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The "no show" absent respondents in International Arbitration

An emerging issue

Arbitration is based on an agreement and is a consensual process. However, it is not uncommon for a claimant to face a respondent who absents itself from the arbitration for various reasons; a deliberate decision to refuse to participate in the arbitration for tactical reasons or where it ceases to exist. The former is by no means a new development, but with a global pandemic and increasing company insolvencies, we are likely to see more and more instances of respondents refusing to participate in arbitrations.

Bearing in mind that the aim of the claimant is to achieve an enforceable award, what practical steps can it take to protect its position when faced with this refusal, what are the relevant considerations for a tribunal, and what impact can this have on enforceability of an award?

Practical Steps

There is no remedy available in arbitration equivalent to default judgment in court proceedings. The claimant is still expected to prove its case against a respondent. It can look to do so by documents alone or look at a more limited hearing. However, before that stage, the tribunal needs to be appointed and the required fees need to be paid. As one would expect, an absent respondent will not pay its share of the fees required by arbitral institutions and the claimant will be on the hook for both its share and that of the absent respondent.

The English Arbitration Act 1996 ("AA") provides for the default provisions for the appointment of an arbitrator where there is no response; (see s. 16-18). Similarly, the arbitration rules provide for default mechanisms; for example the LCIA¹ (Article 2), ICC² (Article 6), the UNCITRAL Rules (Article 4) and the LMAA.³ The failure to give proper notice of the appointment of an arbitrator is a recognised reason to refuse recognition and enforcement under

the terms of the New York Convention 1958. The claimant needs to get this aspect right.

Following the notification theme, the claimant needs to ensure it does its part in terms of notifying the absent respondent of the proceedings. This comes with an added cost of couriering documents and ensuring there are accurate and up-to-date written records kept of those communications. This responsibility continues for the duration of the proceedings. A "belt and braces" approach would be sensible.

With respect to evidence, the claimant ought to present its case as fully as possible whilst also addressing any potential defences to its case. This may seem odd, but the absence of a respondent does place a somewhat heavier burden on the claimant to demonstrate there has been due process.

The recent decision of *Duferco SA v CVG Ferrominera Orinoco CA*⁴ is analogous even though it is court proceedings and not arbitration. There the defendant failed to file an acknowledgment of service or defence. It was found that the defendant was properly served and was aware of the claim, but

¹ London Court of International Arbitration 2020 Rules

² International Chamber of Commerce 2021 Rules

³ London Maritime Arbitrators Association 2017 Rules

⁴ 2021 3 WLUK 104

declined the opportunity to defend. In order to obtain an enforceable judgment on the merits, the claimant sought leave for and was granted permission to seek summary judgment and was then required to advance and prove its case fully and address the potential defences available to the absent respondent.

Claimants will need to be patient as tribunals will still be expected to allow periods of time for the absent respondent to respond and/or serve pleadings. Although this may cause delays, it limits the scope for an absent respondent to argue (at the enforcement of an award stage) that it was denied the opportunity to present its case.

Beware of s. 72 of the AA which gives the absent respondent the right to challenge an award and to question, by court proceedings, the validity of the arbitration, the constitution of the tribunal, the nature of the matters submitted to arbitration and whether those matters were in keeping with the arbitration agreement.

The "*Dallah principle*" is a noteworthy reminder. The Supreme Court in *Dallah Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan*⁵ upheld the principle that a party who has taken no part in arbitration would be given the opportunity to challenge the tribunal's jurisdiction at the enforcement of the award stage, applying s. 72 of the AA. Hence, the claimant must continue to ensure throughout the proceedings that there has been due process to withstand such challenges.

Relevant Considerations for a Tribunal

Unless agreed otherwise, the arbitrators have an inherent power to continue the proceedings in the absence of the respondent. Section 41 of the AA provides:

"If without showing sufficient cause a party (a) fails to attend or be represented at an oral hearing of which due notice was given, or (b) where matters are to be dealt with in writing, fails after due notice to submit written evidence or make written submissions, the tribunal may continue the proceedings in the absence of that party or, as the case may be, without any written evidence or submissions on his behalf, and may make an award on the basis of the evidence before it".

Similar rules exist in other arbitral institutions as cited earlier in this article.

The key consideration for any tribunal is to ensure it publishes a valid and enforceable award when dealing with an absent respondent.

In 2016, the Chartered Institute of Arbitrators published guidance on "*Party Non-Participation*" for tribunals ("the CIArb Guidance"). It addresses scenarios where a party never takes any steps in an arbitration and where it has initially participated but ceases to do so at a later stage. According to the CIArb Guidance, at the outset, the tribunal should satisfy itself that:

- The claimant has a *prima facie* case.
- All parties are properly notified of the proceedings and that the non-participating party has no acceptable excuse for its non-participation.
- It has the required jurisdiction.
- All parties have been given a fair opportunity to present their case.
- It recites in any final award any efforts made to include the absent respondent in the proceedings.

In the "*Arctic Sunrise*",⁶ the respondent (Russia) did not participate in the arbitration brought by the Netherlands at any stage. It submitted no pleadings and failed to attend the hearing or pay any of the funds requested by the tribunal towards the cost of the arbitration. The proceedings were brought under the United Nations Convention on the Law of the Sea which did not prevent proceedings if there was non-participation by a respondent. The tribunal continued the proceedings but took the following key steps, which it cited in its award:

- Ensured that all communications and materials submitted in the arbitration were promptly delivered both electronically and physically to the respondent.
- Granted the respondent adequate time to submit responses to the written pleadings.
- Provided the respondent with adequate notice of procedural meetings and the hearing.
- Promptly provided the respondent with copies of recordings and/or transcripts of procedural meetings and the hearing.
- Reiterated the respondent's right to participate in the proceedings at any stage.

⁶ Arctic Sunrise arbitration (Neth. v. Russ), ITLOS Case No. 22, PCA Case No. 2014-02, Award on the Merits 14 August 2015 <https://pca-cpa.org/en/cases/21/>

⁵ [2010] UKSC 46

It was certainly acknowledged by the tribunal in its award that the respondent's non-participation made the tribunal's task more challenging than usual. We would agree that it is certainly a balancing act to ensure the arbitration proceeds in a timely manner whilst ensuring the absent respondent is afforded an opportunity to present its case at every stage of the proceedings.

Impact on Enforcement

Having spent significant sums on lawyers' and tribunal's fees, a successful claimant in an arbitration naturally wants to know that it has obtained a valid and enforceable award under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the New York Convention").

A common procedural ground for challenge is that the absent respondent did not have a "*reasonable opportunity*" to present its case. It is therefore imperative that the claimant and the tribunal take every possible step to ensure there is no basis for any such challenge. It would be sensible and good practice to adopt the principles outlined in the CI Arb Guidance and the *Arctic Sunrise*.

Conclusion

There is certainly no one size fits all approach. Useful tips for a claimant include:

- A no-show respondent is not an "open goal" by any stretch!
- A very cautious approach is required and a claimant must be mindful of all the procedural pitfalls created by a no-show respondent.
- The objective is to obtain an enforceable award "immune" from challenge. A futile award obtained at expense serves no claimant's interest.
- Always monitor the proceedings to ensure due process is met.
- Be mindful of the reason for the no-show; it may be tactical and deliberate. Complications may arise where the respondent is insolvent in a foreign jurisdiction or where the respondent ceases to exist as a legal entity.

Much will depend on the applicable arbitration rules and the jurisdiction in which the absent respondent is based. Whilst it may create procedural and cost headaches for the claimant, adopting the guidance set out in this article will help to ensure that any award obtained in its favour is valid and enforceable.

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