This article is from the American Review of International Arbitration (ARIA)
Vol 30 No. 4 © JurisNet, LLC 2019 www.arbitrationlaw.com

RESPONDENTS' NON-PARTICIPATION IN INTERNATIONAL ARBITRATION: A PRACTICAL ANALYSIS FOR CLAIMANTS AND TRIBUNALS

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ABSTRACT

This article explores practical ways of addressing respondents' non-participation in international arbitration. Neither institutional rules nor national arbitration laws generally allow for a default award that would be similar to a default judgment in court. Yet an arbitration may proceed without the respondent's participation, and tribunals are entitled to render awards in the respondent's absence. In analyzing the myriad issues that claimants and tribunals face in this situation, this article focuses on the tension that results from proceeding with the arbitration in the respondent's absence. On the one hand, tribunals must guarantee the due process rights of non-participating respondents—critical for enforcement of any award under the New York Convention; on the other hand, tribunals need to move an arbitration forward even in the case of non-participation to give claimants the benefit of the arbitration agreement. This article seeks to guide claimants and tribunals through the different stages of the arbitration process, while balancing these conflicting interests.

I. INTRODUCTION

A respondent's non-participation in international arbitration is a scenario unlikely to be foreseen when an arbitration agreement is drafted. Its occurrence is contradictory to the very nature of arbitration agreements, which are based on the principle of mutual consent. Yet, while most arbitral institutions do not keep statistics on respondents' non-participation, anecdotal evidence suggests that a respondent's non-participation happens more frequently than expected. The Chartered Institute of Arbitrators' Guidelines on Party Non-Participation (the CIArb Guidelines) describes non-participation as either a situation in which a party does not take any steps in arbitration, or a situation in which a party has initially participated, but ceases to participate later in the process.[1] The CIArb Guidelines

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[1] *See* CHARTERED INSTITUTE OF ARBITRATORS, *International Arbitration Practice Guideline 9 on Party Non-Participation*, Introduction (2016) *available at* https://www.ciarb.org/media/4204/guideline-9-party-non-participation-2015.pdf. Note that this article does not cover the issue of intermittent participation of respondents, nor does it cover the question of whether a respondent that failed to participate at the outset of the arbitration, but starts to participate at a later stage, can oblige the arbitral tribunal to resume the arbitration

note that "even though it is rare for a claimant, having commenced the arbitration, to fail to proceed with its claim, it does occasionally happen;" the "more common situation is for a respondent to fail to participate in the proceedings from the outset."[2] But what constitutes "non-participation" varies, and there are no universal rules across arbitral institutions and jurisdictions. With that lack of a bright-line definition, distinguishing a respondent's non-participation from the distinct concept of a defendant's "default" in a state/domestic court is even more important.

The CIArb Guidelines are intended as a resource for claimants and arbitrators, and outline the requirements and expectations applicable in cases in which the respondent has chosen not to participate. However, the CIArb Guidelines seek to set out the current best practice in international *commercial* arbitration.[3] While there are obvious and significant differences between state-to-state, investment, and commercial arbitrations, claimants and tribunals will ultimately face similar, if not identical, issues in the event of a respondent's non-participation across all three types of process.[4] Therefore, this article discusses respondent non-participation generally, without differentiating between commercial, investment, or state-to-state arbitrations, unless a particular rule or process requires it.

Additionally, this article avoids the language of "default" when referring to international arbitrations, because the processes around non-participation are wholly distinct from a defendant's lack of participation in a domestic court matter. While most domestic jurisdictions allow the courts to render a default judgment against a party that has failed to defend itself in court,[5] the same is not true in international arbitration. Neither institutional rules nor national arbitration laws allow for a default award similar to a default judgment in court.

Yet arbitral tribunals can render awards in the respondent's absence, and an arbitration can proceed without the respondent's participation. All major institutional rules and national arbitration laws recognize the inherent power of the arbitral tribunal to carry out its adjudicatory function, even in the absence of a duly

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ab initio. Arbitration literature suggests that the respondent cannot, which seems to be in line with most institutional rules. *See* Daniel E. Tunik, *Default Proceedings in International Commercial Arbitration*, 1(2) INT. A.L.R. 86 (1998).

[2] CIArb Guideline 9, *supra* note 1, Preamble.

[3] CIArb Guideline 9, *supra* note 1, Introduction.

[4] *Compare* issues of non-participation in state-to-state arbitrations discussed in Judith Levine & Garth L. Schofield, *Navigating Uncharted Procedural Waters in a Rising Sea of Cases at the Permanent Court of Arbitration*, in STRESS TESTING THE LAW OF THE SEA (Stephen Minas & H. Jordan Diamond eds., 2018); for issues of non-participation in investor-state arbitration, *see*, *e.g.*, the recent Crimea arbitrations in which Russia refused to participate — Russia seems to have changed strategy with regard to its non-participation in future Crimea-related arbitrations, *see* Sebastian Perry, *Russia challenges Crimea awards and changes strategy*, GLOBAL ARBITRATION REVIEW, Jun. 6, 2019, https://global arbitrationreview.com/article/1193767/russia-challenges-crimea-awards-and-changes-strategy.

[5] *See*, *e.g.*, FED. R. CIV. P. 55 (2015); N.Y. C.P.L.R. § 3215 (2019); CIVIL PROCEDURE RULES [CPR], Part 12(Eng.); ZIVILPROZESSORDNUNG [ZPO] [CODE OF CIVIL PROCEDURE] § 331 (Ger.) *et seq.*; CODE DE PROCEDURE CIVILE [C.P.C.] [CIVIL PROCEDURE CODE] Art. 472 (Fr.) *et seq.*

notified respondent that fails to show sufficient cause to excuse its non-participation.[6] If arbitral tribunals did not have this power, recalcitrant respondents would be able to sabotage international arbitrations as effective dispute resolution mechanisms simply by not responding to any arbitration they believe might be risky or by not responding to a complaint they are disinclined to answer. However, arbitral tribunals do not treat a respondent's non-participation as an admission of the claimant's allegations. Generally, the claimant will need to prove its claims on a balance of probabilities, regardless of whether the respondent participates or not.[7] For example, Article 1 of the CIArb Guidelines notes, "When faced with a non-participating party, before proceeding with the arbitration, arbitrators should satisfy themselves… that the claimant has a *prima facie* case and that all parties were properly notified of the proceedings."[8] Additionally, the CIArb Guidelines suggest that arbitrators "satisfy themselves" that the non-participating party does not have a valid excuse for its non-participation.[9] Thus, an award rendered in the absence of a respondent's participation is intended to be indistinguishable from and equal to any other "final award" and generally enforceable in the same way. The term "default award"—still frequently used for awards rendered in the absence of a respondent—seems ill-placed given its linguistic similarity to the term "default judgment," which is decided under significantly different rules and procedures.[10]

As is clear even in grounding this topic in common definitions, there is tension between the requirement to guarantee the due process rights of non-participating respondents, which is critical for the enforcement of any award under the New York Convention,[11] and the need to move an arbitration forward, even in the case of non-participation, to give claimants the benefit of the arbitration agreement. This article seeks to shed light on the most common issues claimants and arbitral tribunals may face and to suggest ways of addressing respondents' non-participation in international arbitration. Section II shows that major institutional rules provide an overall consistent approach to the conduct of arbitration proceedings in cases of the respondent's non-participation, as defined *supra* using the CIArb Guidelines. Section III presents myriad practical issues and challenges arising from a respondent's non-participation at various points of the arbitration and analyzes

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[6] *See*, *e.g.* ICC ARBITRATION RULES (2017), arts. 6(8), 26; LCIA ARBITRATION RULES (2014), art. 15.8; ICDR RULES (2014), art. 26(1) & (2); SIAC RULES (2016), arts. 20.9, 24.3; HKIAC RULES (2018), art. 26.2; UNCITRAL ARBITRATION RULES (2013), arts. 30(1)(b) & (2); ICSID ARBITRATION RULES (2006), art. 42; *see also* UNCITRAL MODEL LAW, art. 25.

[7] *Id.*; *see also* CIArb Guideline 9, *supra* note 1, Commentary on Art. 1(3)(b); GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION, Chapter 15: Procedures in International Arbitration, 2299 (2nd ed. 2014).

[8] CIArb Guideline 9, *supra* note 1, art. 1(1).

[9] *Id.*

[10] *See* JEFFREY WAINCYMER, PROCEDURE AND EVIDENCE IN INTERNATIONAL ARBITRATION, Part III: The Award, 1281 (2012).

[11] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 6, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter, "New York Convention"].

possible solutions under different scenarios, while considering the perspectives of both claimants and arbitrators.

II. A CONSISTENT APPROACH UNDER MAJOR INSTITUTIONAL RULES

All of the major institutional rules provide mechanisms for dealing with non-participating respondents, thus reflecting the principle that a party must be bound by its arbitration agreement. The consensual nature of the arbitration does not prevent an arbitration from proceeding in cases of the respondent's non-participation—on the contrary, this consent is the reason why international arbitration has proved able to deal with a party's non-participation. Under this approach, the major institutional arbitration rules grant tribunals significant procedural flexibility. However, this flexibility is limited by the tribunals' obligations to safeguard respondents' due process rights.

A. *Tribunals Have Great Procedural Flexibility Subject to Strict Notification Requirements Derived from Respondents' Due Process Rights*

Under all major institutional rules, claimants have the ability to proceed even if the respondent fails to participate.[12] While the language of the rules may differ on this issue, the general approach is the same. For example, Article 6(8) of the ICC Rules (2017) provides that: "If any of the parties refuses or fails to take part in the arbitration or any stage thereof, the arbitration *shall* proceed notwithstanding such refusal or failure." (emphasis added).

Similarly, Article 15.8 of the LCIA Arbitration Rules, removing the imperative language, provides:

> If the Respondent fails to submit a Statement of Defence or the Claimant a Statement of Defence to Cross-claim, or if at any time any party fails to avail itself of the opportunity to present its written case in the manner required under this Article 15 or otherwise by order of the Arbitral Tribunal, the Arbitral Tribunal *may* nevertheless proceed with the arbitration (with or without a hearing) and make one or more awards. (emphasis added).[13]

Notwithstanding any semantic differences, the claimant decides *whether* to proceed with the arbitration in the respondent's absence. In contrast, the tribunal is obliged to decide *when* to proceed with said arbitration, *i.e.* at which point the arbitration shall proceed independently from the participation of the respondent.

A similar approach is followed under national arbitration statutes. While older, domestically-generated arbitration laws like the United States' Federal Arbitration

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[12] For a brief overview of various institutional rules, *see infra,* Appendix at the end of the article

[13] LCIA Rules, *supra* note 6, art. 15.8.

Act (FAA) are silent on the issue of respondents' non-participation in international arbitration, the institutions' consistent approach is well reflected in modern arbitration laws that are based on the UNCITRAL Model Law.[14] Article 25 of the UNCITRAL Model Law states that: "Unless otherwise agreed by the parties, if, without showing sufficient cause… the respondent fails to communicate his statement of defence in accordance with article 23 (1), the arbitral tribunal *shall* continue the proceedings." (emphasis added).[15]

The aforementioned rules require that the arbitral tribunal have been already constituted, with certain arbitral costs already paid. The fact that the arbitration could not proceed without having resolved these two issues at least partially explains why provisions for the default appointment of arbitral tribunals and cost provisions are among the most detailed aspects of the majority of arbitral agreements. While the advance on costs is normally shared between the parties, in cases of the respondent's non-participation, the claimant will typically need to effect a substitute payment on behalf of said respondent for the arbitration to proceed.[16] Some institutional rules try to alleviate a claimant's burden by allowing the claimant to request that the tribunal issue a provisional measure or award for the reimbursement of unpaid deposits toward the costs of the arbitration.[17] On the default appointment of arbitrators, all institutional rules provide effective default mechanisms in the event that a party fails to make an appointment or the parties fail to agree on a sole arbitrator.[18] These default mechanisms are not altered in cases of the respondent's non-participation, and proceed similarly to how they would in any case where there is not a meeting of the minds between parties as to the composition of the arbitration panel.

Once the requisite costs are paid and the tribunal has been constituted, arbitration tribunals generally have significant leeway in choosing how to deal with a respondent's non-participation. The first practical issue arbitrators need to address is *ex parte* communication with the claimant. While *ex parte* communications with either party should generally be avoided, tribunals and claimants will undeniably need to communicate to proceed with the arbitration. The Commentary on Article 1(4) of the CIArb Guidelines provides some helpful guidance on *ex parte* communication in cases of the respondent's non-participation, and recommend, for example, that a written record of any communication between the claimant and the

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[14] *See*, *e.g.*, Arbitration Act, 1996, ch. 23 § 41(4) (Eng.), ZIVILPROZESSORDNUNG (CODE OF CIVIL PROCEDURE) [ZPO], § 1048 (2)-(4) (Ger.).

[15] UNCITRAL Model Law, *supra* 6, art. 25.

[16] *See*, *e.g.*, LCIA ARBITRATION RULES (2014), art. 24.4; JAMS INTERNATIONAL ARBITRATION RULES & PROCEDURE (2016), art. 36.3.

[17] *See*, *e.g.*, SIAC RULES (2016), art. 27(g); *see also* Wolfgang Kühn, *Defaulting Parties and Default Awards in International Arbitration*, *in* CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION: THE FORDHAM PAPERS 2014, 413-15 (Arthur W. Rovine ed., 2015).

[18] *See*, *e.g.*, ICC ARBITRATION RULES (2017), art. 12(3) & (4); ICDR INTERNATIONAL ARBITRATION RULES (2014), art. 12.3; SIAC RULES (2016), arts. 10.2 & 11.2.

tribunal be produced immediately after any such communication takes place.[19] This record of communication should then be sent to all parties, including the non-participating respondent.

Provided that the claimant wants to proceed with the arbitration without the engagement of the respondent, the tribunal is obliged to decide *when* to proceed with the arbitration. Here, the practical issue for arbitrators is that institutional rules typically do not contain strict definitions of what constitutes "non-participation" at different steps of the arbitration. Likewise, most institutional rules do not provide any time limits requiring the tribunal to proceed at various steps of the arbitration in cases of the respondent's non-participation. When combined with the generous procedural flexibility granted to arbitral tribunals, the absence of rigid rules in such cases might seem to lead to ambiguity. Given the absence of default awards in international arbitration, however, this very lack of constraint is an intentional lacuna aimed at empowering arbitral tribunals to make informed case-by-case decisions, rather than a shortcoming of institutional rules. The preservation of tribunals' power to make the best decision in the individual case circumstance takes precedence over the certainty provided by a hypothetical set of strict rules of procedure that determine how tribunals must react when faced with respondent non-participation. Therefore, the very ambiguity is essential to ensuring that tribunals have the power to make the correct choices for an arbitration's unique needs and context.

In contrast to all other major institutional rules, the ICSID Rules are more detailed on some of these points and can provide tribunals with a starting point for appropriate procedure and time limits. Article 42(2) of the ICSID Rules provides:

> Unless [the Tribunal] is satisfied that that party does not intend to appear or to present its case in the proceeding, it shall, at the same time, grant a period of grace and to this end: (a) if that party had failed to file a pleading or any other instrument within the time limit fixed therefor, fix a new time limit for its filing; or (b) if that party had failed to appear or present its case at a hearing, fix a new date for the hearing. The period of grace shall not, without the consent of the other party, exceed 60 days.[20]

Irrespective of the time limit that the tribunal considers appropriate in a specific case, tribunals must, prior to proceeding with the arbitration, ascertain that the non-participating respondent has been properly notified of all steps of the arbitration, including correspondence, procedural orders, directions, submissions, and all other communication between the claimant and the tribunal.[21] This notification requirement is derived from the non-participating respondent's due process rights

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[19] CIArb Guideline 9, *supra* note 1, Commentary on Art. 1(4).

[20] ICSID Rules of Procedure for Arbitration Proceedings (Arbitration Rules), ICSID (2006), Rule 42(2) [hereinafter, "ICSID Rules"].

[21] CIArb Guideline 9, *supra* note 1, arts. 1(1), (3)-(5).

—therefore, failure to properly notify the non-participating respondent of any step of the proceedings is likely to render the award unenforceable pursuant to Article V(1)(b) of the New York Convention.[22] Failure to keep evidentiary records of proper notice or notification attempts can provide respondents with a likely unintended opportunity to challenge the final award or to resist its enforcement.[23] The tribunal's obligation to notify a non-participating respondent does not end after the respondent has been notified of claimant's request for arbitration or statement of claim, and instead continues until after the final award.[24]

Unlike in court proceedings, neither institutional rules nor domestic arbitration laws generally prescribe strict requirements for service of documents on a party. Due to this lack of specificity, some commentators recommend that if tribunals are doubtful about whether the non-participating respondent was given proper notice, they should comply with the service requirements of the arbitral seat or states of potential enforcement.[25] Moreover, the CIArb Guidelines note that when notifying a non-participating respondent, tribunals should always invite the respondent to participate at any point of the arbitration.[26] In the same spirit, it is widely accepted that tribunals must consider any available excuses for a respondent's non-participation.[27] Finally, tribunals are advised to not only keep evidentiary records of all notifications or failed notification attempts, but also to document these steps in the award itself.[28]

B. *Claimants Must Prove Their Claims on a Balance of Probabilities*

Once the non-participating respondent has been given proper notice of the arbitration, the question arises as to whether tribunals need to determine their jurisdiction *ex officio*. With the exception of Article 42(4) of the ICSID Rules, major institutional rules do not expressly require tribunals to determine their jurisdiction *ex officio* if respondents fail to participate.[29] There is, however, wide consensus

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[22] New York Convention, *supra* note 11, art. V(1)(b) ("Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that... (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case.").

[23] On the importance of keeping evidentiary records, Kühn, *supra* note 17, at 407-410.

[24] CIArb Guideline 9, *supra* note 1, art. 1(5).

[25] Kühn, *supra* note 17, at 407; *see also* CIArb Guideline 9, *supra* note 1, Commentary on arts. 1(4)(a) & (b) (providing further helpful guidance on the issue of proper notification of the non-participating party).

[26] CIArb Guideline 9, *supra* note 1, art. 1(4); BORN, *supra* note 7, at 2298.

[27] CIArb Guideline 9, *supra* note 1, art. 1(1).

[28] CIArb Guideline 9, *supra* note 1, art. 1(5); *see also* NIGEL BLACKABY ET AL., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION, 512 (6th ed. 2015).

[29] ICSID Rules, *supra* note 20, art. 42(4).

among arbitration practitioners that tribunals should do so, notwithstanding the absence of express provisions to this effect.[30]

With regard to the merits of the claim, the standard that claimants must meet is well-established under major institutional rules and in current practice, and does not change in the absence of substantive participation from a respondent.[31] As a general principle, tribunals cannot deem that a non-participating respondent is admitting a claimant's assertions simply through that respondent's non-participation.[32] Among the major institutional rules, Article 30(1)(b) of the UNCITRAL Rules contains what could be considered the most clear and explicit formulation of that principle: "If… [t]he respondent has failed to communicate its response to the notice of arbitration or its statement of defence, the arbitral tribunal shall order that the proceedings continue, without treating such failure in itself as an admission of the claimant's allegations."[33]

The mere fact that the respondent does not participate in an international arbitration cannot be treated as an admission of a claimant's claims. Consequently, major institutional rules state that the tribunal may make the award on the evidence and submissions before it.[34] Commentators disagree on the exact nature of a tribunal's duty with regard to the merits in cases of the respondent's non-participation, and speak of a "[d]uty to critically assess the facts and evidence brought by the appearing party"[35] or of the responsibility "[of] evaluating the evidence and arguments presented to it and making a reasoned decision."[36] Ultimately, the tribunal must be satisfied that a claimant's claims are "well-founded in fact and in law,"[37] a standard derived from Article 42 of the ICSID Rules.[38] International arbitration practitioners commonly make reference to this standard

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[30] CIArb Guideline 9, *supra* note 1, art. 1(2); *see* WAINCYMER, *supra* note 10*,* at 1281.

[31] *Cf.* Appendix, *infra*.

[32] *See*, *e.g.*, CIArb Guideline 9, *supra* note 1, Commentary on Art. 1(3); BORN, *supra* note 7, at 2298. Note that according to an older minority opinion, assertions should be deemed acknowledged by the "defaulting" party, *unless* there are serious reasons to doubt their accuracy: *see* Tunik, *supra* note 1, at 89 (citing Werner Wenger, *Säumnis und Säumnisfolgen im internationalen Schiedsverfahren*, *in* RECUEIL DES TRAVAUX SUISSES SUR L'ARBITRAGE INTERNATIONAL 245, 251-52 (Claude Reymond & Eugène Bucher eds., 1984)).

[33] Article 30(1)(b) of the UNCITRAL RULES mirrors Article 25 of the UNICTRAL MODEL LAW.

[34] *See*, *e.g.*, ICDR RULES (2014), art. 26(3); HKIAC RULES (2018), art. 26.3; SIAC RULES (2016), art. 24.3; JAMS RULES (2016), *supra* note 16, art. 28.2.

[35] Tunik, *supra* note 1, at 88-89.

[36] BORN, *supra* note 7, at 2298.

[37] *See*, *e.g.*, CIArb Guideline 9, *supra* note 1, Commentary on Art. 1(3)(b); BORN, *supra* note 7, at 2299; *see also* Russell Thirgood & Erika Williams, *The Non-Responsive Respondent: Taking an Arbitration Forward and How*, 85(1) ARBITRATION 65, 73 (2019).

[38] ICSID Rules, *supra* note 20, art. 42(4) ("The Tribunal shall examine the jurisdiction of the Centre and its own competence in the dispute and, if it is satisfied, decide whether the submissions made are well-founded in fact and in law.").

instead of the "balance of probabilities" standard in case of non-participation.[39] Regardless, one should consider both standards to be equivalents, for the simple reason that claimants must be held to the same burden of proof in order for an award rendered in the absence of a respondent to be considered equal to any other "final award." Thus, a tribunal's principal duty is to decide whether the claimant has proved its claims on a balance of probabilities based on the evidence and submissions before the tribunal, just as if the respondent had participated in the arbitration.

Commentators and arbitration practitioners widely agree that the arbitral tribunal is not, and cannot, act as the non-participating respondent's counsel.[40] In line with this principle, the claimant does not need to argue affirmative defenses that the non-participating respondent could have raised.[41] Likewise, most commentators agree that the tribunal should rule against a non-participating respondent on questions of fact for which the latter bears the burden of proof.[42]

Any award rendered in the absence of the respondent is fundamentally a final award, and the arbitral tribunal has to "set[] forth the facts and the basis for [the] decision in the same manner that an award in a contested proceeding would be rendered."[43] These awards should be treated exactly like a standard arbitration award is treated in a matter in which both parties actively participated. The only difference made by respondent non-participation is that the facts and evidence on which the arbitral tribunal can base its decision are generally limited to what the claimant has submitted to it. Notwithstanding these principles, the question of how to apply the "well-founded in fact and in law" standard in practice remains largely unexplored.

Tribunals and claimants are confronted with two overarching issues in cases of the respondent's non-participation, both of which are discussed in Section III. For the arbitral tribunal, the challenge is to find the aforementioned fine line between evaluating the facts and evidence presented to it while being sure not to *unduly* put itself in the shoes of non-participating respondents—*unduly*, here, meaning the tribunal is acting (maybe unconsciously) as the respondent's *de facto* counsel. As for the claimant, the challenge must be to plead its case in the most favorable way possible without coming across as unfair, unreasonable, or, at the worst, implausible, in the respondent's absence.

III. NO "ONE-SIZE-FITS-ALL" SOLUTIONS: PRACTICAL GUIDELINES FOR CLAIMANTS AND TRIBUNALS

A myriad of unresolved practical issues and challenges arise from respondents' non-participation at various points of the arbitration. One preliminary procedural issue that claimants and tribunals frequently encounter is the question of how to

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[39] *See*, *e.g.*, CIArb Guideline 9, *supra* note 1, Commentary on Art. 1(3)(b); BORN, *supra* note 7, at 2314; *see also* Russell Thirgood & Erika Williams, *The Non-Responsive Respondent: Taking an Arbitration Forward and How*, 85(1) ARBITRATION 65, 73 (2019).

[40] *See*, *e.g.*, Tunik, *supra* note 1, at 88.

[41] *See*, *e.g.*, BORN, *supra* note 7, at 2299.

[42] *See*, *e.g.*, CIArb Guideline 9, *supra* note 1, Commentary on Art. 1(3).

[43] BORN, *supra* note 7, at 2299.

conduct the arbitration in a time-effective manner without jeopardizing the due process rights of the non-participating respondent. A second issue concerns the practical application of the "well-founded in fact and in law" standard in cases of the respondent's non-participation, and a third challenge relates to the implications of the respondent's non-participation on the submission and taking of evidence.

A. *Balancing Claimants' Interest in an Early Determination of Their Claims and Respondents' Due Process Rights*

One cannot overstate the importance of guaranteeing the non-participating respondent's due process rights. In the absence of the necessary procedural safeguards, any final award will likely be unenforceable pursuant to Article V(1)(b) of the New York Convention.[44] On the other hand, the claimant in such cases has a competing yet clear and legitimate interest in proceeding with the arbitration in an efficient and cost-effective manner.

While it is the tribunal's duty to safeguard the non-participating respondent's due process rights, the claimant must be aware of and sensitive to the respondent's rights in the process for the case to move forward successfully. Against this background of conflicting interests, this article addresses the following two practical issues: the challenges that arise from the absence of a clear definition of "non-participation" in international arbitration (specifically how that lack of a clear definition impacts the arbitral tribunal's decision regarding when to proceed with the arbitration at various steps of the proceedings), and the circumstances in which the tribunal should hold a hearing when the respondent is non-participating.

1. How Long Must the Tribunal Wait before Proceeding with the Arbitration?

Institutional rules typically do not require tribunals to proceed with the arbitration after a certain period of non-participation, or after a certain period of disengagement from a process that originally the respondent had engaged. First, the term "non-participation" implies that the respondent must have been given a fair opportunity to participate and present its case before the arbitration proceeded without the respondent. The concept of non-participation requires that it be a choice on behalf of the respondent, and in the event of an excuse (for example, lack of proper notice), it would be improper to term the respondent as "non-participant" in the arbitration. Consequently, the claimant and the tribunal can only proceed with the arbitration if the respondent has been duly notified of claimant's initiation of arbitration; the submitted statement of claim; and any other submissions and communications shared among the claimant, the tribunal, and (when applicable) the arbitral institution.[45]

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[44] New York Convention, *supra* note 11, art. V(1)(b).

[45] CIArb Guideline 9, *supra* note 1, Commentary on Art. 1(4)(a) & (b).

Once the respondent has been duly notified of the claimant's request for or notice of arbitration, institutional rules usually provide a time limit of 30 days from the receipt of the request for/notice of arbitration during which the respondent is obligated to respond.[46] For situations in which the respondent has failed from the outset to engage with the request for/notice of arbitration and the arbitral tribunal is constituted without the respondent's participation, claimants should consider the merits of proposing a timetable or calendar to their tribunal suggesting potential timelines and limits assuming the respondent continues not to participate in the proceedings. Any such timetable must guarantee the respondent's right to enter into the arbitration and present its case at any time until the final award. Timetables cannot skip steps of the arbitration process due to the respondent's non-participation to allow the respondent to choose to enter at any given step. Therefore, all deadlines proposed by the claimant should take into account the foreign nature of the arbitration, including the risk of lengthy service of submissions and other documents, depending on the countries involved. If the claimant does not proactively propose such a timeline, the arbitral tribunal should invite the claimant to do so for cases in which this type of action would be appropriate.

With the exception of the respondent's first answer to a claimant's request for/notice of arbitration, institutional rules are generally silent with regard to specific time limits, especially in cases of the respondent's non-participation. Notably, the ICSID Rules are different in this respect from other major institutional rules. Article 42(2) of the ICSID Rules provides for a "period of grace" not exceeding 60 days within which non-participating respondents are granted an additional opportunity to file their defense or appear at a hearing:

> (2) The Tribunal … shall … grant a period of grace and to this end:
> if that party had failed to file a pleading or any other instrument within the time limit fixed therefor, fix a new time limit for its filing; or
> if that party had failed to appear or present its case at a hearing, fix a new date for the hearing. The period of grace shall not, without the consent of the other party, exceed 60 days.[47]

Unlike the ICSID Rules, major institutional rules sometimes contain general and extremely flexible provisions regarding time limits for further written submissions. These provisions are not specifically tailored to cases of non-participation and are intended to generally encourage time- and cost-efficiency across all arbitrations. For example, Article 25 of the UNCITRAL Rules states that the tribunal should not grant periods of time exceeding 45 days for the submission of written submissions to the tribunal.[48]

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[46] *See*, *e.g.*, ICC Arbitration Rules (2017), art. 5(1); ICDR Arbitration Rules (2014), art. 3(1); UNCITRAL Arbitration Rules (2013), art. 4(1).

[47] ICSID Rules, *supra* note 20, art. 42(2).

[48] *See also* HKIAC Arbitration Rules (2018), *supra* note 6, art. 21.1.

Although the 45-day time limit for written submissions can offer tribunals and claimants some guidance in this respect, such a limit might not be appropriate to each case. In particular, cases in which the respondent has failed to participate from the outset or has expressed a clear and unambiguous intent to not participate in the arbitration might require claimants to be creative in their calendaring. To ensure the arbitration has a clear timeline for moving forward in cases of clear non-participation, the claimant may propose that the arbitral tribunal set two distinct deadlines to progress on such matters. First, tribunals should consider giving the respondent a clear, short-term deadline within which the respondent is only required to notify the tribunal of its intent to defend itself against the claims brought by the opposing side (i.e., the claimant). If the respondent indicates a willingness to move from a position of non-participation to active engagement with the arbitration, a second, lengthier deadline for the substantive preparation and submission of the statement of defense and other written submissions will be necessary. Absent institutional rules or national arbitration laws providing something different, this second deadline could then mimic the 45-day time limit suggested in the UNCITRAL rules. Alternatively, if the respondent does not indicate a willingness to participate before the expiration of that first deadline, it might behoove the tribunal to move the matter into its next stage without allowing additional time for the respondent to involve itself.

The CIArb Guidelines provide additional guidance for situations in which the respondent had a short initial appearance in the arbitration but failed to participate at a later stage. In that situation, the tribunal would likely fix a standard time limit for the respondent's written submission. If a respondent fails to file its submissions within the specified time, the CIArb Guidelines recommend that the tribunal ask the respondent for an explanation as to why the deadline was not met and also ask whether the respondent intends to participate going forward, and warn the respondent that the arbitration will proceed despite non-participation.[49] If the respondent fails to respond to the tribunal's letter, the tribunal may consider adjusting the procedural timetable by introducing the aforementioned two-deadline mechanism (or the claimant may request that the tribunal examine the merits of doing so).

2. In Which Cases Should the Tribunal Hold a Hearing?

In international arbitration, tribunals are generally granted broad discretion to decide whether to hold a hearing, subject to each party's right to request a hearing. The right to request a hearing is intuitively derived from each party's right to be heard, and is therefore directly tied to the concept of procedural justice and due process.[50] Thus, with the exception of Article 15.8 of the LCIA Rules, which explicitly allows the tribunal to proceed with or without a hearing, institutional rules

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[49] CIArb Guideline 9, *supra* note 1, Commentary on Art. 3.

[50] *See supra,* note 6, ICC Arbitration Rules (2017), art. 25(6); HKIAC Arbitration Rules (2018), art. 22.4; ICDR Arbitration Rules (2014), art. 1(4), art. E-8.

granting the tribunal discretion with regard to this issue are generally not specific to cases of the respondent's non-participation.[51]

The only circumstance in which a tribunal must hold a hearing and therefore must invite the respondent regardless of previous participation in the arbitration is where the claimant requests a hearing. In this case, the tribunal must invite the respondent regardless of whether the latter has participated at some point of the arbitration, never participated, or clearly and unambiguously refused to participate. In all other circumstances, arbitral institutions typically do not prescribe a rule that says the arbitral tribunal must hold a hearing before making an award.

Because there are no default proceedings in international arbitration, whether a hearing is necessary in a particular case depends on the evidence and submissions presented by the claimant. For instance, tribunals may decide not to hold a hearing if they conclude that the claimant has proved its claim on a balance of probabilities based on its written submissions or that the claimant does not have a claim regardless of the outcome of a hearing. On the other hand, if the evidence and submissions presented by the claimant show inconsistencies or unexplained gaps, the tribunal may deem that a hearing is necessary. Similarly, if the claimant's case rests on the credibility of its witnesses and/or experts, the tribunal should generally test the statements made in the witness statements or expert reports submitted by the claimant through an in-person hearing. As a point of clarification, however, the mere fact that a case is complex in and of itself is not enough to require that a tribunal conduct a hearing.

Tribunals may be tempted to schedule a hearing "in order to dispel any later impression that the tribunal accepted the claimant's case without testing the evidence and reaching an independent conclusion."[52] However, holding a hearing should not become automatic in cases of the respondent's non-participation—such hearings would not contribute to time- and cost-efficient resolutions of arbitrations, nor would they guarantee the respondents' due process rights *per se*. A hearing is only truly required if the tribunal considers it necessary to test the evidence submitted to it. Consequently, most arbitration practitioners and commentators agree that a hearing is not automatically required in cases of the respondent's non-participation and should not be scheduled automatically without considering the circumstances of the case and the status of the evidence and/or expert submissions.[53] In other words, the mere non-participation and absence of the respondent does not oblige the tribunal to hold a hearing, and it should not result in an automatic calendaring of a hearing.

In such cases, a brief statement by the tribunal in the final award explaining why it did not hold a hearing should be sufficient. As discussed, explicit protection of due process rights of non-participating respondents is essential to preempt any

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[51] LCIA Rules, *supra* note 6, Art. 15.8.

[52] Kühn, *supra* note 17, at 411.

[53] *See*, *e.g.*, BLACKABY ET AL., *supra* note 28, at 411; BORN, *supra* note 7, 2299; Judith Butchers & Philip Kimbrough, *The Arbitral Tribunal's Role in Default Proceedings*, 22 ARB. INT'L 233, 241 (2006).

later allegations of unfair play by the respondents, and to dispel any doubts regarding the enforcement of the tribunal's assessment of the merits of the claim by national domestic courts. Explanations of this type will naturally follow from the tribunal's reasoning and assessment of the evidence. In such cases, the tribunal should inform the non-participating respondent of its intention to make a final award based on the written submissions.[54]

In contrast, if a tribunal decides to hold a hearing in the absence of a respondent, the tribunal should make certain that immediately following this hearing, a verbatim transcript of the proceedings is sent to the non-participating respondent.[55] In addition, both parties should be given the opportunity to submit post-hearing briefs regardless of their presence at or participation in the hearing itself.

B. *Application of the "Well-Founded in Fact and in Law" Standard in Case of Non-Participation*

In cases of the respondent's non-participation, the claimant must prove its claims on a balance of probabilities just as if the respondent had participated in the arbitration. This standard, oftentimes referred to as "well-founded in law and in fact," is more difficult to apply in a one-sided matter than in adversarial proceedings and raises several issues that are addressed in the following section.

Because the claimant expects the non-participating respondent not to reply to its written submissions, the first question that arises is how detailed the claimant's pleadings should be, and in particular how much and which type of evidence the claimant should submit. Once the claimant has presented its case, two important issues arise for the arbitral tribunal at this stage. The first issue concerns the role of the tribunal in assessing a claimant's written submissions, as well as the tribunal's communication with the claimant after the latter has submitted its statement of claim and supporting evidence. The second issue, which is likely also the most challenging and controversial, is whether tribunals can raise arguments that the respondent might have made had it participated, even though the respondent has been absent from the matter.

1. How Much and Which Type of Evidence Should the Claimant Present?

The claimant must prove its claims on a balance of probabilities, which means that the claimant only needs to submit enough facts and arguments to found its claims. Both the claimant and its counsel are held to state the facts truthfully and must not omit certain key facts and evidence without which the facts and evidence *presented* to the tribunal would become untrue. However, while the claimant is certainly entitled to tell its side of the story as if the respondent had participated, the claimant is advised to give the arbitrators the justified impression that it is putting all cards on the table and is presenting its case in a fair manner. From a strategic

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[54] *See* CIArb Guideline 9, *supra* note 1, Commentary on Art. 1(5).

[55] CIArb Guideline 9, *supra* note 1, Commentary on Art. 1(4)(c).

point of view, it may even be advisable to submit more facts and evidence than strictly necessary to prove its claim on a balance of probabilities. Finding the right balance between presenting enough evidence and too little is case-specific and can be challenging.

Still, the claimant should not be worse off than it would have been had the respondent participated. Therefore, the claimant should under no circumstances be required to address points or make arguments that the non-participating respondent could have made. Anything less would not only contradict the adversarial nature of the arbitration, but also privilege the non-participating respondent.

Claimants may also face significant difficulty in presenting enough evidence to prove their case on a balance of probabilities in the event of respondent non-participation. This is especially true for cases in which the claimant planned to rely on documents they believed in the hands of the other side. The IBA Rules on the Taking of Evidence in International Arbitration set out the current best practice of the production of documents that are in the possession, custody, or control of the non-participating respondent.[56] Article 9 of the IBA Rules provides that if respondents fail without satisfactory explanation to produce documents or make available any other relevant evidence requested by claimants, tribunals may infer that such documents or evidence would be adverse to the interests of the non-complying respondent.[57] In case of the respondent's non-participation, the arbitral tribunal faces a dilemma: it needs to apply these rules even though the respondent never took part in the discovery phase of the arbitration. In addition, tribunals are typically conservative and avoid drawing adverse inferences easily, given the risk of violating or being seen as violating the non-participating respondent's due process rights.

The application of Article 9(5) and (6) of the IBA Rules in cases of respondent's non-participation appears inconsistent with the arbitral tribunal's obligation to safeguard the non-participating respondent's due process rights.[58] Therefore, generally, claimants should not be allowed to take advantage of the respondent's non-participation by asking the arbitral tribunal to draw adverse inferences from the requested documents. This statement is true with the obvious exception of situations in which the claimant can show the existence of a specific document in the possession, custody, or control of the other party that allows for an adverse inference in the specific case.

2. What Is the Role of the Tribunal Once the Claimant Has Submitted Facts and Evidence?

The arbitral tribunal cannot simply accept the uncontested evidence submitted by the claimant as true but must carefully examine all of the claimant's

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[56] *See* IBA RULES ON THE TAKING OF EVIDENCE IN INT'L ARBITRATION (2010).

[57] *See* IBA RULES ON THE TAKING OF EVIDENCE IN INT'L ARBITRATION (2010), Art. 9(5) & (6).

[58] *Id.*

contentions.[59] In other words, the claimant's contentions are not automatically deemed admitted in cases of the respondent's non-participation. Instead, the tribunal must ultimately decide how much weight it will give to the evidence presented, and whether the claimant has proved its claims on a balance of probabilities. However, because the tribunal's only duty is to evaluate the evidence and arguments *presented to it*,[60] tribunals are generally advised to refrain from investigating the facts on their own, even when they do not benefit from an adversarial party providing its side of the story. Having said this, should the tribunal intend to rely on any private research or experience, it is advised to communicate its intent to do so to all members of the arbitration and to invite both parties to comment beforehand.[61]

Finally, the tribunal must reach a decision on whether the law supports the claims brought by the claimant. Notwithstanding differing views on the implementation of the principle *jura novit curia* in international arbitration, arbitration practitioners and commentators generally agree that a claimant's case must be "well-founded in fact and ***in law***."[62] Accordingly, the arbitral tribunal is not bound by the conclusions of law the claimant has reached in its submissions, including the claimant's interpretation and application of relevant case law. Whether and to which extent tribunals are entitled to engage in an independent examination of the legal issues and conduct their own legal research is admittedly more controversial. The widely accepted "well-founded in fact and in law" standard suggests at least that tribunals are entitled to undertake an independent examination of the legal issues presented by the claimant and are not confined to the legal materials submitted by the latter.[63] Prohibiting the tribunal from undertaking independent legal research would enable the claimant to effectively and unilaterally determine the legal grounds of the final award, which is an obviously unacceptable outcome. Therefore, just because a claimant argues that a set of facts lead naturally to a certain conclusion of law does not mean the tribunal is bound by that argument or even that the argument will be represented in the judgment, regardless of the tribunal's assessment of the facts.

3. Can the Tribunal Request that a Claimant Submit Additional Facts and Evidence?

The tribunal is obligated to give the claimant a fair opportunity to present its case.[64] Because of the limited adversarial aspect of the arbitration in cases of the respondent's non-participation, the claimant may—inadvertently or not—submit too little evidence that is insufficient to prove the claims in the eyes of the arbitrators. To avoid the risk of depriving the claimant of a fair chance to present its case and in the interest of full disclosure, the arbitral tribunal is advised to not

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[59] *See* CIArb Guideline 9, *supra* note 1, Commentary on Art. 1(3).

[60] *See*, *e.g.*, BORN, *supra* note 7, at 2298.

[61] Butchers & Kimbrough, *supra* note 53, at 240.

[62] ICSID Rules, *supra* note 20, Art. 42(4).

[63] *See* Butchers & Kimbrough, *supra* note 53, at 239.

[64] *See* CIArb Guideline 9, *supra* note 1, art. 1(3); *see also* Tunik, *supra* note 1, at 90; *cf.* New York Convention, *supra* note 11, art, V(1)(b).

make a final award without having given the claimant an additional opportunity to comment on any specific issue that the arbitrators consider relevant that was not fully or satisfactorily addressed in the claimant's initial submissions.

A recent example is the South China Sea Arbitration between the Philippines and China. While this example refers to a state-to-state arbitration, its broad takeaways are transferrable to commercial arbitration. China did not participate in the arbitration from the outset, which led the South China Sea arbitral tribunal to include in its Rules of Procedure the possibility for "supplemental written submissions."[65] This mechanism allowed the arbitral tribunal to invite the Philippines to submit additional facts and evidence in relation to specific matters that the tribunal had identified and deemed as not yet covered by the Philippines' initial submissions.

Tribunals are advised to provide for such mechanisms as soon as it becomes clear that the respondent will not participate in the arbitration. However, the tribunal may under no circumstances *advise* the claimant of its (preliminary) opinion with regard to specific sets of facts or evidence. In other words, it can under no circumstances help the claimant to found its claims. Just like the tribunal cannot act as the non-participating respondent's *de facto* counsel, it cannot act as such for the claimant—doing so would seriously violate the non-participating respondent's due process rights. Consequently, tribunals should merely *inform* claimants of any relevant issues that have not been addressed.

4. Can the Tribunal Raise Arguments that the Respondent Might Have Made Had It Participated?

Major institutional rules and national arbitration laws are consistent in stating that the tribunal is not entitled to act as the non-participating respondent's counsel. At the same time, the claimant's contentions cannot be considered admitted and the tribunal is expected to critically evaluate the facts and evidence presented to it.

At first glance, it seems unrealistic to critically assess a claimant's case without testing the arguments from the respondent's perspective. It is therefore important to carefully distinguish between testing the claimant's arguments and raising new ones on behalf of the non-participating respondent. In general, the arbitral tribunal should refrain from raising new arguments on behalf of the non-participating respondent, i.e., arguments that are not clearly evident from the claimant's written submissions. This somewhat restrictive approach is essential to the aforementioned stipulation that claimants should not be worse off than they would have been had the respondent participated.

However, tribunals seem occasionally to depart from this idea in state-to-state arbitration, for which arbitrators must seek to "discern the position and possible arguments from the perspective of the non-participating party."[66] But while the practical effectiveness of a final award in state-to-state arbitration largely depends

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[65] South China Sea Arbitration (Phil. v. China), Award of 12 July 2016, PCA Case No. 2013–19, ¶ 128; *see* Levine & Schofield, *supra* note 4, at 109.

[66] Levine & Schofield, *supra* note 4, at 111.

on the willingness of the losing state to comply with the arbitral tribunal's verdict, the same is not true in investor-state and commercial arbitrations. In investment and commercial arbitrations, the ICSID Convention[67] and the New York Convention provide parties with a robust basis for enforcing the final award in most cases. Here, raising new arguments on behalf of the respondent would effectively allow the non-participating respondent to benefit from its breach of the arbitration agreement.

At the same time, arbitral tribunals are entitled to and should raise arguments that are apparent from the facts and evidence presented to them—in fact, how a tribunal could seriously conclude that a claim is "well-founded in law and in fact" if serious arguments against the claimant's position appear from the facts and evidence presented by the claimant is questionable. Finding the fine line between those two is case-specific and can hardly be answered in the abstract.

C. *Implications of Respondent's Non-Participation for the Taking of Evidence*

The following analysis first addresses the use of documentary evidence, witness statements, and expert reports in cases of the respondent's non-participation, and then turns to the issue of extra-record evidence that is either publicly available or provided to the arbitral tribunal by the non-participating respondent outside of the ordinary course of the arbitration proceedings.

1. Should the Respondent's Non-Participation Influence the Claimant's Use of Documentary Evidence?

Documentary evidence is likely the strongest form of evidence in international arbitration, and it has even more impact if the respondent does not participate. Strong documentary evidence will have a huge influence on the tribunal's decision to reach a decision on the merits and make a final award based only on the claimant's written submissions. Absent strong documentary evidence, tribunals will be more inclined to hold a hearing in the event that the claimant relies heavily on the testimony of one or more witnesses or experts whose credibility is a deciding issue in the case.

However, not all documentary evidence is necessarily compelling evidence. If the claimant's documentary evidence shows any inconsistencies or unexplained gaps, it will very likely jeopardize the claimant's case, rather than help it. Therefore, from a strategic point of view, the claimant is advised to convey a true and fair picture of its documentary evidence.

2. How Should the Tribunal Address Witness Statements Submitted by the Claimant?

With the respondent's non-participation, the interplay between competing witness statements and between witness statement and cross-examination is

[67] Convention on the Settlement of Investment Disputes Between States and Nationals of Other States Chapter IV, Section 6, *opened for signature* Mar. 18, 1965, U.N.T.S. 575.

dysfunctional. Therefore, the claimant is advised to carefully consider the tone it intends to set in its witness statements as well as the merits of being more or less forthcoming than might be typical, given the absence of competing witness statements and cross-examinations.

Against this background, the claimant also needs to be aware that the arbitral tribunal will generally play a much more active role than it would have had the respondent participated. In the event that the claimant's arguments rely heavily on one or more witness statements, tribunals may be wary of simply crediting written witness testimony—especially if the allegations made by the claimant's witnesses are not corroborated by documents or other evidence. In these situations, tribunals are in fact advised to schedule a hearing to probe the witnesses' testimony.[68]

At the hearing, the arbitral tribunal should under no circumstances act as the non-participating respondent's *de facto* counsel and must refrain from cross-examining the claimant's witnesses.[69] At the same time, if the credibility of the claimant's witness or witnesses is at stake, the tribunal may decide that a hearing is necessary to make a decision on the merits. In this situation, the claimant's counsel cannot be expected to fill in the role of opposing counsel by challenging the witness statement it has submitted on behalf of its client, which is why some commentators have suggested that arbitrators take a "civil law approach" by adopting an "inquisitorial style of questioning."[70] In any event, the tribunal must be allowed to probe the witness testimony in a fair and open-minded manner. Thereafter, the claimant's counsel should be provided with an opportunity of a redirect examination, either to reinforce the points it considers most relevant or to "rehabilitate" the claimant's witness.

3. How Should the Tribunal Deal with Party-Appointed Experts, and Is the Tribunal Entitled to Appoint Its Own Independent Expert?

Both parties typically appoint and instruct their own experts and submit competing (and many times conflicting) expert reports to the arbitral tribunal. The practice of party-appointed experts is based on the adversarial nature of the arbitration: the expert of one party challenges the expert of the other party, and vice versa. In cases of the respondent's non-participation, there will be neither competing expert reports nor cross-examination of experts. The same is true for witness statements, and one might be inclined to respond to this issue in the same way. Indeed, the answer seems obvious at first: the tribunal evaluates the expert report as part of the evidence presented to it by the claimant. If the claimant's case depends on the truth and accuracy of the expert report, the tribunal will likely decide to schedule a hearing to test the expert testimony and challenge the expert as needed.

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[68] *See* BORN, *supra* note 7, at 2299; *see also* Section III.A.

[69] *See*, *e.g.*, BORN, *supra* note 7, at 2299.

[70] Kühn, *supra* note 17, at 411. Note that "inquisitorial style of questioning" does not mean that the arbitrator is entitled to assume the role of opposing counsel by cross-examining the claimant's witness. The arbitrator's role is neither to confirm nor to undermine a claimant's witness statement, but to ask questions that allow the tribunal to assess the truth of the statements made. As such, questions are generally open-ended, sometimes probing the witness testimony or challenging the witness, but never leading.

Thus, the above observations made with regard to the preparation of witness statements apply accordingly.

But the question of *who* should challenge the claimant's expert is qualitatively different. Foremost, the appointing party's counsel will instruct the party-appointed expert and meticulously review and revise that expert's report. Although the party-appointed expert is bound by its professional and other ethical duties, in practice, it can never be seen as entirely independent. Even proponents of party-appointed experts typically agree that it would be odd if the tribunal—eager to probe the expert opinion and challenge the expert report it may be puzzling over—asked the claimant-appointed expert to point the tribunal to the weaknesses of its own report or testimony.

While party-appointed experts are the default option for many arbitrators, especially if those experts are trained in common law jurisdictions, both major institutional rules[71] and the IBA Rules[72] allow arbitral tribunals to appoint independent experts—an alternative option that is not often used when both parties participate in the arbitration, but one that could prove immensely helpful for arbitrations in which the respondent fails to participate. All major institutional rules grant tribunals significant discretion to appoint independent experts and designate the issues to be addressed in the expert report, subject to consultations with the parties. In cases of the respondent's non-participation, tribunals must make sure to not only consult with the claimant, but also to notify the non-participating respondent.

The tribunal-appointed expert's role is to educate the tribunal—not supply judgment. Parties should not view such experts as the tribunal's tool to ascertain the position of the non-participating respondent. In the end, arbitrators are not bound by the expert's findings. Article 6(7) of the IBA Rules states clearly that: "Any Expert Report made by a Tribunal-Appointed Expert and its conclusions shall be assessed by the Arbitral Tribunal with due regard to all circumstances of the case." Likewise, the claimant is not bound by the statements made in the expert report submitted by the tribunal-appointed expert, but is typically entitled to appoint its own expert to challenge the statements made in the tribunal-appointed expert's report. In summary, a tribunal-appointed expert should enable the tribunal to determine whether the claimant has proved its claims on a balance of probabilities, which is why the tribunal's decision to appoint an independent expert will largely depend on both the claimant's submissions and the kind of expertise required to assess the merits of the claims.

Regardless of their legal training and experience, both claimants and arbitral tribunals are advised to carefully weigh the pros and cons between party- and tribunal-appointed experts with regard to the demands of their specific case.

4. Should the Tribunal Consider Extra-Record Evidence?

The arbitral tribunal is generally limited to the facts and evidence presented to it by the parties. In cases of the respondent's non-participation, arbitrators may be confronted with the question of whether to consider statements or arguments that the

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[71] *See*, *e.g.*, ICC RULES (2017), art. 25(4); ICDR RULES (2014), art. 25; LCIA ARBITRATION RULES (2014), art. 21; UNCITRAL RULES (2013), art. 29.

[72] IBA RULES ON THE TAKING OF EVIDENCE IN INTERNATIONAL ARBITRATION (2010), art. 6.

non-participating respondent has made outside the arbitration. At first, this situation may seem odd, given the respondent's failure to participate in the arbitration. However, such a situation could potentially arise, especially given the rapidity and volume of information flow around the world in the modern day. For example, in the above-referenced arbitral proceedings between the Philippines and China regarding China's activities in the South China Sea, the arbitral tribunal considered arguments made in a position paper that was published by China.[73] While the tribunal's decision to consider such extra-record evidence might have been influenced by the fact that the position paper was publicly available, the fact that all laws, regulations, and other publicly available materials as well as any public statements by state representatives are in the public domain illustrates claimants' and tribunals' shared dilemma when a respondent state fails to participate in the arbitration.

Arbitral tribunals should be careful in considering whether to follow this path —especially in commercial arbitration. The reason is simple: by considering any publicly available statements or arguments made outside the arbitration, the tribunal risks penalizing the claimant by depriving that claimant of its right to test the statements and arguments made by the non-participating respondent at a hearing.

The issue becomes more complicated if the non-participating respondent decides to address the arbitral tribunal directly, either by making a formal submission or by sending the tribunal an informal letter. Claimants and tribunals will typically experience this situation in cases of respondents' intermittent participation (as opposed to their non-participation, especially if the respondent was non-participating from the outset). If such an event happens, any written submission to the arbitral tribunal must, however, be treated as a form of participation in the arbitration, and the tribunal should consider the facts and evidence submitted to it accordingly. Given the tribunal's obligation to guarantee the non-participating respondent's due process rights, it cannot simply ignore the respondent even though the latter has not formally participated in the arbitration proceedings. The non-participating respondent must generally be heard with its statements.

At the same time, the claimant must be given an opportunity to respond. While the claimant can easily respond to any legal argument, it cannot test factual allegations, particularly those made in witness statements and expert reports, if the respondent does not participate in the hearing. The claimant's inability to fully defend itself against the non-participating respondent's factual allegations in such a situation means the arbitral tribunal must be extremely thoughtful in deciding how much weight to give to those allegations. Specifically, the tribunal must bear in mind the recurring fairness principle that claimants should not be worse off in cases of the respondent's non-participation than they would have been had the respondent participated wholeheartedly in the arbitration.

IV. CONCLUSION

All major institutional arbitration rules and national arbitration laws allow the claimant and the tribunal to proceed with the arbitration despite a respondent's non-

[73] South China Sea Arbitration (Phil. v. China), Award of 12 July 2016, PCA Case No. 2013–19.

participation. While obtaining an arbitral award might be slower than obtaining a default judgment by a national court, the current arbitral practice grants claimants and tribunals significant latitude in structuring the arbitration process in a cost- and time-efficient way, subject to procedural safeguards and guarantees for the non-participating respondent's due process rights.

From the arbitral institutions' perspective, granting the parties and the arbitral tribunal procedural flexibility is one of the key features of international arbitration, regardless of whether the respondent participates or not. Putting aside the principle of procedural flexibility in international arbitration, the feasibility of introducing default proceedings in international arbitration is doubtful. Changing institutional rules or national arbitration laws would unnecessarily entail the risk of non-enforcement of a final award thus rendered, either based on an alleged breach of due process, Article V(1)(b) of the New York Convention, or a public policy defense related to the alleged lack of due process, Article V(2)(b) of the New York Convention. [74] With that in mind, major institutions generally refrain from providing detailed procedural rules on the issue of the respondent's non-participation. The two main exceptions are provisions for the default appointment of arbitral tribunals as well as cost provisions, both of which allow for the tribunal's original constitution and for the arbitration to ultimately proceed without the non-participating respondent.

Some claimants, however, may still feel a degree of unease at a scenario in which the respondent fails to participate in the arbitration. This creates the temptation to test the feasibility of including a provision allowing for "default awards" into an arbitration agreement. Putting aside the practical issue of negotiating such a clause, claimants would face a high risk that the enforcing court would consider such an award unenforceable under either Article V(1)(b) or V(2)(b) of the New York Convention, therefore rendering the clause effectively meaningless and introducing significant uncertainty into the proceedings.[75] Against this background of potential enforcement risks related to the respondent's non-participation, the current international practice and major institutional rules already provide for a consistent and reliable approach to the issue of non-participation.

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[74] For a high-level discussion of some enforcement issues under the New York Convention, *see* Luca Beffa, *Enforcement of "Default Awards,"* 31(4) ASA BULLETIN 756 (2013).

[75] There are jurisdiction-specific arbitration laws that explicitly allow parties to deviate from their default provisions. Section 1048(4) of the German Code of Civil Procedure gives parties the freedom to "agree otherwise as concerns the consequence of a failure to comply with procedural rules." Among these procedural rules are the general default principle that the respondent's failure to participate in the arbitration cannot be deemed to be an acknowledgment of the assertions made by the claimant, and that the arbitral tribunal may continue the proceedings and issue an award "based on the insights it has obtained." ZIVILPROZESSORDNUNG [ZPO] [CODE OF CIVIL PROCEDURE] § 1048(2), (3) (Ger.). According to some commentators, Section 1048(4) allows parties to deviate from this principle by agreeing that if the respondent fails to participate, the claimant's factual allegations will be deemed admitted by the respondent, and that the tribunal may render its award on that basis. Klaus Sachs & Torsten Lörcher, Part II: Commentary on the German Arbitration Law (10th Book of the German Code of Civil Procedure), Chapter V: Conduct of the Arbitral Proceeding, § 1048 – Default of a Party, *in* ARBITRATION IN GERMANY: THE MODEL LAW IN PRACTICE, at 289 (Karl-Heinz Böckstiegel et al. eds., 2nd ed. 2014).

Appendix

Institutional Rules	Key Provisions Dealing with Non-Participation
Hong Kong International Arbitration Centre, Administered Arbitration Rules 2018 (HKIAC Rules)	**Art. 26.2:** If, within the time limit set by the arbitral tribunal, the Respondent has failed to communicate its written statement without showing sufficient cause for such failure, the arbitral tribunal may proceed with the arbitration. **Art. 26.3:** If one of the parties, duly notified under these Rules, fails to present its case in accordance with these Rules including as directed by the arbitral tribunal, without showing sufficient cause for such failure, the arbitral tribunal may proceed with the arbitration and make an award on the basis of the evidence before it.
International Chamber of Commerce, Arbitration Rules 2017 (ICC Rules)	**Art. 6:** **(3)** If any party against which a claim has been made does not submit an Answer [...] the arbitration shall proceed and any question of jurisdiction or of whether the claims may be determined together in that arbitration shall be decided directly by the arbitral tribunal, unless the Secretary General refers the matter to the Court for its decision pursuant to Article 6(4). **(8)** If any of the parties refuses or fails to take part in the arbitration or any stage thereof, the arbitration shall proceed notwithstanding such refusal or failure. **Art. 26:** If any of the parties, although duly summoned, fails to appear without valid excuse, the arbitral tribunal shall have the power to proceed with the hearing.
International Center for Dispute Resolution, International Arbitration Rules 2014 (ICDR Rules)	**Art. 3(6):** Failure of Respondent to submit an Answer shall not preclude the arbitration from proceeding. **Art. 26:** If a party fails to submit an Answer in accordance with Article 3, the arbitral tribunal may proceed with the arbitration. If a party, duly notified under these Rules, fails to appear at a hearing without showing sufficient cause for such failure, the tribunal may proceed with the hearing. **(3)** If a party, duly invited to produce evidence or take any other steps in the proceedings, fails to do so within the time established by the tribunal without showing sufficient cause for such failure, the tribunal may make the award on the evidence before it.

International Center for Settlement of Investment Disputes, Arbitration Rules 2006 (ICSID Rules)	**Art. 42:** If a party (in this Rule called the "defaulting party") fails to appear or to present its case at any stage of the proceeding, the other party may, at any time prior to the discontinuance of the proceeding, request the Tribunal to deal with the questions submitted to it and to render an award. The Tribunal shall promptly notify the defaulting party of such a request. Unless it is satisfied that that party does not intend to appear or to present its case in the proceeding, it shall, at the same time, grant a period of grace and to this end: if that party had failed to file a pleading or any other instrument within the time limit fixed therefor, fix a new time limit for its filing; or if that party had failed to appear or present its case at a hearing, fix a new date for the hearing. The period of grace shall not, without the consent of the other party, exceed 60 days. **(3)** After the expiration of the period of grace or when, in accordance with paragraph (2), no such period is granted, the Tribunal shall resume the consideration of the dispute. Failure of the defaulting party to appear or to present its case shall not be deemed an admission of the assertions made by the other party. **(4)** The Tribunal shall examine the jurisdiction of the Centre and its own competence in the dispute and, if it is satisfied, decide whether the submissions made are well-founded in fact and in law. To this end, it may, at any stage of the proceeding, call on the party appearing to file observations, produce evidence or submit oral explanations.
JAMS, International Arbitration Rules & Procedure 2016 (JAMS Rules)	**Art. 28.1:** If the Respondent fails to submit a Statement of Defense or the Claimant fails to submit a Reply to Counterclaim, or if at any point any party fails to avail itself of the opportunity to present its case in the manner determined by these Rules or as directed by the Tribunal, the Tribunal may nevertheless proceed with the arbitration and make an award. **Art. 28.2:** The Tribunal will make no final award upon the default of a party without a determination made upon the submission of proof by the non-defaulting party of the validity and amount of that party's claim.

London Court of International Arbitration, Arbitration Rules 2014 (LCIA Rules)	**Art. 2.4:** Failure to deliver a Response within time shall constitute an irrevocable waiver of that party's opportunity to nominate or propose any arbitral candidate. Failure to deliver any or any part of a Response within time or at all shall not (by itself) preclude the Respondent from denying any claim or from advancing any defence or cross-claim in the arbitration. **Art. 15.8:** If the Respondent fails to submit a Statement of Defence or the Claimant a Statement of Defence to Cross-claim, or if at any time any party fails to avail itself of the opportunity to present its written case in the manner required under this Article 15 or otherwise by order of the Arbitral Tribunal, the Arbitral Tribunal may nevertheless proceed with the arbitration (with or without a hearing) and make one or more awards.
Singapore International Arbitration Centre, Arbitration Rules 2016 (SIAC Rules)	**Art. 20.9:** If the Respondent fails to submit its Statement of Defence, or if at any point any party fails to avail itself of the opportunity to present its case in the manner directed by the Tribunal, the Tribunal may proceed with the arbitration. **Art. 24.3:** If any party fails to appear at a meeting or hearing without showing sufficient cause for such failure, the Tribunal may proceed with the arbitration and may make the Award based on the submissions and evidence before it.
UNCITRAL Arbitration Rules 2013 (UNCITRAL Rules)	**Art. 30:** If, within the period of time fixed by these Rules or the arbitral tribunal, without showing sufficient cause: The respondent has failed to communicate its response to the notice of arbitration or its statement of defence, the arbitral tribunal shall order that the proceedings continue, without treating such failure in itself as an admission of the claimant's allegations; the provisions of this subparagraph also apply to a claimant's failure to submit a defence to a counterclaim or to a claim for the purpose of a set-off. **(2)** If a party, duly notified under these Rules, fails to appear at a hearing, without showing sufficient cause for such failure, the arbitral tribunal may proceed with the arbitration. **(3)** If a party, duly invited by the arbitral tribunal to produce documents, exhibits or other evidence, fails to do so within the established period of time, without showing sufficient cause for such failure, the arbitral tribunal may make the award on the evidence before it.