

# **The Empty Chair: Arbitrating against absent Respondents**

## **Managing the Process**

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## Freddie Mercury Rule – Show Must Go On

- Art. 6(8) 2012 ICC-Rules: “If **any of the parties** refuses or fails to take part in the arbitration or **any stage thereof**, the arbitration shall proceed”
- Art. 25(b) UN-ML: “**Unless otherwise agreed by the parties**, if, **without showing sufficient cause**, 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**”

## How should the show go on?

- The competent tribunal will have to balance:
  - (i) fair trial & equal treatment
  - “versus”
  - (ii) efficiency & due process

## Outline

I. Notice of Arbitration

II. Constitution of the Tribunal

III. Advance on Costs

IV. Fixing the Procedure

V. Managing the Hearing

## Notice of Arbitration

**P.** Respondent's address is unknown, is hard to access and/or Respondent attempts to obstruct effective notice

- What can or must be done to effect “proper notice”? (see: Art. 2 Swiss-R, 3(2) ICC-R and 5.2 DIS-R)
  - delivery by a means which provides “record of receipt”
  - delivery to the “actual” or “last known address”
- What does this mean? What will the institution do on its own motion? What can or should Claimant do?

## Constitution of the Tribunal

### P. Respondent does not nominate an arbitrator

- Sole arbitrator: appointment by the institution (see: Artt. 8(2) Swiss-R, 12(4) ICC-R and 12.1 DIS-R)
- 3-member tribunal: substitute appointment by the institution (see: Artt. 8(2) Swiss-R, 12(4) ICC-R and 12.1 DIS-R)
- No agreement on the number of arbitrators
  - Does the “reduced/enhanced complexity” of default proceedings (objectively) warrant a 3-member tribunal or a sole arbitrator?
  - Should Claimant try to convince the competent institution to refer the case to a 3-member tribunal or to a sole arbitrator?

## Advance on Costs

### P. Respondent fails to pay its share of the advance on costs

- Claimant is entitled/obliged to pay Respondent's share (Artt. 41(4) Swiss-R, 36(5) ICC-R and 40 DIS-R)
- How can Claimant seek compensation from Respondent?
  - request for an interim award
  - request for an interim measure
  - request for a summary judgment by a state court

## Fixing the Procedure

**P.** Respondent fails to participate in an early hearing / case-management conference called for by the tribunal

- The tribunal should avoid to “agree” with Claimant on procedural rules including the procedural calendar
  - German courts: Tribunals should generally be careful when phrasing procedural orders as an “agreement” with the parties
  - Special provision in Art. 23(3) ICC-R: Terms of Reference have to be submitted to the court for approval



## Managing the Hearing

- Which hearing?
- Why are tribunals not entitled to issue a “default award”?
- Who decides whether a hearing shall be held?

## The Challenge: Ad Hoc Arbitration & China

- Claimant (German) – Respondent (China)
- Distribution agreement governed by German law
- *Ad hoc* arbitration agreement governed by German arbitration law / no place of arbitration / sole arbitrator
- Claimant – by coincidence – is able to “notify” Respondent
- Kammergericht Berlin appoints sole arbitrator (§ 1035 (3) ZPO)
- Sole arbitrator now – as of today unsuccessfully – attempts to conclude a “signed arbitrator contract” ...

**Thank you for your attention!**

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