XIII.3.8 - Default of a party

Content:
No. XIII.3.8 - Default of a party

Unless otherwise agreed by the parties, if, without showing sufficient cause,

i) the claimant fails to communicate his statement of claim, the arbitral tribunal shall terminate the proceedings;

ii) the respondent fails to communicate his statement of defense, the arbitral tribunal shall continue the proceedings without treating such failure in itself as an admission of the claimant's allegations;

iii) any party fails to appear at a hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make the award on the evidence before it.

Commentary:

1 Typically, it is the Respondent who does not participate in the arbitration, for example, because he thinks that the arbitral tribunal lacks jurisdiction for want of a valid arbitration agreement. However, there are three reasons why a respondent in an international commercial arbitration, who thinks that the arbitration is inadmissible for lack of a valid arbitration agreement, should never remain passive.

2 Firstly, an unconditional appearance before the tribunal, i.e. an appearance without contesting the tribunal's competence would confer jurisdiction upon the tribunal irrespective of the existence of a valid arbitration agreement pursuant to Principle XIII.1.1 (c).

3 Secondly, Subsection (ii) reflects a general principle of international arbitration law, according to which the arbitral tribunal may continue the proceedings if the respondent fails to communicate its statement of defense. This is one of the basic differences to negotiation and mediation, where each party has the right to walk away at any time, resulting in the termination of the process.

4 Thirdly, silence of the respondent on the nomination of a party-appointed arbitrator could not prevent the constitution of the arbitral tribunal as a basic prerequisite for the commencement of the arbitration. Most arbitration laws and institutional arbitration rules provide that, if a party does not nominate its arbitrator within a certain time limit, the other party may request nomination of the second party appointed arbitrator by the arbitral institution or the court. Silence on this issue would thus mean that the party in question loses its right to appoint "its" arbitrator, which is one of the fundamental benefits of arbitration over adjudication before domestic courts.