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Table of Contents

The Non-Responsive Respondent: Taking an Arbitration Forward and How

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Abstract

Non-participation of the respondent in international arbitration does not create an automatic right for the claimant to seek default judgment. Instead, the arbitration process should be followed. For the participating party and the tribunal, continuing a proceeding with an absent party can be a challenging undertaking. To establish an enforceable award, arbitrators must ensure that the absent party is afforded its procedural rights and be given an opportunity to be heard. However, the tribunal must balance this right with its duty to ensure a fair and efficient resolution to the dispute. This paper explores best practice guidelines for dealing with situations where an arbitral tribunal is faced with a non-responsive respondent.

1. Principles

In an ideal world, parties who agree to arbitrate a dispute participate as efficiently as possible when the dispute arises and work together with the opposing party and the arbitrator to ensure that the dispute is brought to a swift conclusion. However, in practice, this is certainly not always the case. Parties to an international commercial arbitration agreement, for any number of reasons, might fail or refuse to respond to a notice that a claimant is bringing an arbitration proceeding against them in accordance with the relevant arbitration agreement. Another similar scenario might be where a respondent initially takes part in the proceeding, but ceases participation at a crucial point, such as when the hearing is due to take place.

Most often, the parties' arbitration agreement is silent as to how to overcome discrete issues associated with party non-participation. When faced with a non-responsive respondent, claimant parties might assume that they can rely on a simple, administrative default process that is similar to the default judgment position in litigation. However, arbitration's "default" award process is very different. The tribunal is typically required to continue the arbitration ex parte, making its award on the merits of the claimant's case.

Non-participation of a respondent during a substantive hearing presents a number of issues for both the tribunal and the claimant. Significantly, the absence of a participating respondent creates a fertile ground for subsequent challenge to an award on the grounds that due process was denied during one party's absence. In these cases, progression of the arbitration reaches a significant point of tension.

Guidance for claimants and arbitrators on this topic is, so far, unconsolidated. What steps does the claimant party need to take to progress its claim? How does an arbitrator issue a final, enforceable award with only one party's evidence? This article seeks to consolidate the available best practice information and provide some guidance for claimants and arbitrators when met with a non-responsive respondent. It ultimately considers how an arbitration can be moved forward in the most effective and efficient way.

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2. Default in litigation v default in arbitration

While the default award process in arbitration is conceptually similar to default judgment in litigation, the procedure in arbitration is very different.

Default judgment in the courts is an administrative process that is dictated by statute. When a judge makes an order for default judgment, as long as they abide by the process as set out in the legislation, their judgment will be deemed valid, procedurally fair and enforceable. This is the case, even if the respondent party is not consulted or heard from at all.

Conversely, the parties' arbitration agreement often dictates the procedures for the conduct of arbitration. Arbitrators do not have the support of legislative rules and procedures which allow them to make an award by default in the absence of the respondent. In the absence of these procedures, arbitrators find it necessary to go to great lengths to ensure procedural fairness when faced with a non-responsive respondent.

The key difference between default judgment in litigation and a default award in arbitration is the rigorous steps that the arbitrator must take to ensure that the default award is procedurally fair and enforceable. Before making a default award, an arbitral tribunal must be certain that due process has been afforded to both parties. This can be a difficult undertaking when the appropriate procedures are not clear-cut.

3. Default judgment in litigation

In Australian litigation, the civil procedure rules of each state dictate the process for dealing with a non-responsive respondent. The civil procedure statutes outline the steps that a plaintiff may take in court when a defendant has not filed a notice of intention to defend or an appearance, and a defence responding to a claim or writ against them within the prescribed time (in Australia, 28 days).[1] The process is relatively straightforward. A plaintiff must prove that the claim was validly served,[2] usually by affidavit of service or a statutory declaration attesting to proper service of the documents. The claimant may then file a request for default judgment to the court or registrar, claiming either their debt or liquidated demand,[3] or, for unliquidated damages, requesting judgment conditional on an assessment of such damages.[4] The application may also require filing of an affidavit or statutory declaration proving the debt amount claimed.

The court may immediately enforce judgment of a debt if it is satisfied that the claimant is entitled to the damages claimed.[5] The court need not assess the merits of the claim. Where other relief or unliquidated damages are claimed, the court may conduct a hearing to determine the amount of damages awarded. After this, the default judgment is made and the proceeding is brought to an end.

[1] Federal Court Rules 2011 (Cth) rr 5.21(d), 5.22; Uniform Civil Procedure Rules 1999 (Qld) r 281(1); Uniform Civil Procedure Rules 2005 (NSW) r 16.2; Supreme Court (General Civil Procedure) Rules 2015 (Vic) o 21.01; Rules of the Supreme Court 1971 (WA) o 13.1; Supreme Court Civil Rules 2006 (SA) r 229; Supreme Court Rules 2000 (Tas) rr 347, 348; Court Procedures Rules 2006 (ACT) r 1118; Supreme Court Rules (NT) regs 21.01, 22.02.

[2] Uniform Civil Procedure Rules 1999 (Qld) rr 120, 282; Uniform Civil Procedure Rules 2005 (NSW) r 16.3; Supreme Court (General Civil Procedure) Rules 2015 (Vic) o 21.02; Rules of the Supreme Court 1971 (WA) o 13.1(3); Rules of the Supreme Court 1971 (WA) o 13.1; Supreme Court Civil Rules 2006 (SA) r 229; Supreme Court Rules 2000 (Tas) r 346; Court Procedures Rules 2006 (ACT) r 1119; Supreme Court Rules (NT) regs 21.01(3), 22.02(2).

[3] Uniform Civil Procedure Rules 1999 (Qld) r 283(2); Uniform Civil Procedure Rules 2005 (NSW) r 16.6; Supreme Court (General Civil Procedure) Rules 2015 (Vic) o 21.03; Rules of the Supreme Court 1971 (WA) o 13.2; Rules of the Supreme Court 1971 (WA) o 13.1; Supreme Court Civil Rules 2006 (SA) r 229; Supreme Court Rules 2000 (Tas) rr 364, 347; Court Procedures Rules 2006 (ACT) r 1120; Supreme Court Rules (NT) reg 21.03.

[4] Uniform Civil Procedure Rules 1999 (Qld) r 284; Uniform Civil Procedure Rules 2005 (NSW) r 16.7; Supreme Court (General Civil Procedure) Rules 2015 (Vic) o 21.04; Supreme Court (General Civil Procedure) Rules 2015 (Vic) o 21.03; Rules of the Supreme Court 1971 (WA) o 13.3; Rules of the Supreme Court 1971 (WA) o 13.1; Supreme Court Civil Rules 2006 (SA) r 229; Supreme Court Rules 2000 (Tas) rr 346, 348; Court Procedures Rules 2006 (ACT) r 1121; Supreme Court Rules (NT) reg 21.04.

[5] Federal Court Rules 2011 (Cth) r 5.23; Uniform Civil Procedure Rules 1999 (Qld) r 283(10).

The default judgment process is a fairly efficient administrative process to combat the complications when a court is faced with a non-responsive defendant. Parties might assume that the process to deal with an absent respondent to arbitration would be as simple, especially when considering arbitration's reputation for being an efficient, flexible and commercial process for dispute resolution.[6]

However, it is a very different procedure. A judge is not required to examine or hear all the parties' evidence beyond the application and claim, which either proves the debt or provides for an assessment of damages. This process does not require extensive evidence or proof on behalf of the claimant. This is because civil litigation procedure deems that a party who does not respond to a claim against them has indicated by its actions that it is unable or unwilling to contest the assertions made. The legislative position reflects this, in that it is valid and enforceable for a judge to make default judgment, even if the interests of the defendant are not presented or considered. Beyond service of the claim, the claimant is not required to give notice to a non-responsive respondent as to the conduct leading up to a default judgment being made.

Where the respondent to an arbitration does not participate, there is no rule which allows a tribunal to draw adverse inferences against the non-participating respondent. On the contrary, the arbitrator will generally be required to continue the process to a hearing, with a significant emphasis on ensuring due process.

4. Default award in arbitration

It is generally accepted in most arbitration legislation and rules that arbitration should continue to a hearing in the absence of the respondent.[7] This position is reflected in the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration,[8] the UNCITRAL Arbitration Rules 2013,[9] the International Chamber of Commerce Arbitration Rules 2017,[10] the London Court of International Arbitration, Arbitration Rules 2014,[11] the Australian Centre for International Commercial Arbitration, Arbitration Rules 2016[12] and Singapore International Arbitration Centre Rules 2016.[13]

Section 23B(1)(d) of the International Arbitration Act 1974 (Cth) (IAA) contemplates that where a party to arbitral proceedings commenced in reliance on an arbitration agreement fails, within the time specified by an arbitral tribunal, or within a reasonable time, to comply with any requirement made by the tribunal to assist it in the performance of its functions, the arbitral tribunal may continue in default of appearance and make an award on the evidence before it.

This provision is based on art 25 of the UNCITRAL Model Law, which provides that:

> "Where the respondent fails to communicate his statement of defence … the arbitral tribunal shall continue the proceedings without treating such failure in itself as an admission of the claimant's allegations."

[6] Philip Chong and Blake Primrose, "Summary Judgment in International Arbitrations Seated in England" (2017) 33 *Arbitration International* 63, 63; Andrew Barraclough and Jeff Waincymer, "Mandatory Rules of Law in International Commercial Arbitration" (2015) 6(2) *Melbourne Journal of International Law* 205.

[7] See, eg in the respective arbitration Acts of Australia, UK, US, Singapore, Hong Kong, Malaysia, Philippines, India, Germany, Italy and France (among others).

[8] UNCITRAL Model Law art 25.

[9] UNCITRAL Arbitration Rules 2013 (UNCITRAL Rules) art 30.

[10] International Chamber of Commerce Arbitration Rules 2017 (ICC Rules) art 26.2.

[11] London Court of International Arbitration, Arbitration Rules 2014 (LCIA Rules) art 15.8.

[12] Australian Centre for International Commercial Arbitration, Arbitration Rules 2016 (ACICA Rules) art 34.1.

[13] Singapore International Arbitration Centre Rules 2016 (SIAC Rules) art 20.9.

This position is clearly at odds with the default judgment position in litigation. Holtzmann and Neuhaus suggest that art 25, in contrast to the default judgment process, is concerned with three safeguards:

> "First, the defaulting party must have been duly notified in advance of the requirement that was not fulfilled … Second, that party must have defaulted without showing sufficient cause for the failure to comply … Third … in the case of a failure by the respondent to communicate its statement of defence—that is, if it refuses to participate in the proceedings at all—the failure in itself will not be treated as an admission of the claimant's allegations."[14]

It is assumed that this means an evidentiary hearing should be held to prove the claim on the basis that default is not a denial of the claim.[15]

Unlike in litigation, a proceeding cannot be decided and brought to an end on the sole basis that the respondent is in default. It seems that a proceeding will be terminated only by final award in favour of the claimant or respondent, or by order of the tribunal for settlement or withdrawal.[16] Obviously, settlement requires some participation from the respondent.

Essentially, in an arbitration where the respondent does not participate:

- the claimant should continue to present evidence on its claim and proceed towards a hearing; and
- the tribunal should continue with a typical arbitration procedure and make a final award in relation to the dispute on the evidence before it, despite the absence of the respondent.

For claimants, the default process may not be as streamlined and time-effective as they may have initially anticipated. The claimant must continue to present evidence in respect of its entire claim. This evidence will be assessed in a (potentially delayed or drawn out) evidentiary hearing. Accordingly, arbitrators should exercise special caution in moving forward towards a final award. As noted, a significant issue for arbitrators is ensuring that the non-participating party is afforded the right to be heard and is treated equally to ensure that due process is fulfilled. This can be a daunting undertaking for the arbitrator. However, guidelines are available to arbitrators to assist with navigating this process.

5. Principles of natural justice and due process

The position for a default award in arbitration is based on a fundamental principle of arbitration, namely, ensuring each party's right to natural justice and due process. Despite the fact that one of the appealing factors of arbitration is the tribunal's discretion to conduct proceedings in a flexible way,[17] this flexibility is subject to the parties' due process rights.[18]

The UNCITRAL Model Law and the many jurisdictions' legislation based thereon reflect these natural justice principles. In particular, art 18 of the UNCITRAL Model Law states that "parties shall be treated with equality and each party shall be given a full opportunity of presenting his case".[19] It is widely accepted that a "full" opportunity means a "reasonable" opportunity.[20] Accordingly, in Australia, this principle is reflected in the modification of s 18C of the IAA. This provision states:

[14] Howard Holtzmann and Joseph Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration* (Kluwer Law International 1989) 699.
[15] Howard Holtzmann and Joseph Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration* (Kluwer Law International 1989) 700.
[16] See, eg UNCITRAL Model Law art 32.
[17] Gary Born, *International Commercial Arbitration* (2nd edn, Kluwer Law International 2014) 2145.
[18] UNCITRAL Model Law art 19(2).
[19] UNCITRAL Model Law art 18.
[20] Nigel Blackaby, *Redfern and Hunter on International Arbitration* (6th edn, OUP 2015) 6.14.

> "For the purpose of Article 18 of the Model Law, a party to arbitral proceedings is taken to have been given a full opportunity to present the party's case if the party is given a reasonable opportunity to present the party's case."[21]

Chong and Primrose suggest that a "reasonable opportunity" might mean ensuring that parties, if willing, are able to participate in disclosure, cross-examination and oral submissions.[22] It is, therefore, a duty of the tribunal to ensure that each party is provided a reasonable opportunity to address its case and engage in, at least, each substantive stage of the proceeding. Evidence of due process will contribute to an arbitral award's impeachability should the non-respondent party subsequently challenge the award.

6. Challenging an award—respondent's perspective

A party may agree to arbitrate a dispute and, when the case arises, not respond to a claim against them. However, not responding to the proceeding does not mean that the respondent is conceding its legal rights. Indeed, parties are just as passionate about their rights and are often quick to bring them to the attention of the tribunal or courts if they believe their rights to natural justice or due process have been offended.[23] If a tribunal delivers an award in the respondent's absence, the respondent can still challenge the award on the basis of jurisdictional error, or errors of due process and natural justice (amongst other limited grounds). A proceeding that takes place without a responding party presents a ripe opportunity, from the perspective of the respondent party, to claim that the proceeding was not conducted fairly.

Article V of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (New York Convention) outlines the grounds upon which a court or tribunal may refuse recognition or enforcement of an arbitral award. Article V provides that each party must be given proper notice of the proceeding in order for it to present and defend its case. If such notice is not given, then the award may be deemed unenforceable. This right to seek the setting aside of an award is afforded to the respondent notwithstanding that they did not participate in the arbitration. To this end, a respondent may seek the setting aside of an award on the basis of art V(1)(b) of the New York Convention, claiming that it was unable to present its case.

Under the UNCITRAL Model Law, an arbitral award can be refused enforcement if a lapse in due process means that a party was unable to present its case.[24] As the UNCITRAL Model Law has the force of law in Australia, Australian courts also adopt this position.[25] In *Hui v Esposito Holdings Pty Ltd*,[26] it was held that:

> "In order to justify the setting aside or remittal of an award, real unfairness or real practical injustice must have resulted by the denial of the relevant opportunity to a party to present its case … Real unfairness or real practical injustice can be demonstrated by showing that there was a realistic rather than fanciful possibility that the award may not have been made or may have differed in a material respect favourable to the party said to have been denied the opportunity … The onus rests on the party seeking to set aside the award or remit the matter and no reverse onus applies."[27]

[21] IAA s 18C.
[22] Philip Chong and Blake Primrose, "Summary Judgment in International Arbitrations Seated in England" (2017) 33 *Arbitration International* 63, 70.
[23] Erika Williams, Hannah Fas and Tom Hannah, "Due Process Paranoia and its Role in the Future of International Commercial Arbitration" (2018) 37(1) *The Arbitrator & Mediator* 43, 44.
[24] UNCITRAL Model Law art 34(2)(a)(i).
[25] IAA s 16.
[26] *Hui v Esposito Holdings Pty Ltd* (2017) 345 ALR 287.
[27] *Hui v Esposito Holdings Pty Ltd* (2017) 345 ALR 287 at [183]–[185].

This means, essentially, that a party can seek the setting aside of an award if some issue with due process means that their rights could have been practically affected in a real sense.

7. Issues arising for the arbitrator

As discussed above, the provision of due process is a paramount element of international commercial arbitration. Naturally, it is much more difficult for the arbitrator to ensure a fair, neutral arbitration process in the absence of one of the parties. In this case, it is crucial for the arbitral process to ensure that respondents are afforded the *opportunity* to present their case. However, where a party is afforded its procedural rights, but chooses not to take the opportunity to participate, there is no reason why an enforceable award cannot be made.

If an arbitrator is found to deny due process, there is a risk their award may be set aside or refused enforcement.[28] Further, there are rules dictating that an arbitral tribunal must ensure their awards are enforceable. For example:

- the ICC Rules direct that the arbitral tribunal "shall make every effort to make sure that the award is enforceable"[29];
- the LCIA Rules require that the arbitral tribunal "shall act at all times in good faith, respecting the spirit of the arbitration agreement, and shall make every reasonable effort to ensure that any award is legally recognised and enforceable at the arbitral seat"[30]; and
- the SIAC Rules provide that the arbitral tribunal "shall act in the spirit of these rules and shall make every reasonable effort to ensure the fair, expeditious and economical conclusion of the arbitration and the enforceability of any award".[31]

Being found to have breached these rules not only harms the professional reputation of the arbitrator, but breaches of due process and natural justice are also a setback for the party in whose favour the award was made. Accordingly, arbitrators faced with a non-participating party might fear that their award will be challenged, overturned or deemed unenforceable by state courts.

It is generally accepted that an arbitrator's decision will be enforceable, unless "there is unfairness, true practical injustice".[32] It is suggested that overzealous application of due process principles is unnecessary, considering that parties do not often challenge awards. A 2008 study by the Queen Mary University of London revealed that 84 per cent of participating corporate counsel indicated that in more than 76 per cent of their arbitration proceedings, the awards are voluntarily complied with.[33] Further, there seems to be a general disinclination for states, especially Australia, to overturn such awards unless there are exceptional circumstances.[34] However, it is also suggested that the risk of challenge to an award is much higher where there is a non-responsive party.[35]

In any case, while arbitrators may be concerned about due process, they must also balance this concern with their duty to ensure that arbitration remains a fair, economical and efficient process. The tribunal's focus on due process must not unduly frustrate or delay the

[28] Erika Williams, Hannah Fas and Tom Hannah, "Due Process Paranoia and its Role in the Future of International Commercial Arbitration" (2018) 37(1) *The Arbitrator & Mediator* 43, 44.
[29] ICC Rules art 41.
[30] LCIA Rules art 32.2.
[31] SIAC Rules art 41.2.
[32] *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* (2014) 311 ALR 387 at [108].
[33] Queen Mary University of London, School of International Arbitration, *International Arbitration: Corporate Attitudes and Practices* (PriceWaterhouseCoopers 2008) 2.
[34] Erika Williams, Hannah Fas and Tom Hannah, "Due Process Paranoia and its Role in the Future of International Commercial Arbitration" (2018) 37(1) *The Arbitrator & Mediator* 43, 48, citing *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* (2011) 38 VR 303 and *Grand Pacific Holdings Ltd v Pacific China Holdings Ltd* [2011] 4 HKLRD 188.
[35] CIArb Guideline art 1(4).

proceeding. For example, art 21.2 of the ACICA Rules creates limitations on procedural fairness requirements by providing that:

> "the arbitral tribunal shall adopt suitable procedures for the conduct of the arbitration in order to avoid unnecessary delay or expense, having regard to the complexity of the issues and the amount in dispute, and provided that such procedures ensure equal treatment of the parties and afford the parties a reasonable opportunity to present their case."

The tribunal should consider the various factors in any particular matter and take an approach that is reasonable in the circumstances of each case.[36]

8. Chartered Institute of Arbitrators: International Arbitration Practice Guideline—Party Non-Participation

The Chartered Institute of Arbitrators has released an International Arbitration Practice Guideline—Party Non-Participation (CIArb Guideline) for arbitrators faced with party non-participation. Articles 1, 3 and 4 of the CIArb Guideline are to be applied in the circumstances of a non-responsive respondent. While it is understood that the CIArb Guideline is soft law, it provides the most definitive best practice guidelines for arbitrators on non-responding parties. The CIArb Guideline recognises that arbitration can continue in the absence of the respondent,[37] but suggests that it is important for the arbitrator to act with caution in the circumstances.

Ensuring sufficient notice of the arbitration

The CIArb Guideline provides that, before proceeding with an arbitration, the tribunal should satisfy itself that all parties are duly notified of the proceedings.[38] This anticipates the position in art V(1)(b) of the New York Convention, which provides that an award may be set aside on the basis that:

> "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."

The UNCITRAL Model Law outlines what is considered to be "due notification" in art 3. Article 3 states that:

> "any written communication is deemed to have been received if it is delivered to the addressee personally or if it is delivered at his [sic] place of business, habitual residence or mailing address; if none of these can be found after making a reasonable inquiry, a written communication is deemed to have been received if it is sent to the addressee's last-known place of business, habitual residence or mailing address by registered letter or any other means which provides a record of the attempt to deliver it."

The UNCITRAL position is adopted in the IAA.[39] This position is also reflected in the ICC Rules and other institutional rules.[40]

[36] Klaus Berger and J Jensen, "Due Process Paranoia and the Procedural Judgment Rule: A Safe Harbour for Procedural Management Decisions by International Arbitrators" (2016) 32(3) *Arbitration International* 415, 419–420.
[37] CIArb Guideline art 3.
[38] CIArb Guideline art 1(1).
[39] IAA Sch 2.
[40] ICC Rules art 3(2); ACICA Rules art 4; SIAC Rules art 2.1; LCIA Rules art 4.2.

The UK Arbitration Act provides that notifications are to be made by "any effective means" to the address of the respondent,[41] including by email.[42] However, arbitrators may deem that personal service is the most effective means for their jurisdiction. Alternatively, notices may be served through court, or by public notification.[43] It would likely be most useful, to ensure enforceability of an eventual award, for an arbitrator to be able to show a statutory declaration verifying that the claim documents have been personally served on the respondent in a manner similar to an affidavit of service used in court proceedings.

If the party does not respond to the initial notice of arbitration, the arbitrator should give further notices, requesting a defence from the non-responding party, and making enquiries about their intention to, or not to, participate. Any correspondence from the arbitrator should strongly urge a response, or at least request confirmation of the respondent's receipt of correspondence and arbitration documentation.

The arbitrator should also request reasons for the party's non-participation. The CIArb Guideline provides that it is good practice for the tribunal to set a time limit for a non-participating party to justify its non-participation. The arbitrator might also choose to defer the preliminary conference in order to hear reasons for delay and give time for a non-participating party to respond. Article 1 of the CIArb Guideline also provides that if there is an acceptable excuse for non-participation (ie exceptional circumstances beyond the party's control), arbitrators may extend the time limitations for response to allow the respondent to engage.

If after being duly served with the relevant documentation, the party does not respond, or responds with an unacceptable justification for non-participation, the arbitrator can conclude that they are faced with the situation of a non-participating party and should mobilise a strategy to proceed with the arbitration in accordance with the CIArb Guideline. The CIArb Guideline states that an excuse will only be acceptable if the non-participation is "caused by unforeseeable circumstances … beyond the control of the party concerned".[44]

Finally, before moving on with the arbitration, the CIArb Guideline states that the arbitrator should consider the issue of jurisdiction, regardless of whether the active party challenges jurisdiction.[45]

Ensuring the respondent remains aware of the conduct of the arbitration

The arbitrator should ensure that the opportunity for the respondent to participate continues for the entire conduct of the arbitration. Article 1(4) of the CIArb Guideline suggests that arbitrators should request that the participating party notifies the non-participating party of each step in the proceedings. The non-responding party should be duly served (in the manner noted above) with every document, submission, direction, procedural order, transcript and piece of correspondence from the proceeding.[46]

It is important that the arbitrator avoids ex parte general correspondence. If they do engage in correspondence with the participating party, they should provide a copy or transcript of such correspondence to the respondent as soon as possible. Practically, the arbitrator should ensure that all parties (including any non-responding party) are copied into all correspondence pertaining to the arbitration.

Further, if the claimant submits a position paper or preference, the arbitrator should write to the respondent and request a response to the claimant's position.

[41] Arbitration Act 1996 (UK) s 76.
[42] *Bernuth Lines Ltd v High Seas Shipping Ltd (The Eastern Navigator)* [2005] EWHC 3020 (Comm), [2006] 1 Lloyd's Rep 537.
[43] *Bernuth Lines Ltd v High Seas Shipping Ltd (The Eastern Navigator)* [2005] EWHC 3020 (Comm), [2006] 1 Lloyd's Rep 537.
[44] CIArb Guideline p 3.
[45] CIArb Guideline art 1(2).
[46] Christopher Style and Gregory Reid, "The Challenge of Unopposed Arbitrations" (2000) 16 *Arbitration International* 219, 222.

Any correspondence from the arbitrator to the parties should be accompanied by a notice inviting the non-responsive party to participate in the substantive arbitration and comment on any current matters. The party should be informed that it can begin participating at any time. By the time of the hearing, the arbitrator should be satisfied that the non-responding party is in receipt of all the documents pertaining to the arbitration.

Ensuring the respondent is aware a hearing can (and will) proceed despite the absence of the respondent

While the non-responsive party should be informed that it can choose to participate at any time, the party should also be informed that the tribunal is entitled to continue the proceeding even if that party chooses not to participate.

Article 3 of the CIArb Guideline suggests it is good practice to also warn a non-participating party of the consequences of their non-participation. The party should be informed that non-participation will affect a party's legal rights and that an arbitral award may be made against their interest. The non-responding party should, ultimately, be urged to participate in the proceeding and the hearing. A practical way to ensure this notice is clear is by, for example, including a cover page clearly stating these issues before the substantive content in a letter relating to the proceeding.

Ensuring fairness of the final award

Finally, decisions made in the final award must clearly set out how due process has been afforded. Article 1(3) of the CIArb Guideline provides that arbitrators should ensure all parties are given a fair opportunity to present their case.

Importantly, the respondent's failure to appear should not be treated as an admission of the participating party's position. The arbitrator should examine the contentions of the participating party; however, the arbitrator cannot just accept evidence because it is uncontested. If the burden of proof rests on a non-participating party, the CIArb Guideline provides that it may be appropriate to decide the point in favour of the claimant in the absence of relevant evidence. However, where evidence is put forth on behalf of the participating party, it is appropriate for the arbitrator to question the participant on their position. The tribunal might also ascertain the non-responding party's likely position by other means, such as through obtaining independent expert evidence. In some respects, this means the arbitrator is acting as a quasi-advocate for the absent party.

On the other hand, the arbitrator cannot become counsel for the non-participating party. The tribunal cannot just accept facts from the perspective of the non-participant. In the case of *Fox v PG Wellfair Ltd*, Lord Justice Denning stated that:

> "I cannot think it right that the defendants should be in a better position by failing to turn up. Nor is it right that the arbitrator should do for the defendants what they could and should have done for themselves."[47]

Alternatively, in an attempt to be seen as a neutral tribunal, an arbitrator might unconsciously impose a higher burden of proof upon the claimant's evidence. This might, conversely, negatively affect due process from the perspective of the claimant.

Importantly, arbitrators should not make an award in favour of the participant party without first considering the merits of the party's position and citing the tribunal's consideration of such merits. The award should also concede any points of contention or doubt and record these points in the award. The arbitrator should also record that they are

[47] *Fox v PG Wellfair Ltd* [1981] 2 Lloyd's Rep 514, [1981] 5 WLUK 34 cited in Christopher Style and Gregory Reid, "The Challenge of Unopposed Arbitrations" (2000) 16 *Arbitration International* 219, 223.

satisfied with the fact that the respondent was duly notified of the arbitration and was provided with all the documents about the conduct of the arbitration.

Ultimately, the CIArb Guideline provides the current best practice for how to manage a process involving a non-participating party in a fair and effective manner. While the practices may seem onerous, ensuring that these practices are undertaken is prudent in making an award that could survive a challenge application. It seems from the CIArb Guideline that where the arbitrator is confident that the party has due notice of the proceeding, is in receipt of all the documents regarding the arbitration, and provides evidence that the tribunal has given ample opportunity for the respondent to engage throughout the proceeding, the tribunal should be confident to continue the proceeding to final award despite the respondent's non-participation.

9. Case studies

A significant case that may provide guidance to tribunals faced with a non-responding party is the decision of *Interprods Ltd v De La Rue International Ltd*.[48] The applicant, Interprods, was a Nigerian company who was agent and distributer in Nigeria for the respondent, De La Rue. On 24 March 2011, the parties fell into dispute at a meeting where Interprods allegedly stated that its commission payments would be used to bribe and corrupt officials in Nigeria. On this basis, De La Rue terminated the agency agreements and commenced arbitration in the London Court of International Arbitration, seeking a declaration that it was entitled to terminate its agreement with Interprods. Following a process that included partial participation from Interprods, the tribunal held that De La Rue was entitled to terminate the agreement and it was not obliged to pay any further commission to Interprods.

Interprods challenged the award in the English High Court, relevantly (among other grounds), pursuant to s 68 of the Arbitration Act 1996 (UK) on the basis that the arbitrator committed irregularities in the conduct of the arbitration so that the award should be set aside. Under this section, the appellant must show that a serious irregularity in the proceeding caused a substantial injustice which, in particular, caused the tribunal to act in a manner that was not fair and impartial, and which hindered the possibility of the appellant putting their case and responding to the opposing case.

One alleged irregularity was that the arbitrator held a telephone conference without the participation of Interprods. Interprods had refused to participate in the conference. A second alleged irregularity was that the arbitrator had conducted an evidentiary hearing without the participation of Interprods. Interprods argued that, by doing so, the arbitrator uncritically accepted the evidence presented by De La Rue and argued that the arbitrator did not adequately test the evidence against a witness statement that Interprods previously submitted. The judge held that the tribunal's decision to proceed with the telephone conference in the absence of Interprods was a "robust but fair decision", because in the circumstances, adequate notice had been given to Interprods about the meeting.[49] When it considered the evidentiary hearing, the court referenced the CIArb Guideline.[50] Accordingly, the judge held that the arbitrator was not uncritical of the evidence, as the arbitrator's position was justified adequately in the award.[51]

Ultimately, the award was upheld as enforceable. This case highlights that, despite a party's refusal to participate, or partial participation, in a proceeding, the non-participating party can still attempt to challenge the award in court by claiming that there were issues with due process. However, this judgment shows that an arbitrator's implementation of the CIArb Guideline measures in determining the award might influence a decision to recognise an award in these circumstances.

[48] *Interprods Ltd v De La Rue International Ltd* [2014] EWHC 68 (Comm), [2014] 1 Lloyd's Rep 540.
[49] *Interprods Ltd v De La Rue International Ltd* [2014] EWHC 68 (Comm), [2014] 1 Lloyd's Rep 540 at [22].
[50] *Interprods Ltd v De La Rue International Ltd* [2014] EWHC 68 (Comm), [2014] 1 Lloyd's Rep 540 at [33].
[51] *Interprods Ltd v De La Rue International Ltd* [2014] EWHC 68 (Comm), [2014] 1 Lloyd's Rep 540 at [41].

Another practical example of a tribunal's strategies to overcome non-participation is the extensive arbitral proceedings between the Philippines and China regarding China's activities in the South China Sea.[52]

From the outset of the arbitral proceeding, China refused to participate in the proceeding. However, China eventually published a position paper on the topic of the arbitration on its Foreign Ministry website. The Chinese Ambassador for the Netherlands also communicated directly to the tribunal (however, noting directly that such communications were not to be interpreted as participation).[53] The position paper was treated as equivalent to an objection to jurisdiction, and a separate hearing was conducted on the matter.[54] The position paper was then considered in the main hearing by reference to the jurisdictional hearing, and by reference to Chinese public documents (despite the fact that China did not participate in any of the substantive arbitration proceeding). At no point was China's participation formal,[55] and the tribunal had to weigh up the Philippines' evidence and China's informal communications.[56]

Ultimately, the tribunal decided that the proceeding could continue despite China's non-participation.[57] However, it acknowledged that China's non-participation imposed a "special responsibility on the tribunal".[58] The award stated that the "tribunal does not simply adopt the Philippines' claims, and there can be no default judgment as a result of China's non-appearance".[59]

To account for this, the tribunal took into account a number of measures to safeguard China's procedural rights.[60] These included:

- ensuring all communications and arbitration materials were promptly delivered, both electronically and physically, to the Ambassador of China to the Netherlands in The Hague;
- granting China adequate and equal time to submit written responses to the pleadings submitted by the Philippines;
- inviting China to comment on procedural steps taken throughout the proceedings;
- providing China with adequate notice of hearings;
- promptly providing China with copies of transcripts of the hearing on jurisdiction and all documents submitted in the course of the hearing;
- inviting China to comment on anything said during hearings, and in post-hearing written comments;
- making the Permanent Court of Arbitration registry staff available to the Chinese Embassy to answer any questions of an administrative or procedural nature; and
- reiterating that the opportunity remained open to China to participate in the hearings at any time.

[52] *Republic of Philippines v People's Republic of China* Award Permanent Court of Arbitration Case No 2013–19 (12 July 2016).
[53] *Republic of Philippines v People's Republic of China* Award Permanent Court of Arbitration Case No 2013–19 (12 July 2016) at p 3 para 13.
[54] *Republic of Philippines v People's Republic of China* Award Permanent Court of Arbitration Case No 2013–19 (12 July 2016) at p 3 para 14.
[55] *Republic of Philippines v People's Republic of China* Award Permanent Court of Arbitration Case No 2013–19 (12 July 2016) at p 3 para 13.
[56] *Republic of Philippines v People's Republic of China* Award Permanent Court of Arbitration Case No 2013–19 (12 July 2016) at p 48 para 126.
[57] *Republic of Philippines v People's Republic of China* Award Permanent Court of Arbitration Case No 2013–19 (12 July 2016) at p 3 para 11.
[58] *Republic of Philippines v People's Republic of China* Award Permanent Court of Arbitration Case No 2013–19 (12 July 2016) at pp 3–4 para 12.
[59] *Republic of Philippines v People's Republic of China* Award Permanent Court of Arbitration Case No 2013–19 (12 July 2016) at pp 3–4 para 12.
[60] *Republic of Philippines v People's Republic of China* Award Permanent Court of Arbitration Case No 2013–19 (12 July 2016) at p 45 para 117.

The tribunal equally took procedural steps to ensure the Philippines' rights. The tribunal remained conscious that it had a duty to avoid unnecessary delay and expense to the parties and sought to provide a fair and efficient process for resolving the dispute.[61] In doing so, the tribunal took into account the Philippines' view in relation to scheduling and logistics, while also inviting China's views.

In respect of the award, the tribunal discerned China's position based on issues raised in the Philippines' submissions. It also undertook consultation with China's officials and obtained statements from the Government of China. The tribunal also asked questions of the Philippines, as the tribunal felt that the evidence presented was inadequate in addressing both parties' interests. The tribunal also sought additional expert evidence from the Philippines.

This case shows that practices reflecting those in the CIArb Guidelines influenced the tribunal's dealings with the absent party.

10. Issues arising for the claimant

Claimants faced with a non-responsive respondent are not entitled to a quick, administrative judgment against the respondent. Instead, the claimant must prove its claim. A usual claimant will have knowledge of the potential arguments in defence to its claim and the contentions that have arisen and can mobilise its submissions accordingly. In the absence of the respondent, the claimant faces the burden of proving the entirety of the claim, even where they expect no response. When faced with no response, the claimant will still need to spend time and money preparing for the hearing: largely to the same extent it would need to if the respondent was present.

However, the claimant must remain aware that the fact that one party is not present does not alter the standard of proof for the arbitration. The tribunal will not blindly accept uncontested evidence of the claimant. The tribunal might still deem this evidence insufficient in proving points of fact or law.[62] The claimant should also be prepared to answer any questions from the tribunal about its claim.

Further, although the tribunal can make an adjusted costs order in the circumstances,[63] the extent of the practical costs implications for the claimant party is unclear. From a practical perspective, the arbitrator may direct that the participating party pay costs as they arise throughout the proceeding on the basis that they may seek to recover all or part of such costs at a later stage in the arbitration.

11. Effect of the arbitration agreement

All potential parties should be aware of the possibility of default. As in the usual course of arbitration, the rules pertaining to an arbitration agreement or clause can be amended by prior written agreement of the parties. Parties could agree on terms or procedures to simplify the tribunal's procedures when it comes to default. However, due process is still the paramount concern. It is likely an arbitrator would decide it is in the interests of justice not to enforce a default process dictated by the parties, because it disrupts the implementation of the CIArb Guideline procedures and could risk an unenforceable award. In any case, the principles outlined in this article should guide the arbitrator.

[61] *Republic of Philippines v People's Republic of China* Award Permanent Court of Arbitration Case No 2013–19 (12 July 2016) at p 45 para 118.

[62] *Lewis Emanuel & Son Ltd v Sammut* [1959] 2 Lloyd's Rep 629.

[63] International Chamber of Commerce Commission, *Decisions on Costs in International Arbitration* (2015) 29.

12. Conclusion

Arbitration rules dictate that an evidentiary hearing should proceed for a claimant to obtain an award, even where the respondent does not participate. Non-participation of a respondent poses a disruption to the usual course of arbitral proceedings. Contracting parties should be cognisant of the possibility of a non-responding party when implementing an arbitration clause. For arbitrators, as this article suggests, implementing the CIArb Guideline is the best way to ensure an enforceable award is made and, in light of the aims and principles of arbitration, ensure that due process is served to all parties.