Global Arbitration Review

The Guide to Advocacy

General Editors
Stephen Jagusch QC and Philippe Pinsolle

Associate Editor
Alexander G Leventhal

Fourth Edition

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This article was first published in September 2019
For further information please contact Natalie.Clarke@lbresearch.com

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Published in the United Kingdom
by Law Business Research Ltd, London
Meridian House, 34-35 Farringdon Street, London, EC2A 4HL, UK

www.globalarbitrationreview.com

ISBN 978-1-83862-210-7

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

Acknowledgements

The publisher acknowledges and thanks the following for their learned assistance throughout the preparation of this book:

3 VERULAM BUILDINGS

39 ESSEX CHAMBERS

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AL TAMIMI & COMPANY

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Advocacy Against an Absent Adversary

John M Townsend and James H Boykin[1]

On the floors of Tokyo
A-down in London town's a go go
A-with the record selection,
And the mirror's reflection,
I'm a dancin' with myself[2]

Advocates trained in an adversary system acquire a set of skills that is generally useful and effective for dealing with an adversary. They are accustomed to anticipating procedural manoeuvres, positioning the case to put the other side off balance, parrying arguments from their opponents, and demonstrating to the court or tribunal why none of the opponent's arguments should prevent their client from prevailing. When the opponent refuses to show up, however, a very different set of skills is needed, especially if the proceeding for which the opponent fails to appear is an arbitration rather than a litigation in court.

Every major set of arbitration rules contains procedures that enable an arbitration to proceed through all its stages notwithstanding a respondent's refusal to participate in the process. Arbitration could hardly work if a respondent could halt the proceedings by simply not showing up.[3] However, what no widely used set of arbitration rules contains are procedures, like those found in national rules of procedure, that allow the arbitral tribunal to enter a default award in favour of the claimant simply because the respondent fails to appear.

---

1 John M Townsend and James H Boykin are partners at Hughes Hubbard & Reed LLP.

2 Billy Idol and Tony James, *Dancing with Myself* on *Kiss Me Deadly* (Chrysalis Records) (1981).

3 Article 15.8 of the LCIA Arbitration Rules (2014) provides: 'If the Respondent fails to submit a Statement of Defence or the Claimant a Statement of Defence to Cross-claim, or if at any time any party fails to avail itself of the opportunity to present its written case in the manner required under this Article 15 or otherwise by order of the Arbitral Tribunal, the Arbitral Tribunal may nevertheless proceed with the arbitration (with or without a hearing) and make one or more awards.'

Trust the tribunal

When opposing counsel appears to do something that might be inappropriate (e.g., refusing to produce evidence that is plainly beneficial to the position of its party), it is sometimes tempting for counsel to overplay the situation, and even become overly aggressive including with the tribunal. Counsel should fight the temptation and leave the tribunal to address the issue. By showing trust to, rather than demanding from, the tribunal, counsel has more to gain eventually.

– Stavros Brekoulakis, 3 Verulam Buildings

In a national court, the consequences of not defending against a claim can be extreme for the defaulting party. A failure to appear can swiftly lead to entry of an adverse judgment, often with very limited judicial scrutiny of the merits of the claim.[4] In arbitration, however, a non-participating respondent faces no such repercussions from its decision not to participate. Rather, the other side's failure to appear in an arbitration presents the claimant with a real challenge to the advocacy skills of its counsel: how to present evidence and prove its case to arbitrators who may enter an award in favour of the claimant only if they are satisfied by the evidence that it is appropriate to do so.[5]

One might think that a claimant would be pleased to have its opponent fail to appear. After all, how difficult can it be to win a case with no opposition? The answer is, 'harder than one might think'. This is because the absence of a counterparty alters the dynamic between the claimant and the arbitral tribunal. Instead of impartially and neutrally assessing the evidence presented from both sides, the tribunal's role shifts. It must scrutinise one side's evidence (the claimant's), while simultaneously ensuring procedural fairness for the absentee respondent. The tribunal remains impartial and neutral, but its engagement with the case is solely with the claimant. Both the claimant and the tribunal must therefore be careful to ensure that this shift in the tribunal's role does not go so far as to change their relationship into an adversarial one, in which the tribunal attempts to fill the vacuum created by the absence of defence counsel. What might superficially seem like a boon to the

4 See, e.g., Federal Rules of Civil Procedure, Rule 55 ('(a) When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise, the clerk must enter the party's default. (b)(1) If the plaintiff's claim is for a sum certain or a sum that can be made certain by computation, the clerk—on the plaintiff's request, with an affidavit showing the amount due—must enter judgment for that amount and costs against a defendant who has been defaulted for not appearing and who is neither a minor nor an incompetent person.').

5 Article 26(3) of the International Arbitration Rules of the American Arbitration Association's International Centre for Dispute Resolution (2014) provides: 'If a party, duly invited to produce evidence or take any other steps in the proceedings, fails to do so within the time established by the tribunal without showing sufficient cause for such failure, the tribunal may make the award on the evidence before it.'

claimant – the lack of an opponent – actually thrusts the claimant's advocate into a delicate and difficult situation.

Professor D P O'Connell QC described the difficulties of this situation and the challenges faced by the claimant's counsel when a respondent defaults.[6] In his oral argument before the International Court of Justice (ICJ) in the *Aegean Sea Continental Shelf* case, Professor O'Connell described the difficulties Greece faced as applicant after Turkey refused to participate in the ICJ proceedings:

> *Both the Court and the applicant are put in an embarrassing position [when the respondent fails to appear]. The Court is embarrassed because, in order to preserve the judicial character of the proceedings it must take infinite pains to avoid putting itself in an adversary relationship with the applicant. And the applicant is embarrassed because it must satisfy the Court that the claim is well-founded in fact and law, without the benefit of hearing the arguments that the respondent ought to have made in support of its observations. It has to imagine the arguments that might be passing through the mind of the Court, whether they are so passing or not.*
>
> *So, the applicant has to bring matters before the Court which ought properly to be brought before it by the respondent by way of preliminary objection, and the protection which the Court gives to the respondent paradoxically erodes the protection which the applicant has under the Court's Rules. The greater the protection to the Respondent, the more progressive is the shift in the balance in its favour.*[7]

Framing the case

The advocacy challenges presented by a respondent's failure to appear begin with the claimant's first submission to the tribunal. The claimant must, as Professor O'Connell observed, decide at the outset just how far – and to what extent – to anticipate and respond to arguments that the respondent might have made if it had participated in the arbitration. A concrete example from the context of investor-state arbitration provides a useful illustration of the Scylla and Charybdis through which a respondent's non-appearance can force the claimant's counsel to navigate.

Imagine you are acting as counsel to a claimant against a sovereign state in an arbitration brought under a bilateral investment treaty. The sovereign state refuses to participate in the arbitration. The definition of 'investment' in the treaty requires that the investor's (the claimant's) investment be 'in accordance with the law' of the host (respondent) state. As

6 Daniel Patrick O'Connell QC was the Chichele Professor of Public International Law at the University of Oxford from 1972 to 1979. He was counsel to the applicant, the Hellenic Republic, in the *Aegean Sea Continental Shelf* case against Turkey. The jurisdiction of the International Court of Justice [ICJ], like the jurisdiction of any arbitral tribunal, is based on the consent of the disputing parties. For that reason, proceedings before the ICJ may find useful application through analogy in arbitration, particularly in investor-state arbitration.

7 Oral Arguments on Jurisdiction, Minutes of the Public Sittings, held at the Peace Palace, The Hague, from 9 to 17 October and on 19 December 1978, p. 318, available at https://www.icj-cij.org/files/case-related/62/062-19781009-ORA-01-00-BI.pdf. Sir Gerald Fitzmaurice reproduced Professor O'Connell's observations appear in his article entitled, 'The Problem of the "Non-Appearing" Defendant Government', *British Year Book of International Law*, Vol. 51, Issue 1 (1980), 89, 95.

many readers of this guide will no doubt be aware, respondent states in investment treaty arbitrations frequently invoke such provisions to argue that an arbitral tribunal constituted under an investment treaty lacks jurisdiction to hear the claimant's claim, because the claimant failed in some respect to make its investment in accordance with the respondent's laws.[8] This objection often is accompanied by allegations of corruption on the part of the claimant. Counsel for the claimant faces a difficult choice when assessing to what extent he or she should address such a potential objection if the respondent has not actually shown up to make the objection.

Claimant's counsel cannot just whistle past this graveyard, because the 'in accordance with law' provision can be read as a jurisdictional prerequisite that a claimant must satisfy to establish the arbitral tribunal's jurisdiction over the dispute. If 'legality of the investment' is indeed a prerequisite to obtaining the treaty's protections, including its arbitration provisions, then surely the claimant must say something to address it. After all, a claimant has the burden of establishing jurisdiction. It would therefore seem prudent to include, as a minimum, an allegation that the claimant made its investment 'in accordance with' the respondent's laws. But such an undeveloped and unsubstantiated allegation poses the risk that the tribunal will find, as Professor O'Connell warned, that the claimant did 'not discharge the burden of proof sufficiently'.[9] That risk is probably too great for most counsel to run.

On the other hand, if counsel overdevelops the claimant's response to an unarticulated illegality objection, then he or she risks conveying 'an impression of defensiveness or want of conviction'.[10] Milquetoast pleadings can be unpersuasive, but pleadings that overcompensate run the risk of provoking a counter-reaction. By pre-emptively responding to an unraised allegation of corruption – and doing so too forcefully – the claimant risks inadvertently creating an impression in the minds of the tribunal that 'the wicked flee when no man pursueth'.[11] That is hardly an impression that an advocate would wish to leave with the arbitral tribunal.

Neither extreme is appealing. The challenge that an advocate faces is finding the 'Goldilocks Zone' between saying too little and saying too much.[12] That challenge is heightened, particularly in the context of treaty arbitration, by the absence of agreement among arbitrators about the precise contours of many jurisdictional requirements, such

8 Rahim Moloo and Alex Khachaturian, 'The Compliance with the Law Requirement in International Investment Law', *Fordham International Law Journal*, Vol. 34, Issue 6, 1471, 1475 (available at https://ir.lawnet.fordham.edu/ilj/vol34/iss6/1) ('It has become commonplace for respondents to allege that investors have not complied with the law in making their investment, and accordingly, should be prevented from pursuing their claims.').

9 Oral Arguments on Jurisdiction, Minutes of the Public Sittings, held at the Peace Palace, The Hague, from 9 to 17 October and on 19 December 1978, p. 318, available at https://www.icj-cij.org/files/case-related/62/062-19781009-ORA-01-00-BI.pdf ('It might, by seeking to counter arguments that had not been put, but which imagination could conjure up, convey an impression of defensiveness or want of conviction. Yet, if it does not counter arguments which actually do occur to the Court, it might not discharge the burden of proof sufficiently.').

10 ibid.

11 Proverbs 28:1 (King James Version).

12 In astrophysics, the 'Goldilocks Zone' refers to the habitable zone around a star where the temperature is just right – not too hot and not too cold – for liquid water to exist on a planet.

Two lessons

1

I was once appointed to serve as a co-arbitrator in an ICC arbitration by a respondent who, after submission of the request for arbitration and answer (and possibly a counterclaim), then failed to appear in the case. The claimant appeared and argued its case on the merits but not the respondent.

This raised two issues that both taught me lessons. The first issue for me was how to deal with the respondent's case, given its failure to appear. As the respondent's co-arbitrator, I felt that this placed a special responsibility on me: I had to try, as best I could, to make up for the failure of the respondent to present its case. The president of the arbitral tribunal and the claimant's co-arbitrator – both highly experienced – acquiesced in my position. Accordingly, with their consent, I cross-examined the witnesses of the claimant as best I could and sought to present all the respondent's arguments to them and later, in conference, to my fellow arbitrators.

From this experience I learned that when a party fails to appear to present its case, there is no way that it's co-arbitrator can replace the lawyers who should be representing it. Unlike a party's lawyers, an arbitrator has no means to make an independent factual investigation of the case but must instead make do with such documents and witnesses as the parties may have presented. Moreover, as a practical matter, an arbitrator can make – as in any arbitration case – only a limited legal investigation, if any.

Thus, while I may have made some inroads into the claimant's case, especially its claim for damages (to the extent that it was unsubstantiated), I was no substitute for the lawyers who should have been there for the respondent.

2

When a tribunal decides to proceed with a case in the absence of a party, the tribunal needs to make a particular effort to ensure that it will render an enforceable award, especially against the non-appearing party. To render such an award, it is necessary that each party is given reasonable opportunity to present its case. A party will only have been given such opportunity if it has been invited to do so at each stage of the arbitration proceedings. Thus, it is essential that the tribunal repeat this invitation to any non-appearing respondent (and the claimant) throughout the proceedings. At the same time, the tribunal must take steps to ensure that all its invitations and other communications to the parties are properly addressed to them. Most important, this must be done in such a way as to ensure that the tribunal will have a record of this by, for example, sending all communications by hand or special courier, requesting a return receipt or a statement from the messenger or courier service that this could not be obtained. If the tribunal's award is later challenged, this documentation will be necessary to establish that the respondent had been given a reasonable opportunity to present its case, thereby denying it the possibility of challenging the award successfully on this ground.

These are the two noteworthy points that I recall from my experience of serving as an arbitrator in a case where the party who had nominated me failed to appear to present its case.

– Christopher Seppälä, White & Case LLP

as the requirement that an investment be made 'in accordance with' law. The divergence of opinion among tribunals about the content of these requirements raises the stakes in responding to the unarticulated objection. For example, should a claimant plead that its investment satisfies all the *Salini* factors even if the arbitration is not taking place under the ICSID Convention, simply because respondent states frequently invoke the application of that test outside the ICSID system?[13] It is easy to imagine how quickly a claimant's submission can become tedious (and unpersuasive) when its counsel – with no opponent with which to join issue – feels compelled to address every conceivable jurisdictional objection, when none has actually been made.

Managing the tribunal

The second difficulty that Professor O'Connell described was the risk that 'the protection which the [arbitral tribunal] gives to the respondent paradoxically erodes the protection which the [claimant] has under the [arbitral rules]'.[14] The primary means through which the arbitral tribunal 'protects' a non-participating respondent is by testing the claimant's evidence. Managing that process can be a real challenge for the claimant's advocate.

A refusal by a respondent to participate in an arbitration puts the arbitral tribunal in a difficult position, and the claimant's counsel needs to be alert to how to help it with the situation. Even when both parties participate in an arbitration, arbitrators must weigh the evidence and arguments presented to them, and may find themselves sceptical about parts of it. Typically, arbitrators will try to probe the evidence or arguments in a way that does not suggest that they have reached a premature conclusion, while still permitting them to satisfy themselves that they have not accepted evidence that they do not find credible or arguments that they do not find convincing. The absence of a party from an arbitration makes it difficult for the arbitrators to test the evidence without appearing to shift into the role of opposing counsel.

If the arbitrators are the sort who like to ask questions, they find themselves with only one party to question, so they cannot demonstrate their impartiality by asking equally difficult questions of both parties. If, on the other hand, they belong to the school of arbitrators that likes to sit back and listen, then they will hear only one side of the case presented to them, and that presentation will not be tested unless the arbitrators themselves do the testing. Professor Hobér described the dilemma faced by the arbitrators when confronted with a non-participating respondent:

> *The arbitrators have no duty to – and should not – act as counsel or representative of the party who has chosen not to participate. Notwithstanding this, the arbitrators must satisfy themselves that the claims are well-founded in fact and in law.*[15]

13 The tribunal in *Salini Construttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No.ARB/00/4, Decision on Jurisdiction, 23 July 2001, made a list of common characteristics of investments that other tribunals have sometimes applied as a test (called the *Salini* test).

14 See footnote 6, above.

15 Kaj Hobér, *International Commercial Arbitration in Sweden*, Chapter 6, Section 229 (2011).

But just how far should the claimant's counsel encourage the arbitrators to go to satisfy themselves that the claims are well founded in fact and in law? If the claimant's evidence has no glaring holes, the claimant's counsel may want to stress that a full picture has been presented. If the tribunal seems reluctant to accept the uncontested expert evidence presented by the claimant, counsel will need to make a judgement about how strenuously to resist the tribunal's urge to test the evidence.

For example, if the expert report addresses a subject with which the members of the tribunal seem likely to be unfamiliar, such as an expert report on the law of the Duchy of Grand Fenwick, then it may be impossible to dissuade the tribunal from retaining its own expert on that subject, and it would probably be a mistake to try. In this situation, a tribunal balancing the claimants' interests in moving ahead economically against the due process rights of the non-participating respondent could well insist on having its own expert, and the claimant's counsel would be well advised to focus his or her efforts on defining the scope of the work to be performed by the tribunal expert as precisely and narrowly as possible.

But what if the subject of the expert report is one about which seasoned arbitrators can be expected to have considerable experience, such as an expert valuation report based on a discounted cash flow model? In such a case, counsel should be able to persuade the members of the tribunal to rely on their own experiences and to focus their efforts on examining the claimant's expert about the assumptions in his or her expert report. It should not in such circumstances be necessary for the tribunal to retain another expert to prepare a competing valuation report so as to discharge its duty to test the evidence. Because the claimant would have to bear the additional costs of paying an expert to assist the tribunal – which can be considerable – the claimant's counsel will have a real incentive to try to rein in the cautious arbitrator's inclination to have both a belt and braces. While the tribunal should award any such additional costs as part of its final award, the claimant can hardly assume that the respondent will pay the award voluntarily if it would not even participate voluntarily in the arbitration.

A more volatile problem will confront the claimant's counsel if the arbitrators, frustrated by the refusal of the respondent to participate, toy with the idea of appointing a sort of *amicus curiae* (or *amicus arbitri*) to perform the adversarial function that the absent party is not performing and that the arbitrators may be uncomfortable about performing themselves. Such a solution can have a superficial appeal to the arbitrators, because it would allow them to sit back and listen, confident that the adversarial process they have engineered will sufficiently test the evidence. The risks posed by such a solution are considerable, however.

First, the tribunal's *amicus* cannot be expected to work for free, so this solution would impose on the claimant the burden of paying for the opposition to its own case. That is unlikely to sit well with the claimant; its counsel would certainly be entitled to protest. Second, the arbitrators may well enlist a more able advocate for the absent party than it would have hired for itself, so that the absentee respondent may find itself in a better position than it would have been in if it had chosen to participate. Third, the advocate thus enlisted can attack the claimant's case without the obligation to offer an alternative case to counterbalance it that normally constrains the aggressive instincts of respondents' counsel. Fourth, because many arbitration rules provide that each party may be represented by persons of their choice, appointing such an advocate could expose an award to challenge

Default victories don't exist

It happens not infrequently that one side in an arbitration (virtually always the respondent) fails to participate in any phase of the arbitration; however, the claimant must not consider that it will automatically prevail. While both arbitration laws and rules permit a case to go forward in the absence of a party, a 'default' victory does not exist. The claimant must still carry the burden of proof (more probable than not) regarding both the tribunal's jurisdiction and the claims. Indeed, I am aware of one case in which an unopposed claimant lost the case because the tribunal considered that its burden of proof was not carried.

A claimant may think it will coast to victory without an opponent, but I beg to differ. Arbitrating without an opponent is like playing tennis with neither a net nor boundary lines. Because the claimant's case is not tested by an opponent, the claimant has to wonder whether its shots are scoring points with the tribunal, or are wide of the mark (what mark?). As for the tribunal, how do you referee a game and ensure its fairness when only one side is playing?

Here are some guidelines for saving costs, and both winning the case and ensuring that the eventual award is not vulnerable to a setting aside procedure:

For the claimant:

- Plead your case as thoroughly as you would any other, but with one addition. Where normally you might not disclose up front the possible weaknesses in your case, hoping the other side will not spot them, take the initiative to point them out to the tribunal and to deal with them. You don't want the tribunal to spot them when writing the award.
- Having been forthright with weaknesses and dealt with them, consider suggesting that the case be decided on documents only, without a hearing, while at the same time encouraging the tribunal to raise any questions it may have regarding your submissions.
- Double-check that both you and the tribunal notify the respondent of each and every communication, and ensure that there is proof of delivery.

For the tribunal, in addition to ensuring proper notification of all communications, two English cases provide good guidance, the fundamental principle being that due process is observed:

- In *Fox v. Wellfair* (1981 WL 186914), Lord Denning stated: '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. His function is not to supply evidence for the defendants but to adjudicate upon the evidence given before him.'
- In *Interprods v. De La Rue* (2014 WL 287657), Mr Justice Teare observed that, in anticipation of the hearing, the arbitrator wrote to the claimant's counsel: 'I would appreciate it, seeing that there will not be . . . cross-examination, if you, sir, will lead [the witness] through some of his testimony.' One question was asked by the arbitrator. In the award, the arbitrator gave his reasons for regarding the witness's evidence as credible. The judgment considered that '[t]hese reasons demonstrate that the arbitrator did not accept the witness's evidence "uncritically".'

Your serve.

– Stephen Bond, Covington & Burling LLP

on the grounds that the respondent had effectively been represented by someone it had not chosen.[16] The claimant's counsel may find his or her tact and diplomacy stretched to their limits, but will want to exert himself or herself to convince the arbitrators that these drawbacks outweigh any benefit they could hope to achieve.

Advocating for a workable process

Second only to presenting a convincing case on the merits, the most effective form of advocacy that a claimant's lawyer can deploy against an absent opponent is to guide the tribunal towards procedural solutions to the opponent's absence that respond to both the sense of responsibility of the tribunal and its frustrations.

In the *Arctic Sunrise* case (*Kingdom of the Netherlands v. The Russian Federation*), an arbitration conducted under the United Nations Convention on the Law of the Sea in which the Russian Federation refused to participate, the tribunal voiced the frustration that most tribunals feel when they must proceed in the absence of a party:

> *Russia's non-participation in the proceedings has made the Tribunal's task more challenging than usual. In particular, it has deprived the Tribunal of the benefit of Russia's views on the factual issues before it and on the legal arguments advanced by the Netherlands. The Tribunal has taken measures to ensure that it has the information it considers necessary to reach the findings contained in this Award. These measures include the issuance, on three occasions, of further questions to the Netherlands on issues arising out of its written or oral pleadings. Members of the Tribunal also put questions to the witnesses presented by the Netherlands at the hearing.*[17]

The procedures adopted in the *Arctic Sunrise* case provide a useful template for an advocate to offer a tribunal tasked with deciding a case in which only one party is participating. Those procedures can be presented to the tribunal as fairly striking a workable balance between the interests of the claimant and the interests of the non-participating respondent. The authors are aware of similar procedures having been used in at least five investment arbitrations in which the same respondent did not participate,[18] and are thus worth describing in a bit more detail.

16 e.g., Article 5 of the UNCITRAL Arbitration Rules (2010) ('Each party may be represented or assisted by persons chosen by it.'). This concern can be particularly acute in the context of an arbitration against a sovereign state. If a state makes a deliberate choice not to participate in an arbitration, that choice reflects the state's sovereign will. The arbitral tribunal may not agree with that choice. The state's choice very well may inconvenience the arbitral tribunal a great deal, but it is the state's inherent right to choose this course of action and accept the consequences of not participating in the proceedings. It is probably better for the arbitral tribunal to respect the state's choice rather than to attempt to override it through the appointment of a 'guardian ad regum'.

17 In the matter of the *Arctic Sunrise* arbitration (*Neth. v. Russ.*), ITLOS Case No. 22, PCA Case No. 2014-02, Award on the Merits, Paragraph 19 (14 August 2015).

18 PCA Case No. 2015-07: *Aeroport Belbek LLC and Mr Igor Valerievich Kolomoisky v. The Russian Federation*; PCA Case No. 2015-21: *PJSC CB PrivatBank and Finance Company Finilon LLC v. The Russian Federation*; PCA Case No. 2015-34: *PJSC Ukrnafta v. The Russian Federation*; PCA Case No. 2015-35: *Stabil LLC v. The Russian Federation*; and PCA Case No. 2015-36: *Everest Estate LLC v. The Russian Federation*.

Don't give the arbitrators an excuse to become opposing counsel

The non-participation of your opponent in the proceedings is never good news. It does not speak in favour of the non-participant, but it is only a very superficial advantage. Arbitrators do not judge companies and people in the light of moral standards. They decide cases on the basis of the evidence presented to them and of the applicable rule of law. Do not imagine that the arbitrators will accept anything you say simply because it is not challenged by your absent opponent. They will scrutinise your evidence to assess whether it supports your case. In this respect, you cannot assume that the arbitrators will not look for the weaknesses of your case. Good arbitrators will do this if you do not do it for them and the risk is that they become your opponent's objective counsel. To be on the safe side and avoid it, you must explain in your written submissions why your opponent's possible defences would necessarily fail. If you are lucky enough to have very good documentary evidence, avoid presenting witnesses; in the absence of your opponent at the hearing, the arbitrators would feel obliged to submit them to cross-examination. The danger is that they will enjoy it. Do not ask for a hearing – just say that you are available to answer any of the tribunal's questions. If your written evidence is well presented and supports a balanced legal analysis, the arbitrators may decide that no hearing is necessary, to avoid having a meeting with just one of the parties. In this way, you will avoid being subjected to possibly embarrassing questions.

– Yves Derains, Derains & Gharavi

The first step is for the claimant to offer to submit its statement of claim – on both jurisdiction and the merits – with all supporting evidence. In preparing that initial submission, the claimant will still face the difficulties (described above) of determining just how far to address objections to jurisdiction that have not been articulated and defences on the merits that have not been raised. However, these difficulties should be ameliorated by the steps in the procedure described below that call for the tribunal to ask written questions, thereby allowing the claimant to focus its submission on the key points that must be established.

The second step is to urge the tribunal to set a date by which the respondent is required to submit its statement of defence. This has the advantage of appearing to be a reasonable protection of the respondent's right to participate in the arbitration, even if it seems obvious that the respondent has no intention of making any submission at all.

Some tribunals have varied this second step slightly by setting two dates. The first, which is set relatively soon after the submission of the claimant's full statement of claim, is a date by which the respondent is required only to indicate to the tribunal and the claimant whether it intends to submit a statement of defence. If the respondent states that it intends to submit a defence, then its statement of defence will be due on the later second date. If the respondent does not indicate its intention to defend the case, then the tribunal can proceed to the next step without waiting until the time limit provided for the respondent to prepare and submit its statement of defence has expired. This variation thus balances the claimant's interest in moving forward with the interest of the non-participating respondent in having an opportunity to reconsider – in light of the claimant's statement of claim – its decision not to participate in the arbitration. If the respondent chooses to let that

opportunity pass by and does not signal its intention to participate, then the arbitration can move forward to the third step without further delay.

The third step involves encouraging the tribunal to submit to both parties, in writing, any questions that it may have arising from the claimant's statement of claim. By addressing the questions to both parties, the tribunal accommodates the respondent's procedural right to preserve an opportunity to participate in the proceeding and react to the claimant's evidence and legal theories, while simultaneously moving the arbitration forward. The claimant has the benefit of being able to react to and engage with specific questions, rather than having to guess about what is on the tribunal's mind. Such questions free the claimant from having to shadow box against the unknown and permit it to craft responsive (and persuasive) answers. However, because the questions are addressed to both parties, and the respondent is always free to proffer its own answers, the tribunal is not seen as taking sides. Typically, the tribunal will also provide for a second date on which both parties have an opportunity to comment on the other's responses to the tribunal's questions in the event that the respondent reconsiders its original decision not to participate after having seen the tribunal's questions and the claimant's answers.

The final step – after the written question phase – is to encourage the tribunal to hold a hearing at which both parties are invited to participate. This entire four-step procedure can be followed either in a bifurcated or a non-bifurcated proceeding. In a bifurcated proceeding, the tribunal would first follow these steps with questions and hearings limited to issues of jurisdiction and admissibility. Once the tribunal is comfortable that it has jurisdiction, the tribunal may apply the same process to the merits of the dispute. In a non-bifurcated proceeding, the tribunal would put to the parties questions of jurisdiction and admissibility at the same time as questions on the merits, and hold a hearing after the procedure for answering the written questions is completed. Either way, the tribunal will be empowered to draft its award secure in the confidence that it discharged its duty to be fair to the absent party, while having been guided by the participating party's advocate through a full presentation of the case.

Conclusion

The lesson for the advocate is that there are few opponents as difficult to manage as the one who refuses to show up. Every move of an active opponent can be countered and every argument actually articulated by the other side can be refuted, but to convince a tribunal to find in a client's favour and against an absent opponent requires the advocate to rebut unvoiced objections and to overcome unseen obstacles. It also requires him or her to keep the tribunal convinced that it is providing due process to the absent party, without burdening the participating party with the unreasonable costs and unnecessary delays that can sometimes result from a lack of confidence on the part of the arbitrators. By recognising, rather than resisting, the need of arbitrators to feel that a meritorious case has not only been fairly presented, but that it also has been diligently questioned, a skilful advocate can steer the participating party through the turbulent waters of unopposed arbitration.

Appendix 1

The Contributing Authors

John M Townsend
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John M Townsend is a partner in the Washington, DC, office of Hughes Hubbard & Reed LLP and chairs the firm's arbitration and ADR group. Mr Townsend was appointed by President George W Bush to the panel of arbitrators of the International Centre for Settlement of Investment Disputes. He served successively as chair of the Law Committee, chair of the Executive Committee and chair of the Board of Directors of the American Arbitration Association. He served as a vice president of the Court of Arbitration of the LCIA, and is a member of the Arbitration Committee and the Challenge Review Board of CPR and a Fellow of the College of Commercial Arbitrators. He served as an adviser to the American Law Institute's project to draft the Restatement of The US Law of International Commercial Arbitration. Mr Townsend has a degree in history from Yale University and a law degree from Yale Law School.

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James H Boykin is a partner in the Washington, DC, office of Hughes Hubbard & Reed LLP and chair of the firm's investment treaty arbitration group. Jim focuses his practice on international arbitration and includes state-to-state and investor-state arbitration as well as commercial disputes. Jim has represented parties in treaty arbitrations under the ICSID, UNCITRAL and SCC Rules. In addition, he has represented clients in commercial arbitrations under the ICDR and ICC Rules. Jim is a member of the Expedited Commercial Panel of the American Arbitration Association. Previously, he taught as an adjunct professor at the College of William & Mary, School of Law, and at American University, Washington College of Law.

Jim is an active member of the German-American Lawyers Association and is a frequent speaker and moderator at various international arbitration conferences. Jim received his BA from the University of Virginia and his JD from the College of William & Mary.

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Appendix 2

The Contributing Arbitrators

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Stavros Brekoulakis is a professor in international arbitration and commercial law at Queen Mary University of London, and a member at 3 Verulam Buildings. He is the director of the Institute for Regulation and Ethics at Queen Mary, co-chair of the ICCA-Queen Mary Task Force on Third-Party Funding, a member of the International Chamber of Commerce (ICC) Task Force on Emergency Arbitrator Proceedings, a member of the ICC Commission on Arbitration, an assistant rapporteur in the International Law Association Committee on International Commercial Arbitration, the general editor of the *Journal of International Dispute Settlement* and the editor-in-chief of the Chartered Institute of Arbitrator's International *Journal of Arbitration, Mediation and Dispute Management*.

Professor Brekoulakis has been involved in international arbitration for more than 20 years as counsel, arbitrator and expert. Having practised commercial law, arbitration and litigation as in-house counsel and private practitioner, he currently serves as arbitrator and expert. He is regularly listed in *Who's Who Legal: Arbitration* and was listed in *Who's Who Future Leaders: Arbitration* 2017 as one of the 10 most highly regarded future leaders, described as 'very thorough and professional' and 'held in the highest regard'. He was also named in *Who's Who Legal: Thought Leaders – Arbitration* 2018, which includes an exclusive list of 'the most highly regarded arbitrators who truly stand out in their field as being leaders and who are held in the highest esteem by their clients and fellow practitioners'. He was nominated for the Best Prepared and Most Responsive Arbitrator award by Global Arbitration Review in 2016 and 2017.

Professor Brekoulakis has been appointed in more than 30 arbitrations, as chairman, sole arbitrator, co-arbitrator and emergency arbitrator under the rules of the ICC, the London Court of International Arbitration, the Stockholm Chamber of Commerce, the Danish Institute of Arbitration, the Court of Arbitration for Sports as well as in ad hoc arbitrations under the UNCITRAL Arbitration Rules. His professional expertise focuses on arbitrations in the context of major construction and complex infrastructure projects, energy and

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Christopher Seppälä is partner of counsel in the international arbitration group of White & Case LLP, Paris, and founded the firm's Paris arbitration practice in 1988. He has served as counsel or arbitrator in many ICC and other arbitrations. His main areas of practice are international commercial arbitration and international construction.

He is the legal adviser to the FIDIC Contracts Committee, is a former vice president emeritus of the ICC International Court of Arbitration and currently serves as FIDIC's representative on that Court. Chris was co-chair of the group that prepared the ICC Commission's updated (2019) Report on Construction Industry Arbitrations.

He is a lecturer on international construction contracts and disputes at University of Paris II Panthéon-Assas, has a BA from Harvard University and a JD from Columbia Law School, and is a member of the New York and Paris Bars.

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Stephen Bond has focused on international commercial arbitration for almost 30 years. A former secretary general of the ICC International Court of Arbitration and US Member of the ICC Court, Stephen participated in the production of the 1998 and 2012 versions of the ICC Arbitration Rules. He has served as an advocate or arbitrator (sole, party and chairman) in well over 100 international arbitrations under the rules of the ICC, the LCIA, the Stockholm Arbitration Institute, the Japanese Commercial Arbitration Association, the Vienna Centre and UNCITRAL, as well as acting as counsel in mediations. Stephen's experience includes disputes in the energy, international joint venture, construction, defence, technology, sales and distribution fields. He is a frequent speaker and writer on international dispute subjects.

Yves Derains
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Yves Derains is a founding partner of the law firm Derains & Gharavi. As a well-known international arbitrator, he has been involved as presiding arbitrator, co-arbitrator in more than 250 international arbitration proceedings, including commercial and investor-state arbitrations. Yves Derains is a former secretary general of the ICC International Court of Arbitration and is the present chairman of the ICC Institute of World Business Law (since 2011). He was chairman of the Working Party on the Revision of the ICC Rules of Arbitration in 1998 and is co-chairman of the ICC Task Force on the Reduction of Costs and Time in international arbitration. He is honorary professor of the law faculties of St Ignatius of Loyola University, the University of the Pacific and the University of Lima,

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ISBN 978-1-83862-210-7