Defaulting Parties and Default Awards in International Arbitration

Dr. Wolfgang Kühn

I Introduction

Whilst international arbitration is the favoured method of international dispute resolution,1 some parties simply refuse to follow through with their choice of dispute resolution and do not participate in arbitration proceedings. When a party elects not to participate, or is unable to take part,2 the arbitral tribunal can have a difficult task ahead given that, unlike civil proceedings in national courts, a default judgment or award does not exist in international arbitration. Instead, an arbitral tribunal must task itself with carefully considering the facts and law of a case despite a party’s absence from the process. This raises issues and concerns in the arbitration process that are particular to default proceedings. This paper will identify and discuss some of these issues and suggest practical steps to be implemented in such cases, with the aim of producing an enforceable award.

II Default Awards in International Arbitration

Unlike a national court, an arbitral tribunal has “no authority to enter an award based on accepting as admitted claims which have not been denied.”3 Instead, an arbitral tribunal is required to review the evidence presented to it, satisfy itself that the case has been proven, and provide reasons for its conclusion in

---

2 It is noted that in some cases a Party is prevented from taking part in arbitral proceedings. This could be the result of on-going criminal proceedings or insolvency proceedings in which the insolvent party no longer has the capacity to arbitrate.
the final award.\textsuperscript{4} Thus, the final award in a proceeding with an absent or defaulting party is just like any other award, the only difference being one-sided participation in the process.

Accordingly, when used in this article, the term “default” award must be understood as an award rendered without the participation of one party, but where the claims have nevertheless been established and proven to the satisfaction of the arbitral tribunal.

\section{Applicable Rules and Laws for Defaulting Parties}

In a typical default case, the claimant files a request for arbitration and the respondent either fails to pay its share of the advance on costs, fails to file an answer to the request for arbitration, or fails to participate in the proceedings. The respondent may also refuse to recognise the jurisdiction of the arbitral tribunal and chose not to participate on that basis.

Whatever the reason for refusal, a party’s failure to participate can be problematic given that arbitration is essentially a consensual method of dispute resolution. However, if an arbitration was unable to proceed simply because a respondent refused to participate, then the process would be particularly vulnerable to recalcitrant respondents. As such, most, if not all national and institutional arbitral rules allow an arbitration to proceed despite the absence or non-participation of one party.\textsuperscript{5} For example, German Code of Civil Procedure provides that where a respondent fails to respond, “the arbitral tribunal shall continue the proceedings, without the failure to comply with procedural rules as such being deemed to be an acknowledgment of the assertions made by the plaintiff,” and where a party fails to appear or produce evidence, “the arbitral tribunal may continue the proceedings and may issue the arbitration award based on the insights it has obtained.”\textsuperscript{6}


\textsuperscript{5} See for example, International Chamber of Commerce Arbitration Rules 2012 (“ICC Rules (2012)”), Art 6(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,” and ICC Rules (2012) Art 26(2): “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.”

\textsuperscript{6} German Code of Civil Procedure (\textit{Zivilprozessordnung or ZPO}), § 1048(2) and (3). The German Legislature implemented Art. 25 Model Law into § 1048 German Code of Civil Procedure; see Quinke SchiedsVZ 2013, 129 130. With respect to § 1048(1) German Code of Civil Procedure,