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Beware Defaulting Parties In Arbitration Proceedings

If you represent clients in dispute resolution matters for any substantial period, you will eventually encounter an adversary who refuses to appear and participate in an arbitration proceeding. Perhaps this adversary wishes to suspend an inevitable outcome. Or perhaps their true motivations are inscrutable. Sometimes, an adversary pursues a strategy of non-participation with the intention to attack an adverse award as unenforceable.[1] What can you, as attorney for claimant, do to maximise your chances of enforcing a favourable award when your adversary refuses to participate?

Non-participation in a court of law

In a United States state or federal court, a plaintiff may seek a default judgment against a non-responsive adversary. Under New York law, for example, a party's default is deemed an admission of the allegations in the pleading filed against them and a waiver of any affirmative defences the defaulting party may have had.

Under this standard, the plaintiff need merely state a valid claim and prove that the defendant was duly served with process but failed to appear and respond (an admittedly low burden). The standard for some default judgments is even lower. Under Rule 55 of the Federal Rules of Civil Procedure, a money judgment can be entered by the clerk – without review by a judge – upon an affidavit by the plaintiff that the claim is for a 'sum certain' and the defendant was served but 'failed to plead or otherwise defend'.[2]

Non-participation in arbitration proceedings

Arbitration is different. Despite occasional references to 'default awards', there is no procedural device available in arbitration that is truly equivalent to a default judgment in a court of law. Confirmation and enforcement of a favourable arbitration award requires more than merely showing that arbitration proceedings were properly commenced, an enforceable arbitration provision exists, the claimant stated a valid claim, and the respondent was duly served with process.

Under New York law, for example, a non-participating party named in an arbitration proceeding retains a statutory right to challenge the obligation to arbitrate or failure to comply with agreed-upon arbitration procedures.[3] Moreover, a party that refuses to participate in an arbitration may also

attack the merits of the award itself, on the basis that the arbitrator's decision 'violates a strong public policy' or was 'wholly irrational'.[4]

Under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Chapter 2 of the Federal Arbitration Act, awards issued in arbitrations having an international character are not enforceable when one or more parties has been denied fundamental fairness in the arbitration proceedings. Fundamental fairness may be implicated when a party is not able to attend the arbitration proceedings, service was not proper or where, for example, an arbitrator refuses to 'to hear evidence pertinent and material to the controversy'.[5]

Thus, claimants pursuing an arbitration award that is not only favourable but also enforceable in court should be mindful to make a record showing that a non-participating respondent received reasonable notice of, and a full and complete opportunity to, participate or present 'pertinent and material' evidence in the proceedings.

Claimants should also be sure to make an evidentiary presentation that would overcome any challenge to the merits of a decision on the underlying claims or based on public policy. The recent decision by the US Court of Appeals Seventh Circuit in Bartlit Beck LLP v Okoda is a good example. In affirming confirmation of the award, the Court of Appeals specifically noted that multiple notices and opportunities to participate in the arbitration were provided to the non-participating respondent. Without a formidable record of notice and opportunities provided to the non-participating respondent, the Court of Appeals would have been without solid ground to confirm the award.

Conclusion

Even when another party refuses to participate in an arbitration proceeding, and issuance of a favourable award is almost certain, a claimant's right to recover is not final. Claimants facing a non-participating respondent in arbitration should prosecute their claims and present evidence with an eye towards the standards required to overcome a later motion to vacate the award.

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[1] This author does not suggest that non-participation is a viable strategy. As recently stated by the United States Court of Appeals for the Seventh Circuit, a party who 't[akes] [it]self out of the race […] cannot […] complain that [it] was unfairly deprived of the chance to win'. Bartlit Beck LLP v Kazuo Okada, No 19-cv-08508 (8 December 2022).

[2] Fed R Civ Proc 55(a) and (b)(1).

[3] New York CPLR 7503(b).

[4] Matter of NRT NY LLC v Spell, 166 AD3d 438, 438, 88 NYS3d 34, 35 (NY App Div 1st Dep’t 2018).

[5] 9 USC s 10(a)(3)