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# Hughes Hubbard & Reed

## The Politics of the Empty Chair: What happens when a party fails to appear in an international arbitration?

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In U.S. court litigation, when a defendant fails to appear in the proceedings, the plaintiff can normally obtain a default judgment in its favor without having to present evidence. Is the same true in international arbitration? Can the non-defaulting claimant obtain a 'default award' against a defaulting respondent?

The short answer is 'No.' Because of the need to avoid giving a defaulting party grounds to resist enforcement of the arbitral award, default awards are largely unknown in international arbitration. So, what happens when a party fails to appear in an international arbitration?

### ***Proceedings not stopped by a party's default***

Most major arbitration statutes and institutional rules contain provisions regarding a party's failure to appear. Such rules and statutes generally allow the proceedings to continue despite the default of one of the parties. For instance, [Article 6\(8\)](#) of the International Chamber of Commerce (ICC) Rules provides that "*the arbitration shall proceed notwithstanding [the] refusal or failure*" of any party to participate.

Similar provisions exist in most major arbitration rules, including those of the London Court of International Arbitration (LCIA), the International Centre for Dispute Resolution (AAA-ICDR), and the Singapore International Arbitration Centre (SIAC).

### ***Does a party's default operate as a de facto admission of the other party's claims?***

Most sets of arbitration rules are silent on the subject.

A notable exception is the JAMS International Arbitration Rules, whose [Article 27](#) addresses the question expressly. Under that provision, in case of default, a tribunal may **not** make a final award without first considering the evidence

submitted by the non-defaulting party in support of its claim. However, a JAMS tribunal “*may draw the inferences that it considers appropriate*” from a defaulting party’s failure to comply with the rules or the tribunal’s directions.

In the absence of provision on the matter, many tribunals operating under other arbitration rules will typically consider that, by itself, a party’s non-appearance does not operate as a *de facto* admission of the other party’s claims.

### ***So, do arbitral tribunals typically issue a default judgment?***

No. While arbitrators may be wary of giving unfair advantage to a party that consciously chooses not to participate in binding arbitration proceedings, arbitrators must also be careful not to jeopardize the enforceability of their award.

The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) regulates the enforcement of foreign arbitral awards in 170+ countries. Under [Article V\(1\)\(b\)](#) of the New York Convention, an arbitral award may be refused enforcement if a party was not given notice of the proceedings or was otherwise unable to present its case. Depending on the circumstances, a defaulting party may be able to rely on that provision to resist the enforcement of an award rendered against it.

Best practices have emerged in international arbitration to mitigate that enforcement risk. For example, the Chartered Institute of Arbitrators issued [Guidelines](#) on the subject.

### ***What can a party do when the other defaults?***

There are special considerations for advocating against an absent adversary. Hughes Hubbard partners [John Townsend](#) and [Jim Boykin](#) examine them in detail in [this article](#). At a minimum, a non-defaulting party may wish to take extra precautions to ensure that the defaulting party is seen to have been granted a meaningful opportunity to participate in the proceedings. This is typically done through one or more of the following procedural steps:

- The non-defaulting party should ensure that all key communications and all pleadings are successfully transmitted to the defaulting party using a method that keeps a record of such transmission, such as email and/or international courier (in case of hard copies). For example:
  - The non-defaulting party may send all pleadings to the defaulting party both by international courier and by email, even if the tribunal does not require it.
  - It may also periodically send hard copies of all emails exchanged between the tribunal, the arbitral institution, and the non-defaulting party.
- The non-defaulting party should also ensure that the tribunal provides the defaulting party due notice of the procedural timetable including, crucially, the time and place of any hearing.
- A *verbatim* transcript of any hearing should ideally be sent to the defaulting party, who should be given an opportunity to comment on such transcript.
- The non-defaulting party should not expect the arbitral tribunal to receive its arguments and evidence passively. Instead, the tribunal should ‘test’ them actively (and ensure the award reflects the fact the tribunal ‘tested’ claimant’s claims).
- In the same vein, arbitrators should examine whether they have jurisdiction to determine the matters referred to them and reflect their findings on jurisdiction in the award – even in the absence of a challenge by either party.

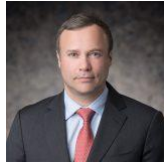
### ***Conclusion***

A party’s default in an international arbitration can be a frustrating experience for a claimant. If that happens, the non-defaulting party should not ‘cut corners.’ Ultimately, if the non-defaulting party continues to prove its case as it would with the opposing party present, and the arbitral tribunal conducts a fair and thorough proceeding, the chances of a successful challenge at the enforcement stage can be significantly reduced.

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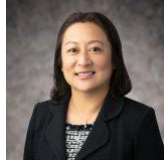
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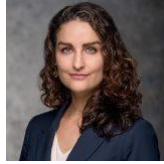
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