

## Alternative Dispute Resolution

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VOLUME 264—NO. 28

MONDAY, AUGUST 10, 2020

# How to Respond to Respondents' **Non-Participation** in International Arbitration

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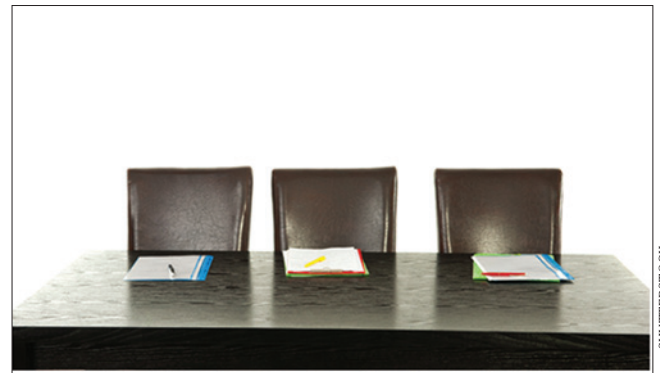
While there are no official statistics on respondent non-participation in international arbitration, institutional guidelines and anecdotal evidence suggest arbitrations without respondents are fairly common. As parties face higher risks of insolvency as well as trade and travel restrictions because of the pandemic, tribunals and claimants are increasingly likely to encounter issues related to a non-participating respondent in international arbitrations. The Chartered Institute of Arbitrators' Guidelines on Party Non-Participation (the "CIARB Guidelines") defines non-participation as when a party either does not take any steps in arbitration or initially participated but ceases to participate later in the process.

Proceeding with an arbitration without a respondent is, at first glance, con-

tradictory to the mutual consent principle of arbitration agreements. Unsurprisingly, neither institutional rules nor national arbitration laws allow for a default award similar to the default judgments possible in U.S. courts. However, all major institutional rules and national arbitration laws recognize that arbitral tribunals have the inherent power to carry out their adjudicatory function with or without the respondent—assuming the respondent has been duly notified of the arbitration and fails to show sufficient cause to excuse its non-participation.

Thus, an arbitration may generally proceed without the respondent, and the tribunal can issue a final award. That award is indistinguishable from and equal to any other "final award," and thus enforceable in the same way under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).

In cases with a non-participating respondent, tribunals must balance the constant tension between guaranteeing the non-participating respondent's due process rights – critical for



enforcement of any award under the New York Convention – and the need to move an arbitration forward, despite non-participation, in order to give the claimant the benefit of the arbitration agreement. For practitioners, navigating the issues that arise from a respondent's non-participation requires recognizing how these competing interests influence the arbitral process, understanding institutional rules affecting claimants, and addressing all the practical issues and challenges along with prospective solutions.

### Practical Guidelines for Claimants And Tribunals

Tribunals and claimants should address three main issues in an arbitration with non-participating respondents. First, tribunals and claimants must familiarize themselves with the

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relevant institutional rules and law of the arbitral seat to ensure the arbitration begins and proceeds properly. Second, tribunals and claimants must be mindful that the claimant's contentions are not automatically deemed admitted in cases of the respondent's non-participation. Instead, claimants will still need to prove their claims on a balance of probabilities to succeed on the merits of the claim.

Finally, when taking evidence, tribunals and claimants must consider the types of evidence that are appropriate for situations with respondent non-participation. Many other issues arise from arbitrations with non-participating respondents, but these three main issues are uniquely relevant to obtaining an enforceable final judgment. How to navigate each issue is discussed in turn below.

### **Proceeding With a Non-Participating Respondent**

Despite the fact that all major institutional rules allow claimants to proceed without respondent participation, there is no uniform rule identifying when the arbitration can proceed independently. Institutional rules generally require two issues to be resolved before continuing. First, the arbitral tribunal must be constituted and, second, arbitral costs must be paid. All institutional rules provide effective default mechanisms for when parties fail to agree on a sole arbitrator or a party fails to make an appointment. These default rules generally can be followed in cases of non-participating respondents. In regards to arbitral costs, while advances on costs are normally shared between parties, if a respondent is non-participating claimants will need to effect a substitute payment on behalf of

the non-participating respondents to proceed.

Once the tribunal is fully constituted and arbitral costs have been paid, the tribunal must address *ex parte* communications with the claimant. While *ex parte* communications should be avoided, claimants and tribunals need to communicate to effectively proceed, so an appropriate process is critical. CI Arb guidelines recommend records of all communications be sent to all parties, including the non-participating respondent. Tribunals must confirm that the non-participating respondent is properly notified of all steps of the arbitration, including: correspondence, procedural orders, directions, submissions, and all other communications between the claimant and the tribunal. Doing so, tribunals and claimants must

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navigate the relatively common lack of strict service requirements and ensure respondents receive proper notice and service of documents during the arbitration.

Additionally, CI Arb guidelines state that tribunals should always invite the respondent to participate at any point. Tribunals must consider any available excuses for a respondent's non-

participation, keep evidentiary records of all communications and notifications involving the respondent, and should include those records in the award. By thoroughly documenting communication with the non-participating respondent tribunals mitigate unintended opportunities for the respondent to challenge the final award or resist its enforcement.

Finally, tribunals are generally granted broad discretion as to when and how to proceed with an arbitration. Once the tribunal decides to continue with the arbitration, claimants should consider proposing a timetable or calendar, assuming the respondent continues not to participate in the proceedings, but also allowing for the respondent to enter the arbitration at any point. Institutional rules are generally silent with regard to specific time limits after the first answer to the request for or notice of arbitration. Therefore, tribunals and claimants should proceed with respondents' due process rights in mind. This means the respondent must be given a fair opportunity to participate and present its case before the arbitration can proceed without the respondent. In other words, non-participation is a respondent's choice, not the choice of a tribunal or claimant.

### **Satisfying the Burden of Proof**

The second issue practitioners face in arbitration with non-participating respondents is satisfying the correct burden of proof to succeed with the case. Unlike courts, tribunals cannot hold that a respondent admits to the claimant's assertions simply based on the fact that the respondent fails to participate. Complications arise from the lack of competing evidence a respondent would ordinarily produce.

Since any award rendered without a respondent is still a final award, the tribunal must outline the facts and basis for the decision in the same manner it would have if the respondent participated.

Ultimately, a claimant's evidence and submissions must be "well-founded in fact and law," to prove its claim on a balance of probabilities. This remains true whether or not the respondent participates, for the simple reason that claimants must be held to the same burden of proof for an award rendered without the respondent as they would be for a final award rendered with a participating respondent. While practitioners widely agree that the arbitral tribunal is not, and can under no circumstances, act as the non-participating respondent's *de facto* counsel, the application of this standard is largely unexplored.

The main challenge for claimants is to plead a case in the respondent's absence, and there are several questions a claimant should consider while proceeding:

- How detailed should the claimant's pleadings be?
- What type of evidence should the claimant submit?
- How much evidence is necessary?

Tribunals, on the other hand, may face difficulty effectively evaluating the facts and evidence claimants present while not unduly acting on behalf of non-participating respondents. Arbitrators should consider the following questions when engaging in a case with a non-participating respondent:

- How should a tribunal assess a claimant's written submissions?
- Can the tribunal request that a claimant submit additional facts and evidence?

- Can tribunals raise arguments that the respondent might have made had they participated?

The answers to these questions may vary by tribunal and depending on the relevant institutional rules and the law of the arbitral seat.

### Implications for Taking Evidence

The third main issue with non-participating respondents is how tribunals should consider evidence. Within international arbitration, documentary evidence is the strongest form of evidence and has a huge impact on the tribunal's decision. That said, claimants should convey a true and fair picture of their documentary evidence—despite the respondent's absence—because any inconsistencies or unexplained gaps are likely to hinder the claimant's case.

Furthermore, witness statements and expert reports become harder to use when a respondent does not participate. Since the practice of competing witness statements and party-appointed experts is based on the adversarial nature of the arbitration, witness statements and expert reports can arguably be seen as dysfunctional when a respondent fails to participate. Claimants cannot be expected to fill the role of an opposing counsel. And tribunals may in turn be wary to quickly find in favor of the claimant in cases too reliant on witness testimony or expert reports.

Hence, claimants should be aware that arbitral tribunals play a much more active role if there is a non-participating respondent than if there is an active respondent. While arbitral tribunals must refrain from cross-examining the claimant's witness, or otherwise act as the non-participating respondent's *de facto* counsel, tribunals can decide a hearing is necessary to make a decision on the merits. Some

commentators suggest tribunals take a "civil law approach" at a hearing and employ a "inquisitorial style of questioning."

Likewise, the role of independent, tribunal-appointed experts may become uniquely important in cases with a non-participating respondent, depending on claimant's submissions and the level of expertise needed to assess the claim's merits and expert report. Regardless of their legal training and background, claimants and arbitral tribunals should carefully weigh the pros and cons of party- and tribunal-appointed experts on a case-by-case basis.

### Conclusion

Although claimants cannot seek a default award in international arbitration like a default judgment in court, a respondent's non-participation does not prevent an arbitration from moving forward. However, claimants need to be mindful of the particular challenges presented in international arbitration with a non-participating respondent, including the need for a clear process for communication, the standards for burden of proof, and the ways in which evidence is considered.

If tribunals safeguard the due process rights of non-participating respondents from the outset until a final award is issued, the current arbitral practice allows tribunals and claimants to structure arbitrations in a cost- and time-efficient way. That said, tribunals and claimants should remember there is no "one-size-fits-all" approach to non-participating respondents and be mindful of the myriad practical issues raised in this article.