Dealing with a Non-Responsive Respondent at the Singapore International Arbitration Centre

By Sarah Galeski

Ironically, doing nothing can sometimes serve as an effective defense. In arbitration proceedings at the Singapore International Arbitration Centre (SIAC), respondents who refuse to respond to the Notice of Arbitration or the Statement of Claim may actually find themselves in a strategically favorable position.

In SIAC proceedings, unlike court proceedings in Singapore or many Western countries, obtaining a default judgment against a non-responsive respondent is not a viable option in practice. While a SIAC rule exists which appears to support obtaining such a judgment, from a practical point of view, this would be a very risky course of action and could later frustrate the enforcement of the SIAC award in the jurisdiction where the respondent holds its assets. This is because most jurisdictions consider the ability of the respondent to present its case and be heard by the arbitral tribunal to be a fundamental principle of justice, so if judgment has been rendered in the respondent's absence—even if such absence is the fault of the respondent—this may justify the refusal of a court to enforce an arbitral award.

In this article, we explain the challenges in dealing with a non-responsive respondent at SIAC and our recommended course of action in this situation.

1. Rule 29 of SIAC

In 2016, SIAC adopted a new set of rules which introduced the concept of early dismissal of claims and defenses. This was a significant precedent, as before this, the early dismissal of claims and defenses was not possible in arbitral proceedings regardless of the parties' choice of institutional rules.

Rule 29 states that a party may apply to dismiss a claim or defense on the basis that it is (i) manifestly without legal merit; or (ii) manifestly outside the jurisdiction of the arbitral tribunal. If this application is accepted by the tribunal, it must issue its order or award within 60 days of the application. Under this rule, both parties must have an equal opportunity to set out their arguments and supporting documents in relation to the application before the arbitral tribunal would issue any order or award.

As the rule does not explicitly allow the arbitral tribunal to issue a default judgment, it is an open question as to whether a respondent's non-participation could in itself constitute a ground for an early dismissal of its defense. In theory, a respondent's silence in response to allegations detailed in a Notice of Arbitration and Statement of Claim constitutes a meritless defense. Due to the respondent's non-participation in the arbitration, it would not provide any arguments or evidence to refute the claimant's contentions put forward in the application. Thus, if the claimant's application to dismiss the respondent's defense has strong legal grounds supported by facts and evidence, the tribunal could dismiss the respondent's defense, reducing the claimant's time, expense, and effort in respect of the arbitration.

The SIAC Rules contemplate the failure of a respondent to file a statement of defense, and in this case, provide that the arbitration may continue in the respondent's absence. Rule 20.9 states: "*If the Respondent fails to submit its Statement of Defence, or if at any point any party fails to avail itself of the*

opportunity to present its case in the manner directed by the Tribunal, the Tribunal may proceed with the arbitration." An application for the early dismissal of the respondent's defense is part of the entire arbitration process. Thus, based on Rule 20.9, an arbitral tribunal could proceed with an application for early dismissal despite the respondent's non-participation, provided the respondent received proper notice of the application.

However, an arbitral tribunal at SIAC may be reluctant to issue a dismissal order in the absence of the respondent because of the risk of the award subsequently being canceled by the courts in the jurisdiction where the respondent holds its assets, explained in further detail below. The Chartered Institution of Arbitrators ("CIArb") Arbitration Rules 2015 suggests a cautious approach, and does not contemplate issuing a default award in the absence of a respondent. Article 30.1 of the CIArb Arbitration Rules addresses default, and provides that a claim may be dismissed if the claimant fails to adequately pursue its case, but states that where a respondent "*has failed to communicate its response to the notice of arbitration or its statement of defence, the arbitral tribunal shall order that the proceedings continue, without treating such failure in itself as an admission of the claimant's allegations*." Article 30.2 similarly states that if a party fails to appear at a hearing without showing sufficient cause for its failure to appear, the proceedings may continue in that party's absence. Thus, the approach proposed by CIArb is that arbitral proceedings should simply proceed in the respondent's absence if it fails to participate.

2. Risks of Obtaining a Default Judgment

It is uncertain whether Rule 29 can be relied upon to obtain a default judgment in the case of a respondent's non-participation, but even if this is possible, such an approach is not recommended due to complications which may arise at the enforcement stage.

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also known as the "New York Convention", requires its member states to enforce international arbitral awards under almost all circumstances. However, there are a few bases listed under Article V of the New York Convention upon which a member state may refuse enforcement of an award. These include, among others, the following:

- One of the parties was not properly notified of the appointment of the arbitration or of the arbitration proceedings, or <u>was otherwise unable to present its case</u>; or
- <u>Enforcement would be contrary to public policy</u> [*emphasis added*].

In Vietnam, Article 459 of the Civil Procedure Code No. 92/2015/QH13 incorporates the above principles and others listed in Article V of the New York Convention. Article 459.2(b) states that foreign arbitral awards will not be recognized where they "*are contrary to the basic principles of law of the Socialist Republic of Vietnam.*" Vietnam's Law on Commercial Arbitration No. 54/2010/QH12 ("Law on Commercial Arbitration") similarly states that an arbitral award will be canceled where it "*contravenes the fundamental principles of Vietnamese law*."

The Supreme Court of Vietnam has provided further guidance on this issue through Resolution No. 01/2014/NQ-HDTP on Guidelines for the Law on Commercial Arbitration dated March 20, 2014 (the "Resolution"). The Resolution states that the court shall only cancel an arbitral award where it contravenes a basic rule of Vietnamese law which is not adhered to by the arbitral tribunal when issuing the arbitral award. In some examples provided in the Resolution, the Supreme Court refers to certain principles contained in the Civil Code, the Commercial Law and the Law on Commercial Arbitration. In considering broadly applicable concepts, the right of a defendant to defend itself appears to be a fundamental principle of Vietnamese law, and is iterated in Article 9 of the Law on Civil Procedure. Thus, a Vietnamese court may cancel a default arbitral award on the basis that the respondent was unable to defend itself.

3. How to Move Forward

Considering the risk of a default arbitral award being unenforceable, we recommend proceeding with the arbitral hearing in the respondent's absence even if it fails to file any form of response or defense. Claimants dealing with non-participating respondents must ensure there is clear proof of service, inform the respondent of the status of proceedings at every stage, and disclose the full case to the arbitral tribunal.

A. Challenges to Proceeding

The CIArb has issued an International Arbitration Practice Guideline on "Party Non-Participation" (the "Guideline") which provides some guidance to arbitrators. If the arbitrators follow the CIArb Guideline, refusing to respond to the Notice of Arbitration or Statement of Claim may indeed prove to be a shrewd strategic move. Under the Guideline, a claimant attempting to proceed with an arbitral claim in the face of a silent respondent must surmount hurdles which it would not otherwise encounter. Instead of permitting default judgment, the Guideline encourages arbitrators to take on a role which in some ways advocates for the absent respondent. The Guideline states that where a respondent fails to respond, before proceeding with the arbitration, the arbitrators must first consider whether the claimant has a *prima facie* claim, despite the fact that the respondent has not raised this issue (Article 1.1, Guideline). Similarly, despite no challenge being raised, arbitrators may need to consider whether they have jurisdiction to decide the dispute (Article 1.2, Guideline). While the Guideline states that arbitrators should not take on an advocative role, it also states that arbitrators should not simply "*accept the contentions of the participating party without enquiry*", and if a contentious point requiring a response from the respondent is unanswered, the arbitrators may request the claimant to address this point (Commentary on Paragraph 3(b), Guideline).

Presenting evidence in a proceeding with a non-responsive respondent is challenging. The arbitration process is intended to be adversarial, so ensuring an award has been issued on the merits is difficult if witnesses cannot be cross-examined, or conflicting evidence cannot be presented. This inherent imbalance in a case lacking a responsive respondent may encourage some arbitrators to take on an advocative, rather than impartial, role. Some commentators even recommend this approach, and encourage arbitrators to adopt an "inquisitorial style of questioning," sometimes found in civil law legal systems. With respect to experts, one recommended approach would be for the arbitral tribunal to select its own experts since cross-examination of one selected by the claimant would be impossible. Overall, continued proceedings in the absence of the respondent will likely reposition the arbitrators from impartial judges to a semi-advocative role. While this is officially discouraged by CIArb, it will likely occur to some degree as arbitrators struggle to obtain a balanced view of the dispute.

B. Clear Proof of Service

It is incredibly important to have clear proof of service where a respondent remains silent. First, service should comply with any terms and conditions on service as set out in the contract between the parties. In the event where the parties did not expressly agree on procedural matters, especially the service of documents, serving arbitral documents should comply with SIAC Rules, the *lex arbitri*, and the law of the place of eventual enforcement of the arbitral award regarding service.

The SIAC Rules are very flexible regarding service. SIAC Rule 2 states that notices, communications or proposals may be delivered by hand, registered post, or courier service, or transmitted by any form of electronic communication (including email and fax), or delivered by any other appropriate means that provides a record of its delivery. Service shall be deemed effective where delivery can be proven (i) to the addressee personally or to its authorized representative; (ii) to the addressee's habitual residence, place of business, or designated address; (iii) to any address agreed by the parties; (iv) according to the

practice of the parties in prior dealings; or (v) if, after reasonable efforts, none of these can be found, then at the addressee's last-known residence or place of business.

However, Article V.1.(d) of the New York Convention states that an award may be refused to be enforced where "*the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place (i.e. the lex arbitri, or the law of the seat)* [*emphasis added*]." Thus, if there is no mutual agreement on the service of documents between the parties, the law of the seat of the arbitration will supersede the arbitration center's rules regarding service. Accordingly, a claimant should serve documents not only under the SIAC rules, but also in accordance with the law of the seat of arbitration.

If a SIAC award must be enforced in a jurisdiction where local courts are reluctant to recognize arbitral awards, it is recommended to serve the arbitral documents in accordance with the local law of the jurisdiction in addition to the law of the seat and the SIAC Rules. We are aware of a case where Vietnamese courts refused to enforce an arbitral award against a Vietnamese company rendered by an English arbitral tribunal because, among other things, arbitral documents were not properly delivered under Vietnamese law to the authorized representatives of the company. While Vietnamese courts have recently adopted a more pro-arbitration approach and more readily enforce foreign arbitral awards, we still recommend complying with Vietnamese service rules in the case of a non-responsive respondent to enhance the chances of enforcement.

In conclusion, if there is any ambiguity or uncertainty in the arbitration agreement regarding service, the claimant should review the contract between the parties, and comply with any provisions regarding the service of notice. In addition, the claimant should serve the Notice of Arbitration and other documents to the registered address of the corporate respondent, all of the corporate respondent's legal representatives at their residential addresses, and via email with a confirmation of receipt or fax if possible. During the arbitration proceedings, in addition to the service of documents conducted by SIAC, it is prudent to proactively conduct parallel service which also complies with requirements under the local law of the place where the award will be enforced.

C. Informing the Respondent at Each Stage of Proceedings

A claimant's burden of dealing with a non-participating respondent does not end with service. Instead, the claimant should inform the respondent of the status of the case at all stages. This approach will bolster enforcement once the award has been issued, as there will be evidence that at each key point of the proceedings, the respondent had a reasonable opportunity to present its case.

In the Preamble to the Guideline, it states that arbitrators should ensure that the non-participating party has received proper notice of the request for arbitration and of any steps in the arbitration, has had a fair opportunity to present its case, and has been informed of the consequences of its non-participation. In respect of keeping the respondent informed, the Guideline recommends that arbitrators copy the unresponsive respondent in all correspondence and require the claimant to send copies of all notices, procedural orders, directions, and submissions to the respondent (Commentary on Paragraph 4(a), Guideline). In addition, the Guideline recommends that arbitrators produce written records of all communications with the claimant and send a copy of the same to the respondent. This would also apply to all hearings held in the absence of the respondent; in this case, the arbitrators may require the production of a transcript of the hearing to be sent to all the parties as soon as possible (Commentary on Paragraph 4(c), Guideline). Finally, before the arbitrators will issue an award, they are recommended to provide reasonable notice to any non-parties of their intention to do so. The final award should recite all efforts to include the non-participating party (Article 5, Guideline).

D. Greater Disclosure Obligations

Under common law, counsel is expected to disclose the full details of the case even if those details do not support his or her client's position in an *ex parte* hearing (i.e., a hearing where one of the parties is not present). Considering the New York Convention's emphasis on the importance of a party's right to present its case, and the mirroring of this provision in Vietnamese law governing the enforcement of arbitral awards, a claimant should disclose the full case before the arbitral tribunal where the respondent is absent. The Guideline comments that if a contention is raised by the claimant, but cannot be commented on by the respondent due to its absence, it may be appropriate to put the point to the claimant to seek its answer and refer to that answer in any award (Commentary on Paragraph 3(a), Guideline). Thus, if a claimant failed to disclose a key fact relevant to the arbitral tribunal's reasoning for the award, the court could find at the enforcement stage that such non-disclosure invalidated the award.

E. Costs

A major disadvantage of dealing with a non-responsive respondent is that the claimant must shoulder the full burden of SIAC's fees. Normally, the parties initially split the costs of the SIAC arbitration, but if the respondent refuses to participate, the claimant must pay the costs in their entirety. However, if the arbitral tribunal makes an award in favor of the claimant, it may be entitled to seek indemnification of these costs at the enforcement stage.

Conclusion

As many businesses have financially suffered as a result of the Covid-19 pandemic, it is likely that claimants will increasingly see a trend of non-participation from respondents. SIAC arbitrations are costly, so many respondents will likely be unable to post the initial costs due upon the commencement of the arbitration. In order to avoid arbitration costs, respondents may also be willing to risk an award being made in their absence, and instead attempt to dispute the award at the enforcement stage.

In fact, remaining silent in the face of a Notice of Arbitration or Statement of Claim may be a strong strategic move for a respondent in circumstances where there is no, or only a weak, defense to the claim. The claimant would be burdened by the costs and onerous procedures involved in proceeding in the absence of the respondent, and the arbitrators may even take on an advocative role to support the respondent's position in some ways. Moreover, if the claimant or the arbitrators missed a procedural step (for example, if the respondent was not informed of one stage of the proceeding) this could form a basis to dispute the award at the enforcement stage. The added difficulties of attempting to arbitrate without the participation of the respondent could provide the respondent with leverage to negotiate a settlement agreement.

From the claimant's perspective, it is essential to proceed cautiously and follow the additional procedural steps mentioned above. Claimants may also wish to investigate whether the respondent has assets which may be executed upon in the event it seeks to enforce an arbitral award, since the respondent's silence could be due to its dissolution or impecuniosity.