Proceedings

As explained above,[97] the vast majority of arbitration laws and arbitration rules do not expressly regulate the termination of proceedings in case the claimant fails to provide security. Nonetheless, and as explained, it is generally recognised that, even without an

90. SCC Rules (2023), Art. 38(3).
91. SCC Rules (2023), Art. 38(4).
92. Jakob Ragnwaldh, Fredrik Andersson &Celeste E. Salinas Quero, *A Guide to the SCC Arbitration Rules* 123 (Kluwer Law International 2019).
93. SCC Case No. 2020/f, Final Award, 7 April 2021, XLVI ICCA Y.B. Comm. Arb. 163, paras 77-85 (2021).
94. The respective provisions in the SCC Expedited Rules (2017) are the same as in the SCC Rules (2023), cf. SCC Expedited Rules (2017), Art. 39(3) and (4).
95. VIAC Arbitration Rules (2021), Art. 34(2.4).
96. Cf. Chiann Bao, *Case Comment, RSM v Saint Lucia: With Prejudice – The Unlikely Death Knell*, 35 ICSID Review 48-49 (2020), who voices doubts as to the tribunal's power to dismiss claims with prejudice under the rule. Cf. further *RSM Production Corporation v. Saint Lucia*, ICSID Case No. ARB/12/10, Decision on Annulment, 29 April 2019, para. 198, which notes the lack of a reference to discontinuance with prejudice in the new rule.
97. *See* §16.03[A].

express rule, tribunals may terminate proceedings for lack of security.[98] However, it is much less clear whether this power extends to a dismissal with prejudice. Insofar it could be argued, on the one hand, that it must be possible to dismiss claims with prejudice. Otherwise, the claimant could reintroduce its claims and potentially harass the respondent with repeat proceedings.[99] On the other hand, a dismissal with prejudice has a devastating impact on the claimant. Effectively, the claimant loses its claim without having had a chance to fully present its case and without the tribunal having properly considered the merits. This would be particularly unfair if the claimant faced actual difficulties in providing security which it overcomes after the dismissal with prejudice. Potentially, this could create the risk of a denial of justice.[100]

As a starting point, it is indeed doubtful whether it is possible to dismiss claims with prejudice for failure to provide security for costs in the absence of an express provision to this effect. As explained above,[101] the source of the tribunal's power to terminate proceedings is not self-evident but is best understood as stemming from the tribunal's general power to conduct the proceedings. However, that power only entitles the tribunal to decisions on the procedure, not on substance. Accordingly, it would seem to be a stretch to argue that a tribunal may dismiss claims with prejudice in the absence of an express rule to that effect.

This also seems to be the prevailing view[102] and was in particular argued by the ICSID annulment committee in the case of *RSM v. Saint Lucia*.[103] In this case, the tribunal (in an unpublished award) dismissed the claimant's claims due to a failure to provide security.[104] Although the tribunal failed to clarify in the operative part of the award that the dismissal was with prejudice, both parties understood this to be the case based on the tribunal's reasoning.[105] Subsequently, the annulment committee was

98. *See* above §16.03[A].
99. Cf. Pierre A. Karrer & Marcus Desax, *Security for Costs in International Arbitration: Why, When, and What If …*, in *Law of International Business and Dispute Settlement in the 21st Century: Liber Amicorum Karl-Heinz Böckstiegel* 339, 352 (Robert Briner et al. eds, 2001); Weixia Gu, *Security for Costs in International Commercial Arbitration*, 22 J. Int. Arb. 167, 200 (2005) DOI: 10.54648/joia2005012.
100. Cf. *RSM Production Corporation v. Saint Lucia*, ICSID Case No. ARB/12/10, Decision on Annulment, 29 April 2019, para. 198.
101. *See* §16.03[A].
102. Jan Heiner Nedden & Inga Witte, *Chapter 4: The Exception in Theory, a Unicorn in Practice? Revisiting Security for Costs from a Practitioner's Perspective*, 4 Stockholm Arbitration Yearbook, 39, 50 (Kluwer Law International 2022); Jean-François Poudret & Sebastien Besson, *Comparative Law on International Arbitration* para. 593 (Sweet & Maxwell 2007); Bernhard Berger & Franz Kellerhals, *International and Domestic Arbitration in Switzerland* para. 1605 (Stämpfli Verlag 2015) (Switzerland); Micha Bühler & Marco Stacher, *Chapter 18, Part IV: Costs in International Arbitration*, in *Arbitration in Switzerland: The Practitioner's Guide*, para. 60 (Manuel Arroyo ed., 2nd ed. Kluwer Law International 2018) (Switzerland); Marco Stacher *Swiss Rules of International Arbitration: Commentary* Art. 41, para. 29 (Tobias Zuberbühler et al. eds., 2nd ed. Juris Publishing 2013) (Switzerland).
103. *RSM Production Corporation v. Saint Lucia*, ICSID Case No. ARB/12/10, Decision on Annulment, 29 April 2019, paras 193 et seq.
104. *RSM Production Corporation v. Saint Lucia*, ICSID Case No. ARB/12/10, Decision on Annulment, 29 April 2019, paras 13-25.
105. *RSM Production Corporation v. Saint Lucia*, ICSID Case No. ARB/12/10, Decision on Annulment, 29 April 2019, paras 193-195.

tasked, *inter alia,* with assessing whether the tribunal committed a manifest excess of power within the meaning of Article 52(1)(b) of the ICSID Convention. It found that while the dismissal as such was covered by the tribunal's general power to conduct proceedings,[106] the dismissal with prejudice was not. According to the annulment committee, that is because a dismissal with prejudice is no longer a procedural but rather a substantive decision.[107] On this basis, the annulment committee partially annulled the award insofar as it provided for the dismissal of claims to be with prejudice.[108]

Incidentally, a similar conclusion in favour of the set aside of an award could also be drawn in a non-ICSID context. In particular, if a claim is dismissed with prejudice on the basis that the claimant failed to provide security for costs, and there is no express provision allowing for such a decision, it could be argued that the claimant was unable to present its case (Article V(1)(b) of the New York Convention), that there was a violation of the arbitral procedure (Article V(1)(d) of the New York Convention) or that the claimant's right to be heard was violated (procedural *ordre public*, Article V(2)(b) of the New York Convention).[109]

Understandably, some might find this result unsatisfactory, as it might mean that a claimant repeatedly reintroduces claims. However, these concerns do not justify a tribunal overstepping its powers. Rather, these concerns should motivate lawmakers and rule drafters to expressly provide for the possibility of a dismissal with prejudice in future reforms of arbitration laws and arbitration rules.

§16.05 THE EXERCISE OF THE TRIBUNAL'S DISCRETION TO STAY OR TERMINATE PROCEEDINGS

If a tribunal has the power to terminate proceedings in a given situation, this does not necessarily mean that it should do so or that it should do so immediately. Generally, the tribunal will first stay proceedings before eventually opting for termination.[110] Moreover, before both a decision to stay and a decision to terminate, the tribunal will need to weigh all circumstances to make sure that its decision does not violate its duties and the parties' corresponding rights.

106. *RSM Production Corporation v. Saint Lucia*, ICSID Case No. ARB/12/10, Decision on Annulment, 29 April 2019, paras. 189-191, with reference to the tribunal's general power to conduct proceedings in ICSID Convention, Art. 44 sentence 2.
107. *RSM Production Corporation v. Saint Lucia*, ICSID Case No. ARB/12/10, Decision on Annulment, 29 April 2019, paras 196-201.
108. *RSM Production Corporation v. Saint Lucia*, ICSID Case No. ARB/12/10, Decision on Annulment, 29 April 2019, paras 200-201.
109. Cf. more generally with regard to grounds for non-recognition in the context of security for costs Noah Rubins, *In God We Trust, All Others Pay Cash: Security for Costs in International Commercial Arbitration*, 11 ARIA 307, 321 (2000); Weixia Gu, *Security for Costs in International Commercial Arbitration*, 22 J. Int. Arb. 167, 192 (2005) DOI: 10.54648/joia2005012.
110. Cf. Gerold Zeiler & Lisa Beisteiner, *VIAC Rules of Arbitration 2018*, in *Handbook VIAC Rules of Arbitration and Mediation: A Practitioner's Guide* 238 (Vienna International Arbitral Centre of the Austrian Federal Economic Chamber ed., 2nd ed. Verlag WKÖ Service 2019); Brooks William Daly, Evgeniya Goriatcheva & Hugh Meighen, *A Guide to the PCA Arbitration Rules* para. 6.110 (Oxford Univ. Press 2016).

As a starting point, the claimant is entitled to a decision on the merits being rendered within a reasonable time, i.e., without undue delay.[111] To this effect, arbitration rules variously provide that the tribunal has to conduct the proceedings efficiently.[112] Thus, in case of doubt, the tribunal should generally continue with the proceedings (rather than stay or terminate them) in order to avoid a delay or denial of justice.[113] At the same time, in case of a breach of procedural obligations, as described above, considerable arguments weigh against continuing with the proceedings. In particular, if the advance is not fully paid, the tribunal runs the risk of doing work without receiving payment in the end. Equally, if security is not provided, the respondent runs the risk of incurring costs for further work in the proceedings without a respective cost claim being secured.

Once there is a breach of a procedural obligation, and to ensure the parties' right to be heard, the tribunal should always seek to ascertain the reasons for the failure to comply with the obligation and the likely time it will take to remedy such failure.[114] If the non-complying party provides a credible explanation and credibly indicates that the failure will be remedied within a reasonable time period, it may not even be necessary to stay the proceedings at all. Conversely, if the explanation given is insufficient or if the time indicated for remedying the failure appears unreasonably long, the tribunal should opt for a stay.

Once the arbitration is stayed, the position of the complying party is secured in that it does not need to incur (major) costs for further procedural steps until the procedural breach is remedied. For example, in the case of security for costs, this means that a respondent will not need to incur (major) further costs until it can be sure that it can make good on a potential claim for such costs based on the security.[115] As such, once the arbitration is stayed, there is no overwhelming urgency to move on to termination. However, as explained by the annulment committee in the *RSM* case, it would be unfair to keep proceedings in limbo forever.[116] In particular, even a suspended arbitration causes some costs, such as for the submission of arguments on how long the stay should continue and for reporting the status of the arbitration to a

111. *RSM Production Corporation v. Saint Lucia*, ICSID Case No. ARB/12/10, Decision on Annulment, 29 April 2019, para. 191; Pierre Heitzmann, *Chapter 31: Arbitration and Criminal Liability for Competition Law Violations in Europe*, in *EU and US Antitrust Arbitration: A Handbook for Practitioners*, para. 31-054 (Gordon Blanke & Phillip Landolt eds., Kluwer Law International 2011).

112. ICC Rules (2021), Art. 22.1; LCIA Rules (2020), Art. 14.1.ii; SCAI Rules (2021), Art. 19.1; HKIAC (2018), Art.s 13.1, 13.5; DIS Rules (2018), Art. 27.1.

113. Cf. Swiss Federal Tribunal, Case No. 4P.64/2004, 2 June 2004, para. 3.2; Joachim Knoll, *Chapter 2, Part II: Commentary on Chapter 12 PILS*, in *Arbitration in Switzerland: The Practitioner's Guide*, Art. 182, para. 61 (Manuel Arroyo ed., Kluwer Law International 2013). Cf. also Luka Groselj, *Stay of Arbitration Proceedings – Some Examples from Arbitral Practice*, 36 ASA Bull. 560, 576 (2018) DOI: 10.54648/asab2018054.

114. Cf. Jakob Ragnwaldh, Fredrik Andersson & Celeste E. Salinas Quero, *A Guide to the SCC Arbitration Rules* 114 (Kluwer Law International 2019); Michael J. Moser & Chiann Bao, *A Guide to the HKIAC Arbitration Rules* para. 9.227 (2nd ed. Oxford Univ. Press 2022).

115. Cf. *LCIA Case No. 132551*, Procedural Order No. 4 dated 2014, 36 ASA Bull. 664, para. 27 (2018) DOI: 10.54648/asab2018067.

116. *RSM Production Corporation v. Saint Lucia*, ICSID Case No. ARB/12/10, Decision on Annulment, 29 April 2019, para. 191.

party's auditors. Moreover, merely having to account for a claim in the company books may have a real economic impact, as potential litigation exposure is reflected in stock prices.[117]

Against this background, the authors consider that it is good practice for a tribunal to clearly indicate for how long it intends to stay proceedings in the stay order. In doing so, the tribunal may wish to clarify that if the breach is not remedied within such period, it will terminate the arbitration unless there are extraordinary circumstances justifying a continued stay of proceedings. During the stay period and before terminating the arbitration, the tribunal should allow the parties to comment on the likelihood and likely timing of the non-complying party eventually remedying the breach. If called upon, the tribunal should balance the impact that the continued pending of the arbitration will have on the complying party and the impact a termination would have on the non-complying party. If the tribunal considers that there are no exceptional circumstances that warrant prolonging the stay, it should terminate the proceedings. Arguably, the tribunal should exercise additional restraint if the claimant's claims would be dismissed with prejudice, given the greater ramifications of such a decision.[118]

Notably, in some cases, the tribunal might even 'make a U-turn' and decide to modify the original order with which one of the parties is not complying. For example, if the tribunal ordered the claimant to provide security in the form of a guarantee by a bank from certain countries, but the claimant is only able to obtain a guarantee from a bank based in another country (and that guarantee is still deemed acceptable to the respondent), the tribunal might adapt the initial security for costs order and set a new time limit for compliance. Moreover, in some cases, it might even be appropriate to revoke the original security for costs order altogether. In *Unionmatex v. Turkmenistan*, for instance, the tribunal was unanimously convinced that the claimant had seriously and diligently tried but failed to procure security for costs.[119] In addition, the inability to post security resulted from the fact that the claimant had been placed in insolvency proceedings, allegedly due to the wrongful conduct of the respondent.[120] Against this background, the tribunal rescinded its initial security for costs order, finding that maintaining the order would 'deny the claimant the opportunity to proceed to the merits' and would result in 'a denial of access to justice'.[121]

117. Cf. Gregory A. Horowitz, *A Further Comment on the Complexities of Market Evidence in Valuation Litigation*, 68 Bus. Law 1071, 1077 (2013).
118. Cf. in this regard Jan Heiner Nedden & Inga Witte, *Chapter 4: The Exception in Theory, a Unicorn in Practice? Revisiting Security for Costs from a Practitioner's Perspective*, 4 Stockholm Arbitration Yearbook, 39, 50 (Kluwer Law International 2022).
119. *Dirk Herzig as Insolvency Administrator over the assets of Unionmatex Industrieanlagen GmbH v. Turkmenistan*, *ICSID Case No. ARB/18/35*, Decision and Procedural Order No. 5, 9 June 2020, para. 21.
120. *Dirk Herzig as Insolvency Administrator over the assets of Unionmatex Industrieanlagen GmbH v. Turkmenistan*, *ICSID Case No. ARB/18/35*, Decision and Procedural Order No. 5, 9 June 2020, para. 22.
121. *Dirk Herzig as Insolvency Administrator over the assets of Unionmatex Industrieanlagen GmbH v. Turkmenistan*, *ICSID Case No. ARB/18/35*, Decision and Procedural Order No. 5, 9 June 2020, para. 22.

§16.06 TERMINATION OF THE ARBITRATION AGREEMENT IN REACTION TO PARTY NON-COMPLIANCE WITH PROCEDURAL OBLIGATIONS?

Notwithstanding the above, there may be an alternative argument to justify the termination of proceedings in case of party non-compliance with procedural obligations, namely that the compliant party has a right to terminate the arbitration agreement. Assuming the arbitration agreement is validly terminated, the tribunal would have to terminate the proceedings with an award declaring that it has no jurisdiction.

[A] Background

Generally, the arbitration agreement is subject to the same rules on contract formation and validity that apply to contracts in general[122] (with the caveat that an arbitration clause in a contract is treated as a separate contract under the doctrine of separability).[123] Thus, it is also generally recognised that an arbitration agreement can be terminated in accordance with the principles laid out in general contract law.[124] As such, a breach of the agreed arbitral procedure by one party could potentially give rise to a termination of the arbitration agreement by the other party.[125] The same potentially applies to a breach of a procedural order issued by the tribunal. That is because a breach of a procedural order can also be deemed a breach of the arbitration

122. Gary Born, *International Commercial Arbitration* § 5.04[A][3] and § 5.06[A][3] (3rd ed. Kluwer Law International 2021). Cf. further *Circuit City Stores v. Adams*, 279 F.3d 889, 892 (9th Cir. 2002); Christoph Müller, *Chapter 2, Part II: Commentary on Chapter 12 PILS*, in *Arbitration in Switzerland: The Practitioner's Guide*, Art. 178 PILS, para. 35 (Manuel Arroyo ed., 2nd ed. Kluwer Law International 2018) (Switzerland); *Zivilprozessordnung* § 1029 ZPO, para. 3 (Hans-Joachim Musielak & Wolfgang Voit eds, 19th ed. Verlag Franz Vahlen 2022) (Germany).
123. UNCITRAL Model Law (2006), Art. 16(1); Art. 178(3) PILS (Switzerland); Dutch Code of Civil Procedure, Art. 1053. Cf. further *Redfern and Hunter on International Arbitration*, paras 2.107 et seq. (Nigel Blackaby et al. eds., 7th ed., Oxford Univ. Press 2023).
124. Gary Born, International Commercial Arbitration § 5.06[D][6] (3rd ed. Kluwer Law International 2021); Daniel Girsberger & Nathalie Voser, *International Arbitration: Comparative and Swiss Perspectives*, para. 528 (4th ed. Schulthess Juristische Medien AG 2021); Lars Heuman, *Arbitration Law of Sweden: Practice and Procedure*, 125 et seq. (Juris Publishing 2003) (Sweden); *Münchener Kommentar zur ZPO* § 1029 ZPO, paras 153 et seq. (6th ed. C. H. Beck 2022) (Germany); *Zivilprozessordnung* § 1029 ZPO, para. 3 (Hans-Joachim Musielak & Wolfgang Voit eds, 19th ed. Verlag Franz Vahlen 2022).
125. Gary Born, *International Commercial Arbitration* § 5.06[D][6][b][iii] (3rd ed. Kluwer Law International 2021) (with further references to domestic law); Higher Regional Court of Munich, 10 SchiedsVZ 96, 99 (2012); Lars Heuman, *Arbitration Law of Sweden: Practice and Procedure* 125 et seq. (Juris Publishing 2003) (Sweden); Anders Relden & Jacob Frank, *International Arbitration in Sweden: A Practitioner's Guide* Chapter 4, para. 122 (Annette Magnusson et al. eds., 2nd ed. Kluwer Law International) (Sweden); *Münchener Kommentar zur ZPO* § 1029 ZPO, paras 156 (6th ed. C. H. Beck 2022) (Germany); Thomas Granier, *Unilateral Termination of an Arbitration Agreement by a Party after the Arbitration Has Commenced*, 45 Revista Brasileira de Arbitragem 108, 114 et seq. (2015) (Germany).

agreement. After all, by agreeing to arbitration, the parties generally also agree to abide by the tribunal's procedural orders.[126]

[B] Limited Scope for the Termination of the Arbitration Agreement

Whether the compliant party may indeed terminate the arbitration agreement in reaction to the other party's non-compliance will depend on the facts of the case and on the law applicable to the arbitration agreement.[127] It would go beyond the limitations of this chapter to conduct a comparative law study on how specific national contract laws regulate the potential termination of an arbitration agreement in case of non-compliance with procedural obligations. However, it would seem fair to say that, generally, the termination of the arbitration agreement should only be possible in very serious and exceptional cases.[128]

Typically, the general idea behind a termination in case of a breach of procedural obligations is that, due to the breach by the non-complying party, the complying party can no longer be reasonably required to abide by the arbitration agreement. However, that will only rarely be the case because arbitration rules and arbitration laws contain a wide variety of mechanisms to address party non-compliance. For example, and as mentioned above, the delayed submission of evidence may be addressed by striking such evidence from the record[129] or by taking the breach into account at the cost stage.[130] Moreover, and as explained above, the failure by a claimant to submit the statement of claim may allow the tribunal to terminate the arbitration by way of a

126. Cf. ICC Rules 2021, Art. 22(5); Swiss Arbitration Rules (2021), Art. 16.1; Guy Pendell & Juliette Huard-Bourgois, *Chapter 17: Rights and Duties of the Parties and Counsel*, in *Arbitration in England, with Chapters on Scotland and Ireland*, para. 17-50 (Julian D.M. Lew et al. eds, Kluwer Law International 2013); Nadia Smahi, *Due Process under the Swiss Rules of International Arbitration*, 38 ASA Bull. 930, 941 (2020) DOI: 10.54648/asab2020149.
127. The question of the law applicable to the arbitration agreement is an evergreen that has gained renewed attention with the 2020 decision of the UK Supreme Court in *Enka v. Chubb*. For a helpful overview of the current state of play in England and Sweden, cf. James Hope, Lisa Johansson, *What Is the Governing Law of the Arbitration Agreement? A Comparison Between the English and Swedish Approaches*, 3 Stockholm Arbitration Yearbook, 296 (Kluwer Law International 2022).
128. Gary Born, *International Commercial Arbitration* § 5.06[D][6][b][iii] (3rd ed. Kluwer Law International 2021); Daniel Girsberger & Nathalie Voser, *International Arbitration: Comparative and Swiss Perspectives*, para. 528 (4th ed. Schulthess Juristische Medien AG 2021); *Bulgarian Foreign Trade Bank Ltd. v. A.I. Trade Finance Inc.*, XXIVa Y.B. Comm. Arb. 321, para. 8 (Svea Court of Appeal, 1999) (Sweden); Lars Heuman, *Arbitration Law of Sweden: Practice and Procedure* 126 (Juris Publishing 2003) (Sweden); *Münchener Kommentar zur ZPO* § 1029 ZPO, paras. 154 (6th ed. C. H. Beck 2022) (Germany). Cf. also Thomas Granier, *Unilateral Termination of an Arbitration Agreement by a Party After the Arbitration has Commenced*, 45 Revista Brasileira de Arbitragem 108, 115 (2015) DOI: 10.54648/rba2015005.
129. Cf. Waincymer, *Procedure and Evidence in Arbitration* 822-824 (Kluwer Law International 2012).
130. Cf. ICC Rules (2021), Art. 38(5); SCC Rules (2023), Art. 49(6); LCIA Rules (2020), Art. 28(4); ICSID Arbitration Rules (2022), Rule 52(1) lit. b; Swiss Rules (2021), Art. 40; DIS Rules (2018), Art. 33.3.

termination order.[131] In light of such mechanisms, the complying party will generally not be allowed to terminate the arbitration agreement.[132]

Arguably, this even applies where the available mechanisms do not fully remedy a breach of procedural obligations. For example, if a party breaches a document production order by a tribunal, the tribunal will typically only be able to react by drawing adverse inferences.[133] However, the tribunal may not always be able to draw meaningful adverse inferences, given that it has been argued that an adverse reference requires that the tribunal be presented with separate prima facie evidence supporting the inference sought.[134] Against this background, the available mechanisms could arguably be deemed insufficient to react to the breach of the procedural obligation. Nonetheless, even in such a situation, the complying party should generally not be allowed to terminate the arbitration agreement. That is because, by agreeing to arbitration under a given set of rules, the parties must be deemed to have accepted that the mechanisms provided to address breaches of procedural obligations may sometimes be imperfect.

Against this background, a termination of the arbitration agreement should generally only be considered if (i) there is a breach of procedural obligations with a serious impact on the complying party; and (ii) the applicable rules do not allow to remedy this breach at all, or the available redress is entirely insufficient.

[C] Consequences of the Termination of the Arbitration Agreement

In case of a valid termination of the arbitration agreement, the tribunal no longer has jurisdiction to decide on the merits of the case. Accordingly, the tribunal has to issue an award declining jurisdiction, and it is impeded from rendering a decision on the merits. Thus, in this scenario, the claimant's claims are not dismissed on the merits and with prejudice. Rather, the claimant will still be able to pursue its claims in the future, just not before the incumbent tribunal.

A termination of the arbitration agreement also entails that the parties cannot initiate any new arbitration proceedings and that they instead have to turn to the courts to resolve their existing dispute or any future disputes. This may be a rather undesirable consequence for the complying party, as it may be satisfied with arbitration as

131. *See* §16.02[B] and §16.04[B].
132. Cf. Gary Born, *International Commercial Arbitration* § 5.06[D][6][b][iii] (3rd ed. Kluwer Law International 2021); Higher Regional Court of Munich, 10 SchiedsVZ 96, 100 (2012); Lars Heuman, *Arbitration Law of Sweden: Practice and Procedure* 125 et seq. (Juris Publishing 2003) (Sweden); Thomas Granier, *Unilateral Termination of an Arbitration Agreement by a Party After the Arbitration has Commenced*, 45 Revista Brasileira de Arbitragem 108, 115 (2015) DOI: 10.54648/rba2015005.
133. Cf. generally IBA Rules (2020), Art. 9.6 and 9.7; Jeffrey Waincymer, *Procedure and Evidence in Arbitration* 880-881 (Kluwer Law Intl 2012).
134. Cf. Jeremy K. Sharpe, *Drawing Adverse Inferences from the Non-production of Evidence*, 22 Arb. Intl 549, 550 (2006) DOI: 10.1093/arbitration/22.4.549; Markus Benzing, *Das Beweisrecht vor internationalen Gerichten und Schiedsgerichten in zwischenstaatlichen Streitigkeiten* 333 et seq. (Springer 2010).

such and may simply want the particular breach by the non-complying party addressed. Against this background, *Born* argues that, in most cases, termination should only be allowed with respect to the pending arbitration in which the breach has occurred and not with respect to the arbitration agreement in general (and thus with respect to future disputes).[135] Whether an arbitration agreement can indeed be 'split up' and only partially terminated in this sense will, however, depend on the law applicable to the arbitration agreement.

[D] The *Bulbank v. AIT* Case

In this context, it is worth revisiting a landmark Swedish case regarding the termination of an arbitration agreement due to an alleged breach of the duty of confidentiality. The case of *Bulbank v. AIT* stems from an arbitration initiated in 1996 under the Arbitration Rules of the United Nations Economic Commission for Europe and seated in Stockholm.[136] In the applicable contract and arbitration agreement, the parties had not provided for an express confidentiality obligation, and the Swedish Arbitration Act also did not expressly provide for the confidentiality of the arbitration.[137] During the course of the arbitration, the claimant AIT released a partial award rendered by the tribunal to an arbitration publication.[138] In response, the respondent Bulbank alleged that this constituted a fundamental breach of confidentiality and, thus, of the arbitration agreement, allowing Bulbank to declare the arbitration agreement avoided.[139] The tribunal, however, rejected the argument and subsequently rendered a final award in 1997.[140]

The respondent challenged the award, arguing that it had validly avoided the arbitration agreement.[141] In the first instance, the City Court of Stockholm accepted the argument. It concluded that, unless otherwise agreed by the parties, a confidentiality regime applied in arbitration proceedings under Swedish law, even in the absence of an express provision to this effect. It then held that the claimant had fundamentally

135. Gary Born, *International Commercial Arbitration* § 5.06[D][6][b][iii] (3rd ed. Kluwer Law International 2021).
136. *Bulgarian Foreign Trade Bank Ltd. v. A.I. Trade Finance Inc.*, XXIVa Y.B. Comm. Arb. 321 (Svea Court of Appeal, 1999). Cf. for background and a detailed overview of the arbitral and subsequent court proceedings Mark F. Rosenberg, *Chronicles of the Bullbank Case – The Rest of the Story*, 19 J. Intl Arb. 1 (2002) DOI: 10.54648/394171.
137. *Bulgarian Foreign Trade Bank Ltd. v. A.I. Trade Finance Inc.*, XXVI Y.B. Comm. Arb. 291, paras 4-5 (Swedish Supreme Court, 2001).
138. *Bulgarian Foreign Trade Bank Ltd. v. A.I. Trade Finance Inc.*, XXIVa Y.B. Comm. Arb. 321-322 (Svea Court of Appeal, 1999).
139. *Bulgarian Foreign Trade Bank Ltd. v. A.I. Trade Finance Inc.*, XXIVa Y.B. Comm. Arb. 321-323 (Svea Court of Appeal, 1999).
140. *Bulgarian Foreign Trade Bank Ltd. v. A.I. Trade Finance Inc.*, XXIVa Y.B. Comm. Arb. 321, 322 (Svea Court of Appeal, 1999).
141. *Bulgarian Foreign Trade Bank Ltd. v. A.I. Trade Finance Inc.*, XXIVa Y.B. Comm. Arb. 321, 322 (Svea Court of Appeal, 1999).

breached the arbitration agreement by breaching confidentiality and that this constituted valid grounds for the respondent to avoid the contract.[142]

The Svea Court of Appeal, however, reversed the City Court's decision.[143] It concluded that there was no general confidentiality obligation and that no implied agreement on confidentiality could be assumed.[144] However, it held that the passing on of information from the arbitration could breach a duty of loyalty, depending on the sensitivity of the information and the reasons for its publication, the extent to which the other party suffers damage by the publication, and the intention behind the publication.[145] Interestingly, the court expressly referred to another mechanism to address the breach of such duties, namely a claim for compensation, and argued that, in light of this remedy, the scope for avoidance of the arbitration agreement due to a fundamental breach was very limited.[146] On this basis, the Svea Court of Appeal concluded that there had been no fundamental breach which would have allowed the respondent to avoid the arbitration agreement.[147]

Finally, the Swedish Supreme Court held that a party in arbitration proceedings cannot be bound by a duty of confidentiality unless it concluded a separate agreement to this effect.[148] On this basis, the court held that there was no breach and that, accordingly, the respondent did not have grounds for avoiding the arbitration agreement.[149] As a result, the award survived the respondent's challenge.[150]

Although the Swedish Supreme Court ultimately did not weigh in on the question of the precise requirements for the termination of an arbitration agreement, the *Bulbank* case is quite illustrative. In particular, the Svea Court of Appeal's reasoning confirms that the scope for avoiding the arbitration agreement should be limited, in particular, because there are other remedies to address breaches of confidentiality (or, under the court's approach, breaches of the duty of loyalty). In this regard, the court had not even considered that tribunals may also order interim measures prohibiting the dissemination of confidential information.[151] Furthermore, and irrespective thereof, one may well wonder whether the termination of the arbitration agreement can be an

142. *Bulgarian Foreign Trade Bank Ltd. v. A.I. Trade Finance Inc.*, XXIVa Y.B. Comm. Arb. 321, 322-323 (Svea Court of Appeal, 1999).
143. *Bulgarian Foreign Trade Bank Ltd. v. A.I. Trade Finance Inc.*, XXIVa Y.B. Comm. Arb. 321, 324-327 (Svea Court of Appeal, 1999).
144. *Bulgarian Foreign Trade Bank Ltd. v. A.I. Trade Finance Inc.*, XXIVa Y.B. Comm. Arb. 321, para. 7 (Svea Court of Appeal, 1999).
145. *Bulgarian Foreign Trade Bank Ltd. v. A.I. Trade Finance Inc.*, XXIVa Y.B. Comm. Arb. 321, para. 7 (Svea Court of Appeal, 1999).
146. *Bulgarian Foreign Trade Bank Ltd. v. A.I. Trade Finance Inc.*, XXIVa Y.B. Comm. Arb. 321, para. 8 (Svea Court of Appeal, 1999).
147. *Bulgarian Foreign Trade Bank Ltd. v. A.I. Trade Finance Inc.*, XXIVa Y.B. Comm. Arb. 321, para. 9 (Svea Court of Appeal, 1999).
148. *Bulgarian Foreign Trade Bank Ltd. v. A.I. Trade Finance Inc.*, XXVI Y.B. Comm. Arb. 291, para. 21 (Swedish Supreme Court, 2001).
149. *Bulgarian Foreign Trade Bank Ltd. v. A.I. Trade Finance Inc.*, XXVI Y.B. Comm. Arb. 291, para. 21 (Swedish Supreme Court, 2001).
150. *Bulgarian Foreign Trade Bank Ltd. v. A.I. Trade Finance Inc.*, XXVI Y.B. Comm. Arb. 291, para. 21 (Swedish Supreme Court, 2001).
151. Ileana M. Smeureanu, *Confidentiality in International Commercial Arbitration* 174-179 (Kluwer Law International 2011). Cf. however Michael Hwang & Katie Chung, *Defining the*

appropriate remedy for a breach of confidentiality in the first place. After all, the consequence of a valid termination of the arbitration agreement would be that the parties must have their dispute decided in litigation, and thus without any confidentiality arrangement.[152]

§16.07 CONCLUSION

As the above analysis has shown, tribunals are only entitled to stay or terminate an arbitration due to a procedural violation in narrow and specific circumstances. Arbitration laws and arbitration rules rarely provide for a stay or termination in response to procedural breaches. Moreover, the scope for a stay or termination based on the general procedural powers of the tribunal is very limited. At the same time, and according to the prevailing view, the tribunal should only dismiss the claimant's claims with prejudice in the rare case that this is expressly allowed by the applicable legal framework.

These limitations on staying and terminating proceedings because of procedural violations are unsurprising, as the tribunal is principally required to move the procedure ahead and render a substantive decision. On top of that, there are usually other means through which the tribunal can ensure compliance. However, if the tribunal is faced with a situation in which it may principally stay or terminate the arbitration, it should take great care not to violate the party's (usually the claimant's) procedural rights. As such, it should grant sufficient opportunities for the parties to comment and for the violation to be remedied.

Finally, depending on the facts and the law applicable to the arbitration agreement, it may also be possible to terminate the arbitration agreement because of a procedural violation. In this case, the tribunal will have to render an award declining jurisdiction. This should, however, only be possible in exceptional cases.

Indefinable: Practical Problems of Confidentiality in Arbitration, 26 J. Intl Arb. 609, 641 (2009) DOI: 10.54648/joia2009034, who doubt the usefulness of this remedy.

152. Cf. Michael Hwang & Katie Chung, *Defining the Indefinable: Practical Problems of Confidentiality in Arbitration*, 26(5) J. Intl Arb. 609, 641 (2009) DOI: 10.54648/joia2009034.