



## **Finding the Truth Without the Respondent: The Claimant's Perspective**

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## Consequences of Default as to the Substance

### Lex Arbitri

- UNCITRAL Model Law:
  - Respondent's failure to submit a statement of defence shall not be treated as an admission of claimant's allegations
  - The tribunal may proceed to an award on the basis of the evidence before it (Art. 25(c))
- Similar approach in England & Wales (Art. 41(4) Arbitration Act); France (Art. 1509 CPC); Switzerland (Art. 182 PILA); Germany (§ 1048 ZPO); Belgium (Art. 1695 Code Judiciaire); Section 24(3) of the Swedish Arbitration Act; South Korea (Art. 26 Arbitration Act)
- Article 1040(3) Dutch Arbitration Act: In case of Respondent's default *"the arbitral tribunal shall render an award in favour of the claimant, unless it considers the claim to be unlawful or unfounded. Before rendering an award, the arbitral tribunal may require the claimant to produce evidence in support of one or more of his allegations."*

## Consequences of Default as to the Substance Arbitration Rules and Practitioners' View

- UNCITRAL Model Rules: Tribunal shall proceed to an award *on the basis of the evidence before it* (Art. 30(3))
- Same approach under: SIAC Rules (Art. 21.3); Swiss Rules (Art. 28(3)); SCC Rules (Art. 30.2); ICDR Rules (Art. 23)
- ICC and LCIA Rules provide that the proceedings shall continue, remain, however, silent as to how the tribunal should proceed and make an award
- Prevailing view amongst practitioners: No presumption that claims are correct in the absence of formal denial, i.e., no "default judgment"

SEE, E.G., BUTCHERS/KIMBROUGH, the Arbitral Tribunal's Role in Default Proceedings, Kluwer Law International 2006, Vol. 22, p. 236 / DANIEL TUNIK, Default Proceedings in International Arbitration, 1 Int'l Arb. L. Rev. 1998, p. 87

## Implications of Default for Claimant

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<i>Nobody who contradicts Claimant's allegations</i>	<i>Nobody who can confirm Claimant's allegations</i>
<i>Claimant can generally control the information available to the Tribunal</i>	<i>Unavailability of documents/information to substantiate the claim</i>
	<i>Opposition at enforcement stage likely</i>

## Implications of Default for Claimant cont'd



*Nobody who contradicts  
Claimant's allegations*

*Claimant can generally  
control information  
available to the Arbitral  
Tribunal*

Need Claimant:

- Issue A): Submit a fully substantiated claim?
- Issue B): Anticipate potential counter-arguments and address weak points?

## Issue A

### **Burden of Proof and Standard of Proof**

- Starting point: Burden of proof
- General principle: Each party bears the burden of proving the facts relied on to support its claim or defense
- Does/should Respondent's absence influence the burden and standard of proof?
  - From a legal point of view?
  - From a psychological point of view?
  - If not, does this mean that Claimant's submissions in default proceedings should not differ from opposed arbitrations?

## Issue A cont'd

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### What Evidence Should Claimant Offer?

- Documentary evidence?
- Witness evidence?
- Expert evidence?
- Less/more evidence than in an opposed arbitration?
- How should Claimant react if the tribunal requests it to provide evidence on certain points?

## Issue B

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- Starting Point: No default award
- Criteria to determine whether/to what extent to be open:
  - Who bears the burden of proof?
  - Good case – bad case
  - Respondent's motivation to default?
  - "Inquisitorial" tribunal?
  - How readily can the tribunal conduct its own inquiries on facts and law, e.g., internet research. The easier, the more open you should be.



## Implications of Default for Claimant cont'd

*Nobody who agrees with Claimant's allegations*

*Unavailability of documents/information to substantiate the claim*

*Opposition at enforcement stage likely*

- Need to submit evidence for facts that would not be disputed in opposed arbitrations
- Possibility to draw adverse inferences, if Respondent does not comply with production request?
- Application to state court for assistance?
- Additional requests for relief?

## Additional Requests for Relief?

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### **Jurisdiction**

- Should Claimant elaborate on jurisdictional issues?
- Should Claimant ask for a (interim) decision on jurisdiction?

### **Non-excusable absence of Respondent/sufficient notice**

- Request for a declaration that Respondent's absence is not excusable?
- Request for a declaration that Respondent has received notice of the arbitration and of all procedural steps throughout the proceedings, particularly the hearing?
- Request for a declaration that Respondent has received notice of consequences of default
- Request for a declaration that Respondent has received all submissions and documents?

### **Request for a declaration of non-liability**

**Thank you for your attention**

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