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The empty chair – arbitrating against absent respondents

Latecomers and quitters

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Outline

- I. Devices to persuade non-participating respondents to engage in the arbitration (the claimant's perspective)
- II. Dealing with latecomers (the tribunal's perspective)
- III. Dealing with quitters (the tribunal's perspective)

I. Devices to persuade non-participating respondents to engage in the arbitration (the claimant's perspective)

- **Why** should the claimant be interested in avoiding a default by the respondent? (examples)
 - reducing the risk that the award may be set aside or may not be enforced
 - reducing time and cost of the arbitration
 - obtaining production of documents by the respondent
 - avoiding additional scrutiny by the arbitral tribunal

- **When** is it worth trying to persuade the respondent to engage in the arbitration?
- It depends on the place of enforcement
- It depends on the respondent's interests and intentions ...
- ... dealing with a participating, but obstructing respondent may be worse than a total default situation (risk of "guerrilla tactics")

What motivates a respondent to be absent from the arbitration? (examples)

- A respondent may seek to delay or to obstruct the proceedings
- A respondent may not see any chance of success
- A respondent, due to a lack of knowledge about arbitration, may not feel “concerned” by the notice of arbitration or may not understand that the proceedings will result in an enforceable award
- A respondent may be unable to participate in the arbitration or to respond in time, e.g. because it lacks the necessary funds / is subject to insolvency proceedings or, for internal reasons, needs more time to organise its defence (e.g. when the respondent is a State)

- ❑ Devices to “**persuade**” the respondent to engage in the arbitration?
(examples)
 - Explain the process: make the respondent understand that the proceedings will continue and that he will be bound by the award
 - If need be, communicate via local counsel in the respondent’s language
 - Identify a competent contact person within the respondent’s organisation (e.g. in case the respondent is a State)
 - Consider making procedural concessions (e.g. regarding the place or language of the arbitration, the number of arbitrators) or waiving jurisdictional objections to possible counterclaims
 - Consider not objecting to requests and partial defaults by the respondent (e.g. extension requests, late filings, etc.)

II. Dealing with latecomers (the tribunal's perspective)

- The respondent can participate at any stage of the proceedings and must be heard
- As a rule, the proceedings need not be repeated, unless the respondent shows good cause for its absence
- The tribunal has discretion in ascertaining whether the respondent is actually in default and/or whether such default can be excused
- Endeavour to strike a fair balance between the requirement of a fair & flexible process vs procedural efficiency

III. Dealing with quitters (the tribunal's perspective)

- Enquire about the reasons for the respondent's withdrawal from the proceedings and clarify potential misunderstandings
- Ensure due process (continuous notice to the respondent, examination whether a default situation has really occurred, grace periods? warnings?)
- Establish a record (procedural orders, transcript of hearings)
- Specify the circumstances in which the proceedings have taken place in the award itself

Conclusions

1. From the respondent's perspective: non-participation is not always based on improper intentions, but may be motivated by legitimate or excusable reasons.
2. From the claimant's perspective: think twice before requesting the tribunal to issue an *ex parte* award; you may have an interest in persuading the respondent to participate in the arbitration.
3. From the tribunal's perspective: be well prepared, fair and open to the respondent's arguments, but firm in case of dilatory or obstructing tactics. Ensure at all times that the respondent has a reasonable opportunity to present its case.

Thank you for your attention!